Spotlight

KEY POINTS

- Existing incentives encourage policy makers to create short term policies and to create new laws and rules.
- The bias to legislate and regulate is sustained in part by the pressures on politicians to respond immediately to any negative events.
- In financial services compliance costs have rocketed but there has been no real scrutiny of the relative costs and benefits to consumers, savers and investors of those changes.
- The author suggests the creation of a new Parliamentary Select Committee, the "Regulatory Review Committee" which would review legislation post implementation with accountability of the relevant individuals who must be ready to explain and justify why decisions were reasonable when made.
- Regulatory change free periods should be the norm.

Author James Palmer

The urgent need for better law and rule making: challenges and solutions

This article, the second of two (see 'Risk elimination by legislating: the limits of the law and challenges of reality' (2023) 5 JIBFL 287) looking at significant policy making challenges, argues that too much recent legislation and regulation is of poor quality, often developed with good intentions but in silos, without effective consultation, proportionality or consistent principle. Too much is created so policy makers can be seen to have "done something" when it will not address the real goals. The article proposes possible solutions, including changing policy maker incentives and the creation of a new Parliamentary Select Committee to introduce accountability for legislative and regulatory outcomes, comparable to spending accountability.

STABILITY v THE CHURN OF LAW AND REGULATION

Surveys of UK competitiveness frequently identify the rule of law (and English common law certainty, combined with flexibility and adaptability), along with predictability, stability and trust, however described, as key factors in making the UK an attractive place to invest and to develop opportunities for valuable and useful businesses to establish and develop. Other factors, including fiscal policy, growth potential, skills and access to markets, are of course key to competitiveness too.

This principle applies more widely: trust in the law as fair and principled is key to broader social trust in government and institutions. Though populist agendas argue otherwise, the reality is government and regulators cannot prevent or remedy every negative event, and to sustain trust they need to manage expectations to that effect, without losing commitments to improvement. Long term trust requires a more thoughtful consideration of new laws and rules, to assess the impacts that are likely to follow, rather than legislating for consequences which will not be delivered by the new laws or rules, but which, on the contrary, will add to cost and burden.

It follows that disproportionate bureaucracy, regulatory churn, unpredictability and loss of consistent principle are obstacles to those opportunities and social values. They may also create costs which in aggregate have material negative effects on productive and sustainable economic growth. There is no doubt that legislative and regulatory changes are needed from time to time, as new challenges and contexts arise. Intended and understood restrictions, judged important notwithstanding a negative growth impact, are of course needed at times for social benefits. But as set out in the previous article, the UK seems to have a plethora of poorly developed legislative and regulatory proposals, without clarity of goal, or evidence as to why the new proposal is likely to achieve the desired outcome. These often lack proportionality, consistency of principle or proper consultation or evidence base. Accordingly, benefits are more limited and negative impacts are greater than planned.

In addition, the sheer volume of legislation and regulation brings inherent cost and burden which is not being taken into account in legislative and regulatory decision taking.

This trend has unquestionably accelerated in recent years, as the first article in this series pointed out. This prompts two key questions:

- Why is this happening?
- What can be done to improve the situation?

This article argues that at the heart of the issue are existing incentives on all policy makers, whether legislators, politicians, senior civil servants or regulators:

- to favour short term rather than long term policy making; and
- to create new laws and rules.

This applies irrespective of likely outcomes. There are insufficient incentives to value stability, predictability, proportionality and principles of fairness in laws and rules, or to seek to consider carefully long-term costs, or to scrutinise the credibility of purported benefits of proposed new laws and rules. The solutions lie in creating strong counter balancing incentives and accountabilities.

While some welcome increased focus is being brought to proportionality on the part of regulators, this article suggests that regulators often already feel significant accountability to politicians and senior civil servants whose departments have statutory power of appointment or removal over them, and also that regulators usually feel significant accountability to Parliamentary Select Committee scrutiny. While some political voices of course urge

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consistency, proportionality, fairness and competitiveness, other political inputs in fact widely foster and accelerate short termism and new rule making by regulators. If, as suggested here, that is correct, a solution focused only on change to accountabilities of regulators will fail sufficiently to address the problems. It will therefore be vital to change the accountabilities and incentives of politicians and senior civil servants above the regulators, not least given the problems with legislative quality, which are for government and Parliament, not regulators.

