

ADDITIONAL COMMENTS

LABOR SENATORS

Summary

Labor Senators endorse the stated rationale of the bill – the creation of an effective fisheries detention regime to strengthen Australia’s capacity to combat suspected illegal fishing by non-citizens in the Australian Fishing Zone and the Torres Strait Protected Zone, including greater capacity for on shore detention.

However, Labor Senators share the concerns expressed in the majority report about the move to authorise private contractors to undertake certain fisheries detention tasks without adequate provision for staff training, or protection of detainee welfare or the public interest.

Labor Senators strongly endorse the majority recommendation that the bill not be passed without amendment providing that all officers, prior to appointment as authorised officers, undertake training prescribed in a disallowable instrument to be made under the Act.

Labor Senators also endorse the recommendation that a code of conduct containing an explicit reference to honesty and integrity, and the obligation to act with care and diligence, be mandated for any contractor engaged to provide staff to perform fisheries detention tasks.

Notwithstanding our decision to endorse the recommendations contained in the majority report, thereby offering conditional support for the bill, Labor Senators hold deep misgivings about measures related to the engagement of private contractors.

We urge the government to reconsider its decision to privatise our national fisheries detention regime – a crucial component of Australia’s border protection system.

Training

Labor Senators note with concern the wide range of powers available to contractors appointed as authorised officers under the provisions of the bill.

These powers include the power to move, screen, identify, search and strip search persons in fisheries detention.

The bill provides that all detention officers, including contractors, can be appointed as authorised officers subject only to “authorisation as provided by AFMA.”¹

Labor Senators are concerned that the bill contains no training provisions despite an undertaking from the Minister during his second reading speech that “[a]n important

¹ RRA&T 6, 17 March 2005

part of the authorisation process will see any prospective officers receive comprehensive training in the effective and responsible use of these powers under the relevant acts.”²

Indeed, according to evidence to the committee, training is discretionary:

Senator O’BRIEN—The minister said in his second reading speech that ‘prospective officers will receive comprehensive training in the effective and responsible use of their powers’ and he describes this training as ‘an important part of the authorisation process’.
Where in the bill can I find the detailed requirement for training?

Mrs Palfreyman—There is not a requirement in the bill for that. It is part of the discretion of AFMA when authorising those officers.³

It is of further concern to Labor Senators that, despite the provision of detailed information about the protocols that apply in the operation of the immigration detention regime, no guidelines for fisheries detention were provided to the committee.

The committee was told in evidence that:

“Guidelines for AFMA’s purposes here may not have been developed as yet.”⁴

The committee was told that Australian Fisheries Management Authority (AFMA) intends to replicate the immigration detention system, including the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) contract and protocols⁵, and was provided with documents outlining DIMIA’s relationship with its contract service provider GSL Australia.

The joint departmental submission to the committee’s inquiry heavily relied on the existing immigration detention regime to explain the operation of the government’s proposed fisheries detention regime.

However, Labor Senators note that no decision has been made about the contract management of the new fisheries detention facility in Darwin,⁶ and believe evidence about the management of the immigration detention regime, including GSL Australia’s internal procedures, needs to be weighted accordingly.

² House of Representatives, *Hansard*, 17 February 2005

³ RRA&T 8, 17 March 2005

⁴ RRA&T 6, 17 March 2005

⁵ RRA&T 6, 17 March 2005

⁶ RRA&T 4, 17 March 2005

A rigorous and effective training regime, particularly for authorised officers, is critical for detainees and staff and the maintenance of public confidence in the fisheries detention regime.

Whistleblower protection

Labor Senators note with concern that the bill provides contract staff with no ‘whistleblower’ protection.⁷

We endorse the call in the majority report for the government to give this matter urgent consideration before passage of the bill.

Commonwealth liability

Labor Senators are also concerned about the lack of clarity with respect to Commonwealth liability for injuries sustained by a contractor in the course of his or her duties. During its hearing on 17 March 2005 the committee was advised:

Mr Moroney—...In relation to any injury suffered by a detention officer, it would depend upon the terms of the contract between the Commonwealth and that contractor. There might be circumstances of the injury itself where, under the laws of negligence, an ongoing employee of the Commonwealth might be liable as a matter of negligence—and therefore there might be some vicarious liability on the part of the Commonwealth. But I would not put down a general proposition, at least from Immigration’s perspective and the way things work in our portfolio, that there would be an automatic right for a detention officer to take action against the Commonwealth for any injury.⁸

The joint departmental submission lodged subsequent to the hearing contained this advice:

“Depending on the circumstances, if an officer or detention officer were harmed during the course of their lawful duties, it is possible they would be covered by the scheme established by the *Safety, Rehabilitation and Compensation Act 1988*.”⁹

The uncertain nature of oral evidence and highly qualified language used in the joint departmental submission give Labor Senators no comfort with respect to the intent to protect the rights of workers engaged to perform fisheries detention tasks under contract.

On a related matter, Labor Senators are concerned that the discretionary application of provisions designed to protect the interests of detainees subject to strip searches provide detainees and staff with inadequate protection.

