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SENATE

RURAL AND REGIONAL AFFAIRS AND TRANSPORT
LEGISLATION COMMITTEE

**Reference: Border Protection Legislation Amendment (Deterrence of Illegal
Foreign Fishing) Bill 2005**

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SENATE
RURAL AND REGIONAL AFFAIRS AND TRANSPORT LEGISLATION
COMMITTEE

Thursday, 17 March 2005

Members: Senator Heffernan (*Chair*), Senator Buckland (*Deputy Chair*), Senators Cherry, Ferris, McGauran and Stephens

Participating members: Senators Abetz, Allison, Mark Bishop, Boswell, Brown, George Campbell, Carr, Chapman, Coonan, Eggleston, Chris Evans, Faulkner, Ferguson, Greig, Haradine, Hogg, Hutchins, Knowles, Lightfoot, Ludwig, Lundy, Sandy Macdonald, Mackay, Mason, McLucas, Nettle, O'Brien, Payne, Robert Ray, Santoro, Tchen, Tierney, Watson and Webber

Terms of reference for the inquiry:

Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005

WITNESSES

DAVIS, Mr Stephen Donald, First Assistant Secretary, Unauthorised Arrivals and Detention Division, Department of Immigration and Multicultural and Indigenous Affairs 1

DUNCANSON, Mr Mark, Assistant Director, Unauthorised Arrivals and Detention Coordination Section, Department of Immigration, Multicultural and Indigenous Affairs 1

MORONEY, Mr Matthew John, Principal Legal Officer and Director, Detention Policy Section, Department of Immigration, Multicultural and Indigenous Affairs 1

MURPHY, Mr Paul Francis, General Manager Operations, Australian Fisheries Management Authority 1

PALFREYMAN, Mrs Louise, Policy Officer, Department of Agriculture, Fisheries and Forestry..... 1

QUINLIVAN, Mr Daryl Paul, Executive Manager, Fisheries and Forestry Division, Department of Agriculture, Fisheries and Forestry 1

WILSON, Mr Rohan Stuart, Senior Manager, Compliance Policy, Australian Fisheries Management Authority 1

Committee met at 4.06 p.m.

PALFREYMAN, Mrs Louise, Policy Officer, Department of Agriculture, Fisheries and Forestry

QUINLIVAN, Mr Daryl Paul, Executive Manager, Fisheries and Forestry Division, Department of Agriculture, Fisheries and Forestry

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MURPHY, Mr Paul Francis, General Manager Operations, Australian Fisheries Management Authority

WILSON, Mr Rohan Stuart, Senior Manager, Compliance Policy, Australian Fisheries Management Authority

CHAIR—I declare open this public hearing of the Senate Rural, Regional Affairs and Transport Legislation Committee. The committee is hearing evidence on its inquiry into the provisions of the Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Bill 2005. I welcome everybody here today. This is a public hearing and a *Hansard* transcript of the proceeding is being made. The committee has authorised the recording, broadcasting and rebroadcasting of these proceedings in accordance with the rules contained in the order of the Senate of 23 August 1990 concerning the broadcasting of committee proceedings. Before the committee starts taking evidence, I place on the record that all witnesses are protected by parliamentary privilege with respect to submissions made to this committee and evidence given. Any act by any person which may disadvantage a witness on account of evidence given by him or her before the Senate or a Senate committee is a breach of privilege.

While the committee prefers to hear all evidence in public, the committee may agree to take evidence confidentially. If the committee takes confidential evidence, it may still publish all or part of that evidence to the Senate at a later date. The Senate also has the power order production and/or publication of confidential evidence. The committee would consult the person whose evidence the committee is considering publishing before taking such action. I also draw your attention the continuing resolutions relating to claims of commercial confidentiality. Under the resolution, a claim to withhold information on the basis that it is commercial-in-confidence can only be made by a minister and must include statements setting out the basis of the claim, including a statement of any commercial harm that may result from disclosure of that information. I welcome everyone from the Department of Agriculture, Fisheries and Forestry, the Australian Fisheries Management Authority and the Department of

Immigration and Multicultural and Indigenous Affairs. I invite you to make a wonderful presentation and then we will ask you some wonderful questions.

Mr Quinlivan—I will make just a few short comments if I could to put the bill in context. As you know, we have been apprehending an increasing number of illegal fishermen in Australia's northern waters. Our arrangements for holding those people after apprehension have grown up based on the small numbers that we had initially, and really nobody has been happy about those arrangements. The government made the decision late last year to introduce more modern arrangements for detaining apprehended fishermen, and they have got two parts: one is the creation of physical detention facilities on land in Darwin and on Horn Island in the Torres Strait; the other is transitional facilities at Broome and Gove. The physical hub of the system will be the detention facility in Darwin.

The other half of the package that is necessary to give effect to the new arrangements is more modern legal arrangements both to manage the administrative arrangements which will now exist—previously this was an AFMA only operation; now it is a joint responsibility between AFMA and DIMIA—and to bring all of our laws into alignment. In the past we had an immigration based regime in the Migration Act, a fisheries regime in the Fisheries Management Act and a lesser arrangement in the Torres Strait Fisheries Act. This bill aims to bring all those into alignment to allow us to make best use of the new physical facilities.

CHAIR—I notice that in the strip search part, you talk about concealed weapons. I presume that means that you can search anyone because, after all, a pencil could be considered a concealed weapon.

Mr Quinlivan—I think some reasonable judgment is required.

CHAIR—If I drove a pencil into your eye—

Mr Quinlivan—That is correct.

CHAIR—But, if I have an AK47, you cannot search me, because it is not concealed.

Mr Quinlivan—Because it is not concealed?

CHAIR—Yes, it says that it has to be concealed.

Senator O'BRIEN—Seeing as you are talking about searches and the like, let us find out whether AFMA currently engage contract staff to detain alleged fishers.

Mr Murphy—Currently our fisheries officers, who are authorised under the Fisheries Management Act, carry out the detention. We have contractors who carry out caretaking duties. They watch the people being detained and provide care for them—for example, food et cetera.

Senator O'BRIEN—So you do not have any contract staff engaged in detaining alleged fishers at the moment?

Mr Murphy—That is right.

Senator O'BRIEN—Do contract staff perform any other enforcement functions? I presume when you say 'caretaking', they keep the illegal fishers confined to their boats.

Mr Murphy—It is in the sense that, when we have boats on the harbour, we have the caretaker on another boat. They look out for the welfare of the fishermen, but they do not tend to leave their boats, because there are drastic tides, stingers, crocodiles and sharks. It is not a very nice environment to escape from.

Senator O'BRIEN—So are you saying that, at the moment, they do not have powers to force them to stay on the boats?

Mr Murphy—That is right.

Senator O'BRIEN—Can you tell us more about the intention of the legislation to create a new class of officer?

Mrs Palfreyman—The new class of officers would be detention officers under the act. The minister will have the capacity to appoint those officers. They will be able to undertake a certain set of duties as specified in the bill.

Senator O'BRIEN—I see that it is on page 8 of the bill that detention officer is mentioned:

detention officer means a person appointed under clause 3 to be a detention officer.

So a detention officer is someone who is appointed as such?

Mrs Palfreyman—That is right.

Senator O'BRIEN—So there will be a ministerial appointment for each officer?

Mrs Palfreyman—Yes, for the class of officers.

Senator O'BRIEN—For the class of officers?

Mrs Palfreyman—Yes, a person or a group of persons could be appointed.

Senator O'BRIEN—Does that mean that they will all be named in an order or some sort?

Mrs Palfreyman—Yes, in an instrument.

Senator O'BRIEN—How many of this new class of officers is it contemplated will be engaged?

