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Llywodraeth Cymru
Welsh Government

Welsh Government Changes to how environmental impact assessment applies to town and country planning

Consultation - summary of responses and Government response

Date of issue: May 2018

Mae'r ddogfen yma hefyd ar gael yn Gymraeg.
This document is also available in Welsh.

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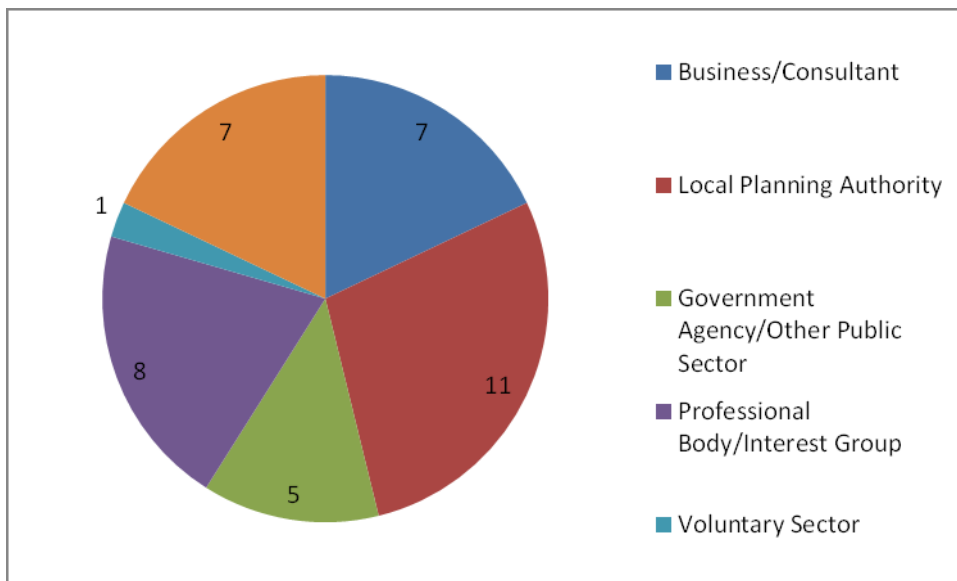
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1 Introduction

- 1.1 The 'Proposed changes to how Environmental Impact Assessment applies to Town and Country Planning' consultation document was issued on 22 August and was open for responses until 11 November 2016. A total of 13 questions were set out in the consultation document, with a standardised form provided for ease of response.
- 1.2 This document provides a summary of the responses.

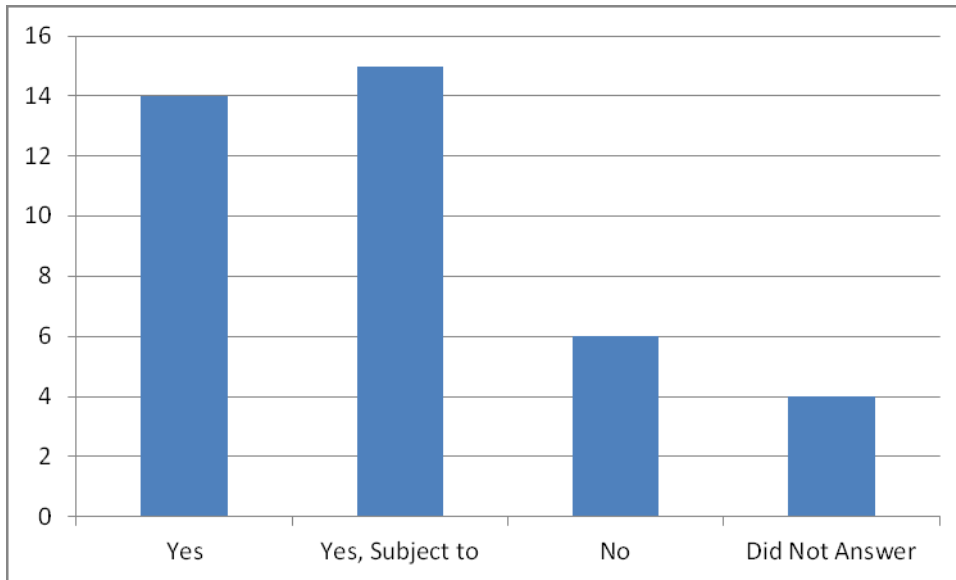
2 Responses

- 2.1 In total, 39 responses were received in response to the consultation. The breakdown of respondents is as follows:



3 Third party screening requests

Q1. Do you agree with our proposals for third party screening? If not, what proposals would you recommend to ensure third party screening requests are made early in the application process.



