Who is regulating the regulators:
Quis custodiet ipsos custodes?

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National Council of State Boards of Nursing
Quis custodiet ipsos custodes?

- Two Millenia ago.

- The Roman Poet Juvenal posed the question “Who watches the watchers?”

- The effectiveness of watchers is based on both power and independence.

- Ensure watchers are properly trained and are wise (Plato)
But Some Would Have Us Believe

- From a systematic standpoint, regulators being government-granted monopolies with a captive “client” base, are unregulated. There is no robust regulation of their performance. There is no quality-assurance regulation of the job these regulators do. They are not accountable to the public in a meaningful way. In theory, agencies are regulated by the political process, but the political process is so ineffective at regulating regulators that the regulators are de facto unregulated.

Baetjer (2015)

Cato Journal 35:3 pg 634
<table>
<thead>
<tr>
<th>Dimensions of considering an Acting in the Public Interest argument</th>
<th>19th to mid-20th Century Perspective</th>
<th>1960s to 1990s Perspective</th>
<th>21st Century Perspective</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Standards of practice</td>
<td>• Service quality</td>
<td>• Costs of regulation</td>
<td></td>
</tr>
<tr>
<td>• Standards of qualification</td>
<td>• Practitioner competence</td>
<td>• Increased efficiency</td>
<td></td>
</tr>
<tr>
<td>• Elevating the profession</td>
<td>• Efficiency of the system</td>
<td>• Increased cost effectiveness</td>
<td></td>
</tr>
<tr>
<td>• Addressing public information deficit</td>
<td>• Best for the patient and the public</td>
<td>• Reduction in entry barriers to mobility</td>
<td></td>
</tr>
<tr>
<td>• Entry Barriers</td>
<td>• Better coordination of services</td>
<td>• Promoting competition</td>
<td></td>
</tr>
<tr>
<td>• Competence of practitioner</td>
<td>• More flexible to patient need.</td>
<td>• Regulation proportionate to risk.</td>
<td></td>
</tr>
<tr>
<td>• Access to services</td>
<td>• Increased patient choice</td>
<td>• Promoting alternatives to the licensure model</td>
<td></td>
</tr>
</tbody>
</table>

**Synopsis**
- Benefits both profession and the public. Quality to the forefront but some concerns over access, choice and entry barriers.
- Professions cannot be trusted to act in the public interest and therefore need oversight. Balance between quality, cost and access.
- Public interest tied to efficient provision of services through minimum regulatory intervention.
Holding the Regulator to Account - Challenges

- Technical complexity of subject with contestable evidential base
- Dynamic nature of work
- Lack of measurement criteria
- Timeframe for impact
- Overlapping responsibilities –
  - Scale and shifting typology of accountability (Independent – Umbrella; legislative – administrative)
- Opacity of some processes (informal settlements)
- From rule-based to principle-based
- Right touch regulation (The new dark-arts)
Why Regulate the Regulators

- To prevent abuses of monopoly power
- To prevent anti-competitive actions;
- To protect public interest;
- To ensure the regulator operates within the bounds of their scope;
- To bring about improvements to efficiency, effectiveness and quality; and
- To ensure discretionary powers are exercised in the interest of the public.
Dimensions to consider

- Operational
- Routine
- Informal
- Elections
- Board Member Responsibilities

- Strategic
- Targeted
- Formal
- Appointments
- Board Member Day-job Responsibilities
## The How – The Current Reality

### Specific
- Complaints
- Regulatory Impact Assessment
- Peer Review
- Freedom of Information Request
- Benchmarks with Best Practices

### General
- Annual reports
- Parliamentary Committees
- Lay Board Members
- Consultation Requirements
- Giving Reasons for Decisions

### Weak
- Judicial Review
- Media Reports
- Board Appointments/Removals
- Audit Reports
- CEO Appointment
- Organizational Competence/Scope

### Strong
- Ministerial Direction
- Funding Control
- Sunset Reviews
- Super-Regulators

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The How – Simply The Best?

Formal

Self Imposed

Externally Imposed

Informal
De Jure & De Facto Independence

**De Jure Independence, is derived from legal and formal arrangements. It often involves the agency being placed outside the bureaucratic chain of command freeing the body from following directives from government (the executive).**

**De Factor Independence, refers to the self-determination of agencies to exercise their autonomy and regulatory competence.**

**Measured by the degree of control over the appointment of board members and the links and reporting/supervisory requirements to oversight structures. Board appointments that are non-renewable and for longer time-frames.**

**Measured by examination of laws, agency statutes and indicated by freedom to appoint and remove senior staff, budgetary control and the degree to which the agency shares power with other entities.**

Derived from analysis of Ennser-Jedenastik (2016)
Better Understand The Forces At Play

Interactions and Relationships between Actors [Modified from OECD (2017)]

(Benton et al, 2017)

