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Better or Meta in Regulatory Reform?

by Ciara Brown and Colin Scott

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Better or Meta in Regulatory Reform?¹

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As a slogan 'Better Regulation' invites neither contradiction nor even debate. Who would promote 'Worse Regulation?' (Weatherill 2007)

1. Introduction

Regulation has been a boom area of public policy over the last forty years in most member states of the OECD. Regulation uses governmental authority, as an alternative to the resource intensive policies of the welfare state, to steer social and economic behaviour (Majone 1994). Though attractive as a policy instrument a perceived proliferation of regulatory rules was targeted, initially in the United States and the UK by reform processes going under the rubric of deregulation. As neo-liberal critiques of state intervention have diminished so regulatory reform processes have recognised the legitimacy of state interventions and progressively been reoriented towards better regulation, encouraged by the deliberations of the OECD, and mirrored in practices developed by the EU over its own legislative processes.

Better regulation policies have been concerned not simply to exert downward pressure on the proliferation of regulatory rules, but also to underpin a quest for more targeted and appropriate instruments for achieving objectives within regulatory domains. The implementation of these policies has, however, not proved straightforward. The emergence of a policy consensus around the desirability of implementing policies of better regulation tends to obscure an important tension between contrasting approaches to regulation which exists within better regulation strategies. These contrasting approaches reflect a broader and fundamental debate about how different institutional forces shape governance regimes, and in particular the tensions between demands for greater scientization and more deliberative democracy (Djelic and Andersson 2006: 382-383). One perspective on regulation and reform gives primary emphasis to oversight by

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reference to rules as both the mode of regulation and the object of regulatory reform. We label this mega-regulation. An alternative perspective emphasises the limits to command and control and places primary emphasis on the potential for steering self-regulatory or self-organisational capacity amongst those who are regulated. An emergent literature refers to this approach as meta-regulation (Parker 2002; Parker and Braithwaite 2003).²

Real world positions on, and practices of, regulation and regulatory reform may be characterised as falling somewhere in between mega- and meta-regulatory approaches. What both these perspectives have in common is a commitment to greater effectiveness and efficiency in regulation. They differ from each other in the roles they assign to public and private actors. Mega-regulatory approaches assign to government and its agencies the setting and enforcement of regulatory rules, with or without a degree of consultation with those affected. Technical expertise and a degree of insulation from politics is highlighted as virtue of regulatory regimes. Meta-regulatory approaches give a greater role to non-state actors, whether associations or individual organisations, to devise and implement regulatory norms, and sometimes also to define objectives. The state role within such regimes is to stimulate such processes and require reporting on the degree to which their self-regulatory activity is successful (Parker 2002: 245-6).

Learning is assigned very different roles within the two positions. For mega-regulation learning is about finding the information necessary to make technically correct decisions about the nature and intensity of regulation – first order learning. For meta-regulation learning has the potential to be deeper and to engage participants in learning not only about the nature of problems faced within their domain, but also about their own preferences with the possibility of second order changes (to the instruments) and third order changes (to the objectives of the regime) (Hall 1993: 279). The position of metaregulation on democratic governance follows from the concern with openness to learning. Braithwaite is closely associated with a republican theory of justice which prioritises participatory decision making processes and non-domination (Pettit and Braithwaite 1992). Such a theory necessarily engages with not only public power, conventionally defined, but also the power of non-state actors within regulatory settings. In the same vein Parker's theory of metaregulation prioritises a form of democracy which engages stakeholders within corporate decision making processes, overseen by public authorities (Parker 2002: 210ff). Other governance theories give greater emphasis again to the potential for actors within a regime to engage in democratic fashion around its appropriate objectives and solutions (Lenoble and Maesschalck 2010).

Tensions between mega- and meta-regulatory perspectives are reflected in the *processes* of better regulation in frustrations from various quarters that the dominant mode, impact assessment of proposed regulatory rules, has not been better adapted to more fully considering alternatives to rule-based regulation. Arguably the limitations to processes of impact assessment are inevitable given the technical nature of a process managed entirely by governmental policy makers working to a political agenda to demonstrate appropriate controls over regulatory creep. It is widely acknowledged that, of the range of different aspects of better regulation policies, the development of regulatory impact analysis (RIA) protocols and their application to new and existing regulatory rules has received more emphasis than other approaches to regulatory

² The term meta-regulation has also been used to refer to the process of overseeing public regulation: (Morgan 2003; Radaelli 2007: 195-6).

reform identified as desirable in supranational and governmental policy statements. The implementation of better regulation policies has focused principally not only on one of the available forms of regulatory reform, but also a single mode of regulation based on the promulgation by legislative bodies of rules and their monitoring and enforcement by public agencies. This tendency reflects a mega-regulatory view of the world.

The alternative meta-regulatory process of regulatory reform engages the variety of actors, governmental and non-state in learning about the steering of conduct within the regime. Reviewing the empirical data from a variety of corporate governance regimes Parker notes that the best regimes are characterised by the creation of 'civic spaces' within corporate governance arrangements, such that employees and other stakeholders may engage with the objectives and implementation of self-regulatory processes (Parker 2002:211). We follow up on Parker's ambitious agenda for introducing a degree of democratisation to corporate governance to suggest that stakeholder engagement in decision making of the operation of self-regulatory regimes offers a means not only to enhance the legitimacy of regulatory governance, but also to improve the understanding of, and commitment, regimes. We support the argument with discussion of processes of regulatory change, not always directly linked to better regulation programmes, which are suggestive of a more reflexive approach to governance.

