UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Submission by the Office of the United Nations High Commissioner for Refugees
New Zealand Immigration Amendment Bill 2012

Transport and Industrial Relations Committee
8 June 2012

I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on the Immigration Amendment Bill 2012, tabled on 30 April 2012, and which has been referred to the Committee for consideration.

2. UNHCR is the United Nations body which has been entrusted by the UN General Assembly to supervise the application of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ('the 1951 Convention'), to which New Zealand is a Party. Its standing to comment is detailed further in Attachment A.

3. The Immigration Amendment Bill 2012 introduces a number of measures that will have a direct impact on the manner in which a new category of asylum-seeker and refugee is received and processed on arrival in New Zealand. Those falling within the proposed statutory definition of a 'mass arrival group' will be treated in a manner differently from those arriving and claiming asylum by other means of transport.

4. For this new category of asylum-seeker and refugee, the proposed changes anticipate (both through legislative changes and policy flowing from it): procedures involving mandatory detention; the suspension of refugee status procedures; restrictions on family reunion; and a requirement to re-establish refugee status after a period of three years. The proposed changes will also affect the rights and treatment of children who form part of family groups arriving as part of a "mass arrival group".

5. In UNHCR's view the combined effect of these proposed measures represents a significant change of direction from New Zealand's traditional, and very positive, approach to asylum-seekers and refugees. The proposed legislative amendments and the policy changes that will flow from them raise important questions about their compatibility with New Zealand's obligations under the 1951 Convention and other related human rights treaties to which it is party.

II. THE OBJECT AND PURPOSE OF THE IMMIGRATION AMENDMENT BILL 2012

6. The object and purpose of the Immigration Amendment Bill 2012, and associated policy changes that will flow from the Bill, are clearly set out in the General Policy Statement

contained in the Explanatory Note to the Bill,[1] as well as the Regulatory Impact Statement.[2] They are also informed by public announcements made by Government Ministers prior to, and at the time of, the Bill being tabled in Parliament.

7. Through the General Policy Statement, the Government has signalled its intention to:

> [E]nhance New Zealand's ability to deter people-smuggling to New Zealand by making it as unattractive as possible to people-smugglers and the people to whom they sell their services … [*and*]… enable the effective and efficient management of a mass arrival of illegal migrants … through group warrants and mandatory detention and streamlined refugee and protection claims processes.

8. The objects and purposes appear, broadly, to be twofold:

   (a) To deter and discourage people smugglers and their prospective 'customers' by providing a series of disincentives for those who arrive in a manner defined as 'a mass arrival group'; and

   (b) To provide a more 'effective and efficient' manner of processing for refugee status, and conducting identity and security checks for those asylum-seekers arriving in this manner, on the basis that 'mass arrival groups' would overwhelm the normal resources available to the Government and Court system.

9. **As to the Objective in paragraph 8(a) above,** UNHCR understands and, indeed, supports the efforts by states in the region, including New Zealand, to curb the often exploitative and dangerous practices of people smugglers. However, it believes that this can be achieved through an appropriate use of closer regional cooperation between states and through the use of the ordinary criminal law.

10. In their efforts to address the criminal dimensions of people smuggling, it is very important that states do not advertently or inadvertently penalise or discriminate against the victims of these enterprises and compromise the protection responsibilities that are owed to refugees under the 1951 Convention and other human rights instruments.

11. In this respect, it should be recalled that asylum-seekers and refugees escaping persecution and seeking international protection are frequently compelled to resort to irregular and illegal means of crossing international borders precisely because normal channels of migration are denied them. For this reason, the 1951 Convention anticipates, in Article 31, that

> Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

[1] Explanatory Note, Immigration Amendment Bill 2012 (NZ), 1.
[2] New Zealand Government: Department of Labour, *Regulatory Impact Statement – Immigration Amendment Bill* (30 April 2012), 14 <http://www.dol.govt.nz/publications/general/gen-ris.asp>.1-4.