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Starting A Deeper Analysis

(Benton et al, 2017)

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<table>
<thead>
<tr>
<th>Theme</th>
<th>Regulatory</th>
<th>Professional Organization</th>
<th>Trade Union</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary Purpose</td>
<td>To protect the public</td>
<td>To advance the profession</td>
<td>To advocate for the nurse (member).</td>
</tr>
<tr>
<td>Organizational Nomenclature</td>
<td>Board, Body, Chamber, College, Commission, Council, Division, Order, Ordem.</td>
<td>Academy, Association, Body, College, Guild, Society.</td>
<td>Union, Syndicate, Society</td>
</tr>
<tr>
<td>Membership Status</td>
<td>Predominantly mandatory</td>
<td>Predominantly voluntary</td>
<td>Predominantly voluntary.</td>
</tr>
<tr>
<td>Individual Designation</td>
<td>Licensee, Registrant</td>
<td>Member</td>
<td>Member</td>
</tr>
<tr>
<td>Coverage</td>
<td>All those who authorized to practice and use the protected title.</td>
<td>Principally those that have affiliated with the association but often seeks to speak for the profession as a whole.</td>
<td>Those that have affiliated with the union.</td>
</tr>
<tr>
<td>Cultural alignment</td>
<td>Impartial and evidentiary approach empowered by legal &amp; societal mandate</td>
<td>Advocate and promote profession</td>
<td>Represent and defend the nurse</td>
</tr>
<tr>
<td>Rights and Responsibilities</td>
<td>Curtailed to public protection</td>
<td>Broadly based and self-determined</td>
<td>Generally, curtailed to labor issues and employment matters.</td>
</tr>
<tr>
<td>Typical Activities</td>
<td>Set minimum licensure, practice, education and discipline standards, maintain register, enforce discipline.</td>
<td>Advocate for the profession, set aspirational standards, offer advanced credentials</td>
<td>Negotiate terms and conditions, promote positive work environments, protect and defend member rights.</td>
</tr>
<tr>
<td>Principle Policy Focus</td>
<td>Regulatory policy</td>
<td>Professional &amp; health policy</td>
<td>Labour policy</td>
</tr>
<tr>
<td>Political Partisanship</td>
<td>No</td>
<td>Sometimes</td>
<td>Usually</td>
</tr>
<tr>
<td>Methods of advocacy</td>
<td>Often indirect or alternatively through formal consultative processes and limited to mandate.</td>
<td>Mostly direct and broadly based advocacy and uses a wide range of mobilization techniques.</td>
<td>Mostly direct, focused on benefits, worker’s rights and conditions of service, use a wide range of mobilization techniques.</td>
</tr>
<tr>
<td>Board Composition</td>
<td>Primarily appointed</td>
<td>Elected</td>
<td>Elected</td>
</tr>
<tr>
<td>Accountability</td>
<td>To public via legislative/governmental structures</td>
<td>To members</td>
<td>To members</td>
</tr>
<tr>
<td>Continuing Professional</td>
<td>Continuing competence of the practitioner</td>
<td>Career progression and professional development</td>
<td>Benefit to the employee</td>
</tr>
<tr>
<td>Development Purpose</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Continuing Professional</td>
<td>Validate participation in approved offerings ensure licensee meet</td>
<td>Provide learning content/opportunities and offer accreditation of learning.</td>
<td>Provide Learning content/opportunities</td>
</tr>
<tr>
<td>Development Role</td>
<td>requirements.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Themes and associated characteristics relating to the three organizational types  (Benton et al, 2017)
But What About Other Stakeholders?

- Education
- Employers
- Funders
- Patients
- Populations
# Metrics And Performance

## Key Features

### Legislation
- Advocacy & Responsiveness

### Organisational & Internal Governance
- Board Governance
  - Ensures members of the regulatory body are subject to regular performance reviews.
  - Clear criteria and the necessary competences for the selection and appointment of board members.
  - Systematic processes for the oversight and evaluation of board members.

### External Governance & Public Accountability
- Accountability
  - The regulatory body is held to account for its performance.
  - The regulatory body has a clear set of performance measures that are regularly reported.
  - While there may be unfavorable outcomes, the regulatory body is required to develop standards, codes, and practice policies to prevent or mitigate their occurrence.
  - The regulatory body acts in a manner that maximizes the outcomes of public, professional, and employee stakeholders.

### Responsibilities & Functions
- Competence & Conduct
  - Continues to provide a comprehensive, practical, and user-friendly training program.
  - The regulatory body has a range of authorized personnel who are accountable to the regulatory body.
  - The regulatory body must maintain a strategy with regard to complaints and professional services.
  - The regulatory body must be transparent, accountable, and accessible to the profession and the public.

## Implementing Legislation
- The regulatory body operates on the principles of facilitating competition and protecting the public.

