

CONSULTATION ON A REGULATORY FRAMEWORK FOR CROWN COPYRIGHT

ANALYSIS OF RESPONSES

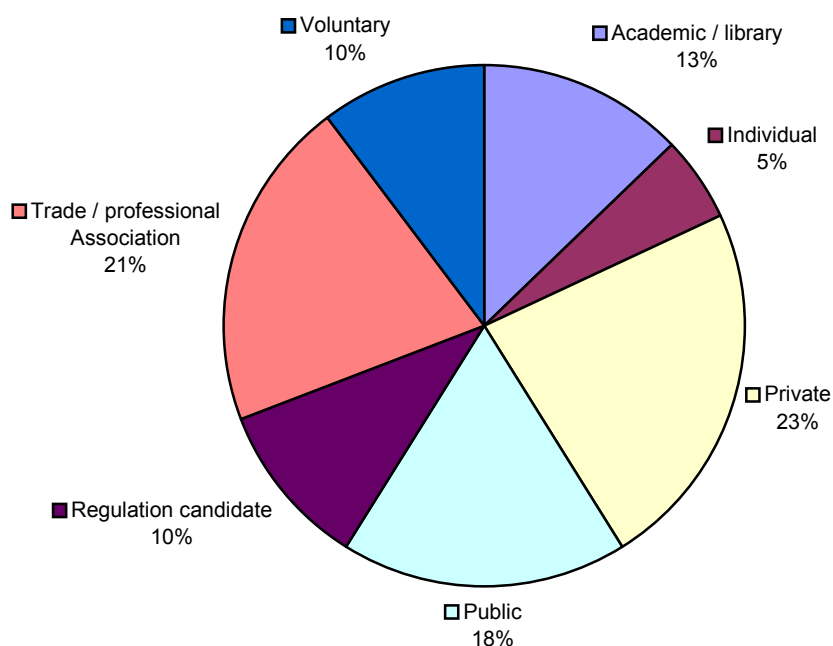
GENERAL

NUMBER AND TYPE OF RESPONDENT

1. The consultation document was published on the HMSO website on 12 October 2001 and closed on 14 January. We alerted 112 organisations we believed might have a stake in the consultation, and 456 people who have registered their interest in consultations on government and public administration issues. We had 31 requests for the paper. The consultation has therefore reached a minimum of 599.

2. 39 responses were received, which we think is a reasonable rate for a specialised consultation such as this. There was a good spread of responses across economic sectors, but we should note that some respondents from the Academic and Library sector complained that they were not alerted directly, which might have reduced the sector's response rate.

Response by Economic Sector

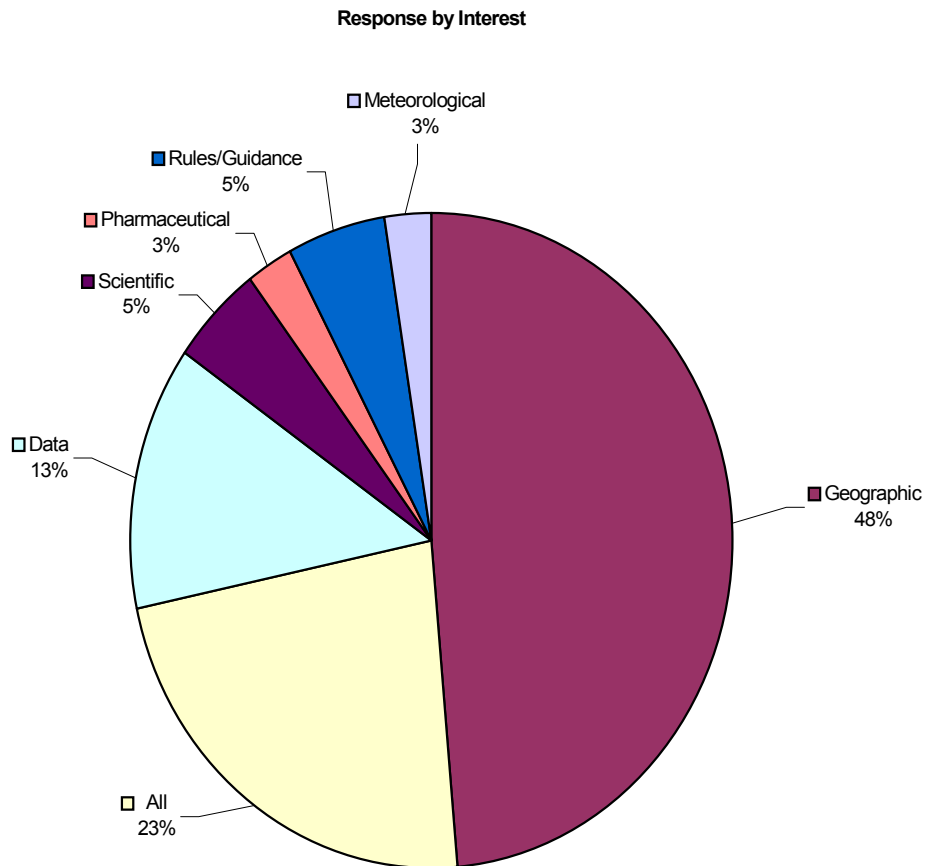


3. We analysed responses by the major information interest of the respondent.

INTEREST	COVERING
GEOGRAPHIC	Geography, geology, spacial referencing of information, mapping.
RULES/GUIDANCE	Regulations in any area of Government, Government-set standards, test questions, guidance.
DATA	Government statistics, databases of company information
SCIENTIFIC	Research, papers, procedures, developments
METEOROLOGICAL	Forecasting, weather data
PHARMACEUTICAL	Drug performance, safety, regulation
ALL	Several of these and any other aspects of Government information

4. The responses were strongly geared to geographic interest, reflecting an especially vibrant area of the information market.

5. We realise that any regime should be designed to cover all the many different information needs, not governed by special features of the geographic information markets. However we also recognise that the geographic information market's growth and health is economically important in itself and that difficulties there might well be symptoms of more general room for improvement.