Mr Murphy—The class of officers we would look at authorising are contractors, so for example, with the Darwin facility which will be the central hub, would need to authorise the existing contractors that the department of immigration use plus we would have to authorise our existing fisheries officers who, as a result of the bill, lose certain search powers. We would authorise those officers to also be detention officers. I do not know exactly but it would be a group of about 30 fisheries officers who would be authorised.

Senator O'BRIEN—And some would be contactors—is that what you are saying?

Mr Murphy—We would have to authorise some contactors, or at least a contractor, to have this power because part of the reason for the bill is that at the moment fishermen transfer from being in fisheries detention, under the Fisheries Act, to being in immigration detention under the Migration Act. The department of immigration use a specific contractor to run their immigration facilities. That contractor has equivalent powers under the Migration Act, so we would be authorising that contractor to have the same powers under the Fisheries Act for the few days that the detained fishermen are in fisheries detention.

Senator O'BRIEN—So the contactor who runs Baxter would also have the contract for Darwin as well—is that what you are saying?

Mr Davis—I am the contract administrator for the existing detention provider. A decision is to be made within the department as to whether we engage the company we currently use at Baxter, GSL Australia, to run the Coonawarra facility or whether we go to an open tender process. In all likelihood, I believe it will be GSL under the existing contractual arrangements, with some focus on the nature of the caseload. Essentially, we already have powers under the Migration Act to delegate the sorts of powers we were talking about here to GSL. They have those powers at Baxter and, for Coonawarra for immigration detainees, they would have those powers. The intent is that, for however many staff GSL employ under the operation at Coonawarra, they would then have equivalent powers under the Fisheries Act with these amendments here. So I expect it to be the same company, yes, but that is yet to be finally determined.

Senator O'BRIEN—Will detention officers be engaged at Horn Island, Broome and Gove?

Mr Murphy—Where there are transitory arrangements, such as in Broome and Gove, I expect we will still be relying on fisheries officers as we do now. We will be authorising those fisheries officers to have detention powers. It could be that we would have a contractor that would also have those powers if they were in that role, but no decision has been made about that.

Senator O'BRIEN—And there will be a specific facilities on Horn Island, at Broome and at Gove for the temporary incarceration of the fishermen?

Mr Murphy—The plan is to still have boat based detention at Broome and Gove but to have an accommodation facility on Horn Island and to move the people out of those three places as quickly as possible to Darwin. We expect that it would be a matter of days; it is all about getting an aircraft lined up to transport people from those locations to Darwin.

Senator O'BRIEN—I take it from the answers that it would be competent for the current DIMIA arrangements to be adopted for the purposes of this legislation—so the nomination of GSL or a succeeding contractor to DIMIA as a detention officer would be intended to be made under this act. Would that mean that their employees or particular employees will be nominated? Is that what it means?

Mr Davis—The way the Migration Act works is that essentially there is the broad nomination of powers of employees of GSL for particular authorising officers for particular aspects of search. It is either a class of officer or, in strip search cases, actually individual officers who are named and authorised. Those individual officers have a regime of training associated with the strip search powers in particular. No strip searches have been authorised or undertaken since GSL have taken over.

Senator O'BRIEN—Does that mean that a person employed by GSL at this facility would be in a type of class that you envisage being encompassed in the term 'class of officer'.

Mr Moroney—Basically there is the ability for the minister to appoint a class of person as officer, which the minister has done. All GSL employees have undergone training and

character checks so that they are employed under the contract and have been made officers for our act. As Mr Davis has said, in relation to specific search powers where the Migration Act is talking about authorised officers, for a class of officer who would normally be involved in the actual administration of the centre upon reception and upon normal duties, the class descriptor has been wide enough so that those searches could be undertaken as and when needed. In relation to the strip search, where we are talking about authorised officers undertaking the strip search, those people have been named individually. The training regime has been such that more people have undergone the training than have actually been authorised because it has been made quite clear in our legislation—and the then minister said so when the legislation was introduced—that our strip search powers were to be used as a last resort. As Mr Davis said, there has not been an instance at all of a strip search since January 2003.

Senator O'BRIEN—I am breaking this matter down into bits so I can understand the legislation. You are dealing with a number of matters together. It might ultimately be helpful but at the moment it is easier for me to contemplate it in bits. My question was: should I understand that the intention is that there was to be the appointment of a class of employees, who were employees of GSL or their successor at the time, as detention officers? I think the answer was yes, that is the intention at the moment.

Mr Moroney—Yes.

CHAIR—Are you familiar with the character reference that gets this tick off?

Mr Moroney—It is done by GSL, as I understand it.

CHAIR—Do you know the guidelines? Could you supply the guidelines?

Mr Davis—We can.

CHAIR—A lot of security firms have the same sorts of tests, and some of the greatest thugs and idiots get through that process to work outside clubs et cetera as security guards. I would like to think that your process was a little bit better defined than theirs obviously is.

Mr Davis—The provisions of the contract outline the nature of employees. That is not just a security clearance; it is also the character assessment. There are some other criteria within the contract which apply to employees. So it goes beyond just the security clearance.

CHAIR—So can we have a copy of how you arrive at a character for the purposes of the test?

Mr Davis—Yes. There is also a requirement in the contract for the police checks which are done prior to a contract employee being engaged in a centre. There is also a requirement for an annual police check thereafter, so that we have ongoing review of, at least, the criminal aspect. There is ongoing training and other things provided by the contractor, and a lot of that is focused on treating detainees with dignity, understanding cultural differences and the sorts of issues that go to treating detainees with appropriate duty of care.

CHAIR—Could you provide the details, because I would assume they get ticked off against the various registers of other classes of rats and mice that are in the community.

Mr Davis—Sure.

Senator O'BRIEN—Is this appointment as a detention officer a disallowable instrument or intended to be a disallowable instrument?

Mrs Palfreyman—I do not believe so.

Senator O'BRIEN—Can you check that and let us know?

Mrs Palfreyman—Yes.

Senator O'BRIEN—Coming to the appointment of detention officers as authorised officers, am I correct in saying that persons appointed as detention officers under this legislation by the minister can subsequently be appointed as authorised officers to undertake a range of specified functions?

Mrs Palfreyman—Yes. If you are appointed a detention officer you also have to be specifically authorised to do certain things under the act, such as searches.

Senator O'BRIEN—So you can be appointed as a detention officer without further authorisation.

Mrs Palfreyman—Yes, and such a person may be providing food or something like that and would not be able to undertake other functions under the act.

CHAIR—So what is the further test for that?

Mrs Palfreyman—The authorisation as provided by AFMA.

CHAIR—How does a person jump from being a food provider to a strip searcher? What extra qualifications, tests, checks and balances are made?

Mrs Palfreyman—Training is provided in the protocols that are appropriate for understanding the regulation and the way that these things need to be carried out.

CHAIR—Can you provide us with the details of that also. If it is fair dinkum, there must be a set of guidelines somewhere.

Mr Quinlivan—Guidelines for AFMA's purposes here may not have been developed as yet.

Mr Murphy—Our intention is to, as closely as possible, replicate the system that DIMIA are using. I understand that their contract is very comprehensive and has all sorts of tests.

CHAIR—If you could supply us with a set of guidelines that weeds out the weirdos.

Mr Murphy—That is what we would be drawing upon: the DIMIA contract and their protocols. The sorts of checks and balances that they have in place we would be looking to do.

CHAIR—Could you also provide us with what training will be given to these guys who will be conducting these new procedures?

Mr Murphy—Yes, we can provide you with the protocols and guidelines that DIMIA use.

Senator O'BRIEN—I take it that when Minister Truss in his second reading speech referred to this 'new class of officers, appointed by the minister, who may exercise limited powers relating to fisheries detention', he was referring to any activity consistent with the powers in part 2 of the bill.