2. From Deregulation to Better Regulation

If there is a distinction between policies of deregulation and better regulation it must lie in a concern to move beyond simply requiring justification of regulatory rules by reference to costs and benefits and to understand better the nature of the policy problem being addressed and the range of possible solutions available to address it. This insight is strongly reflected in better regulation policies.

Most programmes of better regulation give a high degree of emphasis to regulatory impact analysis, and an implicit preference for rules and hierarchical control. The term preference here should be interpreted to reflect the insight that, whilst many and perhaps most policy makers involved in such processes are likely to be aware of alternatives, there appear to be cognitive limitations which restrict the scope of responses to this knowledge. This preference notwithstanding, many better regulation policies place some emphasis on deploying alternatives to rules-based regulation. Alternatives to hierarchical regulation include instruments based on control through community based and competition based processes. Such policies also emphasise processes of regulatory reform which engage stakeholder communities in dialogue. Most better regulation programmes involve a commitment to consultation, and it frequently forms part of the process of impact analysis. A central task of many of the national bodies charged with aspects of oversight of better regulation programmes has been to promote more systematic and effective consultations. However the linkage to regulatory impact analysis is liable to restrict the range of consultations, since their focus tends to be on proposed rules, rather than on the wider range of possible issues such as the nature of the problem being addressed and the potential role for alternatives to rule-based approaches.

The application of competition-based mechanisms to regulatory reform has been rather limited. Strategies based on competition would include taking the option to do nothing, and leave outcomes to market forces, in the face of a social or economic problem. More positive approaches include the generation of competition between regulators, either within a single jurisdiction or on an international basis. Ranking of regulators, though not pursued by national better regulation offices, is a key part of the European Commission Internal Market DG's approach to promoting timely and effective implementation of directives (through its Single Market Scoreboard). Rankings of national regulators appear periodically in respect both of competition policy (Global Competition Review) and telecommunications regulation (European Competitive Telecommunications Association (ECTA)), though these are sponsored by non-state bodies. Other mechanisms which require a degree of competition over scarce resources include the requirement of sunset clauses in new regulatory measures which require those arguing for their renewal to argue a case and to find the time necessary to achieve this outcome. The federal system of government in Australia invites a degree of competition between states in regulatory performance, and this is institutionalised in a private ranking published by the Business Council of Australia. In principle such rankings might inform business decisions as to which state might be the most favourable in which to establish a business.

National and supranational policies on better regulation show a strong understanding of the variety of instruments available to pursue regulatory objectives, and a commitment to acting on that insight. The OECD Guiding Principles for Regulatory Quality and Performance, for example, state in a section on assessing impacts and reviewing regulation, immediately after setting down the principle of regulatory review, that governments should:

[c]onsider alternatives to regulation where appropriate and possible, including self-regulation, that give greater scope to citizens and firms; when analysing such alternatives, consideration must take account of their costs, benefits, distributional effects, impact on competition and market openness, and administrative requirements. (OECD 2005: 4).

In the EU the Mandelkern Group on Better Regulation required the European Commission to draw up 'general guidelines on the use of alternatives to regulation for the pursuit of European policies'. (Mandelkern Group on Better Regulation 2001: v). The alternatives to new regulation identified by the Mandelkern Group included: doing nothing; incentives-based regulation; self-regulation; use of contracts for regulation; mechanisms to ensure assumption of responsibility (eg insurance); mutual recognition; improving existing regulation (eg implementation) (Mandelkern Group on Better Regulation 2001: 15-16). Two forms of co-regulation, involving government in working with self-regulation, were identified in the report. These involved first, the delegation of regulatory tasks to self-regulatory regimes and the second, the recognition or validation by government of rules originating in self-regulatory regimes (Mandelkern Group on Better Regulation 2001: 17). The Group also recognized the value of sunset and review clauses (Mandelkern Group on Better Regulation 2001: 17-18). The Group recommended that Regulatory Impact Analysis should focus on the nature of the problem to be addressed and options for addressing the problem, rather than on proposed rules (Mandelkern Group on Better Regulation 2001: 20). In other words, RIA should be conducted before a preference for new rules has crystallized to make it possible to deploy alternatives to rules where appropriate.

The EU institutions acted on the Mandelkern Report with an inter-institutional agreement on better law-making, published in 2003. The politics of EU lawmaking require the institutions to reaffirm a commitment both to the Community method and to democratic lawmaking. Accordingly the document locates the potential for alternative methods of regulation, including co-regulation and self-regulation, as applications of the principles of subsidiary and proportionality (European Parliament, European Council, and European Commission 2003: para 16), and restricts the deployment of such alternatives to matters not involving fundamental rights, those where ‘important political options are at stake’ and where uniformity is not required (European Parliament, European Council, and European Commission 2003: para 17). Critically the methods of impact analysis and consultative requirements set down in the Agreement, departing from Mandelkern, are to apply to legislative processes, rather than the broader processes of analysing a problem to see whether legislation or other responses are appropriate (European Parliament, European Council, and European Commission 2003: paras 25-29).

