

REGULATORY REVIEW GROUP ANNUAL REPORT - 2008

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Dear Cabinet Secretary

I am pleased on behalf of the Regulatory Review Group to attach our first Annual Report which we feel starts to deliver on the remit you set us of both enhancing and growing our economic competitiveness as well as putting Scotland at the heart of the better regulation agenda in Europe.

We have learned much this year, all of which drives us to the conclusion that without a new partnership between Government and business on this issue, little will change and we will keep pursuing the same goals with little effect.

This partnership has at its heart a change of culture on both sides to recognise and understand better the needs and outcomes of both parties and produce a process for better regulations which both share and participate in. This will not be without its challenges but without this change neither of us will achieve the outcomes we desire.

In our first Annual Report we have focussed on a number of areas which we believe will put in place a better system for producing new legislation plus start to change the way that regulation is developed once implemented.

Our key recommendations are

1. Government and business (in its widest sense and including all those involved in it) should 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, what the impact of that will be, and agree the most appropriate way for that to be achieved.
2. A new shorter and simpler Business Impact Assessment (BIA) should be introduced. To invoke a clear sense of purpose and the resultant culture change that are required the BIA may need to be initially mandatory for all legislation and statutory instruments where businesses will be impacted by its introduction. It 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.
3. Each Government Department and Regulator that introduces or enacts legislation affecting business has a group of businesses that it uses to 'road test' all relevant legislative literature and forms prior to implementation.
4. Government and Regulators constantly review the composition of their stakeholder groups, almost on an issue by issue basis, and continuously ask themselves the question "are these the best people who can give me a true end user view on this specific subject in the detail I require to make the correct decision on the outcome I am seeking?"

5. Regulators should be involved, as a matter of course, in the creation and production of new legislation as without their input the Government is not using all the knowledge it has at its disposal to create better regulation.
6. There should be a system in place that tests Westminster regulation against the different practices, legal systems, and methods that apply in each part of the UK **before** it is enacted, rather than after, which appears to be the case currently. We believe that such a system should be the responsibility of Westminster to the creation and implementation of new legislation which applies across the UK.
7. To ensure transposition of UK-wide legislation into an appropriate form to be enabled in Scottish Law, UK-wide Regulators with HQ based outside of Scotland should have at least one Scottish lawyer employed within them.
8. The Scottish Government should have the right to make its own case directly to the EU where it feels this is necessary rather than relying upon the relevant Westminster Department. In this respect we would strongly support the 'Team Scotland' approach in Europe as set out in the key messages of the Scottish Government Action Plan on European Engagement.
9. The RRG should work with Government and Regulators to develop a system of empowerment which allows relevant officials in Regulators and government, working within clearly defined criteria, to change the way legislation is administered and bring practical proposals to the attention of their senior management who can then discuss with Government how the legislation might be changed.
10. The RRG should work with Regulators and Government to develop a more effective business model for Regulators which would drive the behaviours we all want to see of empowerment and better regulation, which will include both looking at how certain regulators are financed and also how the NDPB outcomes may be delivered in a way that helps them achieve better outcomes.
11. That the potential skills shortages facing Regulators and Local Authorities be addressed. We ask that the appropriate Cabinet Secretary meets the Regulators concerned to look at how these issues can be managed.

Our report also sets out our focus and programme of work for year two which along with ensuring that the above recommendations are implemented will see us examine other aspects of better regulation which we feel need to be addressed.

Critically, to achieve all this will require cohesive and sometimes strong leadership, not just from ourselves but from the First Minister, The Cabinet, Ministers, Senior Civil Servants, those in charge of and working in Regulators and industry, to ensure that real change takes place and is driven from the top. Without this the culture change that needs to happen may dissipate and not bring the rewards we all seek.

We look forward to working with you in delivering that and the rewards it will bring for us all.

Yours sincerely

Professor Russel Griggs OBE
Chair
Regulatory Review Group.

1. Introduction

The Regulatory Review Group (RRG) is pleased to present its first Annual Report to the Scottish Government in line with its joint overall aims of

- creating better regulation for both business and Government in Scotland and
- making Scotland the leading country in Europe in terms of better regulation.

In meeting our aims we are aligned with the Scottish Government's strategy of delivering increased sustainable economic growth to ensure that Scotland improves its competitive position, and to put in place a system of better regulation which makes Scotland the leader in this field in Europe.

RRG remit

The RRG has been in existence since 2004 but its remit was expanded in 2007 by the new Scottish Government, as an independent body, to advise it on better regulation [*Its remit and composition are set out in Annexe 1*]. The key word here is "Better" since Government, business, and the wider population all want at some time or other, new regulation to control aspects of what they do, when it needs to be done, and in a way that is appropriate and proportionate to give the desired outcome. This principle of appropriateness and proportionality applies as much to regulating and enforcing regulation as it does to its introduction.

