KEY POINTS

- New laws and regulations are constantly being introduced seeking to eliminate or mitigate negative outcomes. There are limits to the capacity of law to eliminate negative outcomes.
- Legislative or regulatory risk mitigation may bring protection from some risks, but it may also bring or increase other risks – in particular risks of complexity and cost.
- Specific examples are considered, suggesting a bias to creating new legislation or regulation and a lack of consideration of cost and of possible more effective solutions to identified problems.

Spotlight

Author James Palmer

Risk elimination by legislating: the limits of the law and challenges of reality

This Spotlight article, the first of two looking at significant policy making challenges, argues that legislators and regulators too often seek to avoid and even eliminate risks, at disproportionate social and economic cost to the desired policy outcomes. This reflects challenges in setting better policy goals. It gives examples across financial services and other sectors. Accountability is needed to achieve outcomes, but not all failures or bad outcomes require change of law or regulation. The balance between improving standards and real outcomes on the one hand, with controlling social and economic costs on the other, needs more complex consideration and comprehensive cost-benefit assessment.

THE REALITY OF RISK AND BAD OUTCOMES

It may sound trite, or defeatist, but it is clear that human capabilities and even the capabilities of ever improving AI developed by humans, cannot stop all negative events. The COVID 19 pandemic, the invasion of Ukraine and its consequences, or the earthquake in Turkey are recent stark examples of inability to prevent bad outcomes at a macro level. Other less visible negative events arise, affecting the lives of people and often with terrible consequences. It follows that the law cannot prevent all bad outcomes, whether by imposing liability or criminal sanctions for particular outcomes, or by mandating standards. This article does not argue against efforts to avoid, limit or mitigate these negative events or other less high-profile negative outcomes, quite the contrary, but does argue that looking more carefully at the overall consequences of intended measures is now vital.

In financial markets and more widely, it is clear that no investment is risk free and all may sometimes carry material risk. This includes investments directly or indirectly for retail savers and investors. In March 2023 we saw examples of banks being rescued after their capital was heavily invested in supposedly low-risk government bonds, when the low interest rates on those bonds exposed the institutions to greater risk from inflation and rising interest rates. Similarly, investors encouraged by prudential rules or by financial advisers in 2008 and subsequently, to invest in such supposedly safe government bonds, may have reduced their risks of total loss, but instead took on new risks of low or negative real returns. The changing nature of political and social contexts in fact mean outcomes are less predictable than most might wish them to be. This unpredictability and inherent level of risk means we are constantly exposed to the prospect that measures implemented today, in response to yesterday's risks, may in fact fail to manage other greater risks ahead in different contexts. Legislative and regulatory policies, like investment decisions, involve choices with different potential impacts.

This question of balance between the state protecting, on the one hand, and not by its actions stifling innovation and creativity (and the resultant risks), on the other, is not a new one. The philosopher Bertrand Russell focused on it in his inaugural BBC Reith lectures in 1948-49, published as *Authority and the Individual*. In the opening lecture he said:

> "The fundamental problem I propose to consider in these lectures is this: how can we combine that degree of individual initiative which is necessary for progress with the degree of social cohesion that is necessary for survival?"

His lectures focus on the different aspects of the competing balance between common interest and individual creativity and draw out the considerable risks of stifling innovation and improvement, which of course require risks to be taken, and at times to result in failures and other negative events and outcomes.

This article suggests that Russell would be deeply concerned by the way in which increased social complexity has resulted in a loss of perspective or focus by legislators and regulators on the direct and indirect costs of trying to eliminate too many risks. The article focuses on the UK, but the issues addressed are not limited to UK law and rule-making but apply in numerous other developed jurisdictions.