The impact assessment processes set out by the European Commission in 2002 was more in tune with the broader approach recommended by Mandelkern than the inter-institutional agreement would suggest. In particular the frequently revised guidelines require consideration of the definition of the problem, the policy objectives and the policy options, rather than a focus exclusively on the legislative process (European Commission 2009: 21-30). Policy options to be considered should include:

- o the ‘no policy change’ baseline scenario
- o ‘no EU action’ (e.g. discontinuing existing EU action)
- o where legislation already exists, improved implementation/ enforcement, perhaps with additional guidance
- o self- and co-regulation
- o international standards where these exist. (European Commission 2009: 29).

National better regulation policies similarly indicate a broad approach to the variety of available instruments. In the UK the first statement of Principles of Better Regulation (1998) included a requirement of proportionality - Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimized (Better Regulation Task Force 1998). The industry-led BRTF followed up on this principle with a number of studies of alternatives to rule-based regulation (Better Regulation Task Force 2000, 2005). Further steps have been taken by the British government to reduce dependence both on command and control regulation (Hampton 2005) and on criminal law in the enforcement of regulation (Macrory 2006) (Black 2007).

Australian government policies on regulatory reform have mirrored those of the UK. Guidelines issued in the mid-1990s, emphasised the need to for regulatory impact statements (RIS) to identify the problem to be addressed, the objectives of government action, and the possible

options in terms of regulatory instruments. (Office of Regulation Review 1999: B2-4). More recent guidance amplifies this approach and provides a checklist of alternative options:

In the past, much regulation tended to involve a prescriptive approach. However, governments around the world, including in Australia, are moving away from these approaches to more innovative methods of dealing with identified problems. These alternative methods can be less costly, more flexible, and therefore more effective than prescriptive regulation (Office of Best Practice Regulation 2007: 95).

The guidance offers a checklist of forms of regulation and alternative instruments:

Forms of regulation and alternatives

Forms of regulation

- self-regulation;
- quasi-regulation;
- co-regulation; and
- explicit government regulation (black letter law)

Alternative instruments

- no specific action;
- information and education campaigns (including labelling requirements or media campaigns);
- market-based instruments (including taxes, subsidies and user charges);
- tradeable property rights (marketable rights);
- pre-market assessment schemes (such as listing, certification and licensing);
- post-market exclusion measures (such as bans, recalls, licence revocation provisions and 'negative' licensing);
- codes of conduct or practice (including service charters);
- standards (including voluntary and regulatory standards); and
- other mechanisms, such as public information registers, mandatory audits and quality assurance schemes. (Office of Best Practice Regulation 2007: 95).

The development of a better regulation policy in Ireland was promoted by the OECD in its reports on regulation in Ireland (OECD 2001), and signalled in a White Paper published in 2004 (Department of the Taoiseach 2004). The main purpose of this document was to set out the six principles of better regulation: necessity, effectiveness, proportionality, transparency, accountability, and consistency. It is revealing that the primary definition of regulation offered in the White Paper is 'primary and secondary legislation', but is sometimes extended to include also the public authorities responsible for regimes such as telecommunications regulation (Department of the Taoiseach 2004: 6). In light of this narrow conception of regulation, the Government committed itself to implementing the proportionality principle through seeking to develop alternatives to regulation such as co-regulation, greater use of economic instruments and performance-based regulation (Department of the Taoiseach 2004: 21). The main instrument for implementing the policy was to be Regulatory Impact Analysis. RIA was to include

- ‘quantification of impacts;
- structured consultation with stakeholders;
- evaluation of alternatives to regulation and alternative types of regulation; and
- full consideration of downstream compliance and enforcement issues’ (Department of the Taoiseach 2004: 23).

At both supranational and national levels we find strong commitments to developing alternatives to rules-based regulation, creating a significant challenge of implementation.

3. The Limits of Institutionalised Impact Analysis

Notwithstanding the broad ambitions and instruments within better regulation policies, the practices of better regulation are dominated by processes of impact assessment, within which there is limited scope for either better understanding the nature of the policy problem or the range of options available for addressing it. The main mechanism for considering problems and alternative solutions is consultation but, when linked to regulatory impact assessment, consultations tend to be narrowly drawn around proposed rules, coming too late in the process for a more critical engagement. The predominance of regulatory impact analysis (RIA) within better regulation policies actually reflects a double preference for oversight since RIA applies chiefly to legislated rules (made under primary or secondary legislation) and tends to have limited application to other mechanisms for regulating. Thus, the priority given to RIA both limits the focus on alternative mechanisms of reform over oversight or command and control regulation and, simultaneously reduces the emphasis on alternative forms of regulation (Baldwin 2007: 32-38).

