The point is to change it: exploring advice, guidance and improvement in the inspection of health and social care

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A paper prepared for the ECPR regulatory governance standing group, ‘Regulation in the Age of Crisis’

Third Biennial Conference, June 17-19 2010 Dublin, University College Dublin

Draft version – work in progress –

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Revised 10/08/2010
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Abstract

Regulatory literature suggests that advice and guidance is a central element of regulatory effectiveness. In contrast, UK business interests and government regard it as a missing and very much needed contribution to regulatory practice. Taking a very different stance, the majority of regulators regard advice and guidance as problematic. In spite of these tensions what is consistent in the three above domains is that a description and analysis of advice and guidance as an operational process is missing or under-developed. The aim of this study is to throw light on the use of advice and guidance in inspections and regulation.

Adopting a grounded theory perspective this early report analyses observations of UK based health and social care inspections. The aim is to record the structures of advice and guidance used and their application inside the inspection. The research applies an analysis of the situated actions observed to create a mapping of information and guidance flows in the inspection and a catalogue of the major strategies relevant to advice and guidance. These include the informal rules used by inspectors to define boundaries of responsibility. It identifies modes of governance overlaying the regulatory arena and their relevance to motivation and the concept of improvement. The research makes us aware of the potential contributions of both the marketplace and the community to regulatory practice and how learning is transmitted through the regulatory arena.

Exploratory in conception the study offers a frame of reference for future research in the area and puts forward the notion that community has the potential to be a more active force in regulation. The paper encourages the development of practice and policies to better serve the interests and participation of regulatory end-users, that engages and enables providers to embed improvement, and that contributes to better regulators as a means of better regulation.
Introduction

Regulatory literature suggests that advice and guidance is a central element of regulatory effectiveness. In contrast, UK business interests and government regard it as a missing and very much needed contribution to regulatory practice. Taking a very different stance, the majority of regulators regard advice and guidance as problematic. In spite of these tensions what is consistent in the three above domains is that a description and analysis of advice and guidance as an operational process is missing or under-developed.

There is an extensive wider literature relevant to advice and guidance however it has had relatively little influence on the regulatory discussion. Studies of regulatory structures and behaviours have noted the potential effects but failed to engage with the detail of advice and guidance, to identify its place within regulatory processes and recognise its potential contribution to the relationships between providers, regulators. The greatest omission has been a consideration of the impact of advice and guidance on those who use health and care regulated services.

This silence on advice and guidance is mirrored in the discourse of regulators. There is an anxiety that their use will lead to a compromising of the role of the regulator and, understandably, that boundaries of responsibility will be confused. A further, and important, dimension adding to the discussion is the desire of government and business for regulators to be more proactive in guidance.

Using grounded theory the study aims to examine advice and guidance in the inspection context to be able to identify its occurrence and describe its types and observable functions. A further aim is to map the situation in which advice and guidance occurs – this includes relationships, organisational, collective and technological influences and related discourses.

A review of advice and guidance

Advice and guidance, although an important element of descriptions of regulatory behaviour, is rarely investigated in its own right. It figures prominently in the theoretical and empirical literature but more often than not is conflated with persuasion, negotiation, information, education and training.

Ayres and Braithwaite in the development of responsive regulation recognise different strategies that affect enforcement of which persuasion and negotiation are seen as underpinning strategies (Ayres and Braithwaite, 1992: p. 35, Braithwaite et al., 2007, Braithwaite et al., 2005).

Closely related is the work of Gunningham et al; they distinguish education and information as an important regulatory instrument (1998: 60). Parker (2002: 264-270) sets out a blueprint for successful enforced self-regulation. Parker’s blueprint is detailed and includes three categories of skills and knowledge that regulators might transmit, or transfer to the regulatee in order to promote enforced self regulation including, leadership skills, process/control knowledge, and education and advice. Parker notes that advice can work well only where the regulator has greater sectoral expertise than the target business (see also Boyne et al., 2002). However, the regulator can ‘transfer that knowledge from the leaders (generally large companies) to the laggards (generally small companies)’ (Parker, 2002: 269).
A further study, partly an inspector study but also one of enforced self-regulation, is that of Fairman and Yapp (2005) into 50 small and medium sized enterprises (SME’s) in the food industry regulated by the UK Food Standards Agency. The findings of Fairman and Yapp suggest the positive contribution that an educative strategy with regulatees may make (Fairman and Yapp, 2005 p. 513).

Theoretical level studies stress the importance of advice and guidance but are largely silent on its detail and application.

**Inspection studies**

It might be thought that studies of regulatory inspectors at work would offer significant insights into the role of advice and guidance but this has proved not to be the case. There have been a considerable number of empirical studies of inspection as noted in May’s study of inspector enforcement styles (May and Wood, 2003: 118) many of them consisting of ‘inductive studies of agency and inspector behaviour leading to description’ (May and Burby, 1998: 158). Very often the studies examine the severity of enforcement or its rigidity, or focus on compliance and not the extent and impact of the inspector as adviser. Nevertheless, the extent of advice by inspectors might be considerable as noted in the Retail Enforcement Pilot interim report, possibly as high as 80% of inspection time but little of this, it is noted, is recorded (Department of Trade and Industry, 2006: p. 21).

Hutter found, in a study of inspector behaviour, different compliance strategies. One of these she termed the persuasive strategy.

> The range of tactics favoured by those adhering to such a strategy are informal. Officials educate, persuade, coax and cajole offenders into complying with the law. They explain what the law demands and the reasons for legislative requirements and they discuss how improvements can best be attained (Hutter, 1997: p. 16)

In a more recent study of the food industry Hutter found a strong relationship between the inspector and firms asking for advice

> Two-thirds of the businesses we surveyed actively seek advice from the Environmental Health Officer. Inspection appears to be an important educative channel (Hutter and Jones, 2006: 7).

The work of Black has either referenced advice and guidance as an area of development (Black, 2001: p. 35) or given valuable interpretive contexts of discourse analysis (Black, 1998) or, connectedly, stressed conversation (the main medium of advice and guidance) as the negotiation of regulation (Black, 2002, Hawkins and Thomas, 1984). Inspection studies have been an important source of information on what happens in inspections but apart from noting the existence of advice and guidance have thrown little light on processes or categories and have tended to see it as ‘informal’, something that happens outside of legal regulation.

