

ANTARCTIC ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Environmental Emergencies

Duty to take response action

Section 1 – Duty to take response action

9. This section requires those who organise activities carried out in Antarctica, where those activities are connected with the United Kingdom, to take reasonable, prompt and effective response action in relation to any environmental emergency arising directly or indirectly from those activities. This obligation reflects Article 5(1) of the Liability Annex. ‘Response action’ and what constitutes ‘reasonable’ response action are defined in section 13(5) to (8). These definitions reflect Article 2(e) and (f) of the Liability Annex.
10. *Subsection (2)* makes it an offence to fail to comply with the requirement in subsection (1) to take response action.
11. *Section 1* is subject to the general exclusions set out at section 9. The effect of these is to limit the extent to which liability in the event of a failure to take response action to an environmental emergency will be imposed.
12. The penalties for this offence are set out in *subsection (3)*. *Subsection (4)* and *subsection (5)* require the court, in determining the amount of a fine, to take into account the amount that the offender would have spent had the obligations in this section been complied with (to the extent that those costs are not recovered from the offender under the civil liability provisions of this Part, namely, sections 2 and 3). See Article 6 of the Liability Annex.

Civil liability for failure to respond to environmental emergency

Section 2 – Liability to Parties to Annex VI

13. Under Article 5(2) of the Liability Annex, Parties to the Annex are encouraged to take response action in respect of an environmental emergency in the event that the person causing the emergency fails to take reasonable, prompt and effective response action. Section 2 enables a Party who does take such action, including the United Kingdom Government, to recover its costs from the person in question. The persons who may be liable under this section include, but are not limited to, those to whom section 1 applies. This reflects Articles 6 and 7 of the Liability Annex. See, in particular, Article 6(1).
14. *Subsection (2)* provides that where the Crown, or a person specifically authorised by the Crown, undertakes response action after an environmental emergency arising from activities organised by a person based in the United Kingdom, or from activities connected with the United Kingdom, the Government is entitled to recover the costs of such actions. See further section 10, which defines “the Crown” for the purposes of Part

1 of the Act. In practice, the most likely Crown entity to be involved in any response to an emergency in Antarctica will be the Royal Navy or the British Antarctic Survey.

15. *Subsection (3)* enables other Parties to the Liability Annex to recover the costs, through the British courts, of any reasonable response action that they have undertaken in respect of an environmental emergency arising from activities, provided that the activities giving rise to the environmental emergency were organised by a person based in the United Kingdom, or by a person based in a State that is not Party to Annex VI where the activities are connected with the United Kingdom. This reflects Article 7(1) of the Liability Annex.
16. *Subsection (4)* exempts the Crown and the other Parties to Annex VI from liability under this section for any failure on their part to take response action to environmental emergencies arising from their own activities. This reflects Article 7(1) of the Liability Annex, which applies only to actions against non-State (that is, non-governmental) operators. The obligation under Article 5 of the Liability Annex to take such response action applies equally to State and non-State operators. However, Article 7(4) of the Annex stipulates a set of international mechanisms for determining the liability of a Party as a State operator under Article 6(1); and moreover, that only these mechanisms may be used.
17. *Subsections (6), (7) and (8)* set out the limitation period which applies to actions brought under this section. Proceedings may not be brought after a period of three years from the date of commencement of the response action, or, if later, from the date when the plaintiff ascertained, or ought reasonably to have ascertained, the identity of the person organising the activities, subject to a maximum of fifteen years from the date of commencement of the response action. This reflects Article 7(1) of the Liability Annex.

