From enforcer to enabler: how regulatory sandboxes and adaptive approaches support the move from compliance to collaboration in health and social care

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Newer approaches to regulation are sometimes characterised as being responsive: varying according to context and capable of being described on a pyramid of sanctions and supports. Such thinking has played a notable role in modernising approaches to regulation, and scrutiny more broadly, but requires further modernisation to take account of the continued move towards more collaborative scrutiny and improvement interventions.

Regulators who adopt a strategic posture of compliance over more flexible approaches risk stifling innovation and may prevent opportunities that would be beneficial to citizen, regulator and the regulated. This paper describes a shift towards collaborative regulation, showing how a regulator can move from being an enforcer of rules to an enabler of quality and improvement. Regulatory sandboxes, where people who experience care and their carers, services, and the workforce can operate in ways that would otherwise not be permitted under legislation, can play a part in improving outcomes for people using regulated services.

For some time, there has been broad inquiry about the extent to which a regulator can, or should, require services to be delivered in accordance with established rules. Braithwaite (2011) describes a responsive approach to regulation, where sanctions and support can be applied. This has undoubtedly influenced a general modernisation across many regulators, but more recent thinking suggests that even more radical approaches may bring benefits to citizens. Armstrong and Rae (2017) propose a working model for regulators comprising advisory, adaptive and anticipatory approaches to regulation which, respectively, help new services adhere to existing rules, adapt rules to reflect new services, and iteratively develop new types of services and regulation together. This offers an intriguing conceptual framework for regulators, and the publics they serve, to innovate together.

The context

In 2001, a statutory regime for the regulation of care in Scotland was established, with separate regulators for care services and the social services workforce. The prevailing approach was compliance-based, with regulators operating to set national standards and codes, exercising a wide range of enforcement powers.

A decade later, legislation established new scrutiny and improvement bodies with sharper remits which, in the case of the Care Inspectorate, included the statutory responsibility to support improvement in care quality, operating across social care, social work, children's services, early learning and childcare, and community justice. This reflected a general shift towards the outcomes-focused delivery of public services, and a new

statutory code of practice for Scottish regulators which emphasises proportionality and context-based regulation.

In 2016, new joint governance and delivery arrangements were established between health and social care and, a year later, a new set of outcome-focused, person-led care standards were agreed. These describe what people should experience from care based on their rights, needs and choices rather than what professionals think they should deliver. These care and health standards support an approach to regulation which places emphasis on assessing experiences of people rather than compliance with set processes.

Collaborative and rights-based approaches to care that both promote and support people's experiences, and the focus on outcomes for people, demand a more mature scrutiny and improvement focus. This has driven the Care Inspectorate to re-evaluate its role in the sectors it works in, seeking to be part of a collaborative drive to raise quality rather than an external commentator on it. While others must judge success, efforts have focused on moving from being a compliance-based regulator which enforces rules through inspection and regulation to a scrutiny and improvement body that inherently links collaborative approaches to inspection and improvement to enable quality and person-led, outcomes-focused care in a changing world. This has profoundly affected regulatory practice.

From compliance…

Compliance-based approaches may bring benefits to people using regulated activities, albeit with limitations. To be functional, the things to be complied with must be continually updated and relevant. In sectors which evolve fast, a number of criticisms emerge. Compliance-based approaches force an orthodoxy which may not keep pace with evidence and emergent practice, and may consequently risk perpetuating false assumptions about what good is. Measurement and inspection may be against a minimum acceptable standard, rather than driving collective aspiration to enhance excellence. Where change does happen, change may be directed at satisfying the regulator, rather than embedding local ownership for improvement. Without doubt, more enlightened descriptions of responsive regulation since Ayres and Braithwaite (1995) have helped to ameliorate these criticisms, but only go so far.

Within a health and social care context, compliance-based regulation has generally been directed at ensuring that professionals deliver services in a manner prescribed by the regulator. At a time when professional practice

increasingly places people's rights, needs and choices at the heart of service provision, the limitations of this approach are severely exposed.

…towards collaboration

Collaborative approaches in health and social care focus scrutiny on people's experiences and outcomes, with inspectors trying to answer the questions 'how well is this care meeting people's needs, rights and choices' and 'what impact is this care having on people?'. In other words, inspectors primarily assess quality by examining the impact of the intervention rather than the intervention itself. Care leaders and practitioners are freed to innovate and provide person-led care, and encouraged to self-evaluate on their own performance. Inspectors, in exercising independent scrutiny, provide public assurance that care is having a positive impact on the quality of life of people living in our communities. It can also help shape and evaluate the impact of national policy. Formal regulatory action to change processes may be required in a small minority of cases but is never the first step.

