RILC **Refugee & Immigration Legal Centre Inc**

Submission to the Senate Legal and Constitutional Affairs Committee on Migration Legislation Amendment (Further Border Protection Measures) Bill 2002

1. Introduction

The Refugee & Immigration Legal Centre (RILC) is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia. RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service (RACS) and the Victorian Immigration Advice and Rights Centre (VIARC) which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. Since inception in 1988 and 1989 respectively, the RACS office in Victoria and VIARC have assisted many thousands of asylum seekers and migrants.

RILC specializes in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration's Immigration Advice and Application Scheme (IAAAS) and we visit the Maribyrnong immigration detention centre often. RILC has been assisting clients in detention for over 7 years and has substantial casework experience. We are often contacted for advice by detainees from remote centres and have visited Port Hedland and Curtin Immigration Reception and Processing centres on a number of occasions. We are also a regular contributor to the policy debate on detention.

In 2000 to 2001, RILC gave assistance to 1,838 people. Our clientele is largely consists of people from a wide variety of nationalities and backgrounds who cannot afford private legal assistance and are often disadvantaged in other ways.

2. Summary of submissions

We note that the proposed Migration Legislation Amendment (Further Border Protection Measures) Bill ("the Bill") seeks to expand the definition and operation of the 'excised offshore places' to include further parts of Australia territory in the North of Australia, including islands in the Coral Seas Islands Territory, as well as certain islands which form part of the territory of Western Australia, Queensland and the Northern Territory. In effect, the purpose is to extend the parts of Australian territory where persons entering without visas can be prevented from making valid applications for protection or other visas unless the Minister for Immigration determines that it is in the public interest to lift the bar on the making of a valid visa application by a particular individual. We note that such this practice of excising parts of Australia territory was introduced by the Migration Legislation (Excision from Migration Zone) Act 2001 ("the Excision Act"), which commenced on 27 September 2001.

RILC remains fundamentally opposed to the concept and legislative enactment of 'excision' of any parts of Australia for the purpose of preventing asylum seekers from making valid onshore asylum applications. RILC considers that the Bill risks further breaches of our obligations under the Refugees Convention as well as other international human rights instruments. The primary obligation is to allow a person to claim asylum in the territory of the country where they arrive, whether they arrive in an authorised or unauthorised manner. Further obligations include a prohibition on refoulement of a person to a place of persecution and a requirement to not discriminate or otherwise impose a penalty on persons who comes directly from a situation of potential persecution in order to seek asylum.

RILC considers that the excision of territory is wholly injudicious, disproportionate and unnecessary and ignores a range of other measures which strike a legitimate and acceptable balance between border integrity and the rights of asylum seekers.

A summary of our views on the Border Protection legislation passed by the Senate in November last year, including the Excision Act, are set out in a document entitled 'RILC Response to Proposed Legislative Changes' dated September 2001 (which is attached to this submission for the Committee's reference). In that response we stated that:

> RILC is opposed to the creation of 'excised offshore places' within Australian territory. Such exemption of selective territory is akin to shrinking Australia's borders in order to prevent asylum seekers from engaging protection obligations to which Australia is a signatory under the Refugees Convention. In this regard it is a fundamental principle of international law that every State is entitled to exclusive jurisdiction over its territory and persons within its territory, and that with that authority or jurisdiction goes responsibility. Further, it is accepted principle that a State should not seek to create a selective definition of 'territory' in order to avoid its protection obligations to those asylum seekers who arrive within its territory.
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> It is also accepted principle under international law that a State has a responsibility for a person within territory controlled by it, including the obligation of the State to ensure and protect the human rights of everyone within its territory or jurisdiction. Australia is also a party to Conventions which guarantee these rights.
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> RILC believes that the proposed legislation effectively seeks to avoid direct responsibility by Australia for the protection of asylum seekers within its territory by excluding these people from directly accessing Australia's refugee determination process. Notwithstanding any such attempts, Australia remains bound by its international human rights obligations under instruments such as the Refugees Convention, the ICCPR and the CROC, with respect to its treatment of asylum seekers within its territory.

We maintain that position in relation to the current Bill.

In this submission we propose to address in particular (e) and (f) of the Inquiry Terms of Reference, namely:

(e) The Migration Legislation Amendment (Further Border Protection Measures) Bill 2002; and

(f) Whether the legislation is consistent with Australia's international obligations.

RILC urges the Senate Committee to consider the Bill from a human rights, rather than a border security, perspective. In our view, the relevant starting point must be whether or not the legislation complies with our obligations under international conventions and treaties. If it does not, it is irrelevant whether the legislation can be justified as an effective border security measure.

Alternatively, if the legislation is considered by the Committee to be consistent with international standards, it is then relevant to ask whether the 'excision of territory' is a proportionate and efficacious response to the relevant policy issue – namely, the arrival of unauthorised asylum seekers in Australia.

RILC has been alarmed and disappointed with the focus during the parliamentary debates on the question of 'where to draw the boundary' rather than on the more fundamental question of whether or not it is legally and morally permissible to draw such boundaries at all.

The partial excision of Australian territory breaches an inviolable principle – namely, the right to seek asylum in the territory of a Convention signatory. There is no legally justifiable distinction between excising part of a country and the whole of a country. RILC is concerned that the partial excision of parts of Australian territory could be just a first step towards a more fundamental abrogation of our obligation to accept and determine asylum applications anywhere within Australian territory.

3. The right to seek and enjoy asylum

The right to seek and enjoy asylum is contained in a number of human rights instruments, including, most notably, Article 14(1) of the Universal Declaration of Human Rights, which states that: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

As mentioned above, whilst States, as sovereign nations, clearly have the right to protect their territory, including their borders, the arrival of asylum seekers at those borders, or within those borders, simultaneously invokes certain international responsibilities. This includes observance of obligations set out in human rights instruments to which it is a signatory. As observed by Professor Guy Goodwin-Gill, whilst it may be a fundamental principle of international law that sovereign nations are entitled to exclusive jurisdiction over their territory and persons therein, such authority also carries certain responsibilities.

They include the responsibility to guarantee and protect the human rights of those persons within the territory and under the State's authority.[1] For the right to seek and enjoy asylum to be a meaningful right, it must include the right to make an application for asylum in the country where asylum is sought and the right to proper consideration of those claims, prior to any action being taken to remove the person from the jurisdiction. National security issues are able be addressed through a range of measures and policies, but not at the expense of the human rights of the asylum seeker.

