Response to submissions on the draft Radiation Protection and Control Bill 2013

Introduction

In South Australia, the *Radiation Protection and Control Act 1982* (RPC Act) regulates activities involving radiation sources and provides for the protection of people and the environment from the harmful effects of radiation. This includes providing for the licensing of certain activities, and the registration of certain items and premises which involve radiation sources.

The RPC Act is proposed to be remade as it has not undergone substantial revision since commencement in 1982. As a result, many of the standard administrative and enforcement provisions are outdated.

In addition, national commitments have been made through the Australian Health Ministers' Conference (AHMC) and the Council of Australian Governments (COAG) to implement a uniform framework for radiation protection. The main initiatives requiring implementation under the RPC Act are the *National Directory for Radiation Protection* (National Directory) and the *Code of Practice for Security of Radioactive Sources* (Security Code).

Consultation on the draft *Radiation Protection and Control Bill 2013* (the Bill) was held from 1 October to 30 November 2013. This included two consultation forums and meetings with individual stakeholders.

A total of 21 submissions were received. Submissions were generally supportive of the purpose of the Bill and acknowledged the need for nationally consistent and more flexible legislation. The majority of submissions were received from industry associations, the mineral resources sector and law associations.

A number of changes have been made to the Bill as a result of consultation, which has resulted in changes to the numbering in the Bill. The clause numbers referred to throughout this document are the clause numbers in the revised Bill, unless otherwise specified. A table of the changes which have been made to the Bill is provided in Appendix A. A copy of the revised Bill is available on the EPA's website under 'Open for consultation'.

New provisions have been inserted in the Bill regarding 'financial assurances' (clause 42), 'death, bankruptcy, etc of holder of authority' (clause 53) and 'offence to abandon radiation source' (clause 33). These are discussed further below. If there are any concerns about the inclusion of these provisions, further submissions on the matter are welcome.

Next steps

The future progress of the Bill is subject to the determination of Ministers and the Government of the day. The Bill requires Cabinet approval to be introduced to Parliament. It must then be debated and approved by both houses of Parliament. Further changes may occur during this time. Following Parliamentary approval, the Bill must be proclaimed by the Governor in order for it to come into force.

Overview of key changes to the Bill

Financial assurances

A new clause (clause 42) allows for financial assurances to be required in certain circumstances. This would enable the Minister to request the holder of an authority to provide a financial assurance in the form of a bond (supported by a bank guarantee or other security approved by the Minister), as part of the conditions of their licence or registration.

The intention of this provision is to ensure there is a financial safety net in instances where, for example, a business goes into liquidation and cannot afford to safely dispose of radiation sources, or where a radiation incident has occurred and the remediation costs exceed what the business can afford.

The Minister can only require a financial assurance if satisfied that the condition is justified in view of the nature of the authority, and the degree of harm to the environment or to the health or safety of people that could result if the conditions of the authority are not complied with.

This provision is consistent with section 51 of the South Australian *Environment Protection Act 1993* (EP Act).

Death, bankruptcy, etc of holder of authority

A new clause (clause 53) clarifies who is to be the next holder of an authority if the holder dies, becomes bankrupt, etc. This clause specifies that:

- If the person dies, the personal representative of the deceased, or some other person approved by the Minster on application, will be taken to hold that authority.
- If a person who holds an authority becomes bankrupt or insolvent, the official receiver will be taken to hold that authority.
- If a body corporate is being wound up or is under administration, receivership or official management, a person vested by law with power to administer the affairs of the body corporate will be taken to hold the authority.

Offence to abandon radiation source

A new clause (clause 33) prescribes that ‘a person must not, without reasonable excuse, abandon a radiation source’. This mirrors section 33A of the New South Wales *Radiation Control Act 1990*.

This clause will help to ensure that sources are not intentionally or recklessly abandoned, creating a potential safety or security risk, particularly when the ownership of the source is in question.

Responsible person

A definition of ‘responsible person’ under clause 4 was provided for the purposes of clauses 28 (offence for owner or responsible person to cause, suffer or permit unlicensed person to use or handle radioactive materials) and 36 (offence for owner or responsible person to cause, suffer or permit unlicensed person to operate radiation apparatus).

There was significant concern about the broad interpretation of the definition for ‘responsible person’ and the risk that this places on employees due to the high maximum penalty of $50,000 under clauses 29(2) and 36(2).

It has been determined that the definition of ‘responsible person’ was broader than necessary to implement requirements of the National Directory and that a reference to the ‘owner’ is sufficient. Clauses 29 and 36 have been amended to remove references to ‘responsible person’. The definition of ‘responsible person’ has also been removed.

Penalties

Many submissions acknowledged the need to increase current maximum penalties, but stated that the increase to maximum penalties in many parts of the Bill is ‘excessive and unjustified’, particularly in relation to clauses 55 (causing a serious radiation risk) and 56 (causing a radiation risk). Many parties submitted that penalties should align with those in the EP Act.

Parliamentary Counsel has given further consideration to maximum penalties in the Bill and have determined that they are appropriate, having regard to the nature of the legislation and the particular offences they relate to. Maximum penalties are set on the basis of the worst possible offence which could occur. The Bill, and maximum penalties, will be subject to further scrutiny by Cabinet and Parliament before becoming legislation.

Further explanation is provided on under Penalties throughout the Bill.

Draft Radiation Protection and Control Bill 2013 consultation

Clause-by-clause responses to submissions

Clauses 3 and 58 – Objects and principles, and general duty of care

In relation to the objects and principles it was submitted that a definition is needed about what is considered to be 'unnecessary harmful exposure', as any exposure to radiation could potentially be considered harmful.

