Reforming the framework for better regulation

Department for Business, Energy & Industrial Strategy Response to consultation

By Robin Ellison and Matthew Lesh

CONSULTATION RESPONSE

1 INTRODUCTION

1.1 The Adam Smith Institute ("ASI") welcomes the consultation, and fully supports the objectives set out, in particular the policy objectives of proportionality and pragmatism in setting rules.

1.2 The ASI is a neoliberal, free-market think tank. We are independent, non-profit and non-partisan. The ASI takes a deep interest in civil liberties, freedom of expression, and digital innovation having published numerous previous papers on the subject.

1.3 The ASI has a long-standing interest in the regulatory state, having contributed to various debates over decades with respect to the appropriateness and costs of regulation.

1.4 This submission was jointly written by Robin Ellison, is a Visiting Professor in Pensions Law and Economics at The Business School, City, University of London, a consultant with Pinsent Masons, and author of numerous books on pensions law and on regulation, and Matthew Lesh, Head of Research at the Adam Smith Institute.

1.5 There is no doubt that the UK suffers from a surfeit of lawmaking and rule-making, not only primary and secondary law implemented by parliament, but also tertiary lawmaking implemented by regulators.[1] The intention to right-size legislation and rulemaking has been expressed by many senior politicians of several parties[2] and members of the senior judiciary.[3]

1.6 This consultation is the latest in many efforts over the years to introduce better regulation: they include:

- Heseltine (1986)
- Haskins (1997)
- Clarke/Howe (1997)
- Sainsbury (1999)

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1 See Robin Ellison, Red Tape, Cambridge University Press, 2018.

2 See Attachment 01.

3 See Attachment 02.

- Hampton (2005)
- Macrory (2006)
- Haythornthwaite (2006)
- Redwood (2007)
- Arculus (2009)
- Anderson (2009)
- Young (2010) (2011) (2012) (2013)
- Hodgson (2010)
- Cable (2010)
- Clegg (2011)
- Duncan Smith (2021)

They have had negligible impact.

1.7 In addition, there are or have been several bodies dedicated to improving and reducing regulation, they include:

- Better Business for All
- Better Regulation Commission
- Better Regulation Delivery Office
- Better Regulation Executive
- Better Regulation Executive via DBEIS
- Better Regulation Task Force
- Bureaucracy Reference Group
- Business/Focus on Enforcement
- Cabinet Sub Committee on Deregulation
- Cutting Red Tape
- Delegated Powers and Regulatory Reform Committee (Lords Select Committee)
- Departmental Better Regulation Unit
- Law Commission
- Local Better Regulation Delivery Office
- Local Better Regulation Office
- National Audit Office
- National Measurement and Regulation Office
- Regulatory Delivery
- Natural England Better Regulation
- Office of Tax Simplification
- Red Tape Challenge

Few if any of them have proved successful in practice.

1.8 There have been occasional deregulatory acts, sometimes following Law Commission studies, such as Deregulation Acts, and consolidation acts.

1.9 The costs of over-regulation are material, the NAO suggested some years ago that regulation costs the UK economy around £100B pa.[4] Much of this is

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4 A short guide to regulation, National Audit Office, September 2017 (https://www.nao.org.uk/wp-content/uploads/2017/09/A-Short-Guide-to-Regulation.pdf). It is about twice the cost of the defence budget.

necessary to protect the consumers and others. On the other hand, much is excessive and is administered over-zealously.

1.10 Regulations impose substantial costs on groups and individuals, limiting their ability to pursue meaningful goals. Regulation is well-understood to discourage newer entrants and punish smaller businesses, who lack the scale to have a regulatory compliance unit, undermining innovation, job creation and economic productivity.

1.11 You have asked for responses to be submitted online and in response to particular questions. Our response does not fit in well with your requirements, so we are submitting this response as a short paper.

1.12 This response focuses on three key reform areas:

1. using the RegData approach to reduce regulation;
2. better cataloging of the regulatory burden;
3. changing the culture of regulation by educating lawmakers.