Within most better regulation regimes there is some form of institutionalised oversight within a government department or an independent agency. It is perhaps ironic that the oversight institutions have, within a number of countries, been amongst the chief critics identifying an excessive concentration on rule-based regulation and a failure to properly consider alternatives to such techniques. The European Commission’s Impact Assessment Board, established in 2006, for example, operates independently within the Commission, to scrutinise the impact assessment process at EU level. Its establishment was linked to political concerns to better control the Commission output of legislative proposals (Radaelli 2008). More generally it is suggested that a preference for proceduralization in impact assessment avoids some of the hard questions which would require addressing with a more substantive reform agenda (Meuwese and Radaelli 2010). The Board’s main power is to require resubmission of the impact analyses so as to address the Board’s concerns. In 2008 and 2009 this power was used in respect of about one third of all submissions made (Impact Assessment Board 2010: 6). The Board additionally feeds back its conclusions from reviews into revisions of the Commission’s Impact Assessment Guidelines (Impact Assessment Board 2010: 4). The Board’s own review of its activities suggests that it is seeking to move beyond promoting compliance with basic impact assessment principles, towards development of more substantive analytical concerns (Impact Assessment Board 2010: 7). One of the areas the Board highlights as requiring further analysis is compliance with principles of proportionality and subsidiarity (Impact Assessment Board 2010: 9), suggesting that there is insufficient justification of a preference for legislation in some impact assessments. This criticism echoes the findings of an

independent study of EU impact assessments which suggests that there is limited analysis of alternatives to rule making, though with some evidence of improvements over time in such matters as quantifying costs (though less frequently benefits) associated with alternative instruments (Cecot et al. 2008) .

In the UK analysis of regulatory reform processes has been taken on by a number of discrete units. A powerful central government unit for deregulation, located within the Cabinet Office, oversaw the initial compliance cost assessments (Froud, Boden, and Ogus 1998) and was re-branded in 1997 as the Better Regulation Unit. This unit, now known as the Better Regulation Executive, and relocated to the Department of Business, Innovation and Skills, has primary responsibility for leadership and oversight of regulatory impact statements. All government departments were required at an early stage to establish deregulation (subsequently better regulation) units to act as the link between the central policy and its departmental implementation. Officials in these units acknowledge that compliance with better regulation requirements within their own departments is patchy. We asked senior officials in two UK departments what was the impact of RIA procedures in changing policy outcomes and were told that no records were kept of such outcomes.

Centralised oversight of the better regulation programme in the UK has been accompanied other forms of scrutiny. A predominantly industry-based body, the Better Regulation Task Force, was established by the government in 1998 to offer a broader form of inquiry into regulatory practices, with a particular emphasis on enforcement. The BRTF championed the Enforcement Concordat was a soft law instrument published by the Cabinet Office in 1998 aimed at fostering a more responsive and targeted approach to regulatory enforcement. The BRTF was rebranded the Better Regulation Commission in 2006 and replaced by the Risk and Regulation Advisory Council in 2008. An unexpected source of critique has been the central government audit body, the National Audit Office (Humpherson 2007). It was, for example, a 2004 National Audit Office report that revealed that a majority of RIAs considered no options for regulatory approaches other than that preferred by the Department putting forward the measure (Baldwin 2007: 41). A subsequent NAO report suggested that a cultural change in the practices of departments would be required to make RIA's more effective in managing the decision making process in such a way as to implement effectively the government policy on better regulation (Baldwin 2007: 43.) (Humpherson 2007:142).

As with the UK, initiatives at federal and state level in Australia to engage in 'regulatory review' originated in the mid-1980s. Regulatory impact statements (RIS) became a prime focus of the policy at federal level and was applied also to states and territories in respect both of current and new legislation under the National Competition Policy launched in 1995. A major review of federal regulatory review policies was published in 2006 and concluded that more needed to be done to reduce burdens, to oversee the implementation of regulatory review rules, to act on effective alternatives to traditional regulation, and to engage stakeholders better in regulatory policymaking (Regulation Taskforce 2006). A central feature of the Australian federal regime was the incorporation of the Office of Regulatory Review within an independent agency, the Productivity Commission, with a wider remit to engage in research, policy advice and policy implementation. Under the Rudd government the RIS oversight function has been re-branded as the Office of Best Practice Regulation and moved to within a ministerial portfolio in the Department of Finance and Deregulation. The scrutiny of regulatory regimes, and wider review and advocacy of reform remains –separately – with the Productivity Commission. Similarly at the state level, Victoria assigns the main

responsibility for oversight of the various requirements on regulators (regulatory impact assessment, business impact assessment and application of a standard cost model) to an independent agency, the Victorian Competition and Efficiency Commission (VCEC). The VCEC uses its oversight position to evaluate the impact of public consultations, indicating that between 2004 and 2006 more than 50 per cent of regulatory proposals for which a regulatory impact statement (RIS) was prepared were revised in light of public comments. The Productivity Commission and the VCEC are distinctive features for oversight of the Australian regimes involving greater capacity for systematic evaluation of regulation in Australia and Victoria, independently of ministerial priorities. VCEC combines the broad scrutiny role with the oversight of RISs. The Australian regime builds in a more systematic ex-post review of regulatory measures. All regulations have a ten year sunset clause – causing them to lapse unless they are adopted afresh. The dedicated agency approach appears to facilitate better consideration of alternatives to regulation

Ireland is a relatively late adopter of better regulation, initiating its commitment in 1996, and subsequently making proposals for regulatory reform in a number of sectors. The policy was institutionalised with the establishment of a Better Regulation Unit with the Department of An Taoiseach (Prime Minister) in 2002, a more general policy of better regulation set out in a White Paper in 2004 and a regulatory impact assessment process introduced in 2005. These commitments were promoted by an OECD report in 2001 (OECD 2001). Like the UK Ireland has sought to include some stakeholders in a more strategic review of the regulatory system with the creation of a High Level Group on Business Regulation, which reported in 2008 (High Level Group on Business Regulation 2008).