The express purpose of the 'excision legislation' and, in particular, section 46A of the Migration Act, is to prevent certain categories of persons from making asylum applications in excised parts of Australia. It is relevant to ask how this justifies the removal of this most fundamental principle in a way which complies with the provisions of the Refugees Convention and other relevant international instruments.

There appear to be at least three main legal arguments being used to justify the removal of the right to asylum in Australia through the creation of 'excised zones'. They are as follows:

(a) That it is permissible to remove or return asylum seekers to declared 'safe third countries' without allowing them to apply for asylum in Australia.
(b) That it is permissible to prevent asylum seekers from being able to apply for asylum in Australia provided that they are not 'refouled' or returned to a situation of persecution.
(c) That it is permissible to treat differentially unauthorised asylum seekers if they have not 'come directly' from a situation of persecution.

It is our submission that none of these arguments can be justified in the present context in Australia. We set out below our submissions.

(a) Declared 'Safe third countries'

The Government contends that it is permissible to remove asylum seekers to 'safe third countries' where their claims can be assessed. It is contended that Nauru and Papua New Guinea are such 'safe third countries' and that asylum seekers can legitimately be transferred there. These countries have, in effect, been so declared by the Minister for Immigration pursuant to s 198A of the *Migration Act*.

It is further accepted that Nauru and Papua New Guinea themselves have no capacity to resettle any persons found to be refugees. If any asylum seekers are found to be refugees, they must wait for a settlement place to become available. If an asylum seeker is not found to be a refugee, he or she may be removed back to their country of origin.

In domestic and international law the 'safe third country' concept is designed to apply to asylum seekers or refugees who have existing protection in a third country to which they can return.

[1] See for example, G Goodwin-Gill, *The Refugees in International Law* (2d ed. 1996), at 145-6.

In short, the 'safe third country' is generally a country to which an asylum seeker or refugee has a right of re-entry, a right of residence (including temporary) and from which they will not be 'refouled' or sent back to a country in which they have a well founded fear of persecution or where their life or freedom are threatened.

The concept of a 'safe third country' presupposes some linkage to the country in question, generally through rights acquired by a period of residence or other relevant connections in or with that country.[2] European countries have developed re-admission arrangements amongst themselves for asylum seekers who have transited through their countries. Such arrangements involve one of the countries taking responsibility for the asylum claims. The arrangements provided for under the current 'Pacific solution' scheme, however, do not and are not capable of such an arrangement whereby the country to which the asylum seeker is taken has or will assume responsibility for determining claims for asylum.

Use of the concept of the 'safe third country' to transfer asylum seekers to 'transit camps' in countries where they have no right of entry, to which they have no connection and which have no capacity to facilitate their resettlement is a serious misrepresentation and misuse of the concept of the 'safe third country'. As mentioned, the concept of the 'safe third country' is designed for persons who have an existing degree of 'effective protection' elsewhere or who have a right to return to another country which carries some responsibility for dealing with their claims. It should not be used as a mechanism to 'farm out' asylum seekers to unrelated countries.

It is apparent that the vast majority of asylum seekers who have entered or attempted to enter Australia have no right of entry to any other country, other than their country of origin. Many of them have been refugee in camps in Pakistan or Iran or have transited through those or other neighbouring countries and most have been under pressure to leave those countries on account of their situations. In most cases, the Department of Immigration has been unable to establish a right of return to those countries for them. Prima facie, the concept of the 'safe third country' has no application to these asylum seekers.

RILC remains concerned that the proposed legislation provides no mechanism for dealing with a situation where a country may be deemed safe for most refugees, but may nevertheless be unsafe for a particular individual or class of individuals. Under the

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[2] In relation to domestic jurisprudence, see for example the Federal Court decisions of: *MIMA v. Applicant C* [2001] FCA 1332; *Patto v. MIMA* [2000] FCA 1554, cited in Applicant C, Stone J at 21. In Applicant C, the Court held, amongst other things, that In *MIMA v. Applicant C* the Federal Court held that for there to be "effective protection" for an applicant in a third country, there must exist a relevant right or permission with respect to re-entry to the country in question and a guarantee of *non-refoulement* to a situation of persecution, which is assessed in light of an applicant's particular circumstances. It is not relevant whether the country is party to the Convention, but only that the person will not be subject to Convention harms if returned to the country. In relation to international principles, see for example, Ex Com Conclusion No. 85, which set out requirements in this context such as protection such protection from refoulement, an opportunity to seek and enjoy asylum, and guarantees with respect to protection of the human rights of the asylum seeker.

current arrangements which would be present and applicable to circumstances contemplated by the Bill, there is no specific mechanism for assessing whether an individual will have effective protection in the declared country. The only possible mechanism for individualised assessment is the s 46A(2), which allows the Minister for Immigration to the lift the bar on the making of a valid visa application if he deems it ti be in the public interest. However, this mechanism is inadequate. Notable deficiencies include an absence of guidelines indicating matters relevant to the exercise of the power, as well as the entirely discretionary, non-compellable nature of the power itself.

While a country may be safe for one person, another person may be at risk of persecution due, for example, to their particular ethnicity, religion or political profile. At present there is no mechanism for assessing the unique circumstances of each individual person to ensure that person will not be at risk of persecution if removed to the declared country.

There are other factors which may mean that a declared country will not guarantee effective protection to a specific person. In particular, we note that unaccompanied minors or dependent children may face certain risks which adults do not, and such risks must be taken into account in assessing whether the declared country will provide effective protection to the child. The current arrangements make no provision for taking such relevant factors into consideration.

It is submitted that in order to meet the obligation to ensure effective protection, there must be provision for an adequate mechanism to assess the specific circumstances and unique needs of each asylum seeker to guarantee that the respective person's human rights are not at risk of violation in the country they are being removed to, and that there is no risk of refoulement.

This issue is also central to our submissions below regarding the need for the provision for sufficient and adequate safeguards to ensure that asylum seekers are guaranteed effective protection before they are removed to a declared 'safe third country.'