Mrs Palfreyman—AFMA authorised officers can be authorised to undertake one or more of the functions.

Senator O'BRIEN—We are talking about someone who is appointed as a detention officer. I am just trying to break that down. So a detention officer, if I am understanding the bill, is limited to the performance of any function relevant to part 2 of the bill.

Mrs Palfreyman—No. Detention officers are only able to continue the detention of a person who has been already detained by a fisheries officer. You have to be an authorised officer to undertake further things such as the search provisions.

Senator O'BRIEN—The search provisions are under part 3.

Mrs Palfreyman—I thought you meant part 2 of the entire bill. Do you mean part 2 of the schedule of the act?

Senator O'BRIEN—We are victims of the draftspersons breaking the bill into different parts. I am referring to pages 11 through to 14, starting where it says 'Part 2—Detaining suspected illegal foreign fishers' and ending at the end of page 14.

Mrs Palfreyman—Yes, they can do that. It is about keeping them in detention and moving them. A detention officer can do that without specific authorisation to do so.

Senator O'BRIEN—Clause 10 says:

For the purposes of facilitating an officer determining whether or not to charge a person with an offence against section 99, 100 ... or an offence against section 6 of the Crimes Act 1914 relating to such an offence, a detention officer may detain the person in Australia or a Territory if the detention officer has ...

Does that mean that a person engaged as a detention officer is intended to operate in the field and not at the detention facilities?

Mrs Palfreyman—Detention would be initially undertaken by a fisheries officer, and that is likely to be on a boat. Once the person is moved to a detention facility they would be presented to a detention officer to continue that detention.

Senator O'BRIEN—That is fine, but does that mean a person on the boat has to be appointed as a detention officer as well?

Mrs Palfreyman—Fisheries officers can detain people without being detention officers. The power to detain is in clause 8, and that is an officers' power to detain. That is consistent with what is already in the Fisheries Management Act.

Senator O'BRIEN—Any activity which is consistent with the powers contained in clauses 10 through to 14 and which is not specifically provided for in part 3 is an activity which would be available to the detention officer. Is that right?

Mrs Palfreyman—I can go through them quickly. Clause 10 relates to continuing detention, and that is undertaken by a detention officer. Clause 11 relates to when a person is detained on behalf of a detention officer; it may not be a detention officer. For example, if someone is in hospital there might be a Chubb security guard or someone like that detaining them on the officer's behalf. There may not be a detention officer exercising that particular power; it is detention on behalf of the officer. Clause 12 is about moving detainees. A

detention officer can move a detainee. Clause 13 is about ending a detention, so that does not require an action of a detention officer. That is about the period of time when the detention ends. Likewise, clause 14 is about an offence provision so that is not necessarily to do with a detention officer.

Senator O'BRIEN—Clause 6 is the clause under which AFMA may authorise officers and detention officers. Clause 6(2) means, does it not, that officers as well as detention officers may be identified by reference to a class?

Mrs Palfreyman—That is for the authorisations for doing more specific tasks such as searching. It could include an officer as well as a detention officer.

Senator O'BRIEN—So that relates to authorising a class of persons—officers or detention officers—to conduct searches?

Mrs Palfreyman—Yes. They are subsequently known in the bill as 'authorised officers' for searches, screening, identification tests and those sorts of activities.

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.

Senator O'BRIEN—So it is at the discretion of AFMA.

Mrs Palfreyman—Yes. The protocols that apply to DIMIA will also apply to AFMA.

Mr Quinlivan—I think this relates back to the conversation we were having earlier about AFMA providing information about the basis of their authorisations—borrowing the provisions from the immigration arrangements.

Senator O'BRIEN—In the sense that the minister has given the House some assurances about training, is there no intention of incorporating that in the bill or regulations?

Mr Quinlivan—The managing director of AFMA will have to satisfy himself that the authorisations have been given appropriately, and the plan is that he would draw on the arrangements currently used under the Migration Act to do that.

Senator O'BRIEN—That is a matter of periodic policy, is it?

Mr Quinlivan—I do not know that AFMA has actually made a policy on this, but it is clearly the intention, and that is why the minister said so in the second reading speech. We are not planning to create any new or innovative arrangements here but simply drawing on those arrangements that already work in the immigration arrangement.

Senator O'BRIEN—Can someone explain precisely the difference between a detention officer and an authorised officer? I know we touched on this, but I just want to get this in bits.

Mrs Palfreyman—Fisheries officers are authorised under the act already; detention officers are separately authorised by the minister, and they may include contractors.

Authorised officers are a group of either detention officers or fisheries officers who are authorised to do specific functions such as searching or conducting screens under the bill.

Senator O'BRIEN—So under the bill fisheries officers are as we know them now?

Mrs Palfreyman—Yes.

Senator O'BRIEN—Detention officers will be a group of officers who can be contractors or not?

Mrs Palfreyman—Yes.

Senator O'BRIEN—And that is not the case with fisheries officers. Fisheries officers are not contract officers, are they?

Mrs Palfreyman—No.

Senator O'BRIEN—And this bill does not permit that?

Mrs Palfreyman—No.

Senator O'BRIEN—And authorised officers are individually authorised?

Mr Murphy—Or it can be a class. You have your officers who are already appointed under the Fisheries Management Act, then you have detention officers who are appointed, and they can be authorised officers. As detention officers can also be a class of officers, so can the authorised officers also be a class of officers.

CHAIR—They have got to go through a separate process to get the last hurdle, though?

Mr Murphy—Yes, and that would be the sort of training and protocol already used by the department of immigration.

Senator O'BRIEN—Do I understand you to be saying that potentially all of the detention officers could, as a class, be authorised officers as well?

Mr Murphy—Yes, if they met all the training protocols and there were a need for them.

Senator O'BRIEN—I am trying to understand how the instrument would differentiate amongst detention officers—between those with a particular skill, qualification or aptitude and those without it.

Mr Davis—I will briefly explain how ours work, and Mr Moroney may be able to assist me with the legal technicalities. Within a detention facility a whole range of duties are undertaken. GSL have a general classification of officers called 'detention service officers'. They are the people who man the compounds from day to day and do the entry screening of the visitors and the people coming through the front gate. But you also have more specialist officers, like the people in the kitchen, the medical officers, the nurses, the education officer who runs the educational training programs, the activities officer who does the football, cricket, gym or whatever, and the others who are there every day. So in the facility there are officers who do a certain range of activities.

For the purposes of search powers, Mr Moroney has indicated to me that the categorisation is that, within the range of GSL employees and their subcontractors, the detention service officers have the power to undertake searches, because their designated role is the day-to-day management of the detainees, the compound, the compounds they live in, the accommodation

areas and any movement within, into and out of the facility. A nurse will not have the power to undertake a search, for example. So there are people who are doing other jobs in the facility who are not authorised to perform that particular function. That is the way I would seek to distinguish a class of employee from the full range of people who work at a detention facility.

Senator O'BRIEN—So is there an instrument which identifies those people?

Mr Davis—Yes.

Senator O'BRIEN—Could we have a copy of that instrument?

Mr Moroney—Yes.

Senator O'BRIEN—It would be useful if you could describe how those people are identified. Is it just by a work classification or something like that?

Mr Moroney—Yes, it is by an employment classification.

Mr Davis—And by a job description, as in their duties—except for the strip search. For strip searches, individual officers are named.

Senator O'BRIEN—So for the conducting of searches other than strip searches it is likely to be the same circumstance as at the AFMA facilities?

