



Australian Government

Department of Agriculture, Fisheries and Forestry

Department of Immigration and Multicultural and Indigenous Affairs

Australian Fisheries Management Authority

Senator the Hon Bill Heffernan
Chair
Rural and Regional Affairs and Transport Legislation Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Heffernan

This letter provides information to supplement the advice provided to the Rural and Regional Affairs and Transport Legislation Committee (the Committee) during the public hearing into the provisions of the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005 (the Bill) on the 17th of March 2005. During the hearing, the Committee raised some queries regarding the types and powers of officers established in the Bill, the rights of detainees during detention, the reviewability of decisions made under the Bill and the financial implications of the Bill. This letter provides further advice to the Committee on these issues and questions taken on notice and encloses the specific documents requested by the Committee during the hearing.

The purpose of the Bill is to amend the *Fisheries Management Act 1991* (the FMA), the *Torres Strait Fisheries Act 1984* (the TSFA) and the *Migration Act 1958* (the MA) to ensure that non-citizens suspected of foreign fishing offences are detained under consistent arrangements by the fisheries and immigration portfolios. The amendments in the Bill will allow the seamless transition for people suspected of foreign fishing offences from fisheries detention to immigration detention, and to ensure that detainees are cared for and officers can operate in a safe environment. Detainees held under fisheries detention and immigration detention may be accommodated in a single detention facility, so it is important that the same powers apply to both types of detention. This has meant that significant aspects of the MA have been replicated in the FMA and the TSFA to allow the joint management arrangements to operate effectively.

The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) has provided information in the context of its current operational, legislative and policy environment for the detention of unlawful non-citizens at immigration detention facilities. DIMIA's immigration detention arrangements operate under the MA. DIMIA has developed Migration Series Instructions for the guidance of officers in the discharge of various duties and powers under the MA.

In addition DIMIA has entered into a contract with the Detention Services Provider (DSP) for the provision of a range of services relating to the detention of unlawful non-citizens at immigration detention facilities around Australia (detention facilities) and the management of those detention facilities. The DSP has in certain instances put in place Operational Procedures which have been approved by DIMIA.

The Australian Fisheries Management Authority (AFMA) intends to implement the new powers in the Bill, on the basis of the existing Migration Series Instructions that DIMIA has established, as relevant to the fisheries context. AFMA also intends to explore the possibility of entering into a contract, broadly consistent with the existing contract between DIMIA and the DSP, as appropriate for fisheries detention.

1. Types and powers of officers

1.1 Types of officers

There are three types of officers in the Bill – officers, detention officers and authorised officers. The appointment and authorisation processes relevant to these types of officers are set out in Attachment A and described below.

Officers, detention officers and authorised officers have different powers under the Bill. Officers also have existing powers in both the FMA and TSFA. The new powers of officers, detention officers and authorised officers proposed by the Bill are outlined in Attachment B.

Officers

Currently in the FMA, officers can be appointed by AFMA and are also defined to include a member of the Australian Federal Police, the police force of a State or Territory, the Defence Force, or an officer of Customs (see sections 4 and 83).

Currently, in the TSFA, officers are appointed by the Minister and are also defined to include a member of the Defence Force, the Australian Federal Police or the Police Force of Queensland (see sections 3 and 4).

The arrangements for appointing officers under both Acts are not altered by the Bill.

Detention officers

Detention officers do not currently exist in the FMA and TSFA and are being introduced in the Bill. Detention officers will be appointed by the Minister under new clauses 3 of Schedule 1A of the FMA and Schedule 2 of the TSFA. Detention officers may include contractors.

In the FMA, officers are currently able to perform many of the powers that will be given to detention officers in the Bill. However, in the TSFA, there is currently no power to detain. Under the new regime, officers will be able to do all the things that detention officers can do and therefore will not be appointed as detention officers.

Authorised officers

Authorised officers are officers and/or detention officers that are authorised under new clause 6 of Schedule 1A of the FMA or Schedule 2 of the TSFA to have specific powers as provided in the Bill. The authorisation must specify exactly what things the officers and/or detention officers or class of officers and/or detention officers may do.

Any appointments or authorisations made under the FMA or TSFA with regard to officers, detention officers and authorised officers may be revoked. This is established by section 33(3) of the *Acts Interpretation Act 1901*.

