

Report on the Disused Mine and Quarry Tips (Wales) Bill

April 2025



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April 2025



About the Committee

The Committee was established on 26 May 2021. Its remit can be found at www.senedd.wales/SeneddLJC

Current Committee membership:



Committee Chair:
Mike Hedges MS
Welsh Labour



Alun Davies MS
Welsh Labour



Laura Anne Jones MS
Welsh Conservatives



Adam Price MS
Plaid Cymru

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1. Introduction

On 9 December 2024, Huw Irranca-Davies MS, the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs (the Cabinet Secretary), introduced the Disused Mine and Quarry Tips (Wales) Bill¹ (the Bill), and laid an accompanying Explanatory Memorandum² (the EM).

1. On 19 November 2024, the Business Committee referred the Bill to the Climate Change, Environment and Infrastructure Committee, and set a deadline of 4 April 2025 for reporting on its general principles.³ We requested an extension to 9 April 2025⁴ and the Business Committee noted the intention to lay the report on that date.⁵
2. On 9 December 2024, the Cabinet Secretary also issued a Statement of Policy Intent for the Disused Mine and Quarry Tips (Wales) Bill (the Statement of Policy Intent).⁶ It explains the Cabinet Secretary's current policy intention for making secondary legislation under the Bill.

Purpose of the Bill

3. In the EM, the Cabinet Secretary states that the main purpose of the Bill:

*"... is to prevent disused tips from threatening human welfare by reason of their instability. The Bill will achieve this by establishing a regime for the assessment, registration, monitoring and management of disused tips."*⁷

¹ Disused Mine and Quarry Tips (Wales) Bill, as introduced

² Welsh Government, Disused Mine and Quarry Tips (Wales) Bill Explanatory Memorandum incorporating the Regulatory Impact Assessment and Explanatory Notes, 9 December 2024

³ Business Committee, Timetable for consideration: The Disused Mine and Quarry Tips (Wales) Bill, December 2024

⁴ Letter from the Legislation, Justice and Constitution Committee to the Business Committee, 28 March 2025

⁵ Business Committee, 1 April 2025

⁶ Letter to Llyr Gruffydd MS, Chair, Climate Change, Environment and Infrastructure Committee enclosing the Statement of Policy Intent for the Disused Mine and Quarry Tips (Wales) Bill, 9 December 2024

⁷ EM, paragraph 3.3

4. The long title of the Bill states that it is a Bill to:

“... to establish the Disused Tips Authority for Wales; to make provision to prevent disused tips from threatening human welfare by reason of their instability; and to make provision for connected purposes.”

5. The Cabinet Secretary says that:

“In summary, the Bill:

- *establishes the Disused Tips Authority for Wales (the Authority) as a body corporate. Its main objective in carrying out its functions under the Bill is to ensure that disused tips do not threaten human welfare by reason of their instability;*
- *makes provision for the assessment, registration and monitoring of disused tips;*
- *contains provisions that enable the Authority to deal with tip instability and threats to tip instability. This includes powers to require an owner of land to carry out operations and for the Authority to carry out operations itself, and related provisions in respect of payments in connection with such operations;*
- *contains supplementary provisions including powers of entry for the Authority, information sharing provisions and powers to require information; and*
- *creates related offences to support the enforcement of the regime.”⁸*

The Committee’s remit

6. The remit of the Legislation, Justice and Constitution Committee is to carry out the functions of the responsible committee set out in Standing Orders 21 and 26C. The Committee may also consider any matter relating to legislation, devolution, the constitution, justice, and external affairs, within or relating to the

⁸ Statement of Policy Intent, page 2

competence of the Senedd or the Welsh Ministers, including the quality of legislation.

7. In our scrutiny of Bills introduced into the Senedd, our approach is to consider:

- matters relating to the competence of the Senedd, including compatibility with the human rights protected by the European Convention on Human Rights;
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen in relation to the granting of powers to the Welsh Ministers to make subordinate legislation;
- any other matter we consider relevant to the quality of legislation.

8. We took oral evidence from the Cabinet Secretary on 10 February 2025.⁹

9. Following the evidence session, we wrote to the Cabinet Secretary with questions not reached during the session.¹⁰

10. The Cabinet Secretary responded to our questions on 7 March 2025.¹¹

⁹ Legislation, Justice and Constitution Committee, 10 February 2025

¹⁰ Letter to the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 14 February 2025

¹¹ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025 including Annexes A to F

2. Legislative competence

The Welsh Government is satisfied that the Bill would be within the legislative competence of the Senedd.

11. We considered the Bill under the reserved powers model of legislative competence, as set out in section 108A of the *Government of Wales Act 2006* (the 2006 Act).

12. In her statement on legislative competence, the Llywydd stated:

“In my view, most of the provisions of the Disused Mine and Quarry Tips (Wales) Bill would be within the legislative competence of the Senedd. The following provisions would not be within competence because they require the consent of the Secretary of State and such consent has not been obtained at this time:

- *Section 55 – Meaning of “relevant public authority”*
- *Section 56 – Authority’s power to require relevant public authorities to give information*
- *Section 57 – Duties of Authority and relevant public authorities to share information*
- *Section 72 – Bringing proceedings*
- *Paragraph 21 of Schedule 1 – Amendment to the Coal Industry Act 1994.”¹²*

13. The Cabinet Secretary declared in the EM:

“In my view the provisions of the Disused Mine and Quarry Tips (Wales) Bill, introduced by me on 9 December 2024, would be within the legislative competence of Senedd Cymru.”¹³

14. When the Cabinet Secretary gave evidence to us on 10 February 2025, he confirmed that he was satisfied the Bill was within the Senedd’s legislative

¹² Presiding Officer’s Statement on Legislative Competence, 9 December 2024

¹³ EM, page 1

competence, “[s]ubject to the Minister of the Crown consent and the King’s and the Prince’s consent being received for a small number of provisions.”¹⁴

15. In a letter to the Chair of the Climate Change, Environment and Infrastructure Committee, Llŷr Gruffydd MS, the Cabinet Secretary confirmed that Minister of the Crown consent had been received.¹⁵

16. We noted that the EM does not discuss human rights, although there is mention of human rights within the Regulatory Impact Assessment¹⁶, and asked the Cabinet Secretary if he had taken account of human rights in preparing the Bill. He told us:

“Human rights implications were considered during the development of the Bill. I am satisfied that the Bill is compatible with the European Convention on Human Rights, including Article 1 of Protocol 1, Article 6 and Article 8.”¹⁷

17. We also asked about the outcome of any assessments undertaken in relation to the human rights impacts and what steps the Cabinet Secretary had taken to limit the interference with human rights by the Bill. He replied:

“... during the Bill’s development, consideration has been given to human rights. We are satisfied that the Bill is compatible with Convention rights. There is not an intention to release any additional information on human rights, other than that which is set out in the Impact Assessments - which were published on the Welsh Government website on the Bill’s Introduction.”¹⁸

Our view

18. We note the evidence in relation to matters of legislative competence from the Cabinet Secretary and in particular that the necessary Minister of the Crown consent has been received.

¹⁴ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [10]

¹⁵ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs to the Chair of the Climate Change, Environment and Infrastructure Committee, 27 February 2025

¹⁶ EM, paragraph 7.2

¹⁷ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 2

¹⁸ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 3

19. During the evidence session, the Cabinet Secretary also indicated that consent was required in accordance with Standing Order 26.67 (His Majesty's and Duke of Cornwall's consent).

Recommendation 1. The Cabinet Secretary should confirm whether the consent of His Majesty and the Duke of Cornwall has been received in accordance with Standing Order 26.67.

20. We note the comments made by the Cabinet Secretary regarding the human rights impacts of the Bill.

3. General observations

The development of and need for the Bill

Background

21. Following a request from the Welsh Government, the Law Commission undertook a review of the legislation governing coal tip safety in Wales.¹⁹ The Law Commission published its consultation paper on 9 June 2021²⁰ and its report and recommendations on 23 March 2022.²¹

22. On 12 May 2022, the Welsh Government published for consultation a White Paper on coal tip safety (the White Paper).²² It published a summary of responses to that consultation in November 2022.²³

23. The Welsh Government published its final response²⁴ to the Law Commission report on 22 March 2023²⁵, explaining that “the principle of the recommendations was mostly agreed, but some aspects of delivery may vary to reflect the policy position of the Welsh Government.”²⁶ In terms of the Law Commission’s recommendations, the response stated:

“Our overall responses are as follows:

- *Accept – 50% (18 recommendations)*
- *Intend to implement in modified form – 33% (12 recommendations)*
- *Reject – 8% (3 recommendations)*

¹⁹ EM, 3.14

²⁰ Law Commission, [Regulating Coal Tip Safety in Wales: A Consultation Paper](#), 9 June 2021. The terms of reference for the project are set out in paragraph 1.19. A list of [consultation responses](#) is available on the Commission’s [website](#), together with an [analysis](#) of those responses.

²¹ Law Commission, [Regulating Coal Tip Safety in Wales: Report](#), 23 March 2022. The Law Commission’s recommendations are listed at Chapter 13 of the report. See also, Law Commission, [Regulating Coal Tip Safety in Wales: Summary of the Report](#), 24 March 2022

²² Welsh Government, [Coal Tip Safety \(Wales\) White Paper: A new regulatory framework for disused coal tips in Wales](#), 12 May 2022

²³ Welsh Government, [Consultation – summary of response, Coal Tip Safety \(Wales\) White Paper: A new regulatory framework for disused coal tips in Wales](#), November 2022. Individual responses were also published.

²⁴ [Detailed response to the report on regulating coal tip safety in Wales: Letter \(and annexes\) from Julie James MS, Minister for Climate Change to The Right Honourable Lord Justice Green, Chair of the Law Commission](#), 22 March 2023

²⁵ An [interim response](#) was published on 23 September 2022

²⁶ EM, paragraph 3.20

In addition, there are three recommendations (8%) where we have identified a need for additional supporting evidence to inform a future decision on whether and how to take forward the recommendations.

A more detailed explanation, including rationale where we do not agree with a recommendation, is provided in Annex 1. It is worth noting that in some areas we have necessarily adapted the policy approach because of the inclusion of non-coal tips into the regime – a change the Law Commission’s report anticipated. In most of these areas, though the policy may vary from the specific recommendation, the underlying intention is preserved.”²⁷

Evidence

24. In the EM the Cabinet Secretary states:

“The Law Commission review concluded the existing legislation is outdated; it was introduced at a time when there was an active mining industry and relevant specialist experience was available. The Commission noted that the 1969 Act leaves the responsibility for disused tips to local authorities, but gives them limited powers of intervention, which are confined to situations where there is perceived to be an existing risk to the public by reason of a tip becoming unstable. The Law Commission report reflected that mechanisms in the 1969 Act requiring owners to carry out remedial works are cumbersome and time consuming, and that the alternative it provides – for the local authority to do the work and charge the owner – is unwieldy. It stated that the fragmentation of powers across local authorities led to an inconsistency in safety standards and risk classifications. Reform was seen as vital for protecting the public from any future landslides.”²⁸

25. In the EM the Cabinet Secretary also sets out further information about the key findings in the Law Commission report.²⁹ This includes gaps in the *Mines and Quarries (Tips) Act 1969* – the existing legislative framework providing for the

²⁷ Detailed response to the report on regulating coal tip safety in Wales: Letter (and annexes) from Julie James MS, Minister for Climate Change to The Right Honourable Lord Justice Green, Chair of the Law Commission, 22 March 2023

²⁸ EM, paragraph 3.16

²⁹ EM, paragraph 3.16

safety and stability of mining waste in the UK.³⁰ In particular, the Cabinet Secretary states in the EM:

“Crucially, the 1969 Act does not confer a duty on local authorities to inspect and secure disused tips, but merely provides a permissive regime.”³¹

26. The Cabinet Secretary also highlights that the “1969 Act allows local authorities considerable discretion in their approach to matters like risk assessment, categorisation of tips, monitoring and inspection, management and maintenance of records and enforcement, which leads to inconsistency.”³² He added that:

“This supports the need for legislative change which will strengthen the management regime for disused tips and ensure the approach is consistent and proportionate.”³³

27. The Cabinet Secretary also notes that in the last two decades “there has been a loss of expertise within local authorities in respect of mining activities and disused tips”, citing a number of reasons for that loss.³⁴

28. As regards the White Paper, the Cabinet Secretary said:

“It reflected many of the Law Commission recommendations. In some areas the paper presented an alternative approach, particularly in relation to the monitoring and maintenance of disused coal tips and in relation to hazard assessments and categorisations of tips. The proposals outlined in the White Paper provided an overarching framework, suitable for both disused coal and non-coal tips.”³⁵

29. The Cabinet Secretary also explains that:

“If the legislation is not made it would mean a significant risk of the issues and inconsistencies identified in the current regime under the 1969 Act continuing. This could mean limited mitigation against the ongoing risk of slippage, which not only

³⁰ EM, paragraphs 3.17 to 3.18

³¹ EM, paragraph 3.17

³² EM, paragraph 3.83

³³ EM, paragraph 3.83

³⁴ EM, paragraph 3.22

³⁵ EM, paragraph 3.31

poses a risk to life, but also places considerable financial burdens on communities, local and national government.”³⁶

30. He adds that the Bill should “provide communities in Wales living near disused tips with the assurances and safeguards they need to feel safe and secure in their homes”.³⁷

Consultation and a draft Bill

Evidence

31. Chapter 4 of the EM highlights the consultation undertaken by the Welsh Government on the White Paper and the policy development it undertook subsequently.