Mr Murphy—Definitely, because people are only in fisheries detention for a maximum of seven days, and often it is a lot less than that. If they are held in the same facility, then we want the people holding them to have exactly the same training and requirements and be described the same so that it is a seamless transition between one form of detention and the other, because it would be the same people running the facility and having the powers. That is why we want, as far as we can, to replicate the sort of protocols, training and contractual requirements that DIMIA already uses.

Senator O'BRIEN—And Coonawarra is the Darwin facility?

Mr Davis—Yes.

Senator O'BRIEN—And that does not operate at the moment?

Mr Davis—No.

Senator O'BRIEN—Is it intended to be used for detainees other than fisheries detainees?

Mr Davis—Once it is operating it may have small numbers of other detainees. We have a small number of air arrivals and compliance cases in Darwin and, given that the facility will be open and operating, our intention is to use it for those. However, the numbers are very small. I do not have the figures here, but you are talking about fewer than 50 people a year—those sort of quantities. It is not a large number of people compared to the number of people detained under fisheries detention, but our intention is to use the facility that way, because we have no other facility in Northern Australia to use in such a way.

Senator O'BRIEN—When the government sought to privatise certain AQIS functions through the use of contract labour, the government thought it desirable for them to agree to adhere to the APS code of conduct. At that time, we were told that this was an important accountability measure. Is it equally important for detention officers?

Mr Davis—For us, it is important to have a code of conduct for detention officers and for that to be adhered to. GSL Australia have a code of conduct for their officers and they very vigorously apply that code of conduct. Our experience is that when an issue arises they pursue that issue. While not going into too much detail, there have been several officers already who have parted company from GSL either due to them leaving before an investigation is completed or in one or two cases due to them being sacked. GSL as a company are very serious about having a code of conduct and making sure that that is applied. That is our experience. We have that—

Senator O'BRIEN—How does that differ for the APS code of conduct?

Mr Davis—I would have to take that on notice and provide you the details.

Senator O'BRIEN—I would appreciate it if you did that.

Mr Davis—I could seek GSL authorisation to provide you their code of conduct if that would be useful.

Senator O'BRIEN—Both would be useful. I accept your offer to take that on notice. 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.

Senator O'BRIEN—Even a detainee?

Mr Moroney—Indeed.

Mr Davis—Perhaps I could talk briefly how we undertake it. I imagine AFMA would make similar arrangements. For example, the Coonawarra facility would operate for us in the same way as other facilities are operated. Part of that is actually having DIMIA staff on the site who day-to-day are there watching and monitoring the performance of the contract. It also includes regular visits to facilities by my people from Canberra, who go out and undertake specific monitoring of activities. We also engage what we call expert panel members to go and look at particular aspects of service delivery—like food, medical or education—in which we do not have the particular expertise.

The Ombudsman and HREOC make regular visits to our facilities. I imagine they would do a similar thing for these facilities. We certainly have a very strict regime. If there is any suggestion or allegation of something of a criminal nature of any sort we have a very strong process of referral to police authorities immediately that becomes known to us. I guess AFMA would pick up a similar range of things. The exact detail of the monitoring regime would probably need to be articulated, but that is the range of things that happen in our other facilities that we would seek to apply in Coonawarra.

Mr Murphy—As well as monitoring, we already have in place complaints mechanisms which we will continue. Anyone who is detained has the right to make a complaint, and we have a process that enables to deal with that complaint and follow through on it and remedy the cause.

Senator O'BRIEN—How are whistleblowers protected under the current arrangements?

Mr Moroney—I do not know. I would have to take that on notice.

Senator O'BRIEN—What consultation has AFMA had with its current staff about these new arrangements?

Mr Murphy—Very little. Do you mean fisheries officers?

Senator O'BRIEN—Yes.

Mr Murphy—At the moment, most of our fisheries officers are state based employees and work with state agencies, so we have had very little consultation with them about the specific powers.

Senator O'BRIEN—There are not many AFMA employees, as such, involved as fisheries officers?

Mr Murphy—There are a number of fisheries officers in AFMA in Canberra who are currently appointed officers under the act, and most of them are familiar with the bill and the contents of the bill.

Senator O'BRIEN—But outside Canberra there are not many?

Mr Murphy—No, there would not be.

Mr Wilson—There is a training program being developed which will be released to the state based fisheries officers once we know exactly what the powers will be after the passage of the bill through parliament.

Senator O'BRIEN—Before I turn to some of the specific provisions of the bill, can you tell me if regulations will need to be enacted in addition to the bill to achieve the government's intention?

Mrs Palfreyman—There is one regulation that we are intending to make in regard to passing information, and that is to write DFAT into the explanatory memorandum as the agency that would be passing information to foreign governments—such as finding out the identity of a person or letting another country know that we were holding a person.

Senator O'BRIEN—When would that need to be promulgated?

Mrs Palfreyman—After the provisions are operational, we will go about doing that.

Senator O'BRIEN—Is there not a specific timetable required? Does it need to be operational at the time the bill is given effect?

Mrs Palfreyman—These aspects of the bill are on proclamation as well, and we can do that at the same time.

Senator O'BRIEN—Is that is what is needed, or could you do something else?

Mrs Palfreyman—We intend to do it quickly, so we could do it on the same day.

Senator O'BRIEN—Going back to page 11 of the bill: do detention officers have the power to detain Australian citizens on foreign boats?

Mrs Palfreyman—A person cannot be detained if they are an Australian citizen.

Mr Murphy—People who are authorised only as detention officers do not have the power to detain either. Detention officers can only detain someone who has already been detained.

Senator O'BRIEN—Is a 'foreign boat' defined anywhere?

Mrs Palfreyman—Section 4 of the Fisheries Management Act states:

foreign boat means a boat other than an Australian boat.

Senator O'BRIEN—I am not familiar with how we go about identifying an Australian boat. Does that imply registration, or something else?

Mr Wilson—There are three ways in which a boat may be regarded as an Australian boat. The first way is where it is owned by an Australian or by an Australian company and has been built in Australia and is operating from Australia. The second way is if it is included on the Australian shipping register, except where it is included on the register under a demised charter arrangement. The third way is when AFMA declares the boat to be an Australian boat—that is, it makes a specific declaration that a boat is regarded as an Australian boat.

Senator O'BRIEN—So if it is built elsewhere, other than in Australia, it would need a declaration?

Mr Wilson—A declaration, or to be on the register.

Senator O'BRIEN—I refer to page 13: can you tell me why ministerial approval of another place for detention is not a legislative instrument?

Mrs Palfreyman—A legislative instrument is only required to do so if it is of the character of a legislative instrument under the Legislative Instruments Act. And it does not alter or determine the content of the law; it just applies the law—and that is why it is not a legislative instrument. We have received advice that it is not a legislative instrument under the instruments act.

Senator O'BRIEN—So if the minister writes on the back of an envelope that some particular place is a place of detention, presumably that is good enough under this legislation?

Mr Quinlivan—Wouldn't it depend on exactly what was written rather than what it was written on, because it would be a legal instrument and it would need to be retained as such.

Senator O'BRIEN—It could do. I am not really sure. If what is written purports to approve another place, that is all that is required, is it? It might be written on the side of a cow. I think there was a case on TV where a fellow was passing cheques written on the side of animals or something like that.

Mr Quinlivan—Ministers are making determinations and declarations and decisions all the time. We have got a very well established system for retaining and recording those. I do not think we could fit some of those things on a file.

Senator O'BRIEN—It would be difficult. It would make for some interesting office arrangements. The point that I am making is that, to understand what that means, from what has been said, it does not require anything particular about that instrument. It is not published, as I understand it.

Mr Davis—Are you referring to another place of detention approved by the minister in writing?

Senator O'BRIEN—Yes.

