



# ***Antarctic Bill***

## **Bill 14 of 2012-13**

**RESEARCH PAPER 12/63** 30 October 2012

The Antarctic Bill is presented as a Private Member's Bill by Neil Carmichael MP who came 7<sup>th</sup> in the ballot. The Bill has Government support and follows from a draft Bill consulted on by the previous Government in 2009.

Part 1 of the Bill seeks to implement the "Liability Annex" to the Antarctic Treaty that was agreed in 2005, making the UK the first to do so. This Annex aims to reduce the risks of environmental emergencies in Antarctica and to establish a polluter pays approach to such incidents. The Bill also makes a number of amendments to the *Antarctic Act 1994* extending environmental protection in line with subsequent Treaty changes.

The Bill was presented to Parliament through the Private Members' ballot procedure on 20 June 2012 and is scheduled to have its Second Reading on Friday 2 November 2012. It applies to the UK and allows for the extension of certain provisions to the Channel Islands, Isle of Man, and British overseas territories.

Emma Downing

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## Research Paper 12/63

**Contributing Authors:** Emma Downing, Agriculture and Conservation,  
Science and Environment Section

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## Summary

Antarctica is the fifth largest continent and the windiest and coldest place on Earth. It is internationally designated as a natural reserve devoted to peace and science.

The UK has a long history of scientific exploration and environmental protection in the region and is a high profile and active party to the Antarctic Treaty which governs international activity on the continent. The *Antarctic Act 1994* implements most Treaty requirements in domestic law and the current *Antarctic Bill* seeks to implement further Treaty measures.

**Part 1** implements the 'Liability Annex' to the Antarctic Treaty's Environmental Protocol. These measures enhance contingency planning to reduce the risks of "environmental emergencies" in Antarctica i.e. accidents with significantly harmful environmental impacts such as oil spills. It also provides a framework for recovering the costs of response action if such an emergency does occur and requires those operating in Antarctica to secure sufficient insurance or other financial security to cover an appropriate response to an environmental emergency.

This Part introduces a number of new statutory duties on those operating in Antarctica relating to appropriate response action, preventative measures and contingency planning and information. It will enter into force when it is officially approved by all of the consultative parties which originally signed up to it. Hence, the UK is seeking to show leadership but not to put UK Antarctic operators at a significant disadvantage.

**Part 2** makes a number of amendments to the 1994 Act to give additional protection to the Antarctic environment (flora, fauna and historic sites and monuments) and to allow the Foreign and Commonwealth Office (FCO) to permit foreign nationals on British led expeditions, making it easier to co-ordinate such expeditions.

The original proposal for an Antarctic Bill came from the previous Government who consulted on a draft Bill in December 2009. Mr Carmichael's Bill is based on this draft Bill with some amendments which address technical concerns raised in the consultation on the draft Bill. Key stakeholders operating in the area, including the British Antarctic Survey (BAS) and those concerned with environmental protection, such as WWF-UK, have voiced no major outstanding concerns and are supportive of the Bill.<sup>1</sup>

However, there has been widespread concern surrounding the Natural Environment Research Council's recent consultation on the future of the British Antarctic Survey (BAS) and proposals to merge it with the National Oceanography Centre (NOC). Although outside the scope of this Bill, the matter is generating debate around the UK's status and role in Antarctica.

The Bill has Government support as a measure that "will ensure that our domestic legislation is among the most comprehensive in the world" as well as enhancing Britain's international leadership and strategic interest.<sup>2</sup> Mr Carmichael MP echoed these sentiments and said that by passing this Bill, the UK will be "maintaining its high profile in the region and underline its interest in protecting the environment and protecting the safety of those who visit the continent."<sup>3</sup>

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<sup>1</sup> British Antarctic Survey News Story, [Antarctic Reception with Neil Carmichael MP at House of Commons](#), 25 October 2012

<sup>2</sup> HC Deb 12 September 2012 c139WH

<sup>3</sup> Bright Blue, [The Antarctic Matters to us all](#), Neil Carmichael guest blog, 28 September 2012

## 1 Introduction

Antarctica is the fifth largest continent at 14 million km<sup>2</sup>, approximately 1.5 times the size of the United States. It is almost completely covered (98%) with continental ice with 2% barren rock. The Antarctic ice cap contains 90% of the ice on Earth and it is estimated that if Antarctica's ice sheets melted, the oceans would rise by approximately 60-64m.<sup>4</sup> The region has no indigenous human population.

There are competing claims of interest from a range of nations but the Antarctic Treaty ensures that they are not being acted upon.<sup>5</sup> The Treaty ensures that the region is demilitarised and promotes peaceful, scientific exploration whilst enforcing environmental protection measures. Despite these protection measures, there have been concerns about waste disposal in the region at research bases, the impact of increasing tourism and the threat of a major shipping incident. There have already been 12 significant shipping incidents in the last five years.<sup>6</sup> In November 2007, the 100 passenger cruise ship, The Explorer sank in Antarctica - the first ship to do so.<sup>7</sup>

### 1.1 The UK in Antarctica

The UK is a leading and active Party to the Antarctic Treaty and this helps the UK to protect its long-term interests in Antarctica.

The British Antarctic Territory (BAT) is the oldest territorial claim to a part of the continent, made in 1908.<sup>8</sup> Library Briefing Note [SN5040 Antarctica: the treaty system and territorial claims](#) explains the basis of the UK's claim.

