

MODERNIZING GOVERNANCE

# **Modernizing Governance: Leadership, Red Flags, Trust and Professional Power**

**Andrew Massey and William Hutton**

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# Preface

**Andrew Massey and William Hutton**

The drive to modernize government takes place within a complex context: globalization, the rise of governance and the changing nature of government itself. This report explains why it is now the time to look again at what it means to be a ‘professional’ within the networks that make, shape, and deliver policy. Managerialism has steadily demoted professionals and eroded their power to control the policy process, yet policy-making and service delivery depend on them.

We discuss these issues from the perspective of the procurement of large building projects, the private–public interface and the need to evolve structures to ensure accountability and transparency, but reduce the regulatory burden.

We provide checklists of ‘red flags’ which will help policy-makers detect, deter or disrupt malpractice and mismanagement. It is essential that policy-making and service delivery takes place within an environment of trust and confidence and we suggest that paying attention to the role and competence of professionals is an integral part of this.

We use a short case study, the Alderney breakwater, to illustrate the importance of the red flags and professional oversight. At no stage do we suggest, imply or infer that anyone connected with this project behaved improperly.

All stakeholders in the policy process and society generally, whether they are policy-makers, citizens, taxpayers, or auditing authorities, need to be able to have confidence in professional advice. That professional advice must be proffered on the premise of speaking truth unto power. A robust notion of the public interest and best value is an aid to this. Accountable policy-making and effective and efficient service delivery are dependent upon the commitment and enthusiastic compliance of professionals employed to structure and deliver services. It is again time to seriously debate what it means to be a ‘professional’ and the role these experts play in delivering the services a modern and just society depends on. ■



**Case study: The Alderney breakwater. Photograph reproduced courtesy of the Guernsey Press and Star.**

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‘The consummate leader cultivates the moral law, and strictly adheres to methods and discipline; thus it is in his power to control success’ (Sun Tzu, *The Art of War*, c. 490 BC).

Aside from Pol Pot’s Cambodia or the ravages of a Taliban-led Afghanistan, few if any recent governments would claim to be opposed to modernization, however that concept may be defined. Even those societies that eschew Western-style notions of political and economic liberal democracy, such as Saudi Arabia or Iran, believe in a notion of progress through modernization, though often the modernization intended is of a technocratic and industrial variety. In Western societies (the EU, US and Australasia), the pursuit of modernization is ingrained in both the public and private sectors. Grounded in the political and economic theories of the Enlightenment, the notion of constant structural and institutional change as a desirable process has at times appeared to replace religious belief as the guiding creed (Buchanan, 1999; Massey and Pyper, 2005). All governments claim to be modern and in that sense seek to modernize. The emphasis varies over time and place; sometimes it is an attempt to modernize the ‘economy’, or industry, at other times it is an attempt to modernize the public sector, or government itself.

This report explores the notion of modernization from the perspective of what it means for the role of professionals (in their role as a core element of policy networks and governance), their

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professional ethics and the pursuit of best value, particularly in terms of big public projects. The short case study we refer to is that of the Alderney breakwater. Although a proposed 'new-build' did not take place and therefore the procurement process was never completed, there are some useful lessons to be learned. As we noted in our preface, at no stage is there an intention to allege that any act of fraud or bid-rigging was intended or took place. We simply rehearse our argument that in this, as in many other large civil projects, it is time to resurrect the notion that professional power is an adjunct to managerial power. Furthermore, we take the normative stance that at all times these should be open and transparent, with proper democratic accountability and audit. We pay special attention to public sector procurement and we adopt the definition of public procurement used by Sir Peter Gershon, the first chief executive of the Office of Government Commerce. He noted that 'procurement' has many different interpretations. Throughout his 1999 review of public procurement for the Treasury he argued it equated with:

*...the whole process of acquisition from third parties (including the logistical aspects) and covers goods, services and construction projects. This process spans the whole life cycle from initial concept and definition of business needs through to the end of the useful life of an asset or end of a services contract. Both conventionally funded and more innovative types (e.g. PFI/PPP) of funded projects...This definition is consistent with modern supply chain management practices and that used in the 1995 White Paper (Cm 2840) 'Setting New Standards' .*

Discussing procurement, therefore, allows us to explore notions of governance and professional power that lie at the heart of public administration. By 1999, the total annual procurement spend of UK government departments and their agencies was around £13 billion and by 2004 this had risen to £15 billion (NAO, 2004, p. 1). In the 1999 review Gershon linked the reform of this process very closely to the government's modernization agenda:

*The scale and breadth of this level of expenditure demands the highest levels of efficiency to achieve the best possible value for money. In addition the composition of this expenditure has been changing and will continue to change*

*significantly through: (a) the prime minister's modernization agenda including the focus on outcomes and joined-up government initiatives; (b) the need to achieve value for money savings through better procurement in order to release resources to support the key policy objectives of the government; (c) the increasing use by government of purchased services, e.g. outsourced facilities management, provision of turnkey systems and the use of third parties to deliver public services (ibid.).*

The NAO identified some £1.6 billion worth of 'value for money' gains as a result of the changes put in place with the establishment of the Office of Government Commerce (NAO, 2004, p. 5). There is a complexity of issues to be concerned with here. The processes outlined in Gershon's report intrude across notions of public service, professional ethics and the critiques of those notions by both the political left and right. Some practitioners and observers concerned by the implication of many public sector reforms and the whole process of 'modernization', or indeed wearied by a generation of such reforms, have viewed the government's repeated proposals to use the private sector to drive forward more effective delivery of public services with concern. On occasion it has been argued that the involvement of the private sector could substantially 'erode the public sector's service ethic', assuming that 'there is such an ethic and that it is distinctive to the public sector' (Plant, 2003, p. 560). We have seen in the work of Perry (1996), or Horton (2006), for example, that this notion is often a contested one, at least in terms of what actually constitutes a public service ethic, and how it may be recognized.

In the UK and around much of the world, the modernization agenda has embraced a managerialist approach and includes many elements of policy-making and the procurement of goods and services to deliver those policies, that give rise to concerns about the role of those involved; concerns regarding ethics, trust, accountability and value for money. These concerns are exacerbated by the increased intermingling of the public and private sectors. This intermingling, reflecting a range of dynamics within the global economy, forms an essential part of the process of *governance*. This report explores these issues by discussing the notion of modernizing government, as mainly applied to the UK, followed by a discussion about the role of professional groups and professional ethics. We apply this analysis to

the case of the Alderney breakwater and draw lessons for public sector management more generally.

### **Modernization and public sector reform**

Democracy is fallible, and we have noted elsewhere that it is dependent on the actions and intentions of citizens and their leaders for its continuing success, and on properly functioning institutions and the trust people place in those institutions. In this, the rituals of governance and the rationality of policy-making all play a part. Policies 'often fail and citizens become disenchanted; voter apathy is seemingly *de rigueur* in many countries. Yet the alternatives (to democracy), however they may be adorned by those who advocate them, are hardly attractive' (Massey and Pyper, 2005, p. 171).

To this end, modernization of government, or more particularly the modernization of *governance*, the whole process of making decisions and applying them throughout a given area using the private and public sectors to do so, must include some fundamental questions about the nature of public administration and the way in which decision-makers are made to account for their choices. *Trust*, in a number of guises, is a key to this. The notions of professionalism and a public service ethic have been intertwined for generations; they have also been linked to more obviously Victorian concepts of modernization (rather than post-modernization). The idea of a public service ethic:

*...has for a long time dominated thinking about the motivation, character and moral importance of the public sector within the political community. Initially the idea was applied to the civil service and the administration of the Empire, but as the public sector has grown it has been applied to the character of administration in spheres of health, education and the social services...Allied to this growth in government went some serious thinking about the moral basis of government and those who worked in its service (Plant, 2003, p. 560).*

Linked to the development of the concept of public service was the growth in the modern idea of the professional and the ideology of professionalism. We return to this discussion in a later section, but it is worth noting here that in Victorian times at least, as the basis for the modern public administration was being laid: 'Members of



professions saw themselves as gentlemen, not only in the sense of social status, but as being bound together by common professional ties, by common experiences, particularly at school and university, and by common norms. This led to the formation of a gentlemanly class which differentiated itself from the aristocracy on the one hand and those who worked in trade on the other' (Plant, 2003, p. 561). In this we can see a contributory element to modern notions of a common public service ethic. Furthermore, the issue of professional expertise, of *knowledge*, was inextricably drawn into the administrative/professional nexus because:

*The growth of public administration based on knowledge, professionalism and expertise raised deep questions about trust. If medically qualified people were making demands for more public involvement in health issues, then there was clearly a question as to how far public officials with this expertise could in fact be trusted. The point was in fact made with great insight by the Permanent Secretary to the Treasury in 1871 when R. W. Lingens said: 'I do not know who is to check the assertions of experts when the government has once undertaken a class of duties which none but such persons understand'. While this was particularly so in the field of public health, the point could be generalized over a range of fields in public administration (ibid.).*

It is a conundrum with which contemporary modernizers continue to wrestle and applies equally in terms of engineering expertise, education, social services and other technical issues, as well as the modern generic manager. Plant argued that originally the approach was to trust such people: 'as professionals bound by an ethical code or ethos, and that they are gentlemen who are seeking to do the public good and not recommending schemes which will mean their own enrichment' (*ibid.*).