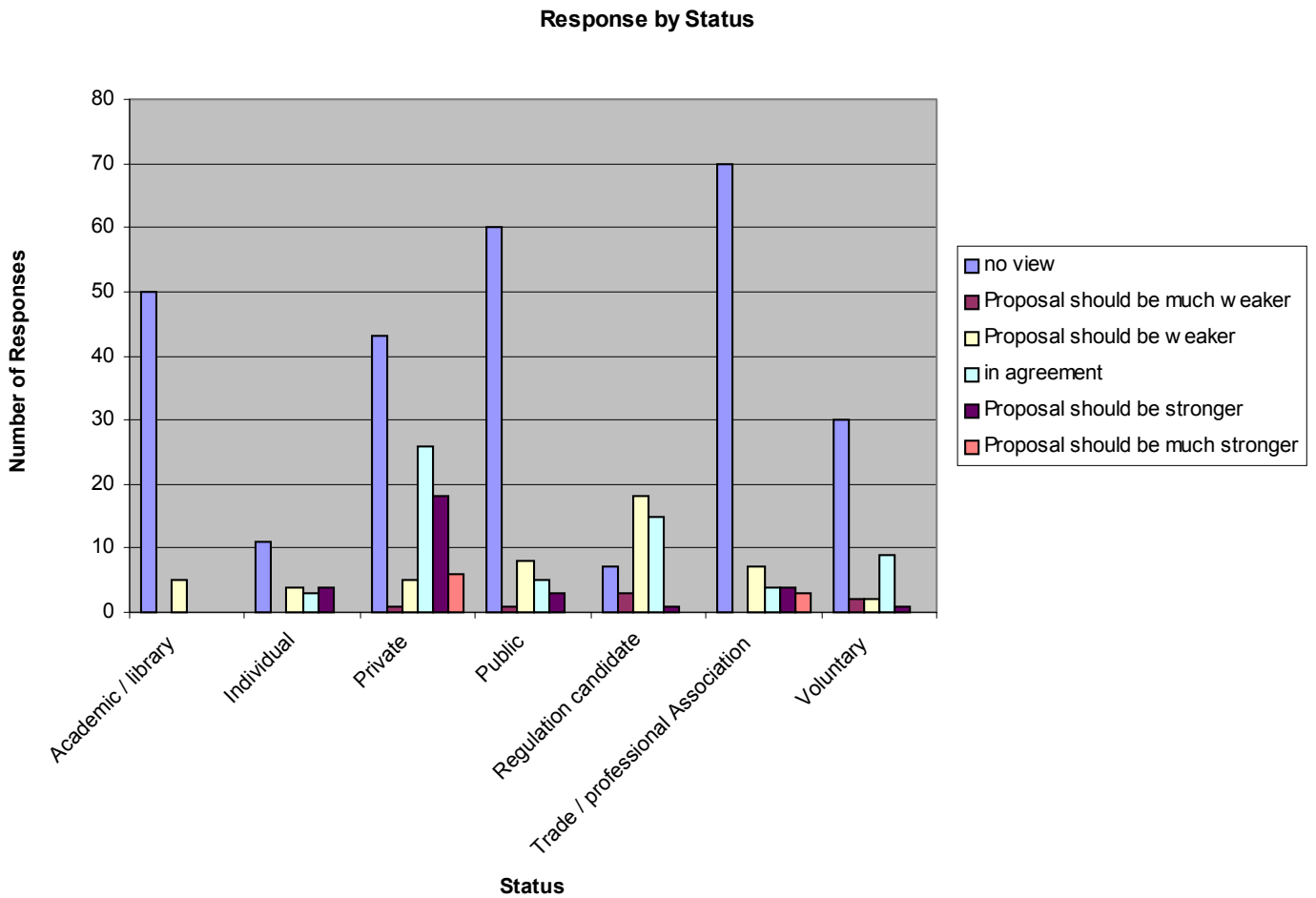


ANALYTICAL METHOD

6. The small size of the response means that we have relied more on qualitative responses rather than quantitative. Each main proposal in the consultation document defined a particular degree of regulation and therefore conversely a degree of discretion for the regulated bodies. We have weighed each response to each main proposal according to whether it supports the proposal as stated, prefers weaker or much weaker regulation, or prefers stronger or much stronger regulation. If a respondent did not comment on a proposal we have not assigned a preference. As we would have expected there were correlations between the economic sector of the respondents and the shading of the preferences for regulation, with the private sector on the whole in favour of the strongest and the public sector the weakest forms of regulation.

7. Copies of the actual responses, anonymised where appropriate, are available from:

HMSO Regulation Division
 7 St James’s Square
 London
 SW1Y 4JU.
 Or from hmsoregulation@cabnet-office.x.gsi.gov.uk



8. Respondents took the opportunity as we had hoped they would, to make observations, counterproposals and constructive criticisms. We have analysed them in their context.

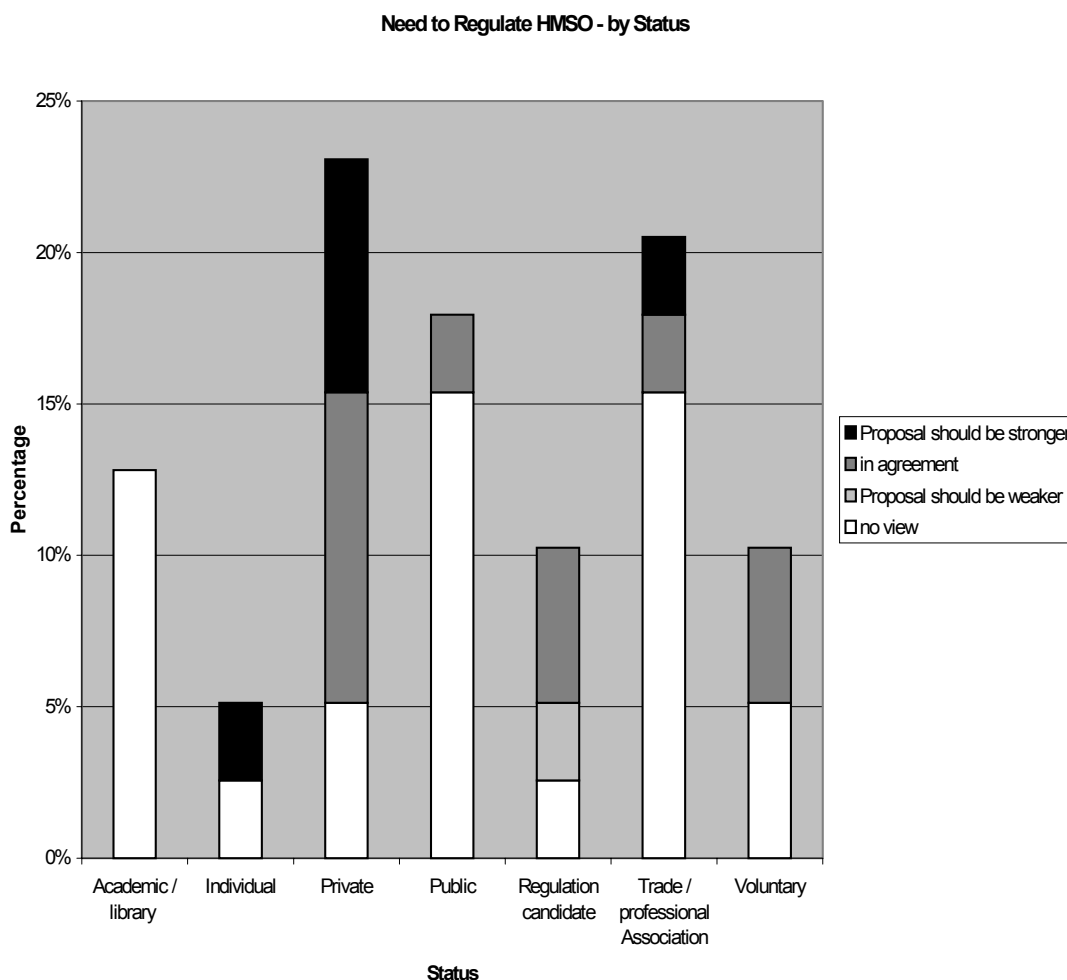
ANALYSIS

AREA TO BE REGULATED

Proposal A
 HMSO will regulate decisions made by Departments and Trading Funds under powers delegated by the Controller of HMSO on licensing of the reuse of Crown copyright material.

9. Consultation on this covered three issues:

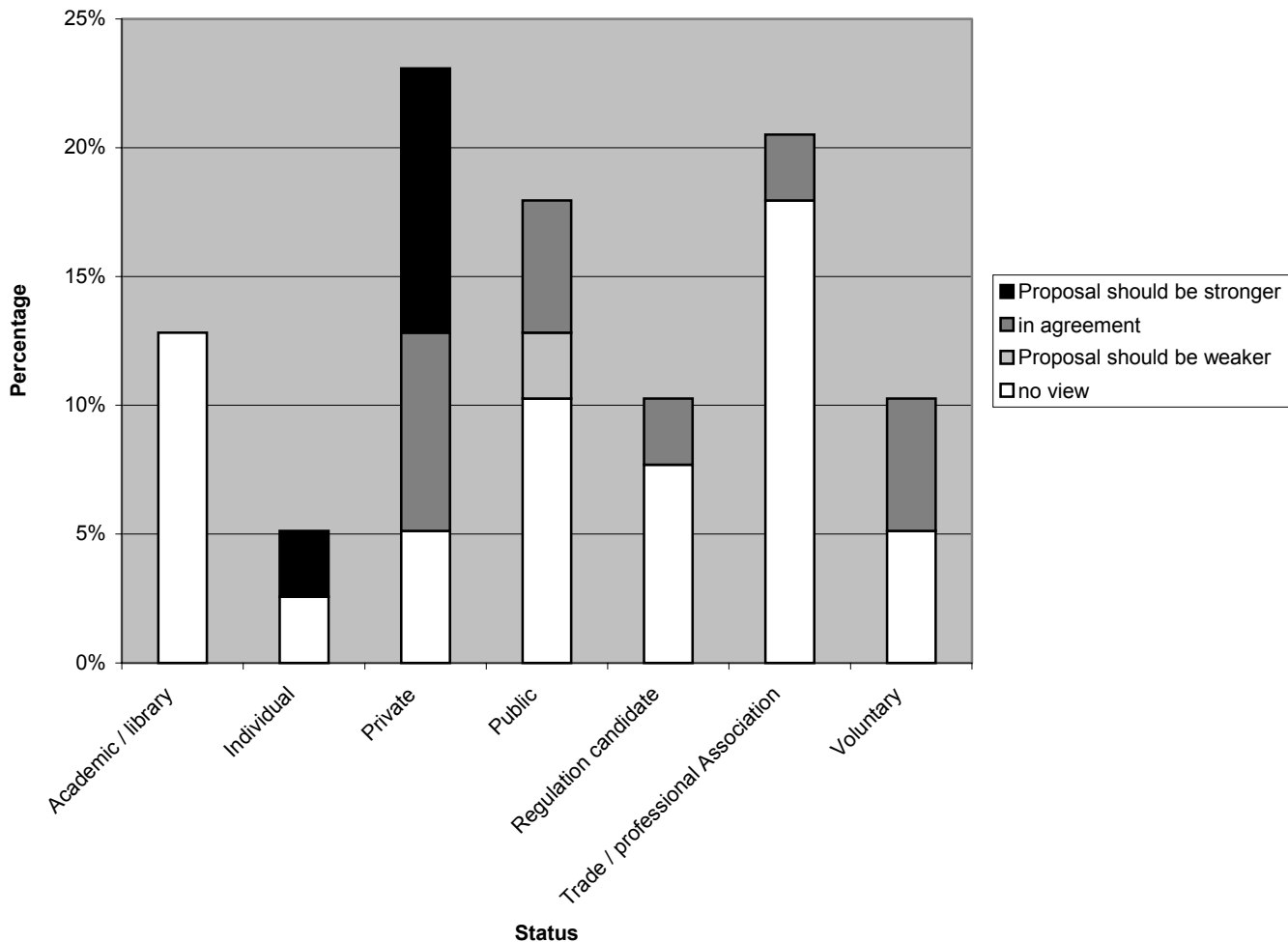
- 9.1 Regulation of HMSO’s own licensing decisions;
- 9.2 Regulation of non-Crown areas;
- 9.3 The regulatory functions of the Advisory Panel.



