



Constitutional and Legislative
Affairs Committee
**Report on the Landfill Disposals
Tax (Wales) Bill**

March 2017



National Assembly for Wales
Constitutional and Legislative Affairs Committee

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The committee was established on 15 June 2016 to carry out the functions of the responsible committee set out in Standing Order 21 and to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the Assembly or the Welsh Ministers, including the quality of legislation.

Current Committee membership:



Huw Irranca-Davies AM (Chair)
Welsh Labour
Ogmore



Nathan Gill AM
Independent
North Wales



Dai Lloyd AM
Plaid Cymru
South Wales West



David Melding AM
Welsh Conservative
South Wales Central



Dafydd Elis-Thomas AM
Independent
Dwyfor Meirionnydd

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Recommendations

Recommendation 1. We recommend that, during the Stage 1 debate, the Cabinet Secretary explains:

- (i) his justification for including extensive Henry VIII powers in the Bill;
- (ii) what alternative approaches he considered in drafting the Bill (instead of using extensive Henry VIII powers);
- (iii) in taking narrower Henry VIII powers than exist in current UK legislation, what powers he no longer has that remain in that existing UK legislation. Page 17

Recommendation 2. We recommend that the Cabinet Secretary justifies the use of each Henry VIII power contained in the Bill during the Stage 1 debate.Page 17

Recommendation 3. We recommend that the Cabinet Secretary sets out during the Stage 1 debate whether he intends to use an annual finance Bill in future to cover changes to tax law. Page 17

Recommendation 4. We recommend that, during the Stage 1 debate, the Cabinet Secretary explains the extent of the regulation-making power being sought under section 4(3) and, in particular, identifies the other enactments relating to the tax that could be amended. Page 20

Recommendation 5. We recommend that the Cabinet Secretary justifies during the Stage 1 debate using the affirmative procedure for the making of the first set of regulations under sections 14 and 45, rather than placing tax rates on the face of the Bill. Page 22

Recommendation 6. We recommend that the Cabinet Secretary should table an amendment to section 15 of the Bill to place a list of qualifying material on the face of the Bill. Page 24

Recommendation 7. The list included on the face of the Bill in section 15 could be added to in regulations subject to the affirmative procedure (because, as the Welsh Government acknowledges, they would relate to a change in taxation). Accordingly, we recommend that the Cabinet Secretary should table an amendment to that effect. Page 24

Recommendation 8. If the Cabinet Secretary decides to retain Schedule 2 on the face of the Bill, we recommend that he should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 40(9). Page 26

Recommendation 9. We recommend that the Cabinet Secretary should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 59(5). Page 27

Recommendation 10. We recommend that the Cabinet Secretary justifies during the Stage 1 debate the need for the inclusion of section 67(2) in the Bill and the power to subsequently amend or repeal that provision using section 67(4), including the extent of how the power to amend would be used. Page 28

Recommendation 11. We recommend that the Cabinet Secretary clarifies during the Stage 1 debate:

- (i) why it is necessary to take, in section 90, powers that make incidental, consequential, supplemental, transitional, transitory or saving provision; and
- (ii) the full extent of those incidental, consequential, supplemental, transitional, transitory or saving provision powers and in particular how he intends to use all of them. Page 30

Recommendation 12. We recommend that the Cabinet Secretary should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 90(1) in accordance with section 90(2). Page 30

01. Introduction

The Committee's remit

1. The remit of the **Constitutional and Legislative Affairs Committee** (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.
2. In our scrutiny of Bills introduced in the National Assembly our approach is to consider:
 - matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
 - the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
 - whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
 - any other matter we consider relevant to the quality of legislation.

Introduction of the Bill

3. On 28 November 2016, Mark Drakeford AM, the Cabinet Secretary for Finance and Local Government (Cabinet Secretary), introduced the **Landfill Disposals Tax (Wales) Bill** (the Bill) and accompanying **Explanatory Memorandum**.³
4. The Assembly's **Business Committee** referred the Bill to the **Finance Committee** and, on **15 November 2016**, set a deadline of 10 March 2017 for reporting on its general principles.⁴
5. On 14 December 2016, we received a copy of a **letter from the Cabinet Secretary to the Chair of the Finance Committee** enclosing the policy intent for subordinate legislation to be made under the Bill.⁵
6. We considered the Bill at our meeting on **9 January 2017**, taking evidence from the Cabinet Secretary and two Welsh Government officials.

Background

7. The Explanatory Memorandum accompanying the Bill states that the Bill:

“...will make provision for a tax on disposals to landfill in Wales, to replace Landfill Tax (“LFT”) from 1 April 2018 ...

¹ National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, September 2016

² Functions under Standing Order 21.8 are the responsibility of the **External Affairs and Additional Legislation Committee**

³ Welsh Government, *Landfill Disposals Tax (Wales) Bill, Explanatory Memorandum Incorporating the Regulatory Impact Assessment and Explanatory Notes*, November 2016

⁴ Business Committee, *Report on the timetable for consideration of the Landfill Disposals Tax (Wales) Bill*, November 2016

⁵ Welsh Government, *Land Disposals Tax (Wales) Bill: Policy intent for subordinate legislation to be made under this Bill*, December 2016

The Bill seeks to build on the administrative framework established through TCMA [the Tax Collection and Management (Wales) Act 2016] by setting out the operational arrangements for Landfill Disposals Tax (“LDT”) in Wales. This will ensure that a tax on disposals to landfill may continue to be managed and collected in Wales once LfT is “switched off” in respect to Wales in 2018. The introduction of LDT will protect tax revenue for continued investment in public services in Wales.”⁶

8. The Explanatory Memorandum also states that the Bill is the third to establish devolved tax arrangements in Wales, and is linked to the ***Tax Collection and Management (Wales) Act 2016*** and the ***Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill***, introduced on 12 September 2016.⁷

9. According to the Explanatory Memorandum, the Bill covers the following areas:

- the definition of a “taxable disposal” on which Landfill Disposals Tax (“LDT”) will be charged;
- what is meant by an authorised landfill site and what is expected of landfill site operators in terms of their liability to pay LDT, the duty to register with the Welsh Revenue Authority (WRA) and how to account for LDT;
- the application of LDT to disposals made other than at an authorised landfill site and who is liable for LDT on such disposals;
- how LDT will be calculated, what rate of tax will apply and what exemptions, reliefs and credits may apply;
- the duties on taxpayers to make payments and pay penalties and interest in certain circumstances; and
- the inspection of premises for the purpose of ascertaining a person’s liability to LDT, and the sharing of information between certain public authorities for the purpose of LDT.⁸

10. Section 19 of the ***Wales Act 2014*** provides for Landfill Tax (“LfT”) to be dis-applied in Wales on a date to be appointed by the Treasury under Section 19(3) of that Act. As set out in its Command Paper on financial empowerment and accountability,⁹ the UK Government’s intention is that LfT will cease to apply (or be “switched off”) in Wales from April 2018. The Explanatory Memorandum therefore indicates that the Bill is needed to replace LfT to secure tax revenue to fund public services in Wales.¹⁰