The BAT is the largest of the UK's overseas territories and is administered directly from the Foreign and Commonwealth Office (FCO) as an Overseas Dependent Territory. The Territory includes the Antarctic Peninsula, which is the most heavily visited region of Antarctica. Around half of all the permanent year-round research stations are within the BAT and 95% of all tourists to the continent visit this part of Antarctica. Consequently the UK has considerable interest in ensuring that those who visit Antarctica, whether for scientific or tourism purposes, do so in a safe and environmentally responsible way.<sup>9</sup>

The UK has a long history in Antarctica in terms of exploration, scientific discovery and governance. The first sighting of the Antarctic coast is credited to Edward Bransfield, a Royal Navy officer, in 1820. Captain Robert Scott and Sir Ernest Shackleton led famous expeditions in the region in the early 1900s and the UK has maintained a permanent presence in the BAT since the Second World War when it established its first stations as part of a secret reconnaissance mission. These stations strengthened Britain's claim to the Falkland Island Dependencies (FID) and also provided an opportunity to undertake scientific research.<sup>10</sup>

In 1945 the bases were put under civilian control and became part of the Falklands Islands Dependencies Survey (FIDS) created within the Colonial Office as a means of achieving a permanent UK presence in Antarctica and its islands and waters. In 1962 FIDS was renamed the [British Antarctic Survey](#) (BAS). The BAS today is responsible for Britain's national

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<sup>4</sup> WWF Global website [wwf.panda.org](http://wwf.panda.org), [Antarctica](#) page [on 30 October 2012]

<sup>5</sup> See section 1.2 below

<sup>6</sup> HC Deb 12 September 2012 c138WH

<sup>7</sup> "[Ship accidents in Antarctica raise ecological and safety concerns](#)", *Travel Weekly*, 28 April 2009

<sup>8</sup> British Antarctic Survey website, [British Antarctic Territory](#) page [on 30 October 2012]

<sup>9</sup> Cm 7635, [Draft Antarctic Bill](#), November 2009, Executive Summary

<sup>10</sup> British Antarctic Survey, [British Research Stations and Refuges - History](#) webpage [on 30 October 2012]

scientific activities in Antarctica such as taking regular ice cores to monitor climate change.<sup>11</sup> It is of world renown and was the first to raise global concern over the depletion of the ozone layer.<sup>12</sup>

The previous Government's consultation on a draft Antarctic Bill summarised the Government's overall approach to its interests in Antarctica:<sup>13</sup>

...The UK protects its long-term interests in Antarctica by maintaining a highly influential position within the Antarctic Treaty System...

...The British Antarctic Territory includes the Antarctic Peninsula, which is the most heavily visited region of Antarctica. Around half of all the permanent year-round research stations are within the BAT and 95% of all tourists to the continent visit this part of Antarctica.

Consequently the UK has considerable interest in ensuring that those who visit Antarctica, whether for scientific or tourism purposes, do so in a safe and environmentally responsible way. The UK is therefore keen to ensure that the regulation of British activities in Antarctica is comprehensive and effective, such that it can be used as a model to encourage other countries to do likewise.

The FCO website declares the UK commitment to "protecting the unique Arctic environment, which is a perfect laboratory for science and exploration".<sup>14</sup>

Answering a recent Westminster Hall debate on Antarctica, FCO Minister Mark Simmonds gave assurances regarding the Government's commitment to supporting the current level of UK activity in the region, particularly scientific research and tangential matters. He also said that he wanted it placed "firmly on the record" that the UK is firmly committed to upholding the Antarctic treaty system, and took its responsibilities towards the proper governance and environmental protection of the British Antarctic Territory extremely seriously. However, he also noted that the Government was not complacent and needed to look consistently at what more "we must do to protect and promote the future of the continent".<sup>15</sup>

### ***Proposed merger of the British Antarctic Survey and National Oceanography Centre***

The Natural Environment Research Council (NERC) has recently [consulted](#) on a proposed merger of the [British Antarctic Survey](#) (BAS) and the [National Oceanography Centre](#) to create the NERC Centre for Marine and Polar Science. The consultation closed on 10 October 2012 and its findings are due to be reported in December 2012.<sup>16</sup>

NERC had already announced in June 2012 that there was a strong strategic case for such a merger for the following reasons:<sup>17</sup>

- Growing awareness of the scientific synergies between marine and polar science and the opportunities to integrate these areas of science more closely to address the most ambitious scientific questions;

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<sup>11</sup> Mike Richardson (Head of FCO Polar Regions Unit from 1992-2007), *NERC is not qualified to decide Britain's Antarctic Future*, Research Fortnight, 17 October 2012

<sup>12</sup> HL Deb 18 October 2012 c1614

<sup>13</sup> Cm 7635, *Draft Antarctic Bill*, November 2009, p.2

<sup>14</sup> FCO website, [Draft Antarctic Bill page](#) [on 30 October 2012]

<sup>15</sup> HC Deb 12 September 2012 c139WH

<sup>16</sup> [HL Deb 18 October 2012](#) c1614

<sup>17</sup> Natural Environment Research Council (NERC), *NERC/BAS merger consultation document*, June 2012

- The need for a long term vision for translating ocean and polar science into timely, beneficial economic and social impact, given the critical role of these “frontier environments” in addressing the challenges of increasing pressures on natural resources and rapid environmental change;
- Recognition of the increasing costs of providing major marine and polar infrastructure and of the need to plan and deliver this in the most cost-effective way, particularly at a time of downward pressure on public finances.

