

## Commissioning and Regulation – a CST Discussion Paper

### Introduction

The [Schools White Paper](#) and [SEND and Alternative Provision Green Paper](#) together bring the ‘system’ into view. Both papers offer an analysis of the education system and provide firm proposals on matters of system governance. System governance refers to the structures, mechanisms, and processes by which the organisations responsible for delivery are held to account. The White and Green Papers propose to do this largely (but not exclusively) through commissioning and regulation.

Commissioning and regulatory proposals are brought forward for both Local Authorities (mostly in the Green Paper) and for School Trusts (mostly in the White Paper). As the government develops the approach to commissioning and regulation, it is fundamentally important that we ask the question ‘how does it all cohere?’ We have a once in a generation opportunity to build system coherence and create a school system that can potentially become the best system in the world at getting better. If the new system governance arrangements mean any children fall through the gaps, these will be gaps we have created. We must be sure that this is a system that works for all children. We should also be asking whether the legislative basis for the school system is sufficient.

While keeping the prize of system coherence firmly in view, this paper deals primarily with the commissioning and regulation of School Trusts. The White Paper promises a regulatory review in May 2022. There is an explicit commitment to a single regulatory approach. Broadly speaking, this commitment is welcome because it potentially solves the problems associated with two separate agencies (ESFA and RSCs), two separate lines of accountability for Trusts, two separate conversations, two sets of account management, two sets of data returns.

The State must be able to act (or intervene) quickly on behalf of children, parents, and the wider public to ensure the highest quality of education, safety, and safeguarding, and enforce regularity and propriety in the use of public money.

However, the principle of the Trust movement – that of strong and independent state schools unfettered from micromanagement, misplaced compliance, and unnecessary interference – is also fundamentally important to protect as we develop the commissioning and regulatory approach. It is this principle of independence that has driven innovation and excellence into the sector.

This paper sets out six questions that we should consider as part of the regulatory review.

### **1. How do we define the regulatory approach – and do we need a regulatory strategy?**

The White Paper makes two significant proposals in relation to regulation:

1. The creation of statutory Trust standards – and new intervention powers that will underpin the standards; and

## 2. A definition of Trust strength.

As we approach the regulatory review promised in the Schools White Paper, it is essential that we protect what is most important about the system of independent state schools. Trust leaders must be able to determine how resources are allocated and how operations are structured and be held accountable for running a strong organisation that delivers high quality education for public benefit. The proposed statutory standards and definition of Trust strength should not detract from this.

Currently, the legislation underpinning regulation is weak. The clearest example of this is addressing underperformance at Trust level. For example, intervention can happen in relation to finance and governance at Trust level, but not for educational standards. Given the statutory basis of many of the confused and overlapping regulatory functions in the academy Trust system at present, it is likely to need primary legislation to strengthen regulation. This is particularly important in a fully reformed system where the regulator will have many more Trusts to oversee.

At this time, there is no single commissioning or regulatory strategy or framework. The Academy Trust Handbook (formerly the Academies Financial Handbook) conflates regulation with guidance. It is also unclear what role (if any) the Academy Trust Handbook would have alongside the proposed statutory Trust standards and definition of Trust strength.

We think there is a need for a commissioning and regulatory strategy accompanied by strong frameworks – these would help us to develop a strong commissioning and regulatory approach.

## 2. What are the 'goods' of education we want to promote?

Drawing on the work of Malcolm Sparrow, regulation can be viewed as:

- The prevention of harms – or indeed the correction of harms; and
- The promotion of 'goods' – or perhaps differently worded, the benefits of education.

It is clear from the White Paper that the statutory Trust standards and new intervention powers are intended to address the first of these, the prevention or correction of harms. But what are the goods of education we want to promote? And will the definition of Trust strength be a strong basis for this?

The White Paper proposes to develop a collaborative standard to ensure that Trusts work constructively with each other, their local authorities and the wider public and third sector. CST has long made the case for Trusts as a new form of civic structure with wider civic responsibility. We believe there is a moral case for the civic work of Trusts but does it need to be underpinned by a statutory standard? And should a collaborative standard, if it exists, apply equally to all system actors?

### **3. Is there a distinction between regulation and commissioning?**

For some, the promotion of goods is a strategic commissioning function (as opposed to a regulatory function) which would grow strong providers based on good performance. We might think about strategic commissioning as stewardship of the system - an approach to the complex challenges associated with managing public service markets. Stewardship involves ensuring that there is sufficient but not superfluous high-quality provision, ensuring the system grows by design and developing strong Trusts.