Later sections of this report explore these issues and approaches in more (and more contemporary) detail. It is worth the final observation here that the concept of a public service ethic linked to a Platonic notion of duty through a higher ideal is one that some analysts have traced explicitly to the Victorian attempts to develop a 'higher' civil service (O'Toole, 2006). As such, debates on modernizing governance and the steps taken to actually put into practice that modernization, must consider fundamental notions of

the role of the state, the place of the citizen in relation to the state and the way in which they hold policy-makers to account, both through traditional methods and new procedures like the pursuit of 'best value'.

### **Red flags**

US academics and practitioners addressing the issue of fraud and corruption have developed the concept of the 'red flag' as an indicator of occupational fraud and abuse (Wells, 1997, p. 25). The red flag is also useful as an indicator of administrative and managerial problems that fall short of wrong-doing, but nonetheless have implications for the process of efficient policy-making and service delivery. The term 'red flag':

*...refers to anomalies, unusual events, a signal that informs or indicates, announces or communicates that something is different from the norm or the expected activity. These anomalies are symptoms or indicators that have been associated with irregularities and fraud in the past. Auditors should therefore be aware of red flags, know when to use them and understand their strengths and limitations (Asian Organization of Supreme Audit Institutions, 2006, p. 2).*

The red flag has entered the general usage of auditors when investigating financial irregularities. It can also be used in reference to non-financial frauds, or at least those with only a partly financial aspect, such as misdemeanours that refer to the laying of false instruments (telling lies in an official document), or falsifying curricula vitae. A recent British example is that of a former chief executive of Shrewsbury and Telford NHS Hospital Trust who invented a degree from Nottingham University in order to progress in his career within NHS management; receiving a suspended prison sentence when he was convicted (*Birmingham Post*, 24 September 2005).

We believe that the concept of the red flag should be extended further because financial irregularities also often indicate broader administrative mismanagement. One way of ameliorating such concerns as they pertain to professionals employed by the public sector (directly and also under contract) is to place their professional

licensing on a statutory basis, in those cases where that does not yet apply. By licensing, we mean a system akin to the medical registration of doctors, itself in the process of being reformed and updated. It is a system whereby professionals must illustrate possession of core competencies in order to remain registered with their professional body; unregistered practitioners no longer being legally allowed to practice or to use a professional title.

In the US, where it has been suggested that fraud and corruption may cost the economy in excess of \$400 billion a year (Kramer, 2005, p. 1), larger jurisdictions produce handy checklists of red flags and questions for officials to detect the early signs of possible wrongdoing. One of the more comprehensive and accessible is that of the attorney general of the State of New York, which identifies different kinds of fraud and conspiracy and then provides illustrations of how officials ought to conduct themselves (Spitzer, 2003). In many instances, good governance and the enforcement of ethical behaviour by professionals would secure value for money in service delivery. Kramer (2005) has identified the types of wrong-doing and then lists the red flags. The following list of red flags is an extensively edited and amended version of Kramer's list:

*Pre-solicitation bid-rigging*

The exclusion of qualified bidders is part of pre-solicitation bid-rigging. A variety of tactics are employed to achieve this, including arranging narrow or unduly burdensome pre-qualification criteria; establishing unreasonable bid specifications; splitting purchases to avoid competitive bidding; and making unjustified sole awards. Red flags include:

- Several different consultants employed to advise the government departments, giving rise to a 'choose and confuse/pick and mix' situation regarding the eventual award of contracts based on professional advice.
- Lock-out clauses.
- A significant number of qualified bidders fail to bid.
- Unreasonably narrow contract specifications.
- Allowing an unreasonably short time to bid.
- Adopting unreasonable 'pre-qualification' procedures.
- The failure to adequately publicize requests for bids, for example using only local publications or failing to publicise the request for bids.

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### *Corrupt payments*

For corrupt payments, such as bribes and kickbacks (which may include non-financial as well as financial benefits), the red flags include:

- Improper or non-competitive selection of a contractor.
- Unjustified favouritism of a certain contractor, for example the approval of high prices or the acceptance of low-quality goods.
- Unnecessary broker or middleman involved in transactions (this allows broker's 'fees' to be brought into the bidding process).
- Procurement officials accept inappropriate gifts and entertainment.

### *Collusive bidding*

This allows pre-selected contractors to win contracts on a rotating basis, or to 'carve out' territories. What in the UK used to be known as 'Buggin's turn' can form an element of this. It has the following red flags:

- The winning bid is too high compared to cost estimates, published price lists, similar jobs or industry averages.
- The rotation of winning bidders by job, type of work or geographical area.
- Losing bidders are hired as subcontractors.
- Unusual bid patterns, for example the bids are too high, too close, too consistent, too far apart, round numbers, incomplete, identical or similar to a prior or another bid.

### *Change of order abuse*

The red flags for change of order abuse, where a contractor in collusion with officials can submit a low winning bid and then increase the price and profits at a later stage by submitting change of order requests, include:

- Weak controls regarding the review of the need to change orders.
- Numerous unusual or unexplained changes of orders.
- A pattern of low bid awards followed by changed orders.
- Vague contract specifications followed by changed orders.
- Incomplete or 'preliminary' specifications subject to change based on later engineering studies etc.

### *Conflicts of interest*

These arise, or may be perceived to have arisen, if officials responsible for

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procurement have undisclosed interests in or with a supplier or contractor, or accept inappropriate gifts, favours or subsequent employment or consultancies from a supplier or contractor. Red flags here include:

- Unexplained or unusual favouritism of a particular contractor or supplier.
- Contracting or purchasing officials 'living beyond their means'.
- Officials have discussions about employment or consultancy with a prospective supplier.
- Close socialization with and acceptance of inappropriate gifts, travel, or entertainment from a supplier.
- Procurement officials or politicians appear to conduct or have an interest in a side business related to suppliers.

### *Cost mis-charging*

Cost mis-charging is done to inflate profits, red flags are:

- The supplier has simultaneous similar cost-type fixed price contracts.
- Transfers of material costs from one contract to another, particularly from a fixed-price or commercial contract to cost-type of government contract.
- Transfer of charges to or from any type of holding or petty cash accounts.

### *Defective pricing*

This occurs if contractors fail to disclose accurate, current and complete pricing. The use of inflated costs in proposals for labour and materials, or fictitious price quotations from phantom suppliers. Red flags include:

- The contractor delays or is unable to provide supporting documentation for costs.
- The contractor provides inadequate or out-of-date documentation for cost proposals.
- The contractor fails to record rebates and discounts.
- Unusual variances between estimated or reported costs and actual costs.

### *Failure to meet contract specifications*

The red flags of failure to meet contract specifications are:

- Discrepancies between test and inspection results and contract claims and specifications.

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- Failed tests and inspections.
- Low quality, poor performance and high volume of complaints.
- Early failure or high repair rates.

### *Leaking of bid information*

Red flags are:

- Poor controls on bidding procedures, such as failure to enforce deadlines.
- Winning bid just under the next lowest bid.
- Private opening of bids.
- Acceptance of late bids.
- Bid due date extended unnecessarily.
- Late bidder is the low bidder.

### *Bid manipulation*

The red flags of bid manipulation include:

- Poor controls and inadequate bidding procedures.
- Winning bid voided for 'errors' in contract specification and the job is re-bid.
- Acceptance of late bids.
- Bids are 'lost'.
- A qualified bidder is disqualified for questionable reasons.

### *Rigged specifications*

The major red flags of rigged specifications include:

- Only one or a few bidders respond to a request for bids.
- Similarity between specifications and winning contractor's product or services.
- Specifications are significantly narrower or broader than previous requests for bids.
- The purchaser uses a brand name in the request for bids.
- High number of competitive or sole source awards to one supplier.

### *Unbalanced bidding*

Here the bidding process is rigged by the inclusion of line item requests for bids on certain works, goods or services that will not actually be called for under the contract and only the favoured bidder is aware of this, enabling

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them to submit an unreasonably low bid on the line item making them the most competitive overall:

- A particular line item appears to be unreasonably low.
- Subsequent change orders reducing requirements for low bid line item.
- Particular line item bids do not appear to have been performed or purchased as specified in the contract.
- A bidder is close to procurement personnel or participated in drafting contract specifications.

### *Unjustified sole source awards*

Red flags are:

- Sole source awards just above or just below competitive bidding limits.
- Previously competitive procurements become non-competitive.
- No justification or documentation for non-competitive awards.
- Split purchases to avoid competitive bidding limits.
- Awards made below the competitive bid limits that are followed by change orders that exceed such limits.

The use of a checklist of red flags is a useful and accessible way into a complex subject, but it is important not to put too much faith in them, remembering that they are products of a particular temporal and institutional context. Much that is now illegal, or frowned on used to be standard practice. Indeed, the notion of ‘Buggin’s turn’ was enshrined in the practice of letting contracts for the construction of large power stations in the UK throughout the first 20 or so years of the old Central Electricity Generating Board. The perfectly legal ‘rigging’ of these contracts enacted in order to ensure the strategic maintenance of a domestic power station construction and manufacturing industrial base (Massey, 1988). Similar concerns are expressed in smaller jurisdictions where the imposition of competitive tendering ensures bids from suppliers located outside of the country have to be considered, often to the detriment of native companies. In Wales, for example, public bodies have been encouraged to ‘buy Welsh’ (BBC, 4 October 2006). Governance, indeed multi-level governance in the global economy, means wrestling with a multitude of difficult ethical and legal issues.

