



**DEPARTMENT FOR BUSINESS
ENTERPRISE & REGULATORY REFORM**

**GOVERNMENT RESPONSE TO THE
CONSULTATION ON THE DRAFT
REGULATORY ENFORCEMENT
& SANCTIONS BILL**

ISSUED 28 SEPTEMBER 2007

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REGULATION
EXECUTIVE

Government response to the
consultation on the

Draft Regulatory Enforcement & Sanctions Bill

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Introduction

- I. On 15th May 2007 the Government published a consultation paper seeking views on the draft Regulatory Enforcement and Sanctions Bill (the Bill). The Bill comprises two distinct but linked Parts, both of which deliver key aspects of the better regulation agenda.
- II. Part 1 of the Bill establishes the Local Better Regulation Office (LBRO) as a statutory corporation with the objective of securing more effective and less burdensome approaches to the delivery of regulatory enforcement by local authority trading standards and environmental health services. Part 1 of the Bill will also establish the Primary Authority Principle. This delivers the Government's commitment to place the Home and Lead Authority Principles on a statutory footing.
- III. Part 2 of the Bill incorporates proposals that implement the key recommendations of the Macrory Review, *Regulatory Justice: Making Sanctions Effective*.¹ Part 2 of the Bill provides for Monetary Penalties (fixed and variable), Discretionary Requirements, Cessation Notices and Enforcement Undertakings to be made available as a menu of sanctioning powers to regulators that can show themselves to be compliant with the Hampton and Macrory principles of regulatory enforcement.
- IV. The consultation document and draft Impact Assessment was sent to over 220 interested organisations, stakeholders, and individuals. This included representatives of business, small and medium sized enterprises, local authorities, trading standards and environmental health professionals, national regulators and legal services. It was additionally sent to every local authority in the UK.
- V. During the consultation period, officials from BERR ran 10 in-depth working groups with businesses, regulators, professional bodies and local authority representatives to discuss the Government's proposals. Officials also met with local authorities from Greater London, the Midlands, East Anglia, the South-West, the North-East and the North-West, as well as local authorities from Scotland and Wales.
- VI. 154 responses were received during the 13 week consultation period. (See fig.1 for breakdown by sector). A number of respondents took the opportunity to welcome the draft Bill and the Government's initiative in this area. A full list of all the consultation respondents, with the exception of those who requested anonymity or that their responses be kept confidential, can be found at Annex A. Analysis of the responses received to specific questions can be found at Annex B.

¹ http://www.cabinetoffice.gov.uk/REGULATION/documents/pdf/macrory_penalties.pdf

VII. The Government is grateful for all the consultation responses received. This paper seeks to reflect the views offered, but inevitably, it is not possible to describe all the responses in detail.

Responses by sector

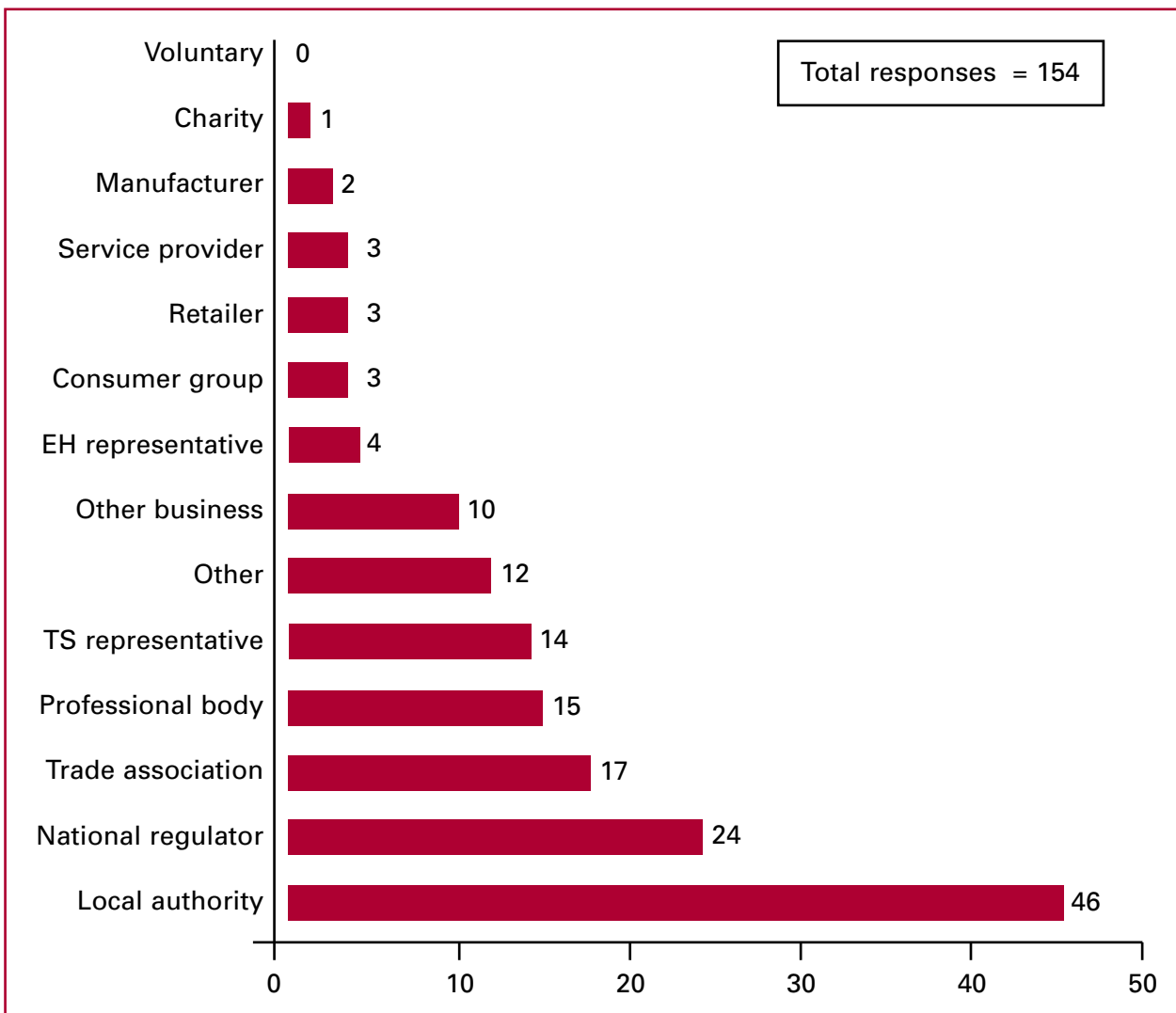


Figure 1

EH = Environmental health
 TS = Trading standards

Executive summary

Part 1

- I. The proposals in Part 1 of the Bill were generally welcomed by respondents. In particular, business expressed strong support for the proposals regarding the Primary Authority Principle, and welcomed the Government's initiative in seeking to improve the consistency of enforcement by local authority trading standards, environmental health and licensing services.
- II. The views of local authority respondents were varied. Most local authorities expressed concerns regarding the proposed Primary Authority Principle, and in particular how the proposals would affect local authority autonomy and the potential resource implications of being a Primary Authority. However, most local authorities also expressed strong support for LBRO's role in advising Government and many took the opportunity to welcome the publication of a list of the Government's regulatory priorities and expressed support for LBRO's role in revising this list.

Part 2

- III. The proposals in Part 2 of the Bill were generally welcomed by respondents. In particular, most regulators and local authorities were keen to take up the new powers as soon as possible.
- IV. The views from business respondents varied. Some welcomed the proposed use of alternative sanctions in place of criminal prosecutions, where appropriate, while others saw this as an opportunity to simplify the current framework for regulation.
- V. Some business respondents, however, expressed concerns about the new powers. Some felt that the alternative sanctions should not replace light touch regulation and ongoing advice to the business. One or two respondents expressed more fundamental concerns about giving such powers to regulators, and argued for stronger safeguards on the face of the Bill.

The Government's position

- VI.** The Government remains committed to the establishment of the LBRO as a statutory corporation. Its role in securing more effective and less burdensome approaches to the delivery of regulatory enforcement by local authority trading standards, environmental health and licensing services is an essential part of delivering the better regulation agenda. The Government also believes that establishing an effective Primary Authority Principle is key to ensuring consistent regulatory enforcement at a local level.
- VII.** We take note of the concerns expressed by respondents regarding some of its proposals and are considering how best to address these with a view to ensuring that the LBRO can bring practical results in action.
- VIII.** The Government remains committed to the vision set out in the Macrory Report of a modernised system of regulatory sanctions that are proportionate, flexible and effective. We believe it is vital that these new powers do not, however, replace ongoing advice from the regulator to business. There will be circumstances where regulators will need powers to tackle breaches of the law where a criminal prosecution may not be the most appropriate or proportionate response. With the appropriate safeguards in place, we consider that giving responsible regulators access to the new sanctions is appropriate.
- IX.** The Government has noted the concerns expressed about the strength of the safeguards in the draft Bill and we are considering whether further detail should be added to the face of the Bill.

1. The Primary Authority Principle

Proposal 1 – Giving business the right to a Primary Authority partnership

The Government proposes that any business operating across more than one local authority should have the option of having a Primary Authority partnership.

Where a business approaches a local authority and the authority does not agree to participate in a partnership, LBRO will be able to nominate a local authority to take on the partnership. LBRO must consult with both the business and the authority before making a nomination. LBRO must also keep in mind the location of the business' decision-making base and any resource issues the potential Primary Authority may have.

Question:

- Do you agree with LBRO's role in helping to facilitate new Primary Authority partnerships?