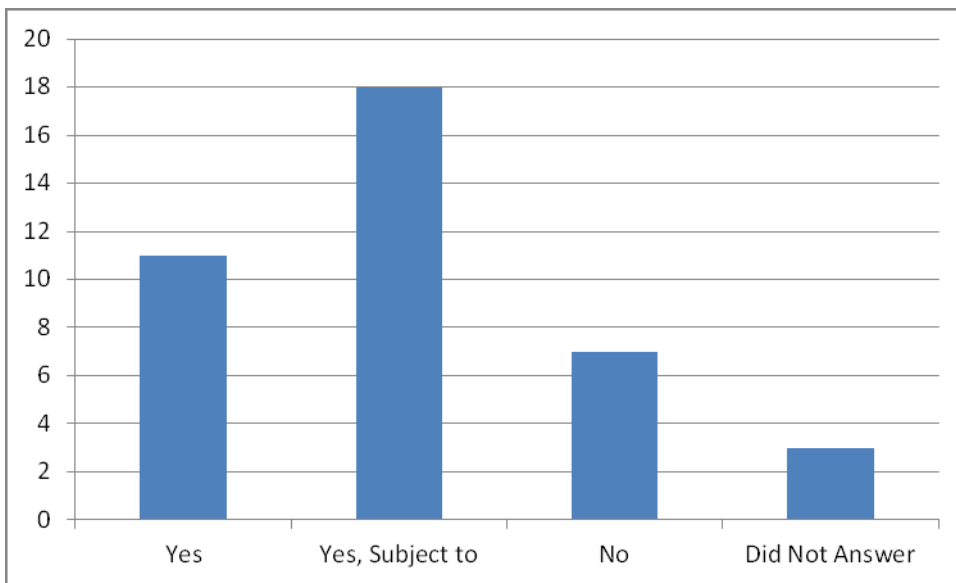
- 3.1 Of those who responded to the question, the majority (74%) agreed with limiting third party screening requests. They considered this would incentivise early screening requests, and as long as the time period was sufficient for parties to consider the request, the proposal was reasonable.
- 3.2 A number of respondents supported the principle of limiting third party screening requests but made comments on the application of a legislative solution in practice. They considered any system would need to have flexibility to allow third parties to make requests after the proposed deadline where new information became available. They also considered that where a request was made after the deadline, it could be very difficult to distinguish between a third party who has genuinely identified environmental risks from a proposed development, and the third party aiming to frustrate the consenting process. One respondent had concerns that introducing a limitation could be in conflict with the Aarhus convention.
- 3.3 Respondents suggested an alternative to legislation. They considered this might be a more flexible and effective approach to addressing the issue of concern. They considered this option could include guidance about such third party requests, indicating the type of criteria that will be used to judge whether they are accepted. Such guidance could indicate the greater justification for making a third party screening request, to the Welsh Government, would be required the later in the consent process the request is sent.

Response

- 3.4 Welsh Government wants third party screening requests to occur early in the process so that all parties have certainty. The respondents support this overall aim; however there are concerns over the inflexibility of a legislative time limit and what would occur after it has passed.
- 3.5 We intend to issue guidance on third party screenings. However, if requests for intervention continue to be made late in the process which could have been made earlier, legislative solutions will be reconsidered.

4 Timeframe to provide a scoping request

Q2. Do you think the timeframe associated with scoping should be revised? If yes, what timeframe do you consider appropriate and why?



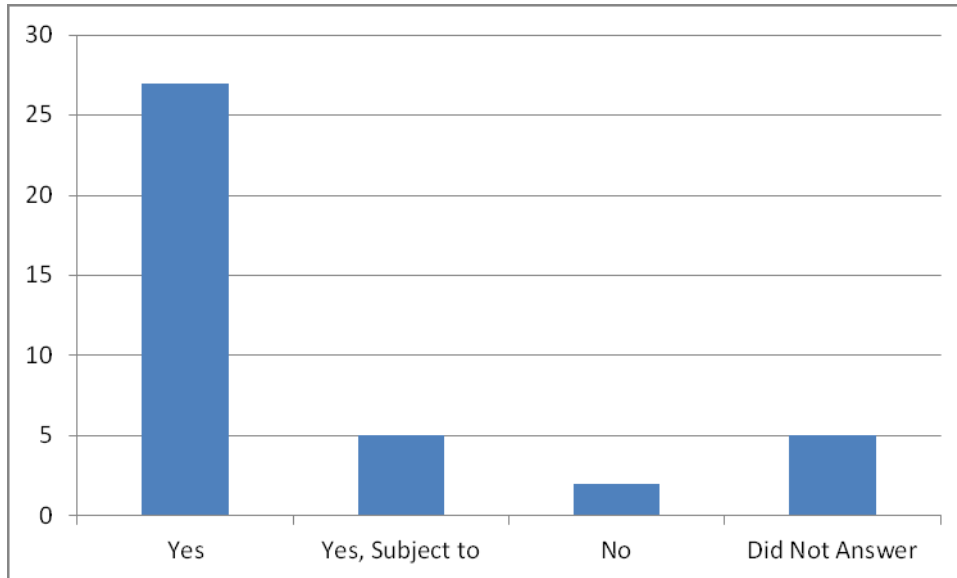
- 4.1 Of those who responded to the question, the majority (74%) agreed that scoping timeframe should be extended. Of those who considered that a different timeframe should be provided, there was a general agreement of 8 weeks.
- 4.2 Those who did not support the proposal considered it is primarily other issues which cause a delay, such as the resources of statutory consultees and the LPA. They considered the additional time would not lead to better decisions, just the same response at a slower timescale.

