

Hard Lessons: Responsive Regulation in a Pandemic  
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Through the pandemic we have seen the limitations of **data** in telling us who is travelling well and who is not, and where the pinch points are. Data is a snapshot, over time we can track consistent change up or down on a few measurables. Coping with disruption that comes with a pandemic requires capacities that are not necessarily being measured.

That said, risk profiles are useful self-regulatory devices. Providers have the context of the data - they know their organization, and can use the data as feedback on where they sit in relation to others. In other words, providers use TEQSA data to do their own detective work regarding how they might improve service and sustainability.

Just as a provider learns from feedback from the regulator, so should the regulator learn from providers. This is where the pandemic has highlighted the value and importance of **case managers**, who are critical in keeping track of how particular providers are adapting or failing to adapt, and ensuring TEQSA is up to speed on what is happening in the sector. Providers who are able to have mature problem-solving conversations with their case manager are at an advantage – they are giving information but also receiving information. Exchanges of ideas help with problem solving and adaptation. The pandemic underlined the importance of skilled and experienced case managers who know the sector. Case managers are the front line, the investigators, the peace makers and the standard bearers. Without the front stage presence, a regulator falls back on back stage data analysts. Robodebt, the Royal Commission into Aged Care, The Royal Commission into Disabilities tells us where federal regulators who rely solely on data analysts end up.

Case managers ideally are in the middle of webs of communication at times of crisis. But it is unrealistic to imagine they will hold the answers and that they will hold up the sector. The reality is that no-one knows what will work. The goal is simply to survive the best way one can. At this early stage, there does not seem to be great diversity in how we are surviving. We should not be hard on ourselves here. John Quiggin has written on how marketization did not produce a diverse range of offerings in higher education. The result has been more a phenomenon of clinging together, staying with your group. I think we see this in the pandemic response as well. The Wells Report raises the risk of too little diversity going forward. We might add the question: Who is going to benefit from current innovations and in what ways?

I have argued in the past for better connections between the regulator and those whom we hope will benefit from higher education – students, families, the citizenry and the workforce. I want to move back to a theme I have argued for before and that is “All Eyes on

Quality.” Going forward, I am suggesting geographically organized open houses where catchment communities - businesses, students, parents, teachers, providers and regulators come together to discuss whether the higher education offerings and the vocational training offerings are practicable and desirable for regions across Australia. In other words, 360 degree feedback on how the sector and providers are travelling is vitally important. I am asking you to envisage a **community of practice**, not around a discipline, but around delivering publicly funded tertiary education services to communities who need them.

When all eyes are on quality and people can see and discuss openly how tertiary education is operating, there is automatically a degree of accountability when regulators ensure they are part of those conversations. TEQSA is arguably one of the better regulators in so far as it has been prepared to engage with the community and not hide behind a bureaucratic process of desk auditing. Even so, **accountability** remains an issue. There is no escaping the fact that the pandemic will create opportunities for rent seeking and profit making to the detriment of service delivery.

I want to draw a distinction here between resistant and dismissive defiance, a distinction I use in relation to regulation across a range of areas. Resistant defiance is pushback against a regulator because the regulator does not understand the provider’s business model or motives. It occurs when a regulator is disrespectful, will not listen, is not interested, and to put it more simply, does not abide by what we might call trustworthiness norms. This is healthy feedback for a regulator: They are the ones at fault who need to change. This is not to say the regulatee is right. But if treated reasonably and fairly, resistant defiance usually morphs into cooperation, maybe begrudging cooperation, but still cooperation.

Dismissive defiance is quite different. Dismissive defiance occurs when a regulator is seen to be irrelevant, is seen as not serving a useful purpose and the end game is winning against it. In other words, its institutional authority is an obstacle to work around or remove, not a legitimate source of protection of a system. Destabilizing the regulator or capturing it through political domination are games associated with dismissive defiance.

Dismissive defiance involves risk taking and is likely to thrive on disruption. The pandemic has presented opportunities to try new models of service delivery, which in theory might be brilliant innovations, but can be profit-making, low-quality initiatives that evade the regulator’s attention and control. This may be the greatest risk to the sector at this time – the promulgation of a bubble of counterproductive activity that makes some very wealthy, but leaves many committed providers and their students poor and disillusioned.

My last point is that **re-registration** has to be accepted as a serious exercise now. The regulator needs to refuse re-registration to providers who are operating with poor service delivery and without respect for the risks they are posing to communities. A provider once

replied to my question, “Is the regulator captured?” with “TEQSA was all over us”. TEQSA needs to be all over everyone at re-registration.

The core of my argument is that disruptive times demand engagement of the regulator and regulatees, not avoidance and stand-offs. In part this is about coping and avoiding missteps. In part it is protection against a re-registration that could go badly wrong. Some safeguards can be found in case managers having a record outside re-registration periods of provider capacity to adapt to the difficulties that COVID-19 has presented. There is also merit in case managers having evidence of provider adaptations that have delivered expected and valuable outcomes for communities.

The regulatory relationship needs to be on-going if one side is to understand the other in disruptive times. As with any authority that can command action of others and is expected to enforce the rules, the regulatory relationship must be based on **engagement with integrity**. This involves agreement that the regulator will pursue its purpose with reasonableness and fairness and be accountable for its decisions and actions, while the regulatee will be listened to and encouraged to build an informed body of evidence of their standards-based achievements. The productive enforcement of standards is not antithetical to this regulatory relationship. Rather it is integral to it.