- 1.1 There was strong support for the Government's proposals that LBRO should have a role in helping to facilitate new Primary Authority partnerships. Business organisations were particularly supportive, with many stating that businesses should have a right to a Primary Authority partnership.
- 1.2 Many local authorities agreed with the proposals for LBRO's role in facilitating new Primary Authority partnerships, provided there was adequate resources available to primary authorities. Business representatives, including the Confederation of British Industry (CBI) and the Federation of Small Businesses (FSB), also noted that adequate resources would have to be made available so as to ensure that primary authorities could effectively carry out their role.
- 1.3 Some local authorities expressed concerns about being obliged to act as a Primary Authority if nominated. The Local Authorities' Co-ordinators of Regulatory Services (LACORS) argued that this *"undermines a local council's ability to decide on its own service provision"* and expressed concern that there did not appear to be a right for local councils to refuse to enter a Primary Authority partnership. Some business and local authority respondents also suggested that Primary Authority partnerships would only operate effectively where both the business and the local authority consent to entering into the partnership.

- 1.4** No respondents objected to a requirement being placed on LBRO to consult with both the business and the local authority before nominating a Primary Authority. Respondents made a number of suggestions regarding the factors that LBRO should consider before nominating a Primary Authority. These included the resources available to the local authority, the proximity of the Primary Authority to the businesses operational centre and the compliance record of the business.
- 1.5** A few respondents queried which types of business were captured by the definition of a multi-site business included in the Bill. In particular, respondents wished to know if the definition captured single site Internet or mail order businesses. Some respondents also suggested that single site businesses should also have a right to a Primary Authority partnership.

The Government's position

- 1.6** The Government believes that any business operating across more than one local authority should have the right to request having a Primary Authority partnership. In light of the support expressed by respondents for the proposals regarding LBRO's role in facilitating new partnerships, the Government intends to retain the power in the Bill for LBRO to nominate a local authority as a Primary Authority.
- 1.7** The consultation has made it clear, however, that in certain specific circumstances a Primary Authority partnership might not be appropriate, and the Government is currently exploring these.
- 1.8** The Government has taken note of the concerns expressed by stakeholders regarding the potential burden of being a Primary Authority and accepts that adequate resources must be made available to primary authorities if they are to effectively carry out their role. The Government is currently considering how this can best be achieved.
- 1.9** The definition in the Bill of a multi-site business as a person who 'carries on an activity in the area of two or more local authorities' will capture 'single-site' Internet and mail order businesses that are active in more than one local authority area. The Government believes that this is appropriate and that the provisions of the Bill should rightly extend to these types of business. It is not, however, the Government's intention to extend the provisions in the Bill to single site businesses.

Proposal 2 – Ensuring communication between primary and enforcing authorities

The Government proposes that:

- LBRO should be responsible for ensuring that a register of Primary Authority partnerships is available;
- An Enforcing Authority must consult and obtain the consent of a Primary Authority before taking enforcement action against a business in a partnership;
- Enforcing authorities be exempt from consulting and obtaining consent from a Primary Authority where there is an imminent risk of serious harm to human health or the environment;
- ‘Enforcement action’, in relation to a breach of a restriction, requirement, or condition, be defined as:
 - a) Any action which relates to securing compliance with the restriction, requirement or condition; or,
 - b) Any action taken with a view to or on connection with the imposition of any sanction, criminal or otherwise, in respect of the breach.

Questions:

- Do you agree with the way the Bill handles the communication between primary and enforcing authorities, including the definition of ‘enforcement action’? If not, what alternatives do you propose?

- 1.10** Of the 63 responses to this question, only 43% agreed with the way that the Bill handles the communication between primary and enforcing authorities, including the definition of ‘enforcement action’.
- 1.11** Local authorities expressed particular concern regarding the Government’s proposal that enforcing authorities seek consent from a Primary Authority before taking enforcement action against a business in a partnership. Many local authority respondents commented that this could undermine local autonomy, create unacceptable delays and result in significant burdens for local authorities.
- 1.12** Most local authorities, while opposed to a requirement to obtain consent from a Primary Authority, expressed support for the proposal that enforcing authorities consult with a Primary Authority regarding proposed enforcement action against a business in a partnership.
- 1.13** A number of local authorities shared the view expressed by Islington Council that: *“There are valid situations where local decision should not need to involve the Primary Authority...other than to make them aware”.*

- 1.14** A number of respondents also suggested alternatives to the way the Bill handles communication between primary and enforcing authorities. The British Retail Consortium (BRC), for example, suggested that, given the difficulty of defining when contact should be made between an enforcing authority and a Primary Authority, it should be for the business concerned to formally request that contact be made.
- 1.15** LACORS suggested that where an Enforcing Authority proposed to take enforcement action against a business, it should be required to seek a statement from the Primary Authority outlining the advice it had issued to the business on the matter in question. The statement would be a public document that could be brought forward in any legal proceedings. A number of local authorities expressed support for LACORS' proposal that enforcing authorities seek a statement from the Primary Authority.
- 1.16** The Chartered Institute of Environmental Health (CIEH) suggested that enforcing authorities be required to have regard to advice issued by a Primary Authority. Were an Enforcing Authority to propose action that went against the advice of the Primary Authority, the Primary Authority could then publish its advice and a business use this during a subsequent court action.
- 1.17** The majority of respondents who expressed support for the proposal that enforcing authorities obtain consent from a Primary Authority before undertaking enforcement action were businesses, business representatives or trade associations.
- 1.18** Many local authorities stated that the proposed definition of 'enforcement action' was too wide, and captured a range of actions including test purchasing, interviews to determine whether or not an offence has taken place and informal advice, that should be legitimately undertaken without the need for the consent of a Primary Authority. West Yorkshire Trading Standards suggested that it may be inappropriate to include a detailed description of enforcement action on the face of the Bill and it would be better to allow LBRO to issue detailed explanatory notes covering the list of actions that they believe should be captured under the term 'enforcement action'.
- 1.19** Some respondents took the opportunity to welcome the Government's proposals that LBRO be responsible for maintaining a register of Primary Authority partnerships.

The Government's position

- 1.20** **The Government is grateful for all the comments received regarding the way the Bill handles communication between primary authorities and enforcing authorities. The Government is particularly grateful for the suggested alternatives to the proposed requirement that enforcing authorities seek consent from primary authorities before undertaking enforcement action.**
- 1.21** **The Government is minded to make amendments to the Bill to refine the role of the Primary Authority. It is currently considering how best to address the concerns expressed by respondents to the consultation regarding the way the Bill handles communication between primary authorities and enforcing authorities.**

- 1.22** Instead of a wide-ranging power to withhold consent on any grounds, we are minded to clarify and focus the Primary Authority provisions around the role of providing advice to business. Primary authorities will provide an important role in checking whether proposed enforcement actions are inconsistent with advice that it has given to that business.
- 1.23** The Government notes respondents' views that a requirement to seek consent may undermine protections where any delay would be counter productive. We are considering how best to address this and in particular a range of possible exemptions to any requirement on enforcing authorities to contact Primary authorities.
- 1.24** The Government agrees with many respondents that there will be occasions where there will be legitimate reasons for local variation in the approach to enforcement (for instance, legislation like the Licensing Act 2003 deliberately seeks to avoid a one-size-fits all approach). The Government will ensure the LBRO will work with the relevant regulators to avoid conflicts as it undertakes its work.

Proposal 3 – Effective arbitration

The Government proposes that LBRO be responsible for providing an arbitration system to cover circumstances where a Primary Authority and enforcing authority disagree over proposed enforcement action for a business with a Primary Authority partnership. LBRO's arbitration should be binding, and its findings issued within 28 days.

Questions:

- Do you agree that LBRO should consider every case referred to it by a Primary or Enforcing Authority?
- Do you agree that LBRO should be obliged to consider evidence from national bodies when resolving enforcement action disputes?

- 1.25** On whether or not LBRO should consider every case referred to it by a Primary or Enforcing Authority, over half the responses stated that LBRO should consider every case referred to it. Some respondents noted that it would be inappropriate for LBRO to choose which cases it heard, and that providing for this would undermine the arbitration system.
- 1.26** Some respondents suggested that LBRO should be allowed to reject cases referred to it for arbitration so as to ensure that it can manage the volume of cases that it has to hear and refuse to hear 'petty and malicious' cases.
- 1.27** Many respondents from businesses, local authorities and trade associations took the opportunity to express their strong support for LBRO carrying out arbitration. Many agreed with the views expressed by the British Beer and Pub Association who stated that arbitration was *"an essential role for the LBRO"*.

- 1.28** Some respondents also took the opportunity to welcome binding arbitration in particular. The Institute of Directors (IoD) stated that arbitration must be binding to *“ensure that any enterprise concerned can plan and maintain its business continuity in light of ongoing arbitration”*. LACORS also stated that it could envisage circumstances where binding arbitration was needed.
- 1.29** A few respondents felt that it was not appropriate for LBRO to carry out an arbitration role, stating that it would result in delays, additional costs and bureaucracy and potentially usurp the role of the courts.
- 1.30** A few respondents also questioned whether LBRO had sufficient expertise to carry out arbitration and whether LBRO would be accountable for the decisions it made when carrying out arbitration.
- 1.31** There was overwhelming support from business, trade associations, local authorities and representatives of trading standards and environmental health professionals, for the proposal that LBRO be obliged to consider evidence from national bodies, such as national regulators, when resolving enforcement action disputes. Of the 69 responses received 86% supported this proposal.
- 1.32** A number of respondents expressed concern that the arbitration system might result in undesirable delays and that some legitimate prosecutions may fail as a result of a local authority being unable to bring the case to court within a statutory time limit.