(b) Principle of non-refoulement (or non-return to a situation of persecution)

The principle of non-refoulement (or non-return to a situation of persecution) is contained in various human rights instruments to which Australia is a signatory. Principal amongst these in the context of our obligations with respect to refugees is Article 33 of the Refugees Convention. Article 33 prohibits a Contracting State from 'refouling' an asylum seeker back to a situation of persecution.[3] By transferring asylum seekers to

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[3] As mentioned, the obligation of non-refoulement is also contained in numerous other human rights instruments to which Australia is a signatory. The ICCPR has an implicit non-refoulement obligation where as a necessary or foreseeable consequence of expulsion, a person would face a real risk of violation of his or her human rights, such as being subjected to torture or the death penalty (no matter whether lawfully imposed) (Arts. 6 and 7). The CAT also has an explicit prohibition against expulsion 'where there are substantial grounds for believing the [person] would be in danger of being subject to torture' (Art. 3). The prohibition in the CAT is absolute: there is no balancing of other factors if 'deportation' would amount

'safe third countries' the Government asserts that these asylum seekers are not being 'refouled' and therefore no Convention or other international obligations are breached.[4] As such, it is argued, there is no need for an asylum application to be made or considered in Australia.

The principle of non-refoulement is one which requires a State to take the utmost care in the treatment of asylum seekers and consideration of their claims, bearing in mind the risk of potential persecution if an error is made. This is consistent with the beneficial intent of the Refugees Convention.

RILC is concerned that the proposed legislation extends the statutory regime authorising removal of asylum seekers from Australian territory, prior to the assessment of refugee status, whilst failing to provide for sufficient guarantees of protection and safety. Current legislative provisions contained in section 198A of the Migration Act fall well short of providing the safeguards necessary to ensure that refugees are protected from return to places where they may be persecuted.

As noted above, it is clear that Nauru and Papua New Guinea themselves have no capacity to resettle any persons found to be refugees, and that any asylum seekers found to be refugees must wait for a settlement place to become available in another country. If an asylum seeker is not found to be a refugee, they may be removed back to their country of origin.

We set out in summary RILC's previous submissions, prepared in September 2001, regarding our concerns about the lack of adequate safeguards at the time of the introduction of the current arrangements. These concerns remain relevant in relation to our opposition to the current Bill:

> "RILC is concerned that these measures fail to articulate detail or criteria concerning the bases upon which such declaration is to be made by the Minister. For example, there is no explanation as to … what kind of protection is required pending determination and finalisation of an asylum seeker's claims. In addition, there is no requirement that such a declared safe third country be party to the Refugees Convention, nor that Australia secure agreement with such a country as to reception of asylum seekers and the conditions and obligations that would apply in these circumstances. In this regard, we note with concern that there is no explanation or articulated criteria for the 'relevant human rights standards' required in providing protection to asylum seekers, and no requirement that a country be signatory to other relevant human rights Conventions such as the ICCPR, Convention Against Torture, or the CROC.
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> In addition, RILC is concerned that while there is provision made for the Minister revoke a declaration in relation to a country, there is no ***mandatory*** requirement to

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to refoulement within the meaning of the CAT. See also: Art 22 of the CROC, in relation to prohibition on refoulement with respect to children.

[4] See for example, Second Reading Speech in relation to the current Bill, p 3.

do so. Given the gravity of the matters at stake, and Australia's international obligations, including that of non-refoulement, there should be such a requirement covering situations where a country no longer provides adequate protection.

Further, the proposed legislation provides no mechanism for consideration that while a country may be deemed safe for most refugees, it may nevertheless be unsafe for a particular individual or class of individuals. In these circumstances, no provision exists for such individuals to have the basis of a unilateral Ministerial declaration challenged. In order to properly protect the human rights of individual asylum seekers, such provision needs to be made.

RILC believes that absence of sufficient safeguards for the declaration of safe countries is a particularly serious omission given that asylum seekers and refugees commonly seek protection from life threatening situations."

RILC continues to be concerned that the current arrangements do not satisfactorily guard against the risk of refoulement of refugees from the declared countries. RILC submits that there has been a distinct lack of transparency or proper scrutiny in relation to the information on which the Minister has relied to satisfy himself that the declared countries will afford effective protection. We have serious concerns that Australia may be violating its obligation to ensure effective protection by removing persons to countries where there is a risk of refoulement.

We submit that, despite the fact that an "offshore entry person" is prevented from making an application for a Protection Visa in Australia due to the operation of section 46A of the Migration Act, the obligations of non-refoulement and ensuring effective protection remain in force with respect to "offshore entry persons". The definition of "offshore entry person" explicitly states that it refers to "a person who (a) **entered Australia** at an excised offshore place after the excision time for that offshore place; and (b) became an unlawful non-citizen because of that entry".

Therefore the non-refoulement provisions of the Convention and other treaties are triggered and are not negated by the operation of section 46A which relates to the making of valid visa applications. Under international law, 'chain' refoulement whereby a person is sent to a another territory from which refoulement eventuates is prohibited as part of the obligation which a State assumes under the principle of non-refoulement. This is also directly linked to the principle of non-rejection of asylum seekers at the frontier.[5]

RILC has serious concerns that the current arrangements are not durable or sustainable. In the event that the current arrangements break down, no provision has been made to ensure that the asylum seekers are afforded effective protection in another country and are not subject to refoulement to a country of persecution.

[5] See for example, Article 3(1) of the UN General Assembly's Declaration on Territorial Asylum, 14 December 1967.

We maintain our opposition to the use of the concept of 'safe third country' in the context of the excision legislation. We further submit that until such time as adequate legislative provision is made for appropriate and sufficient safeguards to ensure Australia meets its obligation to ensure the effective protection of asylum seekers removed to declared countries, it is both irresponsible and inappropriate to further excise certain parts of Australia, thereby significantly increasing the potential for Australia to violate its fundamental obligations under the Refugees Convention to guarantee effective protection and non-refoulement. RILC therefore submits that provision should be made for the following basic safeguards to be implemented:

- There should be increased transparency and proper scrutiny in relation to the process by which the Minister declares a country under section 198A of the Migration Act. In particular, there should be consultation with key bodies such as non-governmental organisations regarding the ability of the declared third country to guarantee effective protection. At present, the complete lack of transparency in relation to the process and the information on which the Minister relies is of serious concern to RILC, given the fundamental nature of Australia's obligation to guarantee effective protection.

- There should be provision for a mechanism to enable the specific circumstances and unique risks of each asylum seeker to be taken into consideration, in order to ensure that that person will be afforded effective protection if removed to the declared country. There should be a mechanism for taking into account a person's age, ethnicity, religion, political profile or other particular circumstances to ensure that the declared country will provide effective protection to the person.

