



Federation of Small Businesses
Ffederasiwn y Busnesau Bach
The UK's Leading Business Organisation
Mudiad Busnes Blaenllaw y DU



Better Regulation for Wales



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The Federation of Small Businesses

The FSB Wales is non-profit making and non-party political.

The Federation of Small Businesses is the UK's largest campaigning pressure group promoting and protecting the interests of the self-employed and owners of small firms. Formed in 1974, it now has 200,000 members across 33 regions and 194 branches. FSB Wales currently has around 10,000 members, a Welsh Policy Unit, two regional committees and twelve branch committees meaning FSB Wales is in constant contact with small businesses at a grassroots level in Wales.

Foreword

Whatever business you are in, you will be regulated by someone. Whether it is the local authority, Natural Resources Wales or the Health and Safety Executive, regulators come in a variety of forms.

Regulation has an essential purpose. It fulfils the important role of setting out clear standards that can be enforced. Such standards are needed for a variety of reasons, they ensure that our food is safe and that dangers in the workplace are minimised.

Well-drafted regulation can make it easier for businesses to adhere to the standards that are expected of them. It can also remove potential barriers to economic growth.

But where regulation and the attendant guidance is poorly drafted, it can mean that those who run businesses may have to spend more time than necessary completing paperwork.

In the absence of clarity in regulations many public servants, whose role it is to enforce

regulation, face a difficult task in balancing competing concerns and this can often lead to ineffective results for all involved.

Poor regulation can also mean that enforcement varies significantly, not only between different authorities, but also between individual inspectors.

In this paper we call for the Welsh Government to adopt a better regulation approach. We need to ensure that regulation is handled in a sensible and proportionate manner that makes it clear what businesses need to do to comply and makes it as easy as possible for them to do so.

At FSB Wales we believe that a better regulation approach for Wales can benefit both those who are regulated and the regulators themselves. It is time that Wales properly embraces better regulation principles so that we have a system of regulation that our modern nation requires.

Janet Jones
Chair, FSB Wales Policy Unit

At FSB Wales we believe that a better regulation approach for Wales can benefit both those who are regulated and the regulators themselves.

Executive Summary

Greater devolution to Wales has increased the scope and breadth of powers available to Welsh Government and the National Assembly to regulate in Wales. This has not been accompanied by the development of a *Better Regulation* agenda as it applies in Wales, despite notable developments elsewhere in OECD countries.

Businesses in Wales now have three main sources of regulation to comply with: the National Assembly for Wales, the UK Parliament and the EU Commission. The Welsh Government should seek to improve the process of creating regulation to ensure new legislation accurately measures the impact on public bodies and businesses.

A number of EU countries have developed *Better Regulation* policies to ensure regulation achieves important policy aims whilst ensuring the burden on businesses is proportionate. In particular, Sweden and the Netherlands have developed innovative policies in this area, seeking to accurately measure

the cost to business of regulation and setting stringent targets for reductions in regulatory costs. Both also place a strong emphasis on dealing with EU regulation.

The Welsh Government should make a clear statement of intent on regulatory policy, creating a *Better Regulation* agenda for Wales. The first step in delivering this would be to assign a Welsh Government department the responsibility for regulatory reform. This could reside with the First Minister's Delivery Unit or a reformed Welsh Treasury. Ultimately, this should seek to deliver;

"a noticeable, positive change in the day-to-day operations of businesses".

The Welsh Government should establish a Regulatory Reform Group for Wales, building on the Dutch and Scottish examples. This would serve as a focal point for private sector and SME engagement with the agenda within central government and should encourage best practice in the creation and delivery of regulation. It should also

Businesses in Wales now have three main sources of regulation to comply with: the National Assembly for Wales, the UK Parliament and the EU Commission.

be supported by a dedicated team within the Welsh civil service.

This could cost between £500,000 and £1,000,000 to implement annually but would be an investment in a more competitive private sector, drawing on existing invest-to-save principles.

The proposed Regulatory Reform Group for Wales would work with the Welsh Government's lead department on *Better Regulation* to inform future Regulatory Impact Assessments. Crucially, this process would be embedded across government departments at an early stage in the policy-making process.

Following the example of the Netherlands, the National Assembly for Wales should adopt a Practicability and Enforcement Assessment process. This would ensure any regulation that is created would have a reasonable chance of achieving its stated aims.

Currently, the Welsh Government commissions the *Better Regulation* Delivery Office (BRDO) to deliver schemes such as the Primary Authority Scheme in Wales. While this is welcome, there is considerable room for improvement in policies aimed at dealing with the delivery of regulation by local authorities and public bodies in Wales.

The Regulatory Reform Group for Wales would take a lead in commissioning work to improve delivery of regulation across Wales. This would build on the current programme led by the BRDO and would seek to ensure practical enforcement is taking place in line with proportionate and risk-based approaches to regulation.

Finally, the Welsh Government should place the Regulators' Code or an equivalent on a statutory basis. The Welsh Government should also monitor developments in Scotland with the Scottish Government's Regulatory Reform (Scotland) Act 2014 and introduce a Regulatory Reform (Wales) Bill to deliver on the objectives set out above for Wales.

Following the example of the Netherlands, the National Assembly for Wales should adopt a Practicability and Enforcement Assessment process.

1. Introduction

The regulatory reform agenda in the UK has developed significantly during the last few decades, seeking to reduce the impact of regulatory burdens on business whilst protecting people and the environment from harm.

There have been significant milestones in the *Better Regulation* agenda from parties of all colours, including the publication of the Hampton Principles of regulation, the foundation of the Regulatory Policy Committee in 2009 under Labour and the current coalition government's One In Two Out policy and Statement of New Regulation publications¹.

However, the pace of change at Parliament and Whitehall has been diluted in Wales as the embryonic National Assembly for Wales (and of course the Welsh Government) has gained greater autonomy. The culmination of this was the 2011 referendum on primary legislative powers, empowering the National Assembly for Wales to develop primary and secondary legislation on a wide range of issue affecting businesses in Wales.

This means that the need for a distinctly Welsh *Better Regulation* agenda has never been greater. The National Assembly can now legislate on a large number of business issues whilst the Welsh Government has a direct role in the delivery of regulation. The impact of this takes effect at many levels.

The gaping void in this area has left businesses and regulators unsure of their joint objectives, leading to a number of unanswered questions, such as: which Minister has the lead for this in Welsh Government? What is the direction of travel in terms of regulatory burden and how will this be achieved?

The way the National Assembly for Wales creates legislation also needs to be reviewed, focusing on Regulatory Impact Assessments. Most recent National Assembly guidance on this issue relates to the Measures system which is now significantly out of date². At a time of growing legislative capacity, this is not acceptable and a system more befitting of a national parliament is necessary.

The National Assembly can now legislate on a large number of business issues whilst the Welsh Government has a direct role in the delivery of regulation.

Delivery of regulation is perhaps the most important aspect of regulatory policy. How does guidance for enforcement officers impact on businesses? Many businesses complain about heavy handed enforcement. This is not necessary when other nations provide risk-based, proportionate approaches to regulation that have generated significant good practice.