**Policy and advice/guidance**

In contrast to the marginalisation of advice and guidance in the academic discourse recent policy in the UK has pushed the role of advice to the fore claiming regulators do not do enough of it and that the need for it costs business ‘£1.4 billion each year … in order to help them comply with regulation’ (Better Regulation Executive, 2007: 5).

The Mandelkern Report (2001) stressed that improvement needed to be made in the use of plain language in the drafting of regulations and that more assistance should be given to people to understand regulatory requirements. Recent UK regulation
policy (Rogers, 2007, Macrory, 2006, Hampton, 2005) suggests that regulators should be more proactive in their advice giving functions.

‘regulators do not give enough emphasis to providing advice in order to secure compliance…There is a large unmet need for advice’… 92 per cent of those responding to the review’s consultation said they wanted more advice from regulators’ (Hampton, 2005: p. 4-5).

From Hampton through to Macrory (Macrory, 2006, Rogers, 2007, Better Regulation Executive, 2006) there is consistency on the significance of advice and how it can contribute to better compliance. The recent UK Compliance Code for Regulators includes a section on advice and guidance (BERR, 2007)

Regulators and advice

Many regulators have a statutory duty to provide advice, not only to ministers and government bodies but also to providers and members of the public. A brisk review of legislation reveals that the new UK National Information Governance Board (Health and Social Care Act 2008) has a duty of advice to those who process information; the Scottish Commission for the Regulation of Care (the Care Commission) is under a duty to advise the public, providers, the Scottish Ministers and representatives of service users.

Similarly, the UK Financial Services Authority (FSA) has wide duties to give advice in order to protect consumers and may decide in which other areas it is desirable to give advice (Williams, 2007).

However, what may be overlooked in criticisms of regulatory advice activity is that many regulators provide guidance, information and advice as part of the inspection report.

In spite of what is possibly a huge amount of advice contained in inspection reports there is little empirical work on regulators attitudes or policies toward advice. An exception is the study by Black of tax advice where she discusses the degrees of bindingness that tax officers might give to advice.

Advice given prior to a transaction is not formally binding on either the Revenue or the taxpayer; there is therefore no system of appeal against adverse rulings. Rather, the circumstances in which the Revenue is bound are set by … the doctrine of legitimate expectations, but the taxpayer may complete his or her tax return in accordance with his or her own interpretation of the statute. Moreover, the taxpayer does not have to mention which interpretation of the statute, the taxpayer’s or the Revenue’s has been adopted in the return (1998: 3).

Regulators are very aware of the dilemmas of the dual role as adviser and enforcer (Department of Trade and Industry, 2006: p. 134); many fear that the giving of advice creates conflict with regulatory independence. There is concern that when inspectors act in an advisory role this may compromise or be in conflict with their impartiality and judgement (Toft, 2004: 85). Supporting evidence is found in a survey of regulators (Brady, 2008) that explored in over 20 interviews with senior regulators from a wide range of sectors what they considered desirable inspector skills. The chief executive of a large regulatory agency offered the following insight,

It might be worth just touching on the other role of the inspector we haven’t mentioned … the person who provides some guidance, and some informal advice. … and there’s a danger of course, if you give too much advice, you actually take the responsibility away from the duty holder. On the other hand, if you give no advice at all, then well, I think there is room to provide some guidance, providing you don’t go over the top,
and one of the issues is how far do you go, and different inspectors play it differently (R14: Brady, 2008).

While regulators are very aware that advice and guidance is transmitted through inspection they are nevertheless cautious about the use of advice, pointing out that the inspector may in fact be regulating his or her own judgements and that it is the role and responsibility of the regulatee to manage the organisation. Martin suggests that advice giving could lead to a compromising of independence, even capture.

There is clearly a risk that in seeking to become more ‘user-friendly’ (the regulator) could be vulnerable to capture. How, for example, will inspectors judge the performance of a housing association or a local authority which has implemented all of the advice proffered ... but has nevertheless failed to improve (Martin, 2004: p. 4)

These dilemmas are well captured in an account by Braithwaite et al of the history of advice in American nursing home regulation. They found, in a study of inspector behaviour that whilst advice, or consultancy was relatively widespread in the early 1990s several states appeared to have moved further away from the use of advice, at least formally. The reasons given for this were:

- Federal regulators and consumer groups feared that it was a substitute for enforcement
- Stage agencies were apprehensive that it might compromise enforcement effectiveness, and
- It took up inspector time (Braithwaite et al., 2007: p 105).

Nevertheless, in the same study there was evidence of ‘advice on the side’ (p 109). This was often given on a one to one basis often referencing other nursing homes that had experienced a similar problem.

Bearing these reservations in mind it is clear that a great deal of advice work is done by regulators, for example, the work done by the Audit Commission on low star rated authorities (Boyne, 2003a, Boyne, 2004, Boyne, 2003b, Boyne, 2003c, Office of Public Services Reform, 2003).

The discussion in this section reflects something of the turmoil and unease surrounding the notion of advice and regulation. Regulators, it would appear, fear giving too much advice/guidance; too much in the sense that they can be held to account for advice/guidance given.

### Defining advice and guidance

Does the wider literature on advice and guidance assist in exploring the area? The decision-making literature may be useful. Rational choice theory suggests that there is an instrumentality to advice and guidance giving and taking (Gilovich and Griffin, 2002: p. 1). Instrumentality in regulatee behaviour links to a seminal discussion on the motivational postures of those who are regulated (Kagan and Scholz, 1984) and is further developed by Braithwaite (2003). Although motivational posture theory does not specifically address advice and guidance it is relevant to understanding the impetus connected to those accepting or giving advice and guidance.

Advice is different from information. Harvey, (1996) in a consumer education context, classifies information as awareness raising whereas advice is enabling. Both are kinds of information giving but the latter assists people in taking specific actions in specific situations.

Bennett and Robson (1999: p. 353) examined suppliers of business advice in a study of 2547 respondents in small to medium enterprises (SMEs). Their definition of
business advice as 'a process that produces change' has similarities with the Harvey
definition used above in the sense of action and progress.