Mr Davis—That is a provision of our existing act and is used extensively, I guess, because of the many and varied circumstances in which we have detainees. For example, there are places like schools. Other than a hospital, you might have nursing homes or other places which may be covered in (c) but in (d) as well. I guess it is a provision that is carefully used to ensure that the legal requirements of detention are met. At times you may have to hold someone in another place. Indeed, in recent times, we had to move fishermen in the company of officers to an Air Force base because of the cyclone coming through Darwin. We went through the process of declaring that as a place of detention to ensure that all the legal requirements were met. I guess you can get unexpected places used as places of detention. Our process for places we declare a place of detention is to have a register of all of them so at any one time we have that information available as to whether a place is declared as a place of detention or not.

Senator O'BRIEN—So a declaration can be retrospective?

Mr Moroney—No, I would not have thought so. It is a place approved by the minister in writing. The intention always is that, where we know where a detainee is going to be placed, we want to know that in advance so there is an alternative place of detention, such as a motel or hotel—which has been used—or sometimes non-government organisations have carer arrangements and sometimes their house is made a place of detention. We like to know those arrangements in advance so that in fact we can do it.

Senator O'BRIEN—The question I am asking is: if the bill is passed into law, would that permit retrospective approval, or would approval need to be given prior to a place being used?

Mr Moroney—I can say for myself that I have never had to consider that question because it has never arisen, to my knowledge. I would have thought that the wording would be such that 'approved' would mean 'approved in advance'. I could take that on notice and seek legal advice if you wish, but to my knowledge it has not come up.

Mrs Palfreyman—That is certainly the intention, in any case.

Senator O'BRIEN—It would certainly be good if that were made clear. In clause 12(3) there is talk of moving detainees. It says:

(3) In exercising the power under subclause (1), the officer or detention officer must have regard to all matters that he or she considers relevant, including:

- (a) the administration of justice; and
- (b) the welfare of the detainee.

Can you explain to me what those matters should be taken to mean in the legislation?

Mrs Palfreyman—In the context of moving detainees, the sort of instances where you might foresee that this would occur would be such as Mr Davis explained before, with the cyclone. If we had to move people off a boat to an alternative location so that they were not being thrown about by a storm, their welfare would be taken into account. For example, we would put them in a facility where there was adequate shelter and things like that so that their welfare would be properly looked after. They are the sorts of things that we would be thinking about in that sort of instance.

Mr Quinlivan—The first one presumably refers to legal proceedings.

CHAIR—How did you hold up under the recent cyclone? Did everything work?

Mr Murphy—I think everything went very well.

Senator O'BRIEN—So you did not need these powers during the recent cyclone?

Mr Murphy—We have powers already under the Fisheries Management Act, so this bill would replace the existing powers. They are under section 84(1)(ib).

CHAIR—It is just a shame the cyclone did not come straight down and bring a bit of moisture with it.

Senator O'BRIEN—Clause 15 of the bill seems to be saying that an authorised officer can ask another person to undertake a search of a detainee in certain circumstances. Is that right? Is my understanding correct?

Mrs Palfreyman—That is when a person of the same sex is not available to conduct a search. There is a policy that an officer of the same sex as the detainee will always be used.

Senator O'BRIEN—So that person would not be an authorised officer? I am assuming that it means that you could ask a person to conduct it who was not an authorised officer but of the same sex as the person in question?

Mr Murphy—Subject to the agreement, as set out.

CHAIR—I take it that is to reduce some sort of intimidation.

Mr Murphy—Yes, and using that person to conduct the search is subject to the detainees agreement.

Senator O'BRIEN—And no warrant will be required for authorised officers to—

Mrs Palfreyman—No warrant is required, as is currently the case under the Fisheries Management Act.

Senator O'BRIEN—So it is not the detainee's agreement that is required for the other person to—

Mr Murphy—No, it is the agreement of the person who is not authorised but who is to conduct the search.

Senator O'BRIEN—Clause 17 authorises a strip search to be conducted by an authorised officer without a warrant.

Mr Murphy—Yes—the approval has to be sought from the Managing Director of AFMA or senior people in the department.

Mrs Palfreyman—Or a magistrate.

Senator O'BRIEN—In each case?

Mrs Palfreyman—Yes, every case has to be specifically authorised by that high-level authorisation.

Senator O'BRIEN—The Managing Director of AFMA, the Secretary of the Department or an SES band 3 employee—

Mrs Palfreyman—That is, a deputy secretary.

Senator O'BRIEN—has to have been consulted and has to agree that there are reasonable grounds for whatever suspicions are alleged to exist. We are talking about activities that are very remote from where those—

Mrs Palfreyman—The authorisation could be obtained over the phone. That is right.

Senator O'BRIEN—So there would not be any knowledge in the possession of those officers other than that which was imparted by the authorised officer?

Mr Murphy—At the least, they would have the knowledge that was imparted by the officer. I assume that they would want that recorded in some way before they would be willing to give the authority.

Mr Quinlivan—They may want some confirmation by an additional person. It would be a matter for their discretion.

CHAIR—Are you eventually going to insist on written authorisation, because there is a way out without the written authorisation under clause 17? So, if the paperwork does not turn up, it does not matter?

Mr Davis—The way it has operated in practice for Immigration is that there have only ever been six authorisations for a strip search. Those authorisations involve more than six people, because most of them were in group situations. For us, all of those have been in writing and at all times the submissions have been cleared through not only staff within the centre but also my division's staff before they even get to the secretary or the authorised officer, to ensure that we meet all the requirements of the legislation and have adequate information to enable the senior officers to make an informed decision. Certainly from our perspective, in our organisation, this is not treated lightly; it is actually something tested.

CHAIR—But, to be fair, if there is not a record and a diary note of the phone conversation, there is no paper trail.

Mr Davis—Indeed, and that would be a matter that would need to be looked at in terms of the processes around the use of this power.

Mr Moroney—We have a migration series instruction specifically on strip search. It was developed out of the protocol which was tabled at the time the then minister introduced our legislation into the parliament. Our MSI makes it crystal clear. An officer—as you have indicated—in the unlikely event that a strip search is necessary, needs to make a thorough diary note of it and then the authorisation must be received within that business day. I can certainly assure you, Chair, that there has not been one occasion—

CHAIR—So why is subclause (7) there?

Senator O'BRIEN—Good question.

Mr Moroney—On the failure to comply with 5(b), basically the authorisation has been given verbally. Let us construct a hypothetical. Say the secretary or deputy secretary provides authorisation late in the evening and then for some reason has to be absent from the office, away from a fax machine or whatever. A strip search has taken place on the basis of an appropriate authorisation from the secretary or deputy secretary and therefore the strip search

has been conducted according to law. Suppose the secretary or deputy secretary who has authorised it could not then get the written authorisation done for some technical reason. It would seem pretty unfair to the person who has conducted the strip search to suddenly have the lawful basis of it being—

CHAIR—Subclause (7) reads: ‘A failure to comply with paragraph (5)(b)’. Subclause (5)(b) says it ‘must be recorded in writing’. In plain English, that could mean that you do not have to record it in writing because 5(b) excludes it.

Mr Quinlivan—It is within one business day as well, which I think is practical.

CHAIR—I am taking the first bit, not the second bit. The first bit applies equally to the proposition that is in (7), so isn’t that a mistake that needs to be separated out, because any clear reading of that says that (5)(b) does not matter?

Mr Murphy—There are two different things the law requires. One is—

CHAIR—I know. But shouldn’t you define that in there? Shouldn’t (7) say ‘and part 2 of (5)(b)’ rather than (5)(b)?

Mr Murphy—I think that (7) is trying to say that if the law is not followed with regard to the administration, the authorisation still stands.

Mr Quinlivan—Can we have a further look at this clause, Chair?

CHAIR—Yes. I am a welder not a lawyer.

