

FROM PUBLIC HEARINGS TO CONSENSUAL DISPOSAL: INSIGHTS FROM THE DECISIONMAKING LITERATURE

A review for the Professional Standards Authority

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From public hearings to consensual disposal: Insights from the decisionmaking literature.

1. Introduction and rationale

This literature review was commissioned by the Professional Standards Authority in response to the increased use of consensual disposal by health professionals' regulatory organisations, including various forms of private hearings (Professional Standards Authority, 2017). To inform understandings of this development we examine the literature on decisionmaking and audience effects and consider what lessons can be drawn in respect of the decisions of panel members during fitness to practise hearings, whether held in private or in public.

Consensual disposal

Consensual disposal is the means by which regulatory panels and registrants can avoid the need for a contested hearing by reaching agreement to conclude cases by deciding in private the outcome that the panel would most likely have reached if hearings were to be contested and held in public. The concern with the current public hearings is that the process is somewhat adversarial and legalistic, not to mention stressful for registrants and complainants (Professional Standards Authority, 2013).

The process is not new and has indeed been challenged on occasions for possibly contravening registrants' rights to a fair hearing under the Human Rights Act 1998, but the main concerns are around the quality of investigations, level of penalties, transparency and complainant representation. These issues notwithstanding, there has been renewed interest in increasing the use of such hearings in the past few years, in part to improve efficiency and economy (Ellis, 2013). Effectiveness however requires that whatever the form of fitness to practise hearings they should fulfil the overarching objectives set out in the Health and Social Care (Safety and Quality) Act (2015):

- to protect, promote and maintain the health, safety and wellbeing of the public;
- to promote and maintain public confidence in the professions regulated by the regulatory bodies;
- to promote and maintain proper professional standards and conduct for members of those professions.

The question is then how does switching fitness to practise hearings from public to private affect outcomes? How is the behaviour of those taking part affected, and in particular to what extent if any are the decisions of panel members dependent on whether hearings are held in public or in private? For instance, does the social environment in which hearings are held affect the rigour, independence, accountability, and transparency of the process, and the potential for participants to challenge claims and assertions made? The literature cannot answer all these questions precisely as much is context specific, but this review aims to contribute to the debate by extracting lessons that can be drawn.

Panel members

While it is obviously beyond the scope of this literature review to examine empirically the core capabilities and competencies of fitness to practise panel members, we should briefly set these out as background to what follows. After all, members' characteristics will affect their behaviour, particularly decisionmaking behaviour, in different environments. The sorts of qualities regulators seek in their panel members include typically the ability to: assimilate and clarify information, exercise judgement, possess and build knowledge, manage work efficiently and communicate effectively (Health and Care Professions Council, 2018). They are expected to be 'interested in contributing to safeguarding the health and well-being of the public while promoting ... values of fairness and transparency, ..., be collaborative yet able to exercise independence of judgement, ... possess high levels of integrity, patience, resilience, confidence and professionalism in dealing with pressured, unpredictable and sensitive situations and, at times, differing points of view' (Nursing and Midwifery Council, 2018).

Of particular interest with regard to fitness to practise hearings are panel members' perceptions of others (including possibly those not present during private decision process such as the public); accountabilities to those others; levels of confidence; information accrual and assimilation, and; independence of judgement, as these, arguably, are most likely to be affected by the presence (or lack) of an audience, whether that audience consists of co-actors or the public.

Fitness to practise decision contexts

Fitness to practise is generally determined in one of three ways which we categorise as private decisions, private hearings and public hearings:

- **Private decisions**, as we conceive them, are less structured than private and public hearings and are akin to consensual disposal. Panel members consider written submissions in private. An example of this type of hearing would be where case examiners work separately but come together at some points during the process (typically at the end) to reach agreement. Within such a process it is likely that informal inputs such as workplace conversations are more influential than in say, public hearings. In the absence of constant scrutiny, it can be argued decisionmakers may, perhaps unconsciously, focus somewhat less on the public interest and somewhat more on their interactions with co-actors, leading perhaps to making decisions that serve to maintain their credibility with colleagues.
- **Private hearings** may be held for all or part of a variety of types of cases, for example where there are significant health issues that would be exacerbated by the presence of the public. The process involves consideration of submissions, hearing evidence from witnesses, deliberation on the evidence, and delivery of the decision. There is an audience throughout (except for the deliberation stage) but that audience is limited to other professionals, such as case examiners. A problem here could again be a tendency by panel members to over-focus on professional concerns, suggesting it may be beneficial to examine how the constant presence of colleagues affects decisionmaking.
- **Public hearings** at present account for the majority of final stage fitness to practise hearings. Members of the public can attend throughout, apart from the deliberation stage which solely involves decisionmakers. Decisionmakers are aware of the physical presence of the public or, alternatively, are aware that their determination will be presented in public. Interestingly, and notwithstanding possible subsequent future scrutiny by the Professional Standards Authority, the presence of the public may mean there is less onus on the panel to demonstrate transparency by recording proceedings fully. There could therefore be accountability issues with regard to the wider public. However, the primary issue here is around decisions made in the presence of an audience and how they compare with decisions made in private.

Methodology

Although we are investigating the impact on panel members of switching from public hearings to private hearings and private decisions, the logical order for our review is to commence with decisionmaking by individuals and use that as the basis for assessing the potential impact of the presence of co-actor and public audiences. For simplicity we refer to these as ‘decision contexts,’ as against decision spaces or decision processes or some other nomenclature, only varying if discussion of a particular theory or model

so requires. To aide our search strategy of literature from many different disciplines and contexts we summarised and to an extent, generalised our three decision contexts as:

- **Private decisions:** individual desk-based investigation, deliberation and decisionmaking, concluding with co-actor conciliation
- **Private hearings:** group investigation, deliberation and decisionmaking in front of co-actors;
- **Public hearings:** group investigation, deliberation and decisionmaking in front of a public audience.

While there is a considerable body of literature, primarily from psychology, economics and sociology on various forms of audience effect, in particular the presence of co-actors, there is none of significance dealing specifically with ‘private’ decisionmaking per se. This aspect of decisions is dealt with in the core decisionmaking literature. Indeed, the literature on audience effect is, or rather can be considered for our purposes, a subset of the general decisionmaking literature from within organisation studies.

We will examine what can be learned from these literatures of the effects on decisionmaking of the presence of these audiences, and in the concluding section consider the impact of switching the decision context from public to private. To that end our approach is conceptual – pragmatic rather than systematic - drawing together a limited number of works from a variety of disciplines to better understand the potential issues arising from increased reliance on consensual disposal in healthcare regulation in the UK. The search phrases used included, alone or in various permutations:

- private, individual, group, public,
- decisionmaker(s) role/strategy/relations (cooperative, competitive) trust, mutual dependency and social learning, process and/or outcome decisions
- decision/type (behaviour and/or standards), risk
- decision context and context dependence, situational milieu, mental models, cognition/framing
- social facilitation, direct/indirect audience/effect, observer effect, demand characteristics.

The review commences by examining the relevance of the classic decisionmaking literature with a focus on risk, trust and standards, given the Right Touch regulation agenda (Professional Standards Authority, 2015; 2016a; b; c; 2017). This section tends to raise more questions than answers about decision context because the literature centres on ideal-rational decisionmaking and decision theories. We then seek answers to the questions raised by examining the primarily psychological effects of the presence of an audience and consider some additional issues of interest in respect of decision context. In the final section we attempt to address the impact of switching contexts from

public hearings to consensual disposal but there is no obvious or specific literature on which to draw so we examine what can be learned from the strategic management literature, specifically on cognitive framing and mental models.