The Government’s position

- 1.33** **The Government believes that LBRO’s arbitration role is an essential means of providing quick, cheap and effective resolution to disputes between local authorities regarding proposed enforcement action against a business.**
- 1.34** **The Government has taken note of the strong support expressed by respondents for placing an obligation on LBRO to consider evidence from national bodies when carrying out arbitration. The Government agrees that LBRO should consider evidence from the relevant national body when resolving enforcement disputes, but feels that LBRO should be given the flexibility to decide which body this is. The Government does not propose to include provision in the Bill requiring LBRO to consider evidence from specific bodies during arbitration. There will be some relatively simple cases where a duty to consider evidence from specific national bodies in every case would cause unnecessary delay.**
- 1.35** **The Government believes that arbitration decisions must be made in a timely manner and that no unnecessary delays should result from LBRO’s arbitration. We believe that 28 days is an appropriate time limit for LBRO to make a decision at arbitration. However, it is minded to include provision in the Bill to extend relevant statutory deadlines for enforcement action by the time required for the full arbitration process to take place, to ensure that legitimate prosecutions do not fail as a result of a local authority being unable to bring the case to court in time.**

- 1.36** There may be cases when it would be right for LBRO to refuse to carry out arbitration. In these cases, it would be accepted that the Enforcing Authority could proceed as it had proposed. The Government is currently considering whether or not to include provisions within the Bill to allow for this.

Proposal 4 – Risk-based enforcement and inspection

The Government proposes that:

- The Bill include provision for Primary authorities to produce written inspection plans that they must bring to the attention of enforcing authorities;
- Enforcing authorities be required to have regard to an inspection plan when dealing with a business in a partnership;
- Enforcing authorities consult with a Primary Authority before acting outside the recommendations of an inspection plan.

Question:

- Is the duty to have regard to inspection plans strong enough, or should local authorities be obliged to ‘act in accordance with’ plans drawn up between a business and a Primary Authority?

- 1.37** Many respondents favoured local authorities being placed under a duty to have regard to inspection plans drawn up between a business and a Primary Authority.
- 1.38** Some respondents stated that local authorities should be under an obligation to ‘act in accordance with’ plans drawn up between a business and a Primary Authority. The majority of these responses came from business groups and trade associations. One local authority and one environmental health representative body favoured local authorities being placed under an obligation to ‘act in accordance’ with inspection plans, however, both argued that allowance had to be made for local discretion.
- 1.39** A number of respondents noted that local variations in a business, particularly in the quality of management, mean that local authorities need the flexibility to act outside the recommendations of an inspection plan. Many local authorities shared the view expressed by Westminster Council that:
- “National companies compliance can vary from region to region and is reliant on local and area management ensuring company systems are operated. This means a company may be compliant in branches within a Primary Authority area but elsewhere in the country be non-compliant. Inspection plans of a Primary Authority are therefore not always a reliable source of compliance information”.*
- 1.40** Some alternatives to the provisions in the Bill allowing primary authorities to draw up inspection plans were suggested by respondents. LACORS suggested that primary authorities should have a power to publish programmes of improvement or to give guidance as to how enforcing authorities should focus their interactions with a particular business. One respondent expressed their support for this alternative.

- 1.41** One local authority suggested that the provisions in the Bill should be revised so that

“where a Primary Authority undertakes a national risk assessment of a relevant business it should publish that assessment and its recommended methods for addressing those risks. This will include frequency and type of interactions with the business”.

The Government’s position

- 1.42** It is the Government’s intention that inspection plans be used as an information resource by enforcing authorities when planning and carrying out regulatory activity relating to a business that has a Primary Authority. Inspection plans should provide an Enforcing Authority with access to a Primary Authority’s strategic knowledge regarding a business with which it has a relationship: for instance, in those areas of performance where the business is relatively strong, and those where improvements are in hand. To give the Primary Authority a meaningful evidence base for such an assessment, the Government believes it is important that where enforcing authorities depart from the suggested approach in an inspection plan, they inform the Primary Authority.
- 1.43** We intend to maintain the broad approach of the draft provisions and place a requirement on local authorities to have regard to inspection plans drawn up by a Primary Authority and a business with which it has a relationship. The Government believes that where a Primary Authority and a business have dedicated resources to drawing up an inspection plan it is only right that enforcing authorities be required to have regard to it when planning and carrying out regulatory activities relating to a business that has a Primary Authority. This will be particularly relevant where the business is engaging in a specialist practice.
- 1.44** The Government has noted with interest respondents’ suggestions regarding information that could be included in an inspection plan. The Government is minded to allow primary authorities and businesses the flexibility to draw up an inspection plan that best suits their particular Primary Authority partnership.
- 1.45** We expect that inspection plans will be stored on the database of Primary Authority partnerships maintained by LBRO, which will be sufficient to fulfil the requirement placed on a Primary Authority to bring an inspection plan to the attention of an Enforcing Authority.

2. Guidance to local authorities

Proposal 5 – Guidance to local authorities

The Government proposes that local authorities be placed under a statutory duty to 'have regard to' guidance issued by LBRO.

Questions:

- Do you agree with this approach?
- Should a stronger requirement be placed on local authorities to comply with LBRO guidance? If so, what is your argument?

- 2.1 There was strong support for the Government's proposal that LBRO have a power to issue guidance to local authorities and that local authorities be placed under a statutory requirement to 'have regard to' that guidance. Of the respondents who supported this proposal, there were representatives from business, local authorities, trade associations and national regulators.
- 2.2 Some respondents stated that a stronger requirement should be placed on local authorities to comply with guidance issued by LBRO. The majority of these respondents were businesses or business representatives.
- 2.3 One respondent suggested that LBRO should be given discretion to decide on the level of obligation to be placed on local authorities depending on the type of guidance issued. This would allow LBRO to place a stronger requirement on local authorities when issuing guidance relating to the operation of Primary Authority partnerships, for example.
- 2.4 Some respondents expressed concern regarding the possibility that guidance issued by LBRO could contradict that issued by other bodies. The Food Standards Agency (FSA), for example, expressed concern that its guidance power may cut across that proposed for LBRO. The FSA suggested that a rule of priority be included on the face of the Bill to provide certainty for local authorities and businesses.

The Government's position

- 2.5** The Government has taken note of the concerns expressed by some respondents regarding the relationship between guidance issued by LBRO and guidance issued by the national regulators. It is not the Government's intention that LBRO's guidance should conflict with or duplicate guidance issued by the national regulators. The Government accepts that unacceptable confusion would result were contradictory guidance on the same matter to be issued to local authorities by LBRO and national regulators. We are currently considering how best to ensure that such a conflict does not arise.
- 2.6** It is intended that, in the majority of cases, local authorities should be under a statutory duty to have regard to guidance issued by LBRO.
- 2.7** The Government is also considering including a further power in the Bill that would enable LBRO to issue guidance with which local authorities would be obliged to 'act in accordance with'. The Government believes that such a power could aid LBRO in achieving its objective, but accepts that it would have to be subject to additional controls, and that the presumption would be that this would only be used as a reserve power.

3. The Government's regulatory priorities

Proposal 6 – The Government's regulatory priorities

The Government proposes that LBRO review the list of the Government's regulatory priorities and that local authorities be placed under a statutory duty to 'have regard to' the list of regulatory priorities.

Questions:

- Do you agree with the process set out in the Bill for evidence gathering and publication?
- Should LBRO be required in the Bill to consult with specific stakeholders?
- Should local authorities be put under a duty to 'have regard to' the list when they plan their own priorities?

- 3.1** There was strong support for the process set out in the Bill for LBRO to gather evidence prior to revising the list of the Government's regulatory priorities.
- 3.2** Many respondents took the opportunity to emphasise that LBRO should consult with key stakeholders. A number of respondents also favoured LBRO being required to consult with specific stakeholders, including national regulators, trade associations, local organisations representing community stakeholders, local authorities and businesses, before publishing a revised list of the Government's regulatory priorities.
- 3.3** Where respondents opposed LBRO being required to consult with specific stakeholders, it was suggested that any list would rapidly become out of date, and would hinder LBRO's ability to consult widely with any relevant body.
- 3.4** There was overwhelming support for the proposal that local authorities be placed under a duty to 'have regard to' the list of the Government's regulatory priorities. A few respondents suggested that national regulators should also be under a duty to have regard to the list of priorities.
- 3.5** Some local authorities considered a duty to have regard to the list of priorities to be unnecessary, as local authorities would do this whether or not it was an obligation.
- 3.6** Some respondents took the opportunity to express their support for the publication of a list of the Government's regulatory priorities. West Lothian Council, for example, stated that *"there is an urgent need to prioritise nationally the competing workload that trading standards and environmental health services face"*.

The Government's position

- 3.7** In light of the strong support expressed by stakeholders, the Government intends to maintain the approach of the draft provisions and place a requirement on local authorities to have regard to any revised list of the Government's regulatory priorities.
- 3.8** We have taken note of the support expressed by some stakeholders for placing a requirement on LBRO to consult with specific bodies prior to publishing a revised list of the Government's regulatory priorities. However, the Government believes that a requirement to 'consult such persons as LBRO considers appropriate' is strong enough to ensure that LBRO carries out effective consultation, prior to publishing a revised list of the Government's regulatory priorities. The Government's expectation is that this would include all relevant bodies.
- 3.9** The Government is also considering giving statutory force to the current Rogers list of national enforcement priorities for local regulatory services. This will likely be achieved by way of a Ministerial direction to LBRO.

Proposal 7 – Advice to Government

The Government proposes that LBRO have the ability to provide advice to Government on issues affecting local authority regulatory enforcement.

Question:

- Do you agree that LBRO should have this advisory role?

- 3.10** There was overwhelming support from respondents from all sectors that LBRO have the ability to provide advice to central government on issues affecting local authority regulatory enforcement. LACORS, for example, stated that *"the role of LBRO in providing advice to government and the Welsh Assembly is absolutely crucial"*. The IoD stated that *"the advisory role is highly important in ensuring a more joined-up understanding between a policy's development and its subsequent implementation"*. The Trading Standards Institute, CBI, FSB and the Office of Fair Trading (OFT) all expressed their support for LBRO having this advisory role, as did a number of local authorities.

The Government's position

- 3.11** In light of the strong support expressed by respondents for this proposal, the Government intend to maintain the approach of the draft provisions and include in the Bill a power for LBRO to give advice to Government on issues affecting local authority regulatory enforcement.