Given normal human tendencies to see the strengths in what one's own organisation does, more than the weaknesses, it is not surprising that politicians see the problem of bureaucratisation as lying mainly at the door of regulators, while regulators see it as lying mainly at the door of politicians or leaders of the organisations they regulate. It seems likely that solutions require a more holistic approach and honest assessment of opportunities to improve impacts from every level. In particular, if political inputs will continue inherently to be inclined to the short term, solutions will not be effective if reliant only on political oversight, without changing legislative incentives and accountability.

CAUSES OF THE DECLINE IN QUALITY OF LEGISLATION AND OF CHURN OF LAW AND REGULATION

Many others have written about the trend to poor policy decision making, bureaucracy building and the cultural normalisation of the creation of new laws or rules and processes which purport to deliver useful social outcomes, but often fail to do so. See for example David Graeber's *The Utopia of Rules* for one of the more provocative diagnoses, as well as Bertrand Russell's *Authority and the Individual*, which was also referred to in the previous article. These diagnoses encourage pessimism for the future, unless the trends are reversed.

Brexit and COVID-19 disruption

A material factor in accelerating this trend has been the huge additional burden and distraction to the machinery of government and policy making in the UK posed first by Brexit, and then by the COVID-19 crisis and response. These have dominated political and public attention, as has the Russian invasion of Ukraine. Significant government and regulatory time and focus has turned to those issues, rightly and understandably given their significance, but depleting materially the capacity to consider carefully and strategically other policy initiatives. In addition, these major events have at times exacerbated political desires for legislative signalling, rather than legislative substance.

Abandonment of good legislative development measures

For many years before and even after the financial crisis of 2008, legislative and regulatory initiatives were frequently developed by a policy discussion "Green Paper" from government, then a "White Paper" and then consultations on specific draft legislation and rules, before legislation was even introduced in Parliament for scrutiny. In some cases, thoughtful reviews preceded these steps, for example the Law Commission and Company Law Review work on reforming UK company law, recognising its value as a UK asset, and introducing a "think small first" principle of proportionality to the policy and development debates, in particular for smaller companies.

In financial regulation, there would be a "DP" discussion paper, then a "CP" consultation paper and then consultation on further rule changes.

This model appears to be materially broken, particularly for legislation, or for regulation driven by political pressures, notwithstanding that it served for many years as an approach for transparent development of policies and law, with time for those affected or interested to contribute thoughtfully. Laws frequently last a long time and rushing them unnecessarily therefore usually has adverse consequences for a long time. This experience of good law-making process is in relatively recent institutional memory within government and regulators, yet it is no longer customary. Returning to this model is, it is proposed, one part of the solutions required to this challenge, as discussed below.

As government seeks to move beyond the urgent pressures of Brexit and COVID-19, there ought to be an opportunity to reintroduce models for legislative and regulatory development which have worked far better than current approaches. This will need to be a priority for all governments, to stop the new unwelcome habits, of rushing poorly thought through legislation and regulation, from embedding permanently.

Disproportionate change and social cost

A sense of bureaucracy building has been prevalent for decades, but has clearly accelerated in recent years. This is notable in business and financial services regulation, but also across almost all limbs of society: the police, health workers, teachers and many others, complain of roles taken over by form filling, administration and process. Usually, each process stems from a law, rule or policy introduced to reduce or stem a particular risk or bad outcome. Each in isolation appears to those with experience of the relevant risk or bad outcome, to make sense. By seeking to force better discipline and accountability, they seek to prevent or reduce the recurrence of the bad outcome. Indeed, learning from negative events, to improve social outcomes, is a key part of society's development and improvement, so is a necessary focus, as are some new controls.

But at the same time, the aggregate of new rules, processes and changes risks creating disproportionate harm: no one could suggest that all police officers should spend 95 or even 50% of their time recording steps, in training, and addressing risk processes. But what percentages of their time should they spend on different aspects of their different roles? We risk, across all aspects of life which are subject to law and regulation, failing to deliver the substantive purposes of roles or activities, because of disproportionate time given to risk mitigation processes and to introducing constant changes to rules developed with

siloed goals in mind and with little positive effect. The reality is that each enhanced focus on an issue may reduce prior focuses. It is not possible to keep layering on processes without cost and without prioritisation. In many areas the changes are vital, and will have real social benefits, but in others they will be ineffectual and disproportionate. The answer to finding proportionality will in each case rightly be subject to differing views. But the importance of proportionality needs to be acknowledged and pursued more thoughtfully and effectively in all cases.