Section 3 – Liability to Antarctic Environmental Liability Fund

18. This section applies to cases where the organiser of the activities which gave rise, directly or indirectly, to an environmental emergency in Antarctica fails to take reasonable, prompt and effective response action, and no response action is taken by any Party to Annex VI. In such cases, the amount that reasonable, prompt and effective response action would have cost becomes a liability which the organiser of the activities is liable to pay to the Antarctic Environmental Liability Fund. The Fund will be established under Article 12 of the Liability Annex, and will be maintained and administered by the Secretariat of the Antarctic Treaty. Its funds may be used only in accordance with a Decision adopted under Article 12 by the Antarctic Treaty Consultative Meeting.
19. *Subsection (2)* provides that in cases involving the activities of the Crown (as defined in section 10), the Secretary of State shall be required to make a direct payment to the Antarctic Environmental Liability Fund of an amount equal to the recoverable costs of the response action. In practice, this will be the Secretary of State responsible for the activities in question.
20. *Subsection (3)* makes provision about payment into the Fund by a person other than the Crown who is liable under this section. *Subsection (4)* exempts the Crown and any other Party to the Liability Annex from any liability under subsection (3) (the Crown is exempted because its liability is under subsection (2)).
21. Where the person organising the activities is based in the United Kingdom, or the activities are connected with the United Kingdom, *subsection (6)* enables the Secretary of State (in practice, the Foreign Secretary) to recover the costs as if they were a debt due to the Secretary of State. Under *subsections (7) and (8)*, the Secretary of State may receive all or any of the amount due and transfer it to the Antarctic Environmental Liability Fund, or require the person who is liable to pay it to do so directly to the Fund. The limitation period is fifteen years from the date on which the Secretary of State

became aware, or ought to have become aware, of the environmental emergency (see *subsection (9)*). This reflects Article 7(3) of the Liability Annex.

Section 4 and Schedule – Civil liability: supplementary

22. *Paragraphs 1 and 2* of the Schedule set out the limits to the amounts recoverable under sections 2 and 3. The amounts are those set out in Article 9 of the Liability Annex, and are accordingly expressed in International Monetary Fund Special Drawing Rights. Under current exchange rates, the limits for environmental emergencies involving a ship range from the equivalent of approximately US\$1.5 million for the smallest vessels, rising upwards to more than US\$45 million for the largest passenger cruise vessels which have operated recently in Antarctica. A limit equivalent to US\$4.5 million is applicable to environmental emergencies not involving ships.
23. To allow for the implementation of any amendments to the financial limits in Article 9 of the Liability Annex that may be adopted by the Antarctic Treaty Consultative Parties under Article 9(4), *paragraph 1(4)* of the Schedule provides for the Secretary of State to amend the limits in *paragraph 1(2) and (3)* by order.
24. *Paragraph 1(5)* of the Schedule provides that where the environmental emergency was caused intentionally, or recklessly and with knowledge that such an environmental emergency would probably result, the liability is not limited by the levels set out in this paragraph. This reflects Article 9(3) of the Liability Annex.
25. *Paragraph 2* of the Schedule provides for the circumstances where there is liability under both the Act and Schedule 7 to the Merchant Shipping Act 1995. Sections 2 and 3 of the Act provide for liability to cover the reasonable costs of response action in the event of an environmental emergency. If the limit on liability in the Merchant Shipping Act 1995 allows for more of the reasonable costs of response to be recovered than the limits in paragraph 1, then paragraph 1 does not apply. However, if applying the limits on liability in the Merchant Shipping Act would result in a lower amount being recovered towards the reasonable costs of response than is laid out in paragraph 1, then the limits in that Act do not apply. The result is that at least the amounts laid down in paragraph 1 are always recoverable to cover the costs of reasonable response action.
26. *Paragraph 3* of the Schedule provides that where two or more organisers of activities in Antarctica are involved in an emergency, they will be jointly and severally liable. However, no person will be liable in respect of any part of an emergency that did not arise from the activities organised by that person.
27. *Paragraphs 4 and 5* of the Schedule prevent double recovery of costs. So, for example, an organiser is not liable in respect of costs that he/she or another person has already paid under the provisions of the Act or of Annex VI as implemented in another State. Neither is an organiser to be liable under both the provisions of the Act and under Part 9 of the Merchant Shipping Act 1995 (which deals with salvage and wrecks) in respect of the same costs.

Preparatory measures

Section 5 – Duty to take preventative measures and make contingency plan

28. *Section 5(2)* requires the organiser of activities in Antarctica, where those activities are connected to the United Kingdom, to take reasonable preventative measures designed to reduce the risk of environmental emergencies arising from those activities and their potential adverse impact. This reflects Article 3 of the Liability Annex.
29. “Activities connected with the United Kingdom” is defined in section 13(9). “Environmental emergency” is defined in section 13(3), which reflects the definition in Article 2(b) of the Liability Annex.