### **Complexity, trust and delivery**

Politics and public sector management in contemporary Britain, Europe and the US is situated within a phenomenally complex organizational, constitutional and political context. In the UK, sweeping reforms aimed at modernizing the public sector are more easily implemented because of the non-statutory nature of many of the constituent organizations, especially the civil service itself. But even this constitutional anomaly does not guarantee the success of modernizing policies once implemented; governments too often confuse outputs with outcomes and neglect the latter, harder to quantify aspects of policy-making. Governments also tend to concentrate on what they can do, and the dramatic changes in public sector structures over the years mean they attempt to do much less; they no longer try to manufacture cars or aeroplanes, ships or steel. This inability to control events can provoke frustration within government, but it reflects the reality of the interconnectedness of the public and private sectors, and commercial, professional and third sector interests.

We may argue that this is all connected to some notion of the 'hollowing out of the state', and the differentiated nature of the political structures and processes in economically advanced countries ensures that many of the government policies attempted in those countries are doomed to failure. This situation is not because of a lack of commitment on the part of public servants. It is the result of power and authority ebbing away from London to Brussels, the devolved countries and amorphous power-brokers within the international (or global) economy. British national government has lost the ability to impose its will through the old hierarchical institutions. This is as true in other parts of Europe and indeed the wider world, as it is in London (or even Washington, D.C.). The modern world is immune to several of the techniques that an old-style national government may use to modernize itself. Much change, therefore, is imposed from outside, or rather 'it is the result of external triggers forcing governments and institutions to respond to change elsewhere by changing themselves' (Massey and Pyper, 2005, p. 172).

The attempts to modernize and remodel the public sector are a response by governments to the issues raised by the internationalization (or, more accurately, the *de-territorialization*) of the



policy process. Often these problems are seemingly intractable, they are the paradox of progress where professional and managerial interests clash with each other and with those of citizens as consumers of government services (Willis, 1995; Massey and Pyper, 2005, pp. 173–175; Hutton and Massey, 2006, pp. 23–30).

Modernization has become a search for ‘stakeholder interests’, ‘citizen preferences’ and responsive ‘joined-up government’. The checklist of red flags is a useful tool here in that there is often confusion between stakeholders, beneficiaries, suppliers and state interests. We need to be clear in the identification of aims and objectives and this is often not clear at all. The use of multiple performance indicators, designed to measure success and guide the delivery of public services in a way commensurate with efficiency and effectiveness, often confuse or obscure the real motives of policy-makers. This is because they originate from conflicting departmental and ‘stakeholder’ aims, especially if one of the stakeholders is the Treasury. Self went so far as to argue that modernization and attempts to improve performance, ‘will be fruitless without the reinvigoration of democracy itself’ and that the ‘basic need is to affirm the importance of and increase the opportunities for responsible citizenship’ (Self, 1993, p. 280).

Effective reforms must be sensitive to the context of the problems and paradoxes of modern governance. As Richards and Smith point out, during the past 30 years, ‘policy-making has become much more difficult and complex’ (2002, p. 285). This appreciation of complexity led post-1997 Labour governments (following on almost seamlessly from John Major’s administrations) to address the problems inherent to this miasma of governance with a ‘two-pronged’ approach. First by adopting ‘a strategy aimed at binding together different elements of society—government, the private sector, the voluntary sector, etc.’ Second, by pursuing ‘a strategy of joined-up government... This is an attempt to resolve one of the problems of the governance era—fragmentation—by wiring the system back up together again’ (Richards and Smith, 2002, p. 285).

We live in an age of super-pluralism and a bewildering diversity of interests and mechanisms of service provision. Ensuring accountable, transparent and ethical governance is a necessary prerequisite of maintaining the health of the political system and civil society. In

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previous generations, up to the early 1980s at least, this was partly done by fostering the notion (some may argue the ‘myth’, or rituals) of a public service ethic. This ethic may be characterized by including:

- *Motivation: individuals do not enter the public service for self-interested reasons, but to serve a ‘common good’ which it is assumed exists and may be identified.*
- *Professionalism: linked to motivation, in that professionals often claim a vocation to serve the public, in doing this they are guided by professional values which emphasise disinterested service. Their specialized knowledge, over which they have control, is put to serve social needs.*
- *Trust: there can be no public service ethic without the central place for trust. Trust between citizens and the agreement that the public sector is there to deliver certain sorts of public goods funded from taxes. There is a general requirement here for efficiency, effectiveness and honesty. Trust also between government and citizens, in that citizens trust government to deliver these services in a fair, just, timely, honest and efficient manner. Trust between government and the public sector, in that ministers rely on officials to deliver services and advice impartially, honestly and efficiently. Trust between the people who work in the public sector, the notion that whatever the organizational affiliation, there is a general sense of public service that overrides parochial concerns. Trust between the public sector and private sector partners, this will form the basis of effective contracts and efficient delivery. Trust between clients and public sector professionals, the most obvious example being patients trusting to the medical expertise, and integrity of NHS professionals.*
- *Impartiality: often seen as the first virtue of public administration and bureaucracy, central also to the rule of law.*
- *Judgement: public officials and professionals are expected to exercise their judgement and to do so impartially, fairly, justly and without seeking to enrich themselves at the expense of the common good (taken from Plant, 2003, pp. 562–565).*

For many on what became known as the ‘New Right’, this snug, even smug, view of the idealism of the public sector was dismissed as a fallacy; officials as much as any private individual were believed to be motivated by self-interest rather than a rosy notion of altruism. Public choice critics advanced consumer-based, service-oriented solutions to

the perceived problems of service delivery, including advocating the need for disenfranchizing professional groups and substituting managerial structures to control them. Trust was something to be earned, not blindly given to professional groups, however much they protested their aims were those of the public good. The critique joined by elements from the political left mistrustful of bureaucracies, has led to sweeping reforms. The public choice critique in particular queried these notions of impartiality, public service, and vocational motivation and sought to ensure a public service compliant to political goals through the wholesale imposition of the managerial revolution.

This is well documented in the academic literature and the current situation needs to be seen in its recent historical context where 'modernization' and a constant process of rolling reforms have beset the public sector for nearly three decades. The public choice critique, combined with the attendant modernization programme undertaken by various public sectors around the globe, led to a concern to discover the dynamics or motivations for people working at different levels in public service. The 'concept of public service motivation, developed by the American academic James Perry (1990; 1996) is one of the most widely known ideas, which addresses these issues' (Horton and Hondégheem, 2006, p. 3). The 1980s were a period of upheaval and sweeping reforms in the structures and institutions that government uses for the delivery of public services. During this time we saw the creation of executive agencies in central government, the privatization of utilities and nearly all the old nationalized industries; the marketization and contractorization of much of local government and a deepening emphasis on improved financial management and accountability. These reforms, as Terry notes, were essentially driven by beliefs about the importance of means rather than ends' (Terry, 2003, p. 1). Perry's concept of public service motivation has several theoretical links to the views expressed by Plant, in that throughout the upheaval of permanent change unleashed by the process of modernization the needs and motives of those who work in the public sector remain underpinned by a sense of ethical purpose or motivation to a greater or lesser extent. Perry argues these include an attraction to politics and policy-making, a commitment to the public interest, a sense of civic responsibility, a commitment to social justice, compassion, and an element of self-sacrifice, what the Victorians

would refer to as 'vocation' (Horton and Hondelghem, 2006, p. 3).

The post-war period, characterized by large welfare hierarchies delivering producer-dominated services, within the framework of a welter of restrictive practices, were swept away by these reforms. As Mrs Thatcher's chancellor, Nigel Lawson remarked, 'The civil servants and middle-class welfare administrators are far from the selfless Platonic guardians of popular mythology' (Plant, 2003, p. 568). Yet it was clear that a more market-based political and economic culture still required other types of interventions in order to defend citizen-consumers against the natural tendencies of monopolists to exploit their positions of strength. Accordingly, throughout the 1990s, successive governments established a staggeringly wide range of inspectorates and audit bodies. Many of these began to use a version of the red flag check list. We saw that in 'a public service culture that had become increasingly contract-driven, inspectorates were an appealing device'. Providing, however tenuously and without clear evidence, 'a reassurance that those in government were still in control of the standards that mattered most to citizens and consumers' (Terry, 2003, p. 1). It may be argued, however, that they are 'a blunt instrument for improvement, and they represent a permanent bureaucratic overhead' the costs of which have to be borne by taxpayers and those organizations over which the inspectorates have oversight (Terry, 2003, p. 1). For example, those who work in higher education can testify to the high costs of a visit from Quality Assurance Agency inspectors. Furthermore, these are costs that must be combined with the lost opportunity costs and the day-to-day compliance burden engendered by the 'quality regime' imposed throughout higher education—a regime that sucks resources from teaching and research, redistributing them to a cadre of quality viziers.

