Tuesday, 21 February 2017

# STANDARDS COMMITTEE

A meeting of **Standards Committee** will be held on

**Wednesday, 1 March 2017**

commencing at **2.30 pm**

The meeting will be held in the Meadfoot Room, Town Hall, Castle Circus, Torquay, TQ1 3DR

**Members of the Committee**

Councillor Brooks
Councillor Haddock
Councillor Morey
Councillor O'Dwyer
Councillor Stocks
Councillor Thomas (J)
Councillor Thomas (D)

## A prosperous and healthy Torbay

For information relating to this meeting or to request a copy in another format or language please contact:
**Lisa Antrobus, Town Hall, Castle Circus, Torquay, TQ1 3DR**
**01803 207087**
Email: governance.support@torbay.gov.uk
www.torbay.gov.uk

# STANDARDS COMMITTEE
# AGENDA

**1. Election of Chairman/woman**
To elect a Chairman/woman for the meeting.

**2. Apologies**
To receive apologies for absence, including notifications of any changes to the membership of the Committee.

**3. Minutes** (Page 4)
To confirm as a correct record the Minutes of the meeting of the Standards Committee held on 13 July 2016.

**4. Declarations of interest**

**(a)** To receive declarations of non pecuniary interests in respect of items on this agenda

**For reference:** Having declared their non pecuniary interest members may remain in the meeting and speak and, vote on the matter in question. A completed disclosure of interests form should be returned to the Clerk before the conclusion of the meeting.

**(b)** To receive declarations of disclosable pecuniary interests in respect of items on this agenda

**For reference:** Where a Member has a disclosable pecuniary interest he/she must leave the meeting during consideration of the item. However, the Member may remain in the meeting to make representations, answer questions or give evidence if the public have a right to do so, but having done so the Member must then immediately leave the meeting, may not vote and must not improperly seek to influence the outcome of the matter. A completed disclosure of interests form should be returned to the Clerk before the conclusion of the meeting.

(**Please Note:** If Members and Officers wish to seek advice on any potential interests they may have, they should contact Governance Support or Legal Services prior to the meeting.)

**5. Urgent items**
To consider any other items that the Chairman decides are urgent.

**6. Communications**
To receive any communications or announcements from the Chairman of the Committee.

**7. Striking the Balance - Upholding the Seven Principles of Public Life in Regulation** (Pages 5 - 96)
To note the report on the above.

**8.** **Judgement in Taylor v Honiton Town Council and East Devon District Council** (Pages 97 - 115)

To note the above.

**9.** **Council Meetings**

To reflect on Council Meetings and discuss whether further development is required.

# Minutes of the Standards Committee

**13 July 2016**

**-: Present :-**

Councillors Brooks, Haddock, Morey, O'Dwyer, Stocks, Thomas (D) and Bent

---

**1. Election of Chairman/woman**

Councillor Thomas (D) was elected as Chairman for the meeting.

**2. Apologies**

It was reported that, in accordance with the wishes of the Conservative Group, the membership of the Committee had been amended for this meeting by including Councillor Bent instead of Councillor Thomas (J).

**3. Communications**

The Governance Support Manager informed Members that there had been a number of informal matters raised with the Monitoring Officer regarding Members behaviour, levels which had not been experienced before. A number of complaints had been formally made with one due to be considered at a Hearing Sub-Committee in the near future and one due to be considered by the Independent Person shortly.

**4. Hearing Sub-Committee**

Members agreed to the establishment of the Hearing Sub-Committee and requested Group Leaders provide notification of the nominated substitutes to the Governance Support Manager.

Chairman/woman

---

# Striking the Balance

## Upholding the Seven Principles of Public Life in Regulation

Committee on Standards in Public Life

Sixteenth Report Cm 9327



COMMITTEE ON STANDARDS IN PUBLIC LIFE

Sixteenth Report of the Committee on Standards in Public Life

Chairman: Lord Paul Bew

# Striking the Balance

## Upholding the Seven Principles of Public Life in Regulation

## Report

Presented to Parliament by the Prime Minister
by Command of Her Majesty

September 2016

CM 9327



This publication is available on the Committee on Standards in Public Life website: www.gov.uk/government/organisations/the-committee-on-standards-in-public-life

Any enquiries regarding this publication should be sent to us at public@public-standards.gov.uk

Print ISBN 9781474136938

Web ISBN 9781474136945

ID 16081677 09/16

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the Williams Lea Group on behalf of the Controller of Her Majesty's Stationery Office

## The Seven Principles of Public Life

The Principles of public life apply to anyone who works as a public office-holder. This includes all those who are elected or appointed to public office, nationally and locally, and all people appointed to work in the civil service, local government, the police, courts and probation services, NDPBs, and in the health, education, social and care services. All public office-holders are both servants of the public and stewards of public resources. The principles also have application to all those in other sectors delivering public services.

### Selflessness

Holders of public office should act solely in terms of the public interest.

### Integrity

Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.

### Objectivity

Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.

### Accountability

Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.

### Openness

Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.

### Honesty

Holders of public office should be truthful.

### Leadership

Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.

Committee on Standards in Public Life

September 2016

Dear Prime Minister,

I am pleased to present the Committee's 16th report, which reviews how regulatory bodies in the United Kingdom uphold the Seven Principles of Public Life.

Regulators play a key role in public life, across a vast range of sectors and professions. From doctors to bankers, and energy suppliers to hospitals, regulators protect and promote the interests of the public. This requires regulators to act according to the standards expected of public office holders.

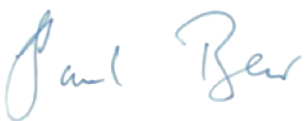
This review was undertaken as a 'health check', to see how regulators are upholding the Nolan principles within their organisations, and where best practice might be more widely shared. The Committee has been reassured by its research which has found that, on the whole, regulatory bodies are committed to maintaining these standards.

Regulation is all about striking a balance: between compliance and capture, between transparency and necessary confidentiality, and between independence – from both government and those they regulate – and healthy engagement. There is also great diversity across regulatory bodies in terms of their size, status, role, function and responsibilities. While encouraged by the overall picture, we have seen instances where, on occasion, there is an imbalance that is out of step with the Seven Principles.

The Committee has made a series of best practice recommendations for regulatory bodies, to help them consider how they can avoid undue influence and demonstrate the decisions they take are fair, well reasoned and evidence-based. In particular, the Committee feels more can be done to maintain integrity through processes to mitigate the risks arising from the 'revolving door', challenges to their independence and some inevitable conflicts of interest.

We have also made recommendations to the government, which is an important player in ensuring that regulators are able to do their job ethically as well as effectively and efficiently. In particular, the Committee is concerned that appointments follow robust, fair and open processes to secure the best people to lead independent regulatory bodies.

When combined, these measures will help to increase public trust in regulation in the United Kingdom. We hope that this review will encourage regulators and their sponsor departments to assess their own behaviour against best practice and, in turn, increase the legitimacy of these bodies that help maintain a safe and prosperous society. And now, with the referendum decision to leave the European Union and Britain facing the prospect of re-writing so many of its regulatory arrangements, these issues are all the more acute and urgent.



Lord Paul Bew
Chair, Committee on Standards in Public Life

# Executive Summary

1. Almost all products, services and activities in the United Kingdom are regulated in one way or another. From the environment to finance, education to healthcare, and transport to energy, regulation plays a key role in public life and impacts significantly on markets, services and professional careers. Regulation contributes to a thriving, safe and fair society.

2. Given the distinctive and powerful role which bodies performing a regulatory function play in public life, the Committee undertook a review of the extent to which they uphold the Seven Principles. This Review is not intended as a commentary on the need or otherwise for regulation, or its effectiveness in particular situations. These are important issues which receive substantial, and sometimes controversial, attention elsewhere. The review does, however, reflect our fundamental belief that a regulatory body should conduct itself in ways which are – and are seen to be – ethically acceptable. This is an important aspect of its overall effectiveness.

3. We undertook the review by surveying a range of regulators, conducting interviews with selected bodies, holding roundtables with academics, regulators and stakeholders, and commissioning four pieces of academic research. We owe our thanks to all those who gave their time so generously.

4. The Committee has been struck by the complexity and disparity of the regulatory landscape, driven by historical and political contexts. Regulators comprise a patchwork of large and small bodies across sectors. They also have a variety of statutory powers, functions, governance and staffing arrangements, as well as standards of practice. Although we do not directly consider self-regulatory regimes as part of this review, much of the best practice identified here will be applicable to those regulators.

5. The commonality they share though is the need to maintain their integrity through independence – both from government and those they regulate – avoiding undue influence and ensuring the decisions they make are fair, well-reasoned and evidence-based. It is a complex space to negotiate and a difficult path to tread.

6. In light of the result of the June 2016 referendum in which the British people voted to leave the European Union (EU), the UK's regulatory landscape is likely to be substantially restructured in the coming years. Given the importance of supranational legislation for the UK's regulatory environment, domestic regulatory bodies are likely to become all the more important as the UK withdraws from the EU's legal framework. In this context, the Committee believes that maintaining the highest ethical standards within regulatory bodies continues to be of the utmost importance.

7. This review was intended as a 'health check' of an important and distinctive slice of public life which the Committee has not previously examined in detail. It was not prompted by any particular trigger event. During the course of the review, however, we came across variances in ethical standards which cause us some concern. Recognising the breadth and range of regulatory bodies, we do not envisage a 'one size fits all' approach. But across all regulators, we believe strongly that the adoption of good practice identified by the Committee would enhance ethical standards of regulators which, in turn, would have a significant impact on regulatory effectiveness.

8. The Committee has grouped this best practice into six key areas, so that all regulatory bodies can check the approach of their own organisation to the ethical standards they should be upholding. We believe that, as far as possible, these can be achieved without the need for statutory changes.

## Our Recommendations for Best Practice

### Governance

**9.** Leadership in ethical standards is determined, in part, by the governance arrangements of the regulatory body. These governance arrangements are critical in helping to set an ethical tone. Regulators' governance should promote collective decision making to help the organisation exercise fair and balanced judgement. The Committee's review has shown that the upholding of the Seven Principles of Public Life in regulatory bodies is dependent on the organisation's leadership, and their efforts to prioritise and promote these standards.

**10.** Regulatory boards need to recognise the importance of maintaining the highest behavioural standards and to encourage the same behaviour by their staff, so as to promote trust from the public, those they regulate and the government. Boards should therefore have processes in place to ensure that high standards of ethical behaviour run throughout the body.

**Best Practice: The board is responsible for providing leadership and setting standards on ethical behaviour within the organisation. The board should seek regular evidence-based assurance that the highest ethical standards are being upheld.**

**11.** Governance structures should ensure that power is not overly concentrated in one individual. This can help mitigate the risks that individuals might act for private gain or pursue their own agenda in regulation.

**12.** Non-executive or lay board members provide an important external perspective, bringing independent judgement and a challenge function, which is vital when the organisation experiences inappropriate pressure from the government or from those being regulated.

**Best Practice: Non-executive and lay members of boards – whether statutory or advisory – have an important role to play in ensuring that the regulatory body is beyond reproach in following the Principles of Public Life. All board members have a responsibility to ensure that adequate discussion of issues occurs before decisions are made.**

**Best Practice: Corporate governance arrangements should minimise the risk of conflicts of interest and individuals acting for private gain.**

**13.** On-going scrutiny of standards of behaviour in organisations – including openness and transparency – is key to ensuring that regulatory bodies are able to manage ethical challenges. Yet, the Committee has found that publicly-accessible registers of meetings, conflicts of interest and gifts and hospitality are not always maintained by regulatory bodies. In some instances these records are published in formats which prevent the public from easily holding the regulator to account. It is the responsibility of accounting officers or their equivalent to ensure that ethical practices are upheld throughout the organisation.

**Best Practice: Compliance with ethical standards of conduct should be confirmed in the published annual certification by accounting officers. Regular, published information should include up-to-date registers of meetings, conflicts of interest and gifts and hospitality. These should be publicly accessible.**

## Codes of Conduct

14. The Committee welcomes the evidence that codes of conduct setting out standards of expected behaviour are widespread across regulatory bodies. However, the extent to which these codes are embedded in the day-to-day practice of the regulators was varied and of uneven quality, sometimes within the same organisation. The Committee saw evidence of cases where staff working alongside each other, with the same access to highly sensitive information, were not covered by the same code of conduct.

15. The Committee is concerned about this inconsistency and the apparent lack of clarity and knowledge within some regulatory bodies about application of their code(s) of conduct to their staff and non-executive members. It is reasonable to expect that a code of conduct should cover all personnel.

**Best Practice: At least one code of conduct should cover all personnel. This includes executive and non-executive board members, employees, secondees, consultants, and contractors.**

**Best Practice: A regulatory body's code of conduct should be at least equivalent to the Civil Service Code, and reflect the ethical risks faced by the regulatory body.**

16. For a code of conduct to have an impact on individuals' behaviour, it is essential that the standards established in the code are embedded within the culture and processes of the organisation.

**Best Practice: The standards established in the code of conduct should be evident in the recruitment and appraisal processes of the organisation. Staff should be made aware of the importance and significance of upholding these standards at their induction and through regular training processes.**

## Revolving Door

17. Whilst the 'revolving door' of staff moving between regulatory bodies and the regulated entities or profession can bring benefits in terms of technical knowledge to the regulator and promote compliance within the regulated entities, it brings its own risks. Neither the appointment of individuals from the regulated sector, nor their movement to it, need be problematic. But, if not properly managed with adequate safeguards, the revolving door can be a serious threat to the regulator's essential integrity and independence.

18. This is not only true for board members and senior executives, but also for operational staff at lower levels of the organisation who may have more detailed knowledge about competitors' confidential information or regulatory intentions than those at the top. In order to ensure that these moves are conducted with integrity, and to promote trust in the regulatory body, regulators should be clear to their staff when they join the organisation about the post-employment procedures for all board members and key staff.

19. A mixed picture has emerged in the policies and procedures for managing the propriety issues around movement of personnel. Of the regulators we surveyed, under a third had policies on managing the movement of staff to those they regulate. Even fewer had policies on the recruitment of staff from the organisation or profession they regulate. The Committee is concerned that, where these moves remain unmanaged, regulatory independence is under threat.

**Best Practice: Policies and procedures should be in place to manage 'revolving door' situations where individuals come from, or go to, the regulated sector. These should apply to all individuals at any level of the organisation.**

**Best Practice: Where board members and staff are recruited from the regulated sector, relevant safeguards should be considered, such as isolation from the regulation of recent employers or exclusion from key meetings.**

**Best Practice: At every board meeting, members should be asked to declare any actual or potential conflict of interest and these should be publicly recorded. Where the board agrees that a conflict is inappropriate, the member should be recused from both the discussion and decision making.**

**Best Practice: The process for departing board members and senior executives should be in line with arrangements for ministers and senior civil servants as determined by the Advisory Committee on Business Appointments. In order to ensure that such moves are conducted with integrity, and to promote trust in the regulatory body, regulators should be entirely transparent about post-employment destinations and restrictions.**

**Best Practice: Additional safeguards should be considered for anyone who leaves the regulatory body. These include explicit prohibitions on disclosing confidential information, restrictions on contact with the regulator, and gardening leave requirements.**

**Best Practice: All individuals taking up positions subject to pre- and post-employment rules should be made aware of them at their appointment.**

20. In the regulatory world, non-executive and lay board members are likely to hold a portfolio of positions which may lead to conflicts of interest between the activities of the regulator and those of regulated entities; these portfolios could compromise the independent judgement of non-executive and lay board members.

**Best Practice: Particular care should be taken where non-executive board members have a live, concurrent post which could give rise to conflicts of interest. Any conflict of interest for non-executives should be established at the start of the selection process and actively managed to ensure there are no material factors impeding independence of judgement.**

## Independence

21. The Committee recognises the immense challenges that regulators face in striking the balance between competing pressures from the government and regulated sector.

22. On the one hand, visible independence is vital to ensure that there is neither short-term political interference nor any sort of bias or favouritism towards or against particular players. This freedom of action is needed to reassure investors, competitors, consumers, and employees. A number of regulatory leaders told the Committee that the imperatives of independence are now less well-understood, and given less weight, than during the major privatisation exercises of the 1980s and 1990s.

23. On the other hand, the Committee recognises that there is a spectrum of independence. There cannot be total independence from government, especially where ministers make appointments, provide funding and have made clear their own priorities. Absolute independence can also lead to regulators operating in a vacuum, isolated from the opinions and actions of those they regulate or those they protect.

24. The government has a legitimate, democratic interest in the strategic direction of a regulatory body and in its efficiency and overall effectiveness. However, governments must not be involved in the operational decisions of regulators as this would influence and undermine their judgement and their authority. Clarity and transparency about the interaction between regulatory bodies and the government can go a long way to allay fears of misplaced interference.

**Best Practice: The operational independence of regulators must be upheld. Ministerial guidance on operational aspects may be transparently considered, but should not be treated as binding, unless there are statutory provisions for such guidance.**

**Best Practice: Any ministerial guidance to a regulatory body on its strategic direction should be published online by the regulator.**

25. Ministerial appointments may have a material impact on the strategic direction and independence of the regulatory body. It is essential therefore that appointments to regulatory bodies follow proper process.

**Recommendation: Ministerial appointments must be made, in a timely and transparent manner, on merit, without patronage and with proper regard to the needs of the organisation.**

**Recommendation: Unless expressly authorised in the statutory foundation of the regulator, ministers should not have the power to hire or fire the Chief Executive or any other operational staff.**

26. While some significant ministerial appointments are subject to pre-appointment scrutiny hearings with relevant select committees, others are not. The Committee views these hearings as an important mechanism to check the suitability of the preferred candidate and ensure that there has been propriety in the appointment process. However, there is lack of clarity over which positions or bodies are subject to scrutiny and which are not.

**Recommendation: Each government department should publish a list of the appointments that are subject to pre-appointment scrutiny hearings, and the justification for those decisions.**

27. Regulators should actively engage with the regulated sector or profession to build knowledge and expertise about their environment, activities, plans, concerns and to promote compliance. They also need to be alive to the risks of being improperly influenced by partial information or lobbying from the sector as a whole or from particular organisations or individuals.

**Best Practice: While constructively engaging with the regulated sector, regulators should guard against the dangers of 'regulatory capture'. Regulators should seek to ensure that staff at all levels are clearly aware of conflicts of interest and are explicitly advised about the risks of bias in decision making.**

28. Regulators may seek to diversify their income streams. However, some funding arrangements have the potential to compromise a regulator's independence by enabling undue influence from those who fund regulation and increase the risk of decisions being based on financial, rather than impartial judgement. Risk-based selection can help to ensure that regulators are not 'leant on' by ministers or other political influences, but remain neutral when selecting targets for regulation.

**Best Practice: Regulators should regularly publish full and accessible information on their sources of funding and, specifically, any restrictions proposed by those who provide their funding. Regulatory bodies should demonstrate that funding mechanisms do not have an impact on their independence and integrity.**

### Transparency

29. Regulators should exercise their judgement in balancing the demands of their role and protecting sensitive information whilst also seeking to be as transparent as possible by not withholding information from the public. This can be managed through publishing publicly-accessible transparency data on the functioning of the regulator, and ensuring that any pertinent information on regulated entitles is published once it is no longer sensitive.

**Best Practice: Regulators should publish and update their corporate governance documents. These should include minutes of meetings, registers of interests, annual reports, their rules and guidance and their decision making processes.**

**Best Practice: Any body with regulatory functions not designated a 'public authority' under the Freedom of Information Act 2000, should have a publication scheme in line with the best practice established by the Information Commissioner's Office.**

## External Leadership

**30.** Although the focus of the Committee's review has been on standards of conduct within regulatory bodies, regulators are well placed to support a wider ethical environment. There has been much comment in recent years about the damage caused by poor ethical standards in some parts of the commercial world. The unique influence possessed by regulatory bodies gives rise to a leadership opportunity, and responsibility, to promote ethical standards, especially in terms of positive approaches to compliance. There is growing evidence that regulatory effectiveness is maximised by a collaborative approach that actively promotes compliance as enlightened self-interest rather than a reliance upon deterrence and punishment.

**Best Practice: Regulators should actively engage with those they regulate and take a leadership role by encouraging positive attitudes towards compliance.**

**Recommendation: Such promotion of an ethical approach to compliance would be supported by a suitable amendment to the Regulators' Code.**

## Conclusion

**31.** Overall, the Committee has been reassured by the level of awareness and consideration of ethical issues by the regulators we reviewed. We found that they generally do understand the importance of supporting and maintaining ethical standards and have succeeded in establishing acceptable standards in their organisations. However, practice varies, and we did come across examples of *ad hoc* or retrospective action to deal with issues as they emerged. Whilst welcoming good practice, we would warn against complacency.

# Table of Contents

## List of Figures

# Chapter 1 Introduction

## Background

**1.1** The Committee on Standards in Public Life ('the Committee') was established in 1994 and is responsible for promoting the Seven Principles of Public Life: selflessness, integrity, objectivity, accountability, openness, honesty, and leadership in public life – commonly known as the Nolan principles – across the United Kingdom.[1]

**1.2** In August 2015, the Committee decided to review how regulatory bodies uphold these principles. This review was not initiated in response to a scandal or 'trigger' event, rather through recognising the important public function of regulation and the distinctive ethical standards challenges faced by regulatory bodies. The Nolan principles apply to regulators in the same way as to all other holders of public office, but the Committee had not previously focused any close attention on them.

**1.3** Regulatory bodies play an important role in public life and have been created to discharge statutory functions across a wide range of commercial and non-commercial activities. The decisions made by these diverse and powerful organisations impact on everyone – individuals, organisations and markets. Their objectives may be specific, but they all broadly serve public interest purposes which – on the part of both the regulated and the regulators – assume honesty, integrity, objectivity and other core values which are reflected in the Principles of Public Life.

## The Review

**1.4** Recognising the distinctive nature of regulatory bodies, this review focuses on the internal arrangements and practices of regulators. The report identifies the ethical issues facing regulators, considers the ways in which they can be managed, and makes best practice recommendations based on our findings. This review does not consider the debates surrounding the need for regulation, nor the merits of different approaches to regulation. Nor is this report focussed on whether or how regulators promote ethical standards for those they regulate.

**1.5** The Committee asked over 60 regulatory bodies to complete a detailed survey, which was followed by 26 in depth, face-to-face interviews with senior representatives from selected regulatory bodies. To supplement these meetings, we held three roundtable sessions with academics, regulatory bodies, and stakeholders, as well as conducting extensive desk research. In addition, four pieces of academic research were specifically commissioned for this project, which cover two regulatory policy areas, a self-assessment tool for regulators and how to promote ethical and effective regulation.[2]

**1.6** The report first identifies the distinctive role of regulation in public life and the ethical standards challenges facing regulatory bodies. We then address these challenges through the framework of the Seven Principles of Public Life and make recommendations for best practice based on the themes arising from each of the principles.

1 The Seven Principles were established in the Committee's first report in 1995. The descriptors were revised following a review in the Fourteenth Report in 2013.
2 For a full methodology, see Appendix 4.

## Understanding the Challenges Facing Regulatory Bodies

At the heart of this review, the Committee has found a strong and demonstrable commitment to ethical standards amongst regulatory bodies. We believe that a regulatory body cannot be effective unless it lives up to these standards. Regulators need to be ethical, effective and efficient. There are ethical challenges though for Regulators in striking a balance between their own statutory responsibilities, the demands of government and those they regulate.

The Committee recognises that the nature of regulatory functions means that ethical risks, conflicts of interest and dilemmas may easily arise, but these must be managed by the regulator. Some of the challenges, tensions and risks faced by regulatory bodies are set out below.

### Maintaining independence and avoiding regulatory capture

Engagement with the regulated entities can bring significant advantages in obtaining specialist and detailed knowledge of the regulated sector.[3] However there must be robust measures in place to ensure a sufficient distance from the regulated sector in order to uphold objectivity and critical oversight and avoid regulatory capture.

### Upholding their statutory functions whilst being aware of governmental objectives, but maintaining their independence

Most regulators are public bodies accountable to Parliament and/or government, which have a legitimate interest in how the law is upheld. However, regulatory bodies are designed to enforce policy at an arm's-length, without political interference.

### Managing conflicts of interest arising through the processes of regulation

Regulatory bodies must walk a tightrope between the government, regulated sector and other stakeholders, making them particularly vulnerable to conflicts of interest. They must manage these conflicts of interest at all levels within the organisation.

### Making controversial and unpopular decisions which will rarely, if ever, appeal to all stakeholders

Although regulatory decisions cannot appeal to all stakeholders, transparent adherence to the highest ethical standards will help ensure that all stakeholders maintain their trust in the process of regulation.

### Recruiting and appointing staff who are professional, experienced, and knowledgeable, but also suitably independent from the regulated sector

Staff working for regulators need to be professional and have the necessary experience to ensure they can conduct their regulatory duties effectively. But, especially where regulation requires specialist expertise of the regulated sector, recruitment processes must ensure that staff are suitably objective in their decision making, and independent from the regulated entities.

### Exercising discretion over the targeting of sectors, behaviours or specific regulated entities

Regulators must be alert to potential bias in their selection of targets or processes of regulation, and should be transparent about the regulatory processes. They should be clear about their approach to regulation more broadly, including whether they take a 'light touch' or 'hard nosed' approach to promoting compliance, as well as the criteria for selecting priority targets or behaviours.

3 Prosser, Tony. The Regulatory Enterprise: Government, Regulation and Legitimacy. Oxford University Press. 2010.

### Ensuring maximum openness to the public, whilst also protecting confidential, sometimes market-sensitive, information

As public bodies, regulators have an obligation to be open and transparent about their behaviour and the judgements they make. However, regulators must equally protect confidential or market-sensitive information which would not otherwise be available to the public.

### Performing a public function, whilst lacking the democratic political accountability of the government

Accountability is a necessary counterpart to independence for regulatory bodies which wield significant powers over both individuals and the market.[4] And yet the process of regulation often requires that regulatory bodies practise their functions with little oversight, until their findings can be made public. As regulators are purposefully apolitical in order to act as independent arbiters, this can lead to confusion regarding their roles and lines of accountability.

### Ensuring that processes are in place to prevent bribery or corruption

Due to the substantial financial impact that regulation can have on both markets and individuals, regulators must robustly and visibly ensure that their staff are not engaging in corruption of any kind. Regulatory bodies must take all available steps to prevent any form of external bribery or internal exploitation of confidential information.

### Ensuring that both the reality and perceptions of regulators reflect high ethical standards

Regulators need to build and maintain their reputations. They must ensure they transparently uphold the highest ethical standards of conduct in order to maintain their legitimacy and the trust of all their stakeholders in the regulatory process.

4 Committee on Standards in Public Life. Standards Matter: A review of best practice in promoting good behaviour in public life. 2013. p. 41.

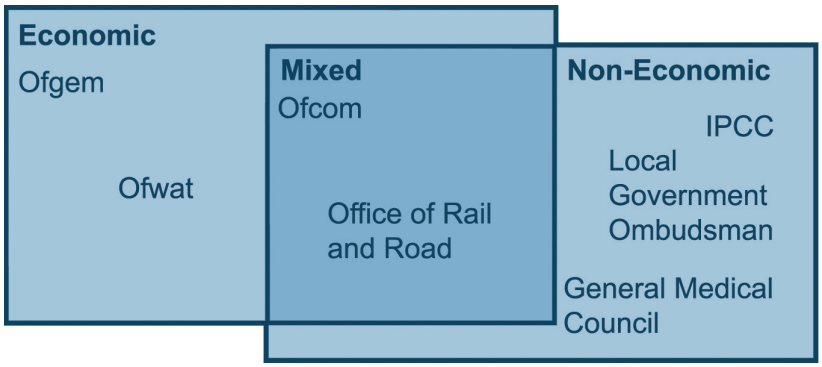
# Chapter 2
# The regulatory landscape

## Who are the Regulatory Bodies?

**2.1** In undertaking this review, the Committee has not followed a precise definition of regulation or a regulatory body. Instead, we have adopted the open-ended approach of including within the scope and application of this review any body that exercises regulatory or similar functions. This approach is purposefully broad in order to consider common themes across this spectrum of public life.

**2.2** Regulation is often used where the public is not in a position to defend its own interests, for example, where the public interest is disparate (as in qualifications regulation), or long-term (as in environmental regulation). The responsibility of a regulator may be purely economic, for example, the regulation of markets, purely non-economic, for example, regulating safe conduct, or a combination of these functions. A regulatory mandate can relate to one specific sector, or cut horizontally across several sectors.

Figure 1: The Responsibilities of Regulators




**In 2015 the National Audit Office estimated that there are over 70 diverse regulatory bodies in the UK covering a wide range of sectors and policy areas.[5]**

**2.3** This approach accordingly embraces distinct and separate bodies which have been established or recognised by statute to control or modify the activities of others, usually with some form of coercive power in the shape of legal enforcement capabilities. It includes various Inspectorates and Ombudsmen, but we have not directly addressed situations where government itself, usually in the form of the Secretary of State, is the regulator.

**2.4** Any regulatory activity involves achieving the objectives of relevant statutory arrangements. Apart from those which flow from international obligations, these reflect the policies of the government of the day which remain in place until repealed or modified at the instigation of a later government. A crucial feature of most regulatory bodies, therefore, is that their authority mainly comes from Parliament and they remain in existence with a semi-permanent and separate status beyond the lifetime of each administration. They possess independence, to varying degrees, from the government and other policy-making institutions and the professions.