4. LBRO's proposed structure and scope

Proposal 8 – LBRO's proposed structure and scope

The Government proposes that:

- LBRO's board reflect a range of experience from local government and national regulation, business, and from consumer groups;
- The Bill dissolves LBRO as a private company and makes arrangements for LBRO as a statutory public body to take over its functions, property and staff at the point when it acquires the powers set out in the Bill;
- The Bill make provision for LBRO's dissolution;
- The legislative scope of LBRO extends to the functions of local authorities in relation to trading standards, environmental health and licensing and that this be defined by a schedule in the Bill;
- LBRO takes on a UK-wide role.

Questions:

- Do you agree with this approach to LBRO's structure and legal powers?
- Are there any pieces of legislation on trading standards and environmental health that are enforced by local authorities, and should be added to this list?
- Should anything be removed from this list?
- Are there other areas that you believe LBRO's work should extend to and why?
- To what extent should LBRO operate across the UK with respect to the following functions?
 - Improving co-ordination and consistency;
 - Guidance to local authorities;
 - Work on regulatory priorities;
 - Advice to Government;
 - Awarding grants.
- How should LBRO's work be tailored to different national contexts?

4.1 There was overwhelming support for the proposed structure and legal powers of the LBRO. Of the 62 responses to this question, 94% expressed support for the Government's proposals.

4.2 Some respondents took the opportunity to emphasise that LBRO's board should include representatives of particular sectors. Some respondents also took the opportunity to emphasise that LBRO should work collaboratively with other organisations, such as LACORS and relevant national regulators.

- 4.3** A number of respondents commented on the proposed schedule of legislation to be included in the Bill. In particular respondents noted that the European Communities Act 1972 (ECA) had not been included in the proposed schedule. Some respondents also noted that the proposed list did not include any secondary legislation and suggested that this should be addressed.
- 4.4** A few respondents noted that the proposed schedule would have to be regularly amended to reflect changes to the statute book. The BRC, for example, expressed support for *“a procedure whereby the Minister can add or remove legislation from the list by order. This would ensure that it is up to date and complete”*.
- 4.5** A range of suggestions were made regarding areas where LBRO could extend its role. Amongst these were planning, building and fire safety. Leicestershire Fire and Rescue Service noted that *“there is scope for the inclusion of Fire and Rescue Services, primarily as the enforcers of the Regulatory Reform (Fire Safety) Order 2005, but also in some instances, as enforcers of designated enactments...in schedule 4”*.

The Government’s position

- 4.6** The Government is grateful for all the suggestions received regarding the legislative scope of Part 1 of the Bill. These will be analysed and included in the final schedule where appropriate.
- 4.7** It should be noted that the majority of local authority environmental health and trading standards functions can be captured by listing the relevant primary legislation in a schedule in the Bill. By listing the relevant primary legislation all the secondary legislation made under the listed Acts will also be included within the scope of Part 1 of the Bill.
- 4.8** It would not be appropriate to list the European Communities Act 1972 (ECA) in this way as the secondary legislation made under the ECA covers an extremely broad range of issues, the majority of which the Government considers to be out of scope for the purposes of Part 1 of the Bill. The Government accepts that secondary legislation made under the ECA that bestows functions on local authority environmental health, trading standards and licensing services will have to be included within the scope of Part 1 of the Bill, and is currently considering how best to achieve this.
- 4.9** It is the Government’s intention that the legislative scope of LBRO should extend to the functions of local authorities in relation to trading standards, environmental health and licensing. The Government believes that, in light of the current reviews of building and planning² legislation, it would not be appropriate to extend LBRO’s role to these areas. LBRO’s scope will however be kept under review.
- 4.10** The Government is minded to include in the Bill a power to amend and update the final schedule of legislation defining the scope of Part 1 of the Bill. This is essential if the list is to remain up to date and reflect changes to the statute.

² <http://www.communities.gov.uk/documents/planningandbuilding/pdf/320546>

- 4.11** In light of the responses to the consultation and the development of the Retail Enforcement Pilot³, the Government believes that it is appropriate to include legislation relating to fire safety, including the Regulatory Reform (Fire Safety) Order 2005, in the schedule of legislation to be included in the Bill for the purposes of defining the scope of Part 1. Joint enforcement between trading standards, environmental health and fire services, means that fire safety legislation includes functions effectively carried out by all of these services.
- 4.12** The Government is also minded to extend the definition of local authority in the Bill to include Fire Authorities. This would mean that Fire Authorities would be eligible for financial support and assistance from LBRO, and subject to guidance issued by LBRO and the provisions of the Primary Authority Principle. The Government believes that including Fire Authorities within the scope of the Bill will maximise synergies with the Retail Enforcement Pilot, help increase compliance and bring about greater consistency of regulatory enforcement by local authorities. The Government intends to write to all Fire Authorities seeking their views on extending the definition of local authority in the Bill to include Fire Authorities.

³ <http://www.dti.gov.uk/consumers/enforcement/retail-enforcement/index.html>

5. Scope of the new powers

Proposal 9 – Who is eligible to receive the new alternative sanctioning powers?

The Government proposes that the alternative sanctioning powers in Part 2 of the Bill will be applicable to a variety of regulators and the criminal regulatory offences that they enforce. The Bill covers two classes of regulators: those listed in Schedule 3 and those authorities who enforce the offences under the enactments listed in Schedule 4. The alternative sanctioning powers can also be extended to offences contained in secondary legislation enforced by the second class of regulator by virtue of clause 35.

Question:

- Are the lists contained in Schedules 3 and 4, and Clause 35(3) accurate?

- 5.1 A number of respondents, largely regulators and local authorities, suggested useful additions to both Schedules 3 and 4 of the draft Bill. Many also queried the absence of a power on the face of the Bill to allow the list of enactments in Schedule 4 to be added to at a later date, particularly with new legislation coming into force. The most commented upon omission was that of the European Communities Act 1972, or any legislation under that Act.

The Government's position

- 5.2 The Government is most grateful for the suggested additions to Schedules 3 and 4 of the draft Bill.
- 5.3 The European Communities Act 1972 ("ECA") and the secondary legislation made under it have not been listed in the Bill. This is because administrative sanctions for offences arising out of Community obligations can already be created under the ECA.
- 5.4 For legal reasons, it will not be possible to include in the Bill a power to amend the schedules. It is vital therefore to get the list in Schedule 4 right. Where new primary legislation creates new offences, this legislation can be used to add such offences to Schedule 4 or can itself confer administrative sanctioning powers on the relevant regulators.

Proposal 10 – How the new powers are to be awarded

Access to these sanctions will be governed by whether the Minister with policy responsibility for the particular area has exercised the powers to make secondary legislation contained in the draft Bill. Before exercising the power, the Minister must be satisfied that the way in which the regulator carries out its enforcement activities is compliant with the Hampton Report. Where appropriate, the Government envisages that the Minister would seek the agreement of the Panel for Regulatory Accountability and provide appropriate evidence that regulator(s) were working to the Regulator's Compliance Code.

The Government believes that local authorities should be judged as to whether as a whole they are ready to receive these powers for specific offences. The consultation paper proposed that the Cabinet Office (now the Department for Business Enterprise and Regulatory Reform) working with an appropriate audit body would assess local authorities' performance. Once satisfied that a suitably high proportion of local authorities were working to the Regulators' Compliance Code, departments would be advised that local authorities as regulators were ready to take on the new powers.

Questions:

- Is the mechanism for awarding powers appropriate?
- Are there other options or processes you would like to suggest?

- 5.5** On the mechanism for awarding powers, over half of the respondents to the question agreed that the mechanism was appropriate.
- 5.6** Of those who disagreed, the reasons varied. Some regulators and local authorities expressed concern that the approval process was complex and burdensome. At the same time some business respondents, felt that there needed to be greater transparency in the process, suggesting a need for clear principles on the face of the Bill and a formal link to the Compliance Code. A few respondents also suggested the need for an independent arbiter to take the decision on whether a regulator should receive the powers, or a need for parliamentary approval.
- 5.7** On the process for approving local authorities, some businesses felt that local authorities should have to seek approval individually, while other respondents urged the need for consistency and for all local authorities to be granted the powers en bloc.

The Government's position

- 5.8** In light of responses, the Government has chosen to take a number of actions. First, we intend to link reviews of regulators (known as Hampton Implementation Reviews⁴ and associated guidance) to an internal approval process for the proposed order conferring the sanctions on the regulator. Once the order has received internal approval it will be subject to consultation. Further, it has confirmed our view that an order-making power should be subject to the affirmative resolution procedure; i.e. it will require the positive approval of both Houses of Parliament.

⁴ http://www.cabinetoffice.gov.uk/regulation/documents/reform/hampton/hir_guidance.pdf

- 5.9 The Government considers that it would be impractical to approve local authorities individually, particularly as this could lead to inconsistencies in enforcement regimes in different areas. We therefore intend that all local authority regulators should be awarded the powers in any one specific regulatory area subject to agreement from LBRO and the National Regulator (where appropriate) in the regulated area.**

Proposal 11 – Suspension or withdrawal of sanctioning powers

The Government believes there should be a mechanism to remove or suspend these sanctioning powers where a regulator is demonstrably not taking a proportionate and risk-based approach to enforcement.

Questions:

- Do you believe that there should be a process to withdraw or suspend powers?
- If so, what triggers do you believe could be used as a decision basis for withdrawing or suspending powers?

- 5.10** There was strong support for a process of withdrawal or suspension of a regulator’s powers, with almost three-quarters of respondents to this question in favour of such a mechanism. Business respondents, in particular, supported this. The British Retail Consortium, for example, said, *“We recognise the difficulties that the withdrawal or suspension of powers would create. However, we believe it is essential that a realistic ‘non-nuclear’ option be available”*.
- 5.11** Others, particularly regulators or local authorities, argued that existing safeguards such as judicial review and ombudsmen should be sufficient. As an alternative, one respondent suggested that approval should be subject to an annual review by the relevant Minister. Others suggested that LBRO had a role to play here in terms of assessing compliance or intervening and advising any local authority that was misusing the powers.
- 5.12** Some argued that misuse of the powers by one or two local authorities should not lead to loss of powers for all. Others argued that for consistency there should be a blanket withdrawal of the powers.
- 5.13** As for triggers for the suspension or withdrawal power, there was broad support for the volume of successful appeals as a test, provided this was set against the total volume of impositions of a particular sanction. Other triggers were also suggested.