10. There were ten responses agreeing with the proposal in the paper that HMSO should not set out to offer a formal self-regulation of its licensing decisions and five proposals for stronger regulation. Strengthening the regulation of HMSO could be by initiating legislation to ratify the role of the regulation staff in HMSO or by creating an executive role for the proposed Advisory Panel. Neither of these is a possible solution. Crown copyright decisions cannot be removed from Ministerial responsibilities, and it is not possible to create powers for HMSO staff to override the policies of the Government or the decisions of the Controller of HMSO. Nor could Non Departmental Public Bodies override properly informed decisions by the Controller of HMSO. One response quoted the Financial Services Authority (FSA) and OFTEL as having formal self-regulation functions, but this is a false parallel. FSA, the financial services regulator, does not offer financial services, and OFTEL, the telecommunications regulator, does not offer telecommunications goods or services. One response called for weaker regulation of HMSO's decisions.

11. There was strong support for extending the proposed regime to other areas of public sector information. Nine responses supported the proposal that HMSO should persuade candidates to adopt the regime; five thought the remit should be stronger or in some cases very much stronger, to gain control over what were seen as the essential information providers - local authorities and the Environment Agency. One response opposed any extension at all. HMSO could only take a stronger grasp on non-Crown information by new primary legislation. Those in favour of stronger controls might not have realised this, but if they had we believe that they would still have thought that the effort was worthwhile.

Extend regime beyond Crown copyright - by Status



12. The desire for HMSO’s direct influence over non-Crown information is driven by

12.1 serious inconvenience to users from the fragmented contacts over the reuse of public sector information;

12.2 serious inconvenience to users from differing policies on reuse; and

12.3 industry ambitions to ensure that industry-friendly policies implemented after “Crown Copyright in the Information Age” are adopted by all public sector providers.

13. The legal status of “Crown” and “non-Crown” bodies goes to the heart of legal responsibilities and capabilities in the UK constitution. There is no possibility of legislation putting non-Crown bodies under the control of the Crown for the sake of information trading. But information industry respondents clearly felt that however complex relationships between Crown and other bodies, those seeking permission to reuse public sector information should be asked to follow a simple and consistent process.

14. There is one new issue which postdates the consultation document. In December 2001, the Minister then responsible for Ordnance Survey said that she was minded to accept the recommendation in Stage 1 of its independent Quinquennial Review to set up a Government Owned Public Limited Company. Before deciding, she commissioned a second stage of the review to confirm the benefits and costs of the move and its practical implications. The outcome of the second stage of the Review is likely to be published in parallel with this document. If the move takes place, it will affect the consultation depending on the future ownership of copyright in material held or newly generated by Ordnance Survey. There might be one of three results affecting Crown copyright:

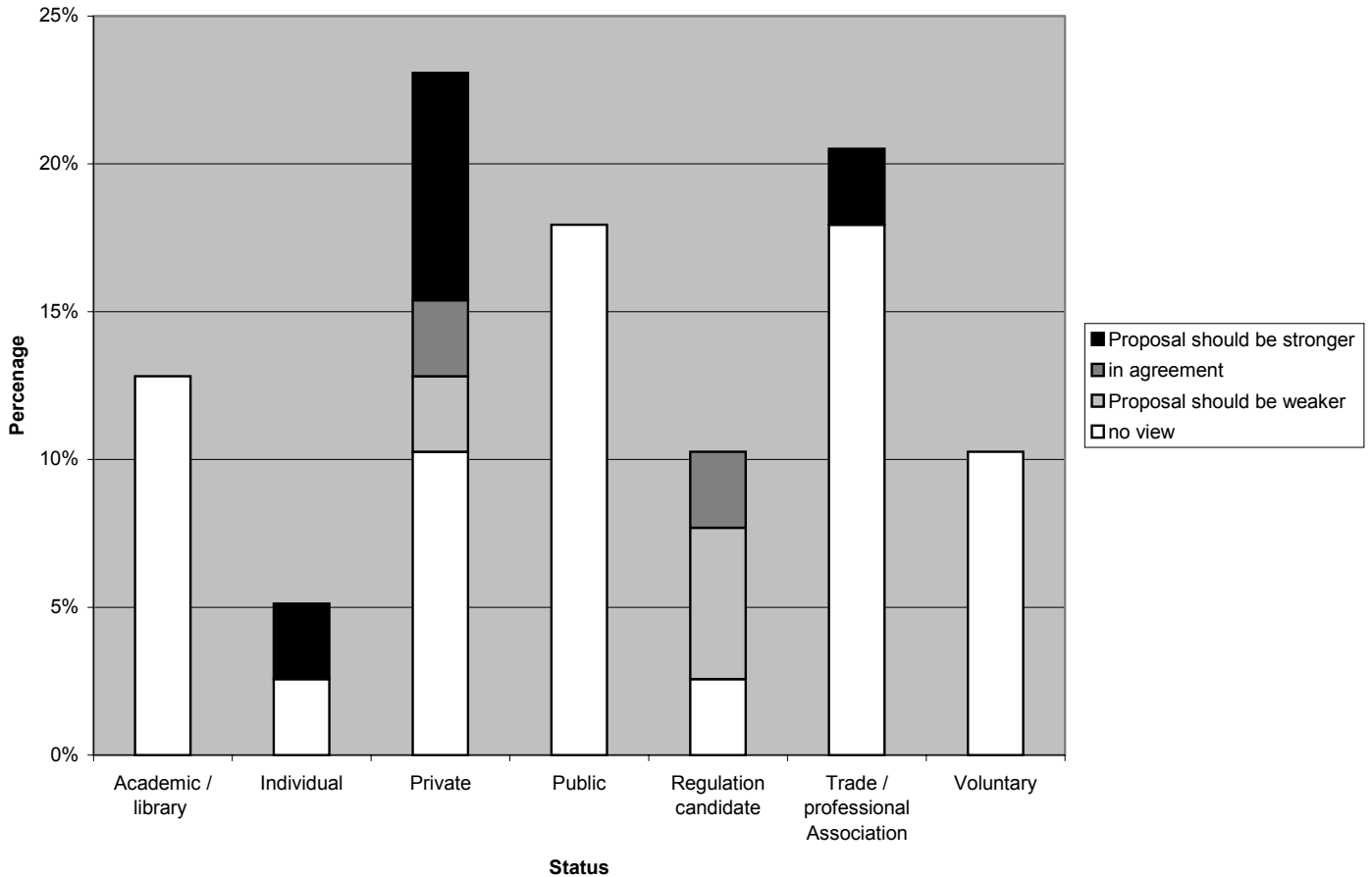
14.1 The move fails to prove its cost effectiveness and does not occur; or

14.2 The move takes place but Ordnance Survey remains a Crown body or other arrangements leave the Controller of HMSO as the owner of copyright in Ordnance Survey material; or

14.3 The move shifts ownership of the copyright away from the Controller of HMSO to Ordnance Survey.

15. There might be regulatory arrangements as part of either 14.2 or 14.3 arrangements. If so, 14.2 would require the Controller of HMSO to work closely with the regulator to ensure that there was no fragmentation of approach or policy. 14.3 might remove potential regulation of Ordnance Survey’s copyright decisions away from HMSO altogether.