5 National Audit Office. A Short Guide to Regulation. 2015. p. 4.

## Functions of Regulatory Bodies

**2.5** The duties, powers, tools, strategies and discretion of regulators all combine to make regulators powerful bodies. They have very significant control and influence over economic markets, the health of the nation, the physical and social environment, and the way lives are led.

**2.6** The relevant legislation sets out the various duties and powers of each regulatory body and provides the range of legal tools at its disposal. These can include controlling access to the market, some pricing controls and/or the imposition of obligations through licences and permits, accreditation powers, inspections and various types of enforcement.[6]

**2.7** The nature of regulatory intervention can vary substantially. Regulation directed at access to markets is largely achieved through licensing or professional qualifications regimes. The central aim of other interventions is the prevention of specific non-compliant activities, or some other form of prior control. Elsewhere the focus may be more on interventions where things have gone wrong. Where deterrence is seen as a priority, both prevention and sanctions are in play as the prospect of powerful penalties may serve to prevent non-compliance. Inspections are also relevant to both aspects and, in their own right, can directly influence future conduct. Some regulators also have statutory powers to create secondary legislation.

**2.8** Although forms of self regulation by many professions and trade bodies have been extant since the 19th century, independent, sectorally focused regulatory bodies largely arose from the privatisation of the 1980s and 90s, including the communications, water, rail and energy regulators. In the 1990s, there was also a rise in independent regulators to uphold professional standards due to concerns of fitness-to-practice. In the 2000s, the issue of regulatory governance became prevalent, and there was a growing appetite for 'non-traditional' methods of regulation. In 2012, the establishment of the Better Regulation Delivery Office, now Regulatory Delivery, led to a shift towards a focus on 'better regulation', including the introduction of the Regulators' Code and the growth duty in regulation.[7] Before the Brexit Referendum the UK government had been a strong supporter of the European Commission's 'Regulatory Fitness' (REFIT) programme which was launched in 2012 to make EU law simpler and more 'fit for purpose' and to reduce regulatory costs while maintaining benefits.

**2.9** While various de-regulation, better regulation and red-tape initiatives may have slowed the rate of expansion in recent years and contributed to some reduction in burdensome regulatory processes, the main impact of these measures on regulatory bodies has been re-organisation.

**2.10** Some bodies have an explicit advisory or educational role, sometimes without any coercive powers at all. In many situations, regulatory conclusions and decisions can have a very large reputational impact, even without recourse to any coercive activity.

Figure 2: Examples of Regulatory Tools[8]


**2.11** Even where there are mandatory duties, and certainly where there is a range of powers, considerable discretion is nearly always available to regulatory bodies. There can be discretion regarding which outcomes are expected, about the targeting of sectors, activities or particular organisations, and about which tools to use, whether routinely or in particular situations.

6 Organisation for Economic Co-operation and Development. The Governance of Regulators. 2014. p. 17.
7 Baldwin, Robert, Martin Cave and Martin Lodge. Understanding Regulation: Theory, Strategy, and Practice Second Edition. Oxford University Press. 2012. pp. 7–10.
8 Adapted from: National Audit Office. A Short Guide to Regulation. 2015. p. 11.

**2.12** Their activities and decisions can have a significant and direct impact on organisations and individuals, extending well beyond the potential or actual imposition of sanctions to ensure compliance. Regulatory decisions can have immediate and direct impacts on specific businesses, institutions or individuals, and it could even be argued that they can wield more immediate power (especially over specific businesses or individuals) than politicians who set out policies and overall frameworks.

## Diversity and Distinctiveness

**2.13** The diversity which exists across the field of regulation reflects the political, cultural, economic and legal factors that have shaped the role and function of regulatory bodies. Variations include the structure of each body, its status, its duties and powers, its funding arrangements, its staffing arrangements and its accountabilities.[9] The process of evolution has produced a regulatory patchwork where successive leaderships will also have an impact on the culture, priorities and reputation of each body.

**2.14** Despite this variation, a typical structure at national level is often an independent non-departmental public body which reports to Parliament via the Secretary of State and is governed by a two-tier structure of a board appointed by the Secretary of State and an executive team, staffed by a mix of seconded civil servants, own staff and/or secondees from the sector, funded by a mix of fees and grants. Professional services regulators more typically have a Council, sometimes including elected members from the profession but with lay members and others with specialist expertise. Local authorities also have regulatory functions which are carried out by their staff with elected councillors performing an analogous role to non-executive and lay members.

Figure 3: The Diversity of Regulatory Bodies


9 For further information see: Institute for Government. Read Before Burning: How to increase the effectiveness and accountability of quangos. 2013.

**2.15** Notwithstanding this diversity, regulators have more in common than separates them. Certain distinctive features, which mark them out from politicians and government officials, are all especially important for the purposes of this review. In most cases, these include:

- Status as semi-permanent public bodies, many of which are 'creatures of statute';
- Independence from government, often as arm's-length bodies;
- Independence from the market or sector they regulate; and
- Coercive power, and/or direct influence, over specific organisations and individuals.

## Regulating the Regulators

**2.16** The independence or autonomy of regulatory bodies does not mean that they are free from oversight, as they are accountable politically, legally and publicly. In addition, Framework Documents agreed with sponsoring departments may contain restrictions on staffing and other administrative arrangements for independent regulators.

**2.17** Enforcement activity is also subject to judicial oversight and where regulators have prosecution powers they must be pursued in the criminal courts. Almost all decisions, for example, licence revocations, 'cease and desist' orders, and civil penalties, can be appealed or reviewed, most often before a specialist tribunal. This may involve challenges to findings of fact, interpretation of the law, or their own processes.

**2.18** More generally, whether or not appeal or review rights exist, all regulatory bodies must operate within the Rule of Law. They must meet, and not exceed, the specific requirements established in the relevant legislation. Public law standards and safeguards seek to protect due process and apply to all enforcement activities of the regulator. Proactive ethical behaviour enables the regulator to act with integrity within these legal safeguards.

**2.19** In some sectors, oversight regulators have been established over a range of several bodies operating in the same field, for example, the Professional Standards Authority and the Legal Services Board. These are often established where the regulatory landscape becomes particularly complex,[10] and are in a unique position to promote ethical standards within regulatory bodies.

**2.20** In more recent years, legislation to introduce 'better regulation' requirements for some, but not all, regulators has been enacted. The 2006 Legislative and Regulatory Reform Act, for example, identifies five principles of good regulation: 'regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent'.[11]

**2.21** Most regulatory bodies, including those regulating professions, must now 'have regard to' the 2014 Regulators' Code.[12] Importantly, for this review, the Code emphasises the need for transparency in the regulatory approach, including the publication of a set of clear service standards to establish the regulator's relationship with the regulated sector. These service standards should include: modes of communication, approaches to providing information, approach to checks on compliance, enforcement policy, fees and charges, and the complaints procedure.[13]

## The Committee's Review

**2.22** A key message from our review is that regulatory bodies do understand the importance of ethical standards and have generally succeeded in ensuring acceptable standards across their organisations. Codes, policies and internal processes largely set equivalent expectations to those found elsewhere in public life. Our research indicates that practices largely match the expectations set out in these policies, and the Committee has encountered many examples of good practice and few examples of concern.

10 Baldwin, Robert, Martin Cave and Martin Lodge. Understanding Regulation: Theory, Strategy, and Practice Second Edition. Oxford University Press. 2012. pp. 147–157.
11 Legislative and Regulatory Reform Act. 2006.
12 Department for Business, Energy and Industrial Strategy, Regulatory Delivery. The Regulators' Code. 2014. p. 3.
13 Department for Business, Energy and Industrial Strategy, Regulatory Delivery. The Regulators' Code. 2014. pp. 5–6.

**2.23** One theme that has emerged is that regulators often have to make controversial and unpopular decisions; it is impossible to make decisions that appeal to all their stakeholders. Nonetheless, regulators should make these decisions with integrity, in the public interest, through fair and transparent process. This is key to promoting and sustaining regulatory legitimacy.

**2.24** The Committee's review does not explicitly address self-regulatory regimes which will not normally involve 'holders of public office'. But the Committee believes that the Nolan principles and their application to the regulatory environment remain pertinent where self-regulation regimes have been established and these regimes have statutory recognition.

**Oversight by local authorities of housing in the private rented sector takes place within a statutory framework that allows considerable scope for development of and improvement in ethical practice. An example of this is Liverpool City Council's 'co-regulation' partnership with the National Approved Letting Scheme (NALS) in which the Council recognises the leadership that voluntary industry schemes, such as NALS and others, can demonstrate by encouraging lettings and management agents to be open and accountable. Together, the co-regulation partners agree and publish a clear set of standards which promotes transparency and honesty in the dealings that agency staff have with landlords, tenants and the wider public. Evidence for success should include reductions in the amount of formal enforcement action being taken by the Council. There should also be fewer complaints from tenants requiring statutory redress.**

**2.25** This is not an in-depth audit and we cannot claim to know every detail. However, overall, the Committee has been impressed by the level of awareness and consideration of ethical issues by the regulators we reviewed. Many can point to ethical improvements over recent years, for example, rules on hospitality and gifts, and there may be scope for further improvements elsewhere. Various specific issues have arisen during the course of the Committee's review, which have been addressed and explored by reference to the Seven Principles of Public Life and the descriptors as updated by the Committee in 2014.[14]

14 Committee on Standards in Public Life. Standards Matter: A review of best practice in promoting good behaviour in public life. 2013.

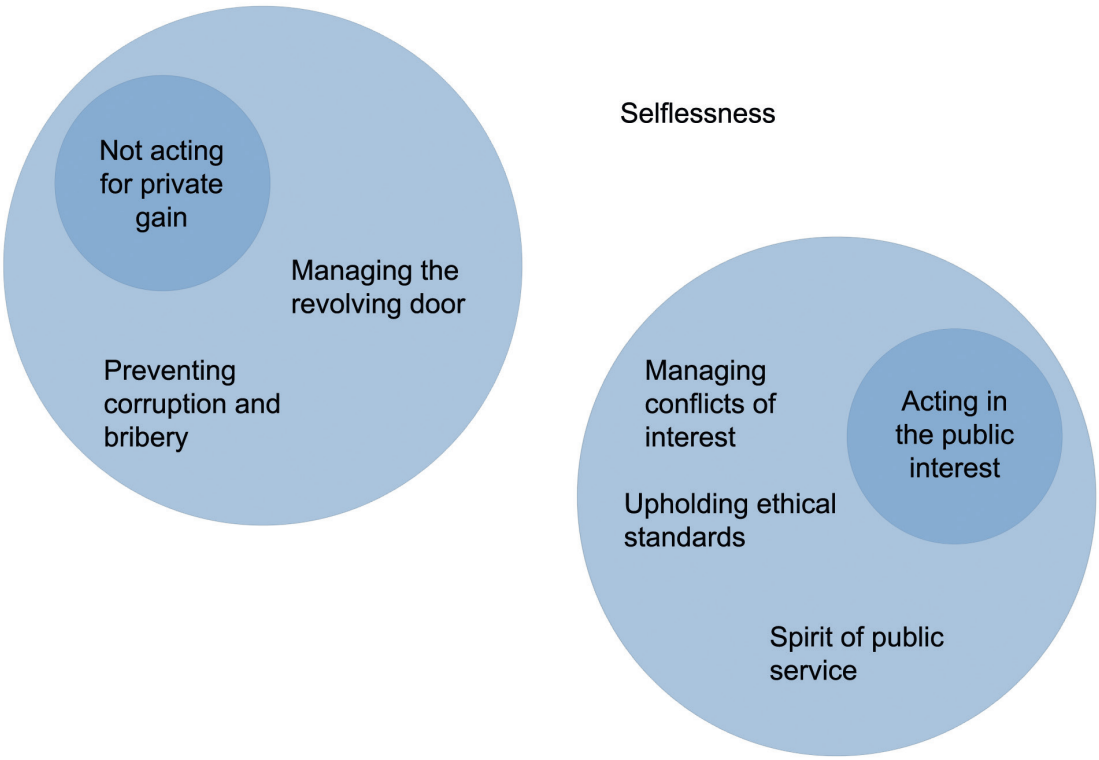
# Chapter 3
# Selflessness

**Holders of public office should act solely in terms of the public interest.**

**3.1** Central to the Committee's definition of selflessness is the view that those in public life should not just avoid acting for private gain, but also actively seek to undertake their role in the public interest.[15] This applies whether or not the functions of a regulatory body include any explicit 'public interest' references. Everybody working for a regulator should not just follow due process in their decision making, but also take active steps to act ethically in their role. In order to aid this, regulatory bodies should maintain an organisational culture of serving the public. Only through putting organisational and personal self-interest aside, can regulators support their function of independent regulation in the public interest.

**3.2** In this chapter, we consider how regulators can uphold the public interest through fulfilling their statutory functions while acting according to the Seven Principles. This includes balancing competing interests, as well as defending against bribery and corruption.

Figure 4: Unpacking the Principle of Selflessness



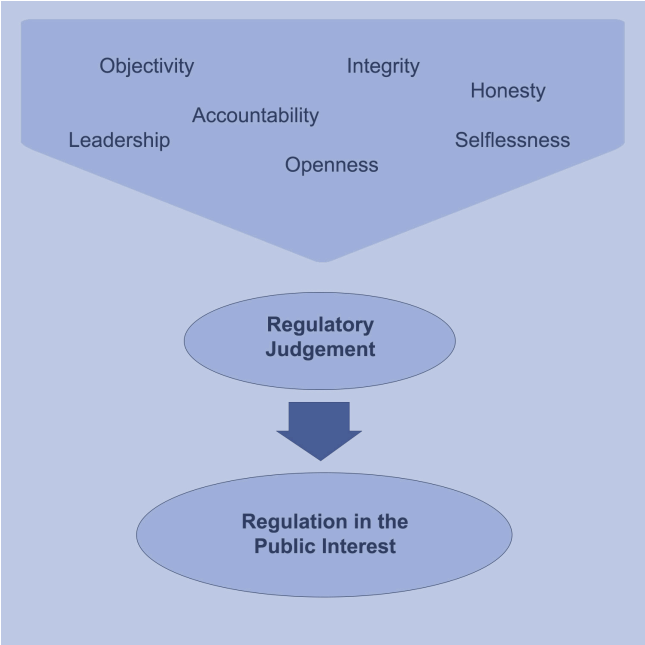

15 Committee on Standards in Public Life. Standards in Public Life: First Report of the Committee on Standards in Public Life. 1995. p. 14.

## Upholding the Public Interest

**3.3** Acting in the public interest does not mean that any regulator can or should ignore their statutory functions. It means ensuring:

- Any private interests do not interfere with broader public interest considerations; and
- Sound judgement with an evidence-based approach, excluding any personal political or intellectual priorities or prejudices, avoiding any suggestions of private gain.

Figure 5: Balancing Competing Interests




**3.4** A recurring theme of the Committee's research has been the need for regulators to exercise their judgement when undertaking their regulatory functions. As one regulator told the Committee, judgement is about managing the conflicts which inevitably arise in regulation. Regulators must improve the regulatory environment, whilst also cutting costs, delivering good outcomes for the intended beneficiaries whilst not unduly inhibiting businesses, and all the while balancing their independence with maintaining a good relationship with the governing department or with the profession they regulate.[16]

**3.5** Acting in the public interest can mean working towards different objectives for each regulator, depending on their role and those they regulate. This may include defending consumer rights, maintaining professional standards, protecting patients through licensing practitioners, or delivering a well-functioning market for customers.[17]

**3.6** There will often be competing public interests. For example, tensions can arise between the short and long-term interests of consumers in the effective operation of markets, and those of individuals and groups as citizens and taxpayers.[18] Here a regulator needs to exercise judgement in balancing the needs of the different classes of consumer with broader public policy objectives.[19]

**We protect and improve the health of millions of people every day through the effective regulation of medicines and medical devices, underpinned by science and research.[20]**
**MHRA mission statement**

16 Organisation for Economic Co-operation and Development. The Governance of Regulators. 2014. p. 13.
17 National Audit Office. A Short Guide to Regulation. 2015. p. 5.
18 Feintuck, Mike. Regulatory Rationales Beyond the Economic: In Search of the Public Interest. In Robert Baldwin, Martin Cave, and Martin Lodge (eds) The Oxford Handbook of Regulation. Oxford University Press. 2010. pp. 41–42.
19 Lunt, Peter and Sonia Livingstone. Regulation in the Public Interest. Consumer Policy Review. 2007. 17/2. p. 2.
20 Medicines and Healthcare products Regulatory Authority mission statement https://www.gov.uk/government/publications/mhra-corporate-plan-2013-to-2018

**3.7** The judgement of individuals working for regulatory bodies is best informed through a strong ethical culture within the organisation, which incentivises decision making in the interest of the public and which promotes fair and proportionate decision making.

> **Everything we do involves a balance, a judgement about how strident or collaborative to be**
> **A Regulatory Body**

### Avoiding Personal Priorities or Prejudices

**3.8** Everyone working in a regulatory body – whether as a leader or at an operational level – must take care to ensure that their own political or intellectual priorities or prejudices do not interfere with either their judgement or their responsibilities. An over-paternalistic appetite, or an equally unsympathetic attitude, could lead to regulators exceeding their formal role. Regulators must not take advantage of their independent status and security of tenure.

**3.9** These risks are best managed by adopting good governance and transparency arrangements which make it difficult for the views or activities of any individual to prevail. A healthy corporate culture, team-working, challenge, and open explanations of decision making help minimise the likelihood of conduct which may threaten the selflessness principle.

## Not Acting for Private Gain

**3.10** The pursuit of personal financial gain is a serious risk. Regulators and their staff should not seek to profit, personally or organisationally, from their role in regulation. They should undertake their regulatory activities and duties selflessly, without seeking to gain financial and/or post-employment advantages from their role as a regulator.

**3.11** These principles apply to all staff within the regulatory body, from the executive board to frontline employees. Regulators should strive to develop a corporate culture where anti-bribery and anti-corruption policies are deeply embedded in the organisation through training and review processes.

### Bribery

**3.12** The Bribery Act 2010 provides clear legal guidance on bribery, including the offence that can be committed by commercial organisations that fail to prevent persons associated with them from committing bribery on their behalf.

> **The Anti-Bribery and Corruption Policy of the Homes and Communities Agency provides a good example of a publicly-available, clear policy which highlights the risks of both active and passive bribery. The policy details the risk posed by giving and receiving bribes and also links anti-bribery to other policies upholding ethical practices (including hospitality and gifts), and provides a practical guide on how to report actual or potential bribery concerns.**

**3.13** Risks of bribery can arise at the inspectorate level, where individuals may receive pressure from regulated entities to be 'softer' on that individual or organisation in return for either a financial or other reward.

**3.14** The regulators the Committee interviewed were acutely aware of the risks of bribery. They said that one way to combat the risks and to ensure that the law is upheld, was to guarantee that the costs of receiving a bribe outweigh any perceived benefits. We also found that many regulatory bodies have corporate policies on the theme of preventing bribery, but not all were supported with staff training programmes and embedded in wider training regarding conflicts of interest.

**It is recognised there is a perceived risk of money changing hands on issues at a local level. It's about integrity and probity. It's technically a possibility, but the professional culture is taken very seriously to stop accusations. The costs of accepting bribes would be very high. There may always be a perception on the part of unsuccessful parties that someone must have been bribed, but we must look at the facts and I am confident that decisions are taken fairly and openly.**

**Chief Executive of a Regulatory Body**

### Preventing Corruption

**3.15** Regulators should be alive to the threats posed by corruption and act to ensure that their organisational structure, their processes and safeguards, and their audit arrangements comply with all relevant anti-corruption legislation and are all robust enough to prevent or expose financial impropriety or actions inimical to the public interest. Clear, full and transparent anti-corruption policies need to be in place to maintain public confidence. Regulators should also ensure that all staff know how to report actual or suspected corruption or bribery.

**3.16** These policies must be supported with induction and regular training sessions to embed the ethical principle of selflessness into the corporate culture. This culture should be strongly developed and manifested in the leadership of the organisation.[21]

**When new staff join the Nursing and Midwifery Council, they must complete a series of ten online courses as part of their induction. One of these sessions is anti-bribery and corruption awareness training.**

## Summary

- The principle of selflessness requires more than just putting self-interest aside, it also incorporates the spirit of public service, transparency and integrity, which should motivate regulators designed to carry out their function in the public interest.
- There is not one all-encompassing definition of the public interest, due to the range of functions fulfilled by regulators across sectors.
- Staff working for regulators use their informed judgement when balancing competing interests and should set aside personal views, opinions and prejudices.
- Staff working for regulators must not seek to gain personally from their regulatory role. Regulatory bodies have an obligation to ensure that they have strictly enforced, clear anti-corruption and bribery policies which are supported by regular training on ethical practices.

21 Committee on Standards in Public Life. Standards Matter. 2013. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228884/8519.pdf

# Chapter 4
# Integrity

**Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must declare and resolve any interests and relationships.**

**4.1** Fundamental to the principle of integrity is the absence of inappropriate influence. Regulators must be seen to make evidence-based decisions without prejudice and with integrity in order to operate at an arm's-length from government and the profession and remain impartial towards the regulated sector or profession, avoiding obligation to anyone.

**4.2** On the one hand, regulators are created to enforce the law independently from government and those they regulate. On the other, they are encouraged to engage with regulated bodies and individuals to promote compliance.[22] Regulators must then maintain a culture of independence so they resist pressure from both sides and make decisions in the public interest. The evidence to the Committee makes it clear that regulatory bodies greatly value their independence, and recognise that their legitimacy is dependent upon maintaining their integrity. This must be transparent to the public. Reputation matters. When the public loses trust in the integrity of the regulator, it can become impossible for the regulator to perform its function.

**The first question I'm asked in relation to independence is how many ex-police officers we employ. In fact, the proportion of ex-police investigators has dropped considerably in recent years, so we are more diverse. But the important thing is how independent they and all our staff are when they are with us.**

**Independent Police Complaints Commission**

**4.3** The Committee has sought to examine the challenges facing regulatory bodies' integrity, and how they are being addressed and overcome. This section considers three themes: 1) independence from the government; 2) independence from the regulated sector; and 3) the 'revolving door' between regulators and the regulated.

## Independence from Government

**4.4** Notwithstanding their accountability to government and/or Parliament, regulators' independence is critical to upholding the regulator's mandate as an independent, non-political body. Some interviewees highlighted the importance of their independence for their purpose of protecting the public interest. For example, the Food Standards Agency emphasised that it could never have undertaken a very significant review if it had been subjected to the political will of the government, due to the perceived electoral unpopularity of the findings.

**It would have been impossible to retain this position if the [regulator] was not independent.**

**Conduct Regulator**

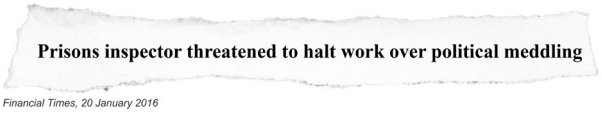
22 Department for Business, Energy and Industrial Strategy, Regulatory Delivery. The Regulators' Code. 2014. p. 3.

## Maintaining Independence

**4.5** A number of regulatory leaders expressed concerns to the Committee that government involvement in regulatory decision making (at both ministerial and official levels) has increased in recent years, especially with respect to operational decisions. We were told by some that the imperatives of independence are now less well-understood, and given less weight, than during the major privatisation exercises of the 1980s and 1990s. The National Audit Office's cross-departmental review of arm's-length bodies found that over half of the 116 bodies they surveyed reported that oversight of their organisation has increased in the past 18 months.[23] In particular, this oversight has focussed on financial and administrative issues, which may mean that the regulator is less able to concentrate its efforts on the service delivered.

**4.6** The evidence collected by the Committee suggests similar developments. Some regulatory bodies revealed that changes in the government's approach to arm's-length bodies more generally have had an impact on the regulator's ability to make strategic decisions. One regulator reported that they had received requests to share papers in advance of board meetings. The regulator refused this request, which they perceived to be a threat to their independence. Another regulator emphasised that its sponsoring department was increasingly concerned with allocations of spending which had an inevitable impact on the regulator's priorities and direction.

**4.7** Some regulators feel that a robust defence of their clear statutory foundations is sufficient protection from challenges from the government or from the regulated sector. Some bodies have very clear statutory safeguards, which can provide a 'defence mechanism' against any improper influence but, due to the evolutionary nature of regulation in the UK, this is not true for all.


Prisons inspector threatened to halt work over political meddling

*Financial Times, 20 January 2016*

**4.8** While government departments clearly have a legitimate and appropriate interest in the strategic direction of the regulator, we are concerned that infringements on the operational and strategic decisions may compromise their independence.

## Relationship with the Government

**4.9** The independence and freedoms of regulatory organisations can vary as much within categories as between them.[24] However, although the statutory relationship between the regulator and the government is indicative of the framework in which they operate, it does not necessarily determine the relationship in practice. The functions of the regulator, as well as its leadership and their attitudes, are also key factors in determining the relationship between the regulatory body and the government at the personal level.

**4.10** The relationship between the government and the regulator is also somewhat determined by the personal relationships and quality of staff, both in the regulator and the sponsoring department. The professionalism of government departmental staff, as well as their knowledge of the regulatory environment, heavily shapes the regulator's engagement with the government. Our research revealed that regulators can be frustrated by their interactions with staff within the host department. Equally, one interviewee stressed how high quality staff in the government department made for a positive relationship with their sponsor department.

**4.11** Regulators the Committee interviewed emphasised that their relationship with the government was crucial to their smooth functioning, but that there must be respect for the democratic mandate. Government has a legitimate, democratic interest in the strategic direction of a regulatory body and in its efficiency and overall effectiveness. However, the independent judgement of the regulators is paramount.

> **We do not shy away from giving unwelcome advice to ministers when it is necessary to do [so] in order to deliver our statutory objectives.**
>
> **Ofqual**

23 National Audit Office. Departments' oversight of arm's-length bodies: a comparative study. 2016. Available at: https://www.nao.org.uk/wp-content/uploads/2016/05/Departments-oversight-of-arms-length-bodies-a-comparative-study.pdf

24 Institute for Government. Read Before Burning: How to increase the effectiveness and accountability of quangos. 2010. p. 16.

### Transparency and Independence

**4.12** One way to help ensure a proper relationship between regulators and the government is to establish a formal and transparent understanding of the regulator's role. This enables regulators to bear in mind the government's strategic direction and have respect for ministers' policy views whilst avoiding undue influence.

**4.13** Transparency and a formal working relationship between regulatory bodies and the government promotes smoother working, leads to greater accountability and is critical in balancing competing pressures. The regulator's role, responsibilities and functioning should be published at the outset.

**As one regulator explained, transparency removes the 'nod and wink' of ministerial communication.**

**Best Practice: The operational independence of regulators must be upheld. Ministerial guidance on operational aspects may be transparently considered, but should not be treated as binding, unless there are statutory provisions for such guidance.**

**4.14** Regulatory bodies also highlighted the benefits of procedural openness. For example, openly liaising with government departments by keeping them abreast of developments or notifying a minister before a decision is released to the press. When regulators do feel government pressure, the Committee has been told that making decisions through due process helps them to 'push back' against this influence. By communicating ministerial interests, influences and meetings, regulators have found that they are less vulnerable to being 'leant on' by government departments.

**One Chair of a regulatory body highlighted that maximum openness can help prevent any formal or informal government pressure on the regulator's decision making. When the government and regulated entities are aware that the regulators make all of this information publicly available, they are more likely to avoid undue or improper attempts to influence the regulator.**

**Best Practice: Any ministerial guidance to a regulatory body on their strategic direction should be published online by the regulator.**

## Independence from the Regulated Sector

Regulatory Capture: **the process through which the regulated sector can influence and manipulate the agencies that are supposed to control them.**

**4.15** Some regulators perceive threats to their independence to be on the increase, due to the move away from enforcement-based models of regulation towards greater focus on engagement with the regulated sector.[25] Less-traditional regulatory tools include guidance, performance monitoring and education for regulated bodies, which involve greater involvement with the regulated bodies and professions.

**As one regulator told the Committee, independent regulators must be able to have a "grown-up" relationship with those they regulate. This necessitates some contact with the regulated sector.**

**4.16** In light of this engagement, regulators must properly manage their relationships with those they regulate, and limit the risk of regulatory capture. There are pressures, for example, for more lenient penalties, for inspectors to become overly sympathetic to the needs of those they regulate, and influence on the selection of 'targets' for regulation. These threats can be posed at all levels, from frontline staff to the executive board. Pressures to compromise regulatory integrity can be perpetuated through lobbyists,[26] trade or consumer groups, and the media.

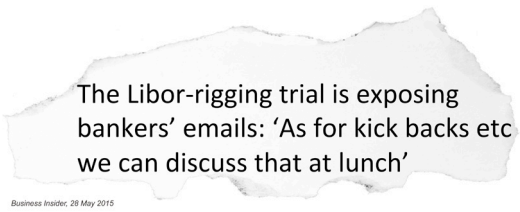
25 Baldwin, Robert, Martin Cave and Martin Lodge. Understanding Regulation: Theory, Strategy, and Practice Second Edition. Oxford University Press. 2012. pp. 227–258.
26 See Committee on Standards in Public Life. Strengthening Transparency Around Lobbying. 2013.

