**JRF scoping paper:**
**Rights, responsibilities, risk and regulation**

# The art of living dangerously: risk and regulation

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This paper:
- considers the debate around risk and regulation and the ideological terms it is couched in;
- demonstrates that the demand that 'something must be done' can lead to demands for both more and less regulation; and
- argues that JRF could develop a more rational approach to risk and regulation, especially for the social care world.

**The Joseph Rowntree Foundation (JRF) commissioned this paper primarily to inform our own thinking, as we scope a potential new programme on Rights, responsibilities, risk and regulation. How do these four themes connect in the lives of adults who use care and support? How do rights and responsibilities feature when it comes to weighing up risk in the lives of people involved in caring relationships? What needs to change, for example in the protective shell of regulation, to enable people to have good lives?**

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# Summary

Risk and regulation are used as shorthand for ideological positions about innovation and competition, protection and self-reliance and about individuals and the state. There is a culture of 'something must be done' in response to public risks and crises – and that 'something' might be to do more, or it might be to do less. A succession of independent task forces and commissions have been set up by all governments since the mid-1990s to promote less regulation, better regulation and risk-based regulation. The environment has become clouded by the professional self-interest of 'risk actors' – those who have something to gain either by implying a greater degree of risk exists than is the case or by complicating the ways in which regulations are interpreted. It's important to bust the myths of regulation but doing so is a rather thankless task – they have a life of their own. Recent interest in the risk and regulation debate has moved from a focus on the individual to a focus on the individual in communities and, in the context of the Big Society, to seeing how the perceived burdens of regulation and administration can be lifted to encourage neighbourhood action.

The Joseph Rowntree Foundation (JRF) could have a pivotal role to play in translating some of these ideas into the social care world and could help to develop a more rational approach to risk and regulation.

## 'Something must be done'

In February 2007 two contrasting reports were published. Their titles neatly illustrate different views about risk and responsibility: *Cotton Wool Kids: Releasing the Potential for Children to take Risks and Innovate* (Jones, 2007) and *Better Safe than Sorry: Preventing Unintentional Injury to Children* (Audit Commission/Healthcare Commission, 2007). These titles also demonstrate what might be said by an individual expressing strong personal opinions, and what can be said by a statutory body, conscious that its words will be taken as writ.

Not surprisingly, it seems individuals feel more able to embrace risk than those in positions of statutory responsibility. At a recent progress consultation about Labour's policies on families and communities, MP Tessa Jowell responded to a question about risk and social care by saying 'I know my 92-year-old mother would prefer to live dangerously at home than in a residential care home – however safe' (Jowell, 2011). It would be a brave Secretary of State for Health who would say the same!

And this is the nub of the issue. Individuals and the state tend to have different responses to risk, individuals tending towards a more libertarian view and the state towards a more protective one. Media headlines demanding 'something must be done' can leave governments feeling damned if they do, and damned if they don't. In the heightened atmosphere of a crisis, the public and media demand 'something must be done' and governments are left with the dilemma of distinguishing when that 'something' is to do more and when it is to do less.

These issues have been analysed by a number of independent, but government-sponsored, bodies: the Better Regulation Task Force (BRTF), Better Regulation

Commission (BRC), the Risk and Regulatory Advisory Council (RRAC) and the Red Tape Task Force –all of which I have served on. If nothing else, the existence of so many bodies (together with the earlier Deregulation Task Force,) shows the persistence of an issue that has challenged governments and their various commissions/ taskforces. (Margaret Thatcher's Conservative Government began the programme of deregulation after 1979. Since 1997 the Labour governments of Tony Blair and Gordon Brown developed a programme of better regulation. This included a general programme for government departments to review, simplify or abolish their existing regulations, and a 'one in, one out' approach to new regulations. In 2006, new primary legislation,  the Legislative and Regulatory Reform Act 2006, was introduced to establish statutory principles and a code of practice. This has been developed further by the Coalition Government).

Ideas of risk and regulation have had a particular place in debates about social care. On the one hand, questions of rights, choice, and personalisation have become vitally important. On the other, there's an expectation that the state will regulate social care to ensure safety, dignity and quality. The various better regulation commissions did not focus directly on social care but they did consider related ideas about protection versus freedom, the regulatory conditions necessary for organisations and individuals to innovate and the need to react to public outcry.

Regulation is of course about more than risk. It can also be a means of enshrining social values such as equality and fairness or stimulating markets and competition. In the two publications cited above, *Cotton Wool Kids* was grounded in a drive towards a more innovative and competitive economy whereas *Better Safe than Sorry* anchored the debate in the reduction of inequality. This report, despite noting that 'overall, deaths from unintentional injury have decreased', went on to say, 'However, there are persistent and widening inequalities between socio-economic groups. Children of parents who have never worked, or who have been unemployed for a long time, are 13 times more likely to die from unintentional injury than children of parents from higher managerial and professional occupations' (Audit Commission/Healthcare Commission, 2007). It was clearly about more than protection and risk: it wanted to end inequality.