Advisory Panel Functions - by Status



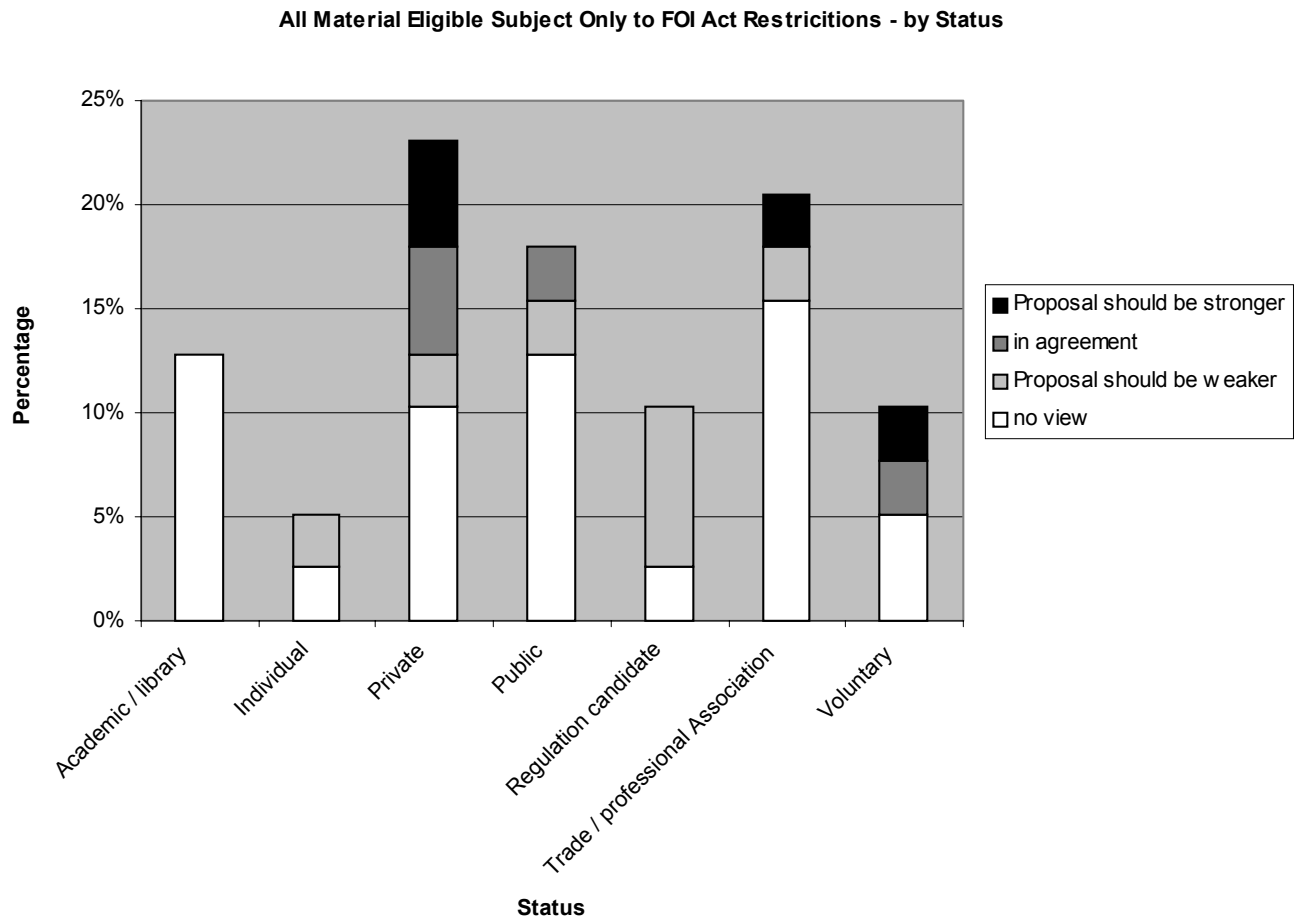
16. Ten respondents expressed an opinion on the powers proposed for an Advisory Panel. Five thought it should be stronger, four of these very much stronger. One, a tempered and nuanced response, suggested that somewhat stronger powers overall should be awarded and exercised with discretion. Two agreed with the proposal and two thought it should be weaker. However, one of those which seemed to approve of the proposal as it stood should be read in context of a general preference for weaker powers of regulation, which taken together would weaken the overall impact.

17. These responses teased out the different visions among the respondents of the proposed Advisory Panel's functions. Those wanting stronger functions were seen to be proposing a movement of executive power away from information providers and from the Controller of HMSO towards a panel with the power to compel the actions of information providers, outside the parameters set by their Ministers or others responsible for them. There is no possibility of the Advisory Panel acquiring responsibility for decisions currently the responsibility of the Controller of HMSO. This would cut across Ministerial and Accounting Officer responsibilities.

RULES

Proposal B

All Crown copyright material should be eligible for licensing, subject to Freedom of Information considerations.



18. Out of fifteen responses, four believed the proposal should be stronger largely because they had concerns over discretion allowed under the Freedom of Information Act 2000. One very specific concern raised was the publication of examination questions which would lose their discriminatory value if published. We believe that very well defined problems like this could be treated as exceptions if necessary. Four responses agreed with the weight of the proposal. Seven thought it should be weaker or much weaker. Three types of concern led to weaker preferences:

18.1 Crown copyright material that is not information is caught by the proposed rule. Software, which is protected only by copyright legislation, is the example concerning respondents, and in HMSO we are aware of other specialised issues relating to IPR, for example in recordings of broadcast material such as advertisements, and photographic archive material.

18.2 Material which has been assigned to the Crown is covered by the paper; one respondent pointed out that assignments might not have been priced to reflect the impact of licensing further reuse.

18.3 Several correspondents said that work in progress, and work never intended for publication, should be excluded from the rule.

18.4 There are concerns about information series, where some elements of the series are more commercially attractive than others. The example given is the data underlying the 1:25000 and 1:50000 mapping series; in accordance with government policy, Ordnance Survey publish all Great Britain map sheets in a series at the same price but commercial competitors allowed to reuse the data in similar products might market only popular areas.

19. We believe that the concerns at 18.1 should be addressed, which can be done by restricting the regime to information and information products. 18.2 should also be addressed, by requiring all new assignments to be made assuming that the material would be licensed on request.

20. Excluding work in progress and work never intended for publication from the regime, as in 18.3, would meet the concerns of those who fear that effort, and therefore administrative costs, of regulated bodies could be diverted away from serving majority customers of standard products into minority services. Fairly pricing such minority services is seen as difficult. But we interpret potential private sector customers of regulated bodies' information to say that they would prefer in some cases to have rights to reuse unprocessed information so that they embody it in finished marketable products in competition with the regulated bodies' own products. Such preferences may lead to sharp conflicts of interest within regulated bodies¹.

21. 18.4 is a concern which goes to the heart of the conflict between the national interest in quality of government information and commercial models for marketing it. Responses are focused on Ordnance Survey and differ predictably, with private sector bodies arguing for no discretion to be offered to regulated bodies allowing them to refuse permission to reuse government information for marketing part series. However this is not a simple confrontation between the private sector and its government information suppliers. Consumer representatives protest against weakening of the whole series' philosophy.

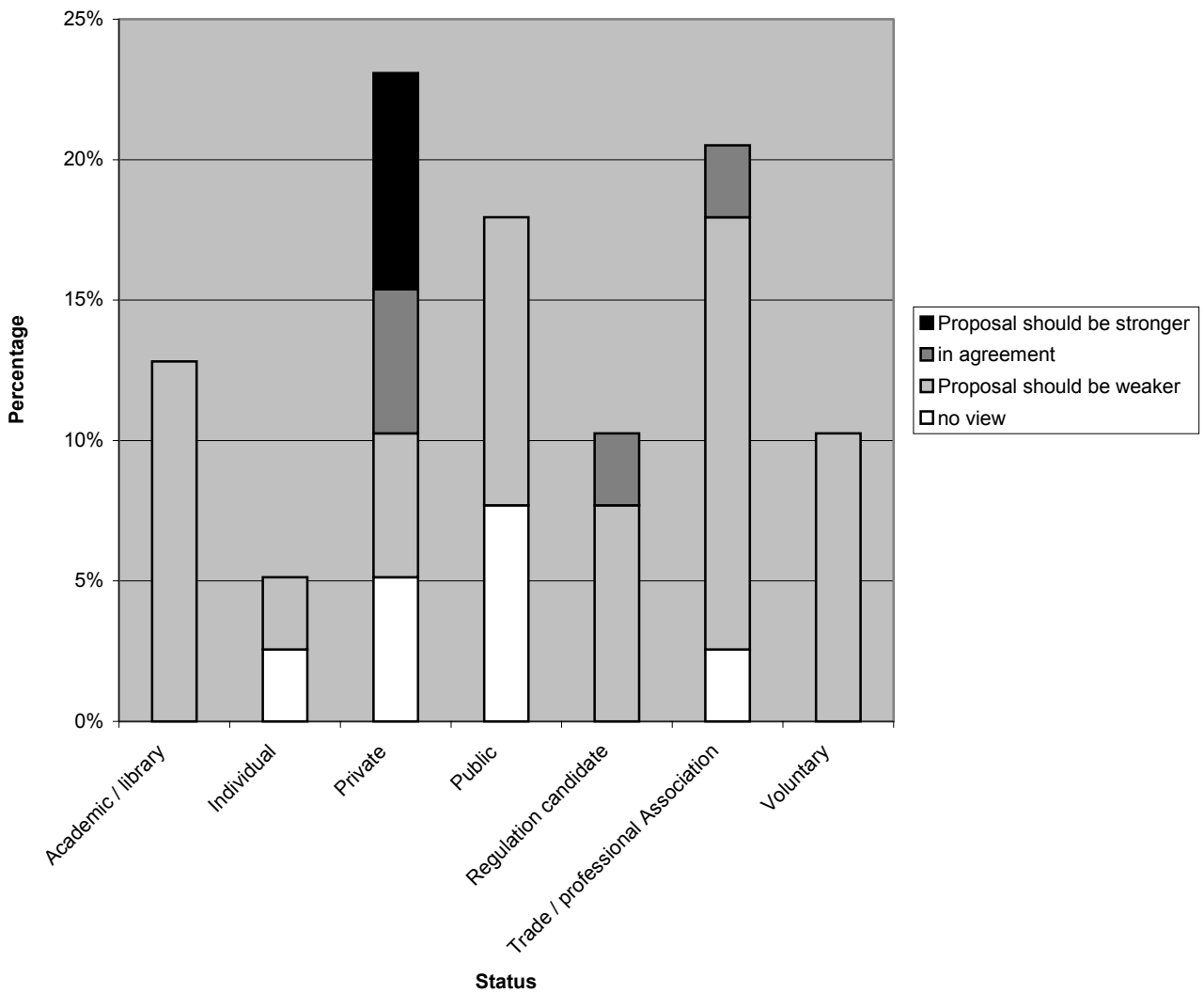
22. Summarising, the consultation on Proposal B did not show consensus on how much if any discretion should be allowed regulated bodies over choosing material to exempt from the requirement to license.