The *Better Regulation* Task Force claimed that the regulatory burden on UK Business was £100bn in 2005³. Data on how large this burden is in Wales is unavailable but making an assumption based on Wales' GVA or population share would lead to an estimate of between £3.5bn and £4.8bn. Most recent figures for Wales compiled for 2012 show a total Workplace GVA of £47.3bn⁴. Therefore, not taking into account inflation since 2005, the costs of regulation could be anything between 7 – 10% of Welsh GVA annually. While this is a relatively conservative estimate using the limited data available, further examination is needed on the state of play in Wales.

That is not to say this regulatory burden is unnecessary, many of the rules relate to social or economic regulation that achieves important policy objectives. However, it does highlight the margins within which a smart approach to the regulatory burden in Wales could drive competitiveness whilst achieving serious policy aims. In examining the case for a *Better Regulation* agenda for Wales, this document draws on case studies from across Europe and other OECD countries.

***Most recent
figures
for Wales
compiled
for 2012
show a total
Workplace
GVA of
£47.3bn***



2. Diagnosing The Problem

Wales can create a competitive regulatory environment without having to re-invent the wheel. Examples of good practice exist across Europe and beyond that could be adapted and adopted in Wales. We have a largely blank sheet of paper to work with so bold action could lead to significant results for Welsh businesses and regulators.

In recognising the importance of regulatory burdens to micro-businesses, the Welsh Government's Micro-Business Task and Finish Group, which reported in January 2012, said the following in relation to Welsh regulation:

*"Although this is arguably an area in which the Welsh Government has fewer direct policy or legislative levers, it is perhaps worth exploring some of the approaches that other governments have pursued, not least in the context of the new legislative powers the Welsh Government now has following the recent referendum."*⁵

The Task and Finish Group rightly identified the need to examine other countries' approach to regulatory reform. This document takes this further by describing the policy, process and delivery aspects of several European countries' *Better Regulation* policies. The inspiration for this analysis comes from the OECD's examination of regulatory reform in the EU15 project⁶.

Regulatory reform should not be about policy formulation. Rather, it should seek to ask whether regulation is the best means of achieving a policy's aims. If regulation is the answer, it should seek to quantify the impact and ensure that any regulation developed has a limited and proportionate impact on businesses whilst achieving the policy's aims.

This approach was perhaps best encapsulated in the Hampton Principles, set out by Sir Philip Hampton in his review entitled:

*'Reducing administrative burdens: effective inspection and enforcement'*⁷.

Regulatory policy in Wales

What is regulatory policy?
The OECD describes the *Better Regulation* agenda as:

*"... (A)n explicit, dynamic, and consistent 'whole-of-government' policy to pursue high-quality regulation. A key part of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance is that countries adopt broad programmes of regulatory reform that establish principles of "good regulation", as well as a framework for implementation. Experience across the OECD suggests that an effective regulatory policy should be adopted at the highest political levels, contain explicit and measurable regulatory quality standards, and provide for continued regulatory management capacity".*⁸

To date, there has been very little development of a *Better Regulation* policy from Welsh Government meaning that as the capacity to increase regulation has grown in Wales, the *Better Regulation* agenda has not progressed.

During the third Assembly the then Minister for Finance and Public Service Delivery, Andrew Davies, set out a policy for inspection, audit and regulation for Wales, the closest example of a coherent policy statement.⁹

This had four key components. Firstly, there was a contract with the *Better Regulation Delivery Office* (BRDO-formerly the *Local Better Regulation Office*) via the Department for Business, Innovation and Skills for the delivery of support and guidance for the primary authority scheme¹⁰. This is still in operation and is supported by £200,000 from the Welsh Government's Communities and Local Government Department according to most recent information¹¹. This is discussed further in the delivery section of this report.

Secondly, there was a statement of expectation that the Hampton Principles would be applied with regard to the statutory requirements of Welsh Assembly Government policies¹². The wording of the statement allowed for an expectation only, however, meaning that in practice regulatory bodies are not compelled to heed best practice, something to which all regulators in Wales should aspire.

The third element of the statement sought to create reporting mechanisms of 'external review bodies', that is bodies involved in inspection, auditing and regulation, to assess the impact of proportional approaches to regulation to be implemented with the 2009 – 10 year as the first annual report¹³. The first and only annual report labelled progress at implementation as 'ongoing' and 'in-progress' without any firm timeframe for delivery¹⁴.

There have been no subsequent reports in this area.

Finally, the statement called for the Regulators' Compliance Code to be made applicable to all regulatory functions in Wales through Welsh Ministers' statutory powers by March 2010¹⁵. The Regulators' Compliance Code is a code designed by the UK Government to crystallise the Hampton Principles for non-economic regulators¹⁶. A recent BRDO publication supported by Welsh Government and BIS suggests, however, that this has not yet taken place¹⁷. Furthermore, the UK Government has since updated the Regulators' Compliance Code in 2013. Therefore, the current Code applies only to non-devolved functions operating in Wales and has not been formally implemented by the Welsh Government.

Sir Philip Hampton set out core principles for better regulation in his influential 2005 report entitled *'Reducing administrative burdens: effective inspection and enforcement'*. The Hampton Principles are as follows:

- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take
- No inspection should take place without a reason
- Businesses should not have to give unnecessary information, nor give the same piece of information twice
- The few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions
- Regulators should provide authoritative, accessible advice easily and cheaply
- Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work
- Regulators should recognize that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.

This therefore does not suggest a positive environment currently exists in Wales.

While the 2009 statement is clearly welcome it is limited in its reach and provides little resource to effect change. It was also quite clearly made in a context of limited legislative power for the National Assembly with an expectation that the frameworks would be designed at Westminster. For instance, the report states:

*"We work with the Better Regulation Executive in the UK Government and with the Local Better Regulation Office to promote a consistent approach across the UK"*¹⁸.

While this may have been appropriate for the pre-2011 competencies of the National Assembly, it is not fit for purpose in today's Wales. Indeed, there are quite clearly three drivers of business regulation in Wales today: namely the National Assembly, the UK Parliament and the European Union.

It is only at the devolved level, however, that we find an absence of *Better Regulation* policies and this is operating in a context where the Welsh Government admits that *"new regulations over time and differing patterns of organising how they are enforced has resulted in a complex system"*¹⁹.

Looking forward, the Welsh Government's current Programme for Government has little to say on regulation and made no commitment to *Better Regulation* principles. Where reference to regulation was made, it was around increasing the regulatory burden, for instance

*"Use building regulations to move towards zero carbon building"*²⁰. Whilst this might be to deliver positive policy outcomes, there was little recognition of the burdens this might place upon the companies concerned, leading to an absence of robust cost-benefit analysis.

For micro firms in particular regulation can be a barrier to growth with the Micro-Business Task and Finish Group suggesting that the Welsh Government should *"(Simplify) regulations within Welsh Government powers (across all departments) to make it easier for micro-businesses to sustain and grow their businesses"*²¹. In response, the Welsh Government stated only that it would continue its work with the BRDO without providing any new initiatives or resources to the *Better Regulation* agenda²².

Therefore, now is the time to examine the Welsh approach and carve out an agenda that drives competitiveness. The recent BRDO mapping document has reiterated this sense of urgency, stating:

*"Following the creation of Natural Resources Wales, and as Welsh law making powers bed in, now is a good time to take stock of the regulatory system to understand its scale and complexity"*²³.

