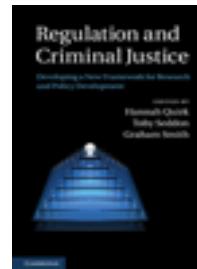


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Rethinking prison inspection: regulating institutions of confinement*

TOBY SEDDON

Closed institutions of all kinds – prisons, juvenile detention centres, police lock-ups, secure psychiatric wards, immigration detention centres and similar custodial services – pose accountability challenges for democratic societies.

(Harding 2007: 543)

Introduction

The need to shine a light into the closed world of prisons has been recognized for a very long time. In Britain, the ‘official’ inspection of prisons dates back to 1835, when its first emergence was part of the broader ‘revolution in government’ in the middle of the nineteenth century during which much of the administrative machinery of the modern state was assembled (MacDonagh 1958; Braithwaite 2003: 10). But the question of external scrutiny of prisons had also been widely discussed in the previous century, notably by the prison reformer John Howard in his classic *The State of the Prisons* first published in 1777 (see Stockdale 1983). Indeed, we can trace this back even further: medieval prisons were sometimes subject to inspection (Peters 1995: 29, 36), as were some in the ancient world, notably in the Roman Empire (Peters 1995: 19).

Today, the inspection of prisons is carried out across the world by a range of national bodies, as well as by supranational organizations such as the European Committee for the Prevention of Torture and the Special Rapporteur on Prisons and Conditions of Detention in Africa. The United Nations Optional Protocol to the Convention against Torture and Other

* I am grateful to participants in the seminar series for a stimulating discussion around my original contribution on prison inspection. Special thanks to John Braithwaite, Anne Owers and John Raine for constructive comments on an earlier version of this chapter. The usual disclaimer applies.

Cruel, Inhuman or Degrading Treatment or Punishment (Opcat) came into force in 2006, requiring signatories to put in place adequate inspection arrangements. In the British context, prison inspection took on its current form at the start of the 1980s following the May report into prison disturbances (May 1979). Since then, a succession of chief inspectors has come to define the role as one involving critical rigour and fearless independence. The previous incumbent, Anne Owers, continued this tradition and the achievements of her inspectorate were impressive (Owers, this book, Chapter 10). Elsewhere around the world, the picture is more mixed. The purpose of this chapter is to develop some new ideas that can inform the improvement and enhancement of prison inspection regimes and practices right across the board, regardless of their present state of development. It offers, in other words, a new generic framework for thinking about prison inspection, rather than one tied to any specific country or region. My central claim is that to do this, we need to rethink the matter in the much broader context of the regulation of public services.

The rest of this chapter proceeds as follows. I begin by considering some key conceptual issues, specifically the concept of inspection itself and its relationship to notions of regulation and accountability, and how they might be applied in the prison context. I then examine the question of how 'special' or distinctive prison inspection is and set out a basis for how we might make useful connections with studies of inspection in other fields beyond criminal justice. I then develop this point by drawing on an empirical study by John Braithwaite and colleagues of the inspection of nursing homes (Braithwaite *et al.* 2007b) and attempt to show how this might inform a rethinking of prison inspection. In conclusion, I draw together the key elements of my argument and suggest some priorities for future research and development.

Conceptual issues: regulation, accountability, inspection

Terms such as inspection, audit, regulation, scrutiny and accountability are often used almost interchangeably. It is worth clarifying a little the conceptual terrain in which prison inspection is located. I will attempt to do that in this section by looking, first of all, at the notions of regulation and accountability and then considering how they relate to inspection.

Regulation and accountability

Two related concepts are absolutely central to the idea of inspection: regulation and accountability. Regulation is the broader term and has been

subject to considerable definitional debate (see Black 2002). Some adopt a narrow or restrictive definition, seeing regulation primarily as rules and standards set and enforced by the state (Ogus, this book, Chapter 2; see also Ogus 1994). Others take a more expansive view (Grabosky, this book, Chapter 4), seeing regulation simply as all attempts at 'steering the flow of events and behavior' (Braithwaite *et al.* 2007a: 3). Black (2002: 26) provides a helpful framing definition:

Regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification.

Clearly, in the context of prison inspection we are largely talking about what Ogus (this book, Chapter 2) calls public regulation, where one part of the state is regulating another (or, in the case of privately-managed prisons, where one part of the state is regulating a private contractor of another part of the state). But it is also necessary to look beyond the state. Around the world, NGOs can and do play a part in the regulation of prison and other custodial regimes. In Britain, for example, organizations like the Prison Reform Trust and the Howard League for Penal Reform all perform what could be termed regulatory functions in the wider sense of the term, using a range of tools, from strategic litigation to media campaigns, to try and change what happens inside prisons. As Owers (this book, Chapter 10) notes, there are also other regulatory bodies such as the Independent Monitoring Boards (formerly Boards of Visitors) and the Prisons and Probation Ombudsman. In relation to prisons, then, there is a complex regulatory space, with many different actors – 'official' inspection forms just one part of this space. Indeed, Hood and colleagues (1999: 134) observe for the British case, perhaps controversially, that in certain respects prisons are over-regulated, in the sense that there are more actors involved in their regulation than for many other public services. Scott (2000: 53) sees this instead as a 'belt and braces' approach – what he terms a 'redundancy' model of accountability – where effective regulation does not stand or fall on the performance of a single actor. The point I want to emphasize here though is simply that prison inspection does not represent the sole regulatory mechanism for prisons. I will return to this later as it touches on an important theoretical issue which has significant practical implications.