⁶ Explanatory Memorandum, paragraphs 1.1 and 1.3

⁷ Explanatory Memorandum, paragraphs 1.1 and 1.2

⁸ Explanatory Memorandum, paragraph 1.4

⁹ HM Government, ***Cm 8838 Wales Bill: Financial Empowerment and Accountability***, March 2014

¹⁰ Explanatory Memorandum, paragraphs 1.3 and 3.3

02. Legislative competence

11. The Explanatory Memorandum states that the National Assembly has the legislative competence to make the provisions in the Bill by virtue of Paragraph 16A (Taxation: Devolved taxes) of Schedule 7 to the *Government of Wales Act 2006* (the 2006 Act). Devolved taxes are defined in section 116A(4) and Part 4A of the 2006 Act, as a tax on:

- disposals to landfill (section 116N); and
- transactions involving an interest in land (section 116L).¹¹

12. Section 116N(2) of the 2006 Act defines a disposal to landfill as:

-
- “(a) it is a disposal of material as waste, and
- (b) it is made by way of landfill.”¹²
-

13. An assessment of the Bill’s compatibility with the European Convention on Human Rights (“ECHR”),¹³ is included in Chapter 9 of the Explanatory Memorandum. It indicates that the principal Articles of the ECHR which are relevant for the purposes of the Bill are:

- Article 1 of the 1st Protocol which guarantees the right to peaceful enjoyment of property;
- Article 6 which guarantees the right to a fair and public hearing in the determination of civil rights and obligations and criminal charges and affords further rights where a person is charged with a criminal offence;
- Article 8 which requires respect for private and family life; and
- Article 14 which provides freedom for a person to enjoy their rights under the Convention without discrimination.¹⁴

14. According to the Explanatory Memorandum, the Bill is considered compatible with the ECHR as:

- its provisions are devised with the principles of proportionality in mind;
- it ensures that adequate safeguards are put in place; and
- the taxpayer will have rights of appeal.¹⁵

15. The Explanatory Memorandum further states that any interference with the ECHR’s Articles is “justified and proportionate”.¹⁶

16. When questioned, the Cabinet Secretary reiterated his belief that the Bill was within the competence of the National Assembly,¹⁷ adding:

¹¹ Explanatory Memorandum, paragraphs 2.1-2.4

¹² Explanatory Memorandum, paragraph 2.5

¹³ In accordance section 108(6)(c) of the 2006 Act, a Bill is not within the legislative competence of the National Assembly if it is incompatible with the ECHR

¹⁴ Explanatory Memorandum, paragraph 9.21

¹⁵ Explanatory Memorandum, paragraph 9.22-9.25

¹⁶ Explanatory Memorandum, paragraph 9.24

¹⁷ Constitutional and Legislative Affairs (“CLA Committee”), **9 January 2017**, RoP [9]

“In the normal way, and as part of the protocols we have with the UK Government, the Bill was shared with the Wales Office in advance of publication, and officials will have had discussions with the Treasury as well given the nature of this Bill, and no issues in relation to competence have been raised as part of those discussions.”¹⁸

17. We also asked whether the Wales Bill (which has subsequently received Royal Assent and is now the *Wales Act 2017*) if currently in force, would impact on any of the provisions in the Bill. The Cabinet Secretary told us:

“The Bill in front of the Houses of Parliament at the moment does have a reservation—I think it’s reservation A1 in the Bill—on fiscal, economic and monetary policy. But the Bill also provides a specific exemption to that reservation for devolved taxes including their collection and management. Therefore, the Wales Bill would not have an impact on the Assembly’s competence as far as this Bill is concerned.”¹⁹

18. He added:

“As you know, there is a second dimension to the Wales Bill, in that it alters some of the balance in relation to consents that need to be obtained from UK Government Secretaries of State. But there are no consents in this Bill that are required either from the Secretary of State for Wales or from Ministers at the Treasury, so that aspect of the Wales Bill would not be engaged either.”²⁰

Our view

19. We note that no issues have been raised with the Cabinet Secretary by the UK Government regarding the National Assembly’s ability to make this legislation under Schedule 7 to the *Government of Wales Act 2006*.

20. We also note the assessment of the Bill’s compatibility with the ECHR included in the Explanatory Memorandum. We note that human rights are engaged; we consider the provisions in the Bill to be proportionate and that appropriate safeguards have been included.

¹⁸ CLA Committee, 9 January 2017, RoP [9]

¹⁹ CLA Committee, 9 January 2017, RoP [11]

²⁰ CLA Committee, 9 January 2017, RoP [13]

03. General observations

Approach to the Bill

21. We explored the Welsh Government’s approach to developing the Bill with the Cabinet Secretary. He acknowledged that the Bill is complex,²¹ noting that striving for simplicity can sometimes actually distort the objectives being pursued.²² He identified three ways in which the Welsh Government had tried to minimise the Bill’s complexity:

- by working very closely with landfill site operators, who expressed “the need for continuity within the system with which they are very familiar today and the law that operates in Wales today, and the law as it will operate beyond 2018”;²³
- to only depart from the way the law currently operates in order to clarify, improve and tighten up the way that the law currently operates;²⁴ and
- by bringing legislation together in one coherent place and putting as much as possible on the face of the Bill, including a lot of material that currently exists in guidance and in regulations.²⁵

22. When asked how the Bill was different from existing legislation, the Cabinet Secretary said:

“There are a number of places where this Bill is different to the current system. Mostly, as I say, it’s a matter of clarifying and tightening provision. But, sometimes, we think we have been able to learn from experience and do some things in a different way.”²⁶

23. He went on to provide an example of where a different, more proportionate approach had been taken, in relation to material that is brought onto a landfill site that isn’t going to landfill, and specifically where it can be stored and how it can be sorted and taxed.²⁷

24. The Cabinet Secretary also spoke of the dangers of waste tourism, noting that if the rates of tax on either side of the England-Wales border were to differ too much, there would be perverse incentives either for people from outside Wales to bring their waste to Welsh landfill disposal sites, or for waste produced in Wales to be driven further away across the border.²⁸ In doing so he noted that:

“The research we have suggests that that behaviour is pretty sensitive to tax changes in this area, and it wouldn’t take much more than a £10 difference between the rate per tonne charged in Wales and charged in England for some of those behaviours to start being produced. Now, I will not be setting rates for landfill disposal tax—assuming that the Bill goes through the Assembly, of course—until the budget-making process in the autumn of this year. But it is

²¹ CLA Committee, 9 January 2017, RoP [15]

²² CLA Committee, 9 January 2017, RoP [15]

²³ CLA Committee, 9 January 2017, RoP [16]

²⁴ CLA Committee, 9 January 2017, RoP [17]

²⁵ CLA Committee, 9 January 2017, RoP [18]

²⁶ CLA Committee, 9 January 2017, RoP [46]

²⁷ CLA Committee, 9 January 2017, RoP [46-47]

²⁸ CLA Committee, 9 January 2017, RoP [53]

exactly that set of arguments that I would need to take into account in setting rates for Wales.”²⁹

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

25. The Cabinet Secretary told us:

“...our starting point was to create a Bill in which as much as possible is on the face of the Bill and in one place, and set out in some detail in order to provide clarity and certainty to those people who have to operate within it.”³⁰