Obviously, debates about risk and regulation are not ideology-free zones. The terms can be seen as shorthand for contrary ideas of independence and over-protection, of competition and equality. One of these reports on childhood suggests risk is necessary for independence and self-reliance, the other that there should be zero tolerance of risk. Can both be true? Do political ideologies have an influence? Can the state say one thing and individuals another? Perhaps, like the Red Queen, we can all believe several contradictory things before breakfast.

## Risk, rights and responsibility

To understand these contradictions better we need to understand what risk is. Is the same thing meant in each of the reports on childhood? Are the ideas underpinning risk and responsibility and 'public risk' the same and do these different meanings reinforce the contradictions and misunderstandings?

In common usage, risk is often synonymous with the likelihood of a loss or threat; it's rarely positive and so it is understandable that headlines about risk are frightening and create uncertainty.

In professional risk assessments, however, the risk process is a way of demonstrating control. It means looking at the worst things that might go wrong, working out the probabilities of these things happening, the likely impact, how the risks might be ranked and mitigated, and where that risk might be transferred. The conflation of these two usages – one about fear, one about control – has resulted in a policy agenda that tends towards eliminating risk altogether, as in Better *Safe than Sorry.* The 'risk tolerant' approach is left to the individual, the libertarian or to 'common sense'.

Discussion of risk, especially when linked to regulation, isn't only about fear and control. It has also become synonymous with a blame or compensation culture. When the consequences of risk or a failure of regulation become unbearable, there is a cry 'who's to blame?' followed by 'who must pay?' When the BRC looked into this, there was no evidence of huge compensation payouts, a finding reinforced in Lord Young's recent report (Young, 2010), but the myth lives on colouring discussion of risk, regulation and personal responsibility.

The moral panic of a compensation and blame culture has a long history and is constantly reinforced, even if inadvertently. In 2004, Polly Toynbee wrote a piece in The Guardian, 'Be robust about risk' (Toynbee, 2004), suggesting that compensation claims starve the NHS of vital funds and have turned us into a society that feasts on blame (although it's interesting to note that Boris Johnson wrote that Polly Toynbee 'incarnates all the nannying, high-taxing, high-spending schoolmarminess of Blair's Britain. Polly is the high priestess of our paranoid, mollycoddled, risk-averse, airbagged, booster-seated culture of political correctness and 'elf 'n' safety fascism' (Johnson, 2006)).

In her article Polly Toynbee cited the case of 'Gillian Beckingham, a 45-year-old mother of three, [who] has just been charged with the manslaughter of seven people ... in connection with an air conditioning unit in the council's Forum 28 leisure centre, the alleged source of an outbreak of Legionnaires disease that infected 140 people'.

When the case was finally resolved (and it took another two years) the manslaughter case was thrown out although both Beckingham and her employer were fined relatively modest amounts under the Health and Safety at Work Act (Workplace Law Network, 2006). However, the damage was done and the impression of a ridiculous and damaging blame culture had been reinforced. Polly Toynbee's article also connected the existence of a blame culture to pressure on the public purse:

'Consider what it is costing the NHS: medical negligence claims stood at £53m in 1990. Last year it was £500m with some £5bn worth of cases now pending ... Any manager or politician who dared to try an old-fashioned brisk response to risk would not survive long. The concept of the act of God died along with God himself' (Toynbee, 2004).

Unfortunately, she did not report the final outcome of the case. Even someone as critical of talking up crises as Toynbee had added to the moral panic. The £5 billion of claims was a huge distortion of the amounts finally paid out; Mrs Beckingham was not found guilty of manslaughter; health and safety had not gone mad. However, the impression remains that to tackle this risk-averse and compensation-mad culture 'something must be done' – and that something is to regulate less.

This brings me, belatedly, to introduce the 'risk actors' – now often seen as the villains of the piece, with a vested interest in the creation of such panics. These are the insurance companies, lawyers, judges and public bodies, politicians and risk professionals who, with the media, create the atmosphere in which risk and regulation are debated. Arguably this atmosphere is not one of calm reason but rather one of fear, and one that reinforces the demands for more regulation and ultimately 'for something to be done' – that is, to regulate more.

To tackle concerns about these risk actors, one of the first acts of the Coalition Government was to tackle what was called the growth of an 'American style compensation culture' and the growth of 'no win, no fee' advertisements, particularly on television. Lord Young in his report, *Common Sense, Common Safety* (Young, 2010) proposed a ban on such adverts. He said: 'As the volume of advertising by claims management companies increased over the past few years, so did public perception of the rise of litigation'. Despite noting 'although the figures do not show, overall, a great increase in the number of people being sued' he said 'there is a firm belief in the public mind of an all-pervasive compensation culture enforced by "no win, no fee" lawyers'.

