An Agenda for Better Regulation

By Mark Boleat

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Policy Exchange

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About the Author

Mark Boleat has held a variety of positions in trade associations, central and local government, regulatory bodies and charities. He has been Director General of the Building Societies Association, the Council of Mortgage Lenders and the Association of British Insurers, a director of two listed companies, Chairman of the Council of Property Search Organisations, a member of the National Consumer Council, a member of Gibraltar Financial Services Commission, Chairman of Hillingdon Community Trust and Head of Claims Management Regulation at the Ministry of Justice. He has also undertaken a variety of major consultancy projects on regulation, consumer policy, trade association structures and housing finance in emerging markets.

His current portfolio includes Chairman of the Association of Labour Providers, Vice Chair of the Association of Charitable Foundations, Chairman of The Green Corridor, Non-Executive Director of Travelers Insurance Company, Trustee of the City of London Citizens Advice Bureau, and Deputy Chairman of the Policy & Resources Committee and Chairman of the Markets Committee of the City of London Corporation.

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Introduction

Regulation is never off the political or media agenda. Every time something goes wrong there are calls for new regulations, better regulation, more regulation and tougher regulation. At the same time, in a sort of parallel universe, there are regular reports that regulation has gone too far - stifling business, preventing school trips and leading to a huge increase in bureaucracy that the taxpayer and business has to fund.

Individual decisions on regulation are frequently taken in isolation of either of these trends, and many regulatory or deregulatory initiatives fail, either because they are knee jerk reactions or because they are not properly thought through or implemented.

This paper seeks to take a helicopter view of these issues. It is about conduct of business rather than prudential regulation of financial institutions, a wider and very different subject, or economic regulation.

The paper is written from the perspective of someone who has spent most of his life running trade associations, therefore on the other side of the table from the regulators, but who also has practical experience as a regulator and on the boards of regulatory bodies. The author gratefully acknowledges the help that he has received in preparing this paper from many people, most of whom do not know that they have given such help. Particular thanks are due to Paul Whitehouse (Chairman of the Gangmasters Licensing Authority), Philip Cullum (Deputy Chief Executive of Consumer Focus), and Neil O'Brien and Andrew Lilico of Policy Exchange.

Executive Summary

The Purpose of Regulation

There are four broad types of regulation: prudential, competition, economic and conduct of business. The paper is about conduct of business regulation, the primary purpose of which is to reduce the detriment to individuals caused by market imperfections, particularly where that detriment is likely to be significant and the consumers are vulnerable.

The Policy Context

There are five principles of good regulation which are now well established and generally accepted: transparency, accountability, proportionality, consistency and targeting. A great deal of work has been done to develop tools to measure the impact of regulation either at the policy making stage or at post implementation evaluation.

Over the last few years there have significant changes in government agencies responsible for the better regulation agenda, some attempts to consolidate regulators and more systematic use of impact assessments and evaluations.

Why Regulation Fails

In general, regulation succeeds in protecting the public and in achieving other objectives, but some specific regulatory initiatives completely fail and most fail to achieve all that had been hoped. This is partly because there are unrealistic expectations as to what regulation can achieve. Also, many regulatory initiatives are badly planned and executed for one or more of a number of reasons, in-

cluding failing to engage key stakeholders and to understand the problem, and lack of resources.

Once regulation is in place, there is too often a concentration on process rather than substance, aided by inappropriate targets. There is also a risk that political and media pressure, often of a fleeting nature, will exert an undue influence.

Why Deregulation Fails

The steady succession of deregulation or better regulation initiatives fail to achieve their stated objectives for a combination of reasons –

- The extent to which rapid and tangible cost savings can be delivered through deregulation is overstated. Much of the administrative burden on business is caused by one-off initial costs, which are not recovered if the regulations are then removed.
- Businesses often oppose deregulation because they see regulation as a barrier to entry and sometimes also as a marketing tool.
- There are many vested interests, including regulators, governmental officials and an army of people in businesses, together with consultants and lawyers, who owe their livelihood to regulation.
- Ministers often resist deregulation initiatives, because from their own perspective the potential downside to them if something subsequently goes wrong far exceeds the benefit to them of a reduced regulatory burden.

Guiding Principles

There are seven guiding principles that should govern all work on regulation:

1 No knee jerk reactions but rather full analysis in the cold light of day.
2 Enforcement is as important as rules. Very often, the rules are adequate and where things go wrong it is because enforcement has failed.
3 New regulations should be subject to comprehensive impact assessments.
4 Regulators must concentrate on substance, in particular practice, not process. Too much regulation merely ensures that paperwork is in order.
5 Back door regulation through judicial decisions, administrative reinterpretations and gold plating must be resisted as far as possible.
6 Regulation is a public good and there should be no expectation that the costs of regulation can be exactly met by those being regulated.
7 All regulators should be subject to regular evaluation, as should many regulatory mechanisms.

Effective Policy Making

Most of the key decisions on regulation are made at the very early stages and are in respect of scope and general approach. This is when the most skill is needed in identifying the nature of the issue and how it can best be dealt with. If the problem is not fully understood regulation is bound to fail. In particular it should not be assumed that information technology will solve the problem.

Good regulation requires hard work, and as in any other area those who do the work must be accountable. This can best be achieved by those who do the regulating effectively making the rules, but subject to the appropriate checks and balances. This is already a common practice.

It is essential that there is full input from those being regulated and those who will be affected by the regulation, in particular consumers. Current consultation policies and practices seldom achieve this. It should often be necessary for specific studies to be commissioned to establish the interests of consumers or businesses and also to have an independent reality check on what is being proposed.

Enforcing the Rules

Regulations that are not enforced can be damaging by giving the impression that there is 'effective regulation and by allowing those engaged in malpractice to operate with a halo of respectability. The registration process, where one exists, should be a crucial part of establishing the framework for effective enforcement. Notwithstanding press reports along the lines of "businessmen face jail for failing to complete forms", the reality is that there are very few prosecutions of businesses. Enforcement has to come through intelligent desk-based monitoring, concentrating resources on inspecting high risk businesses, identifying the pressure points and dealing with them effectively, and appropriate publicity for enforcement action.

Backdoor Regulation

Onerous regulatory burdens can come not only from specific laws or regulations but also from court and tribunal decisions (particularly on employment matters), reinterpretations by officials and regulators, conservative (even scaremongering) advice from lawyers, consultants and in-house compliance experts, and the use of guidance and "best practice" as quasi-regulatory tools. These can be combated only by continual vigilance.

Regulatory Structure

The Hampton Report provided an excellent analysis of regulatory issues and made sound recommendations, but its recommendation that 31 regulators should be combined into seven super-regulators was less soundly based and has proved problematic in practice. There is no reason why a small regulator cannot be effective, and regulating a specific area is generally best done by a specific regulator. Economies of scale and efficiency can be achieved without mergers, which themselves have a disruptive effect.

The OFT is not well placed to deal with consumer protection issues; these need to be separated for all practical purposes from its competition policy responsibilities. There needs to be a central unit, within or outside the OFT, capable of running regulatory regimes for a number of different sectors as well as overseeing trading practices generally.

There needs to be a single agency with responsibility for driving forward the better regulation agenda. There are challenges in doing this effectively within a Government department, particularly within the Department for Business, Innovation and Skills as this department is responsible for much regulation. The report recommends an independent commission with its own secretariat, attached to the Cabinet Office.

The Register and Enforce Model

One model for regulation in the future should be a requirement on businesses providing particular goods or services where there is significant malpractice simply to register, paying a fee for so doing, and the proceeds of the fee being used to contribute to the costs of enforcing existing regulations. A central unit, probably with frontline work being subcontracted to local authority trading standards services, is a model that has been used effectively in one sector and could be applied in others.

Funding Regulation

It is government policy that regulators should cover their costs through the fees they charge to those being regulated, although start-up funding generally comes from the relevant government department. This works well in large sectors but not in small sectors, and can lead to perverse effects of regulators needing to trade off standards of regulation against viability. There is a particular problem for new regulators, as estimating the size of the regulated population is difficult. There should be no automatic assumption that regulators should cover their costs from fees. Regulation is a public good, that often benefits potential new entrants or even firms and households entirely outside the sector rather than merely those operating within the sector, and often may require public money.

Evaluation

There is no effective evaluation of many regulators or of specific regulatory initiatives. What evaluation there is tends to be in-house and therefore biased. It should be standard practice to commission external evaluations of individual regulators in the case of small regulatory regimes, or of specific regulatory initiatives in larger regulatory regimes. These need not be expensive major consultancy exercises, but rather brief evaluations of outcomes against objectives.

Delivering Better Regulation

Better regulation requires a change of culture and mindset within Government, such that more regulation is not seen as being the automatic response to any issue.

Strong political leadership will be necessary to overcome the cultural bias in favour of ever greater regulation.

The necessary cultural change requires more hurdles to be overcome before additional regulation can be imposed. An effective framework for driving the better regulation agenda needs to be developed with a measure of operational independence from government.

Under this framework a combination of measures is needed.

1. Comprehensive impact assessments of all regulatory proposals should be required and the production and quality of such assessments needs to be carefully monitored. The scope of impact assessments needs to be widened to ensure that effects on the supply of the good or service being regulated and on competition in the marketplace are given due weight.
2. A comprehensive programme of evaluation of existing regulations should be introduced, using a variety of techniques include Hampton Implementation Reviews, external evaluations and internal assessments. Such evaluations should be the trigger for some reduction in the regulatory burden.
3. A new regulation should automatically cease to apply after a given period unless a positive step is taken to re-establish it on the basis of a full impact assessment.
4. External involvement in the policy making process needs to be substantially improved through more effective stakeholder engagement, including techniques such as commissioning studies of the impact of proposals on businesses and consumers where otherwise such input would not be available, the use of informal stakeholder consultative groups and commissioning independent reality checks.
5. Backdoor regulation through new interpretations, judicial decisions and changes to enforcement policy need to be brought within the scope of policy on better regulation by ensuring at least adequate notice and, where appropriate, impact assessments and consultation.

6 Departments and regulators should be required to demonstrate that over a period of a year they are reducing the overall administrative burden on business through the impact of simplification measures and deregulation exceeding by a significant margin the burden imposed by new regulation. This would be more effective that the simplistic "one-in, one-out" or even "one-in, two-out" concept, which would be easily seen off by regulators.
7 There needs to be an effective means for businesses to challenge unreasonable regulations. Business groups should be permitted to make a direct application to an independent body for a particular regulation, whether overt or backdoor, to be reviewed on the grounds that it did not meet the tests of good regulation. The requests would have to be backed up with detailed evidence.
8 A Parliamentary Select Committee should be established with power to review individual regulatory requirements at its own instigation and also to oversee work on better regulation generally.

The main impact of this combination of measures should be to make policy makers think more carefully about the impact of regulation, knowing that measures that do not stand up against the tests of good regulation would face a more severe test than is currently the case.

In addition to these substantive points there are some secondary issues.

1 The Hampton restructuring proposal to shoehorn a large number of regulators into a small number of super-regulators, with no analysis and no consultation, should be abandoned in theory as it has already been largely abandoned largely in practice.
2 An effective national body for consumer protection as proposed by Hampton should be established.

3. Provision should be made for a legal framework for the register and enforce model, which entails no new rules but rather the registration of businesses and the payment of a fee to help fund enforcement work. This is an effective means of dealing with malpractice in a number of sectors where there is no case for a dedicated regulator.
4. It needs to be recognised that regulation is a public good. The current general policy that regulators should charge fees sufficient to pay for their costs creates perverse effects and causes unnecessary administrative problems for regulators. The principle should be abandoned. Regulatory fees should be calculated on the basis of what is reasonable, bearing in mind the nature and size of the business and the level of regulatory fees in comparable industries.

1. The Purpose of Regulation

The term "regulation" covers a variety of types of activity, with different purposes, and which need to be treated differently in any analysis. There are four broad types of regulation -

- Prudential regulation – designed to ensure the soundness of institutions so that they can meet obligations to their customers. Almost all financial institutions are subject to prudential regulation.
- Regulation to prevent the abuse of monopoly power, which competition policy seeks to address.
- Economic regulation of services provided by utilities.
- Conduct of business regulation.

Some businesses, banks for example, are subject to all four types of regulation, while others, particularly low value services, are subject only to conduct of business regulation whether by general regulations applying to all businesses or specific regulation. This paper deals with conduct of business regulation, although some of the analysis is also applicable to other types of regulation.

Any analysis of policy and practice in respect of conduct of business regulation must begin with an understanding of the purpose of regulation. Economic theory suggests that when the basic conditions for markets (such as secure property rights, secure contract rights, and a secure and stable medium of exchange) are in place, and when there are no other market or regulatory failures, consumer welfare is maximised through free competition.

Conduct of business regulation finds its rationale in addressing or compensating for various market failures. For example, sometimes

there is an imbalance of knowledge between consumer and producer (economists refer to this as a situation of "information asymmetry"). Regulation has a role to play in addressing this, for example by providing for the provision of specified information, sometimes in a standard form.

Conduct of business regulation can also contribute to the guaranteeing of property rights and rights of contract. If individuals were left to secure their own property rights, there would often be an imbalance of power between consumer and producer. Even general law may be inadequate, as in very few cases will a consumer seek to exercise his rights through the legal process if the amounts of money involved are relatively small, and if left to their own devices some traders, well aware of this, will fail to deliver goods or services that have been ordered and paid for.

Regulation might also ensure that companies had sufficient insurance or money set aside so as to be able to honour agreements when the amounts of money that would be lost by consumers in the event of anything going wrong would be, for them, large. This is true for example in respect of house purchase, the largest transaction that most people undertake, and also other large items of expenditure such as funerals and holidays.

One particular aspect of the imbalance of power and information relevant to regulation is the need to prevent unfair competition through businesses not complying with minimum standards, for example in respect of health and safety or paying the minimum wage, undercutting others and thereby making it difficult for those businesses that do try to operate within the rules from competing effectively.

Having established the purpose of regulation it is also helpful to consider what the purpose of regulation should *not* be. Regulation cannot remove all consumer detriment, nor can it ensure that businesses operate to high standards or that consumers are always treated "fairly", although these points often feature in the list of objectives for any regulator.

Regulation also cannot substitute for the market mechanism, which remains the single most important mechanism for ensuring that consumers are able to buy the goods and services they want without facing significant risk.

In short, the purpose of conduct of business regulation is to reduce the detriment to individuals caused by market imperfections, particularly where that detriment is likely to be significant and the consumers are vulnerable.

2. The Policy Context

This paper is being written within a year of a general election. All of the major political parties will, if the past is a guide to the future, include in their manifestos statements to the effect that they will significantly reduce the burden of regulation on business and sweep away a raft of unnecessary regulations. Meanwhile, other parts of the manifestos will promise tough regulation in a specific number of areas.

It is therefore appropriate briefly to summarise policy developments in the last few years in respect of regulation, the policies and practices of the current Labour government, and the various proposals about which particularly the Conservative Party has either made commitments or is considering.

Regulatory trends generally

There have over the last few years been a number of general developments in respect of regulation that to some extent have occurred regardless of government policy and will continue whichever party is in power.

There are five principles of good regulation that are now well established and generally accepted: transparency, accountability, proportionality, consistency and targeting.

A great deal of work has been done to develop tools to measure the impact of regulation either at the policy making stage or at a post implementation evaluation. The Financial Services Authority and the utility regulators have been prominent in this respect; they have huge resources compared with other regulators, and also operate in areas where quantification is relatively easier than elsewhere.

The Department of Business Innovation and Skills (BIS) website includes a 10 page paper giving guidance on impact assessments. This

states that they are generally applicable to all Government interventions affecting the private sector, and should be made at several stages in the policy making process from the initial policy proposal through to legislation, a draft statutory instrument, immediately prior to implementation and at the review stage. Ministers are required to sign off impact assessments. A standard template for assessments is provided which should be supported by analysis and evidence. The intention is that all costs and benefits - economic, social and environmental - should be covered and monetised as far as possible. However, the emphasis of the BIS website paper is on administrative costs with little guidance on such matters as the effect on the activity being regulated

The Hampton Report (2005) provided a comprehensive analysis of regulatory issues, and contributed significantly to increased understanding among regulators and others about how regulation should be conducted.

Principal recommendations in the Hampton Report

- reducing inspections where risks are low, but increasing them where necessary
- making much more use of advice, applying the principle of risk assessment
- substantially reducing the need for form-filling and other regulatory information requirements
- applying tougher and more consistent penalties where necessary
- reducing the number of regulators that businesses deal with from thirty-one to seven
- entrenching reform by requiring all new policies and regulations to consider enforcement, using existing structures wherever possible
- creating a business-led body at the centre of government to drive implementation of the recommendations and challenge departments on their regulatory performance.

The Hampton Principles

Along with these specific recommendations, the Hampton Review set out some key principles that should be consistently applied throughout the regulatory system -

- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most.
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.
- No inspection should take place without a reason.
- Businesses should not have to give unnecessary information, nor give the same piece of information twice.
- The few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions.
- Regulators should provide authoritative, accessible advice easily and cheaply.
- Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work.
- Regulators should recognize that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.

There has also been an increasing trend towards external reviews of regulators, partly through the National Audit Office, and also through one of the offshoots of the Hampton Review - Hampton Implementation Reviews.

However, while at one level all of this work has been going on, in many areas its impact has yet to be felt. There are blockages that

prevent laudable objectives about regulation from being achieved; how they might be overcome is what this paper is all about.

Current Government Policy

This section briefly summarises what can be taken to be current Government policy based on various policy statements and what is currently on the BIS website.

Responsibility for regulatory reform across government is now in the hands of the Better Regulation Executive (BRE), which is an integral part of BIS. The BRE website sets out its aims as being -

- To work with departments to improve the design of new regulations and how they are communicated.
- To work with departments and regulators to simplify and modernise existing regulations.
- To work with regulators and departments to change attitudes and approaches to regulation to become more risk based.

Following the Better Regulation Task Force (BRTF) report Less is More (2005) the Government has implemented a programme of measuring the administrative burden that regulation imposes, setting targets for a reduction and the publication of simplification plans which explain how this will be achieved. It is important to note that this is concerned with the administrative burdens imposed by regulation, that is primarily ongoing compliance costs, rather than with the policy implications or initial compliance costs.

The Legislative and Regulatory Reform Act 2006 was designed to make it easier and quicker to tackle unnecessary or over-complicated legislation. It enables ministers to make orders to remove or reduce burdens, and to ensure that regulatory functions comply with the five principles of good regulation.

Scrutiny of new regulations covers impact assessments at the policy making stage and consultation with stakeholders.

The institutional framework for dealing with regulatory issues is something of a moving feast, no doubt driven, as in other areas, by a tendency to announce institutional changes as if in themselves these are capable of making a substantive difference.