2. Decisionmaking

There is a substantial classic literature on decisionmaking addressing how individuals make decisions. We provide here, as a baseline for the remainder of the review, an overview of the key theories, addressing in particular, risk, standards and the maintenance of trust, and raise a number of questions relating to our decision contexts: public hearings, private hearings and private decisions. From organisational studies, and its constituent disciplines of psychology, economics, sociology, political science and philosophy, there are a large number of models of decisionmaking. For our purposes we focus on four basic models taught within public administration courses: rational, incremental, satisficing and garbage can.

Rational actor decisionmaking

The normative concept of rational decisionmaking suggests actors make a series of logical choices, from problem identification, generation of options and evaluation of consequences through to decision execution. They are presumed to have absolute freedom of action to achieve their goals, acting logically and objectively at all times. As Plato put it, 'reason ought to rule' (2007). This normative approach does not describe the real world of course but is the basis from which more descriptive realistic accounts have been developed. As Hume points out, 'when we leave our closet, and engage in the common affairs of life, [reasonings] conclusions seem to vanish, like the phantoms of the night on the appearance of the morning; and 'tis difficult for us to retain even that conviction, which we had attained with difficulty. This is still more conspicuous in a long chain of reasoning, where we must preserve to the end the evidence of the first propositions, and where we often lose sight of all the most received maxims, either of philosophy or common life' (Hume, 1789 Book 3, Part 1, Section 1)

Hume here is concerned with the tension between reasoning, morals and the norms of everyday life. We might understand these as concerning the extent to which each panel member's own views on right and wrong inform the logical application of fitness to practise rules (given their role in respect of these rules is to recognise violations and apply sanctions). The questions raised by critiquing the ideal-type normative decision process at this fundamental level are:

- To what extent does context affect each panel member's understandings of:
 - (i) morality – what is right and what is wrong;
 - (ii) the rules - what do they mean; and;
 - (iii) the intent of those rules – how should they be applied; and thus their actions in respect of any particular case?
- Does the presence of other panel members or the public modify, perhaps by suppression, members' original understandings and convictions about the case they are hearing?

Satisficing

Descriptive approaches to decisionmaking focus on the reasoning for decisions - why we veer from the normative ideal - drawing primarily on a combination of psychology, political science, economics and mathematics. The US economist, political scientist and cognitive psychologist, Herbert Simon (1947), developed the concept of 'bounded rationality' to emphasise how decisionmakers are constrained in their reasoning by:

- knowledge of the problem and potential solutions;
- cognitive capacity, and;
- time available.

The implication is that decisionmakers, though still aspiring to rationality do not, as Hume noted, maximally rationalise. Rather they 'satisfice,' that is, search through a necessarily limited number of alternative options until reaching a boundedly rational choice that both satisfies and suffices (Simon, 1959). The rigour of the process and the quality of the decision depends in part, according to Simon, on how closely the decisionmaker identifies with the objectives, routines and values of the organisation and keeps other more personal forms of identity in check. We can thus add a fourth constraint in respect of the integrity of the decision:

- knowledge of, and identification with the organisations' objectives, routines and values.

- In respect of public and private fitness to practise hearings, and private decisions, the question arises of whether working together in front of co-actors or the public produces higher aggregate levels of knowledge and understanding of the issue and potential solutions, consistent with the organisation's objectives routines and values - and even if this is the case, would a satisficing solution have been reached more economically and efficiently without the need for a hearing?

Incrementalist approach

Writing from a more political, rather than administrative science perspective, Lindblom (1959) agreed that decisionmakers inevitably need to simplify when faced with complex decisions but suggested that in the public sector especially, political imperatives and the structure of government (for example the separation of legislature, executive and civil service) encourages an incremental approach. Limited but nonetheless essentially rational agents draw upon precedent, making minor adjustments to previous judgements to address current issues. Incrementalist approaches have the advantage of political expediency and may require little justification but can also be sub-optimal. An effective outcome may require a degree of radical thinking and even a courageous decision.

- Assuming some cases require a more incremental approach while others need more radical thinking, which decision context will be more conducive to each of these approaches?
- Is one decision context more likely than the others to provide the necessary environment for panel members to take the appropriate approach to a case?

Mixed scanning

Both boundedly rational and incremental approaches were criticised as sub-optimal by Etzioni (1967; 1986) amongst others. He argued that a purely rational approach, if operationalizable at all, would produce a surfeit of information, too much for the decisionmaker to process. On the other hand, a purely incremental approach, focusing on aspects of past decisions or current practice for example, would almost certainly risk missing critical information. Etzioni's solution was a mixture of both: 'mixed-scanning',

Decisionmakers, he argued, should optimally take both a radical approach, scanning the organisational environment for changes such as new technologies, and a routine approach, following existing organisational practices that draw on established organisational knowledge about how to achieve required outputs.

- The extent to which the environment can be scanned to maximise the number of options is dependent in part on the number of panel members (but, as we shall see there is an optimum size for the efficient functioning of panels.)
- Is effective scanning for process and outcome options more likely to be achieved by panel members working alone or in public hearings?

Garbage can model

In a later institutional approach to decisionmaking, March, Cohen and Olsen (1972 p1) moved yet further away from rational actor decisionmaking, with their 'garbage can' model, suggesting that within organisational settings there are:

- 'collection[s] of choices looking for problems,
- issues and feelings looking for decision situations in which they might be aired,
- solutions looking for issues to which they might be the answer, and
- decision makers looking for work.'

The way in which these are combined within an organisation and presented post hoc as constituting a rational process is entirely contingent on, for example, resources and/or political pressure at the time the decision is required to be made. This institutional view of decisionmaking at the level of the organisation, treating the decisionmaker as just another element in the decision system alongside decision situations, offers considerable insights and is not necessarily entirely inconsistent with previous behavioural approaches.

- Part of the 'decision situation' to which March et al refer, is of course what we are calling the decision context. Holding the daily tasks of the panel members constant (i.e. decision makers looking for work), garbage can theory suggests each of the three types of fitness to practise contexts will yield different combinations of:
 - (i) understandings of the fitness to practise issue under scrutiny (e.g. what is the underlying problem – malpractice, maladministration etc.);
 - (ii) approaches to how to address the issue (e.g. prioritising rules or morality);
 - (iii) the range of potential solutions (e.g. exoneration, rehabilitation etc.).

Game theory

We turn now to a different, mathematical strand of the decision literature. 'Game theory' uses mathematical modelling to predict the outcomes of strategic interactions between rational decisionmakers (Von Neumann & Morgenstern, 1947). Of particular interest to our decision contexts issue is the Nash equilibrium (1950). Nash's insight is that, in reaching a decision, each decisionmaker considers the effect on themselves of the decisions the others are expected to make. An individual panel member's perception of (i) what is right or wrong, (ii) what the rules mean and (iii) how they should be applied in any particular case, will, it is argued, depend in part on their view of how the others are likely to act, and how those actions will affect the individual panel member.

The theory implies the strategy adopted by panel members during consideration of a case would depend to an extent on whether they are motivated more by cooperation or competition – a desire to appear conciliatory or to seek to lead other panel members to a preferred course of action. This of course is contingent, but in each case, agreement is reached by successive rounds of negotiation until, at some point, equilibrium pertains - that is, no panel member can see any benefit to themselves in changing their position.