32. As regards a draft Bill, the Cabinet Secretary states in the EM:

“There has been no formal consultation on a draft Bill. The provisions that are included in the Bill align, for the most part, with the provisions set out in the White Paper consultation. Where changes have occurred, these have been to create a simpler but more flexible approach, ensuring the provisions in the Bill are proportionate and reasonable. The changes represent an evolution in approach, rather than a radical departure from the original intent.

(...)

Given that extensive consultation that has already taken place on the Law Commission’s report, and a comprehensive consultation plan of engagement was developed for the White Paper to inform the Bill development, the number of responses and ongoing engagement with key stakeholders throughout the development of the Bill, it was not considered necessary to consult on a draft Bill.”³⁸

33. We asked the Cabinet Secretary why the Welsh Government had not consulted on the proposals contained in the Bill in its current form. The Cabinet Secretary told us:

³⁶ EM, paragraph 3.107

³⁷ EM, paragraph 3.111

³⁸ EM, paragraphs 4.38 and 4.40

“Well, we believe that there has been extensive consultation on the proposals. There are differences, of course, between what was set out in the White Paper and what is now contained in the Bill, but that would be expected (...) within the course of any Bill drafting and policy development process. Some of the changes now reflected within this are following the consideration within the White Paper responses, and others came about, I have to say, due to the more detailed testing that has been done with the proposals during the Bill development process. But this wouldn’t be unusual, that there were changes that had come forward by this stage.”³⁹

34. The Cabinet Secretary subsequently told us:

“Whilst the Bill does change elements of what was set out in the White Paper, the provisions that are included in the Bill align, in key respects, with the provisions set out in the White Paper.

It is customary for there to be differences between what is set out in the White Paper and what is contained in the eventual draft Bill. Some of the changes came about following consideration of the White Paper responses. Others came about due to more detailed testing of the White Paper proposals during the Bill development process.

As you note in the question, where we have made changes to the policy they have been made to improve it – to make it more flexible, proportionate etc.

One of the main reasons for not consulting on a draft Bill is we did not consider the level of changes necessitated formal consultation, particularly when the level of engagement with key stakeholders in the Bill development stage, post White Paper, is taken into consideration.

Given the importance of the subject matter, we were keen to introduce the Bill. In light of my view that further formal consultation was not necessary, consulting on a draft would

³⁹ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [12]

have unnecessarily delayed introduction and the establishment of the Authority.”⁴⁰

Balance between what is on the face of the Bill and what is left to subordinate legislation and guidance

Delegated powers in the Bill

35. The Bill contains sixteen powers for the Welsh Ministers to make regulations and one power to make orders.

36. These powers to make subordinate legislation are summarised in Table 5.1 of the EM. The Bill also contains a power to make directions, which is summarised in Table 5.2 of the EM.

37. Of the sixteen powers to make regulations, eight are Henry VIII powers enabling the use of regulations to amend primary legislation. They are discussed separately in Chapter 4.

The proposed use of guidance

38. Section 1 of the Bill establishes the Disused Tips Authority for Wales and section 69 provides the Welsh Ministers with the power to provide the Authority with guidance to which it must have regard in exercising its functions.

39. The Statement of Policy Intent says:

“The Bill does not confer powers on the Welsh Ministers to issue guidance. The Welsh Ministers intend to issue guidance utilising existing powers under section 58A of the Government of Wales Act 2006.”⁴¹

40. The Statement of Policy Intent explains that the intention is that guidance will be developed to cover a number of areas including:

- monitoring and assessment;
- cost recovery, contributions and charging;
- management plans;

⁴⁰ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 5

⁴¹ Statement of Policy Intent, page 24

- appeals.⁴²

41. Throughout the EM and its Explanatory Notes, the Cabinet Secretary makes reference to the use of guidance to support the implementation of the Bill.^{43 44}

Evidence

42. In our letter following the evidence session, we asked the Cabinet Secretary to explain the differences between the Bill as described in the White Paper and the Bill as introduced, and to identify every occasion where the White Paper suggested the use of primary or secondary legislation but where the Cabinet Secretary now proposes to use guidance instead. In his letter of response on 7 March 2025, the Cabinet Secretary told us:

“Some changes have been made, but the fundamentals are there. Changes that have been made are necessary, proportionate and are intended to deliver a regime that will enable the Authority to deliver on its main objective to ensure disused tips do not threaten human welfare by reason of their instability. The differences are set out in detail in Chapter 4 of the Explanatory Memorandum (paragraph 4.9 onwards).

Table 1 below sets out the occasions where the White Paper suggested the use of primary or secondary legislation, but guidance is now proposed instead.”⁴⁵

43. Table 1 from the Cabinet Secretary’s response is reproduced on the next page.

⁴² Statement of Policy Intent, pages 24 to 26

⁴³ For example: EM, paragraphs 3.66, 3.72 to 3.75, 3.89, 4.20, 4.22, 4.25, 4.39, 8.32, 8.34, 8.50, 9.23 and 11.4.

⁴⁴ Explanatory Notes, paragraph 47 (section 10 – Duty to monitor registered tips); paragraph 49 (section 12 – Meaning of “preliminary assessment”); paragraph 50 (section 15 – Meaning of “full assessment”); paragraph 73 (section 20 – Proposal to register a tip); paragraph 103 (section 29 – Proposal to make notifiable change); paragraph 133 (Chapter 1 – Requiring an owner of land to carry out operations).

⁴⁵ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 6

Table 1: Changes in legislative approach⁴⁶

Area	White Paper proposal	Draft Bill
Assessments	<p>Requirement for the Authority to undertake assessments prescribed on the face of the Bill.</p> <p>Minimum content of assessments prescribed in subordinate legislation.</p> <p>The statutory minimum content supported by guidance developed by the supervisory authority.</p>	<p>Requirement for the Authority to undertake assessments prescribed on the face of the Bill.</p> <p>The Welsh Ministers intend to provide guidance to the Authority in respect of assessments.</p>
Content of the register	The minimum content of the register prescribed in subordinate legislation.	The minimum content of the register prescribed on the face of the Bill.
Management plans	<p>Duty placed on the Authority to produce management plans.</p> <p>The minimum content of management plans to be prescribed in statutory legislation.</p>	The Welsh Ministers intend to provide guidance to the Authority in respect of management plans.
Inspection	Minimum content for inspection/ appraisal reports as prescribed by Welsh Ministers in subordinate legislation.	<p>Requirement on Authority to monitor all registered disused tips on face of the Bill.</p> <p>The Welsh Ministers intend to provide guidance to support the Authority in respect of monitoring and inspections.</p>
Guidance about sanctions	A requirement for the Authority to produce guidance on enforcement and civil sanctions, setting out its decision-making approach and use of both criminal and civil sanctions available to it under the Bill.	The Bill does not make provision for civil sanctions, and so there is no requirement for the Authority to produce guidance on that topic. No requirement to provide guidance on enforcement.
Cost recovery	It was proposed the Welsh Ministers by statutory instrument set out principles governing the allocation of financial responsibility for tip safety work between persons or entities in the public and private sectors.	The Bill sets out the factors that a court must take into account in allocating financial responsibility - i.e. demands for payment/contribution orders/compensation etc. The Welsh Ministers intend to provide guidance on the circumstances in which the Authority should seek to recover its costs, or should charge for the provision of advice, assistance or information.

⁴⁶ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 6

44. We explored matters related to the use of guidance with the Cabinet Secretary.

45. We noted that much of the detail on the new regime will be contained in guidance and asked him how much would be provided and its scope. The Cabinet Secretary told us:

"We're going to be developing a suite of guidance (...) we will have things such as the guidance around the preliminary and the full assessments, which are described on the face of the Bill, monitoring inspections, compensation, cost recovery and charging, management plans themselves, categorisation of tips and issuing notices (...) we'll also be developing guidance for Planning and Environment Decisions Wales, which is intended to be the appointed person legally described under the Bill, so that guidance will also relate to things such as appeals, including the determination of applications under sections 36 and 41."⁴⁷

46. We noted that section 69(1) of the Bill says that the authority must have regard to the guidance and asked what it would mean in practice and to what extent could the Authority give due regard to guidance but ignore what it includes. The Cabinet Secretary replied by saying:

"Having regard to guidance means that that body to whom it is addressed must take it into account when exercising its functions. So, for example, in carrying out the duty to monitor registered tips, the authority as defined within the Bill must take into account the relevant guidance, and should reflect this within its actions, such as, for example, using up-to-date inspection techniques.

(...) The authority can't simply ignore guidance that is given to it by Welsh Ministers. What this means in practice is that the authority must take the guidance into account, and if it deviates from that guidance, it'll have to justify that by providing the reasons for doing it. If challenged, the body should be able to demonstrate that it has considered and it has had

⁴⁷ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [16]

regard to that relevant guidance, for example, by specifically referencing it directly in the reason for any decision."⁴⁸

47. An official accompanying the Cabinet Secretary said:

*"So the pace of change, the pace of climate change, means that we have to be really aware that we need to react very, very quickly to whatever happens, and I think having considered those issues, it was one of the reasons we decided that guidance may be more appropriate in this instance."*⁴⁹

48. We also asked the Cabinet Secretary if he had any concerns that the guidance could be too open to interpretation and erode public confidence. He replied:

"No, I don't (...) the guidance (...) will be really developed by engagement with stakeholders (...) it will be very well-developed expert guidance that will be brought forward, and that should give assurance to communities, (...)

*I think that, actually, will be an asset to communities, in that being able to turn to the guidance, which is up to date, is expert, is driven by that expertise on the ground in engagement with stakeholders, will give them the confidence that this has been very well worked. (...) this is a body of work that we can update as technology changes, as assessment changes, and it'll always be pushing forward—that sort of proactive approach."*⁵⁰

49. We suggested to the Cabinet Secretary that secondary legislation would provide a more powerful framework within which guidance can be issued and would also enable scrutiny in the Senedd and by constituents. We also suggested it would then provide a more powerful tool for delivering the means by which tips are dealt with but also provide reassurance for people living in their shadows. In response the Cabinet Secretary said:

"... I'm certainly keen to make sure that we can give as much clarity to those communities, not just over the ambition but over what this would practically deliver. Now, I hear what you're saying; the judgment that we have come to, based on developing the expertise within the authority, has brought us to

⁴⁸ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [22 to 23]

⁴⁹ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [27]

⁵⁰ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [31 to 32]

the conclusion that, on balance, we would want that to be developed within guidance.”⁵¹

50. The Cabinet Secretary also addressed the issue of guidance in his letter of 7 March 2025. He shared summary guidance covering: monitoring; appeals against demands for costs; compensation claims; cost recovery; management plans and assessment.

51. The Cabinet Secretary’s letter stated:

“At the session on 10 February, there was detailed discussion about the use of guidance and the perceived disadvantages of guidance when compared to settled provisions on the face of the Bill, or even further particular powers/duties in regulations.

To reiterate, I agree that in the development of any Bill, there is a balance to be struck between the use of guidance and the use of legislative provisions. I confirm that careful consideration has been given to what should be included on the face of this Bill, where a regulation-making power is appropriate and which areas are most appropriately addressed in guidance. I appreciate that this matter is of significant interest to the Senedd and to this Committee in particular.