12. In such circumstances, refugees cannot be described as 'illegal migrants' as their right to seek asylum and their right not to be penalized on the basis of their irregular arrival are anticipated in Article 14 of the Universal Declaration of Human Rights and Article 31 of the 1951 Convention (set out in para.11 above). It is also noteworthy that both the 'Smuggling Protocol" and "Trafficking Protocol" of the United Nations Convention against Transnational Organized Crime, to which New Zealand is party, provide for the non-penalization for irregular entry of asylum-seekers and refugees. These instruments contemplate the special character of refugee protection and the institution of asylum as they are required to be read in accordance with obligations under international refugee law.

13. **As to the Objective in paragraph 8 (b) above,** UNHCR understands that, in the (unlikely) event of a large number of people arriving at once, exceptional measures might need to be taken to manage and process people in an 'effective and efficient' manner. However, any response would have to be based on the exigencies of any given situation (including the actual number of people arriving and their impact on available resources for fair and expeditious processing).

14. The founding definition of a 'mass arrival group' – on which the whole Amendment and policy changes are predicated - establishes a very low threshold of 11 or more persons. In UNHCR's view it is difficult to see how such a low 'trigger' point is justified when set against the serious consequences of mandatory detention and diminution of other important refugee rights that necessarily flow from it. Moreover, it is also difficult to see why this threshold was set at level where the normal resources of the State are most unlikely to be overwhelmed.

15. The logic of the low threshold and other measures flowing from it, can only really be understood in light of the deterrence and punitive objective identified in paragraph 8 (a) above. In this respect, the language used in public statements announcing the proposed changes is illustrative. This includes the categorization of refugees and asylum-seekers as 'dangerous and illegal mass arrivals by boat' and claims that 'queue jumpers won't be tolerated' by the New Zealand Government.[3] Other language surrounding the Bill refers to notions of "queue-jumping", "illegal migrants" and "mass arrivals".

16. In UNHCR's view these notions, and some of the language in the General Policy Statement are unhelpful in that they tend to mischaracterise the nature of asylum - as distinct from ordinary, managed migration or resettlement programmes.

17. From its experience in other countries, UNHCR has seen that the conflation of these concepts can have the unintended and highly undesirable consequence of undermining public support for the institution of asylum and the 1951 Convention, as well as mischaracterizing that some refugees are more deserving of protection than others, based solely on the manner of their arrival.

18. UNHCR's principal concern, therefore, is that the otherwise two legitimate objectives of the Bill have been conflated and confused both in the provisions of the Bill and in the

[3] Hon Nathan Guy, Minister of Immigration 'New measures to deter people smugglers announced' (Media Release, 30 April 2012) <http://www.beehive.govt.nz/release/new-measures-deter-people-smugglers-announced>.

policy changes that flow from it. From the surrounding language used to introduce the Bill, it is apparent that the objective of deterrence (and by necessary implication, punishment to those actually arriving) may taint and unduly influence the other policy objective of due process and management of people in the (unlikely) event of a genuinely mass arrival.

19. As the result, genuine asylum-seekers, refugees and their dependent families whose manner of arrival might define them as part of "mass arrival group'", will be accorded rights, treatment and a quality of reception and processing that are significantly inferior to those of asylum-seekers and refugees arriving by other means to New Zealand.

20. These differentiated standards of treatment, between people who may be equally deserving of international protection, raises important concerns of compliance with the 1951 Refugee Convention and other principles of international law, particularly the principle of non-discrimination.

UNHCR's submission addresses these issues in more detail below.

A. Mass arrival group

21. The proposed new section 9A establishes the definition of a "mass arrival group", each member of which is liable to arrest, detention, and removal because s/he does not possess a visa to lawfully enter and stay in New Zealand,[4] and who arrives in New Zealand (a) on board the same craft; or (b) on board the same group of craft at the same time; or (c) on board the same group of craft and within such a time period or in such circumstances that each person arrived, or intended to arrive, in New Zealand as part of the group.