Response

- 4.3 We will increase the period within which a scoping opinion must be adopted to eight weeks.
- 4.4 It is recognised that other factors can affect the speed of preparing a scoping report. The Welsh Government commissioned training on EIA scoping to help improve competence of local planning authorities and other government bodies.

5 Coordination

Q3.	Do you agree with proposals to provide for a coordinated rather than joint procedure?
Q4	What coordinating measures would be most useful, and what benefits would they generate?



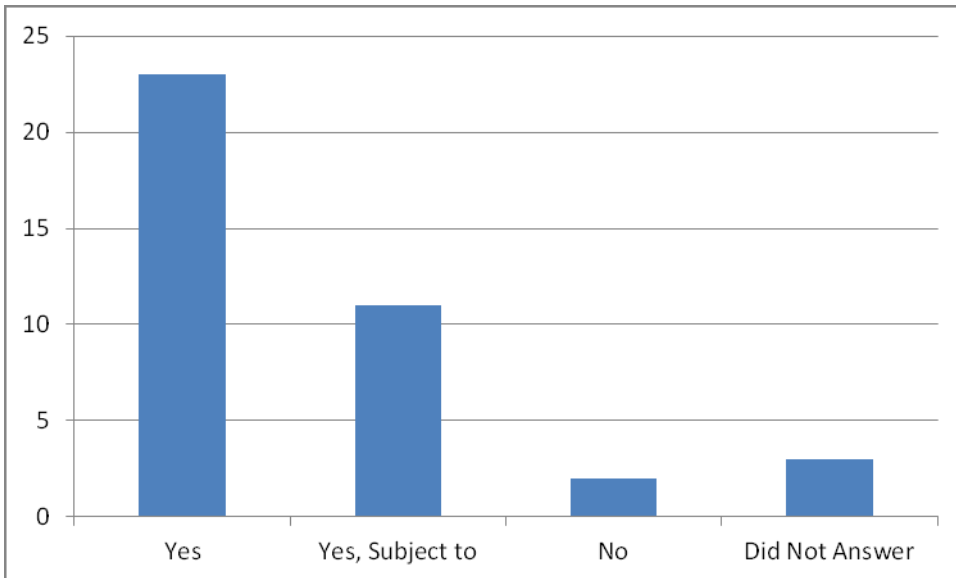
- 5.1 Of those who responded to the question, the majority (94%) agreed with introducing a coordinated rather than a joint procedure. Respondents considered this offered the greatest flexibility to the assessments, and would allow each assessment to fulfil the separate legislative requirements. A number of respondents commented whichever approach is adopted, prescriptive legislation would impact on good working practices already in place.
- 5.2 Of the measures which could be co-ordinated, people saw benefits in coordinating the scoping process and particular topics within Environmental Statement.

Response

- 5.3 Although a few areas were identified where coordination between the assessments would be beneficial, there were no consistent themes. The opportunities for coordination which were identified will be incorporated into guidance.

