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Regulating Coal Tip Safety in Wales: Summary of the Report

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Regulating Coal Tip Safety in Wales: summary of report

1. This summary is designed to provide a readily accessible overview of our report. Further detail, including a fuller discussion of respondents' views, references to sources, a glossary and information on consultation events and respondents to the consultation, can be found in the full report, available online at <https://www.lawcom.gov.uk/project/regulating-coal-safety-tips-in-wales/>.

INTRODUCTION

2. The first legislation to provide for the safety and stability of mining waste in the UK, the Mines and Quarries (Tips) Act 1969, was enacted in response to the Aberfan disaster in South Wales in October 1966, when a coal tip slide engulfed a row of houses and a school, killing 28 adults and 116 children. At the time the Act was passed, the coal mining industry was still active. The legislation was primarily designed to regulate the tipping of waste from operational coal mines, as well as mines and 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.
3. In Wales today almost all coal tips, nearly 2,500 in total, are disused. Part 2 of the 1969 Act is still in force, but it no longer provides an effective management framework for disused coal tips in the twenty-first century.
4. In February 2020, unprecedented levels of rainfall in South Wales precipitated another coal tip slide, when an estimated 60,000 tonnes of coal tip waste slipped down the Llanwonno hillside at Tylorstown in the Rhondda. Fortunately, no homes were destroyed or human lives lost. The slide nevertheless blocked the river, buried a water main and broke a sewer.
5. The vast majority of disused tips are not a hazard. Many can be kept safe by maintenance of the tip's drainage system, whether natural or engineered, as proper drainage prevents the waste from becoming saturated and unstable. A few are likely to require more major work. Immediately following the Tylorstown slide the Welsh Government instituted a coal tip safety work programme to be delivered by the Coal Tip Safety Task Force. This was designed to take stock of Wales's legacy of coal mining tips and ensure that tips across Wales are managed safely and effectively. Urgent safety work has included data gathering on all tips, including location, risk category and ownership type, and walkover inspections of all higher risk tips. The inspections identified the maintenance and remediation work needed, with recommended timescales for completion.
6. As part of its response to the Tylorstown emergency, the Welsh Government asked the Law Commission to undertake an independent review of the coal tip safety legislation and make recommendations for its reform. Our terms of reference required us to evaluate current legislation and to consider options for new legislation. We were asked to develop a robust, integrated and future-proofed regulatory system for

identifying, recording, inspecting and maintaining coal tips throughout their lifecycle, an overarching set of duties and a uniform approach to risk assessment. The way in which the new regulatory regime would be funded falls outside our terms of reference. Our project formally commenced on 2 November 2020.

OUR CONSULTATION AND REPORT

7. Our consultation paper, published on 9 June 2021, reviewed coal tip safety law and the problems encountered in the current management of disused tips. Our preliminary research revealed a number of shortcomings in the current legal framework. The 1969 Act left responsibility for disused tips to local authorities but gave them only limited powers of intervention, confined to situations where there was perceived to be an existing risk to the public by reason of a tip having become unstable. 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. The fragmentation of powers across local authorities led to inconsistent safety standards and risk classifications.
8. We also found gaps in the provision made by the 1969 Act. It did not create a general duty to ensure the safety of coal tips, nor provide a power to require or undertake preventive maintenance to prevent a tip becoming a danger. It did not cover hazards other than instability. There was no central point of responsibility and thus no overarching mechanism to prioritise tips on the basis of risk.
9. There were other difficulties which did not stem from the provisions of the 1969 Act, but which impacted on its operation. Loss of specialism resulting from the virtual cessation of coal mining in Wales, together with constraints on resources, were limiting local authorities' capacity to exercise their powers. The sustained and impressive tip safety work carried out in the decades following the Aberfan disaster in 1966, in particular the Land Reclamation Programme, had come to an end by 2012.
10. We looked at the reasons why these deficiencies had become more significant in current circumstances. Almost all the coal mines that were operational at the time that the 1969 Act was passed have closed, and their tips have moved into the residual category governed by Part 2 of the Act. About 65% of these are in private ownership, owned by landowners with, generally, no connection with the mining industry, no vested or economic interest in the maintenance of tips, and no skill or knowledge concerning their care. In addition, rainfall has increased significantly due to climate change. This increases the risk of instability, particularly if drainage issues affecting a tip are not addressed.
11. We provisionally concluded that the regime created by the 1969 Act was no longer adequate and needed to be replaced by a new regulatory regime. A new regime could also address other problems not arising from the Act itself, by providing efficiencies of scale and addressing the shortfall in specialist skills.
12. We identified two principles that we thought should govern its construction: consistency of approach and the prevention of harm through a proactive rather than reactive approach. In our view, these principles align well with the sustainable development principle set out in the Environment (Wales) Act 2016 and the

requirement in the Well-being of Future Generations (Wales) Act 2015 to act in accordance with this principle.

13. We presented a number of provisional proposals for the new regulatory regime. Our consultation questions asked for views on these proposals. We also asked a number of open questions where we were not sufficiently sure of our preferred approach to make a provisional proposal.
14. Following publication of the consultation paper, we held a series of consultation events. We received 69 responses to our consultation. All responses, save those for which confidentiality was requested, and our consultation analysis are available on the Law Commission website.
15. Our report presents the responses to the consultation and sets out our recommendations for a new regulatory framework. We provide a diagram, reproduced at the end of this summary, to illustrate the way in which we envisage that the new regulatory framework will work.

TIPS ASSOCIATED WITH OPERATIONAL MINES

16. We had been told by stakeholders during the pre-consultation phase of our project that the existing regulatory regime for tips associated with operational mines, under the Quarries Regulations 1999 and the Mines Regulations 2014, was comprehensive and adequate. In our consultation paper we noted that there were areas of concern regarding compliance with conditions governing the closure of mines and the remediation of tips, but these were to do with the operation of available controls rather than the existing legal framework. There are also very few such tips remaining in Wales.
17. The regime for tips associated with active mines and quarries is designed for tips which remain under the control of a mine operator. The provisional view expressed in our consultation paper was that disused tips require a separate regime tailored to the circumstances of tips that, by and large, are not on land owned or controlled by a body with mining or environmental expertise. We provisionally proposed that the existing regulatory regime for operational tips should not be altered.
18. We also noted that the 1969 Act defines a disused tip as a tip other than one to which the Quarries Regulations 1999 or the Mines Regulations 2014 apply. We provisionally proposed that, as at present, the new legislation should be expressed not to apply to tips to which these Regulations apply.
19. Almost all respondents supported our provisional proposals, and we recommend accordingly that the existing regulatory regime for tips associated with operational mines should not be altered and that any new legislation should not apply to a tip to which the Quarries Regulations 1999 or the Mines Regulations 2014 apply.

A SUPERVISORY AUTHORITY FOR DISUSED TIPS

20. Chapter 2 of our report evaluates responses to our provisional proposal for a single supervisory authority. Our consultation paper described the current allocation of responsibility for disused tips to local authorities under Part 2 of the 1969 Act. We

discussed the problems with the operation of the regime reported to us by experienced stakeholders, including local authorities. These included a loss of specialist skill over recent decades, severe strain on local authority resources, an uneven distribution of tips across Wales that placed a disproportionate burden on some local authorities, and a set of statutory powers that only came into play once a tip had become unstable. The net effect of these constraints was to restrict the ability of local authorities to act proactively rather than reactively in ensuring tip safety, and to impede consistency. This suggested a need for a single supervisory body with responsibility for the safety of tips and greater powers. A single body would be able to monitor all disused tips, offering a uniform approach to risk assessments, prioritising the allocation of resources according to risk, and ensuring compliance with regulatory requirements to a consistent standard across Wales.

21. Over 90% of respondents agreed with our proposal, although concerns were expressed about funding. Respondents were fairly evenly split over whether the supervisory authority should be a new or existing body, with a small majority in favour of a new body. If a new body were established, a small majority favoured a central public body. A minority favoured a central joint committee of local authorities; other suggestions included a regional approach within Wales or a UK-wide body.
22. Among existing bodies, the greatest support was for the Coal Authority. But the proposed duties of the new supervisory authority would not fit well within the Coal Authority's statutory structure. In addition, the Coal Authority is a "reserved authority" responsible to a UK Government department, and there are issues of Senedd competence in relation to adding to its functions. Another contender would be Natural Resources Wales (NRW), but its current functions – primarily to manage natural resources and to protect the environment – are somewhat different from the role a supervisory authority would need to play in securing coal tip safety. A newly-created division of NRW might be a feasible option; we leave this to the Welsh Government to consider.
23. We see the creation of a corporate joint committee as theoretically possible but conclude that the legislative steps needed to bring about such a committee in the field of coal tip safety would be cumbersome. We are concerned that a regional approach could lead to tensions and inequalities because of the uneven distribution of coal tips across Wales, and local government policy considerations could impede the development of a consistent tip safety strategy.
24. We recommend that the supervisory authority should be a new body, and that this should be a central public body.
25. Our consultation paper went on to consider whether the responsibility of the supervisory authority for ensuring the safety of disused tips should be defined as a general duty or limited to specified hazards such as instability. A substantial majority of respondents supported our proposal for a general safety duty. The consensus was that a general duty was the best way to ensure that disused tips were safe. We recommend that the supervisory authority should be subject to a general duty to perform its functions so as to ensure the safety of coal tips, without limitation to specified risks.