Evidence Based Approach

In producing this first annual report we have consulted and examined widely both collectively and individually. We believe that our recommendations are based on sound evidence which forms a basis for a new way forward for the creation and management of legislation. We have also met with bodies and individuals looking at related issues e.g. The Crerar Review, to ensure that as far as is possible we are not duplicating what has already been done, as well as ensuring that we are all aligned in the same outcome. [*See Annexe 2 for a list of bodies/individuals the RRG and IRU (Improving Regulation Unit) have engaged with and material viewed*].

Partnership

At the heart of all that is a new partnership between business, Government (in its widest form), its Agencies, and Regulators which demands a change of culture by all partners if the objectives are to be achieved. Without that critical culture change we will not achieve the real change that is needed and therefore will not reach our objectives.

A Change of Culture

The need for a new sense of purpose that will drive culture change is at the heart of most that we report and drives the majority of our recommendations. From our examination of regulatory initiatives elsewhere we feel that tinkering with the process, or focussing only on part of it, does not bring the real, desired and permanent change that we believe needs to happen if all our 'hearts and minds' are to be focussed on the dual purposes of achieving better regulation for all and

increased sustainable growth. This is evidenced by a number of recent reviews of the changes in regulation introduced at Westminster over recent years which, in summary, conclude at best, “the Jury is out” or at worst, real change has been limited. The following links will take you to the report(s).

http://www.nao.org.uk/publications/nao_reports/06-07/0607615es.htm

http://www.nao.org.uk/publications/nao_reports/06-07/0607615.pdf

Consistency of approach

Part of this culture change relates to consistency of approach throughout Government and Regulators and not just at senior level. Indeed, our very first investigation in the care sector in 2005 highlighted that lack of clear understanding from those at the top creating the policy and instructions down to those on the ground who are implementing them, can lead to extra and unnecessary challenges for business and the regulator.

Cohesive leadership

To achieve all this will require cohesive and sometimes strong leadership, not just from ourselves but, critically, from the First Minister, The Cabinet, Ministers, Senior Civil Servants, those in charge of and working in Regulators and industry, to ensure that real change takes place and is driven from the top. Without this, the culture change that needs to happen may dissipate and not bring the rewards we all seek.

2. Context

Since its inception the work of the RRG has developed on the basis of a simple view, namely, that legislation is the product of Government and therefore like any product it should be examined in the terms set out below. In making this analogy we recognise and understand that some legislation is put in place to protect people but we feel that the principles below still apply in terms of making sure that what is needed is implemented and regulated in a way that gives the desired outcome.

Before production

- Is there a consumer demand for it?
- What product best fits that need?
- How should it be designed and what are the components that need to be in it for it to fulfil that need?
- What is the best way of distributing it to get it to the ultimate consumer?
- How will it be marketed, what are the materials, and in what form do they need to be set out to gain maximum impact and understanding from the consumer?

Once it is launched and in place

- Who will check to see it is being operated properly?
- Who will review and refine the product in terms of consumer and producer experience?

Too often a focus on process and procedure can get in the way of outcome so we need to ensure that in all we recommend the fulfilment of the desired outcome of each piece of regulation is the central focus.

In our first year we have focussed on the preparatory stages of legislation on the basis that it is important to ensure all new legislation is more effectively tested before examining existing legislation.

Specific legislative issues

This year we continued to fulfil another part of our remit which is to examine specific issues relating to certain legislation which we have dealt with as necessary. A list of current and previous issues which the RRG has considered is set out in Annexe 3.

Interim report with initial recommendations

We produced an Interim Report in February 2008 which set out some of our initial thoughts and recommendations but the report's main aim was to check whether the Scottish Government was in line with our direction of travel. It is not the intention to reproduce the majority of that report here although its main findings will be summarised as an annexe to this report. [*The Interim Report is available at <http://www.scotland.gov.uk/Resource/Doc/917/0056636.pdf> for those wishing to read it*].

The report's recommendations and the majority of its findings were agreed in principle by both the Scottish Government, the other main political parties, and key national regulators in Scotland. It has been read and commented on positively both in the press and elsewhere.

That our Interim Report is supported by the other main political parties in Scotland is important to us to achieve what needs to be done to reach our objective. Part of that is the recognition that we all need to change and part of that change will be working together on better regulation rather than 'throwing stones' if there are slight deviations or slips along the way, which may happen as we move to a different way of working.

3. Creating New Legislation

In this part of our report we examine how best to create and implement new legislation. The main thrust has to be on that which comes from Scottish Government but we have some suggestions and recommendations on legislation from both Westminster and Europe which we feel would add to the process of creating better regulation overall.