In my view, guidance provides the Welsh Ministers with the flexibility to respond quickly to changing circumstances, such as climate change and advancements in technologies. If some of the areas intended to be covered in guidance were, instead, detailed on the face of the Bill or even included in regulations, there is a very real risk that those provisions could become outdated very quickly. This is particularly true of, for example, guidance on assessments. There are also areas where, by their very nature, the detail that is needed to supplement existing Bill provision falls more naturally to guidance as a result of the multitude of factors that need to be taken into consideration by the Authority when exercising its powers, for example, guidance on compensation and cost recovery.

The status and strength of the guidance seemed to be a concern to members of the Committee. Under section 69 of the Bill, both the Authority and PEDW (who will be appointed by

⁵¹ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [45]

the Welsh Ministers to determine relevant appeals on their behalf) are required to have regard to guidance given by the Welsh Ministers. Having regard to guidance means that the body to whom it is addressed must take it into account when exercising its functions. For example, in carrying out its duty to monitor registered tips, the Authority must take into account the relevant guidance and should reflect this in its actions, which I would expect, for example, to include the use of up-to-date inspection techniques.

The Authority and PEDW cannot simply ignore guidance given to them by Welsh Ministers. What this means in practice is that the Authority/PEDW must take the guidance into account and if it deviates from the guidance it will have to be able to provide clear reasons for doing so. If challenged, the Authority/PEDW should be able to demonstrate that it has considered and had regard to any relevant guidance – for example by referencing the guidance directly in the reasoning for any decision.

I believe that guidance is a very effective tool in technical, rapidly changing areas where it is imperative that both the Authority and Welsh Government are able to keep abreast of, and reflect, best practice and developing knowledge and expertise.”⁵²

52. The Cabinet Secretary also told us that he did not believe that the inclusion of disused non-coal tips in the Bill has led to a greater reliance on guidance (the White Paper proposals focused on disused coal tips).⁵³ He added that:

“The balance between guidance and legislative provision would have been the same had the Bill only applied to disused coal tips.”⁵⁴

53. When we asked how the decision to extend the Bill to include disused non-coal tips had impacted on the level of detail included in the Bill, the powers to make regulations and the use of guidance, the Cabinet Secretary told us:

⁵² Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025

⁵³ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 7

⁵⁴ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 7

“From the outset the provisions in the Bill have been developed to apply in the same way to coal and non-coal tips, therefore the inclusion of non-coal tips in the Bill has not impacted on the level of detail in the Bill, nor on decisions regarding the use of powers or guidance.

I believe we have arrived at the right balance between the level of detail on the face of the Bill, powers to make regulations and what is appropriate to be addressed in guidance. The statement of policy intent (SOPI) sets out our policy intentions in relation to each of the delegated powers in the Bill. (...)

I can assure the Committee that significant thought went into decisions regarding what was included on the face of the Bill and what we intend to address in guidance. I am of the view that guidance is an appropriate vehicle to set out our expectations, because it enables the Authority and stakeholders to be involved in shaping the regime, and, as set out in response to question (i) above, we are creating an expert body who will apply its expertise in determining what action needs to be taken in a particular case and the imposition of fixed rules may be too prescriptive. As you are aware, I have provided outlines of guidance to the CCEI Committee to give an indication of policy thinking/direction in some of these areas, they are also enclosed with this letter.”⁵⁵

54. The Cabinet Secretary also told us:

“The Authority will be established on 1 April 2027.

To support it from day one, the intention is that any necessary guidance will be available and secondary legislation will be in force from that date.”⁵⁶

Our view

55. The Bill is an important piece of primary legislation and we acknowledge its aims.

⁵⁵ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 7

⁵⁶ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 32

56. However, in our view, the balance between provisions that will be on the face of the primary legislation or to be made by regulations versus what is to be left to guidance is inappropriate.

57. Our reasons for reaching this view are set out below. However, we wish to emphasise that we do not doubt the current Government's commitment to the issue of disused tips; our concern is focused on ensuring that the legislation provides a robust, defined framework that allows appropriate oversight of the new regime by the Senedd.

58. As the Cabinet Secretary has acknowledged, the Bill differs from proposals in the White Paper. We note the Cabinet Secretary's view that "[s]ome changes have been made, but the fundamentals are there".

59. However, we consider that the changes that have been made to the White Paper proposals are significant (see Table 1 of this report reproduced from the Cabinet Secretary's letter of 7 March 2025). Moreover, we consider that the changes made have resulted in a Bill that departs from the legislative norms that we would expect to see, in terms of the balance between what is on the face of the Bill, what is to be included in regulations, and what is to be left for inclusion in guidance. The imbalance across these three categories is therefore a matter of concern to us and needs to be addressed. In particular, we consider that the framework adopted has an over-reliance on guidance and that the Senedd is not being provided with appropriate legislative oversight.

60. Furthermore, the rationale for the change in approach has not been explained clearly or justified in a satisfactory way, particularly when reasons of flexibility and proportionality (amongst others) have been cited. We recognise that arguments have also been advanced about the pace of technological change meaning that legislative provisions could become outdated quickly, and we address that point below.

61. One way in which the change of approach from the proposals in the White Paper could have been explored and tested is through the use of a draft Bill. This would have enabled scrutiny of the reasons for this change in more detail prior to the Bill's introduction rather than during the Stage 1 process. We do not agree with the Cabinet Secretary's view that the level of changes did not necessitate further consultation. We are also not persuaded by the Cabinet Secretary's suggestion that consulting on a draft Bill would have "unnecessarily delayed" the establishment of the Authority; taking additional time to test legislation is rarely wasted time.

62. The Committee has had a longstanding preference for the Welsh Government to consult on draft Bills where appropriate, as opposed to consulting solely on policy proposals; in this case, proposals which, in our view, have changed significantly. We believe that consulting on a draft Bill should have been built into the Welsh Government's legislative timetable. In our view, there would have been much to gain: a more open and transparent legislative process; a greater likelihood of the government's approach being fully understood and potentially better legislation.

Conclusion 1. Given the significant differences between the proposals set out in the White Paper and the Bill introduced to the Senedd, we consider that space should have been found within the Welsh Government's legislative timetable to consult on a draft Bill.

63. Table 1 of this report highlights the extent of the changes made to the Welsh Government's original proposals as set out in the White Paper. In addition, the Cabinet Secretary has provided copies of indicative guidance in a range of areas.

64. In our view some of the material contained in this indicative guidance would be better suited to inclusion in regulations subject to Senedd scrutiny in order to provide a more defined legislative framework within which the guidance should operate.

65. We believe the proposals set out in the White Paper provide for a better legislative framework than is currently provided by the Bill. As we indicate above, we believe the approach the Welsh Government has adopted relies too heavily on the use of guidance. In reaching this view, we therefore agree with the evidence given to the Climate Change, Environment and Infrastructure Committee by the UK Environmental Law Association. It stated:

*"As the UK Environmental Law Association, we are concerned especially with questions of habitat protection and biodiversity (see further below) but there is a wider point. We accept that not all guidance will be statutory guidance and that issuance of guidance is an ancillary Executive Ministerial Function in accordance with s.58A Government of Wales Act 2006. Guidance will be subject to consultation and post-implementation review. **Nonetheless, the rule of law requires that legislation should be clear and complete, not leaving gaps to be filled by soft law guidance when hard law, statutory provision is more appropriate.** We raise the question of whether greater clarity is needed in the Bill itself or in secondary*

legislation in relation to some of the concerns about the environment and environmental regulation, ...".⁵⁷ [our emphasis]

66. We note the Cabinet Secretary's suggestion that legislative provisions could become outdated quickly due to technological changes and that, as a consequence, the use of guidance is more appropriate. We are not convinced that overarching principles related to aspects of, for example, monitoring and undertaking assessments of disused tips are likely to change so quickly that this would preclude their inclusion in regulations. Such principles should, in any event, be subject to Senedd oversight.

67. In reaching this view we also note that the Welsh Government has itself made the case for this approach in its White Paper. On some matters we are unclear why its position has changed, and on other matters we do not consider that the arguments made are strong enough to justify the change in approach.

Conclusion 2. The balance between provisions that will be on the face of the primary legislation or to be made by regulations versus what is to be left to guidance is inappropriate. As a consequence, the Welsh Government is relying too heavily on the use of guidance to deliver the Bill's objectives.

Conclusion 3. The matters we refer to in conclusion 2 are the areas of most concern to the Committee.

68. In drawing these conclusions, and highlighting our concern about an over-reliance on the use of guidance, we wish to make another important point. We note that, as matters currently stand, the Welsh Government is relying on powers in section 58A of the 2006 Act to issue guidance. We also note that it will not be under a duty to issue guidance. As such, the new Authority to be established by the Bill will be required to have regard to guidance but there is no requirement in the Bill for that guidance to be produced. We do not believe that this approach represents good law-making. We comment specifically on section 69 (Guidance) of the Bill in Chapter 4 of the report.

69. In our view the Bill needs to be strengthened to require more of the principles underpinning the new regime to be subject to legislative oversight by the Senedd. We believe that this approach would be consistent with the proposals originally included in the White Paper, improve the current Bill's accessibility and aid public understanding of the new regime.

⁵⁷ Evidence to the Climate Change, Environment and Infrastructure Committee by the UK Environmental Law Association (DMQTB10 – UKELA), 16 January 2025

Recommendation 2. The Cabinet Secretary should review all the indicative guidance he has provided with a view to:

- identifying provisions in that guidance that are more appropriate to be included on the face of the Bill or in regulations (subject to an appropriate procedure);
- tabling appropriate amendments to the Bill.

70. Recommendation 2 is overarching and we make similar but more specific recommendations on certain matters in section 4.

71. We also wish to make one more general observation. This is a complex policy area and there have been significant changes from the Welsh Government's White Paper proposals. The narrative in the EM is not particularly easy to follow and would have benefitted from cross-referencing to relevant sections in the Bill to aid understanding. We found Table 1 of the Cabinet Secretary's letter of 7 March 2025 (and reproduced in this report) to be helpful and believe its inclusion in the EM (cross-referenced to appropriate section numbers in the Bill) would have been beneficial.

4. Specific observations

The Disused Tips Authority for Wales: Establishment and main objective

Background

72. Section 1 of the Bill establishes the Disused Tips Authority for Wales (the Authority). Section 1(3) introduces Schedule 1 which makes provision about the Authority's constitution and operational arrangements.

73. Section 2(1) provides that the Authority's main objective when carrying out its functions is to ensure that disused tips do not threaten human welfare by reason of their instability. Section 2(2) places a duty on the Authority to promote high standards in relation to the management of disused tips and threats to their stability. Section 82 defines the meaning of a "threat to human welfare".

Evidence

74. In the EM the Cabinet Secretary notes:

*"The Bill envisages the Authority, as an expert body, being advisory rather than prescriptive when carrying out its duties under the Bill, encouraging those who are responsible for disused tips to meet their responsibilities but also having effective and useable powers to step in where those with responsibility cannot or will not do so."*⁵⁸

75. We asked the Cabinet Secretary why the word "ensure" has been used in the Authority's main objective, and whether it represents a very high threshold. In response, the Cabinet Secretary said:

"Now, as an objective, this is something that the authority aims to achieve, to ensure that tips do not threaten human welfare, rather than (...) a cast-iron duty that it must achieve, because the difficulty there, the challenge, is how on earth do you absolutely, 110 per cent guarantee that? Can you put that duty on the authority to absolutely guarantee? You can absolutely put a duty on them to say they must aim to ensure that disused tips do not threaten human welfare, and they must do

⁵⁸ EM, paragraph 4.12

everything they can, then, to achieve that. So, the purpose of section 2 is to make clear on the face of the Bill what the authority is being established to do."⁵⁹

76. He added:

*"... it needs to have also the general objectives relating to the performance of its functions, which will be set out in the remit letter. So, we don't think this is untypical in the way that it's framed within the Bill, or unusual."*⁶⁰

77. We also asked the Cabinet Secretary why the word "promote" has been used in section 2(2) and also to explain the meaning of "high standards", including how that would be measured. The Cabinet Secretary replied:

*"I think promotion here is really important, because it gives an element of proactivity, as well, to the approach of the authority. I would also expect them to deliver their duties and discharge their powers in terms of disused tips in a very transparent way, to promote it in that way that garners public trust. So, as part of this, we'll be expecting the authority to be quite proactive in helping and advising landowners, working with, collaborating with landowners on management of those tips. (...) We also expect the authority to promote high standards by employing those well-qualified individuals, ensuring that continuous training is undertaken, designing their operation on the latest and most appropriate equipment and knowledge, so constantly demonstrating that it's meeting this duty through its actions, in the way it carries out assessments, (...) the way it approaches its operations, and so promoting those high standards. It will have to, of course (...) say within its annual report each year how it has carried out these functions, how it has satisfied that duty to actually promote high standards as well within its annual report."*⁶¹

78. In our letter following the evidence session, we asked the Cabinet Secretary what the relationship is between the definition of "threat to human welfare" in

⁵⁹ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [62]

⁶⁰ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [63]

⁶¹ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [67]

section 82, and the Authority's main objective in section 2(1), to ensure that disused tips do not threaten human welfare. He told us:

"The meaning of "threat to human welfare" in section 82 is fundamental to the Authority's main objective. The reference to "threatening human welfare" in section 2(1) is to be interpreted in accordance with section 82. This means, that underpinning all the Authority's actions, is an awareness and evaluation of threats and potential threats to human welfare in the context of disused tips and any existing, or potential, instability.