⁷ Joint submission from DAFF, DIMIA & AFMA, pg.6

⁸ RRA&T 19, 17 March 2005

⁹ Joint submission from DAFF, DIMIA & AFMA, pg.6

The bill provides that authorisation of a strip search must be recorded in writing but explicitly provides that failure to do so does not affect the validity of the search.¹⁰

In the interests of detainees and staff, Labor Senators urge the government to reconsider its decision to grant de facto discretionary status to the requirement that authorisation of strip searches be recorded in writing.

Accountability

Labor Senators do not accept the validity of the claim by the Department of Agriculture, Fisheries and Forestry (AFFA), AFMA and DIMIA that the code of conduct employed by current DIMIA contractor GSL Australia with respect to immigration detention is “broadly equivalent” to the Australian Public Service (APS) Code of Conduct.¹¹

Labor Senators prefer the view put in the Community and Public Sector Union (CPSU) submission that the APS Code of Conduct “binds APS employees to the highest standards of professional and ethical conduct” that has no direct equivalent in the private sector.¹²

We note the CPSU’s contention, not rebutted by AFFA, AFMA or DIMIA, that:

“Any attempts by the Australian Fisheries Management Authority (AFMA) to upholding the GSL Code of Conduct for contract detention officers would require AFMA to sue the contractor for breach of contract in the courts. This would be expensive and time consuming, creating a significant disincentive from upholding the APC Code of Conduct from all but the most significant breaches.”

Indeed, joint departmental evidence served to confirm the contention of CPSU submission related to accountability:

Senator O’BRIEN—...How will detention officers, including those appointed as authorised officers, be held accountable for their actions?

Mrs Palfreyman—Through the normal means. If they are a contractor a complaint could be made through the Ombudsman or to HREOC. They could be sued for a breach of contract. People could take civil or criminal proceedings against them if they have acted beyond their powers.¹³

¹⁰ *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005*, cl.17(5)(b), cl.17(7), pg.19 & cl.17(5)(b), cl.17(7), pg.65

¹¹ Joint submission from DAFF, DIMIA & AFMA, pg.3

¹² CPSU submission, pp.4-5

¹³ RRA&T 8, 17 March 2005

It is of particular concern that the Commonwealth had to seek “GSL authorisation” before providing the committee with a copy of the code of conduct in force with respect to the performance of contracted immigration detention duties.¹⁴

Labor Senators are concerned that any sub-contracting of staff positions by the appointed contractor would serve to further erode the capacity of the Commonwealth to maintain appropriate standards of conduct.¹⁵

Labor Senators share the fear expressed in the CPSU submission that the proposed arrangements present a “serious gap in accountability for the exercise of law enforcement powers.”¹⁶

We note departmental evidence that under the proposed arrangements the Commonwealth will not have the power to dismiss a contracted officer. The Commonwealth will merely possess the right to remove authorisation granted to a contracted officer under the Act and, in some circumstances, have the right to prevent individuals from working in a detention centre.¹⁷

Finally, Labor Senators note that the committee was not presented with a proposed code of conduct for fisheries detention staff due to the failure to yet develop AFMA guidelines.¹⁸

Other issues

Staff consultation

Labor Senators regret the government’s failure to consult with existing fisheries officers on the provisions of this bill.¹⁹

In our view, the bill would have benefited from the experience and knowledge of AFMA officers currently engaged in fisheries detention duties.

We also believe the committee’s inquiry would have benefited from the appearance of fisheries officers engaged in fisheries detention and sufficiently briefed on the provisions of the bill.

Complexity

Labor Senators question the administrative efficacy of the proposed fisheries detention regime involving the appointment of three tiers of officers engaged in fisheries detention duties – officers, detention officers and authorised officers.

¹⁴ RRA&T 8, 17 March 2005

¹⁵ CPSU submission, pg.7

¹⁶ CPSU submission, pg.7

¹⁷ RRA&T 14, 17 March 2005

¹⁸ RRA&T 6, 17 March 2005

¹⁹ RRA&T 8, 17 March 2005

We note the inaccurate advice provided to the committee about search powers possessed by nurses working in immigration detention centres²⁰ (corrected in the subsequent joint departmental submission to the inquiry²¹).

It is a matter of concern that DIMIA was unable to explain the operation of the current DIMIA regime without significant error, especially when the proposed fisheries detention regime is based on DIMIA arrangements.

Rationale

The CPSU submission to the committee states:

“The flexibility and responsiveness of the modern APS means that there is no arguable reason why these positions [officers, detention officers, authorised officers] cannot be fulfilled by APS employees.”²²

While noting the government’s intention to align the fisheries detention regime with the immigration detention regime, it is the view of Labor Senators that the government has not convincingly made the case for the adoption of the immigration detention regime for the purpose of fisheries detention, especially when on shore detention at Darwin will overwhelmingly concern fisheries detention matters.²³

Conclusion

Labor Senators endorse the majority report and its qualified support for passage of the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005* but have deep reservations about the impact of engaging private contractors to perform fisheries detention tasks.

Senator Geoff Buckland (Deputy Chair) (ALP, South Australia)
Senator Ursula Stephens (ALP, New South Wales)
Senator Kerry O’Brien (ALP, Tasmania)

²⁰ RRA&T 7, 17 March 2005

²¹ Joint submission from DAFF, DIMIA & AFMA, pg.4

²² CPSU submission, pg.5

²³ RRA&T 7, 17 March 2005