Existing rules recognising the need for considered law and regulation and for proportionality are largely ineffectual

If policies, rules and laws were effective to solve all problems, there would be no problem of disproportionate cost and bureaucracy and diversion from more important outcomes. There are numerous rules in the UK designed to ensure such problems are avoided. The previous article referenced, for example, the requirement in s 3B(a) of the Financial Services and Markets Act 2000 (FSMA) for regulators to consider proportionality, appropriate regulatory burden as well as, in effect, the need for risks to be acknowledged and taken in markets, and the need for economic growth. But this is the tip of the iceberg of rules designed to ensure legislation and regulation are proportionate. See for example the role of the UK government's Regulatory Policy Committee (RPC), which sets out extensive guidance for government departments to use when developing legislation, or writing impact assessments. The RPC role sits alongside the government's Better Regulatory Framework, a set of generally thoughtful principles for better regulation, but ones palpably ignored much of the time, or subject only to lip service, by legislators and regulators.

The cost benefit analyses developed for legislation are almost universally regarded by those outside government as poor and disconnected from real outcomes. This is not for want of rules and guidance to the contrary. See not only the Better Regulation Framework but also the 23 other policies on better regulation and outcome evaluation listed in Annex 2 to that Framework.

One conclusion is clear: making a law or rule or policy that something should happen, or not happen, does not automatically deliver that result. Otherwise, the introduction of the "economic growth duty" in the Deregulation Act 2015 would have been more celebrated and successful than it has proved to be. Achieving relevant substantive outcomes requires different attributes and measures, most notably long-term thoughtful goal setting, effective implementation, and accountability for delivering the thoughtful goals and outcomes, discussed further below.

The same challenge is true for the many initiatives designed to "cut red tape". For example, notwithstanding Prime Minister David Cameron's "Red Tape Challenge", bureaucracy continued to rise under his premiership. Most of these initiatives focus on cutting pre-existing burdens, but are blind to the far greater burden of the completely new or revised laws and rules they introduce in parallel with any limited cutting of burdens. Sometimes, the further change and churn they bring is not welcome, in particular where rushed or for political signalling, detracting from greater priorities, and as compared to the benefits of never introducing them in the first place: such cutting becomes part of the virtue signalling problem. The current Retained EU Law (Revocation and Reform) Bill is a good example of this.

Indeed David Graeber, in *The Utopia of Rules*, proposes "The Iron Law of Liberalism" which "states that any market reform, any government initiative intended to reduce red tape and promote market forces will have the ultimate effect of increasing the total number of regulations, the total amount of paperwork, and the total number of bureaucrats the government employs". Unfortunately, the trends tend to substantiate the accuracy of this unwelcome proposition.

The problem of complexity and resultant silos

It is uncontroversial that societies have become far more complex, with many more inter-dependencies, than used to be the case, particularly as a result of greater global trade (lowering costs for consumers), and of the explosion in technological and communication capabilities.

The challenges described above, whether for businesses, the police, health workers, teachers or others, reflect the fact that this greater complexity has brought with it the need to break down issues to make them manageable. But breaking down complexity leads to silos, with goals and decisions too often defined in silos, unless accompanied by a proper holistic overview which frames goals and decisions. That holistic view is too infrequently apparent in legislative proposals. The way government departments, or regulators, or many large private sector organisations work can often exacerbate the impact of those silos.

The Home Office proposed the original Foreign Influence Registration Scheme (FIRS), as discussed in the previous article, as part of its National Security Bill, ostensibly with a national security focus, but with wholly inadequate business, health, education and other inputs to test it.

Similarly, the Home Office have proposed the new criminal offence of failure to prevent fraud, also discussed in the previous article, given their responsibility for fraud protection, but have again done so disconnected from business, cost assessment and the broader justice agenda. The problem with measures developed in silos is that, absent strong processes, they are inclined to address the responsibility of the silo, not the holistic goals and priorities, nor the costs outside the silo. Gillian Tett's book *The Silo Effect* perfectly sets out the problems of such specialisation holding sway: the wrong goals are pursued, in the wrong ways.

Add to the silo impact the problem of lack of clarity of purpose, and poor legislative proposals will inevitably result.

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The bias of government and Parliament to legislate

The UK Parliament is a legislature. Ministers almost all have backgrounds as MPs, focusing on legislation. Politicians and Ministers often do not have the skills of managing and leading through complexity to deliver substantive outcomes: why should they, as they bring other insights and skills? But a consequence is that there is a natural bias to pursue legislation or regulation over which Ministers and politicians have a greater degree of control, when real improvement may well lie with better execution and implementation across silos, better prioritisation, or improved accountability for not achieving real progress. These are often harder to achieve quickly.