Interim Report Recommendations

In our Interim Report we focussed almost entirely on the production of new legislation and the main points are set out in Annexe 4. These form the basis of our further thoughts and recommendations.

Business Impact Assessment

The rationale behind our suggestion of a Business Impact Assessment (BIA) is also set out in the Interim Report but we have reproduced in Annexe 5 the questions that the BIA would ask.

Part of the BIA focuses on option analysis to look at whether legislation is the best solution to resolve an issue or whether another method is more appropriate. Since publishing our Interim Report we have gathered further evidence, mainly from MPs and MSPs, which reflects the belief, across all parties, that our system of Government (over many decades) both at Westminster and in devolved administrations, including Holyrood, forces the initial jump to legislation more than in other European countries. If this is the case then it further enhances the need for this option analysis, and perhaps for a more fundamental review of our legislative process more generally which is beyond the scope of this report or the RRG itself.

In discussions that we have held since the Interim Report was published the issue of mandatory completion of BIAs has been raised by a number of parties which has led us to restate why we set it out in that manner.

As we will state many times within this initial report, to achieve our objective of creating a system that produces the better regulation that we all desire will require both a real partnership and real cultural change across everyone involved in the process.

We believe that the cultural change we are proposing will bring benefits across a much wider area than just regulation and the real and on going benefit will be better connected government since those working on regulation will become better informed and engaged in the work of other sections of government. However, change is always a difficult thing to implement and sometimes the benefits may not be clear until the process has actually been gone through a few times.

From examination of regulatory processes and recommendations elsewhere, it is clear that if RIAs and other regulatory changes remain voluntary they are not always carried out. For example, there has always been a recommendation in the Westminster Small Firms Impact Test that a 'best practice' option available to officials compiling regulation is one to one visits to at least ten small businesses. It is unclear how often this recommended option has been used since it is not recorded, but evidence suggests that it has not been widely used hence business do not see any real change.

In light of the above we feel that there may need to be 'compulsion', at least initially, to ensure that this part of the BIA is done. It is also one of the most visible changes to the process we are recommending. Change management is always difficult and it is not uncommon for some form of 'compulsion' to be used initially until those involved discover the benefit doing it brings and so move to doing it because they realise this benefit.

We will work with the Scottish Government to introduce the BIA in autumn 2008 in a way that we feel is necessary to achieve its goal as without it we do not believe that

real change will take place in the creation of new legislation from Holyrood. We feel that the BIA gives businesses all they need to satisfy their objectives. However, it is not within the remit of the RRG to decide if the RIA, which has wider uses, should be altered as a result.

Further Recommendations

A) Marketing and Communications

One of the key factors in producing better regulation is to ensure that the instructions and operating procedures the customer has to use are clear and unambiguous. At Government's own admission this has not always been the case and indeed, it was one of the areas of concern from Government when RRG was established in 2004.

It is clear from the consultations on guidelines and other forms of communications that have emanated from Westminster in recent years that there is also concern there. The Department for Business and Regulatory Reform's (BERR) Consultation on Good Guidance on Regulation is one of the most recent with the consultation ending in March 2008. The following link is to the consultation document although the Government response has yet to be published. <http://www.berr.gov.uk/bre/reviewing-regulation/consultation-good-guidance/page44074.html>.

As well as trying to ensure that legislation is enacted properly and is understood one of the other key reasons for ensuring clear and unambiguous information about legislation is the amount of money companies spend – especially SMEs - on seeking advice on what legislation means and how they should enact or interpret it. This is highlighted in the recent Enterprise White Paper from BERR where an independent review has been set up to look at ways of making guidelines unambiguous and legally tight to reduce this cost responsibility on business. We will be meeting with DBERR and the Chair of the review body to participate in the process and will follow the progress of the review to see if and how the outcomes might benefit our work. The following link will give more detail. <http://www.berr.gov.uk/bre/reviewing-regulation/Review%20of%20guidance%20provision/page45278.html>

Also, in the spirit of looking at best practice that we can use elsewhere, in our more general discussions on how government communicates about regulations with business, we were drawn to the process SERAD had in place for some years where a group of farmers pre-vetted every communication from them to ensure that the customer would understand it. Whilst we believe this practice is no longer in place, our investigation would lead us to believe that when it was in place Government experienced no, or very few, problems with their communications of regulation in terms of understanding, so the relationship between them was enhanced.

We recommend that each Government Department and Regulator that introduces or enacts legislation affecting business has a group of businesses that it uses to 'road test' all relevant legislative literature and forms prior to implementation. We believe this will go a long way to improving understanding between both parties, enhance the relationship, and help other changes. Any

business using best practice would always have a group of consumers that it tests its literature on.