Concomitant to the regulatory and managerialist state is the downgrading of professional power and autonomy (Massey and Pyper, 2005, p. 176; Hutton and Massey, 2006). Governments are dependent on the knowledge and compliance of professional groups to deliver services, that is to implement policies. However, in some areas of public service the power of managers over professionals, the loss of autonomy, poor pay and the burdens of audit and inspection have conspired to de-motivate many public sector professionals and

thereby frustrate the enthusiastic implementation of ‘modernizing’ policies (Terry, 2003, pp. 2–3; Massey, 2002). Terry, among others, argues the way forward to secure ‘real’ modernization is to engage with the professional groups and explore how things actually work in the public sector, alongside initiatives to promote training, career development and leadership in public management (Terry, 2003, p. 3).

### **Public and private: reconcilable interests**

The experience of public sector reform tends to reinforce in some observers a rather old-fashioned public administration perspective, notably that despite the constant drive to make managers in the public sector more businesslike and to behave in ways akin to their private sector counterparts, there remain many differences between the public and private sectors. For example:

*As compared with the private sector, government:*

- *Faces more complex and ambiguous tasks.*
- *Has more difficulty implementing decisions.*
- *Employs more people with different motivations.*
- *Is more concerned with securing opportunities and capacities.*
- *Is more concerned with compensating for market failures.*
- *Engages in activities with greater symbolic significance.*
- *Is held to stricter standards of previous commitment and legality.*
- *Has a greater opportunity to respond to issues of fairness.*
- *Must operate or appear to operate in the public interest.*
- *Must maintain minimal levels of public support above that required in private industry (Baber, 1987, pp. 159–160).*

The public sector is distinguished from the world of business:

*Because people there (in business) do act in order to maximize their utilities both as producers and consumers. They are concerned with the needs of the firm and the customer, not with some general idea of the common good and the public interest. Equally, the dominant relationship in the market is that of contract, within which self-interested individuals bargain together to arrive at as mutually advantageous agreements as they can. Similarly, the world of business*

*does not have to be linked to the principle of impartiality* (Plant, 2003, p. 565).

In order to retain citizen support for *government*, however, officials in their capacity as public sector managers must be seen to be ‘driven not by the profit motive, although that may be a subsidiary goal, but by the principles of accountability’ and public interest, however that may be defined and interpreted (Massey and Pyper, 2005, p. 17). It is here that the work of Perry and of others, especially when it can be used to compare the US and EU experience, is useful (Vandenabeele *et al.*, 2006, pp. 13–31).

While being under the direction of elected politicians, officials and public sector professionals are expected to serve a broader interest than ministers—they are expected to behave in the public (or even the national) interest. As such, although remaining accountable for their actions to the elected representatives, officials and public sector professionals are also responsible for their actions and must account for them as individuals; there is a need therefore to protect them from the short-term interests of party politicians. In a sense within this complexity lie one of the most difficult paradoxes of the modernization process: how to reconcile these different and differing accountabilities.

### **The administrative context**

Western governments have traditionally opted to separate out the function of executive action from political strategy or policy-making and have also sought to divorce the individual’s role as an office holder from their personal interests. With a few exceptions, however, this Weberian politics/administration dichotomy never happened, and the perpetuation of its myth contributed to attempts by successive governments in the UK and elsewhere to assert control over an administrative system already subservient to a considerable degree. In this, successive party politicians mistook the inability of officials to deliver on government promises as wilful refusal or obstinacy rather than what it really is, a symptom of a hollowed out state within a differentiated political system. The belief that officials were not doing as they were told, thereby frustrating the democratic mandate, or were incompetent or were under-motivated, has led ministers to chase the chimera of modernization in an attempt to reassert control. Yet for

public sector management in the UK, and indeed much further afield, under the redefining impact of Europeanization and globalization the power structures have shifted, the levers have moved or been disconnected; politicians, however, have yet to publicly acknowledge this fact (Rhodes *et al.*, 2003). Many have yet to fully grasp it with all its implications for national sovereignty, accountability and democracy itself.

Modernizing governments have sought to reform the way government does business and to do so in a way that emulates, wherever possible, the business approach (or what politicians and officials perceive to be the business approach). Yet, there are many things the public sector does in both an objective and a ritual manner that the private sector does not do; activities that have a greater significance for civic society over and above the simple delivery of services, but include the notions of *justice*, *equity*, and *due process*. In his classic definition of New Public Management (NPM), Hood (1991, pp. 4–5) noted that:

- *A move to 'let managers manage' with the development of hands-on professional management that elevated the role of managers above that of professionals in some parts of the public sector.*
- *The implementation of explicit standards and measures of performance.*
- *Greater emphasis on output controls, with resources being directed to areas according to measured performance indicators.*
- *A move to disaggregate units in the public sector, through privatization and agencification.*
- *A shift to greater competition through the use of contracts and public tendering procedures.*
- *A stress on private sector styles of management and flexibility in hiring and rewarding staff.*
- *A stress on greater parsimony and discipline in resource use, cutting costs and resisting interest group and public sector union demands for favourable treatment.*

It is these principles and approaches that have informed the modernization agenda of successive Conservative and Labour administrations. The Blair government's first comprehensive attempt at modernization of the structures of central government (other than

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the hastily prepared and unfinished devolution programme) was the delayed and much heralded 1999 white paper, *Modernizing Government* (Cm 4310).

This white paper was based on a hierarchical approach to the process of modernization, rather than the principles of NPM. It affirmed a belief in the efficacy of government to deliver services to the nation in a coherent and efficient way. The white paper had at its heart the steady reform of the British policy process and this is the context in which policy-making must now be located. Much of the subsequent reform has the broader global dynamic of economic restructuring and international decision-making at its core. In its implementation, it is a form of international socialization. All policy, however seemingly trivial, is located within a global context, or at least a European one, given the plethora of international delivery agents operating across national boundaries. The earlier points regarding the 'hollow state' are particularly telling if one accepts this view. The main point here though, is the need to locate accountability, transparency and trust—these vital aspects of democratic control need to be ingrained throughout the intergovernmental networks and the process of governance. As a core embedded element of the policy-making, delivery and evaluation process, professionals and their motivation and behaviour are a key to this accountability and public interest concern.

### **Public management and procurement: the World Bank's view**

The World Bank has sought to develop a comprehensive range of measures to improve international and national governance and to prevent fraud and corruption in its dealings with administrations globally. To this end, it encourages a steady improvement in public administration as a means to facilitate good governance. Its officials view modernization of government and governance as a process that includes not only a comprehensive updating of the technical skills and competencies of public servants, but also includes a drive for transparency and honesty. The World Bank's policy requires that borrowers, bidders, suppliers, and contractors under bank-financed contracts, 'observe the highest standard of ethics during the procurement and execution of such contracts'. The World Bank has its



own red flags, for example:

- *‘Corrupt practice’ means the offering, giving, receiving, or soliciting, directly or indirectly, of any thing of value to influence the action of a public official in the procurement process or in contract execution.*
- *‘Fraudulent practice’ means a misrepresentation or omission of facts in order to influence a procurement process or the execution of a contract.*
- *‘Collusive practices’ means a scheme or arrangement between two or more bidders...designed to establish bid prices at artificial, non-competitive levels.*
- *‘Coercive practices’ means harming or threatening to harm, directly or indirectly, persons, or their property to influence their participation in a procurement process, or affect the execution of a contract.*

In this we may observe a comprehensive approach to prevent corruption and fraud in all its manifestations. It ties in neatly with our red flag checklist and it is an approach that places the onus on the recipients, partners and other stakeholders of the World Bank to ensure they behave ethically, or at the very least, not dishonestly. However, without the use of a comprehensive external audit process, the World Bank’s red flags would not prevent another Enron.

### **Professional context**

Professionals engaged to deliver a public service must be loyal to their (private or public sector) employer, and they must also serve according to the ethical code of their professional body. For the most part these allegiances are complimentary and there is no conflict between the two, either actual or perceived. Good employers are influenced by (and, in turn, influence) the professions to which their staff belong, as do the increasingly interventionist publicly-established regulatory bodies and their regimes. In some areas, however, but especially in consultancy for large projects, this dual allegiance can lead to a perception of a conflict of interest, even where all concerned are acting to the best of their professional ability. We argue that professionals who are employed by a public or private sector organization are committed through clear contractual and financial incentives to seek to further the aims of that organization. Where these conflict with their ‘professional’ ethics, it is the latter that are often prone to be discounted. This is often not the case with predominantly self-

employed or traditional established professions, such as law and medicine, but it does tend to apply more readily to the technical and social professions, such as those engaged in engineering (Hutton and Massey, 2006, p. 23).

Individual professional advice is subsumed as part of a hierarchical team, with professionals being 'on tap' to contribute their skills within a broader organizational context and managers habitually overrule professional advice, or we may see the professional advice trimmed to suit the policy of their employer. Examples of what may happen when managers ignore the advice of technical professionals in order to meet organizational goals include, for example, in the US the 1986 *Challenger* disaster; a case study that all managers in charge of technical professions should absorb (Weil, 2005). Other examples of the professional paradox may be of a more *ethical* nature, for example pressure by an organization's senior executives on professionals in the health, education or police services to meet targets, which may cause conflicts for professionals seeking to balance quality with quantity measures and in some cases may lead to the outright falsification of data, or a more flexible interpretation of the rules (Loveday, 2000). The managerialization of previously professionally-dominated organizations within a regime of inspection and performance measurement has certainly led to an almost constant process of 'game-playing' by those professionals in order to maximize benefits and minimize risks within that system.

