

# **REFGOV**

***Reflexive Governance in the Public Interest***

## ***Services of General Interest***

Institutional Proposals – Energy

by  
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# Institutional Proposals – Energy Group

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## ***Introduction***

This report builds on the reports of experience in reflexive governance in the energy sector in the UK, Germany, Hungary and Canada; the national reports are available separately on the REFGOV website.<sup>1</sup> Here we shall complement them by drawing out some principles on which institution reform can be based together with some more specific proposals for reform. By proceeding in this way we hope that it will be possible to reflect the extremely varied national experiences and draw lessons from them which can be applied more generally to the development of arrangements for reflexive governance.

## ***General Principles for Institutional Design***

Clearly, even in the areas examined in this report, there is a wide range of different institutional forms and contexts. This makes it helpful to begin not with specific institutional proposals but with a set of principles relevant to institutional design. These can then be applied to institution building in different contexts and adapted to differing needs. The main principles are as follows.

- a) **The decision making level is central to effective institutional design.** In one sense this is a familiar point from studies of multi-level governance, and appears strongly in the Canadian experience in energy regulation and the different experiences of healthcare in the various nations of the UK. These concern the distribution between different geographical entities within a single state; the UK energy study has also pointed to the need to distinguish national and local issues. In particular, clarity as to the procedures for participation in national policy on the one hand and local sub-policies and implementation on the other, is of the greatest importance. The basic philosophy for participation and social learning may not appear to differ between the levels; and in one sense the distinction may seem unhelpful as a truism of policy studies is that policy and its implementation cannot be separated. Yet in this context it is essential that procedures are adopted which are sensitive to the level of decision in question; and in particular that decisions at one level do not pre-empt those at others, making any form of participation in the latter meaningless. In the past in the UK, local participatory input has been possible through the inquiry (or now examination) into the local development framework. By contrast, national policy has been subject to Parliamentary accountability, but it has been possible for matters included in it to be re-opened at the local level. Reforms in the Planning Act 2008 described in the UK national report involving the publication of national policy statements by the national government can be seen positively as a recognition of the distinction between national policy and local implementation; however, the predominant role of the national policy statements and resulting fears that the national policy will pre-empt later stages of participation have led to a crucial lack of trust in the procedures. This brings us to our next general principle.
- b) **Establishing trust is crucial.** The role of trust and its relationship with the effective working of markets and good institutional design is a central theme which has emerged from the reports in this study. It is particularly important when there is a move to a more

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<sup>1</sup> <http://refgov.cpdr.ucl.ac.be/>

experimentalist form of participation, for which by definition ground-rules are weaker than in the economic institutionalist and collaborative or relational approaches. The absence of trust, particularly where decisions appear pre-empted, has been the major problem in the UK experience related here. As in the *Greenpeace* case discussed in the UK report,<sup>2</sup> absence of trust is likely to make recourse to the courts the more likely, yet this compounds the problems because adversarial litigation is itself a low-trust form of monitoring of government. Problems of trust exist both at a national and local level, and are seriously exacerbated by confusions between each level of decision-making. This in turn has two further implications.

- c) **Timing of participatory arrangements is of great importance.** This may appear obvious but the UK experience suggests that it is not. Both the late use of participative procedures, after decisions have been assumed to have been finalised, and the rushing through of proposals with only limited time for participatory arrangements have contributed substantially to the absence of trust. Yet the position is not as simple as this. There may be important reasons for avoiding delays in the taking of major decisions, especially in the context of energy supply where problems have to be anticipated many years in advance. Moreover, formal means of participation through lengthy public inquiries may both exhaust the resources of campaigning groups and delay needed developments. The requirement is for procedures which are both flexible and well-planned to make any forms of participation effective.
- d) **Monitoring and bench-marking are essential.** One theme throughout our discussion has been that there have been only very limited arrangements for the monitoring of the effectiveness of participatory arrangement and for bench-marking them to establish best practice. Where there has been such monitoring, it has largely been undertaken by bodies which have a vested interest in the outcome of proceedings, including government itself. In the absence of such monitoring recourse is likely to be had increasingly to the courts, but their role is inevitably sporadic and increases the problems associated with a low-trust environment. The lack of monitoring of effective participation is in marked contrast to the now highly developed procedures to monitor policy-making to achieve 'better regulation' on grounds of economic efficiency.<sup>3</sup> Yet more effective forms of independent monitoring are essential to develop both reflexivity (through learning from experience) and trust. This is a theme which emerges particularly strongly from the German report which focuses on the capacity of the regulator in developing new modes of social learning through, amongst other things, monitoring duties in the form of 'a systematic, reflexive, periodical or permanent view on and analysis of the actual state and the changes of complex alterable systems by an agency, which is not mandatorily linked with some further legal consequences.' These are associated with more specific duties of evaluation of experience in energy markets and the experience of regulation itself.
- e) **Transparency is a precondition both for effective participation and for establishing trust.** This point is made strongly in the Canadian report, where it formed a major challenge as expertise is highly concentrated in hands of major sector incumbents. This is made even more challenging where these entities are formally transformed into private companies, raising issues of the protection of commercially sensitive information. The point is also central to other national experience; lack of transparency has been a serious contributor to the problems of lack of trust referred to above, particularly at the level of central policy-making, and in the German failure of attempts to arrange network access through a system of corporatist self-regulation.