What then of accountability? On the face of it, this might seem easier to define. Scott (2000: 40), for example, refers to its core as the 'duty to give account for one's actions to some other person or body'. This implies a

backward-looking focus, suggesting that accountability is primarily past-oriented and punitive or corrective. A contrast is sometimes drawn here with regulation which may be characterized as largely future-oriented and preventive. But this distinction is hard to sustain. Accountability is indeed partly about accounting for past actions but it will often also lead to prescriptions or recommendations for preventing future recurrences of the undesired behaviour in question. Similarly, while the attempt to prevent certain behaviours happening in the first place lies at the heart of regulation, in many instances this will draw from, or be combined with, responding to events that have already occurred.

This blurring of conceptual boundaries has generated considerable discussion about the relationship between regulation and accountability (Scott, 2000; Mulgan 2000; Lodge 2004; Mashaw 2006; May 2007; Smith 2009). Some have sought to distinguish the two more precisely by establishing clear points of difference. More helpful, in my view, is Scott's (2000: 39) argument that they are 'linked concepts, operating on a continuum'. In a similar vein, May (2007) describes accountability as a subset of regulation, suggesting it is a 'necessary but insufficient condition for increasing regulatory effectiveness' (2007: 11). It is important to stress though that to say that the two are 'linked' and exist on a continuum is not the same as saying they are synonymous. The concept of accountability centres on the notion of being answerable or responsible (see Bovens 2007) and this is not properly or wholly captured in the idea of regulation as 'steering the flow of events'. We need to retain an appreciation of this difference whilst at the same time understanding how the two ideas are closely linked.

This link or connection is certainly evident in the context of prisons. In an interesting essay, John Raine (2008) describes one of the major strengths of prison inspection in Britain over the last twenty-five years as the way it has enhanced what he terms 'public accountability'. But it becomes clear that what he means by this is a form of answerability that encompasses both ideas – he sees prison inspection as partly about 'placing the issues of prison conditions strongly in the public eye and consciousness' (2008: 95) but also as being 'influential in leading to significant raising of standards' (2008: 94). That Raine chooses to describe this as 'public accountability' is perhaps not surprising, as the discourse of accountability has dominated debates about prisons for some time (e.g. Maguire *et al.* 1985; Vagg 1994; Stenning 1995). One of the contributions I hope to make with this chapter is to switch the focus back onto regulation, as this in turn opens up greater possibilities for seeing inspection as a tool for improvement rather than just as an instrument for scrutiny.

Inspection

Where then does inspection fit in relation to this regulation–accountability continuum? And how can we define it more precisely? Dictionary definitions give the primary meaning of ‘to inspect’ as ‘to look into’ and the secondary as ‘to examine officially’. We might say then that inspection involves authorities of one type or another examining or looking into activities or operations carried out by others. But for what purpose? In the simplest terms, inspection seeks to observe and to check whether the inspected are doing what they should be and in the way that they are supposed to.

An important article by Boyne and colleagues on public service inspection is helpful here in developing this a little (Boyne *et al.* 2002). They identify inspection as a regulatory tool or instrument and offer a ‘working definition’:

Inspection is one element of a system of regulation, is likely to utilise information provided by other elements, entails site visits to service providers and has a strong focus on service standards and outcomes.

(Boyne *et al.* 2002: 1198–9)

Drawing on Hood *et al.*’s (1999) work, they go on to emphasize three core components of the inspection process (Boyne *et al.* 2002: 1201):

- a *director* (a method of setting standards);
- a *detector* (a way of monitoring compliance with standards); and
- an *effector* (a means of changing future behaviour).

These three components map onto Black’s definition of regulation (‘standard-setting’, ‘information-gathering’ and ‘behaviour modification’). This underlines the point that public services inspection is not just about ‘public accountability’ but rather operates across the regulation–accountability continuum. Putting it another way, we can say that inspection is both a regulatory tool and an accountability mechanism.

We can use this tripartite framework – *directing*, *detecting* and *effecting* – to look more closely at prison inspection. Taking the first element, *directing*, it is fundamental to the process of inspecting prisons that the inspectorate should be able to articulate the standards by which it will appraise or evaluate prison regimes and conditions. In the British context, Owers (2004: 108) describes how these standards have been derived from the World Health Organization’s ‘Healthy Prison’ concept and broader international human rights principles. These have produced four tests

which she suggests 'define the core business of a Prisons Inspectorate': that prisoners are held in *safety*; that they are treated with *respect* and dignity; that they can engage in *purposeful activity*; and that they are prepared for *resettlement*. Building on this framework, the British inspectorate has developed a detailed set of standards, called *Expectations* (HMIP 2008). The latest published edition of the *Expectations* runs to 232 pages and provides the framework for all inspections and their reporting. It is clear then that the *directing* component of inspection, that is, the method of setting standards, is quite highly developed in Britain. I will return below to this question of standards and the *Expectations*.

What of the second component, *detecting*? In a sense, this is at the heart of the whole process of an inspection regime based on site visits. The reason that the inspection teams physically go to prisons is precisely to monitor compliance with standards. As Owers (this book, Chapter 10) describes, it does this through a mix of inspection modes:

- full inspections, both announced and unannounced;
- full follow-up inspections which are unannounced and focus on major concerns raised by a previous inspection visit; and
- short follow-up inspections which are unannounced, where there are fewer concerns.

As Owers (this book, Chapter 10) describes, inspections deploy a range of detection methods, including input from prisoners through confidential surveys and the ability to access freely any part of the prison. As she notes, resources perhaps do not allow for 'enough' inspection visits to take place each year but, nevertheless, it is undoubtedly true that there is a rigorous, thorough and substantial system in place for detecting and monitoring compliance with expected standards.