1.2 Detention officers

The Committee expressed an interest in the safeguards that the DIMIA is currently using to ensure that detention officers were of good character, as AFMA will be replicating these standards. The contract between DIMIA and its DSP outlines the staffing guidelines for the DSP (see Clause 3.3 of Attachment C).

The DSP must ensure that all its personnel:

- are, and remain, of good character and good conduct and pass a national police and any other Commonwealth required criminal and security checks to be conducted by the Commonwealth before appointment and annually thereafter;
- are properly qualified for the tasks they are to perform; and
- are either Australian citizens or are lawful non-citizens and have to the satisfaction of the Commonwealth, the appropriate permissions to be employed.

These contractual obligations are reflected in the DSP's Operational Procedure No 1.3 (paragraph 4.1) which outlines the selection process for employees to include a character assessment as evidenced by a national police check (see extract at Attachment D).

In practice, these requirements are fulfilled during the DSP's own recruitment process (see Attachment E). This process is undertaken in three stages to ensure that the highest quality staff are selected:

1. An online application is used to assess whether an applicant's skills, past work experience and qualifications are relevant and transferable to the Detention Services Officer role.
2. An assessment process, involving a combination of formal ability and psychological testing, group exercises and individual interviews, is used to test the suitability of the applicant.
3. A post assessment check, involving conducting professional reference checks, a pre-employment medical examination and an Australian Federal Police check, is used to ensure that a successful applicant is of good character.

DSP's employees working in immigration detention facilities must also pass any other checks required by State or Territory laws. For example, more stringent requirements apply to staff that may be in contact with children.

In addition to these requirements, the DSP also has a Code of Conduct for its employees (see Attachment F). As requested by the Committee, a comparison has been made between the obligations in this Code of Conduct and the Australian Public Service Code of Conduct (Attachment G). These codes of conduct, when considered in the context of the contract between DIMIA and its DSP, are broadly equivalent.

1.3 Authorisations

In new sections 6 of Schedule 1A of the FMA and Schedule 2 of the TSFA, AFMA is responsible for authorising officers for the purposes of various powers within the Bill. AFMA will implement guidelines mirroring those currently used by DIMIA for corresponding powers under the MA to ensure that authorisations are given appropriately and consistently.

For searches and screening procedures, authorisation is provided by way of a written instrument and is directed at a specific class (or level) of officers. For strip searches, a separate authorisation is required and is also provided by way of written instrument. However, for strip searches, individual officers are authorised by name and never by a class or level of officers. Officers who have not been given specific authorisation to carry out a particular search, screening procedure or strip search must not carry out these searches. Paragraph 4.3 of DSP's Operational Procedure No 1.3 sets out these procedures (see extract at Attachment H).

An example of such an instrument of authorisation was requested by the Committee and is included at Attachment I. A copy of the Instrument of delegation and authorisation was not available to DIMIA officers at the time of the Rural and Regional Affairs and Transport Legislation Committee hearing. As a result of subsequent checks of documentation an amendment is sought to what was said by Mr Steve Davis in the Hansard of 17 March 2005 (page 7) in relation to nurses. Nurses and other occupational classes outlined in the Instrument do have search powers under s252 and s252AA of the MA. In practice, however, these classes of employees are highly unlikely to exercise such powers. We apologise if the comments led to any misunderstanding about the Bill.

1.4 Training

Staff are required to undergo extensive training before authorisations are issued to classes or individual officers. DSP's Operational Procedure No. 13.2 describes the general policy and procedures relating to the identification and delivery of training to relevant DSP officers. All potential Detention Services Officers are required to undergo a comprehensive six week training program (including a final week on-the-job training) prior to commencing duty. This training program covers all essential elements of the role of Detention Services Officers. Continuing training and refresher training is provided as and when required throughout their employment as Detention Service Officers.