We recognise that a number of Departments and Regulators already currently have 'stakeholder' groups which they use for various things, including literature review by some. However our examination reveals that many of these stakeholder groups are made up of officials from trade bodies rather than real end user businesses, and also change infrequently. Trade Association officials, by their nature and job, become more aware of the language of Government and while they provide an overview of key issues, this is not the same as testing technical details and language with end users.

So we recommend that Government and Regulators constantly review the composition of their stakeholder groups, almost on an issue by issue basis, and continuously ask themselves the question "are these the best people who can give me a true end user view on this specific subject in the detail I require to make the correct decision on the outcome I am seeking?"

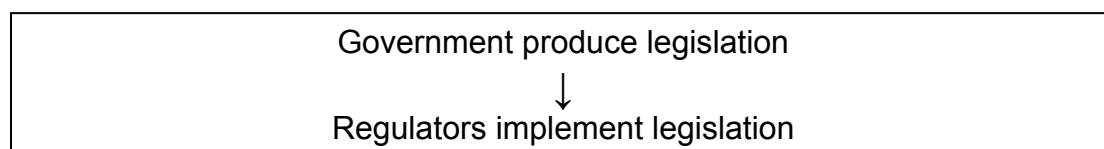
B) Regulators*

**'Regulator' in terms of our report is used to include those in Government and non-government agencies who have input to the regulatory process and include government departments and agencies, the drafters of regulation, enforcers and scrutinisers.*

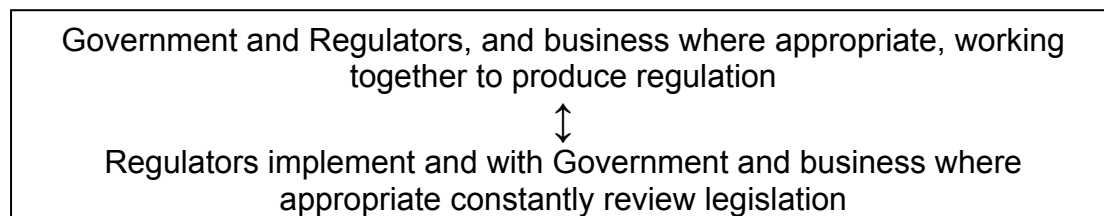
Regulators, of all kinds, shape, and size, are the main means that Government use to implement and enforce legislation so it stands to reason that they should be one of its main sources of information on how legislation is working or whether it could be improved. They should also be a key part of the option appraisal around examining whether legislation is the best answer to an issue as they should have real knowledge of the additional responsibilities or complementarity it would, or would not, offer.

In section 5 of this report we will deal with Regulators role in reviewing legislation and in section 7 have some comments and recommendations on their structure and other issues. However in the specifics of creating new legislation we do not believe that Government has used Regulators as well as it could have.

From the evidence we have collected from our consultations with both Government and Regulators the model that appeared to be in place up until 2007 was:



Our view is that a different model should operate which is:



What this has meant is that some Regulators have said to us that they are implementing historic legislation that, had they been involved in its creation, they would have recommended improvements. We note that since 2007 there has been some culture change with some Regulators now involved in the creation of legislation. However, there appears to be no best practice or procedure which covers this.

Therefore we recommend that as of now Regulators be involved, as a matter of course, in the creation and production of new legislation as without their input the Government is not using all the knowledge it has at its disposal to create better regulation.

This should not be a major shift as the culture is moving in this direction but some Departments move slower than others so we need to get everyone in the same place.

C) Westminster and EU Legislation

While much of this section on creating new legislation can apply only to Holyrood there are issues that need to be dealt with around legislation coming from Westminster and Brussels where the Scottish Government has legitimate rights to act.

In no special order we have recommendations in a number of areas.

i) Ensuring that UK wide regulation is appropriate to each devolved nation.

The four devolved administrations in London, Edinburgh, Cardiff, and Belfast all do certain things differently and those things are increasingly different for a variety of reasons. However it is clear from some recent legislation that these differences are not always taken into account so while it may be appropriate for one area it is not always appropriate for the rest.

A good example of this recently has been the Local Better Regulation Office (LBRO) legislation and implementation. The LBRO were set up around some specific issues relating to how specific Regulators working through Local Authorities (LAs) performed their roles consistently for businesses across the different LAs. A feature of the eventual legislation was the ability for companies to select a 'prime' LA who would act for them across all the other geographies they covered.

At that high level RRG has no disagreement with LBRO and supports the aim of the legislation.

However, because there are distinct differences between how England and Scotland operate in this area, namely

- Only one of the Regulators covered at this stage is common to both England and Scotland.

