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Kate Ollerenshaw: Impact Assessment as an Accountability Mechanism: Past, Present and Future

Editors' note – this post is part of a series on 'Contemporary Challenges for Constitutional Accountability'. The other posts in the series are available* ***here**.**

Introduction

On 19th September, the Government published a revised version of the Better Regulation Framework Manual setting out its new approach to impact assessment for regulatory measures. The system it will replace was aligned with the Government's formal mechanisms to incentivise a reduction in the burden of

regulation on business and civil society, but the repeal of the statutory Business Impact Target (BIT) by s. 18 of the Retained EU Law (Revocation and Reform) Act 2023 and the Government's commitment to 'Smarter Regulation to Grow the Economy' in the post-Brexit world prompted revisions. At first sight the proposals, including the creation of a new 'options assessment', seem to address some criticisms of the previous system. As always though, 'the devil is in the detail' and 'the proof of the pudding will be in its eating'. This post looks at the proposed changes in the light of past practice to highlight areas where the effectiveness of impact assessment as an accountability mechanism might remain compromised. For reasons of space, this post focuses on impact assessment as a prospective tool rather than its role in post-implementation review.

Evolution

The development of the impact assessment system has been iterative, but this section will highlight some key milestones for context. It divides the evolution of the system into three phases which approximate to the past, the present and the future.

Phase 1: the past

Phase 1 begins when, as part of its mission to reduce Government intervention in industry, the Thatcher Government advocated a centralised system of Compliance Cost Assessment for regulatory measures (Department of Trade and Industry, 'Burdens on Business: Report of a Scrutiny of Administrative and Legislative Requirements', 1985) and by 1986 a system was emerging whereby a central body within Government reviewed at this stage only the compliance costs of new regulation. Initially focused on Statutory Instruments, primary legislation was included in 1993, and from 1995 policy makers were required to include a 'Regulatory Appraisal' to discuss the benefits of the regulation being proposed.

This broader approach evolved further under New Labour with all Government departments being required to produce what became known as a Regulatory Impact Assessment (RIA) for proposals that imposed or reduced costs on business or the third sector, and for certain proposals affecting the public sector. The broad aim was to help identify the purpose and intended effect of the policy together with the risks to be managed, to consider the associated costs and benefits and to estimate the likely compliance costs. However, the specific requirements expanded incrementally so that by 2006 RIAs included social, environmental, economic, small firms and competition impact assessments, as well as any health, gender, race, sustainability, rural, human rights, older people and legal aid impact assessments. Concern that these supplementary considerations were increasing the use of narrative in the assessments in a way

that detracted from the pure economic analysis led to a decoupling of many of these issues from the RIA and to a name change. From 2007, the RIA formally became known as simply the Impact Assessment or IA and its scope was limited to making the case for Government intervention and exploring the benefits, costs and effects of each option identified, with separate assessments in other areas annexed where relevant.

Phase 2: the present

As mentioned, the Compliance Cost Assessment had its origins in a desire to reduce the burden of regulation on business, a desire that persisted so that when the Coalition Government came to power in 2010, it announced the introduction of a regulatory off-setting, or 'One IN, One OUT' system. This meant that for every £ of cost imposed on business or civil society by new regulation, a £ would be removed from elsewhere. The introduction of a formal system to measure burden reduction marks the start of what I have called phase 2 of the impact assessment system. The system was ratcheted up to a One IN, Two OUT system with effect from 1 January 2013 and became a One IN, Three OUT system for regulation that was not a manifesto commitment on 1 January 2016 when it was accompanied and then replaced by the BIT. Under this new system, the Government was statutorily bound to set a target for the amount by which the impact of regulation would change over the course of a five-year Parliament and to report periodically on progress. Both the regulatory off-setting and BIT systems had a complex system of exemptions and exclusions, but of note is that a *de minimis* exception was introduced into the BIT system in 2017 for policies with an impact of +/- £5m.

What is interesting about the regulatory off-setting and BIT systems (together with the burden reduction mechanisms) for the purposes of this post is the link between their compliance systems and impact assessment. Figures quantifying the increase or decrease in burden were included in the Impact Assessment, and validated by the Regulatory Policy Committee (RPC), a body established in 2009 to provide external and independent challenge on the evidence and analysis presented in Impact Assessments. In 2015, the RPC's role was put on a legislative footing, but even with statutory backing, its opportunity to comment on policy ends and wider societal impacts was limited. Its primary function in this phase was to validate the monetised assessment of impact from regulatory measures that were not exempt or excluded from the burden reduction tallies (i.e., the value of any IN or OUT or, later, the measure's contribution to the BIT). The RPC's opinion on the Impact Assessment was submitted to the other body involved with compliance during much of this phase, namely the Reducing Regulation Cabinet sub-Committee (RRC), and, at least in the regulatory off-setting period, if Departments had not identified OUTs of the requisite value, approval of the policy generating the IN faced delay in obtaining collective agreement (Cabinet Office,

"Guide to Making Legislation", April 2017, para. 7.5.). In 2020, the RRC's role was assumed by the Domestic Affairs and Union cabinet committee.