It is time to return to the debate about what is a profession and the notion of what it means to be a professional. The academic literature reviewing professional power tends to stress that professions fall into several groups: 'the traditional often ancient professions such law, medicine and the church; the newer social professions such as teaching and social work and the technical professions such as engineering' (Gerstyle and Hutton, 1966). The modernization processes of the past 20 years lend stress to the argument that the entity 'profession' is a dynamic, indeed fluid, one. All professions are situated on a continuum between an ideal type 'pure' profession and the routine occupations, some of which (like physiotherapy and legal executives) are professionalizing, but are almost wholly in a category where they are supervised for the exercise of their skill by other 'higher' professions (such as doctors and lawyers) or managers. Many

of the attempts to discuss professionalism have taken a trait approach, simply describing what goes into making up a profession, or a functionalist approach similar to that of Durkheim who saw consensus in society as being aided by professionalization and the forming of moral communities based on occupational membership. Illich (1977) took the view that the newer social professions often acted to 'disable' individuals by making them dependent on a welfarist approach to life, with professionals making decisions for them in order to bolster their own standing and power in society. Freidson (1973) took this further by arguing the process of professionalizing is about the privileging of an educated élite and their power, status and privilege. Wilding (1982, pp. 19–58) summarizes these perspectives by observing that professional power exists in five areas: power in policy-making; power to define needs and problems; power in resource allocation; power over people; control over their own area of work (autonomy).

The New Right shared many of these conclusions throughout the 1980s and 1990s, viewing the professions as a conspiracy against the efficient and effective running of government and successfully pressured governments to restructure professional power in the public sector (Denham, 1996; Hutton and Massey, 2006).

We need to reconsider the role of the professional within the public sector and more generally within the broader context of the delivery of public services. There is a need to ensure the internalization of 'ethical' norms by those acting in a professional capacity. In many professions these issues are policed by the various professional boards and colleges, with varying and often contentious degrees of effectiveness. In the public sector generally, a rather catch-all Nolan code is supported by a mountain of guidance and regulatory best-practice. The Nolan code sets out the Seven Principles of Public Life, which should apply throughout the public service. There are echoes in the Nolan principles with many of the rules, regulations and codes of professional bodies, indeed the principles appear to be both influenced by them and are in turn a welcome simplification of some of them.

A good example of the impact of Nolan (in its widest sense) is provided by the *Royal Charter, By-laws, Regulations and Rules* (1998) of the Institution of Civil Engineers (ICE), which run to 119 closely typed paragraphs. Paragraph 33 of these rules states: 'All corporate

and non-corporate members are required to order their conduct so as to uphold the dignity, standing and reputation of the Institution'. In 1999, the ICE later defines 'improper conduct' as: 'any breach of the provisions of the charter or of these by-laws or any regulations or rules or directions made or given thereunder, or any other conduct which shall indicate unfitness to be a member or shall otherwise be unbecoming to a member as such'.

If a member of the ICE is found guilty of improper conduct, the disciplinary body may expel the member from that professional body. Aside from being convicted of a criminal offence, or failing to pay their dues to the professional body, it is often difficult to discern with this type of organization a precise definition of unprofessional conduct because clear definitions are not given. This is in direct contrast to the extensive codes of conduct for doctors, solicitors, and indeed members of the UK's Political Studies Association. We noted previously, and reiterate here, that at the time of writing, the authors could find no record of any member being expelled for breaching the professional code of conduct of the ICE or any other British engineering institution. If such examples do exist, then they are rare and poorly publicised.

Expulsion from the professional body is often irrelevant to the individual and their employer. If they are expelled from the 'profession' they may continue to work in an undiminished capacity as it is their employer who decides the issues here, not their professional body. In this objective economic sense, engineers are little different to plumbers and estate agents. Many professionals working in, or for, the public sector and responsible for delivering goods and services to the public view the membership of a professional body in terms that are much diminished from those for doctors, lawyers and accountants. If they are unlicensed, and the applicable professional institutions do not have the power to insist on licensing practitioners, then the real professional code is the one imposed by the government through its regulators. We should note here, however, that with many significant projects bank loans and other commercial financing (for example) would not be forthcoming unless drawings were signed off by an engineer in good professional standing. But an engineer or other technical professional would still legally be allowed to work for their employer if 'struck-off' the register; it is just that the span of

their activities would be restricted, unlike, for example, medical practitioners, priests, lawyers and accountants.

### **Professional accountability through the civil law**

If technical professionals are accountable to their employer and to their professional institutions, via a code of ethics, for their behaviour, advice and decisions, then it follows, given the foregoing points regarding the vacuity of the professional association role, that in essence those individuals are really only accountable via their employer (and the law). This suggests that the growing regulatory framework imposed by government on public and private sector organizations, most with the force of civil and criminal statutes rather than simple guidance, is the way in which the exercise of professional power is effectively controlled. We contend that there is another, less regulated option and it involves a modernization of the professional ethic, backed by the statutory licensing of individual professionals.

At present, should a complaint be made about an individual professional's behaviour, for example about the decision made or advice given by an engineer, by an ordinary member of the public (but who has the stakeholder interest of being a citizen or taxpayer) to a (technical) professional body that does not explicitly engage in the licensing of its members to practise, then the only recourse that complainant has is through an application for judicial review of any decision, or a claim under the Human Rights Act 1998\*.

But that approach is severely restricted. Recourse to judicial review applies to the decision or advice itself (assuming that the public body commissioning the project is not inclined to act) and any subsequent failure to apply professional disciplinary sanctions. The exception is if there are private law duties in tort in relation to the determination of complaints against members, which is unusual in these broad citizen/consumer circumstances. The High Court is limited in its jurisdiction to consider an application for judicial review of a decision if that decision was made by a public body, although this latter term is not defined by statute and is determined on a case-by-

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\*Counsel's private written opinion given to one of the authors, the full reference is at the end of the reference list.

case basis. Thus, ‘the central issue in each case is whether the decision being challenged affects some public law right’ (ibid.). Again, this is clearly limiting the accountability of individual professionals to their community of fee-paying clients, or their employer and rendering them beyond the effective reach of the largest stakeholder group: the public. It may be seen, therefore, that one of the appeals to modernizing governments of treating citizens as consumers, as stakeholders, in the delivery of public services is pretty much invalidated in terms of accountability and recourse to law in the event of poor, but not illegal decisions that do not go so far as to constitute a tort or break a law and are delivered by private sector professionals not employed by a public body.

In English public law, the way in which most professional institutions are established and function means that they are not public bodies and judicial review is not open to complainants, only to those with whom the individual professional and their employer have a contractual relationship.

Taxpayers, therefore, despite indirectly paying for the services of professionals and citizens as consumers of those services cannot exercise a claim against individual professionals, nor may they seek judicial review of professional bodies that have failed to take action against those professionals following a complaint. Only those who are members of a professional institution, or those who have a clear and explicit contract may seek action for a tort. To sum up, legal advice here is the ‘but for’ test (*R versus Chief Rabbi exp Wachman* [1992] 1 WLR 1036 at 1041 per Simon Brown LJ), where, but for the ‘existence of a non-statutory body, the government itself almost inevitably would have intervened to regulate the activity in question’. If that does not apply, the application falls. Furthermore, the test for the applicability of judicial review includes consideration of ‘whether there are indications of governmental support for the decision-maker in relation to the function in question: whether, in relation to that function, the body is “woven into a system of governmental control”’ (ibid.). The case study law here is complex, but includes examples where disciplinary powers are exercised in a purely consensual submission to an agency’s jurisdiction, in such cases, such as that of non-licensing engineering institutions, judicial review of decisions is not granted. It is the belief of the courts that these are private matters

best left to those who can demonstrate a tort. This would not include taxpayers and citizens *per se*, but only those with some kind of contractual relationship. Beyond that the courts would not intervene, thereby limiting the accountability of an individual professional's decision-making to a narrow set of 'stakeholders'.

For the purposes of the Human Rights Act 1998, most professional institutions are not functional public bodies either, except where they perform a duty that would otherwise have to be carried out by the government (which does cover the activities of the accounting, medical and legal professional bodies) (Ibid.). So even gross misconduct by an individual professional or their employer (if not actually criminal or giving rise to a civil tort) is subject to a limited recourse. The Human Rights Act 1998 only gives partial definitions here of what constitutes a public body in sections 6(3) and 6(5), effectively noting they are mostly 'standard public authorities' that is those that are obviously 'governmental in character such as central government, local government, the police' etc. The range of bodies that may be treated as 'functional authorities' is not clear; the government's annual publication, *Public Bodies*, although lengthy and comprehensive in its treatment of non-departmental public bodies (advisory, executive and judicial, nationalized industries and non-ministerial in other ways in their nature), does not address the concept and the role and activities of charities, private bodies and professional institutions. However, the government has expressed a view that 'functional authorities' include: privatized utilities, Railtrack, the National Society for the Prevention of Cruelty to Children, private security firms managing contracted out prisons, doctors in general practice, the BBC, the Independent Television Commission (but not the independent television companies), the Jockey Club, the water companies, the Takeover Panel, the British Board of Film Classification and the Press Complaints Commission. It has recently been held that a housing authority was exercising public functions when it commenced possession proceedings against a tenant (*Poplar Housing Association versus Donghue* [2001] EWCA Civ 595 *ibid.*).