Case study

In care homes for older people, the traditional measure of quality in previous care standards, in respect of someone's room, was the size. Newer approaches establish that quality is assessed through the lens of the resident's personal experience: the regulator moves from checking that a room meets the minimum required size to assessing the extent to which the care home is providing a room that meets someone's need. Professional decision-making is supported by guidance from the regulator.

This means that regulatory guidance sets out the inputs that are likely to lead to positive outcomes; service providers have the responsibility to use that guidance in the decision-making; robust scrutiny assesses the extent to which outcomes are positive as a result based on the needs, rights and dependencies of the individual.

These approaches require whole-organisation mindshift, with empowered staff, new skill sets, and a willingness to treat guidance on highly effective practice as operating guidelines to be taken into account rather than laws to be complied with. Such willingness to think differently should not be interpreted as a free-for-all; to be effective, it requires a structured approach.

The need for this shift to collaborative models of working is particularly necessary at a time of sectoral change. As new models of health and social care are required to meet growing demand and new landscapes of public service delivery, the need for a regulator to actively involve itself in new ways of working becomes urgent. The regulator must move from enforcing rules to enabling innovation and improvement.

The regulatory sandbox

Health and social care scrutiny and improvement has much to learn from innovations in financial service regulation, where the UK's Financial Conduct Authority has pioneered the approach of regulatory sandboxes. These are safe spaces where normal regulatory requirements are waived to support innovation which has the potential for public benefit. This allows the regulator, services, and the workforce delivering them, to test new ideas and develop their own evidence base for change.

In the context of a regulatory sandbox in health and social care, the focus on collaboration helps the person experiencing care, the person providing care, the commissioner, and the scrutiny and improvement body work together to understand and determine what good looks like and design and lever innovation without the prescription of legislation (or perhaps in anticipation of it).

Regulatory sandboxes, in an environment where external scrutiny is applied, can provide important intelligence about service redesign, showing what works and what doesn't work.

In the Scottish health and social care sector, the Care Inspectorate has pioneered the approach in a number of ways. This has required a leadership willingness to work with health and social care providers in more collaborative and trusting ways than hitherto. Sandboxes have been initiated by the Care Inspectorate and also been agreed to by the Care Inspectorate at the request of the sector. Here we describe two sandboxes which are aimed at (a) supporting innovation at the request of a national care and support provider and (b) improving experiences for people where care home providers wish to test new approaches and meet certain conditions.

Case study
A regulatory sandbox to support innovation

The Care Inspectorate has worked with a large social care provider to support the remodelling of its entire provision. This involves moving from providing traditional services, to implementing a Buurtzorg-inspired approach with self-managing teams providing person-led care to people. This challenged traditional notions of regulated care services and the relationship between the social care workforce and frontline managers, but has design principles which align strongly to the collective leadership essential in person-led and high-quality care. By facilitating innovation, and being able to provide appropriate scrutiny of service quality during service redesign, the regulator plays an enabling role to support an organisation on a change journey which it believes will improve the quality of care and support it provides.

Case study
A regulatory sandbox to improve experiences for people

Care homes for older people which provide nursing care are traditionally registered with conditions specifying the number of nurses which must be on duty on any one shift. At a time of changing needs of individuals and recruitment challenge, a number of care homes sought regulatory agreement to alter the skills mix required at any given time. This would reduce reliance on agency staffing, knowing that over-reliance on agency staffing can impact negatively on the experiences of residents. The Care Inspectorate opened a regulatory sandbox for care homes interested in this model. Using a set of published criteria and taking into account risk factors, the Care Inspectorate considered requests from highly performing care homes who proposed to alter their skills mix. Most of the requests sought to provide an enhanced senior carer role, which would replace a nurse on at least one shift. Generally, the nurses would retain clinical leadership of overseeing people's needs and assessment, including planning, monitoring, and evaluation of the nursing needs of residents. The senior carer would have responsibility for the supervision of a team of carers and would undertake some tasks that would have been completed by the nurse, such as medicine administration, skin care, and checking blood sugar levels.

