Cui Bono? A Critical Analysis of the development of the Irish National Quality Standards for Residential Care Settings for Older People in Ireland
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Year of Study: 3 (part-time)

Discipline: Social Policy

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ECPR Third Biennial Conference, Regulation in the Age of Crisis, UCD, Dublin

Friday, 18th June, 2010

Very first draft, please do not cite

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Abstract

In response to dwindling trust in governments over the last thirty years, more focus has been placed on transparency and accountability in governance practices. The use of independent regulation is one such mechanism to restore citizen trust in governments. However, trust in regulators is also fragile. Non-State actors increasingly participate in the development of rules used by independent regulators as “watchdogs”, to ensure rules are written in the “public interest”, a loaded and ill-defined term. Yet, little is known about how this “participative rulemaking” works in practice. This paper aims to address this gap using the case of the development of minimum care standards and regulations governing Irish nursing homes. The minimum standards were written by a Working Group made up of many relevant stakeholders from the residential care sector.

Interviews conducted with members of the “Working Group” suggested that there was a significant amount of distrust of other members; each believed that others were on the group to promote their own self-interested needs, rather than protecting the public interest. Indeed, members of the Group interpreted “public interest” differently in an effort to influencing the content of the Standards, leading to widespread mistrust between members of the Group. As a result, members became pre-occupied with preventing untrustworthy elements from manipulating the process. However, their overriding sense of trust in the newly established regulator appeared to have impacted on their ability to carry out their watchdog function, ultimately giving the government an opportunity to water down the regulations without any repercussions. This in turn points to the need for greater levels of trust between social actors in order to ensure regulation is not seen as a panacea for the shortcomings of service provision.
Introduction

You don’t hear much about trust these days. Instead, we want accountability.
Sebastian Mallaby, Washington Post, October 30 2006

The apparent decline of trust in our political and social communities is widely lamented by both social scientists and political analysts (Lenard 2005). Several pieces of research indicate that trust in governments has declined (Dalton 2005, Lenard 2005), and governments are arguably making more effort to make themselves accountable to the electorate (O'Neill 2002). One common strategy for increasing accountability (and thus trust) is by involving non-State actors in developing and overseeing the implementation of government policies. It is suggested that involving those affected by particular policies not only provides policy-makers with insights into the ramifications of any proposed legislative changes, but is also said to give the emergent policies greater transparency and legitimacy (Barnes, Newman and Sullivan 2007). In this way, non-State actors have been given a “watchdog” function, to ensure governments act in the public interest (Barnes, Newman and Sullivan 2007). A second strategy involves the increased use of regulation. Regulation increases accountability as it removes oversight of non-statutory services from “untrustworthy” governments, particularly in the aftermath of scandals within services either run or overseen by the State (Jordana and Levi-Faur 2004, Power 1997).

In recent years, these two strategies have been used in tandem. Independent regulators often consult non-State actors when developing new regulations or reforming old ones, often to try to increase the transparency of how these regulations were written (Coglianese, Kilmartin and Mendelson 2009). In spite of the increased popularity of this approach (May 2007), our understanding of the process of non-State actors participating in the development of regulations (hereinafter “participative rulemaking”) remains poorly understood.

This article sets out to add to the limited body of literature on participative rulemaking. Using the case of the development of minimum standards and regulations governing the care and welfare of older people living in residential care in Ireland, this paper sets out to explore the role played by trust within the participative rulemaking process.

Partnership in Developing Regulations

Regulation is a policy tool which governments use to protect the best interests of citizens and users of both statutory and non-statutory services. However, it has been suggested that, in practice, regulation often serves the private interests of politically effective groups, a phenomenon known as regulatory capture (Posner 1974, Wilson 1980). This is largely because the public interest can be defined in different ways; e.g. the protection of public health or well-being, or protecting taxpayers and consumers from exorbitant costs (Feintuck 2004). “Negotiated rule-making” was proposed as a mechanism to circumvent problems of regulatory capture, whereby regulated entities, and other interest groups negotiate the content of the rule to be imposed before the agency formally begins the rulemaking process (Harter 1982). It was hoped that this approach would allow both regulated entities and public interest group representatives to work together as compatriots in search of a mutually agreeable outcome (Harter 1982, Seidenfeld 2000). In 1990, the US government passed the Negotiated Rulemaking Act to encourage more use of this approach.