¹ There are related matters concerning access, as opposed to reuse of information. Under the Freedom of Information Act (FOI Act) when it is implemented, information held with the intention to publish will be exempt from the general right of access. Access to work never intended for publication, and not otherwise exempt from disclosure under the FOI Act, would be available on request.

Proposal C

All those applying for a licence to reuse the same Crown copyright material should be granted licences on the same basis. Applicants should be granted a licence unless there is evidence that they might not comply with the licence terms.

No Discrimination Between Licensees Except Evidence for Non-Compliance



23. This proposal drew out by far the largest response including fifteen who responded only to this, and others who clearly responded primarily because of it. To treat all licensees similarly would prevent regulated bodies from making special arrangements for any potential individual licensee or sector of licensees. Predictably, opposition was most heartfelt in the voluntary and academic/library sectors who either receive, or think themselves good candidates, for special treatment. The arguments advanced in opposition were:

23.1 Promotion of various educational objectives, including for example geographic skills, is a key item on the Government's policy agenda.

23.2 Courses and other educational activities which currently depend on special licensing arrangements would be put at risk.

23.3 The commercial sector recovers the price of licences in charges for its products, which is impossible for the voluntary sector.

23.4 Existing non-standardised licences where they exist should be allowed to run their course.

23.5 The proposal will restrict the future options for satisfying individual customers.

24. Trading Funds are encouraged towards price discrimination by means of product differentiation, that is to recover their fixed costs on a variable basis between different products and services. It would be wrong to undermine such arrangements, provided that they are compliant with the Competition Act 1998. Discriminatory pricing by an undertaking with a dominant market position can be abusive conduct under Chapter II of the Competition Act. The Director General of Fair Trading has said² that price discrimination is not automatically an abuse of market power; he anticipates that he would consider price discrimination to be an abuse only if there were evidence that prices were excessive or that it was used to exclude competitors. We do not, however, accept the argument that the Government should systematically allow reuse of information at a lower price on the test that the organisation is not working for profit. Respondents have argued:

24.1 Other commodities, including vital utilities, are priced without reference to the economic sector of the customer;

24.2 Lower prices charged to some non-commercial licensees would mean Trading Funds compelling their commercial licensees to cross-subsidise non-commercial activities which happen to attract favourable status, which is unjust and might be an abuse of market power;

24.3 Those with access to cheap or free services would not use them as efficiently as if they had the information from prices to determine the true demand;

² "The Chapter II Prohibition", paragraphs 4.15 and 4.16.

24.4 Those with access to artificially cheap or free services will be discouraged from buying private sector services which might be better designed, so inhibiting the growth of a market;

24.5 Some voluntary and educational organisations are active traders in information markets; if their base costs were supported by Trading Funds they would have an unfair commercial advantage.

25. There are three reasons, apart from those put forward by respondents:

25.1 It is not fair to commercial organisations or to individuals;

25.2 There are a huge number of potential candidates, distorting markets;

25.3 Testing applications to prevent abuse would be necessary and a burdensome cost.

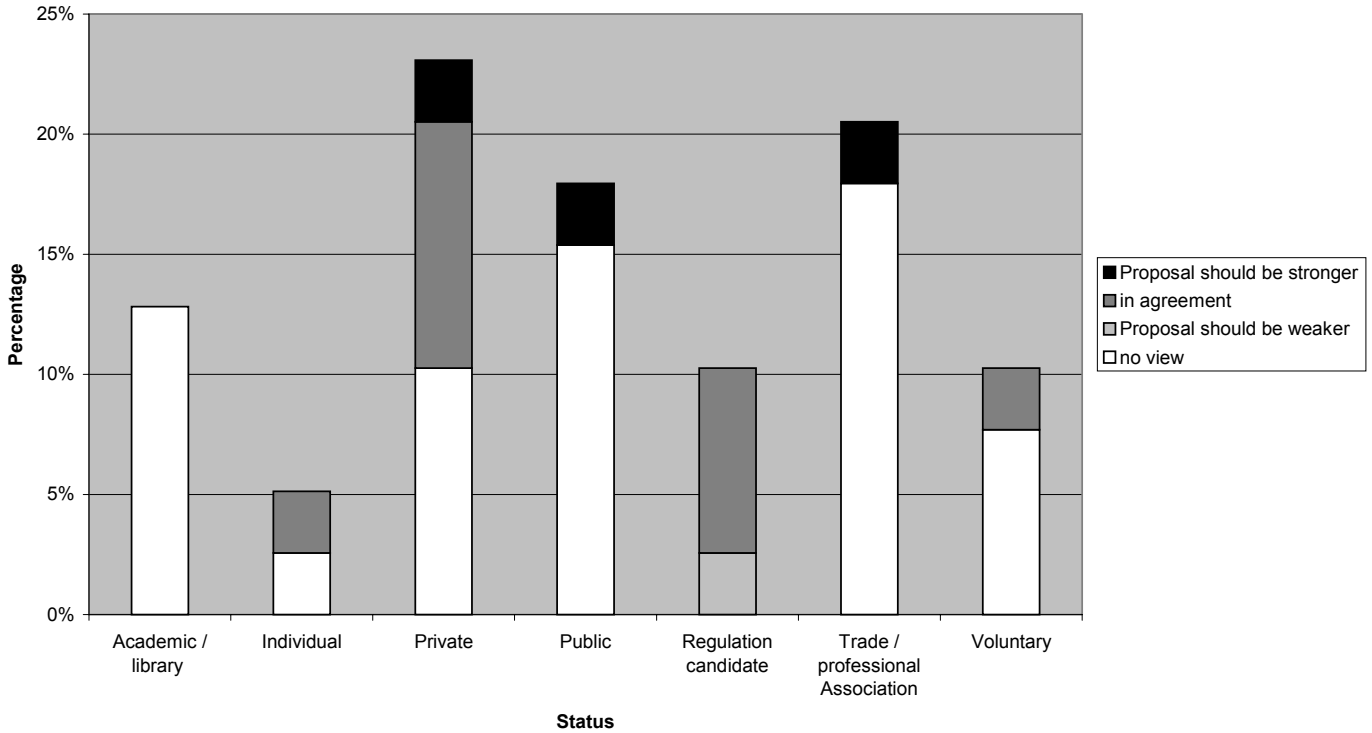
26. We recognise all the arguments against special treatment. However, decisions to offer differentiated products and services, consistent with competition law and Government policy, cannot be overridden by the Controller of HMSO. Any actual case where there might be an abuse of market power can be investigated by the Office of Fair Trading.

27. We do not believe that options for satisfying individual customers will be unreasonably restricted. In summary, the consultation has not delivered a consensus supporting proposal C.

Proposal D

Licences may include restrictions on inappropriate uses.