Given that most engineering and technical professional bodies are not constituted by statute, their disciplinary functions (over members) are not part of an official system and they derive their powers over

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members solely from a subscription-based contract of membership, they cannot be considered to be a functional authority. The final aspect of whether a professional body is a functional body is determined by whether membership of that body is necessary for the practice of a particular profession. In the case of most engineering professions, employers usually stipulate that an individual possesses professionally accredited qualifications and that he or she be a member of and in good standing with the relevant professional body. But these bodies do not have exclusive statutory rights as to who may or may not practice as a professional. As such the legal monopoly enjoyed by, for example, the medical profession's associations with their licensing activities and professional disciplinary practices does not apply, or only partially applies. It seems that the public's best protection lies with the activities of the increasing number of regulators and a diminution of their number or powers is something that should be properly debated and not seen as simply cutting red tape.

An alternative to extensive regulation by governmental agencies, especially when faced by the reluctance of the courts to become involved, is to fully professionalize occupations, such as civil engineers, and ensure that members require a licence to practice. Furthermore, that this licence is contingent on working according to a clear and transparent code of ethics, based on the Nolan principles; that this is also policed in a transparent and accountable way by the professional institutions. It should be noted here that often codes of 'conduct' and 'ethics' are used interchangeably by the institutions themselves and the literature, but that there are often differences between professions and within professions working in different sectors. The important point is that codes of conduct ought to be based on ethical concerns and may, therefore, include aspects of codes of ethics.

The Engineering Council UK (ECUK) is moving towards greater institutional transparency and individual professional accountability. ECUK guidelines for the structuring of institutional codes of conduct include the firm observation that:

*The Code of Professional Conduct of each Nominated Engineering Institution should place a personal obligation on its members to act with integrity, in the*



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*public interest, and to exercise all reasonable professional skill and care to:*

- *Prevent avoidable danger to health or safety.*
- *Prevent avoidable adverse impact on the environment.*
- *Maintain their competence. Undertake only professional tasks for which they are competent. Disclose relevant limitations of competence.*
- *Accept appropriate responsibility for work carried out under their supervision. Treat all persons fairly, without bias, and with respect. Encourage others to advance their learning and competence.*
- *Avoid, where possible, real or perceived conflict of interest. Advise affected parties when such conflicts arise. Observe the proper duties of confidentiality owed to appropriate parties.*
- *Reject bribery.*
- *Assess relevant risks and liability, and if appropriate hold professional indemnity insurance.*
- *Notify the Institution if convicted of a criminal offence or on becoming bankrupt or disqualified as a company director.*
- *Notify the Institution of any significant violation of the Institution's Code of Conduct by another member.*

There is an important addendum to this list of creditable aspirations, particularly given the view of counsel quoted above. This is that the UK's engineering profession, although formally regulated by the ECUK, in fact has this regulation implemented through 36 engineering institutions. These are ECUK's members who are licensed to put suitably qualified engineers on one of the three sections of the ECUK's register of engineers (chartered engineer, incorporated engineer and engineering technician). While these titles are protected by charter and may only be used by registrants: 'In general there is no restriction on the right to practice as an engineer in the UK. Registration, which is renewable annually on payment of a fee and provided that there has been no violation of codes of professional conduct, is recognized as desirable in many fields of engineering employment and provision of engineering services but is not mandatory'. The fact these aims are not mandatory severely limits their effectiveness in law, if not in the day-to-day practice of the professionals themselves. The complexity and cost of large public sector projects and their international nature, with transnational

companies operating and delivering services simultaneously around the globe, means that the professionals engaged in them are expected to be sensitive to the political and cultural context of their work location, but such cultures vary enormously in their interpretation of *good practice* (Moody-Stuart, 1997). A system based on the behaviour of professionals for its effectiveness, behaviour not backed by statute, is 'trust based'. It is a bottom-up approach: 'For key services, like health and education, the drive for improvement should come from the professionals working with management at the local level. This model has been damaged by growing public mistrust of professionals and high-profile organizational failures, for example the controversies over organ retention in hospitals and child abuse cases' (Black, 2006, p. 4).

Trust, therefore, needs to be bolstered by some additional form of accountability and oversight, something that allows for a proper redress of grievance and encourages the professionals to behave in a way that promotes the 'public' interest.

The ethical basis of professional action now requires statutory support. We need statutory licensing of professionals. This would support professional bodies in their oversight of individual members, and it would also support and protect individual professionals in their dealings with their employers and their customers. It would provide a legitimate counter-balance to managerial and market pressures. Within the context of 'modernization', it would also take the debate about what it means to be a professional beyond the old 'characterization of professionalism as an occupational project of market closure and market enhancement'; returning, perhaps, to a discussion about professionalism being a process of effective occupational control and accountability, with clear echoes of Durkheim's view of the professions as a kind of moral community, or Tawney's argument that professionalism is a force 'capable of subjecting rampant individualism to the needs of the community' (Aldridge and Evetts, 2003, p. 548; Evetts, 2003, pp. 22–27).

The US government started addressing some of these issues in the late 1970s, albeit in a global manner, with (among other measures) the passage of the Foreign Corrupt Practices Act 1998 (FCPA). The notion that individuals needed to be compelled to avoid corrupt behaviour found form in the shape of the FCPA. It is just one of the

range of American measures designed to ensure ethical behaviour by executives, managers and professionals abroad, seeking to extend the reach of US law beyond the domestic boundaries and out into a global context. According to the US Department of Justice's website, the FCPA has had:

*...an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subject of criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting, and their employees and officers have gone to jail. To avoid such consequences, many firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.*

But clearly it would severely disadvantage a country's businesses if they were subject to such laws and the rest of the world was not. Following the passage of the FCPA, the US Congress became concerned that:

*American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost 10 years later, the United States and 33 other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States ratified this Convention and enacted implementing legislation in 1998...The antibribery provisions of the FCPA make it unlawful for a US person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States (Department of Justice, 2005).*

Through the activities of the OECD and World Trade Organization, this approach is forming the basis of many aspects of global

governance. But it is governance that is situated within the context of multilevel governance and differentiated politics. As such, local custom and practice obviously varies enormously, as does the response of individual professionals (Fraser-Moleketi, 2005).

The use of effective professional codes of ethics is one more weapon in the armoury of those who seek good governance (and therefore ethical behaviour from their professionals) in this age of global governance.

### **The political and administrative context**

The political and administrative context in which professionals engage in public service or are responsible for the delivery of a public service has been undergoing constant reforms for over 20 years. Some governments are already reconsidering some aspects of NPM. New Zealand, for example, which led the way in terms of NPM has reappraised the functions and structure of the public sector (Diplock, 2004). The focus of policy-makers has turned to recognition that the strength and capacity of the public sector needs to be maintained if the elected government's policies in terms of social and economic development are to be met. New Zealand's public sector has grown by about 10% since 2000, and it has recruited and trained specialist professional staff with a renewed emphasis on a public service ethos—an ethos with obvious similarities to those exhibited in professional codes of ethics. The focus now, as is also increasingly the case in the UK, is on ensuring proper control and accountability across the public sector. In New Zealand rather than talking about 'joined-up government', the key phrase being used by officials is: 'a whole of government' approach to policy-making and service delivery. It is often used with 'managing for outcomes' as a major strand of the government's approach to public sector reform (Diplock, 2004, p. 5).

Reviews like New Zealand's are part of the process of constant reform. They should be seen within the broader context of the globalization and marketization of government services that has taken place alongside the development of new technologies (Crane and Matten, 2004; Fraser-Moleketi, 2005). In Britain, for at least 25 years, both central and local government have experienced a permanent process of policy and managerial innovation. The Local Government Act 1999, for example, represented a profound early move by the

Labour government, replacing compulsory competitive tendering with best value, as part of its drive for securing value for money within an overall commitment to improving public sector performance in terms of efficiency and effectiveness. These reforms should also be seen as part of the modernization agenda that seeks to improve the quality and choice of services available to citizens (Massey and Pyper, 2005, pp. 122–126). The duty of best value replaces earlier concepts of economy and efficiency and applies to all local authority services. Partly the shift to best value reflects the experience of a range of governments (for example in New Zealand and British Columbia, as well as in the UK), of deregulation and marketization leading to the provision of some fairly shoddy delivery. In New Zealand and Canada a scandal known as ‘leaky building syndrome’ occurred, where the pursuit of private profit and low public costs over good delivery and best value, led to ruinously expensive programmes of substandard buildings (Diplock, 2004, pp. 4–12).