## Advocacy
- The regulatory body provides a voice to the public and regulatory bodies.

## Responsiveness
- The regulatory body provides an effective and efficient service to the public.

## Business Processes
- The regulatory body collaborates with other regulatory bodies, professional associations, and other agencies.
- The regulatory body provides a strategic plan that creates service to the public.

## Transparency
- The regulatory body provides a strategic plan that creates service to the public.
- The regulatory body provides a strategic plan that creates service to the public.

## Quality Improvement
- The regulatory body ensures that the regulatory body is subject to regular performance reviews.
- The regulatory body has a system that ensures the performance of the regulatory body is subject to regular performance reviews.

## Collaboration
- The regulatory body engages and consults key stakeholders in the development of policy and standards.

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(Benton et al 2013)

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<table>
<thead>
<tr>
<th>Theme</th>
<th>Issues Compared</th>
<th>Measures</th>
<th>Umbrella Boards</th>
<th>Independent Boards</th>
<th>Statistical Results</th>
</tr>
</thead>
<tbody>
<tr>
<td>Governance</td>
<td>Number of consecutive terms a board member can serve?</td>
<td>2</td>
<td>22</td>
<td>14</td>
<td>$X^2=7.26$, df=2, P=.03</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3</td>
<td>0</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Unlimited</td>
<td>3</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Do statutes known as sunset laws exist for the Board of Nursing?</td>
<td>No</td>
<td>10</td>
<td>17</td>
<td>$X^2=4.705$, df=1, P=.03</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>15</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Who appoints/hires the executive officer?</td>
<td>Board Members</td>
<td>5</td>
<td>23</td>
<td>$X^2=30.5$, df=4, P&lt;.001</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Board Members with Governor input</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Governor with no Board input</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Governor with Board Member input</td>
<td>1</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Department/division of state no Board input</td>
<td>17</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Autonomy</td>
<td>Does Board of Nursing Draft or Approve the budget</td>
<td>Draft</td>
<td>4</td>
<td>9</td>
<td>$X^2=25.498$, df=3, P&lt;.001</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Approve</td>
<td>1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Draft and Approve</td>
<td>3</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not involved in budgeting process</td>
<td>17</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Does the BON have a fund balance</td>
<td>No</td>
<td>8</td>
<td>2</td>
<td>$X^2=5.98$, df=2, P=.05</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>14</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Does Not Apply</td>
<td>3</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Is the BON financially self-sustaining</td>
<td>No</td>
<td>12</td>
<td>1</td>
<td>$X^2=12.07$, df=1, P&lt;.001</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>13</td>
<td>23</td>
<td></td>
</tr>
<tr>
<td>Information</td>
<td>Is there a newsletter published by the BON</td>
<td>No</td>
<td>13</td>
<td>3</td>
<td>$X^2=8.688$, df=1, P&lt;.001</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>12</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Frequency of Newsletter</td>
<td>1-2 times a year</td>
<td>6</td>
<td>3</td>
<td>$X^2=4.9$, df=1, P=.027</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3-4 times a year</td>
<td>6</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Does the Board produce an annual report</td>
<td>No</td>
<td>12</td>
<td>5</td>
<td>$X^2=3.989$, df=1, P=.046</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Yes</td>
<td>13</td>
<td>19</td>
<td></td>
</tr>
</tbody>
</table>

(Benton et al 2016)

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Boxplot Showing Median, upper & lower quartiles, Upper & lower limits & outliers by organizational type

<table>
<thead>
<tr>
<th>Year</th>
<th>Significance</th>
<th>Z</th>
<th>Mann Whitney U</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>0.006</td>
<td>-2.726</td>
<td>195.50</td>
</tr>
<tr>
<td>2014</td>
<td>0.029</td>
<td>-2.180</td>
<td>226.00</td>
</tr>
<tr>
<td>2015</td>
<td>0.024</td>
<td>-2.263</td>
<td>221.50</td>
</tr>
</tbody>
</table>

(Benton & Rajwany 2017)

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Returning to the beginning

- “[T]he selection will be no easy matter”, he conceded; “but we must be brave and do our best.”

Socrates cited in Plato’s The Republic, Book II.
But Some Would Have Us Believe

- From a systematic standpoint, regulators being government-granted monopolies with a captive “client” base, are unregulated. There is no robust regulation of their performance. There is no quality-assurance regulation of the job these regulators do. They are not accountable to the public in a meaningful way. In theory, agencies are regulated by the political process, but the political process is so ineffective at regulating regulators that the regulators are *de facto* unregulated.

  Baetjer (2015)

  Cato Journal 35:3 pg 634
References

- Benton, D., Thomas, K., Damgaard, G., Masek, S., Brekken, S. (2017) Exploring the differences between regulatory bodies, professional associations and trade unions: An integrative review. Journal of Nursing Regulation. 8:3, 4-11