THE ROLE OF LAW AND RISK ELIMINATION

The volume and extent of law and regulation in the UK has grown at extraordinary speed across most areas of legislation, but particularly for businesses and in financial markets. The complexity and specialisation of those laws and regulations have grown too, not at a steady pace, but exponentially. There is no doubt that many new laws and rules have furthered important social benefits and outcomes, without undue cost to society. It is also likely that lawyers and businesses may have biases against change, being too quick to argue against changes which may in fact be beneficial to society. But there is also ample evidence of the creation of more and more poor-quality legislation and regulation, developed for good motives, but in silos which ignore the wider impact and context, and bringing great costs to society. Those tensions raise significant issues for policy makers as well as in relation to the role of law and regulation.

Spotlight

A classic example of a risk of harm which the law has not sought to protect is that English common law does not impose a duty on an individual to save the life of someone with whom they have no relationship, who is at risk of death (for example by drowning). That principle appears to tolerate selfish behaviour, in particular where the life could have been saved. Indeed, most people would deeply disapprove of a failure to act by a healthy adult, who refused to put themselves at low risk by intervening in such a case. But that common law principle reflects an understanding of the complexities and risks which arise from the imposition of duties: is a stranger required to put themselves at risk? What is the risk of someone being accused of wrongdoing when they were unaware of the risk to the individual, or they did not know they could safely intervene? Is this an area for the law or just for moral judgement?

In this example, it is of course the case that certain relationships alter the principle. The law imposes duties to intervene to save life in particular cases on parents, doctors and police officers, among others, whose actions may affect the risk of death of someone else. Sometimes those duties are imposed by criminal sanctions, while in other cases the duties exist through civil, regulatory or employment duties imposed on, for example, a doctor who may be negligent, a police officer who may be dismissed for failure to act to the required standard, or the owner of a property who may have inadequately protected visitors from risk.

This example is by analogy relevant to how we apply legal principles to law and regulation which seeks to influence business or financial market behaviours, and to all aspects of use of laws or regulation.

Questions about the role of law

The reality of risk and of bad things occurring, when risks turn into reality, frames questions for policy makers, both overall and in particular contexts:

- to what extent can the law and regulation preclude or mitigate negative events or outcomes?
- to what extent are other measures and actions more effective to address those goals than legislation or regulation?
- which measures and actions are proper priorities for legislative or regulatory interventions? and
- in assessing the answers to those questions, which interventions are proportionate as regards direct and indirect social benefit from the prospect of the desired outcome, relative to direct and indirect cost?

The answers to these questions require consideration of a further question: given that certain risks require legal or regulatory change to address them, but others do not, are we sufficiently clear as to the need to avoid legislating to address all risks? The answer appears to be that policy makers and regulators are not clear on this point.

The hidden cost of legal complexity and moves away from common law based principles

The next article will look more closely at the need for better quality law through better processes for making legislation and regulation, but it seems clearly the case that the vast number of ideas for regulatory or legal change which individually may seem to their proponents to be obvious candidates for legislation and regulation, are in the aggregate creating systemic problems through the volume and quality of legislation and change, and the cost of poorly thought through policy proposals for such changes. This increases the complexity and obscurity of law for non-experts (and therefore cost and remoteness of access to law and legal recourse), while it reduces predictability and certainty.

As complexity has increased far beyond just business and financial markets, information imbalances have arisen between organisations and individuals with responsibilities affecting others without comparable expertise and understanding. The law and regulation have, in response, expanded the ways in which a person with greater expertise or resource than another takes on further responsibilities to others, to guard against unfair exploitation of customers or the public. This is a key rationale behind much financial regulation and most business regulation.

The law and regulation have also sought to provide more specific and targeted prohibitions and sanctions, seeking to reduce or eliminate harms. This is an understandable response to specific negative outcomes which elicit the reaction of those affected that the harm "must never happen again". But there is a valid question as to the proportionality of each such measure, and the credibility of eliminating bad outcomes by legislation, at least at proportionate social and economic cost. Societies support laws mandating the wearing of seatbelts to reduce harm in car accidents, but have not sought to prohibit the use of cars altogether. The first measure is thought to impose a proportionate burden, but not the second.