The statutory and administrative framework to put the UK’s best value into effect structured it as a process, an approach even, as much as a programme. Its implementation should also promote local accountability and continuous improvement in service performance. In addition to this, in the UK each service in every organization is subject to a periodic and rigorous best value review. In practice this has been implemented throughout the UK’s public sector, but we may also observe it as part of a general trend. For example, the following are just some of the definitions to be found in the UK and US regarding the general principles:

- The British government’s procurement organization defines best value as a: ‘Contract awarded on basis of evaluation of cost and non-cost factors which is intended to provide for selection of source whose proposal offers greatest [best] value to government in terms of performance, risk management, cost or price, and other factors’.
- The procurement organization of the Minnesota State government has a similar definition: ‘A result intended in the acquisition of all goods and services. Price must be one of the evaluation criteria when acquiring goods and services. Other evaluation criteria may include, but are not limited to, environmental considerations, quality, and vendor performance’.

- The US General Services Administration defines it as: ‘The expected outcome of an acquisition that, in the government’s estimation, provides the greatest overall benefit in response to a requirement. A term applied to comparing proposals and ranking them from best to worst, not only on price but on all factors stated in the solicitation’.

In other words, the administrative and political context has moved on from simple, indeed crass, price comparisons, to consider environmental aspects, quality considerations and even the nature of sustainable development when making decisions about the delivery of services or the procurement of goods for large-scale projects.

In addition to this, given the de-territorialization of much economic and governmental activity, governments are also trying to ensure that the ethical concerns they are insisting on domestically are also applied internationally when their citizens and companies compete for the provision of services globally (Moon and Bonney, 2001). An awareness of the risk of fraud and corruption and the measures to deter, detect and punish those engaged in it or tempted to engage in it are now commonplace and ever stronger, with some countries, such as the US prepared to punish their own citizens for infringements committed abroad (NAO, 1995; Moody-Stuart, 1997; Neild, 2002; Harvard Business Review, 2003). It is within this complex, sophisticated context of governance within the global system of multi-level governance that professionals operate. Large civil engineering projects provide interesting case studies for this operation, and it is to one of these, the Alderney breakwater, that we now turn.

### **The case of the Alderney breakwater: background and history**

The Alderney breakwater, also often called the ‘Admiralty Breakwater’, was designed by James Walker, an early President of the ICE. Alderney, part of the Bailiwick of Guernsey, is the northernmost of the Channel Islands and lies 13 km off the Normandy coast of France. Its 870m breakwater on the north-west coast is an important part of the island’s heritage and provides protection to the ships using Alderney’s commercial quay, and sheltered moorings for the fishing fleet and private yachts (private yachts make an important

contribution to the island's economy). The construction of the breakwater was approved in 1844 to allow the Royal Navy to observe and/or blockade the French port of Cherbourg. Construction of the original 1,430m breakwater began in 1847, and was completed in 1864.

In 1872, because of the costs and engineering difficulties, the Admiralty chose to maintain just the first 870m of the breakwater from the shore and it is this that constitutes the current breakwater. The outer portion was abandoned and was quickly breached by storms, leaving a submerged mound about 3m below low water extending about 500m beyond the existing breakwater. This significant reduction in the length of the breakwater had the intended financial payback and reduced maintenance costs by two-thirds. By 1972 it was clear that Alderney harbour was no longer of great value as a naval base, at least in terms of Britain's NATO commitments and in relation to home defence. As a result, it was decided that the breakwater should be maintained at the minimum expense possible. Henceforward, maintenance consisted mainly of tipping rock from a local quarry to retain the level of the foreshore in order to protect the superstructure. Responsibility for this and the general maintenance of the breakwater remained with the UK until 1 April 1987 when it was transferred to the States of Guernsey, ostensibly as part of its contribution towards defence and other 'collective' UK dependency costs. The States of Guernsey gave responsibility to its civil service department: the 'Board of Administration'. At this point, average annual maintenance costs were about £400,000 and rising in pure cash terms (States of Guernsey, 2003).

In July 1994, the Board of Administration declared its objective of a long-term maintenance strategy for the breakwater. The board reported that: 'the rubble mound was continuing to lose material and the superstructure was occasionally being undermined resulting in the failure of masonry joints...[in]...severe conditions, there was the possibility of a breach'. The board recommended allowing the old breakwater to erode into the sea after building a new, smaller, breakwater inside the lee of the old structure. There were several variations on this theme over the following years. Eventually the board settled on one of the designs and the tender by E. Pihl and Son, which became known as 'Pihl Option 3'. This was a design that

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truncated 125m from the end of the old breakwater, and then introduced a spur into the leeward side of the remediated Admiralty Breakwater, 325m from the existing end—in essence, a hybrid armouring/new-build solution. The cost of this new version of the breakwater would eventually be calculated at about £29 million (States of Guernsey, 2003, para 1.8).

### *The defence agreement with the UK*

An Order in Council, with HM The Queen present, on 21 July 1987 enshrined into law and administrative practice the decision by the Bailiwick to assume responsibility for the breakwater as part of its contribution to the defence and overseas costs of the UK and Channel Islands. Given that as long ago as the turn of the 20th century, and certainly since 1972, it had been decided by Whitehall that the harbour at Alderney was more trouble than it was worth and certainly did little to contribute to the defence of the UK, this seemed a rather good deal for the Channel Islanders and a strange one for UK ministers to broker. It came into force on 21 August 1987. The explanation read:

*The Alderney (Transfer of Breakwater) Order 1950 transferred to the Secretary of State for the Home Department the property specified in the Schedule to the Order (the Alderney breakwater and associated property). This Order provides for the transfer of that property, part (including the Breakwater) to the States of Guernsey as appointees of the States of Alderney and the remainder to the States of Alderney, and revokes the Alderney (Transfer of Breakwater) Order 1950. The Alderney (Transfer of Property etc.) Order 1950 transferred the greater part of Her Majesty's property in Alderney to the States of Alderney but (by articles 5 and 6) reserved certain quarrying rights to Her Majesty's Government. This Order provides for the transfer of those rights to the States of Guernsey as appointees of the States of Alderney and revokes articles 5 and 6 of the Alderney (Transfer of Property etc.) Order 1950. The transfers for which this Order provides are deemed to have taken effect as from 1st April 1987 (retrospection is authorized by section 1[2] of the Alderney [Transfer of Property etc.] Act 1923).*

In 2004, the Lord Chancellor noted, in a written answer to a parliamentary question:

*Since 1 April 1987, Guernsey has made a voluntary annual contribution*



*towards the costs of defence and international representation undertaken by the United Kingdom. The contribution has two elements. The insular authorities have assumed responsibility for the maintenance of the Alderney breakwater (which was completed in 1865 to shelter the British fleet). Prior to April 1987 the cost of maintaining the breakwater was met by Her Majesty's Government. At 2003 prices the average annual cost since 1987 associated with the breakwater is £780,000. Guernsey also remits to the UK the fees collected for the issue of British passports. These amounted to £216,201 in 2003 (OR HoL 28 June 2004: Column WA1).*

And, in answer to further questions, that: 'The United Kingdom is responsible for the defence of all of the Channel Islands...The cost of maintaining the Alderney breakwater, borne by the insular authorities since 1987, is one part of the voluntary annual contribution made by Guernsey towards defence and overseas representation, which are the responsibility of the United Kingdom. This contribution is not linked to any specific defence expenditure' (ibid.). Clearly, therefore, the insular authorities should have a vested interest in keeping those defence costs with which they are tasked as low as possible.

Honour was served on both sides, with the efficiency-seeking, privatizing government of Mrs Thatcher securing the 'defence' commitment of Guernsey to maintain a strategically irrelevant breakwater, but one nonetheless that had a social and economic importance for Alderney. In other words, the UK's defence (and then Home Office) expenditure had been used for decades to (literally) shore up a Victorian relic as a kind of hidden welfare subvention by UK taxpayers to the less than 3,000 Alderney residents. A 1985 letter from a Home Office civil servant to the Bailiwick inferred as much, with the dry observation that:

*The current maintenance programme is running at some £600,000 a year and we now find that we are in an untenable position in seeking this amount. It follows that the more costly programme judged necessary by Cruttenden is not a starter. Equally, should a disaster occur, I fear that you would not be able to look to us with confidence for money to remedy the situation. To complete the bad news, I am being pressed to take steps to withdraw UK financing...I fear we have no chance of finding money for a stub arm and arguments that this would*

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*be justified to protect some yacht moorings cannot stand up in the face of the finance involved (States of Guernsey, 2003, Appendix I).*

By assuming responsibility for this task, the Bailiwick's government met some of the criticism of Mrs Thatcher's cost-conscious government, while ensuring that the burden would be a manageable one. On assumption of responsibility for the breakwater the options were to continue as before on a maintenance-only schedule; maintenance plus improvement; or replacement with a new breakwater seeking in this process to reduce the annual maintenance bill in order to meet the costs of the new-build.

