DEPARTMENT OF ENERGY & CLIMATE CHANGE

Implementation of changes to the Paris and Brussels Conventions on nuclear third party liability

Summary of responses and Government response to consultation

March 2012

Contents

Executive Summary

1. The Government carried out a consultation on the implementation of the changes to the Paris Convention on nuclear third party liability and the Brussels Supplementary Convention ("the Conventions") between 24 January and 28 April 2011. This document summarises the responses to the consultation and sets out the Government's response and proposed action.

2. In total we received 83 responses of which: 1 was from a Government Agency; 1 from a Member of Parliament; 3 were from Local Authority representatives; 14 from NGOs; 18 were from nuclear industry representatives (including nuclear operators, trade associations, waste disposal operators, insurance market representatives); and 46 from members of the public. We would like to thank all those who responded to the consultation. The Government response also reflects ongoing discussions with industry stakeholders, international counterparts and others.

The Government response

3. The Government intends to implement the proposals set out in the consultation paper taking account of the responses submitted as described below. The Government's updated proposals will be given effect largely by amending the Nuclear Installations Act 1965 ("the 1965 Act") by means of an Order made under section 76 of the Energy Act 2004. A draft Order was included in the Government's consultation. The Government's aim is to bring forward the Order in accordance with the timetable on page 9.

New categories of damage (as set out in Chapter 4)

4. The Government will implement the proposals on the new categories of damage as set out in the consultation paper. This means that the scope of the damage for which compensation can be claimed will be extended to include, in addition to personal injury and loss of life ("personal injury") and property damage (i) economic loss arising from property damage; (ii) the costs of measures of reinstatement of the impaired environment; (iii) loss of income deriving from a direct economic interest in any use or enjoyment of the environment; and (iv) the costs of preventive measures. In addition, on the basis of the responses submitted during consultation Government has decided:

   a) types of claims will not be prioritised. This means that claims will be considered and compensated on a first come-first served basis;

   b) we will make express provision to address the risk of 'double compensation'. The Government is considering giving the courts additional powers, for example in the case of a claim for the costs of environmental

reinstatement measures, to reduce the compensation to take into account compensation already paid under a claim for property damage;

c) we will not expressly include compensatory remediation in the definition of the measures of reinstatement for which claims can be made;

d) we will make provision in the 1965 Act for a threshold for a "grave and imminent threat" of a breach of duty in line with the Radiation (Emergency Preparedness and Public Information) Regulations 2001 threshold for implementing emergency plans;

e) we will continue to work on ensuring there is a workable interface between the 1965 Act and relevant regulatory regimes. In particular, we are considering amending the radioactive contaminated land regime for England so that it directly gives effect to the costs of measures of reinstatement category of damage and excluding from the 1965 Act what is covered by the radioactive contaminated land regime so there is no direct overlap;

f) with regard to the loss of income deriving from a direct economic interest in any use or enjoyment of the environment, we remain of the view that this category of damage should not be wide in scope and we plan to revise proposed new section 11G of the 1965 Act to reflect this.

Geographical scope (Chapter 5)

5. The Government will implement the extended geographical scope of the Paris Convention so that compensation will be available for damage suffered in certain non-Paris countries (non-nuclear countries and certain other countries that have equivalent reciprocal arrangements) as well as the UK and other Paris countries. We will also reflect the establishment of countries' maritime zones and the more restricted geographical scope of the Brussels Supplementary Convention in our amendments to the 1965 Act. The Government has decided to revise its proposals so as to:

- retain section 13(2) of the 1965 Act, which allows claims to be brought for injury or damage suffered within the territorial limits of a non-Paris Convention country on board a ship or aircraft registered in the UK.

- for the purposes of defining who can benefit from additional Brussels Convention funding when they suffer damage in certain maritime areas, adopt a definition of UK national that includes the following categories of individual:

    i. British citizens
    ii. British overseas territories citizens
    iii. British overseas citizens
    iv. British national (overseas)
    v. British subjects

vi. British protected persons

6. We will also ensure that Article 2(c) of the Brussels Convention (which says that “a national of a Contracting Party” shall include a Contracting Party or any of its constituent sub-divisions, or a partnership, or any public or private body whether corporate or not, established in the territory of a Contracting Party) will be given effect in the changes to the 1965 Act.

Limitation periods (Chapter 6)

7. Government will proceed as indicated in the consultation paper and impose a limitation period of 10 years from the date of an occurrence (or event) for claims against an operator for property damage and the new categories of damage. In the case of claims against an operator for personal injury we will extend the limitation period to 30 years. Beyond these limitation periods, it will not be possible to bring claims for injury or damage against the Government.

8. Radiation-induced personal injury arising from preventive measures will benefit from the longer 30 year limitation period but the 10 year limitation period will apply to claims for ‘ordinary’ personal injury caused by preventive measures.

Liability during transport (Chapter 7)

9. The Government plans to implement its proposals set out in the consultation paper for giving effect to the amendments to the Paris Convention so that during the carriage of nuclear substances liability may only be transferred between Convention operators where the receiving operator has a direct economic interest in the nuclear substances being carried.

10. We agree with the responses that said that it would be desirable to have guidance on liability during transport. We agree that the Nuclear Decommissioning Authority’s Site Licence Companies should be regarded as having a “direct economic interest” in the nuclear substances they deal with on behalf of the NDA and propose to make this clear in the amendments to the 1965 Act.

11. On the question of liability for nuclear substances when they transit an operator’s site, the Government agrees with respondents that difficulties may arise if more than one operator is liable for nuclear substances on a particular site. Therefore, having considered the arguments put forward by respondents the Government proposes not to implement either of the options identified in paragraphs 7.11 and 7.12 of the consultation paper. Rather we will ensure that the all-embracing approach is retained and that the host operator will have liability in respect of the transiting nuclear substances. We believe this approach can be justified under the revised Paris Convention.

Financial liability levels (Chapter 8)

12. The Government has decided to implement the proposals set out in the consultation paper and will set operator liability at:

- €1200 million for standard sites (compared to £140 million that has been in place since 1994); this will be introduced at €700 million and will rise annually by €100 million per year over 5 years;
- €70 million for low risk sites; and
- €80 million for low risk transport.

13. The levels of third party liability for low risk sites and transport are the minimum that can be set under the revised Paris Convention. The Government will consider options for setting a third party liability of less than €1200 million for "intermediate level" sites.

14. The Government is considering with regulators and stakeholders appropriate criteria for determining the type of transport that should benefit from the lower level of liability.

Availability of insurance or other financial security (Chapter 9)

15. Operators are required to have insurance or other financial security to cover their third party liabilities under the Paris Convention. The consultation responses and the independent advice[1] commissioned by Government in the summer of 2011 (set out at Appendix 1) has broadly confirmed the position of the insurance market as able to cover most of the liabilities arising from the new categories of damage but that there may be gaps in the cover for which the operator will have to identify alternative sources of financial security.

16. Government has stated previously[2] that it would consider stepping in to fill any gap in the provision of commercial insurance or other financial security in return for a charge, if the market is unable to provide. We maintain this position in light of the responses received, subject to any EU and UK law requirements.

17. In addition, the availability and structure of any government intervention will take into account the insurance market response to the final version of the Order, so cannot yet be finalised. We have assessed the current position by working with industry and independent consultants and their advice is set out in Appendix 2[3].

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1 Report to Department of Energy and Climate Change on the commercial insurability of the increased liabilities following implementation of the Paris and Brussels Conventions in the UK – INDECS Consulting Ltd, October 2011

2 Written Ministerial Statement by Secretary of State 18 October 2010 – http://www.decc.gov.uk/en/content/cms/news/en_statement/en_statement.aspx

3 Report to Department of Energy and Climate Change on structure and pricing of suggested solutions to gaps arising from Paris and Brussels implementation, INDECS Consulting Ltd, November 2011

Jurisdiction (Chapter 10)

18. The Government will implement the proposals set out in the consultation paper. These are to exercise the option to claim jurisdiction over an area in lieu of an exclusive economic zone (EEZ), by notifying the UK's Renewable Energy Zone and/or the Gas Importation and Storage Zone at the time the revisions to the Paris Convention are ratified[4].

19. In the context of giving effect to the single court requirement in the revised Paris Convention, the consultation paper suggested that where criteria for allocating claims between the High Court of Justice, the Court of Session and the High Court of Northern Ireland resulted in more than one court having jurisdiction, allocation of jurisdiction should be based on the likely impact of an incident. However, as it seems it could be very difficult and costly to establish the likely impact, the Government would like to provide that the High Court of Justice (for England and Wales) should have jurisdiction in the event a tie-breaker situation arises. The Scottish Executive has agreed this approach and the Northern Ireland Departments have been kept informed.

20. The Government does not intend to include a narrower definition of "occurrence" than we proposed in the consultation paper. However, we will make provision in the Order amending the 1965 Act to ensure that it is clear that contamination or emissions that have taken place prior to the coming into force of the revised liability regime will be dealt with under the current 1965 Act regime.

Nuclear waste disposal facilities (Chapter 11)

21. The Government has decided to pursue the proposals as set out in the consultation paper. It will apply the third party liability regime in the revised Paris Convention to nuclear waste disposal sites but without extending the existing 1965 Act nuclear licensing regime to them.

22. However Government believes that low level and very low level (V/LLW) nuclear waste disposal facilities do not present a sufficient level of risk to warrant inclusion in the Paris liability regime. Therefore the UK is proceeding with its application for the exclusion of these facilities to the Steering Committee of the OECD Nuclear Energy Agency (NEA) under which the Conventions are managed. It has raised the issue of excluding V/LLW facilities from the Paris regime with the Nuclear Law Committee (NLC) - one of the standing technical committees under the Steering Committee. The NLC has asked the UK to prepare its proposal and initiate the approval process. The UK Government will now work with the UK regulators, operators and others to develop the proposal and criteria for excluding V/LLW facilities. Exclusion of V/LLW disposal facilities from the Paris liability regime does not mean that these facilities would not be subject to regulatory control or third party liability (under the ordinary law) if damage was caused by an incident at a site.

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[4] Assuming an EEZ has not been established for the UK .

23. There is no guarantee that the NEA Steering Committee will grant such an exclusion and, even if it does so, there is little possibility that it will be granted by the time the revised legislation comes into force. There will therefore be an interim period - possibly for several years - where such V/LLW disposal facilities will fall under the liability regime and will be required to meet the obligations of having the necessary financial security or insurance. We believe that such facilities will fall under the category of low risk sites and would have a liability cap of €70m.

Representative actions (Chapter 12)

24. The Government has decided to pursue the proposals as set out in the consultation paper. These include new provisions to allow the governments of other countries to bring 'representative' proceedings in the UK on behalf of persons who are nationals of the country in question or who are domiciled or resident in that country. The provisions will also allow the Secretary of State to bring 'representative' actions in the courts of other Paris countries or countries offering reciprocal liability arrangements on behalf of UK nationals, and those who are domiciled or resident in the UK.

25. Some changes to court rules of procedure in England and Wales will be needed to allow implementation of the new provisions to allow foreign governments to bring representative actions in the UK. We are liaising with Scotland and Northern Ireland on any rule changes that may be needed in these jurisdictions.