At times laws need updating for new context. Criminalising the abusive behaviour of "upskirting" is a good example of a widely welcomed new law, to address a new context. Laws to address new technologies are often needed, if established principle-based laws do not apply. But swathes of new laws and regulations simply re-articulate, slightly differently, laws or rules which already apply and are intended to deter and punish criminal or harmful behaviour. Yet the assessment of whether the alleged defects of the existing law are actually the problem, in other words the causative link, as opposed to (for example) enforcement challenges or failings, is often far less carefully thought about. Evidence of a harm is treated as evidence of the need for new laws or rules: a curious proposition, in an innately imperfect world. As demonstrated in the previous article, not all harms can be prevented and not all actions can be anticipated or precluded, so enforcement and accountability will always play a role.

In relation to the Economic Crime and Corporate Transparency Bill proposal for the new failure to prevent fraud offence (also discussed in the previous article), concerns of prosecutors are widely cited as a key justification for the proposed new sweeping burdens on honestly led businesses, owned by honest owners and investors. But prosecutors have an inevitably narrow view of the issue, sensitive to (often undeserved) blame for cases which do not secure a conviction and are bound to be drawn to the perspective of making convictions easier, in particular after high profile trials leading to acquittals. How much weight should be given to their understandable perspectives? Clearly some weight, but they represent just one legitimate but siloed perspective, just as any one other perspective does.

This is simply one illustration of how government departments (and regulators) are skewed to the views of those they constantly communicate with and away from those who may be most affected.

The bias to legislate and regulate is also sustained by the pressures on politicians to respond immediately to any negative events. It is easy for a Minister to say they responded to this or that bad event by creating a new law or rule banning that thing, or punishing someone for allowing it to happen. This is not the place to debate the challenge of leading in an era of instantaneous social media and communications coverage, but it clearly drives political and regulatory decision taking, and feeds unhelpful short-term policy agendas.

Short termism and the challenge of improving real and useful outcomes

A further set of reasons for the bias to introducing even more new or "improved" legislation is the short termism brought not only by the external pressure on Ministers and politicians described above, but also by the increasing brevity of tenure of holders of Ministerial roles. How long term an agenda can a Minister develop, let alone implement, if in office only for six or 12 months?

Ministers and the MPs they are accountable to face extraordinary and challenging demands for immediate decisions, responses and solutions, including in many cases where it is obvious they do not have the power or experience to "solve" the problem. MPs' email inboxes and press coverage provide evidence of negative impacts, but not of the complex causes of those impacts, let alone of the long-term measures more likely to result in improvement. The pressure to offer up solutions through legislation or regulation is immense, and of course as indicated above, such measures may be within the immediate control of a Minister or group of politicians, or more so than more complex answers.

Short Ministerial tenures also lead to the far greater prospect of policy goals changing from Minister to Minister, as the ideas of one are replaced by the ideas of another, each usually needing to learn about issues their predecessor may just have started to understand.

It is worth commenting that if short term thinking is fundamentally unsustainable, because of the damage it will cause to growth and to achieving substantive goals, then there is no choice but to find ways to force policy makers to step back from those pressures, and to allow longer term thinking to prevail. Simply responding to criticism of bad ideas by saying "we had to" or "it is just politics" is not going to turn the tide of the ever-growing challenge to growth, competitiveness, trust and fairness, which poor policy impacts bring with them. The trend to using legislation to "send a signal", rather than because the envisaged benefits and consequences of the change of law will be meaningful and useful, needs to reduce significantly and ideally to end. More long-term strategic thinking and evidence gathering by policy makers are required for the complex issues they face, in a context which pulls them to the short term. This will doubtless be hard to achieve, but the consequences of not achieving it will, as set out, be continued loss of growth, competitiveness and positive outcomes, as well as an increasing decline in the quality of our laws, with further negative consequences to trust and fairness.

While it is easy to sympathise with policy makers facing such pressures, the negative consequences of their responses with short term agendas are so significant that it should not be an acceptable sustained long-term approach. It also seems likely that businesses and organisations affected by incessant regulatory burdens and costs, across all areas of activity, will need to raise their voices more loudly to support Ministers and politicians in pushing back on the pressures for short term fixes which will ultimately be harmful.

The hamster wheel of constant change

Finally, in setting out the challenge of the current approach to the law and rule making, the sheer volume of new laws and rules, and the constancy of change and churn, needs to be drawn out.