### *A new breakwater?*

Following the Bailiwick of Guernsey's Board of Administration's acquisition of the Alderney breakwater in 1987, a review of the maintenance requirements was carried out with the appointment of the firm Coode Blizard as consultants. In addition to this, HR Wallingford were appointed as specialist advisors. The two conducted a series of studies to assess the way in which the breakwater is damaged by the sea and propose remedial measures. A serious breach by the sea in storms during 1990 cost the States of Guernsey £1,140,560 in repairs, adding some weight to the Board of Administration's efforts to secure a long-term solution to the breakwater upkeep, especially as the States' insurers declined to continue cover after this incident, given that they also contributed a sum of money to the repair (States of Guernsey, 2003). The Board of Administration reported its findings to the States of Guernsey in July 1994 (Billet d'Etat XVII). The States approved the recommendation to test Coode Blizard's proposals to protect the breakwater through rock armouring, although at this point Coode Blizard were not retained and the studies were to be completed under the consulting engineers, Posford Duvivier (later Posford Haskoning). The States, therefore, authorized the lower-cost maintenance-only option at this stage. In December 1994, however, a contract variation order was agreed by Guernsey's officials to take into account the possibility of much more extensive works. This was not debated in the States government.

By 1997 the consulting engineers had prepared design proposals to advise the Board of Administration on the best options and the

board duly advised the States (1997, Billet d'Etat X) to approve not rock armouring of the existing Victorian structure, as originally requested, but a brand new set-back Accropode armoured breakwater behind the existing Alderney breakwater. (Accropodes, being the patented version of substantial concrete building blocks designed for this type of project). The old breakwater would then be abandoned and left to decay. As the 2003 Billet put it:

*In 1997, the Board proposed the construction of a new breakwater and marina, providing moorings for up to 150 vessels, within the lee of the existing breakwater at a construction cost not exceeding £16,600,000. This would cost millions, rather than the hundreds of thousands of pounds of the existing and explicitly approved policy of an annual maintenance bill, so there was some local opposition to this new-build proposal. A three-man panel of inquiry, chaired by a leading Jersey official, was convened to consider the matter and reported in July 1998 that there was no economic or engineering reason to support the Board of Administration's preferred option of a new-build. Instead, the panel recommended that the existing breakwater be retained and further work undertaken to develop ways of strengthening it (States of Guernsey, 30 July, Billet d'Etat XVII).*

The view of the panel of experts was that the best value to be obtained for the taxpayers from this particular piece of civil engineering was the maintenance of the *status quo*, at least while further survey work was carried out on ways of strengthening the old breakwater; the panel did not recommend a large-scale high-cost new-build.

The Board of Administration, however, then commissioned its consulting engineer, from Posford Duvivier, to review the panel's work and recommendations. The engineer recommended the board's preferred option of a new breakwater on the grounds that this represented the best long-term solution. Accordingly: 'In January 2000, in accordance with the States' Resolutions of November 1999, the Advisory and Finance Committee approved the Board of Administration's appointment of Posford Duvivier (later, Posford Haskoning) as consulting engineer to prepare the necessary documentation for the invitation to tender' (States of Guernsey, 2003, para 3.1).

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And: 'In addition to these appointments, the Advisory and Finance Committee approved a request from the Panel to fund site investigation works...The Committee also approved the further appointment of Babtie Group Ltd to supervise the site investigations. The costs (for site investigations and supervision thereof) have also been met initially from the States Advisory and Finance Committee's vote for consultants' fees and site investigations' (2003, para. 4.2).

The total cost of this came to nearly £750,000, for which sum the Bailiwick could have secured the maintenance of the breakwater for a year. The final cost of the completed project had risen to an expected spend of about £30 million (States of Guernsey, 2003, chapters 6 and 7). The maintenance option, however, remained at about £400,000 per year. A debate at the Royal Court House in St Peter Port, the seat of the Guernsey States of Deliberation on 30 July 2003, saw the president of the Board of Administration, Deputy Roger Berry, introduce Billet d'Etat XVIII, *The States Board of Administration, Alderney Breakwater and Alderney Harbour*, with the intention of securing consent to proceed and funding in excess of £30 million. The end of a long debate resulted in defeat for the proposal and as a result, in 2006, the situation is returned to that which existed in 1987 when Guernsey took over the responsibility for maintenance from the UK's Ministry of Defence: an annual bill for the upkeep of the old breakwater and no plans to replace it. The cost in consultants' fees, engineering studies and the preparation of plans and bids had been substantial, much of it borne by the Bailiwick's taxpayers.

### Lessons learned

At first glance our case study appears to reveal an extraordinary waste of taxpayers' money—huge expenditures on feasibility studies and proposals to end up a position very similar to that which existed in 1987. There is, however, a great deal of extra engineering knowledge regarding the structure of the Alderney breakwater and the way it stands up to tidal flows and Atlantic storms. The old governmental structures that took the decision not to rebuild were replaced in 2004, less than a year after the debate. Many of the people involved in the decisions have also moved on (Massey, 2004). The eventual decision (which was really not to reach a final decision on the future of the breakwater) meant that, although there was no positive outcome in the

sense of a clear and transparent strategy, or indeed a new breakwater or refurbished old breakwater, there was at least no obvious harm done either. By this, we mean there was no ‘wrong’ decision reached. Unlike costly errors in terms of nuclear energy policy decisions or some defence projects, the policy process had not progressed to the stage where a contract was let (although a costly tendering process had taken place) and not a pile had been driven to begin construction. But there are some interesting lessons to be drawn about the role of experts, especially professional experts in the decision-making process and about the role of the political system and officials in ensuring the process is transparent and accords with Nolan principles and principles of value for money.

Although the Bailiwick is legally outside of the UK (in terms of domestic jurisdiction), officials do consider themselves to be British, and have gone to some lengths to ensure that local law and practice accords with the example of best practice, as it is applied in the UK (interview with senior official, 2004).

The Board of Administration certainly sought to achieve best value for its strategic policy decisions, at least in its public announcements, declaring that:

*Options in regard to Alderney’s harbour and the breakwater adjacent thereto have been under consideration for a number of years, with particular references having been made to the implementation of a pro-active capital project rather than the existing reactive maintenance and repair works. The Harbour is of vital importance to the continuing viability of Alderney. The breakwater is recognized as providing protection to the harbour at this time but full-length remediation works are not considered to offer the best outcome or the best value in respect of the continuing feasibility of the harbour. The Board recommends that an option be pursued that would provide the Bailiwick of Guernsey with the opportunity to safeguard the future of the harbour by means of a best value technical option, offering additional operational and commercial benefits (States of Guernsey, 2003, para. 23.1).*

The pursuit of best value would have been better served by a kind of benchmarking consultancy process. Consulting engineers employed at one remove from government charged (openly and publicly) with giving their best professional advice to achieve very

clear aims. Whether this was to be a new-build or a process of annual repair is not relevant. It is not relevant because that is a political decision and as such should be declared and openly debated. Once a policy decision has been made, a toolkit based on a variation of red flags should have been used in this and similar projects to decide the way forward. There ought to be clear cut-offs and distance between the politicians and officials, the consulting engineers, the project management team, and the eventual contractor. At all times the primary stakeholder for all parties should be identified as the citizen taxpayers and their interests should predominate.

The enforcement of this overriding interest can be assisted by placing professions and professional codes on a Nolan-influenced statutory basis. While it is the case that there cannot be any return to the idea of a public service ethic where citizens and government are 'prepared to accept a degree of autonomy on the part of the service providers to determine how services will be provided on the assumption that the service ethic will ensure that such freedom from accountability will work out to be in the public interest' (Plant, 2003, p. 576), a form of statutory licensing and robust auditing directly address this. There remain concerns about simply going down the contractual route. For example, 'there can be a considerable danger in going down the contractual road if we take ideas about rational self-interested motivation seriously...Contracts work best in a situation of trust, promise-keeping, truth-telling, respect and integrity' (Plant, 2003, p. 576).

In other words, 'trust' also needs to be built into the context and supported with statutory weight in order that citizens may have confidence in them. But, in order to have trust, we need also to have confidence in robust systems of accountability, licensing, registration, competence testing and auditing. For example:

*In the context of 'trust' in large-scale public sector institutions outside of face-to-face relationships, it might be better if we thought more in terms of confidence rather than solely trust. Confidence is as much related to competence and performance as it is to trust. If this is so, then while a degree of trust is needed, we also have to focus on competence which includes sanctions and performance. If we focus on confidence, there is perhaps no fundamental ethical divide, at least in this respect (although there will be in others), between the public and*

*other sectors. Therefore the skills of those in the public sector have to be enhanced so that a good service is delivered, and this will lead to a growth in confidence because it should enhance competence. At the same time, as we have seen, public sector goods are complex and the government needs to be much clearer about what its priorities are in different areas of the public sector (Plant, 2003, p. 579).*

A reassessment of the role of professionals alongside a commitment to clarity and transparency in policy-making is one way to begin this process. All stakeholders—policy-makers, citizens, taxpayers, auditing authorities—need to have confidence in professional advice and know that even if it ultimately proves to be wrong, it is honestly wrong. It has to be proffered on the premise of speaking truth unto power. A robust notion of the public interest and best value can be an aid.

But one thing is clear: ethical and accountable policy-making and effective and efficient service delivery are dependent on the commitment and enthusiastic compliance of professionals employed to structure and deliver services. In our age of government in a time of governance, it is time to reawaken the debate about what it means to be a professional. The formulation, delivery and evaluation of policy are intertwined with the role of professionals. The workings of a modern democracy and the benefits of a civilized technically advanced society depend on their skills. If we are to harness those skills for the public purpose—indeed, the public good—then the broader role and responsibilities of all professional groups, both as a profession and as individual professionals must be a core part of the debate about future modernization. ■

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### Note

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