Regulatory Impact Assessments

In Wales, any new legislation is accompanied by a Regulatory Impact Assessment (RIA) as set out under Section 76 of the Government of Wales Act 2006 which dictates that Welsh Ministers must make a code for their application.²⁴ However, the interpretation of this duty is merely procedural. It is for

the Welsh Government to decide on regulatory policy in Wales. The most recent guidance in this process for Welsh legislation was set out on 20th October 2009 and focused exclusively on the National Assembly's then limited Measure making capacity as well as subordinate legislation.

While secondary legislation is still very important in devolved areas, the Measure making and LCO process is now defunct. However, the system set out under this code continues. This is despite an obligation to periodically review the appropriateness of the code, which is now almost five years out of date.

The process set out in the code states that the Welsh Ministers should draw up RIAs to accompany any Welsh legislation. This means the RIAs are completed in-house with the relevant government department taking the lead on assessing the impact of new regulation with the help and guidance of the Strategic Planning Finance and Performance Department.²⁵

The recent review of the Welsh Government's Business Scheme highlighted the weaknesses in the current system. The review included consultation with Wales' Social Partners, organisations representing the private sector and the trades unions. It concluded that:

*"Social partner organisations generally believed that the Impact Assessments prepared by the Welsh Government to assess the effect of new policy and legislation on business were either poor or non-existent. A particular concern for social partners is that the Welsh Government does not always assess or recognise the cumulative effect of policy changes and legislation"*²⁶.

Case Study

“My business provides propane and butane gas products to domestic and commercial customers across Wales. We currently operate across a number of sites in mid and north Wales. Our products are heavily regulated by European legislation and as a result by UK authorities such as the Health and Safety Executive. As such, our contact with Welsh Government regulation is limited.

Our most recent involvement with Welsh regulation relates to the recent passage of the Welsh Language Measure. At the outset, as a company dealing with gas, we were included in the proposed measure. This was because one of the targets of the legislation was the ‘big six’ energy companies that supply to domestic consumers. We were fortunate enough to provide evidence to an Assembly Committee examining this issue and set out our case for why, as an SME working in a very different market to large utility companies, we should be excluded from the legislation. This was accepted by the Welsh Government in the final Measure.

Our only disappointment with this process was that it was only by chance that we found out about the legislation and were able to become involved in its passage. This suggests that the Welsh Government and National Assembly engagement with business is ad hoc and this could be improved in the future.”

The review went on to call for an improved process for assessing the impact of regulation on Wales’ firms.

Best practice elsewhere in the UK and more widely suggests a degree of independence in this process is beneficial in ascertaining the true cost of regulation. This is not present in Wales at the moment. However, the Welsh Government has recently recognised change is needed with a joint BIS and Welsh Government mapping document stating that:

“the Welsh Government plans in the longer term to develop a methodology for assessing the cumulative impact of its programme of legislation on key stakeholders and sectors. In particular, this will assess the cumulative regulatory burden and impacts on sectors affected by the current legislative programme”.²⁷

Whilst this statement is undoubtedly welcome, it lacks the urgency needed to ensure Wales’ regulatory burden is carefully assessed and serves not to over-burden business.

Delivering regulation

Wales has a number of regulators that deliver regulation set out by Welsh Government. These include local authorities as well as public bodies such as Natural Resources Wales and the Food Standards Agency²⁸. A common concern amongst FSB Wales members is that, in practice, delivery of the regulatory agenda is heavy handed and inconsistent. For example, a recent survey of FSB Wales members highlighted that 57 per cent of members believed regulation would increase as a result of Welsh Government policy. Significantly, only 1 per cent believed there would be a decrease²⁹.

While there is a multitude of organisations involved in delivering the regulatory agenda, there is little in the way of best practice in how to ensure that regulation is applied proportionately. For instance, the Hampton principles encourage a risk-based approach that is largely absent in Welsh enforcement as discussed previously.

Interestingly, some of the work done by Westminster extends to local authority functions that are not devolved, so the agenda is not entirely unfamiliar to Wales. However, there is little by way of Welsh Government support for best practice in delivering regulation in Wales, with the exception of a project with the BRDO from the Department for Business, Innovation and Skills. This is funded by a £200,000 grant to the BRDO which BIS describes as:

“Welsh Government has supported a bespoke regulatory delivery-focused programme of work in Wales since October 2009 through an annual grant allocation of £200,000. This is used primarily to fund the co-ordination of the work programme by a dedicated BRDO officer working in Wales and its delivery by a range of BRDO staff”.³⁰

The involvement of the BRDO in aiding the delivery of schemes such as the primary authority scheme in Wales is undoubtedly welcome.

However, the very limited funding made available for improving delivery suggests this issue is undeveloped in Wales. As a result, businesses cannot be confident that they are being regulated proportionately and effectively by regulators in Wales. Furthermore, when compared to other UK nations, a larger number of members in Wales report an increase in the cost of regulation over the last year (see Figure 1)³¹.

Notably, in a recent UK wide survey, 61 per cent of respondents stated that the cost of complying with regulation was more than £1,000 per year, with a further 10 per cent claiming it cost £10,000 per year or more. This would suggest that the quality and equitability of regulatory enforcement can have a significant impact on the economic well-being of many of Wales' micro, small and medium-sized enterprises. Information from the FSB UK report, Regulatory Reform: Where Next? outlined in Figure 2 below highlights the aspects of regulatory compliance that were deemed challenging³².

This would suggest that the time involved in compliance and the regular changes in regulations are difficult for small firms to manage. Moreover, 47 per cent suggested completing paperwork and filling in forms were significant challenges. When considering the sheer range of areas where regulation impacts upon FSB Wales members, there is clearly a need for the agenda to be pursued at a devolved level.

Figure 1 Q12. Has the overall cost of complying with regulation increased, decreased or remained the same over the past 12 months ? (Base: 1943; Wales; 97)