This perception remains very current. The chairman of the recent Red Tape Task Force, Lord Hodgson, noted the pernicious influence of the risk profession. He said: 'Behind the regulations (however relevant) and behind the direct enforcers of regulations (however well intentioned) lies a tangled web of supporting players. A quick visit to the internet will reveal pages offering a chance to train to become an inspector of this or that (often for surprisingly low fees). So there are training establishments, trainees as well as trained personnel – all depending on the continuation of regulation for their weekly wages. So it is hardly surprising that few, if any, wish to question the value of what they are doing. In fact they are much more likely to draw attention to the possibility of grave danger to the public of any reduction in their efforts' (Hodgson, 2011).

The risk actors, in other words, have a great deal to lose from busting the myths about regulation.

## Myth-busting; dare to put a plaster on a child's cut

Myths about regulations and compensation are everywhere. Each of the Better Regulation task forces, commissions and working groups, together with the recent Red Tape Task Force, has noted the prevalence and extraordinary longevity of regulatory myths, particularly those that relate to health and safety.

This creates some frustration among regulators: as Bill Callaghan, then Chair of the Health and Safety Executive (HSE), said in 2007, 'I am sick and tired of hearing that

'health and safety' is stopping people doing something worthwhile and enjoyable. If you're using health and safety to stop everyday activities, get a life and let others get on with theirs' (Davies, 2006).

In parallel with the BRC report on risk and regulation *Risk, Responsibility, Regulation*: *Whose Risk is it Anyway?* (Better Regulation Commission, 2006) (see below), the TUC issued *Health and Safety Myths: The Truth Behind the Headlines* (TUC, 2006). It refuted some contemporary stories about schools not being able to use cardboard egg boxes in crafts; about safety inspectors not being allowed to use ladders; that trapeze artists would need to wear hard hats and of course that children needed to wear goggles to play conkers (a media stunt that backfired). The HSE has issued similar lists (Hodgson, 2011).

These myths remain, however, and have huge currency. Media stories build a picture of a world where bureaucracy has gone mad, where people are not allowed to exercise self-determination. It's clear that stories about 'elf and safety' have taken on a life of their own and are assumed to be true, rather than being greeted with a pinch of salt. The ordinary scepticism of the public, and the media, seems to be missing in the hunt for a good story and the search for someone to blame.
These myths will not go away easily. One of the government- appoionted bodies, the Risk and Regulatory Advisory Council,  decided to tackle them by publishing *A Worrier's Guide to Risk* by David Spiegelhalter, Winton Professor for the Public Understanding of Risk (Spiegelhalter, 2009). Spiegelhalter proposed three ways of thinking to help people understand more and worry less. First, life is uncertain – stuff happens; second, evidence can mislead us – we often don't see the whole picture; and finally he suggested asking, 'should I worry – will it affect me'? Despite many good intentions, neither stories about risk nor the extent of public worrying has reduced. Clearly an appeal to rational thought has not worked!

The Red Tape Task Force has again tried to tackle the myths. It published a list of things you can do if you are involved in community activity: they are all things community groups believed were no longer possible. Through doing this it hopes to change the narrative from what can't be done to what can. The list assures people it's OK to:
- put a plaster on a child's cut
- develop a community organisation or social enterprise using easily available guidance without needing a health and safety adviser
- put up hanging baskets
- hold a pancake race
- develop exciting and challenging playgrounds
- use bunting or flags at events
- support a voluntary organisation that works with children and vulnerable adults without a CRB check unless you have 'frequent and intensive' contact with them
- clear snow from the footpath.

(Hodgson, 2011)

It will be interesting to see how much success this report has in challenging the fear of regulation.

## Responsibility and risk – the Better Regulation Commission and *Unshackling Good Neighbours*

Both under Labour and now the Coalition, the debate about regulation has moved away from simply trying to create 'better' regulation to one that addresses risk and responsibility. In 2006 the BRC published *Risk, Responsibility and Regulation: Whose Risk is it Anyway?* (BRC, 2006). It was a response to a call by then Prime Minister Tony Blair to examine who should manage risk in society and to encourage a sharing of that responsibility.

This was a step-change in the debate about regulation, introducing for the first time a systematic analysis of the ownership of public risks. This approach has been developed in subsequent reports by the RRAC and now the Red Tape Task Force. I chaired the task group that produced the BRC report and tried to balance different approaches to risk and, therefore, to regulation. There were heated debates between two schools of thought: the 'regulate everything that moves; risk must be eliminated' camp and the 'regulation is the very last resort; risk is vital and we'll live with the consequences' tendency. Consensus was eventually reached but differences have not gone away. Any new crisis or moral panic will stir them up again.

In considering the demand for, 'something to be done', the BRC noted that the Daily Mail (and other popular media) called almost equally for more regulation and for less. They also constantly shifted who they thought was responsible for risk. The stance seemed to depend on whether a writer was speaking for themselves or on behalf of someone they perceived to be vulnerable. Similarly, governments' responses changed depending on whether the state was intent on encouraging responsibility and self-reliance or whether it was dealing with the aftermath of a tragedy and public outcry.

