

OCCASIONAL LECTURE 15



REGULATORY IMPACT ASSESSMENT ~ A FALSE DAWN?

Professor David Parker



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REGULATORY IMPACT ASSESSMENT
~ A False Dawn? ~

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PREFACE

The CRI is pleased to publish *Regulatory Impact Assessment – A False Dawn?* as Occasional Lecture 15. The lecture was given by Professor David Parker, Cranfield Centre for Competition and Regulation Research, University of Cranfield, on 17th January 2006 at University College London.

Regulatory Impact Assessments are an important part of the better regulation agenda for any government. They focus attention on the criteria and evidence for making good decisions, and in principle provide the information required for effective scrutiny and accountability. This, of course, requires both the providers of the information, and the users of that information, to be engaged with the process. Clearly, therefore, there are many points at which the potential of RIAs may prove to be unrealised. David Parker is right to remind us, therefore, that RIAs, like many other promising policy initiatives, may run out of steam if not carefully nurtured and properly used. We can only hope that this timely warning will help ensure that RIAs do not become a false dawn.

We are grateful, therefore, that David has taken this opportunity to set out the dangers, and to discuss the implications with us.

Peter Vass
Director, CRI
January 2006

Professor David Parker

David Parker was appointed Professor of Business Economics and Strategy in the School of Management on 1 October 2003 and Research Professor in Privatisation and Regulation at Cranfield on 1 January 2006. He was formerly at the Aston Business School, Aston University. David is co-director of the Regulation Research Programme for the Centre on Regulation and Competition funded by the Department of International Development. He is a Member of the UK Competition Commission and Economic Advisor to the Office of Utilities Regulation in Jamaica. He has advised government and business on privatisation, regulation and competition issues in many parts of the world, including the UK, the Russian Federation, Trinidad, Germany, Taiwan, Malaysia, Czech Republic, Slovakia, Estonia, Lithuania, Cyprus, Mexico, Uganda, Germany, South Africa, Australia and Malawi. He was senior lecturer in economics at the Cranfield School of Management between 1989 and 1992. David has published in leading international journals over a number of years. He is Fellow of the Royal Society of Arts, Fellow of the British Academy of Management and editor of the British Academy Newsletter. In 2004 he was invited by the Prime Minister to write the Official History of Privatisation in the UK.

REGULATORY IMPACT ASSESSMENT ~ A FALSE DAWN?

David Parker

Introduction

I would like to start by thanking the CRI for inviting me here this evening to give this CRI Occasional Lecture.¹ The theme of the lecture is Regulatory Impact Assessment, sometimes also referred to as Regulatory Impact Analysis. The lecture is timely given the arrival on 1 January of the Better Regulation Commission (BRC), which has taken over from the Better Regulation Task Force (BRTF) to provide independent advice to government about new regulatory proposals, and to review the government's overall regulatory performance.² The BRC also takes on new responsibilities for monitoring the reforms set out in the budget 2005, including vetting departmental plans for administrative burden reduction. Alongside the BRC operates the Better Regulation Executive (BRE) within the Cabinet Office, which was established in May 2005. This is tasked with promoting the government's better regulation agenda. The BRE has overall responsibility for the government's commitments to:

- regulate only when necessary;
- set exacting targets for reducing the cost of administering regulations;

¹ Thanks are also due to Professor Colin Kirkpatrick and Peter Vass for their helpful comments on an earlier draft of this lecture. I would also like to thank the lecture audience for useful questions and remarks. I have attempted to address a few of them in this written version of the lecture.

² BRTF (2005a), Better Regulation – from Design to Delivery, Annual Report, London, Better Regulation Task Force.

Professor David Parker, Cranfield Centre for Competition and Regulation Research, Cranfield University School of Management

REGULATORY IMPACT ASSESSMENT

- and rationalising the inspection and enforcement arrangements for both business and the public sector.

The BRE is expected to implement the recommendations of two major independent reports published on Budget Day in March 2005, namely the BRTF report Regulation - Less is More: Reducing Burdens, Improving Outcomes and Philip Hampton's Report, Reducing administrative burdens: effective inspection and enforcement.^{3 4} The BRE will also take forward the work previously carried out by the Regulatory Impact Unit including:

- scrutinising new policy proposals from departments and regulators;
- speeding up the legislative process to make it easier for departments to take through deregulatory measures;
- working with departments and regulators to reduce existing regulatory burdens affecting business and frontline staff in the public sector;
- driving forward the better regulation agenda in Europe.

(http://www.cabinetoffice.gov.uk/regulation/about_us/index.asp)

The title of my lecture might suggest that I am sceptical about the use of RIA. This is not so. I believe that a properly instituted system of RIA within government has the potential to raise the quality of regulation significantly and hence reduce the regulatory costs on business and society in general.

The reason for what might seem a somewhat sceptical title for the lecture is the number of 'false dawns' that have occurred in public administration in the past. I will not endeavour to catalogue them; suffice to say that many of us here tonight have lived through the initial enthusiasm for, and subsequent disillusionment with the practice of, PAR (Policy Analysis and Review), PBBS (Planned Programme Budgeting Systems), ZBB (Zero Based Budgeting), FMI

³ BRTF (2005b), Less is More, Reducing Burdens, Improving Outcomes, London, Better Regulation Task Force.

⁴ Hampton Report (2005), Reducing Administrative Burdens: Effective Inspection and Enforcement, London, HM Treasury.