The Government’s position

- 5.14 The Government agrees that there needs to be some system for suspending a regulator’s powers and is considering how best to implement this.**

6. Fixed monetary penalties

Proposal 12 – Safeguards and appeals

The Government proposes that fixed monetary penalties (FMPs) be available as a sanctioning tool for regulators in respect of low level, minor or high-volume instances of non-compliance.

If the defaulter on whom the penalty has been imposed wishes to challenge the imposition of a FMP, we propose that the defaulter should be able to request a mandatory internal review by the regulator. Should the defaulter be unsuccessful, they would have a right of appeal to an appellate body.

Question:

- Do you feel the balance of safeguards and appeals is appropriate to the process?

- 6.1** Over three-quarters of respondents to this question were content with the balance of safeguards. In particular, there was strong support for the payment of monetary penalties into the Consolidated Fund.
- 6.2** Of those who disagreed, a number argued that there should be greater detail on the face of the Bill about safeguards such as the appeals process, level of financial penalties that a regulator may impose and the standards of proof to be applied. On the latter point, there was strong support from business respondents in particular for applying the criminal standard of proof (i.e. beyond reasonable doubt).
- 6.3** On the process of issuing fixed penalties, some were concerned that there was no mechanism for giving a notice of intent, contrasting this with the process for Discretionary Requirements. There was also concern that allowing regulators to impose fixed penalties could lead to 'parking ticket style' enforcement.
- 6.4** Conversely, some local authorities expressed concern that businesses could automatically appeal against sanctions, even where they know an offence has been committed.

The Government's position

- 6.5** The Government understands the concerns expressed about safeguards and is considering whether to add further detail to the face of the Bill, including the standard of proof to be applied.

- 6.6** The Government believes that the appeals process will provide a further check to excessive use of fixed penalties but also to unmeritorious appeals by a business, provided the relevant appellate body has the power to award costs in such circumstances. The Government is however, considering whether to add further detail to the Bill about the appeals process.

7. Discretionary Requirements, cessation notices and other notices

Proposal 13 – Procedure for issuing Discretionary Requirements

The Government proposes to provide for notices, collectively known as Discretionary Requirements, that may contain any of the following:

- A variable monetary penalty (VMP);
- A requirement on an offending business to do certain things to bring themselves back into compliance; and
- A requirement on a defaulter to do certain things to restore the position, as far as possible, to the way it would have been had regulatory non-compliance not occurred.

The process in the draft Bill for issuing Discretionary Requirements is as follows:

- A regulator discovers a case of non-compliance and decides to impose on a defaulter one or more Discretionary Requirements;
- The regulator serves a notice of intent;
- The defaulter has a period of time to make representations to the regulator and also to offer voluntary undertakings (see section below on Enforcement Undertakings);
- The regulator may take these representations into account and then serves the final notice;
- The defaulter may appeal.

Questions:

- Is the procedure for issuing Discretionary Requirements appropriate for all types of regulatory non-compliance?
- If not, is there another way of issuing Discretionary Requirements and, if so, under what circumstances?

- 7.1 Just under half of respondents to the first question were satisfied with the procedure for issuing Discretionary Requirements. The main source of concern was from local authority regulators who felt that the process was unwieldy. North Yorkshire County Council, for example, argued that the process *“is too bureaucratic and too long. Regulated entities could use the system as a means of delay until it becomes impractical or impossible to use other enforcement methods”*.

- 7.2** In particular, some local authorities and regulators questioned the need to issue a notice of intent, particularly for compliance and restoration notices where a business was failing to comply with the relevant legislation. Another regulator argued for a separate process for variable monetary penalties, which differed from notice powers (such as compliance notices), which required the defaulter to take specific action, rather than simply paying a penalty.
- 7.3** Where businesses had concerns about the procedure, this tended to be linked to their concerns about the perceived lack of safeguards on the face of the Bill. One respondent also suggested that the process for making representations and objections to the regulator be separated from the opportunity to offer voluntary undertakings, as the latter course of action could be considered prejudicial. The BRC suggested the need for a maximum level of variable monetary penalty and that if an offence is so serious that it requires a higher penalty then the case should go to court.

The Government's position

- 7.4** **Discretionary Requirements will be used for more serious offences than those meriting fixed monetary penalties and the Government considers that the two-staged process for issuing them is justified. While this may make the process more complex for regulators and local authorities to operate, we consider that businesses should have the opportunity to respond to the notice of intent and, where appropriate, to offer voluntary undertakings.**
- 7.5** **We consider that creating different processes for each different Discretionary Requirement would unnecessarily complicate the system for both businesses and regulators alike.**

Proposal 14 – Discretionary Requirements – enforcement

The Government proposes that Discretionary Requirements will be enforced in the following ways:

- In the case of a VMP, if the defaulter fails to pay they may not be criminally prosecuted for the original offence or have another Discretionary Requirement imposed on them. The regulator may however enforce the VMP through the civil courts;
- For other Discretionary Requirements where there is non-compliance, liability for criminal prosecution or other civil sanctions may revive.

Questions:

- Do you agree with the proposed enforcement of Discretionary Requirements?
- Should all Discretionary Requirements be enforceable by criminal prosecution for the original offence?
- Do you agree that breach of a Discretionary Requirement should not be in itself a criminal offence?

- 7.6 Just under half of respondents were in favour of the proposed enforcement process for Discretionary Requirements. Some local authorities expressed concern about the proposal that unpaid VMPs should be enforced through the civil courts rather than through the criminal courts. One Trading Standards Partnership, for example, argued that *“the cost-effectiveness of civil debt enforcement will prohibit its use by local authorities in most cases”*.
- 7.7 However, the main criticism of the enforcement process related to the proposal in the consultation document that if a defaulter fails to pay the VMP, they may not be criminally prosecuted for the original offence. A number of regulators and local authorities felt that the option of criminal prosecution should revive in such circumstances, otherwise there would be a temptation to rely on criminal prosecution in the first instance. This was supported by nearly three-quarters of respondents who felt that all types of Discretionary Requirements should be enforceable by criminal prosecution.
- 7.8 By contrast, however, less than half of respondents agreed with the proposition that breach of Discretionary Requirement should not in itself be a criminal offence. The main objection was from local authorities. For some this was linked to their objection to the proposal that criminal prosecution could not be revived in the event of an unpaid VMP. Business tended to take the opposite view, with the British Cement Association saying that making a breach of a Discretionary Requirement a criminal offence would *“run counter to the principle behind such a measure”*.
- 7.9 There was also concern expressed by some local authorities that there should be a mechanism for ‘stopping the clock’ on time limits for prosecution for the original offence – particularly for offences with a six-month time limit – as some businesses could attempt to draw out the process in order to avoid criminal prosecution.

The Government’s position

- 7.10 **The Government takes the view that if a defaulter has had a VMP imposed upon them, then they may not be prosecuted for the original offence even if they subsequently fail to pay the VMP. Given the punitive nature of VMPs, we believe that subsequent criminal prosecution for the same offence would be likely to contravene the legal principle of freedom from double jeopardy. For the other forms of Discretionary Requirement, we take the view that these should be enforceable by criminal prosecution for the original offence as they are less punitive in nature and so the same concerns about double jeopardy do not arise.**
- 7.11 **We are content that enforcement of unpaid VMPs through the civil (rather than criminal) courts remains the appropriate and effective mechanism.**
- 7.12 **The Government does not consider it appropriate to make breach of a Discretionary Requirement a criminal offence.**

Proposal 15 – Cessation notices

The Government proposes that a regulator may require a defaulter to cease any activity that gives rise to regulatory non-compliance by way of a 'cessation notice'. This can either be for a temporary period or permanently.

The Government proposes that the test for permanent cessation notices should be:

- The defaulter is carrying on an activity which gives rise to a significant risk of serious harm to human health or the environment;
- The regulator is satisfied that the defaulter in carrying on the activity in that way is committing an offence; and
- The defaulter has been previously convicted for the same criminal offence.

For temporary cessation notices the criteria are the same with the exception that there is no requirement for the defaulter to have been convicted for the same offence, and that there is an additional category of risk of harm to the financial interests of consumers.

The Government proposes that the process for issuing permanent cessation notices is the same as for Discretionary Requirements. Temporary cessation notices are different and will effective immediately on issue and can be challenged by way of direct access to the appellate body.

Because of the onerous nature of cessation notices, the Government also proposes that compensation schemes may be made available by the regulator.

Questions:

- Do you agree that there should be stricter tests for the issue of cessation notices?
- Do you agree with the criteria for temporary cessation notices (harm to human health, the environment, or consumer interests)?
- Should there be further criteria in the temporary cessation notice test?
- (For regulators) Would temporary or permanent cessation notices be a power that you would use?
- Given the safeguards available before imposing a permanent or temporary cessation notice, is it reasonable to have a compensation scheme?

- 7.13** In view of the potential consequences of a cessation order on a business, over half of respondents felt that the stricter tests should apply to cessation notices, with Durham County Council pointing out that *"an ill-conceived notice could be very damaging to a business, both financially and reputationally"*.
- 7.14** However, some regulators/local authorities suggested that the tests were too stringent and that lower thresholds should apply. There was particular concern about the test of 'significant risk of serious harm'.
- 7.15** Nearly three-quarters of respondents were in favour of the criteria for temporary cessation notices. One respondent, however, disagreed with the criterion of harm of financial interests of consumers, arguing that the effects of consumer protection issues could be reversed through an award of damages, in contrast to risks to human health or the environment.