The conversations behind these positions go something like this:

*'I want to be free to take risks – so lift the burdens of regulation and let me make my own choices.'*

*'I'm worried you don't really understand the risks you are taking – you need protecting.'*

*'You (the state/regulator) didn't protect me – where were you – it's all your fault.'*

*'You (the state/regulator) didn't protect them – where were you – it's all your fault.'*

*'We (the state) want to encourage personal and community responsibility – you should learn to handle risks better and become more resilient.'*

*'We (the state) must be seen to do something – we'll regulate now – we'll make sure that 'never again' will such a thing happen.'*

The BRC (and later the RRAC) tried to unpick these issues, to increase the public understanding of risk and to reframe the role of regulation in enforcing rights and

also in encouraging personal responsibility. It was very much in tune with the times. The Civil Service was being encouraged to be less risk averse. Sir Gus O'Donnell, the Cabinet Secretary, encouraged a focus on delivering outcomes for people, rather than tying them up in bureaucratic procedures which fail to deliver. 'Ask forgiveness, not permission' he famously said, hoping to encourage a culture of personal responsibility and controlled risk-taking in order to release energy and innovation among officials (O'Donnell, 2008).

Rick Haythornthwaite, the chair of the BRC said: 'The BRC's team of ... experts from across the political spectrum ... found a high level of agreement that "enough is enough", with strong support for a rational, national debate on how risk in our society can be managed better without regulation being the default option'.  He continued, 'It's time to turn the tide. We do not seek to blame the government for where we are today. We have all, in our view, been complicit in a drive to purge risk from our lives and we have drifted towards a disproportionate attitude to the risks we should be expected to take. We have all called on the state to manage the process on our behalf, and each incremental intervention has seemed justified by the immediate benefits. The costs of the accumulated burden have only become evident when it is too late' (Better Regulation Commission, 2006).

The BRC called for a national debate to explore three questions:

- What becomes possible if we trust people more and regulate them less?
- What happens if classic state regulation is limited to a last resort rather than a first instinct?
- How far are people ready to take more responsibility for managing their own risks?

Haythornthwaite placed the debate in the context of what he called British entrepreneurialism and self-reliance:

> *Britain is rightly famous for the achievements of our entrepreneurs, risk takers, adventurers and explorers ... Now, our national resilience, self-reliance and spirit of adventure could be threatened by a culture that demands the progressive elimination of risk through more and more regulation ... I want to challenge all of us,  government, citizens, media, to accept that:*
> - *risk is an essential and useful part of life*
> - *rules and regulations are often the worst way to try to manage risk*
> - *personal responsibility for managing risk needs to be encouraged*
> - *government intervention should be actively limited to those few areas where it is really required.*

(Better Regulation Commission, 2006)

He was clear that there 'is no question of removing protection from where it is needed but we need to get things into perspective –  the cost to our society and economy of ever more regulation is too great to ignore.'

The recommendations of the report included:

- emphasising the importance of resilience, self-reliance, freedom, innovation and a spirit of adventure
- leaving the responsibility for managing risk to those best placed to manage it and embarking on state regulation only where it represents the optimum solution for managing risk
- re-examining areas where the state has assumed more responsibility for people's lives than is healthy or desired
- separating fact from emotion and emphasising the need to balance protection with preserving reasonable levels of risk.

(Better Regulation Commission, 2006)

Two further recommendations were made. The first was for high-quality training in the understanding of risk and of risk management for ministers and senior civil servants. There has been some evidence that Sir Gus O'Donnell has kept up the pressure for this approach, and the emphasis on risk-based analysis and evidence-based policy making has influenced both the Department for Environment, Food and Rural Affairs (DEFRA) and the Department of Health (DH) in relation to media storms about health scares and food safety.

The second recommendation was the need to buy time, for a pause for thought, in the midst of a public storm. Such an approach has gained political clout through the recent 'pause' in the NHS reforms. The BRC had recommended that 'buying time' should become a formal part of routine policy process through the establishment of the Fast Assessment of Regulatory Options (FARO) – an independent, *ad hoc* panel for expert, dispassionate, evidence-based examination of urgent calls for government intervention. This proposal has re-emerged in the Red Tape Task Force chaired by Lord Hodgson. He acknowledged 'the pressure on ministers (of all political parties) to take action in the aftermath of an accident are immense. To suggest that a period of reflection and examination of the facts might be the best way forward is to risk appearing coldly unsympathetic to those affected by a tragedy. But over time the cumulative regulatory effect of responding to individual cases can be considerable. The task force considered whether there was any way that ministers could be assisted in these very difficult circumstances. We believe that it would be worth considering the establishment of a mechanism within the Better Regulation Execution to address this problem. We have called it STORE – standing for Speedy Treatment of Regulatory Events...the STORE committee's purpose would be to produce over a few weeks a report which would indicate whether the event revealed a systemic defect which could require a regulatory response or the unhappy consequences of a random event'(Hodgson, 2011).

It will be interesting to see whether a new fashion for reflection can be embedded.

# Public risk and the Risk and Regulatory Advisory Council

The concept of 'public risk' has gained currency in the regulation, deregulation and better regulation debate. This idea came to prominence outside academic circles through the work of the Risk and Regulatory Advisory Council (RRAC) – the first of

the government advisory bodies to include 'risk' alongside 'regulation' in its title. In its publication *Tackling Public Risk: A Practical Guide for Policy Makers* (RRAC, 2009) it attempted to describe, analyse and challenge the public understanding of risk.