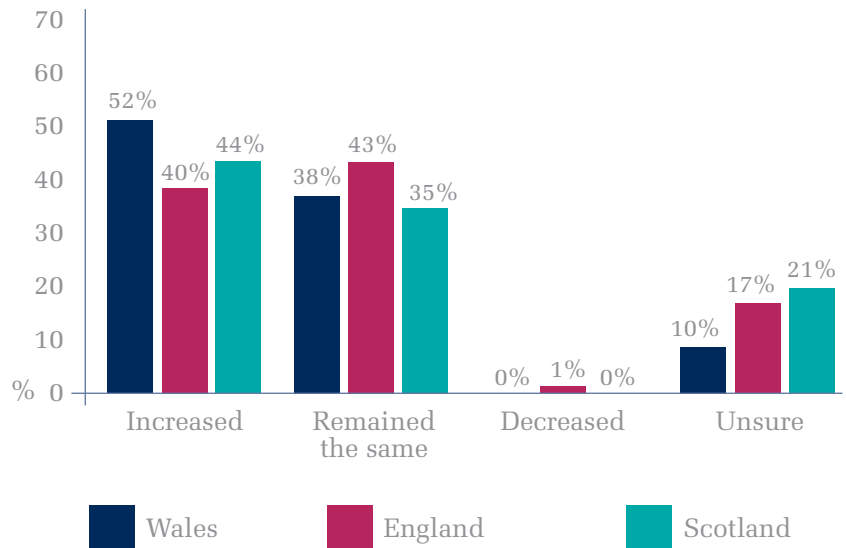
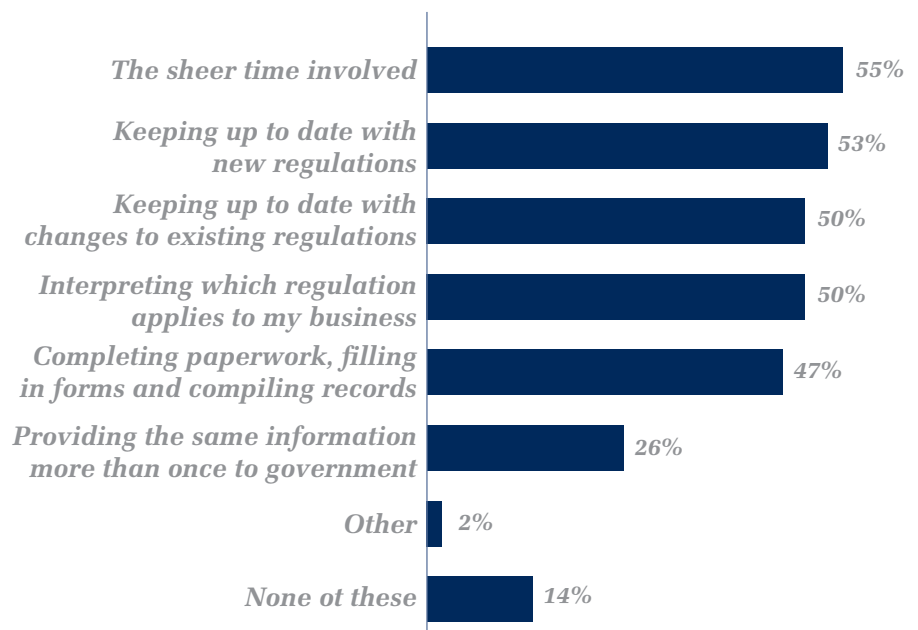


Figure 2: Challenges of regulatory compliance'



Question: Which of the following aspects of regulatory compliance do you find most challenging to deal with, if any ? (Base: 1,669.)



Case Study

“I run an estate and lettings agency and also operate on behalf of a building society. The business has been operating for around 28 years and employs around 8 members of staff in the local area. We recently came across regulation around the planning system in Wales, specifically relating to advertisements on our premises. Noticing that many other businesses locally had similar advertisements on their buildings, we installed a sign describing our services on the side of the premises.

The local authority was quick to respond to our sign and issued us with an enforcement notice asking us to remove the sign or apply for planning permission with a fee of £360. Unfortunately, the correspondence related to a different property and appeared to describe the situation of another business. When queried, another letter was issued again with incorrect details. After significant correspondence the local authority finally issued a response with correct and relevant information and we were able to acquiesce accordingly. The fee for planning permission was corrected to £90, which was significantly different to the original quotation of £360; however we were strongly discouraged from applying for permission in correspondence from the local authority department. Our experience of this process was time consuming and it was difficult to ascertain the necessary information from the local authority.”

The Welsh Government recently provided additional funding to the National Audit Office for a survey of business perceptions of regulation³³. This suggested that 40 per cent of businesses in Wales thought that dealing with local authorities was a burden compared to a UK figure of 30 per cent. This is a concern as many regulatory functions are exercised by local authorities. Wales also has a greater level of employment with small firms compared to the rest of the UK, firms that are unlikely to have resources available for dealing with regulatory burdens³⁴. Furthermore, it states that 35 per cent of businesses in Wales report inconsistency between local authorities with only 19 per cent believing the approaches to regulation from government were joined up. Clearly there is a lot of work to be done on the delivery of regulation for businesses in Wales.

When considering the sheer range of areas where regulation impacts upon FSB Wales members, there is clearly a need for the agenda to be pursued at a devolved level.

3. Approaches to Regulation Elsewhere

In order to understand the best approach to regulatory reform in Wales it is beneficial to examine best practice from elsewhere in Europe and beyond. This section will begin by analysing approaches taken by other governments in the OECD and will draw conclusions on the lessons learned for Wales.

Sweden

The *Better Regulation* agenda in Sweden is now well established after a period of consolidation since 2006. One of the weaknesses noted pre-2006 by the OECD was the patchy existence of regulatory policies that were not integrated in a formal whole of government policy.³⁵ This was rectified with the announcement of the *Better Regulation Programme* in autumn 2006, accompanied by the Action Plan for *Better Regulation*.³⁶

The policy rests on five main priorities, reported annually to the Riksdag and is supported by a simple guiding principle which is

“to achieve a noticeable, positive change in the day-to-day operations of businesses”.³⁷ The first is the accurate measurement of administrative costs to businesses of regulation. This established a baseline of costs from regulation to businesses and set a monitored target reduction of 25%. Secondly, the Swedish Government also strengthened its impact assessment process and set strong guidance on proportionality.

The third reform was to create the *Better Regulation Council* a body that examines the form and content of proposals for new and amended regulations that could have a significant impact on the conditions under which businesses operate. This was done in tandem with high levels of consultation with the business sector, which was the fourth element of the policy.

Finally, an action plan for better regulation was drawn up, reporting annually on the work done to simplify regulation. This increased transparency and set measurable targets, objectives and outcomes. The Swedish example provides an

interesting context for Wales and highlights how *Better Regulation* policies can be rooted in day-to-day business activities.

Aside from domestic regulation, Sweden also has specific measures in place to deal with the transposition of EU Directives. These account for around 50 per cent of the administrative burden on businesses³⁸.

This source of regulation is described by the OECD as “a prominent aspect of Swedish preoccupations over *Better Regulation*” with significant emphasis placed on influencing regulation at all stages, from the EU Commission level through to transposition and implementation³⁹. Importantly, transposition normally takes place via the relevant department, but with oversight from the Prime Minister’s Office EU Co-ordination Secretariat that provides guidance on issues such as the avoidance of gold plating⁴⁰.

Case Study

“As a company providing recycling services we are actively regulated by Natural Resources Wales (and previously the Environment Agency) and various local authorities. We currently provide services to local authorities, as well as commercial operators. Our experience of regulation in Wales is therefore broad and varied. Following changes to cost recovery procedures for local authorities, we have seen a significant rise in the number of compliance visits from officers. This has led to a situation where we were inspected very infrequently, to a situation where we are inspected four times a year at a cost to the business of £280 per visit. While our business is compliant, this has added to the cost of the regulatory process. Given the nature of our business, we have to deal with local authorities outside of our area and this sometimes leads to additional complexity and time requirements.

In terms of regulation by NRW, we are charged around £20,000 in terms of subsistence fees and compliance visits. We submit data reports on a monthly, quarterly and annual basis on the environmental state of the sites we operate. This results in costs in presenting the data in a format acceptable to NRW and roughly 1.5 days of staff time per submission. We have recently discovered that larger businesses that are similarly regulated have moved towards a less onerous system whereby the data is collated but submitted only on an annual basis, with an assumption that if the trends become of concern the full reporting system could be reintroduced. An audit and inspection process that takes such a risk based approach could be of benefit to our business.”