In addition, further specific training is provided to these officers or class of officers who are to be authorised to search, screen or strip search a detainee. Officers who have not received training in the relevant search power must not exercise the relevant search power. The training requirements are outlined, for each of these three distinct powers, in separate Operational Procedures. These Operational Procedures are based on the Department's Migration Series Instructions which provide guidance to relevant officers for the performance of duties and exercise of powers under the MA. For each of the three distinct search powers under the MA there is a separate Migration Series Instruction:

- Migration Series Instruction 389 Powers of Entry, Search and Seizure – s251, 252 and 223 (Attachment J)
- Migration Series Instruction 346 Screening procedures in relation to Immigration Detainees (s252AA) (Attachment K)

- Migration Series Instruction 347 Strip Searches of Immigration Detainees (s252A) (Attachment L)

Officers who are nominated by name as “authorised officers” for the purposes of conducting a strip search must undergo mandatory training and have a current police clearance. An officer must have successfully completed the strip search program before they can be submitted for approval as an authorised officer.

The strip search training includes:

- Civil rights and liberties
- Cultural awareness
- The grounds for conducting a strip search
- The pre-conditions for a strip search
- The role of officers involved in conducting a strip search
- The procedure for conducting a strip search
- The procedures relating to items retained during a search
- Record keeping
- Reporting requirements

2. Instruments and approvals in writing

The Bill includes a range of instruments and approvals to authorise certain aspects of the proposed detention regime. The Committee specifically commented on the nature of some of these approvals and instruments.

For example, in new subclauses 11(1)(d) of Schedule 1A of the FMA or Schedule 2 of the TSFA, the Minister may approve a place (in writing) to be a place in which detention may occur. The Committee queried whether this could have a retrospective effect. Legal advice confirms that a statutory approval generally will be presumed to be exercisable only with prospective effect. The Committee also queried whether the approval would be a disallowable instrument. Legal advice has confirmed that it would not be a disallowable instrument, as it is not a legislative instrument under the *Legislative Instruments Act 2003*. New subclauses 11(3) are declaratory statements which confirm that the approval is not a legislative instrument as it does not have the character of legislative instrument, as required by the *Legislative Instruments Act 2003*.

The Committee also commented on the authorisation for a strip search provided by the Managing Director of AFMA, a Secretary or Deputy Secretary of the Australian Government Department of Agriculture, Fisheries and Forestry (DAFF) or a Magistrate. This authorisation must be recorded in writing and signed within one business day after it is given (under new clauses 17(5)(b) of Schedule 1A of the FMA or Schedule 2 of the TSFA). The Committee was particularly concerned with new subclause 17(7) which provides that a failure to record the authorisation in writing and sign it within one business day does not affect the validity of the strip search conducted on the basis of this authorisation.

Legal advice has confirmed that new subclauses 17(7) does not negate the requirement under new subclauses 17(5)(b) for the authorisation to be in writing and signed as this would deny the existence of the statutory duty. A failure to record and sign the authorisation within one business day would be a breach of statutory duty and such a person could be held accountable for the failure to exercise that duty. For

example, the person and/or AFMA or DAFF could be criticised in Parliament for the failure to ensure that the duty was carried out.

3. Contractors rights and Commonwealth liability

Under the proposed detention arrangements, the Commonwealth will have certain responsibilities for officers and detention officers (including those that are contractors).

Depending on the circumstances, if an officer or detention officer were harmed during the course of their lawful duties, it is possible that they would be covered by the scheme established by the *Safety, Rehabilitation and Compensation Act 1988*. In broad terms, this could mean that Comcare is liable to pay compensation in respect of injury and other loss suffered by an 'employee', where that loss or injury arose out of, or in the course of, the employee's employment. Under this Act, there is scope to extend the concept of 'employees' to cover other persons such as contractors by way of ministerial declaration.

There is also a common law duty for employers to ensure reasonable care is taken to avoid exposing the employee to unnecessary risks of injury. The content of this duty will vary according to the situation, but in general terms imposes an obligation on an employer to take reasonable care to provide a safe workplace and work environment for their employees. In circumstances where a breach of a common law duty is found to exist, the employee would be able to recover damages.

During the hearing, the Committee also queried whether the *Public Service Act 1999*, which contains certain protections for 'whistleblowers', will apply to contractors who are detention officers. The *Public Service Act 1999* will not apply to all detention officers, as some detention officers will be contractors. However, if a detention officer who was a contractor had his or her appointment or authorisation revoked because he or she had acted as a whistleblower, review of that decision may be possible under the *Administrative Decisions (Judicial Review) Act 1997*.

