

The Nanny State

or what will nanny do when the children grow up?

Sheila McKechnie

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Sheila is a graduate of Edinburgh and Warwick University. She is a trustee of the Architecture Foundation and she has a number of appointments to public committees reflecting her role as a consumer champion. She is a member of the Inland Revenue's Tax Law Rewrite Steering Committee and has recently been appointed as a non-executive director of the Court of the Bank of England.

The Caroline Walker Trust

The Trust was set up in memory of the nutritionist and campaigner Caroline Walker, who died in 1986. The Trust's mission is the improvement of public health by means of good food - a cause which Caroline made important to everybody in this country. The Trust, which relies on charitable donations, exists to further her work through research and publications.

The Nanny State

or what will nanny do when the children grow up?

Since the election of a Labour Government in May 1997 an old phrase has crept into discussions about the appropriate role of the state in our daily lives. The phrase is ubiquitous and while it has a clear meaning it has an emotional charge well beyond rational analysis. Accuse the Government of promoting the nanny state and Ministers run for cover with a speed more appropriate to the arrival of an exocet missile. We are clearly in dangerous territory here and I welcome the opportunity on the occasion of the Caroline Walker annual lecture to explore some of the issues behind this explosive phrase.

The role of the state in protecting public health has become controversial in recent decades. Battle lines were drawn around the Black Report and by and large the arguments have continued in various guises since. During the period of the Conservative administration the Department of Health kept an extremely low profile with the significant exception of Sir Donald Acheson's stand on AIDS. The impression that the Department of Health has frequently rolled over in the face of the Ministry of Agriculture has to some extent been confirmed by Sir Kenneth Calman's statement to the BSE inquiry. However, the term 'nanny state' in the context of the general debate about health and safety is relatively new and has extended well beyond the issues of health. Here are some examples from the press:

*"Government critics today hailed a report condemning plans to restrict the sale of vitamin B6 pills a victory against the nanny state."*¹

*"The nanny state has poked its nose in the window of the Wendy house. Trading Standards Officers have issued a warning about the safety of outdoor playhouses. ...Well, we never, This is surely taking public protection too far."*²

Jeff Rooker announced in November that the Government planned to ban the sale of unpasteurised milk. *"Following the banning of beef on the bone and the accusations of a 'nanny state' overprotecting consumers, Ministers are said to be fearful of another backlash."*³

Tessa Jowell launching the Green Paper, *Our Healthier Nation* - "It [the Green Paper] marked an end to the Nanny State approach which applied with the last Government. ...It was not for the state to promote Nanny State social engineering."⁴

"However, once the Nanny State hounds are up in full cry, suddenly all kinds of other oddments of stories flare up to join the general hullabaloo. The Housing Minister is so PC he is banning doorsteps because the disabled cannot get up in them in their wheelchairs" writes Polly Toynbee.⁵

"The Nanny State continues its advance in seven league, knitted jack boots.... What can we do to stop the march of the nannies? ...If Parliament does ban hunting, some of its most respectable and law abiding of our fellow citizens may be at last provoked to defend their way of life by civil disobedience." John Casey, Fellow Caius College, Cambridge.⁶

The phrase 'the nanny state' is intellectually illiterate. It obscures the real debate about the appropriate role of the state in the late 1990s.⁷

When to regulate?

Three main positions can be identified in any discussion about the role of the state. Some advocate that the role of the state should be reduced to those matters that can only be dealt with collectively, often described as the 'nightwatchman' state. Others want a return to a strong centralised state with centralised decision making. The new 'third way' seems to involve some new contract between citizen and state which provides a mixture of individual responsibility and collective decision making.

These debates are not new. From the Greek philosophers onwards the debate has been fundamental to our discussions of politics. Indeed the three positions loosely have antecedents in Hobbes (the nightwatchman), Marx (the socialist state) and all points in between for example John Rawls (Two Theories of Justice).

Descending from the philosophical stratosphere let us examine the more mundane question of when it is appropriate for the state to regulate and when it is not. The starting point for any such debate is the operation of markets.