However, the proposal has been very controversial and has caused speculation about the future of BAS and the UK's commitment to polar research. NERC responded to this speculation pointing out that it had demonstrated its commitment to sustaining polar activity in spite of the financial constraints of its Comprehensive Spending Review settlement.<sup>18</sup> BAS was awarded a £42 million flat cash settlement for the whole period despite the 3% reduction in NERC's budget.<sup>19</sup>

In an October 2012 House of Lords debate on Antarctica marking the centenary of Scott's expedition, there was almost unanimous concern about the proposed merger with only Lord Willis of Knaresborough, a NERC board member, defending it.<sup>20</sup> Many were sceptical of the scope for savings or synergies beyond the organisation's current close collaboration in the southern oceans. Lord Oxburgh, a previous Chairman of the House of Lords Science and Technology Committee, noted that this had also been the outcome of a number of reviews most recently in 2012.<sup>21</sup>

Concern was also expressed in the debate that this proposal signalled a general weakening in the UK's commitment to Antarctica which may have repercussions for the UK's scientific standing and also have geopolitical implications in terms of our territory claim (especially as the British territory claims in Antarctica are in an area disputed with Argentina).

Jonathan Shanklin, one of the BAS scientists who discovered the hole in the ozone layer, has commented that the plans would “create a comparable hole in British Science”.<sup>22</sup> Mike Richardson, a previous Head of the FCO Polar Regions Unit (1992-2007) has also cautioned that the merger is a “dangerous path down which the UK ought not to proceed” and has advised that the proposals need to recognise the geopolitical significance of the BAS internationally and not deal with the proposals as an administrative exercise.<sup>23</sup>

In response to a recent Parliamentary Question by Chi Onwurah about UK presence in Antarctica and the proposed changes to the British Antarctic Survey, the Minister of State for Universities and Science, David Willetts confirmed that there was “at present no agreed plan to change the status of the British Antarctic Survey”. The Minister referred to the ongoing NERC consultation on the matter and said that any changes “would have no effect on the UK's commitment to scientific excellence in Antarctica nor on the existing footprint of scientific bases and research ships.”<sup>24</sup>

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<sup>18</sup> NERC, [Media statement on BAS/NOC merger proposal](#), 2 October 2012

<sup>19</sup> HL Deb 18 October 2012 c1617

<sup>20</sup> House of Lords Library Note [LLN 2012/034, Scott Expedition to Antarctica and Scientific Legacy, 15 October 2012](#), was produced for the Debate.

<sup>21</sup> *ibid*

<sup>22</sup> [HL Deb 18 October 2012 c1625](#)

<sup>23</sup> Mike Richardson (Head of FCO Polar Regions Unit from 1992-2007), [NERC is not qualified to decide Britain's Antarctic Future](#), Research Fortnight, 17 October 2012

<sup>24</sup> [HC Deb 23 October 2012 c851W](#)



## 1.2 The Antarctic Treaty

The Antarctic Treaty was signed in Washington in December 1959. Library Briefing Note [SN5040 \*Antarctica: the treaty system and territorial claims\*](#) covers the Treaty provisions in detail.

The UK was the first nation to ratify it in 1961 and enacted its obligations through the *Antarctic Act 1967*.<sup>25</sup> The Treaty's main purpose is to ensure:

...in the interest of all mankind that Antarctic shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.<sup>26</sup>

The Treaty came about at a time of seemingly, irreconcilable territorial disputes. By the 1950s, 83% of Antarctica had been claimed by seven countries in overlapping territories.

During the 1957-58 International Geophysical Year (IGY) scientists from 12 countries focused on Antarctica in an attempt to diffuse the situation and to encourage scientific co-operation. They installed 40 research stations and assembled in numbers that exceeded all previous visitors to the Continent.<sup>27</sup> The successes of this research venture and the degree of scientific co-operation which evolved encouraged the countries involved to demonstrate an unusual degree of international co-operation and foresight and to seek a permanent solution to the issue – the Treaty.

The Treaty demilitarised the continent and froze all territorial disputes relating to the continent in order to further peaceful scientific investigation and conservation there. Territorial claims still exist but parties to the Treaty are prevented from taking any action to further these claims or to generate new ones.

The UK is one of the original twelve Parties to the Treaty which meets annually along with those that demonstrate their interest in Antarctica by conducting substantial research activity there (together they are called the Consultative Parties). They meet to exchange information, consult on matters of common interest and to develop measures to further the principles and objectives of the Treaty.<sup>28</sup>

At meetings of the Consultative Parties to the Antarctic Treaty, more working papers have been prepared by the UK (the FCO and BAS together) than any other country.<sup>29</sup>

## 1.3 The Protocol on Environmental Protection to the Antarctic Treaty

The Protocol on Environmental Protection to the Antarctic Treaty was signed in Madrid in 1991 and the majority of it entered into force in 1998.<sup>30</sup> It designates Antarctica as a "natural reserve devoted to peace and science" (Article 2) and sets out basic principles applicable to human activities in Antarctica. It introduced stringent measures on environmental protection including a 50-year moratorium on mineral extraction (except for scientific research). Until 2048 the Protocol can only be modified by unanimous agreement of all the Consultative Parties to the Treaty and the prohibition on mineral resource activities cannot be removed