The third component, *effecting*, is less well developed than the first two (see Hood *et al.* 1999: 116). Inspection reports include recommendations, and there is some scope for monitoring their implementation, but ultimately the inspectorate cannot directly *require* 'behaviour modification' (see Owers 2009). Instead, it relies on a set of 'softer' and more indirect methods for achieving change. As will be argued later, this is a significant gap from the perspective of regulatory theory. It is partly for this reason that in the prison context it is so important to bring the concept of regulation to the forefront, instead of allowing it to be overshadowed by the all too evident need for strong accountability mechanisms.

Perhaps to some readers, this conceptual analysis may seem as little more than restating the obvious. I think though that it helps to bring out

more clearly the potential commonalities in inspection across different fields and in different sites – from restaurant kitchens, to schools, to prisons. My argument, then, is that by understanding inspection in this way, as an instrument or tool for regulation and accountability, we can potentially learn lessons from inspection in very different sites extending far beyond the criminal justice system. Before exploring this claim in more detail, in the next section I will consider one of the main objections to this idea, namely that prison inspection is a ‘special’ case and that therefore the potential for cross-sectoral learning is in fact quite limited.

Is prison inspection ‘different’?

It is no doubt possible to overstate the similarities between inspection in different fields. There are certainly some distinctive features of criminal justice, and especially the prison system, which cannot and should not be ignored. I think it is helpful though to try to specify more precisely what exactly is distinctive about criminal justice. Looking at the prison system, its fundamental nature as a closed institution with coercive powers over its inmates certainly changes the regulatory challenge that it presents. As Owers (this book, Chapter 10) observes, the United Nations OpCat protocol, which aims to ensure that prison inspections are in place in order to prevent torture and other mistreatment of prisoners, offers a sharp reminder of the special need for effective monitoring and inspection in penal institutions.

I would suggest though that even here there are some connections that can be made across different fields. Prisons are not the only coercive institutions of confinement – there are immigration centres, secure psychiatric hospitals, military facilities and so on. Indeed, I think this list could be further extended if we see institutions of confinement as operating along a continuum, from the most coercive and secure (e.g. prisons holding category A prisoners,¹ high-security psychiatric hospitals), to the least (e.g. boarding schools, hostels for the homeless). Despite obvious differences, there are also some important commonalities across these diverse institutions, in terms of the nature of the regulatory challenges they face, the use of particular inspection techniques and so on. For example, inspectors of children’s homes concerned with preventing child abuse by residential

¹ Category A is the highest security classification in the English and Welsh prison system. It refers to prisoners who would be highly dangerous to public or national security if they were to escape.

care staff (see Cawson 1997) are engaged to a certain extent in a very similar exercise to prison inspectors visiting institutions holding young offenders. Indeed, there are strong resonances across both these sectors in some of the controversies in recent years about the use of particular restraint techniques by staff on children (see Smallridge and Williamson 2008). In terms of a research and policy development agenda, the idea of institutions of confinement might provide a useful cross-cutting category for looking at inspection. Other cross-cutting categories no doubt could also be developed. My point is that I think we can usefully look at things in a broader regulatory frame rather than sticking unquestioningly to the belief that the criminal justice field is 'special' and 'different'. Further work on developing a typology of inspection sites and inspection regimes might be helpful in this regard (see: Hughes *et al.* 1997; Boyne *et al.* 2002).

Looked at in this way, there are a series of research questions concerning prison inspection for which learning from inspection practices in different sectors could be helpful. Is there any evidence from other fields, for instance, about the relative effectiveness of announced and unannounced inspections? What is the most effective balance between the two? How frequent should inspections be? How significant are the styles of interaction deployed by inspectors on the ground as 'street level bureaucrats' (May and Winter 2000)? Do inspectors need to be specialist experts in the field they are inspecting? What are the characteristics of the best inspectors, not just in terms of skills but also age, background, experience and so on? What is the most effective use of follow-up inspections? What are the best ways of ensuring that those inspected promptly rectify problems identified during inspections? How useful is it to require the provision of documentary evidence either before, during or after site visits? Building up an evidence base that draws from empirical research in different fields does not mean ignoring the distinctiveness of prison inspection but, equally, we should not dismiss the similarities that exist with the inspection of other institutions of confinement.

In the next section, I want to test out this general claim about the potential for cross-sectoral learning about inspection by examining in more detail one specific area outside the criminal justice arena: the inspection of nursing homes for the elderly. I am not suggesting at all that this is the only sector with which useful comparisons can be made but it happens to have been the subject of an exceptionally detailed and extensive empirical research study characterized by rare theoretical insight and conceptual sophistication. In my view, there are unusually rich pickings here for those looking for cross-sectoral lessons.

Learning from nursing home inspection

Drawing a comparison between prisons and nursing homes for the elderly might be seen by some as at best misguided and at worst as wilfully provocative. My intention is not to say that nursing homes are 'like prisons' in a crass or sensationalist way. Rather, the comparison is an analytical one, designed to draw lessons from a major empirical research study on nursing home regulation that might be applied to the future development of prison inspection. Having said that, the comparison is not an entirely fanciful or far-fetched one, of course. In the book *Regulating Aged Care* which reports on the empirical work by Braithwaite and colleagues, a conversation is recalled between one of the authors, Toni Makkai, and her late father (then a nursing home resident):

FATHER: Why am I here?

TM: Because Mom can't look after you anymore and you need to be in a secure and safe place.

FATHER: But I can't get out.

TM: It is for your own good.

FATHER: It's a prison.

TM: No, it's a nursing home.

FATHER: Then why can't I get out?

