Vision 2020: International VET regulatory benchmarking

Issues for discussion

- Does the vocational education and training sector need a new approach – responsive regulation? Self-assessment combined with a review?
- Are we robbing our sector of creativity and flexibility by a heavy regulatory-focused regime?
- How do we weed out high risk providers without punishing high performing providers?

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This paper begins with a broad definition of regulation as that which steers the flow of events (Parker & Braithwaite 2003). Regulation may be formal or informal, market based or non-market based, government led or community led, rule based or principle based, coercive or voluntary, authoritarian or democratic in its organisational structure. There are many ways of regulating how activities are carried out, and many entities that exert a regulatory influence. Nowhere is this more evident than in the VET sector.

Regulation has changed its spots dramatically over the past half century. Post the Second World War, in the Keynesian era of centralised government, regulators and regulatees were the main protagonists in regulation. The approach was largely command and control, involving inspections, compliance checks and sanctions for non-compliance (Bernstein 1955). It was often adversarial, and readily became a game of regulatory empire building. Regulations would become increasingly prescriptive to give the regulator greater authority and legitimacy; it was not unusual for sanctions to be defied or challenged.

Skilled regulators during this period learnt that they could achieve their objectives of compliance more readily if they didn’t simply “go by the book” through ritualistically sanctioning any instance of non-compliance. Wielding power did not necessarily win respect and exert influence. Deterrence alone had limited value, and could create pockets of resistance, disengagement and game playing. More could be achieved through engaging those they were regulating in a compliance process of education, persuasion, praise and dialogue, before resorting to a single regulatory instrument of deterrence (Bardach & Kagan 1982; Hawkins 1984; Braithwaite 1985).

As these advances in regulatory practice were re-writing the script for traditional regulation, another big change was taking place, led by economists from the Chicago School (e.g. Becker 1968). The de-regulation movement of the 70s and 80s claimed the main stage. With this policy shift, self-regulation became the catch-cry of governments. Markets were embraced as a regulatory force for ensuring continuous improvement in goods and services offered to the public. Self-regulation had its strengths for those who were committed to and capable of offering a good product. But it also had weaknesses. Without sufficiently useful and relevant feedback from users, efforts to improve performance could flounder. Self-regulation also increased the sphere of activity for actors who saw opportunity for making profits, while harming their “buyers” through inadequate provision of services and goods.
It was in response to this debate – regulation versus de-regulation – that some 20 years ago responsive regulation came onto the stage (Ayres & Braithwaite 1992). The essential idea was to offer self-regulation with non-intrusive oversight to all those entities and individuals who were getting on with their business without breaking the law and doing harm (enforced self-regulation), and to reserve interventions of varying degrees of intrusiveness for those cases where problems emerged that harmed the community.

While responsive regulation provided some resolution to the regulation versus de-regulation debate, its early practical focus was on regulator and regulatee (see Wood et al. 2010 for a review of practical applications). Even so, responsive regulatory scholars were conscious of the role of third parties in regulation. Ayres and Braithwaite (1992) argued for tripartism so that public interest groups could hold regulators and regulatees to account if responsiveness risked sliding into capture, or even corruption. Other scholars were developing other ideas to take account of third parties in responsive regulation (Grabosky 1995; Gunningham & Grabosky 1998).

Even so, few anticipated the massive change that was ahead a decade on. After a period of de-regulation and extensive privatisation of all sorts of goods and services by governments, the space that government had vacated was not only occupied by producers of these goods and services but also by private regulators. With de-regulation came a virtual explosion of regulatory activity outside of government, described by Jacint Jordana and David Levi-Faur in their work on regulatory capitalism (2004).

As multiple groups emerged with an interest in having their performance or the performance of their constituents measured so that they could provide evidence of their worth and exert influence in the markets in which they competed, new regulatory tools emerged to meet their needs. Protocols of best practice, checklists, and audits by external bodies became popular mechanisms for providing evidence of worth, probity and sustainability. We embraced what Michael Power (1999) described sometime earlier as the “audit society”.

The growth of the audit society meant that regulation was implemented by self and others largely through documents that provided paper trails of performance, policies and risk assessments, serving the joint functions of convincing outsiders of high standards of performance and compliance and promoting a desirable corporate brand. These regulatory processes are largely rituals of comfort, because rarely do they provide a clear line of sight of the delivery of goods and services. They provide assurance that someone is doing something to provide assurances of quality, but leaves unanswered the big question of whether paper compliance actually reflects the important elements of effective practice.

How then do we regulate in an era of regulatory capitalism and how do we move beyond these rituals of comfort in the VET sector?

First, it is helpful to consider the sources of regulation around vocational education, and how and why we need to use strategic conversation to bring them into alignment. This paper looks at four sources of regulation: (a) law that steers the flow of events; (b) formal rules and guidelines that provide a regulatory framework for law enforcement; (c) costs and benefits in a market that steer the flow of events; and (d) social norms of the different players in the VET space that steer the flow of events.
The most widely recognised source of regulation across the community is regulation that is backed by law. In vocational education this law provides for a special purpose regulator, ASQA, which has power to enforce compliance with standards, formally set out in the AQF, the VET quality framework, and training packages.