Applying Nash's concept narrowly, it would appear to be most relevant to the private decision context where there is a degree of independent working and relative lack of interaction until the conciliation stage, but it is of course applicable to other contexts to an extent. To understand how a Nash equilibrium is reached during a private decision process or a hearing we first need to know what motivates each panel member - altruism, appreciation, reputation, popularity, dominance etc. - what do they value, what do they consider a desirable outcome, and why? The agreed outcome will also be informed by the extent to which the panel members approach the decision process: cooperatively or competitively.

There are many game theoretic approaches but ultimately, the applicability of each

depends on understanding what drives panel members and how they behave in each decision context. However, holding their personal characteristics and particularities as constants, we can speculate that:

- **Private decisions** offer, arguably, the least opportunity for panel members to be influenced by colleagues because any interaction is discontinuous, but equally there is less known about how the others are proceeding with a case.
- **Private hearings** would seem to offer more opportunities for interaction than private decisions. However, it could be argued the lack of an external audience would give panel members more opportunities to, for example, compete for dominance or to display behaviours designed to improve their position within the organisation.
- **Public hearings** would seem to offer the same opportunities for panel member interaction, but the presence of an external audience might inhibit them from adopting overtly competitive strategies and potentially promote more conciliatory approaches.

Decisions and Risk

The influence of these theories and models on decisions in general, and 'risk decisions' in particular, is considerable. Risk is a function of the probability of the occurrence of harms and the magnitude of such harms. Conceptions of risk are essentially value driven – what 'bad' will occur if no action is taken to protect something we value and how harmful will be the effect? Decision thinking on risk focuses on the *options* we have, the *outcomes* we desire and our *beliefs* about the probable outcomes from each option. Combatting risks is itself risky as regulators of risk are faced normatively with the task of reducing risk and descriptively with knowledge of their own irrationality (or bounded rationality). Using decision theory (see Bernardo et al, 1985; Resnik, 1987) to address risk involves combining in some way complementary perspectives which reflect the classic approaches outlined above, expressed typically as:

- normative – what is the desired outcome by way of risk reduction, assuming we are fully informed and apply our values (expressed as outcome preferences) in a consistent and logical manner;
- positive – what are the practical options we have for risk reduction;

and relatedly, of especial relevance to public servants:

- prescriptive – what does the current guidance on or interpretation of organisational rule(s) or law suggest about ways to reduce the risk of harm (Fischhoff & Kadvany, 2011).

In some ways, decision theory in all its many variants provides us with a more practical guide to reasoning and decisions than Plato, Hume et al. However, all decisions are beset by uncertainty. Uncertainty is in fact one of the key problems with strictly normative approaches and is interlinked with (bounded) rationality, as Simon noted (Simon & March, 1976; Simon, 1947; 1950). Not only do we have bounded rationality, we are uncertain where the boundary of our rationality lies – we don't know what we don't know – which increases the possibility of our decisions being challenged. In other words, for the decisionmaker, decisions on risk themselves contain risk. Thus, in more self-evidently contestable cases, decisionmakers will tend to act defensively in order to minimise possible harm to themselves by way of attacks on their credibility and reputations. However, such an approach may well increase the chance that potentially workable solutions are ignored, so increasing the likelihood that outcomes are contested.

Contestability is also an issue where decisionmakers are faced with attractive solutions that are, nonetheless, inconsistent with their values. In such cases they will tend to suffer from cognitive dissonance (Festinger, 1957). Unfortunately for the decisionmaker, if this dissonance becomes evident to an audience the chance of the decision being contested increases. Both decisionmaker and audience become locked in a downward spiral of sub-optimal caution and consequent challenge.

- **Private decision** processes may enable panel members to explore more approaches to an issue but that may lead to increased uncertainty about which solution is optimal, and in some cases to cognitive dissonance, both of which increase the possibility that the decision will be challenged. This suggests the conciliation process needs to be suitably rigorous.
- **Private hearings** could limit the range of options considered by panel members but working primarily in front of colleagues, without the constraint of an external audience, could lead to over-focusing on internal organisational factors, increasing both the risk of sub-optimal outcomes and the potential for registrants (and even co-actors) to contest the outcomes.
- **Public hearings** would seem to be most likely to encourage panel members to both demonstrate consideration of a range of approaches, options and outputs, and to promote a coherent 'performance' to their colleagues and the public. The presence of a public audience may serve to decrease the risk of sub-optimal outcomes by encouraging panel members to strive for maximal objectivity.

Starr and Whipple (1980) make a similar case but from an engineering management operations perspective. They argue that dissonance can be caused by differences between analytical and 'intuitive' value-laden understandings of risks, for example where an objective multifactorial social cost-benefit analysis (CBA) produces results that are not consistent with current public perceptions of the magnitude and occurrence of the risk (on CBA and risk see Williams & Giardina, 1993). But the analytical component of risk assessment can alone bring about dissonance where there is strong evidence to indicate more than one solution, and this may be compounded by concerns over whether sufficient data has been collected on which to base the analysis. After all, resources such as time and money are always limited (Olson, 1996; Stigler, 1961; Vaughan, 1997; Williams & Giardina, 1993).

A further problem with both normative and primarily descriptive approaches, is the intangibility of, specifically, 'future' risk. In examining avoidable disasters, Watkins and Bazerman (2003) note: 'We are creatures of the present. We try to maintain the status quo while downplaying the importance of the future, which undermines our motivation and courage to act now to prevent some distant disaster. We'd rather avoid a little pain today than a lot of pain tomorrow'. On the other hand, when presented with a significant number of 'divergent risk assessments from different sources,' signalling a wide range of potential harms, there is a tendency to irrationally 'place inordinate weight on the high risk assessment' (Viscusi, 1997).

- Does either the presence of: (i) an internal and external audience; (ii) just an internal audience, or; (iii) the absence of any audience, promote potentially sub-optimal decisions that avoid immediate risk (for example to reputation or credibility) at the expense of longer-term risks of perhaps even greater magnitude and/or probability?

Decisions and standards

Although, in regulation literatures, most studies touching on standards tend to focus on rule monitoring and compliance mechanisms, we should perhaps briefly consider the construct of 'standards,' the underpinnings of rules. What is standardised and then what is measured or not measured, in order to assess or demonstrate compliance, has been addressed extensively elsewhere (Bevan & Hood, 2006; Smith, 1995), not least in relation to the Mid-Staffordshire NHS Foundation Trust case (Francis, 2010; 2013). Our concern here is primarily with how standards inform regulatory decisionmaking processes.

All organisations have rules governing standards of behaviour of employees although the range of values and/or emphasis placed on particular values differs between organisations. To illustrate the point with a somewhat crude comparison, profitability is an obvious private sector priority while ethical behaviour in dealing with service users may receive greater emphasis in third sector service delivery organisations. But in regulatory organisations, standards not only regulate the behaviour of regulatees but also of regulators. Regulators are not only constrained by the organisational rules put in place by their employer. Their actions are also likely to be shaped to an extent by the values, routines, norms etc. manifest in the standards within the system of rules they enforce – by virtue of the focus in their daily work on enforcing those standards.