(Financial Management Initiative), Rayner scrutinies and cost-benefit analysis (with which RIA has similarities), to name but a few of the policy initiatives over the last 30 years or so.⁵

The beginning of an assessment of RIA is the net benefits (or costs) that may result from state regulation. It has become something of a cliché to refer to the rise of the regulatory state; but cliché or not, there is much truth in the term. As state ownership has declined in popularity since the 1970s, the policy vacuum has been filled by a growing volume of regulation of private sector markets. Public concern about health and safety and the environment have contributed to this development, as has the EU, which churns out new regulations with what many of us consider to be depressing frequency. The privatised public utilities – telecoms, gas, water and sewerage, electricity and the railways – have their own regulatory offices and competition policy continues to evolve under the auspices of the Office of Fair Trading and the Competition Commission.

Estimating the full economic costs of regulation – which would include both the administrative costs of managing regulations by government and the (usually much larger) costs to business of complying with the regulations – is not easy. But undoubtedly the compliance costs are huge and often hidden. The British Chambers of Commerce in 2004 quantified the total costs of regulation on business from 1998 to July 2002 at £20.6bn.⁶ By June 2003 this figure had risen to £30bn., a growth of almost 46% in one year.⁷ ⁸ Sir Digby

⁵ More related to regulatory reform are the expectations created by the Regulatory Reform Act 2001 and the use of Regulatory Reform Orders (RROs) to seek out and remove redundant regulation. The BRE has recently concluded that “*the Act has not achieved its original intention. Its ability to deliver better regulation measures is not as wide-ranging as hoped and the number of reforms delivered is significantly lower than expected*”. BRE (2005). Review of the Regulatory Reform Act 2001, London, Better Regulation Executive, p7.

⁶ BCC (2003), Do Regulators Play by the Rules? An Audit of UK Regulatory Impact Assessments, London, British Chambers of Commerce.

⁷ BCC (2004a), Red Tape Costs Spiral to £30bn., Press Release 8 March, London, British Chambers of Commerce.

⁸ BCC (2004b), Are Regulators Raising their Game? UK Regulatory Impact Assessments in 2002/3, London, British Chambers of Commerce.

REGULATORY IMPACT ASSESSMENT

Jones, the Director General of the CBI, has reported that 95% of business leaders feel that the time they spend dealing with regulation has increased over the past five years and a survey of offshoring work in 2004 by CBI/MORI concluded that regulation in the UK was playing an important part in companies' decisions to relocate abroad.⁹ ¹⁰ The government's Better Regulation Task Force has put an astonishingly high estimate on the total cost of regulatory interventions. It has suggested that the cost could amount to something equivalent to the value of the entire revenue raised by income tax, at around £100bn per annum.¹¹ This year government departments are due to produce figures for the first time on the total administrative burden they impose. This should make for interesting reading.

Whatever the figure eventually placed on the regulatory burden, it is incontrovertible that regulation is extensive and appears to be growing bigger by the day. This has led to public concern in recent months as reflected in the Hampton Report and the investigation by the House of Lords Select Committee on the Constitution into the regulatory state (Hampton Report, 2005).¹² ¹³ In November of last year the prime minister promised a Legislative and Regulatory Reform Bill early in the new year to implement the Better Regulation Task Force's Regulation - Less is More report. The aim is to reduce regulatory burdens and deliver better regulation. The Bill was introduced into parliament on 11 January 2006 and proposes to speed up the tackling of unnecessary or over-complicated legislation and will merge a

⁹ Jones Sir Digby (2005), Tell Us Which Red Tape Should Go, Business Voice, May 2005, p3.

¹⁰ Co L (2004), Why We Stand to Gain, Business Voice, March, pp1-11.

¹¹ BRTF (2005c), Action not Words for Red Tape Reduction, Press Release, 7 December 2005, www.brtf.gov.uk/pressreleases/2005/designdelivery.asp

¹² House of Lords Select Committee on the Constitution (2004a), The Regulatory State: Ensuring its Accountability, 6th Report of Session 2003-04, vols.I-III, HL Paper 68 I-III and House of Lords Select Committee on the Constitution (2004b), The Regulatory State: Ensuring its Accountability: The Government's Response, 12th Report of Session 2003-04, HL Paper 150.

¹³ Vass P (2005), Accountability in the 'Regulatory State' Revisited, Regulatory Review 2004/2005, Bath, Centre for the study of Regulated Industries, University of Bath.

number of regulatory bodies.¹⁴ Like earlier policy initiatives, it is unclear whether the effects will be significant or not in terms of improving regulatory governance.

In this environment of renewed interest in regulation and its benefits and costs, RIA is a topical policy reform. On its web site, the Better Regulation Executive is unequivocal about the benefits of RIA, stating that it “*is a key tool in delivering better regulation. The RIA process will help departments deliver successful policy*” (<http://www.cabinetoffice.gov.uk/regulation/ria/index.asp>) (also see, for example, BRTF).¹⁵ But is this so? In my talk I will discuss the nature of RIA before going on to critically appraise its potential for achieving ‘better government’.

What is regulatory impact assessment?

RIA is a method for assessing both the positive and negative effects of existing and proposed regulatory changes by government at all levels, although in practice it has been implemented mainly within Central government. It can be used in advance of a regulatory change to assess the predicted impacts (a so-called *ex ante* assessment) or after a regulation has been implemented to see if its effects equate with those expected when the regulation was introduced (an *ex post* assessment). The current Labour government mandated the use of *ex ante* RIAs in August 1998. Today all government departments are expected to complete a RIA setting out the risks, costs and benefits of any new regulatory measure that has an impact on businesses, charities and

¹⁴ Cabinet Office (2006), “New Bill to enable delivery of swift and efficient regulatory reform to cut red tape – Jim Muphy”, Press Release, CAB/001, 11 January.

¹⁵ BRTF (2005d), *Routes to Better Regulation: A guide to Alternatives to Classic Regulation*, London, Better Regulation Task Force.