Between 1997 and 2005 responsibility for the better regulation agenda rested with the BRTF which was located within the Cabinet Office. The Taskforce itself comprised people appointed from outside Government assisted by a Secretariat. In January 2006 the Taskforce was replaced by the Better Regulation Commission (BRC). At the same time the Better Regulation Executive (BRE) was created within what is now BIS. In 2007 the BRC was replaced by the Risk and Regulation Advisory Council (RRAC), charged by the Prime Minister with -

- Working with ministers and senior civil servants to develop a better understanding of public risk, and how best to respond to it, through a series of workshops which consider both good and poor practice.
- Working with external stakeholders to help foster a more considered approach to public risk and policy making.

The Council was established with a limited life and disbanded at the beginning of 2009. In April 2009 the Government announced the establishment of a Better Regulation Sub Committee of the National Economic Council, a Cabinet Committee, which will scrutinise planned regulation and proposals for new regulation that will impact on business. It also announced that a new external Regulatory Policy Committee would be established "to advise Government on whether they are doing all they can do to accurately assess the costs and benefits of regulation". At the time of writing the Regulatory Policy Committee is just in the process of being established.

These changes have been confusing to outsiders who still have difficulty in remembering which body is now responsible for better regulation, and also the relationship between the various advisory bodies and the BRE. To the extent that an overall theme can be determined it is that the detailed work on regulatory reform has now been institutionalised within a government department, BIS. There is currently little business or independent input.

A second area of institutional reform has been among the regulators. This stems from the Hampton recommendation: "Regulators should be structured around simple, thematic areas, in order to create fewer interfaces for businesses, to improve risk assessment and to reduce the amount of conflicting advice and information that businesses receive".

He recommended that 31 national regulatory bodies should be consolidated into seven covering the environment, health and safety, food standards, consumer and trading standards, animal health, agricultural inspections, and rural and countryside issues. He also recommended the establishment of a new Consumer and Trading Standards Agency, incorporating the work of four existing regulators, which would help to coordinate local authority services.

The government accepted all of the recommendations of the Hampton Review, paradoxically without any consultation with relevant stakeholders, contrary to its well established policies on consultation. However, as will be discussed subsequently in this report, implementation of the proposals for consolidating regulators has proved problematic.

Following on from the Hampton Review the Government consulted on the proposal to establish a consumer standards regulatory body, which basically came down to an issue as to whether the consumer protection functions of the Office of Fair Trading (OFT) should be separated from its competition policy functions. Before the consultation was completed the Government announced

that it had abandoned the consultation with some powers being passed to the OFT, and a Local Better Regulation Office (LBRO) being established. LBRO is a non-departmental public body, accountable to BIS through the Better Regulation Executive. Its website describes its role as being –

> *"to improve local authority enforcement of environmental health, trading standards and licensing – reducing burdens on businesses that comply with the law while targeting those who flout it."*

Its overall aim is described as being "to secure the effective performance of local authority regulatory services in accordance with the principles of better regulation and the Government is legislating to give it powers to deliver that purpose. Its focus is on ensuring that inspection and enforcement are based on an assessment of risk, so that businesses are supported and regulatory resources are focused on those areas that most deserve tougher scrutiny."

Conservative Party Policy

Like any Opposition the Conservative Party is wary of saying too much in opposition so as to give it as free a hand as possible should it be elected. In this area, as in others, policy thinking is evolving. Following is a brief summary of key indicators of the way that the Conservatives are developing their ideas on regulation.

The policy document *Reconstruction: Plan for a Strong Economy* (2008) has a brief section on regulation, which included three specific proposals -

- Make BERR (now BIS) the clearing house across Whitehall for all legislation which has a regulatory impact.
- Ensure that for any regulation that is introduced two or more existing ones will be removed.

- End the practice of turning a one page EU Directive into 100 pages of UK law.

The policy document recognised the cultural issue –

> *"It is clear that a complete change of culture is required in Government to ensure that we can both reduce the existing stock of regulation, and tackle the flow of regulation as it passes from Brussels to Whitehall to town hall."*

The Conservative Party has commissioned two studies to inform its work on regulation. The Economic Competitiveness Policy Group, chaired by John Redwood MP and Simon Wolfson, submitted a report *Freeing Britain to Compete: Equipping the UK For Globalisation* in August 2007. This made specific proposals in respect of regulation -

- More debate on regulatory statutory instruments including the ability to amend them.
- Regulatory budgets for each department with a base figure, and an annual target for an increase or reduction on that base figure.
- Independent verification of new regulatory impact assessments by the National Audit Office.
- A sunset clause in new regulations by which they would automatically come to an end unless renewed.
- Abolishing special regulators, relying on existing legal processes and mechanisms.
- An annual deregulation bill aimed at removing specific regulations.
- Vigorous opposition to gold plating.
- Ending double regulation at both European and national level.

The report argued that a major underlying problem was the burden of regulation stemming from Brussels.

David Arculus, former Chairman of the BRTF, was commissioned to offer advice on a framework for regulation that a Conservative Government could develop. His report *Enabling Enterprise, Encouraging Responsibility* was published in May 2009. Arculus summarised his report as follows -

> *"I advocate the formation of an independent panel for regulation and risk, a strengthened system of regulatory budgeting, stronger parliamentary scrutiny, and more vigorous involvement with Brussels. I want less regulatory bodies, less centralised control of the public sector, and far more use of alternatives to regulation."*

Recommendations from the Arculus Review

Challenging regulation

- Strengthen and build upon the existing architecture of Better Regulation and de-Regulation.
- Set up a Business Challenge panel to review manifesto commitments.
- Establish a Ministerial 'Star Chamber' for all new regulations.
- Establish an Independent Panel for Regulation and Risk with significant powers to slow the flow and reduce the stock of regulation.
- Use the RPI-X regime to control costs of regulators and public sector bodies.

Regulating the regulators

- Sunset regulatory bodies and then landscape review the survivors every seven years.
- Radically improve the Governance and Accountability of regulators.

- The main regulators to be accountable to Parliament and appointed by Parliament.
- Limit the burden of regulations by establishing a comprehensive system of regulatory budgets. Apply the principles of Better Regulation to the Public Sector as well as the Private Sector.
- Transfer accountability for, and control of, public services to the local level.

Government

- Improve the Parliamentary process with a clear 'Statement of Purpose' to accompany all new proposals, and increased powers for Select Committees.
- Get better domestic involvement with European legal and regulatory processes.
- Use BERR as the clearing house for all European Regulation.
- Proactively seek to improve the European regulatory system, and adapt UK legislation to fit Europe, rather than starting from scratch.

Specific actions proposed by Arculus –

Better process

- Consult on the issue not on the legislation.
- Common Commencement Dates to change from bi-annual to annual.
- Bigger penalties on those who have breached the trust put in them.
- A one in, one out system for new regulations.
- Champion Alternatives to Regulation.
- Give a 'free pass' to genuine alternatives to regulation.

- Concentrate on providing better information such as 'Scores on the doors.'
- Government forms to clearly state how long they should take to complete.

Business and citizens

- Help citizens to seek redress and establish a 'Regulatory Court'.
- Simplify Government contracts for small business and third sector.
- Encourage diverse models of supply in the public and third sectors.
- Establish a website to link the public directly to departments and make better use of helplines.
- Address issues of complexity and burden of the corporate tax regime and set a clear direction of travel.

Law making

- Sunset legislation which does not go through the full process.
- No law to become effective until thirteen weeks after guidance has been published.
- Use Piloting wherever possible.
- Establish a traffic light system for Statutory Instruments.
- Undertake post-legislative scrutiny.

Parliament and Brussels

- Make permanent the Lords committee on regulation.
- Base a senior Minister in Brussels.
- A European Law Commission to reduce the Stock of EU Legislation.
- Strengthen select committees to be specially alert for holding regulators to account and for issues of gold plating.

In October 2009 the Conservative Party published *Regulation in the Post-Bureaucratic Age* setting out the approach it will adopt toward regulation should it form the next Government. The key policy proposals in this paper are –

- A new cabinet committee to enforce a stringent 'One In – One Out' requirement "where any new law must include cuts in old laws which, together, produce a net 5% reduction in the regulatory burden".
- The public and business and consumer groups "will be given the power to nominate the most poorly designed and burdensome regulations, which would be repealed within 12 months unless they were modified or approved by Parliament".
- During the first term of a Conservative government all Regulators will be re-assessed and their duties reviewed.
- "Parliamentary Accountability for regulators and inspectorates will be strengthened with Select Committees holding the key public service regulators to account. In addition, the appointment process of Chairs of major Regulatory Bodies should be subject to Parliamentary Select Committee approval."
- Cost and value comparison measures for local councils will be published to "allow the public to see exactly how well their council is delivering on its value for money remit. This will replace the bureaucratic and expensive system of Audit Commission inspections and reports".
- "The powers of Government inspectors will be drastically curbed by allowing firms to arrange their own, externally audited inspections and, providing they pass, to refuse entry to official inspectors thereafter."
- The introduction of "'MOT style' inspection reports, quoting precisely which section of which law has been broken, to prevent regulatory 'scope creep' where laws are applied too strictly by overzealous inspectors."

- Consultation on changes that may be required to the employment and discrimination tribunals system, "to ensure the system offers fast, cheap and accessible justice, and that it is fair to all sides".

3. Why Regulation Fails

Almost all activities in the UK are subject to some regulation. This might be the general law of the land or a specific regulatory regime applying to the production or distribution of a particular good or service. Much regulation is effective, some of it very effective, but some is ineffective. In some cases regulation may be counter-productive - by creating bureaucracy, giving a false sense of security to people who believe that because a business is regulated that they will be protected from any malpractice, or leading to the with-drawal of a service or the stifling of competition. There is probably a fair consensus that even where regulation is reasonably effective, it does not do everything that was hoped of it. This chapter attempts to assess why regulation does not always achieve its objec-tives.

Unrealistic Expectations

If expectations are unrealistic there is bound to be disappointment. This applies equally to regulation.

There seems to be an expectation among some sections of the media and some interest groups that regulation will automatically solve a problem and completely eliminate malpractice with no scope for anything going wrong, and that any regulation that does not do this is by definition flawed and inadequate. It is common to find calls for regulation, some resulting from just a single inci-dent of something going wrong. For example, *the Scotsman* on 4 March 2008 reported that "Food supplements and herbal medi-cines should be regulated like prescription drugs, a doctor said yesterday at an enquiry into the death of a man taking a popular

remedy for arthritis". There are many other examples of calls for regulation -

- "The Government is under pressure to bring forward regulation of the property sale and rent back market as more property owners are turning to 'fire sales' to stave off repossession or to cut losses on their buy to let investments" (*Financial Times* 2 January 2009).
- "Medical herbalists, acupuncturists and traditional Chinese medicine practitioners should be regulated according to the Health Professions Council" (*Nursing Times* 13 November 2008).
- "Call for regulation of direct to public genetic tests" (*Lab Tests Online* 13 December 2007).
- "With controversy growing over who can and can't call themselves hypnotherapists, campaigners call for regulation to prevent abuse" (Channel 4 2 January 2008).
- "BBC exposed cheap breathalysers and AlcoSense call for regulation" (BBC 14 December 2008).
- "Call for regulation of child phone trackers" (*Guardian*, 14 February 2006).
- "Bonhams call for regulation of auction industry" (*Antique Trade Gazette* 27 October 2008).
- "Campaigners call for tighter regulation of Facebook racists" (*The Independent* 23 April 2009).
- "Healthcare assistants call for regulation" (Royal College of Nursing 4 March 2009).
- "Cosmetic filler fears: Call for regulation of hyaluronic acid" (Sky News 9 May 2009).
- "Call to regulate commercial mortgage advice" (IFA Online 6 March 2009).

A google search records 73,300 pages for "calls for regulation" and just 4,270 for "calls for deregulation", many of which were along the lines of "campaigners have rejected calls for deregulation....".

Laws on criminal activity do not stop crimes but they are a deterrent, and the same is true of regulation. It can never stop malpractice entirely, and even the most successful regulatory regimes do no more than eliminate a percentage of malpractice. Where there is an expectation that regulation will totally eliminate malpractice, it can never be fulfilled.

There is a related expectation on the part of some that merely because there are rules they will be complied with. People partly comply with rules because they believe that the rules are appropriate, but their decision on whether to comply is also influenced by enforcement. For example, very few drivers go through red traffic lights where there are cameras, because they know they will be caught, fined, have points added to their licence and face a higher insurance premium. By contrast, cyclists commit the illegal act of cycling through red lights with impunity, safe in the knowledge that they are very unlikely to be caught, even if directly in front of a policeman, and if they are caught the penalty is minimal.

The advocates of regulation also sometimes believe that it can drive good practice by eliminating the "cowboys", and, through education, encourage consumers to be more discerning. To a very limited extent this can happen. But generally best practice is very different from regulation. It is also subjective, and indeed there is a danger in regulators seeking to advise on good practice.

Bad Planning

Any initiative is likely to fail if it is badly planned; this is true of regulation. The process for developing new regulation, including the parliamentary process, is such that bad planning, if not inevitable, is very likely.

Much regulation is a knee jerk reaction to a particular incident, and is often done at haste with no proper consideration of the

issues. The bad planning is accentuated by a failure to consult effectively which in turn may well result from the relevant stakeholders being unable or unwilling to have an effective input. The consultation code of practice may be followed to the letter but this is of little use if there is no-one capable of making an effective response. This point is developed in Chapter 6.

While regulation may be targeted and may follow a specific example of malpractice, policymakers rarely resist the temptation to seek to do too much and throw in the kitchen sink. As policy is formulated, so the various bits of government, quangos and interest groups have their input, which can result in what might otherwise have been a simple regulatory regime becoming a complex one, without a proper focus.

“To meet a parliamentary timetable the government may be forced to accept amendments that it knows will reduce the effectiveness of the regulator”

The legislative process and then the process of setting up a regulator is a time consuming business, often taking years. The length of the period can mean that the problem has changed markedly since the beginning of the process, either because the market has changed of its own accord or because businesses have changed their method of operation in anticipation of regulation.

The legislative process can also sacrifice effectiveness for expediency. To meet a parliamentary timetable the government may be forced to accept amendments that it knows will reduce the effectiveness of the regulator, and the sections at the end of the bill will not receive the same scrutiny as those at the beginning.

Finally, new regulators generally are guilty of reinventing the wheel, partly because it is far from easy to obtain the practical advice that is needed in establishing a new regulator. While individual regulators may be very helpful to those setting up a new regulatory regime, this may not be sufficient, particularly when the issues are very different.

Political Interference

Regulators always have to anticipate political interference, either from ministers or from officials. Their agenda may be very different from the regulator's agenda, in particular being geared to the short term, to media stories and MPs' postbags rather than substantive issues. A regulator may find that its long term plan approved by the minister is suddenly thrown out of the window when a new issue suddenly hits the media and immediately becomes a key priority. There may also be excessive information requirements which take up valuable resources that could otherwise be used for mainstream regulatory work. Targets may be set which can be achieved, but again at the expense of the overall objective of the organisation.

A legitimate complaint many regulators have is that while they have to meet tough targets in terms of submitting annual budgets and other information to ministers and officials, this promptness is seldom reciprocated. Sometimes it can be well into a financial year before the plan and budget for the year receives formal approval.

The good regulator knows that there will be political interference, and attempts to forestall this as far as possible through having the right working relationships with key ministers and officials, whilst preserving the capability to accommodate an element of political interference if this cannot be avoided. The most effective regulators are those which operate outside their parent department, as non-departmental public bodies (NDPBs), since they have a greater degree of independence.

Poor Execution

Even where a regulatory system has been well designed, it will not be effective if it is poorly executed.

It seems that many regulators fall into the trap of concentrating on process rather than substance. This may result from inappropriate targets set at political level. For example, if there is a target for

a number of specific enforcement actions then a regulator will be tempted to pick the easiest targets rather than the most important ones.

Every regulator says that they are driven by outcomes and do not concentrate on process, but this is seldom the reality. It is easier to pull people up for a failure of paperwork, and more difficult to find out where they are engaged in serious malpractice. This is amply illustrated by the enforcement of the National Minimum Wage which concentrates almost entirely on complaints, and operates through detailed examination of the books of a business. The business that has kept immaculate books but has made a technical error in an area where technical errors are easy to make is liable to face a penalty, whereas the business without any books is unlikely to be caught.

Routine inspections of businesses seldom uncover major malpractice, and invariably fall into the process not substance trap. This is hardly surprising as those people who conduct such routine inspections will not have the capability to deal with major malpractice. Most regulators have wisely abandoned routine inspections for this reason, and instead have a smaller number of higher quality inspectors capable of dealing with the major issues.

Poor execution can also result from a failure to identify the major malpractice, and more importantly the failure to analyse how best malpractice can be stopped. Taking isolated enforcement action is unlikely to be effective. The good regulator needs to identify the key pressure points, and use disruption as a tactic as well as specific enforcement.

4. Why Deregulation Fails

The government has embarked on an ambitious better regulation initiative. It is not the first government to do so, nor will it be the last. And, like previous attempts, success will be partial at best. The politics and dynamics of regulation and deregulation are complex. It is not a matter of turning the tap on and off. Increasing regulation is like falling off a log; deregulation is more akin to climbing a mountain.

There is no expectation in the business community that the present initiative will be successful. The NAO report *Reducing the Cost of Complying with Regulations: The Delivery of the Administrative Burdens Reduction Programme* (2007) provides some useful information on this. 75% of businesses thought the burden of regulation would increase in the following year. 85% of businesses were not confident that the government could succeed in reducing the regulatory burden.

In October 2009 the NAO published *Complying with Regulation: Business Perceptions Survey*. The main conclusions from this survey relevant to the regulatory burden merit quoting –

- "Businesses' high level perceptions of government's approach to regulating remained generally more positive than in 2007, but were unchanged from 2008 to 2009."
- "As in 2008, very few businesses said that complying with regulation had become easier or less time consuming. Just one per cent of businesses said that complying with regulations had become less time consuming in the last year, whereas 37 per cent said it had become more time consuming, and 60 per cent said it had stayed about the same. Only 3 per cent of businesses believed that complying with regulations had become easier."

- "Businesses' high level perceptions of regulation are influenced by concerns over the introduction of new regulations or continuing changes to existing regulations. Of those that said that complying with regulations was more difficult, 43 per cent said that this was due to the need to find out about new regulations. Of businesses surveyed, 95 per cent said that 'having to keep up to date with changes in existing regulation' had not improved or had become more time consuming over the last 12 months. Business perceptions appear to be driven by the impact of new regulations or change to existing regulations, and there is a risk that these factors outweigh the recognition of reductions in the time spent undertaking administrative activities."

This chapter explains why deregulation does not happen and why reducing the regulatory burden is so difficult to achieve in practice.

Government Plans

In *Next Steps on Regulatory Reform* (July 2007) the government announced ambitious plans to cut the regulatory burden. It said that "The UK is taking forward one of the most ambitious and wide-ranging regulatory reform agendas in the world". The agenda includes –

- Measurement of the administrative burden of regulation.
- Simplification plans for each department and agency.
- A commitment to deliver a 25% reduction in administrative costs at both UK and EU level.
- Eighteen government departments and agencies have committed to reducing administrative burdens on business by at least 25% by May 2010.
- Introducing a Regulators' Compliance Code.
- Provision for a statutory duty on regulators to act in a proportionate, accountable, consistent, transparent and targeted manner.