It is also worth noting that recent regimes have moved further away from traditional common law principles, which historically required criminal intent for most forms of criminal liability, or a common law-based duty of care to exist to create civil liability beyond contracting parties. Instead of just punishing for breach, more and more law and regulation seeks to mandate procedures or actions, non-compliance with which may result in criminal liability, regulatory breach and potentially civil liability. This approach focuses on creating sanctions and incentives to avoid outcomes arising, rather than just punishing transgression. In many cases this is clearly important. The seatbelt example above is widely seen as such an example. Large areas of financial services legislation and regulation also set procedures designed to impose minimum standards or share information. Few would argue, for example, against the existence of capital adequacy rules for banks and insurers, or rules requiring provision of transparency to those dealing with them. But the extent and scope of behavioural requirements has grown exponentially and there are justified questions as to the proportionality of the rules to the desired outcomes, and as to whether the policy goals in fact reflect desired outcomes, or an overly risk-averse approach.

Structural costs of financial service and business protections

If the goal of financial services should be to match savings and investments on the one hand, with capital needs for businesses, governments and individuals on the other, are the results delivering? Challenge on this issue can be conflated with lowering standards, and a "regulatory race to the bottom". But the desire to maintain high standards to ensure market success, a goal widely shared by financial market participants in the UK, does not justify failing to consider real long-term consequences of measures. This article does not purport to answer this question, but it does urge closer scrutiny of the answer, and the need for evidence of economic and social cost proportionality to be considered by HM Treasury, Parliament and the UK financial regulators.

Laws and regulation since the City's "Big Bang" in 1986 have expanded at extraordinary and accelerating speed, but are the protections now afforded to savers ones that have aligned behaviours with the long-term interests of those savers, at proportionate cost? Or have requirements for regulatory protection, risk avoidance, multiple tiers of intermediation and liquidity, led to costs which are in fact reducing pensions and savings for large numbers of people? There does not appear to have been any serious government or regulatory consideration of this issue for many years. The Financial Services and Markets Bill (FSMB) introduces some provisions to be welcomed in this regard, including secondary goals of "competitiveness" for regulators, and introducing more focus on transparency by regulators in relation to market outcomes. Belatedly, political and regulatory comments appear to acknowledge the risk of loss of proportionality (see for example the speech by Andrew Griffith, Economic Secretary to the Treasury, on 2 February 2023). However there remain real questions as to whether these steps will be able to challenge the ever-increasing cost of legal and regulatory interventions and the bureaucracy they bring. Disproportionate regulation benefits only lawyers, consultants, compliance specialists and potentially, by introducing barriers to competition, organisations with existing market scale and leadership, (at least in the short to medium term), at the expense of real outcomes for investors. Another risk of such measures is that markets shrink, have reduced relevance, and fail to achieve their original purpose, which was not just to eliminate risk. The misalignment of regulatory and political incentives relating to legislation and regulation from public benefit outcomes, which potentially lies behind this trend, will be explored in the second article.

An example in relation to financial services is considered below. In that context it is interesting to note that even prior to the amendments proposed to the Financial Services and Markets Act 2000 (FSMA) by the FSMB, FSMA already contains at s 3B(a) a requirement for both the Financial Conduct Authority (FCA) and the Prudential Regulatory Authority (PRA) to apply the following regulatory principles:

> "(a) the need to use the resources of each regulator in the most efficient and economic way; (b) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction; (c) the desirability of sustainable economic growth in the economy of the United Kingdom in the medium or long term; (d) the general principle that consumers should take responsibility for their decisions";

and at (f)

> "… the desirability in appropriate cases of each regulator exercising its functions in a way that recognises differences in the nature of, and objectives of, businesses carried on by different persons …"

In relation to the efficient use of resources, is it conceivable that regulators consistently devoting large proportions of their resources to a stream of new law and regulation, which might be described as a churn of regulation, can possibly be using their economic resources to the objective set out in s 3B(a) of FSMA? It seems unlikely, though political pressures for constant regulatory change, on top of resourcing for the necessary implications of the UK's departure from the EU, do not leave the regulators solely responsible for this unsatisfactory state of affairs. In relation to the example of the consumer duty set out below, it needs to be kept in mind that this change required primary legislation and therefore political support.