26. The Government agrees that the regime should be 'opt-in', rather than 'opt-out', that the 'loser pays' principle should be retained and that judgments resulting from an action brought by a foreign government in the UK should be binding on those on whose behalf the foreign government is acting. The Government is considering whether additional measures are needed to deter unmeritorious claims and to take into account the special position of foreign governments and other claimants (for example, as regards costs recovery).

Other points

27. During the consultation period the major earthquake and tsunami occurred in Japan (March 2011), with the consequent impact on the nuclear power plants at Fukushima Daiichi. A number of the responses from individuals and NGOs commented that Government should halt the consultation until the outcome of Fukushima could be assessed and the proposals reconsidered.

28. We considered these concerns and delayed publication of the Government response until we had considered the Chief Nuclear Inspector's final report which was published[5] in October 2011. The Chief Inspector's report does not raise issues relating to liability.

[5] http://www.hse.gov.uk/nuclear/fukushima/final-report.pdf

29. The financial consequences of Fukushima continue to emerge. The NEA and the Contracting Parties to the Conventions, of which the UK is one, will keep developments under review and may in the future decide to revise the Conventions in light of further information from the events at Fukushima. In the meantime the Government and other Contracting Parties believe the right thing to do is to make improvements in the third party liability regime as soon as we can. Going ahead with our implementation of the current revised Paris and Brussels Conventions will significantly improve the current liability regime; it will increase the financial responsibility placed on nuclear operators and increase the scope of damage for which victims can claim and the amount of compensation they can claim.

Next steps

The next steps towards implementation of these changes are:

Expected timing	Activity
Now until summer 2012	Revise and finalise Order.
Autumn 2012	Legislative process: Order laid before Parliament. Timing of debates in both Houses will be subject to Parliamentary business.
Summer/Autumn – end 2012	Operators to submit insurance/financial security proposals to cover liability. Amendment of subordinate legislation e.g. on prescribed sites, excepted matter and court rules.
Late 2012 – early 2013	Period during which we expect Convention countries to ratify the revised Conventions and the Conventions to come into force (although this timing is subject to a range of factors including the readiness of other countries). Legislation will come into force thereafter.

Contact details

30. If you have any questions regarding this response, please contact:

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Introduction

31. The Government's proposals on the implementation of amendments to the Paris Convention on nuclear third party liability and its supplementary Brussels Convention ("the Conventions") were set out in the consultation paper published on 24 January 2011[6].

32. The UK is a signatory to the Conventions which establish a largely western European[7] framework for compensating victims of a nuclear incident. The regime is well established and respected - it has been in place since the 1960s and is one of the cornerstones of international nuclear liability law. The regime is managed under the auspices of the OECD Nuclear Energy Agency (NEA). It has been recognised by the EU/Euratom Community[8] and the principles established in the Paris Convention are largely mirrored in other nuclear third party liability regimes, in particular the Vienna Convention on Civil Liability for Nuclear Damage[9].

33. The Conventions deal with the availability of compensation for damage suffered by third parties in the event of a nuclear incident. They do not deal with other costs or damage that might arise in the event of an incident such as damage to an operator's property or the costs of decommissioning an installation. The Conventions are implemented in the UK by the Nuclear Installations Act 1965 ("the 1965 Act").

34. Amendments to the Conventions were agreed by the Paris and Brussels signatory countries in 2004. They upgrade the existing regime and are intended to ensure that, in the event of a nuclear incident, an increased amount of compensation will be available to a larger number of claimants in respect of a broader range of damage than is currently the case.

35. The amendments to the Conventions are not yet in force. This will take place once the amendments have been ratified by the Contracting Parties to the Conventions. The Contracting Parties who are also EU Member States have agreed to ratify the amendments at the same time in the interest of the EU[10].

36. The UK is committed to ratifying the amended Conventions, and to do so we need to implement the changes in UK legislation. The Government intends to do this through secondary legislation – an Order subject to approval by both Houses of Parliament - made under section 76 of the Energy Act 2004.

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6 Implementation of changes to the Paris and Brussels Conventions on nuclear third party liability – A public consultation http://www.decc.gov.uk/en/content/cms/consultations/paris_brussels/paris_brussels.aspx

7 The Contracting Parties to the Paris Convention are Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Turkey, and the United Kingdom. Greece, Portugal and Turkey are not signatories to the Brussels Supplementary Convention.

8 For example in Commission Recommendation of 28 October 1965 to the Member States on the harmonization of legislation applying the Paris Convention of 29 July 1960 and the Brussels Supplementary Convention of 31 January 1963 (65/42/Euratom) *Official Journal 196 , 18/11/1965 P. 2995 – 2996;* Second Commission Recommendation to the Member States on the harmonization of legislation applying the Paris Convention of 29 July 1960 (66/22/Euratom) *Official Journal 136 , 25/07/1966 P. 2553 – 2554*

9 The Vienna Convention on Civil Liability for Nuclear Liability 1963 as amended by the Protocol of 1997

10 Council Decision 2004/294/EC[10] of 8 March 2004.

37. The consultation concerned only the amendments to the 1965 Act that relate to the implementation of the amendments to the Conventions.

Summary of responses

38. The consultation closed on 28 April 2011. The responses to the proposals and questions posed in the consultation, and by the draft Order and impact assessment, are summarised in the following chapter. Each section is introduced by a summary of the proposals, the question(s) in the consultation paper, followed by a summary of responses and then the Government's decision or next action.

Consultation responses by chapter

New categories of damage (Chapter 4)

39. The scope of the damage for which compensation can be claimed under the Paris Convention has been extended to include, in addition to personal injury and property damage, (i) economic loss arising from property damage or personal injury; (ii) the cost of measures of reinstatement of the impaired environment; (iii) loss of income deriving from a direct economic interest in any use or enjoyment of the environment; and (iv) the cost of preventive measures. Chapter 4 of the consultation paper set out the Government's proposals for implementing the new categories of damage.

40. In the consultation paper we asked questions in each chapter about the Government's implementation proposals. For the chapter on categories of damage we sought responses on the following.

Question 1

We would welcome views on our proposed implementation of the new categories of damage as described in this chapter and as set out in the draft Order.

Particular questions you may wish to consider include:

a) should particular types of claim be prioritised, and if so, how (see paragraph 4.14 of the consultation paper)
b) should we make provision to deal with the case where a claim is made by a public authority for the cost of reinstating property in respect of which compensation has already be paid to the owner (see paragraph 4.29)
c) should "compensatory remediation" be expressly included or excluded from the measures of reinstatement that can be claimed for (see paragraph 4.39)
d) should we define what constitutes a "grave and imminent threat" and, if so, how (see paragraph 4.65)?

Summary of responses

41. Around a quarter of respondents provided comments in relation to the particular questions we asked on this chapter. A smaller proportion of respondents commented more generally on our proposals for implementing the new categories of damage.

Responses to the particular questions

42. On the question of whether particular types of claims should be prioritised, the consensus was that they should not be. Various views were expressed to the effect that prioritisation would be impractical, of no benefit, unfair, and difficult to implement. The main difficulty is that, while some types of damage would be apparent immediately after an incident others, in particular certain kinds of personal injury, would take much longer to come to light and prioritisation could hold up payment for all types of damage. However, some respondents highlighted the need for an appropriate claims handling system to be in place. In addition, some respondents pointed out that in the event of a significant incident, the compensation pot is likely to be exhausted before certain types of personal injury become apparent.

43. With regard to whether there should be provision for the case where a public authority claims compensation for environmental reinstatement costs where the owner of that part of the environment has already received compensation for property damage there was general agreement with the principle that 'double compensation' could not be permitted. A range of solutions were suggested. For example, where compensation has been paid to a property owner for damage this should be offset against later claims for reinstatement by public authorities. Alternatively, it was suggested the authority could pursue the property owner for reinstatement costs or that the property owner should be required to reinstate the damaged land/environment. Another idea was for there to be compulsory purchase arrangements. It was also suggested that there should be co-ordination between the property owner and the authority in bringing their claims.

44. Views were mixed on whether "compensatory remediation" should be expressly included or excluded from the measures of reinstatement that can be claimed for. On one hand some respondents thought "compensatory remediation" would be a good idea, as it could be a more speedy, practical, effective and efficient alternative to other types of remediation. However, others considered that this kind of remediation was more public and speculative in nature and including it in the types of measure for which compensation can be claimed could hold up or reduce the funds available to compensate other categories of damage. In addition, some respondents thought it was outside the scope of the Convention.

45. A variety of views were expressed in response to the question whether and how a "grave and imminent threat" should be defined. It was generally agreed that it would be preferable to have a definition of what constitutes a “grave and imminent threat” or an indication by a competent authority of when such a point has been reached. A number of respondents thought that the threshold in the Radiation (Emergency Preparedness and Public Information) Regulations 2001[11] (REPPIR) for implementing emergency plans could be used, although some of these respondents thought that additional criteria

[11] Radiation (Emergency Preparedness and Public Information) Regulations 2001 - SI 2001/2975

might be required because the threshold in REPPIR is only concerned with human exposure to radiation and not property or the environment. Other respondents thought there should be a formal point in time when a "grave and imminent threat" is declared to exist by an authority such as the Office for Nuclear Regulation or the Secretary of State. It was argued that this would avoid costly and complex arguments about whether or not such a state of affairs existed.

General comments on the proposals

Economic loss arising from personal injury or property damage

46. Respondents agreed that no amendments to the 1965 Act are required to implement this category of damage as it is sufficiently covered by the existing provision for personal injury and property damage in the 1965 Act.

Costs of measures of reinstatement of the impaired environment

47. Some respondents supported the Government's proposal to require that, in order for a claim to be brought for this category of damage, the (significant) environmental impairment must at least be of such a degree that it would be eligible for compensation as property damage under the 1965 Act. It was thought that this would provide increased certainty as to when reinstatement costs can be claimed. By contrast, other respondents thought the Government's proposal was an over-complication and considered it should be left to the courts to determine whether there has been a significant impairment of the environment.

48. A number of respondents noted the connection between the 1965 Act liability regime and the regimes in the UK for dealing with radioactive contaminated land. The view was expressed that care needs to be taken to ensure there is a properly designed interface between the 1965 Act liability regime and relevant regulatory regimes such as the radioactive contaminated land regimes. In particular, doubt was expressed about whether the Secretary of State should be the sole "appropriate person" under the radioactive contaminated land regimes.

49. Some respondents expressed their support for the Government's proposal to limit those who can claim the costs of reinstatement measures to competent public authorities. However, others suggested that it should be possible for individuals as well public authorities to claim for this category of damage.

50. There appeared to be agreement with the Government's proposal that before an operator can be required to pay any costs of measures of reinstatement, those measures must be approved by the Secretary of State (whether before or after the measures are taken). However, some respondents thought that specific provision should be made for emergencies.

Loss of income deriving from a direct economic interest in the environment

51. Respondents noted that the consultation paper stated that this category of damage is not intended to be wide. However, respondents thought that the examples of the losses that might be covered given in the consultation paper and the proposed amendments to the 1965 Act in the draft Order[12] (new section 11G) were inconsistent with this stated policy aim and that on the current drafting of new section 11G the scope of this category of damage could be very broad, potentially allowing a large number of types of claim to be brought following an incident that caused a significant impairment of the environment. For example, it might be possible for claims to be brought by persons who cannot travel through an affected area to get to work, or by persons who cannot work in an affected area or by businesses near to an affected area.

