

GOVERNMENT RESPONSE

TO THE CONSULTATION ON THE

DRAFT ANTARCTIC BILL

April 2010

Published by the Foreign and Commonwealth Office
www.fco.gov.uk/antarcticbill



Foreign &
Commonwealth
Office

OVERVIEW

The draft Antarctic Bill was published to Parliament on Tuesday 10 November 2009 (Command Paper 7635). A public consultation period ran for three months, to 12 February 2010. No Parliamentary committee took up the opportunity to conduct Pre-Legislative Scrutiny on the Bill, although it was considered in general terms by the House of Commons Foreign Affairs Committee.

The Government is grateful to all those who provided written responses during the consultation period, as well as the numerous comments and questions made orally to the FCO's Polar Regions Unit by other stakeholders. (A full list of those who provided written comments, and those who requested specific meetings to provide comments, is at Annex A).

None of the comments suggested that work on the draft Antarctic Bill should not proceed, and many stakeholders welcomed the UK taking a leading position in seeking to be among the first to ratify the Liability Annex to the Protocol on Environmental Protection to the Antarctic Treaty. There were, however, several substantive technical comments, which will be addressed prior to finalising the drafting of the Bill, and these are set out in this document.

The draft Antarctic Bill will now be finalised for potential introduction to Parliament as legislative time allows. The Government looks forward to the continuing constructive engagement of stakeholders as the Bill progresses.

BACKGROUND

The draft Antarctic Bill implements a new Annex to the Environmental Protocol to the Antarctic Treaty on *Liability Arising from Environmental Emergencies* (Liability Annex), and enhances the provisions of the 1994 Antarctic Act to provide additional protection to the Antarctic environment and those travelling to the continent.

SUMMARY OF RESPONSES AND GOVERNMENT REPLY

1. The following summary of consultation responses is set out by the questions posed in the Consultation Document, which was published as part of the Draft Antarctic Bill Command Paper.

Part 1

Do you have any comment on the way in which the draft Bill sets out these definitions based on Article 2 of the Annex?

2. The International Group of P&I clubs raised concerns over the definition of “reasonable response action” in Clause 3(4). They sought clarification that “passive monitoring should be considered as an acceptable and reasonable action.”

The Government accepts that passive monitoring can, in some circumstances, be the most appropriate response action. We believe that Clause 3(4) of the draft Bill allows for this.

3. WWF-UK made a couple of suggestions under this question. The first was that the definition of an “environmental emergency”, in Clause 2(1), did not sufficiently include instances where damage to a particular region has been caused through the misevaluation of any potential impacts (including cumulative impacts) made in pre-assessments.

The aim of the Liability Annex is to establish a liability regime for ‘environmental emergencies’, as defined in Article 2 of the Annex. This is reflected in the definition in Clause 2(1) of the draft Bill. The assessment of environmental impacts of activities in Antarctica, including taking into account potential cumulative impacts, is an intrinsic part of the Environmental Protocol, in particular Annex I, and is already implemented in the UK through the Antarctic Act 1994. The Government does not consider that the framework for liability set out in the Liability Annex is the appropriate mechanism to address potential cumulative impacts. Nevertheless, the UK has consistently engaged on the issue of cumulative environmental impact assessments in Antarctica and agrees with WWF that this is a matter that requires further attention by the Antarctic Treaty Consultative Meeting.

4. The second comment from WWF-UK is that fish are not included in the list of wildlife stated in Clause 2(2).

The Environmental Protocol to the Antarctic Treaty includes a derogation to the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), which provides for the conservation of the Antarctic marine environment, including rational use. The Government is committed to the

sustainable conservation of the Southern Ocean, but believes that the protection of Antarctic fish stocks is best pursued through CCAMLR.

Do you agree it is reasonable to set a criminal penalty for failure to undertake pre-planning for environmental emergencies in Antarctica?

5. One respondent voiced concerns “that not being ‘prepared’ will become a criminal offence” and felt that this issue may take some operators unawares.

The intention in negotiating the Liability Annex was that it was primarily to act as a deterrent to prevent activities being undertaken in Antarctica without adequate preparation and contingency planning in order to protect the Antarctic environment. Under the Antarctic Act 1994, it is already an offence for a British expedition to enter Antarctica without the prior approval of the Secretary of State.