For the past twenty years or so sociologists (e.g. Brunsson & Jacobsson, 2000; Brunsson et al, 2012; Espeland & Stevens, 1998; Tushman & Rosenkopf, 2008), have added to the classic literature previously dominated by political science (e.g. Katz & Shapiro, 1986), management studies (e.g. Garud & Kumaraswamy, 1993) and economics (e.g. David & Greenstein, 1990). From a sociological perspective, regulators, from rule-makers and monitors to compliance and enforcement officers, can be conceived as 'standardisers' (Brunsson & Jacobsson, 2000). While some standards or sets of standards allow a degree of choice on how to comply, all nonetheless serve to promote uniformity in some way, which raises the question:

- To what extent does decision context (public hearings, private hearings, private decisions) condition any tendency towards uniformity in standards-based decisions?

Uniformity requires action by way of compliance on the part of regulatees, so standards can also in a paradoxical sense be considered a dynamic force, both constraining and promoting action. Moreover, as external values shift, new rules are introduced while existing rules are reinterpreted, requiring different responses by regulatees to ensure compliance. Brunsson et al (2012) observe that:

- actors' perceptions of standards change over time (during engagement with rules),
- standards structure the continuously evolving work of regulatees and,
- standards serve as omnipresent governance mechanisms linking regulatees with the frequently shifting sets of values of the wider society.

- Does decision context affect how panel members understand and assess the implications of changes in interpretation of rules or the addition of new rules over time?
- Are panel members more likely to reflect changing societal values if they work in the presence of a public audience? (While the latter question is addressed below, the former is context-dependent and requires empirical research.)

In addition to sociology, contributions specifically on the convergent/divergent effects of standards have been made from within political science (e.g. Kerwer, 2005), law (e.g. Karmel & Kelly, 2009) and economics (e.g. Blind, 2004). From a management perspective, standards are typically categorised as either:

- **Technical** (David & Greenstein, 1990; Garud & Kumaraswamy, 1993; Tushman & Rosenkopf, 2008) – codifying sets of specifications tending to produce uniformity due to, for example, network and peer pressures (Katz & Shapiro, 1986) or noncompliance costs or both (Shimshack & Ward, 2005), or;
- **Non-technical** – generally allowing multiple standards (Reinecke et al, 2012) or a multiplicity of compliant behaviours, for example, in governance codes (Seidl et al, 2013). Decisions on non-technical standards can be more subjective and so allow

for more diverse compliance or, put another way, such standards allow regulatees more space in which to construct compliance.

Standards can also be distinguished by whether they specify processes to be followed or outcomes to be achieved but, in some ways, this is an artificial divide. Processes are designed with outcomes in mind and outcomes are achieved by relevant process design. At one institutional level or another, both need to be specified, a point made convincingly within a series of articles by Black (2005; 2008; 2015) investigating the move to principles-based regulation, particularly in UK financial services. Moreover there is evidence that higher compliance levels are attainable if regulatees are given both process and outcome goals (see e.g. Zimmerman & Kitsantas, 1997).

- Is there any evidence to show that any particular decision context – public hearing, private hearing or private decision, leads to panel members:
 - (i) over-focusing on either technical or non-technical standards, to the detriment of the other, or;
 - (ii) over-emphasising either process or outcome goals, to the detriment of the other?

Decisions and Trust

Trust is defined as the ‘firm belief in the reliability, truth, or ability of someone or something’ (Oxford University Press, 2019a), and trustworthiness as ‘the ability to be relied on as honest or truthful’ (Oxford University Press, 2019b). Trust is critical to sustainable regulation. It has many antecedents and has been examined from within numerous disciplines including economics (e.g. Alesina & La Ferrara, 2002; Dasgupta, 1988; Laibson et al, 2000), sociology (e.g. Coleman, 1994; Gambetta, 1990; Luhmann, 1979; 1988), social/organisational psychology (e.g. Dirks & Ferrin, 2001; Hollis, 1998; Kramer, 1999) and management and organisation studies (e.g. Jeffries & Reed, 2000; Levin & Cross, 2004; Mayer et al, 1995; Morgan & Hunt, 1994). We consider now some of the ideas generated by these writers.

Dasgupta (1988) identifies from within economics, especially from game theory, a number of interrelated requirements for trust to exist, which can be summarised as:

- there must be incentives to cooperate and disincentives not to cooperate;
- individuals must have confidence not only in each other but also in the organisations to which they belong;
- individuals must understand each other (be able to identify the other's position on relevant issues and perhaps even worldview) in order to calculate how the current position was reached and thus probable future actions by the other.

This of course is only relevant if trust in some way improves the quality of decisions made. Evidence from an experimental study by neuropsychologists Hu et al (2018) suggests trust has a slightly different effect at early and late stages of decision processes. At an early stage, trust, compared to distrust, results in greater *motivation* to achieve the best possible outcome, and *expectancy* that such an outcome will be achieved. This develops into an emotional attachment to outcome attainment if high levels of trust continue into the latter stages of the decision process.

- While regulators can introduce policies to try to encourage cooperation and instil confidence in their organisation, opportunities for panel members to interact and so understand each other's position depend on levels of contact.
- Public and private hearings would seem to offer greater opportunity for exchange of views than private decisions, but of course regular progress conversations may enable understanding.
- However, higher frequency of contact may be sub-optimal where incentives to cooperate are absent or where there are disincentives to cooperate.

Coleman (1994) treats trust as a form of social capital 'created when the relations among persons change in ways that facilitate action. ... Groups can achieve more if each member strives to be trustworthy and thus increases overall levels of trust within the group. if A does something for B and trusts B to reciprocate in the future, this establishes an expectation in A and an obligation on the part of B to keep the trust' (pp 304 & 306). This improves social capital in the form of trustworthiness in the entire group and presents as such to newcomers. However, decisionmakers are more likely to focus on the extent to which they can trust others rather than the extent to which they themselves are trustworthy and can thus facilitate or inhibit the decisions of others. For this reason, organisations seeking to encourage trustworthiness should ensure that any particular decision group, such as a panel, has 'closure' (p319), by which Coleman

means that all members are bound to at least two others by reciprocal obligations created by the generation of trust, so that a closed system pertains.

Luhmann (1988), examining the differences between familiarity, confidence and trust, points to the link between trust and risk noting that 'trust is a solution for specific problems of risk.' The generation of trust is therefore a legitimate part of regulatory strategy as it can potentially reduce the risk of harm occurring from the actions of others especially where risks may be unknown or unknowable and thus unspecifiable. Moreover, in respect of fitness to practise panel members, there is of course as noted above, the risk of, for example, reputational harm from either colleagues or the public and other external audiences. Indeed, Checkland et al (2004), writing after the Bristol Royal Infirmary Inquiry (Department of Health, 2002), suggest transparency and demonstrating accountability to more than one audience will improve levels of trust.

Trust is critical to decisions on fitness to practise in particular in matters relating to future compliance by registrants, and in two related ways. Those making decisions are required to assure themselves that the future actions of the registrant will be compliant and at the same time reassure witnesses and observers that decisions reached will offer protection against the risk of possible future harms. For the decisionmaker these are not quite the same. In the former case the onus primarily is on the registrant to instil confidence that future behaviours will be compliant. The role of the decisionmaker is to seek assurances that this will be so. In the latter case the onus is on the decisionmaker to reassure the relevant audience, whether constituted as participants, service users or the broader public, that the decision is in their best interests. Both cases entail recognising reciprocal dependencies (on which see Roberts, 2001; Roberts & Scapens, 1985).