52. Respondents noted that uncertainty with regard to this category of damage is undesirable because it could raise expectations of compensation where none should exist. Further, a broad and/or uncertain category of damage will make it very difficult to quantify the potential damage within scope which will make it very difficult to obtain the necessary insurance or other financial security. It was therefore suggested that draft new section 11G should be amended to clarify its scope, possibly through a definition of what constitutes a “direct economic interest” in the use or enjoyment of the environment .

Costs of Preventive measures

53. Respondents views on the desirability of defining a "grave and imminent threat" are discussed in paragraph 45 above.

54. In addition, some respondents commented on the Government’s proposal to limit the types of consequential losses that can be claimed for to personal injury and property damage. The views were mixed. On one hand some respondents thought this was not the right approach. It was suggested that significant impairment of the environment caused by preventive measures ought to be covered, as well as loss of income directly resulting from regulatory preventive measures such as emergency orders prohibiting the harvesting and movement of crops or prohibiting the movement and sale of livestock. This would allow compensation to be paid where any loss of income or impairment of the environment was not caused by the incident itself.

55. On the other hand, some respondents expressed the view that it was right to limit the type of consequential losses that could be claimed for as otherwise this category of damage could become very broad and uncertain which would make it difficult to obtain insurance or other financial security.

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[12] Published with the consultation paper. Please note that we intend to lay the final Order this autumn.

56. Some respondents thought that claims for the costs of preventive measures and consequential losses could be controlled by having a system of approval for preventive measures along similar lines to that which the Government proposed in relation to measures of environmental reinstatement. It was suggested that in an emergency situation a person's perception of risk may be influenced by extensive or sensational media coverage and this could lead them to take completely unnecessary and costly preventive measures for which they might try to claim. By contrast, other respondents considered that an approval procedure was not necessary.

Government response

57. The Government has considered the response to the consultation and responds as follows.

Particular Questions

58. The Government agrees with respondents that prioritising different types of claim would not be desirable and therefore we will not make provision for this. This means that claims will be considered and compensated on a first come - first served basis.

59. Where a claim is made by a public authority for the costs of reinstating the environment which is property in respect of which compensation for property damage has already been paid, there appears to be a risk that the recipient of the compensation for property damage (or a subsequent purchaser of the property interest) could eventually be over-compensated, with the operator bearing the corresponding additional liability. The Government believes there is a need to make express provision in the 1965 Act to address this. The Government is considering giving the courts some additional powers that they could use if they saw fit to achieve a fair and reasonable solution, for example, in the case of a claim for the costs of measures of reinstatement of the impaired environment, a power to reduce the compensation to take into account compensation paid under a claim for property damage.

60. In addition, having regard to relevant case law[13], we believe it is also necessary to make provision to ensure the courts take into account any reinstatement of property already undertaken by a public authority in a claim for property damage.

61. The Government agrees that it would be desirable for there to be co-operation between those making claims for property damage and public authorities making claims for the costs of measures of environmental reinstatement. It is hoped that the proposed provisions on notifying the Secretary of State of proceedings under the 1965 Act (proposed section 17A of the 1965 Act) will help to facilitate this.

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[13] For example, Gardner v Marsh and Parsons [1997] 1 WLR 489 CA.

62. With regard to “compensatory remediation”, we will not make any express provision either to include or exclude this type of remediation in or from the definition of relevant measures of reinstatement, the costs of which will be recoverable under the 1965 Act. This means it will be for the courts to decide whether the costs of particular compensatory remediation measures are payable having regard to, among other things, current practice and the circumstances of the case.

63. The Government agrees that it is desirable to make further provision to clarify when a "grave and imminent threat" of a breach of duty will arise (under proposed new section 7(1D) of the 1965 Act). This will help to reduce uncertainty and argument about when claims for the costs of preventive measures and certain consequential losses can be made.

64. We think the “grave and imminent threat” provision in the Paris Convention is aimed at ensuring the costs of preventive measures and certain consequential injury or damage can be claimed where an emergency situation arises, but no actual harm has occurred (i.e. no personal injury, property damage or environmental impairment has occurred in breach of a duty under either new section 7(1A) or 7(1B))[14]. We therefore believe it makes sense to make provision that fits in with emergency planning arrangements.

65. We therefore plan to include a definition in the 1965 Act that links in with the UK’s emergency planning legislation. We plan to provide that a grave and imminent threat of a breach of duty will arise when the REPPIR threshold for implementing emergency plans is met (i.e. when either a radiation emergency - as defined in REPPIR[15] - occurs or an event occurs which could reasonably be expected to lead to such a radiation emergency). It should be noted the definition will not turn on whether there is an obligation to implement an emergency plan since not all installations covered by the 1965 Act liability regime are required to have emergency plans under REPPIR. Neither will it turn on the actual implementation of an emergency plan since we would not wish to create a disincentive to implementing emergency plans.

66. As respondents have pointed out, the REPPIR definition of “radiation emergency” is primarily concerned with exposure of the public to radiation, rather than the threat of harm to property or the environment. Nevertheless, we think that the threshold will indirectly provide an indication of threat of harm to these other factors. In the Government’s view, this definition represents a practical approach and will provide a predictable threshold.

67. That said, the Government does not propose to apply the definition to a “grave and imminent threat” that occurs off-site (e.g. during the transport) since the REPPIR definition of “radiation emergency” does not apply in the

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[14] Where injury, damage or impairment does occur in breach of a duty in section 7(1A) or 7(1B), the costs of preventive measures etc. will in any event be recoverable.

[15] In regulation 2(1) of REPPIR “radiation emergency” is defined as “any event (other than a pre-existing situation) which is likely to result in a member of the public being exposed to ionising radiation arising from that event in excess of any of the doses set out in Schedule 1 and for this purpose any health protection measure to be taken during the 24 hours immediately following the event shall be disregarded”.

context of conventional forms of transport[16]. In this case, we propose to leave "grave and imminent threat" undefined and to rely on the ordinary meaning of these words.

68. The Government has noted the arguments some respondents made in favour of a designated competent authority being able to identify the point at which a "grave and imminent threat" arises. However, our current view is that this would not be a practical approach.

General comments

Costs of measures of reinstatement of the impaired environment

69. Having considered the comments of respondents, it is confirmed that:

- Government will make provision in the 1965 Act that will mean that, in order for a claim to be brought for this category of damage, the (significant) environmental impairment must at least be of such a degree that it would be eligible for compensation as property damage under the 1965 Act. This will help to increase certainty about when the costs of reinstatement measures can be claimed and help to prevent anomalies arising with regard to what can be claimed under the different categories of damage;

- those who can claim the costs of reinstatement measures will be limited to competent public authorities. We think that that the appropriate route for individuals to claim for the costs of reinstatement measures is through a claim for property damage;

- before an operator can be required to pay any costs of measures of reinstatement, those measures must be approved by the Secretary of State (whether before or after the measures are taken). We will consider whether specific provision should be made for emergencies.

70. With regard to the relationship between the 1965 Act liability regime and relevant regulatory regimes, for England we are considering amending the radioactive contaminated land regime so that it directly gives effect to the costs of the measures of reinstatement category of damage in the Paris Convention and then to exclude from the 1965 Act what is covered by the radioactive contaminated land regime so there is no direct overlap. This will avoid a doubling-up of the approval and claims processes – at least in relation to contamination covered by the radioactive contaminated land regime.

71. It will be for the devolved administrations to decide whether they want to follow this approach in relation to their respective radioactive contaminated land regimes – and it would still be possible for public authorities to claim their

[16] For example, in the case of road and rail the test for "radiological emergency" is different – see Regulation 24(4) of the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009 (SI 2009/1348).

costs through the 1965 Act if no change is made to these radioactive contaminated land regimes.

72. At present, under the UK contaminated land regimes, the Secretary of State is deemed to be the "appropriate person" to bear financial responsibility for the remediation of "land contaminated by a nuclear occurrence". "Land contaminated by a nuclear occurrence" is defined by reference to property damage covered by the 1965 Act or the equivalent law of another Paris country.

73. In England we propose to alter the provision on who bears financial responsibility so that the operator is the appropriate person up to its 1965 Act liability limit. The Secretary of State will remain the appropriate person above this limit.

74. In order to take into account the point on 'double compensation' mentioned above we are considering providing that, up to the operator's liability limit, certain persons who have received compensation from the operator following a property damage claim under the 1965 Act are also to be treated as an "appropriate person". Revisions to the Radioactive Contaminated Land Statutory Guidance would be able to provide further detail on how the Environment Agency should allocate liability between the operator and the recipient of compensation.

Loss of income deriving from a direct economic interest in the environment

75. The Government remains of the view that this category of damage should not be broad in scope. It is aimed at providing compensation for pure economic loss which is not generally recoverable under the ordinary law and it is important that insurance or other financial security can be obtained to cover this liability.

76. In the Government's view this category of damage should be primarily aimed at those who derive income from lawfully carrying on activities in a part of the environment that they do not own where those activities involve exploiting the resources of that part of the environment (for example, fishermen or cockle pickers with the necessary licences), or are particularly dependent on the characteristics of that part of the environment (for example - potentially - an ice-cream seller on a beach or a train operator using train tracks and stations).

77. The Government considers that this category of damage should not cover loss of income suffered by persons (including businesses) who:

a. travel through an affected area to get to work or carry on some other economic activity elsewhere;

b. merely work or carry on some other economic activity in an affected area (and are not dependent on characteristics of the area);

c. are not located in an affected area but rely on trade attracted by an affected area;

d. use the environment in the course of their employment (since they will not have a direct economic interest);

e. have a contract with person X (for example, for the supply of goods or services) where X is based in an affected area and the contract cannot be carried out by X;

f. use the environment unlawfully (for example, where they do not have the necessary licences or other permissions);

g. have a property damage claim under the 1965 Act;

h. use the responsible operator's site.

78. The Government agrees that there is a need to amend proposed new section 11G of the Order to ensure the legislation gives effect to the policy set out above.

Costs of Preventive measures

79. The Government's response on the desirability of defining a "grave and imminent threat" are discussed in paragraphs 63 - 68 above.

80. We have considered the arguments put forward by some respondents in favour of expanding the types of consequential losses that can be claimed for under this category of damage. However, the Government plans to retain its proposed limit on the types of consequential losses that can be claimed. Without such a limit this category of damage could be very wide and difficult to quantify and therefore difficult to cover with insurance or other financial security.

81. We have also considered the arguments put forward by some respondents in favour of having an approval system for preventive measures. However, we remain of the view that this would not be practical and therefore would not be the best way forward. We think adequate control will be provided by the provision in relation to "grave and imminent threat" discussed above together with the requirement of reasonableness for both the costs of the preventive measures and the preventive measures themselves.

82. We propose to produce guidance on the sort of preventive measures that we think would be regarded as reasonable. It is expected that it will focus largely on those measures contemplated in operators' and local authorities emergency plans (and their foreign equivalents).

Other comments

83. Some observations were submitted about the extent to which the 1965 Act should and does create an exclusive and exhaustive civil liability regime, and

whether further amendment of the 1965 Act is needed to make to clarify the position. We are grateful for these observations and we are giving them further consideration.

