

QUESTION TAKEN ON NOTICE

SUPPLEMENTARY BUDGET ESTIMATES HEARING: 1 November 2005

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

(71) Output 1.3: Enforcement of Immigration Law

Senator Ludwig (L&C 81) asked:

1. Provide a copy of the old and current MSI 234 and if there is an update, when it is available?

Answer:

A copy of MSI 234 *General Detention Procedures* is attached. Please also refer to Question 70.

MIGRATION SERIES INSTRUCTION

Instructions in this **Migration Series (MSIs)** relate to: the *Migration Act 1958*; the *Migration Regulations* and other related legislation [as amended from time to time].

MSIs are a temporary instruction format only; they are intended for ultimate incorporation into PAM. It is the responsibility of the program area to ensure that the information in this MSI is up-to-date. It will be reviewed 12 months from date of issue but will remain current until formally replaced, re-issued or deleted. For information on the status of this MSI see the latest **Instructions and Legislation Update** or contact Instructions and Forms Coordination (IFCO) Section.

Registration Update of Contact Instructions and Forms Coordination (IFCO) Section.		
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Title: GENERAL DETENTION PROCEDURES		

This instruction replaces MSI 92 on 1 June 1999.

New information is sidelined in the text and includes changes to arrangements for the transfer of custody, references to the MRT and other matters.

THIS INSTRUCTION IS INDEXED UNDER THE FOLLOWING LEGISLATIVE REFERENCES

Migration Act 1958: Sections : 5, 189, 192, 193, 250, 253, 254, 256, 257, 258, 491.	Migration Regulations: Regulations	Other legislation: <i>AD(JR) Act 1977; Vienna Convention on Consular Relations; Privacy Act 1988; Air Navigation Regulations.</i>
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1 INTRODUCTION

1.1 Scope

1.1.1 This document outlines the general procedures in relation to the exercise of the detention powers under the Migration Act 1958. It does not address the specific detention provisions or other provisions associated with these specific powers. Therefore, officers should also refer to the MSI dealing with the specific detention provision they require, when seeking guidance on the exercise of a particular detention power. See also the MSI *Investigation and Prosecution*.

1.2 The Meaning of Detention

1.2.1 Under s 5(1) of the Migration Act 1958 (the Act):

‘detain’ means:

- (a) take into immigration detention; or
 - (b) keep, or cause to be kept, in immigration detention;
- and includes taking such action and using such force as are reasonably necessary to do so.

‘detainee’ means a person detained; and

‘immigration detention’ means:

- (a) being in the company of, and restrained by:
 - (i) an officer; or
 - (ii) in relation to a particular detainee - another person directed by the Secretary to accompany and restrain the detainee; or
- (b) being held by or on behalf of an officer in:
 - (i) a detention centre established under the Act;
 - (ii) in a prison or remand centre of the Commonwealth, a State or Territory;
 - (iii) in a police station or watch house; or
 - (iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel - on that vessel;
 - (v) another place approved by the Minister in writing.

1.3 The approval of places of immigration detention in writing should be limited to where it is absolutely necessary because of the condition or special needs of the detainee, the unsuitability of locally available places of detention, or the unavailability locally of places of detention. The mere presence of a person in such a place does not constitute immigration detention. The person must be held by an officer or on behalf of an officer in that place.

2 DETAINING A PERSON IN PRACTICE

2.1 The detention of a person under the Act is analogous to the action which constitutes an arrest by the police or other law enforcement agency. As with

police arrest, immigration detention is brought about by depriving the person of his or her liberty.

2.2 It is important to signify clearly the point at which a person is being detained. To effect a detention, the words and/or actions of an officer must clearly deprive a person of his or her liberty, and the person must clearly understand that this has happened.

2.3 Normally, detention will be effected by an officer clearly explaining to a person that he or she is being detained and the reasons for that detention, and confirming with the person that he or she understands that he or she is not free to leave. However, only when the person submits to this express understanding that he or she is not free to leave, is he or she detained.

2.4 If the person does not readily submit to such an understanding, it may, subject to the conduct of the person, be necessary to effect detention by:

- physically restraining the person; or
- confining the person in a room or similar place.

2.5 Officers should be emphatic in their actions and ensure that there is no scope for a detainee to be left with the impression they have not been detained. Once detention is effected, officers should ensure that they maintain control over the movement and activity of the detainee until released or transferred from their custody.

2.6 On the other hand, if officers do not intend to detain a person they should not speak or act in a way which may lead the person to reasonably believe that they have been detained. Officers should be extremely careful not to do this when questioning a person whom they have no power to detain (because they are yet to establish the requisite knowledge or reasonable suspicion) during visits to homes and workplaces. There is no need to specifically state that the person is not detained as long as the actions and words used do not suggest to the person that they have been detained.

3 USING INTERPRETERS

3.1 It is essential whenever officers are communicating, either in writing or orally, with a detainee or a person in the process of being detained that officers ensure that the person understands the communication and the implications of the communication. Whenever the person has difficulty understanding and/or speaking English officers should arrange to seek the assistance of a qualified interpreter such as from the Department's Telephone and Interpreting Service (TIS). Situations where it may be necessary to provide an interpreter include:

- explaining to the detainee the nature of and reason for detention;
- explaining the general facilities available to detainees;

- seeking information on the detainee's health and/or need for medication;
- informing detainees of their entitlement to seek legal advice;
- informing detainees of their right of access to consular representation;
- interviewing the detainee;
- when providing the 'Notice to Persons in Immigration Detention'; and
- whenever the detainee receives advice from the Department, the RRT and the MRT.