**We are not here to be liked, but at the same time we can't be at war.**

**A Regulatory Body**

## Transparency Around Meetings and Hospitality and Gifts

**4.17** Maintaining open registers of meetings and of all hospitality and gifts is one formal way of mitigating these risks; it reminds staff of the need to protect against inappropriate engagement with the regulated sector. These registers should be managed and maintained in a searchable, online format. Although there can be benefits from informal contact with the regulated sector, for example, at conferences, many regulators told us that they were much stricter with regard to avoiding and declaring hospitality and gifts than was the case a few years ago.



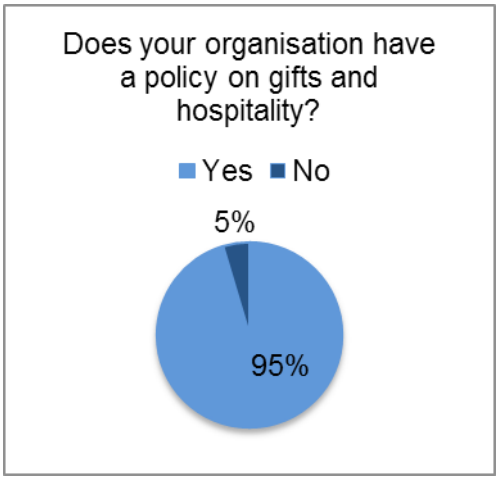


**4.18** We were pleased to note that 95% of the regulatory bodies surveyed had a policy on hospitality and gifts. However, policies varied in terms of which employees needed to complete the register and the frequency with which policies and declarations were updated.

**4.19** Regulators must take these formal practices and procedures seriously. Maintaining and publishing a transparent and publicly-accessible register of meetings and gifts and hospitality will help to embed a culture which reinforces the principle of integrity.

**One regulator interviewed by the Committee stated that one way they maintained their independence was through being 'hot on hospitality'. This regulator recognised that registers of meetings and hospitality and gifts played an important role in ensuring their staff maintained proper relations with the regulated sector.**

Figure 6: Policies on Gifts and Hospitality




**4.20** All staff working for regulatory bodies should declare their meetings, and ensure that their entries to the register of hospitality and gifts are up-to-date. If in doubt, staff should raise their concerns about conflicts of interest policies with their line manager. Further, regulators should use these registers as a tool to measure whether they are allowing equality of access for all stakeholders.[27] And after each meeting, regulators should proactively consider whether they have received a balance of views.

**4.21** The Committee recommends the following features for registers of meetings and declarations of hospitality and gifts:[28]

- All members of staff should be asked to complete the registers;
- All meetings, both with government and the regulated sector, should be listed;
- All but the most insignificant gifts should be declared;
- The registers should be regularly updated;

27 See Committee on Standards in Public Life. Strengthening Transparency Around Lobbying. 2013.

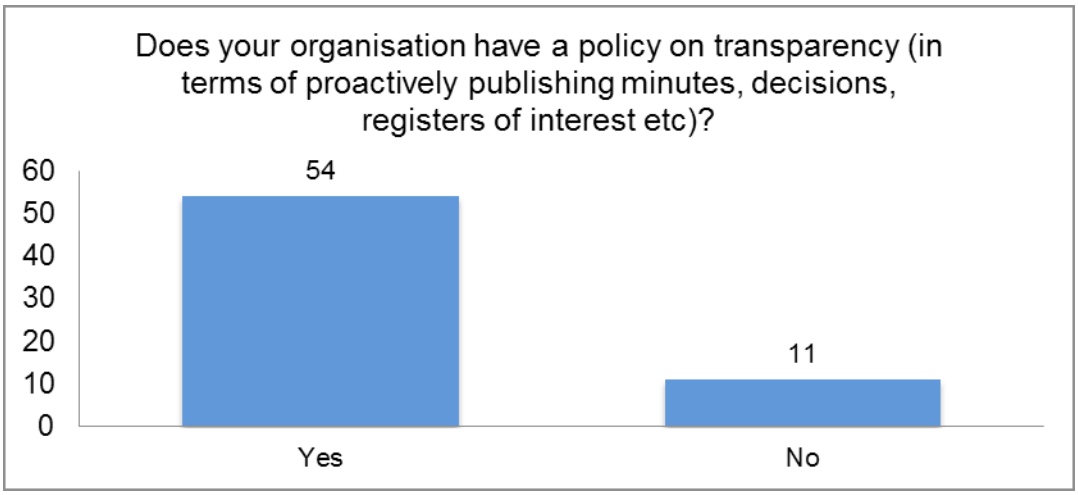
28 See The Institute of Business Ethics. The Ethics of Gifts and Hospitality. 2009. Committee on Standards in Public Life. Strengthening Transparency Around Lobbying. 2013.

- Data should be clearly signposted on the corporate website; and
- Registers must be in a machine-readable format (.xlsx, .csv, not .pdf, .docx).

**4.22** Remember:

- Would you be embarrassed if anyone found out about the meeting or gift?
- How would you feel if you read about it in the press?[29]

Figure 7: Policies on Transparency




**We are scrupulous as regulators and very hair-shirted over the use of public money. If I take someone out to lunch our rules require that I declare that. Behaving ethically is absolutely necessary.**

**A Regulatory Body**

**4.23** Accounting Officers or their equivalent within regulatory bodies have a responsibility to ensure that ethical standards are upheld in the practices and behaviour of staff working for the regulator.[30] Accounting officers should certify annually that they have satisfied themselves about the adequacy of their organisation's arrangements for safeguarding high ethical standards.

**Best Practice: Compliance with ethical standards of conduct should be confirmed in the published annual certification by accounting officers. Regular, published information should include up-to-date registers of meetings, conflicts of interest and gifts and hospitality. These should be publicly accessible.**

## A Culture of Integrity

**4.24** Although difficult to enact through corporate or public policy, a 'culture of integrity' will help motivate staff to resist pressures from the regulated sector. As regulators are responsible for monitoring the activities of other individuals and organisations, they need to be beyond reproach in their own behaviour. For these organisations to be 'cleaner than clean', ethical working practices need to be embedded amongst staff at all levels.

**We're independent and impartial. When we decide a complaint, we look carefully at both sides of the story and weigh up all the facts.**

**Financial Ombudsman Service**

29 See: https://cspl.blog.gov.uk/2015/12/02/it-can-take-a-crisis-to-change-an-organisations-behaviour/
30 Committee on Standards in Public Life. Strengthening Transparency Around Lobbying. 2013. p. 40. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/407530/2901376_LobbyingStandards_WEB.pdf
31 See Appendix 2. David Jackman's paper: https://www.gov.uk/government/publications/academic-research-paper-on-ethics-for-regulators

**4.25** The Committee has seen a range of motivations for the promotion of a culture of integrity within regulatory bodies. These motivations ranged from a strategy of fireproofing against claims of capture to embedding fully ethical standards.[31]

**4.26** Embedding a corporate culture which promotes integrity helps staff make the right decision about appropriate levels of engagement with the regulated sector, both formal and informal. Promoting regulatory independence helps lead to a strong informal culture of behavioural independence and in turn promotes decision making in the interest of the public, rather than of the regulated sector. We have found that regulators are aware of the compromising positions that can arise from their relationship with the regulated sector but approaches vary, as does the ability to promote an independent culture amongst their staff.

**4.27** The Solicitors' Regulatory Authority has particularly identified improving 'the culture within the organisation' in order to meet their objective of making 'fair and justifiable decisions promptly, effectively and efficiently'. Through linking the importance of organisational culture and the effectiveness of the regulation, the SRA demonstrate the importance of cultural integrity in regulation.[32]

**4.28** Risks to regulatory integrity are particularly high where both the government and the regulated sector apply pressure to the regulator in the same direction. As regulated organisations have the freedom to lobby the government, the regulatory body may feel pressure applied from both sides.

**4.29** Promoting integrity in the regulator's corporate culture is dependent on commitment from those at the top, who should lead by example, demonstrating the highest levels of probity, and by providing appropriate induction, codes of conduct and training for staff at all levels. This is key to ensuring that staff, especially at the front line, are not 'captured' by the regulated sector. Embedding this culture requires conscious and continued effort.

## The Revolving Door

**4.30** The 'revolving door' refers to the movement of people into and out of regulatory bodies. The scope for individuals to move to and from the regulated sector is considerable, as regulators work across a wide variety of functions and sectors. For example, frontline health regulators may eventually take jobs with private health companies, members of financial regulatory boards may become corporate compliance advisors, and school inspectors may hire ex-teachers.

**4.31** Where staff revolve between regulators and the regulated industry, regulators are able to acquire individuals with the necessary expertise. However, there is a risk that those making and enforcing regulatory policy are overly sympathetic to the needs of the regulated sector. This may be because personnel 'come from that world', or that they plan to move back to the private sector after working for the regulator.[33]


Enter the revolving regulators

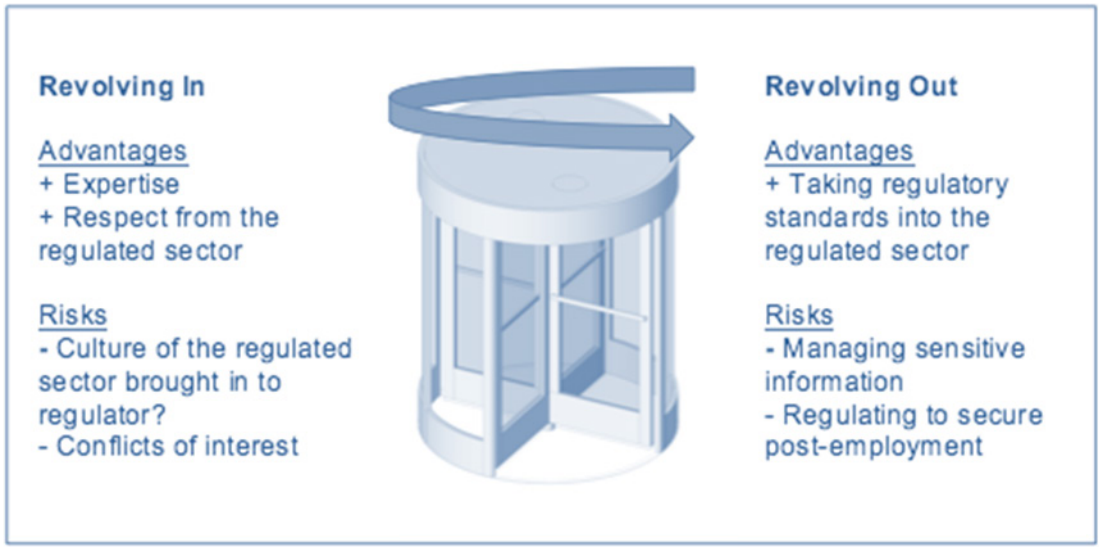
*Financial Times, 23 April 2012*

**4.32** However, the Committee's evidence is clear that completely banning the movement of individuals between the regulator and the regulated sector is both unachievable and undesirable for the working relationship between regulators and those they regulate.

32 Solicitors Regulation Authority. SRA Business Plan November 2015 to October 2016. 2015. Available at: https://www.sra.org.uk/sra/strategy/business-plan/sra-business-plan-2015-2016.page

33 Organisation for Economic Co-operation and Development. The Governance of Regulators. 2014. p. 17.

Figure 8: The Revolving Door's Advantages and Risks




**4.33** The Committee is however concerned about the number of regulatory bodies which do not have formal policies on either recruitment of staff from the regulated sector or the movement of former employees into the regulated sector. For both 'revolving in' and 'revolving out', fewer than a third of the 63 bodies surveyed had policies on the movement of staff.

**Best Practice: All individuals taking up positions subject to pre- and post-employment rules should be made aware of them at their appointment.**

**Best Practice: Policies and procedures should be in place to manage 'revolving door' situations where individuals come from, or go to, the regulated sector. These should apply to all individuals at any level of the organisation.**

Figure 9: Policies on Movement of Staff

## Revolving In

**4.34** In this context, 'revolving in' refers to the movement of individuals from the regulated sector into the regulatory body. Movement in this direction is often spurred by regulators seeking to recruit individuals who have relevant expertise in the regulated sector.

**Just 17 (26%) of the 66 respondents to the Committee's survey had an organisational policy on the recruitment of staff from the regulated sector.**

**4.35** For example, the Civil Aviation Authority told us that it particularly seeks to recruit staff from the regulated sector, such as pilots, surveyors, or air traffic control staff, in order to ensure the people they hire have specialist regulatory oversight capability.

**One regulator the Committee interviewed emphasised that they require individuals with technical skills on their leadership team. Although this exposes a conflict of interest, this 'is inevitable and needs to be managed'.**

**4.36** For employees at the middle management or inspector level within regulatory bodies, 'revolving in' can lead to concerns that individuals may make regulatory decisions in consideration of their post-employment ambitions in the regulated sector. This can also be a problem with board members who set policy, as they may be overly sympathetic to the regulated individuals or organisations. This increases the chance of unduly soft regulation or even regulatory capture.[34]

**4.37** At the board level, conflicts of interest can arise where individuals previously held senior positions at organisations they now regulate. The Committee has seen cases of best practice where board members are asked to recuse themselves from any decision making related to their previous employer or its competitors.

**4.38** Several regulatory bodies were clear that conflicts of interest were common, if not inevitable, in the regulatory world, and were best handled through being announced transparently and managed with clarity. Indeed, as one regulator the Committee interviewed emphasised, regulators have to investigate areas which could run into conflicts of interest, such as where a public protection imperative is at stake.

**A six month cooling off period was decided to be insufficient… As a result he is recused, asked to leave meetings involving any connection with his former company.**

**A Regulatory Body**

**4.39** The appointment of individuals from the regulated sector need not be problematic. Recognising and managing, rather than wholesale avoiding, the movement of employees from the regulated sector into regulatory bodies provides regulators with the opportunity to utilise the skills and expertise of individuals in the regulated sector while also addressing potential conflicts of interest.

**4.40** Our research has identified some existing strategies to manage conflicts of interest when staff 'revolve in', including:

- Ensuring frontline staff are not involved in cases related to their previous employer during an initial 'cooling off' period;
- Executive staff and non-executive board members recusing themselves from business in which they may have a conflict of interest due to previous employment;
- Maintaining a regularly updated register of interests, especially for executive board members;
- Developing and implementing strict recruitment processes that enable regulators to ensure that their employees are appointed fairly and based on merit; and
- Strictly enforced and transparent conflicts of interest policies, which are publicly available. These policies should cover the time period for which past conflicts must be declared (e.g. 3 years prior to employment), the nature of conflicts which must be declared with examples, and the appropriate process for declaring these interests.

34 Dal Bó, Ernesto. Regulatory Capture: A Review. Oxford Review of Economic Policy. 2006. 22/2:214.

**Best Practice: Where board members and staff are recruited from the regulated sector, relevant safeguards should be considered, such as isolation from the regulation of recent employers, or exclusion from key meetings.**

**Best Practice: At every board meeting, members should be asked to declare any actual or potential conflict of interest and these should be publicly recorded. Where the board agrees that a conflict is inappropriate, the member should be recused from both the discussion and decision making.**

## Revolving Out

**4.41** 'Revolving out' refers to the movement of staff from the regulatory body into the regulated sector.

**4.42** There can be advantages to frontline, managerial and executive staff moving into the regulated sector, especially if they have developed a thorough understanding of the policies and working practices of the regulatory body and are able, as 'ambassadors' to take the messages and culture of the regulator into the sector. It would also be an undesirable restraint on career prospects, and an obstacle to the recruitment of the best people, to impose excessive restrictions on outward movements.

**Just 24 of the regulators surveyed have a policy on former employees moving to the regulated sector.**

**4.43** However, if this movement is to be beneficial, it must be properly managed for individuals at all levels. Where staff employed by regulatory bodies are civil servants, regulators should ensure that their staff comply with the Business Appointment Rules for Civil Servants. These rules have been designed to avoid any reasonable concerns that: a civil servant may be influenced in carrying out their official duties by the hope or expectation of future employment; a former civil servant might improperly exploit privileged access to contacts in government or sensitive information; or a particular firm or organisation might gain an improper advantage by employing someone who had privileged access to information.[35]

**There would be times when someone would fall short of the code so Ofsted would then have to instruct and insist that the individual does not continue to work. For example, where a contracted inspector offered a business card to a training provider which had been ruled as inadequate. Ofsted now has a zero-tolerance approach to anyone "selling their wares as an Ofsted inspector". Although proof can be difficult, Ofsted is vigilant to prevent any such conduct. Ofsted has made this clear at conferences and to teaching associations… There had been a recent example of someone leaving, and trying to start up their own company. They were investigated, but no evidence of impropriety was discovered as the Business Appointment rules had been followed.**

**Ofsted**

**4.44** As our interviews uncovered, the post-employment moves of non-executive board members can be cause problems for the perceived integrity of a regulator, as non-executives may not be subject to civil service rules. Regulators should be open and transparent about the movement of their former senior executives and board members. Transparency helps deter poor behaviour and enables the public to hold the regulator to account.


*The Telegraph, 13 October 2013*

35 The Advisory Committee on Business Appointments. The Business Appointment Rules for Civil Servants. 2014. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382937/Business_Appointment_Rules__2014_.pdf

**4.45** The Advisory Committee on Business Appointments (ACoBA) provides transparent details on the application of the rules for new jobs for former ministers, civil servants, and Crown servants.[36] These details are regularly published online and include: the applicant's previous role, the factors considered in the application, the salary of the new role, any conditions and restrictions which may be necessary to uphold high ethical standards, and the date the new role was commenced. Although some regulatory bodies may not formally fall under the ACoBA rules, the Committee advocates that regulatory bodies should adopt similar approaches for both staff and non-executive board members in order to secure their integrity, and trust from the public and regulated entities. There may also be a case for extending ACoBA's remit to cover key regulatory positions where these are not held by civil servants.

**Where non-executive board members are not subject to civil service rules, they can be placed in a strange position.**

**Regulatory Delivery**

### Existing Good Practice

**4.46** The Committee's research has identified some existing practice amongst regulatory bodies to manage conflicts of interest when staff 'revolve out'. These include:

- Clearly codified policies regarding the protection of sensitive information post-employment;
- When senior executive staff leave public office, the establishment of a Conflict of Interest Committee which may help to alleviate concerns during the handover period. This Committee manages the transfer of sensitive information, meetings with the regulated sector and the post-regulatory employment of executive board members;
- 'Cooling off' periods for staff which leave regulatory organisations and join the regulated sector; and
- The promotion of ethical standards through regular training and a values-led corporate culture amongst all staff to increase the likelihood that employees will take the regulators' ethical conduct into the regulated sector.

**Best Practice: The process for departing board members and senior executives should be in line with arrangements for ministers and senior civil servants as determined by the Advisory Committee on Business Appointments. In order to ensure that such moves are conducted with integrity, and to promote trust in the regulatory body, regulators should be entirely transparent about post-employment destinations and restrictions.**

**Civil Service Code:**
**'You must not… disclose official information without authority (this duty continues to apply after you leave the Civil Service)'**

## Protection of Privileged information

**4.47** For both market and conduct regulators, one of the key risks of staff 'revolving out' is the disclosure of market-sensitive or privileged information obtained through the regulatory activity. This risk applies to those involved at all levels of the organisation, from board members to frontline staff. Where individuals are involved in steering regulatory policy, and then move to a regulated entity, there is a risk they may regulate in the interest of their post-employment ambitions. At the front line, regulators may have access to confidential information about competitors.

**4.48** Market regulators have access to market-sensitive information that could be used by regulated organisations in order to gain market advantage over competitors. Conduct regulators may possess highly sensitive intelligence of behaviour or misconduct within organisations, which could illegitimately and unfairly be disclosed in a corporate context.

36 Therefore, these rules are not normally applicable to non-executive directors.

## Protecting Information from Revolving Out

**4.49** There are examples of good practice for the management of sensitive information. Some regulatory bodies provide codified guidance for their staff to manage the protection of commercial or market sensitive information post-employment.

**4.50** Appropriate 'cooling off' periods (or gardening leave) may be used to manage actual or perceived conflicts of interest which may arise. Regulators may also impose a form of subject matter limit or time limit for ex-regulators working on new projects. For example, the Bank of England has a system of 'Restricted Duties', whereby employees engaged in market-sensitive work who resign from the Bank are required to work their notice period in a non-sensitive job.[37]

**The Financial Conduct Authority told the Committee about the frequent use of 'gardening leave'. As it is common for staff at all levels within the organisation to move into the regulated sector, they enforce these notice periods in order to protect confidential information.**

**4.51** When these limits and guidelines are established through a transparent procedure which is consistently applied, regulators are able to manage the movement of individuals out of the regulatory body into the regulated sector. Staff should be made aware of these policies from the start of their employment, and reminded of the necessary processes for managing exit from the organisation prior to their departure.

**When the CEO of Ofcom from 2006 announced his departure in September 2014, the Office actively managed any conflicts of interest that might have arisen. The CEO left in December, and was on gardening leave for six months. Between announcing his departure and leaving, he did not meet regulated firms unaccompanied. A Conflicts Committee oversaw his activities and ensured there was no bias or improper influence.**

**This approach enabled rotation in the leadership of Ofcom, without posing any risk to the integrity of the regulator.**

**One conduct regulator which responded to the Committee's survey stated that they have specific policies on recruitment of staff from the regulated sector and movement of former employment to the regulated sector, but the policy could not be found on their website.**

**4.52** This enables the regulator to act transparently whilst ensuring that they do not undermine their position of trust and responsibility by breaching the necessary confidentiality within the regulated sector.

## Statutory Provisions

**4.53** Many regulatory bodies have statutory prohibitions on revealing information obtained during the process of regulation.[38] For example, the Financial Conduct Authority is bound by Section 348 of the Financial Services and Markets Act 2000. This specifies that confidential information, obtained for the 'purposes of, or in the discharge of, any functions of the Authority', must not be disclosed without the consent of those to which it pertains.

**Section 348.1 of the Financial Services and Markets Act 2000**
**'Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of—**
**(a) the person from whom the primary recipient obtained the information; and**
**(b) if different, the person to whom it relates'**

37 Ethics for Regulators Survey Submission
38 See Review of Statutory Prohibitions on Disclosure. 2005. Available at: http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/StatutoryBarsReport2005.pdf

**4.54** The Information Commissioner's Office, the regulator responsible for the enforcement of the Data Protection Act 1998 and Freedom of Information Act 2000, also has a statutory provision for the protection of confidential information. Under Section 59 of the Data Protection Act 1998, it is a criminal offence for staff working for the regulator to reveal information supplied or obtained by the Office in the course of its duties.

**4.55** The employees of some – but not all – regulatory bodies are bound by the Civil Service Code.[39] The Civil Service Code is clear that all official information must not be disclosed without authority, and that this restriction applies even after an individual leaves the Civil Service. The Code also emphasises that resources should only be used for the authorised purposes.

**4.56** Statutory provisions are not in place or essential for all regulatory bodies. But they, or employment-based equivalents, must be fully and carefully explained, and enforced where necessary.

**When a mid-level member of staff at a large regulatory body moved into the regulated sector, they took one of its largest databases with them. This included confidential information on the performance of some competitors of his new employer – who reported it back to the regulator. Such gross misconduct can undermine the integrity and legitimacy of any regulator.**


**An ex-Ofcom employee stole commercially sensitive data about the UK's major TV broadcasters – and then offered it to one of them**

*City AM, 10 March 2016*

**Best Practice: Additional safeguards should be considered for anyone who leaves the regulatory body. These include explicit prohibitions on disclosing confidential information, restrictions on contact with the regulator, and gardening leave requirements.**

## Secondments

**4.57** Reform of the regulatory landscape in the UK has led to more secondments and the appointment of advisory staff moving between the regulator and those they regulate. This has modernised the regulatory system, but has also blurred the lines between the regulators and the regulated and heightened the risks surrounding potential conflicts of interest.[40]

**4.58** Secondments and advisory appointments can be useful in sharing expertise from the regulated sector and promoting the regulator's culture into regulated organisations. But there are risks. Where individuals are placed within regulatory organisations on a short-term basis, they may still have access to confidential and market-sensitive information. Potentially these individuals could knowingly or unknowingly share this information outside of the regulatory body.

**4.59** 36 of our 66 survey respondents identified that they have an organisational policy on 'secondments into and out of the organisation'. However, in the Committee's meetings with regulators, senior staff were frequently unclear on the nature and scope of these policies.

**4.60** For some regulatory organisations, the Civil Service Code applied to staff on secondment, while in others it did not. This can lead to the situation where individuals working alongside each other (with the same access to information) are not covered by the same ethical code.

39 Civil Service. Civil Service Code. 2015. Available at: https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code

40 Organisation for Economic Co-operation and Development. Revolving Doors, Accountability and Transparency – Emerging Regulatory Concerns and Policy Solutions in the Financial Crisis. 2009.

**Monitor, the independent regulator of NHS Foundation Trusts, has a clear and publicly accessible policy on secondments, which details the standards required of those who seek to undertake a temporary placement either within, into, or out of the regulator. This policy details the fair procedure of allocating secondment opportunities, the process for establishing the terms and conditions of the secondment, and the standards expected of staff moving into the organisation and representing the regulator.[41]**

## Summary

- The public legitimacy of regulators depends on their integrity. Regulators must avoid placing themselves under obligation to anyone who may seek to influence their decision making.
- There are hazards to regulatory bodies' ability to operate free from inappropriate influence. These hazards can arise from the nature and role of regulatory institutions, but importantly are also determined by the culture and conduct of individuals within the regulatory organisation. This informal behaviour is much harder to monitor than institutional mechanisms or corporate policies, yet is critical for the regulator's integrity.
- While the revolving door between regulators and the regulated industry can bring benefits for the regulated sector, it must be managed to ensure that the movement of staff does not compromise regulatory integrity.
- Regulators can face threats to their independence from both the regulated sector and the government. These threats can be managed through the promotion of transparency and a corporate culture of integrity.

41 Monitor. Secondment Policy. 2008. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/314163/SECONDMENT_POLICYV3-SEPT_08_1_.pdf

# Chapter 5
# Objectivity

**Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.**

**5.1** Maintaining objectivity in light of the multiple pressures exerted on regulators requires both an evidence-based approach to regulatory judgements and decision making, and a supportive organisational culture.

**As one regulator who attended the Committee's roundtable for regulators said, retaining legitimacy and claiming to speak in the public interest is a continuing challenge for regulators. Therefore they have to demonstrate the evidence, the arguments accepted and rejected, and conclusions reached.**

**5.2** This chapter considers how objectivity, free from bias or discrimination, can be upheld through both evidence-based decision making and promoting a culture of independence within the regulatory body.

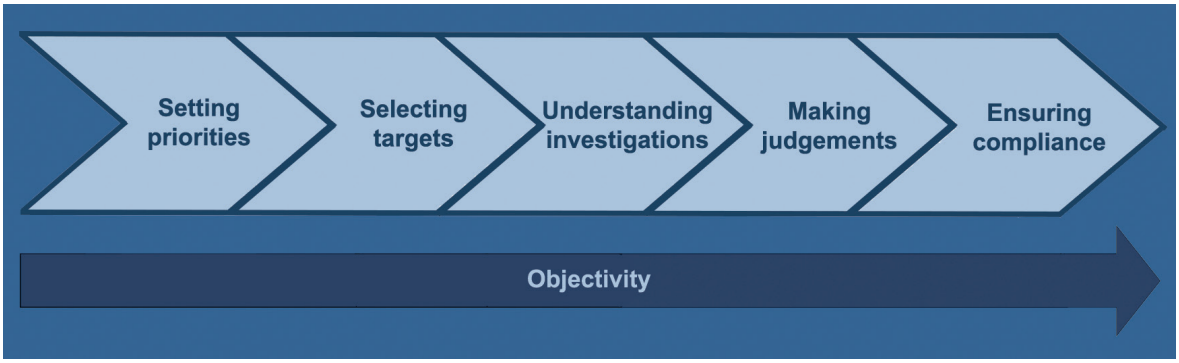
## Evidence-Based Decision Making

**5.3** Many of the regulators we interviewed recognised the value of objectivity in their decision making, and understood that their credibility was reliant on the quality of the evidence gathered in support of their decisions. This evidence base varies depending on the role of the regulator and its relationship with the regulated sector, but a clear audit trail of evidenced-based decision making will protect the regulator against any claims of impropriety, bias or undue influence.

**We have quarterly surveys which keep our finger on the pulse. All grading decisions are taken by teams not individuals and grading changes are subject to both quality assurance and independent verification processes. Financial viability grades are underpinned by robust and objective financial data. All grading decisions are published and, in the case of re-gradings, a detailed explanation is given. We no longer get accusations of favouritism.**

**Homes and Communities Agency**

Figure 10: The Importance of Objectivity throughout the Regulatory Process



**5.4** Regulators we spoke to understood the need for sufficient high-quality data and evidence to be gathered before any regulatory decision was taken. Not only was this essential to resist any judicial appeal or challenge, it also provided more general assurance that decisions had been made impartially, fairly and based on merit. Evidence may be either quantitative or qualitative according to circumstance, but must be of the highest quality and appropriate for the regulator's purposes. This evidence, which can be confidential and market-sensitive, must be managed through robust data systems. The evaluation of this evidence will always rely heavily on the objectivity, judgement and experience of the regulator.