As noted above, the priority given to regulatory impact analysis within regulatory reform processes tends to restrict the range of possible reforms. It is, of course, possible to use oversight as a mechanism to encourage policy makers to consider a wider range of instruments than simply regulatory rules. Thus policies on better regulation issuing from a number of governments require those charged with regulatory policy making to consider alternatives to the use of rules which might include doing nothing, encouraging the development of a self-regulatory regime or promoting greater competition in the affected sector. But evidence from three countries, the UK, Ireland and Australia, suggests the oversight exerted by government, typically through a central unit, focuses predominantly on measuring the costs and benefits of proposed rules through RIA .

How can the preference for oversight be explained? In part it is likely to reflect cognitive limitations associated with the operation of bureaucracy. The collection of data and the formulation of rules is the default mode of public sector bureaucracies. The development of RIA represents a technical response to the weaknesses associated with traditional regulation (cost and ineffectiveness) and fits most comfortably with a view of regulatory regimes which focus on the centrality of public power. To some extent this preference also reflects political involvement in seeking to control activities of units with powers to initiate rule making (Radaelli 2008).

Robert Baldwin has offered an extensive explanation of the difficulties associated with adapting RIA processes to alternative or smarter modes of regulation. If a wider range or mix of instruments were to be considered the task of calculating costs and benefits would become more difficult (Baldwin 2007: 34-35). Furthermore RIA is poorly adapted to consider implementation strategies and enforcement techniques which, though they are critical to the effectiveness of a regime, are not

necessarily specified in regulatory rule making (Baldwin 2007: 36). There is also liable to be a degree of distrust of the wide range of non-state actors on whose capacity an alternative regime might be dependent (Baldwin 2007: 37.) The focus on oversight as the principal mode both for regulating and reforming regulation generates two sets of risks. First there is a concern that rule-based regulation is limited in its effectiveness. Various forms of this argument have been advanced concerning the limited capacity for communicating behavioural requirements through externally set rules (Teubner 1998 (orig. pub 1987)) and the potential that creative compliance is liable to undermine the meeting of objectives (McBarnet and Whelan 1991). A second set of concerns addresses the fragile legitimacy of regulatory governance which is dominated by technical expertise and far removed from democratic governance structures. It is often argued that the legitimacy of regulatory regimes should be gauged by reference to outputs rather than inputs (processes). From this perspective there are good reasons for creating a degree of insulation between regulatory activity and political systems based both in a concern for more expert regulation and a functional requirement to demonstrate the credible commitment of regulatory regimes to stability in their settings, relatively free from political interference (Thatcher 2002). Although the US model of independent regulation conforms fairly well to this non-majoritarian governance model it is arguably that European countries have been rather less successful in separating regulation from politics.

Whether oversight is in ministries or agencies, the experience of limited compliance with better regulation requirements, which appears common to all three countries, is indicative of a more general problem of securing compliance by public sector bodies with regulatory requirements where there are limited or no possibilities of applying sanctions (Wilson and Rachal 1977). The limits to oversight which have been experienced argue for a greater emphasis on the fostering of networks of better regulation practitioners as a means to secure understanding and commitment – a practice which has been extensively developed in the EU, not simply in the area of better regulation, but across energy, telecommunications and competition regulation, and in broader areas of policy making under the rubric of the Open Method of Coordination (Eberlein 2003; Porte and Nanz 2004).

4. Broader engagements over Regulatory Problems and Solutions

If it is correct that there are inherent limitation on processes of impact analysis as a means to broaden regulatory reform beyond mega-regulatory approaches, what alternatives are there? There are examples of deeper engagement between stakeholders within which both problems and solutions have been reconceptualised. The virtue of such processes is that they may offer not only technically better solutions, but also that the process itself may promote the commitment of those involved to make the regime work for them, with the potential for revisiting and revising both goals and instruments in the light of experience. Such an analysis can be located within a broader reconceptualization of democratic governance which emphasises the scope for reflexive learning amongst stakeholders working to resolve policy problems (Lenoble and Maesschalck 2010) . Such an approach might also have the virtue of paying close attention to existing regimes with the potential to identify and implement incremental changes rather than new rules or structures, to effect desired reforms (Baldwin 2007: 44).