26. He provided examples of how this had been achieved, such as provisions relating to how waste is weighed.³¹ He went on to explain the approach taken:

“... we have taken, we think, a pretty broad set of opportunities to bring together, put on the face of the Bill and set out in detail so that there is clarity for those people who are operating the Bill, and clarity for the Welsh Revenue Authority in the work that it will do in collecting revenue for Welsh public purposes. There are exceptions to that, because there are things that are left to regulations.”³²

27. However, he expanded upon three areas where it had been decided to take powers to make regulations instead. First, in areas that are subject to regular review. He said:

“... qualifying materials will be an example of that—materials that qualify to be taxed. That’s kept under regular review. The list changes and we decide that a regulation-making power to keep that up to date would be necessary.”³³

28. Secondly, he provided an example of an area where regulations would be necessary in order to keep up to date with new areas, and changing technology:

“So, another litigious area in landfill tax has been what is called ‘fines’, and fines not in the sense of money fines, but fines in the sense of the fine material that is left, and whether that should be taxable or not. There is a procedure that allows for that to be tested to find out whether it should be subject to tax. The UK Government introduced that loss on ignition test, as it is called, in 2015, and the Scottish Government introduced it in October of last year.”³⁴

29. Finally, he noted that some areas were “genuinely technical in detail”, of which the National Assembly would have “better sight” of them through regulations:

“... there are some areas that are just genuinely technical in detail. There are some tax credit powers that come with this Bill. We intend to use them in

²⁹ CLA Committee, 9 January 2017, RoP [53]

³⁰ CLA Committee, 9 January 2017, RoP [21]

³¹ CLA Committee, 9 January 2017, RoP [24]

³² CLA Committee, 9 January 2017, RoP [27]

³³ CLA Committee, 9 January 2017, RoP [27]

³⁴ CLA Committee, 9 January 2017, RoP [28]

relation to bad debt credit. We think it's of such technical detail that the Assembly will get a better sight of it through regulations."³⁵

The use of Henry VIII powers in the Bill

30. A provision in a Bill that enables primary legislation to be amended or repealed by subordinate legislation (with or without further Parliamentary scrutiny) is referred to as a Henry VIII power.³⁶

31. In its legacy report, the Fourth Assembly's Constitutional and Legislative Affairs Committee highlighted the clear principle that Henry VIII powers "must be subject to the affirmative procedure at the very least."³⁷ On **22 February 2016**, the First Minister also stated that using the affirmative procedure to amend primary legislation would be the "norm" and "usually used"³⁸ but added:

"I can't imagine a situation where it wouldn't be, if I can make that clearer."³⁹

32. In the Fifth Assembly, the First Minister, in a **letter to the Secretary of State about the Wales Bill** in December 2016 said:

"Thirdly, an Assembly Act (which of course will have to be within legislative competence if this situation is to arise) may give Welsh Ministers powers to make amendments to other legislation, including primary legislation. Any such Act can be expected to require compliance with an affirmative order procedure in the Assembly if amendment to primary legislation is envisaged."

33. Of the 30 powers to make subordinate legislation, 19 are Henry VIII powers. Of these 19, three are subject to the negative procedure.

34. We asked the Cabinet Secretary to explain why the Bill contained so many Henry VIII powers. He told us:

"I personally tend to share the view that primary legislation should only be amended via regulation when there is a strong case for doing that. I don't think we've approached it lightly in this Bill. But Members will see the tension immediately. This committee has consistently argued for more material to appear on the face of the Bill, but, then, if you need to keep a Bill up to date and keep it usable, that does push you in the direction of having to amend primary legislation via regulations."⁴⁰

35. He continued by indicating that in some cases, if regulations had been used rather than placing information on the face of the Bill:

"I wouldn't have needed the Henry VIII power to keep them up to date, because they would have been regulation powers, not face-of-the-Bill powers. So, there is a tension, it seems to me, between the two things. However, shall I say that I

³⁵ CLA Committee, 9 January 2017, RoP [29]

³⁶ House of Lords Select Committee on the Scrutiny of Delegated Powers, *Report With Evidence*, HL Paper 57, 1992-93. Although cited as Henry VIII clauses in this report, CLA Committee refers to them as Henry VIII powers.

³⁷ Constitutional and Legislative Affairs Committee (Fourth Assembly), **Legacy report**, March 2016

³⁸ Constitutional and Legislative Affairs Committee (Fourth Assembly), **22 February 2016**, RoP [125]

³⁹ Constitutional and Legislative Affairs Committee (Fourth Assembly), 22 February 2016, RoP [127]

⁴⁰ CLA Committee, 9 January 2017, RoP [31]

think we've gone about it carefully here? There are no examples in this Bill where we take Henry VIII powers beyond the way that those powers are used in current legislation."⁴¹

36. When asked whether the approach taken was because this is a financial piece of legislation, the Cabinet Secretary explained:

"Well, we had to use it for a number of reasons, and the fact that it's financial legislation is certainly one of them, because we don't have an annual finance Bill, which would often be used in the UK Government to make changes of this sort. We don't have recourse to the Provisional Collection of Taxes Act 1968, which, again, the UK Government would have recourse to. So, because our tax-making powers are limited at the moment, we have to find bespoke ways of attending to those taxes that we do have."⁴²

37. He defended the use of Henry VIII powers in three ways:

"First of all, as I say, we never go beyond the Henry VIII powers that are there in the current legislation. One of the reasons why there are more of them numerically in this legislation is that we have broken up some of the very broad and sweeping Henry VIII powers that there are in the current legislation and made it much more specific and precise to the purpose that we are pursuing. So, in doing that, we end up with more of them, but they are much narrower in their scope. And, thirdly, whenever we have Henry VIII powers, I think that, other than in two instances, they're all made subject to the affirmative procedure. So, we do put in safeguards that the Assembly itself as a legislature will be able to exercise, to make sure that the Executive isn't using these powers in a way that wouldn't have the support of the legislature."⁴³

38. Given the number of Henry VIII powers being taken and the lack of an annual finance Bill, we asked the Cabinet Secretary about the anticipated lifespan of the Bill. He replied by saying:

"... this is a declining tax—inevitably and intentionally, it is designed to reduce the use of taking waste to landfill, and there will come a point at which the administrative costs in using the tax will outweigh the receipts taken by the tax ... So, there is a sort of built-in obsolescence to the Act.