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<sup>2</sup> *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin).

<sup>3</sup> See eg S. Weatherill, *Better Regulation* (Hart Publishing, 2007).

- f) **Stakeholder access and empowerment is of fundamental importance.** This emerges clearly once more from the German experience, where important interests such as household consumers and consumer representatives were excluded from the initial model of self-regulation through industry associations; this exclusion was an important reason for its failure. Similar experience can be found in Canada, where in the three provinces decision-making was often restricted to government and industry elites. Capacitation of actors to engage in formal processes involves not just the granting of formal rights but review and possibly veto powers for stakeholders. The ideal is to require their participation in policy development before policy proposals are allowed to progress through formal approval steps, thereby transforming groups from policy takers to co-policy makers. This involves allocating to them resources for capacity building.
- g) **Creation of a deliberative infrastructure.** This requires the building of institutional venues for joint deliberation on policy options. Once participatory rights and procedures are established it is crucial to provide the necessary institutional platform where actors can meet and deliberate. This is a major lesson from the Canadian experience; it is also apparent from the UK, where the planning inquiry has provided such a forum in the past. The new arrangements under the Planning Act 2008 replace this with a new Infrastructure Planning Commission which has important duties to secure participation, but will not have the same degree of testing of proposals through detailed cross-examination, and is subject to serious problems of lack of trust. The absence of such an infrastructure and of civil organisations for consumer protection is a major absence from the Hungarian experience.

### ***Institutional Proposals***

Based on the general principles referred to above and on detailed analysis of national experience, the case studies make a number of more specific institutional proposals which are capable of general adoption.

The UK study makes four proposals. These particularly reflect the problems of lack of reflexivity in relation to land-use planning decisions on major projects such as power stations; currently particularly important due to the Government's decision to permit the development of a new generation of nuclear stations to avoid problems of security of supply.

- a) **A clear hierarchy of decision-making with policy-determination at the top.** Perhaps the most important defect of the past UK arrangements related to the hierarchy of decision-making in relation to strategic level projects with a confused allocation of responsibility for policy-making and its implementation. The assumption was that policy was for the minister, but, in the absence of any institutional means for accountability apart from Parliamentary responsibility, discussions of policy re-emerged at a lower level in local inquiries into particular projects. This is what the new arrangements seek to prevent happening. What is important is to provide additional mechanisms for accountability and scrutiny at the policy level. These require two things; that national policy actually be made in public, and that there be arrangements for effective participation in its making, arrangements which extend beyond a bare requirement to consult. In this respect the proposed system of national policy statements appears to be an important step forward (although Government has for some time consulted on the preparation of planning policy statements without the same legislative weight in individual decision making). The arrangements for making the statements are, however, severely hampered by the lack of trust engendered by past problems and by uncertainty about how effective the new participatory arrangements at this level will be in practice.

At the next level, that of the decision on major infrastructure projects as a matter of principle, we would agree that there is a strong case for decision-making to be by an independent body, so long as it acts on the basis of previously agreed national policy statements, and so long as it is open and participative in its procedures. The latter will involve decisions made as to the degree to which an inquisitorial model is adopted with control of questioning for the panel, or a more traditional public inquiry approach with scope for cross-examination by participants. It is acceptable that time-limits are set for the process.

The final level, that of local implementation, is where there is scope for greater experimentation; here the example of UK waste-management may provide some useful good practice, based around the principle of voluntarism, although this principle will not be of general application.<sup>4</sup> Although the distinction between local implementation and national policy will often be difficult to draw, it is acceptable in principle that issues of national policy are not re-opened at this stage, so long as there has been effective participation at the higher levels of the hierarchy.

Central to this identification of a hierarchy is that, whilst the philosophy underlying the development of reflexive institutions for social learning may be common to them all, there should be room for considerable differences in practice between the different levels, and that a considerable degree of experimentation should be permitted to develop optimum solutions. This, however, poses once more the problem of trust; if discretion in design is left to the public authorities, how can we avoid assumptions that this will be based simply on administrative self-interest? The need to tackle the problem of trust leads us to two further recommendations.