Currently many departments and regulators commit vast resources to developing new laws and rules, pulling those resources away from other needs. These commitments of resource are continuous, not occasional. Those subject to what feels like a hamster wheel of perpetual changes have to spend more and more time and cost managing the changes. Not even the largest global financial or business institutions have the capacity to track and comment on all the new laws and rules being developed relevant to them. So the quality of consultation response and engagement is far lower than it was 25 or even 12 years ago, when the volume of changes across businesses and other organisations as a whole was a fraction of levels today. This sense of constant change seems to be felt by almost all organisations, and the challenge applies far beyond businesses, into public services and other areas of regulatory authority. Instead of prioritising key and impactful changes, consistent with strategies, relevant departments and teams in regulators seem almost to compete to propose more changes, for example in bids for Parliamentary time for legislation. This approach is becoming normalised, but is self-evidently reflective of a poor model. Changes too often bring cost, unpredictability and distraction. Those wider system costs are rarely mentioned in cost benefit analyses, beyond typically simplistic and formulaic assessments of implementation time.

One can fairly ask, if further laws and regulation are going to be so effective in achieving better outcomes, why have so many earlier attempts not already achieved the desired outcomes? In financial services, compliance costs have rocketed: but there has been no real scrutiny of the relative costs and benefits to consumers, savers and investors of those changes. What impact have these costs had on consumer savings, pensions and wider access to building financial security? These questions require separate consideration, but regulation does not seem to have driven adequately useful, inclusive and effective financial systems.

It is suggested that any regulator or government department which on a sustained basis is devoting more than perhaps ten or even 20% of its resource on new legislation or regulation, is likely to be too caught up in short term change, not long-term resource allocation on their substantive roles. Yet it appears that in many regulators the proportion of resource focused on developing and bringing in new rules and regulation has been far higher than these levels. Whatever the right proportion, regulators and policy makers will not act proportionately if they are not considering seriously, at senior levels, keeping control of resource allocated to new rule and policy making. For financial regulation, the current proportion seems to be completely unsustainable.

SOLUTIONS FOR BETTER LAW AND RULE MAKING

Recognition of the problem

Without recognition of the problem of ever poorer law and rule making and the serious long-term costs and consequences of failing to change approach, there is no chance of material change or improvement. Guidance or policies alone will not result in improvement, for all the reasons set out. Political and regulatory leadership is required. There are some glimmers of recognition of the challenge, including political statements recognising the need for proportionality. The Financial Conduct Authority's proposed deregulatory reforms to improve competitiveness of the UK listed equity sector announced in early May 2023 are another encouraging sign, along with its greater commitment to maintaining high standards while removing many detailed regulatory requirements.

Creating accountability: changing the incentives for policy makers and regulators

As explained above, there are incentives to create ineffectual and disproportionate laws and regulation, but there is no real mechanism for accountability for such legislative or regulatory changes. The key proposal of this article is, if a change of approach is accepted as vital, to change the incentives to create a balance in the system which is lacking at the moment.

A new Parliamentary Select Committee to review legislative and regulatory impacts

It is difficult to create accountability for Ministers over and above the accountability Ministers feel to the media, the social media and the consumer feedback they face, or the accountability they feel to the Prime Minister who appointed them and to their parties' electorates at general elections. One form of accountability which has at times proved effective and generally avoids disproportionate expense is the Parliamentary Select Committee structure, as it has evolved. Ministers and their civil servants tend to focus significantly on how their decisions will be received and reviewed by Select Committees, particularly in the House of Commons.

The Public Accounts Committee (PAC), supported by the National Audit Office (NAO) review process, reviews all material spending decisions by government, as well as certain other decisions. It is not perfect, but it has real effect and creates a form of accountability for spending decisions. This is supported by, for example, senior civil servant accountability for signing off on major project cost accountability (Senior Responsible Officer sign off) and on a much wider basis, the Value for Money Framework, requiring a Value for Money Assessment in relation to uses of public funds: Permanent Secretaries are the relevant Accounting Officers responsible for these sign offs. The NAO support provides vital professional objective and evidence-based support and data to bring authoritative scrutiny by the PAC, not just political reaction.

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But there is no equivalent regime either for Ministers, or for senior civil servants, in relation to legislative and regulatory initiatives. No wonder there is too little reservation about the creation of well-intended but poorly thought through, or virtue signalling legislation. Yet the cost of regulation runs for years, and frequently materially exceeds the impact of many large spending decisions. By way of example, it is not unreasonable to suggest that the FIRS proposal originally introduced in the House of Commons in the National Security Bill would have cost the country hundreds of millions of pounds and probably billions of pounds, over a period of several years. The range of economic crime measures already applied clearly cost substantial amounts to implement, and the proposed failure to prevent fraud example may yet, if implemented as currently proposed, add significantly to the burden, through consulting, legal and compliance costs, and legitimate business declined through further required caution, depending on whether its scope is further amended proportionately. Yet no serious analysis of costs has occurred in these cases.