In complying with their general duty of care (clause 58), a person must have regard to the radiation protection principle (clause 3). Clause 3(2) states:

> The radiation protection principle is the principle that people and the environment should be protected from unnecessary harmful exposure to radiation through the process of justification, limitation and optimisation.

'Unnecessary harmful exposure' would therefore be exposure where the radiation protection principle has not been applied, ie if the exposure was unjustified, unlimited or excessive. Clause 3(2) goes on to provide further guidance on the meaning of justification, limitation and optimisation.

Given this, further definition of 'unnecessary harmful exposure' is not required.

In relation to the 'radiation protection principle', what procedures and records would be required to demonstrate justification?

Clause 3(2)(a) states that justification involves:

i Assessing whether the benefits of a practice involving ionising radiation or its use outweigh the detriment; and

ii Only adopting the practice if it produces sufficient benefit to outweigh the detriment;

Whether or not a specific incidence of radiation exposure has sufficient benefit to outweigh the detriment depends on the circumstances in any individual situation. There is no specific process which can be applied across the board in making this determination. In scenarios relating to medical application of radiation this may be a subjective matter for the patient themselves to decide.

For this reason there is no direct enforcement mechanism of the radiation protection principle. Rather, persons must comply with the general duty of care (clause 58).

In complying with the general duty of care a person must 'have regard to the radiation protection principle'. Compliance with the general duty of care can only be enforced by issuing a protection order under Part 6 of the Bill, which would include clear and specific measures to comply with the order. The matter would be taken to court for a penalty to potentially be applied only if the order has not been complied with .

In any prosecution under the RPC Act the general defence (clause 77) would apply.

The language of clause 3(2)(c) should be updated to reflect the increasing use of international recommendations of 'societal' factors rather than 'social' factors.

Use of the word 'social' is consistent with terminology used in the National Directory.

Clause 4 – Interpretation – 'radioactive material'

The definition of 'radioactive material' should include a lower bound of radioactivity. The current practice of prescribing non-radioactive material through the regulations causes unnecessary confusion. It is suggested that the definition for radioactive material in the Bill should refer to material which consists of or contains 'more than the prescribed concentration of any radioactive element or compound'.

It is acknowledged that the current practice is unnecessarily confusing and there is inconsistency in how these amounts are prescribed for different sections of the RPC Act, despite the fact that they ultimately refer to the same levels of radioactivity.

The definition of radioactive material has been amended as suggested. The Regulations will subsequently be amended to prescribe the amounts currently specified under regulation 8 for this purpose.

To provide greater consistency, the definition for radiation apparatus in the Bill has also been amended to "apparatus that provides a dose or exposure level in excess of the prescribed amount". The *Radiation Protection and Control (Ionising Radiation) Regulations 2000* currently prescribe a dose rate for this purpose under regulation 6.

Clause 4 – Interpretation – 'responsible person'

Need greater clarification about who is the 'responsible person'.

This was a significant matter of concern among stakeholders during consultation. It is acknowledged that the current definition of 'responsible person' does not provide sufficient clarity and that the potential application of high penalties to staff causes unnecessary financial risk to businesses and their staff.

Clauses 28 and 36 have been amended to remove references to 'responsible person'. The definition of 'responsible person' has been removed from the Bill.

The definition of 'responsible person', and the subsequent offences under clauses 28 and 36 of the Bill, were included to satisfy requirements of the National Directory. The responsible person as defined in the *International Atomic Energy Agency Terminology Used in Nuclear Safety and Radiation Protection* (2007) is the 'responsible legal person'. This is essentially the person or organisation in whose name the relevant licence or registration is held and who is responsible for preparing and overseeing the relevant safety management plans.

The EPA considers it is sufficient to apply the offences under clauses 28 and 36 to the owner of the radioactive material or apparatus only.

Clause 7 – Radiation Protection Committee

Clause 7 has been further revised following the South Australian Government's review of boards and committees in order to remove the requirement for a minimum number of committee members.

The expertise list has also been revised to state 'nuclear medicine or radiation oncologist' rather than just 'nuclear medicine'. Radiation oncologists are one of the main users of radiation sources and regularly utlise high doses of radiation when treating patients.

The requirement for expertise in 'processing of radioactive material' has been removed as it is felt that a person with experience in mining is generally sufficient. The expertise of 'mining' and 'environmental science' have been combine. This will ensure that the Committee has an understanding of the environmental impacts associated with mining operations.

Concerns were raised about the introduction of a person with expertise in 'representing the interests of the general public' as it was seen that this position may be filled by someone who objects to radiation use without having any expertise in the area. This criteria has been replaced with 'knowledge or experience in public health'.

Clause 7 now prescribes that the Committee is to consist of not more than nine members with expertise in the following:

- radiology or human diagnostic radiography
- nuclear medicine or radiation oncologist
- health, health physics or medical physics
- industrial or scientific uses of radiation

- mining or environmental science
- knowledge or experience in public health.

Clause 10 – Functions of the Committee

Temporary licences no longer appear to be necessary as individual licences are not required to be referred to the Committee.

Temporary licences were previously issued for individually held licences (ie licences to use or handle radioactive substances and to operate radiation apparatus under sections 28 and 31 of the RPC Act) to ensure the applicants were covered until the time that the Committee would meet and consider the issuing of specific individual licences.

Since the Bill provides that these licences will no longer need to be referred to the Committee, temporary licences are not required. References to temporary licences throughout the Bill have been removed.

Clause 10(c) states a function of the Committee is to provide technical advice to the Minister on 'radiation protection and safety relating to human health and the environment'. This is only one of the three objects of the Act given in clause 3(1). Are the other two objects excluded deliberately?