Nurses play a vital leadership role in care homes, but over a period of two years the Care Inspectorate carefully considered applications from 88 care homes to alter their skill mix. Of these, 69 progressed and in many cases more sustainable staffing mixes were introduced, often with the support of local health and care commissioners, ensuring nurses were empowered to play a clinical leadership role. Where the proposals were unlikely to lead to positive outcomes for residents, they were not agreed to. All the care homes involved continued to be inspected robustly, to ensure that the new approach did not compromise on the quality of care for residents.

Enabling better care for people

Not all examples of the journey from compliance to collaboration can be properly described as a regulatory sandbox. In many cases, regulators need to make choices about how to implement traditional regulatory requirements. This involves nuanced decision-making about when to enforce traditional regulatory requirements and when to enable change, often taking into account contextual factors. The determining consideration for any regulator should be the interest of the public in whose name the regulator acts; in health and social care this is widely understood to involve an assessment of what the right thing to do is for specific groups of people experiencing care.

Here we describe two regulatory responses: to support emerging national policy which would otherwise conflict with regulatory approaches, and to support a local authority's response to a humanitarian crisis.

Case study
A regulatory response to support emerging national policy

The risk of compliance-based approaches to regulation is that national policy changes faster than the regulations themselves. In 2015, the care leaving age in Scotland was raised to 21 – a powerful move to support young people in care. In regulatory terms, the effect is that foster care services had to cease supporting these young people at the age of 16; organisations wishing to support the same young person after their sixteenth birthday would have had to register a new adult support service, and pay additional fees. The Care Inspectorate agreed to work flexibly with foster services to prevent the need for this happening; the right approach was to put the young person first and not require additional regulatory burdens in order to comply with regulations which had not kept pace with changing policy.

A similar, but different response was put in place for residential care services supporting these young people. In that case, the Care Inspectorate worked closely with the workforce regulator (the Scottish Social Services Council) to allow young people to continue living in their homes and be supported by the same social service workers they already knew. A joint and adaptive approach allowed new policies to be developed without the need for legislative change. Most importantly, it enabled young people to experience consistency in the workforce providing their care leading to better outcomes and experiences and ensured that the national policy Getting It Right For Every Child (GIRFEC) was firmly embedded and evidenced in all care planning and delivery.

Case study
A regulatory response to a humanitarian crisis

The scale of the humanitarian crisis in Syria and other conflict zones, and related migration, has posed challenges for social services in many European countries. As part of the Dubs amendment to UK immigration legislation, a large local authority in Scotland agreed to welcome 19 unaccompanied girls and young women living in refugee camps in Calais. The housing and support arrangements put in place by the local authority would, on a strict interpretation of the rules, have required the local authority to provide care home accommodation for these children and young people. No such accommodation was available and the prospect of it being built timeously was low. Applying the rule in this way would have either jeopardised the young people's ability to receive refuge in the UK, or may have resulted in dispersing a group of vulnerable young people with significant language barriers and complex needs across many care homes. Instead, the Care Inspectorate agreed with the local authority to use a block of six flats which were available for immediate use and register them in a different way. Care workers with professional experience of children's residential accommodation were on hand to provide care and support. The