4 DETAINEES PROVIDED WITH ADVICE FROM THE DEPARTMENT, THE RRT AND THE MRT

4.1 Whenever a person in Immigration Detention (wherever held) receives advice from the Department, the RRT and the MRT, the person is to be provided with an interpreter to interpret advice (where required), and in all cases the implications of the advice are to be explained to them, again using an interpreter if required.

4.2 Detainees at Immigration Detention Centres

4.2.1 DIMA Business managers at Immigration Detention Centres (IDCs) should interview detainees who receive letters of advice from the Department, the RRT or the MRT and ask them whether they need the help of an interpreter to read the letter. If the detainee:

- is able to read and understand the letter without an interpreter, he or she should be asked to sign a statement to this effect, which is to be kept on file with a copy of the letter; or
- needs an interpreter, centre managers should contact the Department's Telephone and Interpreting Service (TIS) so that they can arrange an interpreter as soon as possible. Once the letter has been interpreted for the detainee, he or she should be asked to sign a statement, in English after the statement has been interpreted to this effect, which again should be kept on the file with a copy of the letter.

4.2.2 In addition, the compliance case officer or the centre manager should discuss with the detainee the compliance implications of the advice received. Naturally, an interpreter should be used where required. Where the detainee is represented by a solicitor or agent, he or she should be invited to contact that representative.

4.3 Detainees held other than at IDCs

4.3.1 Action required is identical to that outlined in 4.2 above, except that the responsibility is that of the compliance case officer. However, the management of the holding institution should be asked to alert the compliance case officer to any correspondence from DIMA, the RRT or MRT received by the detainee.

5 REQUIREMENT TO ADVISE DETAINEE OF NATURE OF AND REASONS FOR DETENTION

5.1 At the time of being detained, the detainee must be informed immediately of the relevant power of the Act under which he or she is detained and of the substantive reason for this (e.g. because the person is known or reasonably suspected to be an unlawful non-citizen). However, if the detainee makes it practically impossible to do this (e.g. by attacking the officer or by attempting to escape) then the officer should fulfil this obligation as soon as possible.

5.2 The use of technical or precise language is not necessary as long as the substance of the reason for detention is clearly communicated to the person. If the detainee appears not to understand English, officers should still attempt to explain the reasons for detention in the first instance but should ensure that, with the assistance of an interpreter, these are fully explained as soon as possible (see 13.2 below for advice on the use of interpreters).

6 IDENTIFICATION

6.1 Officers conducting fieldwork should immediately identify themselves and inform residents and employers on arrival of the substantive reason for their visit, (e.g. they have reason to believe that one or more unlawful non-citizens may be on the premises). However, officers must seek to protect the identity of any person who has provided information in confidence. Similarly, when in search of a particular individual, officers should not advise third parties present of that person's immigration status. Rather, officers should simply advise such third parties that the reason for their visit is to find the person in order to discuss immigration matters.

6.2 Officers must identify themselves as Immigration officers before questioning and/or detaining a person. DIMA officers involved in questioning and/or detaining non-citizens in the field should be issued with identity badges for this purpose and should use these in tandem with Departmental identity cards. Where encountering groups of people, officers should ensure each person is aware of their identity and should identify themselves to any newcomers to a situation.

7 LAWFUL USE OF THE POWER TO DETAIN

7.1 A person must be detained in accordance with the legislation which gives officers the relevant power to detain. Officers who detain a person otherwise will be unlawfully detaining that person. Officers should also follow the policy and

procedural guidelines contained in this MSI and the MSI which deals directly with the detention power being exercised, either Detention of Unlawful Non-Citizens, Questioning Detention, or Detention of Deportees. Officers should be aware that their decisions and actions in relation to the exercise of their detention powers are subject to review by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977.

7.2 It is important to remember that each of the powers to detain is strictly limited to where knowledge or a reasonable suspicion, or reasonable supposition in the case of deportees, has been established. It should also be noted that the detaining officer must actually have the suspicion and this suspicion must be a reasonable one based on objective evidence (i.e. a reasonable person in the position of the officer, in the particular set of circumstances, would hold the relevant reasonable suspicion). The powers cannot be used for the purpose of assisting an officer to establish the required reasonable suspicion. Where no reasonable suspicion has arisen, officers should take exceptional care to ensure their actions and words do not amount to detaining a person.

7.3 For example, when conducting fieldwork in search of unlawful non-citizens, officers should take particular care that their actions and/or words do not restrain or aim to restrain a person, unless there is knowledge or a reasonable suspicion that the particular individual is an unlawful non-citizen. Officers are not empowered to detain members of a workplace or household for the purpose of identifying which, if any, are unlawful non-citizens. Knowledge or a reasonable suspicion must already exist (e.g. through prior information positively identifying a person) or must arise during the operation (e.g. through the person evading officers, known by the person to be immigration officers, or through answers to relevant questions).

7.4 Officers should also note that a person cannot be detained for purposes unrelated to the administration of the Act. For example, it is not permissible to detain or continue to detain a person for the purpose of assisting another agency to carry out an investigation or to permit another agency to ensure the detainee's presence for a court case (use of the Criminal Justice (Stay) scheme should instead be considered in such circumstances - see the MSI on Criminal Justice Visas). The exception to this rule is the detention of persons because of s 250 (see the MSI on Illegal Fishermen and Other Suspected Offenders).

7.5 Where a person is detained for a prolonged period, officers should regularly review the need for continued detention, and for maintaining the form of detention (see MSI on Bridging E Visa - Legislative Framework and Further Guidelines) for advice on the release of unlawful non-citizen detainees). Officers should also regularly monitor the progress of any outstanding application for a visa by the detainee and any request to a foreign government to issue a travel document for the detainee.