SELECTED EXAMPLES

Example 1: The FCA's proposed consumer duty and financial services regulation

There is not space here to address properly the new consumer duty, let alone financial services legislation, but it is striking that consultation only a few years ago on introducing a duty of care to financial services consumers (see FCA Feedback Statement 19/2, responding to the earlier FCA Discussion Paper 18/5) did not support the need for such a statutory duty. Rather it set out in Chapter 6 other reforms it suggested might be preferred approaches. Many stakeholder responses evinced concern that introducing a new statutory duty of care would create duplication with existing rules such as, for example, the requirement to "treat customers fairly" and the then new senior managers regime, as well as FCA Principles and other detailed contractual and regulatory obligations, while it would create significant costs for both firms and consumers. Voices in favour of the change asserted harms to be precluded and necessitating change, but the FCA did not, in their various papers considering this proposal at the policy development stage, set out evidence of costs or of projected results, or how the proposal would satisfy the principles of s 3B of FSMA. While it is of course likely the regulator's support for the new scheme reflected a genuine desire to improve consumer outcomes by seeking to eliminate further risks, it is suggested that the consultation process reveals a significant bias to change for change's sake, possibly led by the political momentum for further change.

Yet the consumer duty is now to be implemented. It attracted political support on the basis it would eliminate some of the harms identified. It seems highly questionable that it will do so at any proportionate cost, given the raft of pre-existing rules and obligations in relation to duties to customers in different contexts. There was little discussion about whether more effective enforcement or access to private law remedies, or devoting more resource away from introducing new rules and towards more active and experienced regulatory supervision, would be more effective. Nor was there considered debate on why the harms objected to had not been addressed by the panoply of existing sweeping regulatory obligations on regulated firms. Nor was clear evidence of the asserted harm set out. Excessive harm which regulation would mitigate was presumed throughout.

The consumer duty seeks to define duties by reference to outcomes. Although the detailed rules seek to be clear that outcomes are not just about ultimate results achieved, or avoiding investors losing money, by defining the duty by reference to outcomes it clearly leads consumers to a greater expectation that they will be protected from all negative outcomes, even though that was not the stated intention. While retail consumers clearly need greater protection than wholesale market investors, it remains unclear what negative outcomes are in fact legitimate, or indeed inevitable in a world innately bringing risk.

To what extent does *caveat emptor* (buyer beware) apply to investors? UK laws allow an individual to buy a home which it may take them 30 years to pay for. The individual is required to be assessed as regards their ability to take out a mortgage, but not to take advice as to whether the home itself is a poor investment or indeed a poor choice of home. This is not to urge the need for advice and further cost in home buying, but to make the point we may be losing proportionality in levels of protection.

This is also apparent in relation to the "advice gap" regarding financial advice for the public. This advice gap reflects a system which has sought to regulate the provision of financial advice so heavily that providers have simply withdrawn from providing it, other than for wealthier investors. This makes no sense in policy terms, as it discriminates against those most in need of advice and of some level of protection. See for example FCA Consultation Paper 22/24, seeking to explore addressing this issue, but these new proposals still do not recognise that it may be better for some low cost and simple investments, albeit still carrying some risk, to be permitted to be sold without advice to any investor, as was recommended by Ron Sandler's review approximately 20 years ago (Sandler Review of retail savings industry, 2002). If any individual can buy a house, a car or an antique, or take out a payday loan or credit card debt, without independent advice, why should regulation make it so hard and expensive to take financial advice? Transparency, clearly setting out the conflicts or risks of particular sources of advice, might well be an improvement on no advice, along with other measures to encourage and facilitate savings.

