

**Towards Better Regulation for Scotland**

**A New Partnership between the Scottish Government and  
Business**

**An Interim Report from the Regulatory Review Group for the  
Scottish Government**

## **Introduction**

When the Regulatory Review Group (RRG) was both reinvigorated and had its remit broadened by the Scottish Government in summer 2007 part of that was to produce an 'Annual Report' for the Scottish Government to show, in the opinion of RRG, how it was performing in terms of better regulation for business.

Since then it has examined a range of issues involving regulation from its production to looking at those already in place. From that has come a host of issues of questions, some of which the RRG have been able to resolve quickly, some of which it will need to gain more knowledge and understanding of, and has highlighted issues and items that need resolved now to move things forward.

The purpose of this 'Interim Report' is therefore focussed on those latter issues and items so that:

1. The Scottish Government can confirm that they are happy with our direction of travel on this matter.
2. You are content to allow us to get on with implementing the recommendations set out in this paper.

What this Interim Report proposes is a process of evolution towards a new way of creating, managing and monitoring regulation that impacts on business, giving us all the good regulations that we desire.

It would still be our intention to issue a full first annual report in the late spring of this year to more fully relate our views and thoughts on this issue but this interim paper will allow us to progress and make the report more meaningful by then.

## A. Context

Government in Scotland and the UK is elected democratically to put in place rules and regulations for us all which help it deliver what the population wants across a wide raft of society. Not everyone will agree with or welcome all of those rules and regulations but has to accept that in the context of a democratic society Government is elected with a mandate to introduce them. Part of that will be regulation which applies to or affects business, and indeed regulation that business itself wishes to introduce.

In simple terms legislation is the 'product' of Government and like any other product it should be market tested to see that there is a market and desire for it, designed in a way that is fit for purpose, and delivered through a distribution channel that gets it easily to the customer with minimal hassle.

For many years now business has 'complained' that there is 'too much regulation'. However the challenge has always been that when asked to be specific on the burdens that regulations impose both on individual businesses and the organisations representing them, they have found it difficult to highlight many specifics which they and Government can jointly engage in a conversation to discuss and resolve.

This has led to:

- a) Business having a belief that Government is there to 'fix' regulation to make it better for them;
- b) A belief by Government that regulation is just one of the things that businesses 'complains' about like taxation.

This has been exaggerated by many of the initiatives that Government in the UK has put into place for better regulation which focus on Government doing its job better without any real involvement of business or understanding what the impact is of what they do.

The above applies equally to EU regulation as it does to devolved and non devolved regulation in the UK.

What this has led to is that the two sides of this debate have positions and views without any real understanding of the way the other side operates or needs to operate to satisfy their individual aims. In simple terms Business does not understand why or how Government operates and Government does not understand why business complains as it does not realise the full impact that regulation has on them.

As long as this position exists and continues it will always be difficult to make real progress as each side will always be judging the other side on these terms, which is never fruitful.

## **B. Proposed Solution**

What is proposed to alleviate the above is that Government and business (in its widest sense and including all those involved in it) move to a way of creating and changing regulation which is a true partnership between both parties.

This partnership will have at its heart the understanding that to make better regulation, each side should understand what the other is trying to achieve and what the impact of that will be and agree the most appropriate way for that to be achieved.

To achieve this there will have to be a greater understanding on both sides of what the Government objective is through a piece of regulation and why it has to do it that way. On the other hand, business will have to help Government understand what the impact of that regulation will have on it. This understanding of the impact will also help Government understand and balance more what it is trying to do and its 'cost', which would hopefully lead to more options being pursued for implementation rather than a straight jump to legislation.

Facilitate the above will require both parts of the partnership to understand they have individual and joint responsibilities in the process and are both accountable for the outcomes.

In simple terms the partners will engage, discuss, plan and announce each piece of legislation. This does not mean that business will necessarily be 100% happy with, or agree with, every bit of legislation but will be content that within a democratic context they will have worked with Government to produce their objective in a way that is most appropriate to them within those objectives.