6 Consultation and participation in the decision making process

Q5.	Do you agree with our proposals for making information available electronically?
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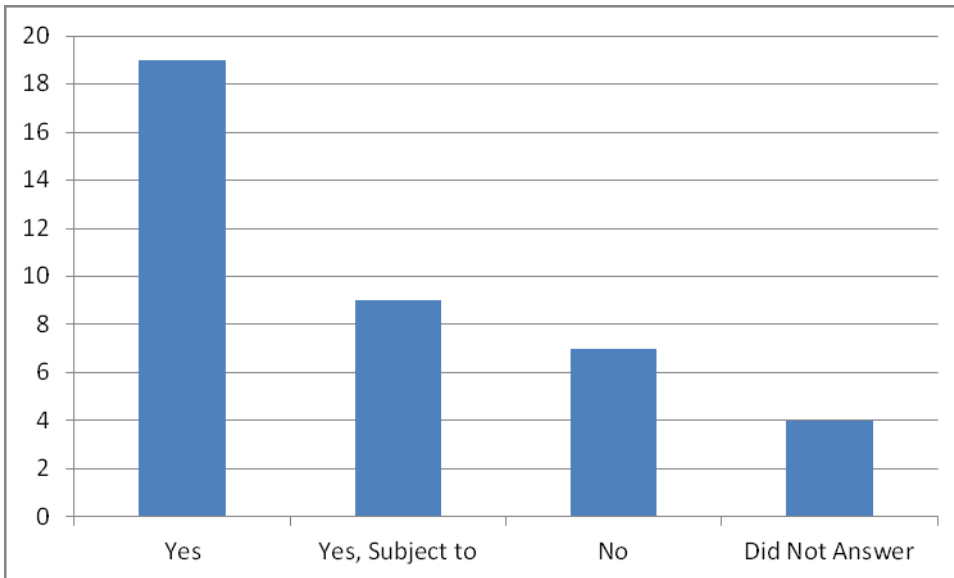
- 6.1 Of those who responded to the question, the majority (94% of those who answered) agreed with our proposals for making information available online. Some respondents identified that certain LPAs already upload all the information associated with a planning application.
- 6.2 Comments on the proposals included:
- The need to ensure publicity for EIA applications via websites is easily identified by members of the public;
 - That this offers the ability to go paperless;
 - The need for clarity over how the Welsh Language Standards apply to such documents; and,
 - The need for publicity surrounding Environmental Statements to continue to be posted in local newspapers as well as online.

Response

- 6.3 The publicity requirements for EIA applications have been enhanced by the 2014 EIA Directive. It is not intended to remove the requirement to publicise the application in a newspaper circulating in the locality.
- 6.4 The Regulations will be amended to require EIA applications to be submitted in both electronic and paper versions. This allows the LPA to comply with the electronic requirement, and fulfil any need for a paper copy. Where the LPA do not need a paper copy, the Regulations provide that the format may be agreed between both parties. We intend to produce guidance which can assist LPAs understanding this and way applications are published on websites and in accordance with the standards.

7 Monitoring of significant effects

Q6.	Do you agree our approach provides the most flexible approach to the 2014 EIA Directives requirements?
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7.1 Of those who responded to the question, the majority (80% of those who answered) agreed with the approach to the monitoring of significant effects.

7.2 Of those who made comments, they noted:

- This provision would increase the amount of monitoring undertaken on developments; and,
- Concerns over the practical application of the monitoring proposals. These were:
 - whether the duty to monitor the effects of development would rest with the LPA or developer;
 - Where remedial action is required, would this be undertaken by the LPA or developer; and,
 - Concerns that monitoring will be imposed by a planning obligation under Section 106 of the TCPA1990 rather than a condition, with the associated legal costs and potential for delay.

7.3 Respondents identified monitoring should include detail on the effectiveness of the action and enable additional action to be required to deliver the anticipated environmental outcome.

Response

7.4 Monitoring of the effects of EIA development is already undertaken, and it is accepted this provision may increase the amount of monitoring undertaken. However, in accordance with the Directive, any monitoring must be proportionate to the nature, location and size of development. Therefore, additional monitoring should not be burdensome.

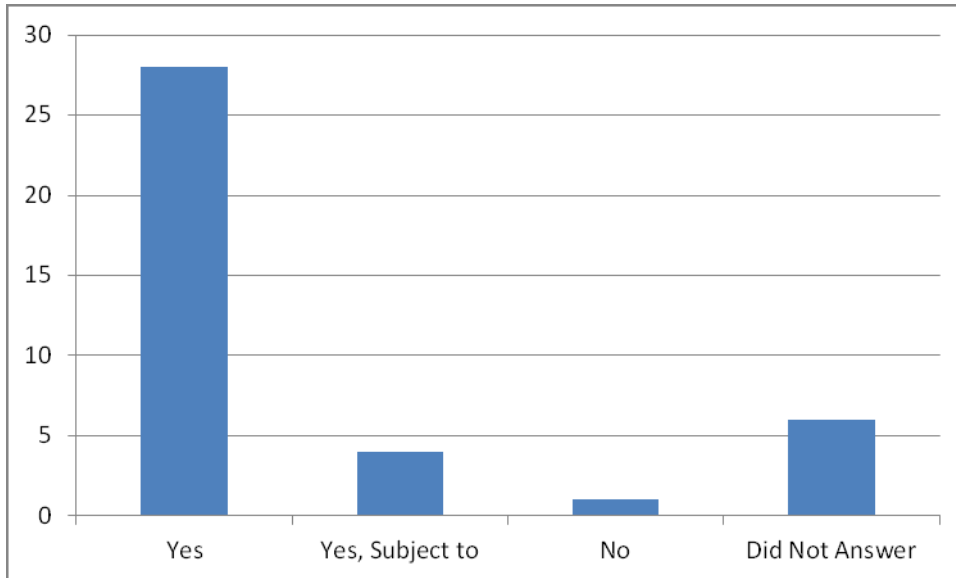
7.5 The Welsh Government wants the transposition of monitoring provisions to be as flexible as possible to account for different development types and has drafted the Regulations to achieve this.