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<sup>25</sup> FCO website, [Draft Antarctic Bill](#) [on 30 October 2012 ]

<sup>26</sup> Antarctic Treaty Secretariat website, [Home page](#) [on 30 October 2012]

<sup>27</sup> House of Commons Library Research Paper 94/36, The Antarctic Bill [Bill 14 1993/94], 23 February 1994

<sup>28</sup> Secretariat of the Treaty website, [Meetings page](#) [on 30 October 2012]

<sup>29</sup> HL Deb 18 October 2012 c1621

<sup>30</sup> Annexes I-IV but Annex V (Protected Areas) was adopted later in 1991 and came into force in 2002

unless a binding legal regime regulating them is in force (Article 25.5). There is therefore "no foreseeable prospect of oil exploration or similar activity in the Antarctic".<sup>31</sup>

The Protocol established a Committee for Environmental Protection (CEP) specifically to address matters of environmental protection and provide advice to the Parties.<sup>32</sup>

### ***Annex VI to the Protocol - The "Liability Annex"***

Article 16 of the 1991 Environment Protocol to the Antarctic Treaty required member countries to negotiate an annex on comprehensive liability for harm to the Antarctic environment. This obligation was not popular with several countries, and this slowed down negotiations. It took several more years for the countries to agree on the liability annex - Annex VI to the Protocol "Liability Arising from Environmental Emergencies".<sup>33</sup>

The Annex was finally adopted in 2005 and aims to prevent irresponsible operations in Antarctica through contingency planning and emergency response requirements. It effectively introduces a "polluter pays" approach as it requires operators to take prompt and effective response action to any environmental emergencies arising from their activities, or where no such action is taken, it imposes financial liability on the defaulting operator.<sup>34</sup>

The Annex will enter into force when it is officially approved by all of the consultative parties which originally signed up to it. Part 1 of the Bill seeks to implement this Annex (see section 2.2 below). In the 2009 consultation on the Bill, stakeholders generally supported this approach suggested by the previous Government to avoid putting UK Antarctic operators at a significant disadvantage. Only WWF-UK pushed for an early introduction of the measures.<sup>35</sup>

## **1.4 Current UK Permitting Requirements**

The 1994 Act makes it an offence for a British expedition to enter Antarctica without the approval of the Secretary of State. A permit is required for any member of a British expedition, unless they have one from another contracting party to the Treaty. A "British" expedition can include non-UK nationals, but to be British has to be organised in the UK or have the UK as its place of final departure (this would include the Falkland Islands).

Specific permits are issued for particular activities such as the taking of flora and fauna and the introduction of non-native animals or plants. Permits are not needed for ships or aircraft travelling on to an immediate destination outside Antarctica or fishing vessels unless they are linked to an expedition.

The current permit requirements for British expeditions entering the Antarctic were introduced through the [Antarctic Act 1994](#), which implemented the Treaty's [Protocol on Environmental Protection](#) and its various requirements covering matters such as waste disposal and marine pollution. The FCO provides a comprehensive guide to the requirements when planning an expedition to Antarctica on its [Planning an Expedition](#) page.

Essentially, permit applications must show that adequate contingency measures have been put in place to deal with health and safety issues, any medical emergencies (including evacuations) and provide adequate search and rescue arrangements. There is also a requirement to ensure adequate insurance to cover the cost of any of the above and to be able to demonstrate sufficient experience and sound equipment.

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<sup>31</sup> Bill 14-EN, Explanatory notes - Antarctic Bill, Session 2012-13, para 5

<sup>32</sup> Secretariat to the Antarctic Treaty, [The Protocol on Environmental Protection to the Antarctic Treaty](#) web page [on 30 October 2012]

<sup>33</sup> Antarctic and Southern Coalition website, [Liability for Environmental Damage](#) [on 30 October 2012]

<sup>34</sup> Cm 7635, [Draft Antarctic Bill](#), November 2009

<sup>35</sup> FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010, para 33

## ***Environmental Requirements***

The Antarctic is a pristine and highly sensitive environment. The accumulation of waste products has been a problem in the region in the past, particularly around research stations. To ensure minimal impacts part of the permit application process requires the completion of a Preliminary Environmental Impact Questionnaire. Depending on the potential impact of any activity a more rigorous Environmental Evaluation may be required. The FCO states that it “*will not normally authorise activities for non-scientific purposes which are likely to have more than a minor or transitory impact on the Antarctic environment.*”<sup>36</sup>

## **2 The Bill**

### **2.1 Overview**

The [Antarctic Bill](#) and [explanatory notes](#) are available online. The Bill seeks to improve the environmental protection and governance of activities in Antarctica, amending the *Antarctic Act 1994* and implementing international agreements as a Party to the Antarctic Treaty.

The Bill is in two parts:

#### Part 1

- implementation of the 'Liability Annex' to the Antarctic Treaty's Environmental Protocol.
- to put onto a legal footing the current requirement that all British Antarctic expeditions have adequate contingency and safety plans.