A TIP REGISTER

26. Chapter 3 considers our provisional proposal that one of the duties of the supervisory authority should be to compile and maintain a central tip register providing information about each tip. This would draw on the work already undertaken by the Welsh Government since the Tylorstown slide towards compiling a central database of all coal tips. Our view was that this was an essential first step for the long-term development of tip management.
27. Over 90% of respondents agreed with our proposal for a tip register. Respondents recognised the need for accurate and consistent data as the precursor to effective risk management. They also pointed to benefits such as ease of updating and access to information on location, risk and management. The need for a duty to review and update was also emphasised. We recommend accordingly that a central tip register should be compiled and maintained by the supervisory authority.

Contents of the register

28. In order to ensure that information on the register was standardised, we provisionally proposed that the contents of the tip register should be prescribed by statutory instrument. A large majority of respondents agreed, highlighting the benefits of clarity and consistency. Some warned that it would be important to maintain flexibility as what is required may evolve over time. Respondents also stressed the need to take account of expert advice.
29. It is important to ensure that the register does not become unwieldy. Given our view, set out below, that the register should be publicly accessible, we conclude that it should contain basic information on risk levels and safety management for the purpose of reassuring the public that tip hazards are being engaged with. We suggest that the information on the register should include each tip's location, risk classification and management measures, including whether any agreements or orders have been made under the new powers that we recommend. We envisage that the statutory instrument would lay out the minimum information which must be held on the register, and that it should include a requirement to keep the content up to date.
30. We conclude that the contents of the tip register should not include the ownership of the land on which a tip is situated. This information is generally available from the publicly available register maintained by HM Land Registry; duplicating it on the tip register would cause unnecessary additional work for the supervisory authority and landowners.

Entry of a tip on the register

31. We provisionally proposed that the supervisory authority should be under a duty to include on the register any tip of which it is aware. We also proposed that there should be a right of appeal against inclusion on the register where ownership or the identification of the land as a tip was disputed. There was strong support for the first limb of our proposal, which was seen as a means of ensuring that the register is comprehensive. A right of appeal was also endorsed in the interests of fairness, as identification of land as containing a tip could give rise to liabilities. Some respondents suggested additional grounds of appeal in relation to the content of the register, but we conclude that these are not needed and could give rise to unnecessary disputes

over matters of technical detail. Our conclusion that there is no need for the register to include details of ownership removes the need for an appeal against the erroneous inclusion of a person as owner.

32. We recommend that the supervisory authority should be under a duty to include on the register any tip of which it is aware. We also recommend that an owner or occupier of land identified in the register as containing a tip should have a right of appeal on the grounds that the land does not in fact contain a tip. We recommend that exercise of the right of appeal should not be permitted to delay urgent work.

Duty to notify the supervisory authority of the existence of a tip

33. Our consultation paper considered the possibility that a few previously unknown tips might come to light. We asked an open question as to whether a duty to notify the supervisory authority of the existence of a tip should be imposed on landowners where they became aware of a tip not already on the register. We recognised that, to be meaningful, the duty would have to be accompanied by a sanction for breach such as a fine.
34. A large majority of respondents supported the imposition of a duty on landowners to notify the supervisory authority of the existence of a tip, although some doubts were expressed. Some questioned landowners' competence to recognise a tip without technical expertise, and saw a need to exclude tips below a certain size. Others raised enforcement difficulties.
35. Given the extensive and thorough work that has already been done in identifying and mapping coal tips, we recognise that the duty will only arise rarely, if at all, but we think it important to cater for this eventuality. One respondent instanced the problems that could arise, in the absence of a duty to notify, where groundworks preparatory to the building of a housing estate revealed tip material below the surface; a requirement to report the discovery would provide important protection to potential purchasers. We have concluded that the duty should only apply to a person having the degree of responsibility for the land connoted by ownership of the freehold estate or of a lease of more than seven years. The duty should only arise where the person has reasonable grounds to believe that the land contains a tip. Breach of the duty should be a summary offence, punishable by a fine.

Public access to the register

36. We asked for views on whether the contents of the tip register should be publicly accessible, in keeping with the overarching principle of collaboration, requiring public involvement and participation, enshrined in Welsh legislation. Our consultation paper acknowledged the risk that information on the register could detrimentally affect property prices and the cost of insurance, but we thought that those considering dealing with a property ought to be able to discover the position from a public register. We emphasised that the purpose of a new regulatory regime would be to minimise risk through detailed tip safety requirements. The fact that risks were being addressed should mitigate any deterrent effect of land being publicly identified as containing a tip.
37. Eighty-one percent of respondents agreed that the information on the tip register should be publicly accessible. Most relied on the need to promote public trust, accountability and transparency. Parallels were drawn with other types of register,

such as those relating to contaminated land, which are open to the public. Those disagreeing with public access raised the risk of blight on property prices and concerns about causing unnecessary alarm to the public. Some categories of information such as security-sensitive information were identified as requiring exclusion from the register. Respondents also raised the importance of extending conveyancing searches to include searches of the tip register.

38. We recognise concerns about blight, but think it important to set these in context. The purpose of the new regulatory framework, including the tip register, is to minimise risk through detailed prescription of requirements for inspection, maintenance and remediation. Reassurance should be provided by publicly available information about the management measures in place.
39. We conclude that that the register should be publicly accessible, and that the information on it should be kept simple, factual, and accessible to the non-specialist. This could include summaries of inspection reports, for example, rather than the whole of the report. We agree that some sensitive information will need to be excluded.

TIP INSPECTIONS, RISK ASSESSMENTS, TIP MANAGEMENT PLANS AND RISK CLASSIFICATIONS

40. Chapter 4 of the report considers our proposed duty to inspect every disused tip with a view to completing a risk assessment, preparing a tip management plan and assigning a risk classification. It also looks at approaches to risk classification.

Tip inspections

41. Our consultation paper explained that one of the main problems with the 1969 Act was the absence of a general duty to inspect all tips. The Act was premised on the view that disused tips were a residual problem, that they were less likely to be dangerous, and that any problems of instability could be dealt with by local authorities. The mechanism provided by the Act to protect the public is limited to a power of local authorities to obtain information and to enter land to carry out exploratory tests to determine whether a disused tip “is stable and whether any instability is or is likely to constitute a danger to members of the public”.
42. Local authorities had told us that they wanted greater clarity around their powers to go on site to carry out an inspection. They did not want to be tied to a need to justify their intervention by reason of a perceived danger to the public. They also wanted the duty to be accompanied by a standardised approach to risk classification. A standardised process of inspection could be supported by the use of a single reporting format and uniform training standards for inspectors.
43. We provisionally proposed that at the inception of our new scheme the supervisory authority should have a duty to inspect all tips entered on the register, except where it considered that a sufficiently recent and thorough inspection had been conducted. This proviso was designed to enable the supervisory authority to take advantage of work already done before its inception. We also suggested that the supervisory authority should have a power to delegate the inspection function to other appropriately qualified bodies if the number of inspections required within a given time was not practicable.

44. Ninety percent of respondents agreed with our proposal. Many responses highlighted the contribution this would make to public confidence in tip safety. If conducted to a consistent standard, initial inspections would provide a consistent and high quality baseline, allowing appropriate decisions to be made as to the future management of a tip, and provide a reference point against which to review future inspections. Some respondents pointed to the scale of the task of inspecting 2,456 tips and suggested that, using the data already gathered since February 2020, inspections of higher risk tips should be prioritised. Questions were raised about who should carry out the inspections.
45. We agree that it is essential that the approach to the inspection is standardised, although the content of the inspection is a technical matter and not for us to determine. The requirements applied may differ according to the type of tip. The standard approach to a high risk tip inspection is likely to be significantly more complex than a more generic process for lower risk tips. Prioritisation of inspections will be crucial. We think that it should be for the supervisory authority to determine the order of priority.
46. We agree that historic records should be drawn upon where available and relevant. It will be important for authorities such as the Coal Authority and local authorities to share records from their archives with the new authority. We also think it important that tip owners share any documents in their possession at the time of the first inspection following registration, if these are not already in the supervisory authority's possession.
47. We envisage that the supervisory authority will have a duty to "arrange for" the inspections. This would include a power to delegate the inspection to others as long as those inspecting have appropriate expertise and a consistent approach is maintained. This could include delegating the inspection of the lowest risk tips to tip owners, including private owners, provided they employ an approved specialist to do the work and complete it within a stipulated time frame. This approach could provide the authority with the flexibility it needs to prioritise work on higher risk tips while ensuring that lower risk tips are inspected as quickly as possible.
48. We recommend accordingly that the supervisory authority should be under a duty to arrange an initial inspection of each tip unless it considers that a sufficiently recent and thorough inspection has been conducted. In order to enhance the quality of inspection, and the efficiency with which it is carried out, we recommend that owners and occupiers should be under a duty to provide any relevant documents relating to the tip or to the land on which it is situated.