Previous Plans

There have been several previous deregulation initiatives which were documented in the BCC Report by Tim Amber and Francis Chittenden *Deregulation or Déjà Vu?* (2007). They concluded: "Both [political parties] approach deregulation (removing existing laws) with enthusiasm, learn little or nothing from previous efforts, and have little if anything to show from each initiative".

Targets for Reducing Administrative Burdens

Businesses frequently complain that the burden of regulation is one of the greatest problems that they face. Regulators are fond of pointing out that when asked for specific examples few are forthcoming. Open invitations to give examples of burdensome regulation, such as the current BRE website, get a minimal response. One reason for this is valid scepticism that representations will not be successful and that therefore business is wasting its time in making a case.

There is scope for an endless debate about the costs of regulation and the corresponding burden borne by businesses and consumers. There are different types of costs that need to be clearly distinguished –

- Policy costs. For example minimum wage legislation is designed to increase the cost of employing lower paid workers.
- Licence fees.
- Cost of form filling and record keeping to meet regulatory requirements.
- Cost of keeping abreast of regulatory requirements and taking advice on how to meet them.
- One-off costs of implementing a new regulation or changes to an existing regulation, such as reprogramming software and reprinting literature.

- The welfare cost to consumers of increasing barriers to entry, thus increasing market power, and hence increasing prices and reducing cost efficiency.
- The welfare cost to consumers of deterring or delaying innovation.

In measuring the regulatory burden it is necessary to deduct costs that would have to be met in any event. For example, all businesses have to meet the costs of administering a payroll and ensuring that the health and safety of workers is protected. But there will be some additional costs in these areas that businesses have to meet solely as a result of regulations.

The government has made a brave attempt to measure the "administrative burden". The official definition of administrative costs is "the [recurring] costs of administrative activities that businesses are required to conduct in order to comply with the information obligations that are imposed through central government regulation".[1] The government has estimated total administrative costs to UK businesses at £31 billion. Of that £31 billion, after 'business as usual' costs had been taken out, the administrative burden was estimated as just under £20 billion as at May 2005[2]. However, the National Audit Office report pointed out that the approach used does not measure the costs to business of complying with the policy objectives of regulation; for example, having to make adjustments to premises to ensure disabled people can access them. Neither does it measure 'one-off costs' nor the 'financial costs' of complying with regulation, such as paying tax or licence fees.

In respect of the 25% target to reduce administrative costs announced in July 2007 the NAO commented: "Reductions are calculated at an aggregate level and, therefore, the total £4 billion reduction would mean only a small average saving per business per year considering that there are over two million registered compa-

1 This approach is based on the so-called "Standard Cost Model" also known as the "Dutch Model", which is also used by the European Commission. The Netherlands employed this model as the basis for imposing declining regulatory budgets.

2 *Reducing the Cost of Complying with Regulations:The Delivery of the Administrative Burdens Reduction Programme*, NAO, 2007

nies in the UK, excluding the self-employed, partnerships, charities and third sector organisations". It went on: "There is, therefore, no guarantee that a 25% reduction in administrative burdens will lead to a noticeable change in the resources that businesses devote to complying with regulation. Administrative burdens are likely to be a relatively small element of total cost to business of complying with regulation."

The NAO survey showed that the administrative tasks covered in the measurement exercises were not always cited by businesses as the most burdensome aspects of complying with regulation. Businesses rated the following activities as particularly burdensome: keeping up-to-date with changes in existing regulations; the time it takes to go through the whole process of complying; the lack of information about which regulations apply; and finding information and guidance.

The Extent to which Rapid and Tangible Cost Savings can be Delivered through Deregulation is Overstated

A key point that is frequently missed in the debate on deregulation is that many of the costs incurred in meeting new regulatory requirements are sunk costs; they are not going to be recovered if the regulations are removed. For example, if a business (perhaps wrongly) thinks that regulations require it to install a toilet suitable for disabled people and to provide wheelchair access to a building where this is very difficult, then it will incur substantial costs in doing so. If the regulatory requirement is removed there is no cost saving, at least in the short term.[3] Similarly, if a financial regulator imposes new information requirements then substantial programming costs may be incurred in meeting these requirements. If the information requirements are removed there is no equivalent one-off cost saving to the business. Most regulations do have ongoing costs, but in terms of their direct cost burden upon firms (as opposed to their

3 Over the longer term there would of course be savings when, for example, the toilet eventually was rebuilt or the firm eventually changed offices.

burden upon the functioning of markets — welfare distortions through impacts on the functioning of markets are generally recognised as much the largest component of regulatory costs) these are small compared with the initial costs of complying with the regulation. All this suggests that business would benefit more from a reduction in the burden of new regulations rather than seeking to remove existing ones. (In principle, consumers, of course, may take a different view.) It also suggests that the current initiative, based on reducing recurring administrative costs, may be raising false expectations as these are absolutely not the major issue.

The following examples illustrate the importance of one-off costs as opposed to recurring costs –

- For the administration of additional paternity leave and pay, a partial regulatory impact assessment in May 2007 estimated the employer one-off costs in year one at being between £1.53 million and £4.5 million and the recurring costs between £0.22 million and £1 million. A similar range of costs was given for year two.
- The Equality Bill, published in April 2009, estimated compliance costs of £211 million in the first year and annual costs of between £11 million and £17 million a year thereafter.
- Implementing the European Commission Directive on a list of ingredients exempt from allergen labelling had a one-off cost of £385,000 with no ongoing costs.
- Introduction of authorised economic operator status by HMRC had one-off transition costs of £67 million and ongoing costs of £5 million a year.
- The retrospective fitting of mirrors to increase the field of indirect vision of goods vehicles had one-off costs of £63 million and annual costs of about £7 million.
- The revision of Food Standards Agency Guidance on the use of marketing terms had one-off costs of £946,000 with no ongoing costs.

- The European Commission's Financial Services Action Plan as a whole is estimated to have imposed one-off costs on banks of 2.41% of operating expenses, but ongoing costs of just 0.43%.

Business Often Opposes Deregulation

While business objects to the burden of regulation, at the same time it frequently opposes any attempt to deregulate. There are good and bad reasons for this. The good reason has been covered in the previous section. Where deregulation will not result in a substantial cost saving there is little benefit to business. In most markets regulatory costs are passed on to the consumer and therefore are not ultimately paid for by business; they are regarded much like a form of tax.

The bad reason connected to this is that regulatory requirements are a barrier to entry. If a business has to meet substantial regulatory costs to get into a market this will be a deterrent to entry. Those who have paid the costs can legitimately argue that it is unfair if new entrants have a competitive advantage by not having to meet those costs, but protection is often an equal consideration.

Within businesses there are many people whose jobs depend on regulation – company secretaries (who may well be the most enthusiastic about the new Companies Act), health and safety staff, compliance officers in financial institutions and legal departments generally.

Trade associations, which represent businesses, may well be part of the pro-regulation group, as regulation increases the demand for trade association services. New regulations on the house purchase market, employment businesses and claims management companies have all proved to be the stimulus for new trade associations.

In the larger trade associations, committees often comprise experts on regulation. Their instinctive reaction is to ask for "clarity" and "certainty", ie more detailed regulation. They do not like

requirements to "take reasonable steps"; they want those steps to be spelt out so that they can build compliance around them. And of course, the more their particular area is subject to regulation the more important they become.

Government Will Chicken Out

It is easy to identify areas where deregulation would be desirable. However, each deregulation move has to be approved by a Minister and he or she will judge the potential benefit to business (a small cost saving) against the benefit and risk to themselves (minimal upside, criticism for removing "essential protection of the public" and huge criticism if the deregulation can be held to cause damage to anyone).

This can be illustrated by an example. Where labour providers transport their workers to their place of work in a vehicle with more than nine seats, a recent legal interpretation means that even if they do not charge their workers, they are deemed to be running a public service vehicle which must be licensed accordingly, and drivers must also have the appropriate qualification. The position was further complicated when in 2007 HMRC either reinterpreted existing legislation or changed its enforcement policy, such that in effect labour providers could not recover the costs of transporting their workers through agreed deductions from payroll, but instead had to implement a cash payment system or use devices such as making notional loans that were then covered from pay.

Some large labour providers run a fleet of vehicles and probably would resist deregulation as the arrangements are an effective barrier to entry. However, smaller labour providers have in some cases reacted to the new interpretation by ceasing to provide transport. They may have a tacit arrangement with some of their workers (even extending to providing the money to buy an old banger) that they will give lifts to their fellow workers, who will be

expected to make a financial contribution to running costs. In the view of this author, the effect has been that instead of workers being driven to their place of work in a minibus for which the employer has some responsibility, they are driven by fellow workers, often new to the country, in vehicles which may be in poor condition, and possibly uninsured.

Despite this, in this case and many others, it is difficult politically to achieve deregulation because the substantial benefit to workers and business is outweighed by the perceived downside risk to the minister.

Culture in Government and Regulators

Government is all about regulation. Many officials are devoted to work on regulation and the primary function of Parliament is to legislate. It is counter-intuitive to expect MPs, ministers and officials to want to do anything other than pass new laws and regulations. Not regulating, and even worse removing regulations, goes against the grain.

Deregulation Initiatives Can Easily Be Countered

Officials are highly skilled at circumventing deregulation initiatives; they have had years of practice. And the initiatives are easy to circumvent, because they are poorly designed.

The Better Regulation Task Force report *Regulation – Less is More* (2005) recommended a "one in one out" rule for new regulations. This is the easiest to get round, and indeed if anything actually encourages more regulation. There are any number of regulations that have long since fallen into disuse and which impose no burden on business. Now it is easier to replace them with regulations that really do impose a burden. Introducing the "regulation of sales of DVDs order" and abolishing the "regulation of sales of betamax video cassettes" is not regulation neutral.

The Conservative Party has supported a proposal that for any regulation that is introduced two or more existing ones will be removed. This would simply require rather more ingenuity on the part of officials to circumvent. Not only will the "Regulation of sales of DVDs order" require the abolition of the "Regulation of sales of Betamax video cassettes order" but probably also the repeal of the "Regulation of sales of long playing records order". An official sufficiently keen to avoid an impact of substance from such a requirement could attempt to identify redundant regulations that have no impact that they can get rid of, and indeed even build up a stock should the proposal ever come into effect. Officials/departments also have the option of making individual regulatory measures cover three or four separate items so that in future they will count as just one regulation rather than four. If this is the best that politicians can throw at regulators it will be no contest.

More generally, unless the underlying culture is changed to one in which genuinely seeking to remove regulations is rewarded, a one-in-two-out rule will be unlikely to achieve much. Where it is not feasible to remove two painless-but-pointless regulations, the "prevaricate and spin it out tactic" is easily used. The need for legal advice may have to be sought, the importance of consultation will be emphasised, and the burden of other work card will be played to the maximum extent. Finally of course is the "my minister is very concerned about this" combined with the threat of dire consequences if deregulation actually occurs. If, despite these obstacles, deregulation does actually occur then it can be counteracted by issuing "guidance" (which quickly assumes the status of regulation) or by stepping up monitoring and compliance arrangements.

Perhaps reacting to such analysis the more recent Conservative Party policy statement has modified the requirement to a more sensible, but still difficult, one that a new regulation must be accompanied by a 5% reduction in the regulatory burden.

Rules alone, however well intentioned, cannot make up for a culture in which over-regulation (regulatory caution) is rewarded and in which problems arising from deregulation are punished whilst problems that are the indirect consequence of over-regulation are invisible and ignored.

5. Guiding Principles

This chapter sets out seven principles that should guide future policy on regulation. They cover new regulation, deregulation and any variety of better regulation initiatives. These principles are expanded upon in subsequent chapters.

No Knee Jerk Reactions

As Chapter 3 illustrated there is always a temptation on the part of the media and politicians to respond to anything that goes seriously wrong by demanding more regulation. Among regulatory regimes that can be directly ascribed to single incidents are those for dangerous dogs (which stemmed from a single event of media hysteria in a slow news period), gangmasters (which resulted from the Morecambe Bay tragedy) and outdoor activities (which resulted from the Lyme Bay tragedy). Other single events have led to significant tightening of specific regulatory regimes.

While this is to some extent an understandable reaction it is one that needs to be fiercely resisted. Of course, there has to be a proper analysis of why things have gone wrong, and on the basis of such an analysis new regulation may be necessary, although it also has to be accepted that regulation cannot possibly end all malpractice. In many cases the problem was not the lack of rules, but rather the fact that they were not enforced. Introducing new rules is not going to deal with that problem.

This principle is in a way the easiest to implement. It simply requires ministers to stop committing themselves to introducing or extending regulation, but rather to commit themselves to a thorough analysis of what went wrong, and the implementation of

measures which will, as far as possible, prevent a recurrence. These may include new regulation but might also include devoting more resources to enforcing existing regulation.

Enforcement is as Important as Rules

This leads directly on to the second point, which applies not only in respect of introducing a new regulatory regime, but rather more in the operation of all existing regulatory regimes. A great deal of time and effort goes into writing rules that regulated businesses must comply with. These rules can sometimes be very long and complex (such as those produced by the Financial Services Authority), or so short that some might argue that they are not sufficiently definite (such as those of the Claims Management Regulator). By contrast, comparatively little attention goes into the enforcement plan or indeed into considering whether particular rules can be enforced at all.

Rule books often have many "nice to haves" when the real target is a small number of significant areas of malpractice in which the consumer is seriously disadvantaged. Having rules that concentrate on such areas with clear enforcement mechanisms is more effective than having a voluminous rule book attempting to cover every conceivable malpractice as well as some that may not be conceivable.

Enforcement needs to be built into the rules rather than there being an automatic assumption that enforcement will happen. This is a major issue where central government introduces new regulations and simply says that local authorities will be responsible for enforcing them through trading standard departments, which are often not resourced adequately to discharge their existing duties let alone any new ones.

"Enforcement needs to be built into the rules rather than there being an automatic assumption that enforcement will happen"

Regulators differ considerably in their enforcement powers. Some have the right to remove a licence to trade immediately, albeit subject to an appeal process. Others can take action only after going through a tortuous legal process – severely limiting the number of enforcement actions that can be pursued.

One might express the point in a stylized way by saying that the current emphasis is something like 90% on rules and 10% enforcement, whereas a more proper balance is probably 30% rules and 70% enforcement.

Full Impact Assessments

Over the last few years, a great deal of work has been done in Britain and internationally on measuring the administrative costs of regulation. Based on work originally done in the Netherlands, a standard cost model has been developed to measure the administrative burdens of regulation. A detailed manual is available on the BIS website on how to use the model.

Any impact assessment should begin with clear statements of why government intervention is required in the sector at all and what is the purpose and intended outcome of this specific regulatory intervention. Quantifying the benefits of any regulatory measure is always difficult but at the least these should be explained and, wherever possible, quantified. It is not sufficient to argue that a regulation is necessary by using clichés such as "ensure enhanced protection of the public, particularly the most vulnerable" or to "increase the benefits of competition through greater transparency".

It is standard practice in many departments to do an impact assessment covering three options. Often, these are the do nothing option which is generally rejected immediately on the grounds that there is a problem so doing nothing is not acceptable, the preferred option and an over-the-top option which is rejected on the grounds

that it is over-the-top. Complex issues seldom lend themselves to three neat options. It would be preferable for government and regulators to be honest here and to set out clearly their preferred option with the impact assessment being based around this. However, the impact assessment should also carefully consider alternatives to regulation such as better enforcement of existing regulation and self-regulation.

An impact assessment needs to go beyond the administrative burdens measured against some difficult quantified benefits. The costs of regulation fall into a number of different categories -

- The administrative burdens, that is the costs to business of complying with the regulations such as the cost of licence fees and reporting requirements. These burdens generally need to be sub-divided into initial burdens that apply the first time the regulation is introduced, and ongoing annual burdens.
- The policy cost, where regulations are deliberately designed to increase the cost on business. An obvious example is the minimum wage.
- The likely impact of the regulation on the activity being regulated. Will it lead to a reduction in activity, a re-organisation of the activity so as to avoid regulation or an increase in activity because barriers to entry are removed? Most impact assessments assume that the marketplace would be broadly unchanged by regulation, although this is very seldom the experience in practice. A number of examples can be given of how regulation has significantly affected the marketplace –
    - Money Laundering Regulations (or rather the interpretation of them) has now made it difficult for people to open bank accounts. This applies particularly to recent arrivals in the country who may not have their passport, because it has had to go to the Home Office to satisfy another Government scheme, and they have no gas bills because they have not

lived in the country. The requirements have led to a cottage industry of producing utility bills off the internet, and at the same time has encouraged the growth of non-bank banking services.

- The requirement in Minimum Wage legislation that for all practical purposes employers who provide accommodation to their workers who are on minimum wage cannot charge more than £32 per week in rent. The effect of this has been that employers have ceased to provide accommodation, whereas presumably the public policy anticipation was that rents would be lowered.

- Competition. This is closely related to the impact on activity. Good regulation should enhance competition. This will apply particularly where businesses have been able to undercut others by providing a poor quality service which the public are unable easily to detect. A good example is car servicing and repairs, where the report *Car Servicing and Repairs* (DTI, 2002), found that only 5% of garages surveyed were rated very good indicating that they had carried out a thorough service according to the manufacturer's service schedule, rectified all the introduced faults and other defects found prior to service, whilst 51% were rated either poor or very poor.

  It seems as if one business can undercut others simply by not doing the work properly and the public will never know about it. If businesses were prevented from charging for work that had not been done, or doing unnecessary work, then those businesses that have operated properly would be better able to compete. A number of regulatory measures do enhance competition, in particular by requiring certain information to be provided in a standard way. Another good example of this, again from the car industry, is the requirement for fuel consumption to be presented in a standard way. However, regulation can also have an adverse effect on

competition by raising barriers to entry to new businesses and by limiting the scope for goods or services to be provided in a particular way.

- The effect on innovation, particularly where regulation is fairly prescriptive. Whether because of technological progress or other reasons new ways of delivering goods or service may be developed. If the regulations do not allow for these it may not be possible to implement them.
- Side-effects. Almost all regulatory measures have side-effects about which one will find little or nothing in impact assessments but which in many cases could have been, and indeed were, easily predicted. The re-organisation of activity to circumvent regulation is one such point, but there can be many other effects.

Ideally, impact assessments should be published alongside a policy proposal and should therefore be subject to consultation in the same way as the proposal itself. However, the respondents to a consultation exercise may not bother with challenging the impact assessment or indeed often challenging the proposals themselves even if they believe that they will not achieve their desired effect. Policy making would be significantly enhanced if, in addition to consultation on policy proposals and impact assessments, an independent consultant was commissioned to review whether the regulation was likely to achieve its desired impact and whether the impact assessment was appropriate.