Example 2: The National Security Bill's foreign influence registration scheme (FIRS)

Another example of the political and regulatory bias to regulate for the sake of change, without properly assessing costs and benefits, is the government's recent FIRS proposal. This was developed in the Home Office to address perceived national security concerns. The political disclosures and explanations for the proposal focussed exclusively on the risk of "malign actors", and hostile governments, seeking to undermine UK policy making by malign influence. While it is clearly the case that national security risks are real, the causal link between the threat and the measures proposed was almost non existent. In addition the scheme did not seek to assess the risk of harm it might actually avoid, let alone the harm the scheme was clearly going to cause if introduced. The scheme was introduced in Parliament late in the passage of the National Security Bill (after it had cleared the House of Commons process), without the specific further consultation envisaged by the initial consultation paper and response on the threat (Legislation countering state threat, Consultation paper of May 2021 and response document of July 2022).

The scheme effectively provided that any foreign organisation whatsoever, other than one exempted by regulation (or a foreign state body itself), or anyone acting at the "direction" of such an organisation, would have to register publicly before (or in certain cases shortly after) communicating in the UK on a policy issue with any Member of Parliament (including any peer), any parliamentary candidate, political party officers, members of devolved parliaments and any civil servant at the level of deputy director or above, or equivalents. The proposed regime even captured influencing an MP or peer on non-policy matters (eg restaurant recommendations). Certain public statements were helpfully excluded from the regime. It was, astonishingly but correctly, accepted that the scheme would be ineffectual in triggering registration by the malign actors who every public communication said it was targeted at. The scheme essentially therefore intended an enormous bureaucracy for all legitimate interaction by any foreign organisation with any arm of UK government or policy making, ignoring the fact that the overwhelming bulk of such interaction is both legitimate and useful to the UK. It also ignored any possibility of a cost by deterrence from such helpful communication or engagement. For example, non-UK scientific or academic or charitable co-operation or interaction would be criminalised, as well as business investment proposals, unless each communication was publicly registered (however sensitive or confidential the issue in question).

It was obvious that any malign actor would not only choose to breach the proposed registration requirements anyway, if subject to them, it was also clear that the construction of the scheme was predestined to failure in relation to such persons: the exemptions for foreign governments, private individuals and UK or Irish organisations meant that a spy

actually employed by a foreign government, as well as others with malign goals, could easily and legitimately fall outside registration. The Home Office proponents of the scheme inferred that no one would mind the burden of public registration if their actions were indeed legitimate, as the scheme would facilitate prosecution of the bad actors it accepted would not register. Evidence put forward for this belief was at best tenuous and anecdotal.

Fortunately, after a significant investment of time in countering the proposal by business, charitable and academic organisations, this particular bad idea has been substantially abandoned (it continues in limited form, requiring registration where someone is directed by an arm of a foreign government to communicate with UK policy makers). But ending the broader proposal took a huge amount of time and effort by those engaging internationally to the benefit of the UK, and also wasted significant ministerial, parliamentary and civil service time too. It could easily have gone ahead but for the speed and depth of objections in this case. Unfortunately, the withdrawal of the substance of the proposal cannot be taken as evidence that badly developed ideas are not in fact implemented.

The FIRS was a classic example of legislative policy being introduced, from within a silo, to achieve siloed goals, with no real consultation and no cost benefit analysis. Yet the social and economic implications and costs could have been substantial, at best adding cost and bureaucracy, and at worst isolating the UK from significant aspects of valuable international collaboration and thinking; all because of the risk of the occasional malign attempt to influence policy makers which it was accepted would not be registered. It was proposed on the apparent assumption that public registration and transparency could not conceivably carry material cost or disadvantage, an assumption which is self-evidently incorrect. Transparency is a vital part of democracy and the rule of law, balancing rights between different individuals or organisations, but that does not make it inherently valuable in every case.