Psychological research into decision-making has been empirically concerned with
the rules and heuristics that people use, or do not use, when making decisions. The
currently accepted view is that humans have two systems of reasoning, System 1
being intuitive or associative and System 2 being a rule based system based upon
symbol manipulation and formal logical systems (Sloman, 2002: p. 383). Very few of
us use System 2 suggesting a lack of ability with rational choices. However, findings
from knowledge management research suggest that advice and guidance is a means
of overcoming this difficulty.

Advice perspectives

Cross et al (2001: 217-219) in a study of knowledge management and sharing in
social networks identified five significant and separate benefits from consulting
others. These were:

Solutions – In turning to others for advice, what advice-seekers appreciated
was the sharing of specific solutions. However, within these solutions it was the
procedural knowledge involved (know-how) rather than the particular facts (know-
what). This is an important distinction, as much regulatory advice tends to be
legalistic (about the rules) rather than directed toward business processes (how to
apply the rules).

Meta-knowledge – respondents would also turn to people who would then
direct them to sources of information or expertise. The advice-seekers were
tapping into overarching experiential maps of where knowledge, information and
expertise were located. However, these locations were, in the majority of
responses, people rather than databases or other repositories.

Problem reformulation – advice was valued under this heading when it
reassured advice-seekers that they were solving the right problem. The adviser
might point out dimensions that the advice-seeker had not considered or have
knowledge or experience of possible or likely consequences of a particular
solution.

Validation – this benefit of advice does not involve the transfer of new
knowledge or contacts instead it refers to the affirming for the advice-seeker of the
validity of the solution proposed. This allowed the advice-seeker to be more
confident especially in handling complex problems with complex consequences.

Legitimation – a solution is legitimated by a respected source promoting its
acceptance more quickly and across diverse social situations.

Other studies, focusing on the individual in the advice situation, suggest that people
take advice from people they trust (White, 2005) and that they avoid advice from
people they believe have a self-interest in a particular future action (Kuang et al.,
and advice giving offer a synopsis of the main findings. These findings use an
experimental design known as the Judge and Adviser System (JAS) where one
subject is the judge and the other(s) the adviser; various combinations and variants
of this are found. The table below lists the central findings.

Table 1: Central findings of the psychology advice literature (Bonaccio and
Dalal, 2006)

| Advice is often integrated from multiple sources |

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There is an element of social conformity in taking advice – the advice taker may not wish to offend

‘Egocentric advice discounting’ – most judges do not follow advice 100%; judges may prefer their own decisions because they believe them to be superior to those of the adviser.

Judges were found to be more responsive to advice from those with greater age, education, life experience, or wisdom.

Those who solicit advice are more likely to follow it.

This review of the relevant literature details the lack of clarity on advice and guidance in the regulation literature whilst at the same time acknowledging its place in regulatory encounters. However, regulators themselves are distrustful of advice and guidance activities in contrast to the emerging demands from regulated sectors and policy makers for more of it. Decision-making, psychological and knowledge-management/network studies describe the benefits of advice and guidance and will be of advantage in the discussion of advice and guidance categories emerging from the research.

**Methodology**

This is a qualitative research study utilising in-depth observations of inspection events with some additional documentary input from inspectors. The study uses the grounded theory approach (Clarke, 2005, Corbin and Strauss, 2008, Glaser and Strauss, 1967, Charmaz, 2006).

The respondents are drawn from a large national UK regulator of health and social care regulating a variety of services in health and social care such as care homes, nursing homes, nurseries, playgroups and residential schools.

A small number of inspectors (N=10) volunteered either to be accompanied on inspections or to email reports on their inspections. The majority of the findings are taken from the observations and from additional communications supplied by the inspectors.

Observation took the form of sitting in with the inspector on planning and feedback sessions, discussing aspects of the inspection with the inspector and following the inspector(s) in their meetings with those using services and the staff of registered services. Contemporaneous notes were made and then revised and added to. Further contact with inspectors was made to clarify certain points. These notes were then coded using NVivo (QSR International, 2007); recoded and finally broad categories of advice and guidance were constructed. In a second group of observations these categories were then explored to establish whether they needed adaptation or expansion or whether they were redundant (theoretical sampling (Charmaz, 2006: p. 189)). The categorisations were sent to the volunteer inspectors and their responses were then incorporated into the analysis and amendments to the categories made. A total of seven inspections were observed amounting to over 40 hours of observation time.

The initial model of advice and guidance used drew upon systems theory (Donabedian, 1980, Checkland, 1981) in particular the notion of self-regulating feedback systems that relied upon information flows. This model had been applied to regulation (Hood et al., 1999, cited in Boyne, Day and Walker, 2002) in terms of a

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Directing mechanism that sets the standards and the limits of variance, a Detector that measures variance and an Effector mechanism for bringing the variance back into line. The communication between the stages necessary for the system to be self-regulating is a feedback process that transfers information from one stage to another, by implication in a constant spiral.

**Data capture protocol**

A tool was devised that captured the range of occurrences of advice and guidance. The literature review had provided some useful parameters of advice and these contributed to the eventual tool. The first characteristic to be sought was the provision of information; such information might contain characteristics of advice identified earlier, for example, that it contributed or set out a process producing change (Bennett and Robson, 1999), or that it was awareness raising leading to an enabling of the provider. The formulation by Cross et al (2001) was helpful in identifying information or proposals that contained solutions, meta-knowledge, problem reformulation, validation and legitimation (see page 7 for an explanation of these terms). This data capture drawn from the literature was tentative and it was important that the emergent data from the observations shape the eventual findings.

Digital recording was not appropriate to the confidential nature of the inspection; consequently notes were taken at the time and reviewed afterwards.

**Findings**

It is not the intention of the study to identify advice and guidance as a social process, a discrete area that could be made sense of in its own right. An inquiry into inspector behaviour inevitably exposes the space of the regulatory arena and the actors in it, the users of services, the inspectors, the regulatees, collective groups and related discourses. Consequently although observing interactions the study also gathered data on relationships and connected processes and organisations.

**Identifying the context of the study**

The examination of context begins with the regulator. The regulator inspects about 15000 registered care services and in 2008 changed its inspection methodology to incorporate a system of grading. Inspectors still inspect against the regulations and the appropriate national care standards have been aggregated into the five quality themes,

- Quality of care and support
- Quality of environment
- Quality of staffing
- Quality of management and leadership
- Quality of information.