REGULATORY IMPACT ASSESSMENT

voluntary bodies.¹⁶ *Ex post* assessments remain rare which is a pity, given that much of the regulatory burden derives from existing laws.¹⁷ RIA is concerned with both the outcome and process dimensions of government regulatory policy.¹⁸ A good RIA attempts to assess all of the regulatory effects or at least those that are likely to have significant social, economic or environmental impacts. The effects may be both quantitative and qualitative – RIA should not be limited simply to quantitatively measurable impacts lest this leads to the omission of important costs and benefits. However, as qualitative effects are more difficult to evaluate and total, the use of RIA needs more effort within government to develop new ways of measuring

¹⁶ More correctly RIAs are required except for: 1) proposals that impose no costs or no savings, or negligible costs or savings on the public, private or charities and voluntary sector 2) increases in statutory fees by a predetermined formula such as the rate of inflation 3) road closure orders.

http://www.cabinetoffice.gov.uk/regulation/ria/overview/who_needs_ria.asp

All RIAs since 2002 must also consider the implications for competition of a regulatory proposal. Where an initial test indicates that there may be an impact, departments should discuss the competition assessment with the Office of Fair Trading. Departments are also expected to pay particular attention to the regulatory impacts on small business. More recently, updated guidance to departments increased the emphasis on the wider impacts of regulation; in particular the new guidance highlighted the impact on different racial groups, rural communities, sustainable development and the public sector.

¹⁷ A listing of recent RIAs by government departments can be found in HM Treasury, 2005. It was suggested in the discussion following this lecture that the reason for the lack of *ex post* RIAs lies in the difficulty in carrying them out so as to produce meaningful results. I am more inclined to believe that the reason lies in the desire of ministers “*to let sleeping dogs lie*”. The fact that the NAO in its investigations into the use of RIAs has been prevented from commenting on the value of the resulting regulations (rather than the process by which the RIAs were carried out) is consistent with a governmental reluctance to have an independent assessment of past regulatory decisions.

¹⁸ Kirkpatrick C (2006), Regulatory Impact Assessment, in M Crew and D Parker (eds) International Handbook on Economic Regulation, Cheltenham, Edward Elgar.

impacts, including the use of proxy measures and the measurement of opportunity costs.¹⁹

The concept of opportunity cost featured heavily in cost benefit analysis, especially during the 1960s (sometimes in the context of ‘shadow pricing’); but RIA is much more than a CBA. It has similarities to CBA in the sense that it attempts to evaluate costs and benefits of a government policy – in this case a regulatory change. But the benefits of RIA for good government should go much wider than this. Arguably, its main contribution lies in improving the process by which the risks attached to a regulation are assessed.

Risk assessment is a central part of any serious RIA because costs and benefits are often unclear. A RIA will need to identify the problem and which possible outcomes lead to harm or gains. It will then need to estimate the probabilities of such outcomes occurring. Choosing the indicators of both costs and benefits should not be a matter for departmental decision but rather it should be the outcome of a process of consulting with a wide range of stakeholders. There will often be different views on which indicators should be chosen and certainly different appreciations of cause and effect relationships. Where there is real uncertainty about outcomes, policy-makers end up taking decisions which are based on judgments that in effect assume a distribution of probabilities. This is helpful because the reasoning behind the choices can be debated. RIA is intended to improve decision making by surfacing uncertainties and tapping into collective knowledge and understanding.

RIA first surfaced formally as a process within government in the USA in the 1970s. But it achieved wider popularity after the OECD began to champion the idea and published, in March 1995, its guidance on RIAs (a fuller discussion of the origins of RIA can be found in Kirkpatrick, 2006). RIA guidelines were introduced for UK

¹⁹ It also requires a re-emphasis on the traditional drafting skills of civil servants, when reasoned cases were prepared taking into account all factors, judgements were explicit, and a disinterested conclusion was presented which sought to persuade the reader of the correctness of the recommendations. RIA should allow civil servants to re-exercise these skills.

REGULATORY IMPACT ASSESSMENT

government departments in 2000. By 2001 20 out of the then 28 OECD member states claimed to be using RIA in some form. In addition to the OECD, international donor agencies such as the World Bank and the Asian Development Bank have undertaken recent initiatives to spread the use of RIA more widely. The European Commission is now also active eg, EC.^{20 21}

Table 1 provides a summary of the extent of the use of RIA in a selection of OECD countries and the EU. It is clear from the listing that RIA is established within government in a range of countries.

Table 1: RIA adoption in selected OECD countries and the EU Commission

Selected Countries	Year that RIA was adopted	Scope of coverage
Australia	1985, strengthened 1997	<ul style="list-style-type: none">• Primary laws, subordinate regulations, international treaties and quasi-regulations that have business or competition impacts. (150 regulations per year out of approximately 2000 regulations)• Business impacts arise in case of significant market impact• Reviews of existing regulations should adopt the RIS framework

²⁰ The European Commission introduced a new Impact Assessment system in 2003. This system built partly on the experiences with its predecessor, the Business Impact Assessment (BIA); see Communication on Impact Assessment, 5 June (2002a), COM(2002)276 final, which was part of the Better Regulation Action Plan (2002b), COM(2002)278 final).

²¹ European Commission (2005a), Impact Assessment Guidelines, SEC (2005)791, Brussels, EC and European Commission (2005b), Communication on Better Regulation for Growth and Jobs in the European Union: Minimising Administrative Costs imposed by Regulation, Detailed Outline of a Possible EU Administrative Cost Model, Commission Staff Working Document, COM (2005)97 final, Brussels, EC.