Like its predecessors, the RRAC endorsed the five principles of better regulation: regulation should be Proportionate, Accountable, Consistent, Transparent and Targeted (PACTT). It added others, saying governments should:

- foster a more thoughtful and pre-emptive policy-making culture with a real focus on outcomes, even in times of crisis
- fight zero-tolerance of risk, encourage a better understanding of public risk and a considered balance of risks costs and benefits
- understand and engage a wide range of groups to combine and influence society and government's responses to risk and incorporate them into policy-making
- recognise and work with complexity and uncertainly as part of policy-making process
- support people in taking back responsibility, to build a more resilient society that can respond better to the risks that it faces.

It went on to highlight 'public risk' as a key element of the debate and to define it as: 'Those risks that may affect any part of society and to which government is expected to respond'. The RRAC's chair, Rick Haythornthwaite, described its approach: 'The Risk and Regulation Advisory Council has been leading an experimental offensive against the mishandling of risk in society. It has looked at how distorted perceptions of risks can encourage poor policy-making and unnecessary laws, leading people to feel that government is interfering too much in their lives' (RRAC, 2009).

The RRAC characterised public risk and its management by six key features:

**Risk is a social phenomenon**: more actors are involved in risk than might immediately be imagined and freedom from legislation doesn't mean freedom to manage risks in our own way. The media, specialist interest groups, companies, standard setters, academics and parliamentarians, may have as much influence on how risk is managed, and perceived, as regulators and individuals.

**Managing risk is about managing complexity**: it is difficult to predict how complex systems are going to respond and what the combined impact of these changes is going to be. Successful solutions often involve small changes to probe the system. Incidentally, this is very much what is currently and fashionably called 'nudging' by David Halpern and the Behavioural Insight Team at 10 Downing Street.

**Managing risk is also about managing anxiety**: perceptions of risk are as important as reality – and it's important to separate out emotion and fact.

**Managing risk is a shared responsibility**: the cumulative effect of many government and regulator interventions can take away the rights of individuals and communities to decide what risks we want to take.

**Communication about risk should restore the voice of reason**: in a society increasingly intolerant of failure and inconsistent in its demands for protection, it's

important to explain the trade-offs implicit in any risk decision. There is a need for more considered dialogue whenever 'something must be done'.

**An independent perspective can help communicate and manage risk**: by taking a step back, creating an environment for rational debate, communicating the risks and rewards of action, trust can be generated.

The RRAC established a number of forums to test its hypothesis that if some basic steps were taken, public risk could be managed better. As a starting point, the RRAC emphasised the need to create space to think and avoid the temptation to be seen to be doing something. It also urged putting the risk in context before deciding the best way forward. This involves getting to the root of how perceptions of risk have been shaped, and mapping the landscape around the risk. It also involves exploring the issue, how it arose, who had a part in its creation and who benefits from maintaining it.

As one delegate in the health and safety forum said, 'A lot of red tape... is created by people who are not statutory regulators' – regulators who have an interest in creating new markets, with unintended consequences. The recent Red Tape Task Force received evidence about reports by health and safety consultants that have resulted in the closure of volunteer-run charity shops – a somewhat contrary result in the Big Society when government is encouraging volunteer led initiatives.

As reported in ThirdSector, '*Cancer Research UK is set to withdraw support for all of its volunteer-run charity shops after inspections uncovered what it described as "considerable issues". Simon O'Leary, head of volunteer fundraising at CRUK [said] that assessments of eight volunteer-run shops had uncovered significant problems .... included[ing] health and safety risks for supporters and the charity ... O'Leary said he asked the commercial brokerage company Colliers International, which provides support for all of the charity's shops, to carry out a routine inspection of the volunteer-run shops last November. He said the inspection found that all of the shops were in an "unsatisfactory state".*

'*O'Leary said it was likely that some of the shops would close. "It is unlikely we'll be able to continue to support any of our volunteer-led shops ... We can't manage the risk in a cost-effective way.* [If a supporter came to him now saying they were interested in starting up a volunteer-run charity shop, he would discourage them]. *There are simpler ways of raising money," he said.*' (Hudson, 2011).

These unintended consequences of the risk environment and the actions of the risk actors led the RRAC to develop practical tools to help manage risk better. It tested its assumption that by engaging with a broad community of people who have an interest in its outcome, a better understanding of risk could be created. It encouraged mapping the risk landscape to develop a common understanding of the issues and to explore together how issues can be tackled. The lessons learned in the forums include:

- It is vital that the conversation isn't restricted to the usual suspects or the loudest voices. People at the margins need to be involved: it's where most

innovation happens. Involve those who claim to know the answers – and those who don't.

- Improve communication and restore the focus to the underlying risk and then provoke debate about interventions and trade-offs.

- Be honest about uncertainty – there are better ways of treating it than ignoring it!