"Markets should be allowed to operate freely and consumers should be able to exercise choice. However we need to ensure that markets work effectively and are not constrained in ways that reduce consumer choice. ...In many areas, the best way to promote consumer choice is to allow consumers to choose freely for themselves." This is the position taken by CA in its report *Making Markets Work*.⁸

However, this is by no means a dogma. In response to the previous government's deregulation initiative we were clear to point out that while we fully supported the removal of over-burdensome regulation this had to be done in the context of recognising the costs and benefits of regulation.

Regulation normally carries a cost and some, if not all, is borne by consumers. Consumers may be willing to accept this, but only if the cost is proportionate to the benefits gained in terms of health, safety, fairer trading practices and better information, for example.⁹

This recognises the need in certain cases for intervention by the state to increase consumer welfare. However, CA does not lightly propose specific interventions itself and tends more towards calling for the appropriate political institutions to make decisions based on a full understanding of the issue. This will typically include an understanding of the consumer case. Having said that, there are times when it is clear to us that the consumer interest can only be preserved through some form of direct intervention.

These are factors such as product safety where the product is complex, cannot be addressed by information alone. How many of us, for example, would ever be able to tell if a new drug was safe? Other examples where intervention may be required include access (for example to essential services) dealing with unknown or perceived risk (for example, in relation to new technologies) balancing short term interests with long term impacts; and dealing with the externalities that arise from consumer actions (for example the polluter pays principle). It is interesting to note in passing that the phrase 'nanny state' is rarely used in respect of the introduction of genetically modified organisms where only the state (or in this case the EU) would be in a position to protect consumers from the actions of global multinationals.

The sort of interventions we might call for range from information campaigns through to product bans. We generally tend towards supporting self regulatory initiatives where possible as these are more likely to have the support of the industry and also may carry lower costs. However, self regulation has its limits and we have to recognise where statutory intervention is required.

However, calls for intervention inevitably lead to a number of questions. For the purposes of this lecture, we will divide these into three groups: the role of the state; the perceived conflict between preventing market distortion and intervention to achieve social policy goals; and the tension between regulation by nation states and the removal of international trade barriers. These factors are all closely inter-related, but useful to separate to understand the issues.

The role of the state

The key question is the degree to which the state should be able to limit the choice of individuals in the interests of promoting welfare. This is the core of the many of the quotes I used at the start of this lecture. Perhaps the most notable was the ban on the sale of beef on the bone (a measure supported by the National Farmers Union, the Meat and Livestock Commission and ourselves. The NFU has since changed their position.) and while there have been issues arising in other sectors, it is in relation to food regulation and policy that the debate has most prominently emerged. It is, perhaps, interesting to compare this with very recent history, where the criticisms were more often that government was not doing enough to ensure food safety.

It is important to recognise that this has occurred during the process of establishing a Food Standards Agency. One area of contention is the agency's role in relation to nutrition, a role that some sectors of the food industry fundamentally oppose. We have called for the agency to be responsible for developing clear nutritional advice and guidelines (this is not the same as trying to tell people what they can and can't eat). So it was perhaps unsurprising that the Food and Drink Federation reproduced an article in their magazine from the Express attacking us. The article finishes with:

*"The health nannies should stop worrying about our lives - and start getting one themselves."*¹⁰

So in order to 'get a life' I have to go along with a completely free market approach. However, there is another more practical way to look at the issue and side step the political minefield of what kind of state. To do this CA often assesses these issues by asking the question - what is the best mechanism for maximising consumer welfare?

As a consumer organisation, we have long been acutely aware of the tension between ensuring consumer welfare via intervention and the rights of

consumers to make their own informed choices. There is unfortunately no hard and fast formula that can be used to balance these factors and they often boil down to a clash between consumer principles (eg safety versus choice).

We must be careful to acknowledge where we really are unable to make a judgement on the best course based on the available information. There are also times where we have to acknowledge that the final decision is essentially a political one and our role is to make sure that the consumer view has been adequately incorporated into the process.