A brief analysis of better regulation policies is suggestive of a strong commitment to consulting relevant stakeholder concerning policy initiatives to address what are perceived as regulatory

problems and to fully consider the range of options available to address a policy problem, ranging between doing nothing and introducing new regulatory instruments or regimes. The practical weakness in such commitments appears to be locating the means to deliver these commitments within processes of regulatory impact analysis which tend to be too narrowly drawn to engage either in a fuller form of dialogue of problems and possible solutions, or over the range of alternatives for addressing problems identified. The role of dialogue and the search for alternatives to traditional regulation are closely linked. The main dialogic mechanism within better regulation policies is consultation. There are thick and thin versions of dialogue. The thin version is concerned with gathering the views of affected stakeholders, typically about costs and benefits associated with proposed or existing regulatory regimes. Within such processes dialogue is not itself a mechanism for changing the behaviour or preferences of the stakeholders, but rather for gathering pre-defined information relevant to regulation.

The thick version envisions the kind of dialogue in which stakeholders, including those in government, are encouraged to learn about their preferences and those of others with the possibility of shaping regulation so as to harness their varied capacities and possibly change those preferences. (Black 2000, 2001) This dialogic approach implies that not only the implementation but also perhaps the objectives of the regime may be set through interaction between the affected parties, with a concomitant 'decentring' of the role of government (Black 2001).

The fostering of dialogue is about the engagement of policy makers with stakeholders in sectors affected by regulation. Conversations occur both within the formal structure of RIA. Broader and less formal discussions frequently take place prior to the making of a full proposal. Notwithstanding considerable development and formalization of consultation procedures evidence from the three jurisdictions suggest that such processes are frequently not very open and, linked to this, the requirement to consider alternatives to traditional regulation is frequently not given full or equal consideration. Indeed, working from instances where approaches to problem solving did yield innovative solutions, we are as likely to find the innovation came from within the policy making unit as from public consultation processes. A case in point is the successful plastic bag levy policy in Ireland, which has all but eliminated the taking of plastic bags by customers in supermarkets and other shops. There was a consultation with stakeholders around this idea, an outright ban on plastic bags having been ruled out as illiberal, but in the end the this successful and popular tax was imposed by government as stakeholders were unable to advance a better idea to address the problem (Convery, McDonnell, and Ferreira 2007: 5-6) .

The relatively recent development of better regulation policies and institutions in Ireland is accompanied by longer standing mechanisms for policymaking and regulatory development, and in particular the mechanisms of Social Partnership established in the mid-1980s as a forum in which representatives of industry, unions and government reached periodic agreements which rapidly spread from their initial orientation on sustainability of pay to take on a wider role in social and economic regulation (O'Donnell 2008). Social partnership is institutionalised through the National Economic and Social Council which is very active in its coordination of agendas and provision of strategy documents. It is perhaps inevitable that such a mechanism of dialogue is more tightly embedded in political, economic and social life in Ireland than is true of the structures of better regulation. Accordingly reflexivity in regulatory policy is as, if not more likely to emanate from social partnership (O'Donnell 2008: *).

Requirements on policy makers to engage in consultation are formalized in consultation codes published in the UK, Ireland and Australia, somewhat distinct from, but linked to impact assessment processes. The UK Code on Consultation was originally published in 2000 and has been revised on a number of occasions (Department of Business Enterprise and Regulatory Reform 2008). The first principle of the revised UK code is that consultation should take place when there is scope to influence the policy outcome. A minimum period of 12 weeks for consultations is recommended (compared to a 28 day period within the New South Wales guidance and 60 days in Victoria) and is indicative of a degree of prioritization of consultation over timely decision making. Whilst there is a clear emphasis on learning within the UK principles – requiring officials to give feedback to participants and to share what they have learned from the experience of consultation exercises with others, the guidelines are limited in their assumption that the normal model for consultation is the publication of a consultation document and the receipt of written feedback. Lower priority is given to such events as discussion forums and public meetings. Public, formal consultation is often as much or more about transparency as it is about solution-finding. To the extent that policy makers comply with the code minimally it may discourage them from the broader dialogues being engaged in by some regulatory agencies such as The Office of Communications Regulation (OFCOM) and the Office of the Gas and Electricity Markets (OfGem) in the UK and the Environmental Protection Agency in Ireland (discussed below). The main emphasis of the Irish Guidelines on Consultation (Department of the Taoiseach nd) is on fostering transparency and accountability rather than dialogue, though there is mention in the Guidelines of the benefits associated with developing a ‘shared understanding of issues’ and working towards ‘agreed solutions’. An official review in Australia found that consultation practices amongst federal regulatory agencies were weak, with only 25 per cent of those organisations having consulted with the public when developing regulations (Regulation Taskforce 2006: *). Consultation with business is required and the federal government has mandated the use of a Business Consultation portal.

In addition to general provision for consultation a number of UK agencies and departments have introduced considerably more developed consultation procedures. The Department of Health, for example, is developing a model of patient and public involvement (PPI) that goes beyond consultation with the ambition to capture a wider range knowledge and experience relevant to the problem under consideration (Vincent-Jones, Hughes, and Mullen 2009). OFCOM and the OfGem have also developed extensive processes for dialogue over what are often quite contentious issues of policy and implementation. The purposes of these processes extend well beyond dialogue and take on characteristics of common problem solving and rethinking of purposes behind particular aspects of the regime. Such processes enable regulators not only to test their own ideas, but also to have the knowledge and ideas of others tested in a public forum. It is telling that OFCOM officials do not necessarily regard such extensive processes as part of a better regulation programme. Indeed one respondent expressed a view that the RIA processes were too rigid and that they had developed other processes to facilitate ‘learning and reflexivity’.