To achieve this:

1. Government will need to be clearer on why it is doing or wishes to do something. This will apply even if it is implementing EU or Westminster legislation where there may be options other than legislation.
2. Government will need to provide analysis on options and explain why legislation has been chosen over other routes.
3. Government will need to consult in detail with business and others (particularly its enforcement agencies) at an earlier stage including detailed consultation with individual users at their premises to see and cost the impact that the legislation will have on them (up to 12 individual businesses for each piece of legislation). Government will need to build this process into its timescale for producing legislation.

4. Business will need to provide both the intellectual and practical resource and time to allow Government to consult with them as set out in 3 and in a time frame that also fits with Government needs.

5. Guidelines also need to be developed at the same time and implementation policies for enforcement agencies need to be consistent and less open to interpretation.

While the outcome of the above will put in place a process for better regulation it will also change the behaviour between Government and industry on this subject as each will learn to understand how each other operates better, as well as what the impact is of specific actions.

It will also allow Government and industry to produce, where appropriate, joint communications for end users on each new piece of legislation that comes into force. One of the challenges that Government accepts it has is telling business what it is going to introduce in a way and in a time frame that is acceptable to it. Part of the outcome of this new process therefore should be that communication from Government comes with a greater understanding and clarity on what it is trying to achieve and why, and how that will finally be achieved.

This new process to produce better regulation, in summary, is producing a partnership which will create an effective 'engine' rather than the disjointed and disconnected process which currently leaves both sides dissatisfied and at times antagonistic towards each other.

### **C. Initial Steps to the Solution**

To put in place the above will mean that a number of specific changes will need to be put in place by both Government and Industry. These will take time, but to begin the process it is recommended that some key changes start to be put in place now that will begin the process of change.

#### **a) The Assessment Process**

The Regulatory Impact Assessment (RIA) is the current vehicle that the Scottish Government uses to fulfil its duty to ensure that any new laws achieve their societal and environmental objectives at lowest cost to business, charities and the voluntary sector. RIAs are intended to ensure that the Scottish Government and their agency officials have considered 2 fundamental questions:

- is the proposed legislation the best way of achieving the policy objective?

- What will its impact be on end user groups, and other affected constituencies?

The RIA was put in place to provide a structured framework for policy makers to think through and analyse the costs and benefits of the proposed legislation. Properly adhered to, it also ensures that any potential effect on business, particularly small enterprises, is taken into account before regulations are made. The current RIA checklist is given in the link below.

<http://www.scotland.gov.uk/Resource/Doc/917/0043719.pdf>

There are two stages in the RIA process: Partial Impact Assessments (consultation stage) and Final Impact Assessment (implementation stage) with the final RIA being signed off by the accountable Minister for circulation to SPICe, the lead Committee, Subordinate Legislation Committee, Parliament Legal Advisers and the Improving Regulation Unit and the Improving Regulation Unit website.

There are however problems with the current RIA system namely:

- 1) Although it is Scottish Government policy for RIAs to be produced, it is not obligatory.
- 2) RIAs are not always used as intended, and the quality of the information in RIAs is extremely variable.
- 3) They now cover areas beyond what is required for a pure business impact assessment so can be long and unwieldy.

In practice, RIAs are often filled in at or near the end of the design process, to secure a Ministerial signature and clearance from the Improving Regulation Unit as part of a tick-box exercise. There is often an incomplete analysis of the key questions the RIA poses, depending on the complexity of the legislation/regulations, the experience of the policy official doing the RIA, and how much consideration the legislative drafting team have given these questions. Of particular relevance to business is the fact that the guidance on completing a small firms impact test (by contacting a number of firms to assess the likely cost/benefit) is often not followed, or may result in poor quality information from those businesses who do respond to any consultation.

To overcome the above it is proposed that a new shorter and simpler Business Impact Assessment (BIA) be introduced as set out below.

The BIA would be mandatory not voluntary for all legislation and statutory instruments where businesses will be impacted by its introduction.