- There should be provision made to ensure that persons who have been removed to declared countries are not at risk of refoulement in the event that the declared country is no longer willing to host the person.

Finally, the use of underdeveloped third countries as 'transit camps' for unwanted asylum seekers is inconsistent with the individual responsibilities imposed on signatories to the Refugees Convention.

(c) Permissible discrimination against unauthorised arrivals

(i) Introduction

It is a fundamental principle of refugee law that an asylum seeker coming 'directly' from a place of persecution should not be discriminated against on account of their mode of arrival in the country of asylum. This principle recognises the fact that many refugees are forced by their situation of persecution to travel in an unauthorised manner to seek refuge. We submit that an asylum seeker arriving in an unauthorised manner by boat off the northern coast of Australia is entitled to be treated in the same way as an unauthorised asylum seeker arriving by plane in Canberra, or an authorised asylum seeker arriving in any part of the country.

However Australian law currently treats categories of unauthorised arrivals differently according to their place of arrival. In short, unauthorised arrivals by boat in 'excised zones' are not allowed to apply for refugee status and are eligible only for Offshore Entry Visas (subclass 447).[6] Unauthorised arrivals outside of 'excised zones' are able to apply for asylum onshore and are eligible for three year Temporary Protection Visas (subclass 785).[7] Asylum seekers who arrive in an authorised manner are entitled to Permanent Protection Visas (subclass 866).[8]

Offshore Entry Visas provide for differential and lesser rights, including a form of successive temporary protection which, unlike the subclass 785 visa, leaves the holder no ability to access permanent residence at the end of three years or at any time in the future. In turn, this necessarily denies the holder any right of family reunion by way sponsorship of relatives who are residing offshore.

Although Article 31 of the Refugees Convention does allow for a degree of discriminatory treatment against asylum seekers who have come indirectly from a territory where their life or freedom is threatened. However, arguably, the permissible degree of differential treatment does not extend to preventing such asylum seekers from lodging a valid asylum application in Australia.

The Government contends that many (if not most) of the unauthorised asylum seekers arriving in northern Australia have come indirectly from a situation of persecution and have bypassed countries where they could have applied for protection. It contends they are 'forum shoppers'.

In this regard, we note the Border Protection Legislation introduced in September 2001 sought to draw a distinction between primary (i.e. direct) and secondary (i.e. indirect) movement. For example, the Explanatory Memorandum to the recently enacted Border Protection (Excision from Migration) (Consequential Provisions) Act 2001 stated that:

> Unauthorised arrivals who reach Australia *other than those directly fleeing persecution within their country of origin*, would only be eligible to be granted successive temporary protection visas. There will be no access to permanent residence unless the Minister exercises a non-compellable discretion to lift the bar.[9]

However this statement is not an accurate reflection of the legislation, particularly the provisions of Migration Regulation 447 which create the Offshore Entry Visa. It suggests that the Government has attempted to draw a distinction between the primary and secondary movement of unauthorised arrivals when no such distinction has been made. The only way a primary unauthorised arrival in an 'excised place' can be treated

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[6] See: Migration Regulations, Sched. 2, Cl. 447.
[7] See: Migration Regulations, Sched. 2, Cl. 785.
[8] See: Migration Regulations, Sched. 2, Cl. 866.
[9] Explanatory Memorandum, Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001

differently from a 'secondary mover' is if the Minister exercises his non-compellable discretion to allow such treatment.[10]

Unauthorised asylum seekers arriving directly or indirectly in an 'excised zone' are treated equally. An unauthorised asylum seeker who arrives directly from a country of persecution in an 'excised zone' is treated less favourably than an unauthorised asylum seeker who arrives directly (or indirectly) from a country of persecution outside an 'excised zone'. An asylum seeker who arrives in an unauthorised manner in an 'excised zone' cannot access the onshore refugee determination process in Australia and is eligible only for an Offshore Entry Visa whilst an asylum seeker who arrives in an authorised manner in an 'excised zone' can apply for asylum and is eligible for a Permanent Protection Visa.

(ii) Discrimination against 'unauthorised arrivals' on account of mode of arrival

Article 31 of the Convention allows for the imposition of penalties only on persons who have not directly fled from a territory where their life or freedom was threatened. Direct or secondary movement from threats to life or freedom are the differentiating elements – not mode of arrival.

In Australia, mode of arrival dictates the type of residence visa a refugee will be entitled to. An unauthorised arrival outside of an 'excised place' will be eligible initially only for a three year Temporary Protection Visa (785). After three years they may become eligible for a Permanent Protection Visa (866) if they are assessed as still being a refugees and if they have come by way of primary as compared to secondary movement as defined by Regulation 866.215 (above). Any authorised arrival will automatically be eligible for a Permanent Protection Visa (866).

An unauthorised arrival in an 'excised zone' regardless of whether or not they have come by way of primary or secondary movement will be eligible only for an Offshore Entry Visa and be automatically subject to the successive temporary visa regime.

Again, mode of arrival, not level of protection in the country of last residence, is the determining factor. Australian legislation thus discriminates against asylum seekers on the basis of their mode of arrival, not primarily whether or not they have come directly or indirectly from a situation of persecution.

To discriminate thus may also constitute a contravention of the rights of non-discrimination guaranteed under Article 26 of the ICCPR.

(iii) Interpretations of Article 31

[10] By lifting the bar preventing an unauthorised arrival in an 'excised zone' from making a valid visa application in Australia, see s 46A of the *Migration Act*. An applicant may then be eligible for a Temporary Protection Visa, although this remains somewhat unclear.

There remains considerable controversy over the meaning of Article 31, and in particular, the meaning of "coming directly". In our submission, there are a range of considerations which should be taken into account in determining whether someone has come by way of primary or secondary movement. These considerations include: actual or potential threats to life or freedom in territories passed through, the refusal of other countries to grant protection or asylum or the imposition of exclusionary provisions such as those on safe third country, safe country of origin or time limits.