The other two objects were not intentionally excluded. Clause 10(d) states that it is a function of the Committee to 'investigate and report on any other matters relevant to the administration of this Act at the request of the Minister or of its own motion'. Clause 10(c) does not limit this function.

Clause 11 – The Committee's procedures

For a committee of six or seven members a quorum would be four members. This has the potential for meetings to be held without participation by members who are expert in key areas. Suggest that a quorum should be half of the membership plus 2.

A quorum of half the members plus two would be prohibitive, for example a committee of six members would require a quorum of five members.

The current clause is consistent with provisions relating to the EPA Board in the EP Act, which states that the Board must have between seven and nine members and a quorum is half the members plus one.

In the event that a major decision is to be made by the Committee which requires the expertise of specific members who cannot be present, this can be determined out of session.

Clause 12 – Subcommittees

Clause 12(2) provides for subcommittees. Whereas members are appointed by the Minister, this does not apply to a nominee of the presiding member. What is the reason for this?

This clause was retained from the current RPC Act. Clause 12(2)(a) of the consultation Bill, which prescribes that the 'subcommittee will consist of the presiding member of the Committee or a nominee of the presiding member' is unnecessary and has been removed.

Clause 12(2) has been amended to instead state that 'a subcommittee will consist of such members of the Committee or other persons as may be appointed to the subcommittee by the Minister.'

Clause 13 – Application of Public Sector (Honesty and Accountability) Act

This clause provides for the application of the *Public Sector (Honesty and Accountability) Act 1995* to subcommittees. Should this apply to the Committee also, or is this provided elsewhere?

The Public Sector (Honesty and Accountability) Act itself specifies that it applies to members of an 'advisory body' which is an incorporated body comprises members appointed by the Minister. Clause 13 simply clarifies that the Act applies to subcommittees of the Radiation Protection Committee in the same way.

Clause 15 – Appointment of authorised officers

A definition of 'suitably qualified person' or guidance as to who would constitute such a person should be included in the Bill or Regulations.

Providing a definition of 'suitably qualified person' would be problematic as there is a broad range of qualifications which may be suitable depending on the circumstances. It is for the Minister to make this determination. Appointments can be subject to limitations, and officers can be authorised for only specified provisions of the RPC Act if this is appropriate.

This is consistent with the EP Act which specifies that any person may be appointed as an authorised officer.

Clause 17 – Powers of authorised officers

No definition is provided for 'radiation risk'.

Clause 18(2) provides that an authorised officer can take certain action if he or she reasonably believes that the action is required to eliminate or prevent a radiation risk.

This has been amended to state 'reasonably believes that action is required to prevent a contravention of the Act'.

Clauses 28 and 36 – Offence for owner or responsible person to cause, suffer or permit an unlicensed person to use or handle radioactive materials/operate radiation apparatus

As outlined in the discussion regarding 'responsible person' earlier in this document, the definition was a significant matter of concern among stakeholders during consultation. The proposed definition did not provide sufficient clarity and the application of potentially high penalties for members of staff would create unnecessary financial risk to businesses and their staff.

The EPA considers that it is sufficient to prescribe that the offences under clauses 28 and 36 apply to the owner of the radioactive material or apparatus only.

Clauses 28 and 36 have been amended to remove references to 'responsible person'. The definition of 'responsible person' has been removed from the Bill.

These offences should be limited to circumstances in which the owner knows, or ought to have known through reasonable inquiries, that the relevant person does not hold a licence. As currently set out, they could cover instances where an employer is misled by a person requiring a licence.

The 'general defence' under clause 77 addresses this issue. It states that it is a defence to criminal proceedings 'if it is proved that the alleged contravention did not result from any failure on the defendant's part to take all reasonable and practicable measures to prevent the contravention'. Therefore, if the owner has taken reasonable and practicable measures to check that the person is licenced (eg by demonstrating established administrative systems for checking this information) and it is later discovered that they were misled by the person, the owner would not be guilty of an offence.

Clauses 32 – Protection of security enhanced radioactive sources

Needs to be clarified that the reason for failure of a background check should be relevant to national security before the Minister can have 'reason to believe that a person may pose a threat to security'. Currently it could be interpreted to mean any summary offence (eg a traffic offence from 20 years ago).

The Regulations will prescribe the definition of 'security background check'. The checks will be performed based on the Security Code's Schedule E which states: 'The security background check includes a security assessment in respect of a

person, issued by ASIO, and criminal history checks by the Australian Federal Police, and all state and territory police services.'

Security background checks will be conducted in accordance with the Radiation Security Background Checking Framework. The Framework sets out the fundamental principles and key structural elements that should be implemented by jurisdictions to establish radiation security background checking schemes.

Security background checks are to include a National Criminal History Record Check, measured against the mandatory disqualifying criteria. The mandatory disqualifying criteria includes disqualifying offences with conviction and imprisonment or repeated (on three or more separate occasions) disqualifying offences with no imprisonment. The type of offences listed as disqualifying offences are serious offences. This includes:

- Offences relating to terrorism, ie involvement with a terrorist organisation.
- Treachery, sabotage and inciting mutiny.
- An identity offence involving counterfeiting or falsification of identity documents.
- An offence involving the hijacking or destruction of an aircraft or vessel.
- A weapons, explosives or firearms offence.
- An offence involving the supply, production, import or export of a prohibited drug.
- An offence associated with organised criminal activity.

It is not clear what is included in 'security enhanced radioactive sources'. The interpretation section defines it as 'the meaning assigned to it by the regulations'.