Having said that, the existing legislation has not been one that has been, you know, very regularly changed. So, the basic outline of the tax has survived the test of time."⁴⁴

⁴¹ CLA Committee, 9 January 2017, RoP [32]

⁴² CLA Committee, 9 January 2017, RoP [34]

⁴³ CLA Committee, 9 January 2017, RoP [34]

⁴⁴ CLA Committee, 9 January 2017, RoP [37-38]

Derivation

39. The Explanatory Memorandum states that:

“The requirement in Standing Order 26.6B for a Table of Derivations is not applicable to this Bill as the Bill is a stand-alone piece of legislation and does not derive from existing primary legislation for the purposes of amendment or consolidation.”⁴⁵

40. The Cabinet Secretary indicated that the Bill only departed from the way the law currently operates where it would clarify, improve and tighten the way the law currently operates.⁴⁶ He added:

“... we’ve taken the opportunity in this Bill to attend to the history of legislation in this field. So, over the 20 years or more that there’s been this sort of legislation, it’s grown up in the way that legislation tends to do: by amendments through secondary legislation; amendments to different parts of primary legislation; notices; directions; guidance.”⁴⁷

Our view

41. As regards the balance between what is on the face of the Bill and what is left to subordinate legislation, we note the Cabinet Secretary’s comments that he has sought to put more information on the face of the Bill than exists in current UK legislation.

42. We make specific comments on the issue of balance in Chapter 4 regarding placing rates of tax on the face of the Bill and in respect of section 15 (Qualifying material).

43. We are concerned at the volume of Henry VIII powers that the Welsh Government is seeking to take in respect of this Bill.

44. As a consequence, if the Bill is passed in its current form, the Welsh Government will be able to amend significant amounts of primary legislation agreed by the National Assembly using subordinate legislation that is not amendable.

45. In such circumstances, Assembly Members will only have the opportunity to vote for or against a piece of subordinate legislation in its entirety; they will not have an opportunity to engage with stakeholders during Stage 1 of the legislative process or to consider individual amendments at the various amending stages. If the Bill is passed, Assembly Members will therefore be prevented from tabling amendments to revisions to the enacted legislation, despite having the ability to do so in relation to the legislation when first introduced.

46. Whether intentional or not, we consider that the approach adopted in the Bill could result in parliamentary scrutiny being effectively limited and the authority of the National Assembly being bypassed in the future. Allowing the executive, with limited scrutiny, to significantly amend primary legislation that the legislature has passed following full scrutiny is not a precedent that we believe should be set.

47. For that reason, we do not agree with the general sentiment behind the Cabinet Secretary’s comments (at paragraph 29) that including information in regulations will give the National Assembly

⁴⁵ Explanatory Memorandum, Annex 2: Index of Standing Order Requirements, page 133

⁴⁶ CLA Committee, 9 January 2017, RoP [17]

⁴⁷ CLA Committee, 9 January 2017, RoP [18]

better sight of it. In our view, for scrutiny purposes and in order to assess the impact of legislation there is often considerable merit in looking at information together to assess how the legislation works and identify any gaps and loopholes that may exist.

48. We note the Cabinet Secretary's justification for using so many Henry VIII powers.

49. As a matter of principle, we welcome detail being placed on the face of Bill. However, increasing the amount of such detail should not then be seen as a legitimate licence for the use of extensive Henry VIII powers to change primary legislation using subordinate legislation. Generally, if an Act of the Assembly becomes out of date quickly for whatever reason and it requires significant change, it should be achieved using further primary legislation.

50. In addition, we note that the Cabinet Secretary has spoken of the need for continuity in legislation from the UK regime. We see some merit in this approach.

51. However, we also agree with the Cabinet Secretary that the Welsh Government should take the opportunity to change existing UK legislation where it would improve the law in Wales, because devolution was not introduced simply to recreate legislation made at Westminster.

52. We believe that this argument applies particularly to the use of Henry VIII powers; the Cabinet Secretary's justification in part for using Henry VIII powers on grounds that they do not go beyond existing powers is not in our view a sound one. There is a danger that splitting existing Henry VIII powers into more numerous, simpler and narrower powers could be perceived as being little different from less numerous, broader powers, particularly if the explanation of how they can be used is unclear and their overall effect is consequently difficult to determine. Making Henry VIII powers narrower does not necessarily make their use more acceptable, particularly when there are so many of them.

53. Related to this latter point, the use of so many Henry VIII powers is also a cause of concern for reasons that our predecessor Committee referred to in its legacy report.⁴⁸ The intention of how powers may be exercised at the time a Bill is introduced is very different from how powers, however narrow, could be used in the hands of a different Welsh Minister, in the same or a different administration. Whatever assurances the current Cabinet Secretary is able to provide to the National Assembly about his intentions, they are not binding on his successors.

54. When commenting on new legislative proposals we are concerned with matters of principle and the making of good, accessible law.

55. We are concerned that this legislation does not represent best practice given the significant number of Henry VIII powers, and believe that the Cabinet Secretary needs to provide stronger justification for their use.

56. The *Wales Act 2017*, which received Royal Assent on 31 January 2017, now provides powers that would permit the Welsh Government to bring forward an annual finance Bill in future.

57. While we accept that it would not have been a viable option on this occasion, we believe that an annual finance Bill would be a better approach in future. Such a Bill, coupled with other legislation equivalent to the *Provisional Collection of Taxes Act 1968*, could potentially overcome the need for so many Henry VIII powers and would make for a more transparent, accessible way to make changes to law involving tax.

⁴⁸ Constitutional and Legislative Affairs Committee (Fourth Assembly), Legacy report, March 2016

58. In our view, the adoption of an annual finance Bill would sit well with the National Assembly's acquisition of tax powers through the *Wales Act 2014* and budget procedure through the *Wales Act 2017*. This approach would not preclude the use of powers under section 92 to make changes to tax rates using the provisional affirmative procedure to guard against potential problems of waste tourism referred to by the Cabinet Secretary.

59. In the meantime, we would have expected to see an interim, transitional approach adopted. Ultimately, we are not convinced that this Bill provides an appropriate one because of its extensive usage of Henry VIII powers. Such powers are not transitional; they could well have a long duration and could limit effective parliamentary scrutiny in this Assembly and those in the future.

60. The Cabinet Secretary would appear to have mirrored the broad approach in Westminster to using Henry VIII powers (albeit in a slightly different way) and we are unclear about what other options the Cabinet Secretary considered in drawing up his Bill.

Recommendation 1. We recommend that, during the Stage 1 debate, the Cabinet Secretary explains:

- (i) his justification for including extensive Henry VIII powers in the Bill;
- (ii) what alternative approaches he considered in drafting the Bill (instead of using extensive Henry VIII powers);
- (iii) in taking narrower Henry VIII powers than exist in current UK legislation, what powers he no longer has that remain in that existing UK legislation.

Recommendation 2. We recommend that the Cabinet Secretary justifies the use of each Henry VIII power contained in the Bill during the Stage 1 debate.

Recommendation 3. We recommend that the Cabinet Secretary sets out during the Stage 1 debate whether he intends to use an annual finance Bill in future to cover changes to tax law.

61. Where powers to amend primary legislation by subordinate legislation are taken, it is our clear principle that they should always be subject to the affirmative procedure and we note the views of the First Minister in this regard. In the Bill, there are three occasions on which it is proposed to use the negative procedure to amend primary legislation and these are considered separately in Chapter 4 of this report.