- No Regulator can prosecute in their own right in Scotland as they can in England. All prosecutions in Scotland have to be approved by the Procurator Fiscal.
- Trading Standards Officers across the LAs in Scotland organise themselves more consistently than appears to happen in England to the end that, as far as RRG is aware, no trade body in Scotland has any major complaints against them.

Therefore, where other elements of the LBRO agenda are deemed to add no value, or potentially to harm the positive relationship between trading standards and business, they should not be applied in Scotland.

While in the end we were able to reach a sensible solution with LBRO on its operation in Scotland it should never have reached RRG.

Therefore we recommend that there should be a system in place that tests Westminster regulation against the different practices, legal systems, and methods that apply in each part of the UK before it is enacted rather than after which appears to be the case currently.

We believe that such a system should be the responsibility of Westminster in the creation and implementation of new legislation which applies across the UK.

ii) The Scottish legal system

The Scottish legal system applies different nuances and practices to legislation coming from Westminster which, it appears, are not always understood. This applies both to how we implement legislation and how it is transposed into Scotland. It is not within our remit to suggest changes to the Scottish legal system, nor would we want to, but both business and Government need to realise that the differing legal systems will impose both positive and negative differences on legislation and its implementation both in England and Scotland. Some examples are

- Guidelines appear to have legal force in England whereas they do not in Scotland. This means that some permits and licences may have to be longer and more cumbersome in Scotland as they have to include the guidelines. Any equivalent English version can just refer to the guidelines without inclusion.
- Costs in legal cases are generally not awarded in Scotland whereas they are in England. So where a Regulator has to resource from its staff the prosecution of legal cases in England, it will recover that cost when it wins whereas in Scotland it will not. This adversely affects the comparable budget of Regulators in Scotland over their English counterparts.
- Where UK national Regulators have to transpose legislation for Scotland they must employ Scottish lawyers in their own teams to do so. We know that one of our key Regulators has suffered for some years now as the last

Scottish lawyer who left their London HQ was replaced with an English lawyer. Since then they have had difficulties implementing legislation and have had to hire at their expense an external Scots law practice to carry out the work for them which has had an unfair impact on their budget compared to their English counterparts.

We recommend therefore that to minimise the impact of at least the last bullet point above that UK-wide Regulators with HQs based outside of Scotland but who issue instructions to their Scottish arm on legislation have at least one Scottish lawyer employed within them to ensure transposition of UK-wide legislation into an appropriate form to be enabled in Scottish Law.

iii) Scottish input to European Commission

As devolution has become part of how we operate politically within the UK and the powers and roles of the devolved administrations have developed, some of the protocols and procedures on how civil servants, Government Departments, and indeed politicians work in this changing environment have been altered to reflect this change.

However, we feel that in the area of input into EU regulation there has not been as much change as there perhaps could have been. We should be clear that this is not a political point but as the devolved administrations are given a larger voice it should be recognised that there will be increasing differences between the needs and priorities of different parts of the UK .

There will be times and issues where Scotland, and indeed other parts of the UK, due mainly to special circumstances, will take us in a different direction, or will hold a different or opposing view to that of the Westminster Department or indeed the other Devolved Administrations. **Where that is the case then we feel strongly that the Scottish Government should have the right to make its own case directly to the EU where it feels this is necessary rather than relying upon the relevant Westminster Department.**

If we do not do this, then we will have a break in the partnership we wish to create between business and Government in regulation, as while businesses either collectively or individually can make their own case direct to Europe sometimes they currently will not have the Scottish Government alongside them, where a Westminster Department leads or has a differing view. **We feel it would add value and weight to Scottish issues if business and the Scottish Government could jointly approach or debate with Europe on issues which they feel are critical to them.**

We are aware that this may lead to a degree of tension between Scottish Government and Westminster Departments but we believe the benefit outweighs that.

In this respect we would strongly support the ‘Team Scotland’ approach in Europe as set out in the key messages of the Scottish Government Action

Plan on European Engagement. The action plan is out in draft form at present so that stakeholders can comment on it before it is finalised in the Autumn.

4. Reviewing and Amending Existing Regulation

We all, at some time, complain about regulation but when asked to be specific and point out any that we think should be changed or reviewed, little, if anything, is put forward.

We have no intention of abandoning the part of our remit that focuses on the examination of existing regulation but over the last year we chose to concentrate more on trying to resolve the process of producing good and appropriate legislation into the future.

However, in examining other issues we have reached a view on part of the process which we feel needs changing as it in itself would encourage constant re-evaluation of what is there specifically in terms of how it is working on the ground.

Currently most Regulators who enforce regulation do exactly that and make sure that businesses comply with the regulation as it is. We should be absolutely clear that this is not a criticism, just a fact, given the way that Regulators currently are charged and managed to deliver their objectives. We know that the management in many Regulators would welcome a widening and flexibility of their role, within specific constraints, as they must always ensure that they deliver their prime purpose. However, the current balance between making sure front-line staff deliver compliance and also try to help to better develop regulation, is not an easy one to produce.