The Regulations will prescribe the definition of 'security enhanced radioactive sources' in alignment with the definition provided in the Security Code.

Schedule B of the Security Code provides for five categories of radioactive sources. Those falling into category 1, 2 or 3 are security enhanced sources.

In clause 33(1)(b) the term 'enhanced security radioactive source' is used. This is presumably a typographical error.

This is a typographical error and has been corrected to state 'security enhanced radioactive source'.

Clause 43 – Application for an accreditation or authority

Subclause 43(3)(b) requires the Minister to be satisfied that every member of the governing body of a corporate applicant is a fit and proper person, etc. Is it practical for the Minister's delegate to check this before granting an accreditation or authority?

Yes, it is practical for the Minister, or the Minister's delegate, to check that each member of the governing body of a corporate applicant is a fit and proper person. This assessment is made on the basis of the information available and if this information indicates that a member of the governing body is not a fit and proper person, the accreditation or authority must not be granted.

If information becomes available at a later date to indicate that a member of the governing body is not a fit and proper person then the accreditation or authority can be suspended or revoked under clause 49. When making an application the applicant should provide all necessary information to make the fit and proper person assessments, or risk having their authority or accreditation revoked at a later date.

Clause 43(4)(b) should be clarified to specify whether it is meant to apply to an application by a natural person only.

Clause 43(4)(b) applies to an application by a natural person only. Clause 43(4)(a) applies the same requirement to any applicant, whether a natural person or a body corporate.

Clauses 43, 47 and 49 – Timeframes to make decision on applications

These clauses do not specify the timeframe by which the Minister must make a decision on an application. Timeframes should be included.

The time required to consider an application depends on many factors, such as the type of authorisation, radioactive source involved, premises or facility, and whether an inspection is required or a third-party inspection has already taken place. It would be impractical to set fixed timeframes for consideration of applications.

Clause 48 – Register of accreditations and authorities

Licences and registrations that have been granted should be on a public register.

This is consistent with what is proposed in the Bill. Clause 48 prescribes that 'the Minister must keep a register of accreditations and authorities granted under this Act…' and the register must be kept available for inspection by any person.

The only change proposed to arrangements under the current RPC Act is the addition of subclause (4) which prescribes that 'the Minister may restrict access to information included in the register if the Minister considers that it is necessary to do so to avoid a security risk'. This may include, for example, people who are known to have failed a security background check.

Clauses 55 and 56 – Causing serious radiation risk and causing radiation risk

There was significant concern from many stakeholders during consultation regarding clauses 53 and 54.

- Many questioned what constitutes a 'radiation risk'? It was suggested that different terminology should be used, such as 'harm' rather than 'risk', stating that this would provide more certainty and have greater synergy with the EP Act.
- It was suggested that determination of whether 'harm' or 'risk' has occurred should be linked to recognised exposure limits.
- Several submissions raised concerns about use of the words 'trivial' and 'of a high impact or on a wide scale', stating that these terms require further definition and suggested that they should link to exposure limits.
- There should be a concept of 'knowledge' for the offence to apply.
- Maximum penalties are excessive and should be in line with those in the EP Act.

The general defence under clause 77 applies to these offences. The general defence has been revised to mirror the general defence in section 124 of the EP Act, which provides greater detail and refers to whether the defendant has taken all 'reasonable and practicable measures to prevent the contravention'. This defence against clauses 55 and 56 is sufficient. If the defendant has complied with all their legislative requirements and the conditions of their authority (such as mandatory exposure limits) this is a strong case for arguing that they took all reasonable and practicable measures.

In relation to terminology used, it is for the courts to determine in what specific circumstances it is appropriate that these clauses apply. Consideration was given to whether the term 'harm' should be used rather than 'risk', but this would not adequately cover all situations. For example, an incident may result in a significant area of land becoming 'radioactive'. This may not have resulted in any immediate harm to people but could create a significant long-term radiation risk to the health and safety of people and the environment which must be managed for the foreseeable future.

Similarly it is not appropriate to limit application of these clauses to situations where there was 'knowledge' that harm or potential harm could occur. This would exclude cases of negligence.

The maximum penalty is the highest penalty that can be imposed by a sentencing court and must reflect the worst possible offence that could occur. The maximum penalties have been set by Parliamentary Counsel with consideration of the nature of the legislation, the particular offences they relate to and the precedent set by other, comparable legislation. While the EP Act provides comparable offences, the maximum penalties prescribed are over 10 years old and the comparison is inappropriate.

Comparable offences exist in the New South Wales *Environment Operations Act 1997*. This Act sets maximum penalties for Tier 1 offences. A person is guilty of a Tier 1 offences if they wilfully or negligently:

- dispose of waste in a manner that harms or is likely to harm the environment (section 115),
- cause (or contribute to the conditions that cause) any substance to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment (section 116), or
- cause any controlled substance (within the meaning of the *Ozone Protection Act 1989*) to be emitted into the atmosphere in a manner that harms or is likely to harm the environment (section 117).

The maximum penalties for a Tier 1 offence (section 119) are:

- In the case of a corporation – $5 million for an offence that is committed wilfully or $2 million for an offence that is committed negligently, or
- In the case of an individual - $1 million or 7 years imprisonment, or both, for an offence that is committed wilfully or $500,000 or 4 years imprisonment, or both, for an offence that is committed negligently.

It is understood that the Authority would not intend to seek to exercise these provisions for small or inconsequential radiation leaks. However, that is not reflected in the Bill.