(Braithwaite *et al.* 2007b: 4)

This rather poignant exchange highlights what we might term sociologically the ontological reality of the cross-cutting category of 'institutions of confinement'. Or, to put it more straightforwardly, from the perspective of the confined, they may not always seem as different as outsiders might think (or hope). In a sobering passage at the beginning of their book, Braithwaite *et al.* (2007b: 4–6) recall some of the worst instances of misconduct due to regulatory failure that they came across in their nursing-home research, ranging from rape, to genital mutilation, to residents being forced to eat faeces.

I will not attempt to summarize the entire study here but a brief description of its scale and scope will provide some context for what follows. The empirical work was carried out across three decades, starting in the 1980s, and covered three countries: England, the United States and Australia. It consisted of a series of linked projects on nursing home inspection through which a vast amount of data was gathered, including interviews with hundreds of inspectors, observations of routine interactions in numerous nursing homes, observation of over 150 inspection 'events', focus groups with nursing home staff, interviews with key stakeholders (from cabinet

ministers to advocacy groups), as well as quantitative studies of compliance and of the validity and reliability of standards. It is an exemplar of a large-scale macro–micro, mixed-methods study of regulatory practice, all of which is brilliantly brought together in the book *Regulating Aged Care* (Braithwaite *et al.* 2007b). So what precisely can we learn from it? There are three particular aspects I will focus on here: the nature of inspection standards; responsive regulation; and building on strengths.

Inspection standards: the paradox of reliability

One of the earlier publications from the nursing home study was an important and influential article by Braithwaite and Braithwaite (1995) entitled 'The Politics of Legalism'. It explored a question which on the face of it might have seemed relatively unimportant but which turned out to be critical to the inspection enterprise: is it more effective to inspect against the yardstick of a small number of general standards/principles or against a larger number of more specific rules? While socio-legal scholars and philosophers of law have long argued the question of rules versus standards, the nursing-home research provided some rare empirical data in which to ground the debate.

Their findings were surprising. One of the central insights they drew from their empirical data concerned what they termed the 'paradox of reliability'. They made a comparison between nursing-home inspection in Australia (based on thirty-one broad and vague standards) and in the United States (based on over 1,000 detailed and precise rules). Turning their initial expectations on their head (Braithwaite and Braithwaite 1995: 310), they found that the Australian regime led not only to more reliable and consistent inspections but was also more conducive to allowing inspectors to help develop better quality of care. Furthermore, they found from their extensive qualitative fieldwork in both countries that the reason 'Australian ratings are more reliable is precisely because they are more (a) broad, (b) subjective, (c) undefined with regard to protocols, (d) resident-centred and (e) devoid of random sampling' (Braithwaite and Braithwaite 1995: 311). This was not what the researchers had expected. Indeed, it is highly counter-intuitive – one would expect that striving for greater rule precision and attempting to eliminate inspector discretion would lead to more consistency and fairness rather than less (1995: 336).

So what should we make of the 'paradox of reliability' in relation to prison inspection? Viewed in the light of these findings, the *Expectations*

document developed by the British prison inspectorate is particularly interesting. At first sight, it might appear to resemble more the United States case in the Braithwaite study. It contains well over 500 separate criteria with the clear aim of comprehensively covering just about everything an inspector should be looking at during a prison visit. For example, in the section entitled 'First Days in Custody', there are twenty-eight separate standards. Each is very precisely defined and even stipulates the sources of information that inspectors should rely on in assessing compliance. Standards 17 and 18 in that section illustrate this well:

17. Prisoners with substance-related needs are identified at reception and given information about services available.

Evidence

Observation: those with acute substance-related needs should be given symptomatic treatment.

Prisoners: check that all prisoners understood the information e.g. foreign nationals.

Documentation: information leaflets.

Cross-reference with substance use inspector

18. All prisoners are given information about sources of help available, including the chaplaincy team, Listeners or Insiders and Samaritans, in appropriate languages. All prisoners are explicitly offered the chance to speak to a Listener or Insider and a member of the chaplaincy on their first night and the following morning.

Evidence

Questionnaire

Observation: individual interviews – speak to Listeners/Insiders. Languages covered should include sign language.

Documentation: check reception packs and whether an up-to-date database on sources of appropriate help is available.

Cross-reference with self-harm and suicide inspector.

(HMIP 2008)

I am sure that such a comprehensive, thorough and detailed guide has been developed in order to make the inspection process as rigorous and penetrating as possible. I am equally sure that it has proved extremely useful for the inspectorate. Indeed, the idea that this level of detail might potentially be counterproductive would probably strike many readers (and prison inspectors) as rather odd. Nevertheless, we should be wary of dismissing out of hand the relevance of the 'paradox of reliability' that Braithwaite and colleagues found in their study. Their explanation for the paradox centres on the notion of regulatory ritualism, that is, the 'acceptance of institutionalised means for securing regulatory goals while

losing focus on achieving the goals or outcomes themselves' (Braithwaite 2008: 141). In other words, ritualism is an adaptation to regulatory demands that looks to satisfy the letter of the 'rules' rather than being concerned about the wider outcome(s) for which each standard or rule stands as a proxy indicator. To give an example, a ritualistic approach to Standard 18 quoted above would focus on ensuring the reception packs and database meet the standard expected by inspectors, whilst being indifferent to whether prisoners in fact get a real opportunity to access help or support if they need it when they first arrive in prison. Their argument is that the proliferation of rules, attempts to make them as precise as possible and efforts to 'tighten up' protocols for measuring them, are all conducive to regulatory ritualism. Conversely, outcome-oriented standards that are more generally expressed, allow inspectors the flexibility to do their job better:

The smaller the number of standards, the better the prospects of ensuring that (a) the most vital information for assessing the total quality of life and quality of care of residents is pursued; (b) lying behind each rating is a collective deliberative process on what that particular rating should be; (c) there is effective public accountability to audit that (a) and (b) actually occur; and (d) inspectors have the capacity to stand back to document the wider patterns in the problems they have identified, to see the wood for the trees.