We tend to analyse issues in terms of the potential risk (numbers affected, impact of no intervention), the ability to enable informed choice and the effectiveness of an intervention. Some interventions may be desirable but are simply pointless if the law cannot be enforced. This was a point we raised in our response to the ban on beef on the bone where we advised the Government to consider the practicalities of enforcement before proceeding. In questions of safety, it is the question of whether individuals are able to make an informed choice, or to avoid risk if they wish, that often decides our stance.

Market distortion

Intervention by the state is likely to have an impact on the operation of markets - that is, cause some form of market distortion. The introduction of free or cheap bus services to enable low income consumers to access lower priced food at out of town shopping centres, for example, can have a ripple effect on other shopping areas which lose custom. This in turn may reduce access for other consumers who fall outside the catchment area of the new bus service. However, while properly functioning markets are one way in which consumer needs can be met, they are by no means the only mechanism and we need to consider the relative merits of different types of action (or non action). We cannot always foresee the impacts that an intervention will have, however, this cannot stop us from forming a view.

A related issue is that of regulatory costs. We are not here to represent the interests of industry, but we do need to recognise the impact that excessive regulation will have and how this may impact on consumers. We therefore start from a position of wanting to minimise regulatory intervention and its costs (which are ultimately borne by the consumer) while wanting to ensure appropriate interventions.

International trade

A further tension that CA runs into in some areas when calling for legislation to promote the consumer interest is that between the introduction of national regulations and the move towards the removal of non-tariff barriers to trade. Both at an EU level and at the global level, there are mechanisms in place for ensuring access to markets for companies based in other states.

CA has long recognised the benefits to consumers of having free movement of goods and services between states (and as long ago as 1975 *Which?* magazine reported that we supported UK membership of the Common Market). However, we have also recognised the need for appropriate levels of consumer protection and that in some cases this may vary between states (for historical, cultural and social reasons). In the EU a general principle has been adopted that the regulation of the home country (that is the country where the good or service originates from) will apply eg if it is acceptable under French law it must be accepted within the UK. Our underlying view is that this is the wrong way around, and that the appropriate regulation should be that relating to where the consumer is based (the host country). However, in practice this creates a potential for a clash between ensuring free movement of goods and ensuring adequate consumer protection.

Very few people in the UK are aware of the implications of the last GATT round establishing the World Trade Organisation (WTO) and the various moves towards deregulation. I recently attended a meeting in Washington to establish an EU/USA Consumer Dialogue to parallel that set up a number of years ago

called the EU/USA Business Dialogue. A quick look at some of the business recommendations to Government will indicate the agenda.¹¹

"Business leaders have specific requests for regulatory reform in 13 Sectors"

"food biotechnology industry is urging governments not to label genetically modified foods for fear of scaring consumers."

"no regulation of dietary supplements."

"TABD calls for industry-led 'market driven' privacy protection principles."

If this was only a business agenda and we had trust in Governments to balance business interests and consumer protection then it would not be so threatening. However, it was clear from consumer groups in the USA that the US Government agenda was to seek to overcome consumer resistance in EU to USA food exports including hormone treated beef and GMOs.

The fundamental tensions between consumer protection and the free movements of goods have led us to adopt an approach based on proportionality. We have called for and supported measures that would effectively act as trade barriers where we have felt the situation to warrant it (eg the number of consumers affected and the seriousness of the impact have been such that it would be unacceptable to take no action). In other cases we have opposed measures that would effectively stifle trade without an appreciable benefit to consumers (eg we opposed moves to require UK chocolate to be called something other than chocolate, despite calls by other EU consumer groups for this to happen). Underpinning this, we have also called for appropriate international standards and good access to justice for UK consumers in other countries' courts.

Analysing the need for an intervention

Dealing with the sort of tensions described above means that we have to be fairly careful when calling for some form of intervention by the state. When faced with an issue, we need to have a good grasp of the potential problem and the way it interacts with other factors. These typically include:

- the market structure within which it occurs (eg patterns of use, of supply and demand, barriers to entry to that market, externalities that arise etc);
- the scale of the issue (eg how many people are affected, what is the likelihood of an effect, what is the impact of that effect);
- what information is available - to us, to consumers and to decision makers;
- what the current regulatory system is.