Scotland

The Scottish Government recently passed the Regulatory Reform (Scotland) Act 2014 at Holyrood, marking the next step in the *Better Regulation* policy agenda which has existed under the three previous Scottish Governments⁴¹. As a devolved nation in a UK and European context, the Scottish agenda resonates well with the situation in Wales.

FSB Scotland has previously engaged with this issue, highlighting central government's role in Edinburgh in providing the guidance and support needed for local authorities and other public bodies to deliver *Better Regulation* whilst ensuring the impact of new regulation is proportionate⁴².

The Scottish Government's *Better Regulation* agenda seeks to:

*“...support the Economic Purpose (to focus Government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth) and all the related elements of the National Performance Framework”.*⁴³

The policy aims to eliminate “obsolete and inefficient” regulation by championing the five principles of better regulation – Proportionate, Consistent, Accountable, Transparent and Targeted. There is also a commitment to measure the impact of regulation by using ex ante impact assessments called Business and Regulatory Impact Assessments (BRIA).⁴⁴ Since their introduction in 2010, BRIAs have been subject to annual reporting mechanisms to highlight regulatory impact.

While BRIAs have undoubtedly been a step forward for regulatory impact assessments in Scotland, there are still concerns around how embedded they are in the regulatory process. For instance, the Regulatory Review Group recently raised concerns that the development of BRIAs is frequently seen as an additional task rather than integral part of policy development and this inhibits BRIAs being implemented early on in the policy-making process⁴⁵. However, anecdotal evidence suggests businesses involved in the BRIA process have found it informing and beneficial, leading to better regulatory outcomes.

The final pillar of the Scottish Government's regulatory policy is to work with regulators on delivery at a local level by liaising with its Regulatory Review Group (RRG). Like many other European regulatory policies, the RRG has

an independent membership that enables external stakeholders to challenge regulatory policy.

The next step in the Scottish Government's policy is the implementation of its Regulatory Reform (Scotland) Act 2014 which will provide a duty on regulators to promote sustainable economic and business growth as well as set out a code of practice for regulatory functions. The debate around the Scottish Act and its success or failure will undoubtedly inform the debate around regulatory policy and the potential for legislation in Wales.

Westminster

Westminster provides an obvious comparison for regulatory reform as an arena where legislation impacting on Wales has and continues to be created. Significant activity on the regulatory agenda (including the *Better Regulation* Task Force

estimating that in 2005 that businesses in the UK were subject to an annual regulatory burden of £100bn) culminated in the creation of the Regulatory Policy Committee (RPC) in 2009⁴⁶.

This Committee is designed to analyse government departments' RIAs to ensure the true impact of regulation is being assessed in the decision making process (see Figure 3).

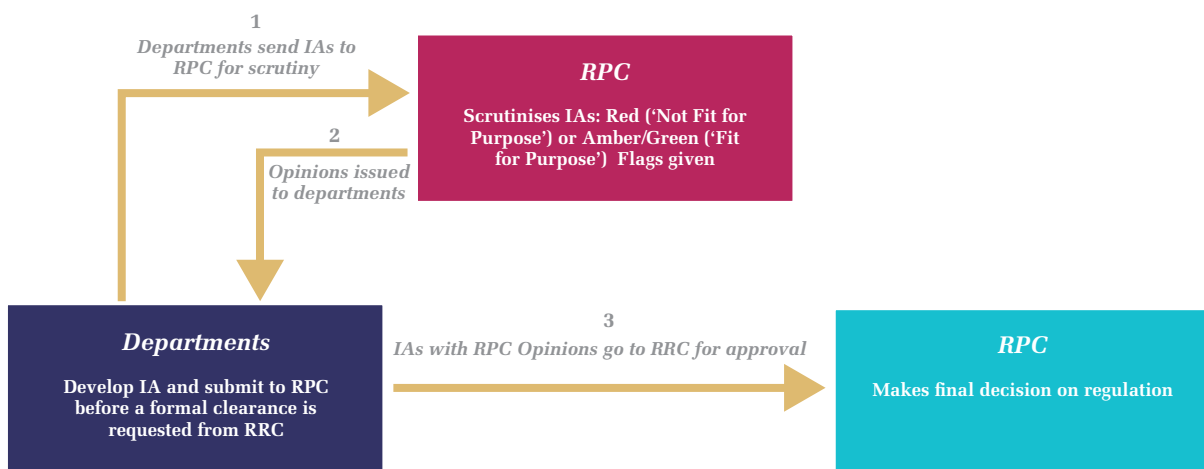
The Regulatory Policy Committee plays a pivotal role in scrutinising the evidence base for proposed regulations. It is an independent advisory Non-Departmental Public Body – sponsored by the Department for Business, Innovation and Skills. The chair is also independent with extensive business experience.

If the RPC rates an impact assessment (IA) as 'red' (not fit for purpose) then it should be sent back

to the department or regulator for changes; however, this system can be overridden by Government. This has happened on nine occasions since the system was set up, in which cases the RPC publishes its opinion on the proposed regulation⁴⁷.

The recent introduction of the Small and Micro Business Assessment to IAs at the Westminster level should also improve this process further. This aspect of the IA forces policy developers to consider the particular impact that an IA will have on a small or micro-business. They will also have to think about how they can mitigate any undue burdens that a small or micro-business may face. In some circumstances this may be an exemption of some description, although we recognise that this may not always be appropriate, but can be other measures such as delayed implementation or different reporting measures.

Figure 3: Summary of the RPC role in the clearance of regulatory proposals



Source: RPC 2011

Following independent scrutiny, the IA is then passed on to the Reducing Regulation Committee, a cabinet sub-committee that ensures the regulation meets the government's wider regulatory agenda.

The UK Government focuses on improving delivery of regulation via two bodies, the *Better Regulation Executive* (BRE) and the *Better Regulation Delivery Office*. The *Better Regulation Executive's* role is to "*(take) forward the Government's better regulation agenda*"⁴⁸. This body resides in BIS, and has responsibility for helping to implement deregulatory policies and provide expert advice and support to departments and regulators on simplification and burden reduction and to improve the quality of new regulation. In addition to these functions, it also produces the Statement of New Regulation and guidance on how to implement policies such as Sunset Clauses and One In Two Out – the system whereby no new regulations can be brought in without a regulation of a similar or greater impact being removed.

The *Better Regulation Delivery Office* (BRDO) sits alongside the BRE in the Department for Business, Innovation and Skills. It looks at how regulation is delivered on the ground as well as helping to administer the Primary Authority Scheme. The Primary Authority Scheme allows local authorities to provide a lead relationship with businesses to avoid duplication of regulatory burdens.

There is an expectation that regulators follow the Hampton principles that arose from the review by Sir Phillip Hampton in 2005. This sought to ensure enforcement and compliance was based on risk and

minimised the impact on businesses whilst still achieving regulatory objectives⁴⁹. This was crystallised in the Regulators' Compliance Code that provides solid principles to regulators on following the Hampton principles.

Netherlands

The Netherlands is often viewed as a leader on the better regulation agenda with strong procedures in place to ensure a consistent approach. The OECD comments that: "*achievements so far have been significant in the programme to reduce burdens on the business community, and considerable by international standards*"⁵⁰. The systems for dealing with regulatory burdens continue to develop, in particular regarding the stock of regulation.