2 PRELIMINARY

2.1 Revision of existing controls

The Consultation refers in particular to existing methods of regulation control, including

- Metrics
- One-in one-outs
- Reporting/FRF/TIGRR
- Regulatory scrutiny (RPC)
- Impact assessments/SaMBAs/&E/BIT/QRP/EANDCB/bNPV/NPSV
- Pre-consultation
- Pre-implementation reviews
- Post implementation reviews
- Sunset clauses
- Deregulation/SBEE legislation
- Regulator's Code/Growth Duty/Sandboxes
- Regulatory supervision/ deep dives

There is limited independent review of the effectiveness of these efforts. While some, such as the sandbox approach to financial regulation, have proven effective in encouraging innovation, there is an immense risk of regulators gaming the system.

2.2 The drivers for more regulation

Before exploring antidotes to excess regulation it would be sensible to note the drivers for more regulation. The behavioural drivers include:

- Legislators' desire to 'make a mark'
- Pressure from press and public (e.g. for a new law against pet kidnapping)
- Regulatory failures creating a demand for additional rules
- Regulators seeking an expansion of their role; TPR and FCA, for example, are continually expanding their rulebooks, and by and large ignore the regulator's code. The Electoral Commission asserts that the Regulator's Code does not apply to them.

There is therefore an asymmetry of drivers; there are no meaningful drivers against the growth of unnecessary lawmaking (other than capacity constraints, e.g. parliamentary time)

2.3 Regulatory layers

There are currently three levels (at least) of regulation:

- Primary
- Secondary
- Tertiary

The first two are within the province of direct government. The pressure on politicians, government ministers and civil servants to introduce ever more legislation as has been mentioned is continuous, and without a change of both regulatory and public mindset as mentioned above is inevitably likely to continue.

The third, regulatory legislation, is within the province of individual regulators. It is not known how much there is, nor do regulators maintain proper records of their rules. There is no requirement, as in the US for example, for regulators to centrally publish their rules, but some rulebooks are immense.

HMRC, for example, has around 6,000 pages of rules dealing with pensions taxation; the FCA rulebook if printed out would be around 10 foot tall. The MiFID II rules involve 1.4 million paragraphs. To be fully compliant with all rules is virtually impossible[5] and the system allows regulators to cherry-pick and impose guilt regardless of intent, especially where there is no rule of law. Some rules impose absolute liability and ignore the rule against self-incrimination.[6]

The solutions proposed in the consultation document are likely only to have superficial impact; what might be required is a change of mindset. Such a change would have both immediate and longer-term impact.

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5 See US Regent Law Professor James Duane, Don't talk to the police, https://www.youtube.com/watch?v=d-o9xYp7eE (video).

6 See for the general principle in English law R v Leckey (1843) CAR 128, insisting in a right to silence, even in the middle of a global war, and contrast with the withdrawal of the right in the currently amended Pensions Act 2004 s72(1B) (it having been originally been specifically granted by the Act in 2004) or Criminal Justice Act 1987 s2, or the way in which regulators can work around right to silence protections in FSA v Daniel Forsyth 2015, fraudster prosecuted for giving false information.

3 APPROACH: MEASURING AND REDUCING REGULATIONS WITH REGDATA

3.1 The existing approaches

The existing mechanisms to discourage overregulation, such as 'one-in-two-out' and regulatory impact assessment, have proven insufficient. This is, in part, because the precise number of regulations is a weak proxy for the extent of regulatory harshness. So two regulations, with little meaning or impact could be removed and replaced with a new more substantial regulation. Impact assessments often fail to account for the 'unknown unknowns', that is, the unforeseeable and unintentional but substantial impacts of regulatory actions on business operations.

3.2 The RegData approach

An innovative approach to measuring and reducing regulations is provided by George Mason University's RegData. The method has been used in the United States, Canada and Australia, at both a national and provincial level.

RegData quantifies and categorises laws and regulations using machine learning and textual analysis. It analyses the restrictions of the text by counting the number of phrases such as 'shall,' 'must,' 'should,' and 'prohibited'. This creates a count of "regulatory restrictiveness clauses".

This method allows for a high quality measurement of regulations over time, between jurisdictions and across industries. This makes it possible to undertake advanced economic analysis for the likes of wages and growth, industry size, dynamism, employment and lobbying, compared to the quantity of regulation.

This is superior to counting the number of regulations, the number of pages of regulations or the number of words in a regulation. RegData provides a more precise indication of the regulatory burden provided by each piece of regulation, as some regulations can be long but have relatively little with respect to restrictions and vice versa.