It is, of course, possible to question whether this would work — why wouldn't the practical upshot be just that regulators would choose "independent consultants" that they knew would provide them with the answers they wanted, so the "review" would be seen as a sham? However, if used properly, this could serve as a useful additional regulatory hurdle to help change the cultural bias towards over-regulation.

Concentration on Substance not Process

Almost all regulators say in their public statements that they are concerned with significant malpractice, and that it is not their intention to become a box ticking regulator concerned with process. In practice, many adopt a box ticking approach and become concerned with process. The reasons for this are fairly obvious.

Where regulators are given targets in relation to enforcement activity then it is easier to pick people up on documentation failures than it is for ripping off the public. Targets set by central government need to recognise this and be focussed on outcomes rather than outputs.

Regulation is not the most exciting job in the world, and it is difficult to get good quality regulatory staff who are capable of identifying and dealing with malpractice. Where such people exist they are often poached either by the regulated institutions or by lawyers or consultants.

“Regulation is not the most exciting job in the world, and it is difficult to get good quality regulatory staff who are capable of identifying and dealing with malpractice”

Routine monitoring, whether desk based or site based, often degenerates into a box ticking approach, because this is what the staff concerned are most able to deal with. They can readily identify that a business has failed to comply with information in respect of data protection, notifying changes of address, submitting returns, having complaints procedures on their websites, and explaining in writing to a customer why they have done something. It is more difficult to deal with a business that can tick all of these boxes but routinely ‘rips off’ customers, perhaps by misleading them as to what goods or services are being provided, giving misleading information on the cost of a particular service, or by failing to deliver the goods or service that have been paid for.

One method of dealing with this problem is to significantly reduce regulatory requirements that come into the box ticking category, particularly where these are the responsibility of other

regulators. But the principal point is that enforcement must be at the centre of the whole regulatory regime, built into the rules as well as the implementation.

Regulation is a Public Good

The Treasury has a general policy that regulators should cover their costs through the fees they charge to regulated institutions. Until recently this was understood to cover not only the costs of licensing or registration but also of ensuring compliance. This is an untenable position. It can only be by chance that reasonable regulatory fees in aggregate exactly equal the reasonable costs of regulating a sector. The application of this policy can cause the regulator to trade off quality against viability and in extreme cases (of which the Security Industry Authority has been an example) to seek to widen regulatory scope to increase revenue as opposed to dealing with malpractice.

The Treasury position may be connected to the idea that costs imposed across the industry will appear in prices in a competitive market, and since consumers are the key beneficiaries of regulation they should also pay. But this is confused, for often the beneficiaries of regulation are not directly within the industry at all, and it is precisely the "externalities" associated with the industry that justify regulatory involvement. A topical example might be the banking sector, where it is believed that systemic effects of banking collapse would go well beyond the banks themselves and their customers. Other examples would obviously include areas where public health issues were a factor — diseases arising because of unsanitary storage might be passed on to many people that were not customers of the original product.

Regulation is a public good that, if it is effective, can often have benefits that go beyond the sector involved and thus should be paid for by the public purse. This is doubly so in cases where intervention is to the benefit of particular players in an industry (e.g. those

consumers that might otherwise end up purchasing from a dodgy firm) rather than the rare – or perhaps even implausible – case of being to the benefit of all consumers or all firms together. It would liberate regulators if they were able to set regulatory fees according to fairly standard criteria, with the relevant department providing any additional finance that is necessary. It is feasible that some regulators would actually earn more than the cost of regulation, although this would not be the general position. This is covered in detail in Chapter 11.

Regular Evaluation

Most good organisations, whatever their corporate form and whatever activity they are involved in, build evaluation into everything that they do. This is not as yet standard practice in the regulatory field. What evaluation there is tends to be fairly mechanistic and dealing with outputs rather than outcomes.

Many regulators produce self-assessments of their performance. These can often be valuable even if there is the risk that they will be biased. They are certainly better than nothing, but best practice should increasingly be to commission external evaluations. These might be of the work of particular regulators especially where they are small, such as the Hearing Aid Council or the Claims Management Regulator, or of particular significant regulations or regulatory initiatives in the case of larger regulators, such as the Approved Code Scheme operated by the Office of Fair Trading or the Treating Customers Fairly Initiative of the Financial Services Authority.

6. Effective Policy Making

Get the Big Picture Right

Most of the key decisions on regulation are made at the early stages and are in respect of scope and general approach. This is the time when the most skill is needed in identifying the nature of the issue and how it can best be dealt with. If the problem is not fully understood regulation is likely to fail.

Using the principles set out in the previous chapter, this work has to entail consideration of whether better enforcement of existing rules or even doing nothing may be the right approach.

The ideal approach is to commission a study on the nature of the problem and how it can best be dealt with. However, there is a danger here. If an issue is looked at in isolation then it is easy to conclude that there are problems and that regulation can help to deal with these. But there may be many more serious problems that have not been studied. A study conducted in isolation is almost certain to conclude that there should be regulation, and probably as a matter of urgency. This silo approach has led to regulation in sectors where there seems little basis for asserting that there is significant malpractice (such as claims management companies) and no effective regulation in sectors where it appears that there is more serious malpractice (such as car servicing and estate agency).

It should also be recognised that sometimes enforcement is not applied because the relevant agency judges that the particular problem is not sufficiently large to justify intervention when compared with problems elsewhere. Sometimes several agencies may take the same view in respect of a firm, which is effectively cheating all of its stakeholders for this reason. It is essential therefore that this study should not approach the problem with a silo mentality.

When new regulation is under consideration it should be part of the process to identify if this is a priority area. The views of the Office of Fair Trading and consumer organisations are important here. These views are needed at the earliest possible stage – to consider whether it is worth exploring the scope for new regulation. However, if asked in isolation as to whether the regulation of any particular goods or services is a good idea they are likely to say that it is. Consumer Focus, the Government established consumer body, and the Office of Fair Trading should both be required to produce annual shopping lists of the areas where they would like to see more or less regulation, and the criteria that they have used in developing such lists. Should any new proposal be made during the year that is not high on their priority lists, then there would be a presumption against it unless the two bodies could produce a compelling argument to the contrary.

Making the Rules

Once a decision has been made to regulate, whether by the introduction of a new regulator or new rules by an existing regulator, then the hard work in drafting the rules needs to take place.

The general presumption at present is that regulatory rules are made by ministers on the advice of policy officials while regulation itself is the responsibility of another group of people who have to take the rules as given. It has never worked fully like this; rather, all regulators expect to have a significant input into the rules and in practice may play the major part in writing them.

It would be sensible to go further than this and for the normal position to be that the regulator should make the rules subject to the approval of the relevant minister. The advantage of this system is that the rules are made by the people who have the most knowledge of the businesses they are regulating and most importantly who will have responsibility for enforcing them. This avoids the

diffusion of responsibility where a regulator is being asked to enforce rules that are unenforceable or undesirable, and ministers have the option of hanging regulators out to dry because they have failed to do what ministers required.

This might seem to be giving more power to unelected quangos and less to politicians. However, ultimate responsibility for approving rules would remain with ministers and where appropriate they could use their influence while the rules are being drawn up. In practice this happens already when regulators have power to make rules. The minister's officials will indicate to the regulator that the minister will not approve rules unless certain provisions are included or not included.

The regulator must have a thorough understanding of the market, the businesses in that market, and the malpractice that regulation is designed to deal with. This will typically be a much more in-depth understanding than that available to policy makers when they took the decision to regulate.

Regulators need to be conscious of speed. Establishing a new regulator usually takes years, and even a new set of rules from an existing regulator can take years. The longer the time period the more likely it is that the problem will have changed by the time the regulations come into effect, and the greater the opportunity for those businesses engaged in malpractice to restructure their arrangements so as to minimise the effects of regulation. Against that however, is the need to ensure that the work is properly done and there is adequate consultation. Generally, the balance has shifted away from the importance of speed; this needs to be remedied.

The point has been made that enforcement is more important than rules, and the sensible regulator therefore tries to make rules self-enforcing as far as this is possible. Where businesses are required to register then the registration process should be geared to help ensure compliance with the rules, for example by requiring a statement

signed by the chief executive, and if necessary backed up by some documentary evidence that the business is complying and will comply with the rules. Audits, whether desk based or site based, can help ensure compliance, but are expensive and really are not self-enforcing. The supply chain, while not technically self-enforcing, can have the same effect. For example, when the mortgage industry wanted to regulate intermediaries it did so primarily by the requirement on mortgage lenders to take business only from those intermediaries that were registered with the Mortgage Code Compliance Board. Regulation of general insurance intermediaries operated in a similar way before it was taken over by the FSA.

Stakeholder Input and Scrutiny

Stakeholder input and scrutiny are essential if regulation is to be effective. However skilful the regulator is there is no way in which he is going to produce 100% effective rules on his own. The scrutiny process currently has much scope for improvement.

Great improvements have been made in the consultation process over the last ten or so years aided by a code of practice and the dissemination of best practice generally within and between government departments, but the system is far from perfect. There is not surprisingly an over-emphasis on meeting the single quantifiable part of the code: that there is a 12 week consultation period. This is unfortunate as the effect of this requirement is that sometimes there is no consultation because having a four week consultation period violates the code whereas having no consultation at all does not (an excellent example of regulation having a perverse effect). Conversely, where officials wish to slow down a new regulatory or deregulatory measure they can easily deploy the "we must do a 12 week consultation" card.

The best consultation exercises are genuinely open and seek to improve the policy making process. There is scope for improve-

ment generally. Consultees are rightly frustrated if no notice is taken of their views. Consultation documents must clearly identify the major issues and state those points that are already settled. Providing specific consultation questions is a helpful aide, certainly to those analysing responses, but there is a danger that these concentrate on points of detail and miss the big issue. The good consultee always identifies the issues that are most important to it.

Where the process is not seen to be open then consultees are likely to tell government what they want to hear and the whole process becomes something of a sham. The result can be bad policy making with scope for mutual recrimination on who is to blame.

“Where the process is not seen to be open then consultees are likely to tell government what they want to hear and the whole process becomes something of a sham”

The consultation process often fails to produce an adequate consumer input. There is no point in simply saying in a consultation document that “We welcome the views of ordinary consumers”. Ordinary consumers are not equipped to respond to consultation documents, either individually or collectively. Organisations such as Citizens Advice, the new Consumer Focus (embracing the National Consumer Council and other consumer bodies) and Which? are useful organisations, but are simply not equipped to comment on every single consultation paper. Regulators should have a duty to ensure that there is an adequate consumer input.

Businesses are generally better equipped to respond, through trade associations, but many trade associations are not effective, and particularly in areas subject to regulation for the first time there may not be any meaningful trade association able to contribute effectively to the policy making process. A regulator benefits by having an effective, well-resourced trade association representing the business sector that it is regulating. Such an association can act as a channel of communication, can provide a valuable reality check on what is being proposed, and, most importantly, can help

marshal and put over the industry interest in a way that can best be used by policy makers. If such an association does not exist than those responsible for regulation should either seek to encourage the creation of such an association or they must provide alternative means of obtaining an industry input such as using a consultant or organising a series of meetings.

On many occasions it would be sensible for those making the rules to commission an independent reality check on what is being proposed, focusing particularly on whether the proposals will achieve their desired objectives. The normal consultation process is flawed in that almost all those responding have a vested interest. An independent assessment would provide a valuable additional resource for policy makers. There should be no need to use major consultancy firms for this, and typically no more than a few days work should be necessary.

A useful tactic employed by some regulators is to establish a permanent consultative group of relevant stakeholders. Such groups have no powers, no statutory position, and even their membership can be fluid. Stakeholders will want to be involved in them if the groups are capable of having an influence over the regulation and if they provide an opportunity for current issues to be discussed. The real value of such groupings is that particular stakeholders have to justify their views in front of all other interest groups which can make some of the more absurd positions difficult to sustain. Generally, such advisory groups can usefully narrow areas of difference between stakeholders, encourage stakeholders to work together, and also get some "buy in" to the regulation. On really difficult issues it may be the case that at the end of a lengthy discussion everyone will agree that there is no ideal solution, but that chosen is the "least bad" option in the circumstances. The Regulatory Consultative Group established by the Ministry of Justice to deal with Claims Management Regulation has been one such successful grouping.

Implementation

The point continually made in this paper is that enforcement is more important than rules. The way that a new regulatory regime is implemented is therefore critical. There is a general requirement that businesses are given adequate notice of new rules and regulations and also now a general presumption that all new provisions should be introduced on one of two days - 1 October and 6 April.[4] (This particular policy needs revisiting in itself, in that it can result in either half baked rules in order to meet the timetable, the failure to give adequate notice or important new rules and regulations being delayed until the next common date.)

A regulator will quickly get a reputation for being effective or ineffective so action in the early days is essential. A light touch approach giving people time to adapt will simply encourage non-compliance. Provided proper notice has been given, and the regulator concentrates on dealing with major malpractice not paperwork errors, then the really effective regulator will seek to initiate enforcement action in the first month or so of new rules coming into effect. This will help set the tone so that all businesses know that effective regulation is in place.

4 From the BIS website: "*Common Commencement Dates*
The Chancellor of the Exchequer announced in December 2004 that Government would extend common commencement dates (CCDs) for all legislation bearing on business. For areas covered by the CCD initiative, and subject to some exceptions, legislation bearing on business will be commenced only on either 6 April or 1 October each year. Departments and Agencies are also required to prepare an annual statement, issued each January, indicating legislation expected to be commenced on the following April and October dates.
The purpose of CCDs and especially the annual statement, is to help business plan for new legislation and to increase awareness of the introduction of new or changed requirements."

7. Enforcing the Rules

Some General Truths

There are four general truths about enforcement -

- If there is no effective enforcement then the rules will be widely ignored, and there is a danger that those breaking the rules will have a halo effect by being able to claim that they are being regulated.
- The severity of penalties is of no relevance if in practice they cannot be imposed.
- Criminal prosecutions in the courts will be few and far between, and are resource intensive to the extent of severely diminishing the capability of the regulator to undertake other enforcement work.
- The reputation and credibility of the regulator will be established at an early stage and by the enforcement action taken rather than by statements made.

Understanding How to Make Enforcement Effective

At a very early stage in developing a regulatory regime the regulator has to understand how enforcement can be made effective. This must follow a comprehensive analysis of the business being regulated, drawing on whatever knowledge and intelligence is available.

A regulator needs to identify the major malpractices that it is targeting. It is important not to fall into the trap of regarding each breach of the rules as equally important which inevitably leads to a process-driven bureaucratic operation. Some examples can usefully illustrate the difference between minor technical transgressions and areas of major malpractice:

- HMRC is responsible for enforcing the minimum wage legislation. The major malpractice is paying below the minimum wage, generally in a way that cannot easily be detected, for example through payments being made in cash. However, compliance is complaint-driven and generally checked by looking at company records, which can mean that technical transgressions in complex areas such as holiday entitlement and payment for accommodation can be the major targets.
- In estate agency the major malpractice is probably estate agents favouring particular purchasers (including themselves or associates), but this cannot easily be detected, so rather attention is focused on client paperwork.
- Car servicing is subject to a code of practice rather than any statutory regulation. The major malpractice is charging for work that has not been done, which is difficult to detect. Failing to give a quote in writing is an easier target.

Having identified the major areas of malpractice the regulator then has to devise the most appropriate means of dealing with them. This requires identifying "pressure points", where regulatory action is most likely to be effective. These pressure points may be some way from the malpractice itself.

The pressure point will often be somewhere in the supply or the distribution chain, particularly for sectors with a large number of small businesses and a small number of much larger businesses that are either suppliers or customers. The example has already been given of advertising, which is in effect regulated not through the advertisers but more through the media. Similarly, the Gangmasters Licensing Authority is able to exert some of its regulatory influence through it being an offence for a labour user to use an unlicensed labour provider, and by applying pressure on the supermarkets to ensure that the businesses that supply them only use labour providers that are licensed and that comply with the rules. In the

financial services sector product providers have generally been made responsible for ensuring that the intermediaries who supply business to them comply with the rules. In these sorts of ways regulators are able largely to ensure compliance by outsourcing the responsibility for it.

In sectors where there is malpractice there is quite often tax evasion, either or both VAT evasion or operating in cash thereby evading income tax and National Insurance contributions. The appropriate regulatory response to malpractice may therefore be to use the tax system, for example by doing limited audits that quickly identify VAT evasion, and then passing on the necessary information to HMRC. This tactic may not address the principal malpractice that the regulator is concerned with, but nevertheless may be the most effective way of dealing with those responsible for that malpractice.

Identifying the Key Culprits and Targeting them

In addition to identifying pressure points a regulator, in gathering information and intelligence on the activity it is regulating, should identify those businesses that have characteristics that suggest they may be engaged in significant malpractice. Hard evidence from trading standards services and organisations such as Which? and Citizens Advice may be helpful in this respect. A regulator also needs an ongoing intelligence mechanism to identify new businesses that appear to be engaged in malpractice in a significant way.

The regulator must have a risk assessment mechanism that identifies such businesses and then a programme for targeting them. Depending on circumstances this might be done in a highly visible way.

The Authorisation Process is Key

For most activities where there is malpractice, there is no requirement on businesses to be specifically licensed, authorised or registered.

Where there is such a requirement then this should play a major part in the regulatory regime. The regulator is at its most powerful when it has specifically to authorise businesses to undertake a particular activity. Once a business is authorised the ability to deal with malpractice is reduced. For this reason "grandfathering", allowing a particular group of businesses to avoid the authorisation process, for example because they have been subject to another regulatory regime, should generally be avoided.

The regulator has to seek the right information at the application stage. The design of the application form is critical. Some regulators, notably the Financial Services Authority, have put a great deal of effort into designing application forms, and this expertise should be readily available to, and used by, other regulators. A good application form should include the following features -

- Requiring essential information (such as the National Insurance number, any criminal record or regulatory action) on the people running the business, including those who have no formal position.
- The application form should be completed online as this minimises the scope for error and therefore substantially reduces the workload on the regulator. Where application forms are completed on paper the experience of regulators is that as many as 80% can be faulty.
- The application fee should be requested in the form of a cheque (at least while cheques remain a standard method of payment), details of which should be retained.
- Ideally an application form should be available only to businesses that first provide basic contact information. This can help deal with subsequent claims by people that they did not know that they had to be authorised. Also, those businesses that began the authorisation process but did not complete it may need to be followed up to see if they are continuing to trade without authorisation.

The application form should include a compliance statement. The person running the business applying for authorisation should verify that he has complied with certain key specific regulatory requirements, and, if necessary, provide documentary evidence to prove this.

Having obtained the information on the application form the regulator needs to undertake a number of checks before giving authorisation. Increasingly a website search is now the most important of these checks. Where the business is a company then a Companies House check can usefully verify the information provided on the application form.