Clause 56(2) provides that it is an offence to cause a radiation risk which is not intentional or reckless. This is the lesser of the offences which can apply. Clause 56(4) states that:

> … for the purposes of this section, a person **causes a radiation risk** if the person commits an act involving a radiation source that harms, or has the potential to harm, presently or in the future, the health or safety of a person or the environment, and the harm or potential harm is not trivial but is not of a high impact or on a wide scale.

This specifically provides that the offence does not apply to situations where the harm or potential harm is trivial. It is ultimately for the courts to determine what is considered to be trivial; however a small, inconsequential radiation leak would certainly be considered trivial. A prosecution would certainly not be pursued in this circumstance as the likelihood of it succeeding would be extremely unlikely.

The new Incident Reporting Framework for Mines in South Australia (which will replace the existing Bachman Reporting system), currently under joint development by the EPA and DMITRE, will provide additional clarity as to what constitutes a trivial event.

It was questioned why these offences could not be provided through existing legislation in the Regulations or in the EP Act, or alternatively via the general duty of care in the Bill.

The Bill provides the maximum penalties which can be prescribed in the Regulations. For a minor indictable offence this is $100,000 for a body corporate, or $20,000 or five years imprisonment for a natural person. These penalties are inadequate for the type of offences that clauses 55 and 56 are designed to target.

In relation to the EP Act, radiation is not prescribed as a pollutant. It also does not cover harm to human health.

The general duty of care has far broader application than clauses 55 and 56. It would be inappropriate to apply penalties to the general duty of care as it does not prescribed in sufficient detail the requirements to ensure compliance with the general duty of care. For this reason there are no direct penalties associated with the general duty of care and it can only be enforced with the use of an order.

There was concern that culpability of the offender may extend to what might transpire after the event, which may involve factors over which the offender has no responsibility or control.

The general defence under clause 77 would apply to any prosecution under the Bill. Therefore the defendant would only need to prove that they took all 'reasonable and practicable measures to prevent the contravention' to avoid prosecution.

It is the role of the court to decide the extent to which a person is culpable in any particular situation, with consideration given to all the evidence.

Some offences overlap with offences provided for in Division 5, sections 30 to 33, of the *Work Health and Safety Act 2012*.

Similar provisions under the Work Health and Safety Act, specifically under Division 5 of Part 2, relate to situations where a person with a health and safety duty fails to comply with that duty, and puts another person at risk of death or injury. These provisions are restricted to situations where a person has a health and safety duty. This chiefly relates to persons conducting businesses or undertakings involving management or control of workplaces.

Clauses 55 and 56 of the Bill may relate to some similar situations, but have a different application in that they apply to any incident involving a radiation source, not limited to the workplace.

Clause 58 – General duty of care

Given that this duty has arisen from the National Directory and the Security Code, can the general duty of care should be deemed to have been met when the person dealing with a radiation source meets the requirements under the National Directory and the Security Code.

Since clause 58 replaces the existing section 23 'General objective' in the RPC Act, it is appropriate that it continues to have the same scope of application.

As provided under subclause 58(3)(a), the general duty of care can only be enforced by the issuing of a protection order under Part 6 of the Bill. A protection order must include specific actions to be taken to secure compliance with the order. Prosecution only occurs if the order is not complied with. This would include requirements to comply with specific parts of the regulations, for example relating to the provision of information to certain persons or the usage of appropriate signage to indicate risk of radiation exposure.

These types of requirements may be more specific than those provided for in the National Directory and the Security Code. It is not appropriate to limit the general duty of care by specifying that it has been met when the person meets the requirements under the National Directory and the Security Code.

Given that compliance with the general duty of care can only be secured by issuing a protection order with specific actions to be taken, the broader application does not increase the risk of prosecution under this section.

The general duty of care should be met where the person has kept the radiation levels as low as reasonably achievable and below mandatory limits. This will align the general duty of care with the radiation protection principle in clause 3 and will align with the general environment duty in section 25 of the EP Act.

The general duty of care has been revised to state that a person must take all reasonable and practicable measures to ensure that 'exposure of people and the environment to ionising radiation from a radiation source is kept as low as is reasonably achievable'.

Since it is not appropriate to apply this principle to non-ionising radiation, and the general duty of care applies to both ionising and non-ionising radiation, an additional subclause has been included to state that a person must take all reasonable and practicable measures to ensure that 'exposure of people and the environment to dangerous or potentially dangerous radiation from a radiation source is minimised'.

It is not necessary to state that radiation levels should be kept below mandatory limits as these are specific legislative requirements. It is implied that to be in compliance with the general duty of care, levels should be kept below mandatory limits.

The third part of the general duty of care, relating to security, has also been revised to relate to security enhanced sources only rather than all radiation sources. This was the original intention, in order to support implementation of the Security Code.

Clause 63 – Reparation authorisation

Clause 62 allows the Minister to take action to remediate harm if a reparation order is not complied with. Given this, what is the purpose of a reparation authorisation?

Clause 62(2) provides that this action may be taken on the Minister's behalf by an authorised officer or another person authorised by the Minister for this purpose. The reparation authorisation is the tool used by the Minister to authorise another person to take this action. For example, a clean-up company could be hired to undertake the work and they would be formally authorised to do this through a reparation authorisation, which can then be presented as evidence that they are authorised to do the work when entering the site.

Clause 64 – Related matter

This clause is not appropriate as it seeks to exclude the usual judicial review of administrative decisions process. An equivalent provision is not included in the EP Act.

This clause does not seek to exclude the usual judicial review of administrative decisions process. Clause 64 applies only to Part 6 (civil remedies) of the Bill in relation to protection orders issued under clause 59, reparation orders issued under clause 61, reparation authorisations issued under clause 63 and orders made by the Environment, Resources and Development (ERD) Court under clause 67.