Risk assessments, tip management plans and risk classification

49. In our consultation paper we envisaged that the purpose of the initial inspection would be to undertake a risk assessment for the tip and to design a tip management plan. The risk assessment would be based on the physical profile of the tip and the receptors that would be impacted in the event of a tip failure, so that both the likelihood and consequences of failure would be considered. We suggested that data could include factors related to a range of hazards rather than solely to stability. The tip management plan would include specifications such as the frequency of inspection, the maintenance and remediation work required and a timescale for any work to be

completed. The work required could be confined to minor maintenance matters or cover complex remedial operations.

50. We provisionally proposed 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 tip register, and that there should be a power for Welsh Ministers to prescribe the matters to be included by statutory instrument.
51. Over 80% of respondents supported our proposal. Many thought that oversight by the supervisory authority would ensure that risk assessments and tip management plans were based on a consistent methodology and high quality information. Concerns were raised once again about the need to prioritise higher profile tips. There was debate as to who should have responsibility for carrying out the risk assessment and drawing up the tip management plan. In some cases, group plans for clusters of tips raising related safety issues were thought to be more suitable than individual tip plans.
52. Respondents also largely agreed that the matters to be included in the risk assessment and tip management plan should be prescribed by statutory instrument. They shared our view that this would help to ensure a consistent approach, provided that Welsh Government had regard to the views of technical experts in deciding the matters to be included.
53. As in the case of inspections, we agree that prioritisation is essential, and that what will be required for each tip will vary widely. In the case of lower risk tips, the plan may amount to little more than a checklist of maintenance tasks. We think that the supervisory authority should have the power to adopt a flexible approach in allocating responsibility for carrying out the work, reflecting the risk level of the tip. But this should be subject to a requirement for the draft plan, together with the inspection report and risk assessment, to be submitted to the authority for approval.
54. We have concluded that it should fall to the supervisory authority to assign a risk classification. The risk classification assigns broad categories to allow decisions to be taken as to priorities and where responsibility to undertake the work indicated by the tip management plan will fall. The virtue of this approach would be that the supervisory authority could maintain a consistent approach to the assessment of all tips.
55. We 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. We also recommend that the supervisory authority should be under a duty to approve the tip management plan and to allocate a risk classification to each tip based on the inspection report and risk assessment. 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.

Approaches to risk classification

56. Our consultation paper looked briefly at the various approaches to classification that have been adopted historically by local authorities and the provisional classification system employed since February 2020 in the coal tip safety work commissioned by the Welsh Government. This provisional system broadly classified tips by reference to

the risk and the consequences of movement. We provisionally proposed that the risk classification of the tip should have regard to the risk of instability of a tip, and the consequences of a slide of spoil. We also asked for views as to whether classification should in addition have regard to risks of pollution, combustion and flooding.

57. Ninety-two percent of respondents agreed that the risk classification should have regard to the risk of instability and the consequences of a stability failure. Some of those agreeing pointed out that risk is inherently informed by the likelihood and consequences of a hazard. Ninety percent agreed that risk classification should also have regard to the risk the tip presents of pollution, combustion or flooding. Some of those agreeing recognised that the primary risk to be considered was instability, and that the other risks were likely to be dismissed early. They nevertheless considered it important that they should be included, particularly as risk factors can interact in complex ways. Those disagreeing thought that there was insufficient evidence to include risks of pollution or flooding or that these risks were adequately covered by other legislation. Some respondents with expertise in the field also set out their views on the best approach to risk classification.
58. While instability will be the most weighty of the hazards considered, we prefer to take a cautious approach and include all risks for which there is a body of support. If the regime were to be extended to cover non-coal tips, including this wider range of risks would be all the more important. We do not have the technical expertise to comment on suggestions of specific approaches to risk classification, but relay them to the Welsh Government in case they are of assistance in drawing up a risk classification system.
59. We recommend that the risk classification of coal tips should have regard to the risk of instability of a tip and the consequences of such failure, and should also have regard to the risk the tip presents of pollution, combustion or flooding.

Consequences of classification: agreements and orders

60. Once the tip inspection, risk assessment and tip management plan have been concluded and a risk classification assigned, the supervisory authority will need to make decisions as to how the work identified in the tip management plan is to be carried out. We envisage that the supervisory authority will have a toolkit of agreements and orders with which to organise tip safety work. The agreement or order will specify who will be responsible for carrying out the work on the tip and who will pay for it. It will also be open to the authority to specify the level of specialism required for the work. The approach taken by the supervisory authority will be influenced by the level of risk posed by the tip and the type of safety operation required.

SECURING THE MAINTENANCE OF LOWER RISK TIPS

61. The vast majority of tips on the register are unlikely to require complex remedial operations. We have been told that the main issue with lower risk tips is the need for regular maintenance work to prevent the tips from becoming a hazard. Our consultation paper explained that the absence of a power under the 1969 Act to ensure that proactive work was carried out was a major gap in the legislation.

62. We provisionally proposed that, following inspection and the preparation of the tip management plan, the authority with responsibility for these tips could be given a power to reach what we termed a tip maintenance agreement with the tip owner. We proposed that this could be backed with a power to make a tip maintenance order in the event of non-compliance, and a power of the authority to carry out the work itself if it concluded that this was necessary or more cost effective.
63. We envisaged that tip maintenance agreements could take a highly prescriptive approach, in order to assist tip owners with low levels of knowledge of tip safety. We thought that the agreements could cover matters such as duties to check drainage systems at stipulated intervals and after heavy rainfall, to maintain and improve drainage systems, or to install and check monitoring equipment. The agreements could also stipulate remediation work required and provide a timescale for completion. Depending on the complexity of the work, the agreement could specify that the work must be done by a suitably qualified professional. In cases of basic unskilled maintenance, owners could carry out the work themselves.
64. We provisionally proposed that the authority with responsibility for this group of tips would be under a duty to inspect a tip subject to a tip maintenance agreement at appropriate intervals to ensure compliance with the agreement. If the owner failed to comply with the agreement or refused to enter into an agreement, the authority could make an order for the owner to carry out the works or provide for the authority to carry out the works itself. Save in an emergency, we provisionally proposed that the owner should be given a right of appeal against such an order.
65. We were unsure whether responsibility for the oversight of tip maintenance agreements and orders and the requisite inspections should fall to the new supervisory authority or to local authorities. We recognised that the work involved was likely to be intensive, and we were mindful of the warning given to us by local authorities with responsibilities for significant numbers of tips that, without additional resources, they could not take on additional burdens. We asked an open question asking for views on the issue.
66. Chapter 5 looks at responses to the questions we asked about the proposed system for managing lower risk tips. As we envisage that agreements and orders will be the mechanism to govern tip safety operations on all tips, whether carried out by the owner or by the supervisory authority, we extended our discussion where appropriate to encompass the application of such agreements and orders to all tips.

Tip maintenance agreements

67. Just under 80% of respondents supported our proposals for tip maintenance agreements providing for the carrying out by the owner of operations specified in the tip management plan. The need for a proactive approach to prevent tip safety problems developing was recognised. Reservations were expressed about who would pay for the work, and how to ensure compliance. Some of those disagreeing thought that the supervisory authority should retain responsibility for all the work needed on tips, including maintenance work. Others thought that owners should be able to make their own arrangements, with an agreement required only if these were unsatisfactory.

68. We maintain our view that such agreements could act to motivate and facilitate maintenance. In the most straightforward cases, the agreement is likely to be very similar to the tip management plan and fairly standard in form. Their content and supporting guidance could have an educational function in increasing tip owners' knowledge. Agreements could also regulate activities or developments on the tip which could be detrimental to tip safety. We envisage that agreements will be capable of being made with owners or occupiers of land containing a tip. This is because the person in occupation of the land will be directly affected by tip safety intervention and may be the person best placed to carry out routine maintenance tasks. We envisage that the definition of an owner will be wide enough to cover any person with a freehold or leasehold interest in the relevant land. For reasons discussed more fully in chapters 7 and 9, we see financial provision in respect of tip work as a separate issue from who performs it, potentially involving a variety of people with interests in the land or in the tip material situated on it. Where there are multiple owners of a tip, a form of joint tip maintenance agreement could be developed. For consistency, we think it important that agreements should be made by the supervisory authority.
69. Problems with compliance will need to be addressed by ensuring there are sufficient resources to carry out inspections and by adequate powers of entry and enforcement. It is likely that there will be cases where the owner is unable, for example through age or disability, to carry out the work themselves. The agreement may need to provide in such cases for the authority to do the work themselves.
70. We envisage that tip maintenance agreements would mainly cover those lower risk tips that require basic maintenance or fairly straightforward remediation measures capable of being undertaken or commissioned by a private owner. Where more substantial remedial work is needed, it may be more appropriate for the agreement to provide for the commissioning or carrying out of work by the supervisory authority, giving the authority a role in negotiating terms and in deciding who would do the work.
71. We recommend that the new legislation should provide for the making of agreements between authorities and the owners or occupiers of land registered in the tip register, providing for the carrying out of operations specified in the tip management plan.