However hard a regulator tries it is invariably the case that it will authorise businesses that are engaged in malpractice. Ideally the regulator should know when it is doing this through its intelligence mechanism, and also through the way that the business undertakes the application process. Those businesses that are deemed to be high risk should be the subject of the most monitoring and, if necessary, enforcement action. Regulators have an important decision to take on tactics here. There is merit in authorising marginal businesses with the aim of bringing some to compliance and because enforcement action can be easier against businesses within the fold rather than outside it. On the other hand, there is danger in authorising businesses known to be committing malpractice because of the signal that it gives to those businesses and its competitors and also because authorisation can give a halo of respectability.

Routine Monitoring

Routine inspections of businesses should no longer be standard practice. This issue was helpfully considered in the Hampton Report (2005). The report commented: "The review believes that all inspection programmes should be based on comprehensive risk assessment

... if risk assessment has been properly used, businesses being inspected will generally be the riskiest, and as such those with the most complicated problems. For this reason, it is particularly important that experienced, expert staff should be assigned to carry out inspections."

However, a regulator will need to carry out some monitoring activity for all businesses. Monitoring websites where these are relevant is simple and cost effective in that it can be entirely desk based and there is little scope to argue over what is on the website. Some regulators also make regular requests for information on particular aspects of the business they regulate, for example requesting copies of contracts or marketing literature or asking for basic information. Provided that such requests make no significant call on the time of businesses they are a simple and effective regulatory technique that serves to remind businesses of the rules as well as to help secure compliance.

Publicity

Regulators need to use publicity carefully. A non-stop barrage of press releases about promises of tough action, warning notices issued and threats of new rules will merely convince people that the regulator is ineffective. By contrast, the occasional publicity dealing with a specific enforcement case will serve to demonstrate that the regulator really does mean business and is effective. Securing the right sort of publicity, particularly in the trade press, is important for regulators, and is worth some investment of both time and money.

The point has been made already that regulators rapidly gain a reputation, either for being effective or for being soft. While to a large extent that reputation will depend on the substantive position, where a regulator has got a good story to tell it is essential that it plays its part to get that message over to the whole sector and to other relevant stakeholders.

8. Backdoor Regulation

So far this paper has concentrated on overt decisions to regulate. In practice, the regulatory burden on business also depends on a combination of other factors, which generally happen without scrutiny, without consultation and often with very little notice. This chapter considers the phenomenon of backdoor regulation, or "regulatory creep" as it is sometimes known, which arises through one or more of gold plating, the use of guidance as a regulatory tool, administrative interpretations, judicial decisions, legal scare-mongering and the impact of external and internal compliance experts.

Gold Plating

Gold plating is the implementation of European Union or domestic legislation in a way that goes beyond the requirements of the original legislation. In respect of EU Directives, it can take one or more of the following forms -

- Adding additional requirements.
- Extending the scope to areas not required by the Directive.
- Increasing the specific requirements (for example, a Directive may require minimum capital of €1 million, while UK legislation may increase this to €2 million).
- Adding documentation or verification procedures to demonstrate compliance.
- Implementation prior to the deadline.
- Imposing an onerous enforcement regime.
- Not taking advantage of permitted derogations.

A characteristic of gold plating of EU directives is that consultation is often inadequate or non-existent, with debate being stifled by words such as "This has to be done to implement European legislation – there is no choice".

Gold plating occurs as a consequence of a number of social and psychological factors. Cultural issues within government and regulators are important. There is perhaps a presumption that a European Directive must be implemented fully, and preferably quickly. Officials tend to be rewarded by fully implementing a Directive on time, not for minimising the impact on a UK business. The UK legal framework also dislikes vagueness. A directive requirement to inspect "regularly" may be deliberately worded to accommodate the fact that some Member States inspect weekly while in others it occurs only once in a blue moon. However, the UK practice would be to translate "regularly" into something like "monthly". There is also an irrational fear of facing infraction proceedings by the European Commission.

There is a particular concern in Britain that a number of other European countries may be as rigorous as the UK in formally implementing a Directive, but they then have no intention of effectively enforcing it, such that the impact of the directive is minimised. In a number of sectors, British businesses have commented that practices that they are told are not permitted in the UK under European law seem to continue without any hindrance, particularly in France and Italy. Much of this evidence is anecdotal, but if it is indeed the case that other countries are less effective in enforcement of European directives than the UK, then the UK should be more vigorous in challenging directives where implementation is in doubt and in challenging enforcing activity, or the lack of it in other countries. Where there is no domestic reason to enforce a directive that is not being enforced in other countries then the UK should consider formally suspending enforcement action or revising the domestic legislation that implemented the directive.

Guidance

Guidance issued by regulators is often well-meaning and intended either to help business comply with rules or to promote good practice. It is often industry supported, with the relevant trade association having a significant input into its drafting. However, there is a danger that guidance may be misinterpreted by businesses or that it may be enforced by suppliers or customers or other regulators. And there is scope for compliance professionals to scare monger.

On the majority of new regulatory requirements there is no guidance from the relevant government department or regulatory agency. Whether or not there is guidance depends not so much on whether there is a need for guidance but rather on the policy of the relevant department or agency and the resources available to it. There is also a tendency for guidance not to be issued on the "too difficult" areas, in particular those where there is uncertainty or which cut across the interests of different departments and agencies.

> "Much of the best guidance on legislative and regulatory requirements has been produced by trade associations which are much closer to business than any government department or agency can ever be"

The fact that there is no official guidance is not necessarily a bad thing. For many years much of the best guidance on legislative and regulatory requirements has been produced by trade associations which are much closer to business than any government department or agency can ever be. The good trade association will work closely with the government department or agency, and the guidance that it issues will often have an unofficial sign off from the department or agency. This arrangement is advantageous because in this way the regulator or government department can often get its message over without having to go through the formalities that it would have to do given its statutory position. There is also a clear distinction between guidance and the specific requirements of the legislation or regulation.

There are other sources of good guidance including accountants, solicitors and consultants in specialist areas. Their guidance and that of trade associations is not always perfect but most businesses that wish to do so have managed to find the sort of combination of guidance that they need.

There are four inherent problems in the production of guidance by regulators -

- Much guidance, sometimes euphemistically called "clarification", is actually produced where the regulation is deficient or where there are conflicts between different legislative and regulatory requirements or because of new interpretations. For example, over the last few years BIS has issued a steady stream of guidance on the National Minimum Wage following tribunal decisions or new interpretations of existing regulations.
- Businesses frequently find themselves in difficulty because different departments and regulators (or even different sections within the same department or regulator) have differing views on the same requirements or may have requirements which in themselves might be reasonable but which conflict with those of other agencies or departments. Guidance is particularly needed in such areas but seldom appears.
- Guidance is frequently used deliberately or carelessly to gold plate regulation. Sometimes it is done deliberately because it is felt that the regulation is not sufficient. More often, guidance tends to set out how businesses can comply but often that guidance on "how" becomes translated into quasi-regulation.
- Even if guidance on how to comply is acceptable, this guidance is often gold plated by other regulators, by trade associations and by consultants, such that the guidance becomes part of the regulation.

Administrative Interpretations

From time to time the official view of what a particular requirement means can change, perhaps because of a legal decision or simply because the issue has been looked at in more detail and a different view has been reached. Often where this occurs it will be stated that what has happened in the past is wrong. This is inevitable in any regulatory arrangement. However, when there is a change in an administrative interpretation, which may have far reaching implications, there is often no scrutiny and no proper assessment of whether this is appropriate or rather whether either a blind eye approach should be adopted or the regulation should be changed. Administrative reinterpretations can often be enforced with immediate effect and perhaps often without any real notice or explanation being given to those affected.

Judicial Decisions

Officials are fond of saying that they cannot give advice on whether something does or does not meet legal requirements as ultimately interpretation is a matter for the courts. Each year there are a number of judicial decisions, either in the courts or in tribunals, particularly employment tribunals, which materially change what was previously perceived to be the regulatory requirement. The judgment itself may be questionable, but nevertheless stands as an interpretation of the law unless overturned in a subsequent appeal or by legislation.

Even more so than in the case of administrative decisions, judicial decisions can become part of the regulatory regime with no notice, no scrutiny and no opportunity for considering alternative action. There is also a danger of gold plating in this area, with administrative interpretations having to be made of the circumstances in which the case alters what was previously believed to be the regulatory requirement.

Legal Scaremongering

Every new law and regulation is accompanied by useful guidance from some firms of solicitors on what businesses have to do to comply, but also some less than helpful guidance, and indeed press campaigns, by other firms of lawyers that are nakedly touting for business. Legal advice can easily misinterpret legal requirements and indeed can significantly gold plate them. The possibilities of enforcement action and penalties are often significantly exaggerated, the point having already been made that prosecutions of businesses are very rare.

Some businesses feel obliged to take legal advice on some regulatory issues, but to protect themselves lawyers may advise a belt and braces approach as no-one can ever be accused of giving advice which doubly ensured compliance. Businesses having taken legal advice often feel bound to follow it even if they do not agree with it.

The recent changes in company law have given ample scope for lawyers to advise their clients on all sorts of things that might be necessary, which in practice are of only very minor importance.

Compliance Consultants

In addition to lawyers there is now in many fields an army of compliance consultants who have much the same effect as lawyers. They are likely to exaggerate the impact of regulation as a means of getting business and if specifically consulted are likely to suggest going rather further than the bare minimum requirements of the law. Again, a business having taken such advice may feel obliged to follow it.

In-House Compliance Consultants

One would assume that in a rational business the people responsible for compliance have the best interests of the company in mind,

and to the extent that they are remunerated according to results then it should be in protecting the company from unnecessary regulation rather than enforcing it. In practice, compliance experts often go native, becoming even more enthusiastic gold platers than regulators themselves. They believe they will be judged on whether they are found not to have complied rather than whether they have contributed to the overall profitability of the business.

This tendency is most noticeable in health and safety matters where it is frequently argued that it is legal requirement, for example, to test and put stickers on all electrical appliances annually or that water must be kept at such a temperature as to burn hands so as to avoid Legionnaires' disease or that certain basic activities should be carried on only by somebody who is deemed to have some sort of appropriate qualification. It is also often found in data protection.

Case Studies

Two appendices usefully illustrate the points made in this chapter. Appendix 1 briefly summarises the additional regulation to which businesses that provide labour to the food industry have been subject in the period since September 2007. Appendix 2 sets out a specific example of gold plating by which a provision which gave a defence to businesses was transformed by guidance and the actions of others effectively into a legal requirement.

Combating Backdoor Regulation

Combating backdoor regulation is even more difficult than combating overt regulation, because often there are no specific steps that can be taken, given that there are no new laws and no new regulations. Generally what is required is constant vigilance on the part of officials and business, but also some fairly clear rules about the implementation of new interpretations or judicial decisions which materially change a

previously accepted position. It is appropriate in such cases for regulators to give reasonable notice of when implementation of the new interpretation will begin with no penalties being applied in respect of transgressions at an earlier stage. BIS adopted such an approach following lengthy discussion about the meaning of the accommodation offset arrangements under the National Minimum Wage. Although the wording of the Regulations had not changed, there was sufficient doubt that a consultation document was issued on the proposed new interpretation, and following comments on this a definitive guidance note was produced with implementation following many months later.

At a lower level a good recent example are the actions of the Gangmasters Licensing Authority. On 8 June 2009 it wrote to machinery rings (organisations that help farmers share farm machinery) about its interpretation of the legislation which until then had been that if a machinery ring worked by putting individual members in touch with each other to do business then the central body or office that runs the ring did not need to be licensed under the Gangmasters Licensing Act 2004. Having considered the matter it had now decided that in fact that they did need to be licensed. The GLA invited machinery rings to respond to the proposed change, and to set out reasons if they disagreed with the GLA view. Four weeks was given for responses. A meeting was also arranged at which this could be discussed. It was not intended to take any enforcement action until eight weeks after the date of the letter, giving machinery rings the opportunity to be licensed.

Appendix 1

New Regulatory Requirements on Labour Providers

Labour providers supply staff to businesses that find it more effective to outsource their labour needs. They are particularly strong in the food sector, where they are also subject to a specific regulator, the Gangmasters Licensing Authority (GLA). For the most part the GLA

enforces not its own rules but rather rules and regulations that apply to businesses generally, for example on minimum wage, contracts of employment, taxation and health and safety. However, compared with other sectors the GLA is able to put huge resources into enforcement activity. This means that rules are enforced very strongly in respect of labour providers. For example, the agricultural minimum wage is hardly enforced against farmers – because the resources to enforce it are very limited. However, it is strongly enforced against labour providers.

The trade association for the sector, the Association of Labour Providers, closely monitors all changes in legal requirements, court and tribunal decisions, administrative re-interpretations etc and advises members on what they have to do to comply. Following is a month-by-month list of the new requirements that were notified to members from September 2007 to January 2009. It will be noted that while some of these stemmed from deliberate regulatory actions many resulted from some form of back door regulation -

- September 2007. The 2007 Agricultural Wages Order, in addition to increasing the Agricultural Minimum Wage, added eight days public holiday to all workers' holiday entitlement irrespective of whether they worked one or seven days a week. This had the effect that an agricultural worker working one day a week had the benefit of 14 days holiday a year, that is over 25% of working time.
- September 2007. The National Association of Licensing and Enforcement Officers advised that with effect from 1 January 2008 all vehicles carrying passengers would require to be licensed, whereas previously in many local authority areas vehicles carrying fewer than nine passengers did not need to be.
- September 2007. Following a query raised with it, HMRC said that where businesses transported workers on the minimum wage to and from their places of work, then it was not lawful

for workers to meet the cost of such transport through an agreed deduction from wages. Instead the money had to be collected in cash, by direct debit immediately after wages had been paid or through devices such as making a loan to the worker and then notionally recovering that loan from wages. This particular new interpretation or decision to enforce caused a huge upheaval for labour providers and, in some cases, cost enough to bankrupt a business.

- September 2007. The statutory minimum holiday entitlement increased from 20 to 24 days.
- October 2007. Following a tribunal decision the Department for Work and Pensions announced that it would amend regulations to make clear that agency workers with contracts of less than three months were entitled to statutory sick pay.
- November 2007. An employment tribunal ruled that businesses cannot dismiss people for being too young.
- November 2007. Following a European Court of Justice judgment that rolled up holiday pay was illegal, BERR amended its website saying that "Employers should have taken steps to renegotiate contracts involving rolled up holiday pay to eliminate this practice".
- December 2007. With effect from January 2008 new regulations came into effect in respect of tachographs on vehicles used for commercial carriage, and also the requirements to hold private hire vehicle licences.
- March 2008. Regulations governing employment businesses were amended to require written notice for services being provided to workers and the ability of the worker to opt out of these services.
- March 2008. Regulations governing benefits for women on maternity leave were extended.
- May 2008. The Office of the Immigration Services Commissioner said that where any business helps a worker

complete a Worker Registration Scheme form then the business had to register as an immigration advisor with the Office. Previously the official position was that such activity did not require registration. (Following protests from the Association this decision was overturned.)

- May 2008. The Government's proposals on "non doms", while ostensibly aimed at the rich, had the effect of making someone who worked in the UK for part of the year, and had income from another country in the same year in excess of £2,000, to be liable either to UK income tax on their worldwide income or to lose their UK personal tax allowance. This would affect a high proportion of workers employed by labour providers and would cause significant administrative work for the labour providers themselves.
- May 2008. New maternity leave guidance was published in relation to non cash benefits.
- June 2008. The High Court ruled that employers are required to pay staff at least the minimum wage, regardless of any tips, gratuities, service or cover charges as long as tips are not paid through the employer's pay roll.
- July 2008. A new qualification for professional drivers comes into force in September 2008, requiring drivers of mini buses with nine or more seats to have a "driver certificate of professional competence".
- September 2008. The agricultural minimum wage was increased but unlike previous practice when the basic rate was kept at exactly the same level as the national minimum wages, the decision was made that it should be 1p higher, causing administrative complications as the boundary between work subject to the agricultural minimum wage and work subject to the national minimum wage is both blurred and illogical.
- October 2008. If labour providers who provide accommodation charge a deposit then this has to be taken account of in calculating whether minimum wage is complied with.

- November 2008. An Employment Appeal Tribunal changed the previously accepted perception of rest breaks.

In many of these cases little or no notice was given let alone the 12 weeks required for new regulations and guidance. However, the principal regulator, the Gangmasters Licensing Authority, took a pragmatic approach to enforcement which eased the burden for labour providers.

Appendix 2

Case Study: Gold Plating Through Guidance – the Home Office

It is an offence for employers to employ workers who are not legally entitled to work in Britain. However, Home Office guidance provides a good example of gold plating such as to create a general, although incorrect, belief that it was a legal requirement to undertake certain document checks and to keep photocopies of passports of all new employees, even a family member. This example is now historic as the legislation has been superseded but it demonstrates the cumulative effective on guidance and the actions of other regulators and even customers.

Section 8 of the Asylum and Immigration Act (1996) stated –

(1) Subject to subsection (2) below, if any person ("the employer") employs a person subject to immigration control ("the employee") who has attained the age of 16, the employer shall be guilty of an offence if—

(a) the employee has not been granted leave to enter or remain in the United Kingdom; or

(b) the employee's leave is not valid and subsisting, or is subject to a condition precluding him from taking up the employment,

(c) and (in either case) the employee does not satisfy such conditions as may be specified in an order made by the Secretary of State.

(2) Subject to subsection (3) below, in proceedings under this section, it shall be a defence to prove that—

(a) before the employment began, there was produced to the employer a document which appeared to him to relate to the employee and to be of a description specified in an order made by the Secretary of State; and

(b) either the document was retained by the employer, or a copy or other record of it was made by the employer in a manner specified in the order in relation to documents of that description."

The gold plating came in Home Office guidance. *Changes to the law on preventing illegal working: short guidance for United Kingdom employer* said –

> *"Section 8 of the Asylum and Immigration Act 1996 requires all employers in the United Kingdom to make basic document checks on every person they intend to employ. By making these checks, employers can be sure they will not break the law by employing illegal workers."*

This statement was wrong; there was no such requirement.

The guidance went on –

> *"It is important that you read this guidance if you employ staff in the United Kingdom. It will help you understand what documents you must ask your potential employees to produce from 1 May 2004, so that you can establish whether they can work for you legally. It also explains what steps you must take under the law to satisfy yourself that any documents produced by your potential employee actually belong to that person."*

The guidance then specified in detail how the document check must be done including checking photographs, checking any United Kingdom Government stamps or endorsements to see if the potential employee was able to do the type of work and finally making a

photocopy "using only the Write Once Read WORM software package" of relevant documents.

In other words a fairly simple legal requirement not to employ illegal workers was transformed with no legal authority into detailed requirements on checking and photocopying documents which most employers believed were actually legal requirements.

This guidance was then repeated by other regulators. For example the Gangmasters Licensing Authority licence conditions stated that "Employers will be required to show that they have complied fully with Section 8 of the Asylum and Immigration Act 1996". They only way that they could "show" this was by making the document checks. The Authority's guidance made this explicit: "It is essential that the gangmaster ensures that proper records are kept and checks made in line with Home Office Guidance."