Phase 3: the future

With effect from late August 2023, the BIT system was abolished and with that the function of Impact Assessments and the criteria for their validation have required reconsideration. This therefore marks the beginning of a new phase. Following publication of the revised Better Regulation Framework Manual, the detail of the new system is now clearer. Broadly, after a transition period which lasts until September 2024, there will be a requirement for legislation caught by the system to have an 'Options Assessment' at the policy formation stage. For regulatory provisions that relate to a business activity and that are not exempt or excluded, it is the Options Assessment that must be validated by the RPC and included when the proposal is submitted for collective agreement. The Options Assessment will then feed into a final Impact Assessment to be laid with the regulation.

Contribution to Accountability

The revised Better Regulation Framework Manual recognises the potential for the impact assessment system to aid scrutiny, but it can only do so if paperwork is prepared and published in a timely fashion, if the detail is based on sufficiently robust data to allow the conclusions to be relied on, and if the scope of what is being assessed matches the use to which the conclusions will be applied. The results from phases 1 and 2 are mixed. In its 2022 report, tellingly entitled 'Losing Impact: Why the Government's Impact Assessment System is Failing Parliament and the Public', the House of Lords Secondary Legislation Scrutiny Committee concluded that the number of Impact Assessments done badly or not made available for scrutiny alongside legislation was increasing. In that report, Lord Hodgson of Ashley Abbotts commented that: *'IAs are being treated like speed limits —everybody says they are a good thing, but some take a more flexible attitude to complying with the requirements than others.'* So, will the new system make a difference? This post reviews three areas: (i) pervasiveness, (ii) scope and quality, and (iii) timing and transparency.

Pervasiveness

Commitment to compliance has fluctuated. I have not found a comprehensive review of compliance that covers Phase 1. As for Phase 2, in 'Losing Impact' the Secondary Legislation Scrutiny Committee noted it had reported an improvement in both quality and compliance in its 2017 report but blamed the volume of legislation required by Brexit and the pandemic for undermining the process. My

own research would attribute the changes to the various iterations of the burden reduction mechanisms, and in particular the introduction of the *de minimis* system which diluted compliance oversight. Analysis of Impact Assessments associated with SIs caught by the burden reduction mechanisms between 2010 and 2019 shows that when the One IN, Two OUT system was in force between 2013 and 2015, reliance on broad Impact Assessments covering a policy rather than a specific legislative instrument increased, meaning that details of how the policy would be implemented were less likely to have been worked out when the Impact Assessment was approved. Nonetheless, an Impact Assessment of sorts (be that a specific one, a broad one or the tax equivalent) is associated with 57% of regulatory Impact Assessments associated with Statutory Instruments in those years. When the BIT was introduced in 2016, reliance on broad Impact Assessments diminishes but once the *de minimis* exception is introduced in 2017 there is a marked increase in Statutory Instruments stated to be below the threshold for producing an Impact Assessment, meaning that the measure escapes the need for routine RPC and RRC scrutiny.

Will the new system be better? A *de minimis* system remains, at least for SIs, with an increased threshold of +/- £10m – but buried in paragraph 6.14 of the revised Better Regulation Framework Manual is a suggestion that that exemption will not apply to public bills, meaning that primary legislation containing 'Regulatory Provisions' (as defined in the revised Better Regulation Framework Manual) that are not otherwise excluded or exempt will need to comply with the requirements. Assessment of a skeleton bill may lack detail, but this is at least recognition that although the impact of a facilitative Bill may be below the threshold, it might enable one or more SIs with combined impacts of potential significance. Another welcome addition is the logging process. Even if policymakers deem proposed legislation to be *de minimis* or within an exclusion, if it is a 'Regulatory Provision', it must be logged with the RPC secretariat to allow the RPC to challenge the categorisation. The success of that system relies on there being no scope for confusion about whether a measure is a 'Regulatory Provision' and on establishing a proportionate system of checks, but it should provide greater visibility as to reliance on exceptions and exclusions, at least to the RPC. It is not clear whether the log will be made public.

