



# Comisiwn y Gyfraith

Diwygio'r gyfraith

## Law Commission

Reforming the law

### DISUSED MINE AND QUARRY TIPS (WALES) BILL – WRITTEN EVIDENCE TO THE CLIMATE CHANGE, ENVIRONMENT, AND INFRASTRUCTURE COMMITTEE

#### Introduction

- 1.1 We welcome the opportunity to make this submission to the Senedd Climate Change, Environment, and Infrastructure Committee (“the Committee”), to inform its work scrutinising the Disused Mine and Quarry Tips (Wales) Bill (“the Bill”).
- 1.2 The Law Commission’s report, *Regulating Coal Tip Safety in Wales*,<sup>1</sup> published in March 2022 (“the 2022 report”), was our last word on the subject. The lawyer and researcher who worked on the project have since moved, as has Nicholas Paines KC, my predecessor as Law Commissioner for public law and the law in Wales. Moreover, this is not a project where Law Commission staff have had any ongoing involvement in implementing the report. Therefore, I and my staff are not as acquainted with the work that went into producing the Bill.
- 1.3 Nonetheless we have endeavoured to make this evidence as useful to the Committee as we can.
- 1.4 We are broadly supportive of the Bill, which implements to a significant extent many of the recommendations of our 2022 report. As the then Minister for Climate Change notes in her response to the Law Commission’s report, the Welsh Ministers accepted 18 of our recommendations in full and intended to implement a further 12 in modified form.<sup>2</sup> The White Paper<sup>3</sup> and the Explanatory Memorandum to the Bill also engage with our report.<sup>4</sup>
- 1.5 In our report we identified several shortcomings in the current legal framework, based as it is on the Mines and Quarries (Tips) Act 1969, enacted in response to the Aberfan disaster in October 1966.
- 1.6 In 1969, the coal mining industry was still active. The 1969 Act was primarily designed to regulate the tipping of waste from operational coal mines, as well as mines and

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<sup>1</sup> (2022) Law Com No 406.

<sup>2</sup> Letter from Julie James AS/MS, March 2023. Available at: <https://www.gov.wales/sites/default/files/publications/2023-03/letter-response-to-the-report-on-regulating-coal-tip-safety-in-wales.pdf>

<sup>3</sup> Coal Tip Safety (Wales) White Paper (2022) WG44302. <https://www.gov.wales/sites/default/files/consultations/2022-05/white-paper-on-coal-tip-safety-consultation.pdf>

<sup>4</sup> <https://senedd.wales/media/oixlr5ys/pri-ld16848-em-e.pdf>

quarries associated with the extraction of other minerals. Although Part 2 made provision for disused tips, such tips were considered to be a lesser problem. This does not reflect current reality. Following the decline of the coal industry, there are now far more disused tips than there are active coal mines.

- 1.7 The 1969 Act left responsibility for disused tips to local authorities but gave them only limited powers of intervention. Its mechanisms for requiring owners to carry out remedial work were cumbersome and time consuming. The alternative that it provided, for the local authority to do the work and charge the owner, was also unwieldy. There was no central point of responsibility and thus no overarching mechanism to prioritise tips based on risk. The fragmentation of powers across local authorities led to inconsistent safety standards and risk classifications. There was no power to require or undertake preventive maintenance to prevent a tip becoming a danger. There has also been a reduction in the number of those in local authorities with the requisite expertise to regulate disused tips.
- 1.8 The Bill now before the Senedd provides a solution to the central problems which our 2022 report set out to address. We thought that the regime created by the 1969 Act was no longer adequate and needed to be replaced by a new regulatory regime. The new regime we proposed sought to ensure consistency of approach across Wales and to prevent harm through a proactive rather than a reactive approach.
- 1.9 In our 2022 report, we made 36 recommendations on regulating coal tip safety in Wales. By our reckoning the Bill would implement approximately half of our recommendations.
- 1.10 Some of our recommendations would be implemented by the Bill in a straightforward way. For example, we recommended that a supervisory body with responsibility for the safety of all disused coal tips should be established (recommendation 3); that it should be a new body (recommendation 4); and that it should be a central public body (recommendation 5). Clause 1 of the Bill establishes the Disused Tips Authority for Wales (“the Authority”), which is a new body corporate sponsored by the Welsh Government.
- 1.11 Other recommendations from our 2002 report are implemented, but in a different way to that envisaged by the report. For instance, we recommended that the contents of a newly established tip register ought to be prescribed by the Welsh Ministers by statutory instrument (recommendation 8). In fact, clause 8 of the Bill prescribes the content of the register itself in primary legislation, which is then supplemented by any additional information specified in regulations made by the Welsh Ministers (having consulted the Authority before making such regulations). This provides a clear framework, alongside the necessary flexibility to modify the requirements of the tip register in the light of gained experience and the expansion of the scope of the Bill to other disused tips in addition to disused coal tips.