If we are to protect the legal independence of Trusts and avoid micromanagement and compliance-based regulation, we need an approach to regulation which is risk-based. This would ensure that regulation is exercised only where there is greatest risk to children's education or safety, in other words to prevent harms or to correct harms.

We need to reach agreement on whether we think the regulator undertakes the functions of stewardship and strategic commissioning? And does it matter that the White Paper proposes that these functions will be performed by the same people – the new regional directors? Is it a problem that the regional delivery function will be undertaken alongside commissioning and regulation? And is it good practice to involve the regulated sector in regulatory decisions in the form of advisory boards – or does this practice involve too much risk associated with actual and perceived conflicts of interest?

### **4. How do we ensure every school is in the right Trust for that school?**

This is surely one of the most important questions that we must ask in the context of the White Paper's proposal for every school to be in a strong Trust by 2030. But curiously it is not explicit in the White Paper. Perhaps this is because it is seen as an implementation challenge.

What the White Paper does do is propose to consult on the exceptional circumstances in which a good school could request that the regulator agrees to the school moving to a stronger Trust. We do not think that this proposal should be part of the answer to this question. The proposal itself fails to understand that the Trust is the legal entity and that the schools cannot secede from it. Even a cursory analysis provides a rationale for why this proposal is flawed – a Trust board cannot be effective in deploying resources more efficiently and enhancing the resilience of its schools if there is a threat that a school could secede if it did not like these proposals. An executive team could not be effective in having difficult conversations about improving a school (even and perhaps especially if that school carries a good or outstanding Ofsted judgement) if there is a threat that the school could secede if it did not like these proposals.

It would be possible to ensure that the new regulatory approach gives active consideration as to whether Trusts have the right shape in order to improve their schools most effectively. This may involve the strategic decision by the Trust board and the regulator to move a school. The key difference here is that this would not be secession by a particular school, but a strategic decision made jointly by the Trust board and the regulator.

But the question of how we ensure every school is in the right Trust is broader than this. As we approach 2030, the point of *entry* to a Trust becomes fundamentally important. We need to support maintained schools to make good strategic decisions about the Trust or Trusts they are considering joining. This includes but goes well beyond ‘due diligence.’ It involves the strategic ‘fit’ of the school with the Trust – in terms of values, ethos, and mission. The same is true of the process by which one Trust joins another Trust.

Finally, we think that the question of integration is important in ensuring that every school is in the best Trust for that school. CST has recently published a [paper](#) on integrating knowledge and practice which goes beyond the sterile debate of autonomy versus centralisation. As the Trust sector matures, we need mental models that help us think differently – to make better decisions.

## **5. How do we limit the burdens of regulation?**

Good regulation is constantly aware of balancing the burdens of regulation (on the regulated sector) with the good regulation is likely to do. This is particularly important in the public sector where the cost of regulation (borne by those who are regulated) is from public funds. Ultimately public resource is used to meet regulatory activity and therefore regulators must be able to demonstrate the benefit of regulation on the public purse.

As we said above, the literature on regulation (see Malcolm Sparrow) point to risk-based regulation. In other words, the regulator should focus on Trusts where there is a higher element of risk and loosen the compliance requirements on the overwhelming majority of Trusts which present no risk indicators.

## **6. What is the role of inspection in a new regulatory approach?**

The White Paper commits to considering the ‘evolving role of inspectorates’ in a fully Trust-led system. Ofsted (the inspectorate) is not a regulator of schools, but inspection is a useful regulatory tool. If there is move towards inspecting Trusts (as distinct from school inspection), then we must be clear about the role of those inspections within the regulatory approach. There are a number of ways in which this could be considered:

- The regulator could commission the inspectorate to undertake an inspection of a Trust where the regulator has concerns.
- Trusts could be inspected on a rolling programme – as schools are now, and the regulator could take inspection outcomes into consideration in regulatory activity.
- Adverse inspection outcomes could trigger statutory intervention in Trusts.

The development of a regulatory strategy which sets out the approach to regulation – and the role of inspection in regulation – may help us to be clearer on this important issue.

*As the sector body, CST looks forward to working with the Department to develop a regulatory strategy and risk-based approach to regulation that will protect and promote high quality education as a public good, as we move forward to build a strong and sustainable education system in England.*