Canada	1978, strengthened 1986	<ul style="list-style-type: none"> • RIA is required only for subordinate regulations. Memorandum to Cabinet (MC) similar to RIA is required for primary laws and policies.
Czech Republic	Developed since 2000	<ul style="list-style-type: none"> • All primary laws including their ‘substantial intents’ and government decrees. Partial impact analysis is done in case of some major subordinate regulations in particular areas, however, this is not systematic.
Germany	1984, strengthened 2000	<ul style="list-style-type: none"> • Primary laws and subordinate regulations. • The RIA process can be applied to the review of existing regulations
Greece	Developed since 2001	<ul style="list-style-type: none"> • Primary laws and subordinate regulations
Hungary	1987, strengthened 1996	<ul style="list-style-type: none"> • Primary laws and subordinate regulations (all acts and decrees) • The analysis process is applied to the existing regulations.
Italy	1999	<ul style="list-style-type: none"> • Primary laws and subordinate regulations.
Mexico	1996, expanded 2000	<ul style="list-style-type: none"> • Primary laws and subordinate regulations. • RIA does not apply to the review of existing regulations.
Netherlands	1985, strengthened 1994-1995	<ul style="list-style-type: none"> • Primary laws in major regulations. Subordinate regulations in major regulations. BET is also applied to the review of existing regulations.
Poland	2002	<ul style="list-style-type: none"> • All legislative proposals (primary laws and subordinate regulations). The Budget Act is excluded from that procedure. • RIA is not required in the review of existing regulations.

REGULATORY IMPACT ASSESSMENT

United States	1974, strengthened 1981	<ul style="list-style-type: none"> • Primary laws in selected cases and all subordinate regulations.
United Kingdom	1985, strengthened 1996 and 1998	<ul style="list-style-type: none"> • Any proposal for which regulation is an option – including both primary and secondary legislation - that would have a non-negligible impact on business, charities or the voluntary sector should have an RIA. • RIA is also applied to reviews of existing regulations. • Regulations affecting only the public sector are currently subject to a Policy Effects Framework (PEF) assessment. Brought within RIA in 2004.
European Commission	2002	<ul style="list-style-type: none"> • Major regulatory and/or non-regulatory proposals with significant economic, social and/or environmental impacts. • Proposals with a significant impact on major interested parties • Proposals that constitute a new policy, policy reform and/or significant change to existing policy • Proposals that involve major regulatory issues (subsidiarity/proportionality/choice of regulatory instrument) • The new procedure does not apply to Community decisions that derive from the executive powers of the European Commission, eg, adoption of EU funded projects, decisions in application of EC competition law

Source: Jacobs (2004).²²

²² Jacobs S (2004), Regulatory Impact Assessment and the Economic Transition to Markets, Public Money & Management, vol 24, pp283-290.

In the UK the BRE publishes guidelines and checklists for government departments to use when undertaking RIAs that draw on and build upon the earlier OECD guidance (details of the OECD's original checklist and of current guidance within the UK on RIAs are provided in the **Appendices**).

The ways policy makers make decisions can be classified as expert, where the decision is made by a trusted expert or experts, consensus, where a group or stakeholders agree a common position (sometimes encapsulated within the term the 'departmental view'), benchmarking, where the decision is based on an outside model or comparison with actions taken elsewhere eg, within another administration (benchmarking is commonly used by utility regulators, for example [for a review see Parker et al, 2006]), and empirical, where the decision is based on fact-finding analysis that defines the parameters of action according to established criteria.²³ A RIA draws on all of these approaches; but it is most clearly part of the empirical approach to policy formulation and action. By systematically gathering evidence and consistently examining the potential impacts (positive and negative) that can be expected to arise from a government regulation, and how these impacts are distributed across different stakeholders, RIA should communicate to decision makers relevant knowledge about the consequences of any proposed regulatory change.

RIA should be applied on a case by case basis and some regulatory changes may be so inconsequential that the costs of undertaking one are almost certainly outweighed by any conceivable benefit that could result. Hence, RIAs should be limited to 'important' regulations; although this does leave hanging what exactly is meant by important – and important to whom? The usual criteria will be the scale or size of a regulation's expected impact; but a RIA may also be appropriate when a regulation is particularly contentious or has significant income redistribution effects.

²³ Parker D, Dassler T and Saal D (2006), Performance Benchmarking in Utility Regulation: Principles and the UK's Experience, in M Crew and D Parker (eds) International Handbook on Economic Regulation, Cheltenham, Edward Elgar.

REGULATORY IMPACT ASSESSMENT

RIA should become an integrating framework for regulation within government. By comparing the linkages and impacts between economic, social and environmental regulatory changes and the effects on different interests, RIA should help to integrate multiple policy objectives and the possible policy responses. The following is an illustration of the stages that a RIA might go through when applied to a potential new regulation. Where it is applied to an existing regulation, the process will centre on Stage 5 below.

Stage 1: Identification of the problem: what is the proposed regulation intended to achieve? Why do we need to regulate at all? Full consideration of the ‘do nothing’ option should occur at this stage.

Stage 2: Consultation with those likely to have an interest in the regulation: attracting the views of interested parties by canvassing views on various regulatory options, including the ‘do nothing’ option. Have we attempted to obtain the opinions and submissions of all relevant interests and have they all been evaluated seriously?

Stage 3: Preparation of the regulation legislation:²⁴ does the legislation reflect the evaluation undertaken after the consultation process and does it adequately address the problem identified at Stage 1?