#### Part 2

- amendment of the 1994 Act to allow the FCO to permit foreign nationals on British led expeditions, and to give additional protection for the Antarctic environment.<sup>37</sup>

The Bill has Government support as a measure that "will ensure that our domestic legislation is among the most comprehensive in the world" as well as enhancing Britain's international leadership and strategic interest.<sup>38</sup>

### ***2009 Consultation on the draft Antarctic Bill***

The previous Government consulted on a [Draft Antarctic Bill](#) in November 2009 (Cm 7635). This had the same core elements as Mr Carmichael's Bill but the latest Bill now covers some of the substantive technical issues highlighted in the consultation. Overall, the [responses to the consultation](#) published in April 2010, were supportive and many stakeholders welcomed the UK taking a leading position in seeking to be the first to ratify the Liability Annex (see section 1.3). However, concerns were raised around:

- the level of liability that might be incurred by smaller expedition operators or commercial fishing operators
- whether it would be expedition organisers or their employees who would be liable for any damage.

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<sup>36</sup> FCO website, [Travelling to Antarctica - Permits for Expeditions](#) [ on 30 October 2012]

<sup>37</sup> FCO website, [Draft Antarctic Bill](#)[ on 30 October 2012]

<sup>38</sup> HC Deb 12 September 2012 c139WH

The previous Government published its [response](#) in April 2010 confirming that amendments would be made to address these issues and then a bill put forward as soon as Parliamentary time was available.<sup>39</sup>

The Bill does not contain what was Part 2 of the draft Bill covering the requirement for contingency and safety planning to include search and rescue, for all British operators regardless of the country granting their permit. According to FCO officials this can be addressed through the permitting system and will not require legislation. Contingency and safety plans would not be able to rely on others in Antarctica without their express permission, to minimise the possibility of rescue attempts by those ill-equipped to respond.<sup>40</sup>

The original 2009 consultation also made reference to a number of areas where the FCO would provide further guidance and suggested the establishment of an Expert Advisory Group to consider the recoverable costs in cases where no action was taken in response to an environmental emergency.<sup>41</sup>

## 2.2 Part 1: Environmental Emergencies

Part 1 of the Bill implements the Liability Annex to the Protocol (see above) which obliges Antarctic Treaty Consultative Parties to require their Antarctic Operators (Governmental and Non-Governmental) to:

- take preventative measures and to establish contingency plans in order to reduce the risk of environmental emergencies in Antarctica
- take prompt and effective response action to environmental emergencies arising from their activities (Article 5 (1))
- obtain insurance, or other financial guarantees, to reimburse another party or pay into a special fund, the costs of response action to an environmental emergency arising from their activities, which the operator, did not or could not undertake or organise themselves.

An environmental emergency is defined as "an accidental event that results in, or imminently threatens to result in, any significant harmful impact on the environment of Antarctica."<sup>42</sup> Certain emergencies are excluded from the requirements. These include those caused by: an act of terrorism, an act or omission necessary to protect human life or safety, or a natural disaster where appropriate preventative measures had been taken (Clause 9 subsection 5).

Currently there is no requirement for expeditions to have contingency plans to deal with any environmental emergencies. It is likely that the measures in the Bill will become part of the current permitting process.<sup>43</sup>

Clause 9 sets out the general exclusions to the liability provisions. A person organising activities as an employee of another person and someone in the course of service in the regular forces or reserve forces (including training) is exempt from criminal and civil liability under Part 1 of the Bill. In line with the original Annex, fishing for profit or activities on vessels or aircraft in Antarctica but in transit to another destination are also not covered by Part 1 of the Bill.

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<sup>39</sup> FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010

<sup>40</sup> House of Commons Library Standard Note, SN06388, The Antarctic Bill, 23 July 2012

<sup>41</sup> For example, FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010, para 9

<sup>42</sup> Clause 13 subsection (3)

<sup>43</sup> As was the stated intention in FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010, para 9

Clause 12 allows the Secretary of State to make orders via statutory instrument to respond to different cases or circumstances and supplement the Bill. These would be subject to the [negative procedure](#) i.e. become law unless there is an objection in either House.

The UK is the first nation to adopt these measures in domestic legislation. However, the liability provisions will not come into force until all the international parties to the Antarctic treaty have adopted them. FCO Minister, Mark Simmonds, recently commented that:

"By acting now and leading the way on this useful protection, we will be at the forefront in regard to influence and we will thereby strengthen our leadership role, without tying our hands by adopting rules that other countries do not."<sup>44</sup>

He described the measures as offering a:

"targeted, proportionate and reasonable way to implement our international obligations".<sup>45</sup>

The Liability Annex does not specify what mix of sanctions should be used when it is implemented into domestic legislation. The Bill proposes a mixture of criminal and civil sanctions to give consistency with the *Antarctic Act 1994* and to provide the maximum protection to the Antarctic environment.

### 2.3 Duty to take response action (Clause 1)

Clause 1 of the Bill introduces a new statutory duty on those organising activities in Antarctica (government and non-government) to take "reasonable, prompt and effective response action" where their activities directly or indirectly give rise to an environmental emergency. The duty only applies to activities organised by a person based in the UK or activities connected with the UK.

A response action is defined for this clause, and Part 1 of the Bill in general, as "measures taken after the emergency to prevent, minimise or contain its impact".<sup>46</sup> It is deemed "reasonable" if it is appropriate, practicable and proportionate. It must also be based on objective criteria and available information.<sup>47</sup> The Bill specifies that the latter includes:

- risks to the environment of Antarctica and the rate of its natural recovery
- risks to human life and safety and
- technological and economic feasibility<sup>48</sup>

and that a reasonable response will always be one which includes determining the extent and impact of an emergency and *may* include clearing up after it.<sup>49</sup>

Failure to make such a response is made a criminal offence with an associated maximum two year custodial sentence or fine or both. In determining the level of fine, it is proposed that the court can take into account the costs which should have been incurred from an

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<sup>44</sup> HC Deb 12 September 2012 c139WH

<sup>45</sup> HC Deb 12 September 2012 c139WH

<sup>46</sup> Clause 13 subsection (5)

<sup>47</sup> Clause 13 subsection (6)

<sup>48</sup> Clause 13 subsection (7)

<sup>49</sup> Clause 13 subsection (8)

appropriate response unless those costs had separately been recovered through civil proceedings.