As noted earlier, the involvement of non-State actors at some point in the rulemaking process has become more common, in spite of limited research and contradictory findings about its potential benefits. Freeman and Langbein (2000), who reviewed empirical research on negotiated rulemaking,
concluded that the costs of traditional rule making and negotiated rulemaking differed little, though they argued that there was also greater legitimacy and ‘buy-in’ from participants for the latter processes. Selmi (2005) also suggests that this approach, while not a cure-all for the shortcomings of regulation, can help parties with very different interests reach creative solutions to regulatory problems. However, Coglianese (2001) suggests that there is no evidence to suggest that negotiated rules are of any better quality than those developed through a more traditional process, nor is there necessarily a higher level of compliance with the regulations developed. Seidenfeld (2000) suggests that claims of collaboration usually fall short of the mark; instead of forming a consensus, participants usually attempt to create strategic advantages vis-a-vis other stakeholders. He argues that the problem of ‘regulatory capture’, whereby regulated entities can manipulate the regulator in order to serve their own ends, rather than those of society as a whole, are so ingrained that regulation developed through collaboration require significant empowerment of public interest groups in the development and enforcement of regulations. Cuellar (2005) also found empirical evidence to suggest that regulatory agencies who attempt to involve the public, as well as regulated agencies, in the development of regulations, may not necessarily take the views of the former into account. According to Cuellar, politicians and other stakeholders involved in the development of regulations dislike hearing the voice of the public, as it would make it more difficult for powerful interest groups to influence the regulations in their favour. The absence of compelling evidence in favour of this approach therefore begs the question of why participative rulemaking has become so common. It is possible that the need to rebuild citizens’ trust in government may be the reason for its popularity.

The Role of Trust in Participative Rulemaking

Trust (or, symmetrically, distrust) is a particular level of the subjective probability with which an agent assesses that another agent or group of agents will perform a particular action, both before he can monitor such an action (or independently of his capacity ever to be able to monitor it) and in a context in which it affects his own action.

(Gambetta 1988: 217)

Trust has been seen as an important element of the functioning of societies and economies (Putnam 1993). Citizens are thought to make judgements on whether to trust politicians/governments based on their perceptions of the latter’s trustworthiness. There is a lack of consensus on exactly how citizens determine trustworthiness, though various dimensions proposed in the literature commonly focus on honesty; competence and capacity to act in the public interest (Poortinga and Pidgeon 2003). Poortinga and Pidgeon (2003) suggest that trust/distrust in government operates on a continuum, ranging from uncritical emotional acceptance to absolute rejection of anything that comes from government. Between these two extremes can be found a “critical trust” and “distrust” in government. Critical trust denotes a practical form of reliance combined with a healthy scepticism, while someone who is distrustful would have low trust in government but is not particularly sceptical about its intentions. However, research by Walls et al. (2004) may suggest that the introduction or reform of regulation may not necessarily increase trust in governments. Instead, quite the opposite is possible; levels of trust in regulatory authorities can be linked to attitudes in the government. Indeed, distrust in governments and in regulators has been linked to major failures of regulation (Freudenburg 2003). This suggests that trust in governments, and in regulators, can be fragile, and thus easily won, and easily lost.

As noted earlier, trust in governments is diminishing (Pharr, Putnam and Dalton 2000). Pharr et al. suggest that this is because of both politicians’ lack of capacity to act in citizens’ best interests and failures of political judgement. This mistrust of politicians can in turn be linked to the consequences
of what Majone (1994) called the rise of the “Regulatory State”. The Regulatory State arose out of perceptions that the light-touch regulation that characterised the 1970's and early 1980’s had failed, prompting calls for more effective consumer protection and the need for greater accountability to citizens about the quality of service provision. As Moran (2002) articulates, “we audit, and we regulate, when we cease to trust”.

As noted earlier, this lack of trust appears to be recognised by government actors themselves. The increased popularity of participatory rulemaking may therefore to be linked to an assumption that non-State actors in the rulemaking process will increase transparency and trust. The Irish government’s White Paper setting out six principles of better regulation argues that:

*Transparency generates greater trust on the part of consumers. It assures and satisfies investors that there is a level playing field, and encourages new entrants to sectors. ... We will consult more widely before regulating.*

(Department of the Taoiseach 2004: 26)

Similar statements can be found in reports from the UK and Australia (Better Regulation Commission 2006, Taskforce on Reducing Regulatory Burdens on Business 2006), highlighting the emphasis placed by governments on restoring trust through participative rulemaking. What this implies is that non-State actors’ have become ‘watchdogs’, monitoring the government to ensure that they are acting in the public interest (Coglianne, Kilmartin and Mendelson 2009). This suggests that governments are willing to cede power to non-State actors in return for a more trustworthy reputation (Jordana and Levi-Faur 2004). However, it is also possible that government still remains in control behind the scenes, e.g. by limiting the power of regulators and limiting their resources (Thatcher 2005). By using a participative approach, politicians may simply be shifting responsibility for any future policy failures to other decision-makers (Fiorina 1982).