### **Points of departure from the Law Commission report**

- 1.12 There are several points of departure between the recommendations of our 2022 report and the content of the Bill. This is to be anticipated. We would expect things to have changed since the publication of our report. Our review of coal tip safety legislation took place alongside work by the Welsh Ministers, and by the Coal Tip

Safety Task Force established by the Welsh Ministers in the aftermath of the Tylorstown landslide in 2020. The work of the Task Force has continued since our 2022 report.

- 1.13 There are also many additional points dealt with in the Bill that were not considered in our 2022 report. Again, this to be expected during an iterative process of instructing drafters to prepare the Bill (a process in which we were not involved) alongside the further consultation exercise following the White Paper. Detailed provisions will be required which are consequent upon the main provisions seeking to enact some of our recommendations and which “fill in the gaps” that were not contemplated when making broad recommendations.
- 1.14 For instance, our 2022 report did not consider how a regulatory scheme for disused tips would deal with Crown land. But in practical terms, any provisions giving a power of entry onto land for investigations or maintenance must recognise the special status of Crown land and carve out a separate approach for entering such land.<sup>5</sup>
- 1.15 In terms of substantive differences of approach, I will highlight here some of more obvious ways in which the regime represented by the Bill would differ from that envisaged by our 2022 report.

#### Application to non-coal tips

- 1.16 It was agreed in the terms of reference for our project that it would focus on the law governing coal tips only. However, as noted in our report, any new regime, like the 1969 Act, may well be required to apply to all types of spoil tips. The Bill proposes an overarching framework suitable for both disused coal and non-coal tips. In contrast to coal tips, where much work has been undertaken in recent years to map them, there is little information on non-coal tips. But they are far more numerous - it is estimated there are 20,000 plus disused non-coal tips in Wales. It is understandable, therefore, that the Bill’s provisions may need to differ from the recommendations in our report to accommodate its broader scope and the relative sparsity of information concerning disused non-coal tips.

#### Comprehensiveness of the tip register

- 1.17 In our 2022 report we recommended that the supervisory authority should be under a duty to include on the register any tip of which it is aware (recommendation 9). This is not implemented by the regime envisaged by the Bill. Instead, clause 6(1) of the Bill places a duty on the Authority to compile and maintain a register of 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*. In other words, the tip register will not be a comprehensive list of all disused tips, but only those which in the Authority’s view are a threat or a potential threat to human welfare by reason of instability.
- 1.18 The duty in clause 6(1) sits alongside a duty placed on the Authority to carry out assessments of disused tips (Part 2 of Chapter 2). The Authority is required to carry out:

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<sup>5</sup> Clause 67 of the Bill.

- (1) a preliminary assessment of disused tips not in the register, to identify those tips that may need to be included in it;
- (2) a full assessment of those tips identified by a preliminary assessment as ones that may need to be included in the register; and
- (3) in certain circumstances, a full assessment of tips already in the register.<sup>6</sup>

The Explanatory Notes to the Bill explain that “it is anticipated that a preliminary assessment will take the form of a desktop survey”, rather than an on-site inspection. In relation to a full assessment, “it is anticipated that a full assessment will involve a physical inspection of the disused tip by a suitably qualified person”.<sup>7</sup>

- 1.19 The Authority must also carry out additional preliminary assessments when the Authority agrees this assessment should be carried out due to a change of circumstances, or the existence of new information that was not available at the previous preliminary assessment (clause 14).
- 1.20 Whilst this may not give rise to a comprehensive register, the duty to carry out preliminary assessments on all disused tips will ensure that there is comprehensive knowledge of disused tips by the Authority. The ability to reevaluate the assessment that a disused tip does not meet registration requirements, alongside the duty to monitor registered tips (clause 10) and to carry out additional assessments of registered tips (clause 17) will achieve a further objective of the Law Commission’s recommendations: to ensure that the register is as comprehensive as possible and is kept up to date. In addition, given the broadening of the scope of application of the Bill to all disused tips, a register of those tips which pose a danger to human welfare by reason of their instability may be a necessary policy choice to ensure the utility of the register balanced against the cost of creating and maintaining the register.
- 1.21 However, this may mean that a further reason for maintaining a comprehensive register is not achieved. Those wishing to carry out public works would benefit from consulting the register to be aware of disused tips that may affect these public works. Disused tips that do not pose a danger to human welfare by reason of their instability may nevertheless pose a potential problem for proposed public works.