### **Stakeholder comment**

WWF-UK pointed out in the 2009 consultation that the definition of an "environmental emergency" did not sufficiently cover instances where damage had perhaps been caused through a mis-evaluation of any potential impacts (including cumulative impacts) made in pre-assessments. The Government felt that although such impacts were important, they were not emergencies as defined in the Annex which the Bill seeks to implement. The Government pointed out that taking into account such impacts was already an intrinsic part of the Environmental Protocol, which was implemented through the *Antarctic Act 1994* in the UK. However, the Government did agree that the issue of cumulative impact assessments was a matter that required further attention by the Antarctic Treaty Consultative Meeting.<sup>50</sup>

The International Group of P&I Clubs, a group of organisations providing protection and indemnity cover for shipping, sought clarification that passive monitoring should be considered as an acceptable and reasonable action. The Government accepted that in "some circumstances" passive monitoring might be the most appropriate response action and felt that the draft Bill allowed for this.<sup>51</sup>

## **2.4 Civil Liability for failure to respond to environmental emergency (Clauses 2-4 and Schedule)**

The Liability Annex encourages parties to take response action to environmental emergencies in Antarctica where those causing them have failed to do so. Clauses 2-4 set out a framework enabling the Parties to recover their costs from non-governmental operators in such a situation and the recovery is not limited solely to those who are subject to the response action duty set out in Clause 1 (see section 2.3 above). The costs that can be recovered are the costs that should have been occurred if appropriate action had been taken (in the same manner as applies by Clause 1).

Clause 2(2) enables the Government to recover costs when the "Crown" or a "person specifically authorised by the Crown" has had to take action to respond to an environmental emergency in lieu of action by UK based organisers of the activities or those whose activities are connected to the UK. The explanatory notes to the Bill suggest that the most likely Crown entity to be involved would be the Royal Navy or the British Antarctic Survey.

Subsection (3) allows other Parties to the Annex to also seek to recover their costs through the British courts in UK-related scenarios.

Clause 2 does not apply where the Crown and other Parties to Annex VI have failed to take appropriate response action in relation to their own activities and another State has. This is because Article 7(4) of the Annex stipulates a set of international mechanisms for determining the liability of a Party as a state operator under Article 6 (1).<sup>52</sup> This includes the Antarctic Treaty Consultative Meeting mechanisms, which include a State arbitration process.

The civil liability proceedings enabled in these clauses are time limited, as required by Article 7(1) of the Annex, and have to be brought within three years of the response action being taken or if later, within three years of having ascertained (or when it was reasonable to have

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<sup>50</sup> FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010, para 3

<sup>51</sup> FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010, para 2

<sup>52</sup> [Bill 14-EN](#), para 18

ascertained) the identity of the person organising the activities. In the latter case, the proceedings have to be brought within 15 years of the response action being taken (subsections 6-8).

### ***Liability to Antarctic Environmental Liability Fund (Clause 3)***

In cases where no response was taken to an environmental emergency by either the operator responsible or a Party to Annex VI, Clause 3 requires the operator responsible to pay the equivalent costs of the response action that should have been taken into an Antarctic Environmental Liability Fund. If that is the Crown then the Secretary of State responsible for the activities in question makes the payment. If the activities are UK organised or UK connected the money can be recovered through the UK courts as if it were a debt to the Secretary of State. The explanatory notes to the Bill suggest that this would, in practice, be the Foreign Secretary.<sup>53</sup>

Article 12 of the Liability Annex provides for such a fund to be maintained and administered by the Secretariat of the Antarctic Treaty.<sup>54</sup>

### ***Civil Liability: Supplementary (Clause 4 and Schedule)***

The Schedule to the Bill sets out some of the finer detail about limits to the costs recoverable and how liability can be apportioned.

#### *Liability limits*

The Schedule sets out the limits to the amounts recoverable in the Bill's civil liability framework (Clauses 1 and 2) as per Article 9 of the Liability Annex.

The limits are set in terms of the International Monetary Fund's [Special Drawing Rights](#) (SDR). These provide a means of setting limits at a standard value which will not date or fluctuate as much as setting a single currency amount. SDR is calculated as the sum of specific amounts of a basket of four currencies: the euro, Japanese yen, pound sterling and the U.S. dollar, which are then valued in U.S. dollars, on the basis of exchange rates quoted at noon each day in the London market. A U.S dollar-equivalent is posted daily on the IMF's website.<sup>55</sup>

The Schedule (paragraph 2) sets out a scale of limits for an environmental emergency involving a "ship" (any vessel or floating platform) by tonnage. The scale starts at one million SDR (approx \$1.5 million) for a ship up to 2,000 tons and then specifies SDR per ton for different weight ranges.<sup>56</sup> The explanatory notes to the Bill suggest that the largest passenger cruise vessels which have operated recently in Antarctica could be liable for more than US\$45 million. A limit equivalent to US\$4.5 million (3 million SDR) is applicable to environmental emergencies which do not involve ships i.e. land-based operations.<sup>57</sup>

The Secretary of State can alter these limits by order to effect any amendments that are made in the future to Article 9 (1) of the Liability Annex (subsection 4).