Seen in this light, governments’ claims of increased transparency through a participative approach may be more rhetoric than reality. Empirical research has shown that “ordinary” citizens’ involvement in developing regulations is weak, largely because they have limited understanding of what the purpose of regulation is and what issues should be covered within such regulation (Cogliane, 2006). Similarly, while the involvement of NGOs can empower citizens and help to build support for regulation (Hutter 2006), regulatory agencies often fail to take into account their views, particularly when they are contrary to the agency’s own views (Golden 1998). Such findings further bring into question the ability to trust governments and regulators who claim to prioritise the best interests of citizens, yet fail to take their views into account in reforming regulatory systems. It is possible that participative approaches may be used by governments to induce trust without changing the status quo (Cogliane, 2008). While it appears that trust may be an incentive for the use of participative rulemaking, how it influences the negotiations and rules developed remains unclear.

**Case Description**

In July 2009, the Irish government introduced new legislation (Government of Ireland 2009) which provided a new independent inspectorate, the Health and Information Quality Authority (HIQA) with the power to inspect and regulate residential care settings for older people. Prior to this, the system for inspecting and regulating residential care settings for older people in Ireland was weak (Mangan 2003, Pierce 2006). Public sector (State owned) facilities were not subject to any inspection, and the inspection of private and voluntary-owned facilities focused more on the physical environment rather than on the quality of life of residents. While the government (through the aegis of the Department of Health and Children) had been making plans to reform the regulation prior to this
(Department of Health and Children 2001), the execution of the new system was arguably sped up after a documentary broadcast on a national television station in May 2005, which showed the systemic abuse of residents in a privately-run residential care home “Leas Cross” caused public outcry.

In January 2006, a small working group, made up of representatives from the Department of Health and Children, the Health Services Executive and other public bodies, was convened to develop a set of minimum quality Standards. The English minimum quality standards (Department of Health 2003) were used as a template for their development. These draft standards were then handed over to a newly-established independent organisation, the Health and Information Quality Authority (HIQA) tasked with inter alia the inspection of the residential care sector. This document was then further developed by a 35-member working group made up of service providers, representatives of advocacy groups for older people, carers and nursing home staff, and government representatives. Upon the completion of a draft set of Standards, a large public consultation process was carried out, in which prospective and current nursing home residents, their relatives and carers, service providers and health and social care professionals, were asked to give their views on this draft set of Standards prior to their finalisation. The final version of the Standards (hereinafter the Standards) “set out what a quality, safe service for an older person living in a residential care setting should be” and strive to ensure that “the holistic needs of the resident take preference” within care homes (HIQA 2009). The Department of Health and Children then developed a set of regulations (Care and Welfare Regulations, 2009) against which all residential care settings would be inspected. The new regulatory system commenced in July 2009.

Methods

Study Design: Case Study Approach

The current study took the form of a qualitative, revelatory case study (Yin 2003), using a process tracing approach (George and Bennett 2005). The fieldwork was conducted in three discrete (but partly overlapping) phases of data collection in order to trace the process:

1. Documentary analysis (a qualitative content analysis supplemented with some quantitative content analysis) of the four drafts of the Standards plus other supporting documentation in order to identify underlying themes in each document;
2. In-depth interviews with 32 of the 37 members of the Working Group, including HIQA staff who facilitated group meetings, which aimed to explore both how the Group operated and how decisions were made and also to ascertain their attitudes towards the Standards; and
3. In-depth interviews with 12 other relevant stakeholders of the nursing home sector, who did not participate in the Working Group, in order to understand why they did not participate in the Working Group and also to ascertain their attitudes towards the Standards.

Data were collected between February, 2009 and February 2010. Interviews lasted forty-five minutes on average. All were audio-recorded. All bar three interviews were conducted in the respondent’s place of work; two were conducted in Trinity College and one respondent was interviewed over the phone (using a device to allow the interview to be audio-recorded.