Geographical scope (Chapter 5)

84. The geographical scope of the Paris Convention has been extended so that, as well as requiring compensation to be made available for damage suffered in the countries that are party to the Paris Convention (Paris countries), it will also require compensation to be made available for damage suffered in certain non-Paris countries (in particular, those without nuclear installations and those with liability regimes that afford equivalent reciprocal benefits). The geographical scope of the Brussels Convention is more limited – generally extending only to damage suffered in the countries that are party to the Brussels Convention (Brussels countries). This means that the additional funds made available under the Brussels scheme may not be used to provide compensation for damage suffered in Paris countries that are not party to the Brussels Convention and the non-Paris countries mentioned above.

85. The questions asked in the consultation paper were:

Question 2

We would welcome views on our proposed implementation of the revised geographical scope of the Paris Convention and the Brussels Supplementary Convention as described in this chapter and as set out in the draft Order.

Particular questions you may wish to consider include:

a) should we align our legislation with the Paris Convention by deleting current section 13 (2) of the 1965 Act. Would any important protections be lost (see paragraph 5.13)?

b) how should we define who should be treated as a UK "national" for the purposes of section 16A (see paragraph 5.21)?

Summary of responses

86. Only a limited number of total responses commented on this chapter of the consultation paper.

87. In respect of whether or not to align our legislation with the Paris Convention by deleting section 13(2) of the 1965 Act, respondents were divided. Some respondents were in favour of aligning with the Convention, on the basis that there are benefits in close alignment with the Convention as it ensures consistency with other Paris countries. Others argued that aligning with the Convention would reduce the scope of persons on board UK ships to take a claim to the UK courts if they wish and that there is more benefit in retaining section 13(2) than in ensuring strict consistency with other Paris countries on this point.

88. On the question of who should be treated as a UK "national" there were a small number of suggestions for definitions, in particular aligning with the definition in the Brussels Convention in Articles 2b) and 2c), or following a definition such as that in the Anti-Terrorism, Crime and Security Act 2001[17].

89. Some respondents raised additional points that did not directly address issues in the consultation, but nevertheless are related. The points relate to the possibility of claims for nuclear incidents being brought in non-Paris countries, with the possibility of circumventing the channelling principle under the Paris Convention (this principle ensures that responsibility for compensating damage arising from nuclear incidents lies solely with the operator of the relevant nuclear installation rather than third parties such as suppliers)[18].

90. It has been suggested that channelling could be circumvented by judgments obtained in non-Paris countries being enforced in the UK. One suggested solution to this issue is to amend the 1965 Act so that liability is imposed on operators in respect of judgments for damage covered by the Paris Convention that are made against third parties in non-Paris countries.

91. A further comment was that the UK should become a party to the Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention as this would help to create a more widely applicable common compensation regime and in particular would ensure channelling within a broader geographical area.

Government response

92. After consideration of the responses submitted to the consultation the Government has decided to:

a) retain section 13(2) of the 1965 Act, which allows claims to be brought for injury or damage suffered within the territorial limits of a non-Paris country on board a ship or aircraft registered in the UK.

b) adopt a definition of UK national that includes the following categories of individual:

i. British citizens
ii. British overseas territories citizens
iii. British overseas citizens
iv. British national (overseas)
v. British subjects
vi. British protected persons

[17] Now replaced by provision in the Bribery Act 2010.
[18] See paragraph 3.4 of the consultation paper http://www.decc.gov.uk/en/content/cms/consultations/paris_brussels/paris_brussels.aspx .

93. These categories of person will be able to benefit from the additional compensation available under the Brussels Convention if they suffer damage on the sea outside the territorial limits of any country (new section 16A)[19].

94. The UK did not, at the time of its signature or ratification of the Brussels Convention, exercise the option in Article 2(b) of the Brussels Convention to treat individuals who are habitually resident in the UK as UK nationals. Therefore our definition of a UK national will not include this category of individual.

95. The Government will ensure that Article 2(c) of the Brussels Convention (which says that "a national of a Contracting Party" shall include a Contracting Party or any of its constituent sub-divisions, or a partnership, or any public or private body whether corporate or not, established in the territory of a Contracting Party) is given effect in the changes to the 1965 Act.

96. So far as the Joint Protocol is concerned the UK intends to consider whether or not to ratify once the revisions to the Paris and Brussels Conventions have come into force. We believe that it would be helpful if the Paris countries who have yet to ratify the Joint Protocol jointly consider their position.

97. In the meantime, respondents may wish to consider the possibility that a Vienna Convention country may be covered by the definition of "qualifying territory" as a "relevant reciprocating territory" (see section 26(1) of the 1965 Act as amended by the draft Order). This would mean that it may be possible for claims to be brought under the 1965 Act in respect of injury, damage or environmental impairment in a Vienna country. This would then engage section 12(1E) as amended which is intended to channel liability to the operator.

98. Similarly, Article 1A(3)(b) of the Vienna Convention (which prevents the exclusion of nuclear damage suffered in non-Vienna countries that offer equivalent reciprocal benefits) may apply so that claims for injury, damage or environmental impairment in the UK could be made in a Vienna country under the Vienna regime as implemented in that country[20]. With regard to the enforcement of judgments, we will consider carefully the additional points made by respondents.

99. With regard to the enforcement of judgments, we will consider carefully the additional points made by respondents.

100. Respondents did not comment on the assumption in paragraph 5.10 of the consultation paper that the changes to Article 2 of the Paris Convention appear to mean that the Paris Convention will no longer cover damage

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[19] In effect this will be within the marine areas of the countries that are covered by the scheme of the Paris Convention but are not Brussels countries due to the change in scope of the Paris Convention (see paragraph 5.10 of the consultation paper).
Note where the damage is suffered within the territorial limits or marine areas of the UK or another Brussels country any person will be able to claim against the additional Brussels funding.

[20] Though the jurisdiction provisions in section 13(1)(a) and (b) of the 1965 Act as amended would not bite.

suffered on the high seas (other than damage suffered on board a ship or aircraft registered in a country covered by the scheme of the Convention). We are investigating whether this was the intention behind the amendments.

101. As explained in the consultation paper the Paris and Brussels Conventions apply to the UK's Crown Dependencies and overseas territories. However Government does not have the necessary powers at present under Section 76 of the Energy Act 2004 to make the changes to the 1965 Act. We propose to amend Section 76 of the Energy Act 2004 at the earliest opportunity in order to make the necessary amendments.

Limitation periods (Chapter 6)

102. In line with the Paris Convention the Government proposed to impose a limitation period of 10 years from the date of the occurrence in respect of claims for property damage and the new categories of damage. For loss of life and personal injury we will extend the limitation period to 30 years for claims against the operator.

103. The questions asked in the consultation paper were:

Question 3

We would welcome views on our proposed implementation of the revised provisions on limitation periods in the Paris Convention as described in this chapter and as set out in the draft Order.

A particular question that you may wish to consider is whether we should apply the 30 year limitation period to claims in respect of injury caused by preventive measures (see paragraph 6.6).

Summary of responses

104. There appears to be a consensus that it is right to allow a 30 year limitation period for personal injury claims resulting from a nuclear incident given that radiation induced injuries may take a considerable time to come to light. However, a number of respondents expressed concern about the availability of insurance or other financial security to cover a 30 year limitation period for personal injury and it was argued that the limitation period should not be extended unless this issue is addressed. Some respondents expressed the view that the current arrangement (whereby claims between 10 and 30 years old are made to the Government[21] and paid at the discretion of Parliament) should be retained.

105. Some respondents questioned our proposal to permit claims to be made to the Government and paid at the discretion of Parliament after the applicable (10 or 30 year) limitation period has expired.

106. On the question of the limitation period for claims in respect of personal injury resulting from preventive measures, there were a range of views. Several respondents took the view that it was impractical to have a separate time limit, particularly if there were doubts as to the cause of the injuries.

107. However, most respondents who commented did not support a limitation period of 30 years for such claims in particular – because it was thought that injuries caused by preventive measures would become evident within the

[21] The “appropriate authority” – see paragraph 6.4 of the Consultation paper .

usual 10 year period. That said, some respondents thought it possible that preventive measures could in some circumstances give rise to radiation-induced injuries as well as 'ordinary', non radiation-induced injuries. The former should benefit from a longer limitation period, but the latter ought not to.

108. It was also suggested that claims for this type of personal injury should be excluded from the 1965 Act altogether and be dealt with under the ordinary law.

Government response

109. Having considered the responses to the consultation the Government has decided it will proceed as indicated in the consultation paper and in line with the Convention. Government does not agree with the contention that operator's personal injury liability should be limited to just 10 years. Unlike the other types of damage there is a possibility that injuries do not appear immediately following an incident, and the operator should continue to have liability. Government will therefore provide a limitation period of 10 years for all claims except those for personal injury where it will be possible to bring claims against the responsible operator for up to 30 years from the date of the occurrence.

110. With regard to the limitation period that should apply to personal injury caused by preventive measures, Government proposes to distinguish between injuries that are radiation induced and those that are not. The former would carry a 30 year limitation period because such injuries may take a considerable time to become apparent. However, the same considerations do not apply to 'ordinary' personal injury and therefore we propose to apply the usual limitation period of 10 years in this case.

111. We considered the possibility of excluding completely non-radiation induced injury caused by preventive measures. But on balance we think it is preferable to make operators responsible under the 1965 Act except where there is negligence or malice on the part of those undertaking the preventive measures[22]. The indications are that this will assist in ensuring the availability of insurance to cover such injury.

112. With regard to the possibility of making a claim to the Government after the expiry of the relevant limitation period, the Government has decided that this will not be permitted as we agree the periods of 30 years for personal injury and 10 years for the other types of damage are sufficient.

[22] This exception should not apply where the person undertaking the measures is the operator.

Liability during transport (Chapter 7)

113. A change in the Paris Convention rules on operator liability during the carriage of nuclear substances means that liability may only be transferred from one Convention operator to another where the receiving operator has a direct economic interest in the nuclear substances being carried.

114. In the consultation paper views were requested on the following points.

Question 4

We would welcome views on our proposed implementation of the change to the Paris Convention regarding liability for transport of nuclear substances and the other related matters as discussed in this chapter and set out in the draft Order.

In particular, we would welcome views on the options set out in paragraphs 7.11 and 7.12. Is it common for nuclear substances to transit a licensed site while en route from one nuclear installation to another?

Summary of responses

115. Respondents noted the importance of always being able to identify with certainty which operator is liable for damage caused by an incident during the carriage of nuclear substances. The view was expressed that although the proposed new provisions in section 7 and new section 7A of the 1965 Act appear technically to achieve this, they are very complex and practitioners such as those responsible for making commercial transport arrangements may have difficulties with the level of complexity. To address this, it was suggested that it would be highly desirable for the Government to produce guidance in this area.

116. Some respondents expressed the view that it would be desirable for the new provisions to clarify the regime generally, for example by defining what is meant by key terms in the 1965 Act such as “on behalf of” etc. Some respondents suggested that liability should only be permitted to transfer from one operator to another with the express agreement of both operators (and not on the basis of physical custody).

117. In addition, it was suggested that the Government should give further consideration to the proposed definition of a “direct economic interest” (giving effect to new Article 4(c) of the revised Paris Convention). In particular, the point was made that the commercial arrangements of the Nuclear Decommissioning Authority (NDA) and its site licence companies (SLCs) need to be taken into account, possibly by indicating in the 1965 Act that SLCs are to be treated as having a direct economic interest in the nuclear substances they deal with on behalf of the NDA.