Mrs Palfreyman—If I could add that 17(7) still provides the onus that it should be recorded in writing—it is just that it would affect the validity if it were not done in the one business day.

CHAIR—Yes, but there is no getting away from what it could be interpreted to mean—from a welder’s point of view. Senator O’Brien, back to you. Senator O’Brien is a broken-down horse trainer.

Senator O’BRIEN—I am not even that! Page 25 says that authorised persons will have the power to screen detainees. I am trying to find where that is. That is what 25(1) is about, isn’t it?

Mrs Palfreyman—Are you talking about visitors or detainees?

Senator O’BRIEN—I am talking about 23(1).

Mrs Palfreyman—Clause 23(1) is about visitors to a detention centre.

Senator O’BRIEN—Yes. Where is the provision which states that a detainee has a right to visitors?

Mr Moroney—I do not think that there is a need to have a legislated right of entry. Any person who wishes to come into a detention facility in our context has a right to make a request to enter, and a decision is made in relation to the good order and security of the facility—subject to the right of the occupier to have specific rules in place governing the right of entry of certain groups, depending on what infrastructure is available. For example, if you have 100 religious people wanting to come into a facility at one time to conduct religious ceremonies for all detainees at that particular time, decisions would obviously have to be

made about what the infrastructure would be able to bear. It might not be possible for all of those priests or religious persons to conduct a ceremony at the precise time they want. There is no harm in a person making a request to enter, but there might be some rules in place which govern whether or not it is possible to facilitate that request.

Senator O'BRIEN—On page 30, clause 29 says that authorised officers must require and carry out identification tests. Does that mean fisheries officers and detention officers, or just fisheries officers who are authorised?

Mrs Palfreyman—An authorised officer could be a detention officer or a fisheries officer if they are so authorised.

Senator O'BRIEN—What happens at present? How does someone satisfy a fisheries officer that they are an Australian citizen?

Mrs Palfreyman—Currently, under section 84(1)(id) of the Fisheries Management Act, there are already provisions to photograph or identify the person.

Senator O'BRIEN—Okay. And what will the role for detention officers be in this regard, with the person already having been apprehended?

Mrs Palfreyman—They can undertake identification tests to determine the identity of the person. That might be done by a fisheries officer or a detention officer, as long as they are authorised.

Senator O'BRIEN—I presume you have got to satisfy yourself that the person is not an Australian citizen before you apprehend them.

Mr Wilson—That is correct. As soon as you form a reasonable belief that the person you hold in detention is an Australian citizen, that fisheries detention ceases and you must release that person.

Senator O'BRIEN—I am just wondering why this is required—authorised officers rather than fisheries officers.

Mr Murphy—I guess, depending on the system that is in place to record and make the identification, it could be that you would want detention officers at a facility to conduct that sort of test for identification and to keep the records.

Mr Davis—It is routine for photographs to be taken upon entry to detention facilities, and that partly assists with day-to-day management issues. I guess in a sense the requirement to take a photograph or the good management that follows from having a photograph and ensuring that all aspects of a detainee's care and treatment within a detention facility is attached to their identity also assists in day-to-day management issues. The other requirement that we have—and in theory it might not occur until they are in immigration detention—is to seek travel documents for their return to their country of origin. The earlier you can initiate those processes for establishing identity and seeking travel documents is also facilitated by taking personal identifiers as early as possible. If they are taken in the early stages of fisheries detention, it shortens the period that the person needs to be held before they are removed. There are those advantages associated with being able to take those identifiers early in fisheries detention processes, as well as whatever requirements the Fisheries Management Authority have for themselves.

Senator O'BRIEN—What is the practical effect of the limitation imposed on the types of identification tests that authorised officers may carry out under clause 28(2) of the bill?

Mrs Palfreyman—Are you asking whether it would be possible to take fingerprints and photographs on boats and things like that? Are they the practical limitations you are talking about? I am not quite following you.

Senator O'BRIEN—You are saying, 'These are the things that it's limited to.' What other tests might have been contemplated and have been, by implication, excluded?

Mrs Palfreyman—Intimate forensic procedures—such as taking DNA or a mouth swab—are not allowed under this legislation, and they could identify a person.

Senator O'BRIEN—And the authorised officer can use force to carry out the identification tests?

Mrs Palfreyman—Under section 32, force can only be used if it is specifically authorised—that is, where 'all reasonable measures to carry out the identification test without the use of force have been exhausted' and where the noncitizen has refused to allow the identification test to proceed.

Senator O'BRIEN—Is there a document which sets out the full list of powers potentially available to this new class of officer? Can we be supplied with such a document or a list?

Mrs Palfreyman—Just a list of the provisions of the bill?

Senator O'BRIEN—A list of the particular powers that the authorised officers will have available to them under the bill.

Mrs Palfreyman—Yes, we could provide a list of those.

Mr Quinlivan—Are you just asking about the senior authorising officer?

Senator O'BRIEN—No, detention officers. Presumably, if a detention officer is injured during his or her employment the Commonwealth has some liability?

Mr Murphy—They would be protected to some extent by the liability provisions of the contract. But whether there would be any residual liability would depend on the circumstance.

Mr Moroney—In our situation there is a contract between the Commonwealth and GSL, and GSL has some subcontracts in place. In relation to detainees, it is crystal clear policy, as well as law, that the Commonwealth has the ultimate duty of care and ultimate liability in relation to any injury suffered by a detainee. 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.

Senator O'BRIEN—Under the bill, how can a detention officer appointed by the minister be dismissed? If they are a certain class of employee, I presume that if they are dismissed from their employment then that is a termination of the appointment?

Mr Davis—Indeed; that is right. The employees of a contractor are employees of the contractor. There is the code of conduct that I mentioned before and their certified agreement. The employment arrangements of the contractor and the company give them the provisions, as well as the legislative provisions. There is a requirement that they meet both state and federal laws in association with employment and workplace safety and occupational health and safety and so forth. In addition, the contract that we have with the contractor does allow me, as the contract administrator, to direct that a person not work within a detention facility. It has never been used—not in this contract or the previous one—but that does not necessarily mean that the contractor has to dismiss that employee; it simply means that they are not allowed to work within a detention facility or with detainees. That is the limit of the power that we have under the contract with the contractor.

Mrs Palfreyman—Another point might be that if you are an authorised officer that authorisation can be revoked under the act. AFMA can do that by instrument in clause 7(3).

Senator O'BRIEN—Does that mean AFMA can say, 'This person will not work in relation to detention'?

Mrs Palfreyman—Authorisations are related to searches and identification, so you would revoke them. You might say that the person may now only provide food or something like that. You might not terminate the employment but you could reduce the duties.

Senator O'BRIEN—I want to go back to page 14 and the seven-day limit. Could you tell me more about that?

Mrs Palfreyman—Do you mean the 168 hours? It already applies under the Fisheries Management Act and it has been upgrading since 1999.

Senator O'BRIEN—So it is simply carrying that forward?

Mrs Palfreyman—Exactly. It is carrying that on from the Fisheries Management Act.

Senator O'BRIEN—Returning to the strip search provision, is there anywhere in the bill which would entitle a detainee to have another person present during such a strip search—a lawyer, for example?

Mr Moroney—Yes, there is. I need to go into a little bit of technicality, but it is based upon what our provisions are. There is a right for a person who is an incapable adult or a minor to have an independent person, normally a parent or guardian, present. A detainee who is aged 18 or over and is competent has the right to request an independent person to be present. Provided that that independent person is readily available and is willing to attend then that person will be able to be there.

CHAIR—Do you agree with the *Bills Digest* that this provision under the Migration Act actually affords less protection than the Crimes Act does? They say that because 'practicable to comply' is not actually in the Crimes Act but is in this it provides less protection.