#### Hazards considered by the risk classification system

- 1.22 We acknowledged in our 2022 report that the risk of tip instability would be the most significant hazard posed by disused tips. The provisional classification system employed by the Coal Authority since February 2020 broadly classified tips by reference to the risk and the consequences of movement. We recommended that the risk classification of coal tips should have regard to the risk of instability of a tip and the consequences of a stability failure (recommendation 19).
- 1.23 The Bill would enact this recommendation. Clause 24 classifies tips which are included on the register on a scale of 1 to 4, according to the different degrees to which disused tips cause the Authority concern (1 being most concerning, 4 being the

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<sup>6</sup> Clause 11 of the Bill.

<sup>7</sup> Explanatory Notes to the Bill, paras 49 and 50.

least). Decisions on the risk categorisation of a tip must be made based on one or more of the factors set out in clause 24(3). The factors are: the tip's instability; its potential for instability; the threat to human welfare posed by the tip's instability; the threat the tip could pose to human welfare in the event of instability.

- 1.24 However, in our 2022 report, we considered whether classification should also have regard to other hazards such as pollution, combustion, and flooding. There was widespread agreement from our consultees that it should. We thus recommended that the risk the tip presents of pollution, combustion or flooding should be taken into account in the risk classification (recommendation 20).
- 1.25 Under the regime proposed by the Bill, however, tips will only be categorised according to the extent to which the disused tip threatens human welfare by reason of its instability. The new Authority's assessment of risk will consider only those hazards which relate to tip instability, not risks which are independent of the potential for tip instability.
- 1.26 The additional risk factors considered in our 2022 report, namely pollution, combustion, and flooding, can pose risks independent of instability, and independent of one another. But they can also interact in complex ways. For example, a tip may impact the local risk of flooding in its original position. But it may also pose a flooding risk as a consequence of instability: the failure of a disused tip, due to instability, could lead to a blocked water course and result in a consequential flooding threat to human welfare. Under the Bill, any flooding risk which is independent of the risk of instability will not form part of the risk classification. Likewise, the risk of combustion of tip materials can be quite independent from the risks posed by instability.

#### Approach to risk assessment and tip management plans

- 1.27 In our 2022 report we recommended that the supervisory authority should be under a duty (a) to arrange for the compilation of a risk assessment and management plan for any tip included on the register; and (b) to approve the tip management plan (recommendation 17). We also recommended that the Welsh Ministers should have a power to prescribe the matters to be included in a risk assessment and tip management plan by statutory instrument (recommendation 18).
- 1.28 The regulatory regime under the Bill also envisages a system of assessments for disused tips. Because the register is not a comprehensive list of all disused tips (as explained above), the Bill envisages that an assessment will be carried out to determine if the tip needs to be included on the register.
- 1.29 However, unlike recommendation 17 of our 2022 report, the Bill does not require the production of management plans. The Explanatory Memorandum says:

It is also proposed that Welsh Ministers will develop guidance for the Authority, which will include guidance on management plans ... 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 set out that the Authority will be expected to work with other bodies to develop management plans for tips within

their ownership, and the Authority itself will be expected to produce management plans for private tip owners, who for whatever reason are unable to or refuse to produce a management plan. The expectation is that all management plans are signed off by the Authority.<sup>8</sup>

But management plans do not feature anywhere in the Bill. Additionally, there is no provision in the Bill for the Welsh Ministers to prescribe by statutory instrument the matters to be included in an assessment or tip management plan, as envisaged by our 2022 report. Nor is there a provision in the Bill requiring Welsh Ministers to produce guidance relating to the content of management plans. Clause 69 of the Bill, rather requires the Authority to take any guidance relating to management plans into account when exercising its functions.

### **Statutory instruments, guidance and “disguised legislation”**

- 1.30 The Law Commission’s report recommended the making of statutory instruments determining the content of risk assessment plans and tip management plans.<sup>9</sup> However, this is not included in the Bill. Rather, the Explanatory Memorandum states that there is an expectation that the Welsh Ministers will produce guidance regarding the content of risk assessment and tip management plans. Clause 69 of the Bill states that the Authority must have regard to this guidance when exercising its functions.
- 1.31 This is a departure from the Law Commission’s recommendation. It is for the Welsh Ministers and the Senedd to determine the extent of democratic scrutiny that may be needed over these measures, it being the case that Statutory Instruments would normally receive more scrutiny than guidance. However, based on my previous work as an academic specialising in constitutional law, I would consider that this use of guidance does not pose any constitutional issues.

Professor Alison Young, Commissioner for Public Law and the Law in Wales.

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<sup>8</sup> Explanatory Memorandum to the Bill, paras 3.73 to 3.75.

<sup>9</sup> Recommendations 17 and 18.