7.6 Monitoring may be secured through a variety of means and the use of conditions and planning obligations where required allows monitoring arrangements to respond to different circumstances. For example, an LPA may agree to undertake the monitoring

through a planning obligation. We intend to provide guidance which will encourage arrangements to be appropriate to the scale and type of development, and the monitoring can include feedback loops if required.

8 Conflict of interest and functional separation

Q7. Do you agree with our proposals for conflict of interest and functional separation?



8.1 Of those who responded to the question, the majority (97% of those who answered) agreed with our proposals for conflict of interest and functional separation.

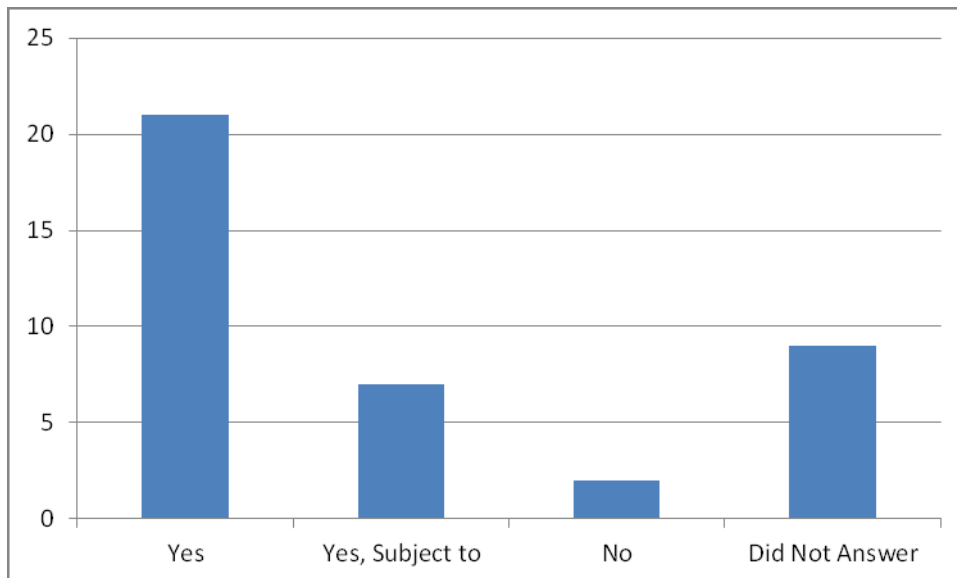
8.2 The majority of respondents considered our proposals were already covered by existing arrangements within authorities. Some respondents wanted clarity over certain words or phrases. These were, the meaning of 'objective' and more detail on what is, or is not, "functional separation" through case law examples or guidance.

Response

8.3 The Welsh Government wants the transposition of functional separation and conflict of interest to be as flexible as possible to account for the different circumstances where this can occur and has drafted the Regulations to achieve this. We intend to provide guidance to clarify the wording.

9 Penalties and enforcement

Q8. Do you agree with the proposed approach to false or misleading information within the EIA process?



9.1 Of those who responded to the question, the majority (93% of those who answered) agreed with the proposed approach to false or misleading information within the EIA process.

9.2 Those who supported the proposal felt it would:

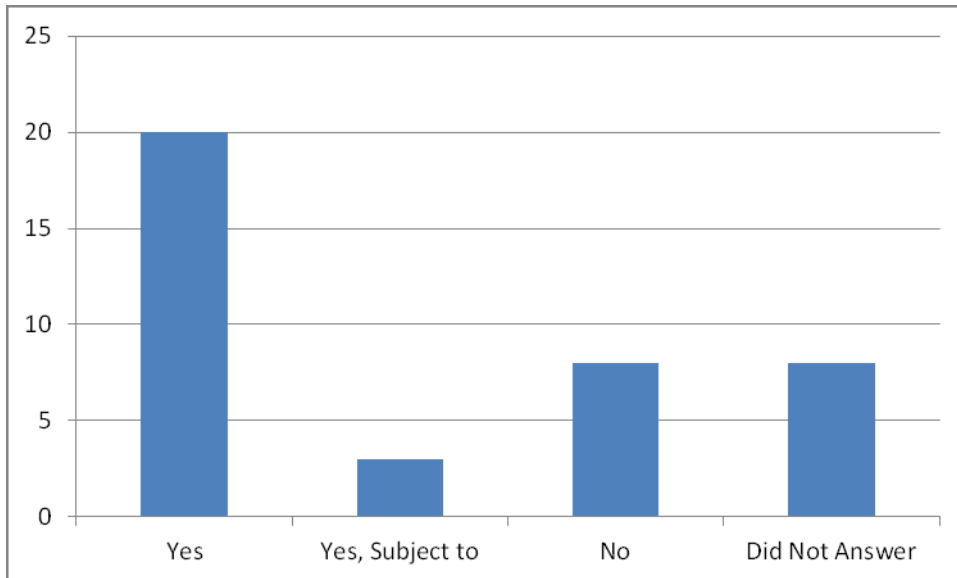
- bring a more professional approach to the process; and,
- help remove any personal bias or the provision of false information.