- 7.16** Less than half of respondents felt there should be additional criteria in the temporary cessation notice test. Of those proposing additional criteria, a number suggested adding the welfare of animals. Another respondent suggested that the effects of stopping the process should be taken into account, as a controlled “shutdown” of a process may be safer than immediate cessation of an activity. Others felt that repeated minor infringements/persistent breach of legislation should be a further factor.
- 7.17** The overwhelming majority of regulators felt that they would use cessation notices. A number, however, queried the need for both temporary and permanent notices. LACORS in particular recommended that *“preventative, temporary cessation and permanent should be looked at together and ... should form part of the same process”*.
- 7.18** Given the possible implications for business, there was strong support for a compensation scheme to be available, with three-quarters of respondents in favour of this. Suffolk County Council felt that *“it is absolutely right that a trader should be compensated if these orders are used inappropriately”*. Some saw compensation as a powerful deterrent to misuse of these powers.
- 7.19** Some regulators and local authorities suggested that having such a scheme may encourage vexatious claims and a compensation culture. Some also suggested that compensation should not be available where the regulator had acted in good faith or should only be payable in relation to successful appeals.

The Government’s position

- 7.20** **The Government has reconsidered the position on cessation notices in light of responses to the consultation paper and the ongoing dialogue with stakeholders. We consider that the primary aim of such a sanction is to bring businesses back into compliance. Permanent cessation notices did not fit well with this objective.**
- 7.21** **We are therefore minded to create a single form of cessation notice, which would be based on the criteria for temporary cessation notices (i.e. a serious risk of significant harm to human health, the environment or the financial interests of consumers). The six-month time limit would, however, be removed so that the cessation notice would remain in place until such time as the business brings itself back into compliance.**
- 7.22** **We are not minded to amend the basic legal test for cessation notices, believing that the safeguards of ‘significant risk of serious harm’ are justified given the nature of the sanction. In addition, there is no need to add the grounds of harm to animal welfare to the Bill as this is already covered by the definition of environment contained in clauses 28(6) and 31(6) of the draft Bill, which state that ‘harm to the environment includes harm to the health of animals and plants’.**
- 7.23** **The Government believes that compensation should be available, particularly where a regulator has acted in serious default in imposing a cessation notice. We will give further consideration as to how this can be effected.**

Proposal 16 – Preventative notices

The Government also sought views on whether to allow a regulator to issue a ‘preventative notice’ requiring a defaulter to take certain steps where an offence is highly likely to occur and which presents a significant risk of serious harm to human health and the environment.

Questions:

- Are preventative notices a necessary addition to the regulatory sanctioning toolkit?
- Do you think that the test proposed is appropriate for preventative notices?
- Do you think that there should be further safeguards around the use of preventative notices?

- 7.24** Nearly three-quarters of respondents felt that preventative notices would be a useful additional power. The United Kingdom Environmental Law Association pointed out that preventative notices could prevent harm and avoid the need to issue an alternative administrative penalty. Hampshire County Council added that *“it is to be hoped that advice and persuasion will be effective, but the ability to compel the activity to stop would be helpful”*.
- 7.25** Some business respondents disagreed with the concept of preventative notices, with the CBI arguing that they should not replace ongoing advice from the regulator.
- 7.26** The overwhelming majority of respondents were in favour of the test for cessation orders being applied to preventative notices, and less than a third felt that there was a need for additional safeguards around the use of preventative notices.

The Government’s position

- 7.27** **The Government agrees that ongoing advice from the regulator to the business is vital. However we consider that there will be times where regulators may need to take action to prevent a breach from occurring, for example, where there is a significant risk of serious harm to human health etc.**
- 7.28** **The Government agrees that there is scope for merging temporary and permanent cessation notices with preventative notices. We are minded therefore to include a forward-looking element to cessation notices, negating the need for a separate form of preventative notice.**

8. Enforcement Undertakings

Proposal 17 – Enforcement Undertakings – publication on a regulator’s website

The Government proposes to introduce Enforcement Undertakings that will allow regulators to accept undertakings offered by companies that have realised that they have fallen into non-compliance and wish to offer to the regulator ways to return to compliance, such as offering to compensate any person affected by the non-compliance.

The Government proposes that on completion of the Enforcement Undertakings the regulator should issue a standard letter to say that the undertakings have been completed to the satisfaction of the regulator.

Question:

- Do you think that the publication of Enforcement Undertakings on a regulator’s website is an appropriate step?
- Do you think that this could be tied with certification of Enforcement Undertakings by also publishing the fact that the Enforcement Undertakings have been successfully completed?

- 8.1 Well over half of respondents were in favour of regulators publishing details of Enforcement Undertakings on their websites. Opinion was largely split between businesses and regulators/local authorities.
- 8.2 Some businesses felt that such an action would have a negative effect on a business’s reputation, particularly where there had been no admission of guilt, and could discourage businesses from offering undertakings. The Institute of Directors, on the other hand, agreed that Enforcement Undertakings should be published, suggesting that *“both the regulated company and the regulatory body should benefit from bringing greater transparency to the process”*.
- 8.3 Regulators and local authorities also argued for transparency, with many suggesting that the public (including shareholders, customers and more importantly victims) were entitled to see what a regulator had done to deal with an offence. Similarly, one respondent suggested that *“the visibility of enforcement action is vital in establishing public support, and hence the willingness of members of the public to report infractions”*. Some also argued that publication would also be a useful deterrent and a useful enforcement tool to encourage compliance with the EU.
- 8.4 Others suggested that publication should at times go beyond websites and include press releases where appropriate. Some also queried why this question only related to EUs and not other sanctions.

- 8.5** If EUs are to be published on regulators' websites, there was overwhelming support for the proposition that successful completion of the EU should also be published, as businesses should be given credit for complying. There was some debate about how long details should remain on the website post-completion.

The Government's position

- 8.6** The Government believes that the EU process should be as open and transparent as possible in order to ensure public confidence in the system. While we understand the concerns expressed by the business community, if the regulator chose instead to pursue a criminal prosecution then the risk of negative publicity for the business in the event of a successful prosecution would be far higher. We therefore intend to maintain the approach set out in the draft Bill.
- 8.7** We consider that regulators are already able to publish detail about any other enforcement action they have taken and further provision is therefore not required in the Bill. The nature and details of such publication should remain a matter for individual regulator's discretion.

Proposal 18 – Combining voluntary undertakings with VMPs

The Government proposes that Discretionary Requirements and Enforcement Undertakings should be able to be combined to fully address an instance of regulatory non-compliance. Undertakings offered during the VMP process are called 'voluntary undertakings' to differentiate them from 'Enforcement Undertakings'.

Questions:

- Are you satisfied with the proposed approach of allowing voluntary undertakings to be offered with a VMP?

- 8.8** The vast majority of the responses to this question were in favour of allowing voluntary undertakings to be offered with a VMP. The Office of Fair Trading, for example, argued that *"this may secure more effective compliance than simply asking companies to pay a fine"*.
- 8.9** More generally some businesses expressed concern that allowing businesses only one approach to agreeing the EU may limit the value of the sanction, particularly for more complex cases. By contrast, some regulators/local authorities were concerned that that the process should not become too complicated and too drawn out.

The Government's position

- 8.10** The Government agrees that there may be circumstances in which it would be appropriate to offer a VMP alongside a voluntary undertaking and the Bill as drafted already provides for this.

9. Resourcing a system of alternative sanctions

Proposal 19 – Resourcing the new system

The Government wishes to ensure that the alternative sanctioning powers in the Bill do not provide a financial disincentive to regulators, but at the same time do not provide direct financial incentive to impose financial penalties.

The Government proposes that monetary penalties will be paid into the Consolidated Fund but that regulators should be able to recover the costs of administering the new sanctions.

Questions:

- Would the financial implications to a regulator’s enforcement budget be a significant factor in deciding if a regulator would want to use these alternative sanctions?
- Would the recovery of cost for administering sanctions mitigate this?

- 9.1 Over three-quarters of respondents (who were mostly regulators and local authorities) stated that financial implications would be a significant factor in determining whether to use the new sanctions. An even larger majority of respondents felt that allowing regulators to recover the costs of administering the new sanctions would mitigate this.
- 9.2 One trading standards authority suggested that *“as investigative and legal costs can be recovered in the criminal courts we would strongly suggest that the other elements of the sanctioning toolkit should be recoverable on a similar basis”*.
- 9.3 Others took the view that financial implications should not be a factor, and that decisions should be only taken in the public interest and with the goal of achieving compliance.
- 9.4 Businesses were firmly of the view that there should be no direct financial incentive for the regulator to pursue the administrative sanction route, while some argued that there should be no cost-recovery from business at all.

The Government's position

- 9.5** The Government is considering whether to allow regulators to recover reasonable investigative costs from businesses where a Discretionary Requirement or cessation notice has been imposed. As regulators/local authorities have pointed out, in the case of a successful criminal prosecution, investigative and legal costs can be claimed and this may serve as a financial disincentive to using administrative sanctions. We are therefore considering a scheme for cost-recovery.
- 9.6** However, we recognise that any scheme should take account of the concerns expressed by business respondents and the need for safeguards to ensure that there is no financial incentive for regulators to pursue the administrative penalty route. This principle will form part of any scheme of cost-recovery.

10. Publication of enforcement policy and penalty guidance

Proposal 20 – Publication of guidance documents

The Government proposes that all regulators using the extended sanctioning toolkit should publish their enforcement policies and penalty guidance on each new sanctioning power conferred on them.

Question:

- Are there other guidance documents that should also be published such as guidance on prosecution?

- 10.1** Just over half of respondents to this question felt that there were other documents that could be published. There was strong support for including guidance on prosecution, such as the Code for Crown Prosecutors. It was also suggested that information about how to appeal against a sanction and how to complain about a regulator should also be published.

The Government's position

- 10.2** The Government agrees that regulators should, as good practice, also publish guidance on prosecution, appeals and complaints handling. We are minded, however, to leave the Bill as drafted in terms of the guidance that regulators will be required to publish (i.e. penalty guidance and an enforcement policy).