118. An additional suggestion was made that we might expand the contents of the Certificate of Financial Security (under section 21(3) of the 1965 Act) to require the responsible operator to state (where this is needed) the nature of the operator's "direct economic interest".

119. More generally, respondents were in favour of aligning the 1965 Act with the scheme of the Paris Convention. Moreover, given the trans-boundary nature of transport, the view was expressed that it was desirable for national liability regimes of Paris countries to be harmonised with each other.

120. The consultation paper sought views on which operator should be liable for nuclear substances stored temporarily on an operator's site while the substances are *en route* to another destination: should it be the operator responsible for the carriage or the 'host' operator? It was clear from some of the responses that nuclear substances do transit operators' sites and therefore this question is not a purely academic one.

121. Some respondents were in favour of liability for nuclear substances staying with the operator responsible for their carriage. However, a significant number of respondents expressed concern about adopting the proposals in either paragraph 7.11 or 7.12 of the consultation paper. It was thought that incidents on an operator's site should remain the sole responsibility of that operator (as is the current position – the "all-embracing" approach described in paragraph 7.9 of the consultation paper). Implementing a solution under which potentially more than one operator could be liable for an on-site incident would undermine the channelling principle. Attempting to establish whether an incident was caused by substances in transit would introduce further complexity and uncertainty, especially where the liability limits applicable to the substances in transit and to the host site itself were different. In addition, such a solution could give rise to complications with handling claims.

122. Some respondents expressed the view that the problem or "mischief" that the direct economic interest test in new Article 4(c) was designed to prevent - "forum shopping" for an operator with a low liability limit (see paragraph 7.5 of the consultation paper) – may not in fact be a significant problem and the "cure" seems likely to give rise to more difficulties than the perceived mischief. In any event, it was suggested that the anti-avoidance purpose of the direct economic interest test would be satisfied if we require a host operator to be liable for nuclear substances transiting its site and we ensure that in the UK the host operator's (significant) liability limit is applied to all on-site incidents, including those caused by or involving the nuclear substances transiting the site. Alternatively, it was suggested that a solution might be found by giving further consideration to what constitutes "transport" or "carriage", as opposed to storage for a short period of time.

Government response

123. The Government accepts that the new provisions on liability during transport are complex, but believes they are necessary in order to ensure a workable

and comprehensive regime. We agree that there would be merit in issuing guidance in this area[23]. We think there would also be merit in expanding the Certificate of Financial Security as mentioned above.

124. The Government agrees that SLCs should be regarded as having a "direct interest" in nuclear substances that they deal with on behalf of the NDA and proposes to make this clear in the new provisions. We will give further consideration to the application of the direct economic interest test in the context of book transfers and co-mingling of fungible materials.

125. The Government recognises the desirability of harmonising the arrangements for liability during transport between the Paris countries.

126. On the question of liability for nuclear substances when they transit an operator's site, the Government agrees, for the reasons highlighted by respondents, that that there are difficulties with the options identified in paragraphs 7.11 and 7.12 of the consultation paper and believes there are clear advantages in retaining the all-embracing approach whereby the operator of a site is solely liable for all of the nuclear substances on its site (including those in transit). In short, we believe having a clearly identifiable entity who is liable fully supports the Paris principles and would make things easier for claimants In addition, we believe that having more than one potentially liable operator for different nuclear substances on a site may cause difficulties with insurance as there would be an "aggregation" of liability limits[24] on that site. Further, we consider that a solution whereby the operator of the host site takes responsibility for transiting nuclear substances fits better with the safety responsibilities placed on nuclear operators.

127. In the circumstances, the Government proposes not to implement either of the options identified in paragraphs 7.11 or 7.12 of the consultation paper. Rather we will ensure that the all-embracing approach is retained and that the host operator's liability limit will apply in respect of the transiting nuclear substances. We believe this approach can be justified under the revised Paris Convention, in particular since the mischief that the anti-avoidance provision in Article 4(c) is intended to deal with can be dealt with in another way, that is by applying the full site liability limit.

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[23] Such Guidance would set out the Government's view of the effect of the new provisions – it could not itself shape the regime.

[24] See also section on nuclear waste disposal facilities, paragraphs 200 - 220.

Financial liability levels (Chapter 8)

128. In chapter 8 of the consultation document Government set out its proposals to increase operator third party liability levels:

- to €1200 million per incident for ***standard installations***, such as nuclear power plants and reprocessing plants. This will be introduced at €700 million and will rise annually by €100 million per year over five years. €1200 million would be €500 million higher than the minimum required under the revised Conventions; and

- to €70 million per incident for ***low risk installations*** (at present it is set at £10m).

129. These levels are in relation to third party liability only and are separate from the costs that operators may have to incur for damage to their own property, business interruption or decommissioning following an incident. Nor do they cover legal costs.

130. The new third party liabilities, once in force, will apply to both existing civil and military sites. The existing civil sites are:

Civil nuclear operators	**Number of licensed sites**
Nuclear Decommissioning Authority (Government body)	18
Others (of which power plants)	11 (7)
Existing low risk sites	2
Total	31

131. The revised regime will also apply to Low Level Waste (LLW) disposal facilities[25] as well as any new build installations (the earliest of which, Hinkley Point C, is planned by EDF to be operational from 2019).

132. In the consultation, the Government also proposed to set third party liability of €80 million per incident for transport of nuclear substances which are unlikely to cause significant third party damage in the event of an incident ***(low risk transport)***. Carriage of nuclear substances deemed to pose a higher risk would be subject to the higher liability level of €1200 million.

133. Under the regime nuclear operators are required to have insurance or other approved financial security to match the new third party liability levels. Operator insurance is discussed in more detail in paragraphs 161 - 181.

[25] See paragraphs 200 – 220 for details

134. In addition, Government also set out its' proposals for ensuring claimants are able to recover compensation by means of a single set of proceedings irrespective of the source of funding for the compensation.

135. The questions in the consultation paper were as follows.

Question 5

We would welcome views on our proposed implementation of the revised financial liability levels as described in this chapter and set out in the draft Order.

In particular, we would welcome views on:

a) the likely impact of increasing the standard liability level to €1200 million as compared to €700 million;

b) the proposal to set a reduced level specifically for low-risk transport and to use the criteria in the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009. Is this a practical solution? Would it add significant administrative burdens? Are there alternative criteria that could be used to identify low-risk transport?

Summary of responses

Setting operator third party liability above the minimum level

136. The issue of operator third party liability levels received the most responses. Opinions on what should be the appropriate level were divided.

137. Some responses favoured increasing the third party liability of operators from the current £140 million, to the new Convention minimum of €700 million, which is the level that most of the other Contracting Parties are proposing to set. Others, including some operators, thought that the Government proposal to increase the liability level to €1200 million was appropriate in that it effectively transferred to operators the additional Brussels Convention 'second tier' of €500 million[26], which would otherwise have to be met through Government funds. However there were many respondents who considered even €1200 million to be too low and recommended that there should be no limit on nuclear operator liability.

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[26] The Liability regime establishes a tiering system for responsibility of paying compensation. Under the revised Brussels Supplementary Convention additional resources, are available for compensation through a three tier system:

- The first tier a minimum of €700m from the operators;
- The 2nd Tier of €500m - an amount being the difference between €1200m and the operator's limit under the 1st tier from public funds provided by the country of the responsible operator; and
- The 3rd Tier of €300m from public funds contributed by all the countries that are party to the Brussels Convention and is €300 million in total i.e. the UK would only contribute a share of this.

138. Those that favoured setting the operator liability at €700 million did so on the basis that this would align the UK regime with most of the other Contracting Parties and seeking to set liability beyond this level would be gold plating. Some noted that the nuclear industry is unusual in that it has imposed on it some special requirements which are not faced by companies in other energy sectors. Not only is third party liability channelled to nuclear operators (i.e. they are liable regardless of who is at fault for nuclear damage) but there is also a legal obligation on operators to have insurance to match their liability amounts. There is not the same obligation on operators in other energy sectors, who do not have channelling of liability and have discretion to choose the amount of insurance they want to take to cover third party liabilities. Having to buy insurance is a cost, which would rise with the level of liability that is required to be covered. By setting the third party liability level at €1200 million or higher, UK nuclear operators would be at a competitive disadvantage, by accruing larger insurance costs not only in comparison to nuclear operators in the other Convention countries that set a liability limit of €700 million, but also in relation to other energy producers who are not under such insurance obligations.

139. It was also highlighted during the consultation period that even now, where operator third party liability is limited to £140 million, there has never been an incident in the UK, since the start of the Paris and Brussels regime in the 1960s, where this amount of liability has had to be exceeded. The largest successful compensation claim to date in the UK has been approximately £10 million[27]. Some respondents considered that it was not appropriate to burden operators with insurance premiums to cover higher levels of liability which were extremely unlikely to be reached.

140. Those who supported the Government proposal of setting the higher limit of €1200 million generally welcomed the progressive increase in third party liability from €700 million to €1200 million over a 5 year period. They noted that setting the liability level at €1200 million from the outset may cause difficulties in the availability of insurance capacity or that it could lead to an extremely limited number of insurers who would be able to provide the full capacity. In addition, increasing the liability level progressively would be unlikely to affect new build operators. The full liability of €1200 million would be in place by the time the first of the new nuclear plants is expected to be in operation in 2019.

141. A large percentage of the public responses as well as NGOs thought that setting a liability limit, even at a level higher than the minimum necessary under the revised Conventions, was inadequate particularly given the potential scale of third party liability costs that would accrue from a severe incident such as Fukushima. They argued that any limit on operator liability was a form of subsidy and Government should therefore set unlimited third party liability levels for nuclear power plants and similar nuclear sites.

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[27] Blue Circle Industries Plc v Ministry of Defence CA judgement of June 1988.

142. A few of the responses in favour of unlimited operator third party liability, argued on the basis that if the theoretical risk of a large scale accident was so small then operators should have no concerns about taking on the contingent liability for such events rather than seeking to keep these with the Government and the tax payer.

143. The Government also understands that although the majority of Contracting Parties are proposing to set operator liability to the minimum €700m required under the revised Conventions, there are a few countries that are proposing unlimited liability, namely Germany, Switzerland, Sweden and Finland. At present only Germany has unlimited liability, based on a retrospective pooling arrangement, and it is proposing to phase out nuclear power altogether. Switzerland has also proposed unlimited liability on operators but like Germany intends to phase out nuclear power. Sweden and Finland are also proposing unlimited liabilities. It should also be noted that these countries set a limit on the level of insurance cover required.

144. A few respondents suggested that regardless of the amount, there should be a common level of third party liability across Convention countries, particularly given the cross-border effects of a large scale nuclear incident.

Lower third party liability levels

145. There was overall support for the UK to implement the discretion provided in the Conventions to set a lower level of third party liability for sites considered low risk such as research reactors.

146. Some respondents suggested that Government should create a category of so called “intermediate sites”, such as fuel fabricators or uranium enrichment plants, which should have a liability level lower than €1200 million set for power plants. It was suggested that applying the standard level of liability to all sites that were not defined as low risk by the Nuclear Installations (Prescribed Sites) Regulations 1983 was disproportionate to the potential level of damage in the event of an incident.