*By way of example, there could be a threat to human welfare if a disused tip located near a residential area became unstable and where any slippage resulting from instability could result in loss of human life, serious human illness or injury or serious damage to property."*⁶²

79. We noted that section 2(1) of the Bill sets out the Authority's main objective, but asked about the Authority's other objectives, and why they are not included on the face of the Bill. The Cabinet Secretary responded:

"A list of the Authority's objectives is not included on the face of the Bill as it is not feasible to provide a comprehensive description in the Bill of all of the Authority's objectives. The main objective, as the phrase suggests, is one of the Authority's objectives. There are others, but these will depend on the circumstances of a particular case, including the specific powers it is acting under. This will include complying with any relevant legal requirements, for example.

*(...) In common with other public bodies, it will have general objectives relating to performance of its functions that will be set in the remit letter for the Authority."*⁶³

Our view

80. We note the Cabinet Secretary's comments regarding the use of the terms "ensure", "promote" and "high standards" in section 2. We also note his comments

⁶² Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 8

⁶³ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 9

about the relationship between the definition of “threat to human welfare” in section 82, and the Authority’s main objective in section 2(1).

81. More generally, we note the Cabinet Secretary’s comments about the Authority being “advisory rather than prescriptive”. The Authority will be key to implementing the new regime; a regime which is to be based substantially on guidance prepared by the Welsh Ministers (as matters currently stand), rather than underpinned by a defined legislative framework. For this reason, the Cabinet Secretary’s phrasing of the Authority’s role as “advisory” does not sit comfortably with us.

82. This unease has been exacerbated by the inclusion of only one objective for the Authority (the “main objective”) on the face of the Bill. We note the Cabinet Secretary’s view that it would not be feasible to provide a comprehensive description in the Bill of all of the Authority’s objectives.

83. However, we note that the *Tertiary Education and Research (Wales) Act 2022*⁶⁴ provides a range of strategic duties for the new body corporate it establishes (Medr, the Commission for Tertiary Education and Research). We see no reason why a similar approach cannot be adopted for the new Authority to be established by the Bill.

84. Also, we do not believe that it is satisfactory to rely solely on the remit letter and consider it should be possible to set out some strategic secondary objectives on the face of the Bill. This would provide more information about what is expected of the Authority, improve transparency and better enable the Authority to be held to account. In turn, this would likely increase public trust and play an important role in setting and managing expectations in affected communities which would be a welcome and positive development in the history of mining in Wales.

85. We also note that paragraphs 19 and 20 of Schedule 1 to the Bill (as introduced by section 1(3)) require the Authority to prepare and publish a corporate plan setting out how it is going to discharge its functions, and an annual report on the exercise of those functions. The functions of the Authority are included throughout the Bill but are not listed anywhere, making them difficult to discern to the reader of the Bill.

⁶⁴ *Tertiary Education and Research (Wales) Act 2022*

Recommendation 3. The Cabinet Secretary should table an amendment to the Bill to supplement the Authority's main objective in section 2(1) with additional strategic secondary objectives covering what is expected of the Authority.

Recommendation 4. The Cabinet Secretary should table an amendment to the Bill to provide a comprehensive list of the Authority's functions.

Monitoring registered tips

Background

86. Section 6(1) places a duty on the Authority to compile and maintain an electronic register of disused tips that it has decided (a) pose a threat to human welfare by reason of instability, or (b) could pose such a threat in the event of instability. Section 7 sets out the criteria for registering a disused tip, while section 8 concerns the content of the register and section 9 relates to public access to the register.

87. Section 10(1) places a duty on the Authority to monitor the stability, and threats to the stability, of each disused tip in the register to be created under section 6. Section 10(2) provides that to perform its monitoring duty, the Authority may carry out inspections and other monitoring activities that it considers appropriate. The Explanatory Notes to the Bill state:

"Utilising powers under section 58A Government of Wales Act 2006, Welsh Ministers intend to issue guidance to the Authority on monitoring."

Section 69 of the Bill will require the Authority to have regard to such guidance in exercising its monitoring functions."⁶⁵

Evidence

88. Chapter 7 of the White Paper states:

"A clearly defined monitoring regime is a fundamental component of any new management regime to provide public confidence that tips are being assessed and providing an up-to-date record of condition as well any necessary works being identified."⁶⁶

⁶⁵ Explanatory Notes, paragraph 47

⁶⁶ Welsh Government, Coal Tip Safety (Wales) White Paper A new regulatory framework for disused coal tips in Wales, 12 May 2022, paragraph 7.3

89. It also proposed a three-tiered system of checks to be undertaken covering inspection, appraisal and assessment⁶⁷ and the frequencies for inspections and appraisals against the categories of disused tip.⁶⁸

90. We highlighted the White Paper in asking whether some matters related to monitoring should be incorporated in subordinate legislation rather than guidance. The Cabinet Secretary responded by saying:

*“This is one of the areas that we’ve already developed the draft guidance on, and, if it is of help to the committee, we can share that with you so that you can have a look at it. I think that will help give clarity. But our judgment is, as of this moment, that, on this, as with some other areas, maintaining that flexibility by keeping it within that guidance that the authority will have to have regard to, is the right way to do it.”*⁶⁹

91. When asked, the Cabinet Secretary confirmed that the guidance will set out the frequency of monitoring disused tips.⁷⁰ As regards whether the guidance will also detail the kind of expertise that should exist or be part of a monitoring inquiry, an official accompanying the Cabinet Secretary said:

*“... that sort of thing isn’t contained in the guidance as it is at the moment, and that’s mainly because this is a very fast developing area. (...) Put it this way, we’ve got capacity and capability problems in Wales at the current time, and so we need to develop the capacity and capability to be able to deal with this in the future. So, the frequency is set out very clearly in the guidance. For the technical aspects of it, we’ll want to work with experts who are on the ground now in order to develop that to make sure it’s right.”*⁷¹

92. We suggested that subordinate legislation should at least set out that there would be a monitoring report or monitoring assessment undertaken every few months, or quarterly for some categories. In his response the Cabinet Secretary said:

⁶⁷ Welsh Government, Coal Tip Safety (Wales) White Paper A new regulatory framework for disused coal tips in Wales, 12 May 2022, paragraph 7.4, Table 6 and Diagram 2

⁶⁸ Welsh Government, Coal Tip Safety (Wales) White Paper A new regulatory framework for disused coal tips in Wales, 12 May 2022, paragraph 7.5 and Table 7

⁶⁹ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [70]

⁷⁰ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [72]

⁷¹ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [75]

“The question is whether we bolt something down that is restrictive within the legislation, or we give that flexibility, recognising that there are quantum leaps going forward, both in technology and expertise around this, and give them the ability, then, to strengthen the guidance and adapt the guidance. (...) what we want to avoid strenuously, (...) is something that is constraining on the ability of that authority, which we see will be developing rapidly in its capacity and its expertise, ...”⁷²

93. We also asked whether matters should be included in subordinate legislation relating to taking action in respect of imminent threats and emergencies following assessment and monitoring. The Cabinet Secretary said that “within the Bill we are bringing forward powers to actually address those urgent, emergency situations that go above and beyond the regular powers that the authority has within the Bill”.⁷³ An official accompanying the Cabinet Secretary added:

“Part of the issue with the previous legislation was that it was definitive and it restricted the ability of authorities to be able to act at the right time. I think what we’re trying to do here is to make sure that the authority has the ability to react at the right time, before a tip has slipped, and I think that was the main issue. I think, if we define it too closely in the Bill and we get it wrong, the risk is that we restrict the ability of this authority to be able to react. So, I think there is a fine balance and there is a need to make sure we are getting it right first time, especially if it’s on the face of the Bill.”⁷⁴

94. We pursued this point by asking whether the guidance will be used by the Authority to determine when an emergency arises and when to take action, or if such circumstances are defined sufficiently clearly in the Bill or in subordinate legislation. The Cabinet Secretary replied:

“We believe it’s clear on the face of the Bill, without a doubt. The clarity of the powers of entry in an emergency situation, the ability to take action in that emergency, with the landowner, but if the landowner were not to be available, would not want to collaborate on the necessary action, the ability of the authority then to actually access—with the necessary rights of

⁷² Legislation, Justice and Constitution Committee, 10 February 2025, RoP [77]

⁷³ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [79]

⁷⁴ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [80]

appeal as well, but to access—and take those necessary remedial messages on site to make that safe, are within the Bill, on the face of the Bill already. I think what we’re talking about is the difference between that and then the guidance around assessments, pre-assessments and how that would normally operate, and recognising, again, and I come back to this point, because it is certainly something that we’ve picked up a little bit, the feeling that we’re not doing any of this yet. Actually, the Mining Remediation Authority is out there doing this right now, and is gathering this experience and this knowledge and expertise. So, by the time we have, if we have, Royal Assent for this and the authority is established, there will be a body of knowledge here that is substantial. If we give them the ability then to work with the guidance, amend the guidance as they go forward, as they develop their expertise, I think it will be a strength for the Bill, not a weakness, that futureproofing.”⁷⁵

95. Table 1 of the Cabinet Secretary’s response of 7 March 2025 includes the following information about the change in approach to monitoring between the White Paper proposals and the Bill,⁷⁶ while Annex A of the response includes indicative guidance on monitoring.

Area	White Paper proposal	Draft Bill
Inspection	Minimum content for inspection/ appraisal reports as prescribed by Welsh Ministers in subordinate legislation.	Requirement on Authority to monitor all registered disused tips on face of the Bill. The Welsh Ministers intend to provide guidance to support the Authority in respect of monitoring and inspections.

⁷⁵ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [83]. See also [Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs](#), 7 April 2025

⁷⁶ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 6

Our view

96. As we state in the our view section of Chapter 3, we believe the Welsh Government's proposals will mean too many requirements will be placed in guidance when they should be placed either on the face of the Bill or in regulations.

97. We note that the indicative guidance in respect of the Authority's duty to monitor registered tips includes matters related to the frequency and timing of inspections for each category of registered disused tip (see section 24), the meaning of a "competent person" to carry out inspections, and the minimum information to be included in an inspection report.⁷⁷ We believe such requirements could be placed in regulations subject to Senedd scrutiny. If the requirements change over time, the Cabinet Secretary would have the flexibility to replace or amend the regulations.

98. We also note that there appear to be issues of capacity and capability in Wales that need to be addressed. In our view this strengthens the need for some details and requirements to be included in regulations; it should be for the Welsh Government to take the lead and set a clear and defined statutory framework to ensure there is clarity about how the regime is to operate successfully and what is needed for that purpose.

Recommendation 5. The Cabinet Secretary should table an amendment (or amendments) to section 10 of the Bill such that the minimum requirements relating to the monitoring and inspection of disused tips are to be set out in regulations in order to enable the Authority to perform its duty under section 10(1). This regulation-making power should be subject to the affirmative procedure.

99. In addition, we see no reason why the Bill should not provide a list of what other non-exhaustive matters *may* be included in guidance for the purpose of transparency and to aid public understanding.

Recommendation 6. The Cabinet Secretary should table an amendment to the Bill to set out what information may be included in guidance in relation to the monitoring and inspection of disused tips (in addition to the requirements to be set out in regulations as a consequence of recommendation 5).