62. We note that this Bill is aiming for consistency with the UK LfT regime with only limited changes. That would suggest, as the Cabinet Secretary has himself indicated, that the Bill derives at least in part from existing primary legislation. As we indicated in our *Report on the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill*,⁴⁹ this may or may not fall within the scope of Standing Order 26.6B.⁵⁰ Either way, we think that the Explanatory Memorandum could have included more information comparing legislation across the UK and indicating from where the influences derived. Presumably the compilation and analysis of this information was fundamental to the development of this Bill, and therefore we do not consider that it would have been onerous to include

⁴⁹ CLA Committee, *Report on the Land Transaction Tax and Anti-avoidance of Devolved Taxes (Wales) Bill*, December 2016, paragraph 41

⁵⁰ Standing Order 26.6B states: Where provisions of the Bill are derived from existing primary legislation, whether for the purposes of amendment or consolidation, the Explanatory Memorandum must be accompanied by a table of derivations that explain clearly how the Bill relates to the existing legal framework.

it. It would have increased transparency and helped stakeholders and practitioners in their understanding of the Bill.

04. Observations on specific powers to make subordinate legislation

Background

63. The Bill includes 30 powers permitting the Welsh Ministers to make subordinate legislation (mainly in the form of regulations). The rationale for the use of these powers and for the parliamentary procedure attached to them is contained in Chapter 5 of the Explanatory Memorandum.

64. Of the 30 powers to make subordinate legislation:

- 25 are subject to the affirmative procedure;
- 3 are subject to the negative procedure;
- 1 is subject to the negative or affirmative procedure dependent on the judgement of the Welsh Ministers; and
- 1 has no procedure as it is applicable to a commencement order.⁵¹

65. The Bill also makes use of a new procedure—the provisional affirmative—for three of the powers initially subject to the affirmative procedure. The Explanatory Memorandum describes the nature and purpose of the provisional affirmative procedure:

“To ensure the Welsh Ministers have the flexibility to amend the tax rates as appropriate, they will have the power to set and amend the standard and lower rate of tax by way of secondary legislation. The affirmative procedure is to be adopted for the initial setting of the tax rates. Part 6 of the Bill (Final Provisions) at section 92 provides for the provisional affirmative procedure to be adopted for the second and subsequent rates regulations. This procedure enables regulations specifying new rates to have effect from the date the regulations are made. However, the regulations must be approved by the Assembly within 28 days of being made if they are to have permanent legal effect. The intention is to provide flexibility and to enable the Welsh Ministers to respond quickly to economic, social or environmental factors, to deter any negative impacts.”⁵²

66. Our scrutiny session focused on those powers of most interest to us and our consideration below considers the specific matters that we wish to draw to the attention of the National Assembly.

Section 4 – Disposal of material by way of landfill

67. Section 4(1) defines disposal of material by way of landfill. Section 4(3) provides that Regulations may modify the meaning of a disposal of material by way of landfill and then adding “(including by amending this section or any other enactment relating to the tax)”. According to the Explanatory Memorandum, the power is needed “to respond to circumstances in the future, and the

⁵¹ Explanatory Memorandum, Chapter 5, Table 4

⁵² Explanatory Memorandum, paragraph 3.53

changes required cannot be predicted with certainty at this point in time”.⁵³ The affirmative procedure is prescribed:

“... because the regulation making power could be used to change the meaning of a concept that underlies one of the conditions that need to be met in order for there to be a taxable disposal. As such any variation could impact on the scope of Landfill Disposals Tax (LDT) and the amount of tax chargeable.”⁵⁴

68. We asked the Cabinet Secretary about what section 4(3) meant in practice. He told us the power exists in UK legislation and Scottish legislation but has never been used in the 20 years it has been available.⁵⁵ He went on to explain why it had been included:

“I think there are a number of reasons. The first is that sort of overriding principle of continuity: it’s there now, landfill operators understand it, they know about it, and we promised them that we would design a Bill that had as much in common with the previous legislation as possible. Secondly, these are new powers for Wales and new areas for Wales. The question was: was it sensible to give away a tool that you might need in the future in an area that you’ve never operated before? I think my feeling was I’d rather keep it until we are sure about the ground that is under our feet ... Again, this has been ... a litigious area ... If, as a result of litigation, the definition of a taxable disposal needs to be amended, I thought it was worth keeping the power in the Bill against that day. Fourthly, and maybe most importantly, this power is available to Ministers in what will be [correction: will be the law in] England. If they were to change the definition of a disposal in England and we hadn’t included the power in this Bill for Welsh Ministers, then we wouldn’t be able to act to take account of the change that they had made. For all those reasons, although it is a closely balanced argument, I felt that it just tipped into the area of keeping it rather than excluding it, albeit that it’s not a power that has had any very great use so far.”⁵⁶

Our view

69. We note the Minister’s views.

70. It is unclear what is meant in section 4(3) by the phrase “(including by amending this section and or any other enactment relating to the tax)”. In the interests of transparency, we believe there would be benefit in clarifying the meaning of this phrase and in particular what other enactments relating to the tax could be amended by this provision. This would help establish the extent of the power being sought.

Recommendation 4. We recommend that, during the Stage 1 debate, the Cabinet Secretary explains the extent of the regulation-making power being sought under section 4(3) and, in particular, identifies the other enactments relating to the tax that could be amended.

⁵³ Explanatory Memorandum, Chapter 5, page 48

⁵⁴ Explanatory Memorandum, Chapter 5, page 48

⁵⁵ Constitutional and Legislative Affairs Committee, 9 January 2017, RoP [49]

⁵⁶ Constitutional and Legislative Affairs Committee, 9 January 2017, RoP [50]

Section 14 – Calculation of tax chargeable on taxable disposal;

Section 45 – Calculation of tax chargeable on taxable disposal;

Section 92 – Regulations changing tax rates

- 71.** Sections 14 and 45 of the Bill set out the mechanism for calculating the tax chargeable on taxable disposal in respect of authorised landfill sites and places other than authorised landfill sites respectively.
- 72.** Section 14 includes regulation-making powers for setting a standard rate of tax (under section 14(3)) and lower rate of tax (under section 14(6)) to be used in the calculation depending on the type of material being disposed of to landfill.
- 73.** Section 45 includes a regulation-making power (section 45(4)) to set an unauthorised disposals rate of tax for material disposed of at a place that is not and does not form part of an authorised landfill site.
- 74.** The first set of regulations made under each provision is subject to the affirmative provision under section 91(6) of the Bill.
- 75.** Section 92 applies the provisional affirmative procedure to the second and subsequent regulations made under each provision (see paragraph 65).
- 76.** For regulation-making powers under section 14, the Explanatory Memorandum states that:

“The affirmative procedure is prescribed for the first regulations made under this power because the regulation will be used to prescribe the amount of tax chargeable in respect of LDT and may create additional administrative burdens on taxpayers. The first set of rates will be set before the tax goes live, and therefore there will be no need for the rates to come into force immediately.”⁵⁷

- 77.** The Explanatory Memorandum adds:

“The provisional affirmative procedure is prescribed for second and subsequent regulations because this will allow the Welsh Ministers to respond quickly to sudden changes in circumstances (for example, a change in Landfill Tax rates in England) to minimise any negative impacts (such as waste tourism).”⁵⁸

- 78.** Similar arguments are made in respect of regulations made under section 45(4), save that the sudden changes in circumstances that may occur are cited as an increase in unauthorised disposals to protect tax revenue and deter this behaviour, thus minimising any negative impacts for businesses and communities in Wales.⁵⁹