7.6 Officers must be aware of the potential for detention to result in injury, emotional distress and/or financial loss to the detainee. For example, there is clear potential for injury at the point at which the person is detained, if he or she resists or attempts to escape. Emotional distress may result from the mere fact of being

detained, especially in a workplace or a public place, which can result in the humiliation of the detainee and loss of respect in the eyes of friends and colleagues. Any physical or emotional damage may in itself lead to financial loss, as may the mere fact of being detained instead of being free to carry out one's normal activities.

7.7 Officers should bear in mind such issues when considering the exercise of their detention powers. They should also keep in mind that a person affected in such ways may seek compensation from the Department and, in extreme cases, from the officer concerned if the exercise of the detention power was, in any respect, unlawful (for example, because there was no basis for knowledge or a reasonable suspicion that the person was an unlawful non-citizen, deportee or person whose visa was liable for cancellation, or because the officer used excessive force in detaining the person).

8 DUTY OF CARE

8.1 Officers have a duty of care with respect to detainees. This means that officers are obliged to take all reasonable action to ensure that detainees do not suffer any physical harm or undue emotional distress while detained. Officers should be aware of the potential for serious consequences for the detainee, the Department and themselves if they fail to fulfil their duty of care. These could, in the worst case scenario, include the death or severe injury of the detainee, and legal action against the officer and the Department in pursuit of damages.

8.2 To fulfil their duty of care officers should:

- ask the detainee, as soon as possible, whether there is anything they need to know about the detainee's health and whether the detainee must take any medication, after being detained, and take appropriate action;
- if the detainee requests or appears to be in need of medical attention, facilitate their access to medical attention;
- take note of the apparent emotional state of the detainee and ensure the detainee is closely supervised if they appear distressed;
- ensure that the detainee is not placed in a dangerous situation, for example, in a room or vehicle with another detainee who is violent, or handcuffed to a fixed part of a vehicle.

8.3 Detainees should generally not be left alone in a room (except in a detention facility) or vehicle. However they must not be left alone if they appear to be emotionally distressed or under the influence of drugs or alcohol.

8.4 If a detainee does not speak English, officers should make all reasonable efforts to obtain responses to questions about the detainee's health and/or need for medication. Officers should use an interpreter to ask these questions as soon as possible if an answer cannot be ascertained immediately after

detaining the person (see 13.2 below for advice on the use of interpreters). Officers could also seek this information from other persons present such as family or friends.

8.5 Detailed questions about the person's health are generally not necessary at the time of taking the person into detention. These will usually be asked by relevant custodial authorities when the person is transferred to a place of detention.

8.6 Officers have a duty of care for any detainee they are personally accompanying and restraining or holding in a place of detention i.e. the duty of care falls to the custodian of the detainee at any particular point of time. A transfer of custody of the detainee results in transfer of the duty of care. However, the duty of care of each custodian extends to informing the next custodian of all known information relevant to enabling them to fulfil their duty of care.

8.7 Medical Attention

8.7.1 Where a detainee requests, or appears to be in need of, urgent medical attention, officers should seek medical attention for the detainee immediately. The health of the detainee should take priority over other considerations in these circumstances.

8.7.2 While officers may have regard to the practicality of seeking treatment in the circumstances and the claimed or apparent seriousness of the condition for which assistance is sought, they should be extremely cautious in making any judgement to delay or refuse the detainee's access to medical treatment.

8.7.3 Officers must recognise that they are not appropriately qualified to assess the need for medical treatment. They should only delay or refuse access to medical treatment if it is absolutely clear that the condition is not debilitating or requiring immediate intervention.

8.8 Where hospitalisation of a detainee has been recommended by a medical officer, consideration should be given to whether, in the circumstances, detention should be maintained or a bridging visa granted (see MSI on *Bridging E Visa - Legislative Framework and Further Guidelines*).

8.9 If a bridging visa is granted, the term may be limited to the duration of hospitalisation. Arrangements should be pursued, as appropriate, with hospital authorities to inform the Department when the person is fit to be discharged, if the bridging visa only covers the period of hospitalisation.

8.10 Detention in a general hospital may not be practicable given the cost of twenty four hour guarding and the appropriateness of the presence of guards in the particular hospital environment. The physical condition of the person may also mean that his or her unnotified departure from the hospital is improbable. If continued detention is, in extreme cases, required, the use of prison hospitals may be considered.

8.11 Officers should see 14.7.6 below for further details on the procedures for detaining a person in a hospital.

9 THE USE OF FORCE

9.1 The definition of the term 'detain' in s 5(1) of the Act permits officers to take such action and use such force as are reasonably necessary to take a person into or to keep a person in immigration detention. Officers also have the common law right to use reasonable force to protect themselves, the detainee, or any other person.

9.2 While use of force is permissible in self defence and the defence of others, officers should be aware that the use of greater force than necessary to secure and restrain a detainee may amount to an assault.

9.3 Handcuffs

9.3.1 Handcuffs represent a use of force in securing and restraining a detainee. Therefore, they must only be used if the person handcuffed had conducted himself or herself or his or her demeanour was such to suggest that he or she would be likely to escape, injure or interfere with persons or property or that he or she threatened violence. If a person is unreasonably handcuffed then he or she is entitled at common law to bring an action to recover damages for the indignity, and the detention of him or her may be ruled to be unlawful.