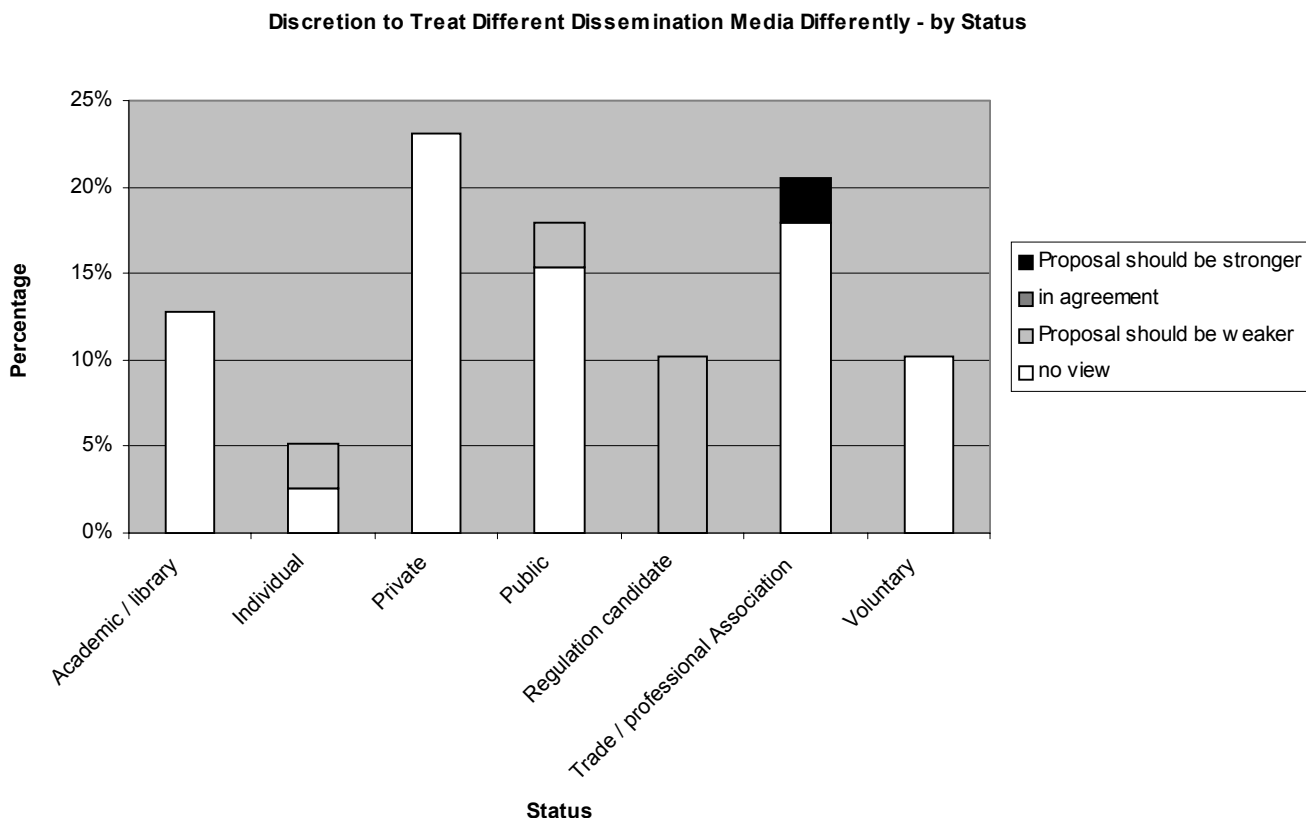
Discretion to Ban Inappropriate Uses - by Status



28. Nine responses supported this proposal, three thought regulation should be stronger (that is, that the regulated bodies should have less discretion) and one response from a Trading Fund thought regulation should be weaker.

29. These seeking stronger regulation warned against the Government assuming unnecessary responsibility for monitoring taste and decency. Respondents also challenged the underlying assumption that the Government's publishing of information was a quality benchmark. We recognise the need to set out boundaries and clear objectives for this proposed discretion. Subject to this, the consultation showed a reasonable consensus.

30. Several respondents took the opportunity to raise the question of restrictions on the media allowed for reuse. One sought stronger regulation to insist that all media should be allowed; six said that there should be considerable discretion. We accept the case for some discretion, transparently exercised within a policy framework.

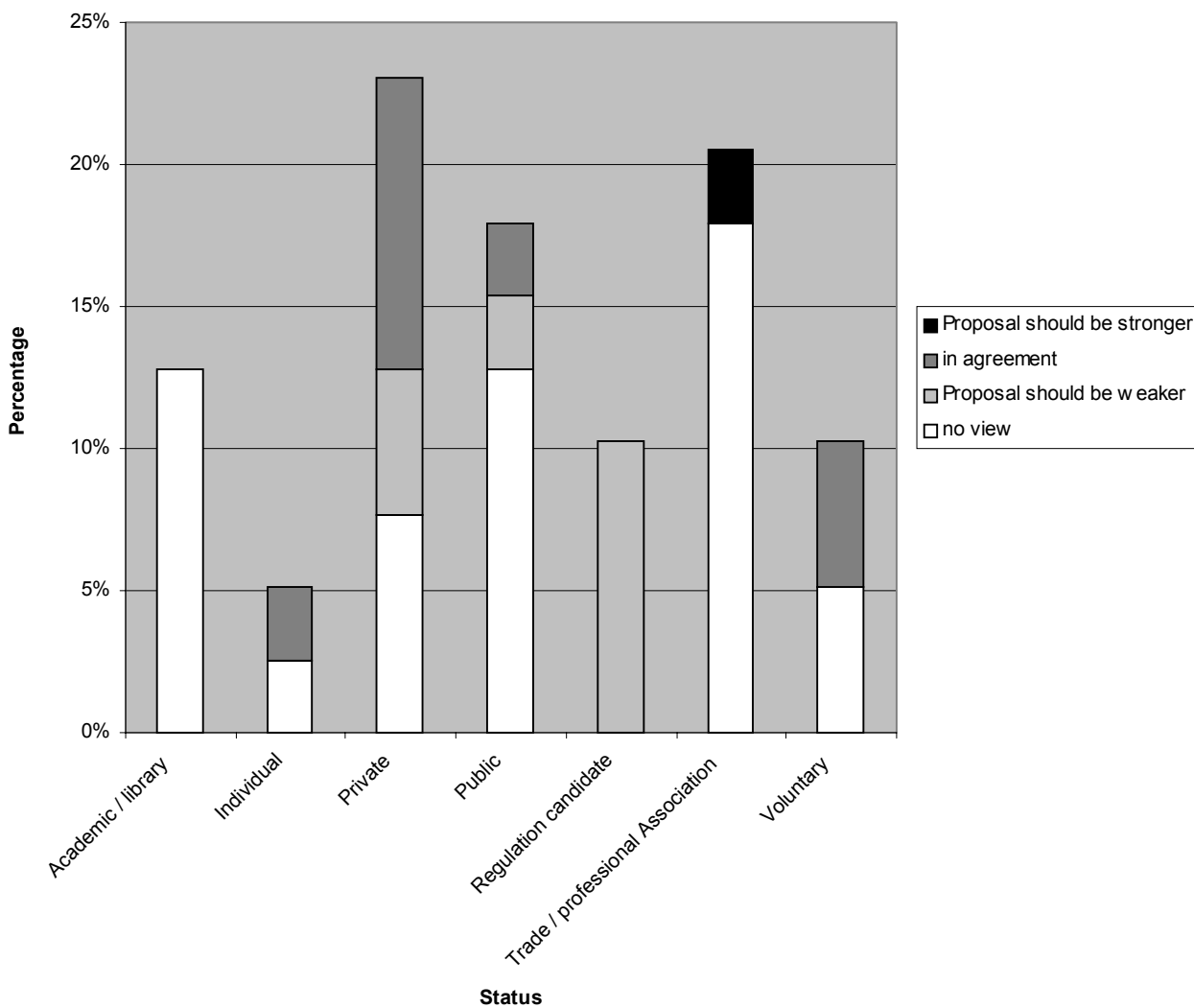


Proposal E
 All bodies licensing Crown copyright material, whether HMSO, Departments with delegations from the Controller, or Trading Funds, should publish their current prices and pricing policies.

31. Eight respondents supported the proposal; seven, including all the potential regulated bodies who replied, thought it should (or in one case would) be weaker, of which two, both potential regulated bodies, thought it should be much weaker. They were concerned about the potential for harm in publicly disclosing specific prices for products or services. That was based on an assessment that since commercial competitors were not obliged to publish the same information the proposal would be damaging to the quality of the information being provided. The unstated step in the argument must be that unregulated private sector competitors will use price transparency to construct threats to the revenue of information providers. The consultation was only concerned with copyright issues, not with delivery of products, so this in turn suggests an assessment that there are bodies which could undercut information providers in supplying information licensed for reuse, and would do so if pricing policies

were known. This might be true, but if so it represents either a normal competitive practice which should drive down costs for customers and ought to be welcomed, or an unfair trading practice under the jurisdiction of the Office of Fair Trading. If the prices that information providers can charge under competitive pressure do not sustain current ambitions to support data, then the Government has many possible options. It is clear from the responses outside the regulated bodies that potential users welcome the benefits of increased transparency. One public body welcomed the proposal specifically because of an unhappy experience dealing with complex and confusing price information from a Trading Fund.

Pricing Transparency - by Status



32. Some of those who supported the proposal nevertheless questioned the boundaries of the Government's right to set financial targets for Trading Funds. That is set out in the Government Trading Fund Act 1990 and is not the subject of this consultation.