A new Parliamentary Select Committee, the "Regulatory Review Committee" (RRC), replicating the focus of the PAC, provided it was also properly supported in evidence gathering by the NAO or an equivalent independent body focused on value and proportionality, would immediately create a comparable counterbalance and disincentive to poorly thought through legislative proposals and processes. Some of the issues it would or could look at are set out below. It would, at the minimum, have a different order of impact from the widely disregarded RPC's valiant efforts.

As with the PAC, an equivalent "value for money" process could be created for the responsible senior civil servants: money spent in unnecessary cost from poorly developed legislation may not be "public money" passed through the Treasury, but it is in reality still public money, with material cost to taxpayers and consumers, directly triggered by government legislative action. Given it is almost always Ministers, supported by civil servants, who decide whether legislation will be enacted, they need to have a proper level of accountability for the consequences.

The new RRC in the House of Commons, or as a Committee of both Houses of Parliament, would be fundamentally different from the existing Delegated Powers and Regulatory Reform Committee of the House of Lords, which does excellent work seeking to scrutinise delegated legislative powers in advance. The challenge of poor delegated legislation is considered briefly below, but the Delegated Powers Committee is focussed on scrutiny during the legislative process of a particular section of legislative proposals. It is a useful mechanism to achieving the goals advocated by this article.

By contrast the RRC, like the PAC, would scrutinise with hindsight, when asserted benefits and actual costs are apparent. The period of time before reviews by the RRC would need to be considered further, and might turn on the timing of implementation of the legislation or regulation. The reviews themselves would likely need to be targeted and proportionate, so they did not fall foul of David Graeber's Iron Law of Liberalism. Not all legislation or regulation would need review, but all should be subject to potential call in for review. The real prospect of any poorly thought through legislation or regulation being called for review with accountability of the relevant individuals, should help to drive better evidence gathering and more proportionate policy making. Material improvement and changes of mindset, not perfection, should be the goal.

Building individual accountability proportionately

It is also proposed that, just as in businesses or other organisations, individuals and leaders are held accountable for their own actions, greater accountability of individual Ministers and civil servants is needed for legislative and regulatory consequences. This is not to sack them, or make them scapegoats or to treat them unfairly. It is simply intended to ensure that decisions of material impact to the country, individually and in the aggregate, have been properly addressed and considered, and that those responsible are ready to explain that and justify why the decisions were reasonable when made. Given the revolving door of Ministers, and the rotation model for civil service roles, the system will be materially less effective if the individuals who took the decisions, as Ministers and responsible senior civil servants can leave their successors to justify their decisions. Accordingly, it is proposed that the RRC should expect to call to give evidence those who were the relevant Ministers and responsible civil servants at the time, albeit with support in the RRC review process from the relevant department. If a proposal they put forward is thoughtful, just as they sign off spending decisions, they should be willing to sign off legislative proposals.

Clearly, they cannot be responsible for amendments forced through against government wishes during Parliamentary processes, provided the counter arguments were properly set out by government. But these situations are only a small part of legislation. So the specific individuals taking the decisions would have to come back and explain and justify them. In cases where the outcomes intended have been proportionately achieved, or surpassed, they should receive the credit which they deserve. If Ministers drove rushed policies, civil servants should be able to evidence their advice in subsequent scrutiny.

No doubt parliamentary experts will identify a raft of reasons this suggested accountability process cannot or would not work. But it is at least intended as a serious proposal to address a significant and systemic challenge faced by the UK, along with other countries. It is a proposal designed to drive more serious long term holistic consideration of the impact of legislation, which Parliament spends so much of its time on. It needs to apply to primary and also to secondary legislation.

The need for better control and scrutiny of secondary legislation

The transposition of EU law into UK law has already increased awareness of the significant

expansion of powers of both government and regulators to regulate, away from primary legislation: the sheer volume of change brought by Brexit has necessitated a large degree of pragmatism, albeit with challenges for democratic accountability. This is not the focus of this article, but it is clear that there is far too much secondary legislation which, given the minimal scrutiny it receives either in Parliament or through consultation, brings all the challenges already described here. Finding mechanisms for better scrutiny in advance of secondary legislation seems a necessary change. The RRC, which this article proposes be established, should therefore as part of that focus have power to call in secondary legislation for post implementation review, as well as primary.