(Braithwaite and Braithwaite 1995: 322)

My hypothesis then is that a slimming down and simplification of the *Expectations* might facilitate a more effective inspection process by reducing this risk of regulatory ritualism. From this perspective, enabling inspectors to identify patterns, make connections and 'see the wood for the trees' would tend to enhance their ability to identify and diagnose problems and to focus on what actually matters most. On the other hand, a continuing accumulation of standards and expansion of the *Expectations* document would tend to increase the likelihood of ritualistic responses to inspection which, in the long run, would significantly dissipate its impact.

Yet, interestingly, there is another side to the *Expectations* which points in a different direction. The four 'healthy prison' tests referred to above – safety, respect, purposeful activity, resettlement – are also used by the inspectorate. These much more closely resemble the 'broad' and 'subjective' standards that Braithwaite and colleagues found in the more reliable and effective Australian nursing-home regulation regime. In fact, one of the best ways to approach reading the lengthy and detailed prison

inspection reports in their published form is to begin with the 'healthy prison summary' that forms part of the introduction of each report and which summarizes inspectors' assessments of outcomes under each test. So perhaps the inspectorate is able partly to transcend regulatory ritualism by the use of these four overarching tests which allow it to 'take the temperature' of a prison without having to be too directly or closely tied by the more detailed standards. However, in the absence of empirical evidence about how these inspectors operate in practice, this remains as speculation. This is an important area for future research.

Responsive regulation

A central dilemma for regulators in all fields is to know when to punish and when to persuade. When is a quiet word or the dangling of a 'carrot' the best way to secure compliance? And when is the threat of punishment or the wielding of a 'stick' most effective? There is no easy answer to this conundrum. Over the last twenty-five years, John Braithwaite and colleagues have set about developing a solution, building a theory based on detailed empirical studies conducted in diverse sectors, from coal mine safety (Braithwaite 1985), to tax avoidance (Braithwaite 2005), to criminal justice (Braithwaite 2002) and, most recently, the nursing-home study which I am focusing on here (Braithwaite *et al.* 2007b). For inspection, it involves recognizing a fundamental point:

Whether it is nursing home inspectors, or inspectors checking for weapons of mass destruction in Iraq, it is myopic to see inspection as something that mainly works through deterrence.

(Braithwaite *et al.* 2007b: 305)

Their solution to the conundrum is encapsulated in the concept of responsive regulation, as set out in the landmark book by Ayres and Braithwaite (1992). The essence of the idea is simple: 'regulators should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed' (Braithwaite 2008: 88). The regulatory pyramid elegantly summarizes this (Ayres and Braithwaite 1992) – see Figure 11.1. The idea is that we begin at the base of the pyramid with the 'most restorative dialogue-based approach we can craft for securing compliance' (Braithwaite 2008: 88). Only when these efforts fail should we move, reluctantly, up to the next level of the pyramid. As we progress up the pyramid, interventions become more punitive and demanding. At each level, the knowledge that we can escalate

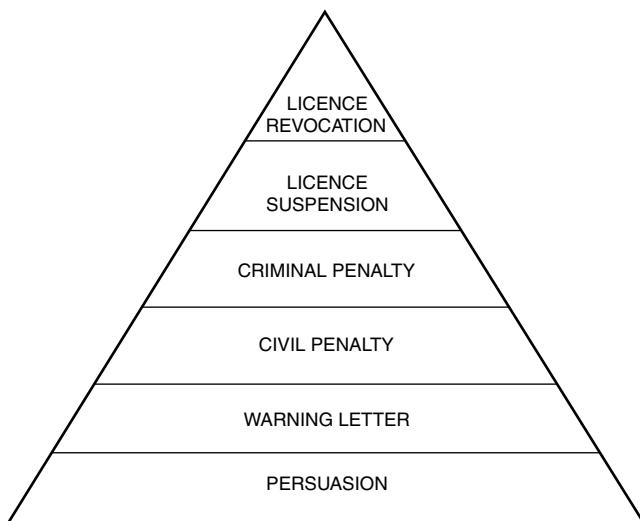


Figure 11.1 Generic regulatory pyramid (adapted from Ayres and Braithwaite (1992))

up the pyramid is part of what helps to secure compliance. When we reach a level where reform or repair starts to be achieved, we should de-escalate, moving back down towards the base again to reward that positive response.

There are several significant implications for prison inspection of the idea of responsive regulation, three of which I wish to highlight here. First, I noted earlier the weakness of the effector component within prison inspection. As Owers (2009: 16) starkly puts it, the inspectorate 'cannot require change, or close down failing institutions'. This is deeply problematic from the perspective of regulatory theory as it cuts away a vital element of a responsive regulation strategy. In effect, the upper layers of the pyramid are missing. Why does this matter? According to the theory, the effectiveness of the lower levels is dependent to a significant extent on the possibility of escalation to a more punitive response. As Braithwaite (1997) nicely puts it, it is about 'speaking softly whilst carrying big sticks'. But, of course, in the absence of big sticks, softly-spoken persuasion tends to lose its potency. The clear implication is that the development of a more responsive approach will require the prison inspectorate to be given proper enforcement powers. This would represent a major shift, requiring new legislation, but, I would argue, is something that should be seriously considered. The aim is not that such enforcement powers would be

extensively used, quite the opposite in fact, as by 'signalling (without making threats) a resolve to escalate up an enforcement pyramid until a just outcome is secured, we can actually drive most of the regulatory action down to the base of the enforcement pyramid' (Braithwaite 2008: 163).