22. UNHCR is concerned by the categorization of more than 10 persons as a "mass arrival group" (which, in the context of New Zealand, equates to approximately three per cent of annual asylum applications). In UNHCR's view:

> What constitutes a "mass or large-scale influx" cannot be defined in absolute terms, but must be defined in relation to the resources of the receiving country. The expression should be understood as referring to a significant number of arrivals in a country, over a short time period, of persons from the same home country who have been displaced under circumstances indicating that members of the group would qualify for international protection, and for whom, due to their numbers, individual refugee status determination is procedurally impractical.[5]

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[4] Classes of persons listed in section 115(1)(a)-(f) of the principal Act.

[5] UNHCR, *UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx*, 15 September 2000, [3] <http://www.unhcr.org/refworld/docid/437c5ca74.html>. See, also, UNHCR, *Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, Global Consultations on International Protection, EC/GC/01/4 (19 February 2001), [14]:

> In numerical terms, what amounts to "large-scale" or "mass" influx will necessarily differ from country to country and/or region to region, and must be decided on a case-by-case basis. The analysis needs to take into account the size and speed of the influx balanced against the size and capacity of the receiving country to process the cases in individual status determination systems.

23. UNHCR notes the Agency Disclosure Statement outlined in the Regulatory Impact Statement,[6] which explains the assumptions underpinning the proposed amendments:

> For the purposes of the options analysis and related costing work, it has therefore been necessary to make some assumptions. In particular, it has been assumed that:
>
> - 500 people would be involved in a mass arrival
> - They would all be from the same country/community
> - All of them would claim asylum on arrival
> - 62 percent of these claims would be declined following assessment by designated refugee and protection officers
> - All of the people whose claims were unsuccessful would lodge an appeal or seek a review of those decisions
> - The full determination and appeal/review process for all 500 asylum seekers would be completed in about 18 months. By then, people would have been granted refugee (or protected person) status, or become eligible for deportation.
>
> Costs and some practical implications would be different for groups of different size and composition.

24. UNHCR recognizes that the arrival of 500 asylum-seekers in New Zealand over a short period of time would present operational and management challenges for the Government of New Zealand, especially since it would exceed the current annual inflow of approximately 300 asylum applications. In the limited (and probably very rare circumstances) of such an arrival, special contingency plans would be useful to ensure that such persons are disembarked and received in a way that is safe, humane and human rights-based whilst, at the same time, protecting New Zealand's legitimate concerns while health and security and identity checks are carried out.

25. UNHCR is concerned, however, that the operating assumptions on which the Bill is partially based (i.e. an arrival of up to 500 people at once) are not reflected in the very low threshold defined as a "mass arrival group" in the Bill.

26. It is difficult to see that an arrival at the lower end of the scale (as few as 11 people) can be considered a "mass arrival group" whose presence in New Zealand would overwhelm the resources available and the efficacy of the current legal framework for dealing with such cases. Here, UNHCR is concerned the stated objective of deterrence might be a factor that would influence any decision to seek a "mass arrival group" warrant of detention when, in fact, the exigencies of the situation would not justify this.

27. UNHCR is concerned that a principal consequence of the legislative amendment, which effectively introduces a new category of asylum-seeker, may be to discriminate unfairly and arbitrarily on the basis of the manner of arrival. The deterrence and punitive elements of the provisions, as announced by the Government around the Bill, tend to undermine the justification that the provisions are required solely for the purposes of effective administration of the State when confronted by large numbers.

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[6] Above n 2, 1(emphasis added)

28. UNHCR is of the view that the stated grounds for the designation as a "mass arrival group" - notably to deter people smugglers and their 'clients' and to ensure 'effective and efficient management' – do not provide a legitimate and lawful justification for a substantially differentiated treatment of refugees and asylum-seekers who arrive as part of a so-called 'mass arrival'. Considerations such as deterrence and punishment are not legitimate criteria on which any decision to detain can be based in the context of refugee protection.