9.3 Respondents sought clarification on the following points:

- the recourse for LPAs to take action under criminal law and how this overlaps with the planning process (for example, where an allegation has been made during the course of an application, should the planning process be suspended until such time as the allegation has been proven / dismissed?).
- The responsible body for investigating and pursuing cases under the Fraud Act 2006; and,
- If separate legislation is used, the need for clear signposting to the relevant sections to assist practitioners.

9.4 Some respondents wanted the transposition of this Article to be contained in the transposing Regulations and not rely on criminal law.

Q9.	Do you agree that our proposed approach to enforcement will ensure the effective compliance with the requirements of the EIA Regulations in a proportionate way and in a way which dissuades bodies which are part of the process from failing to comply?
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9.5 Of those who responded to the question, the majority (74% of those who answered) agreed with the proposed approach to enforcement.

9.6 Those who responded positively noted that:

- following case law, LPAs are already more carefully considering the requirements of EIA in relation to enforcement.
- The existing enforcement arrangements meet the Directive's requirements and it is not considered harmful to make it explicit within the legislation.

9.7 Those who did not agree with our proposals raised the following concerns:

- LPAs have been subject to ongoing budgetary pressure, and as a result only undertake enforcement where it is necessary and prudent to do so. The introduction of an additional explicit duty would adversely affect their role.
- The EIA process is an administrative one, and the Directive does not identify when development is acceptable or whether it would be expedient to take enforcement action in any particular circumstance
- The existing fines levels are not a deterrent to unauthorised development and should be raised.

9.10 One general comment suggested that the enforcement provisions should be linked to the new requirement to monitor EIA developments.

Response

Penalties

9.11 The Welsh Government will issue guidance to provide clarity on how criminal proceedings overlap with the decision making process and who can investigate and pursue matters..

9.12 Criminal law is a non-devolved matter. Welsh Government does not consider it appropriate to introduce overlapping provisions.

Enforcement

9.13 Existing case law already requires an LPA to undertake enforcement action where it relates to EIA development and the Regulations will make this duty

explicit. LPAs will need to ensure that in such circumstances they dedicate the necessary resource requirements to fulfil their enforcement functions for EIA development.

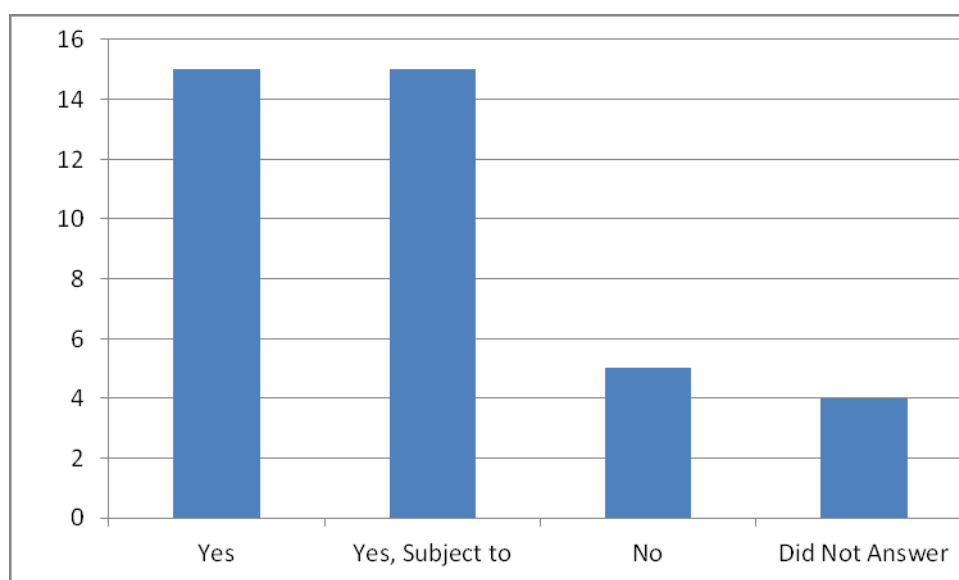
9.14 The Regulations do not state when a development is acceptable. They provide the framework for enforcement action to be taken for EIA development. The decision whether a development is acceptable is a matter for the relevant authority to make, taking into consideration the environmental information.

9.15 The Welsh Government is still considering the fines that are issued where a breach of planning control has occurred.