147. The proposal to set a lower level of third party liability for low risk transport was welcomed in principle. However, a number of respondents raised concerns on the practicality of using criteria set under the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009, because in some circumstances this could lead to perverse results e.g. some low risk nuclear substances subject to a higher liability level because they can and are transported in high integrity packages.

Government response

148. The Government has carefully considered all the responses - both those that support the continuation of limiting operator third party liability and those that do not. The Government is also mindful of the events at the Japanese nuclear plants at Fukushima and the significant costs that are being accrued, of which third party compensation is but one element.

149. The Government however remains of the view that its proposals of limiting the operators third party liability are fully consistent with the Conventions and the approach taken by most of the other Contracting Parties. It is justifiable in the public interest and is the right way of ensuring that risk is appropriately managed. The Government continues to believe that any cost or risk to public funds for third party compensation can be justified by the corresponding benefits of the regime. The Government does not however accept the arguments for raising operator liability only up to the minimum level necessary under the Convention of €700m.

150. The Government has therefore decided to confirm the proposals set out in the consultation paper and will implement the revised Paris and Brussels Conventions on the basis of the following operator third party liability:

a) €1200 million for standard sites (which will be phased in over 5 years starting at €700 million)
b) €70 million for low risk sites; and
c) €80 million for low risk transport.

151. Government will however consider options for setting a liability less than €1200 million for "intermediate level" sites.

152. The Government has continued to develop with the Office for Nuclear Regulation (ONR) its proposal on low risk transport and proposes using the existing international and universally adopted UN numbering for the transport of all dangerous goods, including radioactive material, as the basis for defining which radioactive material transport must have higher liability cover. We will continue to work with the ONR and others to further develop this proposal.

153. Government recognises the concerns of those respondents who argued for unlimited nuclear operator liability. An incident of the scale of Fukushima would lead to costs that far exceed an operator liability limit. The events have also shown that the compensation costs of such an incident will also inevitably exceed the ability of the operator to pay, even where unlimited liability is imposed, and that at some point it will be necessary for government to intervene if it is in the public interest to do so. The Fukushima incident has also shown that the operator will have to face competing demands for its resources including costs associated with making the plant safe as quickly as possible as well as funding for longer term decommissioning. While the government would want operators to do as much as they can, a balance must be sought between the various competing demands for funds as well as between operators, those who have suffered damage, and the taxpayer.

154. The liability regime under the Conventions provides an effective package that seeks to achieve a practical solution for ensuring the availability of compensation in the event of a nuclear incident while balancing the interests of operators, sufferers of damage and the taxpayer. The principles established in the Paris Convention (including the permissibility of limited liability) are largely mirrored in other nuclear third party liability regimes, in particular the international Vienna Convention on Civil Liability for Nuclear

Damage. In addition, the regime has been recognised by the EU/Euratom Community[28].

155. The liability regime established by the Conventions imposes specific and more onerous obligations on nuclear operators regarding the provision of third party liability compensation than they would have under the ordinary law. In the event of a nuclear incident, several different persons (including manufacturers and other suppliers) could be responsible for causing the damage. In all likelihood, under ordinary tort law, victims would have great difficulty establishing which of those persons was legally responsible for particular damage. The Paris Convention seeks to address this by "channelling" liability exclusively to operators who are deemed to be liable for the damage irrespective of whether or not they are in fact at fault. This means victims have a readily identifiable person against whom claims can be brought without the need to establish fault. Moreover an award of compensation against an operator is only as good as its ability to pay. In the event of an incident, there are likely to be numerous competing claims on an operator's resources and it could be that by the time any litigation is complete or settlement negotiated, there are insufficient funds to pay compensation to victims. The Paris Convention seeks to address this issue by requiring operators to put in place insurance or other financial security specifically to cover their third party liabilities.

156. These additional obligations generally do not apply to companies in other energy sectors who may have a theoretical unlimited liability (i.e. until they become insolvent) but are generally not required to accept strict and exclusive liability and have discretion on the level of insurance they purchase.

157. Moreover it is clear that commercial insurance would not be available to cover unlimited third party liability and so the alternative would be to impose a requirement to have a set amount of insurance or other financial security.

158. Beyond the limit of the insurance claims would have to be met from the general resources of the operator. As Fukushima has highlighted the level of funds needed to pay compensation in the event of a severe accident would likely exceed the resources of the operator. Operator insolvency would mean that Government would have to consider stepping in to meet outstanding claims.

159. It has been argued that Government should provide the unlimited insurance cover for a charge, if the commercial insurance market is unable to. However as the likelihood of a catastrophic accident is very small, any charge for taking this risk calculated on a probability basis would not be very large. If the purpose of making the change is to ensure that nuclear operators have the right economic incentives to act safely, we do not believe this is the right

[28] For example in Commission Recommendation of 28 October 1965 to the Member States on the harmonization of legislation applying the Paris Convention of 29 July 1960 and the Brussels Supplementary Convention of 31 January 1963 (65/42/Euratom) *Official Journal 196 , 18/11/1965 P. 2995 – 2996;* Second Commission Recommendation to the Member States on the harmonization of legislation applying the Paris Convention of 29 July 1960 (66/22/Euratom) *Official Journal 136 , 25/07/1966 P. 2553 – 2554*

approach. The most effective way of guarding against catastrophic accidents is to have a robust regulatory regime with appropriate regulatory requirements imposed on nuclear operators to ensure the risk of a significant release of radioactive material is kept extremely small. In effect, through meeting the exacting requirements of the regulatory authorities the nuclear industry is already meeting the costs necessary to properly protect society from a very low probability but high consequence accident.

160. The Government is committed to the effective implementation of the Conventions as they provide the right framework for dealing with compensation following an incident. The Government will work with the other Paris countries in relation to the Conventions including on whether it would be appropriate to revise the Convention requirements.

Availability of insurance/financial liability (Chapter 9)

161. The Paris Convention requires operators to maintain insurance or other financial security to cover their liabilities under the regime. This requirement will continue to apply under the amended 1965 Act. The consultation document noted that the insurance market is able to cover most of the liabilities arising from the new categories of damage but that there may initially be gaps in the cover, for which the operator will have to identify alternative sources of financial security and failing that, as a last resort, Government would consider providing this cover for a charge.

162. The questions for chapter 9 were:

Question 6

We would welcome views on the availability of insurance or other financial security.

In particular, we would welcome views on:

a) what forms of alternative financial security should be acceptable and over what classes of liability might alternative forms of financial security be appropriate?
b) how Government should assess operators' proposals for alternative financial security arrangements?
c) In addition, we would welcome views on the Government stepping in as a last resort to fill any insurance gap. How should Government calculate the charge for this?

Summary of responses

163. This subject received a large number of responses.

a) Acceptable forms of alternative security

164. On the first question respondents suggested that operators should consider a range of insurance alternatives, for example, bank guarantees, parent company guarantees, letters of credit and self-guarantees. A number however noted that some of these may be more acceptable forms of financial security than others.

165. It was also noted by some that the insurance market is continually evolving and that with the increase in operator liability levels new entrants may be attracted to enter the nuclear insurance market with new products.

166. A few suggested that the Government should issue guidance on the types of insurance/financial security that would be acceptable. However most of the responses recommended that the financial security proposals of operators

should be considered on a case by case basis given the relatively diverse nature and size of nuclear operators and their ability to access various financial security vehicles.

b) Assess operators' proposals

167. We did not receive many responses in relation to how the Government should assess operators' proposals on financial security. Those that did respond to this question suggested the use of existing credit assessment methods such as Financial Services Authority (FSA) approval and rating agency reports. One response highlighted that any assessment of financial security proposals needed to cover elements such as the insurer's domicile, their financial strength and claims handling ability.

c) Government providing cover

168. There were many comments on the question on whether and how the Government should step in as a last resort to fill any insurance gaps.

169. A small number of respondents disagreed with any Government intervention to provide cover for any insurance gaps and recommended that operators be required to find solutions.

170. The majority however accepted the possibility of the Government having to step in and cover the gaps for a charge on the basis that the alternatives, as out at paragraph 9.20 of the consultation paper, were less attractive, namely:

9.20 Failure to find a solution to the insurance/financial security gap would mean either that:

- *we do not ratify the amendments to the Convention (and the Brussels Convention) because we cannot introduce the necessary changes into UK law in full (since operators would not be able to comply with the requirements as to insurance or financial security); or*

- *we ratify the amendments to the Convention (and the Brussels Convention) but in our implementation of the changes we do not oblige nuclear operators to have insurance or financial security in place to cover the categories of damage in respect of which commercial insurance or other financial security is unavailable. Those excluded liabilities would in effect fall to Government to pay in the event of a claim.*

9.21 In Government's view neither of these outcomes would be desirable.

171. Respondents also agreed that the Government should charge for providing the cover. The suggestions on how such a charge could be calculated included the use of standard actuarial methodology and one based on a rating structure or tiered arrangement to reflect the hazard of different businesses.

The key point being that the Government charge should be proportionate to the risk being taken on.

Government response

172. The Government will consider stepping in to fill any gap in the provision of commercial insurance or other financial security in return for a charge, if the market fails in this area. We maintain this position in light of the responses received, subject to any EU or UK law requirements.

173. Our understanding is that potential gaps in the availability of the necessary insurance cover may not be unique to the UK, particularly with reference to the extension of the personal injury period from 10 to 30 years. Other European Union Contracting Parties to the Conventions are also exploring whether State intervention will be necessary. We will continue to keep track of what they are doing to see if any solutions can be applied here or any lessons can be learned.

174. Last summer the Government commissioned INDECS Consulting Ltd ("INDECS") to undertake a market review of the availability of insurance and alternative financial security options. INDECS are a consulting firm that specialise in energy industry insurance and risk management consultancy. The review and findings were based on discussions with a number of companies in the insurance/financial sector as well as the nuclear operators. INDECS' full report is attached at Appendix 1.

175. INDECS confirmed that most of the liabilities will be able to be covered through insurance or other financial security options by the market as soon as the revised legislation comes into force. However given the nature of the insurance industry it is likely that some elements of the liabilities may not be covered by the market from the outset of the new regime. The market is at various stages of developing products to cover the liabilities.

176. INDECS noted that the two elements where the market may not be able to immediately insure are due largely to the new Solvency II[29] capital requirements, which come into force next year, and which make it difficult to allocate capital under the new regulations across the longer liability period for personal injury and for authorised discharges/permitted disposals and discharges of radioactive waste which are not considered unforeseen events.

177. Nevertheless, INDECS have concluded that the gaps in the market are in time likely to be filled and have recommended that any Government intervention should be for a fixed period during which time Government cover should be progressively reduced. We agree with this.

[29] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

178. The Government has noted the suggestions made by respondents on the acceptable forms of financial security and will draw on expert advice when assessing operator proposals.