Monitoring compliance with tip maintenance agreements

72. More than 80% of respondents agreed that an authority should have a duty of inspection to ensure compliance with the tip maintenance agreement. Some noted that the lack of a continuing economic interest in the tip meant that owners were unlikely to have an independent incentive to comply with the agreement. Many stressed the need for the inspector to be independent of the owner.
73. We agree that the inspector must be independent of the owner, save where the owner itself is a public authority with required expertise. In order to ensure that inspection duties are workable, we also think that the duty to inspect should include a power to contract out inspections to suitably qualified third parties. It needs to be borne in mind that tips suitable for a tip maintenance agreement will be owned by a wide range of types of owners, including local authorities.

74. We recommend that an authority should be under a duty to arrange for inspections to ensure compliance with a tip maintenance agreement, with a power to delegate inspections to suitably qualified third parties.

Tip maintenance orders

75. Eighty percent of respondents agreed with our provisional proposal as to the circumstances in which an authority should be able to make a tip maintenance order, with provision for a right of appeal against the imposition of an order. Many made helpful suggestions for additions or variations to the proposed preconditions for an order.
76. A number argued that provision must be made to ensure that an appeal did not impede emergency work. It was suggested that a tip order could be treated as a form of land charge to allow it to be enforced against a successor in title. We agree that the exercise of a right of appeal should not prevent emergency work being carried out. We conclude that it is unnecessary to make a tip order enforceable as a land charge, since it will always be possible for the supervisory authority to seek a new agreement with, or make an order against, a new owner. Inclusion of tip agreements and orders on the tip register will alert potential new owners to what is likely to be required of them. We suggest that tip agreements and orders should include a requirement to notify the authority of an impending change of ownership.
77. We recommend that an authority should be able to make a tip order where:
- (1) the owner or occupier has failed to comply with an agreement entered into and has been given appropriate notice of that failure and reasonable opportunity to rectify it;
 - (2) the owner or occupier has been offered an agreement and has refused to enter into an agreement on suitable terms or has failed to respond within 42 days;
 - (3) the authority considers the work specified in the order to be urgently necessary; or
 - (4) it has been impossible to identify the owner or occupier despite having taken specified steps to do so.
78. We also recommend that the authority must be satisfied that the measures proposed are proportionate to the objective to be achieved, and that the order must either require the owner or occupier to carry out the operations or provide for the authority to carry them out. We recommend that the owner or occupier should have a right of appeal against the imposition of an order, but the exercise of the right of appeal should not operate to prevent work which is urgently necessary.

Oversight of tip maintenance agreements

79. A large majority of respondents were in favour of the supervisory authority taking over responsibility for tip maintenance agreements entirely. A small minority favoured local authority responsibility. Several respondents thought that the role could be divided between the two.

80. The main reason for favouring supervisory authority responsibility was a preference for a single body to take responsibility for all disused tips, regardless of risk level, in the interests of consistency and expertise. Some doubted the ability of local authorities to take on the work. Those who favoured local authority responsibility saw advantages in taking a regional approach and relying on local knowledge. Those who thought that the role could be divided suggested that the supervisory authority could retain oversight, but that the system could be sufficiently flexible to allow the delegation of a role to individual local authorities by agreement. A standardised approach to agreements for low level maintenance would be essential to ensure consistency.
81. We recognise the strength of support for the supervisory authority to take on responsibility for tip maintenance agreements entirely. But we think that there is scope for efficiency in a division of tasks between the supervisory authority and local authorities. It is important to bear in mind that our proposal for tip maintenance agreements relates to lower risk tips. The need for consistency of approach, which favours allocation of responsibility to the supervisory authority, needs to be balanced against the efficiencies which may be gained by keeping functions at a local level.
82. We conclude that an effective division of roles could be for the supervisory authority to make the agreements and for the local authorities to supervise them. In this way, the supervisory authority could control the content of the agreements, to ensure that local practices do not diverge. The local authority would have the benefit of proximity to the tips that are the subject of agreements. We appreciate that this will require the supervisory authority to make a large number of agreements or orders, and that it will be important to establish priorities.
83. We recommend that power to enter into tip agreements and to make tip orders for lower risk tips should lie with the supervisory authority, and a duty to supervise the agreements and orders, including to carry out inspections, should fall to local authorities. To assist with the performance of these responsibilities, we suggest that the supervisory authority produce detailed guidance for local authorities and tip owners to provide a consistent approach to commonly occurring maintenance tasks.

PRIORITISING WORK ON HIGHER RISK TIPS

84. Chapter 6 considers a system of designating tips as a way of prioritising work on higher risk tips. Our consultation paper discussed the need for a regulatory framework capable of distinguishing and prioritising tips in need of more rigorous intervention. We provisionally proposed that the new regulatory framework should provide for the designation of a coal tip by the supervisory authority where the tip met criteria prescribed by Welsh Ministers by statutory instrument. We also asked for views as to what the criteria for designation should be, and suggested a number of possibilities. As we thought that designation was likely to add to burdens on the landowner, we provisionally proposed a right of appeal against designation.
85. We looked at where responsibility for the work required on designated tips would fall. We provisionally proposed that the supervisory authority should normally be responsible for carrying out the work specified in the tip management plan for a designated tip. We acknowledged that there were, however, likely to be cases where tip owners would prefer and would be better placed to carry out the work themselves,

for example where the owner or manager of the tip was a public authority. In such cases, we provisionally favoured an approach based on the drawing up of an agreement between the supervisory authority and the tip owner, backed by a power of last resort to make an order.

Tip designation as a way of prioritising tips

86. Just under 90% of respondents agreed with our proposal for a system of tip designation where a tip meets criteria prescribed by statutory instrument. Respondents recognised the importance of prioritising work and the need for a systematic approach to the allocation of resources. Setting criteria by statutory instrument was seen as a way to ensure clarity and consistency, as long as the criteria were developed on the advice of experts in the field, although some thought that criteria could be set by guidance rather than statutory instrument.
87. Several respondents warned against representing designated tips as “higher risk” as this would be misleading and capable of causing unnecessary alarm. We concur. It is important to recognise that designation indicates that certain criteria have been met and that the tip for this reason deserves priority attention. It does not suggest that people in its vicinity are in danger.
88. We recommend that coal tip safety legislation should provide for the designation by the supervisory authority of tips that meet criteria prescribed by the Welsh Ministers by statutory instrument.

Criteria for designation

89. Our consultation paper sought views on designation by reference to matters such as the risk of instability, the likely consequences of tip failure, the risk of pollution, flooding and combustion, and the need for engineering work on the tip. Just under half of respondents agreed with all our suggested criteria. Fifteen percent agreed with some, and a very small minority disagreed with all. Nearly a third made observations which did not expressly agree or disagree.
90. One theme that emerged from responses is that designation should derive from the tip’s risk assessment, which, as considered in chapter 4, should consider all the hazards presented by the tip and lead to the assignment of a risk classification. Respondents also noted that our final criterion, the need for engineering work, adopted a different approach to the issue of designation than the other criteria, which related to the identification of a risk. They pointed out that the need for work is a consequence of the identification of a risk.
91. We conclude that elements of both approaches could be appropriate for drawing up a set of criteria. We identify three broad factors to be weighed in deciding designation:
 - (1) the degree of risk of any of the four hazards (instability, pollution, combustion and flooding) materialising;
 - (2) the seriousness of the consequences;
 - (3) the scale of the work required to address the risk.

92. We also suggest that regard should be had to the consequences of designation. This will require assigning priority to the tip, the conduct of work by specialists, and recognition that work will normally be carried out by the supervisory authority. An important factor will therefore be to weigh the complexity of the work required against the ability of the owner to undertake it.
93. As determination of a set of criteria for designation is otherwise a technical matter, we leave it to the Welsh Government to determine the criteria to be applied in consultation with experts. We anticipate that these criteria are likely to develop alongside the approach taken to risk classification. We express a preference for the criteria being prescribed in a statutory instrument but recognise that it is possible that the criteria developed will not lend themselves to this.

Right of appeal against designation

94. Just over 80% of respondents agreed with our proposal that there should be a right of appeal against designation. In the main they relied on reasons of fairness and the possibility that designation would involve additional burdens on the landowner. Some thought that a right of appeal against a decision not to designate should also be available to those with a legitimate interest in the tip's safety. Those disagreeing highlighted the specialist knowledge which informed the designation.
95. The report explains that we see designation as deriving from the process of risk assessment and classification, which involves technical decisions drawn from detailed consideration of the attributes of a tip and its location. Designation is important as a way to steer decision-making and resource allocation by the supervisory authority, but will not of itself produce any legal consequences for the owner of a tip. There will be a right of appeal against the terms of any tip order that is made. For this reason, we conclude that a right of appeal against an assigned classification is not appropriate.