- b) **A Council for Participatory Governance.** A body independent of the administrative authorities organising participation should be set up with the specific task of monitoring the arrangements in practice for participation at each level and analysing their capacities for facilitating social learning. An important role of this body will be that of benchmarking and publicising examples of best practice. Similar bodies have existed to supervise some areas of administrative justice; example would be the (now defunct but probably to be revived) Administrative Conference of the United States and, in the UK, the Council on Tribunals and its successor, the Administrative Justice and Tribunals Council. The emphasis of the proposed body would be somewhat different, however; it would have the task of facilitating public participation in official decisions, reporting on the use of different institutional forms for such participation, and collecting and distributing examples of best practice. It would have something in common with the supervisory and monitoring role of the Care Quality Commission described in the healthcare case study. A possible name for the new institution would be the Council for Participatory Governance. It is essential that the Council be independent of the bodies actually undertaking the different types of participatory process described above. Its monitoring role might seem to represent an additional burden for hard-pressed local authorities and other decision-makers; however, by taking a more coherent approach to participation it could prevent much duplication of effort, and perhaps avoid the serious burden of legal challenges where such participation has proved inadequate.
- c) **Participation Impact Analysis.** As a further means of developing trust in the system, institutions taking major decisions would be required to undertake a form of participation impact analysis which would be signed off by the new Council before new forms of

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<sup>4</sup> Defra (2006). *Managing Radioactive Waste Safely – A Framework for Implementing Geological Disposal*. London: Department for Environment, Food and Rural Affairs.

participatory arrangement were put into place. A report to the Council would also be required after the process had been completed. We already have, both in the UK and EU, a commitment to the use of regulatory impact assessments (RIAs) as part of the process of reducing administrative burdens. We are also seeing the beginnings of systematic monitoring of public bodies to ensure compliance with human rights obligations as part of the work of the new Equality and Human Rights Commission. The requirements of participation impact analysis would provide a further means of monitoring to ensure that participatory requirements are not ignored, and would be a major source of information for the Council in development models of good practice.

- d) **Assisting Groups in Civil Society.** A further task of the proposed Council would be to assist in the organisation of groups within civil society to enable them to undertake more effective participation in administrative decisions. It would take over some responsibilities of existing bodies, for example that of the Planning Advisory Service for local authorities and Planning Aid for members of the public in relation to facilitating participation; it would also have a general remit of providing advice and support for groups otherwise unlikely to be properly represented in decision-making at both local and national levels. This would have to be conducted with some sensitivity, given the importance of autonomy for such groups and fears of state interference in them. However, so long as the proposed Council was properly independent of government bodies responsible for substantive policy-making and implementation, it could nevertheless fulfil a vital role here in developing participative capacities. On this question, the UK can build on its experience of developing independent bodies for consumer representation such as Energywatch and the National Consumer Council.

The German study focuses on the capacities of the regulator in developing new modes of social learning. Thus to achieve a more reflexive form of regulation it emphasises several elements which can 'form a bundle of (continuous) comprehensive self- and external monitoring systems and provide for an effective search for alternative options of decisions and decision-making'. All have roots in the existing regulatory arrangements. They are:

- a) **Monitoring duties** in the form of 'a systematic, reflexive, periodical or permanent view on and analysis of the actual state and the changes of complex alterable systems by an agency, which is not mandatorily linked with some further legal consequences:
- b) **Evaluation duties** and the issue of periodic reports:
- c) **Coordinating committees:**
- d) **Hearings:**
- e) **Consultation and facilitation**, involving a dialogue with market actors on crucial questions of regulation, followed by a process of 'moderation' to 'facilitate the private actors' agreement and provide for a broad frame relating to the public interest goals and the organization of the process' [47-8]:
- f) **Participation of domestic consumer associations:**
- g) **Integration of experts' knowledge.**

These will be associated with further redesign of governance structures and increasing the flexibility of regulatory decisions; despite some constitutional problems in Germany, this is associated with developing agency rule-making powers. In this respect UK experience is helpful given that the energy regulator, the Office of Gas and Electricity Markets (Ofgem)



already adopts these techniques and is characterised by a considerable degree of transparency. Lessons may also be drawn from UK regulatory bodies in other areas which hold open meetings, publish advice to government and organise permanent monitoring of consumer involvement; the most advanced such body in the UK is the Food Standards Agency.

The German findings are also particularly relevant for Hungary, although the development both of competition and of arrangements for social learning is much more limited there; key requirements are both for an independent regulatory body and support for civil society representation in what are currently closed and highly politicised bargaining processes.

Finally, the Canadian study makes two proposals for institutional reform:

- a) **The transfer of meaningful policy making power to a community-based oversight agency.** This would include representatives from various stakeholder groups; the powers of the agency would vary from province to province, but might include policy making. In all cases, it will be vital to include requirements for the minister to adopt, or respond meaningfully to, agency recommendations.
- b) **Support for reflexive processes in renewable energy generation.** This would involve support by provincial governments for sustainable energy generation initiatives owned, developed and controlled by community residents and other stakeholder groups; a considerable degree of independence from incumbent authorities, and the creation of alternative producers of sector output who could become credible partners for 'old producers'. The result would be that 'trickle down effects' could influence the traditional energy sector, especially if arrangements are established for monitoring, documenting and disseminating information about successes in the renewable energy sector.