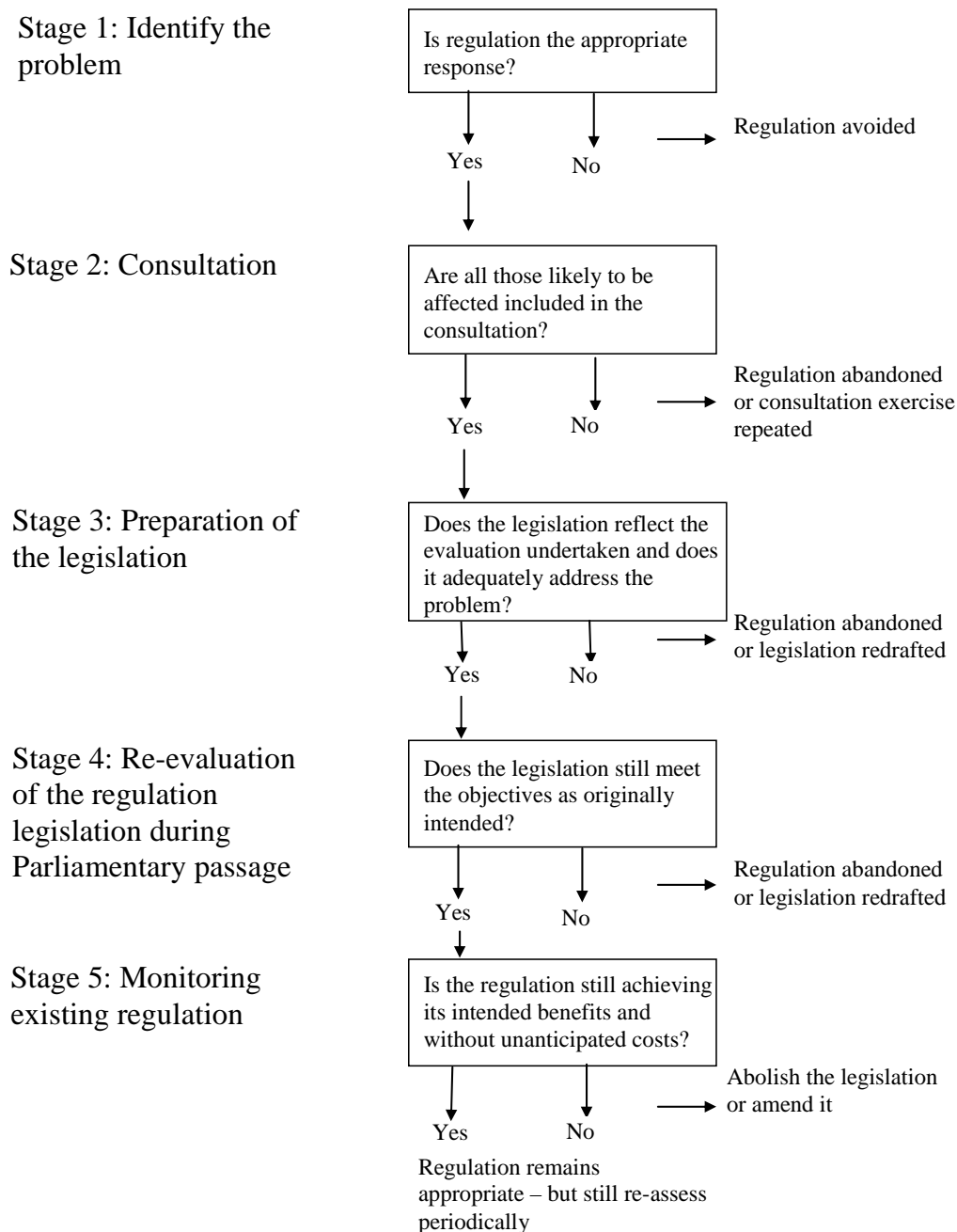
Stage 4: Re-evaluation of the regulation legislation - a second RIA should be undertaken when changes have been made to a regulatory measure during the Parliamentary process. It is important to ensure that the regulatory measure is not altered by amendments tabled during the passage of legislation through the House of Commons and the House of Lords so that it is no longer fit for purpose. Is the regulation appropriate as now drafted?

Stage 5: periodic RIAs should be undertaken as part of the regulatory monitoring process to ascertain whether a regulatory measure now on the statute books is achieving its intended benefits and without

²⁴ Of course, not all regulatory changes need new legislation, in which case the focus is on the statutory instrument or other means by which the regulation is introduced or amended.

unanticipated costs. This stage too will require consultation with affected interests. Is the regulation still appropriate or does it need reformulating or should it be abolished altogether having outlived its usefulness? **Figure 1** below summarises this process.

Figure 1: The RIA process



At the heart of a good RIA is public consultation with all groups likely to be affected by a regulation. In a recent study undertaken with two colleagues at the University of Manchester, we undertook a

REGULATORY IMPACT ASSESSMENT

questionnaire survey of regulation in 40 developing and transition economies.²⁵ Although we were encouraged, although very surprised, by the number of countries that claimed to use RIA (or similar) as part of their regulatory decision making, which was 30, much fewer made the results of their consultation public and few consulted consumer groups and other bodies representing civil society.²⁶ The business sector was usually consulted, although the nature and extent of the consultation were unclear. Therefore, consultation to identify and evaluate the costs and benefits was partial and seemed inherently at risk of capture by special interests. The fear remains that the costs and benefits included in RIAs in these countries could be simply those that justify the regulation already championed by the ruling political party.

To ensure that the consultation process and the RIA evaluation process is properly conducted in any country, it is important that there is both transparency and accountability.

- Transparency is achieved by departments and other regulatory agencies setting out the problem to be tackled clearly and unambiguously, developing a comprehensive data base of affected interests of which all should be asked for their views, and publicising the evidence received during the consultation process (subject to any request that evidence is not published for confidentiality reasons – for instance, where a company gives detailed figures on its costs that would otherwise not be in the public domain and which might give a commercial advantage to a competitor).

Today government departments and agencies have their own web sites and the evidence should be placed on these sites as soon as it

²⁵ Kirkpatrick C, Parker D and Zhang Y-F (2004a), *Regulatory Impact Assessment in Developing and Transition Economies: A Survey of Current Practice*, Public Money & Management, vol 24, pp291-296.