179. We are considering whether it would be appropriate to charge each operator the costs of assessing their proposals.

Charging

180. We also commissioned INDECS to provide general advice on how the Government might structure a solution and how it would calculate the charge (premium). Their report[30] is attached at Appendix 2. Clearly the Government will have to consider this issue in the context of the actual scope and nature of any intervention, with any change made needing to be in line with the guidance in HM Treasury's publication *Managing Public Money* but INDECS' initial recommendations are that:

a) *Government, if it has to intervene, should do so on the basis of a* ***reinsurance*** *arrangement where the facility is open to all insurers participating in the market; and*

b) *Government should utilise technical pricing as a minimum (floor), as a basis for setting a price for the risks it will be underwriting. In the event that the commercial price exceeds the technical price, then the commercial price will be applied.*

181. We do not intend formally to consult on these two matters but would welcome any views.

[30] Report to Department of Energy and Climate Change on structure and pricing of suggested solutions to gaps arising from Paris and Brussels implementation, INDECS Consulting Ltd, November 2011

Jurisdiction (Chapter 10)

182. The changes to Article 13 of the Paris Convention update the provisions on jurisdiction to take into account the exclusive economic zones (EEZs) of the parties[31]. They also specify that only one court in a Paris country should deal with claims arising from a particular nuclear incident. The consultation paper set out how these changes will be implemented. In particular it set out how effect would be given to the single court requirement in the UK through arrangements for determining intra-UK jurisdiction. In addition there was a proposal to clarify the meaning of "occurrence" in the 1965 Act.

183. The questions in the consultation paper were:

Question 7

We would welcome views on our proposed implementation of the Paris Convention changes regarding allocation of jurisdiction, both between Paris countries and within a Paris country, as described in this chapter and set out in the draft Order.

In particular, we would appreciate views on:

a) whether basing our tie-breaker provisions on the impact of an occurrence, event or breach of duty would be a workable solution – how practicable would it be to measure impact (see paragraph 10.16)?

b) whether we need a fall back provision giving jurisdiction to the High Court of Justice (see paragraph 10.17).

In addition we would welcome views on our proposed clarification of “occurrence” in new section 26(2A) of the 1965 Act.

Summary of responses

184. The comments we received on the proposals largely focused on the specific questions in (a) and (b).

185. There was general agreement among the respondents that the arrangements for allocating jurisdiction, both between Paris countries and within the UK, should seek to create as much certainty as possible about which court should be responsible for determining claims arising from a particular incident.

[31] Established under international maritime law.

Allocation of jurisdiction between Paris Countries

186. Respondents did not comment on the proposals in the consultation paper to implement the Paris Convention changes that take into account the establishment of EEZs.

187. However, the question was raised whether section 17(1) of the 1965 Act is currently sufficient to ensure that claims, which the Paris Convention requires to be brought in a Paris country other than the UK, are not in fact considered by a court in the UK.

Allocation of jurisdiction within the UK

188. On the question of whether basing our tie-breaker provisions on the impact of an occurrence, event or breach of duty would be a workable solution, a small number of respondents thought that it would be. But there was clear view from other respondents that it would be very difficult to predict with any accuracy what the impact of an incident would eventually be, in particular because exposure to radiation may have delayed effects on health.

189. With regard to whether we need a fallback provision, giving jurisdiction to the High Court of Justice in the event that jurisdiction cannot be allocated to a court in the UK by applying the other allocation criteria in the 1965 Act (as amended), most of the respondents expressed the view that it would be better to retain such a provision.

Occurrences

190. The other issue covered in this chapter was the proposed clarification of the term "occurrence"– specifying that the mere presence of nuclear matter in a place as a result of a previous occurrence is not to be treated as a separate occurrence. Clarification of this term was welcomed by the respondents who commented. Some respondents expressed the view that we should go further and define “occurrence” more narrowly by linking it more closely to the emission of radiation from a site.

191. Others thought it would be wrong to adopt a more restrictive approach that limited an "occurrence" to an "accident" or uncontrolled release of radioactive material because important protection (for example, for workers) would be lost. There was a suggestion that we should make it clear in the 1965 Act that an “occurrence” covers an authorised emission resulting from normal operations as well as abnormal/unplanned emissions or accidents.

192. Respondents also raised the related issue of whether liability for contamination or emissions that have taken place before the Paris Convention and 1965 Act changes come into force should be covered by the revised regime. In particular, is there a possibility of new “occurrences” resulting from pre-existing contamination or emissions being covered by the revised regime? Respondents thought that liability for pre-existing

contamination or emissions should be covered by the current regime rather than the revised regime.

Government response

Allocation of jurisdiction between Paris Contracting Parties

193. As indicated in the consultation paper the Government intends to exercise the option to claim jurisdiction over an area in lieu of an exclusive economic zone (EEZ), by notifying the UK's Renewable Energy Zone and/or the Gas Importation and Storage Zone at the time the revisions to the Paris Convention are ratified[32].

194. The Government agrees that it is important that the 1965 Act puts in place a workable mechanism for ensuring that the UK courts should not decide cases which the Paris Convention requires to be dealt with by the courts of another Paris country. We will give further consideration to the question about question about the adequacy of section 17(1).

Allocation of jurisdiction within the UK

195. The Government agrees with respondents that it is desirable to have arrangements for the allocation of jurisdiction that minimise uncertainty. We think the tie-breaker situations identified in the consultation paper would be unlikely to arise[33], but if they did it would be very undesirable to have protracted and expensive litigation about which court should deal with the claims. We are also persuaded by the consultation responses that predicting the impact of an occurrence, event or breach of duty could prove to be difficult and would introduce an element of unnecessary uncertainty and expense. In the circumstances, we do not think our tie-breaker provisions should be based on impact. Instead the Government would like to provide that the High Court of Justice (for England and Wales) should have jurisdiction in the event a tie-breaker situation arises. The Scottish Executive has agreed this approach and the Northern Ireland Departments have been kept informed.

196. We will keep the fall-back provision allocating jurisdiction to the High Court of Justice under review.

Occurrences

197. The Government is reluctant to include a narrower definition of “occurrence” than we proposed in the consultation paper as our present view is that this

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[32] If the UK's EEZ has not been established.

[33] An occurrence would have to occur:

- in more than one of England and Wales, Scotland and Northern Ireland e.g. where the occurrence takes place across a border;
- outside the UK (but not in a place where another Paris country has jurisdiction) where two or more operators based in different parts of the UK are responsible e.g. an incident occurs on board ship on which operators from England and Scotland are transporting nuclear matter.

could risk losing important protections for claimants. However, we will keep the matter under review.

198. Although section 7 of the 1965 Act imposes duties in respect of emissions of ionising radiations as well as "occurrences", it is the Government's assumption that the references to "occurrences" elsewhere in the 1965 Act cover the emissions referred to in section 7 - see for example, sections 15 and 16 and new sections 16B and 26(2A). The Government is also of the view that the duties in section 7 cover authorised emissions and discharges.

199. Although we do not currently plan to narrow the definition of "occurrence" any further, the Government is of the firm view that claims arising from contamination or emissions which have taken place prior to the coming in to force of the revised liability regime should be dealt with under the current 1965 Act regime, rather than the revised regime, irrespective of whether it could be argued that a new "occurrence" has occurred after the revised regime has come into force. We will make provision in the Order amending the 1965 Act to ensure this is clear.

Nuclear waste disposal facilities (Chapter 11)

200. The revised Paris Convention expressly brings nuclear waste disposal facilities within the definition of a "nuclear installation" and therefore requires such facilities to be covered by the liability regime. To comply with this obligation the Government proposed to bring such facilities within the 1965 Act liability regime without extending the existing nuclear licensing regime to cover them. However it considered that the Paris liability regime should only apply to nuclear waste disposal facilities which present the level of risk that the Paris Convention was designed to cover. In the consultation paper the Government therefore proposed to seek a specific exclusion for low level nuclear waste disposal facilities from the Paris Convention.

201. The questions raised in the consultation paper were:

> **Question 8**
>
> **We would welcome views on our proposals for implementing the Paris Convention requirements in respect of nuclear waste disposal facilities.**
>
> In particular, we would welcome views on the number of commercial waste disposal facilities who may be affected by the proposed changes and how they may be affected.

Summary of responses

202. This chapter of the consultation paper generated the most comments outside those on liability and financial security. Most respondents agreed that Lower Level Waste (LLW) and Very Low Level Waste (VLLW) facilities should not be licensed and thought that these facilities should be excluded from the Paris liability regime, but there were more mixed views about the Government's proposal to apply the liability regime to V/LLW disposal facilities in the interim period until an exclusion from the Paris Convention can be secured.

203. Many respondents agreed with the consultation paper that the existing legislation covering waste facilities (such as the Environmental Permitting Regulations England and Wales 2010 or the Radioactive Substances Act 1993 in Scotland and Northern Ireland) provided sufficient regulatory control and therefore licensing under the 1965 Act is unnecessary.

204. However a few respondents expressed the view that disposal facilities for higher activity wastes should be licensed. Others noted that our arrangements need to comply with the EU Directive on the management of spent fuel and radioactive waste and the IAEA Joint Conventions on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management.

205. With regard to the Paris liability regime a number of respondents made the point that V/LLW facilities present a very low risk of incident and consequential harm. Respondents expressed the view that the Paris liability regime was not intended to cover such low risk installations and that applying the Paris regime - with the requirement to purchase insurance or other financial security to cover a level of liability - would impose a disproportionate and unnecessary burden on the operators of V/LLW disposal facilities. This could have a detrimental effect on the implementation of the UK's LLW strategy and decommissioning programme by increasing the costs of disposal and acting as a disincentive to market entry at a time when the emerging market needs to be encouraged.

206. For these reasons some respondents argued that the liability regime should not be applied to V/LLW facilities in the interim, prior to our obtaining a specific exclusion from the Paris Convention. It was suggested that instead liability could be retained by the licensed operators sending V/LLW for disposal or be borne by Government.

207. Other respondents supported the Government's proposal to apply the Paris liability regime until a specific exclusion can be obtained. They recognised the UK's international obligations in this regard and thought the proposal was reasonable, pragmatic and proportional.

208. Some respondents noted that there may be disadvantages in excluding V/LLW disposal facilities from the Paris liability regime, for example in relation to the loss of channelling and limited liability. It was suggested that it might be preferable to permit a very low liability limit under the Paris regime rather than dispense with it altogether.

209. A question was also raised whether the Government should consider applying for an exclusion from the Paris liability regime for installations that may in future be involved in the management of quantities of material that represent a very small risk.

210. A number of practical and technical points were raised about the implementation of the proposals. In summary, these related to:

- the need to ensure the lower liability for "prescribed sites" (€70m) applies to V/LLW disposal facilities;
- the availability of insurance/financial security to cover the liabilities of operators of these facilities;
- the transfer of liability from the licensed operator sending the V/LLW to the operator of the facility;
- transitional arrangements (e.g. for insurance) when such facilities are eventually excluded from the Paris regime;

- when the Paris Convention liability regime will cease to apply to all disposal facilities following their closure.

211. As to the number of commercial waste disposal facilities affected, it was estimated that fewer than 10 operators at 10 sites would be subject to the proposed changes.

Government response

212. The Government has considered the responses submitted during the consultation and has decided to pursue the proposals as set out in the consultation paper. It will apply all of the aspects of the liability regime in the revised Paris Convention (and Brussels Supplementary Convention) to disposal sites but without extending the existing 1965 Act nuclear licensing regime to them. This does not preclude the future application of the requirements of the nuclear licensing regime to particular classes of disposal facilities if they are intended to handle materials or undertake activities that are considered to warrant further nuclear safety regulation. We also note the comments on the exclusion of other types of installation that may in future be involved in the management of quantities of material that represent a very small risk e.g. processing and storage facilities, and will consider this.

