

GOVERNMENT RESPONSE TO RISK

Introduction

This paper briefly analyses why the Government's response to risk so often leads to more legislation and regulation, with little evaluation as to the effectiveness of this approach or to the merits of alternatives. The paper suggests some solutions which would help to address the problem.

The Issue

Over the last 10 or 20 years the prevailing view has increasingly been that nothing should go wrong and that if something does go wrong then somebody, often the Government, is to blame. This leads to an expectation that the Government should seek to regulate almost every activity such that malpractice cannot occur.

Combined with this is the impact of insurance. There is an expectation that insurance, whether in the form of a private insurance policy or public insurance in the form, for example, of deposit protection schemes, can ensure that people are compensated when something does go wrong. In a number of areas the Government has made insurance, in particular professional indemnity insurance, compulsory, as this is seen to be a powerful addition to the armoury of devices that helps protect the public. Seldom is there any rational analysis of whether this is actually the case.

The Cause of the Problem

There is no single cause of these changing perceptions over time. To some extent they are a natural public reaction to higher standards and increasing affluence. For example, going back 200 or so years there was a high level of infant mortality. The death of children during childbirth or in the early years of their lives was something that was regarded as normal. In economic terms, as the number of child deaths was high so the "price" of each one was comparatively low. Such deaths have now been largely eliminated so each one now carries a very high "price". In some cases there are allegations that somebody must have been to blame and that compensation is due.

The concentration of the media on human interest stories accentuates this trend. A single missing child, particularly one of whom there are attractive photographs, can stay in the news for months and months, whereas children dying or otherwise being severely disadvantaged get much less publicity. This has led to a general perception that the risks to children of being abducted have hugely increased, notwithstanding no evidence in support of this.

Ministers have both reacted to the changing attitudes, but also have reinforced them by giving the impression that they can deal with any problem that might arise merely through legislation and regulation. Every time a minister is interviewed after, for

example, a knife or gun attack in London, they reassure the public with the news that they are reviewing the legislation and will bring in tough new laws if required. Perhaps some ministers believe this, as they are seldom in post long enough to implement new laws and certainly for those laws to have effect.

The media tend to be not only unchallenging but contribute to the problem. They are far too easily satisfied by the ministers' assurance that if necessary tough new laws will be brought in. Indeed, ministers are frequently challenged by the media to explain why they are not introducing new laws "as there is a demonstrable need for them as the existing laws are clearly not adequate."

The civil service structure and ethos contributes to the problem. Success is frequently seen as being new legislation or new regulations rather than actually dealing with the problem. Often, compromises will have to be made to get legislation through Parliament, and officials may well be very aware that the legislation is half-baked. Nevertheless an Act of Parliament is regarded as an achievement for an official regardless of the merits of the legislation itself.

The consultation process, rather than acting as a constraint on the development of unreasonable attitudes, can sometimes serve to accentuate them. The process is frequently fictitious on both sides. The Government is consulting because it is required to consult, and has little or no intention of changing anything as a result of the consultation. Those responding to the consultation are often well aware of this and therefore do not bother to make a proper response based on substantial evidence, research and analysis. There may well be an assumption that the Government does not want to hear that what it is proposing will not work, and hence consultation responses can be more favourable than the views of the respondents would actually suggest.

The various "experts" can accentuate the trend. Lawyers want more law because there will be an opportunity for them to advise on them. Compliance experts are only too keen to have yet more requirements and will for ever demand clarity, meaning more detailed requirements on the meaning of such words as "reasonable" and "normal". They not only frustrate the consultation process but contribute significantly to gold plating. Once the advice of a lawyer or a health and safety "expert" has been taken, then most organisations feel obliged to follow that advice, no matter how illogical it might be. The lawyer or consultant is well aware of this and frequently sees the opportunity of yet a further fee for helping to implement whatever they have said is necessary.

As regulation is introduced so the objective can easily become putting the regulation in place, meeting deadlines and ensuring compliance with the letter of the law rather than actually dealing with the problem that the legislation was designed to address. All legislation is invariably faulty to a greater or lesser extent, but where fault is found then often this is not regarded as a fault but rather as the intentions of Parliament which have to be implemented however inappropriate they might be.