In order to minimise the possibility that operators may be caught unawares, however, the Government intends to issue, and circulate widely, appropriate information and guidelines prior to the implementation of Part 1 of the draft Bill. For those operators which already seek Antarctic permits under the 1994 Act, it is the intention that the pre-planning requirements of the new liability provisions will form part of that process once the Annex comes into force.

Do you agree it is fair that failure to inform the Secretary of State of an environmental emergency in Antarctica be potentially subject to criminal proceedings?

6. All respondents were either supportive or had no comments on this point.

Are you content that the issue of how the draft Bill relates to existing legislation which also sets liability limits has been appropriately dealt with?

7. The British Chamber of Shipping and International Group of P&I Clubs raised concerns over Clause 11 as drafted. They urged the Government “to ensure that they are consistent with existing legislation and treaty law obligations. In particular they were concerned that the Clause disregarded the limits set out in the Convention on Limitation of Liability for Maritime Claims (LLMC) and that this would lead to shipowners potentially incurring increased liability.

The Government understands the point being made here and recognises that the way in which Article 9(2) of the Liability Annex should be applied to the LLMC is not entirely clear. We are consulting with other Antarctic Treaty Consultative Parties who are also Parties to the Convention on Limitation of Liability for Maritime Claims (LLMC) to seek their positions on this point. We will continue to liaise with those stakeholders who raised this issue to develop the final wording for the Bill.

Do you consider that it is reasonable for the Secretary of State to require certain information directly from those in Antarctica whose activities have given rise to an environmental emergency?

8. No specific issues were raised on this question.

Overall, do you agree that the draft Bill implements the Liability Annex into UK law in a reasonable, fair and consistent way?

9. A number of concerns have been raised about the Expert Advisory Group which the FCO intends to form in order to deal with questions regarding the recoverable costs in cases where no action was taken in response to an environmental emergency (paragraph 4.18 of the Consultation Document). Firstly that the decisions of the group could conflict with command and control responses in the region. Secondly that the group could make subjective decisions with the benefit of hindsight and finally that the group risks being “arbitrary and capricious.”

The Government recognises the concerns that have been raised with regards to the establishment of this group. The intention was not that the group should have any statutory power in establishing liability levels, nor that it would have any role in the ongoing monitoring of the aftermath of an environmental emergency. It is not mentioned in the draft Bill.

The aim of the group, as originally conceived, was to provide expert advice to the Secretary of State on the “recoverable costs” in the circumstances set out in Clause 10 of the draft Bill (i.e. when no reasonable, prompt and effective response action is taken). The advice of the group would inform the Secretary of State’s view on the liability of the person whose activities gave rise to the emergency to pay the “recoverable costs” to the Antarctic Environmental Liability Fund, and on the appropriate amount of any such costs. The person liable to make such a payment could then elect to pay the amount determined by the Secretary of State, or, leave it to the Secretary of State to bring proceedings under Clause 10 of the draft Bill, for the court to determine liability and set the appropriate amount.

It was also intended that the expert group could be available to provide ad hoc advice to the Secretary of State in to inform future UK policy positions on appropriate response actions to environmental emergencies in Antarctica. In the longer-term, the group may also be consulted by the UK Government in regards to any future claims by Parties on the Antarctic Environmental Liability Fund and how they should be assessed by the Antarctic Treaty Consultative Meeting.

The Government remains of the view that it would be useful to establish an expert advisory group. Following the consultation responses, however, we will make clear that the intended composition of the group would be limited to

public bodies (i.e. Government Departments, Agencies and non-Departmental Public Bodies.) Any wider expertise would be sought under contractual terms only.

10. The IGP&I clubs pointed out that Clause 11(5)b did not accurately reflect the provisions of the Liability Annex, suggesting that instead the words “recklessly and with” should be added to the beginning of the Clause.

Clause 11(5) implements Article 9(3) of the Liability Annex and no change in meaning was intended. In finalising the Bill, we will ensure that the wording reflects this position.

11. The IGP&I clubs were also keen to ensure that, with regards to the insurance or other financial security required by Clause 13, that cover from International Group would be deemed as sufficient.

The Government acknowledges that there are a range of options for providing sufficient financial security, which may include appropriate cover from the International Group. In each and every case, it would be for the operator to demonstrate that they had adequate insurance cover or other financial security for the type of activities intended to be undertaken in Antarctica.