A degree of formalization in stakeholder engagement has occurred in Ireland through the establishment of standing panels to represent stakeholder interests in a number of sectors. These panels are typically associated with advising regulators rather than ministers and have been established in both the communications and financial sectors, and in some ministries. The Financial Regulator, for example, is subject to oversight and engagement requirements with standing Industry and Consumer Panels, appointed by the minister. In the UK the BERR has established a Ministerial

Challenge Panel comprising industry, union and consumer representatives to challenge the department's policy agenda. Such a model has potential for steering government towards more innovative thinking at early stages of policy, in a manner which may be equivalent to the partnership structures in Ireland. The development of panels of this kind address a key weakness in developing more dialogic modes of policy development – that those from whom policy makers wish to learn lack the resources and commitment to sustain their engagement. Recommendation to establish standing stakeholder fora in Australia (Regulation Taskforce 2006: *) have not been adopted by the Federal government, though they are quite widely used in Victoria, for example in respect of consumer affairs and occupational health and safety.

Some agencies have institutionalised consultation processes to a greater extent than required by the consultation code. The Environmental Protection Agency (EPA) in Ireland places strong emphasis on highly transparent consultation processes and to this end publishes all of the submissions which it receives as part of its consultation. The EPA's orientation to transparency may partly be explained by the contentious nature of some of the issues in which it is involved in decision-making. More generally environmental protection is a field that has yielded more than its fair share of innovative regulatory instruments as a response to demonstrable weaknesses in command and control regulation in defining and achieving regulatory objectives, particularly in respect of complex issues (Gunningham 2009). The capacity of the EPA for policy openness is limited by the fact that policy and legislation is determined by ministers and consultation can only occur over implementation. The EPA also faces the problem that key responsibilities in the environmental area are allocated to other agencies. In the area of enforcement of illegal landfills, the primary responsibility lies with local authorities. Noting that enforcement appeared to be poor, the EPA established an Environmental Enforcement Network which engaged directors of services responsible for waste in every local authority in discussion of problems and issues (Lynott 2008: 188-189). Gardai (police) were involved in training in gathering of evidence and preparation of court cases. In this way the EPA has used a network approach to extend its influence and capacity into a variety of activities in which it has a limited statutory role.

The Irish EPA's Victorian counterpart is equally committed to open dialogue with stakeholders and delivering regulatory innovations. A key example is the development of Environmental Improvement Plans (EIP) within the Victorian regime. An EIP is a document drawn up by a business offering a commitment to improve environmental performance. Firms demonstrating a high level of achievement and commitment to improving environmental performance were offered reductions in prescriptive environmental controls (Gunningham and Sinclair 2002: 157-8). A key aspect of the development of EIPs is the creation of Community Liaison Committees, which typically include the businesses involved, community residents, local government representatives and the EPA jointly identifying and addressing problems of environmental performance with outcomes of the process reflected in the EIP (Gunningham, 2002 #1598: 157: 160). The process requires firms to think about what they do and how they do it and engages in communities both in problem identification and resolution. The innovation extends beyond standard-setting to enforcement – breaches of the plan require firms to explain their conduct at townhall meetings. An EPA official told us the EIPs were 'close to the best thing we've ever done.' The EIP regime has been evaluated positively by academic commentators – as a key example of 'smart regulation' (Gunningham and Grabosky 1998: 207), though reservations have been reported amongst both EPA field officers and community representatives. Unsurprisingly their effects are perceived as more beneficial in firms with senior

management commitment and sufficient management capacity to ensure they are effectively implemented through the organisation {Gunningham, 2002 #1598: 166-167}. Other areas of Victorian EPA practice also indicate the commitment to dialogue. In renewing waste regulations the EPA engaged stakeholders in workshops concerning the problems and solutions of the existing regulations prior to committing any proposals to writing. An informant told us 'we are happy to let business come up with the optimal implementation mechanisms and not constrain them too much. We are focused on getting the outcome, on realising the environmental objective.'

As noted above, better regulation programmes in Australia, the UK and Ireland each contain commitments to consider and deploy alternatives to traditional regulation. It is questionable whether alternatives are always or necessarily given proper consideration in the better regulation process, since the undertaking of a RIA is triggered by the proposal for new rules and at this stage there may be already a commitment to traditional regulation. Respondents did however give us examples of circumstances where consultation occurred with stakeholders of policy problems at an early stage and alternatives to regulation were developed as solutions. In Ireland the Department of the Environment engaged in discussions with the banks over littering at ATM machines. The banks offered to invest further in their technology to give customers the choice of printing a receipt or not, rather than printing one automatically for each transaction (Department of the Environment 2007) . This change appears to have provided a technological solution to the problem and no regulation has been introduced.