3.3. Setting a regulatory budget

The RegData approach is particularly appropriate for tracking regulatory reduction efforts. Some jurisdictions, such as British Columbia in Canada, have successfully used the regulatory restrictions as part of a "one-in-x-out" initiative, where x is the number of clauses (not pages or regulations) replaced for every new one introduced. The same approach has been used in a number of US states. It provides a strong impetus to drive regulatory reduction.

3.4. The British Columbia example

British Columbia has been pursuing efforts to reduce regulatory burden since 2001 and in 2015 became the first government in the world to pass a law requiring that one regulation be removed for every new regulation introduced. In 2001, a new government tasked with the goal of reducing regulations

choose 'regulatory requirements' to measure red tape reduction defined as "an action or step that must be taken, or piece of information that must be provided in accordance with government legislation, regulation, policy or forms, in order to access services, carry out business or pursue legislated privileges."

The initial baseline count found 382,139 such regulatory requirements in British Columbia found across 2,200 regulatory instruments. Each department was required to reduce their regulatory requirements, to track progress against their baselines, and disclosed publicly and at cabinet meetings. Each minister was required to develop a checklist and sign off on how many regulations were added and removed. Since 2001, British Columbia has reduced regulatory requirements by 41%. This proved relatively simple and effective. This required top-level political support and understanding across government including within the bureaucracy.

In 2017, Missouri in the United States took a similar approach, explicitly using Mercatus' RegData technology. They have reduced the number of regulatory restrictions by 19,000.

3.5. Implementing RegData in the UK

It would be possible for the UK Government to similarly measure 'regulatory restrictiveness' and set targets for reduction across departments using a '1-in-2-our' regulatory restrictions rule. This could be combined with sunset clauses for new and existing regulations, particularly those imported from the European Union but not analysed for relevance to UK law.

4 APPROACH: CATALOGUING THE LAW

4.1. The nature of the law

The law is constantly changing and growing — increasing in length and complexity — placing growing burdens on citizens and businesses.[7]

Citizens must comply with an ever expanding array of legislation, regulations known as 'statutory instruments' (of which there were over 1,000 in 2020), imported European Union legislation, and tens of thousands of pages of materials issued by dozens of regulatory agencies.

4.2. The lack of depository

The United Kingdom lacks a depository of all laws and regulations. We are all expected to follow the law, yet there does not exist a proper list of the legislation and regulations that citizens must abide by.

The lack of single regulatory source undermines the rule of law, severely burdens business and leads to the creation of more red tape.

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7 https://www.adamsmith.org/research/ignorantia-legis

Businesses spend thousands of hours attempting to find and interpret the law, employing costly external regulatory consultants and professional legal advice.

In addition to clearly cataloguing laws, regulations, and departmental guidance, there is a need to reduce and simplify the burdens on citizens to a point at which the legal responsibilities of citizens is comprehensible and clear.

4.3. Creating a proper depository

There is a need to ensure the publication of rules in accessible website, data feed (XML, JSON) and PDF formats, amendments to be dated and time-travelled, penalties for breach not to be applicable without proper publication and obligation to provide user friendly websites;

The UK could adopt the Australia/New Zealand system of holistic law publication, where legislation is accompanied by explanatory memoranda, parliamentary debates and other documents designed to help the user;

5 APPROACH: CHANGING THE MINDSET

5.1 Failures in lawmaking

It might be worth exploring why the frequent previous initiatives have been such signal failures.

There are may be two main reasons:

- An absence of training for lawmakers and regulators in how to produce good law and regulation and
- An inappropriate mindset, treating law and regulation as the first rather than a last solution

But we can also see that existing systems of regulation and lawmaking are continuing to fail to protect the public. It may not be light-touch regulation that is causing harm, but excess regulation.[8]

5.2 Solution

As we have seen, conventional methods of constraining rulemaking have been ineffective. Without a change of mindset, that will continue to be the case. There is no purpose, as the EU has done, in publishing a rulebook on containing rules. Rules to stop making rules do not work.

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8 There is a substantial literature on regulatory failures, including for example those of the Financial Conduct Authority, or the various agencies involved in the Grenfell Tower tragedy.

We recommend therefore that there should be instead a system to encourage lawmakers and regulators to properly respond to the narratives articulated by the press and the public for ever more legislation.