29. The only grounds that might justify a limited period of detention, or some lesser restrictions on liberty and freedom of movement - and a departure from the current law in New Zealand - would be that legitimate issues of identity, health and security need to be assessed and that these cannot reasonably be done in the absence of some limited restrictions on freedom of movement of an individual.

30. In this regard, the legislation may be at variance with international human rights standards which only allow differentiation in treatment if the criteria for such differentiation are reasonable, proportionate, objective, and for a legitimate purpose.[7] If these criteria are not met, the differentiation may constitute discrimination and may be inconsistent with Articles 2 and 26 of the 1966 ICCPR, and potentially also Article 3 of the 1951 Convention.

31. Detention based on such grounds could be considered arbitrary if not linked clearly to a legitimate purpose and objective.

RECOMMENDATION 1:

UNHCR recommends that the Committee review all the provisions of the Bill to ensure that considerations of deterrence and penalty are excised entirely from the operative parts of the Bill and that only elements that are genuinely required to meet the operational exigencies of a mass arrival are included.

RECOMMENDATION 2:

UNHCR recommends that the Committee closely review whether the low threshold of 11 or more persons constitutes a "mass arrival group" is an appropriate level to trigger the detention and other arrangements anticipated by the Bill and recommends a more flexible definition and higher 'trigger' level which can be seen, objectively, as necessary and proportionate to the exigencies of any given "mass arrival group" arriving.

[7] United Nations Human Rights Committee General Comment No. 18: Non-discrimination: 10/11/1989, para. 13.

B. Detention of mass arrival group

32. The proposed new sections 317A to 317E provide for the application, determination, variation, extension and cessation of a warrant of commitment for the members of a mass arrival group ("a mass arrival warrant").

33. Section 317A specifies that 'an immigration officer may apply to a District Court Judge for a mass arrival warrant authorising the detention, for a period of not more than six months, of the members of the mass arrival group'(as defined in new section 9A).[8]

34. Designation of a mass arrival group requires a prior determination by an immigration officer that each member is unlawfully in New Zealand and, therefore, liable to arrest, detention and turnaround pursuant to section 115 of the principal Act.

35. The District Court Judge is then required to complete a two-step determination which considers (i) whether the warrant is necessary, for the reasons prescribed in new section 317A(1)(a); and (ii) whether one or more of the circumstances prescribed in section 316(1) of the principal Act, relating to the ability to remove the person from New Zealand, apply in respect of each member of the mass arrival group. 'If satisfied as to the above matters, the Judge is required to issue the warrant detaining the group for up to six months unless he or she is satisfied that a shorter period of detention is appropriate.'[9]

36. The new section 317A(1)(a) specifies that a group warrant will be necessary: (i) to effectively manage the mass arrival group; or (ii) to manage any threat or risk to security or to the public arising from, or that may arise from, 1 or more members of the mass arrival group; or (iii) to uphold the integrity or efficiency of the immigration system; or (iv) to avoid disrupting the efficient functioning of the District Court, including the warrant of commitment application procedure.

37. It is noted that the Immigration Amendment Bill 2012 provides for the "mandatory" issuance of a (group) mass arrival warrant subject to these conditions being satisfied. However, procedural safeguards have been incorporated by section 317B, which requires the District Court Judge to determine the necessity of a group warrant and the removal of a member of the group; and section 317D, which authorizes a District Court Judge to impose reporting requirements (relating to the ongoing necessity for the warrant) on an immigration officer when issuing a mass arrival warrant or varying a mass arrival warrant.