*Tackling Public Risk* (RRAC, 2009) explained how policy-makers can apply this approach to their own public risk issues and also provided details of tools developed and tested by the RRAC to support this approach. It noted that there are some particularly difficult areas – and some of these affect social care, particularly when they concern children, vulnerable adults and large-scale tragic events.

However  in general this approach was about claiming space to think, being inclusive, refusing to be forced into action by public cries of 'never again' and to effectively communicate what is appropriate and reasonable to do. It can be done, as the Mayor of London, Boris Johnson, showed. He explained why it was uneconomic for London to maintain the capacity to deal with the sort of snowfalls that only occur once in every couple of decades: 'This is the right kind of snow, it's just in the wrong quantities...' (BBC News Channel,  2009).

In order to illustrate its approach, the RRAC published four case studies from its forums. One tackled the zero-risk culture in policing, what was described as a 'do nothing wrong culture' and a 'record everything' culture. Sir Ronnie Flanagan, head of Her Majesty' Royal Inspectorate of Constabulary (HMIC) asked that the 'RRAC look into the role of risk within the police service, and begin a national debate on risk aversion and culture change at a central government level'. The Flanagan report *The Review of Policing* (Flanagan, 2008) noted two drivers for this culture. One was internal, what he called a 'just in case' mentality; the other was external, essentially a political response to public outcries of 'this must never happen again'. These features have obvious resonance for adult social care and for children's social work services.

Another study looked at health and safety in small organisations. In general it recognised that UK health and safety legislation has one of the most successful records in the world – it sets out what organisations are expected to deliver but not how: it's an outcome based approach. However, it also noted that this poses difficulties for small organisations and community groups that are unclear what is expected of them and so respond by over-engineering and incurring unnecessary costs. Although far from its intention, this approach creates risk aversion and a culture that leaves people too frightened to act. Consequently, health and safety regulations were frequently cited as having most influenced the public's perception of risk and regulation, and creating an expectation of an overreaction.

Health and safety was also deemed the area in which risk actors were most active and where they had created uncertainty about what the law actually requires. They were seen to inflate the level of health and safety requirements, influencing perceptions about the volume of regulation and cost of compliance at the same time

as providing advice and guidance through consultants, insurers and trade associations.

The RRAC decided it wasn't enough to say the risk actors should stop frightening people, there also needed to be a sense of empowerment which would give individuals and communities the strength to resist and be more reliant on its own judgement. This idea was developed under the theme *Building Resilient Communities* in another of its forums. It has particular resonance for social care and community development. The user movement, for example, might well endorse the conclusion that 'People and communities can take responsibility for, and in doing so change, the way things happen in society'.

Finally, the RRAC held a forum on 'trees and tree management', reacting to the claim that 'trees can damage your health'. A new tree interaction standard had been proposed by the BSI that appeared to be over-prescriptive and likely to lead to a disproportionately expensive scheme – or to the felling of perfectly healthy trees. The RRAC successfully promoted a wide constituency of interest to get involved, encouraged it to engage in the BSI's consultation process its approach. The RRAC followed its own advice and was able to test its hypothesis in real time. It took the following steps:
- understand the risk
- quantify the actual incidence of damaging events and calculate the real risk
- develop public understanding and debate
- balance the different stakeholders
- campaign for effective action
- give regulators the tools to pull back from inappropriate and disproportionate action.

The RRAC study noted that trees had not become more dangerous – but it did note that a recent legal case had produced uncertainty; that the uncertainty was leading to a disproportionate response, that the new standard might produce unnecessary burdens and lead to unnecessary tree felling. In July 2008 *The Telegraph* noted that 'Rick Haythornthwaite ... called for a common sense break in discussions which could seriously affect the future maintenance of trees right across the UK' (Cockcroft, 2008). In the end, as *The Times* noted, 'The Risk and Regulatory Advisory Council said that the level of risk posed by trees did not warrant a national inspection regime' (Bennett, 2008). And the trees were saved.

The forums produced these case studies to show what can be done when the principles of better regulation, combined with the steps and principles piloted by the RRAC, were put into effect. Two questions remain: how can policy-making in general do this? And whose responsibility is it to do something about public risks?
It's clear that risk is an integral part of public policy decision. It's also apparent that disproportionate attitudes towards risk exert an unhealthy influence on policy-making. Policy-makers themselves are acutely aware of this and struggle to take a more proportionate approach. In concluding its report, the RRAC noted not only the influence of the risk actors (who are accused of becoming riskmongers, self-interestedly pressing for excessive regulation) but also identified some of the political trends that influence the creation of inappropriate regulation and legislation (RRAC, 2009). Counter-intuitively (but echoing Spiegelhalter, 2009) it noted there is almost

too much data and information – and so the public gives up, baffled by the complexity of it all. In addition, the public is intolerant of failure, inconsistent in its demands for protection, and so politicians come under pressure to make announcements, to be seen to have done something.

Finally, the RRAC concluded that community resilience had not been a strong enough focus of public policy. Interestingly, it's this last subject, renamed the Big Society, that now seems to dominate the debate.