30. *Subsection (3)* gives some examples of the preventative steps that the organiser may need to take to satisfy the obligation in subsection (2) to reduce the risk of environmental emergencies and reduce the potential adverse impact of any such emergencies. The examples of preventative measures outlined in subsection (3) are not exhaustive. *Subsection (6)* requires the measures to be taken before the persons who will carry out the activities enter Antarctica.
31. *Subsection (4)* requires those organising activities in Antarctica, where those activities are connected to the United Kingdom, to develop a contingency plan for responding to environmental emergencies and other incidents which may have a potential adverse impact on the Antarctic environment. This reflects Article 4 of the Liability Annex.
32. *Subsection (5)* gives examples of what a contingency plan required by subsection (4) might include, such as setting out plans for taking action in response to an environmental emergency or incident and arrangements for informing the Secretary of State. The examples outlined in subsection (5) are not exhaustive. Subsection (6) requires the plan to be made before the persons who will carry out the activities enter Antarctica.
33. *Subsections (7) and (8)* make it an offence to contravene the requirements of subsection (2) or (4) by the time specified in subsection (6). The penalties are set out in *subsection (9)*.

Section 6 – Insurance relating to environmental emergencies

34. This section requires organisers of activities in Antarctica to secure adequate insurance cover or other financial security for (a) the costs of taking any response action required by section 1; and (b) any liability which may be incurred under section 2 or 3. This section reflects Article 11 of the Liability Annex.
35. Examples of “other financial security” are bonds or guarantees of a bank or similar institution.
36. *Subsections (4) and (5)* specify conditions that the insurance cover or financial security must satisfy to qualify as “adequate” for the purposes of subsection (1). It must not be subject to any limitation, exception or exclusion that makes it fundamentally deficient and the level of cover for liability under sections 2 and 3 must be at least as high as the limits on liability as set out in the Schedule to the Act.
37. Failure to secure adequate insurance or other financial security to cover potential liabilities before entering Antarctica is an offence under *subsection (6)* and will give rise to the penalties set out in *subsection (7)*.
38. *Subsection (8)* exempts the Crown (as defined in section 10) and other Parties to Annex VI from the requirement to obtain insurance. This reflects Article 11(3) of the Liability Annex, which is based on the recognition that governments usually self-insure.

Information

Section 7 – Duty to inform the Secretary of State

39. **Section 7** requires organisers of activities in Antarctica which are connected to the United Kingdom to inform the Secretary of State promptly of any environmental emergency of which they become aware as a result of the carrying out of those activities. There is a duty on a person to inform the Secretary of State on becoming aware of an environmental emergency even where the activities of that person did not cause the environmental emergency (*subsection (2)*). Failure to inform the Secretary of State as required is an offence (*subsection (3)*), the penalties for which are set out in *subsection (5)*. *Subsection (4)* provides that a person shall not be guilty of an offence if he or she informed the Secretary of State as soon as practicable in all the circumstances of the environmental emergency. This reflects Article 4(3) of the Liability Annex.

Section 8 – Secretary of State’s power to require information

40. This section enables the Secretary of State by notice to require specific and detailed information from those organising activities connected with the United Kingdom in Antarctica in the event that those activities appear to the Secretary of State to have, directly or indirectly, caused an environmental emergency or an incident which has the potential to cause an adverse impact on the environment of Antarctica. Failure to comply with a request for information within the time period specified is an offence (see *subsection (4)*), except if the person does not have the information and could not reasonably be expected to obtain it (*subsection (5)*). *Subsection (7)* prohibits the use of information given by a person pursuant to a notice under this section from being used in evidence against the person in any criminal proceedings.