- Are different strategies required to generate trust in private decisions, private hearings and public hearings? High trust relationships involve virtuous circles of dependency with the opposite being the case for low trust relationships.
- Thus, it is important to emphasise in each decision context those aspects of fitness to practise hearing and decision processes designed to develop and demonstrate trustworthiness.
- Trust can be achieved in part by encouraging recognition of the reciprocal dependencies between (i) the registrant and the regulator, and; (ii) the regulator and relevant audiences including the public.

De Cremer et al (2018) draw from an empirical study to argue that trustworthiness essentially trickles-down hierarchically. They use social learning (Bandura, 1977) as their theoretical frame. The theory posits that learning is a function of (i) existing inducements for behaviours, (ii) reinforcing feedback influences and (iii) level of cognitive function – the capacity to acquire and use knowledge. They found that if an authority figure B endows superior authority A with trustworthiness, then subordinate C will also view B as trustworthy. However, aggregate levels of trustworthiness are enhanced also when A is seen to trust B who in turn trusts C, and also, in respect of C, when B engages with C in joint decisionmaking. By extension it can be argued that (taking A as a senior regulator, B as panel member(s) and C as the registrant):

- Any warranty from the registrant over future (more compliant) behaviour, is more likely to be valid if, during the decision process:
 - (i) panel members demonstrate trust in their regulatory authority - and the authority is seen to reciprocate;
 - (ii) panel members feel able to demonstrate trust in the registrant and engage the registrant in joint decisions on future compliance.

3. Decisionmaking in the presence of others

Having set the scene in the previous section considering how individual decisionmakers might make sense of their environment we turn now to what many would claim to be the starting point for popular organisational psychology. (Most of the more relevant literature for this section of our review comes from within organisational studies, drawing primarily on social and organisational psychology, with some ideas first developed in economics and sociology.)

Hawthorne effect

The experimental studies carried out between 1924 and 1932 by Mayo (1924; 1932; 1947) linked productivity increases at the Hawthorne Works in Cicero, Illinois, directly with specific improvements in conditions for the workers. These included longer breaks and better quality lighting as well as a sense of being appreciated and respected, aspects of work 'deeply rooted in sentiment and feeling' (Roethlisberger & Dickson, 1939). The term, the 'Hawthorne effect' was actually coined later by Landsberger (1958) to refer to findings based on the original studies by what were then known as industrial psychologists (and some sociologists) - from Mayo onwards. Their primary conclusion was that, as many of the productivity increases turned out to be only temporary, it was likely the intervention or even the mere presence of the researchers was having an effect on the workers – the 'observer effect'. But the changes in behaviour resulted from a desire to cooperate with the researchers, particularly during periods of formal observation (Mayo, 1945). The subjects placed themselves under the control of the researchers in "a special form of social interaction" and so "must be recognized as [...] active participant[s] in any experiment." Orne (1962) refers to this as 'demand characteristics'. Participants will display the characteristics they believe are being demanded of them. They behave in ways they think the researcher expects them to behave, based upon their understanding of the researcher's objectives, or even their understanding of anticipated research findings.

Of course, researchers are also participants in the sense that they too play a role and thus experiments (and indeed the uses made of secondary data) are also susceptible to 'researcher bias.' (For a review and discussion of researcher bias see Podsakoff et al, 2003). This adds a further complicating layer to demand characteristics. Subjects, attempting to guess how they are expected to behave may not only misunderstand the researcher's ostensible objectives but may also be misled by researcher bias. The desire to appear to cooperate is nonetheless strong. Goffman (1978) suggests that "because we desire to conform to social expectations, although are not always able to do so, ... we become 'merchants of morality' attempting to sell our performed 'moral character' to anyone who will buy" (Alonzo, 1985).

- So, a simple reading of the early Hawthorne findings implies panel members will perform better in private and public hearings as a result of being observed by, respectively colleagues, and colleagues together with the public.
- Thus, the absence of an audience in private decision processes might lead to lower performance.
- However, as later studies of the findings suggest, in order to demonstrate cooperative demeanours, groups will display characteristics expected of them. This applies to panel members, colleagues and the public, not to mention registrants and any representatives present.
- The situation is further complicated because actors might dissemble and mislead by suggesting they value one set of characteristics in others while actually valuing another set.

Metaphysical audience

The Hawthorne studies show that an examination of individual, group and public decisionmaking must consider relations, not least power relations, between participants. This applies even when the other is not physically present, when decisions are taken alone or in a dispersed group via some conciliating mechanism. In an empirical study of how senior regulators conceived their duty towards the public, Sanderson (2001) found that: (i) around one third were positivists who claimed their enabling Act of Parliament clearly defined this aspect of their role (although in reality they conceived the public interest as anything the relevant Act required them to do); (ii) one third produced a metaphysical public when wrestling with issues in which the interests of the public were involved, conjured up by means of a kind of Platonic dialogue (on which see Silverman, 2009), and; (iii) one third acted contingently, alternating between a formal proxy for the public and a metaphysical public presence, as the situation seemed to demand. These metaphysical publics were far from powerless as they exerted a demonstrable grip on the regulators' decisionmaking.

- The presence of an audience in a decision process is not a simple binary – physically present/not physically present - in fitness to practise hearing decision contexts – including private decisions and private hearings. This should be borne in mind when considering lessons from the literature which, for the most part, deal simply with the physical rather than metaphysical presence of an audience.

The above caution notwithstanding we now turn to a number of articles on a range of topics primarily from social psychology, economics and other disciplines, that raise issues relating to the ways in which the physical presence of others affects specifically, decision choices. Only those with specific learning that might be applied to members of fitness to practise panels behaviour in private decisions, private hearings and/or public hearings were included for consideration.

Social facilitation theory

Social facilitation theory focuses specifically on improvements to performance in the presence of others and has some useful learning for our purposes. First articulated by Triplett (1898), the theory suggests performance overall is improved by the presence of either peers/co-workers (the co-actor effect) or an audience (the audience effect). In a co-actor experiment with two cyclists Triplett found that performance improved when they raced against each other rather than the clock. The concept of social facilitation has been continually tested and refined from outset. Dashiell (1930) found arithmetic speed increased in front of an audience but accuracy declined. Chen (1937) performed similar experiments with ants when studying leaders and followers. An ant, working noncooperatively next to another would dig up three times as much sand as when working alone. Others found similar effects when carrying out experiments on multiplication (e.g. Allport, 1924), signal detection (Bergum & Lehr, 1963) and even eating (e.g. Conger et al, 1980; Nisbett & Storms, 1974).

Competition improves individual performance. Recall from game theory that players are assumed to adopt either competitive or cooperative strategies and as Nash (1950) posited, each will adjust their position based on how they presume others will act until an equilibrium is reached. It follows that if the majority of players act competitively each will maximise their own performance but there may be costs to the others and indeed, social costs. For instance, the negotiation process will be longer, less efficient and perhaps less effective (unless improved individual performances lead to increased aggregate performance). On the other hand, cooperative strategies, depending on circumstances, could possibly be more economic and may lead to shorter and more

efficient games but again are only more effective if aggregate group performance is higher than the sum of individual performances.

- The performance of individual fitness to practise panel members is likely to be raised by competition between them, which requires proximity and virtually continuous exchange, and thus favours private hearings and public hearings. However, whether, or the extent to which, higher individual performances would improve overall panel performance is not clear from the early pioneers' work on social facilitation theory.