Responsibility for work on designated tips

96. Eighty percent of respondents agreed with our provisional proposal that, in the case of a designated tip, the supervisory authority should normally be under a duty to carry out operations specified in the tip management plan. They did so primarily because this would be the best way to bring about a timely, consistent and reliable approach in respect of those tips most in need of immediate attention. It was also viewed as a way of ensuring that work above a certain level of complexity was carried out by suitably qualified professionals and appropriate documentation maintained.
97. Those disagreeing with our proposal did so mainly on the ground that the owner of the tip should do the work, in some cases stipulating that the owner should bear the cost of doing so. Some qualified their view to add that the authority should step in as a last resort if the owner was unable or unwilling to do the work. Most of those adopting this view also thought that the supervisory authority should be under a duty to conduct inspections of the work undertaken.
98. We agree that, if the supervisory authority does the work, this will promote a timely, consistent and reliable approach. These are factors which increase in importance as the risk posed by the tip increases. We therefore regard this as the best approach for tips in most immediate need of attention, but it may become less necessary as the risk level decreases. For this reason, if the criteria for designation select those tips which

pose the greatest risk or are in need of the kind of complex remedial operations that would generally be beyond the capacity of the owner, we take the view that the work should normally be done by the supervisory authority itself.

99. We envisage that, where the supervisory authority determines that it needs to carry out works or to require work to be done on a tip, it would in the first instance seek to reach a tip agreement with the tip owner and occupier and other relevant parties. This would be backed up by the power to make a tip order in the event that agreement is not reached or an agreement not performed. In the case of a designated tip, the presumption would be that the agreement would provide for the supervisory authority to do the work. But this presumption could be displaced where it was appropriate for the work to be contracted out to suitable bodies, or for the owner, or multiple owners, to do the work themselves. This might be the case, for example, where the Coal Authority or a local authority owns the tip.
100. We recommend that in the case of a designated tip the supervisory authority itself should normally be under a duty to carry out the operations specified in the tip management plan. While this should be the presumption where a tip is designated, we also recommend that the supervisory authority should have power to contract out this work or to provide in a tip agreement for the tip owner or occupier to carry out the work where it is appropriate to do so.

DEFINITIONS

101. Chapter 7 looks at how the new regulatory regime will approach two important concepts: that of a “tip” and of a “tip owner”.

Definition of a tip

102. The current regime for disused tips, Part 2 of the 1969 Act, applies to all types of mine and quarry waste. It defines a tip as “an accumulation or deposit of refuse from a mine or quarry ... other than an accumulation or deposit situated underground”. The definition of a tip associated with an operational mine or quarry provided by the Quarries Regulations 1999 and the Mines Regulations 2014 adds that the definition “includes, but is not limited to ... overburden dumps, backfill, spoil heaps, stock piles and lagoons”.
103. Our consultation paper explained that, unless any legislation that results from this project were to be extended to all types of mine and quarry waste, the legislation introducing the new regulatory regime would require a definition of a coal tip. We asked for views on whether a satisfactory definition could be framed by replacing the reference to “refuse from a mine or quarry” with wording such as “waste from coal mining”. We also asked whether a regime for disused tips needed to include express reference to overburden dumps, backfill, spoil heaps, stock piles and lagoons.
104. Almost all respondents (96%) agreed that the definition of a disused coal tip could refer to waste from coal mining and favoured an extended definition of a tip to include all or most of the express references. Most thought that adding detail to the definition would promote clarity and minimise disputes, as long as the definition was expressed as “not limited to” these features. The most compelling argument offered for including the express references was that it would bring the definition of a disused tip into line

with the regime for tips associated with active mines. The discussion also raised the issue of whether “waste from coal mining” needed further refinement in order to encompass waste from opencast mines, given that a “mine”, as defined in the 2014 Regulations, refers to underground working.

105. Some experts in the field explained that certain types of waste from coal mining were intermingled with associated minerals including ironstone and seatearth, and warned that, to avoid the need for protracted research, it would be important to include reference to such minerals. Another warned of the need to exclude coal waste where used as a construction material. Several respondents suggested that the definition of a tip should be subject to a specified spatial size or depth to exclude insignificant deposits.
106. We do not make a formal recommendation on a matter of legislative drafting but are of the view that a satisfactory definition of a disused coal tip could refer to waste resulting from the prospecting, extraction, treatment and storage of coal and associated minerals and as including, but not limited to, overburden dumps, backfill, spoil heaps, stock piles and lagoons. It will be important to ensure that the tip definition encompasses waste from opencast mines, and there may be merit in spelling out that “an accumulation or deposit of refuse” does not encompass situations where tip waste has been re-deployed as a construction material.
107. We acknowledge the concerns expressed about the need for a size threshold. We understand that the Welsh Government is working on the development of a technologically acceptable threshold. We do not have the technical expertise to offer a view on the different options.

Definition of a tip owner

108. The definition of an owner for the purposes of the 1969 Act encompasses: a freeholder who has not granted a lease; a tenant who has been granted a tenancy for a term of any length, provided that, at the relevant date, the term has at least a year to run; and a freeholder who holds the reversion of a lease which, at the relevant date, has less than a year to run. We explained in our consultation paper that the impact of this provision on short leaseholders is mitigated by the court’s power to order contribution. But this power is discretionary, leaving leaseholders uncertain as to the extent of their liabilities unless they have covered them in an agreement.
109. Our provisional view was that the law should provide a greater degree of certainty by directing liability to the person who is in economic terms the owner of the land containing a tip. We considered first how to determine whether someone holds a lease of land as an owner rather than a renter. We thought that the length of the lease may be the clearest marker. Leases granted for a term of more than 21 years are often seen as crossing a dividing line. We provisionally proposed that, to the extent that liability under the new regulatory framework rested with the owner of land containing a tip, the owner should be defined as the freeholder or a leaseholder under a lease of 21 or more years, except where their interest is in reversion upon a term of 21 or more years.
110. Seventy-six percent of respondents agreed with our proposal. Respondents thought it was fairer that only longer leases with some capital value were included, and agreed

that the term of the leasehold interest should be the deciding factor as opposed to the residual term on the lease. Dissenting views included the suggestion that a suitable “cut off” could be based on the fact that a tenancy of more than seven years is a registrable interest under the Land Registration Act 2002.

111. Some respondents warned that owners fearing new liabilities could take measures to absolve themselves of responsibility by making their ownership less straightforward, for example by creating shell offshore companies. Provision for default liability, or a sequential approach to attributing liability, were suggested.
112. Issues around ownership of land in economic terms are relevant principally where the expectation is that the owner should bear the cost of work on the land. We have come to the conclusion that it is not helpful, in the context of our recommended scheme, to have a single, exclusive definition of “the owner”. Various people having a connection to land containing a tip will need to have rights, duties or obligations under our recommended scheme. Who they are will depend on the pattern of interests in the land and the purpose of the particular right or duty in question.
113. In chapter 3, we recommend that the duty to notify the supervisory authority of the presence on land of an unregistered coal tip should be imposed on the owner of the freehold or of a leasehold of more than seven years. As we explain in chapter 5 of the report, the possible parties to a tip agreement or order include both owners and occupiers of the land containing the tip. We suggest, for these purposes, a broad concept of an owner, to include the owner of a freehold or leasehold interest in the land. In chapter 9, we recommend replacing the provision for contribution orders with a broad power to make provision in a tip agreement or order for payment of the cost of works by or to a party to the agreement or person named in the order.
114. It is a matter for the Welsh Government to decide who should bear the cost of tip works in particular circumstances. To the extent that ownership of the land is determined to be a relevant factor, we recommend that the owner for these purposes should be defined as the owner of the freehold estate or the owner of a leasehold estate of 21 or more years. The exception to this should be where the freehold or leasehold estate is in reversion on a leasehold estate of 21 or more years.

ENFORCEMENT POWERS, OFFENCES AND APPEALS

115. Chapter 8 considers the enforcement powers and offences of non-compliance needed to ensure that the new regulatory framework is effective, and avenues for appeal where we have indicated that a right of appeal is required.

Enforcement powers and offences

116. The 1969 Act gives local authorities the power to require information from tip owners and others, and to enter upon land to carry out exploratory tests, remedial operations and works of reinstatement. The exercise of these powers is limited to cases where a tip is known or suspected to be unstable. Failure to provide information and obstruction of a person entitled to enter upon land under these provisions are criminal offences, as are obstructing the tests and works or damaging or interfering with works.

Power of entry and offence of obstruction

117. We provisionally proposed a wider power of entry onto land containing a registered or suspected disused coal tip for prescribed purposes, with provisions for notice and for application to a justice of the peace for a warrant authorising entry by force. We proposed that obstruction of any authorised person or of an inspection, test or works should be a summary offence.
118. Just over 80% of respondents agreed with our proposals, finding them proportionate and essential for public safety. Helpful suggestions were made with regard to individual components of the proposed power. Some respondents warned that existing problems of specialist skill shortages and resource constraints also needed to be addressed if the new powers were to provide effective enforcement. It would also be important to encourage landowner cooperation and awareness of their new duties. Dialogue was to be preferred to enforcement measures wherever possible.
119. We agree with these provisos. Following consideration of suggestions made as to specific aspects of our proposed provisions, we recommend that persons authorised in writing by the supervisory authority or any other public body charged with functions under the coal tip safety scheme should have a power of entry upon land for the purposes of
- (1) inspecting, carrying out tests or sampling upon a known or suspected coal tip;
 - (2) performing, supervising or inspecting works of maintenance or remedial operations or installing and monitoring instrumentation upon a coal tip; and
 - (3) gaining access to a coal tip for the above purposes.
120. We further recommend that the power of entry should be exercisable upon 48 hours' written notice to the owner (if identifiable) and any other person known to be in occupation; that the supervisory authority should have power to apply to a justice of the peace for a warrant authorising entry by force where a person has prevented or is likely to prevent the exercise of the power of entry; that persons authorised to enter land under these provisions should have power to take with them necessary equipment; and that obstruction of any authorised person or of an inspection, test or works should be a summary offence.