result is that highly vulnerable young people were accommodated in safe housing in a safe country, and supported to stay together and attend the same school. In this case, the willingness of the regulator to act innovatively, and work collaboratively with a local authority in response to great humanitarian crisis, was the right thing to do for very vulnerable young people.
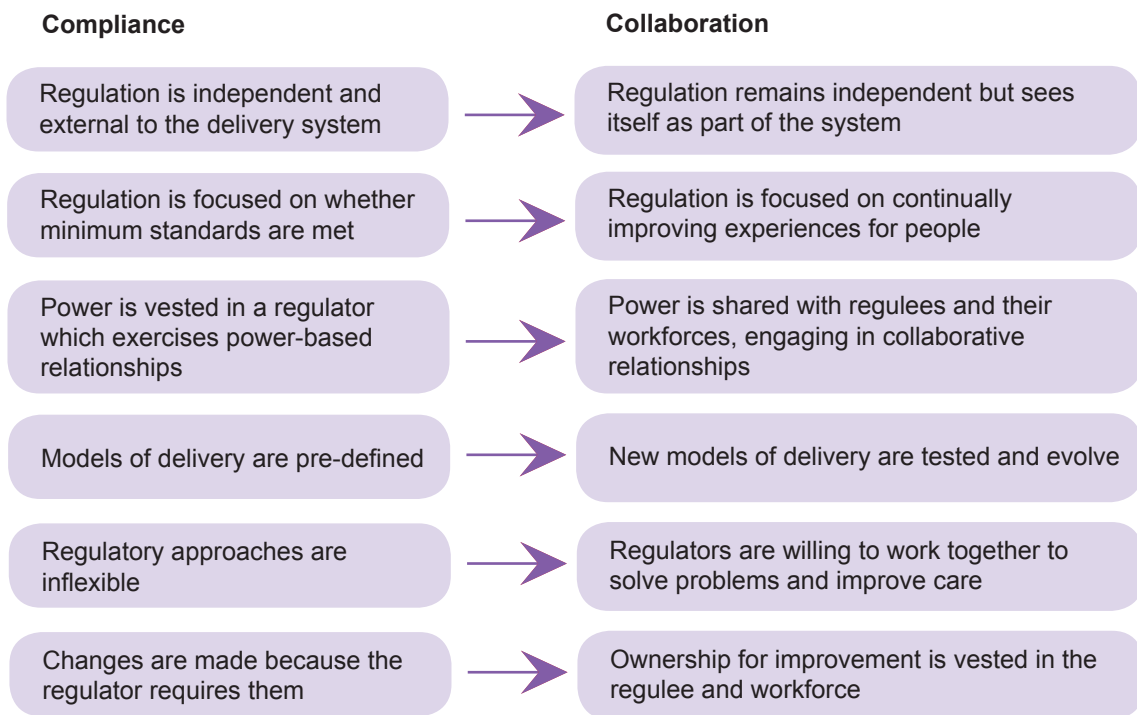
A model for supporting a new approach

The approaches taken by the Care Inspectorate have evolved through strategic visioning and leadership as well as in response to collaboration and engagement initiated by the health and social care sector itself. It would be disingenuous to suggest that in every case of regulatory flexibility has arisen at the behest of the regulator. More often than not, the flexibility, sandboxing and enabling approach has arisen at the request of the sector itself. This is mark of an innovative sector, eager to develop new models of care and understandably anxious for both sector and professional regulators to support that.

The risk of presenting a model for moving from compliance to collaboration is that it retrofits a conceptual design to a regulator-regulee relationship which has evolved from an understanding that there is a shared imperative: the desire

to improve people's experiences and outcomes. That said, some characteristics of this change can be described in this model, where these arrows represent a continuum, not a binary state. It is emphatically not the case that the Care Inspectorate has moved from being wholly on the left to wholly on the right of this diagram: like every organisation engaged in change, it is on a journey between two poles.

For regulators used to working in more traditional ways, this approach may represent a profound change are require a change journey commensurate with it. Staff and stakeholders need time to adjust to new ways of working, support to build capacity and, crucially, be involved in deciding and developing how approaches are to change to meet a different strategic vision.

Compliance	Collaboration
Regulation is independent and external to the delivery system	Regulation remains independent but sees itself as part of the system
Regulation is focused on whether minimum standards are met	Regulation is focused on continually improving experiences for people
Power is vested in a regulator which exercises power-based relationships	Power is shared with regulees and their workforces, engaging in collaborative relationships
Models of delivery are pre-defined	New models of delivery are tested and evolve
Regulatory approaches are inflexible	Regulators are willing to work together to solve problems and improve care
Changes are made because the regulator requires them	Ownership for improvement is vested in the regulee and workforce

Conclusion

Those who suggest such collaborative approaches to scrutiny and improvement reduce the responsibilities of the regulator perhaps misunderstand the many ways in which responsibility can be exercised.

Nothing about collaborative approaches to regulation prevents regulatory action being taken to protect people from harm or if all other means are exhausted, direct improvement. The ability of the regulator to act independently and robustly is not removed; rather there is a recognition that by working collaboratively with people experiencing care and their carers, local authorities, NHS and service providers can together support better experiences and outcomes and an improved quality of life. It also contributes to improving the quality of the workforce; sharing good practice; supporting innovation; and can contribute to sustainable economic development within the care sector market.

The approaches described here largely draw on the experience of regulation in social care and social work, including integrated health and social care, but their applicability across service and workforce regulators in other sectors is highly likely. Just as public sector delivery is changing, so too is regulation. Spending on public regulation is resource not spent on service delivery, so the regulator's ability to add public value must be clear, effective and transparent. The assessment of whether public value is added should made be on the extent to which regulators enable quality and act as a catalyst for improvement and innovation to improve people's lives, rather than enforce rules.

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