# A new policy context: the Big Society, small state and social care

The Big Society, together with its mirror image of the' small state', has created a new context for a discussion about risk, regulation and responsibility. It has also created a hope that resilient communities can incubate resilient individuals and then wean them off a dependence on the state.

Adult social care is an important aspect of this new context. Its provision is no longer seen as primarily the responsibility of the state. It is now viewed as a shared responsibility with individuals and their families. This is partially due to economic pressures – especially worries about the costs of an older and more disabled population. It's also partly because ideas about individual autonomy, about expectation of personalised services in social care and health, about the spread of personal responsibility and personal budgets, have become mainstream. They have informed discussion about the very structure of health and care services and the regulation of those who deliver them. Mirroring the way care is now seen as a shared responsibility, the provision of services is now discussed in terms of partnerships between the state, voluntary organisations and private sector. And, alongside the debate about social care in the Big Society, there's an emphasis on personal self-reliance, family responsibility and community resilience.

At the same time, the need to protect people seen as vulnerable has not diminished, and campaigns, for example against elder abuse, understandably highlight the failures of the care system and regulators to protect and safeguard.

The tensions between the rights of individuals to take risks and the state's role in protecting people at times of vulnerability have real relevance for social care. This has been articulated in relation to the registration of personal assistants employed by people with physical disabilities and in debates about capacity of people with a learning disability or with other impairments. The campaigns for older people, especially those with dementia, have also taken up these issues.

A recent article in *Community Care* illustrates these tensions.  A feature titled *Dementia and sex:the last taboo* (Bamford, 2011) debated the right of people with dementia, living in residential care, to have sexual relationships. It was a thoughtful and challenging piece about consent and coercion, about how the views of family members and those with power of attorney could be accommodated and about the role of care staff in supporting, or hindering, such relationships. Overall, it came down in favour of a careful and supportive approach to the subject. However, in

response a reader quickly cautioned against this by pointing out that staff face prosecution if they could be deemed to have facilitated a sexual relationship or permitted coercion (Betts, 2011). A simple call to take careful risks did not go unchallenged. For some, even a discussion of the subject was a step too far.

Regulations apply in many circumstances and not only in high risk areas of work. For many voluntary organisations, such as WRVS, the regulations that create their operating frameworks are sometimes not understood by either commissioners or stakeholders – particularly volunteers. Many people chose to become involved in voluntary organisations because they are attracted to their values of independence and to belonging to a non-statutory body. As a result, this can lead to volunteers resenting, for example, Criminal Record Bureau (CRB) checks. They feel that if they are giving time for nothing, if their contribution is needed in the Big Society, then they should be exempt from many regulations. As the Chief Executive of WRVS, and as a former regulator, I do not believe this position to be tenable. However, it is not uncommon. After health and safety, the issue of CRB checks and vetting and barring probably brought in more correspondence than any other to the Red Tape Task Force. While the task force was completing its report, a review of CRB regulations was announced and it is likely it will reinforce the actual requirements, and not the catch-all practices that have become common. Whether this will end concerns about personal intrusion will have to be seen. The tensions between protection and personal autonomy are not easily negotiated and social care highlights some of the more complex balancing acts.

## The Coalition Agreement; putting better regulation at the heart of policy-making

Like previous governments, the Coalition Government has decided to try to balance these tensions, putting better regulation at the heart of policy-making and the Coalition Agreement (Cameron and Clegg, 2010), in an attempt to underpin the conditions needed for the Big Society. It announced a regime of light touch and residual regulation, declaring:

> *The Government will regulate to achieve its policy objectives only:*
> *a) having demonstrated that satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches; and*
> *b) where analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative, self-regulatory or non-regulatory approaches; and*
> *c) where the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate; accountable; consistent; transparent and targeted.*

It also states:

> *There will be a general presumption that regulation should not impose costs and obligations on business, social enterprises, individuals and community groups unless a robust and compelling case has been made.*

Several recommendations of earlier BRC and RRAC reports were enshrined in the Agreement, particularly the adoption of the 'one in one out' approach to regulations, and an adherence to the principles of Better Regulation.

The Red Tape Task Force was set up to translate these principles into practical action, and to support the development of the Big Society. It aimed to free up the voluntary sector and small enterprises from the burdens of regulation, including in:

- health and safety
- employment law
- contractual arrangements when civil society organisations provide public services
- responsibilities of trustees and volunteers
- data protection
- co-ordination between government departments and regulators.

It's clear that myths about regulation are alive and well. More than 600 pieces of evidence were received by the task force from the public, citing seemingly irrational burdens that prevent people from taking action in their communities. Most of these related, unsurprisingly, to health and safety regulations, to the administration of CRB checks, to planning regulations, to the over-zealous activities of regulators who 'took in each other's washing' by asking about regulations not in their remit. Its report's conclusions (Hodgson, 2011) are intended to play a part in myth-busting, in arguing the case for getting on and doing things, for rejecting risk aversion and for promoting individual and public resilience. It accepts the need for appropriate protections but also resists the notion that risk can be eradicated. Like many other reports, it notes that it is often not the legislation and regulations themselves that cause problems but the heavy-handed, inconsistent, risk averse application and interpretation of them by the risk actors.