Second, as the nursing-home study clearly shows, along with many others conducted by Braithwaite and his collaborators, at the heart of a responsive regulation strategy lie dialogue and conversation. Skilled nursing-home inspectors talking to residents, staff members and managers was the foundation for effective inspection. As one would expect, for dialogue-based regulation to work at its best, inspectors need above all else to be good listeners able to make even the weakest and quietest voices be heard, a point that I will return to in the next section. One tool for conversational regulation described in the nursing-home study is the exit conference. This takes place at the end of the inspection visit and involves managers, staff and resident representatives coming together to hear the inspectors' preliminary findings and to start discussions about how any identified problems might be remedied. The approach and purpose of the conferences is reparative and restorative rather than confrontational. They should in this respect resemble the family group conferences that restorative justice practitioners convene. No doubt they are sometimes difficult for participants but they can also be immensely powerful:

We observed a team of three Australian inspectors in 2005 give the assembled staff of the nursing home a round of applause at the end of an exit conference.

(Braithwaite *et al.* 2007b: 198)

Currently, the prison inspectorate in England and Wales does hold formal debriefs with senior managers at the end of inspection visits. One way of developing this could be to trial full-blown restorative exit conferences involving all the key actors in the prison (including prisoner representatives), as a concrete means of shifting to a more responsive regulation strategy. I do not underestimate the shift in attitudes and thinking this would require, especially for prison managers, but in my view it is worth exploring as a tool that may potentially improve the effectiveness of the inspectorate as a regulator.

Third, one of the more recent developments of the regulatory pyramid has been the idea of 'networked escalation', first developed by Peter Drahos (2004) – see also Braithwaite (2008: 87–108) and Wood and Shearing (2007). This draws on the notion that we live increasingly in a world in which governance is polycentric or nodal (see Shearing and

Froestad, this book, Chapter 5; Burris *et al.* 2005), that is, that it occurs through and within networks. Drahos's insight is that weaker regulators do not always have to operate on their own. They can also enrol network partners to escalate pressure on the regulated as they move up the pyramid. In the nursing-home study, networked escalation was found to be a vital strategy:

Empirically, Braithwaite *et al* (2007) found British nursing-home inspectors to be weak regulatory agencies, in both legal powers and resources. Yet they accomplished a great deal of improvement in quality of care by creative networking even of organisations as powerful as banks. Banks become reluctant to lend money to homes when inspectors put up on the Internet excoriating inspection reports.

(Braithwaite 2008: 96)

It is clear that prison inspectors already practise networked escalation to some extent. An infamous example of this occurred in 1995 when the then Chief Inspector, Sir David Ramsbotham, pulled his team out of Holloway prison halfway through an inspection visit in protest at the conditions they found there and immediately wrote to the Head of the Prison Service and the Home Secretary demanding improvements be made before they would return. The resulting negative publicity placed more regulatory pressure on the prison management to improve conditions than even the most viscerally damning inspection report could have done. More mundanely, inspectors regularly draw on formal and informal links with others (e.g. non-governmental organizations – NGOs) to bring about change. My proposal here is that they should experiment further with networked escalation, viewing it as a constructive and positive regulatory weapon rather than just as a necessity borne out of weakness. By looking strategically at the range of partners with whom they might profitably network, prison inspectors could potentially expand their regulatory capacity and potency quite significantly.

Strength-building

One of the most original contributions to regulatory theory made by the nursing-home study is its development of a new pyramid designed to operate alongside the enforcement pyramid discussed above. The authors explain the new twin-track approach:

To craft a new regulatory environment that has two complementary models – a regulatory model backed by enforcement and a strengths-based

model backed by rewards. The former is designed to ensure that the standard of care in nursing homes reaches the minimum standard set by the regulator; the latter is designed to build out from micro and macro strengths within nursing homes and the industry to lift the standard of care beyond the minimum to continuously higher levels.

(Braithwaite *et al.* 2007b: 330)

With the new strengths-based pyramid, inspection shifts away from being an accountability mechanism towards being primarily a regulatory tool. Here 'the most important thing regulators do is catalyse continuous improvement' (Braithwaite *et al.* 2007b: 322). The aim becomes to push the regulated to ever higher standards, rather than just to make sure that basic standards are met. The philosophy is to 'pick strengths and expand them' on the basis that the 'best way to improve is to build out from your strengths' (Braithwaite 2008: 152).

This philosophy transforms the inspection process. While the enforcement pyramid draws on shame, disapproval and sanctions for failures to manage risks and solve problems, the strengths-based pyramid uses praise, pride and rewards where opportunities for improvement are successfully taken (Braithwaite *et al.* 2007b: 320). Inspectors are no longer just concerned with identifying problems and recommending solutions to them; now, they are charged also with identifying strengths and opportunities to build on them. And institutions become accountable to inspectors not just for dealing with problem areas but also for proactively seeking to improve what they do, building out from existing successes.

As I argued above, listening is an important part of the inspectors' toolkit within a responsive regulation approach. When a strengths-based pyramid is added alongside it, it becomes absolutely central, as Braithwaite (2008: 154) argues:

A key skill of the strengths-based inspector is being a good listener. You cannot build strengths without empowering those with the strength. A mistake I observed many neophyte inspectors in Australia to make when they had a strengths-based philosophy, but executed it badly, was to jump in quickly with communicating expectations on what kind of improvement is desired. More sophisticated practitioners of this philosophy were more patient, encouraging nursing-home staff to tell their own story of how they were building on their strengths, what their plans were for future improvement ... We can empower people by the simple act of listening to their stories, making their stories the point of reference for the stories we contribute to our conversation with them. Therefore, good strengths-based inspectors are accomplished listeners. Through their listening they

help convince staff that yes they do have the power in their own hands to transcend regulatory ritualism and secure real further improvement.