**In their response to the Committee's survey, the Centre for Environment, Fisheries and Aquaculture Science stated that evidence gathering and assessment is supported by independent reviewers to ensure objectivity and impartiality. This can be one strategy for promoting fair and balance decision making.**

## Mitigating Risks of Bias at the Front Line

**5.5** The Committee's research has found that to safeguard objectivity and their reputations, regulators must mitigate risks of actual or perceived influence from the regulated sector at all levels of the regulatory organisation, especially at the front line where staff responsible for inspection and enforcement may be particularly susceptible to influence on their decision making.

**There have been two types of inspector – those employed directly (about 500) and those contracted (about 1500). But since September 2015, there has been a move to direct employment and direct engagement of self-employed inspectors. This has been somewhat controversial politically, but Ofsted believes it has been the right thing to do and it has been supported by the education community.**

**Ofsted**

**5.6** The Committee's survey highlighted that conduct regulators, in particular, were aware of the need to prevent bias in their dealings with the regulated entities at the local level. For example, the Sports Ground Safety Authority highlighted that their staff are made particularly aware of the risks that relationships 'on the ground' can pose to regulation. Another professional regulator told the Committee they had concerns that local authorities may have an incentive to be lenient to local regulated entities, such as restaurants and waste sites, which contribute to the community but may cause a threat to the public.

**One regulator the Committee interviewed highlighted that regulatory capture is not always due to active influence from the regulated sector, but can be due simply to continued contact with those they regulate.**

**Their inspectors, which had day-to-day contact with the regulated sector, had become so understanding of the pressures on those they regulate, that they had an inclination to be too sympathetic in their judgements.**

**Therefore the regulator undertook an independent review, and trained another group of people to undertake unannounced checks to mitigate the risks of inspectors losing their objectivity.**

**5.7** Open accountability and maintaining due process, particularly a 'paper trail' can also mitigate against frontline staff making decisions in favour of the regulated sector. As one regulator identified, now that decisions are made transparently and publicly, there are 'no longer charges of favouritism'.

**In their response to the Committee's survey, Ofqual, the regulator of qualifications, tests and exams, stated that they do not find that ethical dilemmas arise often – primarily due to their focus on evidence based decision making.**

**Best Practice: While constructively engaging with the regulated sector, regulators should guard against the dangers of 'regulatory capture'. Regulators should seek to ensure that staff at all levels are clearly aware of conflicts of interest and are explicitly advised about the risks of bias in decision making.**

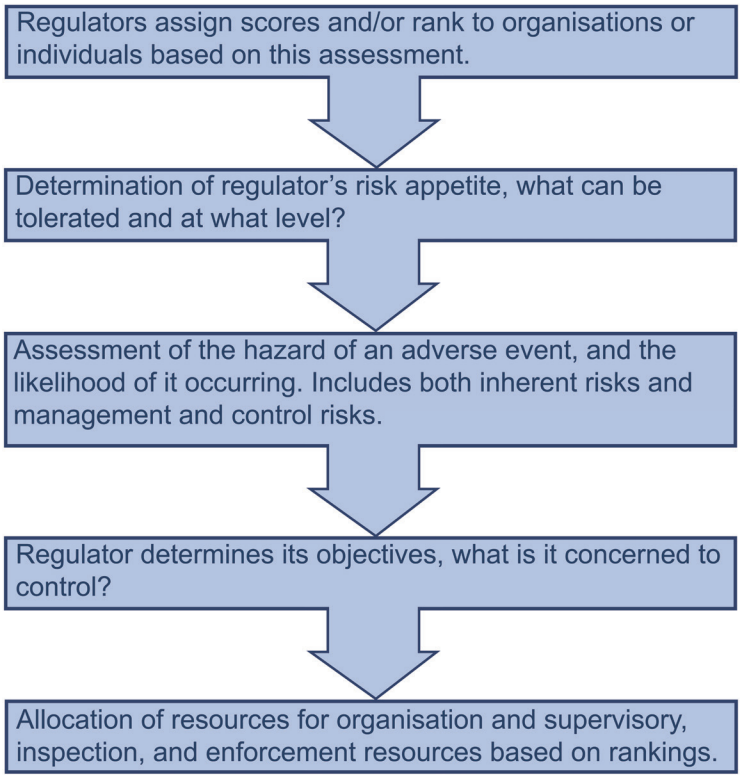
## Risk-Based Regulation

**5.8** As regulators cannot enforce every rule at all times, they must make decisions about where to allocate their resources. The Hampton Review 2005 recommended that all regulatory bodies should operate a risk-based system. In the decade since then, regulatory bodies in the UK have been encouraged to direct their resources where they can have the maximum impact on outcomes.[42]

**5.9** For risk-based regulators, the decision of where to allocate enforcement resources is based on assessments of the risks that a regulated entity poses to the regulator's objectives.[43] This risk-based approach can help to ensure that regulators are not 'leant on' by ministers or other political influences, but remain neutral when selecting certain targets for regulation.

**5.10** One weakness of this system of regulation, however, is that the risk frameworks can become static. The Hampton Review recommended that risk-based approaches were combined with some degree of random inspection in order to assess their validity. This risk can also be mitigated through providing opportunities for staff to communicate new or emerging risks.

Figure 11: Risk-Based Model of Regulatory Resource Allocation[44]




42 HM Treasury. Reducing administrative burdens: effective inspection and enforcement. 2005.
43 Black, Julia and Robert Baldwin. Really Responsive Risk-Based Regulation. Law and Policy. 32/2. 2010. p. 188
44 Black, Julia and Robert Baldwin. Really Responsive Risk-Based Regulation. Law and Policy. 32/2. 2010. p. 187

### Reputation

**5.11** Maintaining a reputation for fairness is key to promoting regulated entities' compliance with regulation. One of the best ways to do this is to ensure that all decisions are made objectively based on evidence and that the decision making process is open and transparent. When the regulated sector recognises that regulation has been carried out objectively, they are motivated to comply, and even approach, the regulator with their concerns in a no-blame environment without having to rely on the inspection cycle.[45]

**5.12** One regulator the Committee interviewed described 'objectivity through due process' as a crucial foundation for independent regulation. Although the regulated sector, government, or public may disagree with the regulatory decision, they can nevertheless maintain trust in the regulator's process when they believe that the regulatory body is acting fairly and objectively. This trust soon disappears if independent regulators are perceived to be relying upon dubious or inadequate evidence.

**5.13** One way in which regulatory bodies have been seen to incorporate ethical risks within their risk management processes is through the organisation's risk register. This process provides an opportunity to document all risks posed to the regulatory body, and therefore should include the ethical standards challenges facing regulators. The Committee has found that many regulators include ethical standards risks, according to the Seven Principles, under the 'reputational risks' posed to the regulator.

**A regulatory body must live up to its own principles and its reputation can be undermined when it comes under close scrutiny. For example, following the collapse of BHS, the Pensions Regulator will need to defend its claims that:**

***"We act with integrity***
- ***We are open, even handed and transparent***
- ***We base our judgements on principles, evidence and fact***
- ***We take ownership for, and are accountable for our actions…"***

## Promoting a Culture of Objectivity

**5.14** While evidence provides the necessary basis for regulators to make objective decisions, this must also be supported by a culture of impartial objectivity within the regulator. Promotion of the right organisational culture is necessary to ensure that staff recognise the importance of exercising their judgement objectively. This must be pervasive throughout, from the executive board to frontline staff.

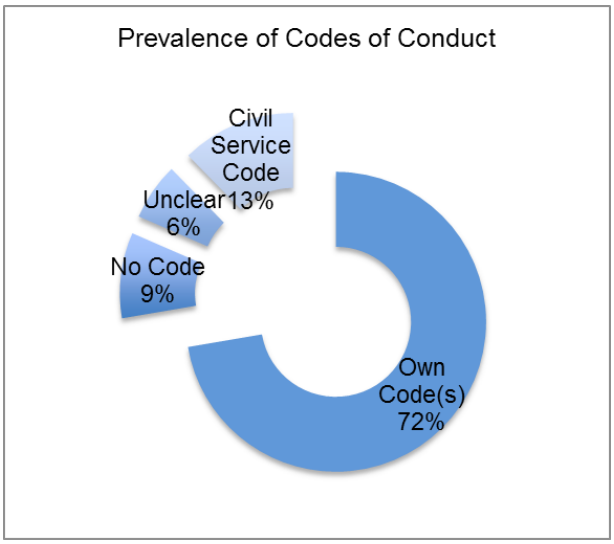
### Codes of Conduct

**5.15** Codes of conduct provide a key opportunity for the board to set the ethical tone of the organisation. The principles outlined in these codes should be seen as the behaviour expected of staff, and provide them with a roadmap for undertaking their daily work.

**In response to the Committee's survey, the Office of Rail and Road said that the Civil Service values of honesty, integrity, impartiality and objectivity underpin everything they do and their expectations of all staff.**

45 See Annex 4, Chris Hodges, paper: https://www.gov.uk/government/publications/academic-research-paper-on-ethics-for-regulators

Figure 12: Prevalence of Codes of Conduct




**5.16** Yet, the Committee has found that for some regulatory bodies, codes of conduct are not applied equally across all personnel. Our research revealed that staff working alongside each other, with the same access to highly sensitive information, might not be covered by the same code. There was also confusion in some bodies about application of their code(s) to their staff.

**5.17** In some regulatory bodies, where the staff code did not apply to non-executive directors or lay members, a code of conduct for board members has been established. The Committee observed similar disparities with respect to secondees, consultants and contractors. Since all of these individuals can have the same (or sometimes greater) influence, discretion and access to information as those employed by the regulator, they should also be covered by a code of conduct.

**Good Practice: Codes of Conduct[46]**

- **Proportionate, giving enough detail to help guide actions without being so elaborate that people lose sight of the underlying principles;**
- **Adapted to the needs and context of each organisation;**
- **Clear about the consequences of not complying with the code, both for the individual and others.**
- **Framed positively wherever possible;**
- **Personalised, as active personal commitment can have a big impact on encouraging people to behave in the right way; and**
- **Reinforced by positive leadership and embedded in the culture of the organisation.**

**Best Practice: At least one code of conduct should cover all personnel. This includes executive and non-executive board members, employees, secondees, consultants, and contractors.**

**5.18** Embedding the code provides one of the greatest challenges to the ethical leadership of the regulator. It relies on those at the top to set the ethical tone of the organisation, not least by exhibiting the highest ethical standards in their behaviour and attitudes.

**The code of conduct is the writing that goes through the middle of a stick of rock. We do a lot of public-facing work. If you call others to account you must be beyond reproach… Our ethical code of conduct is part and parcel of who we are and how we do our job on a daily basis.**
**Independent Police Complaints Commission**

46 See Committee on Standards in Public Life. Standards Matter. 2013. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228884/8519.pdf

**5.19** In order to ensure that the standards espoused in the code of conduct are upheld throughout the organisation, ethical values should be evident in the recruitment and appointment process. These values can be reinforced and encouraged through training, induction and appraisal processes that draw not only on 'what' is done, but 'how' it is done.

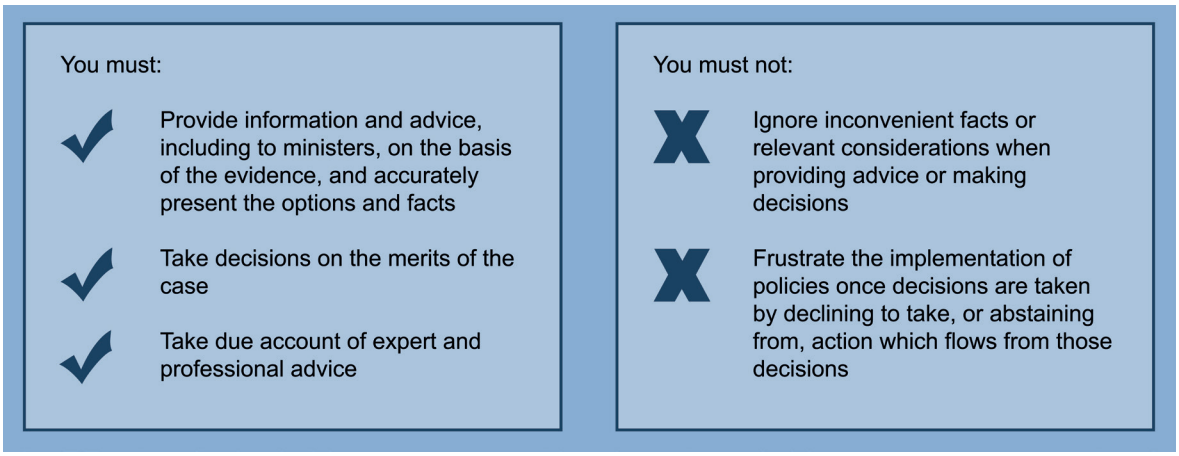
**5.20** The Committee's research has shown that embedding these principles relies on staff understanding the importance of codes of practice, and their application to daily activities. Therefore, a code of conduct must be supported with training to ensure development of the necessary skills and attitudes to make fair and impartial judgements.

**The General Medical Council holds an annual Valued Awards ceremony which celebrates the achievements of staff and teams across the GMC. Staff can nominate colleagues and teams for their commitment to the GMC's values of excellence, transparency, fairness and collaboration. Through these and their in-year Valued Awards, the GMC strives to keep the values real and relevant and to embed them across the organisation by recognising outstanding performance.**

**14 of the 63 bodies surveyed specifically detailed that the principle of objectivity was incorporated by name in their ethical code.**

**5.21** In cases where staff working for regulatory bodies are employed under the Civil Service Code, they are required to adhere to the principle of objectivity. Civil Servants working within regulatory bodies must agree to make decisions based on the merits of the case. This principle, as espoused in the Civil Service Code, should be upheld as the necessary ethical standard for all regulatory bodies.

Figure 13: Civil Service Code: Objectivity[47]




**5.22** Where regulators include the principle of 'integrity' or 'objectivity' in the development of their own ethical codes of conduct, they should also elaborate what this principle means for regulatory decision making by applying the principles to everyday decisions and interactions.

**Best Practice: A regulatory body's code of conduct should be at least equivalent to the Civil Service Code, and reflect the ethical risks faced by the regulatory body.**

**Best Practice: The standards established in the code of conduct should be evident in the recruitment and appraisal processes of the organisation. Staff should be made aware of the importance and significance of upholding these standards at their induction and through regular training processes.**

47 Civil Service. Civil Service Code. 2015. Available at: https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code

### Ethical Approaches to Compliance

**5.23** Objectivity embedded within the culture of the regulator will help staff understand the importance of avoiding any sort of bias or discrimination in both their formal and informal relations with the regulated sector. This includes investigations, evidence gathering and informal meetings.

> **'Critically, a strong reputation and the resulting higher levels of trust enable regulators to take better, more risk-based decisions.'**
>
> **Dame Deidre Hutton DBE, Chair, Civil Aviation Authority**

**5.24** This principle may be supported with measures, such as rotating staff across the regulated organisations that they are monitoring, to ensure they do not become too close to those they regulate or develop inappropriate personal relationships. The Committee found that this practice was commonplace within some regulatory bodies, but could be adopted or improved in others.

**Oversight Regulators**

**In some sectors oversight regulators have been established to regulate the standards and behaviour of a group of regulatory bodies. For example, the Legal Services Board regulates the regulation of the legal services profession in the UK, while the Professional Standards Authority oversees the nine health and care professional regulatory bodies. These bodies provide an opportunity to ensure ethical standards are met across regulatory bodies within one sector, and are often established where the regulatory landscape becomes particularly complex.[48]**

**Oversight regulators are in a unique position since they have a duty to promote ethical behaviour in both internally and in the regulatory bodies they oversee. These bodies may utilise their power and influence to ensure that the regulators they oversee also maintain the highest ethical standards.**

## Summary

- Regulators must recognise the importance of the principle of objectivity and avoid any bias or prejudice from their decision making process.
- Regulators must rely on the broadest possible evidence base for their decisions. The evidence collected depends on the nature of the regulation, but one way to promote objectivity in selecting targets of regulation is through risk-based approaches to regulation.
- This evidence-based approach must be supported with a culture of objectivity. This can be encouraged by emphasising the importance of objectivity within the ethical code of conduct for the regulatory organisation. Through training and development, this principle can aid ethical engagement with the regulated sector.
- An objective regulator will make fairer regulatory judgements, supporting the achievement of their regulatory objectives. Therefore, promoting ethical behaviour within the regulatory body also encourages effective regulation.

48 Baldwin, Robert, Martin Cave and Martin Lodge. Understanding Regulation: Theory, Strategy, and Practice Second Edition. Oxford University Press. 2012. pp. 147–157.

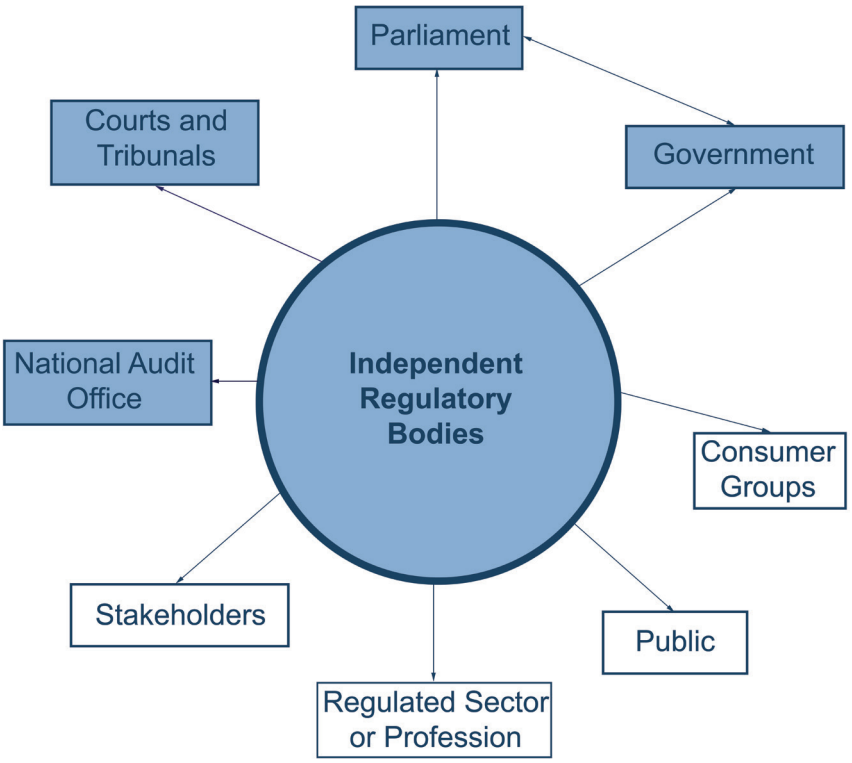
# Chapter 6
# Accountability

**Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.**

**6.1** Regulators are accountable to various stakeholders, both directly and indirectly. Directly, they are typically accountable to the government and/or Parliament, audited by the National Audit Office, and subject to judicial review by the courts and/or appeals against their formal decisions. Indirectly, not least through the media, they are accountable to the regulated sector or profession, stakeholders, consumer groups, and the public more widely.

**6.2** This chapter looks at those relationships and how they may impact on ethical standards for regulators. We examine how regulatory bodies are held to account through the government, Parliament and the courts, before turning to practices for the regulator's own employees to hold the body account.

Figure 14: The Accountability of Regulators[49]




49 Adapted from House of Lords Select Committee on the Constitution. The Regulatory State: Ensuring its Accountability. 2004. p. 20.

**6.3** Central to the Committee's definition of accountability is the scrutiny of decisions and actions taken by those in public life; these actions need to be made in a way that can be justified to the public. Being accountable to the public is not necessarily in tension with the independence of regulators.[50] Indeed, their accountability can serve to increase the regulator's legitimacy, and therefore maintain the independence of regulatory bodies in the face of political pressure. Accountability is closely linked to best practices in openness and transparency. Moreover, the prospect of external scrutiny acts as a preventative measure for unethical behaviour.

**6.4** The evidence available to the Committee suggested that regulatory bodies engage with their stakeholders to varying degrees, with some regulators having a more limited appetite for such accountability. Further, as there has been a shift in approaches to regulation towards more constructive forms of engagement and non-traditional mechanisms of enforcement, the accountability mechanisms for regulatory bodies have also had to adapt.[51]

## Democratic Accountability

**6.5** The political accountability of regulators is typically established in the regulator's relationship with Parliament and government. The formal models of accountability for regulatory bodies are however diverse, and vary according to the regulatory body's foundational statute. A frequent, but not universal, requirement is for the Secretary of State to lay the organisation's annual report before Parliament.

**As one regulator the Committee interviewed expressed, independence is a spectrum and regulators must be accountable to Parliament while maintaining their independence from the government.**

### Parliamentary Scrutiny

**We need to be accountable to Parliament yet still independent.**

**A Regulatory Body**

**Parliamentary bodies with an interest in scrutinising independent regulators:**
- **Public Accounts Committee**
- **Departmental Select Committees of the House of Commons**
- **Ad hoc House of Lords Committees**
- **Cross cutting thematic committees, such as the Public Administration and Constitutional Affairs Committee**

**6.6** Regulatory bodies can be called to give evidence to Parliamentary Committees, which are able to request evidence from both regulators and stakeholders. However, select committee appearances depend on the priorities and interests of each committee and can vary between the frequent and non-existent. Moreover, Committees do not normally hold regulatory bodies to account for their internal ethical practices and behaviour. Thus there is no consistent Parliamentary scrutiny of the ethical practices of regulatory bodies across sectors.[52]

**MPs call time on pubs adjudicator**

*Financial Times, 29 July 2016*

50 Committee on Standards in Public Life. Standards Matter: A review of best practice in promoting good behaviour in public life. 2013. p. 43
51 May, Peter J.. Regulatory Regimes and Accountability. *Regulation and Governance* 1: 8–26. 2007.
52 House of Lords Select Committee on the Constitution. The Regulatory State: Ensuring its Accountability. 2004.

## Government Scrutiny

**6.7** Independent regulators can be accountable to governmental scrutiny through both private channels of communication and more transparent mechanisms. The government has legitimate interests in both the efficiency and effectiveness of regulators and it is common for the statute to require ministerial or Treasury consent, for example, on budgetary and staffing matters. This is often elaborated through a Framework Document. Although it can be difficult to strike the right balance, it is possible for government to respect the independence of regulatory bodies while holding them to account through such mechanisms.

**6.8** One core concern raised by regulatory bodies was the increased demands by government departments for what was regarded as excessive information on the direction and operational functioning of the regulator. The Committee found that regulators recognise that they need to balance the government's 'need to know' with protecting their independence. Regulatory bodies' attitudes towards informing the government varies across bodies, depending on their formal relationship with the government, the leadership of the regulator, and sometimes the preoccupations of particular ministers.

**6.9** The Committee's research has demonstrated that balancing the independence of regulators with their accountability to the government is dependent on there being clarity about the regulator's relationship with the government. For example, the statute establishing the Competitions and Market Authority provides that the Department for Business, Energy and Industrial Strategy should set out a non-binding 'strategic steer' outlining the government's strategic priorities for the Authority. This published document then provides broad aims which do not alter the regulatory body's powers, but which do make the government's expectations of the regulator explicit.

## Judicial Accountability

**6.10** Regulators are also held accountable through the courts, as regulated entities (and in some cases others with a sufficient interest) can challenge or appeal decisions made by the regulatory body. Indeed, one regulator the Committee interviewed said they couldn't remember a time the regulator wasn't under judicial review. Most independent regulatory bodies are subject to an appellate system, usually involving a specialist tribunal. Where they enforce the criminal law, they must prosecute before the criminal courts.

**6.11** One concern raised was the uneven balance of appellate power between large regulated entities, who may have in-house teams in place to contest regulatory decisions, and the public which cannot easily collectively mobilise against regulatory decisions.

**6.12** These processes of contestation are largely welcomed by regulators. Judicial accountability is an important check and balance, which provides authoritative interpretation of the statute pertaining to the regulator and brings cases into the public domain which can serve both deterrent and educational purposes. Judicial accountability encourages the adoption of processes which are as transparent, deliberative and evidence-based as possible. Public law principles also militate against unethical conduct, such as bias or financial impropriety.

**As one regulatory body told the Committee, an adverse ruling after a judicial review process which found that decision making processes weren't as they ought to be, enabled the regulator to enhance the professionalism of their decision making. Although a painful process for the regulatory body itself, they recognised this to be in the public interest.**

**6.13** Regulatory bodies must also be accountable to the public, whose interest they have been established to defend. The media have a very important role to play here, though regulatory bodies are entitled to expect fair treatment without distortion or unjustified sensationalism.

**Public Accountability: Bank of England**
**The Bank places the utmost importance on both its accountability through the Treasury Committee to Parliament and its accountability more broadly to the citizens of the United Kingdom.**[53]

### National Audit Office

**6.14** The National Audit Office (NAO) is critical to the external scrutiny of the financing of regulators. Many – but not all – must have their accounts audited by the NAO. This plays an important part in deterring or exposing any impropriety or irregularity. The NAO also has a wider role scrutinising all public spending for Parliament, in order to safeguard taxpayers' interests. It reports to the Parliamentary Public Accounts Committee which may undertake hearings based on NAO findings.[54]

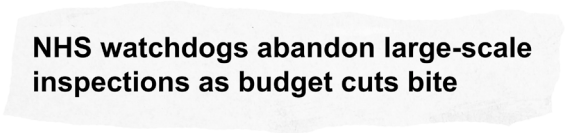
**6.15** In 2015 and early 2016, the NAO conducted reviews into the regulation of competition and markets, charities, water regulation, and financial markets regulation.[55] A 2016 review of arm's-length bodies uncovered many of the challenges facing regulators. These reviews provide a technical insight into the financial management of regulatory bodies. The NAO's audits of regulatory bodies provide an important opportunity for the scrutiny of regulators' financial practices. Through promoting ethical financial behaviour, these audits help to secure high ethical standards in regulation.

## Funding

**6.16** Regulators mainly fund their regulatory activities through a mix of government funding, fees for services or levies of one sort or another on the regulated sector. Regulators are aware of the need to be proportionate in their financing, and have an obligation to act fairly and proportionately when they financially sanction those they regulate. However, scrutiny of the funding of regulatory bodies is key to their accountability.

### Government Spending on Regulation

**6.17** Many regulatory bodies, notably for utilities, financial services and the professions, receive little or no public funding. Their income is mainly derived from licence or other fees or levies (usually turnover-based) or from charges for services. Fee levels often have to be approved by the Treasury. Reductions in state funding have led to other regulators to exploit similar sources of income. Over-dependence on funding from the regulated sector may however bring its own ethical risks.




*The Telegraph, 24 May 2016*


*The Guardian, 24 May 2016*

53 Bank of England. Transparency and Accountability at the Bank of England. 2014. Available at: http://www.bankofengland.co.uk/publications/Documents/news/2014/warshresponse.pdf

54 National Audit Office, An Introduction to the National Audit Office. 2016. Available at: https://www.nao.org.uk/about-us/wp-content/uploads/sites/12/2015/12/Introduction-National-Audit-Office.pdf

55 See National Audit Office. Reports by Sector: Regulation, Consumers and Competition. https://www.nao.org.uk/search/type/report/sector/regulation-consumers-and-competition.

**The funding of regulation can raise ethical issues, but need not raise special or insurmountable risks. Where else will sufficient, sustainable funding come from in the current climate? Businesses are increasingly paying for the costs of aspects of regulation, notably with the Primary Authority scheme. The Environment Agency charges fees for its permitting work and levies are a developing trend. There are bound to be perceptions that these schemes could compromise regulators, but, so far, the data doesn't show that is happening in practice. Those who pay will expect to have a voice to ensure effective regulation, but that is true of anyone who is regulated. The important thing is that any arrangements are transparent and that a watch is kept on this aspect.**

**Regulatory Delivery**

**6.18** This issue was raised at the Committee's stakeholder roundtable where stakeholders were concerned that regulators may be incentivised to pursue activities which would lead to greater financial return, rather than regulate on a risk basis. At the same time, there were fears of conflicts of interest arising where regulated entities, whether individually or collectively, may seek to reduce, re-direct, or at least have a say in, regulatory activity 'in exchange' for the funding they are providing. This may ostensibly be done in the name of reducing regulatory burdens or increasing accountability. Even where no attempts at influence are in prospect, the risks of regulatory capture are increased with regulators becoming over-involved with, or overly sympathetic to, those who are funding them.

Table 1: Government Funding of a Sample of Independent Regulators 2015[56]

| Name | Classification | Government Funding[1] | Total Gross Expenditure[2] | Percentage of Funding from the Government |
|---|---|---|---|---|
| Legal Services Board | Executive NDPB | £0 | £3,921,000 | 0% |
| Traffic Commissioners and Deputies | Tribunal NDPB | £0 | £1,451,000 | 0% |
| Office of Gas and Electricity Markets (Ofgem)[3] | Non Ministerial Department | £700,000 | £87,286,000 | 0.8% |
| Office of Qualifications and Examinations Regulation (Ofqual) | Non Ministerial Department | £21,009,000 | £21,334,000 | 98.5% |
| Charity Commission for England and Wales | Non Ministerial Department | £22,620,000 | £21,485,000 | 105.3% |
| Office for Standards in Education, Children's Services and Skills (Ofsted) | Non Ministerial Department | £155,523,000 | £170,389,000 | 91.3% |
| Environment Agency | Executive NDPB | £857,000,000 | £1,295,000,000 | 66.2% |

1 Represents funding as voted by Parliament, funded from central government or grant/grant-in-aid from the parent department.