9.16 The existing system allows the LPA to take enforcement action where agreed monitoring has not been undertaken.

10 Competent experts

Q10. Do you agree our competent expert proposals provide the most flexible approach to the Directive's requirements?



10.10 Of those who responded to the question, the majority (86% of those who answered) agreed that our competent expert proposals provide the most flexible approach to the Directive's requirements.

10.11 Those who supported the proposals commented:

- The approach suggested retains flexibility which is necessary to cater for the wide range of development proposals that may be subject to EIA. It also allows sufficient flexibility to cater for the wide variety of topics that can be included within an Environmental Statement;
- Any form of accreditation would be unduly onerous and could interfere in the market and be anti-competitive;
- The judgment of the Authority should be open to challenge;

- There is concern if the requirements placed on the competent authority require them to use experts with a particular qualification or expertise as this would be burdensome;
- There may be additional costs and responsibilities if the approach set out in the consultation document requires an obligation on the local planning authority to establish an accreditation system and updated register of competent experts.

10.12 Those who disagreed with the proposals commented:

- The term competent expert should be defined by objective criterion and not subject to the competent authority's opinion. It was also questioned if the latter aligns with the amended Directive's intent.
- Does the “competent authority” had the ability and resources to judge competence and the criteria they would use.
- The specified criteria of competency being applied to a developer must be applied equally to the determining authority.

Response

Placing competent expert in the opinion of the LPA

10.13 The Regulations will prescribe that the ES must be prepared by persons who in the opinion of the relevant authority have sufficient expertise to ensure the completeness and quality of the statement. The Regulations need to make clear and transparent requirements for the competent expert duty placed on the developer. The term competent expert could be defined by reference to facts, eg specific qualifications that the person must hold to be a competent expert. This would make it clear whether someone fits the description and a developer is compliant. Or, the Regulations can prescribe that whether someone is a competent expert falls to be determined by reference to another quality, eg another person's opinion. The Welsh Government considers defining competent expert by precise reference to facts or qualifications does not provide flexibility to the developer as to who prepares the ES (for example qualification standards may change, people may not be members of professional bodies, or there may be conflict with the Services Directive/Technical Standards Directive).

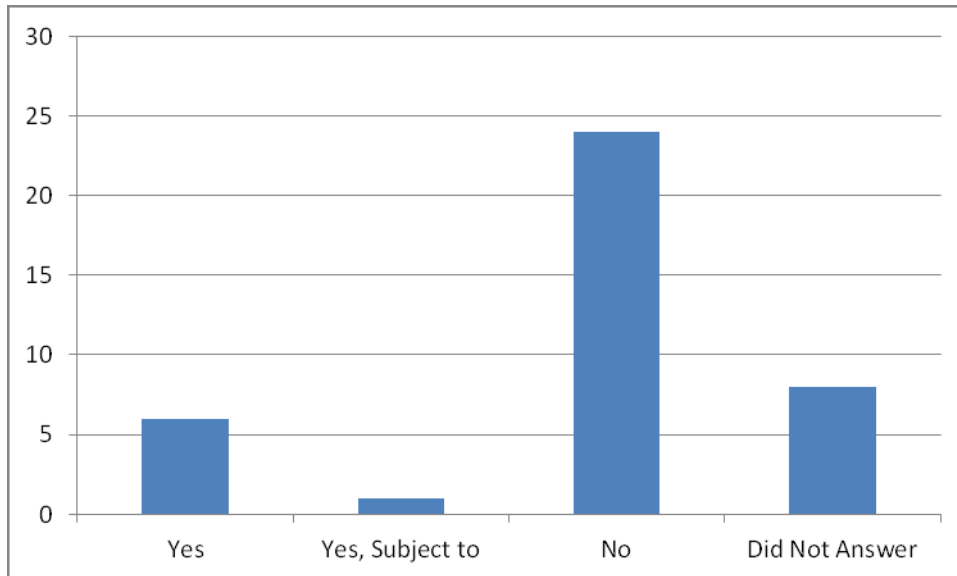
10.14 To assist the competent authority the Regulations will require the developer to set out how they have meet the competent expert requirement. The Welsh Government will issue guidance on the competent expert requirements. . LPA's do not need to establish a local accreditation system to assess a person's competency.

Expertise requirements on the competent authority

10.15 The Directive requires the competent authority to have, or have access as necessary to, sufficient expertise to examine the ES. This is a lesser requirement than the requirement on the developer to ensure the ES is prepared by a competent expert. The Regulations will copy out this requirement. LPA's will need to ensure the people assessing the ES fulfil that requirement. To assist in this matter, the LPA will also have the comments from the wider LPA teams and statutory consultees..

11 Purchase notices under Section 141 of the TCPA

Q11. Do you have any comments on the application of procedures to secure that Welsh Ministers have access to an ES which is consulted upon and considered before granting consent under Section 141 for EIA development?