I recognize that to apply the strengths-based pyramid to prison inspection involves quite an imaginative leap. For prisons, inspection has to some extent, and for entirely understandable reasons, been framed primarily as a means of preventing abuses and assuring minimum standards are attained. The idea of using inspection for continuous improvement and to aspire to excellence may seem to border on the fanciful in the face of some of the grim conditions to be found in prisons around the world. But I think it would be a failure of aspiration and imagination to reject this out of hand. Why should our prisons not be striving for excellence in what they do?

So what might a strengths-based approach to prison inspection look like? There are two features that I want to pull out here. First, it would alter what inspectors are focused on looking for during prison visits. Rather than just hunting out deficiencies, they would be trying at the same time to find opportunities for improvements based on what the inspected prison was doing well at. The *Expectations* document might include not only minimum standards but also examples of excellence from institutions across the prison estate. Exit conferences would cover both what was needed to rectify failures to meet basic standards and also ideas about creating a route towards continuous improvement. This twin focus would then be reflected in the written inspection report and in the conduct of any follow-up inspection visits. In other words, a strengths-based approach would add an entirely new dimension to the whole inspection process. Second, as we saw before with the enforcement pyramid, improvement that builds on strengths is also something that can be effected through networked governance. In an individual prison, inspectors could facilitate the networking of relevant stakeholders into a project of institutional transformation. As a national player, the prison inspectorate can also more readily grasp what Braithwaite (2008: 148) calls the 'micro–macro linkages' involved in networked governance. An innovative improvement in a privately managed prison might subsequently be taken up by other institutions managed by that particular private company. By flagging this up, the inspectorate could then help to engage NGOs and other stakeholders in a national campaign to extend that learning more widely across the entire prison estate. This is what Parker (2002) has called triple-loop learning, whereby micro-change in a single institution (or a single part of an institution) can eventually lead to macro-change at a national level. Braithwaite *et al.* (2007b) certainly found examples of this in their study.

Conclusion

An obvious, and entirely justified, response to my argument in this chapter would be to return to the claim that prisons are simply too ‘different’ for this type of cross-sectoral learning to be of any real use. I happily admit that this may be so but it seems to me that this is an empirical question rather than one that can be decided in advance. My own judgement is that there are sufficient commonalities within the category of ‘institutions of confinement’ for such comparisons to be worth pursuing. I have no doubt at all that a study of prison inspection would throw up some surprises, some issues that are truly ‘different’ from other institutional contexts. But this is something that can only become apparent through empirical work. It is, in any case, absolutely central to the idea of responsive regulation that I have been proposing that specific regulatory strategies need to be crafted on the basis of an understanding of their specific regulatory context. While there are generic design principles – e.g. the regulatory pyramid – regulation scholars like Braithwaite have repeatedly emphasized the need for an empirically grounded appreciation of each particular field as the basis for developing effective approaches that are suitably attuned and responsive to context.

In this sense, what I have been engaged in in this chapter has been the setting out of some hypotheses for exploration in concrete research studies. In other words, it is a research agenda, rather than a detailed blueprint for change. The latter can only come as an evidence base begins to accumulate. It is striking, in fact, how little research has been done to date on prison inspection, despite the growing global recognition of its profound importance, as indicated, for example, by the expanding list of signatories to the UN Opcat Protocol. Today, there are nearly 10 million people held in penal institutions across the world (Walmsley 2009) and problems of suicide, self-harm, overcrowding and poor conditions are endemic in many countries, with rich countries far from immune from these difficulties – in England and Wales, for example, there were over 22,000 recorded incidents of self-harm and 92 suicides in the prison system during 2007 (Prison Reform Trust 2009). The need to monitor what goes on inside prisons and to improve performance is more important and urgent than ever. An imaginative and rigorous programme of research on prison inspection, exploring the issues of compliance, responsiveness, and so on, that I have discussed here could make a genuinely significant and positive contribution.

So I want to end by making a modest proposal, or rather two proposals. First, to regulation scholars, I propose that the inspection of prisons

should be the subject of comparative empirical research, as an important site for advancing regulatory theory. Second, to prison researchers, I propose that they turn at least some of their attention to the work of prison inspection which has been often praised but rarely researched to date. And, of course, to achieve either of these will require prison inspectorates to be as open to scrutiny and to the potential for improvement as they themselves hope that the prisons they inspect are.

References

Ayres, I. and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*. Oxford University Press.

Black, J. (2002) 'Critical Reflections on Regulation', *Australian Journal of Legal Philosophy*, 27, 1–35.

Bovens, M. (2007) 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal*, 13(4), 447–68.

Boyne, G., Day, P. and Walker, R. (2002) 'The Evaluation of Public Service Inspection: A Theoretical Framework', *Urban Studies*, 39(7), 1197–1212.

Braithwaite, J. (1985) *To Punish or Persuade: Enforcement of Coal Mine Safety*. Albany, NY: State University of New York Press.

(1997) 'On Speaking Softly and Carrying Sticks: Neglected Dimensions of Republican Separation of Powers', *University of Toronto Law Journal*, 47, 1–57.

(2002) *Restorative Justice and Responsive Regulation*. New York, NY: Oxford University Press.