38. Whilst these are useful procedural safeguards, UNHCR reiterates its longstanding position that the detention of asylum-seekers is inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Refugees are frequently victims of torture or trauma and a detention environment for them – even for limited

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[8] NZ Parliamentary Library, *Bill Digest: Immigration Amendment Bill 2012*, No 1973, 2 May 2012, 3 (emphasis added) <http://www.parliament.nz/NR/rdonlyres/ED688E98-AC49-4AB6-A66B-1B93A5339AAF/217777/1973Immigration1.pdf>

[9] Ibid (emphasis added).

periods – can be highly inappropriate. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.[10]

39. In this respect, Article 31 takes into account the fact that refugees may be compelled to enter a country illegally in order to escape persecution. Article 31 also provides that Contracting States shall not apply to the movements of refugees, restrictions other than those which are strictly necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country.

40. The United Nations Human Rights Committee has noted that for detention to be lawful, it must pursue a legitimate objective that is determined to be necessary, reasonable in all the circumstances and proportionate in *each individual case*; and that detention can only be justified where other less invasive or coercive measures have been considered.[11] Detention must also be subject to periodic and judicial review (see, specifically, article 9(4) of the 1966 ICCPR). In particular, the UN Human Rights Committee has stated that mandatory and non-reviewable detention is unlawful as a matter of international law.[12]

41. Practically, detention has been shown to cause psychological illness, trauma, depression, anxiety, and other physical, emotional and psychological consequences. Detention can exacerbate the suffering and trauma that asylum-seekers may already have undergone prior to or during flight to seek protection. These consequences of detention can be even more severe for vulnerable asylum-seekers such as children, pregnant women, the elderly, victims of torture or trauma and persons with physical and/or mental disabilities.

42. As deterrent, there is no empirical evidence that detention prevents irregular migration, or discourages persons from seeking asylum.[13] It is also an irrelevant consideration in any decision to deprive an individual of his/her liberty. Detention can also create increased difficulties for later integration in the host country for those persons found to be in need of protection.

43. Taking these considerations into account, UNHCR is if of the view that the human rights consequences, as well as the social and economic costs of administrative detention for

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[10] See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953), Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, opened for signature 22 November 1969 (entered into force 18 July 1978), and Islamic Conference of Foreign Ministers, *Cairo Declaration on Human Rights in Islam*, 5 August 1990.

[11] *C v. Australia,* HRC, Comm. 900/1999, 13 November 2002, [8.2].

[12] *A v. Australia,* HRC, Comm. No. 560/1993, 30 April 1997, [9.4]-[9.5] and *C v. Australia,* HRC, Comm. 900/1999, 13 November 2002, [8.3] concluding on violations of article 9 (4) ICCPR, see ExCom Conclusion No. 44 (XXXVII), *Detention of Refugees and Asylum-Seekers*, (1986), (e).

[13] A. Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, UNHCR, PPLA/2011/01.Rev.1 http://www.unhcr.org/refworld/docid/4dc935fd2.html; and UNHCR, *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, July 2011 <http://www.unhcr.org/refworld/docid/4e315b882.html>.

any prolonged period, would argue for deeper exploration of, and investment in, alternatives to detention, with which New Zealand has, to date, had good experiences and been a model for.[14]

44. UNHCR's *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* specify the limited basis on which the detention of asylum-seekers may be permissible, if necessary and if prescribed by a national law which is in conformity with general norms and principles of international human rights law. The exceptional situations in which detention of asylum-seekers may be permitted are those agreed to by States in ExCom Conclusion No. 44 (XXXVII) of 1986:[15] (i) to verify identity; (ii) to determine the elements on which the claim for refugee status or asylum is based;[16] (iii) to deal with cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or (iv) to protect national security or public order.

> Detention of asylum-seekers which is applied for purposes other than those listed above, for example, as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country. Detention should also be avoided for failure to comply with the administrative requirements or other institutional restrictions related to residency at reception centres, or refugee camps.[17]

45. UNHCR's Detention Guidelines also propose a number of alternatives to the use of detention for asylum seekers, including the use of reporting and residency requirements, release on bail, sureties and allowing asylum-seekers to live in open centres where their presence can be monitored.