2 Total gross expenditure for the financial year, i.e. the total resources expended which does not include any income.

3 Ofgem also receives income to offset its gross expenditure from both licensed energy companies and other government departments. The total 2014-15 income from other government departments was £24,910,000.

**6.19** At the local level, there is a similar trend towards businesses being required to finance regulation directly. The Primary Authority scheme, which has a statutory foundation and is overseen by Regulatory Delivery, is a recent example. This scheme was introduced in 2008 to harmonise local authority regulation, by encouraging businesses to form a partnership with a single local authority (the 'Primary Authority'). This partnership is legally recognised, and advice from this authority must be taken into account by other local authorities when dealing with that business.

56 Cabinet Office. Public Bodies 2015. Available at: https://www.gov.uk/government/publications/public-bodies-2015.

**6.20** The scheme, building on previous informal arrangements, has been introduced to cut the costs of compliance across local authorities, provide an individual point of contact for businesses regulated by local authorities and to standardise local authority guidance.[57] All partnerships are approved by the Secretary of State for Business, Energy and Industrial Strategy (in practice Regulatory Delivery) and Primary Authorities can recover the costs of establishing the Primary Authority partnership. With substantial pressures on local authority finances, local authorities may be incentivised to become aggressive or competitive in developing partnership arrangements and businesses might be able to pressurise 'their' Primary Authority for a more relaxed approach.

**6.21** The Committee was reassured during its visit to one Primary Authority Council that these risks seem to be mitigated. Funding is on a strict cost-recovery basis – with no profit or cross-subsidy element – and no signs have so far emerged of undesirable activity by either local authorities or businesses. Regulatory Delivery emphasised that the funding of regulation can indeed raise ethical risks, but also felt that there is no evidence to suggest that such funding is in fact compromising regulators.

**6.22** Overall, at both national and local levels, the evidence available to the Committee suggested that the risks are theoretical rather than real, so far at least. Regulators do seem to be very aware of the risks and ethical challenges of over-dependence for funding and robustly defend against them. Nevertheless, the Committee suggests that this is an issue which needs to be monitored. Full information about the funding of regulatory bodies should be transparent for both regulated entities and the public to consider. This should be up-front and more than something buried in the statutory accounts.

**6.23** Further, regulators must be clear with the public and those they regulate about any restrictions or other pressures proposed by the regulated entities which provide their funding. In order to promote objectivity and integrity in decision making, regulators should also actively demonstrate that these mechanisms of funding are not influencing their judgement.

**6.24** Finally, although the Committee has not encountered any examples of fines directly funding a regulatory body, it would view any such approach with very considerable unease. Any dependency upon fines would present perverse incentives which would threaten integrity, objectivity and other ethical standards.

**Best Practice: Regulators should regularly publish full and accessible information on their sources of funding and, specifically, any restrictions proposed by those who provide their funding. Regulatory bodies should demonstrate that funding mechanisms do not have an impact on their independence and integrity.**

## Internal Accountability

**6.25** The use of risk registers has already been mentioned. Internal Audit has a role in checking that standards are being observed, for example, ensuring that policies for the movement of staff are in place and are observed. Internal Audit needs to be satisfied that newly appointed individuals can act with integrity and that organisational information is not at risk when staff leave.

**6.26** Mechanisms should also be in place for staff to report wrongdoing or malpractice within regulatory bodies.

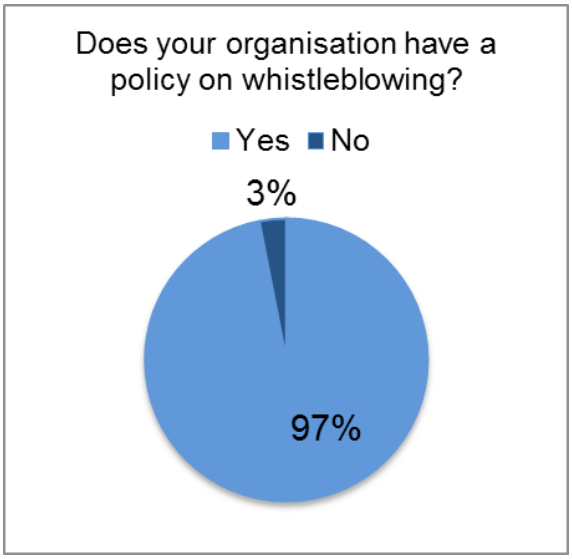
### Whistleblowing

**6.27** Whistleblowing is recognised in the Public Interest Disclosure Act 1998 and subsequent legislation as the disclosure of information where the worker reasonably believes that they are acting in the public interest by revealing wrongdoing relating to: criminal offences, failure to comply with legal obligations, miscarriages of justice, endangering health and safety, environmental damage, or covering up wrongdoing in any of these categories.[58] The Act, however, protects only staff and not (in most cases) non-executive board members.

57 Department for Business, Energy and Industrial Strategy, Regulatory Delivery. Primary Authority Handbook. 2015.
58 Public Interest Disclosure Act. 1998. Available at: http://www.legislation.gov.uk/ukpga/1998/23/contents.

**6.28** Regulatory bodies may act as points of contact for whistleblowers within the wider public, for example, Ofsted administers complaints regarding wrongdoing in children's services; the Food Standards Agency manages public interest concerns about the production of food. However, it is also best practice for regulators as employers to develop and promote an internal whistleblowing policy.

Figure 15: Policies on Whistleblowing




**6.29** Although employers are not legally required to have a whistleblowing policy in place, providing a platform for employees to raise concerns (alongside the Public Interest Disclosure Act 1988) demonstrates a commitment to internal scrutiny and accountability.

**6.30** Where regulatory bodies have a public interest disclosure policy, this must be supported by a culture of accountability which recognises the importance of an open and supportive working environment where employees are respected. Management should demonstrate through clear leadership that they welcome disclosures, and provide an environment in which employees are supported in quickly resolving wrongdoing.[59] The Committee has identified mixed provision in the implementation of these procedures.

**Good Practice: The Food Standards Agency**
**The FSA's Director of Operations leads on Whistleblowing. Allocating a member of executive staff responsible for whistleblowing emphasises the importance of internal accountability to the regulator.**

**6.31** Best practice in whistleblowing procedures include:

- Anonymised e-mail addresses or telephone appointments to maintain whistleblower confidentiality;
- Staff training for employees on how disclosures should be raised, and for managers on how to handle disclosures;
- The establishment of 'nominated officers' for disclosures, who are well-versed in the relevant codes, procedures, and the Public Interest Disclosure Act 1988;
- Clearly identifying the point of contact for disclosures, which should include at least one member of senior staff who can act as a 'whistleblower champion', especially in cases where the disclosure involves a breakdown in the management chain; and
- Dealing with all disclosures raised appropriately, consistently, fairly and professionally.[60]

59 Department for Business, Energy and Industrial Strategy. Whistleblowing: Guidance for Employers and Code of Practice. 2015. p. 4.
60 Department for Business, Energy and Industrial Strategy. Whistleblowing: Guidance for Employers and Code of Practice. 2015. p. 11.

## Summary

- Democratic scrutiny of regulation is dependent on legal and Parliamentary accountability, and transparency in the regulator's relationship with the government.
- Regulatory bodies must be accountable to the public and public scrutiny (especially via the media) is crucial in maintaining ethical standards in regulation, as accountability and transparency encourage high ethical standards more generally.
- Public scrutiny is encouraged through the regulator placing information on their actions and decision making in the public domain, including minutes of meetings and/or recordings, corporate reports, and regulatory judgements.
- Scrutiny of the funding of regulatory bodies is key to their accountability. In a restructured funding environment, scrutiny of the financing of regulators helps to defend against undue influence from the regulated sector. The NAO fulfils an important public function in auditing the financial accounts of regulators.
- Internal Audit should play its role in checking that standards are upheld, for example, ensuring that policies for the movement of staff are in place and are observed so that organisational information is not at risk when staff leave
- Where regulators have an ethical organisational culture of accountability, they welcome scrutiny. This scrutiny can be external, or internal through the disclosures of employees. Regulators should maintain a professional, open and fair whistleblowing policy and procedures to address disclosures.
- Regulators value their accountability to their stakeholders, and recognise the importance of fulfilling their function in an open and transparent manner. Effective regulation is dependent on the reputation of the regulator as a fair and independent arbiter, which is best defended though promoting and maintaining the accountability of regulatory bodies.

# Chapter 7
# Openness and honesty

**Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.**

**Holders of public office should be truthful.**

**7.1** Regulators have an obligation to be transparent and open to the public. Wide-ranging powers, which can be quasi-judicial, mean that regulators must be open and honest about their decisions and decision making processes.

**7.2** The diversity in the role and function of regulators, as well as the powers available to them, means that, beyond a presumption of openness, there can be no single transparency standard which can be applied to all regulators. Regulators should exercise their judgement in balancing the demand of ethical regulation with the public interest of a well-functioning market, or unbiased inspection and licensing for fitness to practice with seeking to be as transparent as possible in ensuring that their dealings with the regulated sector are openly available.

**7.3** Openness and honesty in regulation does not mean restrictive constraints on regulatory behaviour, but can positively enable both ethical and effective regulation. Recent years have seen a clear trend towards much greater transparency in regulatory bodies, which have become increasingly open about their operations, including their priorities, regulatory strategy, selection of targets, and investigations.

**7.4** This chapter considers how regulators can maintain an open culture through being transparent whilst protecting confidential information, public engagement and following the best practice set out in Freedom of Information Act.

## Openness Throughout the Process of Regulation

**7.5** Regulators should not unduly withhold information from the public, and make their decisions, processes, and judgements openly available. This includes:

- The guidance and decision making processes;
- The activities of regulated entities; and
- The feedback they issue.[61]

61 Adapted from: Lodge, Martin. Accountability and transparency in regulation: critiques, doctrines and instruments. In: Jordana, Jacint and Levi-Faur, David, (eds.) Politics of Regulation. Edward Elgar Publishing, Cheltenham. 2004. pp. 124–144.

## Openness about Guidance and Decision Making Processes

**7.6** Rules and guidance issued by the regulator, and its procedures, should be placed in the public domain so that those regulated, as well as the public, are aware of the regulatory framework applicable in their sector.

**7.7** The Committee has found cases of best practice where regulators have strong external communications processes through which they can communicate regular updates on guidance, secondary legislation, and best practice to those they regulate.

**One regulator the Committee interviewed highlighted the importance of social media for their engagement with the public and the regulated sector. As a transparent and open way of communication, which can very effectively reach large numbers of people, social media can become a great tool for those regulators which have an education or public awareness function.**

**7.8** Given the variety of regulatory approaches and models, it is essential that regulators have transparent decision making processes and that they are clear about how they approach regulation with their staff, those they regulate, and the public.

**Where public money is involved…. the government has to play a part and that brings its own complexities. There is always some behind the scenes activity, but regulators need to find a process to accommodate that. We think this is best tackled with maximum openness.**
**Chair of an Economic Regulator**

**7.9** In order for the regulatory body to operate effectively, staff must be aware of the regulatory culture of the organisation and how it operates. Management must take responsibility for ensuring that their employees are familiar with the decision making processes within the body.

**Previously, it may have been the case that relations with the regulated sector were too close. Historically there were one-on-one relationships and CEOs would approach to ask for things to be done. It could lead to unethical situations.**

**The system now has a team approach – with team visits and team decisions. We have quarterly surveys which keep our finger on the pulse. We do not do things behind closed doors – everything is fully explained and done very publicly. We no longer get charges of favouritism.**
**Chair of a Regulatory Body**

**7.10** It is essential that regulated entities are aware of how the regulator operates, what to expect from the process of regulation, and how they should engage with the regulator.

**As one regulator reported, members of the executive board expect their staff's reports to them to be 'clear, honest and packing no punches'.**

**7.11** Regulated bodies or individuals should also be aware of the process to raise any concerns and bring them to the regulator.

**7.12** Therefore, regulators should regularly produce and update documents that explain the regulator's approach to selecting targets, inspection, and decision making. There should be easily-accessible documentation available on the regulator's website which details working practices and enforcement strategies including whether and how risk-based approaches are used to set priorities and select targets and how the regulated sector is engaged in this process.

**7.13** The Regulators' Code specifies that regulators must ensure that their approach to regulatory activities is transparent. This includes clearly providing details on the service standards that regulated entities can expect from regulators.

**Transparency in the Regulators' Code[62]**
**A regulator's transparent service standards should include their:**
- **Strategy for communicating with those they regulate;**
- **Approach to providing information, guidance and advice;**
- **Approach to checks on compliance;**
- **Enforcement policy;**
- **Fees and charges; and**
- **Routes to appeal.**

**7.14** Regulatory bodies should disclose the rules and means by which they make their decisions. All regulatory bodies should be open, clear and honest about their governance arrangements. This includes the composition of the board, their appointment processes, and the process for the escalation of complaints. However, the Committee recognises that there cannot be total transparency and there are risks that regulated entities may seek to use access to information to manipulate the process of regulation.[63]

**Regulators should publish, and maintain up to date public records of:**
- **Minutes of meetings;**
- **Audio recordings of meetings (where possible);**
- **The regulator's organogram;**
- **Annual reports, including budgetary allocations;**
- **Registers of interests;**
- **Registers of hospitality and gifts;**
- **The body's appointment processes; and**
- **The procedure for raising concerns or complaints.**

**Best Practice: Regulators should publish and update their corporate governance documents. These should include minutes of meetings, registers of interests, annual reports, their rules and guidance and their decision making processes.**

## The Activities of Regulated Entities

**7.15** Regulators have a responsibility to ensure that the public are not only aware of the role of the regulator, but also the results of their investigations. This arises from their trusted position of oversight of the regulated sector.

**7.16** However, at the same time, regulators have obligations to safeguard the confidentiality of the regulated sector. This is a particularly difficult balance for regulatory bodies, with access to confidential and market-sensitive information which is not in the public domain. The Committee has found that regulators can face significant tensions between the regulator's commitment to transparency and maintaining the trust of the regulated sector.

**7.17** One way to balance this tension is by managing the process through which information is released. As demonstrated by the Davis Review of the Financial Conduct Authority's premature release of price-sensitive information,[64] regulators have an obligation to ensure that they manage the release of information in a manner which does not threaten the functioning of the market, or individual reputations.

**7.18** Regulators may hold live market-sensitive or confidential information whilst undertaking their investigations, and their final decisions will sometimes be market sensitive. But the Committee believes that all evidence supporting a formal decision should be disclosed when the decision has been made and the information is no longer live. It also becomes easier in many cases to disclose contextual information and knowledge after such a decision has been made.

62 Department for Business, Energy and Industrial Strategy, Regulatory Delivery. The Regulators' Code. 2014. pp. 5–6.
63 Organisation for Economic Co-operation and Development. The Governance of Regulators. 2014. p. 83.
64 Davis, Simon http://www.fca.org.uk/static/documents/reports/davis-inquiry-report.pdf, http://www.fca.org.uk/static/documents/reports/davis-inquiry-report.pdf

**7.19** As one regulator suggested, one way forward was to be very clear with all parties in advance about when information will be made available. This enables the regulator to act transparently, whilst ensuring that they do not undermine their position of trust and responsibility by breaching necessary confidentiality within the regulated sector.

**An early case[65] under the Freedom of Information Act (2000) involved a request for the latest hygiene inspection report of a hotel undertaken by Bridgend County Borough Council. The Council refused the request, arguing that disclosure would undermine the way it carried out inspections, and their relations with businesses. This was overruled by the Information Commissioner who ruled there was an 'overwhelming' public interest in disclosure of this category of information. Local Authorities now routinely disclose inspection reports and the results for over 500,000 establishments can be searched on a single website.[66] Many restaurants now display their 'scores on the doors'.**

### Feedback Issued by Regulators

**7.20** Regulators must be as open as possible with the public and regulated bodies about their judgements and provide full and prompt feedback. This should include a clear overview of their concerns, findings from investigations, recommendations and explanations for actions taken or not taken. Where possible, these reports should clearly identify how findings from any investigation may be applicable to the wider sector.

**The Charity Commission is the regulator of all registered charities in England and Wales, and part of the Commission's remit is to investigate particular cases of potential wrongdoing. These case reports identify the following features of the investigation in one, easily-understandable document:**

- **Why the case was investigated;**
- **How the investigation was carried out;**
- **The Commission's findings;**
- **The Commission's recommendations for the case; and**
- **The implications for the sector more widely.**

**7.21** Publishing details of investigations enables staff within the regulator, as well as the public, to monitor the extent to which the regulated sector comply. Moreover, there will be more public accountability for non-compliant regulated entities where 'plain English' rulings are made openly available.

## Openness and Public Engagement

**7.22** Public engagement is a key strategy through which independent regulators can remain accountable, and keep a focus on substantive regulation that meets the needs of citizens.[67] The public may well perceive regulation to be a concealed and complex 'fourth branch of government'.[68] One way to avoid this is through engaging with the public and highlighting their responsibility to uphold the public interest, protect consumers, and ensure high standards of conduct.

### A More Informed Public

**7.23** Depending on the sector in which the regulator operates, regulators may also have a duty to ensure that the public are informed about their rights, both as citizens and consumers. Where appropriate, regulatory bodies should seek to engage with the public, through outreach programmes and consultations, as well as through measures to help inform the public about regulation, their rights and how to protect themselves.

65 Information Commissioner's Office. Decision Notice FS50073296 https://ico.org.uk/media/action-weve-taken/decision-notices/2005/358022/decision_notice_73296.pdf

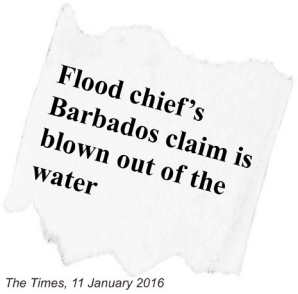
66 Food Standards Agency. Food Hygiene Ratings. Available at: http://ratings.food.gov.uk

67 Barr, Michael S. Accountability and Independence in Financial Regulation: Checks and Balances, Public Engagement, and Other Innovations. Law & Contemporary Problems. 78/3. 2015. p. 126.

68 Baldwin, Robert, Martin Cave and Martin Lodge. Understanding Regulation: Theory, Strategy, and Practice Second Edition. Oxford University Press. 2012. p. 339.

## Communicating through the media

**7.24** The print and broadcast media play a fundamental part in the openness of regulatory bodies and holding them to account. The media provide channels of communication to the general public and to the regulated sector, and also to the government and Parliament. The reputation of a regulator can be built and enhanced through positive reporting, but it can also be quickly broken.


Flood chief's Barbados claim is blown out of the water

*The Times, 11 January 2016*

**7.25** Regulators told us that they often adopt a targeted approach to communication, to engage with particular types of consumer or citizen or, especially through specialist press or business pages, to reach specific types of trade or profession. There has also been a substantial increase in the use of social media in recent years.

**7.26** Regulators communicate through the media for a range of reasons. These may include advising and assisting consumers about their rights and how best to protect their own interests, educating businesses about their responsibilities and publicising enforcement activities for deterrent effect. As well as communicating proactively, most regulators find they are the focus of media attention on a regular basis and (as previously noted) this is an important form of scrutiny and accountability.

**7.27** The Committee believes constructive relationships between regulators and the media are important to improve effectiveness and reinforce ethical conduct. But both sides need to act responsibly. Regulators must be careful not to seek publicity for its own sake or for personal aggrandisement. They must carefully consider propriety before using 'name and shame' tactics and avoid publicity which could compromise their impartiality, or send misleading messages.

**7.28** The media can assist by alerting regulators to issues or problems which need to be investigated. But, as far as possible, they should be aware of regulatory realities and not, for example, assume that a media story in itself provides sufficient evidence for successful enforcement action or write up a story in a way which could jeopardise due process requirements.

## Websites

**7.29** Where possible, regulatory bodies should offer advice and guidance for the public on an easy-to-navigate central webpage. This advice should include details on contacting the regulator, making complaints or raising concerns, and signpost relevant services.

**7.30** As part of the Cabinet Office's Open Government Partnership UK Action Plan, arm's-length bodies have a requirement to publish transparency data according to the Public Data Principles.[69] Regulatory bodies should comply with these principles, including the publication of machine-readable governance and accountability data, through the www.data.gov.uk website. These principles are aimed at promoting greater accountability, public service improvement and economic growth.

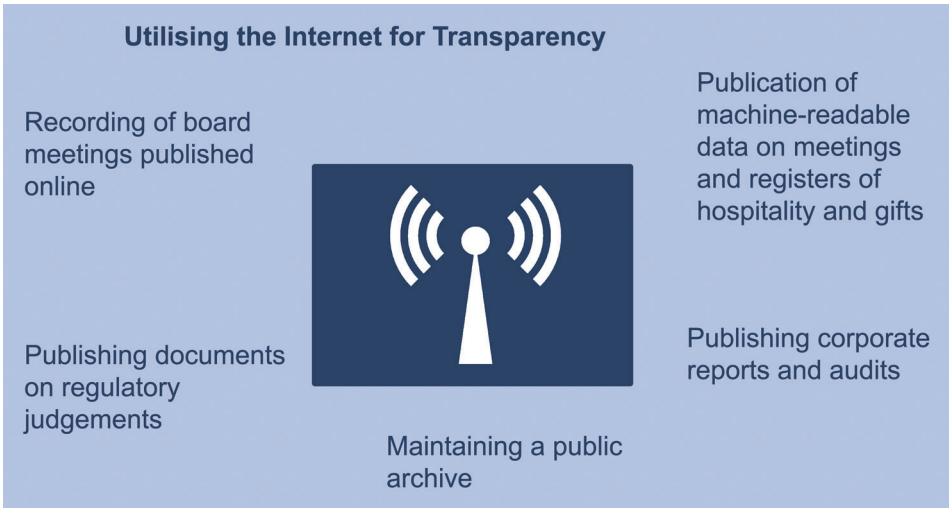
**7.31** As the main gateway for public engagement with regulation, the websites of regulatory bodies should be well-designed, easy to navigate and regularly updated. Regulatory bodies should see their website as an important aspect of their public-facing operations.

**7.32** The Committee has found that the websites of regulatory bodies are very mixed in terms of ease-of-use, the regularity with which they are updated, and the provision of relevant documents.

**We have lost some of the benefits of the control of our own interface we had on our own website and the functionality that charities and trustees told us they found helpful. We are looking at ways to get to charities and communicate with them more effectively alongside gov.uk.**
**Charity Commission**

69 Cabinet Office. Open Government Partnership UK National Action Plan 2013 to 2015. 2013. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255901/ogp_uknationalactionplan.pdf

Figure 16: Technology and Transparency




**7.33** While many regulatory bodies the Committee interviewed emphasised the importance of using their websites as a gateway for engagement with the public and those they regulate, there was considerable frustration over the platforms provided for these websites. Many regulators are now obliged to use the standardised '.gov.uk' web format, and several told us that it was not fit for their purposes.

**7.34** This platform can make the publication of the necessary transparency information difficult, and also restricts the regulator's autonomy over their engagement with those they regulate. Regulatory bodies using the '.gov.uk' platform do not have the complete editorial input and control they require to ensure that they provide all of the necessary transparency data in an accessible manner. At least one regulatory body was particularly concerned that the standardised government web platform gave the impression to the public that the regulator is not independent from the government.

**The web presence of Ofgem, the energy regulator, provides an easily-accessible portal for the public to understand how the regulator works, as well as its current investigations and consultations. The webpage is easy to navigate, and the 'About Us' section provides thorough details on the role and function of the regulator. This website also provides clear access to up-to-date transparent corporate information, as well as detailed minutes and meeting notes.**

## Freedom of Information Act

**7.35** The public is also able to request information from 'public authorities' through the Freedom of Information Act 2000. This legislation also requires public authorities to take proactive steps to publish certain information about their activities. This includes information regarding the public body's organisation and activities.

| **The Seven Classes of Information**[70] | |
|---|---|
| Who we are and what we do | Our policies and procedures |
| What we spend and how we spend it | Lists and registers |
| What our priorities are and how we are doing | The services we offer |
| How we make decisions | |

**7.36** The statutory obligations of regulators under the Act have the potential to enhance the public's access information about the role and function of regulatory bodies, which should be welcomed by the regulators as a method to boost their legitimacy.

70 Information Commissioner's Office. Model Publication Scheme. 2015. Available at: https://ico.org.uk/media/for-organisations/documents/1153/model-publication-scheme.pdf

**7.37** Not all of the bodies the Committee identifies as performing regulatory functions are designated as 'public authorities' under the Freedom of Information Act.[71] However, all regulatory bodies should adhere to the best practices set out in the Act as standard, in order to promote high ethical standards within the organisation. For example, the Advertising Standards Authority voluntarily publishes 'much of the information a public authority would be obliged to make public'.[72]

**Best Practice: Any body with regulatory functions not designated a 'public authority' under the Freedom of Information Act 2000, should have a publication scheme in line with the best practice established by the Information Commissioner's Office.**

### Engagement for Better Regulation

**7.38** Maximum engagement with the regulated sector enables the regulator to have more 'eyes and ears', and provides mechanisms for the regulator to become more responsive to identifying any intelligence that may arise. Regulators must draw upon the widest possible evidence base. Direct or indirect engagement with those who use regulated services is also important, both to uncover new trends and evidence of non-compliance (especially via complaints) and in order to understand further what the public expects. Regulatory bodies have also found in recent years that close monitoring of the media yields useful intelligence.

**7.39** One way in which regulators may engage with the public is through citizen and consumer consultations which can take place either offline or online. Online tools may be used to enhance this engagement, and reach wider audiences.[73]

**Openness in Practice: The CQC**
**The Care Quality Commission (CQC) host public consultations on their regulatory practices. They also run a range of other engagement programmes, such as public meetings, advisory groups, patient participation groups, twitter hashtags and online discussions, and focus groups with members of the public.[74]**

## Summary

- Openness and honesty should not be seen as aspirational values for regulators. Instead, they should be the baseline for ethical regulation, and consistently maintained in the day-to-day operation of the regulator.
- By undertaking their role with maximum openness and honesty, regulatory bodies are able to maintain their legitimacy with the public.
- Regulators must balance being open about the regulatory process with their protection of market-sensitive and confidential or personal information. Due to the range of roles of regulators, and the diversity of the sectors in which they operate, there is no one-size-fits-all solution for the disclosure of information. However, regulatory bodies must seek to publish as much information as possible pertaining to their guidance, governance, functioning, the regulated sector and their judgements.

71 The public bodies covered by the Act are detailed in Schedule One of the Freedom of Information Act 2000. Available at: http://www.legislation.gov.uk/ukpga/2000/36/schedule/1
72 ASA Submission to the Committee's Survey
73 Bussu, Sonia. The public's voice on regulation. Sciencewise. 2015.
74 http://www.cqc.org.uk/content/consultations

# Chapter 8
# Leadership

**Holders of public office should exhibit all seven principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.**

**8.1** Leadership is essential to promoting and upholding ethical standards in regulatory bodies. Promoting these behaviours also means challenging unethical behaviour. Those at the top have the fundamental responsibility to lead by example in terms of how they conduct themselves. The governance arrangements of any regulatory body, which determine who promotes and oversees standards of behaviour, are equally crucial. The culture of a regulatory body requires that everyone working for it vigorously defends ethical principles in all contexts. However, the matter of governance itself can raise some ethical challenges which must be managed.

**8.2** In this chapter we examine the responsibility of leaders to promote an ethical culture to all staff working for the regulator and to prioritise ethical standards in their strategies. This chapter also reflects on the role of non-executive and lay board members, and makes recommendations to the government on ministerial appointment processes.

## Leadership and an Ethical Culture

**The UK is seen internationally as being "ahead of the game" with modern thinking about regulation. There is broadly a new consensus about the new mind-set required of regulatory bodies. Their purpose is to change behaviour, which is achieved through engagement – regulators need to talk to business! Of course they can then be accused of regulatory capture and responses should always be based on risk, but working with the regulated is essential for regulation to be effective.**

**Perceptions about the work of regulators are crucial which means changing people's attitudes.**
**Regulatory Delivery**

**8.3** As many regulators told the Committee, much depends on the leadership and behaviours from the top. In order to maintain their legitimacy and ensure that they are acting in the public interest, regulatory bodies should promote and uphold an ethical culture for all members of staff. Maintaining this culture is not just the responsibility of the board or Governing Council and the senior management but of every member of staff, each of whom who should demonstrate ethical behaviour in their everyday activities.[75]

75 Committee on Standards in Public Life. Standards Matter. 2013. pp. 36–39.

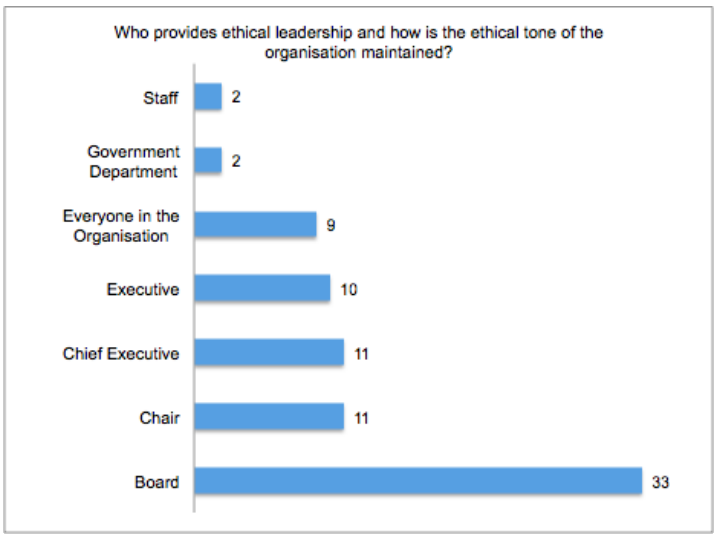
## Setting the Tone at the Top

**8.4** There is no universally applicable method or standard for embedding an ethical culture within the regulatory body. However, it is important to remember that 'what people see others doing is much more important than what they hear them say.'[76]

**When asked who provides ethical leadership for the regulator, Ofcom highlighted that ethical leadership comes from the Chairman, board and senior management, but is ingrained in the organisation and part of their culture.**

**8.5** Our evidence demonstrated the importance of visible and engaged leadership for promoting ethical standards within the regulatory body. Where the board takes integrity, openness, and accountably seriously, the ethical culture of the regulatory organisation reflects this. Half of the bodies we surveyed stated that the board provides ethical leadership for the regulatory organisation.[77] Evidence suggests staff know the ethical standards of the board and adjust their behaviour accordingly.[78]

Figure 17: Who Provides Ethical Leadership?