However, the issue, as always, is the limited repercussions from non-compliance. The revised Better Regulation Framework Manual retains a link with the collective agreement process, but it is open to Ministers collectively to decide whether to give agreement to proposals without the requisite paperwork. Likewise, although the revised Better Regulation Framework Manual states that regulatory legislation should not be introduced to Parliament without the correct paperwork 'unless there is a valid reason', that would seem to leave plenty of wriggle room. It is a far cry from the suggestion in the Secondary Legislation

Scrutiny Committee Report that MPs should be able to refuse to debate a Bill in those circumstances.

Scope and Quality

Turning now to scope and quality, it is important to note that the two are inextricably linked but not identical. What is included in a calculation of contribution to regulatory impact is different from an evaluation of whether a regulatory policy is suitable, and either of those can be done well or badly. This leads to an important point when considering the contribution of Impact Assessments to accountability: accountability for what? The tension between using Impact Assessments to account for burden reduction and to account for the implications of policy more broadly has been present throughout the evolution of the impact assessment system and requirements as to what to include have fluctuated. So, does the link with burden reduction for business remain? The figures in the Options Assessment and the final Impact Assessment will no longer contribute to a target designed to incentivise reduction in regulatory impact, and the Options Assessment should now include a consideration of the impact on households as well as on business, but legislation is only caught by the system if it relates to a business activity and the principles behind the exercise require a focus on proportionality and considerations of alternatives to regulation. The Options Assessment must also still set out how the compliance burden will be minimised. The RPC's role has become broader. It will be involved at an earlier stage and its scrutiny extends to considering the rationale for regulation, the options identified and their appraisal, including the wider impacts. However, whilst the Options Assessment must include a quantification of impact on business, even if the figures are just an estimate, there is scope for discussing household impacts more qualitatively. The challenge going forward will be to maintain an appropriate balance without diluting the analysis.

Quality is also key. It is clearly important that all possible impacts are identified as a precursor to their assessment, and that whatever data is relied on is robust. Quality was an issue in Phase 1. In their review of CCAs between 1992 and 1994, Boden and Froud mourned the lack of 'a coherent technique', referring to 'an elaborate calculative ritual'. The RPC has done much to improve the quality of the analysis within its remit but, nonetheless, many Impact Assessments from Phase 2 report that the impact cannot be monetised, and ironically the drive for burden reduction has incentivised a reduction in routine information provision by the regulated that could otherwise be used to support the analysis. Consultation may help but without data to inform the options to be consulted on the process risks becoming circular and protracted.

Timing and Transparency

The Secondary Legislation Scrutiny Committee Report has many examples of delayed Impact Assessments. My own research did not focus on the timing of publication but did note where the Explanatory Memorandum referred to an Impact Assessment which was missing from legislation.gov.uk (114 regulatory SIs between 2011 and 2019). So, the record on timely publication requires improvement. However, the revised Better Regulation Framework Manual suggests that Options Assessments will not be published and RPC opinions on them will only be made available when the legislation is introduced to Parliament. The final Impact Assessment will be a public document, but only a subset of these will be validated by the RPC. Since analysis within them can be 'proportionate', a concept that can allow for subjective judgement by officials as to the level of detail it is appropriate to include, and since responsibility for their timely publication rests with departments, the record on timing and transparency will be an area to watch.

Implications for Accountability

When assessing the role of impact assessment as an accountability mechanism, the implications must also be considered. First, there is the additional time and cost introduced by the process, though 'urgent' legislation is excluded. It will be interesting to see how often urgency will arise. Then there is a risk that attempts to represent the pros and cons of qualitative issues with quantitative analysis misses the mark, or that a mix of considerations dilutes the focus. Finally, there is a risk that an Options Assessment or final Impact Assessment is used to legitimise a policy. To operate as an effective accountability mechanism, the analysis should aid Parliamentary scrutiny of Government proposals, not replace it. If supported by a final Impact Assessment based on a validated Options Assessment, signed off by the RPC and approved by Cabinet, the policy may escape more detailed review by MPs, thereby actually diminishing accountability.

Conclusion

The impact assessment system has the potential to aid accountability, and at first sight, the proposals in the revised Better Regulation Framework Manual have the potential to meet some of the previous criticisms of the system. However, the system is complex and the balance between allowing sufficient flexibility and ensuring effective compliance is difficult. Time will tell whether the latest proposals enhance the role of impact assessment as an accountability mechanism.

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