²⁶ We have grounds for concluding that our questionnaire results grossly exaggerated the true extent to which RIA methods have been adopted, see Kirkpatrick C and Parker D (2004b), *Regulatory Impact Assessment: an overview*, Public Money & Management, vol 24, pp257-270.

becomes available. Once a regulation is introduced or an existing regulation is evaluated then regulators should be encouraged to publish reports setting out the actions taken as part of the RIA process, the main evidence received, and the reasons for accepting or rejecting the evidence. The document should make clear why the action taken was approved within government.²⁷ In this context, it is disappointing to note that the publicising of RIAs by departments in the UK appears to remain patchy. The British Chambers of Commerce study, referred to earlier, claimed to be able to track down only 499 of the around 700 RIAs that had been undertaken in the UK over a four year period (BCC, 2004).

- Accountability is achieved by ensuring that all RIAs are subject to *ex post* reviews. In the UK the BTRF published a number of useful analyses of the application of RIAs in government departments. Departmental RIAs are now scrutinised by the BRE. The National Audit Office has also undertaken splendid work in this respect, drawing attention to ‘good’ and ‘less good’ practices within different departments.²⁸ Moreover, when RIAs are published they may be subject to scrutiny by the media and by curious academics like me. In the future the Freedom of Information Act may provide another fruitful source of knowledge about the use of RIAs within government, although the extent to which the Act can be used to obtain detailed information on RIAs that are not already in the public domain remains unclear.

²⁷ Sometimes RIAs are produced after a decision has already been made. Such use of RIAs does not tap into their full potential, but a RIA may still be useful in communicating decisions and expected impacts, NAO (2005), Evaluation of Regulatory Impact Assessments Compendium Report 2004-05, HC 341, London, The Stationery Office, p3.

²⁸ NAO (2001), Better Regulation: Making use of Regulatory Impact Assessments, London, National Audit Office; NAO (2004), Evaluation of Regulatory Impact Assessments Compendium Report 2003-03, HC 358, London, The Stationery Office; NAO (2005), Evaluation of Regulatory Impact Assessments Compendium Report 2004-05.

A chequered experience

So far so good. On the face of it, the introduction and systematic use of RIA seem to have the potential to increase the quality of government and address some of the criticisms of the growth of regulation voiced by business and others. Certainly, RIA has taken off internationally and compliance in UK Central government is now, officially, 100%.²⁹

Level of compliance and results

Date	Compliance
December 2002	92%
November 2003	100%
June 2004	96%
November 2004	100%
June 2005	100%

Source:

http://www.cabinetoffice.gov.uk/regulation/ria/ria_compliance.asp

However, the results from RIAs appear to vary substantially across departments, probably reflecting differing levels of enthusiasm about the process. In 2003 the NAO undertook its first set of evaluations of a sample of RIAs performed in the UK. The study identified the use of a number of approaches across UK government departments, including evidence of good practice and areas in need of much improvement (NAO, 2004).³⁰ Whereas RIA was well embedded within government as part of the policy making process, there was insufficient attention paid to the generation and analysis of alternative options (including alternatives to regulation where appropriate) and quantifying costs and benefits remained a challenge. Rarely were benefits quantified. Particularly worrying was the tendency for

²⁹ Kirkpatrick C and Parker D (2004c), Regulatory Impact Assessment and Regulatory Governance in Developing Countries, Public Administration and Development, vol 24, pp1-12 and Parker D (2004b).

³⁰ Humpherson E (2004), The National Audit Office's Evaluation of RIAs: Reflections on the Pilot Year, Public Money & Management, vol 124, pp277-282.

departments to report single point estimates when quantifying costs and benefits with no accompanying sensitivity analysis. This NAO study was followed up in 2004 with another study which again found a chequered record on the application of good practice when undertaking RIAs within government. There had been some improvements between 2003 and 2004 in the RIA cases studied, but still only four out of the 10 RIAs involved quantified benefits. Only four out of the 10 provided a reasonably description of the monitoring and evaluation procedures (NAO, 2005). Few RIAs appeared to recommend the abandonment of a proposal on the grounds that the costs exceeded the benefits. Similarly, studies of the use of RIAs in the USA and EU have all found significant deficiencies in their operation.³¹

This mixed experience suggests obvious dangers. In particular, if expectations greatly exceed the reality there is a real danger that RIA will be seen as a just the latest ‘fad’ in public administration. This will then be followed, inevitably, by examples of more RIA failures and, ultimately, disillusionment with the concept. If those of us who believe that RIA can contribute to good government are to see RIA having long-term benefits in terms of improving regulation, then we need to guard against excessive and naïve exuberance at this stage. So let me now set out some of the difficulties that RIA faces in terms of improving government.

Firstly, RIA must not operate in a silo. If it is to improve the regulatory state then it has to be part of a wider reform of government aimed at increased transparency and accountability, and the other attributes of good regulation set out succinctly by the Better

³¹ For example, Lee N and Kirkpatrick C (2004), A Pilot Study of the Quality of European Commission Extended Impact Assessments, Impact Assessment Research Centre Working Paper No.5, University of Manchester carried out a performance evaluation of a sample of Extended Impact Assessments undertaken by the European Commission and found a number of weaknesses. These included poor identification of the problem, unbalanced coverage of different types of impacts and lack of clarity in the explanation of the analysis, alongside weaknesses in the presentation of the RIA findings.

REGULATORY IMPACT ASSESSMENT

Regulation Task Force, namely consistency, proportionality and targeting.³²

Regulation by government is always a second best to competitive markets in the absence of market failure, ie, externalities, public goods, serious information asymmetries and natural monopoly.³³ It should be adopted only where there is a clear case for it, established through systematic analysis (which, of course, is the anticipated contribution of RIA). RIA requires the existence of regulatory appraisal skills within government. It also requires comparable skills outside of government if interested parties are to respond to consultation in a meaningful way. It is not clear as to the extent to which such skills exist within government departments, or outside, in the UK – and they certainly do not exist in many lower income economies. The purpose of Better Regulation Task Forces, Executives and Impact Units within government is to improve the understanding of RIA by spreading the gospel and assisting in training and skills development. This must remain a priority.