Having witnessed, over time, discussions between front-line Regulator staff and businesses we feel this single drive for compliance is not delivering best value for either party or, indeed, helping the Regulator and business develop the type of partnership they will need if we are to change hearts and minds on key issues.

Also, this focus on complying with the rules does lead to frustration when businesses come up with what they feel are sensible alterations or anomalies which, if changed, would benefit the legislation. Replies from junior Regulator staff that include 'Nothing to do with me', 'Not here to change things', or 'Just doing my job' are not helpful. Since these are likely, in most cases, to be the only personnel from Regulators that businesses meet, we believe it harms the relationship between business and Government, not just Regulators, as business feels frustrated and ignored in its attempt to improve legislation beneficially for all parties.

What we would like Government to consider in this area - as we realise implementation will not be without its challenges - is some latitude or flexibility in regulator's ability to change administrative procedures within set criteria, which will alter both between and within each Regulator depending on the issues. From our discussions with the majority of Regulators involved with business in Scotland we believe that giving this power to them would empower all their staff to act in a different manner both with business and with others and in the end produce better

regulation. In many ways this simply is the consistent application of common sense in a regulated environment to achieve the desired outcome.

From our examination of the way better regulation has been implemented in British Columbia in Canada their key feature is to trust bodies to deliver their outcomes in the most appropriate way and leave them to do that. The results have been that in the main people have responded to that trust and real change has taken place.

We do believe that there is that same will amongst Regulators in Scotland to be more involved in the creation of legislation. They should also be involved in its adaptation once in practice, to take account of real situations that arise on the ground. Currently they may live with a situation both parties know is not as good as it could be as they are not empowered to change.

It should be remembered that in many areas of legislation that we face today we are entering new areas that have not been legislated on before. Therefore, in a sense, we are all learning what the best form and type of legislation to deliver the outcomes we desire will be.

It is not surprising then, that as we learn how to tackle these situations better we will refine and change the legislation.

As in anything we do in life, we seldom get it perfectly correct at the first time of asking so we have to accept that changes might need to be made in these areas of new legislation.

Our recommendation is that RRG work with Government and Regulators to develop a system of empowerment which allows relevant officials in Regulators and government, working within clearly defined criteria, to change the way legislation is administered and to bring practical proposals to the attention of their senior management who can then discuss with Government how the legislation might be changed.

As is stated above this should be a 'common sense' measure so that the desired outcome from a regulation is met in a sensible manner rather than concentrating on process issues which we feel is the case too often currently. Indeed it may mean that the outputs are not reached.

It would also allow, we believe, Regulators to start to bring a more flexible approach to the way they deal with differing businesses with 'light' and 'harder' touches where appropriate, and carrots as well as sticks to encourage real change.

5. Regulators

Our discussions with all the Regulators we have dealt with to date have been both useful and positive. There is a universal desire to want to make what they do as beneficial as possible and recognise that business needs to be their partner rather than opponent in creating the solutions that are required across all that they do. That some of the Regulators are part of UK bodies and others are not makes no real difference other than the specific issues we have raised in the section above on

Westminster and EU legislation. The RRG is also aware that regulators often suffer from pressing resource constraints which inhibit their ability to deliver functions effectively for all parties.

Also we believe that their more focussed and day to day involvement in the creation and review of legislation will add greatly to how they perform.

More generally though we believe that the business models some of them operate under may also lead to them not performing as well as they would wish and we have two recommendations which we believe would help alleviate this in two specific areas.

Business models have a tendency to drive behaviour and currently we believe that the business models of at least two of the Regulators could lead to the wrong behaviour.

Some Regulators are constructed on a model where their funding comes from a mixture of Government grant funding and the raising of revenue by the Regulator in terms of licence fees, fines etc. We should state we have seen no evidence of this but it is still a concern that Regulators could be driven by their desire to raise revenue which highlights compliance and not development.

Also as is stated above some Regulators may wish to give businesses carrots as well as sticks for carrying out change themselves without the Regulator having to enforce it. We have examples where Regulators currently have to charge business for doing something which they have done of their own accord which does not help change hearts and minds as the business feels it is being penalised for taking positive action.

On a wider scale some of the restrictions on working under the NDPB model can lead to this same inflexibility plus involve management in issues which detract from their real focus.

Our recommendation is that we work with Regulators and Government to develop a more effective business model which would drive the behaviours we all want to see of empowerment and better regulation, which will include both looking at how certain regulators are financed and also how the NDPB outcomes may be delivered in a way that helps them achieve better outcomes.