The Financial Services and Markets Bill and regulatory accountability for rule changes and burdens

It is worth noting that this Bill has sought in certain respects to achieve comparable accountability to that discussed above, specifically for the financial regulators. It seeks to introduce a secondary competitiveness and growth regulatory goal, which brings with it a clear need to consider competitiveness and cost proportionality as aspects of holistic policy development. The Bill has also expanded on the reporting transparency required by the regulators to support their competitiveness and other goals.

This approach of requiring transparency of regulatory performance against long term strategic goals, with thoughtful metrics, thoughtfully applied, is a good model. The key is to apply long term judgements to performance, recognising that regulatory risks of over or under regulating are not constant. A good example and precedent for regulatory review of the cost of regulation is the International Accounting Standards Board's post implementation reviews. There is no doubt these drive greater thoughtfulness before new rules are created, as well as after, and a hesitancy to add new rules without compelling evidence and careful engagement first.

These approaches seem likely to be important, in tailored and proportionate forms, for most statutory regulators, if the burden of new rules is to be kept proportionate and focused on long term goals, not just the immediate issue or latest problem.

But as explained above, it seems unwise to rely only on such incentives for regulators without addressing the tone from the top, and the accountability and care to be applied by Ministers and senior civil servants too. Decisions will never be perfect, just as spending decisions reviewed by the PAC continue to have inefficiencies and weaknesses, but at least material improvement and a greater seriousness towards legislation may follow.

Better law and rule making priorities

There are many excellent principles for better law making and rule making already set out in the government's Better Regulation Framework referenced above. Some key issues need to be tested consistently against fundamental questions.

(a) Are the goals of relevant legislation clear?

What specific outcomes is it seeking to achieve and, if relevant, what specific outcomes is it seeking to deter or preclude? In short, what problem is it trying to solve and why?

(b) Is legislation (or regulation) the right answer to achieving those goals?

Have other approaches been adequately considered and explored? Are other approaches more likely to be effective, including for, example, more effective use of existing processes, or more effective enforcement and accountability under existing law or regulation?

(c) Has a proper policy consultation process been followed?

Or are there urgent reasons to curtail that? In particular have properly sequenced consultation processes occurred with timetables which enabled time to respond for busy people and organisations, often facing multiple other consultations? Did policy development involve consultation by Green Paper, White Paper and then Consultation Paper on draft proposals? What policy development occurred pre- formal consultation, eg by the Law Commission, or expert review bodies? It is important to bear in mind that Parliamentary Select Committee reviews and specific issue focused reviews, while often useful, are not a substitute for the deeper strategic consultation and analysis that solely politically led review processes are unlikely to be able to substitute. Indeed, Select Committees can be prone to finding short term blame and fixes, along with their work focused on long term outcomes, particularly when responding rapidly to something which "has gone wrong". This is why support from the NAO or a similar independent body is a fundamental requirement for the RRC.

(d) What other departments and organisations have responsibilities covering aspects of the impact of the legislative proposal, or addressing its policy content and goals, and have those aspects been properly explored and addressed in consultation?

A write around of departments after a proposal has been developed frequently does not surface a problem until after consultation by the lead department, with its own priority agenda, has gone ahead, but without the capacity properly to assess consultation responses. The Home Office preliminary consultation on FIRS is a case in point. Similarly, the Home Office proposals in relation to economic crime consistently fail to understand implications properly: that is not a criticism of those seeking greater law enforcement, with great expertise in that area, but it is a criticism of the processes which set poor goals in silos and ignore other important aspects and implications of the proposals.

(e) What is the existing legal and regulatory framework relevant to the goal? What gap in the laws has been identified, with what evidence of what harm?

As discussed, many new laws and rules simply add to or restate the legal accountability which already applies.

(f) In considering whether an activity requires legislative or regulatory intervention, consider its proportionality against the hierarchy of means of accountability by which actions are encouraged, deterred, mandated or precluded

Too often there is a bias to criminal sanction and to enforcement by prosecutors or statutory regulators. But the law has always sought to recognise the following principles:

- **Moral disapproval:** Some things people disapprove of should not be banned or require legal sanction: individuals or organisations can supply their own moral judgements and sanctions. So customers can boycott a retailer whose practices they disapprove of, or an employer can choose not to promote someone who does not display leadership attributes. Behaviours and choices of individuals and organisations can often be very effective in driving positive change and be more tailored than regulation or law.
- **Private civil law accountability:** Many actions or behaviours do not require criminal or regulatory interaction because they are best dealt with by the private law rights and remedies of those affected: this is where civil law legal duties are key. For example, an employer may sanction or dismiss an employee under their employment contract; an individual may sue a service provider or supplier for poor service or faulty goods.
- **Private regulatory requirements:** These provide enforcement by regulators established by private individuals or organisations.
- **Statutory regulatory requirements:** This requires enforcement by the state via regulation.
- **Criminal sanction:** Criminal sanction also requires enforcement by the state and therefore needs to be reserved for matters not only needing state intervention, but where criminal sanction is justified and fair.