Offence of non-compliance with a tip order

121. In our consultation paper, we provisionally proposed that failure, without reasonable excuse, to comply with a tip maintenance order should be a summary offence. We did not think it appropriate for non-compliance with a tip maintenance agreement to constitute an offence; the sanction for non-compliance would be its replacement with a tip order. As we envisage that tip orders would be used to empower tip safety work on all types of tip, our discussion of an offence of non-compliance relates not only to tip maintenance orders but to tip orders in general.
122. Ninety percent of respondents agreed with our proposal, emphasising the need for a penalty to provide an incentive to comply. There were differing views as to the appropriate penalty to be imposed. In our view, a fine is most likely to be appropriate, but imprisonment might be appropriate in more serious cases where, for example,

sustained or repeated breaches of an order create a serious risk to public safety. We can also see a role for civil sanctions in cases of, for example, persistent failure to carry out minor maintenance operations such as clearance of drainage channels.

123. We recommend that failure, without reasonable excuse, to comply with a tip order should be a summary offence punishable by imprisonment for a term not exceeding the maximum penalty for a summary-only offence, or by a fine, or both. We recommend that the Welsh Government give consideration to the use of civil sanctions in respect of infringements of a tip maintenance order.

Avenues of appeal

124. We recommend in the report that a right of appeal arise against the inclusion of land on the tip register and the imposition of a tip order. The issue arises of the appropriate body to hear appeals under the new regime. In our consultation paper, we noted that the precise appeal mechanism was outside our terms of reference, and should be left to the Welsh Government. But we suggested that, as the grounds of appeal may require distinct areas of expertise, it would be important to provide for the appeal to be heard by a person with appropriate expertise. We asked for views on appeal jurisdiction.
125. Respondents agreed with the need to ensure appropriate expertise, and that further work was needed to develop an appeal mechanism. Sir Wyn Williams, President of Welsh Tribunals, referred to our separate project on Devolved Tribunals in Wales in which we have recommended the creation of a new First-tier Tribunal and Appeal Tribunal for Wales. In the light of that, we suggest that the Welsh Government may wish to consider whether a new body to deal with disputes relating to tips should be created to fit into those structures.

FINANCIAL TERMS OF AGREEMENTS AND ORDERS

126. Chapter 9 looks at the power to charge, and whether there is any need to retain the existing framework of applications to a court for compensation and contribution orders. Our consultation paper explained that under the current system, primary financial responsibility for tip safety work falls to the owner. This is subject to claims for contribution against others and the power of the Welsh Ministers to make grants to fund remedial operations carried out by local authorities. We explained that contribution orders acted to soften the impact of the rigid definition of an owner under the 1969 Act.
127. We reported that under the current regime local authorities have found it difficult to recoup funds from owners. In addition, there is a gap in the provisions, in that there is no power to charge for maintenance work or for exploratory tests which do not lead to remedial works being carried out.

Charging power

128. We provisionally proposed a general power to charge fees and expenses to the owner of land containing a tip. A majority of respondents supported our proposal for a general power to charge fees and expenses to the owner of land containing a tip, but, at 68%, the level of support was lower than that expressed for our other provisional proposals. Those agreeing observed that the long-term sustainability of the

supervisory authority was likely to rely on some ability to charge for its services, and that the charging regime under the 1969 Act is outdated. Some doubted whether charges could realistically be recovered. Others thought, in accordance with the “polluter pays” principle, that liability should fall on those with past responsibility for coal mining rather than current owners.

129. We explain that a new charging power would need to take into consideration where tip owners, both public and private, were doing their own work. We recommend that, in order to enable flexibility, there should be a power to impose charges or make payments. The debate as to where liability for the cost of the scheme should fall is a matter of policy for the Welsh Government.

Claims for compensation or contribution

130. The current regime for claiming expenses from landowners is subject to a complex system of claims for compensation or contribution. There are duties to account for the proceeds of sale of material removed from a tip in the course of remedial work, and provisions for compensation where an order to carry out remedial works is revoked and where third parties suffer damage or disturbance in consequence of tests or remedial operations. There is also provision for financial contribution to the liability of an owner by certain categories of person. We explained in our consultation paper that the provisions appeared cumbersome, and that we were unsure of the extent to which there remained any need for them. We asked for views on whether the provisions should be retained, and for any practical experience of their application.
131. A majority of respondents broadly agreed with the retention of the provisions, but for a wide range of reasons and with qualifications. Many responses agreed with compensation or contribution in principle, but indicated a need to streamline or simplify arrangements. No respondent offered any instances of experience in applying the provisions.
132. We agree that there is a need to keep the provisions simple and to avoid reproducing the problems with the 1969 Act mechanisms. We think that provision for compensation and/or contributions in tip agreements and orders could provide the solution. In cases where there are multiple owners of the land containing the tip or the works impinge on the rights of neighbouring landowners or third party owners of tip material, a more efficient approach to the issue is to provide for them in a tip agreement or, failing that, in the consequent tip order.
133. We have already recommended that the power to make a tip agreement and order should include power to impose charges for works or, conversely, to pay the cost of them. We conclude that the agreement and order-making power should extend to making financial provision as between the public purse and any party with an interest in a tip site or its contents. We further recommend that a tip agreement or order should be able to make provision for the sale of material removed in the course of tip works and the disposition of any proceeds of sale, and for the payment of compensation. The right of appeal against a tip order we have recommended would provide a remedy if the terms of an order were considered to be unfair.
134. It will be important to have a clear statement of the applicable principles which should guide the supervisory authority in drawing up the financial provisions of tip

agreements and orders. We therefore recommend that principles to be applied in determining the allocation of financial responsibility should be laid down by the Welsh Ministers by statutory instrument.

SPECIALIST SKILLS

135. Chapter 10 considers our provisional proposal for a specialist panel of engineers to inspect tips and supervise operations on them. In our consultation paper, we suggested that this could be a good way to ensure both consistency and safety.
136. Eighty-six percent of respondents thought that a specialist panel would be a good idea. Compelling reasons were given, including the need to ensure consistent and accurate safety work and the professional development opportunities a panel would offer. A number of experts in the field explained to us that our reference to a “panel of engineers” was unduly narrow, and that we should instead have included reference to all relevant tip specialists, not just engineers. The suggestion was made that different grades could apply for different activities. Several respondents mentioned the need to ensure that agreements with private tip owners for tip maintenance work contained provision for the skill level required for particular tasks.
137. Several experts in the field mentioned alternative approaches such as the UK Register of Ground Engineering Professionals (RoGEP) and the Specialist in Land Condition (SiLC) register, and suggested that a register might be a better approach. This could be administered through professional institutions.
138. Respondents also saw an opportunity to stem the loss of specialist skills in the field. Academic institutions and professional bodies could provide for appropriate specialist training, continuing professional development and career progression.
139. These responses caused us to question whether a formal panel is the best approach to securing the correct level of specialism for coal tip safety tasks. It is important to distinguish the specialist panel approach taken by the reservoirs regime. Reservoirs are mostly still in use, and owners in the main derive economic benefit from them. Coal tips are almost entirely disused, and are not associated with income generation. In general, disused coal tip owners have no knowledge of tip safety work arising from operational control.
140. In the new regulatory regime, we recommend highly prescriptive tip maintenance agreements for lower risk tips. The tasks required will include basic maintenance which can be undertaken without specified qualifications. For more complex tasks, including remedial work, the need for specialist qualifications could be specified in the agreement unless the work is to be carried out by the supervisory authority itself. The supervisory authority could ensure that the correct level of specialist qualification is stipulated in agreements for such operations.
141. This suggests that a less formal system than a panel system could be appropriate. A register could work more effectively and flexibly. A coal tip safety specialist register could assess the range of skills needed for different coal tip safety tasks and provide different grades of registration depending on professional qualifications. It could also devise a code of practice to define competences in terms of knowledge, skills and experience and establish a supporting forum. The body administering the register

would need the specialist knowledge to assess competence. It could be empowered to bestow recognition of levels of competence for the purposes of the regulatory regime. A register could be developed by professional and industry bodies in coordination with the supervisory authority without the need for a statutory footing, and could have a role in training and development.

142. We recommend that the Welsh Government enters into discussions with academic institutions and professional and industry bodies in the field of tip safety work with a view to securing compilation of a register of professionals competent to undertake tip safety work.