11.10 Of those who responded to the question, the minority (23% of those who answered) had comments to make on the application of procedures to secure that Welsh Ministers have access to an ES which is consulted upon and considered before granting consent for EIA development under Section 141.

11.11 Those who commented did not disagree with the approach. They noted that the proposal provides for clear and transparent decision making, closes potential loopholes in the system and ensures a level playing field.

Response

11.12 The Regulations will introduce a mechanism for EIA development under Section 141.

12 General Questions

Q12. Do you have any related comments on issues which we have not specifically addressed?

12.10 A summary of the key issues and comments raised are provided below:

- There were a number of requests for Welsh Government to clarify certain elements of the Directive. These were:

- The requirements for 'competent expert' and sufficient expertise only applies at the assessment of the ES and does not apply to screening/scoping.
 - When does the 30 day public consultation period commence.
 - What are the minimum requirements that would need to be adhered to for conflict of interests and functional separation.
 - Templates are provided for letters / screening opinions etc. to give consistency to the process and responses.
 - The new topics of human health, including mental health, and how this is assessed.
 - Guidance on what is meant by 'other relevant assessments'.
- There were requests for regulatory changes, these were:
 - Applying this extension of time (30 days) for all consultees on an application and not just the public.
 - The consultation proposes to update the Regulations to require paper and electronic copies. This is contrary to the EIA Directive 2014 and contrary to WGs position in terms of the ability for 100% electronic planning submissions.
 - Clarification over the exemption for projects from the Directive where there sole purpose is national defence
 - There were also further recommendations to the Regulations, including, defining 'consultees' 'sensitive areas' and the information to be provided by Developer on the Projects Listed in Annex II.

Response

Guidance

12.11 The Welsh Government will issue guidance to help clarify these areas.

Regulatory change

12.12 The Regulations will provide that a LPA must not determine an application until 30 days after the statutory consultee has received the ES.

12.13 The Regulations set out that an applicant must submit the ES in electronic and paper format unless otherwise agreed in writing.

12.14 Defence is a non-devolved area. The exemption for projects that are solely for the purposes of defence will be contained within the English Regulations.

12.15 The existing definition of sensitive area is considered appropriate. Other areas of wildlife designation are an important part of the EIA process. For example, the selection criteria for screening Schedule 2 development, requires the competent authority to take into account the environmental sensitivity of geographical areas likely to be affected by development, having regard, in particular, to ... European sites and other areas classified or protected under national legislation.

Q.13 Do you have any comments to make about the draft partial Regulatory

12.16 A summary of the key issues and comments raised on the RIA are provided below:

- There is caution against the use of generic use of costs in the RIA
- In determining whether a proposals is EIA development through the screening process any changes which could ensure that additional information (inc. mitigation) is provided by the developer and which allows the LPA to make a more informed determination is to be encouraged. The implication that there may be less proposals requiring an ES and the associated savings is to be welcomed.
- The proposals will have a significant impact on resources at a time where LPAs need to be frugal in their use so as to be as efficient as possible in playing their part in bringing forward land for development – particularly for housing and rural economic development in Wales.
- It is also the case that these proposed provisions could have an adverse effect on developers and the delivery of economic development in as much as small scale rural economic developers are likely to think twice about coming forward with development proposals because of the disproportionately higher cost impact of EIA.
- There is a danger that the system will be forced into being more bureaucratic and less flexible.

Response

12.17 The RIA that accompanied the consultation was a partial draft RIA. The RIA that will accompany the final Regulations will contain an assessment of all of the proposals taken forward.

Respondents to the consultation

<p>Businesses/Consultants</p> <p>Innogy Renewables UK Limited CEMEX UK Materials Ltd Barton Wilmore RWE Generation UK plc Persimmon Homes West Wales LDA Design Redrow Homes Limited</p>	<p>Government Agency/Other Public Sector</p> <p>Ministry of Defence Public Health Wales Health and Safety Executive Natural Resources Wales The Coal Authority</p>
<p>Local Planning Authorities</p> <p>Anglesey County Borough Council City and County of Cardiff National Parks Wales Flintshire County Borough Council Bridgend County Borough Council Denbighshire County Council Newport City Council Monmouthshire County Borough Council Gwynedd County Borough Council Caerphilly County Borough Council Rhondda Cynon Taff County Borough Council</p>	<p>Professional Bodies/Interest Groups</p> <p>Envirowatch The Law Society Bolton University RSPB Mineral Products Association Home Builders Federation IEMA RTPI Cymru</p>
<p>Voluntary Sector</p> <p>Campaign for the Protection of Rural Wales</p>	<p>Other</p> <p>Glandŵr Cymru Severn Trent Water CLA Cymru Private individual Private individual Private individual Private individual</p>