11. Impact assessment

Questions:

- Do you believe the assessment of costs and benefits in the impact assessment is realistic?
- If not, is there any further evidence that you can provide that should be taken into account?

- 11.1** A number of respondents commented on the impact assessment (IA) and provided useful additional information. The Government is considering this information and will update the IA in due course.

Annex A Respondents

Responses to the consultation were received from the following organisations. Please note this list excludes responses made in confidence or where anonymity was requested.

Organisation

Advertising Association
 Advertising Standards Authority
 Anglian Water Services Limited
 Association of British Bookmakers
 Association of British Insurers
 Association of Chief Police Officers
 Association of Convenience Stores
 Association of Personal Injury Lawyers (APIL)
 Babergh District Council
 BAE Systems Ltd
 Bayer CropScience
 Bristol City Council
 Bristows (consultant)
 British Beer & Pub Association
 British Cement Association
 British Chambers of Commerce
 British Hallmarking Council
 British Retail Consortium
 Business In Sport and Leisure
 Cambridgeshire County Council
 Chemical Business Association
 Chemical Industries Association (CIA)
 Cheshire County Council Trading Standards Service
 Cheshire Environmental Health Managers
 Chief Fire Officers Association
 Citizens Advice Service
 City of Bradford Metropolitan District Council
 City of London Corporation
 Civil Aviation Authority (CAA)
 Civil Engineering Contractors Association Wales
 Confederation of British Industry (CBI)
 Corus UK Limited
 Council on Tribunals
 Crop Protection Association
 Denbighshire County Council
 Derbyshire County Council
 Dundee City Council
 Durham County Council
 East of England Trading Standards Association
 EEF

Sector

Trade Association
 National Regulator
 Service Provider
 Trade Association
 Trade Association
 Professional Body
 Trade Association
 Other
 Local Authority
 Other Business
 Retailer
 Local Authority
 Professional Body
 Trade Association
 Trade Association
 Other Business
 National Regulator
 Other Business
 Trade Association
 Local Authority
 Trade Association
 Trade Association
 Local Authority
 EH Representative
 Professional Body
 Consumer
 Local Authority
 Local Authority
 National Regulator
 Trade Association
 Other Business
 Manufacturer
 Other
 Other
 Local Authority
 Local Authority
 Local Authority
 Local Authority
 TS Representative
 Trade Association

Organisation

Environment Agency
 Environmental Health Merseyside
 Environmental Services Wolverhampton
 Ernst & Young LLP
 Federation of Small Businesses
 Food Standards Agency
 Forum of Private Business (FPB)
 Gambling Commission
 Greenwich Borough Council
 Hampshire County Council
 Hampshire Fire and Rescue Service
 Health and Safety Commission (HSC)
 His Honour Judge Swift
 Housing Corporation
 Human Fertilisation & Embryology Authority
 Information Commissioner's Office
 Institute of Directors (IoD)
 Institute of Licensing
 Institution of Occupational Safety and Health
 Islington Council
 Kingfisher Plc
 Kirklees Environmental Services
 Kirklees Metropolitan Council Environmental Services
 Lancashire County Council Trading Standards
 Leeds City Council
 Leicester, Leicestershire and Rutland Environmental Health
 Managers' Group
 Leicestershire Fire & Rescue Service
 Licensing Act Active Residents' Network
 Lifting the Burdens Taskforce
 Local Authorities' Co-ordinators of Regulatory Services (LACORS)
 London Borough of Enfield
 London Fire Brigade
 London Trading Standards Authorities
 Luton Borough Council
 Magistrates Association
 Manchester City Council
 Medicines and Health Products Regulatory Agency
 National Association of Licensing and Enforcement Officers
 National Association of Master Bakers
 National Consumer Council
 National Farmers Union
 National Lottery Commission
 Natural England
 Newspaper Society
 Nigel Dawson
 North East Trading Standards Association
 North Yorkshire County Council
 Northgate Information Solutions
 Northumberland Trading Standards Service

Sector

National Regulator
 Local Authority
 Local Authority
 Other Business
 Other Business
 National Regulator
 Other Business
 National Regulator
 Local Authority
 Local Authority
 Local Authority
 National Regulator
 Other
 National Regulator
 National Regulator
 Professional Body
 Other Business
 Professional Body
 Professional Body
 Local Authority
 Retailer
 Local Authority
 Local Authority
 Local Authority
 Local Authority
 EH Representative
 Local Authority
 Consumer
 Other
 Professional Body
 Local Authority
 Other
 TS Representative
 Local Authority
 Professional Body
 Local Authority
 National Regulator
 Professional Body
 Trade Association
 Consumer
 Other
 National Regulator
 National Regulator
 Trade Association
 Other
 TS Representative
 Local Authority
 Other Business
 TS Representative

Organisation

Office of Fair Trading (OFT)
Office of Rail Regulation (ORR)
Pesticides Safety Directorate
Plymouth Licensed Taxi Association
Postcomm
Price Waterhouse Coopers
Prof. Colin T. Reid
Professional Contractors Group
Proprietary Association of Great Britain
Rail Safety and Standards Board
Reading Borough Council
Redcar & Cleveland Borough Council
Rother District Council
Rugby Borough Council
Rushmore Borough Council
Scottish Environment Protection Agency (SEPA)
Scottish Widows
Security Industry Authority
Society of Chief Officers of Trading Standards in Scotland (SCOTSS)
Society of Chief Trading Standards Officers
Solihull MBC
South Gloucestershire Council
Suffolk County Council
Swindon Borough Council
The Alliance Against IP Theft
The British Holiday & Home Parks Association
The Chartered Institute of Environmental Health (CIEH)
The Electoral Commission
The Pensions Regulator
The Scotts Company
The United Kingdom Environmental Law Association (UKELA)
Tonbridge & Malling Borough Council
Trade Marks, Patents & Designs Federation
Trades Union Congress (TUC)
Trading Standards East Midlands
Trading Standards North West
Wales Heads of Environmental Health
Wales Heads of Trading Standards
Wandsworth Borough Council
Water Services Regulation Authority (OFWAT)
Water UK
Welsh Language Board
Welwyn Hatfield Borough Council
West Lothian Council
West Yorkshire Trading Standards Service
Westminster City Council
Wychavon District Council
Yorkshire & Humber Trading Standards Group

Sector

National Regulator
National Regulator
National Regulator
Trade Association
National Regulator
Other Business
Other
Professional Body
Trade Association
National Regulator
Local Authority
Local Authority
Local Authority
Local Authority
Local Authority
Professional Body
Service Provider
National Regulator
TS Representative
TS Representative
Local Authority
Local Authority
Local Authority
Local Authority
Other
Trade Association
EH Representative
National Regulator
National Regulator
Manufacturer
Charity
Local Authority
Professional Body
Other
TS Representative
TS Representative
EH Representative
TS Representative
Local Authority
National Regulator
Professional Body
Other
Local Authority
Local Authority
Local Authority
Local Authority
Local Authority
TS Representative

Annex B Analysis of response to specific questions

It is important to note that, although we had 154 individual responses, not everyone answered all the specific questions raised in the consultation with a 'yes' or 'no'. We have examined answers given against the individual questions and, where it appears clear, have allocated a 'yes' or 'no' answer. Where the comments did not answer the specific question, they have not been included as 'responses' for this particular analysis. The individual responses can be found at: www.cabinetoffice.gov.uk/regulation/enforcement_sanctions_bill

Question 1: *Do you agree with LBRO's role in helping to facilitate new Primary Authority Partnerships?*

Number of responses **67** Yes **72%** No **28%**

Question 2: *Do you agree with the way the Bill handles the communication between primary and enforcing authorities, including the definition of 'enforcement action'? If not, what alternatives do you propose?*

Number of responses **63** Yes **46%** No **54%**

Question 3: *Do you agree that LBRO should consider every case referred to it by a Primary or Enforcing Authority?*

Number of responses **67** Yes **64%** No **36%**

Question 4: *Do you agree that LBRO should be obliged to consider evidence from national bodies when resolving enforcement action disputes?*

Number of responses **69** Yes **86%** No **14%**

Question 5: *Is the duty to have regard to inspection plans strong enough, or should local authorities be obliged to "act in accordance with" plans drawn up between a business and a Primary Authority?*

Number of responses **63** Have regard to **71%**

Act in accordance with **29%**

Question 6: (a) *Do you agree with this approach?*

Number of responses **60** Yes **77%** No **23%**

- (b) *Or should a stronger requirement be placed on local authorities to comply with LBRO guidance? If so, what is your argument?*

Number of responses 48 Yes 21% No 79%

- Question 7: (a)** *Do you agree with the process set out in the Bill, for evidence gathering and publication?*

Number of responses 61 Yes 87% No 13%

- (b) *Should LBRO be required in the Bill to consult with specific stakeholder groups?*

Number of responses 66 Yes 77% No 23%

- Question 8:** *Should local authorities be put under a duty to have regard to the list when they plan their own priorities?*

Number of responses 71 Yes 86% No 14%

- Question 9:** *Do you agree that LBRO should have this advisory role?*

Number of responses 71 Yes 92% No 8%

- Question 10:** *Do you agree with this approach to LBRO's structure and legal powers?*

Number of responses 62 Yes 94% No 6%

- Question 11:** *Are there any pieces of legislation on trading standards and environmental health that are enforced by local authorities, and should be added to this list?*

Number of responses 57 Yes 60% No 40%

- Question 12:** *Should anything be removed from this list?*

Number of responses 49 Yes 31% No 69%

- Question 13:** *Are there other areas that you believe LBRO's work should extend to, and why?*

Number of responses 62 Yes 45% No 55%

Question 14: *To what extent should the Local Better Regulation Office operate across the UK, with respect to the following functions?*

a) improving co-ordination and consistency	YES	96%	NO	4%
b) guidance to local authorities	YES	94%	NO	6%
c) work on regulatory priorities	YES	94%	NO	6%
d) advice to Government	YES	98%	NO	2%
e) awarding grants	YES	92%	NO	8%
Number of responses		52		