12. A number of respondents raised concern over the level of financial limits of liability set down in Clause 11. In particular that the levels do not take into account the position of small independent vessels, i.e. under 100 tons. The independent operators have suggested that such smaller vessels are not capable of causing environmental damage at such a level and are totally different from a ship of the 2000 ton size. There has been suggestion that there should be a further sliding scale to provide lower limits for such small cruisers. Equally the limit on the amount of liability for a land expedition, set out in Clause 11(3), 3 million SDR was considered by some to be too high for the smallest of land-based operations.

The Government agrees that there is a significant difference between a small yacht expedition and a vessel of 2000 tonnes. However, this issue was also raised during the negotiations on the Liability Annex, but consensus was eventually reached on the limits set out in Article 9 of the Annex, which are reflected in Clause 11 of the draft Bill. In setting the minimum level at one million SDR, the Antarctic Treaty Parties noted that where small vessels were arguably not capable of causing damage requiring that level of response action, they would not attract the higher limit of liability. It would therefore be for the insurance industry to set the appropriate level of insurance premiums, based on their assessment of the risk. In addition, during the consultation on this draft Bill, the Government has consulted with appropriate insurance industry contacts, who have indicated that the requirement to insure up to a limit of one million SDR is not an excessive amount, even for very small vessels, and is consistent with many current standard policies.

The Government also recognises that there is a wide diversity of land-based operations in Antarctica, some of which may be unlikely to attract potential liabilities of the three million SDR limit in the Liability Annex. However, as mentioned above, it will be for the insurance industry to set the appropriate level of premiums, based on their risk assessment of the activities.

The UK has a responsibility to implement all of the agreed liability limits, as set out in Article 9 of the Annex but, the UK will bear these issues in mind when the ATCM reviews the limits, after the Annex enters into force.

13. With regards to Clause 8 respondents raised the issue of clarity over whether it is the duty of an operator who discovers an environmental emergency, rather than causing one, to report it to the Secretary of State.

The Government's intention was that anyone who discovers an environmental emergency shall have a duty to report it, regardless of who may have caused it. We will consider this issue to ensure this is clear in the final Bill.

Do you have any comments on the Impact Assessment for this part of the draft Bill, we would be especially interested in any views on potential costs of compliance?

14. The only comments on the Impact Assessment have already been dealt with in conjunction with points on financial limits above.

Part 2

Do you agree that it is reasonable to make both the organiser of activities to be undertaken in Antarctica, and, if different, the conductor of those activities actually in Antarctica, both criminally liable in a case where adequate contingency plans and insurance arrangements have not been put in place prior to the activities taking place? If not, how do you suggest that liability should be divided in such a case?

15. All comments regarding this question were positive.

Do you think that it is a reasonable interpretation of Measure 4(2004) to require UK nationals who conduct activities on expeditions in Antarctica, which are subject to prior authorisation under the Antarctic Act 1994, but organised and authorised in other countries, to ensure adequate safety planning? If not, how do you suggest that compliance should be required from those conducting activities in Antarctica, as well as those organising the activities?

16. Where respondents commented on this issue they were generally positive, but Pelagic expeditions questioned the workability of this requirement.

For British expeditions authorised by the UK under the Antarctic Act 1994, demonstration of adequate safety planning is already part of the permitting

process. However, in order for the UK to fully comply with its responsibilities under Measure 4(2004), we also need to ensure that those whose activities require a permit under the Antarctic Act, but who fail to obtain one, are also covered by these new offences, if they fail to put adequate safety plans in place.

17. High Latitudes commented on the definition of ‘the person responsible for conducting the expedition’ in Clause 23(2)b and sought clarity that it would apply only to the leader of the expedition and not the crew or passengers on a vessel/expedition.

The Government will make a clear distinction between a person who conducts an activity in their own right, and a person who conducts an activity on behalf of another. In the case of the latter, it will be the organiser who will be liable under the Bill.

Overall, do you agree that the draft Bill implements Measure 4(2004) into UK law in a reasonable, fair and consistent way?

18. The consultation raised a number of concerns over the requirements in Part 2 of the draft Bill for adequate Search and Rescue (SAR) provision. A number of respondents questioned the level of SAR provision that the draft Bill would require, especially for small expeditions. It was pointed out that an open ended search operation would not be feasible or insurance cover available.