100. As regards dealing with emergency situations the Cabinet Secretary told us that appropriate information was contained on the face of the Bill, although it is

⁷⁷ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, Annex A

not immediately apparent to us where those provisions sit and therefore their accessibility to the public.

Recommendation 7. The Cabinet Secretary should set out the sections of the Bill that are intended to deal with emergency situations that may arise or be discovered as a result of monitoring and the action the Authority will be able or required to take.

101. We are also unclear about how emergency situations and emergency preparedness are to be dealt with more broadly. We note that “guidance will cover scenarios such as emergency preparedness and incident response”.⁷⁸ In light of our concerns about the use of guidance generally and the importance of this issue, we believe there would be merit in reflecting on whether the Bill needs strengthening in relation to dealing with emergency situations, including as regards ensuring relevant provisions are easily identifiable to aid transparency and public understanding.

Recommendation 8. The Cabinet Secretary should consider whether the Bill needs strengthening generally in relation to dealing with emergency preparedness and emergency situations, including to ensure that relevant provisions are easily identifiable.

Assessment of disused tips

Background

102. Section 11 is an overview section on the assessment of disused tips. For the purposes of assessing disused tips, section 12 defines the meaning of “preliminary assessment” and section 15 defines the meaning of a “full assessment”. A full assessment may only take place after a preliminary assessment has been conducted.⁷⁹ The Explanatory Notes state that:

“The Welsh Ministers intend to issue guidance to the Authority about the way in which preliminary assessments should be carried out. It is anticipated that a preliminary assessment will take the form of a desktop survey that will look at matters such as the height and volume of a disused tip, its proximity to sensitive receptors (such as housing, infrastructure etc), any

⁷⁸ EM, paragraph 3.74

⁷⁹ Explanatory Notes, paragraph 51

information about the tip's history that may be relevant to its stability and existing inspection or structural reports.

(...) The Welsh Ministers intend to issue guidance about the way in which full assessments should be carried out. It is anticipated that a full assessment will involve a physical inspection of the disused tip by a suitably qualified person.”⁸⁰

103. Section 13(1) places a duty on the Authority to (a) carry out a preliminary assessment in relation to every disused tip in Wales, and (b) produce a report for each assessment. Section 13(2) requires the Authority to prepare a programme of work setting out its proposed approach to, and a timetable for, carrying out those assessments (in respect of some 2,500 disused coal tips and over 20,000 other disused tips⁸¹). Section 16 places a duty on the Authority to carry out a full assessment of an unregistered disused tip if, based on a preliminary assessment, it appears to the Authority that the criteria for the registration of the tip may be met. The Authority is required to produce a report of the assessment.

Evidence

104. In the EM, the Cabinet Secretary states that:

“The Welsh Ministers will issue guidance on preliminary and full assessments which the Authority must have regard to.”⁸²

105. We asked the Cabinet Secretary why there is no detail about how assessments are to be carried out on the face of the Bill and why he did not consider including a power for that information to be set out in regulations. In response, the Cabinet Secretary said:

“I can confirm that careful consideration was given to what would be on the face of this Bill and what would be more appropriately addressed in guidance. Several of the more technical elements of the regime, including the approach to assessments, will require input from experts, including experts from the Authority. This gives us the ability to have experts inform and shape the guidance, as the process for assessment becomes more sophisticated.

⁸⁰ Explanatory Notes, paragraphs 49 to 50

⁸¹ Explanatory Notes, paragraph 53

⁸² EM, paragraph 3.66

Guidance on assessments will need to keep pace with technological advances, putting the detail of how assessments should be carried out on the face of the Bill risks those provisions becoming outdated very quickly. Our approach ensures a robust and future proofed regime and gives the Authority flexibility to adapt its approach to the assessment processes. Guidance supports the principles of an adaptive and futureproof regime as it will allow the practical experience of the Authority, as it develops, to be incorporated into guidance.

I did give consideration to including a provision on the face of the Bill requiring regulations to prescribe how assessments are to be conducted. Whilst regulations are quicker to amend than primary legislation, they are still not as responsive to change and developments in best practice and technology as guidance. So, for that reason, I determined that guidance was the most appropriate vehicle.”⁸³

106. Table 1 of the Cabinet Secretary’s response of 7 March 2025 includes the following information about the change in approach to assessments between the White Paper proposals and the Bill,⁸⁴ while Annex F of the response includes indicative guidance on assessments.

Area	White Paper proposal	Draft Bill
Assessments	Requirement for the Authority to undertake assessments prescribed on the face of the Bill.	Requirement for the Authority to undertake assessments prescribed on the face of the Bill.
	Minimum content of assessments prescribed in subordinate legislation.	The Welsh Ministers intend to provide guidance to the Authority in respect of assessments.
	The statutory minimum content supported by guidance developed by the supervisory authority.	

⁸³ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 10

⁸⁴ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 6

Our view

107. We note that the indicative guidance in respect of the Authority's duty to assess tips includes matters related to, for example, what preliminary and full assessments will involve and be expected to include, the minimum information that preliminary and full assessment reports should include, the timings on the production of reports and the qualifications required to produce reports. The latter point is highlighted as part of the need to "build the necessary resource capacity and capability in Wales". We believe such requirements could be placed in regulations.

108. We note the Cabinet Secretary's view that:

"Whilst regulations are quicker to amend than primary legislation, they are still not as responsive to change and developments in best practice and technology as guidance."

109. We do not consider this view to be sufficient justification for not including certain requirements in regulations, such as those highlighted above, or to move away from the proposals in the White Paper. If the requirements change over time the Cabinet Secretary would have the flexibility to replace or amend the regulations.

Recommendation 9. The Cabinet Secretary should table amendments to the Bill to require that regulations subject to the affirmative procedure set out how preliminary and full assessments of disused tips are to be undertaken, including by specifying minimum requirements.

110. In addition, we see no reason why the Bill should not provide a list of what other non-exhaustive matters *may* be included in guidance for the purpose of transparency and to aid public understanding.

Recommendation 10. The Cabinet Secretary should table an amendment to the Bill to set out what information may be included in guidance in relation to how preliminary and full assessments of disused tips are to be undertaken (in addition to the requirements to be set out in regulations as a consequence of recommendation 9).

111. We also wish to seek clarification on one matter. Section 11(a) (part of an overview section for the assessment of disused tips) states that the Authority is required to carry out "a preliminary assessment of disused tips not in the register". However, section 13(1)(a) of the Bill states that the Authority must carry out "a preliminary assessment in relation to every disused tip".

Recommendation 11. The Cabinet Secretary should explain the difference in wording between section 11(a) and section 13(1)(a) of the Bill as regards the carrying out of preliminary assessments.

Registering and deregistering disused tips

Background

112. Where the Authority concludes that the criteria for registering a tip (section 7) are met based on the report of a full assessment (section 16), section 20 places a duty on the Authority to give a “notice of proposed registration” to the persons listed in section 20(2)(a) and (b). Section 21 sets out the procedure that the Authority must follow once the period for making representations about a proposal to include a disused tip in the register has expired.

Evidence

113. In our letter to the Cabinet Secretary following the evidence session, we noted that the Law Commission recommended a right of appeal against an entry in the tip register on the grounds that there is no tip situated on the land. We also noted that, rather than an appeals process, sections 20 and 21 set out a different approach, and we asked to what extent it captures the intent of the Law Commission’s recommendation. In his response, the Cabinet Secretary said:

“The Law Commission’s recommendation belongs to a different system, under which the inclusion of a tip in the register automatically triggered obligations on landowners. The system in the Bill operates differently, and so the same approach is not needed.

In accordance with section 21(3)(b), the Authority is under a duty to have regard to any representations submitted to them as part of its decision-making process on whether to include a disused tip in the register.

I am of the view the right to make representations captures the essence of the Law Commission’s recommendation which sought to ensure balance and fairness and a right for those affected by decisions on registration to have their views heard and taken account of. However, an advantage with our proposal is it gives those who receive a notice of proposed registration the opportunity to make representations before a

decision on registration is made – rather than after as would be the case with an appeal.

It is also relevant to note that once a disused tip is included in the register, there are provisions within the Bill to remove a tip from the register. The Bill does not prevent a person from presenting evidence to the Authority requesting a tip's removal. As a public body, the Authority would have to consider any such representation received.”⁸⁵

Our view

114. We note the evidence of the Cabinet Secretary and are content.

Categories of disused tip

Background

115. Section 24(1) provides that a disused tip may be placed in one of four categories on the register: category 1, 2, 3 or 4 (a numeric descriptor is used as the register will be available in both English and Welsh⁸⁶), with category 1 representing those disused tips that cause the Authority the most concern, and category 4 the least. Section 24(2) provides that the four categories represent the different degrees to which disused tips cause the Authority concern. Decisions on the categorisation of a tip must be made on the basis of one or more of the factors set out in section 24(3).

Evidence

116. The White Paper stated in paragraph 7.7:

“We believe to provide clarity on roles and responsibilities, the legislation should clearly state who is responsible for which category of tip, providing parties with sufficient knowledge in advance of what responsibilities they will be required to meet.”⁸⁷

⁸⁵ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 11

⁸⁶ Explanatory Notes, paragraph 88

⁸⁷ Welsh Government, Coal Tip Safety (Wales) White Paper A new regulatory framework for disused coal tips in Wales, 12 May 2022, paragraph 7.7

117. In particular, the White Paper proposed that the Authority should be responsible for category 1 disused tips, a local authority for category 2 and the owners of the relevant tip for categories 3 and 4.⁸⁸

118. We asked the Cabinet Secretary why he had not followed what the White Paper proposed in paragraph 7.7. He told us:

“Paragraph 7.7 of the White Paper relates to responsibility for inspecting a disused tip. It, and the following paragraphs, propose different arrangements for different categories of tip.

Under the Bill, the Authority will be responsible for monitoring all tips that are included in the register. This places the Authority under a duty to monitor any disused tip that poses a threat to human welfare by reason of instability, or which could pose such a threat in the event of instability. The monitoring and inspection of tips not included in the register – i.e. those tips that do not meet the criteria for registration, will remain the responsibility of the owner. We think this is a far more robust approach that ensures any disused tip with any potential to pose a threat to human welfare by reason of its instability falls under the monitoring responsibility of the Authority.”⁸⁹

Our view

119. We note the evidence of the Cabinet Secretary in respect of section 24 and are content.

Requiring an owner of land to carry out operations

Background

120. Section 33(1) gives the Authority the power by notice to require the owner of land to carry out specified operations on the land if the Authority thinks the operations are necessary to fulfil the objective set out in section 33(2). The objective is to (a) prevent or deal with threats to the stability of a disused tip, or (b) to stabilise a disused tip or prevent a disused tip from becoming more unstable,

⁸⁸ Welsh Government, Coal Tip Safety (Wales) White Paper A new regulatory framework for disused coal tips in Wales, 12 May 2022, paragraph 7.8 and Table 8

⁸⁹ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 13

so as to avoid or reduce threats to human welfare. “Operations” are defined in section 85 as including, but not limited to, building and engineering operations.

121. In the EM the Cabinet Secretary indicates that the White Paper proposed that the Authority could issue maintenance orders if owners failed to comply with maintenance agreements and that the Bill envisages similar powers for the Authority, namely the provisions in section 33.⁹⁰

122. Section 34 permits owners who are not in occupation of land, or any part of it, which is the subject of a notice under section 33, to enter the land if the notice requires them to carry out operations on that land. Sections 34(3) to (5) make provision about the removal and disposal of any property belonging to another person for the purpose of carrying out operations required by the notice, including by sale.

123. Section 36 gives an owner of land who is given a notice requiring the carrying out of operations on land pursuant to section 33, or a person who is given a copy of the notice under section 35, a right to apply to the Welsh Ministers to vary or cancel the notice. Section 37(1) provides that an application made under section 36 to vary or cancel a notice issued under section 33 is to be determined by a person appointed by the Welsh Ministers (an “appointed person”).

124. Section 38(1) places a requirement on the Welsh Ministers to make regulations about the procedure to be followed in determining appeals (under section 36) against a notice requiring an owner of land to carry out operations (under section 33). Section 38(2) gives the Welsh Ministers the power to make regulations about any other (non-procedural) matter that is connected to the determination of appeals under section 36. Section 38(5) provides that regulations under this section may create offences in connection with failures to comply with any requirements imposed by or under the regulations.