TIP SAFETY AND ENVIRONMENTAL LEGISLATION

143. Chapter 11 considers conflicts between tip safety responsibilities and obligations under environmental legislation. The 1969 Act was not designed to interact with modern environmental protection. It prioritises public safety, while environmental legislation imposes requirements that can obstruct remediation and clean-up works.
144. The problem arises when the material on a tip moves. Once separated from the tip, the material is likely to fall within the definition of waste for the purposes of the Environmental Permitting (England and Wales) Regulations 2016. This means that a permit will be required to do anything with it. It is a criminal offence to carry out such acts without a permit. The process of obtaining a permit can be lengthy, and may involve a need to undertake environmental impact assessments and to design works in a way which protects the ecology of a site. The Regulations provide an operator with a defence, under regulation 40, to a prosecution for acting without a permit where the acts in question were taken in an emergency to avoid danger to human health, as long as all reasonable steps were taken to minimise pollution, and the regulator was informed promptly.
145. The defence assists in the immediate aftermath of a minor failure, but the reality for most incidents of tip movement is that clean-up work will take a long time, and will progress through stages of recovery and remediation. A more efficient regulatory framework will help to ensure that tip emergencies do not occur, but it is still important that the law should not act as a barrier to a solution if such an event does occur. For this reason, it is important that there are legal solutions for the disposal of tip material if it threatens to slide, slides or is otherwise displaced. There are also non-urgent instances when environmental legislation clashes with tip maintenance.
146. Our consultation paper looked at a number of ways to resolve these problems.

A power of direction

147. The first possibility we considered was to provide a power, along the lines of powers under the Civil Contingencies Act 2004, for Welsh Ministers to give a direction to require a Category 1 responder to perform a function to control, mitigate or respond to a coal tip emergency or threatened emergency. Almost 80% of respondents agreed with this approach. The power was seen as important to ensure that measures taken at the time of an emergency were lawful, as long as actions were taken on the advice of experts, and directions were made subject to a requirement to seek required consents when circumstances permitted.

148. The power of direction could be created by way of an order by Welsh Ministers to include the supervisory authority as a Category 1 responder. But there is no express provision in the 2004 Act to allow Welsh Ministers to override legal requirements applying to Category 1 responder functions in the exercise of their power of direction, and the list of permitted actions is limited.
149. One way to resolve the risk that an emergency direction could involve a breach of planning and environmental regulations would be the introduction of a “permitted development right” in planning legislation and an equivalent provision in environmental legislation. This would apply to actions taken pursuant to a Civil Contingencies Act direction issued to the supervisory authority, and in effect give the permissions required by planning and environmental legislation for the action specified.
150. An alternative approach which does not give rise to the same difficulties as an amendment to the 2004 Act would be to incorporate a power of direction into the legislation creating the new tip safety regulatory regime. This could set out a bespoke list of actions which might be directed by Welsh Ministers in a coal tip emergency. It could also provide that the direction would override specified environmental permitting or planning requirements.
151. We recommend a power of direction as the primary means to resolve the problem of clashes between tip safety responsibilities and other regulatory requirements in an emergency. We leave it to the Welsh Government to decide its preferred approach to creating the power.

A wider emergency power under the Environmental Permitting Regulations

152. A power of direction does not rule out adopting other approaches as well, particularly once the early stages of an emergency have passed, or where there is a clash between tip safety and environmental legislation which does not arise in the context of an emergency. Another approach we considered in our consultation paper was an extension of the defence provided by regulation 40.
153. Nearly three-quarters of respondents thought that the power of the supervisory authority to take action in an emergency should be widened. Agreement was expressed in fairly general terms, to ensure that longer-term tip safety work could be undertaken without impediment. Some saw the problem in terms of the definition of an emergency. Time frames for tip safety work may not match the way in which an emergency has been defined in other situations. Both earlier redemptive action and longer-term “emergency management” may be necessary.
154. Some respondents disagreed with reliance on a defence as a means of empowering an authority to undertake urgent action, as it was incorrect to view regulation 40 as “allowing” emergency action. A specific exemption would be preferable. Relying on a defence was also an unreliable way to secure an outcome.
155. We conclude that our recommendation for a power of direction will provide a solution for most emergency situations in which a breach of environmental regulations might otherwise occur. We agree with the observations made that widening the defence to prosecution under the Regulations is not the best way to resolve the tension between tip safety requirements and environmental protection. But the defence may still be

relevant in those situations where very urgent action is needed or where the situation is not sufficiently serious to warrant ministerial intervention. It is important for this reason to ensure that the defence functions effectively. We recommend that what constitutes action in a coal tip emergency should be defined more broadly in the Regulations.

Other approaches

156. Even after steps are taken in the aftermath of an event, further work is likely to be needed on an accelerated timetable, for example to clear large volumes of tip material. Other ways of managing tensions between tip safety and environmental legislation may be needed to cover the subsequent, less urgent, stages of a clean-up operation. Our consultation paper looked at broader strategies, for example a more collaborative approach between authorities in order better to coordinate and agree responses to a coal tip emergency, better contingency planning, and bespoke storage solutions for tip material. We asked for views.
157. Many very helpful proposals were made. It is beyond the scope of the project to make recommendations in relation to these proposals, and it is clear that further work is needed. But we are able to make a number of observations:
- (1) For the less urgent stages of a clean-up operation, we think that a tailored exemption to the Environmental Permitting Regulations for tip material could be the answer. We recognise that the Regulations are targeted at people who create waste, in accordance with the “polluter pays” principle. It seems to us that they do not fit well in controlling the activities of those who are effectively stewards of waste created by past generations. We think that this justifies a temporary exemption of activities seeking to deal with this waste when it moves for reasons beyond the control of the authority.
 - (2) It may be possible to devise a specific exemption for storage of coal tip waste during remedial works, or to reclassify tip material, possibly at the level of guidance, so that it falls outside the definition of waste. But we are concerned, unless carefully limited by time, and possibly by the scale of works, that important environmental protection could be lost unnecessarily if these approaches were to be too widely drawn.
 - (3) There may be scope to extend the idea of a “permitted development right” to a broader range of activities involving tip material in order to permit the authority to carry out “permitted development” without the need for planning permission, but with environmental screening. Regulations for tip remediation which define certain activities as “permitted development”, along the lines of existing land drainage regulations, could work well.
 - (4) A “one stop shop” consent, operating along the lines of development consent for nationally significant infrastructure projects, could streamline and rationalise the permissions needed for remedial works.
 - (5) Collaboration between different authorities and the development of guidance to allow advance planning with knowledge of a specific tip and its location would both be very valuable.

RECLAMATION PROJECTS AND NON-COAL TIPS

158. Our consultation paper explained that the increased rainfall brought by climate change created an increased risk of drainage failure in some tips, effectively hastening the end of their design life. Stakeholders had suggested to us that in these circumstances a fresh round of tip reclamation was needed. Reclamation differs from remediation work in that an additional objective of the work is to bring the tip back into a specified beneficial use. We asked whether new tip safety legislation should be combined with provision for longer-term tip reclamation, and, if so, whether respondents favoured any particular model. Chapter 12 considers a wide range of suggestions.
159. Seventy percent of respondents thought that the new tip safety regime should be combined with consideration of reclamation. Some of those agreeing with this approach thought that there was no need for legislative provision to do so. A number of respondents gave examples of reclamation models which could be adopted. Important factors for consideration in the development of individual reclamation plans included the heritage value of some tips and tip biodiversity. Several respondents specified that coal washing (the extraction of saleable coal from tip material) should not be available as a means of financing reclamation work. Those disagreeing thought that regulatory legislation should be confined to tip safety.
160. Some respondents had ideas for beneficial uses for reclaimed tips. Reclamation was seen as an opportunity to make environmental gains such as carbon capture, the promotion of biodiversity and renewable energy.
161. We do not make any recommendations in relation to whether new tip safety legislation should be combined with provision for tip reclamation as this falls outside our terms of reference. We invite the Welsh Government to consider respondents' views.

Non-coal tips

162. The remainder of chapter 12 considers the potential to extend the new regulatory framework to non-coal tips. Although our terms of reference are confined to the safety of coal tips, our consultation paper explained that the Welsh Government would welcome views on how workable and desirable such an expansion would be.
163. All those respondents who commented on the issue were in favour of extending the framework to include non-coal tips. The general view was that this would provide a holistic approach to safety issues posed by all types of mining and quarrying tips. In practical terms, it was also pointed out that confining a new regulatory framework to coal tips in Wales could create awkward distinctions. Our recommendations would entail amending the 1969 Act in respect of coal tips only. The Act would still apply in relation to tips other than coal tips. This would lead to two separate regulatory regimes, and could also create regional imbalances, as waste from different types of mining and quarrying is unevenly distributed across Wales.
164. We observe that further research will be needed to determine how the regulatory framework would need to be adapted if it were to be used for all disused tips, but make no recommendations in this area, as the discussion falls outside our terms of reference. We relay views to the Welsh Government for further consideration.

Recommendations

CHAPTER 1: INTRODUCTION

Recommendation 1.

1. We recommend that the existing regulatory regime for tips associated with operational mines should not be altered.

Recommendation 2.

2. We recommend that any new legislation should not apply to a tip to which the Quarries Regulations 1999 or the Mines Regulations 2014 apply.

CHAPTER 2: A SUPERVISORY AUTHORITY

Recommendation 3.

3. We recommend that a supervisory authority with responsibility for the safety of all disused coal tips should be established.