Clause 64 specifies that a person cannot claim compensation in respect of a requirement imposed under this Part. This means that a person cannot claim compensation for the costs incurred when complying with a requirement of an order issued on the person under Part 6.

It also specifies that a person cannot claim compensation on account of any act or omission undertaken or made in the exercise (or purported exercise) of a power under this Part. This is referring to actions undertaken by the Minister (or an authorised officer or other person authorised by a reparation authorisation), in accordance with clauses 60(1) or 62(1), in the event that the requirements of a protection order or reparation order have not been complied with. These are actions which the person failed to undertake themselves.

Clause 64 should not apply where the Minister, an authorised officer, or a person acting under their authority, acting under Part 6:

- intentionally or recklessly damages the person's property; and
- the damage was not necessary to exercise a power under Part 6.

Clause 63(5)(c) specifies that if a person other than an authorised officer is authorised to take action then 'the provisions of this Act apply in relation to the exercise of such powers by the person in the same way as in relation to an authorised officer'. This means that clause 17 (powers of authorised officers) applies in the same way that it would apply if an authorised officer was taking the action.

This includes clause 17(11) which states:

> If the exercise of a power under this section (other than a power exercised with the authority of a warrant) results in any damage, the Minister must make good the damage as soon as is reasonably practicable or pay reasonable compensation for the damage.

Clause 64 only limits claiming compensation in respect of acts or omissions undertaken or made in the exercise (or purported exercise) of a power under this Part. Therefore, if the actions taken, which caused damage, were beyond those specified in the order or authorisation then clause 64 would not apply and compensation would have to be given.

It is not necessary to specifically state that clause 64 excludes intentional, reckless or unnecessary damage.

Clause 67 – Orders made by Environment, Resources and Development Court

In relation to subclause (5) – people with standing to bring an application under clause 67 should be limited to those whose interests are affected by the actions of the relevant respondent.

Clause 67(1) specifies that applications can be made to the ERD Court for orders only if:

- a person has engaged, is engaging or is proposing to engage in conduct in contravention of the RPC Act,
- if a person has refused or failed, is refusing or failing or is proposing to refuse or fail to take any action required by the RPC Act, or
- if a person has suffered injury, illness, loss or damage to property as a result of a contravention of the RPC Act.

The court may also, if it considers it appropriate, require payment of exemplary damages by a person who has contravened the RPC Act.

Given that the issuing of any of these orders requires evidence to the satisfaction of the court that the person has contravened the RPC Act, or is intending to contravene the RPC Act, it would be inappropriate to limit who can make an application for an order.

If a person has sufficient evidence that there has been or will be a contravention of the RPC Act then they should be allowed to make an application to the court regardless of how this relates to that person's particular interests. This is especially so if there is a risk of harm to other people or the environment.

It is ultimately for the courts to decide if there is sufficient evidence and in what circumstances it is reasonable to issue an order.

Clause 68 – Adoption of documents forming part of National Directory

The intent of the Bill is to implement the National Directory for Radiation Protection. It is suggested that documents in the National Directory be adopted by default, rather than relying on a notice in the Gazette.

The purpose of publishing a notice in the Gazette is to ensure there is some official record and notification of when these documents have been adopted as part of legislation. Placing a notice in the Gazette is not overly onerous and is an appropriate measure.

To provide certainty to proponents, and to ensure a uniform national scheme, we submit that clause 68 should specifically prohibit the Minister from varying the document adopted.

If the document was varied from the original then this clause would no longer apply as it could not be considered to be a document forming part of the National Directory.

If it was intended to implement regulatory requirements beyond those specified in the National Directory this would need to be carried out through an amendment to the Regulations and would require Cabinet approval.

Clauses 71 and 72 – Environment, Resources and Development Court

Concerns were raised at the public forum on 18 November 2013 that courts need expert understanding of issues to ensure decisions are not coloured by preconceptions about radiation. Moving the RPC Act to the jurisdiction of the ERD court will help to achieve this.

The ERD Court provided comment in relation to this proposal. They stated that it would be imperative that sessional commissioners with relevant expertise in radiation protection and control be appointed promptly in order to enable the court to meet the requirements of the Bill. This would be necessary and would ensure radiation issues are considered with the appropriate expertise.

The ERD Court also commented that if the workload generated under the RPC Act is small, it will be able to be accommodated within existing resources. However, should a greater volume of matters be generated than anticipated, then there will be a need for additional resources.

It is anticipated that the workload would be small. Only around one prosecution a year occurs under the RPC Act.

Clause 74 – Offences by officers of bodies corporate

Refers to a 'manager of a body corporate'. It is uncertain who would constitute a 'manager'. Clarification should be provided.

It is agreed that this term would benefit from further clarification. Section 129 (liability of officers of body corporate) of the EP Act provides for a similar provision and refers instead to an officer of the body corporate. The definition of 'officer' is provided in the interpretation section as:

> **officer**, in relation to a body corporate, means—
>
> a a director of the body corporate; or
>
> b the chief executive officer of the body corporate; or
>
> c a receiver or manager of any property of the body corporate or a liquidator of the body corporate,
>
> d and includes, in relation to a contravention or alleged contravention of this Act by the body corporate, an employee of the body corporate with management responsibilities in respect of the matters to which the contravention or alleged contravention related;

Clause 74 has been amended to refer to an 'officer of a body corporate' and a definition for 'officer' included in line with the definition provided in the EP Act.

Clause 77 – General defence

What constitutes 'due diligence' in these circumstances is not clear.