The BIA would ask 9 straight forward questions that would have to be answered substantively for such legislation etc. Questions 1-7 are questions that business would ask of Government in its creation of the

new legislation, and questions 8 and 9 are ones that Government would ask of business. The questions would be:

1. What is the objective of the bill/legislation at a strategic level? (eg making a better environment, making us more healthy, stopping people dying etc.)
2. What are the benefits it will bring to us all if enacted? This is a key question as the aim must be to have benefit led legislation which is clear and understandable.
3. How does it fit with Scottish or UK Government, or EU policy?
4. Options – Has the Government looked at other options for doing this other than legislation? It would also need to show why each option had been accepted or rejected.
5. How will the legislation be put together and how will it achieve its objective?
6. Who will implement/enforce it and how are they being involved in the creation/consultation process?
7. Gold Plating – is this more than elsewhere – UK/EU – and if so why?
8. Will it have an impact on the competitiveness of Scottish companies within the UK or elsewhere in Europe or the rest of the world?
9. Business Impact:
  - i) How many businesses and what sectors is it likely to impact on?
  - ii) What the likely cost or benefit to business will be? To do this between 6 and 12 companies of varying sizes will be visited to tell them what the legislation will do and what that will mean to them (this will include form filling) and with each business work out the impact and cost to the business both in monetary and other terms.

Obviously all 9 questions can only be asked of legislation coming from the Scottish Government, its agencies, local Government, and from private members legislation (including implementation of EU legislation which falls to the Scottish Government) but consideration should be given to applying questions 6–9 for UK and EU legislation to be applied in Scotland.

It is understood that to put this process in place, time and resource would have to be put into the questions above and especially into

questions 8 and 9 where business would have to help Government formulate and construct the questions it would have to put to them to receive the substantive answers they required.

The above BIA would also replace the small business test as within 9 (ii) above and would be an obligation on the department involved in formulating the regulation to ensure that a spread of companies in terms of size are visited and at least 2 would have to be small firms.

The advantages of the new BIA will be:

- a) The mandatory BIA will help convince both business and Scottish Government civil servants and officials in our agencies that the Scottish Government take their Better Regulation responsibilities seriously.
- b) We will begin to gather more robust estimates of business impacts, in terms of both costs and benefits.
- c) To start to enable the RRG in partnership with Scottish Government, by grossing up the sample estimates, to begin to create a more robust regulation impact data set. This would begin to provide an estimate of the impact of regulation on Scottish business as a whole, which could be used for future measurement and benchmarking purposes. This would fulfil one of the obligations placed on the RRG by the Minister for Enterprise, Energy and Tourism to devise "a better system of measuring" (after having agreed to take the RRG's advice not to take forward the "one in one out" proposals) and thereafter targeting reductions in administrative burdens.
- d) Re-enforce the emphasis that better regulation is a partnership between business and Government with each getting to understand each other's issues better. The added benefit from this interaction is that over a time civil servants and business people will add more value in all sorts of ways in wider areas and flag up other issues as the two interact.

All the above does not say that the RRG recommends the abolition of the RIA as that is neither within its competence or remit. The BIA will give the RRG what it requires in this area of its objectives but other Government Departments and others external to Government may require parts of the current RIA to meet their objectives e.g. Carbon Impact.

#### **b) Challenges with the new BIA**

The BIA will create challenges for both the Scottish Government and business but both are solvable as is outlined below.

i) Business

To carry out the tasks of the BIA correctly, Scottish Government officials will require to access businesses who they visit, to work with and work within, to create the impacts that legislation will have. In doing so, it is important that Government has access to as wide a base of businesses as possible to ensure that the 'same' or 'a group' of businesses do not become the same sample over time. Part of the process in doing this will therefore have to be an 'audit' of companies to ensure that this does not happen.

Therefore identifying and arranging support from as wide a base of business as possible may at times be difficult as well as making businesses understand what their role is in this partnership and the time and resource they have to devote to it.