Recommendation 4.

4. We recommend that the supervisory authority should be a new body.

Recommendation 5.

5. We recommend that the supervisory authority should be a central public body.

Recommendation 6.

6. We recommend that the supervisory authority should be subject to a general duty to perform its functions so as to ensure the safety of coal tips, without limitation to specified risks.

CHAPTER 3: A TIP REGISTER

Recommendation 7.

7. We recommend that a central tip register should be compiled and maintained by the supervisory authority.

Recommendation 8.

8. We recommend that the contents of the tip register should be prescribed by the Welsh Ministers by statutory instrument.

Recommendation 9.

9. We recommend that the supervisory authority should be under a duty to include on the register any tip of which it is aware.

Recommendation 10.

10. We recommend that an owner or occupier of all or part of land identified in an entry on the tip register should have a right of appeal on the ground that there is no tip situated on the land.
11. We recommend the exercise of the right of appeal should not be permitted to delay urgent work.

Recommendation 11.

12. We recommend that it should be a summary offence, punishable by a fine, to fail to notify the supervisory authority, within a prescribed time limit, of the existence of a coal tip particulars of which are not included on the tip register.
13. We recommend that the offence should be capable of being committed by
 - (1) a freehold owner of land containing the whole or part of such a coal tip; and
 - (2) the owner of a leasehold interest in such land originally granted for a term of more than seven yearswho has reasonable grounds to believe that the land contains all or part of a coal tip.

Recommendation 12.

14. We recommend that the prescribed content of the tip register should be governed by whether it is in the public interest for particular information concerning coal tips to be publicly available.

Recommendation 13.

15. We recommend that there should be public access to the tip register, providing an accessible summary of relevant information.

Recommendation 14.

16. We recommend that the Welsh Government engages with the Law Society, the Coal Authority and local authorities in Wales with a view to establishing a search of the tip register as part of a standard conveyancing search in relation to property in Wales.

CHAPTER 4: TIP INSPECTIONS, RISK ASSESSMENTS, TIP MANAGEMENT PLANS AND RISK CLASSIFICATIONS

Recommendation 15.

17. We recommend that, upon the entry of a tip onto the register, the supervisory authority should be under a duty to arrange an inspection of the tip unless it considers that a sufficiently recent and thorough inspection has been conducted.

Recommendation 16.

18. We recommend that, at the time of inspection, there should be a duty on tip owners and occupiers to provide to the supervisory authority documents in their possession of relevance to the tip or the land on which it is situated.

Recommendation 17.

19. We recommend that
 - (1) the supervisory authority should be under a duty to arrange for the compilation of a risk assessment and management plan for any tip included on the register;
 - (2) the supervisory authority should be under a duty to approve the tip management plan; and
 - (3) the supervisory authority should allocate a risk classification to each tip based on the inspection report and risk assessment.

Recommendation 18.

20. 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.

Recommendation 19.

21. We recommend 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 20.

22. We recommend that the risk classification of coal tips should also have regard to the risk the tip presents of pollution, combustion or flooding.

CHAPTER 5: SECURING THE MAINTENANCE OF LOWER RISK TIPS

Recommendation 21.

23. We recommend that coal tip safety legislation should provide for the making of agreements between authorities and the owners or occupiers of land registered in the tip register, providing for the carrying out of operations specified in the tip management plan.

Recommendation 22.

24. We recommend that an authority should be under a duty to arrange for inspections to ensure compliance with a tip maintenance agreement, with a power to delegate inspections to suitably qualified third parties.

Recommendation 23.

25. We recommend that an authority should be able to make a tip order where
 - (1) the owner or occupier of land has failed to comply with a tip agreement entered into by them and has been given appropriate notice of that failure and reasonable opportunity to rectify it;
 - (2) the owner or occupier has been offered an agreement and has refused to enter into an agreement on suitable terms or has failed to respond within 42 days;
 - (3) the authority considers the work specified in the order to be urgently necessary; or
 - (4) it has been impossible to identify the owner or occupier despite having taken specified steps to do so.
26. The authority must be satisfied that the measures proposed are proportionate to the objective to be achieved.
27. The order must either require the owner or occupier to carry out operations or provide for an authority to carry them out.
28. The owner or occupier should have a right of appeal against the imposition of an order, but the exercise of the right of appeal should not operate to prevent work which is urgently necessary.
29. Save in the case of an order made where work is urgently necessary, the order must provide sufficient time within which to appeal.

Recommendation 24.

30. We recommend that power to enter into tip agreements and to make tip orders for lower risk tips should fall to the supervisory authority, and a duty to supervise the agreements and orders, including to carry out inspections, should fall to local authorities.

CHAPTER 6: PRIORITISING WORK ON HIGHER RISK TIPS

Recommendation 25.

31. We recommend that coal tip safety legislation should provide for the designation by the supervisory authority of tips that meet criteria prescribed by the Welsh Ministers by statutory instrument.

Recommendation 26.

32. We recommend that the criteria for designation should be developed by the Welsh Government in consultation with experts.

Recommendation 27.

33. We recommend that in the case of a designated tip the supervisory authority itself should normally be under a duty to carry out the operations specified in the tip management plan.
34. We recommend that the supervisory authority should have power to contract out this work or to provide in a tip agreement for the tip owner or occupier to carry out the work where it is appropriate to do so.

Recommendation 28.

35. We recommend that provision for the carrying out of work on designated tips, whether by the supervisory authority or a tip owner or occupier, should be made by way of a tip agreement or order.

CHAPTER 7: DEFINITIONS

Recommendation 29.

36. We recommend that, to the extent that liability under our recommended scheme rests with the owner, in economic terms, of land containing a coal tip, that owner should be regarded as the owner of the freehold estate or the owner of a leasehold estate of 21 or more years, save where the freehold or leasehold estate is in reversion on a leasehold estate of 21 or more years.

CHAPTER 8: ENFORCEMENT POWERS, OFFENCES AND APPEALS

Recommendation 30.

37. We recommend that persons authorised in writing by the supervisory authority or any other public body charged with functions under the coal tip safety scheme should have a power of entry upon land for the purposes of
- (1) inspecting, carrying out tests or sampling upon a known or suspected coal tip;
 - (2) performing, supervising or inspecting works of maintenance or remedial operations or installing and monitoring instrumentation upon a coal tip; and
 - (3) gaining access to a coal tip for the above purposes.
38. We recommend that the power of entry should be exercisable upon 48 hours' written notice to the owner if identifiable and any other person known to be in occupation of the land or without notice in an emergency.
39. We recommend that the supervisory authority or any other public body charged with functions under the coal tip safety scheme should have power to apply to a justice of the peace for a warrant authorising entry by force where a person has prevented or is likely to prevent the exercise of the power of entry, and it is reasonable to use force in the exercise of that power; the warrant may require those entering pursuant to it to be accompanied by a constable.
40. We recommend that persons authorised to enter land under these provisions should have power to take with them necessary equipment, provided that notice includes a description of any heavy machinery to be taken onto the land.
41. We recommend that obstruction of any authorised person or of an inspection, test or works should be a summary offence.

Recommendation 31.

42. We recommend that failure, without reasonable excuse, to comply with a tip order should be a summary offence punishable by imprisonment for a term not exceeding the maximum penalty for a summary-only offence, or by a fine, or both.
43. We recommend that the Welsh Government give consideration to the use of civil sanctions in respect of infringements of a tip maintenance order.

CHAPTER 9: FINANCIAL TERMS OF AGREEMENTS AND OTHERS

Recommendation 32.

44. We recommend that the provision that can be made in a tip agreement or order should include provision
 - (1) for the making of payments by a person named in the agreement or order;
 - (2) for the making of payments to a person named in the agreement or order;
 - (3) for the sale of any materials recovered from a coal tip;
 - (4) for the payment of the proceeds of sale of such materials to a person named in the agreement or order; and
 - (5) for the payment of compensation by a person named in the agreement or order to another person named in the agreement or order.

Recommendation 33.

45. We recommend that principles governing the allocation of financial responsibility for tip safety work between persons or entities in the public and private sectors should be laid down by the Welsh Ministers by statutory instrument.

CHAPTER 10: SPECIALIST SKILLS

Recommendation 34.

46. We recommend that the Welsh Government enters into discussions with academic institutions and professional and industry bodies in the field of tip safety work with a view to securing compilation of a register of professionals competent to undertake tip safety work.

CHAPTER 11: TIP SAFETY AND ENVIRONMENTAL LEGISLATION

Recommendation 35.

47. We recommend that the Welsh Ministers should have power to give directions to the supervisory authority regarding actions to be taken in response to a coal tip emergency.
48. We recommend that the power be subject to a requirement, where possible, to consult the supervisory authority and other relevant authorities as to the terms of such directions.
49. We recommend that the Welsh Government give consideration to the desirability of providing, in the legislation creating the power or in environmental and planning legislation, an exemption from any requirement to seek advance consent under planning or environmental legislation. Any such exemption should be subject to a duty to seek required consents retrospectively.

Recommendation 36.

50. We recommend that the Environmental Permitting (England and Wales) Regulations 2016 be amended to define an emergency in the context of tip material.

Flow chart