It requires a change in both mindset and regulatory skills. It is significant that while most senior activities (such as bus driving or brain surgery) require at least some initial training, Accordingly it would be instructive to require anyone involved in regulation at any level to be subject to

- Enjoy a code, intended at the least to make them aware of some general principles, and breach of which might be embarrassing
- Swear an on oath, similar to that of MPs or mythically of doctors, which again is unenforceable, but might operate to induce a different mindset; and
- The attainment of some qualification, through training.

Any lawmaker or regulator, whether MP or board director, should be embarrassed by not having completed some form of diploma before assuming office.

5.3 Training

The Cabinet office reinvention of the Civil Service College offers an opportunity for MPs, ministers and others to have some modicum of both training and responsibility to think through the issues of proportionality, alternatives and narrative to manage the pressure for more rules.[9]

5.4 Principles of regulation

Few regulators follow general principles of regulation, even those they self-declare. In relation to risk, for example The Pensions Regulator (TPR) frequently states it is a 'risk-based' regulator, which it is in some respects: it is however risk-averse, witness the USS issues widely reported. The imposition of ever-more regulations confirms its risk appetite (as for most regulators) is less risk for itself, with resultant costs being borne by the public.

MPs, for example, and select committee members, frequently behave in irresponsible, tribal ways, which they would be less likely to do if they were mindful of codes and given basic training in regulatory norms.

And in relation to Grenfell for example, initial studies showed an excess of regulation that may have contributed to the tragedy, rather than inadequate or light touch, with no-single regulator being accountable.

A basic training in the principles of lawmaking and regulation should be required for all middle and senior servants, boards of regulators and senior and middle ranking regulatory officials, including local authorities, ministers and select committees. It would include:

- Behavioural regulation

9 Declaration on Government Reform, Cabinet Office, 15 June 2021.

- Regulatory creep
- Principles of simplicity
- Risk analysis and understanding
- Narrative crafting
- Dealing with press and the public and lobbyists
- Regulatory risks
- Trust and respect
- Proportionality
- Managing and disavowing the blame and 'never-again' culture
- Use and abuse of sanctions
- The rule of law
- Deregulation and unregulation
- Principle of law and rule-making
- Ethics and professionalization in rulemaking
- Cost-benefit analysis and metrics
- Governance and accountability of lawmakers
- Lawmaking and the courts
- Regulatory capture
- Failures and successes in lawmaking
- Outcomes-based lawmaking
- Use of existing rules and regulations
- Limits to lawmaking
- Drafting rules and their limits
- Use of oaths and codes for lawmakers
- Light touch and heavy touch regulation
- Unintended consequences
- Competition in regulation

6 CONCLUSIONS

6.1 NIT-PICKING OR HOLISTIC APPROACH TO INTELLIGENT LAWMAKING

Experience indicates that 'jenga-style' removal of individual rule and regulations is highly unlikely to be successful in reducing the bureaucratic overload of lawmaking and regulating. There is no silver bullet to the problem of reducing the regulatory overhead, reducing cost and complexity.

6.2 THE NEED FOR REFORM

Nonetheless current experience in relation to Brexit and the fallout from that strongly indicates a need to make the UK more competitive as well as safe in a more intelligent way.

6.3 DISMANTLING SOME OF THE REGULATORY OVERLOAD – AND MOST OF THE SUGGESTED REMEDIES

It is critical therefore to dismantle the bureaucratic system of better regulation, which simply adds to the already heavy costs, and allows gaming of the

system, to change mindsets. This may take some years, but will be more cost-effective and effective than any of the so-far failed alternatives.

6.4 Changing the mindset

The better, and longer-term, solution is to change the mindset of lawmakers – through education and training – and introduce personal responsibility and accountability for lawmakers and regulators without imposing blame.

It is absurd that while we expect brain surgeons and bus-drivers to be trained in what the do before being let loose on the public, we expect lawmakers and regulators to impose rule son millions of people and billions of pounds without any training other than in parliamentary procedures, and hope that select committees and others hold the office-holders to account.

The changing of the mindset can be better supported by efforts to properly catalogue the regulatory state and set specific regulatory reduction targets using the RegData approach. This will require buy-in from minsters, civil servants and regulators.