46. The proposed safeguards within section 317A through to 317E are reassuring, however, UNHCR is of the view that the new section 317A(1)(a), which specifies the criteria for determining that a group warrant is necessary, but may be too vague and uncertain. The conflation of the objective of sound public administration - which might involve limited periods of detention as part of a legitimate, necessary and proportionate response - with the overarching language and objective of deterrence is unhelpful.

47. UNHCR is concerned that the grounds outlined to justify that a group warrant is necessary detracts from an individualized, case-by-case, assessment of the basis for detention (as provided in section 316(1) of the principal Act), especially when a "mass arrival group" is defined in the numerical terms of more than 10 persons. The fact that '[a]n application under this section may, but is not required to, include any other

[14] Ibid.

[15] UNHCR, ExCom Conclusion No. 44 (XXXVII), *Detention of Refugees and Asylum-Seekers*, 13 October 1986, available at: http://www.unhcr.org/refworld/docid/3ae68c43c0.html [accessed 8 June 2012]

[16] UNHCR elaborates that 'the asylum-seeker may be detained exclusively for the purposes of a preliminary interview to identify the basis of the asylum claim … and would not extend to a determination of the merits or otherwise of the claim', Ibid; UN High Commissioner for Refugees, *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, 4-5, available at: http://www.unhcr.org/refworld/docid/3c2b3f844.html [accessed 8 June 2012]

[17] Ibid, Detention Guidelines, 5 (emphasis added).

supporting evidence, for example, the names of, photographs of, or other information relating to the members of the mass arrival group' reaffirms this concern.

48. In particular, UNHCR is concerned that a mass arrival warrant may be interpreted to be necessary, in accordance with the new section 317A(1)(a)(ii), 'to manage any threat or risk to security or to the public arising from, or that may arise from, 1 or more members of the mass arrival group'.

49. UNHCR's Detention Guidelines acknowledge that detention may be necessary to protect national security or public order; however, all decisions to detain an asylum-seeker must be based on an individualized (case-by-case) basis, and not based on the circumstances of their arrival with other persons who are assessed to present such risk.[18]

50. UNHCR appreciates that in exceptional circumstances, with very large numbers of asylum-seekers, a limited period of detention on a group basis may indeed legitimately be considered necessary, on a temporary basis. However, even in such circumstances, the focus should return as quickly as possible to an individualized assessment of risk. Such exceptional circumstances would not, in UNHCR's view, arise should a boat of 11 asylum-seekers arrive. This would be neither reasonable nor proportionate to New Zealand's demonstrated capacity and resources.

51. Additionally, UNHCR is of the view that the issuance of a mass arrival warrant, which requires a District Court Judge to determine that each member of the group is unlawfully in New Zealand and that each member of the group is not removable, may in fact be onerous on the judge, and consequently not achieve the purpose of subsections (1)(a)(i), (iii) and (iv), to enhance the effective and efficient management of mass arrival, the integrity or efficiency of the immigration system, or the efficient functioning of the District Court.

52. It seems that the District Court Judge must still be satisfied that each and every person on the 'mass arrival group' warrant is properly included on that warrant (after due enquiry has been made that the person is not an unaccompanied minor and is not in possession of legitimate identity documentation that would justify his/her release either conditionally or unconditionally).

53. If this is the case then the Judge will have to carry out the extensive assessment that the Bill is trying, for reasons of efficiency and good administration, to avoid.