Professor Goodwin-Gill suggests that Article 31 was never intended to allow the imposition of penalties on persons who had merely transited other countries, but was designed for those who had settled either permanently or temporarily in other countries. This interpretation appears to be supported by the comments of participants at the 1951 conference (including by the English and Belgians)[11], and the discussions leading to the final version of Article 31. Goodwin-Gill argues that 'directly *should not be strictly or literally construed*, but depends rather on the facts of the case, *including the question of risk at various stages of the journey.*"[12]

Further, UNHCR advise that "the expression 'coming directly' in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin*, or from another country where his protection, safety and security could not be assured*. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received asylum there. *No strict time limit can be applied to the concept of 'coming directly' and each case must be judged on its merits*."[13]

We submit that a short-term presence in a country should not be used to invoke the penalty provisions of Article 31. Only when there is no objectively reasonable element or nexus of 'protection motivation' in the movement of a person should Article 31 provisions operate. A person who relocates for 'reasons of mere personal convenience' might be considered an immigrant and should be excluded from the benefit of Article 31[14], but a person who has a reasonable 'protection motivation' (because they have not yet found protection or an adequate level of protection) should not be penalised.

In our submission, the current and proposed provisions in relation to the excision legislation are arguably not consistent with Article 31. In particular, they operate to discriminate on the basis of mode of arrival at the outset, not primary or secondary movement. Further, the penalties imposed by the creation of Offshore Entry Visas are

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[11] G Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection,' prepared for the UNHCR Global Consultations, October 2001, at , para 19 (hereafter cited as "Goodwin-Gill")

[12] Goodwin-Gill, para 98. We further note that EXCOM Conclusion No 58 refers to persons who have 'already found protection' in another country.

[13] UNHCR Guidelines and Applicable Criteria and Standards relating to the Detention of Asylum Seekers., para 4

[14] Goodwin-Gill, para 19, comments from UK representative to 1951 Conference

disproportionate and appear to breach minimum standards required under the Refugees Convention.

RILC contends that asylum seekers must be provided an opportunity to fully detail their reasons for not having accessed protection prior to the imposition of a penalty, such as a particular visa class. Over the years, RILC has acted for many hundreds of Afghan and Iraqi asylum seekers in detention centres in Australia. In our submission, many of them have had legitimate reasons for their inability to access 'effective protection' in host or transit countries.

The decision to treat asylum seekers differently because they have arrived in a particular part of Australia has no legal basis and breaches fundamental principles of non-discrimination. It is inconsistent with Article 31 of the Refugees Convention.

(iv) Imposition of penalties

If an asylum seeker has not come directly from a territory where their life or freedom is threatened, it is conceded that they may be subject to the imposition of a penalty. A related question is then whether the penalty imposed is proportionate and directed to a legitimate object. RILC is of the view that two types of treatment of unauthorised asylum seekers in Australia in particular constitute a penalty. 'Unauthorised' asylum seekers arriving in Australia are penalised by:

- Being denied the ability to apply for asylum in Australia and being transferred outside of Australia for processing in other countries; and
- By being eligible for only temporary visas with limited rights.

In our submission, neither of these penalties are justified when regard is had the question of proportionality and legitimate objectives.

(a) Inability to apply for asylum and transfer outside Australia

Earlier in this submission, we have argued that arrangements made by Australia to transfer unauthorised arrivals in 'excised zones' to 'safe third countries' for processing is discriminatory because it is predicated on the basis of 'mode of arrival[15]', and not for valid reasons of 'secondary movement' pursuant to Article 31. We further submit that there is no objective justification for this arrangement on administrative grounds. As such the Australian government's policies constitute a penalty.

[15] Whilst 'place of arrival' is the key distinguishing factor in the new regime, it is clear that the new legislation is designed to address 'mode of arrival'. The 'excised areas' are the zones where 95% of unauthorised boats arrivals have landed within the last 3 years.

In this regard, Goodwin-Gill notes that 'any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Art 31 unless objectively justifiable on administrative grounds.'[16]

Whilst the visa regime clearly attempts to target unauthorised boat arrivals who are considered to be the subject of 'secondary migration', it does not comply with the provisions or intent of the Refugees Convention and most particularly does not comply with Article 31 of the Convention. For example, the regime goes well beyond any legitimate administrative strategy of targeting people smugglers as it targets bona fide refugees without prior protection elsewhere. The number of arrivals cannot be considered to be a 'mass influx' situation. Similar numbers of asylum seekers arrived during 1999 and 2000 in Australia. Australia has the capacity to accommodate and process large numbers of asylum seekers. The Government has in fact made a considerable investment in processing asylum seekers arriving in Australia (primarily through commissioning additional detention centres).

(b) Temporary protection as a penalty

'Unauthorised' asylum seekers who arrive at excised places are no longer eligible at any time for permanent residence in Australia. Rather they are eligible only for Offshore Entry Visas and successive temporary protection thereafter. Whilst Australia is under no obligation to provide refugees with permanent residence in Australia, we submit the conditions on Offshore Entry Visas fall short of the minimum standards required under the Refugees Convention.

We concur with the comments of Goodwin-Gill[17] that the conditions such as those attached to the Offshore Entry Visas amount to a penalty. The single most debilitating restriction on these temporary visas are the absolute prohibition on family re-unification (including of the 'nuclear family') for the duration of the visa. This restriction cannot be justified on objective administrative reasons as it directly breaches the principle of family unity.

(b) Proportionality in imposition of penalties

Thus far it has been argued that excision legislation does not reflect the wording or intention of Article 31. We have also submitted that many 'unauthorised' asylum seekers who come to Australia in fact may arguably have come 'directly from a territory where their life or freedom was threatened'. However even if unauthorised asylum seekers have come by way of secondary movement, there is an implicit requirement of proportionality in any penalties imposed.

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[16] We also note the opinion referred to in the discussion paper by the Department of International Protection that "Any punitive measure, that is, any unnecessary limitation to the full enjoyment of rights granted to Refugees under international Refugees law, applied by States against Refugees who would fall under the protective clause of Article 31(1) could, arguably, be interpreted as a penalty.", footnote 15 of discussion paper

[17] Goodwin-Gill, para 64

Whilst penalties may be imposed on refugees, the penalties must be reasonably necessary to meet a legitimate administrative objective. Any penalties imposed (which may include the penalties of less favourable treatment) cannot fall short of minimum standards under the Refugees Convention.

Transfer of asylum seekers to third countries where they are considered for visas for which they may not be eligible is not a proportionate response to a minor influx of refugees. As mentioned, there are insufficient safeguards in Australian legislation to prevent the potential re-foulement of asylum seekers who are transferred to the 'safe third countries' of Nauru and Papua New Guinea.