As well as the suggestion of establishing STORE (see above*: The Mechanism to help ministers pause for thought*) its main conclusions are that the government should:

- consider reforms to the law to clarify the extent of charity trustee and volunteer liability to encourage more involvement and participation
- eliminate regulatory duplication and repeated requests for the same information in slightly different formats, for example by Companies House, the Charity Commission and commissioners
- establish a working party to include representatives of the insurance industry and community and social organisations (CSOs) to address the insurance needs of the sector
- encourage fundraising for CSOs by creating a new category of 'social investor' and clarifying the position of trust law with regard to charities
- provide clear standard guidance as regards the licensing of fundraising events to local authorities and the sector – simplify the whole regime
- display posters prominently in all Jobcentres encouraging volunteering and emphasising that it does not affect benefits*.*

What's interesting about these recommendations, sensible as they are, is that they do, in many ways, repeat the sorts of recommendations made by previous task

forces – they are about freeing people up to get involved, to take responsibility, and they aim to tackle the myths and risk averse practices that act as barriers to participation. The last recommendation, for example, is meant to be a practical way of tackling the longstanding issue of claimants being discouraged from volunteering for fear of losing benefits – a fear that has affected many in the disability movement.

# Learning from better regulation and future action by JRF

The history of risk and regulation, of the creation of better and deregulatory frameworks, and the affects of public opinion on policy-making and politicians, is rather mixed. There has been some progress, a considerable amount of ideologically-driven rhetoric and some valiant attempts to stop the nation worrying and falling foul of moral panics.

Having served on so many of these regulatory bodies (and having been a regulator three times), the story of the regulatory journey, and my contribution, could be seen as one of abject failure (especially as no recent government has left power with fewer regulations in force than were there when it took office).

In fact, there is, at least in the world of policy-making, some real progress. To my astonishment, well over half of the recommendations made by each commission and task force have been taken up by successive governments. This success rate has even survived changes in political party – the principles of better regulation originated in the Conservative deregulation agenda of the 1990s were embraced by Labour and have survived into the Coalition Government.

However  the mood music has not changed. Despite all the myth-busting and Spiegelhalter's work to stop the nation worrying, public opinion and politicians can easily be nudged into a moral panic. The national debate that Rick Haythornthwaite urged back in 2009 (RRAC, 2009) has not produced a rational approach to public discourse on risk. Regulation is still seen as both the sign of a nanny state and as a mechanism for negating all risk.

As a regulator, committed to the cause of better regulation, I have felt it can be hard to stand up for regulation. As with other things, it has often felt as though the devil has the best tunes. The narrative is either about how regulation has failed to prevent a tragedy or about how it has denied someone the freedom to take risks. There are few stories about its successes and the ways in which proper, proportionate and fair regulation can not only protect but also create the framework for choice and self-reliance.

So what can JRF do to help this debate?

Using its reputation for independent, evidence-based dialogue, JRF could promote a debate about the balance between protection and freedom; it could orchestrate some songs about good regulation; it could bust the myths of inappropriate regulation in social care. It could develop good practice to help ministers understand the risks that come to their notice, and it could debate the most relevant forms of

regulation, if any. It could create and deliver the training ministers and civil servants need; it could bring the media, regulators and those who deliver and use social care together and develop joint training and tools. And finally it could create the necessary space for ministers to pause, reflect, and bring in relevant expertise. It could host the social care FARO or STORE – the respected place for the dispassionate, evidence-based examination of urgent calls for government intervention.  It could use its credibility and authority to buy time, to avoid 'something being done' in a hurry and to propose calm responses to crises.

JRF could also, though its commitment to evidence-based research, challenge the 'not invented here' culture of so much policy-making. Having sat on so many better regulation initiatives, it is clear that more progress could be made, more quickly, if lessons from one review were taken forward to the next, without politicians having to act as though we were always returning to year zero. JRF has years of research and evidence that could be mined for good practice. It too doesn't need to reinvent – but to use and bring up-to-date lessons that could be of use in different circumstances.

Finally, JRF could work to increase public confidence and trust in social care, its regulation and the risks that need to be managed, and it could do this by emphasising its values of empowerment and user control. It could champion a positive view of public risk management and avoid the traps of moral panics.  It could use its undoubted commitment to the rights of service users and their families, its understanding of how communities work and its ability to create constructive dialogue to lead a balanced debate about the uses of regulation and the sharing of responsibility for risk.

JRF would be unlikely to do any of this on its own and its expertise in creating effective partnerships, in working within changing political and social landscapes could underpin a new way of looking at these issues. JRF is committed to playing its part in the Big Society – and seems well placed to understand the potential and limits of the small state. What better task for JRF than to put itself forward in defence of freedom, where possible, and protection, where necessary? And to host debates that balance risk, regulation, individual responsibility and community resilience.

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