54. UNHCR notes, in this regard, that the Regulatory Impact Statement identifies significant resource implications associated with the proposed legislative amendments:

> There would be resource implications for the prison system, the [Mangere Refugee Resettlement Centre] MRRC and the additional facilities that would need to be commissioned to accommodate up to 500 people during the initial period of detention.
> …
> More detention facilities would be needed for longer. People detained outside prison would be held in 'open' detention facilities which would not be as secure as prisons. If

[18] Ibid, Detention Guidelines, 3.

more than about 200 people arrived, the MRRC would not be adequate and additional facilities would have to be commissioned.'[19]

Need to consider alternative reception arrangements instead of mandatory detention

55. A mass arrival warrant does not afford any individualized assessment of the place of detention, especially in respect of families, women and children. In UNHCR's view, '[a]lternatives to the detention of an asylum-seeker until status is determined should be considered. The choice of an alternative would be influenced by an individual assessment of the personal circumstances of the asylum-seeker concerned and prevailing local conditions.'[20]

56. Contingency planning for a large arrival need not automatically require a regime of mandatory detention. In UNHCR's experience, some less intrusive reception arrangements might serve as perfectly adequate to protect New Zealand's security but also allow more humane and appropriate treatment of asylum-seekers and refugees.

Treatment of Families, Vulnerable Individuals and Children, including Unaccompanied Minors (UAMs)

57. UNHCR welcomes the general policy statement that a mass arrival warrant will not apply to any unaccompanied minors arriving as part of a mass arrival group.[21] However, the new section 317A(5) elaborates that a minor (a person under 18 years of age) must not be included in an application for a mass arrival warrant 'unless the person has a parent, guardian, or relative who is a member of the mass arrival group.'

58. This provision is problematic because:

    (a) A minor accompanied by a relative with whom s/he has no real bond (*in locum parentis*) might be included in a mass arrival warrant when s/he should be more appropriately considered an unaccompanied minor under UNHCR Guidelines;
    (b) A proper assessment of the family relationships, to determine UAM status, would require an extensive interview by a child protection specialist;
    (c) It lacks the flexibility to deal with children in a manner required by the Convention on the Rights of the Child and other standards, including a requirement that detention of any child, whether accompanied by a relative or not, should be a last resort and as non-intrusive and for as short a time as possible;[22]
    (d) It does not properly take into account in individual circumstances of vulnerability and disability;
    (e) Alternatives to detention should be explored before any child is included in a mass arrival warrant. This would require an enquiry into the best interests of the child by a suitably qualified official. It is also difficult to see how detention would

[19] Above n2, 7-8
[20] Above n16, Detention Guidelines, Guideline 4, (emphasis added).
[21] Above n 1, 1
[22] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, article 37(b)., available at: http://www.unhcr.org/refworld/docid/3ae6b38f0.html [accessed 8 June 2012]

be required for any child unless there were clear reasons for considering the child posed a security threat to New Zealand;

(f) Concerns over health and identity of children can easily be considered in a reception centre or community-based arrangement and would not, except in very exceptional circumstances, require formal detention.

RECOMMENDATION 3:

UNHCR recommends that the Committee:

1. **Examine whether alternatives to mandatory detention, including open reception centres with reporting and other conditions of residence, are more appropriate than the scheme proposed by the Bill.**
2. **Explore better safeguards to ensure that vulnerable individuals, particularly victims of torture or trauma, single women and persons suffering from severe disabilities are not included in mass arrival warrants without careful support plans being in place and unless alternative reception arrangements are determined not to be available.**
3. **Review whether families with children can be excluded from a mass arrival group and offered more appropriate reception and treatment.**
4. **Review whether the definition of 'unaccompanied minor' in Section 317A(5) is appropriate and properly reflects customary or traditional family relations and responsibilities.**
5. **Conversely, review whether children designated as 'accompanied' can properly be subject to detention.**
6. **Overall, enquire whether New Zealand's responsibilities to all children, pursuant to the Convention on the Rights of the Child, can be met under the detention provisions proposed in the Bill.**
7. **Give close consideration to the issues set out in para.58 of the Submission.**

C. Suspension of the processing of refugee and protection claims by regulation

59. The proposed new section 135A prohibits a refugee and protection officer from determining a claim where the processing of the claim is suspended in accordance with regulations made under section 400.