33. Although there is no consensus on this proposal, we believe that the consultation identified a near consensus outside the regulated bodies in favour of price transparency.

REGULATORY BODY

Proposal F

HMSO will establish a Regulation Division which will be charged with:

- (i) Investigating complaints about decisions made by Departments and Trading Funds on the licensing or reuse of Crown copyright information;
- (ii) Advising the Departments and Trading Funds they regulate on Crown copyright issues;
- (iii) Improving the licensing performance of regulated bodies;
- (iv) Generally increasing, and becoming the main contact for, all HMSO's communication with Trading Funds;
communication with Trading Funds;
- (v) Secretariat support for the Advisory Panel.

34. Six responses broadly assented to the regime as proposed; six thought it should be stronger of which three thought it should be very much stronger. Two, potential regulated bodies, thought it should be weaker or much weaker.

35. One of those suggesting the regime should be weaker focused on the role of the Advisory Panel. As constructed, it was an invitation to complainants not to attempt to reach agreement with suppliers or to accept the outcome of a regulation. This response also identified a gradient of decreasing detailed knowledge as the problem escalated, reducing the chance of a well-made solution.

36. Other comments suggesting a weaker regime pointed out the potential for conflict if Advisory Panel representatives included commercial competitors of companies with complaints.

37. Those responding from an information industry perspective thought the proposal should be stronger. Since the purpose of the policy underlying this consultation is to promote the Knowledge Economy, that is a critical issue. It is clear that the vision of regulation underlying the information industry's ambitions cannot be achieved without some or all of:

- 37.1 Constructing a regulatory body independent of the executive;

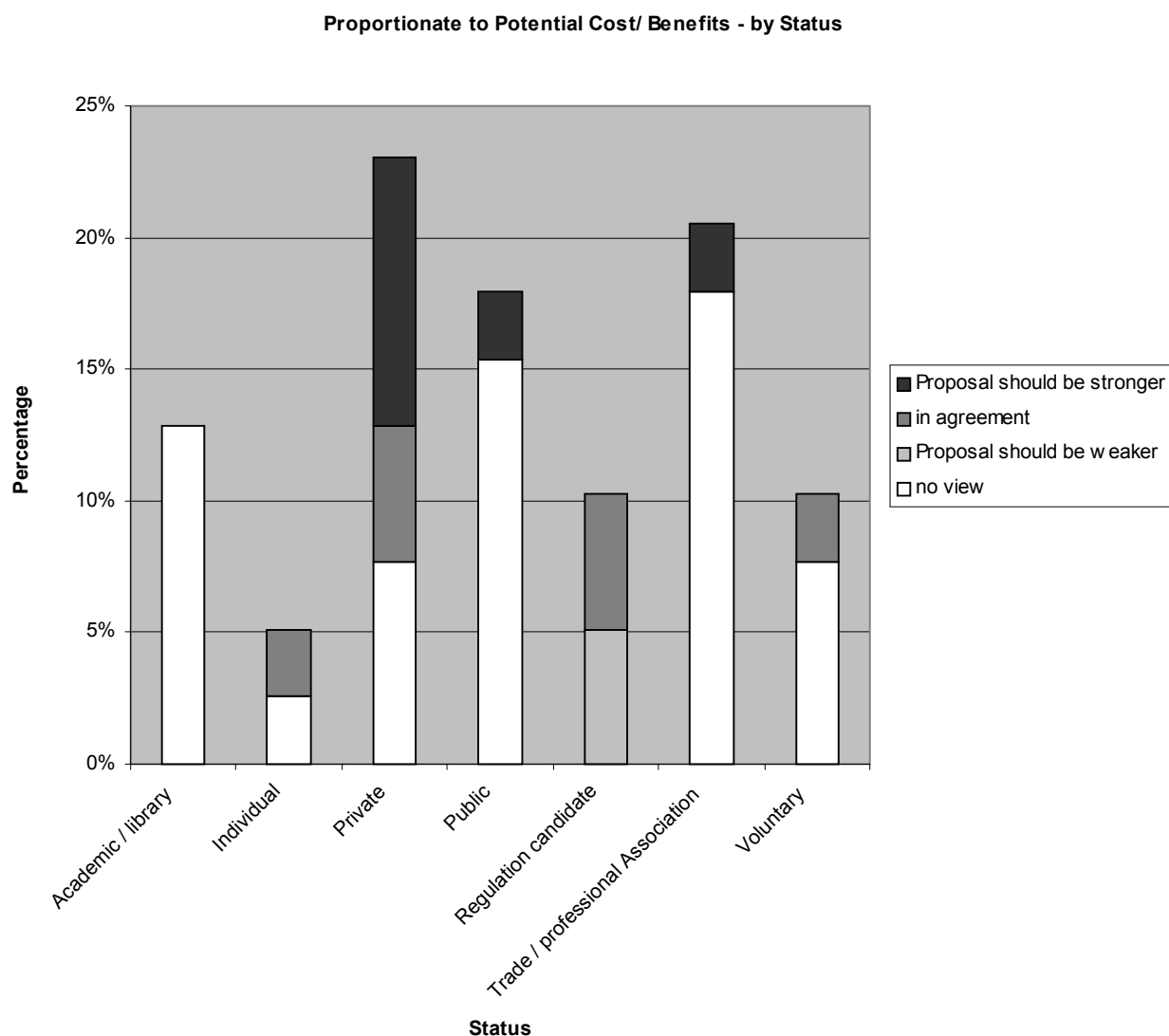
37.1.1 with statutory powers over regulated bodies;

37.1.2 much larger and with a more specialised and varied skill base than the proposed repositioned HMSO.

37.2 Giving the Advisory Panel an executive power to overturn Ministers' decisions.

37.3 Giving the Advisory Panel a budget independent of oversight by departmental Accounting Officers.

37.4 Recruiting the Advisory Panel outside the recruitment process for public bodies.



38. The proposal appears to have been based on the model especially of OFTEL and the Financial Services Authority. OFTEL and the other regulators of privatised monopolies were established to ensure that private sector companies with fiduciary duties to maximise shareholder value were not allowed to pursue certain routes to fulfilling those duties. (The Financial Services Authority is in a different position because it is funded entirely by the private sector financial services industry and regulates the entire private sector industry which we assume is not intended here.) But Government entities are not analogous to the privatised monopolies. If the Government wishes to constrain the way a Trading Fund behaves, there is no need to go through a regulation process; the Government can simply amend its objectives and targets. It seems likely therefore that the appetite for a strong model of regulation for public sector information suppliers arises either (i) because the needs of industry are not accepted as policy objectives by those setting the targets of the providers or (ii) by the providers falling short of the policy objectives set them. In the first case, if the policy objectives of the information providers do not match the ambitions of industry they might nevertheless match the intentions of those responsible for setting them, and a large expensive regulator is not an efficient solution. The second case suggests a demand for stronger internal supervision of providers by those formally responsible for them, which if the need were accepted could be done directly. Strong regulation might create an incentive for stronger supervision but it would take a long time to have any effect.

39. Any regulation of Ordnance Survey, if it is formed into a Government owned plc, was not at issue in this consultation.

40. We accept that there are strong perceptions of unfairness in how some Trading Funds manage their conflicting duties, and some responses have complained that there is no clear process for seeking redress. We accept that there is a demand from the information industry for one body to handle or at least manage, allocate and chase progress on complaints and concerns about public sector suppliers.

41. There would be a justified outcry if we tried to interpose such a body between complainants and their access to the Office of Fair Trading, the Parliamentary Ombudsman, responsible Government Departments, Ministers or any other sources of help.