**8.6** Where responsibilities are divided between a Chair and Chief Executive, it is especially important that they work in partnership to act as ethical leaders of the organisation. While the Chair may take greater responsibility for ethical leadership in representing the regulator externally, the executive branch may be more visible to the staff and set the tone within the organisation.

**8.7** The Committee has found that there is mixed provision across regulators regarding views on ethical leadership. Some bodies we surveyed perhaps overlooked the importance of all staff maintaining ethical principles through the display of ethical leadership in their day-to-day activities.

**Best Practice: The board is responsible for providing leadership and setting standards on ethical behaviour within the organisation. The board should seek regular evidence-based assurance that the highest ethical standards are being upheld.**

**8.8** A culture of leadership cascades from the executive and non-executive leaders of an organisation, who are responsible for ensuring an appropriate framework is in place to reward staff for acting ethically. Methods to help promote a culture of ethical practice include: regular reminders of the regulator's bespoke ethical principles; a focus on 'how' things are done during recruitment and selection as well as appraisals; and awards for staff who are seen to act ethically.

76 Committee on Standards in Public Life. Standards Matter. 2013. pp. 39.
77 Where multiple responses were given in answer to this question, every response is listed.
78 See PwC Center for Board Effectiveness. Board Effectiveness – What Works Best?. 2011.

**Embedding ethical awareness is a deep seated cultural thing. You can have all the paperwork in place, but a lot depends on leadership and behaviours from the top especially from the CEO and Chair. An organisation needs both formal structures and framework in place and a value system built in about how you do things – with strong role models. You just know whether the culture is healthy.**

**Legal Services Board**

### Ethics in Regulatory Strategies

**8.9** One way in which regulatory bodies can embed an ethical culture within the organisation is through setting and maintaining ethical standards as a priority within their strategic documents. Most regulatory bodies publicise their overall strategy, for example, by setting out priorities over a three or five year span, typically supported by more detailed business plans and enforcement policies. These send powerful signals to the regulated sector, but are also important for the accountability of the body itself.

**8.10** Coverage of ethical standards and issues in such documents signifies and reinforces the importance senior management attach to the importance of standards and means they become a formal priority. The Committee suggests therefore that the regulator's Business Plan and Annual Report should incorporate ethical issues as standard topics to be addressed.

**In their 2016–2021 Corporate Strategy, the Sports Grounds Safety Authority their Chief Executive states 'For the first time this strategy sets out the values which define us as an organisation – excellence, independence, integrity and partnership. We will keep these front and centre…'[79]**

## Regulatory Governance

**8.11** How regulators are governed determines both their outward and inward-facing ethical leadership. However, the Committee's research has shown that board governance can also bring ethical hazards which must be managed by regulatory bodies in order to ensure that they uphold the public interest in their role and function.

**The terms of reference for the Information Commissioner's Office Management Board state that the Board 'provides corporate governance and assurance... setting values and demonstrating integrity'.**

### Towards a Board Governance Structure

**8.12** The implementation of board governance has enabled regulators to draw on a wider range of skills, and promotes stability for the regulator which is essential to regulation in the long-term public interest.[80]

**Where governance board decision making structures have been adopted, the board is responsible for:**
- **Setting the strategic direction of the regulator;**
- **Ensuring compliance with the law and the organisation's remit;**
- **Developing the policy of regulator;**
- **Monitoring regularity policy; and**
- **Appointing and dismissing the Chief Executive.[81]**

79 Sports Grounds Safety Authority. Strategy 2016–2012. 2016. Available at: http://www.safetyatsportsgrounds.org.uk/sites/default/files/documents/pdf/SGSA-Strategy-2016-2021.pdf
80 House of Lords Select Committee on the Constitution. The Regulatory State: Ensuring its Accountability. 2004. p. 40.
81 Organisation for Economic Co-operation and Development. The Governance of Regulators. 2014. p. 70.

**8.13** Disagreements may of course occur within boards and these must be managed by board members maturely and responsibly in the interests of due diligence, and in the public interest. Such disagreements encourage robust decision making through discussion and scrutiny, but the necessary procedures can in place to ensure that any disputes can be resolved.

**One Chair of a regulatory body which moved from a corporation sole to corporation aggregate governance framework emphasised the need for clarity in the formal division of responsibilities between board members.**

**8.14** Regulators should seek to ensure that too much power is not placed in the hands of one individual, as this can increase the perception that individuals are able to act to benefit personally from regulation, and therefore undermine public trust in the regulatory body.

**8.15** In the course of our review, we noted that a few regulators in the UK have a corporation sole organisational structure, where one individual is appointed as the regulator, supported by staff who make on-the-ground decisions. Several of these bodies have, however, created a Management Board or similar which include non-executive directors or lay members who can contribute their relevant experience and knowledge to the workings of the regulator but who retains the statutory responsibility for decision making. We welcome the adoption of this arrangement.

**Examples of Governance Arrangements for Regulators[82]**

***Corporation Sole* – Corporate power is invested in a single individual**
**Her Majesty's Inspectorate of Constabulary (HMIC)**
**Information Commissioner's Office (ICO)**
**Director of Public Prosecutions**
**Various Ombudsmen**

***Corporation Aggregate* – Corporate power is invested in a board**
**Ofwat**
**Ofgem**
**Ofcom**
**Crown Prosecution Service (CPS)**

**Best Practice: Non-executive and lay members of boards – whether statutory or advisory – have an important role to play in ensuring that the regulatory body is beyond reproach in following the Principles of Public Life. All board members have a responsibility to ensure that adequate discussion of issues occurs before decisions are made.**

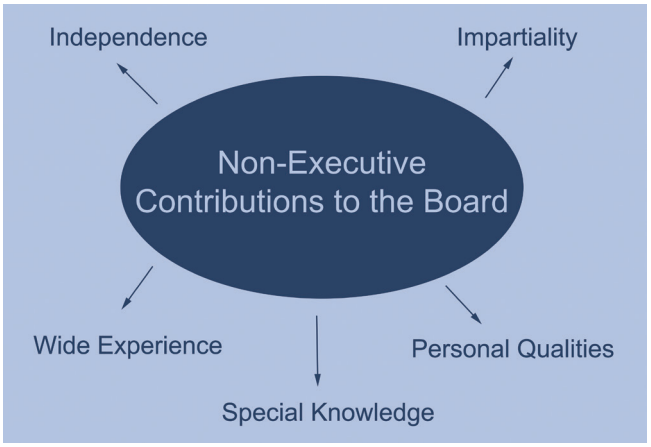
**Best Practice: Corporate governance arrangements should minimise the risk of conflicts of interest and individuals acting for private gain.**

82 See Drew Smith, Sheila. An independent review of the governance arrangements of the Independent Police Complaints Commission. 2015. Available at: https://www.gov.uk/government/publications/governance-of-the-independent-police-complaints-commission

## Non-Executive and Lay Board Members

**8.16** Along with the increased prevalence of board decision making structures, there has been a concomitant rise in the role of non-executive and/or lay member involvement. The Committee has found that these individuals make important contributions to regulatory decision making, but may bring their own actual or perceived conflicts of interest which must be managed. This remains the case where (as is common) the board is involved in strategic issues rather than operational matters.

Figure 18: The Role of Non-Executives




**8.17** Non-executive directors and lay members 'should bring independent judgement to bear on issues of strategy, performance and resources including key appointments and standards of conduct'.[83, 84] In many regulatory bodies, non-executive and lay members are appointed to secure the public interest and bring their outsider perspective. Particularly, they can help to defend against mission creep, the belief that more regulation is always the solution.[85]

**8.18** Non-executives have a vital responsibility to monitor the ethical standards of the regulator, so should have the necessary background and values to challenge fellow board members if necessary and to hold the senior management to account. Hence – as elaborated below – the appointment arrangements for non-executive and lay members are particularly important. Since they provide a challenge function within the internal functioning of the regulator, non-executives and lay members must be suitably independently minded from both government and the regulated sector or profession (and sufficiently remote for operational matters) to fulfil this function.

### Conflicts of Interest

**8.19** Recognising and actively promoting the public interest to avoid any actual or perceived conflicts of interest is crucial to the effectiveness of the regulator. But, by their very nature, non-executives are likely to have other interests and it is almost impossible for regulators to avoid conflicts of interest altogether. Regulatory bodies must therefore actively and appropriately manage conflicts arising from the appointment and involvement of non-executive board members.

**8.20** For market regulators, an additional concern is the financial management of any stocks or shares held by the non-executive board members. The Committee has seen many ways in which this concern has been managed. Non-executives should never benefit financially from the decisions made by the regulatory body.

83 The Committee on the Financial Aspects of Corporate Governance. The Financial Aspects of Corporate Governance. 1992.
84 Committee on Standards in Public Life, Ethical standards for providers of public services. 2014. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336942/CSPL_EthicalStandards_web.pdf
85 Robert Baldwin, Martin Cave and Martin Lodge. Oxford Handbook of Regulation. 2010. p. 77.

**8.21** Where there is a need for members to be appointed to the board with some familiarity of the industry or relevant technical expertise, they should robustly support regulation in the interests of the public, not the regulated industry.[86] And any perceived or actual conflicts of interest should be declared from the outset of the recruitment process. Where conflicts are (or are perceived to be) concealed from the public, confidence in the integrity of the regulator can be undermined.

**8.22** Accordingly, one of the individual responsibilities of members of regulatory boards is to declare any interests which may influence their decision making; regulators should ensure that their formal declaration of interest policies and regulations are upheld. To promote transparency and public confidence in regulation, these policies and registers of interests should be regularly updated and publicly available.

**Best Practice: Particular care should be taken where non-executive board members have a live, concurrent post which could give rise to conflicts of interest. Any conflict of interest for non-executives should be established at the start of the selection process and actively managed to ensure there are no material factors impeding independence of judgement.**

## Codes of Conduct for Non-Executives

**8.23** One area of concern to the Committee is the mixed evidence it has seen regarding the provision of ethical codes for non-executives on the governing boards of regulatory bodies.

**We treat non-executives as though they are civil servants and follow the same rules which are incorporated into their contract. They are also subject to a number of specific rules which they are made aware of during their induction.**

**A Regulatory Body**

**8.24** Some regulators have developed bespoke codes of conduct for their non-executive members, while others are not covered by an ethical code at all. Sustaining ethical standards within a code is important both for maintaining standards of conduct within the decision making structures of the regulatory body, but also in building the public's trust in the probity of regulation. A non-executives' code should extend beyond activities undertaken directly as a result of board membership, for example, declaring an unrelated meeting or social occasion where the individual is lobbied on matters of interest to the regulatory body.

**The induction pack for newly appointed non-executive directors at Ofgem includes information on:**

- **Registering Conflicts of Interests;**
- **Declaring political interests;**
- **Confidentiality; and**
- **Gifts and Hospitality.**

**One of the conditions of appointment for non-executives is to abide by Ofgem's Aims, Standards and Values.**

**8.25** Therefore, regulatory bodies should ensure that all non-executive and lay members are covered by the regulator's overall code of conduct or are bound by a similar, but bespoke, code. Further, the applicable code of conduct must be made available to board members at the time of their appointment, and become a central part of their induction and feature as part of their appraisal processes.

## The Selection of Non-Executive and Lay Members

**8.26** The responsibilities of non-executive and lay members of regulatory bodies go wider than setting strategic direction and oversight of effective and efficient functioning. Given their 'tone from the top' role in upholding ethical standards, it is important that desirable characteristics should not just be based on technical competences and business skills, but should also draw on the necessary attitudes and values for governance in the public interest.[87]

86 Organisation for Economic Co-operation and Development. The Governance of Regulators. 2014. p. 68.
87 Professional Standards Authority. Fit and Proper? Governance in the Public Interest. 2013. p. 4.

**8.27** The importance of ethical values and standards should be specified within the job description for non-executive positions. These should be clearly established at the beginning of the recruitment process, and become the guiding criteria for appointments.

## Appointments

**8.28** The Committee has encountered considerable variation in the arrangements for the appointment of both non-executive and lay board members and the executive staff of regulatory bodies in the UK. Appointments can bring into sharp focus the difficult balance which needs to be struck between the independence of a body responsible for upholding the public interest and the government's legitimate interest in that body's effectiveness and efficiency.

### Ministerial appointments

**8.29** As one attendee at the Committee's roundtable for regulatory bodies pointed out, the issue of appointments must have a major impact on the capacity of the body to maintain its independence. Concerns in our subsequent discussions mainly centred on situations where ministers are responsible for an appointment – typically chairs and non-executive board members. No-one disputed – as statute provides in the vast majority of cases – the entitlement of ministers to make such appointments. There was widespread agreement that the overriding priority should be to get the best person, on merit, for each job having regard to the needs of the organisation. The view was expressed, however, that sometimes political considerations and/or political relationships were unduly influential. On more than one occasion, Ministers' special advisers were mentioned as a having an excessively prominent role in the appointments processes. As well as concerns about excessive "political" influence, complaints were frequently voiced to the Committee over delays which could sometimes bring considerable disruption for the flow of work for a regulatory body and its leadership.

> **A feeling I share is that government has moved in the wrong direction on public appointments, the system was effectively independent six or seven years ago. In the non-executive director appointment process, there have been huge delays when awaiting Cabinet Office approval, and in one case Number Ten vetoed the appointment.**
>
> **Chair of a Regulatory Body**

> **There is some unease about the selection of [board] members. A special advisor asked someone to apply. They were short-listed, but gave such an appalling interview they were not appointed. But this required full reasons to be given and caused delays. We are a regulatory body which has to have full technical skills. We had to justify why someone needs financial expertise to be appointed to deal with a multi-billion pound industry.**
>
> **Chair of a Regulatory Body**

**8.30** The Committee is concerned that the situation may get worse. In future, ministers may be able to appoint candidates whom the appointment panel believes to be 'below the line' in terms of experience, skills and/or suitability. This follows the 2016 Grimstone Review of Public Appointments which paved the way for a new Governance Code, expected to come into force later in 2016.[88]

**8.31** Whilst the Committee welcomed some aspects of the Grimstone Review,' particularly around diversity and transparency, we are concerned that the cumulative effect of the Grimstone proposals may remove too many of the checks and balances on ministerial powers and erode public confidence in the system. The Public Administration and Constitutional Affairs Committee (PACAC) expressed its fears in its report of 7 July 2016: 'The Grimstone review threatens to undermine the entire basis of independent appointments'.[89] PACAC asked the government to 'think again'.

88 Grimstone, Sir Gerry. Better Public Appointments: A Review of the Public Appointments Process. 2016. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/507066/Better_Public_Appointments_March_2016.pdf

89 Public Administration and Constitutional Affairs Committee. Response to the Grimstone Review of Public Appointments. 2016. Available at: http://www.publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/495/49502.htm

**8.32** Regulatory bodies have influential powers over markets and individuals. Their impact and need for independence arguably makes ministerial appointments even more sensitive than for advisory, executive and other public bodies. Their boards set the strategic direction, hire and fire the senior staff and oversee effectiveness and efficiency. The Committee believes therefore that the procedures for such appointments must be transparent and sufficiently independent to safeguard against any such undue influence. The processes must maintain the appropriate balance between government involvement and regulatory independence. It is critical that those appointed to such boards are diverse and are selected on merit, are suitably qualified for the role and meet the needs of the organisation.

**Recommendation: Ministerial appointments must be made in a timely and transparent manner, on merit, without patronage and with proper regard to the needs of the organisation**

## Executive and other appointments

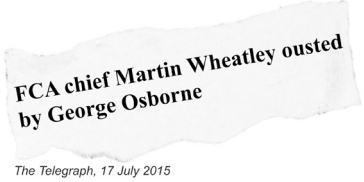
**8.33** Disquiet has also been expressed where, beyond any statutory requirements, government gets excessively involved with executive appointments and with appointments which are made by the regulatory body itself. The Committee heard of pressures to appoint candidates favoured by the government. Independence and integrity can be significantly compromised where either government exercises undue influence over the appointments of Chief Executives and other staff with operational responsibilities.

**The appointment processes for regulatory bodies:**
- **Who is responsible for writing the role description?**
- **Who has the responsible for administering the recruitment process?**
- **Who is represented on the interview panel?**
- **Who is responsible for the final appointment?**

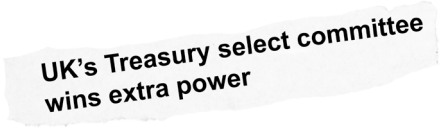
**8.34** The Committee has identified a wide range of responses to these questions across sectors and regulatory bodies. For example, some regulators told the Committee that they did not have the capacity to administer the application process, and therefore the sponsoring government department performed this function. Other bodies kept these processes entirely in-house. There is certainly inconsistency in the procedures and the reasons for the different approaches are neither clear nor widely understood.

**8.35** The Committee believes the appointment of a Chief Executive (CEO) (or Chief Operating Officer) should be as independent from government as possible. The CEO leads all operational aspects and these must not be subject to interference. Responsibility and accountability for the appointment of these individuals should therefore lie with the board (or equivalent) of regulatory body itself. It is sometimes said that the hiring of a CEO is a board's most important function. Sometimes it will also be necessary to remove (or not re-appoint) a CEO who is considered, for whatever reason, to be unsatisfactory or unsuitable.

**8.36** It is not unreasonable for government to have some involvement with these matters, for example, minority representation on an appointment panel or by expressing a view about the suitability of an incumbent. It may make sense for the government department to assist with administrative support for the appointment process for a very small regulatory body. Exceptionally, statute can provide for direct ministerial involvement in executive appointments, for example, as for the CEO of the Financial Conduct Authority, and the Chief Executive of the Independent Police Complaints Commission is appointed with the approval of the Home Secretary.


FCA chief Martin Wheatley ousted by George Osborne

*The Telegraph, 17 July 2015*


UK's Treasury select committee wins extra power

*Financial Times, 19 April 2016*

**8.37** As was illustrated in the FCA case, however, such situations can prove highly controversial, should remain exceptional and should be safeguarded by parliamentary scrutiny.

**Recommendation: Unless expressly authorised in the statutory foundation of the regulator, ministers should not have the power to hire or fire the Chief Executive or any other operational staff.**

## Pre-Appointment Parliamentary Scrutiny

**8.38** An appointment process can be scrutinised through Parliamentary Select Committee pre-appointment hearings. These hearings provide an important mechanism for the democratic accountability of the appointments process to regulatory bodies. Select committees can assess the independence and suitability of appointments and increase the transparency of the appointment process.[90] Although this scrutiny may delay the process, it can also address any conflict of interest issues, serve as a deterrent against any irregularity and ensure that the best person is appointed for the job.


**8.39** However, there is insufficient clarity over why some positions are subject to pre-appointment scrutiny, and others are not. The Committee is concerned that while the Cabinet Office has a list of positions subject to parliamentary scrutiny, this list does not reflect the pre-appointment scrutiny hearings that have taken place in recent months.[91] Further, in cases where the candidate has a pre-appointment hearing, it is unclear what the Parliamentary Committee's powers are regarding the appointment. Although the relevant committee may not have a veto power for appointments to regulatory bodies, it is not clear whether the onus is on the government department to explain why they seek to proceed with the appointment in the case that the committee is dissatisfied with the preferred candidate.

**8.40** The Committee suggests that this mixed landscape should be formalised, in order to make clear which positions are subject to pre-appointment scrutiny hearings. Further, the justification for each position's parliamentary oversight arrangement should be made transparent. The Liaison Committee's report into Select Committee's role in the appointment process proposed consolidation of both the posts subject to parliamentary scrutiny, and the role that the parliament plays in sanctioning the preferred candidates.[92] PACAC supported this proposal, to enhance parliamentary accountability in light of the Grimstone Review.[93] The Committee echoes these recommendations, and seeks clarification of the pre-appointment landscape.

**Recommendation: Each Government department should publish a list of the appointments which are subject to pre-appointment scrutiny hearings and the justification for those decisions.**

90 Institute for Government. Balancing Act: The Right Role for Parliament in Public Appointments. 2011
91 The Cabinet Office list of positions subject to pre-appointment hearings is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/259686/Guidance_publication.pdf.
92 House of Commons Liaison Committee. Select Committees and Public Appointments. 2011 Available at: http://www.publications.parliament.uk/pa/cm201012/cmselect/cmliaisn/1230/1230.pdf
93 Public Administration and Constitutional Affairs Committee. Response to the Grimstone Review of Public Appointments. 2016. Available at: http://www.publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/495/49502.htm

## External Leadership

**8.41** The main focus of the Committee's review has been the ethical standards of regulators as holders of public office. We have not been directly concerned with the effectiveness of regulation, nor the ethical standards of those who are regulated. Nevertheless, as this review has progressed, it became increasingly clear that these aspects cannot be ignored and, indeed, are closely intertwined.[94] There is a significant ethical dimension to regulatory effectiveness. Put simply:

- A regulatory body cannot be effective unless it is also ethical; but it is no use being ethical unless it is also effective; and
- Encouraging an ethical approach to compliance on the part of the regulated entities may have a considerable impact on overall effectiveness.

**8.42** To help the Committee explore these issues and develop its thinking, we commissioned Christopher Hodges, Professor of Justice Systems, at the University of Oxford, to prepare a paper entitled 'Ethics in Business Practice and Regulation'.[95] Drawing on studies of behavioural psychology and regulatory practice, it highlights the importance of ethics in regulatory activity and argues for approaches to the design and operation of regulatory systems which are founded on ethical values.

**8.43** Professor Hodges' research confirms that:

- Regulatory bodies need to be both effective and ethical. As well as their specific responsibilities, they have a broader leadership role to bring about a more ethical environment within and beyond public life.
- Promoting an ethical approach to compliance can be seen simultaneously as a sound commercial *and* regulatory strategy. There are positive gains in terms of commercial reward, better compliance and reduced enforcement costs.
- Reinforcing such an approach, the active development of collaborative relationships brings benefits for both sides and can be seen as a further dimension of the ethical leadership that the Committee expects of regulatory bodies.

**Best Practice: Regulators should actively engage with those they regulate and take a leadership role by encouraging positive attitudes towards compliance.**

**Recommendation: Such promotion of an ethical approach to compliance would be supported by a suitable amendment to the Regulators' Code.**

## Summary

- Although primary responsibility lies with the board, all individuals working for regulatory bodies should uphold ethical standards in their daily behaviour. Regulators can promote and facilitate this individual-level behaviour through policies and procedures that enable an ethical regulatory culture.
- The governance arrangements for regulators help to set the ethical tone of the organisation and can contribute to greater diversity and accountability.
- Board members, whether non-executive directors or lay members can have conflicting interests due to their other roles and responsibilities. These risks must be recognised when appointments made and the regulator must continue to manage any conflicts of interest.
- Given the importance of leadership for good regulation, the appointment process for both non-executive and executive positions must be rigorous, transparent, and based on merit.
- Upholding ethical standards internally can help regulators become more effective in meeting their statutory objectives, and also promote these standards to those they regulate.

94 For further elaboration on this theme, see appendix 3
95 See online annex , Chris Hodges' paper: https://www.gov.uk/government/publications/annexes-to-ethics-for-regulators-report

# Appendix 1
# Health and Financial Sector Regulation Case Studies

### Ethical Issues Arising in the Regulation of the Health and Financial Sectors

The Committee commissioned two pieces of research focussing on the ethical standards and challenges for regulators of the health and financial sectors. The academic research was carried out by Dr Sarah Devaney, Senior Lecturer in Healthcare Law at ManReg: the Manchester Centre for Regulation and Governance, University of Manchester;[96] and Dr Costanza Russo, Senior Lecturer in International Banking Law and Business Ethics at the Centre for Commercial Law Studies, Queen Mary University of London and co-Director of the CCLS Institute for Regulation and Ethics.[97]

The Committee is very grateful to Dr Devaney and Dr Russo for their thoughtful and in-depth research. The papers helped to inform the Committee's research, but remain the personal analyses and conclusions of the authors. The full documents are available online, and this appendix provides a summary of the key issues and recommendations that have emerged.

## Regulation in the Healthcare Sector

Dr Devaney found that the regulation of healthcare in England takes place in a context of organisational change and financial pressure. Moreover, healthcare in the UK is a highly complex sector which includes treatment provision, service commissioning, research, training and professional revalidation. Healthcare regulation itself is complex, mirroring its sector, and there are a multitude of principles applying to healthcare provision and its regulation.

Challenges to healthcare regulators in relation to their compliance with the Seven Principles are:

- The complexity of healthcare provision and its organisation;
- Budgetary constraints on healthcare provision;
- The complexity of healthcare regulation; and
- An inconsistency in the principles and values said to apply to and guide healthcare provision and its regulation.

There is a range of regulatory approaches in this complex field, but notwithstanding this varied approach, it was found that principles and values form a core part of the regulation of healthcare in the organisations evaluated by Dr Devaney for the purpose of her report.

Dr Devaney's review covered six healthcare regulators, which were chosen on the basis that they oversee a comprehensive range of healthcare activities, from the provision of healthcare services, to healthcare professionals' behaviour, to medical research. They have a variety of accountability relationships, some with each other and others with external parties.

96 'Ethics for Healthcare Regulators: Enhancing Compliance with the Seven Principles of Public Life'

97 The Ethics of Banking and Finance Authorities: A study of the Bank of England, the Prudential Regulation Authority, the Monetary Policy Committee and the Financial Conduct Authority. Both papers available at: https://www.gov.uk/government/publications/annexes-to-ethics-for-regulators-report

**Regulatory Bodies Considered in Dr Devaney's Review:**
- **The Care Quality Commission (CQC)**
- **Healthwatch England (HWE)**
- **The Professional Standards Authority for Health and Social Care (PSA)**
- **The General Medical Council (GMC)**
- **The Nursing and Midwifery Council (NMC)**
- **The Human Fertilisation and Embryology Authority (HFEA).**

## Compliance with the Seven Principles

Dr Devaney suggested a number of recommendations to assist healthcare regulators in complying with the Seven Principles of Public Life.

- Principles-Based Regulation (PBR) and a Common Goal

  PBR regimes which are based on 'mutuality, trust and responsibility',[98] encourage communication between regulators and their stakeholders. This is most effective when there is a common, overarching goal to assist in the interpretation of relevant principles.

- Governance

  Health regulators are improving their own governance structures, and have implemented the Seven Principles within their organisations through codes of conduct, and additional policies including reviews of appraisals. This should continue and governance structures should be assessed to ensure they are consistent with best practice.

- A Collaborative Approach and Reflexivity in the use of Expert Advice

  Healthcare regulators should collaborate with experts to inform their decision making, to provide consistency for the regulated entities. However, this practice should be reflexive, with the use of expert advice, so the process does not fall prey to vested interests. On the one hand, drawing on the input of experts enhances compliance with the principles of integrity, objectivity, and accountability. However, on the other, this may undermine the accountability of regulators by discouraging debate and discussion, and integrity and objectivity by narrowing the frame of inquiry to a particular specialism. This may even lead to regulatory capture as regulatees can sway its determinations in favour of their own interests.[99]

  Regulators are able to display leadership and facilitate greater levels of legitimacy where they have accessed relevant information and used it appropriately. They should also communicate with each other on best practice in obtaining information from and engaging with patients as part of achieving quality of care and patient safety. Moreover this collaboration can go further to embrace experts, practitioners, and patients all playing a key role.

- Compliance and Sanctions

  Dr Devaney argues that consistency is important in relation to sanctions. Discussions should take place between regulators to identify the appropriate enforcement approach so those working in the sphere are subject to a consistent approach.

  Where healthcare regulators uphold the Seven Principles of Public Life, there will be a number of benefits both to them and to the sector. Firstly, by increasing the regulators' legitimacy, the likelihood of compliance with the regulator's rules will be enhanced; secondly, the risks of regulatory capture will be significantly reduced; and thirdly, it will enhance regulators' capacity to achieve the regulatory goal of ensuring quality of care and patient safety. Healthcare regulators should go beyond a formal acknowledgement of the Seven Principles of Public Life, to embedding them more deeply in their activities.