An environmental emergency may also invoke liability under the *Merchant Shipping Act 1995*. In this scenario, if the Bill provisions would produce a lower liability result then these provisions will not apply (paragraph 2, Schedule 4). Hence, these liability limits would be the

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<sup>53</sup> [Bill 14-EN, para 23](#)

<sup>54</sup> [Bill 14-EN, para 20](#)

<sup>55</sup> International Monetary Fund, [SDRs Factsheet](#), 24 August 2012

<sup>56</sup> Based on SDR of 1USD=SDR 0.65081 on 24 October 2012

<sup>57</sup> [Bill 14-EN para 24-25](#)

very least that could be recovered. Paragraph 5 of the Schedule sets out how payments would work when there is overlap with the 1995 Act.

#### *Applicability to smaller ships*

During the 2009 consultation, a number of respondents raised concerns over the level of financial limits of liability. In particular, that they were not appropriate for small, independent vessels i.e. under 100 tons. Independent operators felt that such smaller vessels were not capable of causing environmental damage at such a level and were totally different from a ship of the 2,000 ton size (the top end of the lowest size range in the schedule of limits). The addition of a further sliding scale to provide lower limits for such small cruisers was suggested. Equally the limit on the amount of liability for a land expedition of 3 million SDR was considered by some to be too high for the smallest of land-based operations.

The Government responded that this issue had been raised during the negotiations on the Liability Annex but consensus was eventually reached on the limits included in the Bill. In those discussions the Antarctic Treaty Parties apparently 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. The Government response advised:

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.<sup>58</sup>

## **2.5 Preparatory Measures**

### ***Duty to take preventative measures and make contingency plan (Clause 5)***

Clause 5(2) requires the organiser of UK-connected activities in Antarctica to take reasonable preventative measures to reduce the risks and potential adverse impacts of connected environmental emergencies. Subsection (3) provides some examples of such measures in relation to specialised structures, procedures and training, and indicates that these measures need to be taken before entering Antarctica.

The person must also make a contingency plan for responding to environmental emergencies and other incidents with a potential adverse impact on the Antarctic environment "which result from or affect the carrying on of the activities" (subsection 4(b)). Subsection 5 suggests examples of what could be included and these are centred around including plans to demonstrate how the key Part 1 duties are being met. For example, in relation to taking response action and providing information.

### ***Insurance relating to environmental emergencies (Clause 6)***

Clause 6 requires that anyone organising activities in Antarctica has "adequate insurance cover or other financial security" (e.g. bonds and bank guarantees) to cover the costs of any response action related to the environmental emergency and civil liability provisions of Part 1 of the Bill. To be adequate it cannot be subject to any "limitation, exception or exclusion" which would make it "fundamentally deficient" in covering these costs and the various limits on liability set out in the Schedule to the Bill.

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<sup>58</sup> FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010, para 12



Failure to have the necessary cover or security carries a possible two year prison sentence and/or fine. This requirement does not apply to the Crown or other Parties to Annex VI reflecting the original assumption that governments usually self-insure.<sup>59</sup>

The 2009 Government consultation suggested that setting a criminal sanction was intended to provide a deterrent against failure to secure the necessary financial security. At the time it was intended that the penalty would only be used as a last resort. Since the vast majority of activities in Antarctica take place in the BAT, the UK needs to be sure that there are incentives (such as cost recovery) for response action to be taken when necessary.<sup>60</sup>

## 2.6 Information (Clauses 7 and 8)

Clause 7 introduces a duty to inform the Secretary of State promptly (as soon as practicable) about an environmental emergency. The duty falls on anyone organising activities in Antarctica (connected with the UK) or their employees when they become aware of such an emergency, *even* if they did not cause it. Clause 8 allows the Secretary of State to give a notice to require information from a person organising UK-connected activities in Antarctica if it appears that they have directly or indirectly caused an environmental emergency or an incident with a "potential adverse impact on the environment of Antarctica". It is an offence not to comply with the notice unless a person does not have the information required and could not reasonably have been expected to obtain it.

Failure to meet either of these requirements can confer a two year jail term and/or a fine. Ultimately these requirements would help the Government to seek expert advice in the event of an environmental emergency, assess whether the operators require further assistance and perhaps alert others in the area.<sup>61</sup>

## 2.7 Part 2

Part 2 of the Bill implements agreed revisions to Annex II of the Environmental Protocol on the Conservation of Antarctica flora and fauna and generally tidies up the implementation of the original Treaty (signed in 1959 and brought into force in 1961) and subsequent agreements.<sup>62</sup>

The Bill proposes to:

- give marine plants and invertebrates protection for the first time. The revisions provide this additional protection particularly in response to climate change and an enhanced understanding of the fragile Antarctic environment.
- introduce measures to conserve British Historical Sites and Monuments in Antarctica better.
- update the *Antarctic Act 1994* to facilitate better regulation of British activities in Antarctica, including to respond to the increasing internationalisation of Antarctic expeditions.

These provisions would come into force two months after the Act is passed (Clause 18 subsection 2).