Section 124 of the EP Act provides a similar 'general defence', but does not use the term 'due diligence'. Instead:

> It will be a defence in any criminal proceedings … if it is proved that the alleged contravention did not result from any failure on the defendant's part to take all reasonable and practicable measures to prevent the contravention or contraventions of the same or a similar nature.

Section 124 of the EP Act provides further detail in the section about how the general defence may be applied. Clause 77 in the Bill has been replaced with a new clause to mirror section 124.

Clause 87 – Regulations

It is recommended that the regulations be allowed to adopt standards, codes and other regulatory documents that are published by the EPA with minimal burden on the EPA.

Clause 68 provides that documents forming part of the National Directory may be adopted via a notice in the Gazette. Alternatively, codes or standards could be adopted via licence condition if they are applicable only to specific licensees.

Other codes or standards could be adopted by the Regulations, as provided in Clause 87(7). This includes those developed by the EPA (they would refer to a specific date of publication to ensure certainty of which version is enforced). Codes and standards would be given effect via Regulations, requiring Cabinet approval.

This system balances the flexibility needed to quickly accommodate changes as new technologies and practices are adopted with the need to maintain Cabinet scrutiny, while also ensuring licensees are provided with sufficient certainty about their obligations.

Penalties throughout the Bill

While the need to increase current penalties is acknowledged, the increase to maximum penalties in the Bill is excessive and unjustified.

Many submissions acknowledged the need to increase current penalties, but stated that the increase to maximum penalties in many parts of the Bill is 'excessive and unjustified', particularly in relation to clauses 55 and 56. Many parties submitted that penalties should be aligned with those in the EP Act.

The EPA requested that Parliamentary Counsel (who drafts the legislation and sets the maximum penalties) give further consideration to maximum penalties in the Bill. Parliamentary Counsel's view is that the maximum penalties in the Bill are appropriate, having regard to the nature of the legislation, the particular offences they relate to and the precedent set by maximum penalties in comparable legislation. The penalties in the RPC Act are over 30 years old, and penalties in the EP Act are 10 years old, so it is not appropriate to compare penalties in the Bill with those Acts. The penalties included in the Bill are intended to operate into an indefinite future as it is unlikely that the penalties will be reviewed until the RPC Act is reconsidered in full.

A maximum penalty is the highest penalty that can be imposed by a sentencing court for the worst possible offence that could occur. The offence has to be proven beyond reasonable doubt by the prosecution, and after conviction both the prosecution and defence make submissions on what penalty should be imposed in the particular case. It is extremely rare for courts to impose penalties that are close to the maximum penalty. Courts are required to sentence in accordance with the *Criminal Law (Sentencing Act) 1988*.

Parliamentary Counsel has also advised that the maximum penalty for an offence by a body corporate should be five times the maximum penalty for a natural person. This is the ratio adopted by the Commonwealth, South Australia and most other Australian jurisdictions.

The Bill, and maximum penalties, will be subject to further scrutiny by Cabinet and Parliament before becoming legislation.

It is recommended that the EPA prioritise an educative approach in the implementation of the legislation and punitive measures be reserved to address deliberate and repetitive non-compliance.

The EPA does prioritise an educative approach in the implementation of its legislation.

The EPA's Annual Compliance Plan 2013–14 is available on the EPA website. It outlines our regulatory approach and how we determine what regulatory action should be taken.

Schedule 1 – Roxby Downs Joint Venturers

Schedule 1 of the Bill should be removed in its entirety or certain clauses removed which restrict application of the Act.

The *Roxby Downs (Indenture Ratification) Act 1982* (Indenture) is an independent Act. Schedule 1 of the Bill provides the details of how it interacts with the RPC Act. Amending or removing Schedule 1 would not alter how the Indenture applies in relation to the RPC Act.

Subsection 8 of the Indenture provides that any licence required under the RPC Act must be granted. Section 49 of the Indenture provides that where there is any question, difference or dispute arising between the state or the minister and the joint venturers then the matter is to be referred to arbitration.

The Indenture does not limit the Minister's ability to change licence conditions, but if there is a disagreement about what the conditions should be, then the matter is referred to arbitration to resolve, rather than an application for review being made to the Courts as would occur with other licensees.

Other comments

The Bill should provide mechanisms to exempt certain activities from the Regulations and the National Directory.

The current RPC Act provides sufficient mechanisms to exempt either certain types of activities, or individual activities, from compliance with any part of the RPC Act or Regulations. These mechanisms are maintained in the Bill.

Clause 70 of the Bill provides for the granting of individual exemptions from compliance with any specified provision of the RPC Act (this include the Regulations and any other codes or standards in force under the RPC Act). If it is appropriate that a certain class of person or activity be exempt from a certain provision of the RPC Act then this can be done by prescribing that person or activity in the Regulations as a prescribed class for that section of the RPC Act.

The relevant Regulations, codes or standards can specify which requirements apply to activities or persons. Some of the proposed amendments to the Regulation making powers in clause 87 of the Bill will assist in creating more flexible Regulations by allowing these to refer to external codes and standards rather than having all requirements prescribed in the Regulations. The Regulations are currently being reviewed with this in mind and the intention to create simpler Regulations to better keep pace with technological developments.

Details of licences and registrations should be made available online for owners. This would also assist in checking whether employees have valid licences for operating apparatus and handling radioactive material.

It is intended to develop an online system where owners will be given a unique login and will be able to view licences and registrations, and pay for renewals online. Specific timeframes for implementation are not yet known.

Concern with the potential for the instigation of prosecutions based on vexatious claims from third parties. Need assurance of rigour in the EPA assessment of claims to ensure vexatious claims are not given credibility.