To facilitate this it is proposed that the RRG on this and other issues acts as the 'hub' within a system which enables this partnership to operate effectively by facilitating interaction between both parties by allowing other industry groupings to be connected to this.

The challenge in achieving that is the plethora of business groups and associations that exist in Scotland currently and in many ways is as 'cluttered' as the Government thinks its own sector is. Annex 1 sets out pictorially how this 'hub and spoke' system would operate but highlights the challenge of incorporating not only those bodies represented on the RRG, but also wider sector bodies and those formed by Government agencies where appropriate, and enforcement agencies into the system. There are too many to make an effective hub and spoke system so RRG will work with Government and the main Trade Associations to select who would be the best to respond for varying sectors e.g. the Chemicals and Farming sectors have clear bodies in these areas in terms of the Chemical Industry Association and National Farmers Union. Some other sectors are not as clear.

It is a delicate balance, as on one hand the RRG want to create a hub and spoke system that can operate effectively, but on the other hand does not want to preclude any body from raising sensible regulation issues with it. It is likely therefore that this hub and spoke system will develop and change over time as RRG discover which bodies can provide the most effective leadership and results in the area of regulation.

These associated bodies would help supply the names of companies who would work with Scottish Government officials in

the BIA process. This process over time should overcome any challenge in this area.

ii) Scottish Government

While i) above will allow that there will be a supply of businesses to provide the information that civil servants will need to collect to produce the impact and other data the BIA will require, there will also be a mechanism to verify that the data and responses that they are given are correct and exact. While over time, as is stated below, this process will create a body of civil servants who will be knowledgeable about business it may be initially that some extra checking may be necessary.

Part of that should come from the number of businesses that will be contacted in each BIA process – up to 12 - where real difference between companies should be highlighted and can be investigated. As well as that it is proposed that both the enforcement bodies and the sector bodies involved with those businesses be involved in the verification as well.

It is clear also that the new BIA process will mean that civil servants who are involved in the production of legislation will have to visit more companies and spend more time 'out of the office'. In a typical year the Improving Regulation Unit deals with around 50-60 RIAs. If on average we were to visit 9 firms per RIA this would involve a total of around 500 visits per year to firms throughout Scotland. This does not include Statutory Instruments or secondary legislation which impact on business as well plus of course Westminster and EU legislation where impact may want to be measured or checked with what has been done before.

This will incur more cost in travel and other expenses as well as perhaps having resource implications elsewhere.

Also, to gross up the impacts from the sampled companies to start to give overall impact numbers on sectors and markets will require input from the Government's analytical and economics teams in different areas. However since part of RRG's remit was to establish a way of calculating this impact we feel that this is part of that process.

However all this cost should be seen similar to the time that business will put into working with them as the 'investment cost' necessary to achieve better regulation and over time create a body of civil servants with real understanding of the sectors and industries that they operate in which will have a positive impact on other parts of their role.

### **c) Reviewing Legislation**

It is also important like any 'product' that legislation is reviewed where appropriate some time after its introduction. This is especially true of legislation which has been introduced for the first time or where there were doubts or concerns expressed around its implementation.

The RRG is aware that reviewing each piece of legislation would not be relevant or effective so recommends that as part of its role and importantly as the hub in the new proposed system it highlights legislation for review as it is enacted but also relies on its 'spoke' organisation to put up legislation for review where it thinks it is not working effectively.

The RRG would recommend that no legislation should be tested until at least two years of enactment have passed which should have given it enough time to bed down and be implemented. Two years is a minimum and it could be that with some legislation 3-5 years may be more appropriate and it is important therefore that the rule revolves around 'Legislation for review' rather than timescales within which reviews must take place.

Where a review is appropriate the department who introduced the legislation would have an obligation to do so within the following framework.

- i) Interview a representative sample of those affected by the legislation to ask:
  - Is it achieving its objectives?
  - If not why not?
  - How could it be implemented better?
  - Where are the issues arising? (its basic intent; how it is being implemented or enforced.)
  - Is the cost impact what was expected? (to do that part of the sample would have to be taken from those who helped produce the costings in the first place.)
- ii) Speak to the enforcement agencies and elicit their views.
- iii) If appropriate speak to a wider grouping who may be affected peripherally by it.