The themes are subdivided into statements again corresponding to the national care standards. They are graded at each inspection on a 1-6 scale with 1 being unsatisfactory and 6 being excellent. Any grading of 1 or 2 will mean that the service could be issued with a formal notice to improve. Grades of 1 or 2 do not automatically start the enforcement process. The regulator may choose to work with the provider first to improve the grades. Past history of compliance and sustained improvement is taken into account when considering formal action.

The inspection process begins with the service owner or provider completing a self-assessment against the themes and sending this to the regulator. The inspector then uses this as the basis for identifying evidence for each of the themes. These are
subsequently graded and the regulator makes arrangements so that commissioners of services have access to the information. In the new grading inspection there is an emphasis on the involvement of those who use services and their families in the actual assessment evidence. For example, the service provider might evidence a theme by referring to the participation of people using services in consultation or management decisions.

An important objective of the grading scheme is to extend the participation of users of services and families (and by implication the community) in the assessment of care quality. This creates a consumer centric quality management system similar to the ISO standards (ISO Central Secretariat, 2002). An important difference is its potential for involving those using the services and the wider community. In order to evidence consultation and participation inspectors gather evidence to demonstrate participation in the quality management of the service by those who use services. In the case of the observations in this study inspectors made visits to joint service user management meetings, relatives meetings and meetings with individual users of supported housing services. Such meetings were achieved out with the inspection visit; however, the regulator defines inspection as a process rather than an event so such meetings are an anticipated part of the inspection process. The impact of this on the inspection process is that it begins with user and carer feedback and then tracks back and compares with the self-assessment of the provider. The service users and families, it could be argued, drive the impetus for service improvement.

Grading was developed in cooperation with the sector and, it is claimed by the regulator, reflects a demand from the sector. Certainly, the future success of this scheme depends upon the extent of motivated buy in from the regulated sector. To date the results look promising with, as of March 2009, 71% of the sector having received a grading with around 80% of services achieving grades 4 (good), 5 (very good) or 6 (excellent) for each of the quality themes. The regulator has encouraged providers to see these overall gradings as a benchmark to measure themselves against.

Certainly, in the observations providers and managers were keen to do as well as they could on the gradings, but why would they wish to support a system that might do their reputation harm?

The health and social care sector is one where change, quality and improvement have been problematic (Clough, 1996, Barter, 1998, Kennedy, 2001, Pring, 2002, Waterhouse, 2000, White et al., 2003, Smith, 2004, Wardaugh and Wilding, 1993). Those in the sector with a commitment to the quality of the service have seen little reward in participating in quality ratings systems that the public do not understand and are not aware of. Perversely, competitors, by not having the expense of a quality management system, have gained an advantage in supplying lower quality care at a lower cost. This supports the findings of the regulatory literature that often regulation is welcomed by a majority of the sector, primarily to exert control over those who will not conform to expected standards (Day et al., 1996).

**Characteristics of observations**

Methodology is an important context to consider. Further, each of the inspection observations takes place in different types of organisation.

Figure 1 gives details of the seven observations. It can be seen that the observations take place in care homes, nurseries and housing support agencies. Each setting (the different agency or organisation) has a regulatory support assessment that assesses the level of risk and determines the inspection frequency and intensity. Only one of the observations had been served a formal notice of enforcement action. Grading prior to the observation of the inspection is shown and in the next column the grade
resulting from that inspection. With one exception the observations were of low risk and high graded services.

Clearly, having a majority of good services is not balanced. However, the nature of access to the data was such that inspectors volunteered and selected the inspection. What this offers the study is high quality and confident inspectors in settings where improvement means more than simply raising quality to a compliance level standard.

**Figure 1: Characteristics of the observations**

<table>
<thead>
<tr>
<th>Setting</th>
<th>Risk Assessment</th>
<th>Enforcement Notice</th>
<th>Grading prior to Obs.</th>
<th>Post Ob Grading</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Observations March 2009</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Observation 1</td>
<td>Care Home for adults</td>
<td>High</td>
<td>Yes</td>
<td>Not yet graded</td>
</tr>
<tr>
<td>Observation 2</td>
<td>Private Nursery</td>
<td>Low</td>
<td>No</td>
<td>Not yet graded</td>
</tr>
<tr>
<td>Observation 3</td>
<td>Residential School</td>
<td>Low</td>
<td>No</td>
<td></td>
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<thead>
<tr>
<th>Setting</th>
<th>Risk Assessment</th>
<th>Enforcement Notice</th>
<th>Grading prior to Obs.</th>
<th>Post Ob Grading</th>
</tr>
</thead>
<tbody>
<tr>
<td>Second Observations May 2010</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Observation 4</td>
<td>Care Home for Adults with dementia</td>
<td>Low</td>
<td>No</td>
<td>Not yet graded</td>
</tr>
<tr>
<td>Observation 5</td>
<td>Care Home for Adults</td>
<td>Low</td>
<td>No</td>
<td>5</td>
</tr>
<tr>
<td>Observation 6</td>
<td>Housing Support</td>
<td>Low</td>
<td>No</td>
<td>4</td>
</tr>
<tr>
<td>Observation 7</td>
<td>School Nursery</td>
<td>Low</td>
<td>No</td>
<td></td>
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</table>

**Who are the inspectors**

Ten volunteer inspectors participated in the study. Qualified in social work or nursing, childcare or teaching they had all additionally completed a one-year work based academic award in regulation. An important part of the identity of the inspectors is their dual role, not only are they inspectors and responding to the value frameworks of regulation but they also maintain the values and ethics of their respective professions. This study will not chart this relationship or its interactions, which is for a

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1 New registration
further study, but it is worth noting the potential of the dual role and its interplay with inspector behaviour and the regulatory arena.

The volunteers were briefed on the purpose of the research, which was to explore the use of advice and guidance in the inspection context. The observations were fed back to them for comment.

**Categories of guidance**

The categories were tentatively created in the first observations and then tested during the second observations. In grounded theory this is known as theoretical sampling (Charmaz, 2006: p. 189) - the purposive selection of further respondents in order to test out the emerging model. The provisional categories that are emerging from the research are shown below. In the category title box is given the number of frequencies recorded. In addition there is a suggested match to the Cross et al advice types (on page 7) to establish a 'theoretical conformation' through the reviewed literature.