Prohibiting asylum seekers who arrive in Australia from applying for refugee status onshore, negates the most basic right of a refugees, namely the right to seek asylum and to be assessed in accordance with the definition contained in Article 1 of the Refugees Convention. Such provisions effectively remove an asylum seeker from the scope and protection of the Refugees Convention and subject them to 'overseas resettlement selection, [which] for example depends on factors additional to refugee status, including quotas, priorities and links.'[18]

Finally, UNHCR advise that "States that [offer the possibility of direct departure mechanisms] continue, in parallel, to receive claims on their territory from spontaneous arrivals. If this were to cease to be a possibility, the right to seek asylum and opportunities to access protection would be seriously undermined."[19]

4. Border security vs. the Refugees Convention

RILC further contends that the current Bill is injudicious and a disproportionate response to an issue that is more properly dealt with through alternatives that do not sacrifice asylum seekers' human rights to the concept of border security.

We refer the Committee to the UNHCR paper "Addressing Security Concerns without Undermining Refugee Protection" of November 2001. In that paper, the UNHCR state that:

> [our] main concern is twofold; that bona fide asylum-seekers may be victimised as a result of public prejudice and unduly restrictive legislative or administrative measures and that carefully built refugee protection standards may be eroded.
> …
> The summary rejection of asylum-seekers at borders or points of entry may amount to refoulment. All persons have the right to seek asylum and to undergo individual refugee status determination.

[18] Goodwin-Gill, para 32
[19] Refugees Perspectives and Migration Control: Perspectives from UNHCR and IOM

We also refer to the comments of Susan Martin in her paper 'Global migration trends and asylum' (UNHCR Global Consultations papers), in which she states that:

> Policies that make it harder for asylum seekers to exit their countries or to reach their destination merely shifts responsibility from one State to another, or to the broader international community without solving the basic problem of refugee protection.'

In addressing concerns about border security and the phenomenon of people smuggling, RILC urges the Government to increase its use of internationally acceptable mechanisms for dealing with these issues, namely:

- Assistance to countries of first asylum to allow them to shoulder their refugee burdens.
- Encouraging non-signatories to sign the Refugees Convention and other human rights treaties.
- Making available greater numbers of refugee places in Australia to ease the burden on countries of first asylum.
- Participation in international fora dealing with the issue of people smuggling and global migration trends within the framework of refugee protection.
- Targeting people smuggling rackets in ways which do not breach the rights of refugees caught in the 'smuggling trap'.

The excision of territory (or further territory) is an unnecessary and retrograde step. It is an entirely disproportionate response to any issue of border security and is a step towards consolidating the 'Pacific Solution' which appears unsustainable in the medium-term. More alarmingly, it is a significant step towards complete denial of our responsibility to receive asylum applications in Australia.

RILC considers the Border Protection legislative package passed last year to be an ill-considered and heavy-handed approach to an issue of legitimate concern to the community. It was naïve to believe that such an important issue could be properly and fairly dealt with in Australia through the hasty implementation of a policy of removal of asylum seekers, coupled with a punitive visa regime. Other Convention signatories have been dealing with the complexities of these issues on a far greater scale for many years. Current policy places us well out of step with international best practice towards asylum seekers.

Additionally, it would appear that the 'Pacific Solution' policies have done no more than confirm Australia's international responsibilities at considerable cost, delay and trauma for the asylum seekers on Nauru and Papua New Guinea. It appears unlikely that many countries will be prepared to accept for resettlement refugees who are seen essentially as Australia's responsibility. Australia will continue to have responsibility for the repatriation of those asylum seekers who have been found not to be refugees. The same outcome could have been achieved in Australia without the setting up of 'excision zones'.

At a time which calls for a critical reappraisal of the Border Protection legislation, it makes no sense to extend the policy of excision to many thousands of islands off the northern coast of Australia. For these reasons, RILC urges the Committee to reject the proposed Bill in its entirety.

August 2002

RILC **Refugee & Immigration Legal Centre Inc**

RILC RESPONSE TO PROPOSED LEGISLATIVE CHANGES

This commentary is intended to provide RILC's position in relation to a package of three Bills currently before the Australian Senate. These three Bills are: The Border Protection (Validation and Enforcement Powers) Bill 2001 Migration Amendment (Excision from Migration Zone) Bill 2001; and Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001.

RILC has previously commented on and indicated its opposition to the introduction of three additional Bills currently before the Senate which represent far-reaching restrictions on the rights of refugees and asylum seekers, namely: the Migration Legislation Amendment Bill (No.6); Migration Legislation Amendment (Judicial Review) Bill 1998 [2001]; and Migration Legislation Amendment Bill (No.1) [2001]. These Bills seek to, amongst other things, narrow the definition of a refugee, and restrict independent judicial scrutiny and review of administrative decisions.

RILC considers the proposed changes contained in the above mentioned three Bills to amount to a package of legislative measures which will drastically affect and diminish the rights refugees and asylum seekers in Australia. RILC is also concerned that such measures represent a serious undermining of Australia's commitment to the protection of refugees and asylum seekers under the Refugees Convention and other international human rights obligations.

In the year of the 50th Anniversary of the Refugees Convention, the Federal Government is sending a strong signal that it intends to downgrade its international commitment to refugees.

If every signatory to the Refugees Convention decided to impose additional requirements on asylum seekers or to divert direct responsibility for protection according to its own domestic agendas, the Convention would become unworkable. Such an approach would be inconsistent with the protective intent of the Refugees Convention and would have the effect of retarding the UNHCR's objective of encouraging a consistent and humanitarian approach to the refugee crisis, particularly amongst wealthier nations.

RILC is concerned that the proposed legislation effectively seeks to avoid direct responsibility by Australia for the protection of asylum seekers within its territory. Notwithstanding any such attempts, Australia remains bound by its international human rights obligations under instruments such as the Refugees Convention, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the Convention Against Torture, with respect to its treatment of asylum seekers within its territory.

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1. Summary of Bills

There are six Bills currently before the Senate which collectively seek to introduce far-reaching measures designed to further remove the rights of refugees and asylum seekers. Three of these Bills represent a specific package of legislative measures primarily designed to excise certain parts of Australia's territory from the 'migration zone' in order to prevent asylum seekers and refugees from accessing Australia's refugee determination process. These Bills are: The Border Protection (Validation and Enforcement Powers) Bill 2001 ("the Border Protection Bill"); Migration Amendment (Excision form Migration Zone) Bill 2001; and Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001.