The requirements of Measure 4(2004)/Part 2 of the draft Bill do not impose a requirement for open ended contractual search and rescue arrangements. The UK has been implementing Measure 4 (2004) through our permitting system since its adoption. As such all expeditions since that date, which have received a UK permit would be considered to have complied. As above, however, in order for the UK to fully comply with our responsibilities under Measure 4(2004), we need to ensure that no British activities are undertaken in Antarctica without having clear SAR plans in place, in order to avoid the potential burden on other operators if called upon to provide that service without prior agreement.

In practical terms, expeditions will need to demonstrate that they have arrangements in place to regularly report their positions to another operator in Antarctica with the capacity to search for and uplift, as necessary, those on the expedition if that contact is lost, or in the event of an emergency. The FCO will develop more detailed guidelines, based on the practice of implementing Measure 4(2004) to date, as to the kinds of SAR arrangements that have been assessed as adequate.

19. Some consultees raised questions over the requirement for Medi-Vac procedures under part 2 of the draft Bill.

The Government considers that all expeditions, whether land based or on a vessel, need to have contingency plans in place in case for an urgent medical evacuation. Such plans are currently required as part of the permitting process under the Antarctic Act 1994. This requirement is underlined for all expeditions at Clause 21(1)d of the draft Bill.

20. A question was raised over Clause 20(2) and the timing for needing adequate safety planning to be in place. The Clause sets out that it needs to be in place prior to entering Antarctica and it was pointed out that in reality this should be for when a permit is issued, usually prior to departure for Antarctica.

The reason that this subsection is drafted in this way is to also cover UK nationals who carry out activities in Antarctica without a permit, in breach of the Antarctic Act 1994, and to establish when an offence would have been committed. However, for those travelling on a British expedition under a UK permit, a demonstration of “adequate arrangements for personal safety” will continue to be required before a permit can be issued.

21. High Latitudes made the case for a clearer definition of ‘adequate insurance’ in Clause 20(1)b.

The Government believes that ‘adequate insurance’ is sufficiently defined in Clause 22(2). When issuing a UK permit, the FCO (as the permitting authority) in discussion with the operator, will determine the appropriate level of insurance.

22. WWF-UK sought for fishing vessels to be included in the provisions of Part 2 as they have just as much “potential for accidents and safety planning and insurance are important considerations for all activities.”

Whilst the UK Government agrees in principle with this point, the Government believes that questions relating to fishing activities are best pursued through the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), to ensure international consistency.

23. The JNCC made the case for “a series of practical guidelines, templates and standards.”

Guidelines for permitting and contingency plan issues are already in place and are available at www.fco.gov.uk/antarctica. These will be updated, and further expanded, following the passing of the Bill to provide more information about the liability framework and to reflect the relevant changes to the Antarctic Act 1994.

Do you have any comments on the Impact Assessment for this part of the draft Bill?

24. In consultation with the insurance industry, concerns were raised that the draft Bill as written put unnecessary burdens upon small operators for things such as medical care and full Search and Rescue capabilities. It appeared the draft Bill suggested that operators would need full medical cover for all passengers. This would be extremely costly and would certainly prohibit smaller expeditions from journeying to Antarctica.

The Government is quite clear that putting the provisions of Measure 4(2004) on to a statutory footing should not increase the current requirements under the permitting system. We will seek to make this clear and unambiguous during the passage of the Bill.

Part 3

Do you agree that it is appropriate to amend the existing Antarctic Act 1994 to enable the UK Government to authorise the education or scientific activities of non-British nationals on British expeditions?

25. All those who responded to this question supported it, including crucially the British Antarctic Survey who are likely to be the primary stakeholders in such a process.

Do you agree that the Antarctic Act 1994 should be amended to enable permits to be granted to enable the conservation and repair of Historic Sites and Monuments, including the potential for any part of such sites to be removed from Antarctica for such purpose?

26. There was full support for the requirements of Clause 25. The Government is pleased that the UK Antarctic Heritage Trust welcomes its provisions.

Do you agree that marine plants and invertebrates should be afforded the same protection as terrestrial plants and invertebrates, even though this is not included in the revision to Annex II of the Protocol on Environmental Protection to the Antarctic Treaty?