Secondly, RIA must not become a box ticking exercise. As someone who works in Universities and ticks boxes, the box ticking mentality is the antithesis of what RIA should be trying to achieve. To repeat, RIA is a process for decision making. It is not a mechanical exercise and involves judgment. It relies upon those involved in the process understanding its operation and rationale. This requires having staff in regulatory offices that have a positive mental approach to RIA and this can only come about when the employees are properly trained. Results should be properly evaluated; hence, so-called function tests have been proposed to assess which regulatory proposals are revised or abandoned as a result of a RIA (Kirkpatrick, 2006).

Thirdly, RIA assumes that policy making is an objective and rational process which is enhanced by fact finding and disinterested analysis of the evidence. As we know well from research in Public Choice

³² BRTF (2003), Principles of Good Regulation, London, Better Regulation Task Force.

³³ Parker D (2002), Economic Regulation: A Review of Issues, Annals of Public and Cooperative Economics, vol 73, no 4, pp493-519.

theory since the 1960s, civil servants are not disinterested individuals and may wish to promote their own or their department's agendas.³⁴

³⁵ Politicians are clearly not disinterested and government is, by definition, a political act. Therefore, RIAs are undertaken in a challenging environment, where pressures constantly exist to ensure that they produce results consistent with 'official policy'. The worst type of RIA is one that effectively exists as a false shop window to the world – 'look, we are doing it!' – and where the process is simply used to validate decisions made politically. In this context, we might expect that RIAs have more scope for application as intended and for improving regulatory governance the further the distance of the body carrying out the RIA from political sensitivities. The RIAs carried out by 'independent regulators' such as Ofgem and Ofcom seem less likely to be politically influenced because of the autonomy of the regulatory offices than RIAs carried out in government departments. This deserves further investigation.

Fourthly, RIA should not be treated as a 'one size fits all' policy initiative. Any attempt to role it out across government in a standardised format is asking for trouble. Government departments will differ in their readiness to operate RIA. Also, the orientation that RIA might take, and the extent of its usefulness, can be expected to vary across government. This means that in developing the use of RIA, a first obvious step is to identify which departments (and perhaps which sections of departments) will benefit most from training in the use of RIA.

Fifthly, and following on from the last point, it is important to build an effective regulatory management system with support for the process at the highest political level. The establishment of the Regulatory Impact unit and now the Better Regulation Executive located within the Cabinet Office and the existence of an independent Better Regulation Commission were, and remain, important signals across government in the UK about the importance of the RIA

³⁴ Niskanen W A Jr (1971), *Bureaucracy and Representative Government*, Chicago, Aldine.

³⁵ Buchanan J M (1972), *Theory of Public Choice*, Michigan, University of Michigan Press.

REGULATORY IMPACT ASSESSMENT

initiative. Nevertheless, the interventionist culture within government and the limited incentive for civil servants to reduce the regulatory burden - coupled with the public's knee jerk response to any crisis that 'government should do something about it' - means that the Better Regulation promoters have a mountain to climb.

A false dawn?

I will finish this lecture by once again stressing that I believe that RIA has the potential to improve government and reduce the mounting regulatory burden on society. It has much room to do good – not least because state regulation has expanded and continues to expand, at a pace and on a scale that must be of concern to all of us. Regulation must be restricted to where there is clear 'market failure' and its benefits can be demonstrated clearly to outweigh its costs. There is no point at all in replacing market failure with state failure.

But it should be clear from my lecture that the successful introduction and development of RIA will depend a lot on the context. The pre-existing legal and administrative arrangements will obviously shape the process, in any country.³⁶ So will the existence of parties outside of government willing to invest the time and effort in responding meaningfully to the consultation which is an important component of the RIA process.

Business has complained about the costs of regulation. RIA provides the opportunity for business to input into the regulatory process and thereby ensure that regulation is restricted to where it is really needed and produces net economic, social or environmental benefits. By so doing the critical relationship to government in a democracy – trust – can be restored. But for RIA to achieve this goal, business as well as government must invest in building regulatory data bases and in the training of regulatory staff, as well as providing the necessary

³⁶ Radaelli C M (2005), Diffusion without Convergence: How Political Context Shapes the Adoption of Regulatory Impact Assessment, *Journal of European Public Policy*, vol 12, no 5, pp1-20.

resources and time for staff to communicate with government about regulation.³⁷ This applies equally to consumer groups and other representatives of civil society. There is a need for a better educated public response and the government has a responsibility to help bring this about; for example, by communicating clearly the grounds for deciding when regulation is appropriate and when it is not. RIA is no free lunch. Better regulation initiatives must range wider than government and be meaningful.

In general, the introduction of RIA has been welcomed in the UK. However, the authors of the recent study sponsored by the British Chambers of Commerce, mentioned earlier in this lecture, were critical of the fact that, as they saw it, the cumulative burden of regulation in the country was still discounted, the dynamic effects on competitiveness ignored, and the benefits claimed to justify new regulations seldom quantified. The study reported that costs and benefits for business were quantified in only 69% and 20% of RIAs, respectively. Although in most of the RIAs studied consultation occurred, in only 38% of the cases was it noted with whom the discussions took place. Based on these findings, there is clearly much ground to make up before transparency leading to “trust” between government, business and civil society is ensured or before the public will be convinced that RIA is having an effect on reducing the intrusiveness of the regulatory state. The conclusion to the BCC study is particularly sobering in this respect. It suggests that much remains to be done:

“There is no clear evidence that the RIA system reduces the number of regulations. It is not possible either to conclude that the RIA system adds value to UK governance or that it does not... this research makes it

³⁷ In this respect, the government’s recent announcement that business has been slow to come forward with actual examples of burdensome regulation, rather than simply grumbling about regulation in general, is educational – and disappointing.