However, without the people in the Regulators to achieve that, any new business model that we create may well be ineffective which leads us to another concern that we have found as we have discussed issues with Regulators. Across many areas of regulation it is proving difficult to bring young people into their industry. This is true from Trading Standards, to Food Inspections, to Environmental Health, to Occupational Health, and some Regulators are concerned that without the ongoing influx of new staff they may be unable to fulfil their obligations in the future.

We believe that **this is an issue that needs to be addressed and would ask that the appropriate Cabinet Secretary meets with the Regulators and the Local Authorities concerned to look at how this challenge may be resolved.** Skills

shortages in this area are as concerning as in any industry and given the culture changes we are proposing, even more so.

6. Measurement of regulations and other issues

Measurement of the impact of regulation over recent years has been the subject of much debate and indeed of not insignificant cost in trying to find an answer. We have looked at all that has been done and are still not convinced that anyone has as yet come up with a sensible or realistic figure and indeed some question if it is worth seeking. The recent Enterprise White paper from BERR sets out a new desire to put in place Regulation Budgets across Westminster Departments but first needs to calculate how it does that so we will watch and participate with interest if it comes up with a better answer than previously in place. Also we understand that even if put in place the Regulation Budgets will not apply to new large areas of Government policy like Climate Change where the outcomes are still unclear.

In all the conversations that we have had about measurement perhaps the most fruitful was with the Finance and Regulation Minister for the State of British Columbia in Canada who in 2001 counted the number – not the impact – of pieces of legislation they had which impacted on business and consumers. We asked him why they had not then gone on to work out the financial impact and cost of each to get a total value and his reply sums up our view which was ‘The benefit of finding out what it was, was not worth the cost in doing so.’ Also, interestingly, British Columbia has not created a large resource to monitor progress but trusted each Department to do the task they had been given in a sensible way. We would support that approach.

However, we understand any Government or stakeholder desire to know where we are starting from so we recognise the importance of providing some kind of a base line although we would be reluctant to set targets to decrease as our thrust is always on better regulation not necessarily less.

Other Issues

The RRG has also been asked its opinion on other issues including ‘one in - one out’ and common commencement dates. Neither have been our focus as in our opinion they are peripheral issues in terms of what it is we are trying to achieve in terms of a system of better regulation for business and Government in Scotland.

We have never been convinced of the merits of ‘one in one out’ especially as it can be used and manipulated to give a desired result. It takes no account of the impact of what is coming in or out.

On common commencement dates we can see the sense in grouping like legislation together to, if nothing else, make sure that it is examined together. However a single or dual commencement date could in effect get in the way of better regulation on occasion and it is interesting to note that having asked for it some Trade Associations are now questioning it on the grounds that it prevents business from introducing regulation when it wants as well.

However, as we move forward into our second year we will look at these in more depth but still feel they are at the periphery of the real culture change that we need to invoke to produce sustainable better regulation.

7. New Issues for Year 2

As we move into our second year we will obviously continue to work to ensure that the recommendations set out in this report are implemented.

In addition there are also a number of issues which we want to develop further including ways of reviewing specific legislation, which we highlighted in our Interim Report. We will work in partnership with the Scottish Government to develop methodologies to not only review specific legislation but look at ways of identifying those worthy of review as well.

However there are other areas where we will expand our work including:

A. Competitiveness

We will expand the work we have already begun of looking at how specific legislation and regulation effects our competitive position both within the UK and further afield by examining more specific examples of where it appears it costs Scottish business more, in whatever form, to implement or comply with legislation than its competitors elsewhere.

B. Other Government Bodies and Agencies that impact on business

Other Scottish and UK agencies work with business and have regulatory requirements (e.g. forms, statistics) and the RRG's needs to understand and examine that they are necessary, appropriate, and proportionate. In the next few months we will work with the Scottish Government to identify these agencies but they will include, for example, Scottish Enterprise, Highlands and Islands Enterprise, and Skills Development Scotland. We will examine and review whether these agencies act in a way that empowers their staff to measure risk with compliance within good common sense and like everything else understand that they are in a partnership with obligations on both sides.

C. Local Authorities

A part of the legislation that business is involved with is delivered by Local Authorities and we need to examine firstly if local authorities understand they have a legislative responsibility in this area and also, where they do deliver regulation or work alongside Regulators they do so in a way that avoids duplication, and is appropriate.

Also, we need to look at areas where Local Authorities may gold plate national legislation which adds cost to themselves and business. For example, while there are national standards for Care Homes across Scotland which the Care Commission was established to ensure compliance with, many councils have set higher standards. This means that they have their own compliance measures outside the

Care Commission and their own internal inspection teams. We find it difficult to understand why there needs to be gold plating in this area unless the national standards were set too low, which appears not to be the case. This gold plating adds an extra responsibility on business as well as taking up Local Authority resource that could be spent on other issues.