<table>
<thead>
<tr>
<th>Connecting – observed frequency 17 – corresponds to meta-knowledge</th>
</tr>
</thead>
<tbody>
<tr>
<td>The first category is Connecting. This is the most obvious type of advice and guidance and refers to the supplying of an information source or of a way of connecting to that source. This category had the highest observed frequency.</td>
</tr>
<tr>
<td>An inspector might send a copy of a good practice guide on dementia care; they might bring a copy of the relevant standards. The relevant care frameworks or government policies, or legislation might be referred to as well as making the provider aware of the benefits, for example, of a particular advocacy service. The regulators own website might also be connected to as a source of information. The purpose of this category is to connect the provider to information sources.</td>
</tr>
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<tr>
<th>Explaining – observed frequency 7 – corresponds to solutions</th>
</tr>
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<tbody>
<tr>
<td>This category is about how ideas, events, things and processes are explained to those regulated.</td>
</tr>
<tr>
<td>The process of the inspection is explained (see also contextualisation), there was explanation of what the grading system means, how it works and how it fits with the self-assessment documents providers complete. The importance of the regulations is explained and how they relate to the care standards. One inspector explained the quality improvement aspect on the phone before the visit. The purpose of this category is to make clear what is to happen in the inspection.</td>
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<tr>
<th>Illustration – observed frequency 6 – corresponds to solutions</th>
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<tbody>
<tr>
<td>Using examples from other providers or practice elsewhere, or evidence-based studies, to suggest how an outcome might be achieved. In the Illustration category examples, vignettes and stories are used to picture options available to the provider and manager in terms of actions.</td>
</tr>
<tr>
<td>These could include illustrations of the way that other providers have administered questionnaires to parents (nursery inspection), instances of where inspectors have come across pictures of food used on menus for those with dementia (care home inspection) and how young people might be involved in the induction of new staff</td>
</tr>
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(residential school inspection). The purpose of this category is to suggest different ways that outcomes might be achieved.

**Persuading – observed frequency 8 – corresponds to problem reformulation**

The persuading category is about identifying responsibilities for decision-making and action – who makes the decision, who acts and what are the consequences. The responsibilities and role of the provider and/or the manager are explained including notification of incidents. A major aspect of this category is identifying management responsibility and distinguishing that from the responsibilities of the inspector.

*A nursery claimed to be using a certain specialist teaching method, yet no longer had a teacher trained in that method. Did they need to think through the implications of this and what they wanted to do in the future?*

*In order to persuade a head teacher to better manage nursery resources inspectors discussed the need for improved organisation of the resources cupboard and more methodical management of the children’s progress files. The issue was identifying who was responsible for the management of the nursery. The purpose of this category was to clarify the potential outcomes of possible decisions.*

**Reassuring – observed frequency 2 – corresponds to validation + solutions**

Although inspectors avoid the ‘micro-management’ of a regulated service they do offer reassurance as to the direction of travel. Providers are responsible for the necessary actions/decisions to create improvements but inspectors do offer subtle ‘green lights’ as to the intended plans.

*Is this way of dispensing drugs acceptable a provider wants to know? Does it meet the needs of the residents the inspectors reply? These examples occurred during feedback, the point at which direction of travel is discussed.*

*We intend to include pupils on the interviewing panel for new staff a provider informs an inspector. What are your reasons for doing that the inspector asks: does that achieve the outcome of the quality statements?*

*Reassuring the childminder that the inspector will be around next year to explain it all again.*

The purpose of this category is to reassure on travel of direction while holding back from taking on the responsibility of the provider to make decisions.

**Revealing – observed frequency 7 – corresponds to problem reformulation**

This category was one of the most observed. It identifies how inspectors can redirect information and data made known through the inspection to reveal issues and problems that the provider may not be, or appears not to be, aware of. Such information can be used to cross check the motivation and veracity of the provider. If responses to revealing tactics are evasive and/or defensive this may contribute to inspectors’ estimation of motivation, dependability and the longer-term sustainability of the quality of the registered service.

*An example of this would be that although the nursery manager claims in the self-assessment that all nursery staff are aware of the recommended child care guidelines inspectors have found in their conversation with staff that this is not the case, staff identities are not disclosed. The manager is confronted with this, is initially taken aback, and then sets out that this will be corrected. Inspectors issue a formal recommendation and this will be crosschecked at the next inspection.*
In the inspection of an older peoples care home the inspectors are discussing participation by family and relatives in the quality management of the home. Inspectors had attended a relatives meeting the previous week and let it be known that there was some difficulties with people being able to contribute and to participate. The manager responds immediately and thanks the inspectors for their remarks and sets out the changes she thinks are necessary.

An inspector spoke with a number of care staff in a care home and also with the cleaning staff of the care home. Management had been required to make changes to cleaning practices and to care practices. The conversation was a means of monitoring the degree of commitment the management team had to implementing the necessary changes. This information could then be used at the feedback session to reinforce the inspector’s efforts to improve the quality of care in the home.

An inspector suggested a further example; discussion with staff in a residential school facility shows that care staff and educational staff are not working well together. Revealing this at the feedback session promotes the potential to encourage an integrated/holistic approach to care.

The purpose of this category is to use information to reveal shortcomings at the feedback session or earlier.

### Recommending – observed frequency 15

Recommending here refers to the inclusion in the report of a recommendation and is consequently a different level of advice and guidance. It is included for the sake of completeness. Recommendations are requests that the registered service review a particular process and is based on a care standard. Together with a Requirement – the infringement of a regulation, this is one of two formal devices that are included in the report. Recommendations in themselves are forms of guidance containing practice improvements identified with the more normatively based care standards.

*The service should look at how it keeps parents informed on children’s daily activities.*

*The Homes participation strategy should be reviewed to show how improvements in care would take into account consultation with service users and their families.*

### Supporting – observed frequency 10 - legitimation

The final category is supporting. It ranked third in use after connecting and recommending. It refers to the overall ethos of the inspection in enabling and supporting the provider and staff in offering better care to those using services. One of the ways in which support can be given is to recognise the individual circumstances of the service, an inspector comments that supporting providers to improve may involve: ‘

*With some providers e.g. childminders it may be necessary to explain interpret the self-assessment form viz. put it into plain English and relate to their day to day work particularly if they are dyslexic.*

Another inspector summed up how the approach was intended to be supportive;

*Not being prescriptive, but providing options and choices to the provider so that they still feel empowered to make their own changes.*

Others referred to endeavouring to transmit a positive value to the service provider.