9.3.2 The use of handcuffs is also governed by the following strict principles:

- handcuffs must only be issued to officers who will be engaged in detaining persons;
- officers must ensure they have the keys for the handcuffs before and during use and that spare keys are kept in the office (on operations out of town, a spare set of keys should be taken);
- officers should not carry handcuffs in public view;
- minors, the frail and the elderly should not be handcuffed;
- the dignity and comfort of the person being handcuffed must be respected; and
- handcuffs must not be used in a manner which is likely to cause injury, serious discomfort or potential danger to the detainee (for example, a person must never be handcuffed to any part of a car while being transported).

9.3.3 In deciding how a detainee should be handcuffed, officers should have regard to the risk of violence or escape, and to both the safety and comfort of the detainee.

9.3.4 As a rule, handcuffed detainees should have their hands behind their back when placed in the rear seat of a sedan car. If handcuffed with their hands in front of their body they may use the handcuffs as a weapon which can inflict serious injury to front seat passengers.

9.3.5 Officers should take special account of the detainee's comfort when there is a need to handcuff the person for a lengthy period, such as when driving a detainee for long distances outside a metropolitan area. Unless there is an exceptionally high risk of injury or escape, officers should periodically release the person from handcuffs under close supervision.

9.4 Australasian Correctional Management (ACM)/Police assistance

9.4.1 Officers should recognise that situations requiring the use of force also pose a threat to their safety. Where officers encounter a situation in which they perceive their safety to be at risk, officers may withdraw from the situation and seek assistance from other officers, ACM officers and/or the police.

9.4.2 Where it is anticipated that violence may ensue during a field operation, assistance in the conduct of the operation should be sought from the police. If these agencies are involved, officers should be guided by their recommendations on how the person should be detained.

10 ACCESS BY DETAINEE TO LEGAL ADVICE

10.1 Section 256 of the Act states that:

‘where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention’.

10.2 As a matter of policy, each detainee should be informed as soon as practicable of their entitlement to seek legal advice, except those detainees referred to in s 193(1) of the Act.

11 ACCESS BY/TO CONSULAR REPRESENTATIVES

11.1 Article 36 of the *Vienna Convention on Consular Relations*, to which the Australian Government is a signatory, provides detainees with rights of access to consular representation. All detainees must be informed of these rights as soon as practicable and officers must not obstruct the exercise of these rights.

11.2 However the detainee must request or agree to consular access. If consular officials spontaneously request access to a detainee (for example, following a media report on a detainee), the detainee must agree to this access.

11.3 The detainee's rights include:

- if he or she so requests, the right to have a consular representative informed of his or her detention without delay;
- the right to communicate freely with a consular representative and vice versa;
- the right to have any communication to the consular post forwarded without delay;
- the right to have consular representatives visit him or her, converse or correspond with him or her, or arrange for his or her legal representation.

12 IDENTIFICATION OF DETAINEES

12.1 Section 258 of the Act states that:

‘where a person is in immigration detention by virtue of this Act, an authorised officer may do all such things that are reasonably necessary for photographing or measuring that person or otherwise recording matters in order to facilitate the person's present or future identification’.

12.2 Fingerprints

12.2.1 An authorised officer should only obtain fingerprints of a detainee where all other means of identifying the detainee have proven inconclusive or where fingerprints are required for the issue or renewal of travel documents. (See the MSI *Fingerprinting of Detainees*.)

12.2.2 Officers should not normally take fingerprints for the purpose of identifying a detainee unless there is an intention to match the fingerprints for the purposes of identification.

12.3 Authorised officers should note on file in detail the reasons for, and nature of, the identification procedures they use under s 258. A form to assist officers meet this requirement is attached to the MSI *Fingerprinting of Detainees*.)

13 INTERVIEWING DETAINEES

13.1 Detainees obliged to answer certain questions

13.1.1 Section 257 of the Act states that:

‘(1) For the purpose of determining whether a person who is in immigration detention under this Act is an unlawful non-citizen, a removee or

a deportee, an officer may put to that person such questions as the officer considers necessary and may move that person from place to place.

(2) Where an officer puts a question to a person in accordance with subsection (1) after having informed that person that he or she is required to answer the question, that person shall not -

- (a) refuse or fail to answer the question; or
- (b) in answer to the question, make a statement which is false or misleading in a material particular.

Penalty: Imprisonment for 6 months

(3) Where subsection (2) is applicable in relation to a question put to a person, that person is not excused from answering the question on the ground that the answer might tend to incriminate him or her, but the answer to the question shall not be used as evidence against that person in any proceedings other than proceedings under that subsection.'

13.1.2 Detainees are not obliged to answer questions, except those which have the purpose stated in s 257(1).

13.1.3 Before commencing an interview with a detainee, officers should inform the person that he or she is obliged to answer questions directed to determining whether he or she is an unlawful non-citizen, removee or deportee, and that he or she may be prosecuted and sentenced to a maximum of 6 months imprisonment for refusing or failing to answer, or providing false or misleading information in response to, such a question.

13.2 Use of Interpreters

13.2.1 Officers should arrange to have an interpreter assist in the interview where the person so requests or where it is apparent to the officer that the person has difficulty in understanding and/or speaking English. Officers should seek the assistance of the Department's Translating and Interpreting Service (TIS). TIS will arrange the services of an appropriately qualified interpreter and, if necessary, can advise on how to conduct an interview using an interpreter in the particular circumstances. Officers may also wish to refer to the pamphlet issued by TIS, titled *Bridge the Communication Gap - Use an Interpreter* and to the *Professional Conduct Code* for interpreters contracted by TIS.