From the above, the department concerned should produce a detailed evaluation report and from that recommend any changes that should be made, including where necessary, changes to the legislation itself. Each evaluation report and recommendation would be reviewed by the RRG.

#### **d) The Enforcement Agencies**

The changes to the assessment process as outlined above should start to make sure that the 'what' (what it is Government is trying to achieve from specific legislation) matches the 'how' (how the legislation is enacted on the end user), and in a way that is understood by both parts of the partnership.

However also key to the 'how' are the enforcement agencies and regulators which Government establishes and uses to effect and monitor legislation. How they deliver what Government wants can have a positive or negative effect and therefore are a critical part of the process.

The RRG has discussed varying issues with some of the enforcement agencies that work closely with business but needs to widen and deepen its discussions in this area before making wider recommendations. However even from these initial discussions there are two clear areas where the RRG would like to make recommendations now. These are:

1. That enforcement agencies be involved in the creation of legislation which they will have to enact. Our evidence to date suggest that this does not happen now which we feel is a mistake in that enforcers often can make legislation better by using their experience to put in things that work and importantly make sure that those that do not work are not repeated.
2. That enforcement agencies as part of the RRG 'annual review' process tell the RRG how they can do their job better in terms of both satisfying their own objectives and ensuring business understand and comply with what is asked of them. To do this effectively enforcement agencies should feel unhindered in their replies and suggest anything they wish, including changes in their financial or business models if they feel those hinder it fulfilling their task. While that may mean that Government may have to increase funding as a result of the suggestion we do not feel that that should preclude the agencies from suggesting it.
3. That we work with the enforcement agencies to try and develop a 'lighter' touch approach where appropriate with the approach focussed on outcomes. This could also address the view that some enforcement agencies have expressed of a willingness to 'reward' companies who of their own volition address issues.

We feel that the implementation of both these proposals now would help the process of better regulation move forward.

In terms of 2, as we state above, we have still not examined all the enforcement agencies that could be involved with business to determine who should be monitored by the RRG going forward so suggest that we use SEPA and The Care Commission to start the process in 2 above. This will also allow us to test the methodology and also establish a discussion process with Government to resolve them.

#### **D. RRG role**

All the discussion and progression around the above has allowed the RRG to re examine its own role in light of its original remit and the additions to that outlined in the Cabinet Secretary's letter to us last year.

In simple terms the RRG is there to ensure that Government has in place a system for better regulation that satisfies its own and businesses needs. In this there is an understanding that there will always be creative and perhaps even other tensions around this area between Government and Business and there is nothing wrong or concerning around this as it is an integral part of any good partnership that there is honest and open exchange between the two. That will lead to the good practice we see as the outcome.

The RRG sits between Government and business creating and managing the environment in which the partnership can work well and ensuring that the processes are in place to do so, as well as providing independent scrutiny over all regulation affecting business. It also acts as the focus and arbiter for resolving issues of alleged bad regulation.

As is stated in the introduction to this Interim Report part of that obligation is to produce an annual report on how Government has done in terms of better regulation in the last year and while we will do that we feel it should also include comment on how business has done in helping that process.