The majority of interviews were transcribed verbatim on the day of or in the days immediately following the interview in order to allow each interview to inform the rest of the interviews.

Data Analysis

Analysis was conducted in three phases, using tools outlined by Miles and Huberman (1994). The first stage of analysis involved examining the lead up to the establishment of the Working Group, in
order to ascertain HIQA’s rationale for the process, as well as examine perceptions of trust in HIQA and fellow Working Group members amongst those interviewed. The second stage involved examining the dynamics of the group in order to ascertain how trust impacted on the decisions made. The third stage, which consisted in particular of an analysis of the documentary data, examined how the various interests were reflected within both the Standards and the regulations documents. The software program NVivo 8 (QSR International, Doncaster Australia) was used to aid analysis.

As with all research, this study had limitations. The use of a single case study means that it is possible only to generalise the findings to theory, rather than other cases (Yin 2003).

Results

Establishment Development of the Partnership

As noted previously, a draft of the National Quality Standards for Residential Care Settings for Older People in Ireland was developed by a small group of civil and public servants within the government Department of Health and Children in 2006. In early 2007, these draft standards were then formally referred to the (interim) Health Information and Quality Authority to “further develop, consult on and finalise as the mandatory, meaningful standards against which all residential care settings, both public and private will be inspected by the Authority” (HIQA 2007: 4). HIQA established the group both in order to ensure that “the standards are developed with the involvement, engagement and consultation with users of the service, providers, and other key stakeholders” (HIQA 2007: 4) and to guarantee “a shared vision across all stakeholders as to what should be contained in the National Quality Standards” (HIQA 2009: 6).

Interviews with HIQA staff suggested that the purpose behind the large group was also to promote HIQA’s reputation as a consumer-driven organisation, which they recognised would help them to become trustworthy, both to the residential care sector and the wider public:

I think part of what went on in the older people’s standards was that people felt they could trust individuals [within HIQA]. It was HIQA’s first outing, and HIQA was setting out its stall and saying it was a body that was going to listen to people, it was going to be consultative, it was going to benchmark things against best practice. They felt we were reasonable and listening and that. Because HIQA was new. In a sense I think the organisation has its own reputation now but it hadn’t at that point.

Which is what?
R: Well again, I can only say what I think it is. I think people see it as an organisation that gets things done, that had pushed for change... There is a sense out there that HIQA is a dynamic organisation, that it said it was going to do this in this timeframe and it has done it.

(HIQA Staff member on the Working Group)

This quote indicates that HIQA was aware that trust within regulatory agencies is a vital component in allowing them to operate successfully. By allowing the different interest groups into the decision-making process, they were ensuring legitimacy in the rulemaking process, and demonstrating that they had arrived at decisions in a fair and transparent manner (Coglianese, Kilmartin and Mendelson 2009).

Many members of the group praised HIQA’s efforts to ensure that everyone on the group was listened to and had an opportunity to feed into the Standards, leading them to trust HIQA’s abilities and motivations. However, a small number were critical of the way in which members of the group were selected. The approach was essentially a two-stage stakeholder identification process.
(Achterkamp and Vos 2007). Firstly, the CEO of HIQA identified a list of organisations she felt should be present at the meetings. Each organisation was invited to send a representative to the first meeting. Secondly, at the first meeting, all present were asked to identify other relevant stakeholders not already present. Although stakeholder identification is not an exact science (Varvasovszky and Brugha 2000), some of the members of the Working Group questioned the competence of HIQA, suggesting that notable absences from the table at the first meeting indicated a lack of knowledge about the nursing home sector:

_I got a phone call one day here from someone who was sitting at the table of the Working Group. He said there was no Director of Nursing for older persons services at all. So, how the participants on the makeup of that group was decided, I never found out. But the fact that there was no director of nursing on it was seriously flawed. I mean, the Director of Nursing of Older Persons services is the leader of older persons services. To have them not there is a fallacy from beginning to end (laughs)._  

(Member of the Working Group, public sector)

As competence is a key component of trust (Poortinga and Pidgeon 2003), it can be argued that doubts about HIQA as “trustworthy” were present from early on in the process.