Finally, regulation tends to feed on itself with the result that there are, broadly speaking, two sectors of the economy. There is the regulated sector where regulation gets tighter and tighter, and the unregulated sector, where there is no specific regulation at all. Once regulation is in place then any failure is perceived to be a failure of regulation which can be dealt with only by tougher regulation, and there is always a demand for more clarity on what the rules actually require, which again means further regulation. Any shortcoming by a regulated institution is seen to be a failure of the regulator (e.g. Northern Rock and Equitable Life) and the only regulatory response is to strengthen regulation and increase the number of

regulators, even if this is perverse. The FSA's report on its handling of Northern Rock illustrates this. The problem was not the number of regulators but rather the quality of the people doing the regulation.

Solutions

An understanding of the problem is essential before one can attempt to identify possible solutions. The remainder of this paper identifies five partial solutions, all of which would contribute to addressing the problem that currently exists, but none of which would be sufficient to turn the tide in itself.

Solution One – Re-defining Stakeholders

The nature of the policy making process is that the principal participants are those with a vested interest in legislation and regulation, that is, ministers, civil servants and specialists in regulation, particularly lawyers and those responsible for compliance. These are the best resourced groups who participate in the policy making process. In order to have a better process it is necessary to involve others more effectively.

The insurance industry is primarily concerned with selling insurance not with risk management. Insurance should be seen as a sub-sector of risk management and indeed this is the way it is viewed in large organisations. A business will properly decide how to handle a multitude of risks including seeking to mitigate them by management action, insuring against them, accepting them or eliminating the risk by eliminating the activity.

There are two representative bodies for risk managers, the Association of Local Authority Risk Managers (ALARM) and the Association of Risk Managers in Industry and Commerce (ARMIC). However, while these are effective as far as they go, they represent individuals rather than businesses and are not nearly as well resourced as, for example, the Association of British Insurers. On some policy issues, it would be sensible to commission one or both of these bodies to have an effective input on behalf of their members who are responsible for managing risk on a day-to-day basis.

Policy makers all too often use the "usual suspects" to consult and to involve in the policy making process. These typically include the CBI, the major national trade associations, the unions and consumer bodies such as the National Consumer Council. Many officials seem unable to identify effective trade associations and other interest groups and how to engage them. This is not part of the training of civil servants and other officials. Consumer bodies, who often have a far more realistic perception of what regulation and legislation can achieve than do policy makers, are often unable to participate fully in the policy making process because they are not resourced to do so. A major trade association will think nothing of spending £50,000 on representative work on a particular policy issue, while for a consumer group this could take a large chunk of its annual budget.

Where the various interests groups are not properly resourced to participate in a policy making exercise, then Government should consider funding them to do so, something which is not easy but which would result in a more effective policy outcome.

Related to this is the need for an independent evaluation of regulatory proposals and systems. This does not necessitate commissioning PWC or McKinsey to do one of

their major exercises. Rather, it means identifying an individual, perhaps an academic or perhaps someone with relevant experience, who can give a reality check and perhaps say things that officials could not say, even if they know that they are correct.

Solution Two – Effective Policy Making and Scrutiny

The policy making process is flawed. Notwithstanding any number of learned papers about regulatory impact assessments and how various options should be evaluated, it is often the case that ministers decide to do something and the analysis follows subsequently. Alastair Campbell put it very well in his diaries when he said that the Government was not so much into “evidence based policy making” but rather into “policy based evidence seeking”. Policy analysis invariably is in a very narrow context. For example, there is currently some discussion as to whether ticket touts should be regulated. No doubt if one did a detailed examination of this subject in isolation, an excellent case could be made for regulation. The more important issue is whether this is high on the list of priorities for issues where the public needs some protection. The Office of Fair Trading should be equipped to comment on this and may well comment on such issues, although probably it does not do so and when it does its views are ignored. Every regulatory initiative should be viewed in a wide context and not simply in isolation.

The independent evaluation mentioned in the previous section would contribute to this.

There is a need for challenge within Government departments and regulators and also from the BRE. However, the evidence is that such challenge is often not on the grounds of the need for the regulation or whether it will work but rather on various process matters such as the gender impact, the racial equality impact, the environmental impact, whether it meets the Hampton principles, whether it entails setting up a new regulator and whether the regulator will be able to cover his costs. In a way this is hardly surprising because the people tasked with challenging are seldom well equipped to challenge on the big issues.

Regular effectiveness reviews of regulation are essential. Again, these do not need to be full blown efforts commissioned from the NAO or PWC. In the case of smaller regulatory bodies or particular regulatory programmes run by large bodies, an independent consultant or an academic should be capable of doing a very thorough exercise for under £20,000.