In summary, therefore, the RRG feels at the end of its first year that it has learned much and now understands better where the focus of its work should be in bringing Scotland to where we, and the Scottish Government, want it to be, that is leading the way in delivering appropriate and proportionate better regulation. We are heartened by the support we have had from the Scottish Government and others in implementing our recommendations some of which we know will be challenging to achieve. As we said at the outset of this report this will involve a major change in culture across many areas and without leadership that is unlikely to happen. While we can provide direction and some of that leadership the main strength must come from The Scottish Cabinet as without its support much of what we wish to achieve will not happen or be diluted.

Regulatory Review Group
July 2008

Remit and Composition of the Regulatory Review Group

The Regulatory Review Group (RRG) was set up in December 2004 to examine the issue of regulation. It is an industry-led group made up of representatives from the main business organisations and its work involves identifying regulations that are causing business concern and investigating areas for review.

In June 2007 the First Minister announced a re-invigoration of the Group under the Chairmanship of Professor Russel Griggs with a remit to:

- continue with its original role, to try and resolve specific problems and regulations that were causing Scottish businesses concern;
- formulate a strategic approach and to develop processes to improve the regulatory landscape such as making recommendations for improving the Regulatory Impact Assessment (RIA) process;
- advise the Scottish Government on all aspects of its Better Regulation agenda, including measuring compliance costs to business, one in one out, proposals for a Local Better Regulation Office etc;
- act as a truly independent and informed monitor, helping to co-ordinate, review and judge the Scottish Government and its regulatory agencies Better Regulation performance;
- report annually, helping the Government in its work to improve the regulatory environment for business.

Membership

Chairman - Professor Russel Griggs - Confederation of British Industry (CBI)
Niall Stewart - Scottish Council for Development of Industry
Garry Clark - Scottish Chambers of Commerce
James Withers - National Farmers Union of Scotland
Charlotte Barbour - Institute of Chartered Accountants of Scotland
Jim Gorie - Forum of Private Business
Stephen Boyd - Scottish Trade Union Congress
Susan Love - Federation of Small Businesses

The following people have observer status within the Group:

Kyla Brand - Office of Fair Trading
Trisha McAuley - Scottish Consumer Council
Robin Hayes - Scotland Office

Annexe 2

List of Bodies and individuals the RRG (and IRU) have engaged with and material viewed

Regulators:

- Scottish Environment Protection Agency (SEPA)
- Health and Safety Executive (HSE) Scotland
- Food Standard Agency (FSA) Scotland
- The Care Commission
- Accountant in Bankruptcy (AIB)
- Scottish Natural Heritage (SNH) - meeting scheduled for July 2008

Government:

- Director Generals in Scottish Government
- European and External Relations Committee
- SG European Unit officials
- Hon Rick Thorpe, Minister of Small Business and Revenue & Minister Responsible for Regulatory Reform in British Columbia. Viewed a hard-copy of their Regulatory Reform Initiative followed by a tele-conference with Rick Thorpe
- Baroness Shriti Vadera, Parliamentary Under-Secretary of State for Business and Competitiveness
- Scottish Procurement Directorate
- Climate Change Bill Team
- Representatives of the main political parties in Scotland
- Better Regulation Executive
- Risk and Regulatory Advisory Council (RRAC)

Other Bodies/Individuals:

- Local Better Regulation Office (LBRO) – Chief Executive (Graham Russell) and Director of Policy (Jane Martin)
- David Thomson, Chairman of SCOTSS (Society of Chief Officers of Trading Standards in Scotland)
- Business Experts Law Forum (BELF)
- CoSLA – Lindsay McGregor
- Chemical Industry Regulatory Forum – Dr Peter Wormald
- Trade Association Forum (TAF)
- Scottish Association of Meat Wholesalers

Annexe 3

Specific Issues addressed during the year

Waste Management Review

Company Accounts

Sect 57 (2) of the Scotland Act

Stamp Duty Land Tax Process

Dispute Resolution

Confidential Invoice Discounting

Care Homes/Care Commission – business compliance issues

Sub Sea Submersibles

“One in, one out”

Maternity/Paternity Regulations

Local Better Regulation Office

Macrory Review

Climate Change (Scotland) Bill

Planning Bill

Davidson Review of Gold Plating of EU Legislation

Crerar

Strengthening and Streamlining the Way Forward for the Enforcement of Environmental Law in Scotland

Licensing

Summary of Interim Report

‘What is proposed 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:

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.’

‘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.

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.

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

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

It 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.'

BIA Questions

1. What is the objective of the bill/legislation at a strategic level? (e.g. 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.