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<sup>59</sup> Bill 14-EN, Explanatory notes - Antarctic Bill, Session 2012-13, para 40

<sup>60</sup> Cm 7635, *Draft Antarctic Bill*, November 2009, para 4.22

<sup>61</sup> *Ibid*, para 4.23

<sup>62</sup> *Ibid*

## 2.8 Non-nationals (Clause 14)

Clause 14 amends the *Antarctic Act 1994* to enable the UK to grant permits to non-British nationals on British expeditions. For example, this will enable foreign scientists working in the UK to apply to the UK for authorisation, rather than to their national Governments. At present non-UK nationals are not eligible for a UK permit even if their activity is to take place on an expedition organised by a British scientific institution. The explanatory notes to the Bill highlight that this has caused previous inconvenience to UK institutions employing non-UK nationals and could even prevent a national of a state which is not party to the Protocol from being issued a permit at all.<sup>63</sup>

BAS, one of the key stakeholders most affected by this measure, has been supportive of this move.<sup>64</sup>

## 2.9 Permits for Historic Sites and Monuments (Clause 15)

Human exploration in Antarctica is marked by a number of historic sites and monuments including the huts built by Captain Robert Scott and Sir Ernest Shackelton.

Clause 15 allows for a new permit covering the conservation or repair work of designated Historic Sites and Monuments in Antarctica to be authorised through the *Antarctic Act 1994* permitting regime. This regime protects historic sites and monuments in line with Annex V to the Protocol and makes it an offence (Section 10) to damage, destroy or remove any part of a historic site or monument. The amendment ensures that effective conservation management can take place which might involve the removal or relocation of a protected site or monument.

## 2.10 Conservation of animals and plants (Clause 16)

Clause 16 makes a number of amendments to the *Antarctic Act 1994* which were largely welcomed in the 2009 consultation. It seeks to make the following changes:

- **the extension of environment protection measures to a wider range of species**
  - marine invertebrates** and plants to be included in any protection of "native invertebrates" and "native plants" in the 1994 Act (*Subsection 9*)
  - native invertebrates** to be afforded the same protection as native plants so that it is an offence to remove or damage such quantities that the local distribution will be significantly affected unless authorised (*Subsection 2*)
  - species present in Antarctica due to natural migration** to be included in provisions as indigenous species. This reflects revisions to Annex II of the Protocol which offer this protection and acknowledge the impact of climatic changes in such migration.<sup>65</sup> (*Subsections 9 and 10*)
- **prohibiting the keeping of animals on board vessels in Antarctica** unless the animal is a recognised assistance dog or the vessel is only in transit across the Antarctic Marine Area. This amends Section 8 of the 1994 Act. It removes an existing exception to the offence of introducing a non-indigenous species into Antarctica which allowed animals and plants on ships as long as the animal remained on board.

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<sup>63</sup> Bill 14-EN, Explanatory notes - Antarctic Bill, Session 2012-13, para 54

<sup>64</sup> FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010, para 25

<sup>65</sup> Bill 14-EN, Explanatory notes - Antarctic Bill, Session 2012-13, para 65

This is in line with many other Antarctic Treaty Parties' domestic legislation.<sup>66</sup> (*Subsection 4*)

- **prohibiting the non-authorised introduction of any microscopic organism of a non-native species into Antarctica.** This is not an offence if a person takes reasonable precautions and does not include an organism inhabiting the human body or the body of an animal (*Subsection 6*)
- **prohibiting the introduction of non-sterile soil into any part of Antarctica** unless the person took reasonable precautions to prevent this. The latter caveat was added after concerns were raised in the consultation about visitors accidentally having trace amounts of soil on clothes and shoes and the provision going further than the original provision in Annex II.<sup>67</sup> (*Subsection 8*)

### **Stakeholder comment**

Stakeholders were asked, as part of the 2009 consultation, if there were any other areas that they wanted to see amended. The Joint Nature Conservation Committee suggested a ban on the redistribution of indigenous species between biologically distinct areas within Antarctica. The Government felt that this was a matter where there was still not international consensus and that as such it was too early to include it in domestic legislation.<sup>68</sup>

WWF-UK pushed for the protection of fish species along similar lines to those of marine plants and invertebrates. However, the Government felt that the protection of Antarctic fish stocks was best pursued through the [Convention for the Conservation of Antarctic Marine Living Resources](#).<sup>69</sup> This Convention provides for the conservation of the Antarctic marine environment and as a result of a UK proposal there is a large marine protected area in the Southern Ocean. The Convention was a response to concerns that unregulated krill catches in the Southern Ocean were threatening Antarctic marine ecosystems because many seabirds, seals, whales and fish rely on krill for food.<sup>70</sup>

The FCO Minister, Mark Simmonds recently confirmed that the UK is a key player in the [Commission for the Conservation of Antarctic Marine Living Resources](#), which upholds the Convention and is working with other members of the Commission to promote further areas of protection.<sup>71</sup>

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<sup>66</sup> Explanatory notes, para 61

<sup>67</sup> FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010, para 29

<sup>68</sup> FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010, para 30

<sup>69</sup> FCO, [Government response to the consultation on the Draft Antarctic Bill](#), April 2010, para 27

<sup>70</sup> Commission for the Conservation of Antarctic Marine Living Resources website, [History of the Convention](#) page[ on 30 October 2012]. Krill are a shrimp-like source of protein.

<sup>71</sup> HC Deb 12 September 2012 c139WH