- 79.** The Cabinet Secretary explained his approach to using these powers:

“... the first time that rates are set, they will be through the ordinary affirmative procedure, but thereafter, if Welsh Ministers needed to change the rates of tax

⁵⁷ Explanatory Memorandum, Chapter 5, pages 50-51

⁵⁸ Explanatory Memorandum, Chapter 5, pages 51-52

⁵⁹ Explanatory Memorandum, Chapter 5, pages 58-59

in relation to landfill, the provisional affirmative allows for that change to be introduced immediately, but then to be subject to the oversight of the legislature. Within 28 days that decision has to come in front of the National Assembly; it is subject to the affirmative procedure; the Assembly can either decide to endorse the course of action that a Minister has taken, or to overturn that course of action ... just to give one practical example—let us make the assumption for a moment that a Minister in England decides to raise the tax on landfill in England by more than £10 ... that might have the effect of diverting lorries now to come to Wales to pay the lower tax. Because, if a Minister was not able to bring that in immediately but had to wait for 28 days, there'd be 28 days when lorries might be queueing to the border while people are trying to beat the tax. So, there is a proper policy need to be able to make these decisions stick on the day that they are made, to avoid those perversities. But the Bill provides for, I think, a proper safeguard for the legislature.”⁶⁰

Our view

80. We note that the first set of regulations under sections 14 and 45 is to be made under the affirmative procedure and that the announcement about tax rates is to be made in the autumn, which, like the Bill, is in advance of the April 2018 commencement date for the new tax.

81. On a Bill making provision about taxation of disposals of material by way of landfill it would be reasonable to assume that tax rates would appear on the face of the Bill to ensure transparency.

Recommendation 5. We recommend that the Cabinet Secretary justifies during the Stage 1 debate using the affirmative procedure for the making of the first set of regulations under sections 14 and 45, rather than placing tax rates on the face of the Bill.

82. We note that the purpose of section 92 of the Bill is to apply the provisional affirmative procedure to the making of the second and subsequent regulations under sections 14 and 45. We are content with this approach.

83. This does not detract from our view that in future tax changes should ideally be introduced by means of an annual finance Bill. As we indicate earlier in the report, the provisional affirmative procedure could be used to guard against potential problems of waste tourism referred to by the Cabinet Secretary.

Section 15 – Qualifying material

84. Section 15 provides that material that qualifies for the lower rate of tax will be prescribed by the Welsh Ministers in regulations, along with any conditions. The regulations are subject to the affirmative procedure “because the exercise of this regulation making power could affect the amount of tax that will be chargeable”.⁶¹

85. According to the Explanatory Memorandum, the reason for taking the power is so that “the Welsh Ministers will be able to vary the list of qualifying materials and conditions that must be met in order to accommodate future circumstances and policy changes”.⁶² The policy intent document states that the “power will enable the Welsh Ministers to maintain consistency with the rest of the UK

⁶⁰ CLA Committee, 9 January 2017, RoP [85]

⁶¹ Explanatory Memorandum, Chapter 5, page 53

⁶² Explanatory Memorandum, Chapter 5, page 53-54

on material qualifying for the lower rate of tax”.⁶³ Similar provisions exist in UK and Scottish legislation.⁶⁴

86. When questioned about why information on the qualifying material was not being placed on the face of the Bill, the Cabinet Secretary said:

“... because we are dealing with a relatively small number of businesses, they are already aware of what’s currently included on the list. They are highly aware of the way in which the scheme currently works. They haven’t asked us to do it in a different way to the way that we’re doing it currently. We are proceeding with the same methods as were adopted in the current legislation. So, we don’t believe that the way that we’ve drawn up this Bill is going to have an impact on businesses, because we’ve worked hard with them in order to do things in the way in which they tell us. They are familiar with the process and they’re happy to proceed with it like this.”⁶⁵

87. He added:

“... just knowing what’s on the list doesn’t quite do all the work that’s necessary. What’s relevant to the people working in this area is to know what’s on the list and how much we will tax them and so on. I’m not going to make those decisions until the autumn of this year. For me, it will be more useful to the businesses, but also to those Assembly Members scrutinising all of these issues, to have those two things together because they do go hand in hand.”⁶⁶

Our view

88. The Cabinet Secretary’s argument for not putting information on the face of the Bill relating to qualifying material is not persuasive.

89. While we welcome and applaud the extent to which the Cabinet Secretary is working with landfill site operators on the Bill, it is equally important to consider what constitutes good, transparent law, not least for others with an interest in the legislation.

90. In our view, the initial list of qualifying material that is subject to the lower rate of tax should appear on the face of the Bill, particularly as that list of material is already known. In reaching this view, we also note the Cabinet Secretary’s comment, when discussing section 40 and Schedule 2 (see paragraph 101) that information was placed on the face of the Bill to make it easily accessible.

91. Any subsequent changes to the initial list of qualifying material could be made by regulations. There are advantages to including them on the face of the Bill. These include providing certainty to landfill site operators, who will know what is expected of them and also, providing the National Assembly as the legislature with an opportunity to scrutinise the list through engagement at Stage 1 and in subsequent amending stages.

⁶³ Policy intent document, page 7

⁶⁴ Policy intent document, page 7. A similar power is provided at section 42(3) *Finance Act 1996* and section 13(4) *Landfill Tax (Scotland) Act 2014*. The underlying list of qualifying materials and conditions they have to meet is set out in the *Landfill Tax (Qualifying Material) Order 2011* and *The Scottish Landfill Tax (Qualifying Material) Order 2016*.

⁶⁵ CLA Committee, 9 January 2017, RoP [57]

⁶⁶ CLA Committee, 9 January 2017, RoP [58]

92. Having qualifying material on the face of the Bill and adding to it by regulations in light of experience may leave the list in two places but so would placing the list initially in regulations and then adding to them in separate regulations.

93. We note the Cabinet Secretary's comments that it would be more useful to businesses and for the purposes of scrutiny to have a list of qualifying material and the accompanying rate of tax together because they go hand in hand. We believe that the Cabinet Secretary's comments could be used to make a case for placing both a list of qualifying material and the lower rate of tax on the face of the Bill.

Recommendation 6. We recommend that the Cabinet Secretary should table an amendment to section 15 of the Bill to place a list of qualifying material on the face of the Bill.

Recommendation 7. The list included on the face of the Bill in section 15 could be added to in regulations subject to the affirmative procedure (because, as the Welsh Government acknowledges, they would relate to a change in taxation). Accordingly, we recommend that the Cabinet Secretary should table an amendment to that effect.

Section 40 – Tax chargeable in respect of accounting period

94. Section 40 provides that the tax chargeable on a taxable disposal made at an authorised landfill site is chargeable in respect of the accounting period in which the disposal is made. The exception to this is if a landfill site operator issues a landfill invoice in respect of a disposal within 14 days beginning with the day the disposal is made. In such circumstances, the tax then becomes chargeable in respect of the accounting period in which the invoice is issued.