Interpretations of laws and standards always have to be debated and settled within a regulatory community. They result in guidelines and rules that all agree are practicable and reasonable across contexts. The need for dialogue and debate to develop these guidelines and rules is most necessary in a regulatory community where law and regulations are seen through different lenses by different groups with different interests and values.

VET is such a community. It encompasses small and large RTOs, private and public organisations. Training needs are diverse, ranging from being intensive and expensive to being low cost and mass-produced. Assessment needs similarly vary greatly, as does the need for a strong interface between class-room teaching and work-based training. Such variability means that rules and regulations risk impacting some research training organisations (RTOs) in ways that are out of proportion with what was intended. The conversation about how regulation is to be implemented in a fair and reasonable manner is an important one in VET.

The next source of regulation addresses the question of interests through competition to be a successful RTO. *Competition to advance one’s interests* is a regulatory mechanism based not on legal constraints but on individual motivations. Private and public RTOs compete for students; they need to win in the marketplace through “selling” their strengths as benefits and ensuring that their weaknesses do not impose unacceptable costs on the RTO.

Any legal or rule-based regulatory requirements that are not of benefit to the business – that are not part of shoring up the organisation’s strengths – threaten to become a drain on resources, a regulatory burden.

Ideas around which actions benefit the organisations and which are wasteful or inefficient are greatly influenced by *social norms around what vocational education* offers and how it can best contribute to a skilled workforce. These norms are shared within groups within the regulatory community. They are held in place by pedagogy, experience and political beliefs. They are not easily changed. They are regulatory. They will affect teaching and training practices, management practices, assessment requirements, expectations of students, families and employers. They affect relationships among groups: industry and employers, licensing boards and unions, teachers and trainers, the general public, and government. These norms that determine interpretation of what is happening in VET and what should and is being done in the VET space can be thought of as being upheld and advocated by particular groups (professional groups, peak bodies, industry councils, government committees).

On some issues the norms of the teachers/trainers and industry councils may be the same, in other instances they may be complementary so that they reinforce each other, and in other circumstances, they may conflict. Alliances and opposition will be part and parcel of the regulatory space occupied by all these players. For formal regulatory bodies to have credibility and legitimacy they must find the common ground, as must others who wish to have influence in steering the flow of events.
This is why there can never be too much conversation and dialogue around regulatory matters. The many groups who have a role to play in regulating the VET sector need to have a shared understanding of each other’s goals and aspirations and find a collective voice to realising them. The regulator is part of this regulatory community, but cannot regulate the community alone. In the complex community that is VET, the regulator cannot hope to uphold standards through a top-down command and control model of regulatory practice.

The process of building support for regulatory standards

Education is an important ingredient in regulation, particularly when new standards are being developed and new practices and processes of best practice introduced. But just as important as education is the art of listening which leads to constructive debate, contest, persuasion – and then change, if a consensus cannot be forged across a broad enough community (Braithwaite, Makkai & Braithwaite 2007; Braithwaite 2011). How regulation is to be carried out is a conversation that requires everyone’s participation.

There are many webs of dialogue along which ideas travel and change in the regulatory community (Braithwaite & Drahos 2000). There are also webs of control. At the end of a dialogic process, decisions have to be made about how regulation is to proceed, and those at the centre of webs of control make those decisions. In VET’s case, ASQA as the legal authority is going to be at the centre of decision-making.

But sometimes ideas can be snuffed out prematurely, before everyone has had a chance to have a say and put their best ideas forward. The result is resistance to the regulator and its decisions, game playing around the rules and court challenges, and disengagement from participating constructively in the regulatory process.

All of these responses create problems for a regulator. Resisters loudly and earnestly do battle with the regulator to gain their attention, game players invest in winning against the regulator, and disengagers slip quietly under the radar (Braithwaite, Makkai & Braithwaite 2007; Braithwaite 2009, 2014). Whatever the preferred mode of defiance, the regulator cannot deal with all forms on a limited budget and quickly is presented with an even greater problem of enforcement swamping if defiance turns into serious non-compliance.

Webs of dialogue and webs of control can easily become bogged down in conflicts of values and self-interest. Common points of agreement, however, can be found. The Australian Taxation Office’s mantra of making compliance quicker, easier and cheaper was well received by taxpayers from all walks of life. Behavioural economists have brought together a host of empirical findings that have been shown to improve compliance around the idea of “nudge” (as popularised in Thaler and Sunstein’s 2008 book). Nudges that are openly shared and agreed can work: in the VET space they need to respect the norms of the group being regulated and actually deliver on the promise of less burden and more benefit.