98 Black J, 'Forms and Paradoxes of Principles Based Regulation', (LSE working paper 13/2008)
99 Baldwin R and Cave M, *Understanding Regulation – Theory, Strategy and Practice* (Oxford: Oxford University Press, 1999), 20

**Regulatory Bodies Considered in Dr Russo's Review:**
- **The Bank of England (BoE)**
- **The Prudential Regulation Authority (PRA)**
- **The Financial Conduct Authority (FCA)**
- **The Monetary Policy Committee (MPC).**

## Regulation in the Financial Sector

Dr Russo's in-depth review provides a fact finding analysis of the way in which four different banking and financial regulatory authorities in the UK live up to the Nolan Principles.

Firstly, Dr Russo identifies some critical issues which need to be taken into account in order fairly to assess compliance with the Seven Principles:

- The legislative framework – the activities, procedures, powers, duties and governance of banking and finance authorities are strictly governed by laws and regulations, though there is a view that the authorities still retain too much discretion and independence. Against this background, the research analysed the extent to which authorities are able to comply with the more aspirational nature of the Nolan Principles.
- The distinctive nature of banking and finance regulators – the need to protect investors, financial stability and market integrity may create tension with the implementation of some of the Seven Principles, particularly with regard to transparency, openness and conflicts of interest;
- The relationship with the regulatees and the government – on the one hand financial regulators need to be independent from political and business interference, yet on the other they cannot be so detached from the regulated sector so as not to understand their business; and
- Potential conflicts of interest of the external board membership – especially regarding personal pension plans, financial services regulation must strive to avoid actual or perceived conflicts of interest arising.

Dr Russo assessed each of the organisations against compliance with the Principles and made a number of recommendations.

- Selflessness

  Dr Russo's research found that authorities differ as to their ability to communicate effectively to employees, current and prospective, a strong sense of public purpose. They also differ with regards to their ability to instil a sense of belonging and loyalty, to monitor selfish behaviour and to impose sanctions upon it.

  Dr Russo recommended that financial regulators should make it clear in their staff job descriptions and other relevant documents that they act in the interest of the public and as such expect the highest possible standards of behaviour by their employees irrespective of roles and functions. They could also communicate more effectively the applicability of the Seven Principles to their members of staff and perspective employees, as well as include those principles in their training when possible.

- Integrity

  In line with the Committee's definition of integrity, Dr Russo reviewed how the selected financial regulators met the principle on the basis of a three pronged analysis which investigated: independence, avoidance of conflicts of interest, and disclosure and resolution of conflicts. Policies varied in the breadth of details demanded by the selected regulators, with some setting the bar higher than others. In line with the Committee's findings, Dr Russo argues that policies on conflicts of interest and revolving doors should be tailored to the different roles and backgrounds with an increased level of scrutiny and severity for the most sensitive roles and the most striking conflicts. However, within their rigour, measures should allow for a fair, just and necessary flexibility.

  Further, especially with regard to grey areas in possible conflicts of interest, regulators should communicate clearly with the public to avoid a negative impact on trust given that the general public may not have the technical knowledge necessary to understand such conflicts.

- Accountability

  In the past, banking and finance authorities have been subject to allegations of a perceived lack of accountability. However there has been a tendency by both the FCA, Bank of England and the MPC towards greater transparency and internal scrutiny.

  Dr Russo examined how authorities reacted to those allegations and if concrete steps have been taken to address the main criticisms. She discovered that they have been open to changes and improvement and that internal action has been taken accordingly.

- Objectivity

  Objectivity was analysed within the context of enforcement actions as Dr Russo argues that decisions over monetary policy and financial stability necessarily entail a certain level of subjective judgement. In that respect, she reiterates the importance of governance and transparency arrangements for decision making processes. With respect to enforceability, the research found out that approach to enforcement varies in, clarity, publicity and rationale for the use of discretion. Dr Russo suggested that authorities should be clear and transparent. Concerns may also arise with regard to settlement processes.

  In line with the Committee's findings, Dr Russo states that accountability mechanisms are the gatekeepers of fair and substantiated decision making. Given the level of discretion enjoyed by the authorities, it is all the more important that they act with objectivity and beyond any suspicion of arbitrariness.

- Openness and Honesty

  Dr Russo examined the extent to which banking and financial authorities engage with the public on their decision making processes. There are distinct challenges with respect to openness as authorities have strict statutory requirements with relation to confidentiality

  However, protecting market-sensitive information does not prevent authorities from being transparent. In fact, as the research found out, some are very clear as to what can and cannot be disclosed together with the underlying rationale. Overall they do publish their board minutes, corporate documents, annual reports, and business plans. They also publish speeches, consultation documents, approaches to regulation and supervision and a wealth of other documents.

- Leadership

  Dr Russo commented on the need for further research as to the comparability of hard and soft law standards applicable to the banking and finance industry and those applicable to the regulators to determine leadership of the latter.

Overall, Dr Russo recommends that compliance with the principles should not be merely a 'tick box' exercise, but regulators should adopt a 'comply or explain' approach. There could be a section included in each regulator's annual report as to how far the authority has complied with their ethical standards. This will also provide scope for a more tailored approach in the principles' implementation.

# Appendix 2
# Towards Values-Led Regulatory Bodies

The Committee commissioned David Jackman, Visiting Fellow at Cambridge Judge Business School and the founder of The Ethical Space Limited, (formerly Head of Ethics and Competence at the FSA) to develop a model of regulatory maturity and explore how regulators can create an ethical culture where the Seven Principles of Public Life are embedded.

David Jackman has also developed an ethical self-assessment toolkit for regulatory bodies, which provides a profile for self-evaluation of ethical standards and demonstrate areas for further development.[100]

## Cultural Change and the Seven Principles of Public Life

David Jackman identifies three elements of regulatory maturity:

1. Effectiveness in delivering statutory objectives;
2. Maturity of the regulator's relationship with all stakeholders; and
3. Integrity of the regulator's internal culture, including embedding the Seven Principles of public life.

To be credible and effective in these three areas, regulators need to develop their own governance, integrity and ethics. David Jackman suggests that regulators develop their internal ethical culture in parallel with the evolution of the wider regulatory environment and the culture of regulatees.

In order to identify the regulator's stage of development, four levels of 'regulatory maturity' have been established:

| | |
|---|---|
| **1. Superficial** | *How can minimum standards appear to be covered?*<br>• As little transparency as can 'get away with'<br>• Lack of confidence, vision and security |
| **2. Procedural** | *What do we have to do?*<br>• Unthinking tick-box, mechanical compliance<br>• Culture of dependency on policies and procedures |
| **3. Embedding** | *How can we be more effective?*<br>• Making the business case for extensions of scope, reputational repair or building trust<br>• Judgment led, risk and cost-benefit analysis |
| **4. Values-Led** | *What do we want to do?*<br>• Well developed individual responsibility and a sense of ownership by all staff<br>• Innovation, confidence, leadership and knowledge sharing within and between sectors |

100 See online annex: https://www.gov.uk/government/publications/annexes-to-ethics-for-regulators-report

David Jackman proposes two methodologies for promoting cultural change within regulatory bodies:

1. Creating 'ethical spaces' to encourage and enable ethical decision making; and
2. Structured questioning (constructive challenge) as an effective facilitator of a practical tool to identify areas which require future development.

In order to provide the ethical space for regulators to move towards a value-led approach to the Seven Principles, there must be consciously engineered and progressive empowerment within a framework of strong boundaries which provide the vision, direction and desired outcomes of the body. David Jackman has also identified the importance of strong values and ethics in the development of a mature and healthy culture; including co-ordinated appraisal, reward and sanction policies; and procedures to provide clear boundaries for unhelpful behaviour.

The Committee's research confirmed the importance of these features, including leadership, codes of conduct, and policies which help to ensure regulatory integrity and considers this framework provides a strong basis for regulatory bodies to promote a values-led approach among their staff.

Within this framework, there is space for innovative and creative solutions to ethical challenges. Individuals must take responsibility for their actions, and ensure that they uphold and actively promote the highest ethical standards. Both the Committee and David Jackman have found that this process requires the trust and support of senior management.

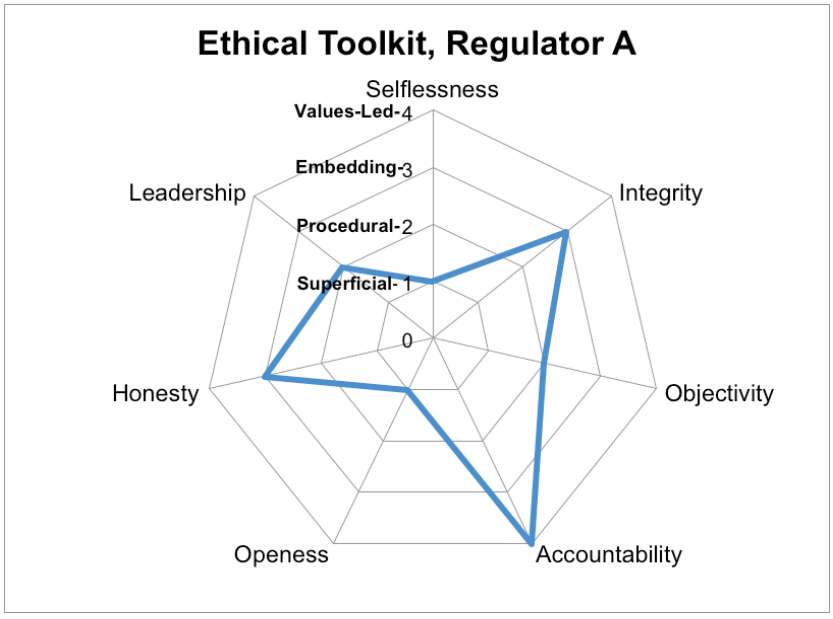
## The Self-Assessment Toolkit

David Jackman has also developed a self-assessment toolkit which enables regulatory bodies to develop an understanding of their development progress towards a values-led approach through establishing a development matrix. The review is intended to be conducted internally, in order to identify areas of strengths and weaknesses in the ethical maturity of a body.

By considering the structured questions provided in Annex X and comparing the approach and attitudes of their responses alongside the stages of development provided in the Annex, regulators can develop a profile of both their formal and informal ethical culture.

The resulting profile provides a basis for self-evaluation and development. This is intended to be an honest, self-assessment whereby strengths and weaknesses are identified, as well as routes for progress and future development. The profile will also enable the organisation to find areas where they may be 'lagging'. The resulting evaluation should take the form of a radar, and may be repeated to indicate development over time.

Figure 19: Ethical Toolkit



# Appendix 3
# Effective and Ethical Regulation

The Seventh Principle of Public Life expects that leaders of regulatory bodies will 'actively promote and robustly support the Principles of Public Life and be willing to challenge poor behaviour wherever it occurs'. But to what extent should regulators promote the Seven Principles of Public Life amongst those they regulate?

To help the Committee explore these issues and develop its thinking, we commissioned Christopher Hodges, Professor of Justice Systems, at the University of Oxford, to prepare a paper entitled 'Ethics in Business Practice and Regulation'.[101] Drawing on studies of behavioural psychology and regulatory practice, it highlights the importance of ethics in regulatory activity and argues for approaches to the design and operation of regulatory systems which are founded on ethical values.

Professor Hodges proposes six principles for the design and operation of an effective regulatory system:

1. A policy of supporting ethical behaviour. The regulatory system will be most effective in affecting the behaviour of individuals where it supports ethical and fair behaviour.
2. Ethical regulators. Regulators should adopt unimpeachable, consistent and transparent ethical practice.
3. Ethical businesses. Businesses should be capable of demonstrating constant and satisfactory evidence of their commitment to fair and ethical behaviour that will support the trust of regulators and enforcers, as well as of employees, customers, suppliers and other stakeholders.
4. A learning culture. A 'blame' culture will inhibit learning and an ethical culture, so businesses and regulators should encourage and support an essentially open collaborative 'no blame' culture, save where wrongdoing is intentionally or clearly unethical.
5. A collaborative culture. Regulatory systems need to be based on collaboration if they are to support an ethical regime, and to maximise performance, compliance, and innovation.
6. Proportionate responses. Where people break rules or behave immorally, a proportionate response is needed.

## External Leadership

Our research and Professor Hodges' analysis, leads the Committee to conclude that regulatory bodies do have an external leadership role to promote an ethical approach on the part of those they regulate. But this must be a limited role. This emphatically does ***not*** need to involve imposing any new obligations on regulatees, such as some sort of duty to behave ethically or anything else which enlarges statutory functions.

The Committee believes, however, that regulatory bodies should be aware of the benefits of encouraging, facilitating and championing positive approaches towards the fulfilment of regulatory obligations, especially where such approaches are anchored within some sort of explicit commitment to ethical behaviour.

In the search for maximum effectiveness, regulators need to build on the substantial body of evidence that, driven by reputational and other considerations of enlightened self-interest, more and more organisations seek to be seen to be behaving well and fulfilling their legal obligations. In turn, this depends upon developing or maintaining a collaborative culture between regulators and regulated entities.

101 See online annex https://www.gov.uk/government/publications/annexes-to-ethics-for-regulators-report

## A Collaborative Culture

Establishing a collaborative culture will improve the regulator's knowledge of what is actually (or prospectively) going on within the sector, build mutual trust, promote the understanding and learning which will maximise compliance and identify unacceptable conduct which needs to be stopped or sanctioned.

However, these relationships need to be transparent and all those subject to the rules should be aware of them and understand them. Where regulatees are unaware of their obligations, a punitive response would be seen as unfair, and could undermine willingness to comply. Equally, where non-compliant activities have been deliberate, upholding the law with suitably serious responses is necessary to protect society and to uphold its values. Enforcement responses must also be fair and proportionate.

This concept of 'responsive regulation', with a commitment to active support for genuine efforts to comply, contrasts with the traditional idea that the rationale and purpose of enforcement is deterrence.[102] Professor Hodges demonstrates how empirical evidence and behavioural psychology studies have challenged the theory that deterrence in fact produces significant effects on behaviour.

Despite pressures from the media, and sometimes from public and political opinion, for regimes of hard-hitting punishment, both UK government policy and the practice of many regulators, have increasingly adopted an approach towards regulatory enforcement that is based on differentiating between a supportive approach for most firms and a punitive approach for manifestly wrongful behaviour. This is in line with the Hampton Report 2005, which fundamentally advocated that regulators should adopt a *risk-based* approach towards securing compliance, and use advice and persuasion as the first step.

With widespread (but not universal) application, the Regulators' Code stresses the need for regulators to adopt a positive and proactive approach towards ensuring compliance, requiring that:

- Regulators should carry out their activities in a way that supports those they regulate to comply and grow; and
- Regulators should ensure clear information, guidance and advice is available to help those they regulate meet their responsibilities to comply.

The Committee welcomes these developments and is supportive of what has so far been achieved on these aspects by the Regulators' Code. Professor Hodge's paper goes further by suggesting a series of practical actions which could be taken by businesses, regulatory bodies and government to embed an ethical approach more deeply. These include amendment to the Regulators' Code to encourage recognition of ethical practice, possibly through adoption of and Ethical Business Practice (EBP) Protocol which would set out best practice standards.

102 Baldwin, Robert and Julia Black.. 'Really Responsive Regulation', *Modern Law Review* 71: 59–94. 2008.

# Appendix 4 Methodology

## Methods

In order to examine these issues the Committee used a range of methods, including:

- Unattributed roundtable meetings with academics, regulators and stakeholders;
- A survey of regulatory bodies;
- Interviews with senior representatives of regulatory organisations;
- Commissioned academic research; and
- Desk-based research including:
  - A review of academic and practitioner research;
  - A review of the governance arrangements of regulatory bodies; and
  - A review of documents provided by regulatory bodies, including registers and reports.

## Roundtables

The Committee on Standards in Public Life held three roundtable meetings. These discussions considered the core themes of the review. The first roundtable was held with academics with research expertise relevant to the review. The second roundtable was held for representatives of regulatory organisations. The final roundtable was held with a range of key stakeholders, in order to consider how the key themes of the report may impact on various stakeholders in the process of regulation.

## Academic Roundtable

| Academic | Role and Organisation |
|---|---|
| Dr Sarah Devaney | Senior Lecturer in Law, University of Manchester |
| Professor Cosmo Graham | Professor of Law, University of Leicester |
| Professor David Hine | Professor of Politics, Oxford University |
| Professor Martin Lodge | Professor of Political Science and Public Policy |
| Professor Gillian Peele | Fellow and Tutor, University of Oxford |
| Professor Mark Philp | Professor of History and Politics, University of Warwick and Chair, CSPL Research Advisory Board |
| Dr Costanza Russo | Senior Lecturer in International Banking Law and Business Ethics, Queen Mary University of London |
| Professor Frank Vibert | Senior Visiting Fellow, London School of Economics and Political Science |
| Professor Ania Zalewska | Professor of Finance, Director of Centre of Governance and Regulation, University of Bath |

Regulator Roundtable

| Organisations Represented | |
|---|---|
| Advertising Standards Authority | Human Tissue Authority |
| Architects Registration Board | Independent Police Complaints Commission |
| Association of Taxation Technicians | Institute and Faculty of Actuaries |
| Bar Standards Board | Institute of Government |
| Centre for Licensed Conveyancers | Independent Parliamentary Standards Authority |
| Chartered Institute of Taxation | Legal Services Board |
| Chartered Institute of Public Finance & Accountancy | Local Government Ombudsman |
| Civil Aviation Authority | Medicines and Healthcare Products Regulatory Agency |
| Environment Agency | Monitor |
| Equality and Human Rights Commission | Nursing and Midwifery Council |
| Financial Conduct Authority | Ofcom |
| Financial Reporting Council | Office of Rail and Road |
| Food Standards Agency | Ofqual |
| Gangmasters Licensing Authority | Ofsted |
| Human Fertilisation and Embryology Authority | Professional Standards Authority for Health and Social Care |
| General Dental Council | QMUL Institute of Regulation and Ethics |
| General Optical Council | Security Industry Authority |
| Health Care Professionals Council | Solicitors Regulatory Authority |
| Housing and Communities Agency | The British Hallmarking Council |
| The Pensions Regulator | |

Stakeholder Seminar

| Stakeholder Organisations Represented | |
|---|---|
| Action against Medical Accidents | Finance & Leasing Association |
| Association of Optometrists | Financial Markets Law Committee |
| Banking Standards Board | Institute of Chartered Accountants of England & Wales |
| Bar Council | Institute of Directors |
| British Bankers Association | Law Society |
| British Medical Association | Lawyers in Local Government |
| British Soft Drinks Association | Public Stakeholder |
| Cambridge Judge Business School | Royal Institute of British Architects |
| Chartered Banker Institute | St Paul's Institute |
| Chemical Industries Association | The British Dental Industry Association |
| Committee on Standards in Public Life | Trades Union Congress |
| Consumer Credit Trade Association | Transparency International |

| Stakeholder Organisations Represented | |
|---|---|
| Engineering Employers Federation | University of East Anglia |
| Essential Services Access Network | University of Manchester |
| Federation of Small Businesses | Which? |

## Survey

The Committee also issued a survey to 78 bodies that the Committee identified as performing a regulatory function. This survey enabled an overview of the practices and procedures of regulatory bodies, as well as their attitudes to approaching ethical hazards more generally. The Committee received 64 responses to the survey; the non respondents were typically very small regulators or those who did not consider themselves to be regulators or have statutory regulatory functions. The results enabled us to draw conclusions across regulatory bodies, and identify cases of best practice. Each of these responses has been published online alongside the publication of the report.

The following questions were asked of each of the regulatory bodies:

1. Please provide your contact details
2. How (if at all) are the Seven Principles of Public Life (selflessness, integrity, objectivity, accountability, openness, honesty and leadership) embraced, embedded and promoted within your organisation?
3. Does your organisation have a policy on the following:
   - Transparency (in terms of proactively publishing minutes, decisions, registers of interest etc
   - Declarations and conflicts of interest
   - Gifts and hospitality
   - Recruitment of staff from the regulated sector
   - Movement of former employees to the regulated sector
   - Secondments and interchange into and out of the organisation
   - Whistleblowing
   - Handling complaints about the organization

   3.1 To what extent do any of these policies apply differently (or not at all) to any Board Non-Executive or similar office-holders?

   3.2 Please summarise or refer to any innovative or specific aspect of any of these policies, which particularly reflect your organisation's role as a body with regulatory or similar functions
4. How are ethical issues dealt with as part of induction or training within your organisation?
5. How do your organisation's appraisal, promotion and reward procedures take account of values and ethical behaviour?
6. How are ethical risks included in your organisation's risk register or other risk management procedures?
7. Who provides ethical leadership and how is the ethical tone of the organisation maintained?
8. What is the procedure for dealing with ethical dilemmas that arise within the organisation?
9. How does your organisation satisfy itself on a regular basis about the adequacy of the organisation's arrangements for safeguarding high ethical standards?
10. Do you have any further comments you wish to share regarding ethical standards of regulatory bodies, either in relation to your own organisation or more broadly?

## Interviews

The Committee undertook 26 in-depth interviews to inform the review, which were conducted on the basis that no comments were attributable to the interviewee. The bodies to be interviewed were identified through their responses to the Committee's survey. The Committee is very grateful to those interviewed for committing their time to the development of the report.

| Bodies Interviewed | |
|---|---|
| Chartered Institute of Public Finance & Accountancy | Homes and Communities Authority |
| BBC Trust | Human Embryo and Fertilisation Authority |
| Better Regulation Delivery Office (now Regulatory Delivery) | Insolvency Service |
| Better Regulation Executive | Independent Police Complaints Commission |
| Charity Commission | Legal Services Board |
| Commissioner for Public Appointments | Local Government Association |
| Financial Conduct Authority | Medicines and Healthcare Products Regulatory Agency |
| Food Standards Agency | National Audit Office |
| Gambling Commission | Ofcom |
| General Medical Council | Ofgem |
| Health and Safety Executive | Ofsted |
| Her Majesty's Inspectorate of the Constabulary | Office of Rail and Road |
| Hertfordshire County Council | Planning Inspectorate |

## Academic Research

The Committee is very grateful to the four academic experts who conducted independent research projects which the Committee was able to draw upon in the development of the report. The Committee was able to consider the insights and perspectives offered in each of these research projects. Each of these independent reports is available online.

The following papers were commissioned by the Committee:

*Ethics in Business Practice and Regulation*
Professor Christopher Hodges, Professor of Justice Systems, and Fellow of Wolfson College, University of Oxford

*Ethical Self-Assessment Toolkit for Regulators*
Mr David Jackman, Visiting Fellow at Cambridge Judge Business School and the founder of The Ethical Space Limited

*Ethics for Healthcare Regulators: Enhancing Compliance with the Seven Principles of Public Life*
Dr Sarah Devaney, Senior Lecturer in Law, University of Manchester, and Co-Director of ManReg: the Manchester Centre for Regulation, Governance and Public Law

*The Ethics of Banking and Finance Authorities: a study of the Bank of England, the Prudential Regulation Authority, the Monetary Policy Committee and the Financial Conduct Authority*
Dr Costanza Russo, Senior Lecturer in International Banking Law and Business Ethics, Queen Mary University of London

All four papers are available in full at: https://www.gov.uk/government/publications/academic-research-paper-on-ethics-for-regulators

ISBN 978-1-4741-3693-8

Neutral Citation Number: [2016] EWHC 3307 (Admin)

Case No: CO/1091/2016

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2016

**Before** :

**MR JUSTICE EDIS**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **JOHN TAYLOR** | **Claimant** |
| **- and -** | |
| **HONITON TOWN COUNCIL** | **Defendant** |
| **-and-** | **Interested Party** |
| **EAST DEVON DISTRICT COUNCIL** | |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Wayne Beglan** (instructed by **Pardoes Solicitors LLP** ) for the **Claimant**
**Jonathan Wragg** (instructed by **Foot Anstey LLP**) for the **Defendant**
**Jeremy Phillips** (instructed by **Henry Gordon Lennox, Strategic Lead (Legal and Licensing and Democratic Services) and Monitoring Officer**) for the **Interested Party**

Hearing date: 9th November 2016

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE EDIS

**Mr. Justice Edis :**

1. By this claim for judicial review, the claimant seeks an order quashing a decision (the Decision) by Honiton Town Council (Honiton) dated 14th December 2015 to impose sanctions on the claimant and for declaratory relief in relation to that decision. East Devon District Council (East Devon) is an interested party because of its important role in the procedure which led to the Decision.

2. The issue in the case turns the exercise of functions regulated by ss.27-28 in Chapter 7 of the Localism Act 2011 which is headed "Standards". The relevant provisions are set out at paragraph 29 below. Honiton is for these purposes a Parish Council and East Devon is its principal authority. They work in tandem under the statutory scheme to fulfil the functions of a local authority under those provisions in ways which will require some analysis below. Essentially, East Devon is a substantially larger and better resourced local authority than Honiton and is therefore given certain functions on behalf of Honiton which a larger authority would perform for itself. Between them they seek to comply with the duty under s.27(1) which is as follows:-

> (1) A relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority.

**Factual Summary**

3. The claimant has been a town councillor of Honiton since 2007. He played a significant role in the running of Honiton, sitting on a number of committees and working groups, including in particular, the finance committee. The present issue arose because he became concerned about the funding of a large building project in the town of Honiton called the "Beehive Community Centre". It will not be necessary for the purposes of this judgment to analyse those concerns in depth or to make findings about that project. It is enough for present purposes to say that it was an enormous project by the standards of Honiton and that significant difficulties arose over the budget and how shortfalls could be funded. The shortfalls were created by the contractor raising claims for additional costs at a late stage. Honiton had entered into a standard form JCT building contract, the terms of which provide for the making of payments against certificates and the making of claims and so on. The Auditor had reported in June 2014 that the Council was at risk because of these additional costs and the very low level of reserves available to meet them, and other costs. The Auditor recommended speedy and decisive action and suggested that the obvious option was to extend the borrowing from the Public Loan Works Board. The conduct of this exercise was certainly a matter of legitimate public interest and was a matter in which a member of the Town Council was likely to take a particular interest.

4. The Decision was communicated to the claimant by letter of 18th December 2015 from Honiton. It imposed sanctions upon him because of a finding that he had committed a breach of Honiton's Code of Conduct for its members by failing to treat the Town Clerk with courtesy and respect. In essence the allegation related to a letter dated the 27th January 2015. Because some argument turned on the nature of that letter, I will set it out. I have highlighted phrases which are of particular significance in the light of counsel's submissions, and the emphasis below is mine. I have otherwise sought to set it out exactly as it was written.

"I am a Town Councillor for Honiton St Michael's Ward. A meeting of the Council was held last night 26 January 2015 most of which was held in 'private'. I am **publishing** one event that asked me to conspire to break the law and I hope that I am allowed in law to issue **this leaflet** under the defence of Public Interest. I may be accused of breaking the rules of the Council and stopped from attending? I might even be arrested and prosecuted but if that happens you will know that I am being punished for telling of an **offence, a conspiracy to use money from the Public Works Loan Board (PWLB) for an improper purpose**. The Town Clerk of Honiton stated that she has applied a loan of £98000 (value published) to cover 'poaching' of monies from the accounts (quote from published internal audit); in fact needed to replace 'poached reserves' used to pay £75000 worth of bills that should have been disputed. This intent etc is already in the public domain. However the Town Clerk stated that she would not need all of the money. That statement would be covered by the 'Part B privacy rules'. She stated that she intended to put the surplus into a high interest account and to use that as a reserve to pay down the loan. That also is covered by the Part B privacy rules. However, to apply for money knowing that there it is not needed for a purpose allowed under the PWLB rules is illegal because it is a way of replacing reserves that are required to be kept by all Councils but in the case of Honiton Town have been 'poached'. The Mayor suggested we use the fancy word 'virement'. I will not stay silent on this. There were other things in the meeting that were **scams on the ratepayers of Honiton** but I have yet to find out my rights of disclosure within section 100a of the Local Govt Act publish because of 'privacy' rules. I can say that six Counsellors have signed a request for a motion that asks for the finances of the Town Council and the Beehive to be investigated by the Devon and Cornwall Constabulary. The Mayor and the Town Clerk got the request yesterday.

"I think the loan must be approved by EDDC and must be consistent with the rules of PWLB. Will EDDC let the application go through? What is stated on the application as justification? – I have not seen it. The PWLB pays out from loans raised by the Government, i.e. 'the public borrowing requirement' of which all political parties are shouting should be controlled and lots of people's incomes are under pressure because of this. Not Honiton Town Council (Beehive).

"Issued by John Taylor Town Councillor for St Michaels. You may see me in handcuffs? Or gagged? I doubt I can be sued for whistleblowing on this."

5. This caused the Town Clerk to make a complaint against the claimant by letter of 28th January 2015 to East Devon saying that the letter had been published in the Express and Echo. She complained that she had been slandered and that her professional reputation was affected. She said that she had only ever acted on the instructions of the Town Council following advice from both the internal auditor and the Audit Commission. She said "I have always ensured that work has been carried out in a professional and legal manner to say this is not the case is not acceptable."

6. After the Monitoring Officer of East Devon had attempted to resolve the complaint informally by suggesting that the claimant should make an unreserved apology, which the claimant refused to do, he appointed Tim Darsley to investigate the complaint on 2nd June 2015. Mr. Darsley decided that the following paragraphs of Honiton's Code of Conduct were engaged by his remit:-

> "General Obligations
>
> 4(a) You must treat others with courtesy and respect
>
> 4(f) You must not disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to aware, is of a confidential nature [subject to exceptions]."

