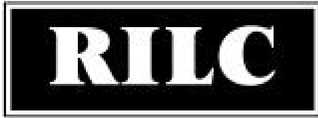

Refugee & Immigration Legal Centre Inc

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.

<u>Summary of proposed changes</u>

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 Australia at an 'excised offshore place' without a visa (or are taken to another 'safe' country such as Nauru), having not arrived directly from their home country. If assessed as refugees, they will only be entitled to 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.

It appears that for asylum seekers who arrive at an 'excised offshore place' in Australia having directly fled from their home country, they will be entitled to the same three-year temporary protection visa currently available to asylum seekers, but only if the Minister lifts the bar applicable to persons who arrive at an 'excised' part of Australia.

- 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.