Collectively, these Bills seek to prevent unauthorised asylum seekers who arrive in these areas of Australia from making an application for refugee status (a protection visa). The Explanatory Memoranda make clear that the overriding purposes of these amendments include:

- to respond to increasing threats to Australia's sovereignty;
- to discourage unauthorised arrivals, including asylum seekers;
- to prevent unauthorised asylum seekers who enter Australia from making an application for a protection visa.

We set out a summary of the key proposed changes in an attached document entitled "Summary of Proposed Changes".

2. RILC's position on aspects of the Bills

We set out below a summary of some our key concerns in relation to a number of critical aspects of these Bills. This response is necessarily limited in scope due to the rushed introduction and passage of these Bills. We emphasise that any failure to address a particular aspect of these Bills should not be taken as indicating agreement with introduction of such provisions. RILC opposes the introduction of this package of legislative changes, as well as the rushed circumstances in which such far-reaching legislative proposals have been introduced into Parliament without a proper opportunity for scrutiny and public debate.

Excision of Australian territory

- RILC is opposed to the creation of 'excised offshore places' within Australian territory. Such exemption of selective territory is akin to shrinking Australia's

borders in order to prevent asylum seekers from engaging protection obligations to which Australia is a signatory under the Refugees Convention. In this regard, it is a fundamental principle of international law that every State is entitled to exclusive jurisdiction over its territory and persons within its territory, and that with that authority or jurisdiction goes *responsibility*. Further, it is accepted principle that a State should not seek to create a selective definition of "territory" in order to avoid its protection obligations to those asylum seekers who arrive within its territory.

It is also accepted principle under international law that a State has responsibility for a person within territory controlled by it, including the obligation of the State to ensure and protect the human rights of everyone within its territory or jurisdiction. Australia is also a party to Conventions which guarantee these rights. Relevant Conventions include the International Covenant on Civil and Political Rights ("ICCPR") and the Convention on the Rights of the Child ("CROC").

RILC believes that the proposed legislation effectively seeks to avoid direct responsibility by Australia for the protection of asylum seekers within its territory by excluding these people from directly accessing Australia's refugee determination processes. Notwithstanding any such attempts, Australia remains bound by its international human rights obligations under instruments such as the Refugees Convention, the ICCPR, and the CROC, with respect to its treatment of asylum seekers within its territory.

Ministerial declaration of 'safe' countries/Australia's non-refoulement obligations

- RILC is concerned that the proposed legislation authorises the removal of asylum seekers from Australian territory prior to the assessment of refugee status, whilst failing to provide for sufficient guarantees of protection and safety. In this regard, the Bills do not appear to meet Australia's international human rights obligations under the Refugees Convention or other international Conventions to which it is a party, which prohibit the return of a person to a situation where his or her life or freedom would be threatened.

  In this regard, RILC acknowledges that the proposed legislation contains a new section 198A of the Migration Act which provides for the Minister for Immigration to make a declaration in relation to the safe third countries where asylum seekers may be transported to from Australian territory. However, such provisions fall well short of providing the safeguards necessary to ensure that refugees are protected from return to places where they may be persecuted. The proposed new section 198A will allow the Minister to declare that another country provides access for asylum seekers to effective determination procedures, protection for asylum seekers and refugees, and meets relevant human rights standards.

RILC is concerned that these measures fail to articulate detail or criteria concerning the bases upon which such declaration is to be made by the Minister. For example, there is no explanation as to what will be considered to be effective procedures for refugee status determination, nor what kind of protection is required pending determination and finalisation of an asylum seeker's claims. In addition, there is no requirement that such a declared safe third country be party to the Refugees Convention, nor that Australia secure agreement with such a country as to reception of asylum seekers and the conditions and obligations that would apply in these circumstances. In this regard, we note with concern that there is no explanation or articulated criteria for the 'relevant human rights standards' required in providing protection to asylum seekers, and no requirement that a country be signatory to other relevant human rights Conventions such as the ICCPR, Convention Against Torture, or the CROC.

In addition, RILC is concerned that while there is provision made for the Minister revoke a declaration in relation to a country, there is no ***mandatory*** requirement to do so. Given the gravity of the matters at stake, and Australia's international obligations, including that of non-refoulement, there should be such a requirement covering situations where a country no longer provides adequate protection.

Further, the proposed legislation provides no mechanism for consideration that while a country may be deemed safe for most refugees, it may nevertheless be unsafe for a particular individual or class of individuals. In these circumstances, no provision exists for such individuals to have the basis of a unilateral Ministerial declaration challenged. In order to properly protect the human rights of individual asylum seekers, such provsion needs to be made.

RILC believes that absence of sufficient safeguards for the declaration of safe countries is a particularly serious omission given that asylum seekers and refugees commonly seek protection from life threatening situations.

Diversion of protection responsibilities to other countries/the UNHCR

- The practical application of the proposed legislation appears contrary to the spirit and intent of the Refugees Convention, which provides for a system of international burden-sharing in which wealthier states take an appropriate responsibility for the protection of refugees. It is likely that the practical application of this legislation will result in Australia diverting its protection responsibiltites to less wealthy, developing countries which may be less equipped to cope or to provide adequate protection. RILC believes that this, together with the apparent intention to use the UNHCR to process claims, is an inappropriate response which is likely undermine international attempts to encourage and foster a consistent and humanitarian approach to the refugee crisis. Were all developed countries to seek divert their protection responsibilities on to the already stretched resources of the UNHCR and developing countries, the international system of refugee protection would be seriously undermined.

Refugee status determination procedures

- We are also concerned about the apparent lack of detail or criteria regarding the refugee status determination processes which will apply to asylum seekers who arrive in 'excised' parts of Australia or are taken to other countries. For example, despite the Bills being before Senate, it remains unclear what role and resources the UNHCR are prepared to commit in the context of proposed legislation which clearly seeks that the UNHCR play a significant role in the assessement of claims for refugee status.

New temporary visa regime

- RILC opposes the measures contained in the proposed legislation to create a new visa regime which, amongst other things, seeks to distinguish between the rights of asylum seekers on the basis of mode of arrival and to provide for only successive temporary protection.

  RILC has previously maintained its opposition to the introduction of 3-year temporary protection visas in 1999. It is not proposed to rehearse such objections here. Needless to say, the current proposal to grant those who arrive at an 'excised' part of Australia as a result of flight through another country (as is the case with most refugees who arrive in Australia) only successive temporary protection with a bar on the grant of a permanent protection visa is a particularly grave development, which further undermines the rights of refugees and entrenches the temporary and uncertain nature of any protection afforded.