**The Investigation Report**

7. Mr. Darsley considered various documents and conducted face to face interviews with the claimant and the Town Clerk and spoke to a journalist from Pulman's Weekly News. He made findings of fact which were set out with care in paragraph 5 of his Report which was dated 31st July 2015. When he was appointed there had been discussion about whether it was necessary to resolve the question of the contractor's entitlement to payment for additional costs in order to deal with the complaint. If so, this might tend to justify what the claimant had said in his letter because the existence of unbudgeted but valid claims would support allegations of at least incompetence against Honiton. He said this:-

> "5.6 I am quite clear, however, that establishing the validity or otherwise of the additional building costs which made the loan necessary, is outside of my remit. This is a matter for the Town Council and the contractor to pursue. Any disputed costs should be resolved by negotiation or through dispute resolution under the contract. The outcome of this process is not required in order to reach a finding on this complaint."

8. Mr. Darsley explained that the total costs of the Beehive project exceeded the funds available by £98,073 on what Honiton was told was a "worst case" basis and that it had applied for a loan from the PWLB of £98,000 on 23rd January 2015 and that at its meeting of 26th January 2015 Honiton had agreed to sign and seal a 10 year lease of the Beehive to Honiton Community Complex at a nominal rent. It was this meeting which caused the claimant to write his letter, which Mr. Darsley refers to as a "statement". It found its way quickly to the local media who asked Honiton for a comment on it on 27th January 2016, before the Town Clerk had seen it. An article

appeared on 28th January 2016 in the Express and Echo which refers to the statement and to its allegation of impropriety coupled with a request for a police investigation. The weekly press ran a similar article on 3rd February. Mr. Darsley found that it was not altogether clear how the statement had been issued. The claimant told him that he gave out no more than ten copies to some constituents and one or two councillors. Mr. Darsley accepted this and also the account of the journalist that a scanned copy of it had been distributed to the press by a councillor and constituent of the claimant called Jill McNally.

9. Mr. Darsley considered the accuracy of the statement so far as what the Town Clerk had said at the meeting. This was the subject of a dispute in that the Town Clerk said that she had not used the word "poaching". Mr. Darsley found that she had not, because the claimant accepted that this was probably the case. He also found that the statement was misleading because the Town Clerk had not said definitively that the whole of the loan would not be needed. She had said that the final amount required was not yet resolved and the £98,000 was a "worst case" estimate. She did not then know whether there would be a surplus and could not have said, as the claimant had alleged, that the surplus would be put into a high interest account and used as a reserve to pay down the loan. He concluded overall, that the statement was inaccurate, selective and out of context and as a result gave a misleading account of what the Town Clerk had said. He also found:-

    i) That Honiton had been advised by its Internal Auditor to extend the PWLB borrowing.

    ii) That the Town Clerk had obtained the relevant guidance and taken advice from the PWLB and the County Secretary for the Devon Association of Local Councils.

    iii) That the process for applying for the loan was in line with the provisions of the Local Government Act 2003 and followed relevant guidance.

    iv) The key decisions regarding the application for the loan and the amount of funding were taken by Honiton and not the Town Clerk who implemented the decisions in accordance with the resolutions of Honiton.

    v) There was therefore no evidence to suggest that the loan application was in any way illegal, and was used for an improper purpose.

    vi) The statement did not disclose confidential information because it contained information which was properly in the public domain and the claimant's own contentions about it. No specific confidential information was revealed.

10. As a result of these factual conclusions, Mr. Darsley found that the claimant publicly made claims of illegality and impropriety associated with the Town Clerk and that, in the absence of any reasonable justification for his claims, this constituted a failure to treat her with respect. He felt that criticism of officers by councillors should be made in a proper forum and that personal criticism made in public is unlikely to be acceptable. He found therefore that there was a breach of paragraph 4(a) of the Code, but he found no breach of paragraph 4(f).

11. There is no attack on the procedure by which these findings were made. Mr. Darsley is an officer of East Devon and East Devon is not a defendant to this claim. It became an Interested Party in the way I shall describe below.

**The October Sanctions Policy**

12. On 12th October 2015 at a full meeting of Honiton the Council resolved to approve a report of the Policy Committee called "Code of Conduct Sanctions Report". This provided for the automatic imposition of sanctions when a Monitoring Officer had ruled that a member had been in breach of the Code of Conduct and specified actions to be undertaken. Until those actions had been complied with in full the following will automatically apply

    i) A member will be unable to speak at any meeting including the Council Meeting. They would retain their right to vote.

    ii) A member will be removed as a member of any committee or working group.

    iii) A member attending any meeting as a member of the public will not be able to speak.

    iv) A member "can also be prevented" from coming into the council office unless accompanied by arrangement. They can be required to make an appointment so that staff are not left alone with them.

13. The origin of this policy is a little unclear. On the 28th September 2015 the Policy Committee of Honiton was advised as follows:-

> "The Deputy Town Clerk advised that both Officers of the Town Council are of the view that local government legislation only permits a local council to act where it has a specific power to do so and that no power exists to remove a Councillor's right to speak at a Council meeting. The advice from the County Secretary of the Devon Association of Local Council's was read out. The advice supported the view of the Town Council's Officers."

14. It appears that the Policy Committee decided not to follow that advice and in the Report for the Council says that the power to disqualify or suspend councillors had been removed but that the powers in relation to alleged [sic] breaches were "for local determination" and that the Act "is silent on [breaches not involving disclosable pecuniary interests] leaving it to the discretion of local authorities to decide their own sanctions".

15. The October Policy also included a Training Policy and Training Plan.

**The November meeting of East Devon**

16. East Devon considered Mr. Darsley's report at a meeting on 30th November 2015 of its Standards Hearings Sub-Committee. There was a pre-hearing report which explained that the conclusion that the statement had constituted a breach of the Code was reached by the Investigator, by two Monitoring Officers and by the Independent

Person. The Pre-Hearing Report explained that this conclusion applies regardless of the accuracy of what the claimant was actually saying. This is a rather different emphasis from that of Mr. Darsley who did consider the question of accuracy and is an approach which is criticised by Mr. Beglan, counsel for the claimant. The Pre-Hearing Report explained that it would be for the committee to determine the facts and whether there had been a breach of the Code and, if so, whether to recommend to Honiton that a sanction should be imposed and, if so what that should be.

17. The Decision Notice of East Devon acknowledged the claimant's genuinely held concerns regarding the financial governance of Honiton but, in line with the Pre-Hearing Note, said that this was outside the remit of the Standards Sub-Committee. The Sub-Committee found that the claimant had forwarded the statement to Jill McNally knowing that it was likely to be more widely circulated by her. It was not marked confidential and he did not withdraw its contents when they appeared in the media. The Sub-Committee did not, as it might have done, infer from the terms of the statement, highlighted above, that it was clearly a document intended for dissemination and not a letter addressed to an individual. It describes itself as a "leaflet". It says that it was intended to make matters public which revealed criminal conduct. There is no reason not to conclude that the claimant created it for these purposes and intended that it would reach the media. On the main issue the Sub-Committee found that there was a breach of paragraph 4(a) because the claimant had not treated the Town Clerk with respect. They said this

> "In conclusion the findings of the Sub-Committee were that Councillor Taylor had issued a statement, written as a Honiton Town Councillor, which was sent by a recipient to the media. The statement made a number of claims about the legality and propriety of a loan obtained by the Town Council. In the statement, Councillor Taylor referred to the Town Clerk three times, which after deliberation the Sub-Committee concluded that this implied a direct criticism of the clerk's integrity in dealing with the finances of the Beehive."

18. On advice from its officers, East Devon's standards sub-committee recommended these sanctions

    i) That Honiton Town Council censure Councillor John Taylor for his breach of the Code of Conduct;

    ii) That Honiton Town Council publish the findings of the Hearing Sub-Committee. (EDDC will anyway publish the findings on its own website as a matter of procedure).

    iii) That Honiton Town Council instruct EDDC's Monitoring Officer to arrange training for Councillor Taylor in respect of the Code of Conduct and Councillor conduct – such training by the end of the current financial year ("the training requirement").

19. The claimant was represented at the hearing and Mr. Kinder, his solicitor, emailed to the Sub-Committee on 1st December 2015 with a series of complaints and requests for further documentation. The email said that counsel was to be instructed "in relation

to a judicial review of the decision yesterday" but no such proceedings have ever been issued against East Devon.

20. The claimant was therefore found by East Devon to have breached paragraph 4(a) of the Code. He had failed to treat the Town Clerk with respect in that he had publicly accused her of criminal behaviour, namely conspiracy to obtain a loan by deception in that its true purpose was misstated on the application. That finding was the foundation for the Decision.

**The decision of Honiton**

21. In the Decision Honiton imposed the sanctions recommended by East Devon as above and applied its October Policy by adding the following measures which were to remain in place until the claimant had complied with the training requirement:-

    i) A restriction preventing the claimant from speaking at any meeting including the Council meeting.

    ii) The removal of the claimant from the 5 committees and working groups on which he served.

    iii) A restriction preventing the claimant from attending any meeting as a member of the public together with a restriction from speaking as a member of the public at any meeting.

    iv) A restriction preventing the claimant from attending at the Council offices unless accompanied by the Mayor of the Council.

**The challenge**

22. The claimant raises 3 issues by his claim for judicial review which was issued on 1st March 2016:-

    i) Illegality for these reasons

        a) The Council has no power to make the Decision;

        b) The Decision was based on a rigid application of policy;

        c) The Decision was imposed for an improper purpose;

        d) The Decision is inadequately reasoned;

        e) The Decision is perverse.

    ii) The Sanctions were not imposed on a proper basis in the light of East Devon's conclusions on the investigation.

    iii) The hearing before the standards sub-committee was procedurally unfair.

23. Long before the proceedings were issued, and by letter of 19th January 2016 Honiton said that it was modifying the sanctions because of "further information" and that the

claimant would be able to participate in full meetings of the Council. By letter of 16th February they said that they were seeking advice from specialist counsel and said

> "In light of the fact that your client seeks to challenge the decision of the District Council dated 30th November 2015 we hereby withdraw all sanctions currently imposed on your client. The Council will, however, consider the issue of sanctions again after (i) any fresh decision made by the District Council and/or (ii) the outcome of any judicial review proceedings against the District Council."

24. As appears above, despite the threat of proceedings against the District Council, East Devon, they were in the result issued against the Town Council, Honiton. By letter of 19th March 2016 Honiton expressed the hope that the claim would be withdrawn because it said:-

i) The Town Council agrees that the decision dated the 14th December 2015 should be treated as never having been made.

ii) The Town Council agrees that it will not seek to re-impose all of the sanctions that were imposed on the 14th December 2015. However, the Town Council will consider in due course what actions it might wish to take in light of the decision of East Devon District Council - which decision has not been challenged by your client. It is likely that any such decision of the Town Council may well involve the imposition of some of the sanctions (but not the additional sanctions/measures) previously imposed on your client on the 18th December. Any such decision will take into account (i) the issues raised by your client in his claim against the Town Council (ii) the Town Council's response to your third question below and (iii) further legal advice taken by the Town Council;

iii) The Town Council is aware that your client seeks a measure of comfort. However, the Town Council has found it difficult to determine what is meant by your third question. The vagueness of the terms you have used makes a meaningful response impossible. The Town Council is content to confine any future sanctions/measures to those set out in the case law you have referred to. Consequently, your reference to "sanctions and/or measures intended to ensure sanctions are adhered to" will not arise.

iv) The Council will pay your client's costs on the standard basis to be assessed if not agreed.

25. Honiton accepted in its Acknowledgement of Service dated 23rd March 2016, before the grant of permission on 24th May 2016, that it had no power to impose a training requirement and does not intend to do so. It is an unusual aspect of the case that the only interest East Devon has in these proceedings is in establishing that such a requirement is lawful.

26. The approach taken throughout the proceedings by Honiton and East Devon is that the decision on whether there had been a breach of the Code of Conduct was taken by East Devon and that Honiton had no power or duty to substitute its own decision on

that question. On the issue of sanctions it is said that East Devon made a recommendation but Honiton made the decision. That is how the decisions were in fact taken, as the documents I have quoted above make clear. If that is right, then these proceedings are not a proper forum for a challenge to the decision on breach because East Devon is not a defendant and its decision is not attacked.

**The Issues**

27. Because it seemed to me that these proceedings may raise only academic issues in view of the stance taken by Honiton, I decided that it would be helpful to start the hearing by asking each party what order they were asking the court to make. Their responses were as follows

    i) The claimant, through Mr. Beglan, said that he sought a quashing order in relation to the Decision, which it was accepted he should have. He sought a declaration as to the October policy and a "steer" in relation to any determination Honiton may make as to sanctions. Can Honiton rely on the November decision of East Devon including on disputed matters of fact, and given the terms of s.28(11) of the Localism Act what are the respective roles of Honiton and East Devon in dealing with allegations of breaches of the Code of Conduct.

    ii) Mr. Wragg on behalf of Honiton said that his clients accept everything which is said under Ground 1 and that it had tried to concede everything and get out of these proceedings, but it was unable to accept the claimant's contention that East Devon merely makes recommendations as to whether a breach should be found and that Honiton must make up its own mind on that issue. He said that such an approach would render the task of Parish Councils impossible because they often have no professionally qualified officers and the point of the 2011 Act is to remove decisions on breach from them for that reason.

    iii) Mr. Phillips on behalf of East Devon said that his clients were not the subject of any challenge, but that rulings on two questions may be helpful to them and other local authorities. These were

        a) What is the status of a decision of an authority exercising its function as principal authority under s.28 of the Localism Act 2011? Is the Parish Council bound to accept its findings of fact and on the issue of breach of the Code. On that issue East Devon's position is the same as Honiton.

        b) Is there a power to require a Councillor to undergo training as to the Code of Conduct as a sanction consequent upon a finding of breach? On this issue East Devon and Honiton take different positions.

28. I have considered with some care whether I should make any order at all in this case and whether I should decide the questions raised by the parties since they are academic because the Decision has been withdrawn, several times. The parties have expended costs on these proceedings, and permission has been granted which has encouraged them, no doubt, to continue in the hope of securing a decision. East Devon was joined as an Interested Party at the request of Honiton for this purpose.

Further, the parties will have further dealings and it may be helpful if I make some findings. For these reasons, I have decided that I will address two questions.

i) I will decide whether Honiton was bound by the findings of East Devon as to the facts and as to whether there was a breach of the Code. This is because the Decision actually involves two stages: breach and sanction. Honiton has certainly withdrawn the second, but says that it is still bound by the first. The point is not academic to the Decision and to the order which should be made. Whatever the outcome of this issue, I will quash the Decision. This does not mean that the route to that result is irrelevant. If the claimant is right I will quash the finding that there was a breach of the Code because no such finding was made by Honiton which wrongly simply adopted East Devon's decision. If Honiton and East Devon are right I will quash the Decision because Honiton has conceded that it wrongly included sanctions which are beyond its powers.

ii) I will also consider whether there is a power to impose a training requirement. This is not entirely academic because the application of unlawful sanctions is one basis of the quashing order and the extent to which the sanctions were unlawful is therefore involved in the decision.

**The statutory scheme under the 2011 Act**

29. The 2011 Act is not entirely clear in the provisions which govern the answers to the questions which are raised. So far as relevant, ss.27 and 28 provide as follows:-

> "27**. Duty to promote and maintain high standards of conduct**
>
> (1) A relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority.
>
> (2) In discharging its duty under subsection (1), a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity.
>
> (3) A relevant authority that is a parish council—
>
> > (a) may comply with subsection (2) by adopting the code adopted under that subsection by its principal authority, where relevant on the basis that references in that code to its principal authority's register are to its register, and
> >
> > (b) may for that purpose assume that its principal authority has complied with section 28(1) and (2).
>
> …….
>
> (6) In this Chapter *"relevant authority"* means—
>
> > (a) a county council in England,

(b) a district council,

(c) a London borough council,

(d) a parish council [Honiton is a parish council for this purpose].

……

28. **Codes of conduct**

(1) A relevant authority must secure that a code adopted by it under section 27(2) (a "code of conduct") is, when viewed as a whole, consistent with the following principles—

(a) selflessness;

(b) integrity;

(c) objectivity;

(d) accountability;

(e) openness;

(f) honesty;

(g) leadership.

(2) A relevant authority must secure that its code of conduct includes the provision the authority considers appropriate in respect of the registration in its register, and disclosure, of—

(a) pecuniary interests, and

(b) interests other than pecuniary interests.

(3) Sections 29 to 34 do not limit what may be included in a relevant authority's code of conduct, but nothing in a relevant authority's code of conduct prejudices the operation of those sections.

(4) A failure to comply with a relevant authority's code of conduct is not to be dealt with otherwise than in accordance with arrangements made under subsection (6); in particular, a decision is not invalidated just because something that occurred in the process of making the decision involved a failure to comply with the code.

…….

(6) A relevant authority other than a parish council must have in place—

> (a) arrangements under which allegations can be investigated, and
>
> (b) arrangements under which decisions on allegations can be made.

(7) Arrangements put in place under subsection (6)(b) by a relevant authority must include provision for the appointment by the authority of at least one independent person—

> (a) whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate, and
>
> (b) whose views may be sought—
>
> > (i) by the authority in relation to an allegation in circumstances not within paragraph (a),
> >
> > (ii) by a member, or co-opted member, of the authority if that person's behaviour is the subject of an allegation, and
> >
> > (iii) by a member, or co-opted member, of a parish council if that person's behaviour is the subject of an allegation and the authority is the parish council's principal authority.

(8) [This sub-section provides detailed apparatus for the selection of independent persons for the purposes of subsection (7). It is unnecessary to set the terms of the provision out in full, but it is to be inferred from them that Parliament considered that the role of the independent person was of real importance].

(9) In subsections (6) and (7) *"allegation"*, in relation to a relevant authority, means a written allegation—

> (a) that a member or co-opted member of the authority has failed to comply with the authority's code of conduct, or
>
> (b) that a member or co-opted member of a parish council for which the authority is the principal authority has failed to comply with the parish council's code of conduct.

……..

> (11) If a relevant authority finds that a member or co-opted member of the authority has failed to comply with its code of conduct (whether or not the finding is made following an investigation under arrangements put in place under subsection (6)) it may have regard to the failure in deciding—
>
> (a) whether to take action in relation to the member or co-opted member, and
>
> (b) what action to take.
>
> ……."

**Discussion and decisions**

Issue 1: the status of East Devon's decision

30. This is a matter of statutory interpretation of the somewhat difficult provisions of ss.27 and 28 of the 2011 Act set out above. It is a question which could easily have been answered by simple and clear words in the Act but was not. It must therefore be answered by interpreting the words used in their proper context to identify the intention of Parliament.

31. The starting point is subsection (6) which exempts Honiton, as a parish council, from the obligation to have in place arrangements for investigating allegations and making decisions on them. It follows from this that Honiton is also exempt from the duty to appoint at least one independent person and to involve that person or those persons in decisions imposed by subsection (7). Any decision taken by Honiton will therefore not involve this independence which Parliament, as I observe at paragraph 29 above, plainly regarded as being of importance.

32. Subsection (9)(b) defines an allegation in relation to a relevant authority as meaning a written allegation that a member of a parish council for which the authority is the principal authority has failed to comply with the parish council's code of conduct. It follows from this that East Devon was required by subsection (6) to have arrangements in place, including independent persons, for the investigation of allegations against members of Honiton and for making decisions on those allegations. East Devon did have such arrangements in place as I have set out above, and did investigate the allegation against the claimant and did decide that he had acted in breach of Honiton's code. It did not decide to recommend to Honiton that it should find the breach, but did so itself. It did so in a way which has not been challenged in these proceedings.

33. In my judgment the effect of subsection (6)(b) taken together with subsection (9)(b) is to place the duty of investigation and decision of allegations against members of Honiton on East Devon as principal authority. The arrangements for decision making must involve independent persons and it would frustrate that important safeguard to hold that a parish council had a duty to reconsider the principal authority's decision and substitute its own if it chose to do so.

34. Subsection (11) is a rather puzzling provision. I shall have a little more to say about it below, but in this context I observe that it appears to suggest that the same authority which makes the finding of failure to comply with the code must decide what, if any, action to take about it. Although it refers to arrangements for investigation under subsection (6) it does not in terms deal with the possibility that a decision may have been taken under subsection 6(b) by the principal authority and identify which of the two authorities involved may have regard to the failure and decide what, if any, action to take about it. Both of them are "relevant authorities" as defined in s.27(6) and this creates a difficulty in allocating responsibility for different parts of the process to each of them when subsection (11) appears to contemplate that only one will be involved.

35. In this case East Devon decided the issue of breach but made recommendations to Honiton about what action it should take consequent on that finding. Honiton took the decision on sanctions. The challenge in these proceedings is based on the proposition that East Devon's role was limited to that of investigator and adviser on both questions and contends that Honiton was the ultimate decision maker on both issues. This appears to me to be clearly wrong for the reasons set out above. A natural reading of the Act gives decision making power to the principal authority and requires it to have arrangements for the exercise of that power in place. It would make a nonsense of that scheme if the parish council were able to take its own decision without having any of those arrangements in place. The whole point of the scheme is to remove decision making powers and duties from very small authorities which do not have the resources to manage them effectively and who may be so small that any real independence is unattainable. I therefore reject the challenge.

36. In doing so, I decline to decide that the Act requires the splitting of the decisions as between breach and sanction between the two relevant authorities in the way in which this happened in this case. No-one contended before me that East Devon had responsibility for both decisions under subsection (6)(b) and that Honiton had no responsibility for any part of the decision making process. That being so it is not necessary, or desirable, for me to decide whether that contention, if advanced, would be sound. The language of s.28(11) may point one way, but s.27(1) and (2) to which I return at paragraph 41 below may point the other.

Issue 2: the training requirement

37. The decision of Hickinbottom J in *Heesom v Public Services Ombudsman for Wales (Welsh Ministers intervening)* [2014] EWHC 1504 (Admin), [2015] P.T.S.R. 222 featured in the claimant's representations to East Devon when it took the Decision and also in the submissions before me. It is a decision on different provisions because the Localism Act 2011 does not apply in Wales. However, the judge did include some discussion about the 2011 Act as part of his narrative of the origin of the Welsh provisions. He said this:-

> "The legal framework in England
>
> 25 Until 2012, Wales and England shared the scheme as set out above, the role of the Ombudsman in Wales being performed in England by, first, the Standards Board and, later, ethical standards officers of Standards for England.

26 However, for England, that regime was abolished by the Localism Act 2011 from 1 April 2012. This abolished the model code of conduct for local authorities in England, in favour of a new regime that requires local authorities to formulate and adopt a code of conduct locally which must be based on seven identified principles: sections 26 and 27(1)(2) . The requirement for local authorities in England to have standards committees was also abolished, in favour of "independent persons" who have a consultative role as part of their local standards arrangement: section 28(7).

27 Ethical standards officers in England (the equivalent of the Ombudsman in Wales) were abolished, and their functions were not retained. Instead, from 1 July 2012, section 34(1) makes it a summary criminal offence deliberately to withhold or misrepresent a disclosable pecuniary interest which, on conviction, may attract a maximum fine of £5,000 and an order disqualifying the person from being a member of the relevant authority for up to five years. Thus, in England, a councillor cannot be disqualified unless he is (i) in the paid employment of the authority (section 80(1)(a) of the 1972 Act: see para 12 above); (ii) convicted of any offence and sentenced to imprisonment for at least three months (section 80(1)(b) of the 1972 Act: again, see para 12 above); or (iii) convicted of an offence under section 34(1) of the 2011 Act and thereafter made the subject of a disqualification order by the magistrates. The power of local authorities to suspend members was also revoked from 7 June 2012.

28 It was uncontentious before me that, there being no common law right for an authority to impose sanctions that interfere with local democracy, on the abolition of these sanctions and outside the categories I have described above, a councillor in England can no longer be disqualified or suspended, sanctions being limited to (for example) a formal finding that he has breached the code, formal censure, press or other appropriate publicity, and removal by the authority from executive and committee roles (and then subject to statutory and constitutional requirements).

29 The rationale for this change was set out in a number of statements issued by the Department for Communities and Local Government. There appear to have been two themes. First, the United Kingdom Government considered that the earlier regime, consisting of a centrally prescribed model code of conduct, standards committees with the power to suspend a local authority member and regulated by a central quango, was inconsistent with the principles of localism. There was, in addition, concern that the regime was a vehicle for vexatious or politically motivated complaints which discouraged freedom of

> speech and which could be used to silence or discourage councillors from (eg) whistle-blowing on misconduct.
>
> 30 The Welsh Ministers have not adopted the same approach as England; and, for Wales, have maintained the pre- Localism Act scheme. In their written submissions as interveners in this appeal, they say (at paras 21–23): (1) The Localism Act 2011 has been largely rejected by the Welsh Ministers as being inappropriate to the social policy agenda in Wales. (2) The Welsh Ministers were confident that the Ombudsman, adopting a robust approach, could sift out any minor, vexatious and politically-motivated complaints made in Wales. (3) Thus, the Welsh Ministers were not persuaded that the ethical standards system in Wales was in need of reform. That was confirmed in the Welsh Government White Paper, *Promoting Local Democracy* (May 2012). (4) That remains their view. They refer to paras 16–19 of the Committee for Standards in Public Life annual report 2011–12, which expressed concerns about what the committee regarded as inadequate sanctions in the new English scheme, which were restricted in essence to "criminal law or … the ballot box". The Welsh Ministers remain of the view that the scheme in Wales complies with article 10 of the Convention."

38. The passage underlined in paragraph 28 above has been relied upon as indicating that sanctions in this case were limited to the finding of breach, censure and publicity. Since he did not include a training requirement, there cannot be any power to impose one. This is a misreading of the paragraph which contains the words "for example" indicating that what follows is not an exhaustive list, and of the purpose of this section of the judgment. Hickinbottom J was summarising the agreed effect of provisions which did not apply in his case and which were only tangentially relevant. He was plainly not deciding anything. In my judgment this valuable and penetrating judgment should not be regarded as the origin of a definitive list of sanctions available following a finding of breach of a Code of Conduct.

39. Section 28(11), which I have described above as "puzzling", permits a relevant authority to "have regard to" a breach of the code when deciding whether to take action and if so what action to take. At first sight, this would appear to include a discretion to ignore the breach when deciding whether to take action and what action to take in relation to it. It may also have regard to a breach whether the finding follows an investigation under subsection (6), which appears to sit uneasily alongside subsection (4). I do not have to decide any issue about the scope of this rather odd provision and my interpretation of it is limited to one observation relevant to Issue 2: Parliament clearly contemplates that a relevant authority may take "action" following a finding of non-compliance with a code, and does not seek to define or limit what action that may be. The abolition of the old regime carries with it, as Hickinbottom J observed, the abolition of the power to disqualify and suspend but otherwise the powers appear to be undefined, at least where the breach does not involve any impropriety in relation to pecuniary interests. It also means that suspension and disqualification are not available as sanctions for non-compliance with any action

taken in respect of a failure to comply with a code of conduct. This means that any action which required a councillor to do anything could not be enforced by suspension as a means of securing compliance. As the Welsh Government observed the only sanction where the criminal law was not involved in England was the ballot box.

40. That said, the fact that a requirement cannot be enforced by suspension does not mean that it should not be imposed. Provided that it is lawful, which in this context includes fully respecting the important right to freedom of expression enjoyed by members of local authorities in the interests of effective local democracy, a sanction may be imposed which requires a member of a local authority to do something. It must be proportionate to the breach In *Bank Mellat v HM Treasury (No 2) [2014] AC 700* , the test of proportionality was stated as follows by Lord Sumption JSC at 770, para 20, I as follows:

> "the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

41. It must be remembered that Honiton is under the statutory duty to maintain high standards of conduct under s.27(1) of the 2011 Act set out at paragraph 2 of this judgment in relation to its members. Section 27(2) requires it to have a code of its own or to adopt that of East Devon. The existence of a code of conduct is regarded by Parliament as an important aspect of the maintenance of standards. It appears to me to be proportionate to a significant breach of it for a relevant authority to require the person in breach to be trained in its meaning and application. There is no point in having a code of conduct if members of the authority are not aware of its meaning and effect and where a member has demonstrated by his conduct that this is the case, a reasonable amount of training appears to be a sensible measure. A local authority should be able to require its members to undertake training which is designed to enable them to fulfil their public functions safely and effectively.

42. It was reasonably open to the decision maker to conclude that this was a serious breach of the Code. There is no finding as to the claimant's motives and it may be that he acted in good faith, believing that his statement about the Town Clerk was justified. However, it was not. He accused her of criminal conduct when there was not the slightest justification for doing so. This was a very serious error of judgement. Therefore, a requirement of training was proportionate.

43. If such a requirement is made but the member refuses to comply, the only sanction is publicity. Such conduct may reduce the confidence of the electorate in the member so that he or she is not re-elected. Equally, it may not. That is a matter for the electorate to decide which it can do only if it has the relevant information. For these reasons I

consider that it is open to a relevant authority exercising its power as contemplated by s.28(11) to take action following a failure to comply with a code of conduct to require the member to undertake training. That decision will usually be published and it will be open to the authority to publish what happens as a result of the requirement.

## Conclusion

44. I therefore quash the Decision on the ground that, in so far as it applied the October Policy and added additional sanctions over and above those recommended by East Devon, Honiton acted unlawfully. The decision of East Devon both as to breach and the sanctions it recommended was lawful.