While some of the (arguably) relevant stakeholders who were not represented on the Working Group had few difficulties with HIQA’s decision not to include them, others felt that they should have been represented. For example, a professional body representing dietitians appeared to have been excluded simply as a result of oversight (i.e. was not identified in the stakeholder identification process). However, the decision not to allow the organisation to join the Working Group as a late entry was deemed to be inexcusable:

_I think the collaboration was brilliant, I think the more people on board from each angle, the better. [But] we should have been represented. We would consider ourselves to be the professional body [in this area], the expert voice and for a standard, a national standard to be written around [this topic] without our input, just seemed a bit mad._  

(Individual not on Working Group, public sector)

This also appeared to have resulted in some degree of mistrust for HIQA, though in this case, it appeared to have been borne out of a sense of unfairness, also thought to be a vital component of trust (Poortinga and Pidgeon 2003); while most other therapists’ organisations were represented, dietitians were not. This in turn appeared to have generated a sense of suspicion about HIQA’s motivations, culminating in a view that it was not acting in the public interest as it was not prepared to take expert views on board.

However, these criticisms were largely the exception rather than the rule amongst all respondents. As noted above, most respondents appeared to hold the organisation in high regard. The positive, trustworthy reputation built up by HIQA stand in contrast to the Department of Health and Children, which was portrayed variously as incompetent and dishonest. Not only had they failed to regulate nursing homes adequately (culminating in the Leas Cross abuse case), they were also unwilling to take on board the views of stakeholders in developing the earlier draft set of Standards.

_There was a set of Standards developed with a very poor level of communication within the Department of Health and there was a degree of unhappiness about that_
really. But once HIQA took over, eh, I really had a lot of confidence in the process because I actually think they are probably about the most professional public body I have seen in Irish public life so far.

(Individual not on the Working Group, public sector)

Ironically, the decision by the smaller, Departmental Working Group not to take on board the views of stakeholders was so that they would ensure the Standards reflected public interest and not be influenced by vested interests:

*The Department determined that it was going to be done... they would produce them and then they would go out for consultation. But that, it wasn’t going to be everybody sitting around a table drafting them. The Working Group would draft them, then they’ll consult. We knew that... there was a considerable agenda... There were so many interest parties that it was a much better idea to just actually keep it to a small drafting group. And [once it’s completed], then let’s get them to come at it.*

(Member of the Department of Health and Children internal Working Group)

This quote appears to indicate a pre-ordained scepticism about the motives of other members of the Group, a feeling also shared by a number of individuals on the Group. As will be discussed in greater detail below, this split occurred broadly between those representing the public and private sectors. This led many group members to question the make-up of the group, suggesting that other factions were over-represented. Some of those who worked in the public sector suggested that private sector members did not adhere to the rules of membership:

*I know after one meeting where something just got torn apart by the private sector, I actually raised the question to say “we took a vote in there but there was people in there that shouldn’t have been in the room” and what they had said was that “we came because such and such is going to be missing three meetings so we are going to be taking over and we want to get a sense of what’s happening” and all of a sudden they became permanent members of the group and the balance of the group shifted.*

(Member of the Working Group, public sector)

It later appeared that this process of self-selection was allowed to develop largely because official rules around membership were not set down by HIQA at the start. For their part, private sector representatives suggested that they had invited new members onto the group in order to redress the imbalance of power. These findings paint a picture of a process characterised by tensions between different factions, overseen by a new regulator trusted by most members. It is possible to argue that tensions between members led them to view their “watchdog” function to be monitoring each other, rather than ensuring that HIQA acted in the public interest.

*Operations of the Working Group*

The large size of the group notwithstanding, the vast majority of members felt that the deliberations had been a success, given that the Standards were of a high quality and were likely to improve the care of older people when implemented. Most praised the work of the HIQA staff, who helped to foster meetings which were respectful and inclusive in nature, which in turn helped everyone to participate fully and continue to work hard to ensure that the Standards would be effective.
However, conflict developed between the various factions within the group in relation to the significant cost implications of the Standards, particularly those likely to result in significant additional expenditure for providers (higher staff costs, staff training, refurbishment etc). While private providers wished to keep standards as low as possible, those working in the public sector called for standards to be raised significantly. This debate was framed within a discourse of different interpretations of the ‘public interest’ versus self-interest. Most respondents working in the public sector suggested that their calls for higher standards were to improve the quality of life of older people living in residential care, and suggested that the private providers were only interested in making a profit, rather than truly trying to improve standards for residents.

_Money is a massive pre-occupation in the private sector. Massive. They want to fill their beds, they want to make money, they are commercial organisations, the priority is filling beds and making a profit. In countries where you don’t have the private sector leading these initiatives, you do come up with something that is much more objective._

(Member of the Working Group, public sector)

For their part, private providers suggested that standards which were too high would effectively prevent them from carrying out their public duty, which they delineated as supplying enough beds to meet demand (Feintuck 2004).