SANCTIONS

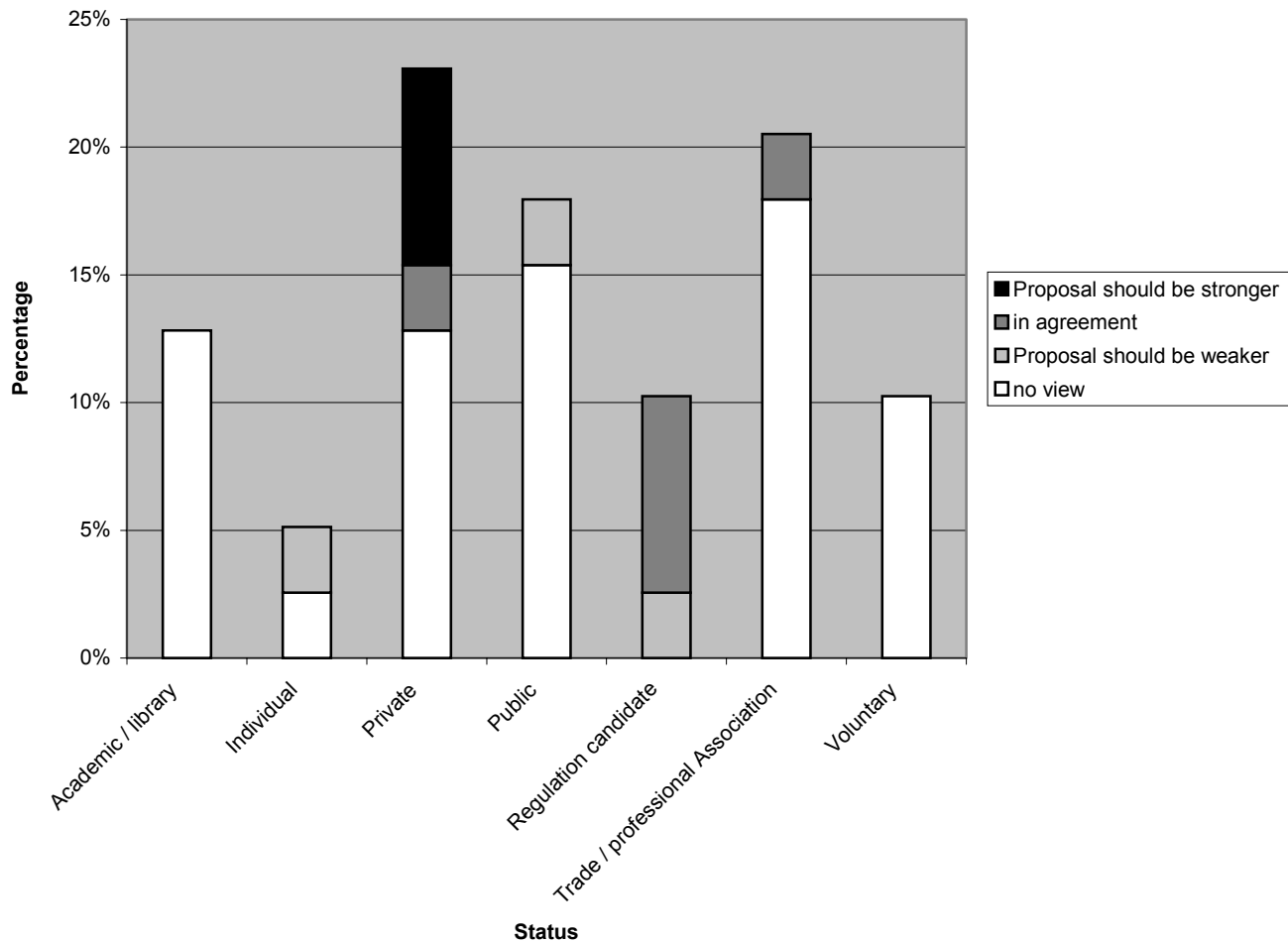
Proposal G

For each complaint they find to be justified, the Regulation Division will identify a remedy to put matters right. Remedies may be:

- (i) The offer of a licence which had previously been wrongly refused or;
- (ii) A reduction in the price of a licence or;
- (iii) Changes in the conditions attached to a licence.

If HMSO and the body complained of do not agree on the appropriate outcome of an investigation, the complaint will be put to Ministers. The Controller may suspend a delegation if she has evidence that the organisation is not equipped to make correct decisions on licensing.

Remedies - by Status



42. Five broadly agreed, three preferred a weaker repertoire, one pointing out that it could be difficult to offer a modified licence without being unjust to other licensees. Three preferred a stronger or much stronger remedy, because they felt that financial compensation should be available. There were calls for a stronger appeals process, related to concepts of a much stronger regulatory regime. On the whole we believe a reasonable consensus on this issue has emerged from the consultation, but we recognise that it is not independent of the strength of the regulatory body's powers.

43. The Office of the Parliamentary Commissioner for Administration made helpful comments which will help ensure that any published regime accurately represents the Ombudsman's jurisdiction.

REPORTING AND ACCOUNTABILITY

Proposal H

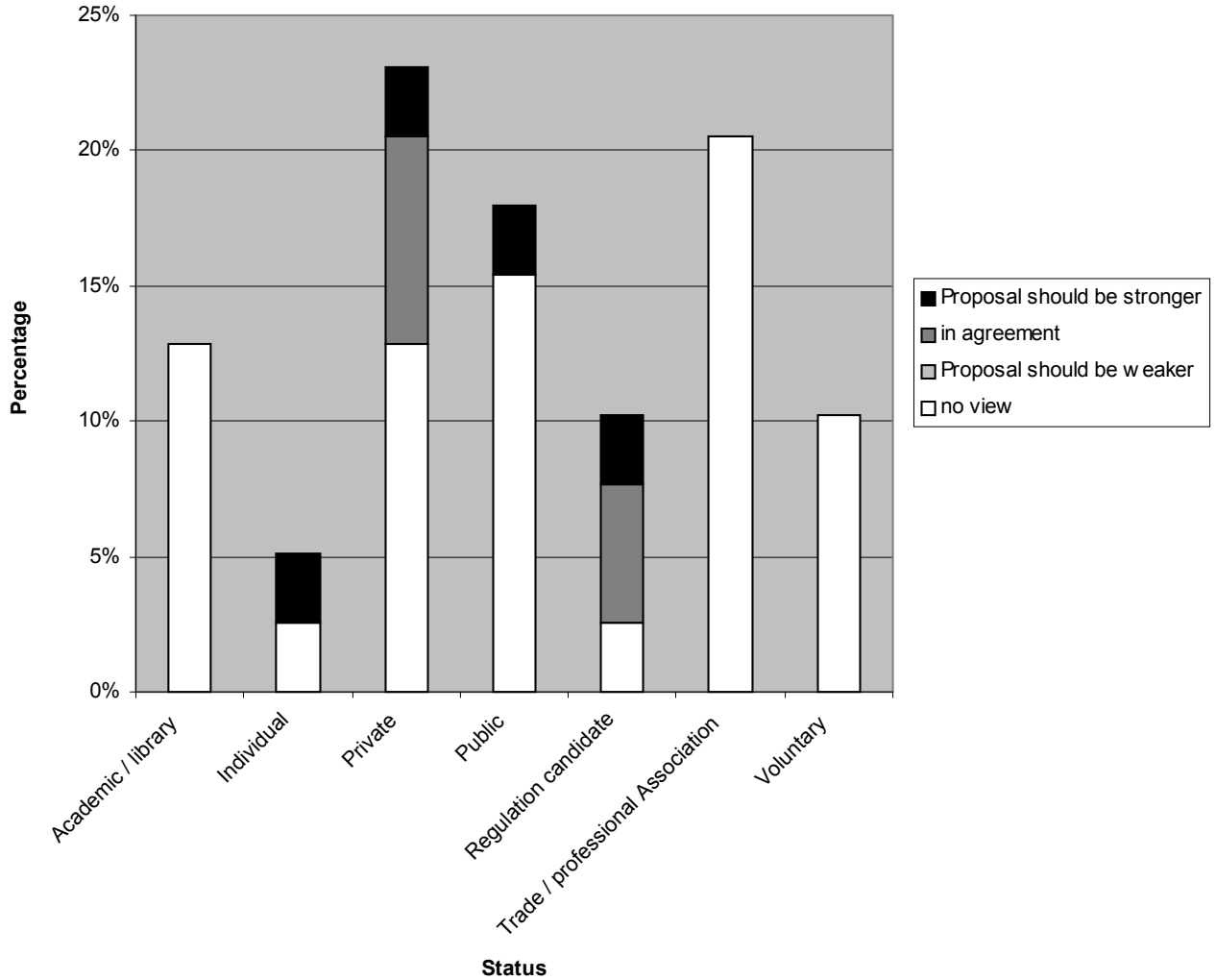
HMSO will report annually on the cause, handling and outcome of all complaints about Crown copyright licensing to:

- (i) The Minister for the Cabinet Office;
- (ii) The Secretary of State for Trade and Industry and the Chief Secretary to the Treasury;
- (iii) Ministers of the Scottish Parliament where appropriate;
- (iv) The Advisory Panel.

Reports will be published on the HMSO website. HMSO will regularly review the regulation regime to test whether it is still necessary and effective. The results will be reported to:

- (i) The Advisory Panel; and
- (ii) The Minister for the Cabinet Office.

Accountability - by Status



44. This excited very little comment. Although five responses endorsed the proposals we sensed that enthusiasm was tepid. Four responses called for stronger reporting to increase confidence in the independent behaviour of the regime. There were recommendations that the Advisory Panel itself, specifically not HMSO, should commission an annual report from industry on the regime so that some independent monitoring should be available.

45. We believe there is a broad consensus on this recommendation and that any concerns can be met.

CONCLUSION

46. We were very grateful for the efforts of those responding. The detailed needs – for transparency, access, speed and seamlessness – should be addressed in the regime design. We noted a cautious encouragement for the near consensus in favour of increased regulation, but recognise that there are great differences between the information industry’s aspirations and what is possible and accepted in Government. We should thoroughly monitor the goals and achievements of any regime carefully, and be ready to withdraw it if it is not performing.