Research projects on social facilitation have gradually become more sophisticated over time. Conger et al (1980) found overweight subjects seated next to participants eating a relatively large quantity of crackers ate 86 percent more crackers themselves but when they sat next to someone who ate no crackers their normal intake decreased by 42 percent. In other words, people are likely to respond more to those of a similar disposition or displaying similar preferences. In a related vein, Zajonc and Sales (1966) found task performance in front of an audience increased when the subjects were skilled and had confidence in their abilities but decreased when the task required skills they did not possess – *social inhibition*. Note that the audiences in this experiment were unknown to the subject. They were essentially public audiences rather than co-actor audiences.

- In public hearings the performance of fitness to practise panel members possessing the competencies necessary to hear a particular case will be higher (i.e. facilitated) than if those same members were hearing the same case in private contexts - certainly private decisions, possibly also private hearings.
- Conversely, panel members not possessing the necessary competencies will underperform (i.e. be 'inhibited') in public hearings compared to how they would perform in private decisions and possibly also private hearings.

Michaels et al (1982) reported similar results using research on observations of students playing pool, although using the same research, Sanders, Baron and Moore (1978) argued the subjects were simply distracted by the presence of others. In work

environments the 'evaluation apprehension hypothesis' may explain observed differences in performance results. Individuals are concerned at being evaluated by those who can formally or informally reward or punish (Cottrell, 1972; Cottrell et al, 1968).

- In fitness to practise hearings where colleagues are a significant presence, i.e. private hearings, and to a slightly lesser extent, public hearings, panel members may perform sub-optimally, becoming overly-concerned with reputation in front of those who can judge their performance and affect their careers. Arguably, this 'evaluation apprehension hypothesis' is less likely to hold in private decision contexts.

Social facilitation has thus come to mean in general the way in which dominant well-learned responses are strengthened by the presence of others and conversely, subordinate, less well learned responses, are weakened, as a result of some combination of increased arousal, distraction, and awareness of evaluation.

Social loafing

Note however that some studies have shown total performance can decrease in absolute terms with group working, starting with Ringelmann (1913), an agricultural engineer, who found that size of group is significant. Individual performance is inversely related to size of the group. The larger the group, the lower the performance of individuals within the group – the 'Ringelmann effect.' The group provides a cloak of anonymity – cover for less prosocial behaviours, an idea that came to be known as 'social loafing' (Karau & Williams, 1993; Latané et al, 1979; Simms & Nichols, 2014). Social loafing is essentially a free-rider problem, countered by increased identification of group members, individual goal-setting (Latané et al, 1979) and, importantly for this review, well-defined rules of conduct. Given the formal nature of fitness to practise hearings social loafing is a less likely result than social facilitation although this is dependent on developing significant levels of trust between participants (Leana III & Van Buren, 1999) and maintaining small panel sizes. We note by way of example both the General Optical Council (2019) and the Nursing and Midwifery Council (2019) panels have a maximum of five members.

- The free rider problem of 'social loafing' is less likely in private decision contexts – as long as the defined tasks and contribution of each individual panel member are clearly identified and discernible to others.
- In any case, in all decision contexts, panel size should be optimally small, and an emphasis placed on developing trust between the panel members.

Conformity effect

A more significant issue from the group working literature concerns the 'conformity effect.' In a famous experiment Asch (1951) presented students with a card with a line on it, and a second card with three lines on it, one of which was the same length as the line on the first card. A student subject was placed within the group who were then all asked to identify the matching line on the second card. What the student did not know is that the rest of the group were actors. In most repetitions the actors identified the correct line, as did the student, but occasionally they would all identify the wrong line. In a significant minority of those cases the student subject would conform with the group and give the evidentially incorrect response. Afterwards the students were interviewed and asked why they conformed? A few believed that had given the correct answer but the rest gave a variety of reasons, reflecting the wide range of attributes and characteristic behaviours studied over the past century by researchers of, in particular, differential psychology (see for example Anastasi, 1937; Binet, 1916; Cronbach, 1957). In other words, their responses reflected their personality, motivation, intelligence, ability, interests, values, self-concept, self-efficacy, and self-esteem, which in this case can be characterised as either (i) normative – a desire to be considered cooperative, or (ii) informational – a belief the rest of the group must be better informed.

A number of criticisms have been levelled at Asch's work however, mostly concerning situational context. The 1950s were a time of cold war tensions in the US and conformity was a patriotic value, not least amongst the mostly male university-age undergraduates of the time. The experimental research environment was stressful for the subjects. They experienced fear over whether to conform. Over time the experiment was refined and repeated by Asch and others. Some of these situational concerns were addressed, and findings produced of particular interest to this review. For instance, the group size at which conformity is maximised was found to be a majority of 3, to avoid suspicion of collusion (Baron & Byrne, 1977) and if the lone subject was aided by the introduction of a confederate, the desire of the subject to conform decreased substantially (Allen & Levine, 1968; 1971; Asch, 1956). The basic idea holds but note that in the original model the premise is an extreme case – the majority lie, and the lone

individual's initial determination is correct. The later refinements showed a weaker effect as more realistic circumstances were modelled.

- Private decisions are less likely to be affected by the conformity effect as contact is discontinuous.
- However, it may be possible for a dominant group within a panel to subvert the initial determinations of a cooperatively minded member in both public hearings and private hearings (subject to other constraints being ineffective), though this is less likely if the size of the panel is optimally small.

Nonetheless, the conformity effect does provide some insights into how individual panel members might respond to uncertainty, a matter addressed briefly above when we considered decisions and risk. On a related subject, the economists Tversky and Kahneman (1983) examined how decisionmakers respond when faced with two outcomes they perceive equally probable. For an example we could return to the Asch study where students had to balance their own perception of the length of line against the incorrect but overwhelming majority opinion. In interviews after the experiment, students typically had found under pressure at the time both cases more or less equally convincing. Tversky and Kahneman note that 'judgments under uncertainty, ..., are often mediated by intuitive heuristics' by which they mean that 'when faced with a difficult question, we often answer an easier one instead, often without noticing the substitution' (Kahneman & Egan, 2011 p12). Thus, rather than engage in lengthy consideration student subjects opted for a simplifying common-sensical rationale – the majority could not be wrong – much easier than standing their ground. The incorrect majority caused cognitive bias in the lone student subject who had to balance the loss from being proven wrong with the gain of being proven right. As 'prospect theory' demonstrates, we are more influenced by a current or potential loss than a future or equivalent gain (Kahneman & Tversky, 1979).

- Irrespective of whether objectively correct or not, a panel member will tend to simplify, relying more on intuition than logic, when faced with uncertainty caused by finding their assessment of a case differs from the majority of the panel.
- This cognitive bias is more likely to occur in public hearings or private hearings where the majority have the opportunity throughout to attempt to sway an individual or minority from their initial stance. This problem is less likely in private decision contexts, with the exception of the final conciliation stage of the process.