_Our fear is that we are not going to get a return on capital investment; it’s a genuine fear. We are very concerned about whether it will be cost-effective to meet the Standards or whether we’ll have to close some nursing homes._

(Member of the Working Group, private sector)

Private providers suggested that public sector staff had ulterior motives for calling for higher standards:

_My biggest criticism of it was that everyone had their own agenda. You had people in the HSE who wanted a new nursing home built for themselves who were throwing stuff into the pot that wasn’t necessary, it was just “oh, we’re doing it”, to pump the standard up so high that their existing facilities wouldn’t meet the regulation._

(Member of the Working Group, private sector)

Findings from the interviews suggested that private sector members were more determined to successfully influence the content of the Standards. While public sector representatives appeared to believe that simply highlighting how their recommendations would benefit residents would result in them winning an argument, those in the private sector adopted a more systematic approach:

_It would have become far too expensive for us to build a new nursing home on the regs that these lads were suggesting, [so] we went into battle quite hard. It turned into a kind of filibustering. We were talking down the clock. It got to that stage, where you just kept talking and arguing and arguing, so as at the next meeting, maybe the guy who was arguing against you wouldn’t be there and you would be able to knock it on the head._

(Member of the Working Group, private sector)

In spite of this organised approach, private owners did not get their way. It appeared that HIQA remained unconvinced that private nursing home owners’ recommendations were sufficient to provide residents with a good quality of life. This led HIQA to intervene and make unilateral decisions where necessary (e.g. increasing the proportion of single bedrooms). According to HIQA,
these decisions were determined by what they believed to be in the best interests of their client, nursing home residents. HIQA suggested that it felt it had to advocate on behalf of older people as no-one else was prepared to do so. While there were a number of individuals from advocacy groups for older people participating in the process, their knowledge of residential care was limited, as the primary focus of these organisations was supporting active older people.

These findings describe a process through which the various interest groups sought to promote their private interest (Posner 1974), couched in an interpretation of the “public interest” which suited their own needs. In this case, HIQA was able to persuade almost all members that in this case, the public interest at stake was the quality of life of all current and future nursing home residents. Rather than worrying about the negative consequences of their decisions (e.g. the possibility of a reduction in the supply of residential care beds with demand increasing), HIQA suggested that it had a mandate to develop Standards based on evidence and best international practice, in the best interests of older people.

The findings also suggest that Coglianese et al.’s (2009) description of the benefits of participatory rulemaking may well be valid. HIQA was able to demonstrate that it reached its decisions in a fair and transparent manner by approaching the regulatory problem with an open mind, taking into account all relevant interests, instigating further trust in HIQA as a capable, truly independent regulator. However, HIQA’s decision not to listen to members resulted in the erosion of trust in the organisation to some degree, highlighting the tensions of participative policy-making and negotiated rule-making, highlighting further the fragility of trust in regulators.

Outcomes of the Process

An analysis of the final draft of the Standards document suggests that they adopted much of the empirical evidence on how to ensure older residents have a good quality of life (Barnes 2006, Guse and Masesar 1999, Hancock, Woods, Challis and Orrell 2006, Murphy, O’Shea, Cooney, Shiel and Hodgins 2006). However, it appears that HIQA may have itself been ‘trumped’ by the Department of Health and Children, as the content of the legislation underpinning the Standards (the 2009 Care and Welfare Regulations) is considerably different from the Standards in many ways. While there are 32 Standards, with a total of 330 criteria, only 120 of these have a basis in the Care and Welfare Regulations. Many of the costly issues which led to significant debate on the Working Group were not mentioned within the regulations (e.g. the regulations do not specify bedroom sizes or ratios). While providers may encounter problems if they do not comply with the Standards, HIQA acknowledged that they had no jurisdiction to force providers to meet the standards:

Yeah you are not going to close them down. But you will follow it up. And the next time, you would inspect it again and you would publish that they haven’t done so.

(HIQA Staff member on Working Group)

However, providers on the Group have indicated that they are not likely to comply with anything other than the regulations:

I think there has been a bit of a change alright, on HIQA’s behalf, that it is not the Standards now, it is the regulations. And that mightn’t be a bad thing to be honest with you. I think the way the regulations are more em, it’s easier to … Not to get to that Standard, but it’s easier for them to regulate against those than against the Standards.