13.3 Interview Procedures

13.3.1 Before the interview commences, officers should familiarise themselves with any information already held about the detainee. This will allow better targeting of questions and assessment of answers. Officers should also think carefully about what type of information they need to elicit from the person and should limit their questions to those directly related to the matters under consideration.

13.3.2 Officers should introduce themselves and inform the detainee of the purpose of the interview.

13.3.3 Officers must provide detainees with an opportunity to comment on information received from other sources which is adverse to the detainee and which may be taken into account when making decisions about the detainee's case. Officers should take care not to reveal the source of this information. However, where it appears that the source of the information must or will be revealed in order to provide the person with a reasonable chance to comment on the information, officers may refer the issue of whether the information and/or source must be disclosed to the person, to Central Office for formal legal opinion.

13.3.4 Officers should complete an interview report which records the questions put and responses received in the interview. Wherever possible, officers should attempt to record the exact words of the interviewer and the interviewee, and any significant non-verbal activity (e.g. where the detainee is shown a document and asked to comment). This record should preferably be completed during the interview, or should be completed as soon as possible afterwards on the basis of detailed notes taken during the interview. Both the report and any notes on which it is based should be retained on file.

13.3.5 The detainee should read the interview report, with the assistance of an interpreter if necessary, and should be asked to sign an acknowledgment on each page of the report that that page is a true and accurate record of the interview. The interpreter should also be asked to sign such an acknowledgment. A copy of the report should be given to the interviewee.

13.3.6 Officers should amend the interview report in accordance with any amendments suggested by the interviewee, that they agree with. Officers should note the details of any amendments on file. Where the interviewing officer does not agree with the interviewee's suggested amendments then this should be noted along with those suggested amendments. If the detainee refuses to sign an acknowledgment of the accuracy of the interview report, this should also be noted on file.

13.3.7 Officers should also note the additional procedures for interviewing detainees detained under ss 189 and 192 of the Act, which are outlined in the MSIs on *Detention of Unlawful Non-Citizens* and *Questioning Detention*.

13.4 Taping

13.4.1 If taping an interview, the taping device must be in view of all persons being taped and those persons must be notified that the device is operating. The interviewee must also consent to the interview being taped.

13.4.2 A written interview record should be transcribed from the tape as soon as possible. The interviewee should be given a copy of the tape. The tape should be retained on file in a clearly marked envelope.

14 TRANSFER OF CUSTODY OF DETAINEES

14.1 The definition of 'immigration detention' in s 5(1) of the Act requires that, to keep a detainee lawfully in such detention, an officer transfer custody of a detainee by either transferring custody to:

- another officer (the definition of 'officer' in s 5(1) of the Act includes police, Customs and ACM officers, and any other person authorised by the Minister, by notice published in the gazette, to be an officer for the purposes of the Act) who will hold the detainee in a place of detention, or accompany and restrain the detainee outside a place of detention;
- a non-officer requested to hold the detainee in a place of detention on behalf of the officer; or
- a non-officer directed to accompany and restrain the detainee by a delegate of the Secretary for this purpose.

14.2 A transfer of custody places responsibility on the new custodian for the lawful detention of the detainee. It also involves a transfer of the responsibility for the custody of the detainee, and of the duty of care for the detainee (see 8.6 above for details on transfer of the duty of care).

14.3 It is, therefore, necessary for each custodian of a detainee to be able to demonstrate that he or she had a lawful basis for holding the detainee in immigration detention, and to demonstrate the times at which he or she was responsible for the security and welfare of the detainee.

14.4 The authority for and time of a transfer of custody will be best evidenced by a written record of that transfer. Custodial authorities will generally require a written authorisation from DIMA when accepting or relinquishing custody of a person in immigration detention. Written records of the time of transfer of custody should be made by those persons actually accepting or relinquishing the custody of a detainee. External agencies determine the need for their officers to record the time of the transfer of custody. DIMA officers physically transferring custody of a detainee should record, on file, the time of transfer.

14.5 Use of Documentation

14.5.1 Where there is a simple transfer of custody between officers of the Department (e.g. during the conduct of a Compliance operation or to escort a detainee to a place of detention), those officers are not required to complete a formal written record at the time of the transfer of custody. However, given the transfer of responsibilities outlined above, officers should take contemporaneous notes of the occurrence and circumstances of such transfers of custody and should record this information on file or, where appropriate, in Field Operation Reports.

14.5.2 On each occasion where custody of a detainee is transferred between the Department and an external agency (such as the police, ACM, State Corrective Services), this transfer should be recorded by the use of a formal written notice.

These agencies will usually require a written record of the basis for their accepting or relinquishing custody of the detainee. Exceptions to this may be where custody is transferred to officers of these agencies for a brief period (e.g. to police during a Compliance operation).

14.5.3 Where custody is transferred between officers of the same agency and those officers are also officers for the purposes of the Act (e.g. ACM, police or ACS staff), the need for the use of documentation may be determined by those agencies. For example, where ACM officers at an IDC transfer custody to ACM escorting officers, the transfer may be recorded by that agency without the use of DIMA produced documentation. However, if the relevant agency requires this formal documentation to record the particular transfer, it should be provided.

14.5.4 A formal written notice should be used to authorise and record the transfer of a detainee into the custody of persons who are not officers for the purposes of the Act (e.g. State prisons or fisheries officials). Where the detainee is, under s 254 of the Act, being transferred into immigration detention at the end of a period of custody for another reason, such as a criminal offence, officers should refer to the MSI Non-Citizens Held in Prison Liable to Enforced Departure for guidance.