*Staff are also supported. Conversations in corridors were with staff the inspector had seemingly bumped into, but there was reassurance offered on the positive side of the
home and a reinforcement of the value of the training that staff had undertaken as part of the homes plan to raise standards.

Users of a care service under threat of closure were also reassured that their views of the positive side of care would also be taken into account.

In the second set of observations two new categories were added. Neither are categories in the same way as the above. They deal with underlying structures promoting advice and guidance such as relationship, mutuality of intention, trust and justice. The first is

**Contextualisation**

Contextualisation is about being aware of the context of a particular service. In the observations it was noticed that each inspection started with what appeared to be a fairly loose discussion. Categorised as contextualisation this category provides the temporal, emotional and value basis for:

1. Understanding the individual circumstances of the service, their special composition, purpose and any difficulties they are experiencing.
2. Establishing the practical arrangements for the inspection by identifying issues that need attending to immediately, for example, a grievance, complaint or annoyance. There may be circumstances that need attending to – a disability, a conflicting appointment. The provider needs to know the programme for the day, if not known already, in particular which documents or people the inspector might want to see.
3. Establishing the relationships for the inspection. Some of the conversation may be general or social but all of it has a point in establishing the identity and the motivation of the staff and provider. In a number of observed ‘contextualisations’ there was an exchange of feelings and values around care. This sharing assisted the inspectors in conveying their concerns around specific practice issues (in one case it was towards those who ignored specialism knowledge required in dementia care) and in ascertaining the depth of the value commitment of the provider.
4. Some inspectors referred to ‘laying the professional boundaries’ which referred to the different duties and obligations of the inspector and the provider and making sure that these were known.
5. The contextualisation is the point at which the provider can bring forward special issues and the inspector can begin to consider how these weigh against the quality framework and the standards. An example helps to clarify this. In one service the workers were all completely deaf. They were working for vocational qualifications as laid down in the care standards but experiencing communication difficulties with vocational assessors partly because signing interpreters lacked familiarity with vocational qualifications. Consequently their progress in the qualifications was sincere but very slow. The inspector took this into account when considering that area of the quality statement.

Contextualisation is the space and place where relationships are formed, re-formed made or mended and the process itself made transparent. This then forms a basis for the next area of consideration, procedural justice.

**Procedural justice**

Procedural justice refers to the processes whereby people are more likely to comply with the decisions of regulators and other legal bodies (Tyler, 2003: p. 286, Murphy et al., 2009). Applied to regulation it suggests that compliance is enhanced if there is

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an overall fairness to the process used and the authority is seen as exercising its
authority in a fair way. Elements of this process are:

1. That decision making is based on discernable objective evidence
2. That the actions of the regulators are understandable and clear
3. That people are treated with dignity and fairness
4. That people have the opportunity to state their point of view
5. That there are shared social bonds

Procedural justice, whilst not being the central focus of the study, is nevertheless
relevant in explaining the principles on which the inspections were set up and
delivered by the inspectors and how advice/guidance promoted the delivery of
procedural justice and vice versa. Contextualisation therefore is a point at which the
elements of procedural justice as described above are brought into play and are
maintained and supported throughout the inspection.

**Rules of thumb and the limits of advice/guidance**

Regulators are uncomfortable with the advice and guidance role. As noted earlier
there is a broad acceptance that a point exists beyond which there is a risk that
regulators are taking on responsibilities that are rightfully the providers. Too much
advice and providers are likely to become dependent for improvement and quality on
the interventions of regulators. If such reliance develops it may lead to the
dependency of a sector as providers wait to be told what to do in the next regulatory
intervention.

In comparison inspectors in the study placed firm constraints around the use and
extent of advice and guidance. What was of interest was how they gauged this and
what they saw as the rules of the advice/guidance encounter.

Discussion with each of the inspectors and between inspectors produced the
following list of ‘rules’ used to place a limit on advice and guidance.

1. The service must be committed to improvement
2. The service must accept responsibility
3. Inspectors do not offer policy design
4. The service capacity must be sustainable
5. The inspectors should not micro manage, but
6. Inspectors may have to be prescriptive if the provider is resistant to change
   (requirements/enforcement)
7. Advice/guidance will be more effective if the service/provider is willing to work
   with the inspector
8. Generally this is where a good relationship has been established with the
   inspector(s)
9. It is important to work at establishing relationships, even if it is over a period
   of time.

The rules above reflect the descriptions and purposes of the categories identified by
the research showing how each category is mediated by the rules in order to serve
its function. It should be noted that inspectors expected a commitment to
improvement. The expectation was of compliance with the objectives of the
methodology as well as compliance with the legislation.
Figure 2: relational map of guidance

- Users of services
- User led groups
- Nurses, care staff
- Provider
- Manager
- Regulator organisation
- Training Personnel and programmes for updating
- Other regulated services used as examples
- Advice/guidance materials:
  - Web based
  - Literature
  - Academic
  - Other regulated organisations
  - Professional bodies
  - CPD
- Other academic programmes
- Methodology and procedure guidance
- Regulator development groups
- Informal Inspector Groups
- Professional organisations
- Training and updating sources
- Other academic inputs
- INSPECTOR
- Information flows in
- Guidance examples returning, feedback loops
- Inspector Guidance out

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Relations of guidance Map

Figure 2: relational map of guidance shows the relationships in advice and guidance as revealed in the observations. The thickness of the arrows indicates the amount of advice and guidance in those relationships. Solid blue lines show the information collected by the inspector. Dashed green lines show the guidance offered by the inspector. Solid red lines show information and examples returning to the inspector and consequently to the inspector groups.

The main recipients of advice and guidance are the registered provider, the manager and other staff who also receive guidance on completing the self assessment forms directly from the regulator website. In terms of information flows it reveals the extent of information the inspectors gather in order to complete the inspection and to provide advice and guidance. It also gives an indication of the ways in which inspectors update their own expertise.