Mr Moroney—I do not know that it affords less protection.

CHAIR—That is what they say. I am asking whether you disagree.

Mr Moroney—There is not a right in the sense that there is appropriate protection in our legislation in relation to the right of a competent adult to have a person present. I do not have

the Crimes Act in front of me but if there is a requirement in the Crimes Act for a mentally competent adult—

CHAIR—No. What I am saying is that under this provision it says ‘provided that it is practicable to comply’. Under the Crimes Act there is no such let-off. You have to do it.

Mr Moroney—The situation, I think, is a little different in relation to the context of our—

CHAIR—So is this a cultural or a sexual thing?

Mr Moroney—I am sorry?

CHAIR—What is it all about? Is it to protect the person from cultural intimidation or from sexual intimidation?

Mr Moroney—I think it is to protect the dignity and the privacy of the detainee as best as is possible. I think it is taking into account cultural sensitivities that detainees have as well. Basically, the situation may well be with the Crimes Act that a person is under suspicion in relation to some offence or whatever. In relation to the immigration detention context, the Commonwealth has an overarching duty of care to the detainee, to all persons in the detention centre—

CHAIR—Under the Crimes Act you afford them better protection because there is no provision that says ‘practicable to comply’. So you are being tougher on the poor old fishermen than you are on the crim.

Mr Moroney—I think in the context—

CHAIR—I am only following the advice of the *Bills Digest*, and of course there is a fundamental flaw in the proposition which I have put to you in writing, about which I am not going to go into detail.

Mr Moroney—If you wish we can take that on notice and come back to you.

CHAIR—Okay.

Senator O’BRIEN—Just so I can be clear on this, where in the bill is the right of a witness, being a person over 18 who is capable of managing his or her affairs?

Mr Moroney—It is in paragraph 18(1)(h).

Senator O’BRIEN—I am trying to read that in the way that you suggest. I see; I misread it—my apologies.

CHAIR—Proposed section 59 could be seen as ambiguous. The proposed new section deals with disclosure of a detainee’s personal information. Is it the intention of the provision that all the purposes listed should be met before the relevant information is disclosed? Obviously, it probably is not. So could it be made clearer by having ‘for the purposes described’ changed to ‘for any of the purposes’?

Mrs Palfreyman—*Bills Digest* put this up. I guess it was our view, when we drafted the provisions, that all of those things—immigration detention, removal and welfare—would be present in mind as ‘for those purposes’.

CHAIR—So it is not one of them but it is all of them?

Mrs Palfreyman—It is drafted to be all of them.

CHAIR—So you are going to take the person into detention and remove them?

Mrs Palfreyman—Essentially, if AFMA were to transfer information to DIMIA or their respective staff, that would be passing information ‘for the purposes’—

CHAIR—Because you are going to remove them as well as detain them, not just detain them?

Mrs Palfreyman—They are detained for a short period before, obviously, they are repatriated, so they are all keyed in together.

Senator O’BRIEN—On the question of strip searches, have any of the DIMIA officers authorised one?

Mr Davis—I and Mr Moroney have both been involved in the strip searches that have been authorised under our legislation to date. There have been six such incidents under the previous contract and also the current contract. The last of those was in January 2003. There has not been one since that time. Almost all of them were in that period of December 2002 to January 2003 and a number of them were associated with the major fires we had in December 2002 to new year of 2003.

CHAIR—So what does that mean—a box of matches? Here’s an extra question: did you find anything?

Mr Davis—We did indeed. Most of the incidents that had been authorised were associated with the fires that we had—several at the Baxter centre and some at other facilities, where there was major unrest. We had fires in a number of compounds and there was the process of reasonable suspicion that detainees had further implements to cause further disorder and unrest—and they had those in their possession.

CHAIR—So it verified your judgment.

Mr Davis—Indeed. There was some other strip search authorised associated with other matters. One was an individual who was moving from one facility to another and a pat research revealed a weapon so a reasonable suspicion was formed that he had something else. In that case I do not believe anything else was found after the strip search but a strip search was authorised by either the secretary or the deputy secretary at that time. There was another incident in Villawood where we had some unrest between groups of detainees around the same period where reasonable suspicion was that they may have weapons available to cause further injury to each other as well as disorder to the centre. Each decision was taken very carefully and I personally and Mr Moroney were involved in all those decisions. As part of briefing our secretary or deputy secretary who authorised those, we went to great lengths to assure ourselves that the reasonable suspicions were justified. We did all of them in writing and that gave us confidence and we went through an extensive process of, to the best of our ability, verification of information and so forth to assure ourselves as we briefed our secretary and he made the decisions that they were legitimate in those circumstances.

As I said, there has been none since January 2003, and certainly that is our desire—we have had other times when we have been approached for possibly considering strip searches and we have said, ‘Have you done everything you possibly can without going to that length to

search the detainee, for example using a wand or pat search?’ and we have had no other cause to feel that any other requests have been justified. There have not been many but no others have been authorised since that time.

Senator O’BRIEN—What happens if someone conducts a strip search in breach of the legislation, in the view of members of the opposite sex or proceeding beyond what is required to ascertain whether the person has any weapon concealed on their person?

Mr Davis—I am not aware of any instances where the strip searches have been conducted, for example, with members of the opposite sex present. Those requirements have been met. Where there is any suspicion of a strip search going beyond what is reasonably required, the matter is immediately referred to police authorities.

Senator O’BRIEN—Are the rights of the person has been the subject of the strip search affected by the legislation? For example, would they be in any way prohibited from taking an action for assault against the person by this legislation?

Mr Davis—They could take action for assault or prosecution or whatever under normal legal provisions. They are not prohibited from that.

Senator O’BRIEN—If they were denied a witness and the witness was reasonably available, what actions would be available to them then?

Mr Moroney—Certainly to my knowledge I am not aware of any such instance which has been put to us that that has happened.

Senator O’BRIEN—I did not ask you whether you were aware of any such instance; I was wondering what actions would be available in those circumstances.

Mr Moroney—The legislation itself does not provide a specific remedy in the terms of the legislation but the normal scrutiny provisions, the normal complaint mechanisms and the normal rights to take legal action are in no way diminished by what is in the legislation. It would be a matter that certainly Mr Davis could take into account in relation to the way that the contractor is held accountable to the Commonwealth in the way that the contract is administered, because all of the people who are authorised to conduct strip searches are actually GSL people—there are no DIMIA officers who are authorised to conduct the strip search—so therefore the contractor would be accountable to Mr Davis and the Commonwealth for the way that the power has been exercised.

In addition, the protection that the authorised officer has to interfere with the personal integrity of the person, in the way that the strip search legislation allows, is there only within the specific terms of the legislation. The legislation itself is very specific in that there are quite detailed rules beyond which an officer cannot go. If an officer goes beyond them then that officer puts themselves at risk of civil or criminal liability.

Senator O’BRIEN—A person without a witness is in a very difficult position to prove what has happened in the context of a strip search.

Mr Moroney—All I can say is that, to my knowledge, the intention and the way that the strip search power has been exercised has not been exercised with a view to diminishing the rights that the detainee has in relation to what—

CHAIR—I suppose it cuts both ways, doesn't it? If it is a one-on-one thing, the person being searched could say, 'He jumped on my head.'

Senator O'BRIEN—Sure. They could, but the person being searched has less chance of organising the one-on-one circumstance than the person doing the search does. If there are two on one and there is a conspiracy by the two then the person being searched has little chance of proving their case.

CHAIR—It just goes to show that it is better not to illegally fish, doesn't it?

Senator O'BRIEN—Or be suspected of it. We are talking about people, who, in the first seven days under this legislation have not been convicted of illegal fishing. They may have been present in Australia.