14.5.5 Where formal written notices are required, DIMA officers should normally sign these. This ensures DIMA supervision of transfers of custody and meets the requirements of external agencies in relation to documenting authorisation for their custody of a detainee.

14.5.6 While the procedure for the use of these documents is detailed below, officers may also refer to Attachment 1 for quick guidance on which documents should be used to effect and record a transfer of custody in particular circumstances.

14.6 Request for an officer to hold in immigration detention

14.6.1 Wherever a formal notice is required to record a transfer of custody to a person who is an officer for the purposes of the Act (as defined in s 5(1)), DIMA officers should provide the Request for an Officer to Hold in Immigration Detention form (Attachment 2).

14.6.2 Examples of such transfers of custody would be placing the detainee in an IDC or police station, or transferring custody of the detainee to ACM officers escorting a detainee.

14.7 Request for a *Non-officer to hold in immigration detention* form.

14.7.1 As stated in s 5 of the Act, the meaning of immigration detention includes 'being held by, or on behalf of, an officer in' various places of detention. If a detainee is held in a place of detention but is not held by or on behalf of an officer, that person will not be lawfully detained under the Act.

14.7.2 Therefore, where a detainee is to be held in a place of detention by persons who are not officers (e.g. in a State prison by corrective services officers, or

aboard a vessel by fisheries authorities) these persons should be requested to hold the detainee on behalf of an officer.

14.7.3 This should be done by providing a *Request for a Non-officer to Hold in Immigration Detention form* (Attachment 3). This form documents that the detainee is lawfully held in immigration detention on behalf of the officer who signs it.

14.7.4 This only applies in relation to detainees to be held in a place of immigration detention by a non-officer on behalf of an officer. If the detainee is to be escorted outside that place of detention by a non-officer, the Direction to Accompany and Restrain, explained below, must be provided.

14.7.5 Where the staff at a place of detention are officers under the Act, such as at Immigration Detention Centres and police stations, a Request for an Officer to Hold in Immigration Detention Form should be used instead.

14.7.6 Where a detainee is to be held in a non-custodial institution, such as a hospital or school, officers should use a business letter to request that the detainee be held at that institution. Officers must first arrange for the particular institution to be approved as a place of 'immigration detention' under s 5(1) of the Act. The letter should seek the institution's co-operation in holding the person on behalf of the officer signing the letter. A standard format for such a letter is at Attachment 4 (Letter to non-custodial authority). This takes a similar wording to the 'Request for a Non-Officer to Hold in Immigration Detention', but would be presented in a format more appropriate for dealing with a non-custodial institution. This format is open to amendment to suit particular circumstances.

14.8 Transfer of custody form

14.8.1 Where a custodian, either officer or non-officer, requires a formal notice before relinquishing custody of a detainee to another custodian, a Transfer of Custody form (Attachment 5) should be used.

14.9 Direction to accompany and restrain form

14.9.1 As stated in s 5(1) of the Act, immigration detention includes 'being in the company of, and restrained by:

- (i) an officer; or
- (ii) in relation to a particular detainee - another person directed by the Secretary to accompany and restrain the detainee.

14.9.2 Where a non-officer is to accompany and restrain a detainee, an officer must complete a Direction to Accompany and Restrain form (Attachment 6) and provide it to the person. This must be done by an officer who has been delegated the Secretary's power to so direct a person. If this direction is not provided to a person who is not an officer for the purposes of the Act, the detainee will not be lawfully detained in immigration detention by the person.

14.9.3 Officers should not ask a non-officer to assist with the detention of a detainee unless that person is given the specific direction to accompany and restrain the detainee. Officers should also ensure that they only give such a direction to persons who are suitable to accompany and restrain a detainee (e.g. officers of relevant agencies, private security officers). Officers should also note that the person is entitled to decline to accept the direction.

14.10 Release Order

14.10.1 When a detainee is to be released from immigration detention for any reason, the custodian of the detainee may require a written record of their authority to release the detainee. If so, an officer should complete a Release Order (Attachment 7) and provide this to the custodial authority. The release order should specify when the detainee should be released. Officers should either specify a particular time (e.g. immediately, if the person is granted a visa) or the occurrence of some future event (e.g. when placed on board flight X for removal or deportation from Australia).

14.10.2 Where a deportee detained under s 253 is to be released, only officers delegated the Ministerial and Secretarial power to release under s 253(8) of the Act, may complete the Release Order.

14.10.3 Where the release of a detainee is ordered by a court, there is no need for a Release Order, however, the custodial authority should be provided with a copy of the court order if they so require.

15 THE USE OF ESCORTS

15.1 When a detainee is transferred from one place to another in Australia, the assistance of ACM, Australian Protective Service or the police in escorting the person may be sought. These agencies should only be called upon if it is cost effective and/or if necessary to maintain security over the detainee.

15.2 The costs for the escort's travel are to be met from DIMA funds. The class of travel is economy class or in accordance with a contract agreed with this Department. The cost of such travel is a cost to be met by the detainee as a debt to the Commonwealth (see the MSI *The Liability of Non-citizens to Repay Costs*).

16 MOVEMENT OF DETAINEES BY AIR

16.1 Where it is intended to move a detainee by air, appropriate information should be provided to the carrier to enable it to decide on whether it will agree to carry the detainee, escort arrangements it may require for the detainee and the procedures for the journey.

16.2 Air Navigation Regulations administered by the Department of Transport and Communications set down the conditions for the carriage of detained

persons by air. Further details about these regulations can be found in the MSI *Implementation of Enforced Departure*.

17 VISITORS

17.1 Visitor access to detainees held in an Immigration Detention Centre or other custodial institution is subject to the rules of the particular facility.