REGULATORY IMPACT ASSESSMENT

clear that the UK regulators do not yet play by their own RIA rules” (BCC, 2003, p14).³⁸

The need to address the burdens imposed by the regulatory state is too great to allow the opportunity offered by RIA to pass us by. But if a combination of inertia and scepticism within government (and just as importantly outside of government) about the value of RIA grows then there is a real risk that RIA will be progressively side-stepped. In this context the apparent lack of media interest in RIAs is worrying. If deep scepticism about the contribution of RIAs results then they will become merely another false dawn in the search for better government.

³⁸ Of course, it is the case that RIA is intended to lead to *better* regulation and not necessarily *less* regulation. However, it would be disappointing to many of us if it did not do something to stem the regulatory juggernaut.

Appendix 1

The OECD RIA Checklist

1. Is the problem correctly defined?
2. Is government action justified?
3. Is regulation the best form of government action?
4. Is there a legal basis for regulation?
5. What is the appropriate level (or levels) of government for this action?
6. Do the benefits of regulation justify the costs?
7. Is the distribution of effects across society transparent?
8. Is the regulation clear, consistent, comprehensible, and accessible to users?
9. Have all interested parties had the opportunity to present their views?
10. How will compliance be achieved?

Source: OECD³⁹

³⁹ OECD (1995), Recommendation on Improving the Quality of Government Regulation, Paris, Organisation for Economic Cooperation and Development.

Appendix 2

Regulatory Impact Assessment Guidance RIA cost and benefits checklist

Economic impacts

- Will the proposal result in receipts or savings to the government?
- Will the proposal affect the costs, quality or availability of goods or services?
- Will the proposal result in new technologies?
- Will the proposal result in a change in the investment behaviour both into the UK and UK firms overseas and into particular industries?
- Will it impact on the levels of competition within the affected sector?
- Will the proposal impact on the public sector, including the resources of front-line delivery staff?
- Will the proposal impact on business, charities and voluntary organisations? This could be in the form of a change in prices, outputs, levels of employment or competitiveness?
- Will the proposal impact on consumers?

Social impacts

- Will the proposal influence health-related behaviour or affect demand for health services?
- Will the proposal influence safety at work or affect the likelihood of accidents in the community?
- Will the proposal affect the rate of crime or crime prevention or create a new offence/opportunity for crime?
- Will the proposal affect the levels of skills and education?
- Will the proposal affect the provision of facilities or services that support community cohesion or in other ways that affect the quality of life in the local community?

Could the proposal result in any changes in or a differential impact on any of the following?

- Race equality – assessing policies for race equality impacts is a **statutory** requirement under the Race Relations (Amendment) Act 2000
- Rural communities
- Human rights
- Gender equality
- Disabled people
- Children and young people
- Older people
- Income groups
- Devolved countries
- Particular regions of the UK

Environmental impacts

- Will the policy option lead to a change in the emission of greenhouse gases?
- Will the policy option be vulnerable to the predicted effects of climate change?
- Will the policy option lead to a change in the financial costs or the environmental and health impacts of waste management?
- Will the policy option impact significantly on air quality?
- Will the policy option involve any material change to the appearance of the landscape or townscape?
- Will the proposal change?
 1. the degree of water pollution
 2. levels of abstraction of water
 3. exposure to flood risk ?
- Will the policy option disturb or enhance habitat or wildlife?
- Will the policy option affect the number of people exposed to noise or the levels to which they are exposed?

Source: edited extract from the BRE RIA guidance to departments
http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/costs_and_benefits/cost_and_benefits_checklist.asp

Appendix 3

Regulatory Impact Assessment Guidance

Step-by step guidance

Analysis of costs and benefits

- Describe all the costs and benefits of each option, including the ‘do nothing’ option.
- The information and analysis on the costs and benefits in the RIA should be proportionate to the likely impact but be rigorous enough to inform decision making.
- As it is often difficult to predict accurately the exact costs and benefits you should consider presenting a range and stating whether this represents extreme values or the most likely range of outcomes.
- For each option you must present only the costs and benefits that are additional to those that would have been incurred if no action were taken. So any discussion of current costs and benefits should only be included in ‘background’ information.
- Total costs should be further described as either administrative or policy costs. These should be described fully here and also included in the summary part of this section.
- Identify any related or overlapping regulations that already affect those organisations and individuals likely to be affected by your proposal in order to work out the impact of your proposal. Consider the cumulative effect each option may have and any interactions there may be with other regulations.
- Do not assume 100% compliance with existing law or that there will be 100% compliance with your policy proposal. Consider the impact of lower levels of compliance. Additional costs and benefits can arise from new regulations or administrative policies designed to improve compliance with existing law.
- Consider what could go wrong or how the policy could turn out better than expected and how this would affect the costs and benefits. This should build on the possible unintended consequences you identified in the Options section.
- All the evidence and information you have gathered during the RIA process must be included in the RIA. Publication of the partial and

final RIA will help meet commitments under the Freedom of Information Act 2000.

- You should spell out and test any assumptions, and provide references to any data sources or methodologies used.
- You should be careful to avoid undue burdens that inhibit e-commerce and consider the impact of your proposal on the international competitiveness of the UK for e-commerce. The Cabinet Office e-Government Unit has developed a set of e-policy principles to help ensure that legislative and policy proposals do not hinder e-commerce.

Source: edited extract from the BRE RIA guidance to departments
http://www.cabinetoffice.gov.uk/regulation/ria/ria_guidance/costs_and_benefits/cost_and_benefits_checklist.asp

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