The balance between control by private law remedy and control by criminal or statutory regulatory action seems to receive less and less attention in policy making, with a tendency to expand the intervention of the state and reduce reliance on private law remedy. That may be the right approach and for those who believe state control is required or more effective, it will often be so. But in such cases it is important that this is done thoughtfully, consciously and with appropriate consistency of principle to the balance between state and private law accountability. Few would disagree that states cannot fix everything. "What is the state not expected to fix?", is a key question.

It was interesting to observe that many policy makers, for example, liked giving authority to the EU when they shared the goals of the EU, but did not when their goals were different. This is understandable. But once control is ceded, it can be difficult to take it back (or to do so without substantial wider implications, as occurred with Brexit). So thinking carefully about the balance between state or regulatory intervention and the right level for such intervention, versus leaving matters for private law accountability needs to be taken more seriously again. How many challenges would in fact be better addressed by more effective private access to legal redress, rather than criminal or regulatory led actions? The answer will be complicated and depend on the context. Even more effective civil courts, with high degrees of public trust in the judiciary, may be part of better solutions.

Periods of stability with no legislative or regulatory changes:

The volume and speed of change of laws and regulation is an inherent cost in itself. The extent of change needs far more control, with a goal of sustained periods without legislative or regulatory change for businesses, sectors and other organisations. This requires much greater weight to be given to the cost of constant change, in assessing whether further changes warrant prioritisation.

In addition to introducing better accountability for the successes and failures of introducing legislative or regulatory change, the sheer volume of change exacerbates the lack of effective thinking about legislation and regulation. It materially reduces the capacity of individuals, businesses and other organisations to consider and engage on changes, which would improve consultation and policymaker understanding of context and implications.

Constant change also undermines the ability of organisations, whether business or public services, to sustain the goals of earlier positive approaches: businesses are disproportionately drawn to the roll out of the new changes, inevitably with the risk of cutting across other important and positive existing focusses, such as their core goals and purpose. Regulatory change free periods should be the norm.

Legislating and regulating by principles

There is a much wider debate to be had about the way in which ever more detailed legislation and regulation inevitably creates new precedents which can be used to justify ever greater burdens in other areas. There have been huge benefits to the UK in applying principles based common law and statute-based laws for many years. The common law is often cited with favour, but good legislation can be as effective as good common law, for example the legendary Sale of Goods Act 1893, largely carried forward into the Sale of Goods Act 1979, set down principles which applied highly effectively, as markets, goods and standards evolved. The adaptability and effectiveness of principles-based laws should not be underestimated. The attribute the common law and principles-based statutes share is coherence of principle and flexibility to apply to new contexts.

Therefore, requiring law and regulations to reflect framing principles should be a key goal. Where laws follow and reflect principles,

Biog box

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they are more accessible to the public and small businesses and organisations, with the inherent advantages and trust which accessibility builds.

As a general rule, since many actions can be for good effect and purpose or for bad effect and purpose, laws and rules which define specific processes, without applying principles, may have less accessibility, adaptability and effect and more disproportionate cost than those clearly following considered principles. Legislation and regulation focussed on process or specific contexts, will continue to be required, but its extent and effect needs to be kept in balance and it too should follow coherent and consistent principles.

CONCLUSION

Whatever the right measures are to address the growth in poor quality law and rule making, and the massive expansion in the volume and burdens of laws and rules, it seems unsustainable to ignore the building challenges. These challenges apply in the UK and elsewhere. Could the UK take a lead, to its competitive advantage and with a positive impact in building public and international trust, in being renowned for its leading approach to better legislation and regulation? Such a goal would be entirely consistent with the UK's pride in its reputation for the rule of law, a reputation which still stands strongly and supports competitiveness and social trust but cannot survive forever a continuous flow of badly considered laws. ■

Further Reading:

- Risk elimination by legislating: the limits of the law and challenges of reality (2023) 5 JIBFL 287.
- The Great Game: UK financial services and the Edinburgh Reforms programme (2023) 4 JIBFL 212.
- Lexis+® UK: Banking & Finance: Article: Failure to prevent fraud: making up for failure to prosecute (2023) 6 JIBFL 397.