Question 15: *How should its work be tailored to the different national contexts?*

Text answer only

Question 16: *Are the lists contained in Schedules 3 and 4, and Clause 35(3) accurate and are there any omissions?*

Number of responses	58	Yes	36%	No	64%
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Question 17: (a) *Is the mechanism for awarding powers appropriate?*

Number of responses	62	Yes	63%	No	37%
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(b) *Are there other options or processes you would like to suggest?*

Question 18: *Do you believe that there should be a process to withdraw or suspend powers? If so, what triggers do you believe could be used as a decision basis for withdrawing or suspending powers?*

Number of responses	65	Yes	72%	No	28%
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Question 19: *Do you feel that the balance of safeguards and appeals is appropriate to this process?*

Number of responses	67	Yes	78%	No	22%
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Question 20: *Is the procedure for issuing Discretionary Requirements appropriate for all types of regulatory non-compliance? If not, is there another way of issuing Discretionary Requirements and, if so, under what circumstances?*

Number of responses	56	Yes	46%	No	54%
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- Question 21:** *Do you agree with the proposed enforcement of Discretionary Requirements?*
- Number of responses **59** Yes **47%** No **53%**
- Question 22: (a)** *Should all Discretionary Requirements be enforceable by criminal prosecution for the original offence?*
- Number of responses **62** Yes **71%** No **29%**
- (b)** *Do you agree that breach of a discretionary requirement should not be in itself a criminal offence?*
- Number of responses **64** Yes **71%** No **29%**
- Question 23:** *Do you agree that there should be stricter tests for the issue of cessation notices?*
- Number of responses **61** Yes **59%** No **41%**
- Question 24:** *Do you agree with the criteria for temporary cessation notices (harm to human health, the environment, or consumer interests)?*
- Number of Responses **59** Yes **75%** No **25%**
- Should there be further criteria in the temporary cessation notice test? If so could you suggest further criteria?*
- Number of responses **53** Yes **40%** No **60%**
- Question 26:** *(For regulators) Would temporary or permanent cessation notices be a power that you would use? Please give examples of how you would use them.*
- Number of responses **41** Yes **88%** No **12%**
- Question 27:** *Given the safeguards available before imposing a permanent or temporary cessation notice, is it reasonable to have a compensation scheme?*
- Number of responses **64** Yes **77%** No **23%**
- Question 28:** *Are preventative notices a necessary addition to the regulatory sanctioning toolkit? Please give reasons for your answer.*
- Number of responses **63** Yes **73%** No **27%**
- Question 29:** *Do you think that the test proposed is appropriate for preventative notices? If not, please give your reasons.*
- Number of responses **48** Yes **81%** No **19%**

Question 30: *Do you think that there should be further safeguards around the use of preventative notices? If so, please provide further detail.*

Number of responses 60 Yes 32% No 68%

Question 31: *Do you think that the publication of Enforcement Undertakings on a regulator's website is an appropriate step?*

Number of responses 67 Yes 79% No 21%

Question 32: *Do you think that this could be tied with certification of Enforcement Undertakings by also publishing the fact that the Enforcement Undertakings have been successfully completed?*

Number of responses 65 Yes 82% No 18%

Question 33: *Are you satisfied with the proposed approach of allowing Voluntary Undertakings to be offered with a VMP?*

Number of responses 70 Yes 81% No 19%

Question 34: (a) *Would the financial implications to a regulators' enforcement budget be a significant factor in deciding if a regulator would want to use these alternative sanctions?*

Number of responses 53 Yes 83% No 17%

(b) *Would the recovery of cost for administering sanctions mitigate this?*

Number of responses 49 Yes 86% No 14%

Question 35: *Are there other guidance documents that should also be published such as guidance on prosecution?*

Number of responses 61 Yes 51% No 49%

Question 36: *Do you believe the assessment of costs and benefits in the impact assessment is realistic? If not, is there any further evidence that you can provide that should be taken into account?*

Number of responses 39 Yes 21% No 79%

Analysis of responses to questions raised by the government consultation on theDraft Regulatory Enforcement and Sanctions Bill

Question	Total		Local Authorities		Trading Standards		Environmental Health		National Regulators		Business		Professional Bodies		Other		Regulators		Regulated	
	Number	Positive	Number	Positive	Number	Positive	Number	Positive	Number	Positive	Number	Positive	Number	Positive	Number	Positive	Number	Positive	Number	Positive
1	67	72%	29	55%	10	60%	2	0%	3	100%	19	100%	3	100%	1	100%	48	60%	19	100%
2	63	46%	29	21%	7	0%	1	0%	3	67%	18	100%	4	50%	1	100%	45	24%	18	100%
3	67	64%	34	62%	9	44%	2	50%	3	33%	14	93%	4	50%	1	100%	53	57%	14	93%
4	69	86%	33	82%	10	60%	2	100%	3	100%	17	100%	3	100%	1	100%	52	81%	17	100%
5	63	71%	27	93%	9	88%	1	0%	3	100%	18	33%	4	50%	1	100%	45	87%	18	33%
6a	60	77%	30	83%	10	70%	1	0%	2	50%	12	67%	4	100%	1	100%	48	79%	12	67%
6b	48	21%	24	4%	7	0%	1	0%	2	0%	9	100%	4	0%	1	0%	39	3%	9	100%
7a	61	87%	29	90%	8	63%	2	100%	3	67%	14	93%	4	100%	1	100%	47	85%	14	93%
7b	66	77%	29	76%	9	56%	2	50%	3	100%	18	89%	4	100%	1	0%	48	73%	18	89%
8	71	86%	33	82%	8	63%	2	100%	3	67%	19	100%	4	100%	2	100%	52	81%	19	100%
9	71	92%	31	87%	10	80%	2	100%	3	100%	19	100%	4	100%	2	100%	52	88%	19	100%
10	62	94%	27	85%	7	100%	3	100%	2	100%	18	100%	4	100%	1	100%	44	91%	18	100%
11	57	60%	29	69%	7	57%	3	100%	2	100%	12	8%	3	100%	1	100%	45	73%	12	8%
12	49	31%	26	31%	5	80%	3	100%	1	0%	11	0%	3	0%	0	0%	38	39%	11	0%
13	62	45%	30	57%	9	22%	2	100%	2	0%	14	36%	4	50%	1	0%	48	48%	14	36%
14a	53	96%	26	96%	7	86%	1	100%	2	100%	12	100%	4	100%	1	100%	41	95%	12	100%
14b	52	94%	26	92%	6	83%	1	100%	2	100%	12	100%	4	100%	1	100%	40	93%	12	100%
14c	52	94%	25	92%	7	86%	1	100%	2	100%	12	100%	4	100%	1	100%	40	93%	12	100%
14d	51	98%	25	100%	7	86%	1	100%	2	100%	11	100%	4	100%	1	100%	40	98%	11	100%
14e	50	92%	24	92%	7	86%	1	100%	2	100%	11	100%	4	100%	1	0%	39	90%	11	100%
16	58	36%	21	38%	8	25%	2	50%	8	25%	11	45%	5	20%	3	67%	45	36%	13	38%
17a	62	63%	25	56%	8	50%	2	100%	9	78%	9	56%	6	67%	3	100%	51	65%	11	55%
18	65	72%	24	71%	9	56%	3	33%	6	50%	16	100%	5	60%	2	100%	48	63%	17	100%
19	67	78%	24	79%	10	90%	3	100%	9	89%	13	46%	6	83%	2	100%	52	87%	15	47%
20	56	46%	20	35%	10	50%	1	0%	8	38%	11	64%	5	60%	1	100%	43	40%	13	69%
21	59	47%	26	46%	9	22%	1	0%	8	63%	8	63%	4	50%	3	67%	49	45%	10	60%
22a	62	71%	27	85%	8	86%	2	100%	7	57%	11	36%	5	40%	2	100%	50	80%	12	33%
22b	64	44%	26	31%	10	40%	1	0%	6	50%	14	71%	5	20%	2	100%	49	37%	15	67%
23	61	59%	23	57%	9	56%	1	100%	7	29%	15	80%	4	25%	2	100%	45	51%	16	81%
24	59	75%	26	85%	7	86%	1	100%	8	50%	11	55%	4	75%	2	100%	47	81%	12	50%
25	53	40%	22	32%	7	43%	1	0%	8	50%	10	40%	3	67%	2	50%	42	38%	11	45%
26	41	88%	24	83%	7	86%	0	0%	7	100%	1	100%	2	100%	0	0%	40	88%	1	100%
27	64	77%	24	67%	7	71%	1	100%	8	50%	16	100%	6	83%	2	100%	46	67%	18	100%
28	63	73%	24	83%	10	70%	1	0%	6	50%	14	64%	6	83%	2	100%	47	77%	16	63%
29	48	81%	21	90%	7	86%	1	100%	7	29%	5	100%	6	83%	1	100%	41	80%	7	86%
30	60	32%	24	17%	8	0%	2	50%	7	29%	12	92%	5	20%	2	0%	47	17%	13	85%
31	67	79%	28	82%	9	100%	2	100%	8	88%	13	46%	5	100%	2	50%	53	87%	14	50%
32	65	82%	27	78%	9	100%	2	100%	8	88%	11	64%	6	100%	2	50%	52	85%	13	69%
33	70	81%	28	75%	9	100%	1	100%	9	89%	15	73%	5	80%	3	100%	53	83%	17	76%
34a	53	83%	28	82%	10	70%	2	100%	8	88%	1	100%	4	100%	0	0%	52	83%	1	100%
34b	49	86%	24	88%	9	76%	2	100%	7	100%	2	50%	4	100%	1	0%	46	89%	3	33%
35	61	51%	25	36%	9	56%	1	100%	8	38%	12	83%	5	40%	1	100%	48	42%	13	85%
36	39	21%	19	21%	8	0%	1	0%	5	40%	3	0%	3	67%	0	0%	36	22%	3	0%

Note: The positive answer to Question 5 was taken as 'Have regard to...'

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