4. Rights of detainees

The Committee raised some queries about the right of detainees to have an independent person to witness identity tests and strip searches and the right of detainees to request that certain people of the opposite sex are not present during these procedures.

4.1 Independent person – identity tests

New clauses 30 of Schedule 1A of the FMA or Schedule 2 of the TSFA requires that an adult detainee must be informed that he or she can request that an independent person be present during an identity test. An identity test could include taking a photograph, fingerprints or recording a person's signature which would be used to help identify the detainee.

Migration Series Instruction 405 outlines the instructions for an authorised officer to conduct an identity test under the powers in the MA (see Attachment M). Under

Paragraph 4.4.1 of Migration Series Instruction 405, the authorised officer must inform the immigration detainee that he or she may ask that:

- an independent person be present while the test is carried out; and
- the test is carried out by a person of the same sex as the detainee.

An authorised officer is taken to have informed the detainee of these matters if they communicate the information (using an interpreter if necessary) in a language in which the detainee is able to communicate with reasonable fluency. The obligation to provide information can also be met if the authorised officer supplies the detainee with a form that sets out all the required information. This form must also be translated into a language in which the detainee is able to communicate with reasonable fluency.

Under paragraph 5.3.3 of the Migration Series Instruction 405 (see Attachment M), where an adult immigration detainee requests the presence of an independent person, the test may still go ahead in the absence of such a person if no independent person is readily available to attend the test. "Readily available" is given its ordinary meaning in accordance with established principles of statutory interpretation. That is, an independent person will be readily available if he or she is easily accessible and ready to be present at the identification test within a reasonable time. Where a detainee requests the presence of an independent person, and the test proceeds without them regardless, the reasons for this must be explained to the detainee and recorded on the detainee's file.

Identity tests on minors (a person who is less than 18 years of age) and incapable persons must be conducted in the presence of a parent, guardian or independent person.

Similar powers are inserted in new sections 47 and 48 of Schedule 1A of the FMA and Schedule 2 of the TSFA.

4.2 Independent person – strip searches

Migration Series Instruction 347 outlines the procedures that must be followed while conducting a strip search on a detainee under the powers of the MA (see Attachment L). The checklist indicates that capable adult detainees are to be advised that they may nominate another person to be present during the strip search (see "presence of others during a strip search" in Attachment 1B of Attachment L).

The information provided to all immigration detainees prior to the strip search (see Attachment 4 and Paragraph 8.1 of MSI 347) under the heading "Your rights under the law" also advises that another person may be nominated to be present. The information is to be provided in writing and in a language he or she understands.

Under paragraph 4.7.4 of Migration Series Instruction 347 (see Attachment L), where an adult detainee capable of managing his or her own affairs requests the presence of an independent person, the strip search may still go ahead in the absence of such a person if no independent person is readily available to attend the strip search. "Readily available" is given its ordinary meaning in accordance with established principles of statutory interpretation. That is, an independent person will be readily available if he or she is easily accessible and ready to be present at the strip search within a reasonable time.

Under the MA a strip search cannot be conducted on a minor who is under the age of 10 years and can only be undertaken on a minor who is at least 10 but under 18 years of age and only after obtaining a Magistrate's order. Strip searches on minors and incapable adult detainees must be conducted in the presence of a parent, guardian or independent person. Migration Series Instruction 347 provides that for minors and incapable persons there is a requirement that the authorised officer checks that the detainee has no objections to their parent or guardian being present for the strip search (see Attachment 1A and Attachment 1C of Attachment L).

Similar powers are inserted in new paragraphs 18(1)(g) of Schedule 1A of the FMA and Schedule 2 of the TSFA.

4.3 Witnesses to identity tests

The Committee also made some comments on the rules regarding the presence of a person at an identity test. The Committee noted that the Bill's Digest reported that the protection afforded to detainees undergoing an identity test was less stringent than that afforded to people subject to identity tests under section 23XI of the *Crimes Act 1918* (the Crimes Act).