(Member of the Working Group, private sector)
There are two alternative explanations for the Department of Health and Children’s decision not to make all of the Standards mandatory. Firstly, as suggested by the Department, as the regulations gave the regulator the power to close down all non-compliant homes, it was important that the regulations be measurable so that prosecutions could be made against non-compliant homes. Otherwise, the regulations could themselves be called into question. However, a few years previously, the Department had written regulations which simply stated that an accreditation board had the authority to accredit nursing homes according to standards set by the accreditation board itself (i.e. rather than incorporating elements of the standards into the regulations).\(^1\)

An alternative explanation could be the cost to the State in meeting the Standards set out by the Working Group. Although staff from the Department of Health denied that concerns over funding post-Celtic Tiger effectively resulted in the regulations watering down the Standards, there is ample evidence to support this view. As noted earlier, many public residential care beds are provided within former workhouses, the condition of which are wholly inadequate to meet the needs of residents (Murphy, O’Shea, Cooney, Shiel and Hodgins 2006). A costs assessment of the Standards, commissioned by the Department of Health and Children calculated that the costs involved in public sector compliance\(^2\) with the Standards would reach approximately €1.2bn (PA Consulting 2009). Staff within the Department of Health acknowledged this difference and suggested that the regulations were pitched at a minimum level in order to avoid homes which did not meet the Standards from being closed down:

\[I\text{ suppose the reason is that [the regulations] set out the minimum that you would require, the absolute barest minimum required to keep people safe. So if you are breaching the regulations, it means you are putting people in danger and there is a need for action immediately... If you are in breach of the regulations you are shut down full stop... Whereas with the standards, it is also about driving quality forward, so it is set at a higher level than the regulations.}\]

(Department of Health and Children staff member, not on Working Group)

While a significant amount of government funding had been ring-fenced (€112mn) for the development of 860 new public residential care beds by the end of 2009, only 333 of these had been delivered by the end of July 2009 (Health Service Executive 2009), raising the possibility that the government may have faced the prospect that its own State-run homes would not meet the Standards and may thus be forced to close down.

Whichever the reason for the decision not to make all of the Standards mandatory, it is striking that both the Department of Health and Children and HIQA issued press releases implying that the regulations provided for nursing homes to be inspected against the Standards:

These Regulations give effect to the [new National Quality Standards for Residential Care Settings for Older People in Ireland] to allow independent registration and inspections by the Chief Inspector of all nursing homes (public, private and voluntary) to commence today... Today is a significant day for older people, particularly for each and every resident in a nursing home - we have set a bar for service providers with Standards and Regulations that will drive quality care.

(press release, Department of Health and Children, 1\(^{st}\) July, 2009)

\(^1\) S.I. No. 160/2002 — Irish Health Services Accreditation Board (Establishment) Order, 2002

\(^2\) As the Irish government’s requirement to provide nursing home care is enshrined in legislation (under the Poor Law Reform (1906) and Health Act (1970)), it is possible that private homes may also have requested State investment, further increasing the cost.
Nursing homes will be inspected against the National Quality Standards for Residential Care Settings for Older People in Ireland and regulated under the Health Act 2007 to see if they are safe and whether the residents are cared for properly.

(press release, HIQA, 1st July, 2009)

These ambiguous statements raise a number of interesting points. Firstly, it is worthy of note that HIQA did not clarify the difference between the functions of the Standards it produced in consultation with the Working Group (guidelines) and the regulations (mandatory). The reasons for this are unclear. However, it is possible to speculate that HIQA did not clarify the difference because it wanted to maintain its reputation as an effective regulator; not only as a trustworthy and dynamic organisation, but as client-focused. As the Standards had been HIQA’s first project, it is possible that failing to get endorsement from the Department might have tarnished the reputation it was working to build up.

This failure by the Department to endorse the Standards in turn raises questions about the role of government within the regulatory process. While the Minister for Health has the power to make regulations she thinks appropriate, the fact that she has this discretion raises questions about HIQA’s independence. While HIQA could make unilateral decisions in opposition to private nursing homes, it did not have the authority to overcome what may have been the government’s vested interests (namely, maintaining the status quo to keep costs low).