The Regulatory Reform Group (RRG) is a recent development which grew out of a merger of a number of other institutions. The RRG produces biannual reports for Parliament. It provides training and guidance on better regulation issues across government. In addition, there is a Steering Group for *Better Regulation* for the four main government departments.

Alongside these internal groups is an independent watchdog, the Advisory Board on Administrative Burdens (ACTAL). This body has had a key scrutiny and advisory role as well as being a driving force for regulatory reform. ACTAL has now become a statutory body.

This independent oversight of progress on this agenda is a crucial addition to the advice it provides to Cabinet.

The regulatory reform agenda appears to be becoming embedded in the thinking of the Dutch Government and is producing results. However, concerns have been raised that the institutional framework remains fragmented, and therefore weak.

This is an important lesson for Wales: too many institutions involved in the agenda may in fact weaken the structure. Focusing on fewer institutions works better and allows for external stakeholders to engage more usefully.

In relation to enforcement and delivery, the Netherlands has been recognised by the OECD as "*(engaging) in pioneering work to ensure that compliance and enforcement are considered at the start of the rule-making process*"⁵¹. As part of a well defined and clear agenda, local and national players are involved in sharing best practice with municipalities being used to test pioneering practice.

The Ministry for Justice is the lead department with its Inspection Council working closely with the Regulatory Reform Group. There are three aspects to this policy in the Netherlands. The Directives on Legislation are designed to ensure that it is possible to adequately enforce regulations before they are adopted.⁵² This forces rule makers to consider how regulation will be enforced and set out principles for improving enforceability, including minimising scope for different interpretations, minimising exceptions, directing rules at "situations which are visible or which can be objectively established" and ensuring practicability for both enforcers and the regulated⁵³.

This is then reinforced in the impact assessment process via a 'Practicability and Enforcement Assessment'. This facilitates identification of the effects of proposed legislation for implementing and enforcement authorities.⁵⁴ The Netherlands has focused on a considerable risk based approach to enforcement. This is done by carrying out risk analysis based on estimations and measurement of non-compliance as well as the credible effects of non-compliance. This is then agreed with lead ministries to ensure it reflects wider priorities.

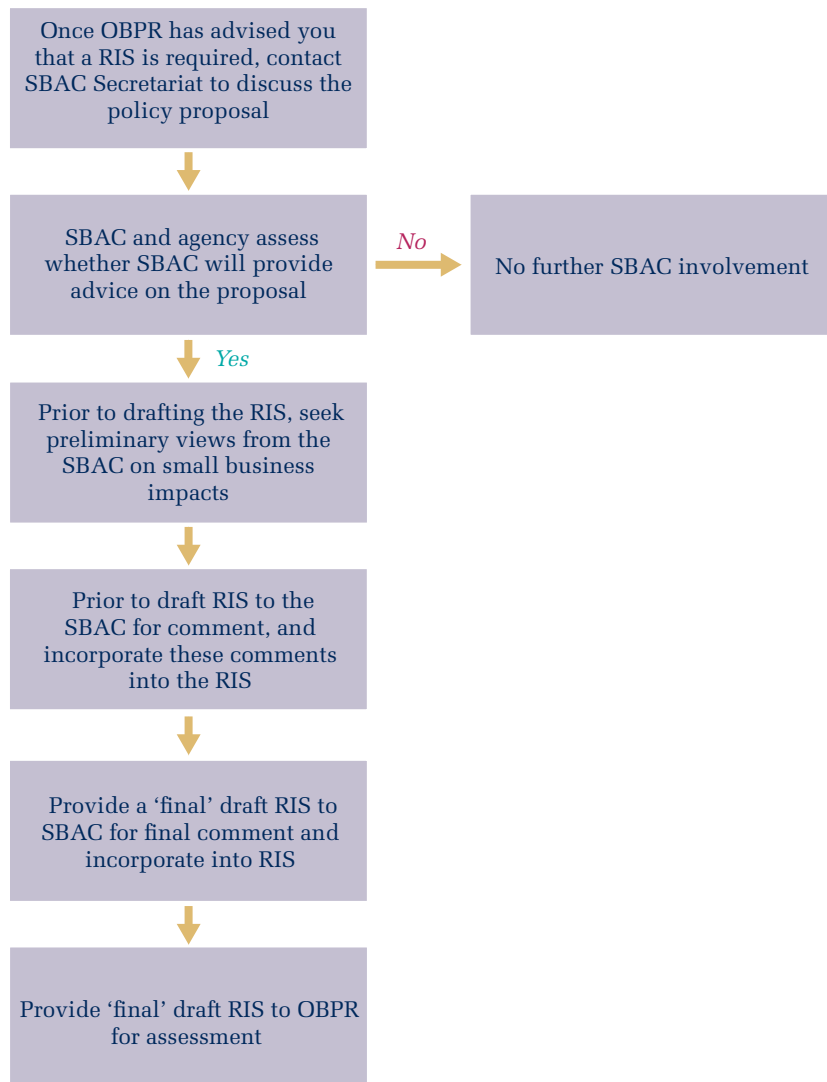
Australia

The Australian system benefits from a high level of transparency. In the Australian model, there are three central actors. The deregulation group sits within the Department of Finance and Deregulation and comprises the Deregulation Policy Division and the Office of Best Practice Regulation (OBPR).

Perhaps the most obvious lesson for Wales from Australia comes from another actor, the Small Business Advisory Committee (SBAC). The SBAC assists departments or agencies to understand the impact that regulations in development may have on small businesses.

The deregulation group within the Department of Finance performs a number of functions. Most important are its duties to support departments in implementing deregulation policies as well as reporting publicly on their progress – a similar role to those of the *Better Regulation* Executive and Regulatory Policy Committee in Westminster combined.

Figure 4: Role of the Small Business Advisory Committee in Australia⁵⁵



(RIS refers to Regulatory Impact Assessment. SBAC refers to the Small Business Advisory Committee and PBPR refers to the Office of Best Practice Regulation.)

Meanwhile the OBPR offers regular training for policymakers on IAs as well as on how to comply with deregulatory requirements. It publishes views on each individual impact assessment online soon after the proposal is made public. The OBPR also produces an annual report on Government's overall compliance with deregulatory measures, including the performance of departments and government agencies across a range of deregulatory measures.

This public assessment provides a powerful incentive for departments and agencies to prioritise this policy objective.

SBAC has a key role in the government's deregulatory agenda and sits within the Australian equivalent of the Welsh Government's Economy, Science and Transport department (ETS). The SBAC is composed of independent individuals who have extensive knowledge of business.

However, the SBAC's role is not formal, and it only provides advice to, "improve the quality of regulation and minimise compliance costs for small business by being involved throughout the development of the Regulation Impact Statement process"⁵⁶.

It may recommend that an IA needs to pay further attention to factors that have not been fully considered or on which more information is needed. This advocacy body has the potential to ensure that the interests of small businesses are constantly considered in the development of regulation, something that is currently inadequate in the RIA process in Wales.