Labour providers are also audited by their customers, principally packhouses, and by their customers, principally supermarkets. Each expected to see that the document checks had been carried out.

9. Regulatory Structure

Regulatory structure receives attention beyond its importance, but structure is a small part of effectiveness. Good regulators can work within a bad structure; bad regulators can fail to make a good structure work. Any regulatory restructuring imposes a heavy cost, in particular by diverting attention away from key issues, and takes years to do what in other sectors would be done in months. There is also a danger that combining different types of activity in a single regulator will impose significant costs which must be offset against possible economies of scale.

The Hampton Proposals

The Hampton Review of regulation was published on Budget Day in March 2005 and the conclusions were immediately accepted by the government as a whole without any external consultation.

The report recommended that the administration of new policies and regulators should be based on a set of principles. These included "Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work".

The report said that a major problem with the current regulatory structure was the problems caused by complexity, in particular overlapping areas of responsibility and small bodies having limited efficiency in the use of resources. The organisational problems of small bodies are analysed in paragraphs 4.26 and 4.27 -

> "4.26: *While smaller regulators can create small centres of expertise, they do not benefit from the sharing of experience and expertise that larger organisations can more readily embrace. The complexity of structure at a*

> *national level can be seen in the proliferation of small regulators – 31 regulators within the review's remit have fewer than 100 staff, and twelve have fewer than 20. Regulators of that size are unlikely to be able to allocate resources efficiently, and lack political and institutional prominence. Within themselves, they cannot carry out broad risk assessments, or easily understand the cumulative burden of the regulations they are imposing. More broadly, it is difficult for Government to allocate resources to areas of importance if funding for regulation is balkanised among so many different bodies.*
>
> *4.27: Further, the existence of a large number of national regulators, with their different cultures, approaches and focus on specific market segments or business activities, significantly inhibits the prospect of introducing a collectively agreed approach to risk assessment of inspection programmes and form filling requirements. A more consolidated regulatory landscape would allow not only the introduction of a more uniform approach to risk, but also simplify the process of ensuring that the national regulations adopt and mainstream Hampton principles."*

Hampton proposed a wholesale restructuring of regulation: "thirty one national regulatory bodies should be consolidated into seven, with individual regulators covering the entire scope of environment, health and safety, food standards, consumer and trading standards, animal health, agricultural inspections, and rural and countryside issues".

Implementation of Hampton

In November 2006 the government published *Implementing Hampton*. This reported that "there is now agreement that 19 national regulators will be consolidated into" [six existing agencies]. In practice just eight separate organisations had ceased to exist. It listed "agreed mergers", one of which (the Gangmasters Licensing Authority into

the HSE) has not happened and another (the Adventure Activities Licensing Authority into the HSE) which seems to have been a merger in name only with the previous structure continuing in practice. The paper then reported that "reviews are being undertaken to inform the decisions around mergers" for 12 bodies. A scrutiny of the websites of these bodies shows only modest signs of such reviews; most of the organisations currently retain their separate status and it may be the case that most will continue to do so.

The implementation has failed largely for the reasons set out in the first section of this chapter. The proposals were themselves not fully thought through, were subject to no consultation or debate and no impact assessment was produced. The analysis and consultation came after the decision had been announced, not a good example of how to make policy. Not surprisingly, on closer examination, the case for some of the rationalisation proposals did not stand up to scrutiny. This was particularly the case in respect of the absorption of the Gangmasters Licensing Authority by the Health and Safety Executive. The Association of Labour Providers, in a submission to Defra, commented -

> *"The official rationale for subsuming the GLA into the HSE is to reduce duplication and overlap by regulators, in particular to reduce the number of inspections. This is of no validity as the HSE has little relevance to the work of the GLA and does not inspect labour providers.*
>
> *As a result of the announcement there is now uncertainty among those governing and employed by the GLA and also among the labour providers who will be regulated by it. As well as concentrating on its job, the GLA now has to devote senior resources to structural issues."*

This uncertainty has persisted.

The disruptive effect of the Hampton proposals on other regulators is also apparent. The opening words of the Hearing

Aid Council Chairman's Annual Report for 2008 show how structural issues can detract from the main business of the regulator: "We now expect to be transferred to the Health Professions Council (HPC) at the end of March 2009. Uncertainty about how and when the transfer will happen has been one of the two pivotal issues facing us this year. The other has been an alarming rise in the number of complaints consumers are making about our registrants". The transfer has been deferred for another year and is expected now to take place in March 2010.

It would be as well to abandon the Hampton mergers, while continuing to look for opportunities for rationalisation and sharing good practice on a case-by-case basis.

The OFT and Consumer Protection

One weakness of the present regulatory structure is the diffused responsibility for consumer protection. In addition to specific regulators, at local level trading standards services have responsibilities while at national level the Office of Fair Trading has a general oversight function as well as some specific responsibilities. Hampton's analysis of this is worth reproducing –

> *"4.47: In the area of consumer protection and trading standards, there is a multiplicity of local providers, and some major national interests, but no clear co-ordinating body. The lack of strategic focus on trading standards, outlined in the analysis of local authority performance, is partly attributable to this, as is the lack of joining up on issues such as the provision of generic advice to businesses and the general public. While there have been considerable advances in coordination in this area, led by the DTI and the Local Authorities. Coordinators of Regulatory Services (LACORS), the review believes that coordination can go much further.*

4.48: Accordingly, the review recommends that a new body should be created at the centre of Government, to coordinate work on consumer protection and trading standards. This body would have lead policy responsibility for trading standards nationally. It would have the responsibility of overseeing the work of local authorities on trading standards issues, as the Food Standards Agency does in respect of food.

4.49: The Office of Fair Trading has some consumer enforcement powers which should be included within the new body. It also has some liaison functions in relation to trading standards, and has worked in partnership with other enforcement bodies to coordinate activities. All of these functions sit within wider responsibilities to ensure markets are working well for consumers and alongside specific duties to enforce competition legislation.

4.50: The new body would need to dedicate significant resources to deliver a more coherent enforcement network and to improve performance in local authorities around the country. Institutionally, there are two possible structures for the new body: either a wholly new body could be created; or it could be based within the existing Office of Fair Trading. Both options have pros and cons. The review considers that, of the two, the balance of argument points clearly in favour of a new body, and that there would be significant managerial and organisational advantages in creating a body which was wholly focused on this major task. Equally, however, it will be essential to ensure that any new structure retains strong linkages between consumer and competition policy, and that any new consumer structure retains a strong market-based approach. The review therefore recommends that, before taking a final decision on this structural question, the Government considers the issues further and consults with stakeholders including consumer groups, the Office of Fair Trading and others."

The Government duly began the consultation process. However, before it was completed at the end of 2005 the Chancellor announced that the proposal to establish a new body had been abandoned. Instead, a Local Better Regulation Office would be established and the OFT would take over the other functions envisaged for the new regulator. This is not satisfactory. The OFT is culturally and politically geared to competition policy; consumer protection is very different, requiring a different mind-set and different tools. At the very least the consumer protection part of the OFT's work should be run as a separate business within the OFT with a different chief executive, board and ways of working.

It is relevant that the Conservative Party is committed to dismantling the Financial Services Authority, prudential supervision of the major financial institutions being moved to the Bank of England and many of the remaining functions being moved to a Consumer Protection Agency. The Conservatives' policy paper on banking supervision in July 2009 said –

- We will create a powerful new Consumer Protection Agency (CPA). The CPA will take a much tougher approach to consumer protection and will be given a mandate to act as a consumer champion. It will be a far more consumer-orientated, transparent and focused body than the FSA.
- We will transfer the regulation of consumer credit from the Office of Fair Trading to the CPA. This will create a unified regulatory regime for financial services firms and consumers.

It is not clear that the implications of this have been fully thought through. It seems that the CPA will be a new body, taking some of the FSA's old functions and some of the OFT's functions, but that it will be confined to financial services matters. This would accentuate the present imbalance of resources devoted to consumer protection in respect of financial services as against consumer protection in other areas.

Responsibility for the Regulatory Agenda

There needs to be within the Government machinery a department or agency responsible for a better regulation agenda. Currently, most of this work is within BIS in the form of the Better Regulation Executive. An external Regulatory Policy Committee is in the process of being established and there is a Cabinet sub-committee of the National Economic Council on regulation. The reality, however, is that the bulk of the work is now done by the BRE.

The BRE is an integral part of BIS, which itself is responsible for much of the regulation which so concerns business. Also, where the body responsible for better regulation is part of the Government, firmly established within a Government department, it is not in a strong position effectively to change what is going on either in that department or in other departments. There needs to be a measure of independence as there was with the Better Regulation Task Force.

However, the expertise that currently exists within BRE, and the expertise which has been developed over time in the Better Regulation Task Force, the Better Regulation Commission and the Risk and Regulation Advisory Council, must not be lost. In addition to the required leadership from the Prime Minister and other senior ministers there does need to be an external body, staffed predominantly by outsiders and supported by a secretariat who would generally be civil servants on secondment. They would be able to drive forward the better regulation agenda, both through high level analytical work, and also by dealing specifically with regulatory measures that do not meet the tests of good regulation.

10. The Register and Enforce Model

This chapter proposes a new regulatory model for sectors where there is no specific compliance mechanism. It is essentially a model designed to make existing rules and regulators work more effectively.

Categorisation of Traders Dealing with Consumers

Consumers experience most problems in respect of services rather than goods. Generally, people get what they see in respect of goods, and most goods are manufactured by large businesses against which enforcement action can generally be effectively taken. Services are not tangible, difficult to evaluate and often the consumer does not know when he has suffered detriment. For example, a person selling a house through an estate agent may be very satisfied with the performance of the estate agent not realising that the agent has sold the house, for 10% less than it is worth, to a connected person. Similarly, somebody may be satisfied with a car repair or car servicing when in fact what has been charged for has not been done.

- Businesses that provide services to the public come under five very broad categories in respect of the structure of regulation -
- Services subject to a strong national regulatory regime where there is no involvement of local enforcement agencies. These include banking, insurance, the utilities, telecommunications, broadcasting, health services and legal services.
- Services subject to a strong local regulatory regime, such as licensed premises, sex shops and taxis.

- Services that are largely, but not wholly, provided by nationally operating businesses which are subject to specific regulation but where there is either a limited or no enforcement mechanism. The best example is estate agency, which is subject to a negative licensing system by the Office of Fair Trading and specific legislation but there is virtually no provision for enforcement. Other sectors are consumer credit, travel agents and bailiffs.
- Services that are provided predominantly, but not entirely, on a national basis where there is no specific legislation or regulation. Such services include car servicing, dry cleaning and funerals.
- Services that operate predominantly at a local level where there is no specific regulation. These include restaurants, some retailing, window cleaning and most forms of building and other property related work.

There is a significant overlap between these five groups, in particular the fourth and fifth groups. For example, much car servicing is done by nationally franchised car dealers but much is also done by local businesses operating from one unit only. Similarly, estate agency comprises both chains and franchises operating nationally and businesses operating from a single local office. However, the broad categorisation is helpful for the purposes of this chapter.

Issues

Malpractice by traders falls into a number of broad categories: misleading advertising in the media and on websites; failure to give adequate information on charges; failure to provide adequate information about the business, particularly on websites and business cards (eg physical address and the name of the business); failure to deliver the services paid for, and oppressive contracts.

The existing regulatory structure is not easily able to handle much malpractice by traders. Clearly, there is no structural problem

in the sectors subject to specific regulation, such as financial services, utilities and licensed premises, although in some such sectors there are concerns about the effectiveness of regulation. There are bigger issues in each of the other sectors, including those ostensibly subject to specific regulation, such as estate agency, and those where there is no specific regulation at all, such as building work.

Local authorities are responsible for enforcement of the law in respect of trading generally and also some specific areas. Each local authority has its own priorities in respect of trader malpractice and also its own resource position. To a large extent, activity by trading standards departments is complaint-driven rather than proactive, because there are not the resources for a proactive programme of compliance such as mystery shopping and audits. Nor is there legal provision for such things as audits of businesses unless these are requested by the businesses.

The current arrangements mean that there is little consistency between local authorities. For example, some authorities have developed effective enforcement and compliance mechanisms for building work and car servicing, whereas others choose to give little priority to these areas. Also, there is limited scope to exploit economies of scale and, as a result, substantial reinventing of the wheel. While trading standards officers do network and share best practice, this is not as effective as exploiting economies of scale through a single operation.

The home authority principle works within its limitations. It is concerned with individual businesses rather than sectors. For example malpractice by car dealers is handled by the local authority in which the car dealer is based, which means that different authorities will deal with different car dealers rather than an overall approach to the sector being taken.

There is therefore a position in which enforcement of existing legislation is inadequate and patchy. At the same time government cannot resist the pressure to regulate more and more, putting greater burdens on local authorities to achieve compliance. Home

information packs are a recent example of a new regulatory burden on local authorities.

Principles for Reform

New arrangements should be built on the basis of four principles -

- A model capable of working in different sectors of the economy.
- Drawing on the skills and expertise that currently exist within trading standards departments.
- Specific programmes aimed at specific sectors, designed to achieve compliance with existing legal requirements.
- No new regulations or legislation.

Which Sectors

The criteria for the sectors that would most likely benefit from this approach can largely be borrowed from the criteria used by the OFT to invite applications for its approved codes scheme: known problem areas for consumers, complex products, high-risk transactions, low consumer awareness of products and rights, likelihood of a successful code, absence of a sector specific statutory regulator, and absence of an alternative self regulatory regime.

In 2001 the OFT identified the following sectors as its initial targets: used cars, car repair and servicing, credit (including debt management and credit repair), funerals, travel, estate agents and direct marketing.

Subsequently, the following have been added to the list: assistive products, caravans, car repair and servicing, computers, dental (excluding clinical care and insurance), domestic appliance repair, home furnishing, introduction services, pest control, photography, removers, renewable energy, ticket agents and will writing.

Approved codes are currently in place only for the motor trade, estate agents, removers, carpets, debt managers and direct selling,

although this does not mean that malpractice has been successfully dealt with. There are no approved codes in respect of credit, travel or funerals, three sectors in the original list, or for most of the sectors in the second list.

A Model

Based on these principles it is possible to construct a model which would lead to more effective enforcement of existing legislation and regulation. At the centre of this model would be a small unit operating within the central unit for trader regulation, currently the Office of Fair Trading. This unit would develop a programme of projects to deal with malpractice for specific sectors, based on enforcing existing legislation and regulation and, where they exist, industry codes of practice. The sectors would be selected by the unit itself but subject to consultation with consumer bodies, in particular Citizens Advice, Which? and Consumer Focus.

The central unit might run parts of this programme directly but more commonly it would outsource projects, wholly or partially, to one or more trading standards departments selected after a competitive tendering process. The projects would be time limited – generally for between six months and five years, depending on circumstances. Six months might be sufficient for will writing; estate agency might need five years. The central unit would need the capacity to maintain a more limited compliance programme for the sector after the end of the contract period.

Funding of projects would need to be determined on a sector by sector basis. There are four possible sources of funding -

- Where there is provision for this, the businesses being regulated should pay fees. It may be that in some sectors subject to national regulation but no enforcement, such as estate agency, the legislative provisions allow a fee to be levied.

- Voluntary contributions from the industry. These would be most appropriate either where the industry has been calling for statutory regulation thereby implying a willingness to pay for regulation (such as estate agency) or where there are a relatively small numbers of large players (such as car servicing and arguably estate agency as well).
- A specific charge to businesses that sign up to compliance with a regulatory regime and submit themselves to a compliance programme. This would be most appropriate where there was an industry code of practice and a strong trade association. The businesses that "signed up" to the compliance regime could advertise this and hopefully gain a marketing advantage.
- Government funding, where no other funding was available.

A Variation on the Model Requiring a Legal Change

The model that has been described would work more effectively if there were provision to allow the government to designate sectors in which those wishing to operate were required to register with a specified body and to pay a modest annual fee (typically no more than a few hundred pounds), the proceeds of which would be used entirely to fund compliance and enforcement work. There would be no new regulation. Such an arrangement would have two major advantages. Firstly, one problem for enforcement agencies is actually knowing what businesses exist, where they are, how to contact them and who is running them. Registration would deal with this and also help keep track of "rogue traders". The second benefit is that the registration fees would provide some of the funding for enforcement activity.

The Model in Practice

The model as described is based on the regulation of claims management businesses under the Compensation Act 2006. In this case

there was specific regulation and also the provision to charge fees. However, the regulatory regime is largely based on enforcing existing legislation and regulation, the bulk of the work has been outsourced to a local authority trading standards department and the whole operation is run very economically on a breakeven basis, regulatory fees and costs being around £1.5 million a year. The model is described in more detail in Appendix 1.

Appendix 2 sets out how the model could work in a number of other sectors.

Appendix 1

Claims Management Regulation

The Compensation Act 2006, providing for the regulation of claims management activities became law in July 2006. When the decision to legislate was made no decision had been made as to who the regulator would be. The Act accordingly allowed for every type of regulatory structure. The Secretary of State (for Justice) was empowered to establish a new regulator, designate an existing body to take on the role of regulator or undertake the role of regulator.

A tight timescale was set which ruled out the first option. No other regulator was willing to take on the task. Accordingly, the third option was adopted by default. The model adopted had the following structure –

- The Secretary of State is formally the Regulator.
- The Secretary of State appoints an individual as "Claims Management Regulator". That individual has responsibility for the implementation of the regulatory regime. However, he is not the designated "regulator" but rather exercises the powers on behalf of the Secretary of State. The individual must be a Ministry of Justice official. A suitably qualified outsider was appointed as a temporary civil servant to hold the position initially.

- A Regulatory Consultative Group. This has no legal status or powers. It comprises nominees of relevant stakeholders. Its function is to oversee the operation of the regulatory regime and to provide advice and guidance to the Regulator.
- The administration of the regulatory regime and compliance and enforcement activity is outsourced on a contract, initially for three years, to a Monitoring and Compliance Unit (MCU). This is responsible for handling and vetting applications for authorisation, maintaining a public register of authorised businesses, monitoring authorised businesses including running or managing an inspection process, enforcing the authorisation conditions, policing the perimeter and taking enforcement action. It has no responsibility that has formally been delegated to the Regulator. Rather, it advises the Regulator when he has to take any decision, for example on the granting of authorisation, the removal of authorisation or prosecutions. The nature of the work fitted in well with the work done by trading standards departments. After an open tender process Staffordshire County Council was selected to provide the service.

The Act provided for fees to be charged to businesses seeking authorisation. The fee scale was borrowed from the Financial Services Authority fees for insurance brokers. In the event in the first full year regulatory fees of £1.5 million were almost exactly equal to the costs of regulation.

The Rules of Conduct that businesses must comply with are very brief. Mostly they require compliance with existing laws and regulations. There are just a few specific requirements (such as a prohibition on cold calling in person and a requirement to have a 14 day cooling off period).

