Defence Portfolio

# INQUIRY QUESTION

(Question No. 1)

Senator the Hon David Fawcett asked the Department of Defence the following question, upon notice, on 13 March 2024:

Senator FAWCETT (page 53 of Hansard): “I will pick up where Senator Shoebridge was just talking. If it is not the intention to store waste, to give the public confidence, in division 3, paragraph 12, where it says 'What are NNP?'—naval nuclear propulsion facilities—at subparagraph (d)(i), where it says 'is for managing, storing or disposing of radioactive waste from an AUKUS submarine', if the committee recommended to the government that that was changed to 'from an Australian submarine', going back to a previous definition, would that in any way unnecessarily limit the legislation in terms of how Defence intends to operate the Australian AUKUS submarines or collaborate with the UK and the US?”

[Brief exchange between Kim Moy and Senator Fawcett….]

Senator FAWCETT (page 53 of the Hansard): “…My question is: if we amended subpara (d)(1) and replaced the words 'AUKUS submarine' with 'Australian submarine', would there be any unintended consequences?”

[John Reid stated that Defence would take this on notice]

Senator FAWCETT (page 53 of the Hansard): “It seems a pretty binary question here, in that, if we're not intending to take the waste from US or UK owned and operated submarines, then saying that we're going to store the waste just from Australian submarines would appear to be a pretty black-and-white answer.”

[Moved onto another topic]

Senator FAWCETT (page 54 of the Hansard): “Sure. Going back to the previous question, where you're taking on notice that division 12(d)(1), could you also look at subdivision A, section (7), the definition in subpara (i) of 'AUKUS submarine', where, after subparas (a) and (b), there's text that says 'and includes such a submarine that is not complete (for example, because it is being constructed or disposed of). Could you come back to the committee with any unintended consequences if we changed that such that the 'disposed of' element only applied to an Australian submarine?”

**Defence provides the following answer:**

The proposed amendment to clause 12(d)(i) of the Bill would exclude from the scope of regulatory control facility activities relating to *all* radioactive waste – including spent nuclear fuel or other high-level radioactive waste, intermediate- and low-level waste – from UK or US submarines (as defined in the Bill).

The Government has confirmed that Australia will not be responsible for the management, storage or disposal of spent nuclear fuel from UK or US submarines. However, the Government would need to carefully consider any amendment which excluded the possibility of regulatory control of the management of low-level radioactive waste from UK or US submarines as part of Submarine Rotational Force–West (SRF-West).

The rotational presence of UK and US submarines in Western Australia as part of SRF-West provides a core opportunity for Australia to learn how these vessels operate, which involves the management of low-level radioactive waste from routine sustainment operations. Low-level radioactive waste will consist of items, such as disposable gloves, wipes, reactor coolant and used Personal Protective Equipment, with minor levels of contamination from contact with radioactive materials. Defence has a strong record of securely managing radioactive waste, which is stored safely in licensed facilities on the Defence estate.

The phased approach of the Optimal Pathway was specifically developed to build Australia's nuclear stewardship capability. Radioactive waste of this nature will be managed in line with relevant international best practice and in accordance with Australia's international and domestic legal obligations and commitments, including the Treaty on the Non-Proliferation of Nuclear Weapons and the South Pacific Nuclear Free Zone Treaty.

Amendments to the Bill, including to clause 7, that confine a reference to 'disposal' to an 'Australian submarine' as defined by subclause 7(2), would be consistent with plans for the optimal pathway.

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# INQUIRY QUESTION

(Question No. 2)

Senator the Hon David Fawcett asked the Department of Defence the following question, upon notice, on 13 March 2024:

Senator FAWCETT (page 55 of Hansard): “So if the committee were to make a recommendation that the legislation should make it an offence to inappropriately pressure, influence or otherwise exert or try and coerce the direction of an outcome or a report, other than by command direction et cetera, could you take that on notice and come back to us to say whether such a provision would be workable and whether there would be any unintended consequences from that? That's something that we've seen very recent evidence of, which is highly inappropriate, and, in this regime, would undermine the whole structure that you're seeking to put in place.”

**Defence provides the following answer:**

The Bill is drafted to protect the integrity and the performance of functions of the Regulator and ensure its members (including inspectors) are not subject to undue influence.

Clause 109(3) provides that the Director-General and Deputy Director-General cannot be ADF members. Clause 104 of the Bill would provide that the Regulator has complete discretion in the performance of its functions, and would not be subject to direction by any person in relation to the performance of those functions. For members of the Regulator who are also members of the Australian Defence Force (ADF), clause 120 of the Bill would provide that the member is not subject to any ADF command in relation to the performance of the member’s functions under the Act.