Example 3: Failure to prevent fraud proposal

A further example, at the time of writing this article, is the Home Office's announced plan to introduce into the Economic Crime and Transparency Bill a new criminal offence for companies of "failure to prevent fraud" (see the Ministerial Statement by Security Minister Tom Tugendhat of 25 January 2023). This major change and potential new offence was not part of the original scope of the Bill.

The proposal follows a review by the Law Commission of a range of issues relating to corporate criminal liability (Discussion Paper 2021 and Options Paper June 2022). These included, apart from possible new offences, possible amendment to the identification doctrine under which in general a company can only be liable for a criminal offence where a person who is the "directing will and mind" of the company is responsible for the offence. The Law Commission came up with multiple options and it was clearly envisaged that further consultation would be needed on specific options. The Law Commission did not purport to set out evidence as to the scale of the problem under existing law, and it did not address the scale of cost of any proposal, other than noting the concerns of respondents as to cost. Yet one of the options raised by the Law Commission is now proposed to be made the subject of legislation, on the basis of asserted but unspecified problems, in a rush, in legislation not intended to address the issue. It remains unclear what problem any legislation brought forward is trying to solve, beyond "fraud", which is of course already unlawful. There has been no examination of better enforcement or prosecution resources or capabilities as a way forward, or weighing up the costs to the government and the country of such measures versus the cost to law abiding and responsible private organisations of a new offence.

The proposed offence in essence envisages criminal liability on the part of a company if a fraud is committed and any employee or agent of the company engaged in the fraud with intent to benefit either the company or a customer of the company, and the company had failed to put in place adequate procedures (or some similar test) to prevent fraud. The intention test is designed to ensure some level of alignment between the wrongdoer and the interest of the company. This aligns broadly with the approaches taken by the Bribery Act 2010, s 7, and by the Criminal Finances Act 2017, ss 45 and 46, relating respectively to corporate criminal liability for failure to prevent bribery and failure to prevent tax evasion.

The inference is that the unusual standard in those two legislative approaches, whereby a positive duty exists on all organisations which are not dishonest, (because those providing the "directing will and mind" of the organisations are not dishonest), is necessary in order to prevent criminality to others more widely. There are clear arguments and evidence that some companies could, because of the scale of benefits flowing to them, be incentivised to turn a blind eye to bribery or tax evasion. But to extend that principle to fraud, a risk already affecting every company, without clear evidence comparable incentives to turn a blind eye, would be a significant reversal of the core common law principle that the honest are not criminalised by virtue solely of the dishonesty of others. No evidence has been tabled of evidence of a widespread bias by companies to tolerate fraud for their own benefits or that of customers. The new offence would introduce what is effectively a negligence-based standard for criminal corporate liability for fraud. Civil liability of course may already exist for companies, and in many sectors, such as financial and professional services, regulatory duties to provide comparable protection already exist. That such a radical change, with implications for every company in the country, should be introduced without proper consultation and costing, is indicative of the bias to legislation without evidence or proper process.

Proponents of the offence argue that the requirement for intention to benefit the company or a customer is a significant safeguard. This is obviously incorrect. A fraud by one employee of a large company, employing tens of thousands of other law-abiding employees, might satisfy the intention test either if the employee intended the fraudulent transaction to

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Biog box
James Palmer is a partner at Herbert Smith Freehills LLP. He is a corporate lawyer with experience across all sectors but with particular experience of the financial services sector. He has worked with policy makers on legislative and regulatory proposals for nearly 30 years.
Email: james.palmer@hsf.com

generate revenue for the company (as any transaction providing goods or services would likely do), or would generate a profit for a customer, who might be a co-conspirator of the employee. There is no inherent moral reason to treat as criminal the law-abiding company, penalising its shareholders and managers, over the action of one rogue employee or agent. So, the argument must rest on the benefits of changing behaviours to solve a clear identified problem.