Mr Moroney—In the context of the Migration Act there are specific, very heavy penalties for people who are organising on a people smuggler basis, and particularly heavy penalties for those who are organising people-smuggling of more than five. Even though a person who enters Australia does not in fact commit a criminal offence they are subject, in most cases, to mandatory detention, although I do not think we can deal with an unlawful arrival in an excised offshore place at the moment.

Senator O'BRIEN—Are these people usually on the water, not landing on mainland Australia or on its islands?

Mr Moroney—In the sense of criminal action, though, the person has not been convicted of a fisheries offence, but nor would a detainee be convicted of an immigration offence at the time when we would be exercising power under the Migration Act. I think it comes down to whether the circumstances which justified the strip search, within the specifics of the legislation, are reasonably enlivened and, if so, then it is appropriate to seek permission to conduct the search and that the permission to conduct the search is independent. The then minister said it was a power of last resort, and the way that it has been administered in our portfolio—and especially the fact that there have been no strip searches at all since January 2003, after the major fires—would indicate that power has been exercised very carefully, in accordance with what the then minister said.

Senator O'BRIEN—We will think about some of those answers. Detainees have the right to reasonable facilities for obtaining legal advice.

Mrs Palfreyman—Under section 9—

Senator O'BRIEN—What are 'reasonable facilities'? A telephone? How does that work?

Mr Moroney—In the immigration context, the legislation is a little different from the draft legislation for fisheries. Because an unlawful fisher is potentially subject to an offence, the provisions of the Crimes Act are incorporated into the request for legal advice because in fact there is a criminal element to it. In relation to the Migration Act, it is section 256 of our legislation, and an immigration detainee has the right to request the reasonable provision of legal advice and access to legal advice in relation to their immigration detention. As a matter of practicality, there are facilities within an immigration detention centre available for lawyers and paralegal staff, normally on a three-day notice provision, to come to the centre to conduct those consultations. In addition, there is telephone access as well as normal letter writing and

all that sort of thing. So it says ‘reasonable’ access. Naturally, if all the lawyers for all the detainees wanted to come at one time, we would face a logistical problem, so there has to be a planned process. It is subject to the good order and security of the immigration detention facility, but we do try to be facilitative in what we do.

Mr Murphy—I think clause 9 of the bill protects the rights of fishermen that already exist under the Crimes Act—that is, the right to legal counsel et cetera. The Crimes Act also requires officers to advise people of their rights throughout the process—that is, when they move from being a protected suspect to someone being interviewed on suspicion of committing an offence.

Senator O’BRIEN—Clause 24 talks about ‘reasonable facilities’ and then clause 9 talks about the application of part IC of the Crimes Act, which you say grants certain rights to—

Mrs Palfreyman—It creates an onus on the officers to tell the people being questioned that they have access to legal advice.

Senator O’BRIEN—So the obligation is to give all detainees that information?

Mr Murphy—There are two stages. Initially, people are considered protected suspects under the Crimes Act, and fisheries officers would read them their right to remain silent or otherwise the information they might give could be used in legal proceedings. If the detention moves to a stage of interviewing then they are read additional rights. The rights they are advised of at that stage include the right to legal counsel.

Senator O’BRIEN—What about the rights of detainees who do not speak English? Are they entitled to advice in their own language?

Mr Murphy—They are read their rights in their own language by the fisheries officers.

Mr Quinlivan—And immediate consular access.

Mr Murphy—Yes, they are all offered the opportunity in Darwin to see the consulate.

Senator O’BRIEN—And that is the provision of the Crimes Act that was referred to in clause 9 of the bill?

Mrs Palfreyman—That is right—section 23G, I think.

CHAIR—Do you ever get anyone whom you cannot work out where they come from?

Mr Murphy—You never know for sure.

CHAIR—There has been a fairly spectacular example of that in recent times.

Mr Murphy—It is often difficult to identify people. Through the process of investigation you have to try to work out who is telling the truth and who is not telling the truth.

CHAIR—I was thinking how the hell would you know which consulate they should have access to. Best of luck.

Senator O’BRIEN—Where force is to be used to carry out an identification test an independent person must be present, and also when the detainee asks for the independent person to be present where force is not required. Is that is right?

Mrs Palfreyman—Yes, if force is required an independent person should be there.

Senator O'BRIEN—Should or must?

Mrs Palfreyman—Must be there. And if a person requests that an independent person be present and they are available and willing to go, then they must also be there.

Senator O'BRIEN—So, if no force is required, will the detainees be told that they can have an independent person present, that they can request that?

Mr Murphy—What AFMA will do again is try and create very similar protocols and procedures as used by the department of immigration. Our view would be that if that were a standard procedure that DIMIA use then we would be adopting it.

Mr Davis—We do not have our instruction here to double check, but we understand that, yes, that is made known to the detainee at the time. We need to confirm that from our instructions.

Senator O'BRIEN—If you could, I would appreciate that. Where it says in the legislation that the independent person must be readily available at the same place, what does 'readily available' mean? Does it mean that they can be contacted and brought there within a matter of minutes or hours? Given the importance of an identification test as distinct from searching for a weapon, what sort of latitude is there in understanding the term 'readily available' in this provision?

Mr Moroney—I would have to double check what our instructions say, before going much beyond what the normal meaning of the legislation is. It is meant to conduct the tenor of: it is to proceed in an orderly fashion but an appropriate opportunity is given for independent people, without being unreasonable. The opportunity should be given and they should have the right to it, provided the taking of the test itself is not unreasonably delayed.

Senator O'BRIEN—Where force is required for the identification, who will constitute the class of senior authorising officers? Will that include detention officers?

Mr Moroney—In our legislation no officer under SES band 1 is able to authorise the use of force. My recollection of our instrument is that not all SES band 1 officers do have that. Certainly the SES band officers within Mr. Davis's division do, as does Mr Davis. I certainly would not want to give the impression that it is all SES band 1 officers. But no officer under SES band 1 is able to authorise the use of force.

Senator O'BRIEN—That means that detention officers must be so authorised?

Mr Moroney—That is right.

Mrs Palfreyman—In accordance with clause 32(9) of the bill, the senior authorising officer can be an officer or detention officer but it is the person who AFMA specifically authorises in this context. A senior authorising officer is most unlikely to be a detention officer. It is very likely to be a senior officer in the AFMA organisation.

Mr Davis—Indeed. That is probably consistent with our approach in the sense that the decision has been made by the secretary, as I understand it, in his instrument to identify that SES band 1 officers and above involved in the detention program are essentially the ones he has authorised in the interim. But he has nominated that to be the case.

Senator O'BRIEN—That is the practice?

Mr Moroney—Yes.

CHAIR—You have had a bit of practice—

Mr Davis—No, not a lot, because we have only just had the legislation passed for this power to use force. It has only recently been passed through the parliament and authorised by the minister, and the delegations and other things are progressively being authorised by the secretary. Ours is one of the first that is being made available within the department from the new legislation. So we have not had a lot of practice, no.

Senator O'BRIEN—In terms of the additional costs which are envisaged in the explanatory memorandum, can you supply us with an outline of those costs to the department, to AFMA and DIMIA? Annualised costs will be fine. Will any of these additional costs be subject to cost recovery from industry?

Mr Murphy—The measures are specific to illegal foreign fishers. They will be government funded and not recovered from the Australian fishing industry.

Senator O'BRIEN—So there will be no additional costs to the Australian fishing industry arising from this legislation?

Mr Murphy—That is right.

Senator O'BRIEN—I do not have any more questions. It may be that we need to look closely at whether we need further hearings about any particular matters that arise from today's hearings or other matters.

CHAIR—Thank you for your attendance before the committee today.

Committee adjourned at 6.02 p.m.