Importantly, clause 91 of the Bill would provide for a strict liability offence where a person obstructs, hinders, intimidates or resists an inspector or a person assisting an inspector in the performance of their functions.

Inspectors or persons assisting the Regulator would also be ‘Commonwealth public officials’ for the purpose of the Schedule to *Criminal Code Act 1995* (the Criminal Code). There are a number of existing offences in the Criminal Code in relation to dishonestly influencing Commonwealth public officials (section 135.1(7)), causing harm and threatening to cause harm to a Commonwealth public official (sections 147.1 and 147.2) and obstructing, hindering, intimidating or resisting a Commonwealth public official in the performance of a Commonwealth public official’s functions (section 149.1).

Defence considers the existing provisions of the Bill and the Criminal Code would provide the necessary protections required for inspectors and other persons assisting the Regulator in this regard, and would criminalise the conduct in question.

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# INQUIRY QUESTION

(Question No. 3)

Senator the Hon David Fawcett asked the Department of Defence the following question, upon notice, on 13 March 2024:

Senator Fawcett (on page 55 of the Hansard): “Sure. The last element of that question [referring to QON #2] is: regarding any reporting from an individual inspector through the regulator, what assurance is there that the report of an individual at the coalface will actually flow through to senior decision-makers within the regulator? That's also a live issue in the area of capability assurance more broadly in defence, so what provisions are being put in place to ensure the transparency of reports that somebody makes at that working level being considered without being watered down and incorporated into broader conclusions by different levels within the regulator?”

**Defence provides the following answer:**

As outlined in response to QoN #2, there are a number of carefully drafted provisions in the Bill and other applicable Commonwealth legislation (including the *Criminal Code Act 1995*) directed towards protecting the integrity and independence of the performance of functions of the Regulator. These provisions would support the development of a regulatory culture in which decision-makers in the Regulator have access to complete, comprehensive and accurate information from inspectors and other relevant members of the Regulator that is free from undue influence or the product of coercive behaviour.

The Bill contains instances where inspectors of the Regulator are required to provide reports to the Director-General. There would be other instances where members of the Regulator provide reports as a matter of administrative practice.

In the case of statutory reporting requirements, inspectors must provide a report to the Director-General of the Regulator should they exercise the following powers:

- Securing evidence during the exercise of monitoring powers in accordance with section 42 of the Bill (securing evidence with the requirement to provide a report to the Director-General at section 42 (3));
- Taking a sample or seizing a thing within the terms of section 43 of the Bill (Additional powers in relation to evidential material with the requirement to provide a report to the Director-General at section 43(5)).

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# INQUIRY QUESTION

(Question No. 4)

Senator David Shoebridge asked the Department of Defence the following question, upon notice, on 13 March 2024:

Which international agreements it is intended will be prescribed by the regulations, as contemplated under section 136 of the Bill?

**Defence provides the following answer:**

The Australian Naval Nuclear Power Safety Regulations are being drafted and will undergo public consultation in due course.

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# INQUIRY QUESTION

(Question No. 5)

Senator the Hon David Fawcett asked the Department of Defence the following question, upon notice, on 13 March 2024:

Senator FAWCETT: Thank you. Could we come to section 5, subpara (2)—this is on page 11—and look at 'reasonably practicable'. We had concerns raised by witnesses earlier today that this may be too low a standard. In my experience of managing risk, it seems appropriate. But, for the record and for the committee, could you talk to us about why that standard has been chosen in terms of the obligations of someone working for the regulator and in terms of their conduct of duties associated with nuclear safety. Mr Moy: When it comes to the phrase 'reasonably practicable' as it's defined in section 5 of the bill, those words were chosen to align that approach with the Work Health and Safety Act, which would also apply concurrently with this legislative scheme. I mentioned that there are general nuclear safety duties, and it was mentioned today, particularly around section 18, which is a general duty to ensure nuclear safety 'so far as reasonably practicable'. That requires a similar approach that would have to be undertaken under the WHS Act when it comes to work health and safety. In this case, this is in a nuclear safety context. Where we depart from the WHS Act is that there's a mechanism in the WHS Act that enables the operator to switch off those obligations in the interests of defence or national security, among other things. This legislation is absent that. It doesn't have that mechanism. The practical impact of that is that the operator, the person undertaking the regulated activity—eventually, in the future, it'll be the people operating a naval nuclear propulsion system on an Australian submarine—will be required to adhere to these nuclear safety duties throughout. This is a standard that is qualified, and the definition of 'reasonably practicable' in section 5(2) steps out what's involved in determining what is reasonably practicable. Senator FAWCETT: For context—if you need to take this on notice, do so—in terms of the obligations placed upon people working at ARPANSA and their oversight of nuclear safety at ANSTO et cetera or in equivalent regulatory regimes in the UK, what is the standard there? Is it a similar 'reasonably practicable' standard? Mr Moy: We will take that on notice, but what I would add is that, in the Australian context, the Work Health and Safety Act would apply. That's separate from nuclear safety, yes, but the same construction would still apply, and that is safety 'so far as is reasonably practicable', as much as that would apply in a workplace such as this.