Thirdly, it is also worthy of note that none of the members of the Working Group recognised the differences, with the notable exception of the private nursing home owners. This is perhaps unsurprising, given that few of the others had had any prior experience of the regulatory process. This may indicate that the earlier efforts made by HIQA to build trusting relationships meant that no-one saw any reason to doubt HIQA when it stated that nursing homes would be inspected against the Standards as meaning anything other than the regulations gave legal standing to the Standards. Although members had previously indicated a mistrust of the Department, the trust they had in HIQA led them to believe HIQA’s implicit assertion that the regulations gave effect to all of the Standards. In addition, the group was dissolved once the Standards had been finalised, essentially absolving them of any responsibility about the efficacy of the regulatory process.

Finally, the outcome of the process highlights the centrality of trust and trusting relationships within the regulatory process. Most of those interviewed regarded HIQA as a trustworthy organisation in light of its efforts to be transparent, honest and driven by the needs and well-being of residents (Poortinga and Pidgeon 2003). It is possible that the Department of Health and Children may have capitalised on this trust, deliberately creating ambiguity around the relationship between the Standards and the regulations in order to deflect attention from the weaknesses of the regulations. Although HIQA is currently receiving a significant amount of praise within the media for its efforts to improve the standard of care provided in Irish nursing homes, the future of the regulatory process remains unknown. Trust in the regulator is widely regarded as central to the effectiveness of the regulatory process (Walls, Pidgeon, Weyman and Horlick-Jones 2004). Thus, any knowledge that this trust has been broken may be damaging, both for HIQA and the regulatory process.

Discussion

The findings of this study suggest that the oversight of an independent regulator can provide reassurance to civil society actors that the government, if not trustworthy, is at least acting in the public interest. However, the very fact that the regulator is so trustworthy can limit the ability of civil society actors to perform a similar watchdog function over the former. Hardin’s (1999) rhetorical

3 Under the Health Act 2007
question “do we want trust in government?” may therefore have some merit; distrust in government may well be necessary, as we can police government actions to ensure they are acting in our best interests. However, there is ample evidence to suggest that mistrust can have a detrimental effect on society (Fukuyama 1995, Putnam 1993).

In spite of this, social regulation has become a more commonly used tool of governance (May 2007). When regulation fails (an inevitability, according to Posner (1974)), the common response is to strengthen the weaknesses of regulation, such as introducing non-State actors into the regulatory process. However, regulatory reform is not always the perfect solution, as it cannot overcome the fundamental problems of regulation, namely difficulties in avoiding regulatory capture, flexibility in representing consumer interests, the political and cultural environment in which the regulatory regime operates (Rothstein 2005). Yet, with the global financial crisis on-going, the need for independent oversight has arguably never been clearer, to help limit the dangers of questionable banking practices, even where weak regulation itself may have contributed to the meltdown. What then is the solution?

One possibility is to explore alternatives to regulation when shortcomings in service provision are identified. Yet, alternatives to regulation are rarely considered (Organisation for Economic Co-operation and Development 1997). The Irish government’s decision to respond to the Leas Cross scandal by developing a new regulatory regime highlights the high regard in which regulation as a cure all is regarded. However, other aspects of the Irish nursing home system have also been criticised. Firstly, the significant growth of the private sector has been questioned. While systematic research on the quality of care provided in Irish nursing homes remains extremely sparse, there is some evidence from other countries to suggest that the quality of nursing home care provision within the private sector is not as high as in the public sector. Secondly, the difficulties of recruitment of appropriately trained staff into Irish nursing homes have been well-documented. Thus, increasing public provision and creating opportunities for staff training and quality improvement may have been more suitable policy responses than regulation. It is possible that these approaches may work well in tandem with oversight by an independent regulator. Braithwaite et al. (2007) argue that regulation alone is an inadequate response, and recommend a “strengths-based pyramid” to complement the “regulatory pyramid”, to encourage the nursing home industry to embrace continuous improvement. This strategy of combining regulation with other quality improvement tools is also recommended in other sectors (c.f. Gunningham, Grabosky and Sinclair 1998). Indeed, there are a wide range of other strategies for improving the quality of care in the sector that would work along with an improved regulatory system (Wiener 2003).

Such approaches may have some hidden positive knock-on effects. The findings from this case study have demonstrated how important protecting the public interest is in generating trust in the government and the regulator. Governments have a duty of care to protect vulnerable citizens. By developing other strategies to protect vulnerable citizens, governments can prove their trustworthiness to the electorate and release the regulator to perform its key function, namely, ensuring service providers are not slipping below the minimum standards required of them. Government endorsement of trust as a new policy objective, it appears, may benefit us all.
References