New sections 31 of Schedule 1A of the FMA and Schedule 2 of the TSFA provide the general rules for carrying out identity tests, including a request that the test not be conducted in the presence of a person of the opposite sex. Under Section 31, if the detainee makes such a request, the test can only be undertaken in the presence of a person of the opposite sex if it is not practicable for officers to comply with the request. In contrast, the Crimes Act provides a blanket ban on any forensic procedure being carried out on a suspect in the presence of a person of the opposite sex. The Crimes Act defines a 'forensic procedure' to include intimate forensic procedures which are expressly prohibited under the Bill. In this context, it is clear that the more stringent protection provided by the Crimes Act is not relevant for the non-intrusive identity tests permitted in the Bill (such as the taking of photographs or fingerprints).

5. Mechanisms for review

The Committee also raised a query regarding the mechanisms available to a detainee to challenge decisions or actions of officers, detention officers or authorised officers.

Administrative review

The power to detain and continue detention as well as the powers and the manner in which searches, screens, strip searches and identification tests are conducted pursuant to the Bill, are all subject to review under the *Administrative Decisions (Judicial Review) Act 1997*. Decisions made by officers are also reviewable in some cases under section 75(v) of the Constitution or section 39B of the *Judiciary Act 1903*. In the event that the exercise of power is shown to be unlawful (for example the correct procedure and requirements were not followed or the decision-maker has acted beyond his or her powers), a range of administrative law remedies would be available. These could include setting aside and remaking the decision. In some circumstances this could have the effect of releasing the detainee from detention.

There would only be a limited range of circumstances where a detainee could seek to recover damages due to the invalid decision or conduct.

Civil and criminal proceedings

If a search, screen, strip search or identity test was done and was unlawful, civil or criminal action could be taken against the authorised officer. It would be open for a detainee to seek to recover damages in tort in such circumstances. The most likely bases upon which a tortious claim could be brought would be by way of a claim for breach of a statutory duty, a general claim for negligence in the exercise of the statutory power, or a claim based on misfeasance in public office.

6. Financial implications

The revised detention powers will have minimal cost impact for AFMA as they will simply require changes to existing procedures for detaining fishers. The expanded set of detention powers in fisheries legislation provide new rights and obligations on AFMA contractors and employees but will not require additional resources to implement (other than minor one-off amounts for implementation, such as training, which will be absorbed by AFMA in the existing appropriation).

As powers of detention apply only to foreign fishers, the Australian fishing industry will not incur additional costs as a result of this Bill.

The Bill provides specific powers for fisheries officers and detention officers to collect personal identifiers from detained fishers. The Australian Government has announced that it will provide AFMA with \$900,000 in 2006-07 and \$100,000 per annum in subsequent years to establish a Positive Identification system to enhance AFMA's capability to identify repeat offenders. The collection and administration of the personal identification data is expected to cost AFMA approximately \$10,000 pa in staff time and will be met by AFMA within existing and future budgets.

The Bill does not require any additional costs to DAFF and DIMIA, other than the usual costs involved in developing draft legislation which will be met from within the Departments' existing resources.

The relevant costs are provided in the table below

	2006-07	2007-08	2008-09
AFMA	\$910,000	\$110,000	\$110,000
DAFF	0	0	0
DIMIA	0	0	0
Total	\$910,000	\$110,000	\$110,000

7. List of attachments

Please find enclosed the following documents that were requested by the Committee during the hearing into the provisions of the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005 or are referred to in this submission. A list of attachments is provided in the table below.

A	Table of appointment and authorisation processes
B	Table of new powers of officers, detention officers and authorised officers
C	Detention Services Contract (between DIMIA and DSP)
D	Extract from DSP's Operational Procedure No 1.3 (paragraph 4.1)
E	DSP's General Recruitment Information
F	Detention Services Code of Conduct
G	Comparison between APS Code of Conduct and DSP's Code of Conduct
H	Extract from DSP's Operational Procedure No 1.3 (paragraph 4.3)
I	Instrument of Authorisation
J	Migration Series Instruction 389
K	Migration Series Instruction 346
L	Migration Series Instruction 347
M	Migration Series Instruction 405

Thank you for the opportunity to provide a submission clarifying these issues.

Yours sincerely

Daryl Quinlivan
Executive Manager
Fisheries and Forestry
Department of Agriculture,
Fisheries and Forestry

Richard McLoughlin
Managing Director
Australian Fisheries
Management Authority

Steve Davis
First Assistant Secretary
Unauthorised Arrivals and Detention
Department of Immigration and
Multicultural and Indigenous Affairs