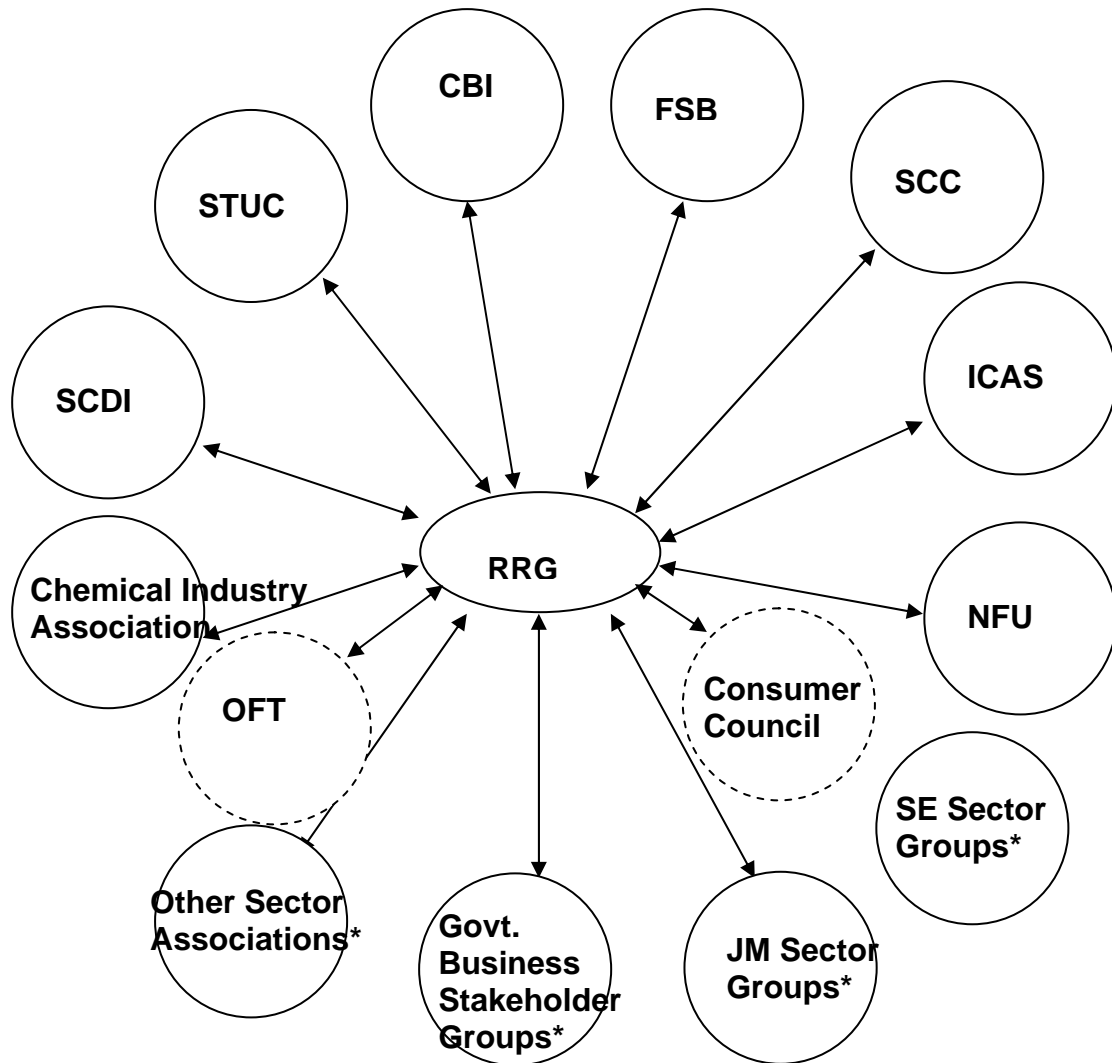
All the above, if implemented, should provide a good start and framework on which both parts of the partnership can build a better regulation process that works for us all - including the people of Scotland – with the RRG providing and creating the functionality that allows that to happen.

Like everything in life good processes drive good outcomes and we believe this begins to put in place the process that will give us the desired outcomes.

Professor Russel Griggs  
Chair  
Regulatory Review Group  
February 2008

Annex 1

RRG Hub and spoke operations with Business



The Hub and spoke system outlined above puts RRG at the centre of the better regulation process in terms of deciding strategy and process but using trade associations, sector groups and others to provide it with specific examples of poor legislation as well as providing the Scottish Government through the RRG with names of businesses to be approached for the BIA impact process. The RRG have already established that relationship with the Chemicals industry and would wish to do it with those circles marked by an \*.