(2003) 'What's Wrong with the Sociology of Punishment?', *Theoretical Criminology*, 7(1), 5–28.

(2005) *Markets in Vice, Markets in Virtue*. New York and Sydney: Oxford and Federation Press.

(2008) *Regulatory Capitalism: How It Works, Ideas for Making It Work Better*. Cheltenham, Glos.: Edward Elgar.

Braithwaite, J. and Braithwaite, V. (1995) 'The Politics of Legalism: Rules Versus Standards in Nursing-Home Regulation', *Social and Legal Studies*, 4, 307–341.

Braithwaite, J., Coglianese, C. and Levi-Faur, D. (2007a) 'Can Regulation and Governance Make a Difference?', *Regulation and Governance*, 1, 1–7.

Braithwaite, J., Makkai, T. and Braithwaite, V. (2007b) *Regulating Aged Care: Ritualism and the New Pyramid*. Cheltenham, Glos.: Edward Elgar.

Burris, S., Drahos, P. and Shearing, C. (2005) 'Nodal Governance', *Australian Journal of Legal Philosophy*, 30, 30–58.

Cawson, P. (1997) 'Who Will Guard the Guards? Some Questions about the Models of Inspection for Residential Settings with Relevance to the Protection of

Children from Abuse by Staff', *Early Child Development and Care*, 133(1), 57–71.

Drahos, P. (2004) 'Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach', *Temple Law Review*, 77, 401–24.

Harding, R. (2007) 'Inspecting Prisons', in Y. Jewkes (ed.), *Handbook on Prisons*. Cullumpton, Devon: Willan, pp. 543–65.

Her Majesty's Inspectorate of Prisons (HMIP) (2008) *Expectations: Criteria for Assessing the Conditions in Prisons and the Treatment of Prisoners*, 3rd edn (at: www.justice.gov.uk/inspectories/hmi-prisons/docs/expectations_2009.pdf; accessed 10/09/09).

Hood, C., Scott, C., James, O., Jones, G. and Travers, T. (1999) *Regulation Inside Government*. Oxford University Press.

Hughes, G., Mears, R. and Winch, C. (1997) 'An Inspector Calls? Regulation and Accountability in Three Public Services', *Policy and Politics*, 25(3), 299–313.

Lodge, M. (2004) 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments', in J. Jordana and D. Levi-Faur (eds.), *Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*. Cheltenham, Glos.: Edward Elgar, pp. 124–44.

MacDonagh, O. (1958) 'The Nineteenth-century Revolution in Government: A Reappraisal', *Historical Journal*, 1, 52–67.

Maguire, M., Vagg, J. and Morgan, R. (eds.) (1985) *Accountability and Prisons: Opening up a Closed World*. London: Tavistock.

Mashaw, J. (2006) 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance', in M. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences*. Cambridge University Press, pp. 115–56.

May, Mr Justice (1979) *Report of the Committee of Inquiry into the United Kingdom Prison Services*. London: HMSO.

May, P. (2007) 'Regulatory Regimes and Accountability', *Regulation and Governance*, 1, 8–26.

May, P. and Winter, S. (2000) 'Reconsidering Styles of Regulatory Enforcement: Patterns in Danish Agro-Environmental Inspection', *Law and Policy*, 22(2), 143–73.

Mulgan, R. (2000) 'Accountability: An Ever-Expanding Concept?', *Public Administration*, 78, 555–73.

Ogus, A. (1994) *Regulation: Legal Form and Economic Theory*. Oxford: Hart.

Owers, A. (2004) 'Prison Inspection and the Protection of Human Rights', *European Human Rights Law Review*, 2, 107–16.

(2009) 'Reforming Prisons: The Role of Inspection', *Criminal Justice Matters*, 77, 16–17.

Parker, C. (2002) *The Open Corporation: Effective Self-regulation and Democracy*. Cambridge University Press.

Peters, E. (1995) 'Prison Before the Prison: The Ancient and Medieval Worlds', in N. Morris and D. Rothman (eds.), *The Oxford History of the Prison: The Practice of Punishment in Western Society*. Oxford University Press, pp. 3–43.

Prison Reform Trust (2009) *Bromley Briefings: Prison Factfile, June 2009*. London: Prison Reform Trust.

Raine, J. (2008) 'Inspection and the Criminal Justice Agencies', in H. Davis and S. Martin (eds.), *Public Services Inspection in the UK. Research Highlights in Social Work 50*. London: Jessica Kingsley, pp. 87–101.

Scott, C. (2000) 'Accountability in the Regulatory State', *Journal of Law and Society*, 27(1), 38–60.

Smallridge, P. and Williamson, A. (2008) *Independent Review of Restraint in Juvenile Secure Settings*. London: Ministry of Justice and Department for Children, Schools and Families (at: www.justice.gov.uk/publications/docs/restraint_review.pdf; accessed 11/01/10).

Smith, G. (2009) 'Citizen Oversight of Independent Police Services: Bifurcated Accountability, Regulation Creep and Lesson-Learning', *Regulation and Governance*, 3(4), 422–42.

Stenning, P. (ed.) (1995) *Accountability for Criminal Justice: Selected essays*. University of Toronto Press.

Stockdale, E. (1983) 'A Short History of Prison Inspection in England', *British Journal of Criminology*, 23(3), 209–28.

Vagg, J. (1994) *Prison Systems: A Comparative Study of Accountability in England, France, Germany and the Netherlands*. Oxford: Clarendon Press.

Walmsley, R. (2009) *World Prison Population List*. 8th edn. London: International Centre for Prison Studies, Kings College London.

Wood, J. and Shearing, C. (2007) *Imagining Security*. Cullompton, Devon: Willan.