Belgium

Given the diverse nature of responsibilities in the Belgian state, the *Better Regulation* agenda is articulated at numerous levels of government. At the Federal level, the main approach is the *Kafka* plan building on a commitment to reduce red tape.⁵⁷ The *Kafka* test was applied to impact assessments in 2001, which sought to measure the impact of regulations at an early stage. This has since been augmented with a sustainability test, measuring the economic, social and environmental impact.

One of the perceived weaknesses of the Belgian regulatory agenda is the lack of coordination between programmes⁵⁸. That said, the strength of the *Kafka* brand has enabled the issue to be raised up the political agenda.

This has been reinforced by the Administrative Simplification Agency (ASA) which works across federal, regional and local levels to promote

best practice.⁵⁹ Belgium provides an interesting case study for Wales. Its decentralised state proves challenging for regulators that work in differing political contexts.

The federal nature of the Belgian state also provides an example for Wales of how transposition of EU Directives can be carried out within a decentralised framework. Negotiations on the nature of Directives takes place at an EU Commission level with the Belgian Federal Public Service for Foreign Affairs (FPS) playing the role of coordinator for the various Belgian governments involved in the subject matter.

Importantly, this includes coordination at both a political and administrative level. A pilot authority is then appointed by the FPS for Foreign Affairs to monitor transposition by the responsible department or federated state.

Lessons for Wales

The examples set out in our country analysis provide a snapshot of regulatory policies in other developed nations. Perhaps the first lesson for Wales is that a clear statement of direction in terms of regulatory policy is usually a prerequisite to policy success. Wales needs similar well-articulated and bold action from Welsh Government.

The Swedish example sets out very clear principles for the regulatory policy agenda as well as a vision for what that policy should achieve "a noticeable, positive change in the day-to-day operations of businesses". This principle, coupled with clearly measured and transparent targets, has helped

drive their agenda and provides an articulated policy to which business and regulators can subscribe.

Scotland has shown that within the context of a devolved legislature it is possible to make the regulatory agenda apply across government. Their ambitious proposals to ensure regulators are contributing to sustainable economic and business growth should embolden *Better Regulation* principles. There are clearly parallels in the way regulation is delivered in Scotland and Wales with local authorities being a key agent for change. Any Welsh response should learn from this experience, ensuring that central government in Cardiff Bay has the resources to meaningfully improve delivery of regulations across Wales.

Case Study

“Natural Resources Wales has caused a four year delay in the renewal of outline consent for industrial units due to regulatory activity (Outline Planning Consent only remains valid for three years and requires regular renewal). This is as a result of requirements to produce a strategic Flood Consequences Assessment (FCA). Originally, the local authority produced its Strategic Flood Consequences Assessment but this included a number of errors that prevented the FCA being accepted. Despite these obvious errors in the data Natural Resources Wales refused to accept our own FCA and any subsequent corrections. Eventually in December 2013 I finally was able to escalate the issue and the Senior Officer agreed that there were grounds for his officers to meet with us at our offices and agree slight amendments to the FCA document to enable them to approve and remove their objections to the planning applications. These changes amounted to minor amendments to the wording of three sentences. This took a disproportionate amount of time out of other business activity and caused unnecessary delays.”

A common theme running through many examples is the need to deal with EU Directives in a manner that reflects *Better Regulation* principles. As a nation in the EU, Wales is also affected by EU regulation and therefore the Welsh Government should seek to influence the process of EU Directives and regulations at the earliest opportunity.

This includes lobbying the European Commission before a proposal emerges, working with MEPs and in particular ensuring that Wales's voice is heard when UK Ministers and civil servants negotiate and vote in the Council. In this respect, Assembly Members and Welsh MPs could also take a greater interest in what is being proposed at EU level and use the existing powers of parliamentary scrutiny, as granted under the Lisbon Treaty, to challenge proposals at an earlier stage.

The process of creating new regulation is crucial in ensuring that objectives are met without undue burdens on business in Wales. As part of its EU 15 – *Better Regulation in Europe* project, the OECD is clear on the benefits of a grounded

Regulatory Impact Assessment process, stating:

*“Ex ante impact assessment of new regulations is one of the most important regulatory tools available to governments. Its aim is to assist policy makers in adopting the most efficient and effective regulatory options (including the ‘no regulation’ option), using evidence-based techniques to justify the best option and identify the trade-offs involved when pursuing different policy objectives. The costs of regulations should not exceed their benefits, and alternatives should also be examined.”*⁶⁰

The OECD also has a clear rationale for reasons such an approach is often resisted, that reflects to some extent experience in Wales:

“However, the deployment of impact assessment is often resisted or poorly applied, for a variety of reasons, ranging from a political concern that it may substitute for policy making...to the demands that it makes on already hard pressed officials... experience around the OECD shows that a strong and

A common theme running through many examples is the need to deal with EU Directives in a manner that reflects Better Regulation principles.

coherent focal point with adequate resourcing helps to ensure that impact assessment finds an appropriate and timely place in the policy and rule-making process, and helps to raise the quality of assessments.”⁶¹

The examples used reinforce the OECD’s perspective. The lesson from the Westminster system is that independent scrutiny can help provide a solid assumption of the costs and benefits of increasing regulation. The Netherlands example serves to reinforce that the *Better Regulation* agenda needs to be taken seriously across all departments of government.

It also highlights the need for a well-resourced and respected standard bearer to make this happen. The Australian model highlights how training policy makers to be aware of regulatory burdens, as well as significant and early involvement of SMEs, can make a real difference to outcomes.

There is clearly a role for best practice in delivery of regulations by regulators in Wales such as local authorities. The examples used highlight why this is important in two regards. Firstly, anticipating the resource implication for enforcement officers ensures that any regulation that is created can realistically expect to be adequately enforced.

Secondly, by ensuring that novel methods of enforcement are tested and adopted where appropriate, including risk based approaches that minimise the impact on low risk businesses. This is particularly pertinent in the context of emerging Welsh legislation. For instance, concerns have already been raised recently about the practicalities of enforcing the Food Hygiene Rating (Wales) Act 2013.⁶²

The Netherlands example serves to reinforce that the Better Regulation agenda needs to be taken seriously across all departments of government.



4. *Designing a Better Regulation Policy for Wales*

The evidence supports the need for Wales to have its own Better Regulation policies to reflect the growing legislative autonomy following the milestone referendum in 2011. Now, more than ever before, businesses in Wales look to Cardiff Bay to provide an economic environment that is fit for purpose and a competitive Wales eager for growth. Learning from the lessons of other nations: what would such a policy for Wales include?

A clear statement of intent

The first step towards creating a Better Regulation policy for Wales would be to give a clear statement of intent. Lessons from the Swedish and Dutch examples show that having a government department with responsibility for ensuring the agenda is pursued across all departments is worthwhile.

This could be done by the First Minister taking ownership of the approach in Wales by making a statement to the National Assembly for Wales. Alternatively, the Minister for Finance could take the lead as

part of the remit for the growing concept of a Welsh Treasury.

The statement would build on the work done by the 2009 Inspection, Audit and Regulation in Wales statement by placing a Welsh Better Regulation agenda into the current context⁶³. Such a statement would set out the ambition for the agenda with a clear and concise definition seeking to replicate Sweden's ambition to "achieve a noticeable, positive change in the day-to-day operations of businesses".