Application of this Part

Section 9 – General exclusions

41. *Subsection (1)* excludes from criminal and civil liability under Part 1 of the Act a person organising activities as an employee of another person, in the course of service in the regular forces or in the course of service or undertaking training or duties in the reserve forces.
42. *Subsection (3)* specifies activities which are not covered by Part 1 of the Act. These are: fishing for profit and activities carried out on a vessel or aircraft while travelling to an immediate destination outside Antarctica. These exclusions are consistent with those in section 5(2) of the Antarctic Act 1994, and incorporate the exemptions provided for by Article VI of the Antarctic Treaty, which applies by virtue of Article 4 of the Protocol.
43. *Subsection (5)* sets out the situations in which criminal liability for failure to take reasonable response action to an environmental emergency under section 1, or civil liability under sections 2 and 3, will not arise. In respect of a natural disaster, the exclusion of liability will only apply in circumstances where the organiser had taken preventative measures under section 5. This subsection reflects the exemptions from liability in Article 8 of the Liability Annex. The list of situations in subsection (5) is exhaustive.

Section 10 – The Crown

44. *Subsection (1)* provides that Part 1 binds the Crown, except as otherwise expressly provided (for example, section 6(1) (insurance) does not apply to the Crown – see section 6(8)(a)). *Subsection (2)* exempts the Crown from criminal liability, although not persons in the service of the Crown (*subsection (3)*) (although, as explained above, section 9(1) exempts members of the armed forces from liability). *Subsection (2)* provides however for a relevant court to make a declaration against the Crown. For the purposes of Part 1 of the Act, *subsection (4)* ensures that references to the Crown include the Natural Environment Research Council (including the British Antarctic Survey), which is a Non-Departmental Public Body, and any other persons specified by the Secretary of State by order.

General

Section 11 – Offences

45. This section contains various technical provisions relating to offences under the Act. It provides in *subsection (1)* that sections 17 (places where proceedings may be taken etc.), 19 (offences by bodies corporate and Scottish partnerships), 28 (consents required for institution of proceedings) and 29(1)(b) and (2) (power to make regulations about arrest) of the 1994 Act apply in relation to offences under the Act as if such offences were offences under Part 2 of the 1994 Act. *Subsections (2) to (5) and (7)* deal with offences

*These notes refer to the Antarctic Act 2013 (c.15)
which received Royal Assent on 26 March 2013*

committed by unincorporated associations and *subsection (6)* sets out the extent of a reference to an offence under the Act.

Section 12 - Orders

46. *Subsection (3)* requires that the exercise of any delegated powers by way of an order under Part 1 be subject to annulment in pursuance of a resolution of either House of Parliament (negative procedure). This is consistent with the procedure for exercising delegated powers contained in the 1994 Act (see section 32(3) of that Act).

Section 13 – Interpretation

47. This section defines certain terms used in Part 1.
48. The definition of “environmental emergency” in *subsection (3)* reflects Article 2(b) of the Liability Annex. The definitions of “response action” in *subsection (5)* and what constitutes “reasonable” response action in *subsections (6) and (7)* reflect Article 2(e) and (f) of the Liability Annex.
49. *Subsection (9)* sets out which activities are “connected with” the United Kingdom for the purposes of Part 1. This concept is relevant to the application of many of the provisions. Activities are “connected with” the United Kingdom if they are organised in the United Kingdom, the Channel Islands, the Isle of Man or a British overseas territory and if they are, or are to be, either carried out on a British expedition within the meaning of the 1994 Act, or, in all the circumstances in which they are or are to be carried out, the activities require a permit under any other provision of the 1994 Act. It does not matter for these purposes whether a permit has in fact been granted in respect of the activities under the 1994 Act. When a permit application is made, compliance with these requirements would be assessed prior to the grant of any permit by the Secretary of State.
50. *Subsection (10)* defines when a person will be considered to be “based” in the United Kingdom or elsewhere. In the case of an individual, the test is where that person has their habitual place of residence; in the case of a body corporate it is where the body is incorporated or has its principal place of business. In any other case, the test is where that person has their principal place of business or where their activities (other than those that take place in Antarctica) are principally carried out.
51. These definitions are designed to secure that the provisions of the Act apply in the way required by the Liability Annex and reflect in particular the definitions in Article 2(c) and (d) of the Annex.