The structure proved to be effective -

- The Act became law in July 2006, Staffordshire County Council was awarded the contract to provide the MCU in September 2006, applications for authorisation were invited from

November 2006, and the offence of operating without authorisation was activated in April 2007. The nine month period between royal assent and full implementation is probably without precedent; two to three years is more normal.

- The arrangement can be extended (the contract has already been extended twice), upsized or downsized relatively easily.
- The arrangement is low cost - an entire regulatory structure for an annual cost of £1.5 million. The arrangement suggests that the Hampton view that small regulators are inefficient is at least questionable.
- Malpractice has been successfully dealt with. The strategy for dealing with malpractice was devised by the Regulator and permanent Ministry of Justice officials; the MCU was responsible for implementation. The strategy relied heavily on a thorough authorisation process and a highly targeted enforcement programme.

Appendix 2

Examples of how the Model could be used in Specific Sectors

Estate Agency

Estate agency is an area where there is substantial malpractice. Estate agents are subject to the law of the land which is particularly relevant in matters such as misleading advertising and misrepresentation. There are also specific legal requirements in estate agency legislation, including most recently in the Consumers, Estate Agents and Redress Act 2006. Under the 2006 Act estate agents must belong to an ombudsman scheme. However, there is no enforcement mechanism for all of this regulation. Rather, with a very small staff, the OFT and the ombudsman act on the basis of complaints. As this is an area where consumers do not know that they have been ripped off, this mechanism is inadequate to deal with malpractice.

Under the proposed model the central unit would analyse the huge amount of existing data on malpractice and develop a program designed to deal with it. In this particular case the programme would concentrate on mystery shopping to test such matters as where estate agents fail to pass on offers or seek to give more favourable treatment to purchasers buying other services from them. Based on the results of mystery shopping, strong enforcement action would be taken which would send a clear message to other estate agents. The intention would be to force all businesses to ensure that they complied with legal requirements otherwise they would face regulatory action. In this particular case, funding for such an operation, which might perhaps run to £3 million to £4 million a year for three or four years, could be sought from the estate agency industry as for years it has been arguing for stronger regulation.

Car Servicing and Repairs

The total market for car servicing and repairs is huge. In round terms, the UK car servicing and repair market is worth around £10 billion a year. The market lends itself to malpractice. The product is purchased because it has to be rather than because of any intrinsic value. There is an imbalance of knowledge between the businesses providing the service and the customer. The customer often does not know what needs to be done to the car, what has been done to it after service or repair and is generally in no position to assess value for money.

Specifically, the market has the following characteristics, all of which are well supported by evidence –

(a) Work that should be done is not done.
(b) Work is done that is not necessary.
(c) Work is charged for that has not been done.
(d) Work is done very poorly.

There is ample evidence to demonstrate the extent of malpractice. The most comprehensive analysis was commissioned by the Department of Trade and Industry in 2002. This included an extensive mystery shopping exercise involving vehicles into which seven faults were introduced. The main conclusions on garage servicing were –

(a) Only 5% of garages surveyed were rated very good indicating that they had carried out a thorough service, according to the manufacturer's service schedule, rectified all the introduced faults and other defects found prior to service.
(b) 51% were rated either poor or very poor.
(c) 17% of garages carried out unnecessary work.
(d) 40% of garages missed or did not replace at least one item on the service schedule. For female car owners, the figure was 58%.
(e) 86% of garages missed at least one of the introduced faults and 17% missed all four introduced faults.
(f) Dealers charged women, on average, £50 (26%) more than men.

On the basis of this data, it seems reasonable to argue that the extent of consumer detriment must be at least 20% of total consumer expenditure, that is around £2 billion a year.

The government has put this issue into the "too difficult" category and has made empty threats to the motor trade which has treated them accordingly. Various attempts have been made to implement a code of practice, as yet none with significant success.

The approach here should be very similar to that for estate agency. Mystery shopping and prosecution of offenders is essential to force businesses to stop malpractice. The large motor dealers could be requested to make a contribution to the costs of running the regulatory system, or a system could be developed in which

garages paid a fee for voluntarily registering and being subject to regular audits, in exchange for which they would receive some recognition.

Bailiffs

For over seven years the government has been considering various options for regulating civil enforcement agencies (largely synonymous with bailiffs). A 2001 green paper outlined options for the future structure for the regulation of enforcement services. Responses indicated a consensus in favour of regulation. The government subsequently identified the Security Industry Authority (SIA) as the appropriate body for regulating the sector and a proposal to this effect was published in March 2003. Following a further consultation, in March 2008 the government reaffirmed that the SIA should be the regulator.

If the government firmly believed that the SIA was the appropriate body to regulate civil enforcement agencies then this would have been completed by now, bearing in mind that the proposal was made as long ago as 2003. The March 2008 Ministry of Justice paper *Regulation of Enforcement Agents* produced no argument as to why the SIA should be the regulator. The exact wording in the Ministry of Justice paper is-

> *"We recommend regulation by the SIA. The SIA has a stakeholder engagement strategy and engages with each stakeholder using methods appropriate to that specific group or individual. The benefit of the SIA option would be that they would establish networks that will enable these diverse interests and individuals to contribute to SIA policy-making in a constructive manner."*

It seems fairly clear that the government wanted to regulate, had no confidence that the SIA would be right regulator but saw no other option. In March 2009 it announced "plans for a new code regu-

lating the activities of bailiffs" prior to a permanent solution of independent regulation from 2012. There was no mention of the SIA option.

The model in this case would need to use inspections of businesses and investigation of complaints. It would not be easy to obtain funding from the industry so this project would need to be government funded.

11. Funding Regulation

It is government policy that regulators generally should seek to recover their costs from the organisations they regulate. This chapter argues that this policy is unworkable in respect of small or new regulators and is capable of producing perverse results.

The chapter is based largely on the experience of three relatively new regulators: the Security Industry Authority, the Gangmasters Licensing Authority and the Claims Management Regulator, but the analysis is applicable more generally.

Current Policy

There are two broad types of regulator. Firstly, organisations with very wide ranging functions of which regulation is but one, where the fees may cover the direct regulatory costs but these are a small part of the total costs of the organisation. The Environment Agency and local authorities come into this category.

The second type is a specialist regulator which does little else, although there may be some public information functions. Such regulators are expected to cover their costs. When a new regulator is being established the set up costs are generally provided for out of public expenditure and are regarded as part of the costs of implementing the relevant legislation.

Safeguards

It may be argued that current policy removes any normal commercial pressure from a regulator as they can afford to operate on a cost plus basis knowing that regulated institutions have no choice but to pay whatever price is demanded.

In practice, there are some safeguards. Regulatory fees are a price like any other and the higher the price the lower the demand. If a regulator pushes up regulatory fees (and the cost of regulation generally) too high then this may cause some organisations to move out of the market or, where it is possible, to seek another regulator or to operate without authorisation.

There are also some safeguards inherent in the system of public administration. These include –

- A requirement on regulators to have a public consultation on their fees and to publish impact assessments. However, it has to be said that most impact assessments give little scope for real debate.
- Legislation normally provides for the sponsoring department either to approve the fees or to stipulate the fees. The government department can be expected to properly check that the regulator is running efficiently (and there is often an incentive to do so as government officials may be somewhat jealous of seemingly much higher expenditure by regulatory bodies connected to their departments).
- There is haphazard oversight by bodies such as the National Audit Office, the Public Accounts Committee and individual select committees.

Large Sectors

The arrangements generally work well in large sectors of the economy with well- established, substantial businesses and effective trade associations. The various checks and balances tend to work with such regulators. Also, large sectors can absorb a significant regulatory cost in absolute terms because it is likely to be small in relation to turnover.

In large sectors, being regulated may be essential to trade and therefore there is a captive market with little opportunity for organisations

to opt out and go into other markets. However, there is the occasional threat, for example from some financial services firms, that they will move out of London if the regulatory regime is not sufficiently benign.

Among the large sectors where regulatory fees are not a great issue are financial services, utilities, communications and legal services.

Small Sectors

There are different arguments in smaller sectors of the economy. Here, being regulated may not be a licence to trade. A small business can have the option of moving into other businesses or even operating illegally safe in the knowledge that it may not be caught. Regulatory fees have much more of a market effect in smaller sectors than in larger ones.

Regulation generally has a high fixed and low marginal cost. The bulk of the expenditure is in developing regulatory policy, consulting, establishing frameworks and analysis and reports. The actual work involved in dealing with individual regulated organisations is often quite small. It costs little more to regulate, say, 3,000 organisations than 1,000, and it is therefore likely that in a regulated sector with 1,000 institutions the fee could be nearly three times as high as that in a sector of 3,000 organisations. The position is different if each regulated organisation is audited annually, but this is the exception and contrary to the Hampton principles.

With the cost recovery policy, there is no reason why the resultant scale of fees should be reasonable for the regulated institutions. Indeed, they may be so prohibitive as to put organisations out of business.

There is a wider policy issue here. Regulation is a public good. There is no point in doing it unless the public obtain a benefit. In some cases the State also obtains a benefit, for example through

higher tax revenue. Impact assessments should seek to quantify this benefit and when they do so it is often a substantial multiple of the cost. To seek to recover the costs of regulation from regulated institutions almost denies this public benefit and indeed could lead to a perverse result. For example, a regulator may have as a side effect a substantial increase in tax revenue for which it obtains no credit. However, the regulatory fees may be so high that the regulator has to cut back on its costs, in particular monitoring and compliance, as a result of which malpractice increases and perhaps tax revenue falls.

“It is not uncommon for a regulator to have to decide that it can only pursue one or two major enforcement cases a year”

At the extreme, the regulator may find itself in the position of having to trade off standards against viability. The imposition of what might be regarded as appropriate regulatory standards could so reduce the size of the industry that the regulator becomes unviable. In a similar way, regulators are often constrained by their financial position on how much enforcement activity they can undertake. It is not uncommon for a regulator to have to decide that it can only pursue one or two major enforcement cases a year.

Particular problems of new regulated sectors

Notwithstanding the intention to reduce the number of regulators, the reality is that a number of new regulators are created every year as there is no means of applying a general policy to specific circumstances each of which can be justified in its own right.

A newly established regulator faces a particular problem in seeking to recover costs. It is unlikely to know with any precision how many organisations will seek to be licensed. The very purpose of licensing is to change behaviour in a sector. There may be, say, 2,000 companies in a sector, but after licensing perhaps only 500 will remain. This could be regarded as a huge success for regulation in taking out the undesirable parts of the industry. However, if the regulator was bank-

ing on 2,000 licence fees and only has 500, this will present it with a financial problem. It is impossible for a newly established regulator to get it right in respect of the number of regulated institutions. This is illustrated in the case studies in the following section. The effect of this is that the fees quoted by the regulator in the run up to the introduction of regulation may be very different from those subsequently levied, and the regulator may also find itself in severe financial difficulty. This reduces its credibility with the industry it is regulating and also with its parent government department.

The position is complicated further because the scope of any licensing regime is determined not by the regulator but by the government department. With deregulation now being on the agenda, a decision to narrow the scope of a licensing regime will have major effects on the financial viability of the regulator.

At the end of the day, a regulator cannot go bankrupt and the government has to bail out the regulator with financial difficulties, often with the chief executive and chairman paying the price. All of this disrupts the regulatory process, which is designed to have a public benefit far in excess of the costs of regulation.

Case studies

Gangmasters Licensing Authority

The government has introduced a statutory licensing scheme for "gangmasters" (in fact, the scheme covers employment businesses and not gangmasters but that is another issue). A Gangmasters Licensing Authority (GLA) was established to operate the licensing scheme. On 30 July 2004, Defra published a consultation paper on the establishment of the GLA. This included a regulatory impact assessment. That assessment was based on the assumption that there would be 4,000 licences. The estimated licence fee was between £585 and £750 a year.

Subsequent research indicated that the number of potential licensees would be 1,000 rather than 4,000. When the GLA

published its initial fee proposals in October 2005 the proposed fee was either £2,130 a year or a scale running from £660 to £32,500. The £2,130 figure was between 2.8 and 3.6 times as high as the initial estimate. Interestingly, the impact assessment made no comment on this, and the higher regulatory costs led to no changes in the proposed regulatory regime which questions the point of an impact assessment in the first place.

In the event the government realised that fees at this sort of level were unrealistic and various fudges have been made to reduce them.

The Security Industry Authority

The Security Industry Authority has been established to regulate the private security industry. Its initial business plan published in June 2003 allowed for 100,800 door supervisors to be licensed in 2004/05; by December 2005 the number of licences issued was 37,000. The budget also allowed for 25,500 security guards to be licensed by March 2005 and 123,200 by March 2006. By December 2005, 17,300 licences had been issued. The Corporate and Business Plan 2005/06-2008/09 (published in June 2005) had figures for 2005/06. The plan was to issue 90,000 licences for security guards, 2,000 for vehicle immobilizers, 7,000 for CCTV and 5,000 for close protection. The actual figures as at December 2005 were 17,280, 1,116, 7 and 6.

The SIA therefore had a significant shortfall of income which it attributed to "unreliable base data and licensing inertia". This required cost savings of £8 million, but £13 million of additional Home Office funding was also necessary. The SIA also made the point that "uncertainty with the Home Office approach to exemptions" (possibly the removal of some sectors from the need for licensing) "may present a serious financial risk", usefully illustrating the perverse effects that the cost recovery principle can have; ie the argument that deciding the regulatory scope needs to take account of the financial viability of the regulator.

Claims management activities

Under the Compensation Act 2006 the activities of claims management activities are regulated by the Ministry of Justice. The Department decided to adopt a different approach to setting regulatory fees. In a consultation document on its initial fee scale it said –

> *"Other regulators have found that their estimates of the number of businesses that will seek to be authorised have been inaccurate. It is not possible to make a precise estimate of the number of businesses that will seek to be authorised or their size. It is proposed that fees will instead initially be set according to reasonable comparisons with the fees charged by comparable regulators and the work involved in regulation. It will soon become clear what income the fee scale will produce. DCA plans to underwrite the costs of introducing regulation and to support the initial costs of operating the regime.*
>
> *The fees charged by other Regulators provide a benchmark which can be used in determining the fees to be charged to claims management companies. There is also a sense in which a "level playing field" is appropriate given that claims management companies to some extent compete with other regulated organisations, in particular insurance companies, insurance intermediaries and solicitors. It is therefore appropriate to concentrate on fees charged by the Financial Services Authority (particularly as the FSA has been considered as a potential regulator for claims management activities), the Law Society and other legal services regulatory bodies."*

In the event the Department decided to use the fee scale used by the FSA for general insurance intermediaries. Perhaps fortuitously this yielded just about the right amount of income to cover the costs of regulation.

A way forward

The present policy is not working for small regulators. This has been amply illustrated by the experience of the SIA. Policy has to be based

on the assumption that regulation results in a benefit to people other than those being regulated. Taking the three case studies –

- The SIA should remove much of the criminal element which has pervaded the private security industry.
- The GLA should reduce exploitation of workers and lead to a substantial reduction in tax evasion. The impact assessment on the legislation stated that it was not unreasonable for direct benefits to the Treasury to be in the order of £10 million a year.
- The regulator for claims management activities should reduce exploitation of vulnerable people, reduce the cost of compensation and lead to genuine claimants keeping more of their compensation.

In each case these benefits are a multiple of the costs of regulation, but the Treasury policy seeks to imply that the beneficiaries of regulation are the regulated organisations.

It would be sensible for general principles to be drawn up for regulatory fees, based on an analysis of current fees. A "back of the envelope" analysis of the fees charged by regulators suggests that £200 is a reasonable fee for an individual providing a non-professional service (such as a security guard), and for an organisation the fee should be around 0.1% of turnover, sharply tapering after turnover of around £20 million.

In conjunction with the BRE a regulator or government department should set fees that are reasonable in relation to other fees, taking account of the public benefit. This could mean a lower fee so as to bring more people within the regulatory net if this would significantly increase the public benefit.

An appropriate budget for the regulator should be set jointly by the sponsoring department and the BRE. There is no logical reason by the regulator's fees should bear any relation to the necessary

budget. However, the difference between the two should at least be substantially exceeded by the perceived public good.

Once set, the broad structure of regulatory fees should be kept unchanged for say three years with perhaps modest annual increases. After three years a major review of both fees and budget should be carried out.

12. Evaluation

This paper has already suggested that on some issues it would be appropriate to seek an independent input at the policy formulation stage, as well as seeking views from stakeholders. The principle applies equally to evaluating the impact of regulation. It should go without saying that any significant regulatory measure should be subject to full regular evaluations as to its impact, covering both costs and effectiveness in dealing with the issues that the regulation was designed to address. At present, while there is provision for post-implementation evaluation in respect of many EU directives and regulations and some domestic legislation, often it either does not take place at all or if does, it is done in a half-hearted way. Evaluating existing regulation, with the implications that it might not turn out to be perfect, is unattractive to policymakers and officials compared with working on new regulation.

In the case of some comparatively small regulators, for example the Gangmasters Licensing Authority, the Office of the Immigration Services Commissioner, the Hearing Aid Council, PhonepayPlus and the Claims Management Regulator, this evaluation should logically be of the whole of the regulatory regime operated by the regulator. In sectors where either there is no specific regulator or where there is a very wide-ranging regulator, then evaluations should be on an appropriate sub-sector. For example, the Office of Fair Trading has a regulatory responsibility for estate agency. This is an area where an analysis of the impact of the existing regulation would be useful. There are other sectors, such as car servicing and building work, where there is no regulator other than the general law of the land and trading regulation, where an impact of the assessment of the effectiveness of that regulation would again be useful. In the case

of very wide-ranging regulators, such as the Financial Services Authority, the Food Standards Agency and Ofcom, evaluations might be on a particular aspect of their work.

Types of Evaluation

There would justifiably be concern if evaluations became a huge business in themselves, being costly to commission and absorbing the resources of the regulator to an undue extent. There are a number of different ways in which evaluations can be carried out, and different agencies that can carry them out. A judgment has to be made as to the appropriate type and frequency of evaluations. One approach would be to have a full-scale evaluation every, say, three years, with more modest in-house evaluations annually.

“At a very minimum, each regulator should have an annual programme of work within a long-term business plan, setting out identifiable targets and key performance indicators”

At a very minimum, each regulator should have an annual programme of work within a long-term business plan, setting out identifiable targets and key performance indicators. As a matter of good practice, regulators should produce an annual self-evaluation of the impact that they have had.

There are a number of bodies which could carry out evaluations, perhaps across a range of different activities. The Office of Fair Trading should be one such body. Its website shows that it has undertaken a number of evaluations but these seem few and far between. Under its plan for 2008/09 it intended to evaluate and publish the impact of at least three market interventions and evaluate the specific impact of a consumer campaign. The Low Pay Commission stands out not as a regulator but as the organisation that sets the minimum wage, but which nevertheless undertakes comprehensive assessments of the impact of policy decisions on the minimum wage.