Evidence

125. We noted that sections 33 and 34 enable property to be disposed of by the Authority and disused tip owners, including by sale. We asked the Cabinet Secretary why this provision is necessary and to provide details of what could be sold under this power. He told us:

“Including express authorisation for removal and disposal within these provisions is considered necessary, because express authorisation avoids doubt about whether the property

⁹⁰ EM, paragraph 4.26

rights of third parties represent an obstacle to carrying out operations.

The sale of any property would essentially be ‘a means to an end’ – a way to remove material from land for the purposes of carrying out operations required by a notice issued under the Bill. Such a sale would be ancillary to the overarching objective of the Bill: to ensure that disused tips do not threaten human welfare by reason of their instability.

Property that might need to be sold under this power would depend on the specific circumstances but could comprise materials from the disused tip itself or objects on the land which might interfere with the ability to carry out operations.”⁹¹

126. As regards section 38(5) of the Bill, we asked the Cabinet Secretary if he considered including this provision on the face of the Bill; he told us that he did, but that setting these matters out in regulations would enable them to be adjusted more quickly in light of experience than if included on the face of the Bill, noting also that they would be subject to the affirmative procedure.⁹²

127. We then asked why it is appropriate for section 38(5) to enable regulations to create criminal offences in connection with failures to comply with requirements imposed by regulations made under section 38(1). The Cabinet Secretary replied that it was needed to enforce these provisions, for example “if someone ... unlawfully denies entry to the site”. In doing so, he made reference to the application of criminal sanctions under section 66 (Penalty for obstructing entry to land). He also noted that any regulations that create criminal offences would be subject to a justice impact assessment and be subject to the affirmative procedure.⁹³

Our view

128. We note the evidence provided by the Cabinet Secretary in respect of sections 33 and 34.

⁹¹ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 18

⁹² Legislation, Justice and Constitution Committee, 10 February 2025, RoP [106]

⁹³ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [108]

129. We note the Cabinet Secretary's response in respect of the regulation-making power in section 38(5), which has the effect of creating criminal offences by means of regulations.

130. It has been our longstanding view that provision for criminal offences should be made on the face of the Bill. We note the Cabinet Secretary has adopted this approach in respect of provision for criminal offences elsewhere in the Bill (namely section 32 (Penalty for obstructing monitoring activities or assessments); section 39 (Penalty for failure to comply with notice); section 54 (Penalty for obstructing operations etc.); section 61 (Penalties in connection with notices requiring information) and section 66 (Penalty for obstructing entry to land)).

Recommendation 12. The Cabinet Secretary should table an amendment to the Bill to leave out section 38(5) and table amendments to make separate provision in the Bill about criminal sanctions relevant to the failure to comply with matters concerning the determination of applications under section 36 of the Bill (Right of owner and interested parties to appeal against notice) .

Guidance

Background

131. Section 69(1) requires the Authority to have regard to any guidance given to it by the Welsh Ministers. Section 69(2) provides that, when an appeal is being determined under section 36 (Right of owner and interested parties to appeal against notice) or section 41 (Reimbursement of owner's expenses on cancellation of notice), the person determining the appeal must have regard to guidance issued by the Welsh Ministers.

Evidence

132. Given the amount of detail that will be left to guidance, we asked the Cabinet Secretary why the Bill did not include a duty on the Welsh Ministers to produce and update guidance and why the executive ministerial functions in section 58A of the 2006 Act were being relied on. We also sought an explanation as to how this approach was consistent with the Welsh Government's accessibility agenda. In response the Cabinet Secretary told us:

"There isn't a need to include a power for the Welsh Ministers to produce and update guidance, because such a power to make guidance already exists in the Government of Wales Act 2006. We intend to utilise the power in section 58A to make guidance in connection with the Bill, as it would be inappropriate to

duplicate legal powers. There is no reason why this guidance would not be published and therefore a specific duty in the Bill is not considered necessary.

*In my view, the Bill and the supporting guidance is consistent with the Welsh Government's accessibility agenda. (...) The guidance will assist in ensuring that the legislation is easy to understand, and accessible, to all who may wish to rely on it. This is consistent with, and promotes, the values underpinning the accessibility agenda."*⁹⁴

Our view

133. We note the Cabinet Secretary's evidence in respect of section 69 of the Bill.

134. Section 58A of the 2006 Act is titled "Executive ministerial functions".⁹⁵ The word "guidance" is not used directly in that section although we recognise that issuing guidance constitutes exercising a Ministerial function for the purpose of that section.

135. We note the Cabinet Secretary's position that to include a power to issue guidance would "duplicate legal powers", which he considers inappropriate. We do not share that view and do not consider the Cabinet Secretary's approach to be transparent and therefore accessible. Furthermore, we note that, for example, section 39 of the Visitor Accommodation (Register and Levy) Etc. (Wales) Bill includes the following provision:

"39 Guidance issued by the Welsh Ministers

*(1) The Welsh Ministers **may issue guidance** on this Act and any regulations made under this Act, but before issuing any such guidance the Welsh Ministers must consult such persons as they consider appropriate.*

*(2) A principal council must, in the exercise of functions under Part 3 (including when considering whether to exercise a function under that Part), have regard to guidance issued by the Welsh Ministers under this section."*⁹⁶ [our emphasis]

⁹⁴ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 19

⁹⁵ Section 58A, Government of Wales Act 2006

⁹⁶ Visitor Accommodation (Register and Levy) Etc. (Wales) Bill, as introduced, page 22

136. We see no reason therefore why the Bill could not have included a power regarding the issuing of guidance, not least given the emphasis being placed on guidance by the Welsh Government in order for the new regime to operate and function effectively.

137. We believe that the Welsh Ministers should be under an explicit and express duty to issue guidance. Throughout the evidence and supporting documents, reference is made to the intention to issue guidance. We do not doubt the sincerity of the current Cabinet Secretary when he said, “There is no reason why this guidance would not be published and therefore a specific duty in the Bill is not considered necessary.” However, the Cabinet Secretary cannot provide an absolute guarantee that a future Welsh Minister in a future Welsh Government would publish such guidance.

Recommendation 13. The Cabinet Secretary should table an amendment to section 69 of the Bill to place a duty on the Welsh Ministers to issue, following consultation, guidance relevant to the operation of the new regime to be introduced by the Bill once enacted.

138. In this report we also include recommendations about non-exhaustive matters that *may* be included in guidance relevant to monitoring, assessment and management of disused tips as a means of aiding public understanding of how the new regime will operate.

Power to modify application of Act to Authority land

Background

139. Section 80 enables the Welsh Ministers to make regulations, subject to the affirmative procedure, to modify the application of the Bill if enacted in relation to land in which the Authority has an estate or interest.

Evidence

140. In explaining why this power was necessary, the Cabinet Secretary told us:

“The regulation making power in section 80 allows the Welsh Ministers to modify the application of the Act so that the Act continues to operate as intended in the situation where the Authority has an estate or interest in land.

At present, there are no plans for the Authority to acquire an estate or interest in land. The regulation making power has

*been included as a safeguard should the Authority do so, at some point in the future. Any regulations would reflect the Authority's role in the new regime, in the context of any acquisition of an estate or interest by the Authority. It might be necessary, for instance, to modify the provisions relating to the service of notices on landowners if the Authority acquires land, as the Authority would otherwise be required to serve notice on itself."*⁹⁷

Our view

141. We note the Cabinet Secretary's response about the regulation-making power in section 80 but believe further clarity and information is required to justify the inclusion of this provision. As matters currently stand it would appear to amount to a 'just in case it is needed' provision. We would therefore welcome further information about the circumstances in which the Authority may need to acquire an estate or interest in land.

Recommendation 14. The Cabinet Secretary should explain the circumstances in which the Authority may need to acquire an estate or interest in land, so there is clarity around the Welsh Government's justification for including section 80 in the Bill.

Interpretation

Background

142. Section 81 defines "tip" and "disused tip" and both definitions encompass coal and non-coal tips.

143. Section 81(3) provides that tips that are located "wholly or partly in Wales" fall within the definition of "disused tip".

144. Section 81(3) places tips that are subject to the provisions of the Quarries Regulations 1999 (the 1999 Regulations) or the Mines Regulations 2014 (the 2014 Regulations) outside the scope of the Bill. According to the Explanatory Notes, the effect of this is that the Bill does not apply to any active tips that are associated with operational mines or quarries.⁹⁸ If either the 1999 Regulations or the 2014 Regulations are revoked or amended, section 81(4) enables the Welsh Ministers, by

⁹⁷ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 23

⁹⁸ Explanatory Notes, paragraph 301

regulations subject to the affirmative procedure, to amend the meaning of “disused tip”.

145. Section 81(5) provides the Welsh Ministers with a regulation-making power, subject to the affirmative procedure, that enables them to set out certain descriptions of tips that would fall outside the definition of a “disused tip” either altogether or for the purposes of those provisions of the Bill specified in the regulations.

146. Section 82 defines the meaning of “threat to human welfare”.

147. Section 84 defines certain terms used in the Bill that relate to the Crown: “Crown land”, “Crown interest”, “Duchy interest”, “private interest” and “appropriate Crown authority”. Section 84(7) clarifies that “the Crown” is to be treated as including the Senedd Commission.

Evidence

148. We questioned the Cabinet Secretary about the definitions.

149. We noted that a reader of this Bill has to read and understand at least three pieces of legislation to establish what a disused tip is. We therefore asked the Cabinet Secretary to explain why he considered the definition to be sufficiently accessible. He said:

“... the definition of ‘tip’ itself, the tip, is clear and simple to understand. It’s on the face of the Bill in section 81(1). But the definition of ‘disused tip’ needs to refer to the quarries regulations because it’s in a very different context. So, the Quarries Regulations 1999 and the Mines Regulations 2014, because those regimes are outside the scope of the Bill. So, what we’re trying to do here, the effect of this, is to ensure that the Bill doesn’t apply to active tips that are associated with operational mines or quarries. So, the definition recognises that legislative landscape and makes sure that the statute book works. We’ve also got that clarification, I hope, that is very clear there within the explanatory notes as well, explaining that context.”⁹⁹

⁹⁹ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [49]

150. In the EM, the Cabinet Secretary states:

“... rather than trying to exclude certain tips from the Bill based on specified characteristics, we have instead chosen to take a regulation making power (section 81) which will allow us to revise the meaning of “disused tip” based on experience and practice once the Authority has been established and is fully operational. This would enable the fulfilment of the recommendations from the Law Commission on this issue.”¹⁰⁰

151. We asked the Cabinet Secretary why section 81(4), a broad power, allows the definition of a disused tip to be amended, given its importance to the Bill, without a duty to consult. The Cabinet Secretary said:

“Even though there isn’t a duty to consult on the face of the Bill, I can absolutely confirm that Welsh Government would consult before making regulations that would make such a significant change. It would be incumbent on the Government to consult, and I can say that absolutely clearly.”¹⁰¹

152. As regards the regulation-making power in section 81(5), we asked about its purpose and why the decision was taken not to include the relevant definition on the face of the Bill on grounds that it “could lead to complexity and confusion, and risk striking the wrong balance”¹⁰². We also asked why this would be different to including a definition in regulations. The Cabinet Secretary responded:

“... section 81(5) of the Bill gives the Welsh Ministers this regulation power to set out certain descriptions of tips that would fall outside of the definition of a disused tip. So, it’s either altogether or for certain provisions of the Bill within the regulations that are specified. So, this is in line with the Law Commission report. We considered in the White Paper whether separate definitions of ‘tip’ were required. We consulted on the possibility of including in the Bill a definition of, in effect, a de minimis tip to which the provisions of the Bill just would not apply. So, you could look this in terms of things such as gradient or tip height or volume or surface area, or even the material from which it is composed, or, indeed, a combination of all the above. So, in practical terms, regulations could provide, for

¹⁰⁰ EM, paragraph 4.14

¹⁰¹ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [51]

¹⁰² Statement of Policy Intent, page 18

*example, that the authority's not under a duty to carry out the functions under Part 2 of the Bill in relation to disused tips where there is a negligible deposit of waste. So, that's the purpose of section 81(5)."*¹⁰³

153. As regards sections 82(b) to 82(g), we asked why it was necessary to include the word “serious” in each case and whether this creates a problem, for example, where a possibility of human illness or injury exists but this is not serious, and would not constitute a threat to human welfare under the Bill. In response the Cabinet Secretary said that “serious” had its ordinary meaning and that the qualification is important “because it allows the authority, as defined in the Bill, to make that judgment, considering all the circumstances”.¹⁰⁴

154. He added:

*“It's worth also saying that, as a public body, the authority will be required to act in accordance with standard public law principles, ones such as ‘fairly’, ‘reasonably’, and so on when making a judgment as to what constitutes ‘serious’ in the context of the events in section 82. So, it's a very straightforward way, we believe, to say there is a threshold here. It's not things that are inconsequential or marginal; they need to be serious. If we didn't have a threshold (...) it's worth mentioning this could make the Bill unworkable, as it would remove any threshold within the definition. This would mean, for example, that virtually all disused tips would meet the criteria, meaning that the authority, for example, would have a duty to monitor virtually all disused tips, regardless of any threat or jeopardy, and they'd have to deploy their resources in that way. It would also mean that the authority could require or undertake operations in a much wider set of circumstances. So, we think this threshold is right and appropriate.”*¹⁰⁵

155. We asked why specific reference is made to treating “the Crown” as including the Senedd Commission in section 84(7) of the Bill. The Cabinet Secretary said:

“Section 84(7) helps to future proof the Bill as whilst we are not aware that the Senedd Commission owns land that could affect the stability of a disused tip, or intends to own such land

¹⁰³ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [53]

¹⁰⁴ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [55]

¹⁰⁵ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [56]

in the future there could be a circumstance in the future – although I appreciate this appears unlikely – where the Senedd Commission purchases land containing, or near, a disused tip and entry may be required.