Prosocial behaviours

Also from within economics, Houser, Montinari and Piovesan (2012) examined private and public decisions in social dilemmas, drawing on evidence from the behaviour of children. They used as subjects (i) older children who could anticipate that selfish behaviour could lead to shame (see Ferguson et al, 1991), and (ii) younger children who had not yet exhibited full theory of mind related skills, i.e. they could not yet impute mental states to themselves and (differentiate themselves from) others (see Premack & Woodruff, 1978, esp p515). Houser et al generated some intriguing results, and their focus on conflicts arising from social dilemmas is pertinent. Citing Hardin (1968) they note that 'social dilemmas involve conflict between an individual's short-term self-interest and a group's ability to sustain social cooperation.' Their study tested the linked propositions that (i) exposure to an audience encourages broadly optimal behaviours while (ii) anonymity promotes the opposite (posited originally by Hoffman et al, 1994; 1996). Houser et al found that public decisionmaking promoted pro-social behaviour only in individuals who above all want to avoid being perceived negatively by others. For these individuals, implicit threats of punishment or other forms of retaliation are of less concern. They concluded overall that decisionmaking in public 'might have distinct efficiency advantages over alternatives e.g., monitoring and enforcing sanctions (on which see Xiao & Houser, 2011) that require costly interventions at the individual level' (Houser et al, 2012). These findings are supported by experiments by Chen, Houser, Montinari & Piovesan (2016), who also show that popularity is a factor in prosocial behaviours, and in the original research in this area conducted by Hoffman et al (1996). The latter demonstrated that the desire for reciprocity - in their formulation a specific calculative form of cooperation - increases linearly with social distance, i.e. as the size of group increases. This may be an evolutionary strategy for dealing with larger numbers of unfamiliar people.

- A panel member's intent to benefit others is maximised in public hearings but only where that individual is concerned to avoid being perceived negatively by others. In large panels such a member would act more calculatedly, seeking reciprocal benefits.
- Knowledge of the character of individual panel members is thus a critical component in assessing whether any particular set of panel members will perform well overall. Size of panel, as discussed earlier, is also critical.

One of the ways in which individuals encourage group acceptance is by demonstrating a concern with fairness. Shaw et al (2014) conducted experiments with children of varying ages and found that while all engaged in fair behaviour because being fair was seen as intrinsically good, the older children also demonstrated a desire to be seen to be fair by others. This is consistent with social signalling models. Andreoni and Bernheim (2009) employed econometric modelling to examine the 50-50 norm - why people opt so often to share profits, split restaurant bills, workloads etc. Their conclusions provide support for the audience effect. They found the 50-50 norm is more prevalent when decisionmakers are observable. They used a version of game theory, the 'dictator game,' (Forsythe et al, 1994; Guala & Mittone, 2010; Güth et al, 1982) to show that, despite earlier findings by for example Fehr and Schmidt (1999), altruism alone cannot account for demonstrations of fairness. Dictators by definition have no need to distribute resources, yet they do, to an extent. Observability is the driver. Being seen to be fair – to an extent - yields superior outcomes.

- Recent econometric modelling suggests public hearings and private hearings are more likely to yield fair outcomes than private decisions (in contrast to findings from the work undertaken in the 1990s that showed the audience effect to be negligible and that fairness resulted primarily from altruism.) The differences between these findings and indeed other inconsistent findings surveyed above are in no small part due to the context-specific nature of much of the empirical research reported here, and indeed to the assumptions made in the theoretical studies.
- Specific observation of panels at work would be required to make anything approaching a reliable determination about which studies and models are most consistent with the three fitness to practise contexts. Nonetheless the studies reported here do suggest differences and point to issues that could be usefully investigated.

4. Decisions in context: Public hearings, private decisions

Having reviewed a selection of relevant key works on individual decisionmaking and the impact of an audience we focus now more on situational context, analogous to our decision contexts. There is no directly relevant body of literature though there are many that offer insights that point us to the factors we might benefit from observing or considering to aid our understanding of what might happen when the same panel members are asked to make the same decision on the same case but in a different context. As context is contingent the field is somewhat fragmented and answers are few, but we focus here primarily on what can be learned about the importance of context from the strategic management literature (applied learning from psychology and sociology) as it is concerned, for the most part, with decisionmaking in organisations.

Contexts

Within organisations (and without for that matter), decisions are social rather than purely personal constructs. Panel members do not perceive fitness to practise cases in isolation. Yes they follow (i) specific task instructions and (ii) relevant rules to be followed to reach a rational decision and outcome, but in the course of considering a case they will also reflect (iii) prevailing values and underlying assumptions and knowledge about existing practices and structures (Perrow, 1986). Schein (1992) uses a similar type of categorisation from an organisational culture perspective, identifying (i) artefacts: visible organizational structures and processes, (ii) espoused values: strategies, goals, philosophies, and (iii) basic underlying assumptions: unconscious, taken for granted beliefs, perceptions, thoughts and feelings. In both approaches structure (analogous to decision context) and values, play a role in helping us make sense of the tasks we face.

We raised in the previous section the way that particular decision contexts may lead to panel members over-focusing on either outcome or process goals. How they might reach such decisions was the subject of an experimental study of compromise and contrast effects in legal cases by Kelman et al (1996). They tested the responses of psychology students to legal cases with different sets of potential penalties to see if attitudes to justice changed in different contexts. They found they could guide the subjects towards agreeing on different levels of penalties for the same crimes by manipulating the range and severity of the penalties available – compromise and contrast. While there was some evidence of context independence, there was also evidence of context dependence. The difference was entirely contingent on the exact details of the context. The introduction of a compromise option that still served to punish

but was not at the extreme end of the range of penalties would produce context-dependence so as ever, the details are everything in considering the impact of context.

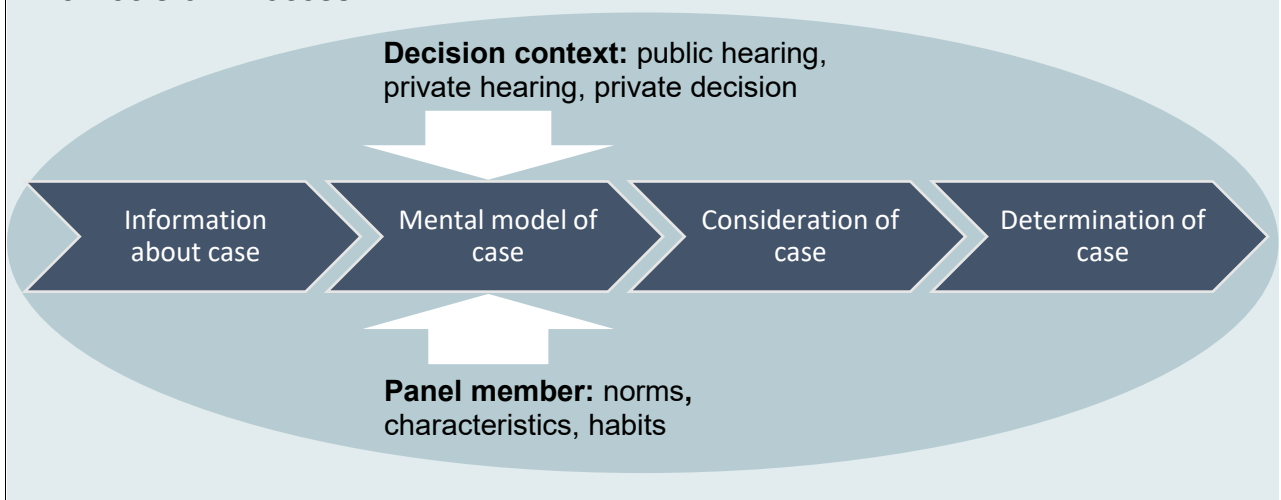
- Experimental studies suggest panel members may reach different judgements for the same case of noncompliance in different decision contexts – public hearings, private hearings, decision contexts - but this is entirely contingent on circumstances so would need to be empirically researched.