17.2 However, if officers have reason to believe that visitor access may compromise security or particular immigration activities, they should discuss the possibility of restrictions on visitor access with the relevant custodial authority. The reasons for and nature of any such restrictions should be noted in detail on file. The State or Regional Director should be informed as soon as possible of action to deny access to a detainee.

17.3 It should be remembered that where the detainee requests access to consular representation or legal advice, other than in those situations covered by s 193 of the Act, this cannot be obstructed.

17.4 Where other agencies request a visit to an Immigration Detention Centre in order to inspect its facilities, officers should refer this request to the Director, Detention Section. If necessary, the view of the Minister's office will be sought on proposed visit arrangements.

18 MEDIA ACCESS

18.1 The *Privacy Act 1988* substantially limits the disclosure of personal information to the media. Any possible disclosure to the media also requires close consideration at senior levels within the Department.

18.2 Any media requests to interview detainees, to visit Immigration Detention Centres or for information, must be referred to the Director of the Public Affairs and Information Section in Central Office.

19 WELFARE OF DEPENDANTS

19.1 Cases may arise where a detainee wishes to have citizen or lawful non-citizen dependent relatives stay with them at a place of detention. This should normally be refused as detention facilities are generally not an appropriate environment for those who do not need to be detained. In addition, detention costs would increase and the Commonwealth may become subject to a duty of care for such persons which would not otherwise arise.

19.2 If it appears that dependents of a detainee are likely to suffer hardship, efforts should be made, with their consent, to obtain welfare assistance and/or accommodation for them.

20 DETENTION IN STATE INSTITUTIONS

20.1 A person with a history of or predisposition to violence, or other disruptive, threatening behaviour or criminal activity should not, where practicable, be placed in an Immigration Detention Centre, but in a state prison or other institution where there are more adequate and appropriate facilities for custody and/or treatment.

20.2 Decisions on whether to hold a detainee in an Immigration Detention Centre or a state prison should be taken in consultation with the State Compliance Manager and with the relevant custodial institution, in accordance with the MSI *Transfer of detainees to State prisons*.

21 MAINTENANCE COSTS ARISING FROM DETENTION

21.1 Detainees are liable for the costs of their detention. An exception to this is detention while removal is stayed by a Criminal Justice Stay certificate or warrant, when the agency responsible for obtaining that certificate or warrant is liable. In some cases, carriers may also be liable for the costs of detention.

21.2 Officers should refer to MSIs dealing with the liability of non-citizens to repay costs and the mechanisms for cost recovery for more details on how detainees incur this liability, the rules for determining this liability and the process of recovering this debt from former detainees.

21.3 As detainees are constantly accruing a debt to the Commonwealth, they should be provided with a statement of accrued liability on a weekly basis and when they are released. It should be noted that where detention has been found to be unlawful, the person detained does not incur liability for detention costs.

22 ESCAPE FROM DETENTION

22.1 Section 491 of the Act states that:

(1) A person who is being kept in lawful immigration detention in accordance with a relevant provision of this Act shall not escape or attempt to escape from that immigration detention.
Penalty: Imprisonment for 2 years'

(2) In this section a reference to a relevant provision of the Act shall be read as a reference to section 178, 189, 192, 250 or 253.

22.2 Where a person escapes from immigration detention, officers should decide whether to pursue prosecution of the person by referring to Departmental prosecution policy which is outlined in the MSI on *Offences and Prosecutions*.

23 RECORDING DETENTION DETAILS

23.1 Full details of every incidence of detaining a person must be kept on file and, where appropriate, all relevant fields on the Compliance Computer System should be completed quickly and accurately.

23.2 Officers should note:

- the basis for the detention, including the evidence which gave rise to the relevant reasonable suspicions;
- the circumstances and extent of any use of force (including the use of handcuffs);
- consideration of any application for a bridging visa;
- the time and place of the detention;
- any other relevant action or event.

Andrew METCALFE
First Assistant Secretary
Border Control and Compliance Division

ATTACHMENT 1**Documents to be used in each transfer of custody**

('officer' refers to officer for the purposes of the Act)

1. Transfer from DIMA officer to officer of ACM, Police or ACS

DIMA officer completes and provides REQUEST FOR OFFICER TO HOLD IN IMMIGRATION DETENTION

2. Transfer from officer of ACM, Police or ACS to DIMA officer

DIMA officer completes and provides TRANSFER OF CUSTODY

3. Transfer between officers of ACM, Police, ACS

Between agencies

DIMA officer authorises transfer - completes TRANSFER OF CUSTODY and gives to current custodian, and completes REQUEST FOR OFFICER TO HOLD IN IMMIGRATION DETENTION to give to new custodian

Within agencies

Documentation only needed if agency wishes documentation to be provided - if so, use as in transfer between agencies

4. Transfer of detainee into custody of non-officers (e.g. State prisons or fisheries officials), including transfer from DIMA officer to non-officer

If detainee is to be held at place of detention specified in section 5, DIMA officer to provide REQUEST FOR NON-OFFICER TO HOLD IN IMMIGRATION DETENTION.

If detainee is to be accompanied and restrained outside place of detention, DIMA officer to provide DIRECTION TO ACCOMPANY AND RESTRAIN to custodian.