Including the Senedd Commission in section 84(7) follows recent precedent set in other legislation such as the Infrastructure (Wales) Act 2024 and the Historic Environment (Wales) Act 2023 and allows land owned by the Commission to be treated in the same way as land owned by Government departments.”¹⁰⁶

Our view

156. As regards the definition of “disused tip” in section 81, the Cabinet Secretary has not explained directly why a free-standing definition cannot be placed on the face of the Bill or what any potential obstacles to that approach may be. The Explanatory Notes do not offer much additional information and paragraph 4.14 of the EM is not clear.

157. We remain unclear therefore why a disused tip has to be defined by reference to the Quarries Regulations 1999 or the Mines Regulations 2014 as set out in section 81(3) rather than by providing a clean, all-encompassing definition on the face of the Bill.

158. In our view the definition of “disused tip” is not accessible and that is a concern for a definition that is fundamental to the operation of the new regime. Placing a free-standing definition on the face of the Bill would in our view assist understanding for communities of what constitutes a disused tip and help build public confidence in the new regime.

Recommendation 15. The Cabinet Secretary should table an amendment to section 81 of the Bill to provide a free-standing definition of “disused tip” without the need to make reference to the Quarries Regulations 1999 or the Mines Regulations 2014.

159. We note the Cabinet Secretary’s acknowledgement that amending the definition of disused tip by regulations (section 81(4)) would amount to a significant change. While the Cabinet Secretary can provide a commitment on behalf of the current Welsh Government to consult on a change to the definition,

¹⁰⁶ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 24

that would not apply to a future Welsh Government. For such an important change to the legislation, we believe a duty to consult should appear on the face of the Bill.

Recommendation 16. The Cabinet Secretary should table an amendment to section 81 of the Bill to provide for a duty to consult in respect of regulations to be made under section 81(4).

160. As regards section 81(5) of the Bill, we note the Cabinet Secretary's suggestions that placing detail on the face of the Bill "would lead to complexity and confusion, and risks striking the wrong balance". We are not clear from the Cabinet Secretary's evidence why this would be the case.

Recommendation 17. In reviewing the definition of "disused tip" in accordance with recommendation 15, the Cabinet Secretary should consider whether information can be placed on the face of the Bill about the tips that are not to be treated as disused tips, rather than relying solely on the regulation-making power provided by section 81(5).

161. We note the comments of the Cabinet Secretary regarding the meaning of "serious" in section 82 and recognise that an appropriate threshold needs to apply.

162. We also note the Cabinet Secretary's comments as regards the reference to the Senedd Commission in section 84(7) of the Bill.

Management plans

Background

163. The Law Commission stated in its report:

"We also recommend that the supervisory authority should be under a duty to arrange for the compilation of a risk assessment and tip management plan for any tip included on the register and to allocate a risk classification to the tip based on the information submitted to it. We conclude that risk classification should have regard to the risk of tip instability and the consequences of such failure, and to risks of pollution, combustion and flooding. We recommend that the Welsh Ministers should have power to prescribe the matters to be

included in a risk assessment and tip management plan by statutory instrument.”¹⁰⁷

164. In its response to the report, the Welsh Government stated:

“The supervisory authority will be under a duty to make arrangements for management plans to be prepared for category 1 and 2 tips. Plans may also be prepared for lower category tips should the responsible party for these tips wish to do so.

This differs from both the Law Commission’s recommendations and the proposals outlined in the Welsh Government’s White Paper in not requiring management plans for lower category tips. This approach is a proportionate one, based on the tips having been categorised as requiring a lower level of oversight and management, and the updated duties relating to inspections and appraisals being sufficient in achieving that. The management plans will vary depending on the category and individual characteristics of each tip. They will include, at minimum, details of the tip; schedules of inspections, appraisals and additional specialist inspections required; and a proactive programme of maintenance and remediation works.”¹⁰⁸

165. Also, in its White Paper and in line with the Law Commission report,¹⁰⁹ the Welsh Government said:

“We propose the Welsh Ministers by statutory legislation can prescribe the minimum content for management plans, this power should also enable the Welsh Ministers to amend the minimum content, where evidence and prior consultation with the supervisory authority recommends an amendment. We also propose the supervisory authority can make recommendations to the Welsh Ministers to amend the minimum content.”¹¹⁰

¹⁰⁷ Law Commission, Regulating Coal Tip Safety in Wales: Report, 23 March 2022, paragraph 1.31 and see also recommendation 17

¹⁰⁸ Detailed response to the report on regulating coal tip safety in Wales: Letter (and annexes) from Julie James MS, Minister for Climate Change to The Right Honourable Lord Justice Green, Chair of the Law Commission, 22 March 2023

¹⁰⁹ Law Commission, Regulating Coal Tip Safety in Wales: Report, 23 March 2022, recommendation 18

¹¹⁰ Welsh Government, Coal Tip Safety (Wales) White Paper A new regulatory framework for disused coal tips in Wales, 12 May 2022, paragraph 6.12

166. The Bill, as introduced to the Senedd, did not make a reference to management plans.

Evidence

167. In the EM the Cabinet Secretary provides the following commentary about management plans:

“It is also proposed that Welsh Ministers will develop guidance for the Authority, which will include guidance on management plans. Whilst the Bill does not require the production of management plans, these will be important to the application of the regime. The purpose of a management plan will be to detail tip specific information, and to provide a proactive, proportionate management strategy for a tip. This will include information and the details necessary to monitor and maintain the tip safety, alongside specific information on identifying and managing risks and the development of tip specific contingency plans. Management plans will be informed by the tip assessments and categorisation undertaken by the Authority.

The guidance from Welsh Ministers will include guidance on the roles and responsibilities of the Authority, how the Authority’s role interacts with other public bodies, and guidance intended to assist private owner(s) of disused tips. This will include guidance in relation to management plans and their content. The guidance will make it clear that the Welsh Ministers expect the Authority to produce management plans for the highest risk category of tips, (categories 1 and 2) and to consider on a case-by-case basis whether a management plan is considered appropriate for the lower rated category tips (category 3 and 4). The guidance will cover scenarios such as emergency preparedness and incident response. The guidance will clarify that every tip location is unique, and each management plan is expected to detail the hazard potential, receptors at risk, emergency scenarios and response strategies. The guidance will set out an expectation that the plans crucially consider the site-specific constraints which may dictate emergency preparedness, incident response and remedial strategy. Such constraints will include the proximity of

ecologically designated sites, location of adjacent critical infrastructure or interactions with designated water courses.”¹¹¹

168. The Cabinet Secretary also stated:

“The guidance will clarify the expectation on the minimum content of management plans and inspections/appraisals.”¹¹²

169. The Cabinet Secretary emphasised that management plans “are going to be absolutely crucial, integral to this new system”.¹¹³ He added:

“The draft outline guidance (...) makes it very clear that we expect, Welsh Government Ministers expect, the authority to produce these management plans for the highest risk category of tips, which will become categories 1 and 2 as described in the Bill, but also to consider on a case-by-case basis whether a management plan is appropriate for the lower rated category tips as well. So, the authority is going to have to have regard to the relevant guidance; it’ll clearly state that expectation that the authority produce management plans for those tips there. We simply can’t envisage a situation where the authority would not produce a management plan.”¹¹⁴

170. He re-iterated that final point, saying:

“I’d find it hard, genuinely, to envisage a situation where the authority (...) would not produce management plans...”¹¹⁵

171. The Cabinet Secretary also emphasised the expertise of the Authority, noting that it was about “having the confidence in that authority, rather than in me as a lay person Minister, to bring forward the proposals of how that management plan should look.”¹¹⁶

172. We posed the following question to the Cabinet Secretary: if the preparation of management plans is only an expectation in guidance, does that mean some Category 1 and 2 tips could feasibly not have management plans and therefore undermine the effectiveness of the legislation? He replied:

¹¹¹ EM, paragraphs 3.73 to 3.74

¹¹² EM, paragraph 4.22

¹¹³ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [56]

¹¹⁴ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [90]

¹¹⁵ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [94]

¹¹⁶ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [96]

“The Authority must have regard to the relevant guidance which will clearly state the expectation that the Authority produce management plans for category 1 and 2 tips. Therefore, if the Authority decided not to produce a management plan for a category 1 or 2 tip, it would have to be able to show that in making that decision it has taken account of the relevant guidance and have cogent reason(s) for departing from it. We cannot envisage an instance where, or a reason why, the Authority would not produce a management plan for a category 1 or 2 tip.”¹¹⁷

173. We also asked the Cabinet Secretary what had caused the position to change from that which was outlined in the Welsh Government letter of March 2023 to the Law Commission, such that there was no longer a duty on the Authority to make arrangements for management plans to be prepared for Category 1 and 2 tips. He replied by saying:

“I want to re-emphasise the importance of management plans, which will be integral to the new system. The draft outline guidance that I have made available (...) makes clear that the Welsh Ministers expect the Authority to produce management plans for the highest risk category of tips – categories 1 and 2, and to consider on a case by case basis whether a management plan is considered appropriate for the lower rated tips.

In reaching a decision on how best to incorporate management plans into the Bill, I am aware that we are leading the way, and we are one of the first/or the first country to devise a system for managing disused tips in a post mining environment during a time of great change in climate. With that in mind I am keen to ensure that we have the flexibility to respond quickly to developing expertise and changing circumstances.”¹¹⁸

174. Table 1 of the Cabinet Secretary’s response of 7 March 2025 includes the following information about the change in approach to management plans

¹¹⁷ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 15

¹¹⁸ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 14

between the White Paper proposals and the Bill,¹¹⁹ while Annex E of the response includes indicative guidance on management plans.

Area	White Paper proposal	Draft Bill
Management plans	<p>Duty placed on the Authority to produce management plans.</p> <p>The minimum content of management plans to be prescribed in statutory legislation.</p>	The Welsh Ministers intend to provide guidance to the Authority in respect of management plans.

Our view

175. We note the evidence from the Cabinet Secretary on his decision not to place a duty on the Authority to produce management plans.

176. While we do not doubt the Cabinet Secretary's personal commitment to the need for management plans, we are not persuaded by the arguments he has advanced for not placing an appropriate duty to prepare such plans on the face of the Bill. When we asked what had caused the position to change from the position outlined to the Law Commission in March 2023, the response provided by the Cabinet Secretary was disappointing. It did not directly address the point we raised and provided no justification for the change in approach.

177. The Cabinet Secretary told us that management plans are “important” and “integral” to the operation of the new regime under the Bill. We were also told that the Cabinet Secretary would find it “hard, genuinely, to envisage a situation where the authority would not ... produce management plans”. If that is the case, we do not follow what the barrier is to placing on the face of the Bill a duty on the Authority to produce management plans.

178. We note that Annex E of the Cabinet Secretary's letter of 7 March 2025 sets out the Welsh Government's views on the range of issues that management plans should include, for example relating to recording specific tip information, monitoring and inspection activity, emergency preparedness, incident responses and remedial strategies.