Context, though contingent, has thus been recognised as an important component in decisionmaking as researchers in the field moved understandings of decisions on from the classical rational actor and descriptive decisionmaking literatures, outlined in the second section of this review, to a more nuanced and diffuse post-positivist perception of decisions as part of a process of sensemaking (Weick, 1995). This idea of sensemaking reminds us that we are not dealing with a purely objective environment but rather with how decisionmakers perceive their environment, their context (Child, 1972; Weick, 1979).

Mental models and frames

Decisionmakers build a mental model of the problem to be solved (Forrester, 1971; Johnson-Laird, 1983; Norman, 1987). 'The mental model is a "selective abstraction" of reality that we create and carry around in our head. As big as some of our heads get, we still can't fit reality in there. Therefore, all mental model are simplifications. They necessarily omit many aspects of the realities they represent' (Richmond & Peterson, 2001). In the case of fitness to practise hearings, as shown below, a panel member's mental model will be informed by (i) the information directly relevant to the case, (ii) the panel member's characteristics, norms, and habits, and (iii) their understanding of the decision context.

The Decision Process



Mental models can be considered specific versions of cognitive frames (Goffman, 1974; Tversky & Kahneman, 1981) which are broader forms of schema comprising simplified representations of the world around us. Frames use psychological concepts such as:

- expectancy (belief that a course of action will bring about the desired outcome),
- demand (meeting the expectations of others), and
- intention (planning action to achieve the desired outcome),

which together form 'patterns of interpretation through which people classify information in order to handle it efficiently' (Scheufele, 2004).

- Panel members will frame cases differently in different decision contexts because both fitness to practise hearings, howsoever constituted, and consensual disposal will:
 - (i) generate different methods for resolving the case;
 - (ii) contain different co-actors and audiences at varied relational distance;
 - (iii) promote different levels of commitment to the case
- Understanding how panel members construct different frames in different contexts would again require observation of fitness to practise cases.

Framing has been used fairly widely in decisionmaking and is particularly useful in relation to our decision contexts. We can readily conceive how a panel member might differentiate and produce separate frames for public hearings, private hearings and private decisions. The components of a decision frame are similar to the components of mental models though they focus on decisions, obviously. Thus, a decision frame refers to the decision-maker's conception of the acts, outcomes, and contingencies associated with making a particular choice. The frame that a decision-maker adopts is controlled partly by the formulation of the problem and partly by the norms, habits, and personal characteristics of the decision-maker.

Panel members, like the rest of us, are not consciously aware of framing. This can lead to sub-optimal decisions. 'Decisionmakers (i) might have a different preference in a different framing of the same problem, (ii) are normally unaware of alternative frames and of their potential effects on the relative attractiveness of options (iii) would wish their preferences to be independent of frame, but (iv) are often uncertain how to resolve detected inconsistencies' (Tversky & Kahneman, 1981 pp457-8). In practical terms, framing issues start with (i) above - which context is appropriate for handling a particular case? - an issue raised in the consultation on consensual disposal by the General Optical Council (2017). Decisionmakers tend to associate particular contexts with specific decision outcomes, with each repetition habitually strengthening the association between frame and outcome (Bargh, 1990; see also James, 1890). This can have efficiency advantages because the more often a behaviour is performed in a given decision context, the faster that behaviour can be retrieved when that same context is next encountered (Aarts & Dijksterhuis, 2000). Of course, poor behaviours may also be reinforced.

- Panel members who are used to working methodically alone using their own systems within existing parameters for reaching conciliated private decisions, will find public hearings 'jarring' and will notice differences in procedure which will become magnified within their decisionmaking process. There may also be efficiency losses.
- The same will apply in reverse: Panel members used to a quasi-judicial public hearing will find their attention drawn to differences in the structures and process caused by absence of the public in a hearing, and even more so when asked to work independently in a private decision context.
- Panel members may not notice that behaviours optimal in a previous decision context are sub-optimal in a new context. This applies particularly to embedded habits, norms and routines, and even underlying values, especially instrumental values.
- Observation of precise differences in structure and process - from the perspective of the panel member - would be needed to understand the impact on outcomes in different contexts and of course in switching between different contexts.

Cues

In a similar vein, Weick (1995), drawing on Shotter (1983; 1993) writes of the contextual relevance of 'cues' in sensemaking. The concept is used in psychology to refer to stimuli that help the retrieval of a certain memory. Context-dependent cues help retrieve memories formed in a certain context (Smith & Vela, 2001). Familiarity with structures and processes, and one's role within them, present as cues or guides to future action. Context affects both what is considered a cue and also the interpretation of that cue. To the extent to which panel members 'notice' or consciously are aware of the structures and processes of private decisions, private hearings and public hearings, their responses will differ (Starbuck & Milliken, 1988), all else being held equal. It should be noted however that not all cues are context-dependent. In a meta-analysis, Smith and Vela (2001) found that encouraging subjects to develop the use of non-contextual cues in one context, as well as selective reinstatement of appropriate context-dependent cues in a new context, reduced the harmful effect of 'environmental manipulations.'

- Panel members' experiences and subsequent habits routines, norms, gained working in one decision context, such as public hearings, are not necessarily optimal when reproduced in another context such as consensual disposal. Guidance may be useful to guard against this possibility, and a very simple message: emphasise the commonalities, deemphasise the differences in the panel member's task set between public hearings and consensual disposal.

5. Summary and Conclusion

In this review we have addressed how decisionmakers make decisions and the psychological effect on decision-makers of observers and considered some implications of panel members switching from public hearings to private hearings to consensual disposal. A number of useful insights have been elicited from the organisational psychology and other literatures on decisionmaking and have been presented above. By way of a brief summary to illustrate the importance of decision context:

- Panel members are more likely to strive to perform better in public hearings because of the presence of the public but may be inhibited from suggesting more radical solutions to cases than they would if the process was private.
- The lack of an external audience in private hearings and private decisions could lead to panel members directing their attention more to colleagues, consciously or not, serving their own (career) interests.
- Private decision processes enable panel members to consider a broader range of options, but fewer opportunities for formal interaction and negotiation could in some cases be sub-optimal, leading to more decisions being contested.

However, what has become obvious in the course of conducting this review is that decision context is contingent and is treated as such in the literature. In a previous work, reviewing the medical regulatory systems of ten countries, we found the outcomes of seemingly similar fitness to practise processes differed so much that it was impossible to confidently draw any conclusions from comparisons except to note that even 'the odds of a formal judgment after a complaint has been received can vary tremendously' (de Vries, 2009 p13), pointing to considerable variability in the way outwardly similar contexts are understood and enacted by decisionmakers. Decisions are context-dependent. When the same rules are instated in two different decision contexts, their operationalisation will likely be different. For example, the values implicit in the configuration of one context may promote leniency in a case but such values may be less apparent in another context when addressing the same case.

To conclude, we have usefully reviewed the literature on decisionmaking and observer effects and gained some intriguing insights. Nonetheless, a more contextualised understanding of how fitness to practise panel members' practices, as well as outcomes, are affected by the shift from public hearings to consensual disposal would require empirical research be undertaken.

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