Solution Three – Targeted Enforcement

The point has already been made that much of the pressure for new regulation is because something has gone wrong, even though whatever has happened was contrary to existing law. The Morecambe Bay tragedy is a good example of this. Many existing laws were being broken and the person who broke them was duly imprisoned. However, this did not stop the call for new legislation which was duly implemented.

At present it is understandable that ministers should say that they are dealing with the problem by legislation because this is the only tool that they seem to have available to them. There should be another tool, that is a team, probably within the Office of Fair Trading, able to concentrate on a particular sector by dealing entirely with breaches of existing legislation rather than setting up yet another regulatory regime. Almost all the major problems that are identified as causing consumer

malpractice already breach existing legislation. What is lacking are the resources to enforce the legislation not the legislation itself.

If Government could demonstrate that it could deal with identifiable malpractice quickly and effectively by administrative means there would be less pressure on it to go for yet more legislation.

Solution Four – Civil Service Training and Structure

It seems to be the case that the extensive training programs for civil servants do not cover at all the politics and dynamics of engagement with interest groups, something which should be central to any official involved in policy making.

Similarly, the options for dealing with a particular problem invariably amount to do nothing, self-regulation, set up a new regulatory body or pass a new law. The additional option of targeting enforcement is seldom considered, perhaps because there seems to be an implicit assumption that all rules and regulations work without any conscious enforcement activity being necessary.

On particular policy issues there would be benefit in bringing in suitably qualified individuals to work with permanent officials to design, build and implement new regulatory regimes or to review existing ones. An outside view, wherever it comes from provided it comes with some expertise, is always desirable but it is often lacking within the civil service and regulatory structure.

Solution Five – Political Leadership

The drive for better regulation, clearly laudable in every way, will never succeed unless there is very strong, political leadership. This means leadership from the Prime Minister and the BERR ministers in particular. It requires ministers frequently to say that there is no need for new regulation or new legislation, that there are better ways of dealing with problems and occasionally to say that we have to accept that not everything will be perfect and that things are bound to go wrong. Sometimes, a more subtle approach is needed of promising a review or promising firm action or even carefully considering legislation but without actually doing anything.

However, there can be a danger in this. A good example at present is the Ministry of Justice's attempts to deal with reforming the compensation claims process. Having published a consultation paper and promised a response by October 2007, it has failed to produce any response by May 2008. Those who have some knowledge of the issue will know that there will be no firm Government response for political reasons. However, the Government is not announcing this, leaving those with less political knowledge to believe that some major reforms are about to take place which could significantly impact on their business. This approach to policy making brings officials and ministers into disrepute.

Ministers and officials must be willing to change their mind on the face of significant evidence. The fact that something has been in a manifesto does not mean that it absolutely has to be implemented in the way that was stated in the manifesto. Ministers ignore manifesto commitments when it suits them, but sometimes they feel that they have to implement those that will do no good but not very much harm so they can say that they have, for example, implemented 90% of their manifesto commitments.

The present Government in particular has given the impression that constructive criticism and attempts to help the Government come to a solution to deal with a problem are unwelcome and are seen as obstruction. Rather, on some issues ministers are seeking support for something they have already decided to do. With this mentality there will be no proper challenge and no effective decision making. There will be frustration at the end of the day on the part of ministers, because what they have done has not worked, from officials because their own input is not valued and their time is wasted, and from business which has to put up with yet another regulatory burden.

The perverse incentives for yet more regulation must be removed. Getting a Bill through Parliament should no longer be seen as a high point of a civil service career and something that people should get under their belt on the way to promotion to high office. Legislation should never be seen as more than a stepping stone to dealing with a problem, and quite a modest stepping stone at that in many cases. The foot is generally taken off the accelerator after legislation becomes law and then there is the long painful process of secondary legislation which is often given barely any scrutiny and delay after delay in implementation.

Finally, there must be a willingness on the part of political leaders, senior regulators and civil servants to take risks, to recognise that not everything will work and that there will be failure from time to time and that there is just a bigger risk from regulating as there is from not regulating.

Conclusion

Driving the better regulation agenda is not easy and there is little in what the Government is doing that suggests it will be significantly more successful than its predecessors. The problems are not mindless bureaucrats and officials determined to regulate everything that moves but rather a far more subtle and complex interaction of forces which includes ministers, the media and then the whole culture within the civil service and regulators, combined with an approach to policy making which over-emphasises the importance of some stakeholders and greatly underplays the importance of others.

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He has written two other papers related to this subject, both published on his website, www.boleat.com.

Trader regulation, structural issues (2008)

Why deregulation does not happen (2007)