Where necessary we also try to identify the climate of opinion within which we are operating. Therefore we gauge consumer opinion, political views and media discussion of the issue.

Having identified the problem and its context, we look at possible solutions. In some cases the nature of the issue will mean that there is only one course of action available, in others there may be more than one option. The first step must be to identify the options and at a very basic level whether they are practical or possible (this must include looking at the practicalities of taking no action).

We then try to identify the potential costs and benefits of the alternatives. It may not always be easy to identify these and we cannot always quantify them. However, what we can do is be aware of the positive and negative impacts of a measure and make these explicit in our decision making. Where we cannot obtain enough information on impacts to make a reasoned decision, we tend to encourage decision makers to carry out the required research. The introduction of a freedom of information bill should enhance this approach if it ever emerges from the Home Office.

The final stage is to test the solutions through consultation with those affected to see what problems they throw up. This final stage is often the most informative in terms of identifying whether our proposals hold water, whether there are potential refinements, or whether we need to go away and think again.

I will apply this approach to four different issues:

Financial services

In the case of financial services, we are faced with a situation where making a sensible decision about certain products requires consumers to sift through a large amount of highly complex material. CA's research, and that from elsewhere, has shown that consumers are largely unable to do this. This situation has been exploited by some players to market products that are unsuitable for their purpose. While education may in the long term go some way towards addressing the problem in part, this will take some time and can not completely deal with purposeful mis-selling.

The consequences of making the wrong choice in relation to some financial products can be extremely severe, both for the individual and for the taxpayer. This has led us to call for the introduction of minimum standards for financial products. By implication this could mean banning some products for sale. In this instance, we would wish the level at which standards are set to be related to the level of risk and complexity of the products on offer (two interdependent factors).

We would compare this approach to minimum safety standards for other consumer goods, such as electrical appliances.

Children's toys

Not surprisingly, when accidents happen CA is often called on to support bans on children's products. These are emotive issues especially if a child has been badly injured or killed. However, proportionality is the key criteria. It is often

more sensible to call for better point of sale information particularly on the recommended age of users. Bans prevent access to those able to use the product safely while only benefiting a small minority of consumers.

Beef-on-the-bone

The decision to ban beef on the bone because of concerns about BSE infectivity in the dorsal route ganglia and bone marrow of cattle has proved to be a particularly controversial issue. It has highlighted the complexity of communicating the vast number of uncertainties that still surround the BSE issue.

When deciding whether or not this was an issue that could be left up to consumer choice or whether government intervention was necessary, we considered whether it would be possible for consumers to make an informed choice. In view of the uncertainties relating to the BSE agent and how it is transmitted, it is not possible to quantify the risk - despite media reports attempting to do just this. Although consumers will obviously be aware when they are buying a T-bone steak that it is on the bone, it is not so straightforward with soups and stocks for example. Therefore, if consumers wished to avoid eating beef on the bone it would not always be possible to do this. We therefore supported the Government's decision to ban beef on the bone and cut off a further route of BSE infectivity and called for clear guidance as to how the regulations were to be effectively enforced.

Raw milk

The debate about whether or not to ban raw (unpasteurised) milk clearly demonstrates the choice vs safety issue. Raw milk is already banned in Scotland. A study by the Public Health Laboratory Service indicating a problem with the microbiological quality, including E coli O157, in raw cows' drinking milk in England and Wales, prompted the Government's advisory committee (the Advisory Committee on the Microbiological Safety of Food) to advise a ban. Some consumers do, however, enjoy drinking raw milk.

In this case, there was a problem with enforcement of hygiene legislation relating to the quality of raw milk. The same legislation requires that raw milk be labelled so that consumers who are buying raw milk are aware that it is a high risk product. We therefore concluded that a ban was not appropriate and that the problem should be addressed by ensuring compliance with existing legislation and clear labelling.