In other areas open dialogue over policy problems may be backed by the clear threat of legislation should non-legislative solutions not be found. Addressing problems surrounding the sales of alcohol the Irish Department of Justice initiated dialogue with industry groups and accepted proposals for a Code of Practice from industry representatives which would address some areas of concern – for example the separation of alcohol from other items in stores, ending the window advertising of alcohol and the development of staff training (<http://www.rrai.ie/>). Within this context the government legislated in the Intoxicating Liquor Act 2008 for a more limited range of issues, for example restricting the hours during which alcohol could be sold for consumption off the premises.

The establishment of regulatory agencies to undertake tasks previously undertaken by ministries and by public sector undertakings has been a hallmark of the rise of the regulatory state and formalises oversight in many instances (Levi-Faur 2005). We might expect the move of regulatory functions out of government ministries to reduce the degree to which the regulatory function is part of the broad networks within which ministries participate. We might also expect agencies to be more formal in their relations with stakeholders – having regard to their statutory mandates and enforcement powers. Whilst it is clear that statutory mandates do restrict the scope for broad policy innovation (as with the case of the Irish EPA above) there is some evidence from all three jurisdictions that regulatory agencies may compensate for their reduced networkedness through more expansive and open processes of dialogue with stakeholders. Officials in the UK NAO, for example, found that network regulators have been quite open in setting down policy problems over which extensive stakeholder dialogue is organised to work through the variety of potential solutions. With a number of agencies we were told that core objectives are set down in legislation and are not negotiable, but the modes of implementation are often opened to extensive dialogue. In addition to public consultations the UK Office of Communications (OFCOM) uses citizens' juries as deliberative fora on

particular issues. OFCOM's commitment to broad consultation is targeted not only at making better decisions, but also bolstering its legitimacy as a transparent and responsive regulatory agency.

5. Institutionalising Better and Meta-Regulation

Reflexive and meta-regulatory forms of governance are not necessarily suitable to every domain and policy issue. Accordingly it is not appropriate to conceive of a choice between mega and meta-regulatory approaches. Rather they are complementary both in looking towards capacities for efficient and effective solutions to policy problems, but also in their appeals to different forms of democratic legitimation. Examples of successful regulatory dialogue do not necessarily exclude elements of oversight for government departments and agencies. Rather they tend to recast the role of government from one of seeking to direct social and economic behaviour, to one of less direct steering which recognizes that much of the capacity lies with those to be regulated. This combination of oversight and dialogue has been labelled meta-regulation or the regulation of self-regulation. But self-regulation must be understood in a broader sense than simply firms or associations of firms regulating their own conduct. Rather it refers to the role of government in steering the capacity of social and economic actors in developing acceptable modes of ordering – norms and processes – through its capacity for oversight. Mega-regulatory options are likely to be judged necessary where direct coercion provides a proportionate mechanism to achieve public objectives.

The examples discussed in this paper are indicative of a number of different ways in which structures for supporting enhanced regulatory reform processes may be institutionalised, drawing on each of the main bases of control, oversight, community and competition. This does not come down to a choice between the mega-regulatory version of better regulation and meta-regulation, but rather is concerned with prompting the complementary uptake of the ideas of each approach. Two forms of independence appear to underpin stronger commitments to more inclusive processes and alternatives to rules-based regulation, but is dependent on stronger oversight. Independent scrutiny, whether through free-standing regulatory oversight bodies, as in Australia and the EU, or from more general oversight organisations such as public sector auditors, has significantly enhanced understanding of the limits of impact assessment. In both instances these bodies have displayed forms of policy entrepreneurship in seeking to highlight commitments to enhanced regulatory reform processes. Independent regulatory agencies, though they may be limited in their capacity for policy innovation, have demonstrated commitments to more inclusive and transparent processes of consultation and learning than are common with government ministries. Standing consultative panels and routinised stakeholder conferences are significant features of this landscape. The Environmental Improvement Plans pioneered in Australia stand out as an instrument in which community discussion around both the nature of problems and possible solutions has yielded imaginative outcomes, satisfactory to key stakeholders, with limited state involvement. They offer a novel version of local democratic decision making. Non-state actors also have a key role in promoting competition between regulatory regimes through league tables and, potentially, establishing competition between self-regulatory regimes (Ogus 1995). Routine provision of sunset clauses engenders a degree of competition for legislative time requiring a degree of prioritization concerning regulatory requirements.

Attempts to enrich regulatory reform processes, drawing on experiences which are frequently parallel to, but not part of better regulation programmes, are not unproblematic. If such processes are to correspond to ideal types of deliberative democracy or reflexive governance then the issue of who participates is as important as how they participate. Even the question how participants are selected does not yield an obvious answer and, like other aspects of meta-regulation, may involve a relaxation of ideas of centralised control in favour of observations on processes to check do they broadly correspond with some acceptable model of decision making in terms of inclusiveness and process, whether led by public agencies, firms or NGOs. A richer collection of documented examples of domains whose processes broadly correspond to this kind of model would be valuable. A further question is raised by the suggestion that mega and meta-regulatory approaches each have a role, but who is to decide which is more appropriate and on what grounds? A further set of questions attaches to legitimacy. Is it possible to envisage a single model of regulatory legitimacy for the very different models of regulation and oversight implied by this discussion, or do we rather need different forms of legitimation to attach to more technocratic forms from those applying to the more deliberative forms?

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