The flows of guidance with return flow

Neither was all the guidance one-way. Guidance flows back into ad hoc groups of inspectors. There are also flows back to those using services and their families. Inspectors used examples from other registered services to illustrate and explain and by implication those services observed would also provide examples for other services. One inspection revealed a new approach to nursing home medication administration. Inspectors might well use the example, or part of it, in other homes. From discussion with an inspector it was learnt that in one region childminders, normally a single person micro-business, had grouped together to address issues and provide resources for the inspection. The lesson for these micro businesses was a ‘know how’ lesson, the business process involved, rather than a ‘know what’ lesson.

One inspector offered an insight into the reciprocity of advice and guidance. When a service is graded at 6 it had become a centre of excellence and the inspector was learning from the service.

Flows of advice/guidance between inspectors, users of the service and their families were sometimes immediate but could be re-directed to the provider. Reverse flows of this kind present an interesting area of further research as to how people using services are incorporated into information flows and the extent to which the reciprocity of such flows and the consequent balances might be enhanced.

The resources for guidance

It is clear that the advice and guidance environment is demanding for the inspector. Updating of sectoral knowledge and perspectives is essential if advice and guidance as part of the improvement process is to work. Inspectors convened informal group meetings around adult care or childcare sharing knowledge, connections and experiences. Those sharing a provider would meet to get a consistent approach and knowledge to the issues of those services. They also had access to external and internal courses supported by the regulator and various formal groups inside the regulatory organisation that monitored areas of development.
Discussion

The findings of this exploratory study suggest that there are a range of categories of guidance that correspond with different inspection strategies and functions. The main players in advice and guidance are the inspector, provider, manager and staff and those using services. The categories developed in this qualitative research go some way to matching the review of conclusions of advice research reviewed by Cross et al (2001). In order to maintain the boundaries of responsibility and dependency inspectors use a set of shared rules of thumb to set the limits of guidance.

Constructing a positional map on which to place inspector behaviour in terms of either proximity to decision making or policy construction reveals that their guidance would very rarely assume responsibilities that are seen as those of the provider/manager. There is a clear divide between the regulators responsibilities and those of the provider (see Table 2). Consultancy for example, where the consultant is employed by the organisation and takes on the organisational goals is placed at the top right of the diagram reflecting the decision making, responsibility and policy ownership of the consultant. Advice is not quite consultancy but it possibly breaches our inspector rules in terms of being too close to responsibility for policy and decision making. Guidance on the other hand is constrained so as to permit the exercise of provider responsibility and to demonstrate commitment to improvement.

The positional map of Table 2 shows the relative placing of guidance as the preferred strategy.

### Table 2: Positional map of responsibility and decision-making

<table>
<thead>
<tr>
<th>Decision Making +++</th>
<th>consultancy</th>
</tr>
</thead>
<tbody>
<tr>
<td>requirements and recommendations</td>
<td>advice</td>
</tr>
<tr>
<td>guidance</td>
<td></td>
</tr>
<tr>
<td>information</td>
<td></td>
</tr>
</tbody>
</table>

Provider responsibility +++

The nature of guidance

Different points of occurrence of guidance

In using the Director, Detector, Effector model to design the study it was expected that there would have been a fixed point at which guidance was given. This was only partly confirmed. Guidance occurred throughout the inspections. However, the initial meeting, or contextualisation stage as it has been called here, involved much guidance right at the start of the inspection. Following on from this there was also guidance at the Effector stage, what inspectors called 'feedback'. Much of this used the Reassuring category but there might also be the use of Revealing and Persuading. Whether the feedback contained all of these categories varied between inspection and whether managers/providers were available throughout the inspection or only at the feedback stage. Normally by feedback most of the issues had been
raised and addressed. Feedback was the point at looking to the future and how various necessary actions might be formally recorded into the inspection report. Grading was left to the feedback but the majority of the evidence would have been discussed with the provider before then.

**Variation in types of guidance**

The different types of guidance identified correspond to the intentions of inspectors in using them. For example, the Connecting category is simply about connecting providers to information and guidance from others. Of interest is the variety of ways in which guidance was used from the relatively simple to the more complex. Surprising also is the way that information generated in the inspection was used to reveal shortcomings in the provider’s evidence. Such shortcomings could have been used in other regulatory contexts to say – ‘gotcha now’ but in these cases that wasn’t necessarily so. Shortfalls and omissions were seen as a means of enlisting and validating the commitment from the provider to improvement.

**Different strategies of guidance**

Guidance was also used to support and this was particularly the case with the smaller micro-business such as the childminder. The childminder probably has none of the knowledge of systems or processes necessary as conditions of compliance (Organisation for Economic Co-operation and Development, 2004) yet in terms of high grades awarded the interim findings grading report published by the regulator evidences that this group has done particularly well.

Inspectors see a strong link between guidance and improvement and preferred the changed methodology because it demanded more of their experience, judgement and expertise.

**Arenas and modes of governance**

Inspectors, providers, managers, staff, those using services and families are all part of a complex interaction of social arenas and collective social worlds which not only bound the space of legal regulation but overlay it.
As is shown in Figure 3 the regulatory arena is overlapped by three arenas,

- the arena of hierarchy including judiciary, legislature and government,
- the market arena which includes commissioners, consumers (service users and family) and regulated health and social care services and,
- The network arena which includes service users, families, community groups and the media.

These arenas (excluding the regulatory) are structured around different modes of governance - ways of organising human behaviour (Tenbensel, 2005).

As can be seen in Figure 3 the collective organisations and social worlds acting in the regulatory arena are multiple. Inspectors are also members of professional groups; providers are members of the same groups. The regulatory organisation has a strong presence. In this same arena are the organisations to which providers belong, both as public, private or voluntary enterprises. The regulatory organisation overlaps the arena of government. It is closer to government and the judiciary and gains its income from government and the regulated sector. Those using the services of the sector are directly involved in the arena but rarely as a collective. They are weak and vulnerable. Their families are a stronger force but again not as a collective. Various groups are within the regulatory arena representing their voices. Penetrating into this regulatory arena are EU directives and policies. The media represents the arena to internal and external worlds.

The market arena also overlaps the regulatory arena. Regulation has always been aligned to markets; more often than not regulation is used to compensate for market
failure (Baldwin and Cave, 1999). It is also implicated in affecting the viability of the market place in terms of regulatory burdens (Hampton, 2005). However, the methodology observed in this study could, arguably, produce different market dynamics. The gradings are themselves a form of market lever, a sort of a hotel rating. These have a market value – the gradings affect the potential returns of the registered service on the open market, as far as commissioners (for local authorities) and the public are guided by the gradings.