However, we do not live in an entirely rational world. National cultures have many characteristics and many of these issues hit raw nerves. Would many of those who defended Government inaction in the case of BSE have done so if it was not standing up for the 'roast beef of Old England'. Imagine what our reaction would have been if it had been Italian pasta or French cheese. Indeed, try banning cheese from unpasteurised milk in France! Likewise try telling the Danes that their ban on adverts directed at children is a fundamental infringement of the liberty of companies to promote legal products.

We should also be aware of the importance of history. Germany has not followed the rest of Europe and the US in banning smoking public places. The first attempt to ban smoking in Germany was associated with Hitler and his ideas about the superiority of the German race. German politicians to this day have been haunted by the association and unable to act, not least because of a possible press backlash.

The media

That brings us neatly to the role of the press. One of the factors that makes such decisions very difficult for the politicians, certainly in the west, is the role of the media. Politicians understand, as many experts do not, that people make choices depending on their sources of information and advice.

In the use of the term 'nanny state' writers understand what experts do not that we want to be in control of our own life decisions. No one wants to admit ignorance. When faced with a dilemma like whether or not to feed children beef at the height of the BSE episode, parents wanted to know is it safe? The last thing they wanted to hear was the expert view that it was an unknown and essentially unquantifiable risk. A point I will return to later.

What drives the media to report on issues in a particular way is far too broad a subject to tackle here but I will venture one comment. Our attitude to risk is largely determined by our personalities. It is quite common to find a general news report on a particular issue written by a consumer journalist saying one thing and the newspaper columnist saying another. Columnists are by their nature people of strong individualistic characteristics more prone to be risk takers and contemptuous of those who are not. This does not make for sensible debate.

Food and health scares have often been dismissed as media hype. So, does the media create fears about risks or simply reflect the nature or risks in modern society? As the statement 'x is not a risk' is usually not considered news, the media must by its nature create a climate of exaggeration about risk. The sheer availability of information through print and broadcast media also has its own dynamic. While the Government sits on information used in its own deliberations; the media will continue to set the agenda. The recent failure of the Government to communicate about the possibility of BSE in sheep was a case in point.

Perhaps I am simply making a plea for more rational discussion in the media of these complex issues. A plea that I know will fall largely on deaf ears. So what may be more interesting to look at is why risk, particularly in relation to food, is such a difficult and complex issue.

Nature of risk

Government bodies and quangos charged with assessing risk are out of touch with the environment in which they are operating. Several factors have contributed:

- there has been a decline in deference. Decision making by experts behind closed doors, resulting in decisions without explanation, has come under serious attack from individuals and organisations who regard such attitudes as patronising and inadequate.
- there has been a decline in the belief that science has all the answers. A number of factors are involved.
- science itself is under attack, for example many consumers feel they want more 'natural' foods whereas industry sees new technologies as the answer to current problems. Science becomes the problem not the solution.
- governments no longer control access to information. Anyone with a computer and a modem can get a great deal of information; some of it with little to identify the credibility or otherwise of the source.

These factors make it necessary to have a new approach to the assessment and communication of risk especially when the risks are difficult to quantify or predict.

How can we achieve a level of risk that is socially acceptable when we may not have all of the facts to hand to enable a proper and accurate assessment of the risk. While we are moving towards a more inclusive system of decision-making and accepting that science alone is not a sufficient basis for decision-making

where outcomes are political, social and economic, there needs to be greater debate within science itself about the need for a radical change in the way we approach risk. While it is the case that the Health and Safety Commission (HSC) has done much within the field of occupational risk analysis to develop approaches which formulate risk characterisations in a theoretical way, much input into other decision-making structures has remained profoundly empiricist. We need to find a way of balancing the limitations of an empiricist approach with broader socio-economic input.