**Defence provides the following answer:**

The concept and meaning of ‘reasonably practicable’ as defined in the ANNPS Bill is consistent with the term as it is adopted in *Work Health and Safety Act 2011* (WHS Act) and the corresponding work health and safety laws of the States and Territories. By way of example, it also appears in the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*.

As noted in the Explanatory Memorandum for the Bill that became the WHS Act, "the standard of 'reasonably practicable' has been generally accepted for many decades as an appropriate qualifier of the duties of care in most Australian jurisdictions. This qualifier is well known and has been consistently defined and interpreted by the courts" (paragraph 13).

The *Australian Radiation Protection and Nuclear Safety Act 1998* (ARPANS Act) does not include a framework of nuclear safety duties comparable to those in sections 18 – 25 of the ANNPS Bill. However, the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) uses the concept of 'as low as reasonably achievable' or "ALARA", but in different contexts. By way of example, the *Australian Radiation Protection and Nuclear Safety Regulations 2018* (ARPANS Regulations) (s 53(e)) provides, in broad terms, that the Chief Executive Officer of ARPANSA must, in considering an application for a licence, take into account whether an applicant has shown that 'the magnitude of individual doses, the number of people exposed and the likelihood that exposure will happen are as low as reasonably achievable…'. 'As low as reasonably achievable' is not a defined term for the ARPANS Regulations.

The term 'as low as reasonably practicable' or "ALARP" is referenced throughout the United Kingdom's (UK) nuclear regulatory framework, including in relation to offences under the *Energy Act 2013* and in relation to duties under the Ionising Radiations Regulations 2017. The DSA02-DNSR Defence Nuclear Safety Regulations of the Defence Nuclear Enterprise (Version 1.1 March 2024), published by the UK Defence Safety Authority, provides further information about the UK Government position in relation to the meaning of "ALARP":

> The commonly used variant of the legal term So Far As Is Reasonably Practicable (SFAIRP). ALARP and SFAIRP mean essentially the same thing and at their core is the concept of "reasonably practicable"; this involves weighing a risk against the trouble, time and money needed to control it. The requirement for risks to be ALARP is fundamental and applies to all activities within the scope of the Health and Safety at Work (etc) Act 1974 (HSWA).

Defence considers both ALARP and SFARP generally call for the same test to be applied, which turns on the meaning and application of 'reasonably practicable', which is defined in the ANNPS Bill in a manner that is consistent with other relevant Commonwealth legislation.

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# INQUIRY QUESTION

(Question No. 6)

Senator the Hon David Fawcett asked the Department of Defence the following question, upon notice, on 13 March 2024:

Senator FAWCETT: Thank you. I have one last question, if I could. There's been quite a bit of discussion around independence and there have been some calls for complete structural independence and some recommendations from ARPANSA for working with the current structure but increasing the efficacy or assurance around independence. The two recommendations they had—I think you discussed a little earlier with Senator Reynolds about membership of the committees. Is it Defence's understanding that membership of those committees would also mean that Defence would then be subject to direction or guidance from those committees in respect to standards? Mr Reid: We'll take that question on notice.

**Defence provides the following answer:**

No. Part 4 of the *Australian Radiation Protection and Nuclear Safety Act 1998* (ARPANS Act) establishes the Radiation Health and Safety Council, the Radiation Health Committee (RHC) and the Nuclear Safety Committee (NSC). The legislative powers of these committees relate to CEO ARPANSA's functions.

The administration of the ARPANS Act is a matter for the Department of Health and Aged Care. Further details regarding the structure, function and composition of advisory bodies established by or under that Act should be referred to that Department.