95. Section 40(8) defines a landfill invoice and Schedule 2 lists the information that needs to be contained in the landfill invoice. Section 40(9) gives the Welsh Ministers the power to make regulations to amend Schedule 2.

96. According to the Explanatory Memorandum, the power is needed "to accommodate future circumstances including changes in operational practice and policy changes"⁶⁷ and, according to the policy intent for subordinate legislation, "the changes required cannot be predicted with certainty at this point in time".⁶⁸

97. We explored this issue with the Cabinet Secretary. He told us:

"I suppose this is one of those areas where there is some difference of view between the Government and the committee, as there was in the previous Assembly on this matter ... It is our belief that there are some instances where even Henry VIII powers are being used to change matters that are so technical, or mechanical, in nature that the negative procedure is the correct procedure to use.

... the sort of material that is set out in Schedule 2 requires the person to put on it the date on which the invoice is issued, to put on it the name and address of the person issuing the invoice, to put down the rate of tax that is to be charged on the material. It really is the fine administrative detail that lies behind the tax.

⁶⁷ Explanatory Memorandum, Chapter 5, page 57-58

⁶⁸ Policy intent document, page 10

And I suppose the Government's position will be that, if we were to want to alter something of this very basic administrative nature, that, although it is using a negative procedure, and it is a Henry VIII power, a negative procedure is not an unreasonable way of proceeding."⁶⁹

98. He also noted that:

"It isn't simply that the Schedule, by itself, is a matter of very basic administrative detail, but it's also the effect that the Schedule has, because the Schedule has a very limited effect in relation to the operation of landfill tax."⁷⁰

99. An official accompanying the Cabinet Secretary told us that the effect of section 40 is basically as an accounting mechanism:

"So, the effect of section 40 is, generally, when a taxable disposal is made, you pay the tax during that accounting period. If you choose to issue an invoice that complies with Schedule 2, within 14 days of the disposal, you can then pay your tax in the accounting period in which you issued the invoice. So, it's basically an accounting mechanism that allows you to carry it over into the next accounting period. So, it's not going to change anybody's tax liability or the amount of tax owing; it's simply a mechanism for carrying that tax across to the next accounting period."⁷¹

100. In discussing the merits of the Henry VIII powers further the Cabinet Secretary speculated:

"That is certainly not the way that the current law is constructed ... it's the committee that thinks that the status quo is not satisfactory? And the onus is less on me than on the committee, perhaps."⁷²

101. Given the Cabinet Secretary's previous comments that technical matters would be better placed in regulations, we asked why these technical matters were placed on the face of the Bill. He told us:

"Our starting point of this Bill is that it is better, for the sake of clarity, for the sake of accessibility for the sake of the people using the Bill, to be able to make use of it, to have as much on the face of the Bill as possible. Therefore, it is a small number of cases that are so technical and so complex in their technicality that we've put them into regulations, per se. I think it is just a matter of proportionality, I suppose. For me, it's on the face of the Bill because then it's easily accessible for people."⁷³

Our view

102. We strongly believe that, as an important matter of principle, regulations that amend primary legislation should always be subject to the affirmative procedure. This is because having given

⁶⁹ CLA Committee, 9 January 2017, RoP [63-64]

⁷⁰ CLA Committee, 9 January 2017, RoP [68]

⁷¹ CLA Committee, 9 January 2017, RoP [69]

⁷² CLA Committee, 9 January 2017, RoP [72]

⁷³ CLA Committee, 9 January 2017, RoP [74]

Assembly Members the right to amend the Bill during its legislative scrutiny and to formally pass the Bill, at the very least, Members should be given the right to formally approve any changes that have been previously agreed.

103. The use of the affirmative procedure would not result in any significant delay to the legislative change being proposed by the Welsh Government. As our predecessor Committee noted, the use of one procedure over the other (negative or affirmative), does not offer any significant degree of flexibility or time-saving for the Welsh Government, it merely provides for varying degrees of scrutiny by the National Assembly.

Recommendation 8. If the Cabinet Secretary decides to retain Schedule 2 on the face of the Bill, we recommend that he should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 40(9).

Section 59 – Disclosure of information to WRA

104. Section 59 allows information acquired by local authorities in Wales or Natural Resources Wales (NRW) to be disclosed to the WRA to help it collect and manage LDT, and to investigate tax avoidance or tax evasion where necessary.

105. According to the Explanatory Memorandum:

“It is envisaged that this power may be used where, as part of their day-to-day functions, a local authority or NRW identifies any activity, such as an unauthorised disposal, which could give rise to a liability to LDT. This power allows these bodies to pass on information relating to the activity and any associated potential liability to WRA so that it can be used in a tax investigation or tax enforcement action.”⁷⁴

106. The Welsh Ministers may by regulations under section 59(5) specify other individuals or organisations on the face of the Bill that are allowed to share information with the WRA. According to the Explanatory Memorandum “these could include public bodies such as National Parks Authorities”.⁷⁵

107. The Explanatory Memorandum states that the “power will allow the Welsh Ministers to accommodate future circumstances, for example to update the list as public bodies change over time”⁷⁶ and that:

“The negative procedure is prescribed as regulations made could prescribe technical detail as to the application of the Bill to disclosure of information and will not impose additional tax liabilities on taxpayers.”⁷⁷

108. The policy intent document also notes that:

“The Welsh Ministers may by regulations add, modify or remove persons or descriptions of persons from the list of those who may disclose information to

⁷⁴ Explanatory Memorandum, Annex 1: Explanatory Notes, paragraph 123

⁷⁵ Explanatory Memorandum, Annex 1: Explanatory Notes, paragraph 126

⁷⁶ Explanatory Memorandum, Chapter 5, page 63

⁷⁷ Explanatory Memorandum, Chapter 5, pages 62-63

the Welsh Revenue Authority for the purpose of assisting it in the collection and management of LDT.

This power enables the Welsh Ministers to respond to circumstances in the future, and the changes required cannot be predicted with certainty at this point in time.”⁷⁸

Our view

109. Our comments in relation to amending primary legislation using subordinate legislation at paragraphs 102 and 103 apply equally to regulations made under section 59(5).

Recommendation 9. We recommend that the Cabinet Secretary should table an amendment to the Bill, applying the affirmative procedure to the making of regulations under section 59(5).

Section 67 – Penalties relating to non-disposal areas

110. Section 67 provides that should a landfill site operator fail to comply with the terms of a non-disposal area designation as required by section 55 (Duties of operator in relation to non-disposal area) or corresponding record keeping records as required by section 56 (Duties to keep and preserve records) then they will be liable to a penalty not exceeding £5000, but that not more than one penalty may be imposed in relation to each act or omission. Regulations under subsection (4) may amend or repeal subsection (2) and are subject to the affirmative procedure “because the regulation-making power could increase the financial burden on the taxpayer.”⁷⁹

111. The Explanatory Memorandum states that the power under section 67(4):

“... is required to enable the Welsh Ministers to amend or repeal 67(2) so that a penalty would then apply to individual breaches even if they derived from the same act or omission.