None of this should be taken as underestimating the difficulties scientists have in communicating with a largely scientifically illiterate public. However, scientists are not necessarily blameless; the odd list of 'shroud waving' or 'miracle cures' are tempting to ensure funding for projects. It may not always be possible to clearly quantify what the long term costs and benefits of new developments will be. Despite this, technological change is taking place at a rapid pace. This is not necessarily a negative development - it can offer benefits and opportunities. But it also means that much of the research has been based on addressing commercial needs. We now need to frame the questions correctly from the beginning - before there is no going back. If the research doesn't give us a clear picture - we should delay a decision until the research can provide us with a clearer picture. In effect, this means applying the precautionary principle.

But if in any risk decision-making process the level of proof required for action is causal and verifiable then this itself acts as the barrier to the implementation of the precautionary principle. The history of regulation, for example on smoking or asbestos shows how the levels of proof for action were continuously set beyond the capacity of existing research capacity which resulted in the delaying intervention by Governments. If you don't go and look for evidence you rarely stumble across it accidentally. Controlling the research agenda is often used as a means of ensuring evidence does not exist. To quote Stephen Dealler's website, "*Absence of evidence is not evidence of absence.*"

At the other extreme, if we take all potential or theoretical outcomes as likely to happen then innovation would be stifled. Current attempts to quantify the risks that are likely from the amount of BSE that has gone in to the human food chain have stumbled on this problem. If you take the most pessimistic assumptions, then the number of human cases of nvCJD could be up to half the population. If you take very optimistic assumptions, then only a few cases will arise. Decision-making in such a context becomes difficult and the science will be of only limited help. Risk assessment cannot be understood as a strictly scientific approach - we need to adapt it to ensure that broader societal issues can be addressed from the outset.

Structures, processes and culture

There are only three main ways to reform the current system of food regulation in Britain. Firstly, there are structural issues. The Ministry of Agriculture, Fisheries and Food is seen as putting industry interests before human health. Consumers do not believe that MAFF should have a key role in setting standards.

A new institution in form of a Food Standards Agency has to be the first step in restoring consumer confidence in the Government's role. Secondly, the process of setting standards must be transparent and accessible. However, neither of these changes will themselves bring about a change in our current culture of mistrust, rumour mongering and misinformation. All parties to the food standards debate should recognise that they have a shared interest in resolving the current unsatisfactory climate and take their responsibilities seriously in establishing and supporting a new food standards agency.

Despite there being considerable support for the new Food Standards Agency, at the time of writing there are press reports that the Government is dropping the Bill from the Queen's Speech. If that is the case then we are unlikely to get the new start that we need in respect of food standards. If this is the result of pressure from food manufacturers it is a very shortsighted approach and it is

likely to sabotage any plea for a balanced and sensible approach to risk analysis, risk management and food regulation in general.

What will nanny do when the children grow up?

Returning to the starting point of this lecture, I will now try to draw some conclusions.

Much of the current debate around the term nannying has obscured and obfuscated some difficult and complex issues.

Politicians and the media - which they both use and abuse - have been cowardly in the face of the need to explain and debate the complexities of many of the issues particularly in relation to food.

Industry has had a short term view which has set itself an agenda which may damage its long term interest. Deriding nanny may be fun but it creates a mood of debate in which irrationality triumphs over sense.

Consumers cannot have a risk-free environment. We cannot promote our right to make choices on the one hand and make demands for protection against risk on the other.

Finally, if we have learned anything over the last few months it should be that uncontrolled free markets are the source of their own destruction. Life is more complex and the fundamentals of political stability are that we have institutions that we trust, scientists that we believe and understand, a sensible balance between choice and the general good. We need to face up to the complexity of modern life not run away from it.

Sheila McKechnie

Director, Consumers' Association

29 October 1998

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What role should the government take in protecting consumers and promoting public health? Discussions on this issue - and the appropriate role of the state in our daily lives - often turn to the concept of 'the nanny state'. Where does sensible public health policy end and nannying begin?

Sheila McKechnie's thought-provoking analysis explores the issues behind this explosive phrase. She argues that the debate around nannying has obscured some difficult issues and that we need to face up to the complexity of modern life not run away from it.

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