Norms and social pressures that hold people and organisations together to achieve high standards, and set out expectations that members will behave responsibly and be accountable, can do much of the heavy lifting in regulation. In the VET space, those norms are associated with the professionalism of teachers and trainers. When these pressures fail, however, formal regulatory intervention may be required. Responsive regulation depends on a strong regulator who can take action in the worst cases. Paradoxically, when regulators have extensive power that is used sparingly, regulatees are far more likely to be successfully regulated through informal and light touch means. This is at the heart of responsive regulation.
Responsive regulatory pyramids: controls and supports

Responsive regulation is commonly explained through regulatory pyramids (see Figure 1, but also Wood et al. 2010, Braithwaite 2011). A regulatory pyramid sets out a set of actions that will be pursued in response to a particular problem of non-compliance. Context determines what actions are in the pyramid and where one might start. But the key principle is to use the least intrusiveness required to achieve compliance. If a light touch intervention does not work, a more intrusive intervention is tried. Pressure is increased with the regulator working his/her way up the regulatory pyramid until a compliant response is elicited. Future interactions return ideally to cooperation at the bottom of the pyramid.

In more recent developments, movement up the pyramid can involve other influential players in the regulatory community (professional associations or licensing boards in the case of VET) (see Figure 2). Sometimes other actors can succeed in eliciting compliance where the formal regulator has failed.

Responsive regulation now also incorporates pyramids of supports as well as pyramids of sanctions (see Braithwaite, Makkai & Braithwaite 2007; see Figure 3 for another example in medicine). These complementary pyramids recognise the importance of positive feedback through praise and recognition for things done well alongside criticism of things done badly in effective regulatory encounters. A regulator’s concerns about a particular risk in an industry (e.g. the financial viability of certain RTOs) should not preclude recognition of quality training in those organisations should it exist.

Figure 1: A responsive regulatory pyramid (image courtesy John Braithwaite)
Pyramids of supports and sanctions are in keeping with Neil Gunningham and Darren Sinclair’s (2002) work on leaders and laggards in regulation. If leaders are continuously pushing standards higher, laggards will feel the pressure too, and will be pulled, perhaps reluctantly, above the threshold standards. Supporting leaders to become even better is a regulatory strategy that can lift standards across the VET sector (see Figure 4 for an application of this idea by the South Australian EPA).
Figure 3: Pyramids of supports and sanctions for regulation of medicines (Dukes, Braithwaite & Moloney 2014)

Pyramid of supports

- Nobel Prize in medicine
- Reformed patient incentives
- Escalated prizes or grants to resource/encourage/facilitate strength-building
- Prize or grants to resource/encourage/facilitate strength-building
- Informal praise for progress in safe testing, safe manufacture, ethical marketing
- Education and persuasion about a strength

Pyramid of sanctions

- Loss of license to sell medicines
- Criminal prosecution
- Escalated sanctions
- Sanctions to deter
- Shaming for inaction
- Education and persuasion about a problem

Figure 4: Diagram from the South Australian Environmental Protection Agency’s annual compliance plan (EPA 2013)

Encourage improvement

- criminal
- chancer
- careless
- confused
- compliant
- champion

full force of the law

enforce

educate

enable

engage

recognise and reward
Warning: importance of separating risk and sanctions

Last but not least, it is worth noting a distinction between assessing risk and a regulatory intervention. In order to contain regulatory costs, it is not unusual for a regulator to opt for community-wide education and training for self-regulation and be satisfied with this minimal intervention for all except those identified as high-risk groups. Responsive regulation then becomes an approach that is developed for those high-risk groups that may require a full regulatory pyramid to elicit compliance. The regulator still starts by listening, however. Being classified as part of a high-risk segment does not justify stigmatisation from the regulator. The regulated may be more than willing to cooperate if they understand the regulator’s concerns and know how to meet compliance demands.

One might suppose that the thinking of regulators who have mapped risk onto responsive regulatory pyramids is that they want to signal to their own staff how far the regulatory agency will go in their efforts to elicit compliance. Unless risk is high, they are not prepared to sequence interventions all the way up the regulatory pyramid. Often regulatees know this as well, unfortunately. Their take-home message is that “my misdemeanour is not significant enough for the regulator to worry about me – nothing more will happen, I am safe continuing with my non-compliance for the moment”. This way of thinking is likely to be particularly common in fields where risk assessment is a driving methodology. When risk is used in this way, risk assessment practices may undermine efforts to regulate responsively, not strengthen them.

Conclusions

Regulation for 2020 needs to be responsive, it needs to recognise the many parties outside of government contributing to VET regulation, and include these parties in webs of dialogue. Integrated webs of dialogue enable the regulator in three ways: (a) to develop shared goals for the sector and legitimate institutional pathways for achieving these goals; (b) to identify future risks to the sector; and (c) to identify current regulatory problems that are not being resolved satisfactorily by others and that require leadership from the regulator and possibly regulatory intervention. The regulator then becomes part of a complex regulatory infrastructure around RTOs, supporting informal regulators and staying in tune with the sector’s ambitions, while providing a regulatory stick when informal, local efforts to regulate fail.
References
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Note
1 Examples of work signalling this change include Shearing and Stenning’s (1987) and Wood and Shearing’s (2007) work on private policing, and Burris, Drahos and Shearing’s (2005) work on networks of governance in intellectual property and community-level security.