27. Again this question garnered a totally supportive response from all respondents. The Government is particularly pleased to have the support of the JNCC and WWF-UK for these changes to the 1994 Act. The WWF-UK, however, also pushed for the protection of fish species along similar lines to marine plants and invertebrates.

The Environmental Protocol to the Antarctic Treaty includes a derogation to the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), which provides for the conservation of the Antarctic marine environment, including rational use. The Government believes that the protection of Antarctic fish stocks is best pursued through CCAMLR.

Do you agree that the UK should clearly prohibit the carrying of any animals on board vessels visiting Antarctica?

28. All comments referencing the ban on keeping animals on board vessels visiting Antarctica were positive.

Do you consider that the new offences in Clauses 28 (microscopic organisms) and 29 (non-sterile soil) are a reasonable way to implement the recent revisions to Annex II? If not, could you suggest an alternative approach?

29. The majority of respondents were content with the provisions of Clause 29. There was however some concern from the industry that as written the draft Clause was more draconian than Annex II and could mean visitors breaking the law through the accidental introduction of trace amounts of soil on shoes or clothing. There was also a request for some for guidelines on best practice in this area.

The Government accepts this point and will ensure that the relevant Clause (29(2)) excludes unintentional introductions, provided reasonable precautions have been taken. The UK is playing a leading role in the Antarctic Treaty on developing new guidance to minimise the introduction of non-native species to Antarctica.

Overall, do you agree that the proposed amendments to the Antarctic Act 1994 are justified and reasonable? Would you suggest any other amendments to the Antarctic Act 1994?

30. The JNCC made the suggestion that the Antarctic Act 1994 could be amended to include a ban on the redistribution of indigenous species between biologically distinct areas within Antarctica.

The Government agrees that this is an important point. However, as above, the UK is pursuing the development of more robust guidance to minimise the introduction and redistribution of non-native species in Antarctica through the Antarctic Treaty Consultative Meeting. The Government does not consider that there is, as yet, sufficient international consensus on what measures should be adopted to address this issue and therefore considers that a ban in the draft Bill would be premature.

31. The British Chamber of Shipping pointed out a potential error in cross-referencing in Clause 32.

The Government will ensure that the cross-references in this Clause are correctly drafted.

Do you have any comments on the Impact Assessment for this part of the draft Bill?

32. There were no comments on this part of the impact assessment.

PART 4

Would there be any justification for bringing Part 1 of the draft Bill into force in the UK even before the Liability Annex has come into force?

33. The Foreign Affairs Committee and several other respondents sought to ensure that the Liability Annex is not introduced before other Treaty Parties to avoid unfair competition. The only respondent who pushed for an early introduction was WWF-UK.

The Government agrees with the view that an early introduction of Part 1 of the Bill would put UK Antarctic operators at a significant disadvantage and thus would only seek a commencement order for Part 1 of the Act when the Liability Annex comes into force (after it is ratified by all Antarctic Treaty Consultative Parties).

Do you have any other comments on Part 4 of the draft Bill?

34. WWF-UK gave their support to extending the Bill to all Crown Dependencies and UK Overseas Territories.

The Government will consult the Crown Dependencies and Overseas Territories on extension of the Bill, after enactment.

General

35. The British Mountaineering Council sought to ensure that the Bill could not be interpreted differently in the future than currently.

The Government, through the Bill's Explanatory Notes, FCO guidance and the Parliamentary debate on the Bill, will seek to ensure that the intended interpretation of the Bill is made clear.

36. Both WWF-UK and the WDCS stressed the need for leadership from the UK to drive forward the early introduction of the Annex.

The UK has been a leading player in the Antarctic Treaty system since being the first Party to ratify the Treaty in 1960. By being amongst the first to ratify Annex VI we would again be able to demonstrate our commitment to the Treaty and leadership to other Treaty parties. We will continue to push other Treaty Parties for as early ratification as possible.

List of Respondents providing written comments

British Antarctic Survey
British Chamber of Shipping
British Mountaineering Club
Foreign Affairs Committee
High Latitudes
International Group of P&I Clubs
Joint Nature Conservation Committee
Mr Caradoc Jones
Mr Alan Parfitt
Pelagic Expeditions
UK Antarctic Heritage Trust
Waterborne Underwriting Agency
Whale and Dolphin Conservation Society
WWF-UK

List of stakeholders who provided oral comments in specific meetings with FCO

International Association of Antarctica Tour Operators