One of the follow ups to the Hampton Review is "Hampton Implementation Reviews", comprehensive assessments conducted by regulators from other areas together with Audit Commission and Better Regulation Executive staff. These reviews come into the "Rolls Royce" category, meaning that there will be very few of them. Under Phase 1 in 2007 there were reviews of the major regulators: Health and Safety Executive, Financial Services Authority, Food Standards Agency, Environment Agency and Ofcom. Under Phase 2, starting in 2008 and for completion in 2009, 31 bodies will be reviewed. While the BRE website states that regular reports will be published, as at October 2009 there were only nine such reports on the website.

Using an external resource can usefully validate an internal impact assessment, or can be a substitute for it. It is not essential here to go for very comprehensive, expensive reports from the major firms of management consultancies or the Hampton style reviews. A very modest assessment, using an academic or a small consultancy firm, costing, say, £20,000 rather than £200,000, is quite sufficient to deal with the major issues.

Publicity

Any evaluations should be published in a form that is readily accessible. This includes having a meaningful executive summary which brings out the key issues. In some cases, it would be sensible for the regulator to arrange a stakeholder meeting to discuss evaluations.

Case Studies

This section gives a few examples of practices currently followed in respect of evaluations which might usefully be copied elsewhere.

The Claims Management Regulator, part of the Ministry of Justice, is responsible for regulating claims management companies under the

terms of the Compensation Act 2006. In April 2007, when regulation was fully implemented, the Department published a baseline study describing the markets subject to regulation, identifying malpractice, outlining the strategy for tackling malpractice, and analysing the likely impact of regulation. In August 2007, just three months after the commencement of full regulation, the Department published an initial assessment of the impact of regulation. In April 2008, the Department published a one-year assessment. This took the objectives of regulation quantified in the baseline study as the starting point, then examined the various regulatory processes, before making an assessment of the impact of regulation in each of the sectors subject to regulation. The report concluded that the regulatory regime had had a significant effect in reducing malpractice in its first full year of operation, and gave eight specific examples. It then outlined the areas where more work needed to be done. All of the reports were written by the regulator and therefore it may be argued that they were not objective, but they fairly represented the regulator's own view of the impact of regulation and provided an analysis which could be challenged by others.

The Gangmasters Licensing Authority (GLA) was established to regulate labour providers under the provisions of The Gangmasters (Licensing) Act 2004. The GLA has commissioned the University of Sheffield and the University of Liverpool to assess the impact of the Authority. A baseline report was published in August 2007. The baseline review was designed to -

- Help the GLA and other relevant bodies monitor the effectiveness of licensing in tackling worker exploitation and business fraud.
- Identify the key outputs of the GLA and locate these outputs within their broader political and economic environment.
- Support independent assessment of the GLA and the Gangmasters (Licensing) Act 2004.

- Raise awareness of the gangmaster/labour provider industry and the governance issues pertinent to the sectors covered by the Gangmasters (Licensing) Act 2004.
- Inform the annual review of the Gangmasters Licensing Authority.

In November 2007, the GLA published the first annual review by the universities. This was based on extensive research and consultation. The report concluded by setting out the advantages and disadvantages of GLA licensing. It made a series of recommendations. Interestingly, in the context of Chapter 11 of this paper, one of them was to assess the extent to which beneficiaries of agency legislation are required to meet the costs of enforcing this legislation. It asked if the reduction of worker exploitation and business fraud was a benefit to UK society as a whole, and was regulation a public good and something that could receive greater support from the public purse. It concluded on this point, "Very simply, is the principle of the gangmaster paying for his/her industry to be regulated fair?"

A second-year evaluation report was published in the spring of 2009.

The baseline report and first year review cost £51,200 and the second year review £37,200.

PhonepayPlus is the regulator of premium rate telephone numbers. But its website gives no indication of any evaluations. Its Annual Report has a section on key performance indicators, but these cover process issues such as percentage of calls answered within 30 seconds, out of remit correspondence handled within 10 days, lead investigations closed within 12 weeks, percentage of invoices sent within 10 days of the panel date, etc.

The Office of the Immigration Services Commission is responsible for ensuring that persons seeking immigration advice and immigration services are treated fairly, honestly, and receive competent, fit advice. The website gives no evidence of any evaluation of the impact of its work.

The Hearing Aid Council is responsible for setting standards of professional training, performance and conduct of individuals who sell hearing aids. The Annual Report gives details of the number of invoices settled within 30 days, but gives no indication of the impact of regulation, while observing that there had been a substantial increase in the number of complaints.

The British Hallmarking Council regulates the provision of hallmarking services. The Annual Report includes statistical information on offences detected and action taken, but no overall assessment on the impact of regulation.

The Coal Authority's KPIs were almost confined to process issues, such as paying invoices in 30 days. There is no evidence of it attempting to evaluate the effectiveness of its regulatory role.

The Office of Fair Trading has an evaluation team which aims to meet two needs: external accountability to evaluate whether the OFT delivers its objectives and does so cost-effectively; and internal management to help it prioritise, conduct, and follow-up its work to ensure that it maximises its impact. The OFT has a target of delivering measurable benefits to UK consumers of five times its annual budget. It intended to publish all of its research reports. The website duly includes a number of such reports: for example, the impact of the Supply of Extended Warranties on Domestic Electrical Goods Order 2005, and an evaluation on the impact on business of the Consumer Codes Approval Scheme carried out by an independent consultancy firm. However, the number of such reports is fairly small, with other reports concentrating on analysing markets.

The OFT also has an innovative small grants scheme through which grants of up to £5,000 are available to stimulate further thinking and focussed pieces of analysis on competition and consumer topics.

Generally, the OFT therefore seems committed to evaluation, but the quantity of its evaluation studies compared with the vast area for which it has responsibility as yet seems fairly modest.

13. Delivering Better Regulation

This chapter draws on the analysis in the previous chapters and brings together the conclusions on how to improve the quality of regulation. Together, the proposals set out a regulatory agenda.

Culture and mindset

The raison d'etre for many civil servants and ministers (but with honourable exceptions) is to legislate and to regulate. Getting a bill through Parliament is seen as a positive achievement, even if the consequences are harmful. Legislation is seen as the solution to a problem, often simplistically so as if legislation is a magic wand. The media encourage this attitude. When another teenager in London is the victim of gun crime or knife crime, ministers earnestly say that they are planning to "tighten regulations", and the media swallow this hook, line and sinker, satisfied that the necessary action is being taken. Why existing regulations are not enforced is seldom a matter for discussion.

The Parliamentary process does not help. Sometimes there is effective scrutiny of legislation. More often the desire to get the legislation through Parliament outweighs the need to ensure that the legislation is right. A Minister who fails to get his Bill through the Commons is a failure; introducing a poorly designed Act that achieves little if any useful purpose is unlikely to reflect badly on the Minister, who will have long since moved to new pastures by the time the deficiencies become apparent.

It is built into the DNA of many officials that the answer to a problem lies in legislation, regulations, orders or guidance which can be structured to give the impression of having legal effect. Indeed, that is what they are good at, although at the higher level

there are many outstanding officials who understand that more regulation is not the answer.

Regulators naturally favour regulation, although interestingly it is the chief executives of many regulatory bodies who are trying to push back against pressure from ministers, civil servants, the media and their own staff. The further down one goes in a regulatory body the more the belief that everything must be regulated and be seen to be regulated, which leads to a concentration on regulating process rather than substance.

Like ministers, regulators are blamed for a perceived "failure" of regulation but not for the consequences of over-regulation. They run the inherent risk of being like over-protective parents, so shielding their charges from "danger" that they become dysfunctional.

The natural response to any significant new problem should not be "regulate" but rather "how can existing regulatory mechanisms be used to deal with this problem". It may not be as attractive to the media but will be more effective.

A change in culture and mindset is needed, but that can be achieved only over a period of many years and with strong leadership and appropriate training. Leadership is the key. The wide range of practices currently in existence and the different approaches taken by different regulators suggest that the right leadership can create the necessary culture and mindset for effective regulation, even if the underlying framework is unsatisfactory. More effective training for civil servants, both at the National School of Government and elsewhere, must cover how to regulate effectively, and in particular how to best engage stakeholders so as to achieve regulatory objectives.

Political leadership

The main enemy of better regulation is the political climate in which ministers have to be seen to be "doing something" to ensure that

"this must be stopped". Unless ministers are willing to practice what they preach on better regulation then nothing will happen. The lead has to be taken by the Prime Minister and the Business Secretary (or whatever title), and ministers given support in standing up to the formidable "more regulation" lobby. Demands for new regulation must be fiercely resisted by ministers, rather than as present being supported by them. Equally, they have to push through deregulation where this is appropriate and expose the self-interested groups that wish to preserve regulation to protect and benefit themselves rather than the public.

Forcing Cultural Change

Cultural change amongst regulators is not going to be achieved merely by exhortation and education. Rather, more obstacles have to be put in the way of new regulations being imposed to ensure that they do meet the tests of good regulation. Currently, the Government seeks to achieve better regulation by a combination of consultation, impact assessments, Parliamentary scrutiny and some high-level scrutiny and policy work by the Better Regulation Executive and the external advisory body of the day.

One proposal to bolster the obstacles is that departments and regulators should have regulatory budgets in the same way that they have expenditure budgets. There is significant support for the concept of regulatory budgets, including in the Arculus Review, and at first sight the concept sounds very attractive. The current Government had a preference for regulatory budgets; it published a consultation document in August 2008, the tone of which was that regulatory budgets would be introduced with the consultation being about how rather than whether.

The Government's proposal would allow for regulatory budgets to be set at the departmental level; that is, they would cover both direct regulation by departments and also the various regulatory

bodies for which they were responsible. Budgets would cover only new regulation and not the existing stock of regulation, be set for three year periods and would cover all administrative costs; that is, direct costs, indirect costs and unintended costs. The benefits of regulation would not be netted-off from the costs but rather would be taken account of in setting budgets. Any administrative savings resulting from existing simplification programmes could be netted-off from new administrative costs. To allow flexibility, any unspent budget allocation could be carried over to a new period, departments could trade budgets and there would also be provision for regulatory burdens to be imposed in exceptional circumstances on top of existing budgets. Recognising that the initial administrative costs can be much higher than ongoing annual costs, the proposal was that these would be amortised over a period of years.

The rationale for regulatory budgets is that the existing controls on taxes and expenditure make regulation an easy option for policy makers because any costs are out-sourced to others. The main benefits of regulatory budgets were said to be greater prioritisation between different regulations and better control of costs as well as more transparency.

The consultation document was more white than green with the clear message being that regulatory budgets would be introduced. Of the consultation responses, 49% were in favour and 39% against with 16% being neutral. Broadly speaking, businesses were broadly in favour and everyone else was against. In April 2009 the Government announced that it was not proceeding with regulatory budgets. Sadly, it did not explain why it had come to this decision, issuing only a very brief statement which covered a number of issues including the establishment of the Better Regulation Sub-Committee of the National Economic Council and the new external Regulatory Policy Committee.

In practice, it is difficult to see how regulatory budgets could work effectively. The costs of regulation cannot be measured with

anything near the precision of the costs of direct public expenditure (and the benefits of regulation are, notoriously, even harder to estimate, let alone measure). Future costs are particularly difficult to predict; indeed, the Government claimed that regulatory budgets would have to take account of unintended consequences without explaining how regulators would know what unintended consequences were. The experienced regulator would have little difficulty getting around the concept of regulatory budgets. There would be a tendency to under-estimate administrative costs. The Government also provided itself with a let-out which would allow budgets to be exceeded in exceptional circumstances. It is also the case that budgets would deal only with administrative costs, not the rather more important regulatory impacts on competition and innovation. A regulation could easily have a minimal administrative cost but maximum adverse impact on competition to the detriment of consumers. In the same way that public expenditure constraints have pushed policy makers down the more regulation route, so, unless they were constructed so as to avoid this, regulatory budgets could risk providing an artificial encouragement for particular types of regulation.

Having accepted that regulatory budgets will not work but that the existing arrangements are also unsatisfactory, what then would redress the balance between those wishing to regulate and businesses subject to regulation? Having the appropriate institutional structure would be a good starting point. As set out in Chapter 9 there needs to be a new framework combining the Better Regulation Executive with the Conservatives' proposal for an Independent Panel on Regulation and Risk or the government's new Regulation Policy Committee. This body has to sit somewhere in the Government machinery, and the Cabinet Office is the appropriate place although with a sufficient degree of operational independence. It is equally important that the unit is not staffed entirely by civil servants but also has a sufficient number of outside

people on secondment or permanent contract. This body would have the following functions -

- High level work on risk and regulation, as is being done at present.
- To scrutinise particular regulatory proposals at its own volition.
- To set out requirements for regular evaluation of all regulations and to ensure that these are achieved.
- To act as a central clearing house for impact assessments ensuring that they are of the required standard.
- To consider requests from business to review particular regulations.

Under this framework a combination of measures is needed.

1 Comprehensive impact assessments of all regulatory proposals should be required and the production and quality of such assessments needs to be carefully monitored. The scope of impact assessments needs to be widened to ensure that effects on the supply of the good or service being regulated and on competition in the marketplace are given due weight.
2 A comprehensive programme of evaluation of existing regulations should be introduced, using a variety of techniques include Hampton Implementation Reviews, external evaluations and internal assessments. Such evaluations should be the trigger for some reduction in the regulatory burden.
3 A new regulation should automatically cease to apply after a given period unless a positive step was taken to re-establish it. This "sunset clause" has been frequently debated in the past and is supported by the Conservative Party. The concept would need to be combined with the requirement to have a full impact assessment before any steps are taken to renew the regulation.
4 External involvement in the policy making process needs to be substantially improved through more effective stakeholder

engagement, including techniques such as commissioning studies of the impact on proposals on businesses and consumers where otherwise such input would not be available, the use of informal stakeholder consultative groups and commissioning independent reality checks of particular proposals.

5 Backdoor regulation through new interpretations, judicial decisions and changes to enforcement policy need to be brought within the scope of policy on better regulation by ensuring at least adequate notice and where appropriate impact assessments and consultation.

6 Departments and regulators should be required to demonstrate that over a period of a year they are reducing the overall administrative burden on business through the impact of simplification measures and deregulation exceeding by a significant margin the burden imposed by new regulation. This would be more effective that the simplistic "one-in, one-out" or even "one-in, two-out" concept, which would be easily seen off by officials.

7 There needs to be an effective means for businesses to challenge unreasonable regulations. At present, there is no real means of doing this other than complaining to Government which would, of course, defend what it is doing, or by seeking support from MPs which would work only in a tiny number of cases. There needs to be a mechanism that sits sufficiently outside Government that enables businesses to challenge regulations that do not meet the tests of good regulation. Business groups should be permitted to make a direct application to the BRE for a particular regulation, whether overt or back door, to be reviewed. The business group would be expected to back up its argument with detailed evidence so as to prevent frivolous complaints. To ensure that consumer interests were properly protected, Consumer Focus and other relevant consumer and other interest groups would be invited

to comment on such applications. Individual trade bodies would quickly gain reputations for being effective in identifying unreasonable regulation and facilitating dealing with the particular issue, while others would be known as perpetual whiners, strong on assertion and weak on evidence. The BRE would have no power to force regulators to change their decisions but its recommendations would be public and departments would be required to respond to them in much the same way as they are required to respond to select committee reports. This proposal would also have a powerful side effect in forcing a much needed improvement in the quality of trade associations, and it would encourage them to work with consumer bodies to gain support for any of their applications to review regulations. (The recent Conservative Party document contains a proposal of this kind.)

8 The Arculus Review proposed that Bills imposing new regulations should be scrutinised by a Parliamentary Select Committee. This misses the point because the most onerous regulations do not arise as a result of Parliamentary Acts but rather from the decisions of individual regulators or Government departments, some of which may require regulations but many of which do not. However, Parliament must have a role in scrutinising regulation. A refinement of the Arculus proposal would be for a select committee to have the power to review individual regulatory requirements at its own instigation or at the request of the BRE, and also to oversee the work of the BRE.

The main impact of this combination of measures should be to make policy makers think more carefully about the impact of regulation, knowing that measures that do not stand up against the tests of good regulation would face a more severe test than is currently the case.

Secondary issues

In addition to the substantive points set out above there are a number of secondary issues that need to be tackled.

1 The Hampton restructuring proposals should be abandoned. There is at any one time a case for some rationalisation of regulators, and every regulatory body or its sponsoring department should regularly review whether its separate existence is justified or rather whether the public interest would be better served by the regulator merging with others. However, the shotgun approach recommended by Hampton of shoehorning a large number of regulators into a small number of super-regulators, with no analysis and no consultation, should be abandoned in theory as it has already been largely abandoned largely in practice.
2 Create an effective national body for consumer protection as proposed by Hampton. The current arrangement, whereby this is done from within the Office of Fair Trading, is not working. There needs to be a Director General of Consumer Protection with the same authority and control over policy and resources as the current Director General of Fair Trading has in respect of competition policy. Pragmatically, this is probably best done within the existing OFT legal framework, although ideally a separate body would make such a split easier to achieve.
3 Provide a legal framework for the register and enforce model. The register and enforce model, which entails no new rules but rather the registration of businesses and the payment of a fee to help fund enforcement work, is an effective means of dealing with malpractice in a number of sectors where there is no case for a dedicated regulator. It would in particular be able to deal with malpractice in sectors such as estate agency, funerals, and building work, where at present there is huge malpractice but very little enforcement because the resources are not available.

The necessary legislation would not create any new rules other than a requirement on businesses in designated sectors to register. It would therefore not be back door regulation or imposing new administrative burdens, but rather would be providing an effective means of enforcing existing regulations.

4. Recognise that regulation is a public good. The current general policy that regulators should charge fees sufficient to pay for their costs creates perverse effects and causes unnecessary administrative problems for regulators. The principle should be abandoned. Regulatory fees should be calculated on the basis of what is reasonable, bearing in mind the nature and size of the business and the level of regulatory fees in comparable industries.

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Regulation is never off the political or media agenda. Every time something goes wrong there are calls for new regulations, better regulation, more regulation and tougher regulation. At the same time, there are regular reports that regulation has gone too far - stifling business, preventing school trips (and other odd consequences of health and safety requirements), leading to a huge increase in bureaucracy that the taxpayer and business has to fund. Individual decisions on regulation are frequently taken in isolation of either of these trends, and many regulatory or deregulatory initiatives fail, either because they are knee jerk reactions or because they are not properly thought through or implemented.

In this report, Mark Boleat analyses the political and cultural factors that result in this unsatisfactory position, a key point being that there is all too easily an acceptance that more regulation is the answer to any problem, whereas the usual position is lack of enforcement rather than lack of regulation.

The report sets out some guiding principles for regulation covering in particular effective policy making, enforcement, combating "backdoor regulation", funding and evaluation. The paper is a timely contribution to an issue that is bound in feature in the 2010 election and will be a useful resource for policymakers.

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