The statement should also produce an estimate of the cost of regulation in Wales to Welsh businesses. This would then lead to setting out a target for the limitation, or removal of unnecessary burdens on Welsh businesses⁶⁴.

Again, the Swedish ambition for a 25% reduction, measured and reported annually, would serve as a good example. There are numerous other European states with similar targets (such as the Netherlands and Denmark)⁶⁵.

Evidence from studies conducted by the OECD suggests that a reduction of 25% in EU25 countries could contribute to around 1.5% growth in long run GDP by 2025.⁶⁶ In discussing this, decision makers should be mindful that in contrast to nation states such as Sweden and Denmark, the Welsh Government has capacity to act only in the devolved areas.

The statement would also set out the measures to be taken to achieve such a target and would be updated at least annually to allow Assembly Members to scrutinise progress. Included in this would be a recognition that much of the delivery would need to take place at a local level with local authorities and other public bodies playing a pivotal role.

It would also ensure other departments and regulators are fully signed up to the Better Regulation agenda by placing the Regulators' Compliance Code or an equivalent on a statutory basis. The next step in this process would be to create an expert stakeholder group to lead on the *Better Regulation* agenda.

This group could be called the Regulatory Reform Group for Wales (RRGW) mirroring terminology used in Scotland and the Netherlands and should be supported by a dedicated team of civil servants from the parent department. This should be a natural evolution of the Wales Regulators' Forum that currently exists to include wider representation among the private sector.

Currently, the Welsh Government spends around £200,000 directly on the Better Regulation agenda via the BRDO funding one member of staff. To improve on this situation, the Welsh Government could consider allocating between £500,000 and £1,000,000 to the Better Regulation agenda in Wales, setting up a small team of civil servants within the host department to lead on the issue. This would be roughly commensurate to a Barnett share of activity that the UK Government currently undertakes on regulation.⁶⁷

This would enable the Welsh Government to employ at least six full time staff within the civil service to resource the Regulatory Reform Group for Wales dealing with regulatory reform across government⁶⁸. It would also provide support for *Better Regulation* ambassadors within each department who would liaise closely with the RRGW.

The need to deal with this issue has been recognised by Wales' social partners during the recent review of the Welsh Government's Business Scheme. The review highlighted concerns with the regulatory agenda and called for:

"A specialised capacity could usefully be established within the Welsh Government to review all proposed policy changes and

*legislation in the light of their economic impact on business. This would add additional rigour to the policy development process and assist in providing a rationale for legislation when it is scrutinised within the National Assembly for Wales."*⁶⁹

The creation of the RRGW would provide a focal point for the regulatory reform agenda in Wales. To be successful, there would need to be annual reporting mechanisms to the National Assembly and scrutiny from the National Assembly for Wales's Enterprise and Business committee. It would also allow for independent challenge from the business community that would undoubtedly improve the transparency of the process.

Improving new regulation

In the context of increasing legislative powers, the process for new legislation should be updated. This means improving how Regulatory Impact Assessments are created. The need for such an improvement was highlighted in the review of the Welsh Government's Business Scheme which carried the following recommendation:

*"Recommendation 8: The Welsh Government should ensure that capacity exists and is tasked with assessing whether or not Regulatory Impact Assessments (RIAs) / Economic Impact Assessments (EIAs) have properly accounted for the effect on business of proposed legislation and of proposed policy changes that do not require legislation."*⁷⁰

This could be done in a number of ways. For instance, the RRGW could work with a dedicated Better Regulation team within

Welsh Government to assess Regulatory Impact Assessments to ensure they truly reflect the perceived costs and benefits. The RRGW would also coordinate the approach to regulation across Welsh Government departments.

This would provide independent engagement on the creation of regulation that has proved effective in the Australian and Westminster RIA processes. It could also seek to draw on the Australian Small Business Advisory Committee (SBAC) model that ensures there is early engagement with small business issues in formulating any new regulation.

The Regulatory Policy Committee's traffic light system at Westminster provides a user-friendly way of measuring such impact and ensuring legislators are fully aware of the costs and benefits of regulation. This should be adopted as part of the reporting process for any new legislation proposed by the Welsh Government and National Assembly for Wales by the RRGW working with the Welsh Government's *Better Regulation team*.

The department responsible for regulatory policy would also draw on the RRGW's expertise and independent analysis to ensure solid guidance was provided to other government departments on how to draw up impact assessments that are fit for purpose. This would serve to embed the agenda across government.

Regulators that promote sustainable economic growth

As well as providing independent scrutiny and reporting progress on regulatory reform, the RRGW

would lead in the commissioning of projects to promote best practice in delivery. While Welsh Government sets the direction and framework for many regulatory policies, it is important to recognise that much of the delivery is done by local authorities and other public bodies.

Experience from FSB Scotland has shown that local authorities have significant discretion in how policies are delivered and generally look to central government in Edinburgh for guidance on delivery. To be effective, there needs to be ownership of the policy area at central government that is well resourced to encourage uptake of best practice⁷¹. The proposed Regulatory Reform Group for Wales should seek to play this role.

This should start by building on the existing £200,000 grant provided to the BRDO as well as where possible drawing on existing organisations across the UK such as the RPC and BRE. This would enable local authorities and other regulators to take novel approaches to regulation that minimise burdens on businesses (the primary authority scheme being a good example).

The use of 'Practicability and Enforcement Assessments' as part of the impact assessment process as seen in the Netherlands could ensure that resource implications of new regulation would not prevent there being a reasonable chance of the regulation being enforced properly. This is particularly relevant given the experience of the Food Hygiene Rating (Wales) Act 2013. In this instance, the likelihood of businesses being able to get re-rated for their food hygiene score within the statutory three month time period designated by the regulation has been questioned and some estimates from Trade

Union representatives suggest that a six month period is more likely, a significant time-lag on the statutory obligations of local authorities^{72 73}. This raises significant questions around the effectiveness of the current RIA process with regards to delivery and highlights that quite often unforeseen issues can arise in the current system.

The RRGW should also assist the Welsh Government in periodically examining how well regulators comply with the Hampton principles (or a replacement Regulators' Compliance Code) and encourage risk-based approaches to enforcement that target those most likely not to comply whilst acting on good faith for those at least risk.

Finally, the Welsh Government should consider a Regulatory Reform (Wales) Bill along the Scottish model, taking advice from the RRGW on how this should be of benefit to Wales' businesses and regulators. This would provide a suitable mechanism for the adoption of the Regulators' Compliance Code or a Wales only equivalent on a statutory basis as well as providing the architecture for the reforms outlined in this document.

Better Regulation for Wales

Many of the recommendations above could be implemented without significant resource allocation. There is little doubt that as Wales' businesses look to Cardiff Bay for the conditions for growth the Welsh Government will need to ensure its policies are minimising the impact on business. At the same time the Welsh Government rightly needs to protect citizens and the environment from harm. There is no reason why the two are not compatible.

A smart, *Better Regulation* policy for Wales could make this possible. It would ensure Wales' firms are competitive whilst targeting regulation and enforcement at areas of high risk. It would allow decision makers to formulate policy safe in the knowledge that the regulatory impact would be balanced with the desired results. It would ensure best practice is adopted across Wales in the day-to-day inspections of businesses. This should be the Welsh Government's ambition in promoting sustainable economic development in Wales.

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