5. Transfer between non-officers

DIMA officer to provide either REQUEST FOR NON-OFFICER TO HOLD IN IMMIGRATION DETENTION or DIRECTION TO ACCOMPANY AND RESTRAIN to new custodian

DIMA officer to provide TRANSFER OF CUSTODY to current custodian

6. Transfer from non-officers to DIMA officers

DIMA officer to provide TRANSFER OF CUSTODY to current custodian

7. Transfer from non-officer to officer in ACM, Police, ACS

DIMA officer to complete REQUEST FOR OFFICER TO HOLD IN IMMIGRATION DETENTION and provide to ACM, Police, ACS officer

DIMA officer to complete and provide TRANSFER OF CUSTODY to non-officer

8. Transfer to non-officers from ACM, Police, ACS officers

DIMA officer to provide either REQUEST FOR NON-OFFICER TO HOLD IN IMMIGRATION DETENTION or DIRECTION TO ACCOMPANY AND RESTRAIN to non-officer

DIMA officer to provide TRANSFER OF CUSTODY to ACM, Police, ACS officer

9. Any release from immigration detention

DIMA officer to complete and provide RELEASE ORDER to custodian

ATTACHMENT 2**COMMONWEALTH OF AUSTRALIA
MIGRATION ACT 1958****REQUEST FOR OFFICER TO HOLD IN IMMIGRATION DETENTION**

(only to be provided to persons who are officers for the purposes of the Migration Act 1958)

To
.....
.....I, _____
am an officer for the purposes of the Migration Act 1958._____
is held in lawful immigration detention under the Act, as:

(tick whichever is applicable)

he/she is known or reasonably suspected to be:

- ☐ an unlawful non-citizen; or
- ☐ a non-citizen whose visa is liable for cancellation; or

he/she is known or reasonably supposed to be:

- ☐ a deportee

Section 5 of the Act specifies that you are an officer for the purposes of the Act and you are, therefore, authorised to lawfully hold him/her in immigration detention.
I hereby request that you hold the him/her in immigration detention.

Signature_____
Date

COMMONWEALTH OF AUSTRALIA
MIGRATION ACT 1958

REQUEST FOR NON-OFFICER TO HOLD IN IMMIGRATION DETENTION

(only to be provided to persons who are not officers for the purposes of the Migration Act 1958)

To

.....

.....

I, _____
 am an officer for the purposes of the Migration Act 1958.

liable to be held in immigration detention under the Act, as:

he/she is known or reasonably suspected to be:

an unlawful non-citizen; or

a non-citizen whose visa is liable for cancellation; or

he/she is known or reasonably supposed to be:

a deportee

Under **section 5** of the Act, a person is in immigration detention, if being held by or on behalf of an officer at a place specified in paragraph (b) of that definition ('a place of immigration detention').

As an officer for the purposes of the Act, I hereby request you to hold him/her on my behalf in

_____,
 a place of immigration detention.

 Signature

 Date

LETTER TO NON-CUSTODIAL AUTHORITY

(Departmental letterhead paper to be used)

(Provide full title and address of head of institution)

Dear Sir/Madam

I am an officer for the purposes of the Migration Act 1958 (the Act).

Person X is liable to be held in immigration detention under the Act, as:

he/she is known or reasonably suspected to be:

an unlawful non-citizen; or

a non-citizen whose visa is liable for cancellation; or

he/she is known or reasonably supposed to be:

a deportee

Your institution has been approved under paragraph (b)(v) of the definition of immigration detention in section 5 of the Act as a place in which a person may be lawfully held in immigration detention by or on behalf of an officer.

I hereby request that you hold X in immigration detention within your institution on my behalf.

Signature

Date

ATTACHMENT 5

COMMONWEALTH OF AUSTRALIA
MIGRATION ACT 1958

TRANSFER OF CUSTODY

To

I, _____
 am an officer for the purposes of the Migration Act 1958.

You currently hold _____ ('the
 detainee') in lawful immigration detention under the Act.

I hereby authorise you to transfer custody of the detainee to:

me; or

_____,
 an officer for the purposes of the Act; or

_____,
 whom I, as a delegate of the Secretary under paragraph (a)(ii) of the definition of
 immigration detention, have directed to accompany and restrain the detainee;

_____,
 whom I, as an officer, have requested to hold the detainee on my behalf at a place
 specified in paragraph (b) of the definition of immigration detention in Section 5 of
 the Act.

 Signature

 Date

COMMONWEALTH OF AUSTRALIA
MIGRATION ACT 1958

DIRECTION TO ACCOMPANY AND RESTRAIN

To

I, _____
 am an officer for the purposes of the Migration Act 1958.

_____ ('the detainee')
 is liable to be held in immigration detention under the Act, as:

he/she is known or reasonably suspected to be:

an unlawful non-citizen; or

a non-citizen whose visa is liable for cancellation; or

he/she is known or reasonably supposed to be:

a deportee

Under **section 5** of the Act, a person is in immigration detention if the Secretary or a delegate of the Secretary of the Department of Immigration and Ethnic Affairs directs a person to accompany and restrain the detainee.

As a delegate of the Secretary for this purpose, I now direct you to accompany and restrain _____,
 and thereby detain him/her in immigration detention, until

 (specify time and/or event at which person should be person should cease to
 accompany and restrain detainee e.g. when placed on flight X for removal from
 Australia; when transferred to place of detention X)

 Signature

 Date

COMMONWEALTH OF AUSTRALIA
MIGRATION ACT 1958

RELEASE ORDER

To
.....
.....

I, _____
am an officer for the purposes of the Migration Act 1958.

You currently hold _____ ('the detainee')
in lawful immigration detention under the Act

In accordance with the Migration Act, the detainee should be released from
immigration detention:

(specify time and/or event at which person should be released e.g. immediately,
when placed on flight X for removal from Australia).

Signature

Date