179. We believe that there should be parliamentary and therefore democratic accountability for the content of management plans, in line with the proposals set out in the White Paper. We believe this will provide an opportunity to engage with

¹¹⁹ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 6

communities and help build confidence in the new regime. Given the aims of the legislation, we believe that using the knowledge of communities living close to disused tips to help identify and address important matters would be beneficial.

180. As we have indicated elsewhere in this report, the Cabinet Secretary cannot speak on behalf of future Welsh Governments. By leaving these matters solely to guidance there is a risk, however inconceivable, that a future Welsh Government may not choose to cover management plans in guidance or may cover them in a way that the current Cabinet Secretary does not envisage.

Recommendation 18. The Cabinet Secretary should table amendments to the Bill to:

- place a duty on the Authority to produce management plans for Category 1 and 2 disused tips; and
- enable the Authority to produce management plans for Category 3 and 4 disused tips.

Recommendation 19. The Cabinet Secretary should table amendments to the Bill to:

- provide the Welsh Ministers with a regulation-making power, subject to the affirmative procedure to set out the minimum content of management plans; and
- provide a duty to consult for regulations that set out the minimum content of management plans.

181. In addition, we see no reason why the Bill should not provide a list of what other non-exhaustive matters *may* be included in guidance for the purpose of transparency and to aid public understanding.

Recommendation 20. The Cabinet Secretary should table an amendment to the Bill to set out what information may be included in guidance in relation to management plans (in addition to the requirements to be set out on the face of the Bill and in regulations as a consequence of recommendations 18 and 19).

Enforcement provisions in the Bill and civil sanctions

Evidence

182. As regards enforcement provisions, in the EM the Cabinet Secretary provides the following information:

“The White Paper proposed a range of enforcement powers and associated offences. These included powers of entry to disused tips and to land that needs to be crossed to access disused tips. The White Paper proposed access without notice in emergency situations. The Bill contains provisions for powers to enter any land to carry out operations. As set out above, access without notice is permitted where a disused tip is unstable and the instability poses a threat to human welfare that requires immediate entry to the land. There are protections in place for residential land, which mean if consent is not provided by the occupier, the Authority may not enter without a warrant. The Bill contains criminal sanctions for obstructing entry to land.

The White Paper also proposed a range of civil sanctions such as fixed monetary penalties, compliance notices, stop notices etc. These have not been included in the Bill. During the course of policy development, it was determined that their inclusion would make the regime overly bureaucratic and unwieldy. It would be difficult for the Authority to administer and complex for landowners. It would also not foster the collaborative approach the Bill favours with a focus on the Authority providing advice and assistance.”¹²⁰

183. The Cabinet Secretary notes that the Bill provides the Authority flexibility in determining what level of intervention is required, for example in relation to the issue of notices to owners of land to carry out operations on land or to undertake operations on land itself (under section 33, with the penalty for failure to comply with a notice set out in section 39).¹²¹

184. The Cabinet Secretary also identifies provisions in the Bill for the purpose of ensuring compliance with the regime established in the Bill (namely section 32 (Penalty for obstructing monitoring activities or assessments); section 39 (Penalty for failure to comply with notice); section 54 (Penalty for obstructing operations etc.); section 61 (Penalties in connection with notices requiring information) and section 66 (Penalty for obstructing entry to land)).¹²²

¹²⁰ EM, paragraphs 4.29 to 4.30

¹²¹ EM, paragraph 4.31

¹²² EM, paragraph 4.32

185. In our letter following the evidence session, we noted that the White Paper proposed a range of civil sanctions such as fixed monetary penalties, compliance notices, stop notices etc., but these have not been included in the Bill.

186. We also noted the Cabinet Secretary's view that during the course of policy development it was determined that the inclusion of civil sanctions "would make the regime overly bureaucratic and unwieldy".

187. We asked the Cabinet Secretary why he had come to this view and why no civil sanctions regime appeared on the face of the Bill. He told us:

"I recognise the importance of effective enforcement provisions within the new regulatory regime, and I am satisfied that the Bill has a comprehensive suite of criminal offences that ensure the regime established under the Bill is enforceable. (...)

During the Bill's development, the conclusion was reached that including fixed monetary penalties, compliance and stop notices etc, would have made the system unwieldy and add an unnecessary layer of complication to the system including additional appeals which could lead to delay. These delays could have a negative impact on timescales for completion of work on disused tips. This would have been difficult for the Authority to administer and complex for landowners.

A policy judgement needed to be made balancing the utility of such measures against (i) the added bureaucracy and potential delay to the completion of works on disused tips that the institution of such measures could engender and (ii) damage to the collaborative approach that the Bill fosters with an emphasis on advice and assistance (with notices requiring works only being issued as a last resort where advice and assistance has not worked).

Our judgement was, when weighing these factors, that the complexity and bureaucracy that would accompany these measures was not justified when a comprehensive system of enforcement is provided for by the criminal sanctions under the Bill.

The aim of the Bill is to devise a regulatory system where the Authority works with landowners and supports them in the responsible management of disused tips. In the vast majority of

*cases advice and support will be sufficient and a complex system of civil sanctions was not considered to be warranted and would run counter to the collaborative ethos fostered by the Bill.*¹²³

188. Table 1 of the Cabinet Secretary's response of 7 March 2025 includes the following information about the change in approach to sanctions between the White Paper proposals and the Bill.¹²⁴

Area	White Paper proposal	Draft Bill
Guidance about sanctions	A requirement for the Authority to produce guidance on enforcement and civil sanctions, setting out its decision-making approach and use of both criminal and civil sanctions available to it under the Bill.	The Bill does not make provision for civil sanctions, and so there is no requirement for the Authority to produce guidance on that topic. No requirement to provide guidance on enforcement.

189. Section 72 of the Bill provides that the Authority and the Director of Public Prosecutions may bring a prosecution in respect of an offence in the Bill, or in regulations made under it. Third parties may also bring a private prosecution in respect of an offence in the Bill, or in regulations made under it, but need the consent of the Director of Public Prosecutions to do so.

190. We asked why section 72 was necessary, and the Cabinet Secretary replied:

*"The Authority and the Director of Public Prosecutions (DPP) may bring proceedings in respect of an offence in the Bill, or in regulations made under it. Third parties may also bring a private prosecution in respect of an offence in the Bill, or in regulations made under it, but need the consent of the DPP to do so. This restriction helps to prevent baseless or duplicative prosecutions from being brought: the DPP acts as a filter in this respect."*¹²⁵

¹²³ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to questions 16 and 17

¹²⁴ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 6

¹²⁵ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 20

191. He also told us that:

“As set out in the Justice Impact Assessment, it is anticipated that the Authority will bring the majority of any prosecutions that are brought under the Bill and it will not be reliant on a third party to do so on its behalf.”¹²⁶

Our view

192. We note the Cabinet Secretary’s evidence on why a civil sanctions regime does not appear on the face of the Bill but do not share his views.

193. We believe that a lack of civil sanctions weakens the Bill. Having a civil sanctions regime on the face of the Bill as part of a suite of enforcement options would, in our view, be appropriate and sensible. This would enhance public confidence in the new regime and provide the Authority with all the necessary tools to enable the regime’s effective operation.

Recommendation 21. The Cabinet Secretary should table amendments to the Bill to put an appropriate civil sanctions regime in place.

Henry VIII powers

Background

194. The Bill contains eight Henry VIII powers:

- section 20(4) which enables the Welsh Ministers to amend section 20(3)(e) to change the minimum period for making representations about a proposal to register a disused tip;
- section 22(4) which enables the Welsh Ministers to amend section 22(3)(d) to change the minimum period for making representations about a proposal to remove a disused tip from the register;
- section 29(3) which enables the Welsh Ministers to amend section 29(2)(e) to change the minimum period for making representations about a proposal to make a notifiable change in relation to a disused tip;
- section 55(3) which enables the Welsh Ministers to amend section 55 to change the definition of “relevant public authority”. In accordance with section 55(4) a public authority can only be included within the

¹²⁶ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 17

definition of “relevant public authority” if its functions are exercisable only in relation to Wales and are wholly or mainly functions that do not relate to reserved matters;¹²⁷

- section 73(2) which enables the Welsh Ministers to make supplementary, incidental, transitional or saving provision which modifies any enactment;
- section 81(4) which enables the Welsh Ministers to amend the definition of “disused tip” by regulations if the Quarries Regulations 1999 (S.I. 1999/2024) or the Mines Regulations 2014 (S.I. 2014/3248) are amended or revoked (see above);
- paragraph 2(4) of Schedule 1, which enables the Welsh Ministers to amend the number of Members of the Authority referred to in paragraph 2(1); and
- paragraph 19(10) of Schedule 1, which enables the Welsh Ministers to amend the Authority’s planning period in paragraph 19(9)(b).

Evidence

195. We asked the Cabinet Secretary why the Henry VIII powers in sections 20, 22 and 29 are subject to the negative procedure. He told us:

“The Henry VIII powers in sections 20, 22 and 29 respectively allow the Welsh Ministers, by regulations, to amend the minimum period for making representations in respect of a proposal to register a disused tip; a proposal to remove a tip from the register and a proposal to make a notifiable change to an entry on the register.

The negative procedure was applied to the respective regulation making powers, even though they give the power to amend primary legislation, as these are considered to be relatively minor changes in the context of the overall regime.”¹²⁸

196. We asked the Cabinet Secretary why the inclusion of the Henry VIII power in section 55 is appropriate and whether the limitation placed on this power by section 55(4) is included because the addition of bodies that are not devolved

¹²⁷ Explanatory Notes, paragraph 218

¹²⁸ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 12

Welsh authorities would cause an issue with regard to legislative competence. In response the Cabinet Secretary told us that:

“... we don’t envisage there are going to be many instances where this power will be relied on. But where it is relied on, it’ll be to ensure that the regime works effectively, so the effect of any amendment is limited to the provisions related to information sharing. What this provision does do is it gives Welsh Ministers the opportunity to make regulations at a later date, should it become apparent that another body should be added to the definition in subsection 1. Now, what this does is it ensures that, for example, if a new body is created with functions that means it receives information relevant to the authority, as described in this Bill, such a body could be brought within the scope of section 55. So, we regard this as a very sensible approach, and very appropriate to this Bill.”¹²⁹

197. The Cabinet Secretary told us that the Henry VIII power in section 73 is required because:

“It is usual practice in Senedd Bills to include a Henry VIII power in the section that confers powers on Welsh Ministers to make consequential, transitional etc provisions. For example, such powers are included in the Health and Social Care (Wales) Bill and the Local Government Finance (Wales) Act 2024 that have recently been before the Senedd.

Without such a power, there is a risk that the government would be unable to make all the necessary consequential and/or transitional provisions required to give effect to the policy.

Such a power, if exercised, is subject to the affirmative resolution procedure and so will be subject to Senedd scrutiny and approval.”¹³⁰

198. As regards the Henry VIII power in paragraph 19(1) of Schedule 1, the Cabinet Secretary told us:

¹²⁹ Legislation, Justice and Constitution Committee, 10 February 2025, RoP [110]

¹³⁰ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 21

“Paragraph 19(1) of Schedule 1 to the Bill places a duty on the Authority to prepare a corporate plan for each planning period. Paragraph 19(9) provides that the meaning of planning period is (a) the period of 3 years beginning with 1 October 2027, and (b) each subsequent period of 3 years. Paragraph 19(10) gives the Welsh Ministers the power to amend sub-paragraph 19(9)(b) by regulations.

I am satisfied a three-year planning period is appropriate, and there are no current plans to amend it. However, I am conscious that once the Authority is established there may come a time when, based on practical, operational experience, the Authority may ask that consideration be given to changing the planning period. This could be an increase or a decrease in the current three-year term.”¹³¹

Our view

199. We note the Cabinet Secretary’s evidence above about Henry VIII powers. In line with our longstanding view, Henry VIII powers that amend primary legislation should be subject to the affirmative procedure.

Recommendation 22. The Cabinet Secretary should table amendments to the Bill to apply the affirmative procedure to the making of all regulations in the Bill that amend primary legislation and to which the negative procedure currently applies.

¹³¹ Letter from the Deputy First Minister and Cabinet Secretary for Climate Change and Rural Affairs, 7 March 2025, response to question 26