Third parties cannot instigate a prosecution under the RPC Act, only authorised officers can do this. If a third party had a complaint they would need to raise this with the EPA who would investigate the issue and determine if there is sufficient evidence to demonstrate that an offence has occurred. The EPA would not recommend prosecution unless all other reasonable tools to bring the person into compliance with the RPC Act had been exhausted and failed.

The EPA's Annual Compliance Plan for 2013–14 is available on the EPA website. It outlines our regulatory approach and how we determine what regulatory action should be taken.

The Bill seeks to introduce additional enforcement tools which can be used as an alternative to strict prosecutions. The key tool is the ability to issue protection and reparation orders under clauses 59 and 61 of the Bill. Orders can be issued to a person and include specified actions which the person is required to take to secure compliance with the RPC Act. There is no penalty attached with the order unless the person does not comply with the requirements of the order, in which case they can be prosecuted for non-compliance with the order.

It is recommended that the licence to possess radiation sources and the registration of individual sources be merged into a single process.

This was considered in detail when the licence to possess a radiation source was introduced. However, there is no legislative changes which would effectively reduce costs and regulatory burden. New radiation sources still need to be inspected for compliance and fees still need to be calculated on the basis of the number of radiation sources in order to ensure the costs of regulation are recovered.

The EPA has aimed to make administrative changes to align the licence and registration processes where possible. For example, aligning the renewal dates for the licences and registrations so these can all be paid at the same time.

It is recommended that Radiation Management Plan template be prepared.

It is intended to develop a template for Radiation Management Plans for all industries over time. There are templates available for individual industries in other jurisdictions which will be adapted for use in South Australia.

There should be mutual recognition for interstate licences as this is problematic when there are visiting experts, etc.

It is not appropriate to include a broad exemption for persons holding interstate licences due to differences in licence schemes and requirements. Wherever possible, the EPA will recognise an interstate licence when considering a licence application or exemption, doing so on a case-by-case basis.

If specific classes of persons are regularly requiring exemption it is possible to prescribe this group of persons in the Regulations as a prescribed person for the relevant section of the RPC Act. The Regulations already exempt equipment being used for sales purposes.

Appendix A Changes to draft Radiation Protection and Control Bill

Consultation clause	Revised clause	Change
Throughout	–	References to 'temporary licences' removed throughout the Bill
4	**4**	**Radiation apparatus** Amended to 'means ionising radiation apparatus or non-ionising radiation apparatus that provides a dose or exposure level in excess of the prescribed amount'. Existing Regulation 6 will be prescribed for this purpose.
4	**4**	**Radioactive material** Amended to '… means a material or substance occurring naturally or artificially produced (whether solid, liquid or gaseous) that contains more than the prescribed concentration of any radioactive element or compound …'. Existing Regulation 8 will be prescribed for this purpose.
4	**4**	**Responsible person** Definition of 'responsible person' removed.
7(2)(e)	**7(2)(e)**	**Radiation Protection Committee** Amended to refer to 'mining or processing of radioactive material' rather than 'radioactive ores'.
7(2)(g)	**7(2)(g)**	**Radiation Protection Committee** Amended the requirements for a member of the Committee to have expertise in 'representing the interests of the general public' to 'communicating with the general public in relation to matters involving radiation safety'.
12(2)(a)	**12(2)**	**Subcommittees** Amended to state 'a subcommittee will consist of such members of the Committee or other persons as may be appointed to the subcommittee by the Minister'.
18(2)	**17(2)**	**Powers of authorised officers** Amended to state 'reasonably believes that action is required to prevent a contravention of the Act'.
29(2)	**28**	**Offence for owner or responsible person to cause, suffer or permit unlicensed person to use or handle radioactive materials** Removed clause 29(2) and other references to 'responsible person'.
33(1)(b)	**32(1)(b)**	**Protection of security enhanced radioactive sources** In clause 33(1)(b) the term 'enhanced security radioactive source' is used. Replaced by 'security enhanced radioactive source'.

Consultation clause	Revised clause	Change
New clause	**33**	**Offence to abandon radiation source** A new clause has been included to provide that it is an offence to abandon a radiation source without reasonable excuse. The penalty prescribed for this offence is: • in the case of a body corporate – $500,000; or • in the case of a natural person – $100,000.
36(2)	**36**	**Offence for owner or responsible person to cause, suffer or permit unlicensed person to operate radiation apparatus** Removed clause 36(2) and other references to 'responsible person'.
New clause	**42**	**Financial assurances** A new clause has been included to provide that the Minister may require financial assurances in the form of a bond (supported a bank guarantee or other security approved by the Minister) as part of the conditions of a licence or registration.
New clause	**53**	**Death, bankruptcy, etc of holder of authority** A new clause has been included to clarify who is taken to be the holder of an authority if the holder dies, becomes bankrupt, etc. This clause specifies that: • If the person dies, the personal representative of the deceased, or some other person approved by the Minster on application, will be taken to hold that authority. • If a person who holds an authority becomes bankrupt or insolvent, the official receiver will be taken to hold that authority. • If a body corporate is being wound up or is under administration, receivership or official management, a person vested by law with power to administer the affairs of the body corporate will be taken to hold the authority.
72	**74**	**Offences by body corporate** Amended to refer to an 'officer of a body corporate' and prescribe a definition for 'officer' in line with the definition provided in the *Environment Protection Act 1993*.
75	**77**	**General defence** Clause amended to provide a general defence which mirrors the general defence under section 124 of the *Environment Protection Act 1993*. Section 124 refers to 'reasonable and practicable' rather than 'due diligence' and provides greater guidance in how it applies.