But unlike the Bribery Act analogy, no significant evidence has been put forward of frauds which will be prevented by such a fundamental change, even though the proposal would criminalise organisations led by those who are honest (if they are dishonest, the company already faces criminal liability). Furthermore, no consultation whatsoever has been carried out by government to assess the costs of every company facing criminal liability for failure to prevent fraud. Supporters of change argue that those who are honest and already worry about fraud need not worry: they are already doing what is required and can continue as before. This is clearly incorrect. There is extensive evidence that law abiding organisations respond to new legal and regulatory requirements: procedures will be added, consultants and lawyers instructed to advise on them, guidance followed and business and customers turned away if they are judged to carry greater risk. This has occurred in relation to anti-money laundering legislation, and separately in relation to the provision of financial advice which was discussed above. It would seem likely to occur in relation to anti-fraud legislation. The costs, across all businesses, may prove to be vast, as anti-money laundering procedures have proved to be, yet no assessment or consultation has been done. Indeed, compliance and risk mitigation costs across some sectors such as financial services are clearly in the billions of pounds a year. Such a wide-ranging proposal as this raises particular concerns.

It is worth noting that the new offence catches actions which are already criminal on the part of the primary actors. This suggests that prosecution of the primary actors is regarded as an insufficient policy outcome. But that assumption alone is highly questionable. A further question seems to be to ask whether legislators are now seeking to introduce new laws not because the outcome of the new law is just or proportionate, but rather to try to do something, or be seen to do something, to address the lack of or limits of effectiveness of government and other authorities to address the underlying risk and harm? Parliament is a legislative body, which therefore may have a bias to legislate rather than to focus government, regulators and public authorities on the potentially harder challenge of achieving better results and outcomes through how they carry out their functions.

CONCLUSION

The examples of the consumer duty, foreign influence registration scheme and proposed offence of failure to prevent fraud could be seen as isolated examples of poor legislative and regulatory policy making, designed to avoid or eliminate risks which may in fact be unaffected by further laws precluding them, and possibly adding to existing layers of obligations which have not eliminated those risks or harms.

Unfortunately, that is not the case. Numerous different examples could have been given, including high-profile measures such as the Retained EU Law Bill and the proposed Bill of Rights, but also numerous smaller changes occurring all the time. These poorly thought through proposals seem likely to continue absent, first, recognition of the lack of sustainability of that approach and, second, a fundamental change of approach to how laws and regulations are developed. Siloed thinking in relation to policy goals has increased along with the greater complexity and detail of existing rules and needs new mechanisms to counter it. The volume of regulatory and legislative change is so great that organisations acknowledge that they cannot possibly track all proposals of potential relevance to them. Furthermore, they clearly do not have the time or resources to feed in to so many consultations or proposals.

The motives of those proposing change are socially positive: the desire to eliminate and reduce specific harms by ever more specific laws and rules. In some cases, new rules or regulations will affect behaviours and eliminate or reduce undesirable outcomes. As societies change, new contexts may need new rules, though it is notable that existing laws in the UK have long been adapted to address new contexts and harms. Principles based laws and rules will more naturally do so than context specific rules.

The second article on these policy making challenges will address these questions in more detail, including commenting on the bias to legislate or regulate and the insufficiency of evidenced based policy making, and of accountability for carefully assessing the costs and benefits of new laws and rules. It will identify possible mechanisms to drive improvements. The extent of the rapid deterioration in the quality of policy making for law and regulation in the UK is a relatively new phenomenon and need not be inevitable, if acknowledged and addressed thoughtfully. Only twenty years ago the extent of current problems arising from legislative and regulatory change would have been unthinkable, so solutions may still be within the experience of policy making individuals, organisations and groups. ■

Further Reading:

- A new Consumer Duty in financial services: a significant change or more of the same? (2021) 8 JIBFL 552.
- Reforming corporate criminal liability: a missed opportunity to modernise the law (2023) 1 JIBFL 30.
- Lexis+® UK: Article: Law v Policy: Judicial review and judicial deference in the age of hyper-regulation.