  The creation of a successive temporary protection regime is arguably inconsistent with Australia's protection obligations. The new visa regime draws a fundamental distinction between classes of asylum seekers on the basis of mode of arrival. For example, those unauthorised asylum seekers who arrive in Australia at a non-excised place will still be entitled to the grant of a 3-year temporary protection visa with access to the grant of a permanent visa after 30 months. In contrast, those asylum seekers arriving at an 'excised' place will not be entitled to a permanent visa unless the Minster exercise his personal, non-compellable discretion to the bar on such application. To draw a distinction between rights in such a way may constitute contravention of the rights of non-discrimination guaranteed under Article 26 of the ICCPR.

  The successive temporary protection regime also appears to effectively place a prohibition on the ability of a person granted refugee status being able to access provisions which would allow for family reunion through sponsorship of close family members. This may result, for example, in a refugee being granted successive temporary protection visas over a period 9 years during which he or she will at no point be able to be reunited with spouse or children. Such provisions appear completely at odds with the principle of family unity under international law. They may also be in contravention of various provisions

concerning the rights of the family under the ICCPR (Articles 17 and 23), and the CROC (Articles 3, 9, 10, 16, 20 and 22).

Finally, RILC is concerned that such a measure fails to adequately or appropriately address the reality that many refugees who seek protection in Australia come from places where durable changes in their home country are unlikely to occur in the medium to long term. We are further concerned that in failing to provide or foster long-term stability in the lives of people who are commonly traumatised and particularly vulnerable, the new visa regime could create an 'underclass' of refugees who, on account of their uncertain temporary status and lack of social and family support, become further marginalized and unable to contribute to their full potential within Australian society. In turn, RILC is mindful of and concerned about the well-documented adverse impact that such instability and further traumatisation commonly has on refugees.

Removal of right to bring proceedings against the Commonwealth

- RILC objects to the proposed prohibition on unauthorised asylum seekers who arrive at 'excised' places from exercising their rights to bring legal proceedings against the Commonwealth or an officer of the Commonwealth. Australia is bound by international human rights law which guarantees the rights of people within its jurisdiction to access legal protection against and violation of such rights. The proposed legislation effectively removes access to challenge potential violations of the rights of refugees or asylum seekers, however serious such violations may be.

September 2001

Summary of proposed changes

The proposed changes contained in the package of 3 Bills include the following:

- Excision of certain Australian territory from the 'migration zone' to prevent unauthorised asylum seekers who arrive in such 'excised offshore places' from making applications for refugee status in Australia;
- Defining of 'excised offshore place' to include the following Australian territory: Christmas Island; Ashmore and Cartier Islands; Cocos (Keeling) Islands; other prescribed external Territories; prescribed islands which form part of an Australian State or Territory; and an Australian sea or resource installation.
- Vesting the Minister with a non-compellable, personal power to lift the bar on a person making of a protection visa application in certain limited, 'public interest' circumstances;
- Empowering Australian officials (including members of the Australian Defence Force ("ADF")) with a discretion to *detain* unauthorised asylum seekers who are either in or seeking to enter an 'excised offshore place' in Australia.
- Empowering Australian officials (including members of the ADF) to send such asylum seekers from an 'excised offshore place' in Australia to other countries on the basis of a Ministerial Declaration that a country is deemed safe (i.e. that certain non-refoulement and human rights standards are met in the other country). For example, it will enable asylum seekers to be taken from a place such as Christmas Island to Nauru for the assessment of refugee status.
- The sending of an asylum seeker from such a place in Australia to another country will not amount to 'detention'.
- A bar on the bringing of legal proceedings against the Commonwealth or any person acting on behalf of the Commonwealth in relation to the entry, status, detention and transfer of an unauthorised asylum seeker who is an 'excised offshore place'.
- Creation of new visa regime with a new class of visa to be called the "Refugee and Humanitarian (Class XB) visa, with a number of new visa subclasses. In summary, the new visa subclasses will only initially provide temporary rather permanent protection. They will apply as follows:

  - *New "Secondary Movement Offshore Entry (Temporary) (Subclass 447)" visa ("the Offshore Entry visa")*

  This visa will apply to those asylum seekers who arrive in Australia at an 'excised offshore place' without a visa (whether or not they remain there or are taken to another declared 'safe' country such as Nauru), having not arrived directly from their home country. If assessed as refugees, they will only be entitled to be granted successive 3-year temporary protection visas. In effect, there will never be an entitlement to permanent residence for such persons, nor the right to family reunion (i.e. sponsorship of family members such as wife and children to Australia), unless the Minister exercises a non-compellable, personal discretion to lift the bar.

- *New "Secondary Movement Relocation (Temporary) (Subclass 451)" visa ("the Relocation visa")*

This visa will apply to an asylum seeker outside her or his home country who has not entered Australia but is assessed to be a refugee in a 'transit' country (i.e. Indonesia). Instead of being granted a permanent offshore visa, such persons will only be entitled to a 5-year temporary protection visa, and will only be eligible for the grant of a permanent visa after 54 months. There will be no rights to family reunion during this period.

For asylum seekers who arrive at an 'excised offshore place' in Australia having directly fled from their home country, they will only be entitled to apply for a visa if the Minister lifts the bar applicable to persons who arrive at an 'excised' part of Australia. It is unclear what subclass of visa they will be entitled to.

- No guarantee that any asylum seekers who arrive in an 'excised' part of Australia and are assessed to be genuine refugees will be granted refugee status in Australia. This will apply to those people either still in Australia or to those taken to another country (e.g. Nauru).
- Retrospective validation of recent actions taken by the government in relation to the MV Tampa, the Aceng and other vessels. The proposed legislation provides that such actions are lawful and seeks to prevent any legal proceedings from continuing or being brought concerning these actions.
- Preservation and extension of the powers of Australian officials to undertake similar actions as those taken in respect of the MV Tampa, including powers to detain, restrain and search asylum seekers on board vessels in the territorial sea or contiguous zone for purposes including taking them outside Australia.
- A new mandatory sentencing regime for '5 persons or more' people smuggling offences under the Migration Act, including minimum sentences of 5 years imprisonment for a first offence and 8 years for a repeat offence.