An additional form of market interaction is that the gradings methodology has a market value in its own right. Previously there was no one quality management grading system common to the sector, purchasers had to select from a wide variety of different and confusing reports made available and purchased by the providers themselves. The grading system, as far as we accept that it possesses the rudiments of a quality management system, offers to all members of the regulated sector a simple and common system of quality assessment provided by an independent and relatively well known authority. The market benefits to the sector of such a system are significant and there is the additional advantage that the system may well squeeze out those giving the sector a bad name. In addition, the grading system itself is of economic value; the registered provider would have to pay for a similar service.

The network arena here refers to the community as it occurs inside and outside of the registered service. Network as community allows us to present a further mode of governance affecting the regulatory arena. Many services do serve a community. The methodology of gradings with the emphasis on participation by those using services or potentially using services encourages the service to connect to local networks in order to demonstrate participation. One of the services observed had taken this further and through encouraging relatives groups had provided a venue and support for members of the wider community to participate in educational sessions on wandering and dementia.

Of course, in using the conceptual tool of modes of governance, we should not mistake the tool for reality. As a tool it is useful to explain governance characteristics but the probable reality is that the three modes are always present in the regulatory arena to a greater or lesser extent. What is of interest in the current discussion is how the specific arenas relate to advice and guidance. The means of exploring this will be through the motivation of those observed and by considering the notion of improvement.

**Motivation**

The inspection observations noted that all regulatees were willing and motivated to comply. The study did not set out to evidence the extent or quality of the compliance, only to understand how compliance and motivation fitted with advice and guidance. It is always possible that some, if not all, regulatees are complying with the methodology but are not committed to the aim of the methodology (Davis and Martin, 2008: p. 140, McBarnet and Whelan, 1991). The study therefore offers no evidence as to compliance. However, it can be conjectured why there might be a high degree of compliance.

The issue of compliance is often seen as mediated by regulatees’ postures towards the law and legal authorities (Tyler, 2003, Braithwaite, 2003). The findings from the study can make some contribution to the discussion on compliance particularly the issues of social distance and motivational postures, ‘individuals choose how socially distant they wish to be from the authority’ (Braithwaite, 2003: p. 138). Murphy et al (2009) extended this notion of distance. The regulatee, in Murphy’s view, may also place social distance between pieces of legislation as well as types of authority.
Observations in this study suggest a social closeness with the regulatory objectives, how can this be explained?

A number of factors may affect motivation given the mixed modes of governance seen above (page 20). Le Grand in a discussion of the motivation of professionals in the UK National Health Service draws upon social psychology to explain that an extrinsic motivation such as the desire to be successful in the marketplace ‘can crowd out motivations that are internal to the individual’ (Le Grand, 2002; p. 150). It can easily be pictured that this overlay of forms of governance, market and network loyalties, ambitions and norms can modify the attitude of the regulatee towards the legislation and/or the authority.

In this particular context there is an interesting case to be argued that regulatee motivation is better levered by the overlap with market and network (community) modes; business interests and community reputation may be enhanced by cooperation with the regulator.

**Bottom up improvement issue**

Regulatees in other studies have been observed to comply with a methodology that is in itself flawed. Bundred and Grace have criticised some UK improvement inspection methodologies in that they verify processes rather than outcomes (Bundred and Grace, 2008). In this study it was observed that the source of outcome information and its quality was obtained from the person using services or their families. Six services were performing well above a minimum standard and inspectors and providers were still genuinely aware that improvements could be made.

If we assume that this was an improvement methodology is it reasonable to ask who was it an improvement for? A recent commentary does use the source of the improvement methodology as a means of understanding the weakness of the model and ultimately its value for the end user. Grace and Martin see the weakness of improvement methodologies as,

- The criteria for success are top down
- They fail to move beyond compliance, and
- What is needed is embedded innovation rather than incremental improvement (Grace and Martin, 2008: p. 5).

The authors identification of these weaknesses convey the top down nature of much that is regarded as improvement – top down in that it comes from a hierarchical source. Is improvement levered by market relationships top down? It could be suggested that improvement then is embedded. But, the important question is who improvement is for? There is the possibility, revealed in this study, that in fact improvement could be bottom up - responding to the criteria of the community, the public, the end users of regulation, instead of, or as well as, the criteria of the state and the market.

**Conclusion**

Educating, informing, persuading, advising, negotiating, training, cajoling and giving guidance are the different ways of referring to advice and guidance. The study demonstrates the flexible and purposive way in which guidance is used and the limits inspectors place on the boundaries of advice and guidance.

It was seen that guidance was a two way flow and that inspectors enable regulatees to reformulate problems and to connect with what they might consider as solutions to
issues arising. In that sense the inspectors were propagators of learning in organisations and across organisations (Raelin, 2008, Senge, 1990, Wenger, 2001). Regulation as pragmatic, learning from its sectors and communities, is a constructive way of approaching regulatory practice leading to ‘improved regulatory governance arrangements’ (Wright and Head, 2009: p. 213)

The study took place within the specific context of health and social care, with a regulator who had recently introduced a grading system for services and where there was a methodology intended to make quality improvements in registered services. Although the study did not address whether guidance did affect quality improvement the observed cooperation and engagement from providers suggested that this was the case. A check on providers’ websites showed that they were keen to incorporate the ratings into their public information.

We have noted the importance of the market as a mode of organisation and attempted to link that with the motivation of the provider. It seems an oversight that we have not attempted in a similar way to assess the motivation of those using services as they participate in the regulatory arena. Perhaps more could be developed to assess how far grading schemes might engage the end users of regulated services in this sector and their wider community. Certainly, there seems no reason why markets and hierarchies should exert a more powerful force on regulatory behaviour than networks and communities. Regulatory methodology and policy driven by community influences may not be as far fetched as it sounds.

**The need for further research**

This is a tentative exploration that charts the topography of advice and guidance. There needs to be further work done, on a more extensive scale, across different organisations and possibly over time different sectors to corroborate, expand, expunge and improve the categories and tentative strategies developed. The paper encourages the development of practice and policies to better serve the interests and participation of regulatory end-users, that engage and enable providers to embed improvement, and that contribute to better regulators as a means of better regulation.
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