213. Turning to the issue of V/LLW disposal the Government is mindful of the need to comply with its EU and international obligations with regard to waste management. Our view is that these can be satisfied in respect of V/LLW disposal facilities without needing to apply the 1965 Act nuclear licensing regime to them.

214. The UK is proceeding with its application to the Steering Committee of the Nuclear Energy Agency (NEA) under which the Conventions are managed. It has raised the issue of excluding V/LLW disposal facilities from the Paris regime with the Nuclear Law Committee (NLC), one of the standing technical committees under the NEA Steering Committee. The NLC includes representatives from all the Paris countries as well as other members of the NEA. The NLC has asked the UK to prepare its proposal and initiate the approval process. The UK Government will now work with the UK regulators and others to develop the proposal and criteria for excluding such facilities.

215. There is no guarantee that the NEA Steering Committee will grant an exclusion and if it does so there is little possibility that it will be granted by the time the revised legislation comes into force. There will therefore be an interim period – possibly for several years - where V/LLW disposal facilities will fall under the liability regime and will be required to meet the obligations of having the necessary financial security or insurance. We believe that such facilities will however fall under the category of low risk sites and would have a liability cap of €70 million.

216. As respondents pointed out, at present where V/LLW is sent from a nuclear licensed site to a disposal facility, liability under the 1965 Act remains with the licensee and does not pass to the operator of the disposal facility. The

Government considered the possibility of retaining this position until the grant of an exclusion from the Paris Convention. However, we concluded this would not be the best way forward as it would not accord with the channelling principle in the Paris Convention (with the result that there could be confusion about who claims could be brought against where a number of licensees send V/LLW to a particular disposal facility). In addition, where a number of licensees send V/LLW to a disposal facility, there would be an "aggregation" of liability limits which would be likely to cause difficulties with licensees' insurance. By contrast, our understanding is that insurance will be available to the operators of V/LLW disposal facilities - subject to the general caveats noted in Chapter 9 of the consultation paper.

217. As explained in the section on financial liability levels (paragraphs 128 – 160), Government considers that the nuclear industry should bear appropriate responsibility for its third party liabilities and therefore Government believes that it should not take on such liabilities arising from the disposal of V/LLW pending the granting of an exclusion.

218. With regard to how the Paris liability regime will be applied to V/LLW disposal facilities, it is envisaged that the 1965 Act will be amended so that the operators of such facilities will form another category of operator on whom duties are imposed - alongside licensees (section 7), the Authority (section 8) and the Crown (section 9). When V/LLW is sent by a licensee to a V/LLW disposal facility, liability will transfer from the licensee to the operator of the V/LLW disposal facility when the waste arrives at the disposal facility. We are considering whether liability could also transfer where the V/LLW disposal facility operator agrees to accept responsibility for the transport of the waste to the V/LLW disposal facility i.e. where carriage is "on behalf of" the V/LLW disposal facility operator in 1965 Act terms[34]. The requirement to have insurance or other financial security in section 19 would need to be extended to V/LLW operators[35].

219. Where an exclusion is granted the intention would be for liability for incidents after the exclusion to be determined in accordance with the ordinary law. Further amendment to the 1965 Act or secondary legislation under the Act will be needed to achieve this. Licensees that send V/LLW to a disposal facility would cease to be liable for it under the 1965 Act but would remain subject to regulatory control and third party liability under ordinary law. It would be possible to bring claims against all parties considered to be responsible under the ordinary law (possibly including the sending licensee(s) and the operator of the disposal facility) and there would not be a cap on liability. However the 1965 Act insurance/financial security requirements would not apply. It is recognised that transitional arrangements will be needed to determine what liability regime should apply and the insurance/financial security requirements.

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[34] In effect V/LLW disposal facilities will be an additional type of "relevant site". We are considering whether carriage on behalf of a V/LLW operator would be a type of "relevant carriage".

[35] Other consequential amendments will need to be made to the 1965 Act to take into account this new category of operator.

220. The Government agrees that further work needs to be done in relation to when the Paris Convention should cease to apply to disposal facilities in their post-closure phase. A discussion needs to take place in particular among representatives of the Paris Contracting Parties.

Representative actions (Chapter 12)

221. The revised Paris Convention now requires the Paris countries to ensure that their laws allow other countries to bring an action on behalf of persons connected with that country (where those persons would have a claim under the Convention). The consultation paper set out how the Government proposed to implement this requirement in the UK.

222. The question in the consultation paper was:

> **Question 9**
>
> We would welcome views on our proposals for implementing the new Paris Convention requirements in respect of representative actions.

Summary of responses

223. Only a small number of respondents commented on this chapter. Some respondents expressed support for permitting this kind of action as it may prevent a plethora of separate claims and allow for the co-ordination of claims. Others were not in favour, either on the basis that such actions are unnecessary or that they could allow the pursuit of unmeritorious claims. The view was expressed that non-UK claimants (on whose behalf an action would be brought) should have no greater rights than they would have in their own countries.

224. We also received comments about the likely risks of permitting actions of this type and how we might address these risks. In particular, the view was expressed that mechanisms should be put in place to prevent unmeritorious claims being brought (such as use of a claim Ombudsman or allowing the court to prevent certain claims proceeding). It was thought the 'loser pays' principle should remain a possibility to deter claims that are unlikely to succeed. The view was also expressed that the regime should be an 'opt-in' regime rather than an 'opt-out' regime to ensure that claims are only brought on behalf of persons who actually wish to seek redress. In order to ensure finality and the avoidance of double-recovery, the view was expressed that once an action has been brought by a country on behalf of a person, that person should not be permitted to bring a further claim.

225. In addition, to deal with the fact that other countries may not know how the court systems (or 1965 Act works) in the UK, it was thought that it would be desirable to provide appropriate guidance literature to any country wishing to bring an action on behalf of persons.

Government response

226. The Government has considered the responses submitted during the consultation and decided to pursue the proposals as set out in the consultation paper. We think the amendments to the 1965 Act are necessary to give effect to Article 13(g)(i) of the revised Paris Convention. The 1965 Act will be amended to allow the governments of other qualifying countries to bring proceedings in the UK on behalf of persons who, at the time the proceedings are initiated, are nationals of the country in question or who are domiciled or resident in that country. The power to bring proceedings will include the power to take over the conduct of existing proceedings.

227. The 1965 Act will also be amended to confer a discretion on the Secretary of State to bring proceedings in the courts of other Paris countries or countries that offer reciprocal liability arrangements[36] on behalf of UK nationals, and those who are domiciled or resident in the UK at the time the proceedings are initiated. The Secretary of State's power to bring proceedings will include a power to take over the conduct of existing proceedings. We also plan to include in the 1965 Act powers to protect the Government's financial position in the event that the Secretary of State brings proceedings of this kind, in particular a power to require a contribution towards the cost of bringing the action and a power to recover costs from any award of compensation/costs or settlement.

228. As indicated in the consultation paper some changes will be needed to court rules of procedure in England and Wales to reflect and allow implementation of the new provision in the 1965 Act to permit foreign governments to bring actions on behalf of others in the UK. We are liaising with Scotland and Northern Ireland on any rule changes that may be needed in these jurisdictions.

229. The Government agrees that the regime should be 'opt-in' rather than 'opt-out' and therefore the 1965 Act will provide that both foreign governments and the Secretary of State will not be able to bring proceedings on behalf of a person unless that person has consented. We also agree that the 'loser pays' principle should be retained and that where proceedings have been brought by a foreign government in the UK on behalf of a person, that person should not be able to bring further proceedings – in other words, the outcome of the representative action should be binding on the persons on whose behalf the representative action was brought. The Government will consider whether additional measures would be desirable to deter or prevent unmeritorious claims - beyond those which exist already, including the loser pays principle - and to take into account the position of foreign governments and other claimants not based in the UK (for example, as regards costs recovery).

[36] "Relevant reciprocating territories" in the draft Order – see paragraph 5.11 of the consultation paper.

230. The Government agrees that it would be desirable for guidance on bringing representative actions under the 1965 Act to be made available to foreign governments (and those they may go on to represent).

Impact assessment

231. The draft impact assessment that accompanied the consultation paper sought information on the following questions.

Impact assessment questions	
IA 1.	Can you provide information on current actual costs of insurance or other financial security and the impact of the proposed changes?
IA 2.	If you cannot provide actual costs, are you able to provide information on the scale of change for the costs of insurance or other financial security through higher insurance premiums or alternatives?
IA 3.	Are these estimates for a standard installation or a low risk installation or for transport activities?
IA 4.	Can you provide information on ongoing legal and administrative costs as a result of the changes and the likely scale and nature of transition costs?

Summary of responses

232. There were a limited number of responses to the issues raised by these questions and the impact assessment overall.

233. No respondents provided information on current actual costs that they were willing to have made public. On the scale of costs (question 2) a range of estimates were provided. The most common estimates were that there would be increases of between 4 to 8 times current costs of insurance premiums, however the range extended from 2 to 10 times current costs, depending on the type and risk of installations covered. There were also comments on the fact that these estimates related to the risks that insurers were prepared to cover i.e. not all of the new categories of damage.

234. In general, responses related to standard rather than low risk (prescribed) sites.

235. In relation to the ongoing legal and administrative costs as a result of the changes, there were very few comments. These included that increased clarity of the legislation would mean lower legal and administrative costs for operators. Furthermore, introducing a new Act rather than amendments would reduce legal costs.

Government response

236. The impact assessment has been updated to reflect the outcome of the consultation including the information provided on the scale of costs, and is attached at Appendix 3.

Annex 1 - List of respondents

MPs, Government Agencies and Local Authority Representatives

Caroline Lucas MP
Norwich Green Group City Councillors
Nuclear Free Local Authorities
Scottish Environmental Protection Agency
Stroud District Council

Non-Governmental Organisations

Braystones Residents
Campaign for Nuclear Disarmament
Energy Fair
Greater Manchester SERA
Greenhouse Trust
Greenpeace UK
Low Level Radiation and Health Conference
No Money for Nuclear
Parents Concerned About Hinkley
People Against Wylfa B/Pobol Atal Wylfa B
Radiation Free Lakeland
Shut Down Sizewell Campaign
Welsh Anti Nuclear Alliance
West Cumbria and North Lakes Friends of the Earth

Nuclear industry representatives

Augean plc
EDF Energy
ELINI
GE Healthcare
Horizon Nuclear Power
LLWR Ltd
EnergySolutions
Marsh Ltd
Nuclear Decommissioning Authority
Nuclear Industry Association
Nuclear Risk Insurers
NuGeneration Ltd
Rolls Royce
Sellafield Sites
Studsvik UK Ltd
Urenco
Waste Recycling Ltd
Westinghouse Electric Company UK Ltd

Members of the public

W Allison
J Amos
P Anderson
C Aris
J Birch
S Bolt
D Carson
C I Clowes
P Conway
M Davey
The Fairbairns
L Fulford
C Gifford
U Grant

P Griffiths
C Head
J Hammond
M Higham
M Hill
M Hunter
W Leigh
B Leslie
B Irvine
B Loudon
C MacIntosh
A & E Mack
V Mainwood
M & G Margolis
F Martin
B Norris
D Packham
M Parker
M Poteliakhoff
D Power
T Richards
L Rogers
L Rose
A Schuman
R Street
S Thompson
M Toomey
O Tickell
C Way
EA Wheal
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