This power will enable the Welsh Ministers to ensure that the penalty arrangements are proportionate to the non-compliance and will also allow the Welsh Ministers to respond to future circumstances and policy changes.”⁸⁰

112. The policy intent document states that the “power enables the Welsh Ministers to respond to circumstances in the future, and the changes required cannot be predicted with certainty at this point in time.”⁸¹

113. The Cabinet Secretary was asked why it was necessary to take a power to repeal section 67(2). He told us:

“Under the current system, if people make a mistake or fail to observe the rules in relation to non-disposal areas, then the whole of the material in that area becomes subject to tax. We’ve decided instead to have a different regime, where the Welsh Revenue Authority will be able to penalise people, through fines of up to £5,000, for any violation of the agreement. We think that’s more

⁷⁸ Policy intent document, page 14

⁷⁹ Explanatory Memorandum, Chapter 5, page 63

⁸⁰ Explanatory Memorandum, Chapter 5, pages 63-64

⁸¹ Policy intent document, page 14

proportionate. We think that will be a more effective and workable way of the Welsh Revenue Authority being able to make sure that these non-disposal areas are properly used, and if they're not properly used, to take action to make sure that they are. However, it is a new way of doing things ... this area is an area where the way the law is interpreted, and working practices, have not always been entirely straightforward. So, I wanted to take a power that if this penalty regime turned out to be abused, or wasn't actually working in the way that we thought it would, that we could think again, and we could take this regime out and think of a better way of policing this very important part of activity on landfill sites.”⁸²

Our view

114. We note the Cabinet Secretary's views.

115. We recognise that the purpose of section 67 is to introduce a more proportionate system than currently exists in UK legislation. Section 67 allows a penalty to be set (up to a maximum of £5,000) which is commensurate with a person's failure to comply with a requirement.

116. Section 67(2) expresses a legislative presumption that a person will only be penalised once for the same act (or omission).

117. The comments of the Cabinet Secretary suggest that if the provision in section 67(2) encourages unacceptable behaviour in relation to non-disposal areas, then section 67(4) could be used to remove this provision by regulations to ameliorate the problem.

118. We are unclear of the circumstances in which the Cabinet Secretary considers it would be necessary to repeal section 67(2), especially given that this guards against double penalties being imposed.

119. If there is a risk of abuse of the specific protection provided by section 67(2), then arguably it may be sensible to remove sections 67(2) and 67(4) entirely. Then the WRA would be subject to the general requirement to act fairly and proportionately in deciding how much a person is to be charged, commensurate with their failures.

120. Section 70 (Double jeopardy) provides that a person would not be liable to a penalty under this Chapter of the Bill if they have been convicted of an offence in relation to it. There is no ability to remove this protection by regulations. The Explanatory Notes⁸³ do not explain the difference in the Cabinet Secretary's approach between section 67 and section 70 (which is not covered).

Recommendation 10. We recommend that the Cabinet Secretary justifies during the Stage 1 debate the need for the inclusion of section 67(2) in the Bill and the power to subsequently amend or repeal that provision using section 67(4), including the extent of how the power to amend would be used.

Section 90 - Power to make consequential and transitional etc. provision

121. Section 90(1) provides that the Welsh Ministers may by regulations, make such incidental, consequential, supplemental, transitional, transitory or saving provision as they think appropriate for

⁸² CLA Committee, 9 January 2017, RoP [91]

⁸³ Explanatory Memorandum, Annex 1: Explanatory Notes, paragraphs 134-136

the purpose of, or in connection with, or for giving full effect to, any provision made by or under this Bill. Section 90(2) states that the regulations may amend, revoke or repeal any enactment, including any enactment contained in, or made under, the Act.

122. Section 91 (Regulations under this Act: general) of the Bill provides that regulations made under section 90(1) are subject to the negative procedure, unless the Welsh Ministers consider that the regulations make provision that may cause tax to be chargeable when it would not otherwise have been or to increase the amount of tax chargeable, in which case the affirmative procedure applies.

123. According to the policy intent document for subordinate legislation:

“This power would only be used for such matters as making changes to other legislation needed in consequence of the provisions of this Bill or regulations made under it, or to deal with unforeseen details arising out of the implementation of the new system.

Transitional, saving and consequential elements are designed to cater for the process of moving from one landfill transaction tax regime to another, so that the process is as “seamless” as possible and that the new law operates as intended.”⁸⁴

124. The Minister said:

“... it’s important to emphasise that the scope of the regulations made under section 90 is limited to giving effect to incidental, consequential or supplementary changes required as a result of the Bill becoming law. The power, therefore, cannot be used to make regulations containing new substantive powers or to make fundamental changes to other legislation or to extend the scope of this Bill by the back door.

Rather, those are changes that are simply necessary to ensure that the provisions of this Bill work properly. The power would only be used for such matters as making changes to other legislation needed in consequence of the provisions of this Bill. It cannot be used to do anything contrary to the provisions of the Bill as approved by the Assembly, if indeed the Bill is approved. So, that’s why it’s essentially a negative power. However ... the affirmative procedure can be used where regulations made under this section have the effect of imposing or increasing an individual’s tax liability.

I do think it’s important for me to be clear that, apart from a small number of regulations made under this section shortly after Royal Assent, for example to provide for the transition from the current law to the new law, section 90 is unlikely to be used to make regulations by itself. It’s far more likely to be used in conjunction with another regulation-making power provided for in the Bill,

⁸⁴ Policy intent document, page 16

and the procedure associated with that other regulation would inform the procedure to be used under section 90.”⁸⁵

Our view

125. We are taking a keen interest in the use of powers that make incidental, consequential, supplemental, transitional, transitory or saving provision and in particular the extent to which they can be used by the Welsh Ministers.

126. Section 91(5) envisages a situation in which regulations under section 90 can cause an increase in tax. So the breadth of incidental, consequential, supplemental, transitional, transitory and saving is not that narrow if it can be used to increase tax. Where regulations do cause an increase in tax, the affirmative procedure applies and we welcome the position the Cabinet Secretary has taken.

127. However, we would welcome clarification of the full extent to which all the powers could be used.

Recommendation 11. We recommend that the Cabinet Secretary clarifies during the Stage 1 debate:

- (i) why it is necessary to take, in section 90, powers that make incidental, consequential, supplemental, transitional, transitory or saving provision; and
- (ii) the full extent of those incidental, consequential, supplemental, transitional, transitory or saving provision powers and in particular how he intends to use all of them.

128. We also note that the powers include the ability to amend primary legislation using the negative procedure rather than the affirmative. For reasons that we explain in paragraphs 102 to 103, we do not consider this to be appropriate.

129. We have also noted that equivalent provisions within the Public Health (Wales) Bill (as introduced) and the Additional Learning Needs and Education Tribunal (Wales) Bill (as introduced) that amend primary legislation are subject to the affirmative resolution procedure. We believe that the procedure attached to the making of regulations making incidental, consequential, supplemental, transitional, transitory or saving provision should be consistent across all Bills.

Recommendation 12. We recommend that the Cabinet Secretary should table an amendment to the Bill to apply the affirmative procedure to the making of regulations under section 90(1) in accordance with section 90(2).

⁸⁵ CLA Committee, 9 January 2017, RoP [99-101]