60. The Regulatory Impact Statement outlines that '[m]easures in this area could affect people who have lodged claims for refugee and/or protection status (whether they arrived in New Zealand as part of a mass arrival or otherwise).'[23]

[23] Above n .2, 8.

61. UNHCR notes that no regulations have been proposed which outline the circumstances under which a suspension of refugee status determination (RSD) processing may be contemplated. However, the Regulatory Impact Statement indicates that

> Suspending the processing of claims could sometimes provide flexibility in the management of asylum claims where, for example, reliable country information was not available to adequately determine their claim.[24]

62. Explanations by Government Officials as to the purpose of this provision seem to suggest that the suspension of refugee claims might take place where there is a rapidly evolving situation in a country of origin such that it would make an accurate assessment of refugee status difficult. Reference was made, by analogy to a decision by the Australian Government in April 2010 to suspend the processing of Afghan asylum seekers for a period of 6 months and that of Sri Lankan asylum seekers for 3 months. The justification for this suspension was, ostensibly, because of an evolving security situation in each country of origin.

63. UNHCR recognizes that there may be circumstances where pauses in normal refugee status determination processing are appropriate and in line with States' obligations under the 1951 Refugee Convention. Circumstances which might warrant such action could include mass influx situations and quickly evolving post-conflict situations where reliable country information is not available to adequately determine claims for protection.

64. Internationally, the main purpose of such measures is to increase the protection and humanitarian space for refugees and asylum-seekers while they are individually assessed. They should not be punitive or discriminatory in their application and should, ideally, be developed in cooperation with UNHCR and other countries in the region that are also affected by these issues.

65. UNHCR's concerns about the Australian policy, and arguably the current amendment to Section 135A are:

    (a) The real purpose of the suspension was a deterrent to asylum-seekers from those countries and not because the situation in either country warranted the suspension;
    (b) In the case of New Zealand, the suspension would appear to apply only to people on a 'mass arrival group' category and not other asylum-seekers of the same nationality but who had arrived by different means – thereby raising issues of rationality and discrimination.
    (c) Moreover, a deterrent or penalty for those in a 'mass arrival group' could be at odds with Article 31 of the 1951 Convention as it is based on the manner of arrival. It would also compromise New Zealand's obligations to uphold the principle of non-discrimination;
    (d) From a practical perspective, the main consequences of a suspension would be to prolong periods in detention, delay a proper assessment of protection needs, delay integration for genuine refugees and exacerbate the psycho-social trauma of displacement even further;

[24] Ibid, 9.

(e) As a deterrent measure (even if that were permissible, which UNHCR argues it is not), it was shown in the example of Australia not to have any effect at all.

66. UNHCR recommends that the circumstances under which a suspension of refugee status determination processing may be contemplated, implemented and withdrawn, and the entitlement to rights of any person who is the subject of a suspension, should be clearly specified in the principal Act rather than contained in subsidiary regulations. As proposed, the amendments represent a significant deviation from the need to have an effective assessment process with certainty and finality.

67. The suspension should be for a limited period of time and should be reviewed at the end of that period. The rights of the asylum-seekers who are the subject of the suspension must be identical to those of refugees.

RECOMMENDATION 4:

1. **UNHCR recommends that the circumstances under which a suspension of RSD processing may be contemplated, implemented and withdrawn, and the entitlement to rights of any person who is the subject of a suspension, should be clearly specified in the principal Act rather than contained in subsidiary regulations.**
2. **The introduction of any suspension should be strictly time bound and objectively justified on the basis of a rapidly evolving situation in a country of origin.**
3. **The use of suspensions for any purpose of deterrence or penalty would not be appropriate.**
4. **Any decision to suspend the processing of asylum claims should be accompanied by adequate procedural and substantive safeguards as to the treatment of people affected. In respect of the duration and regular review of the suspension, such safeguards would include; protection from *refoulement*, appropriate reception arrangements and special attention to the needs of vulnerable people, notably children.**

D. POLICY ANNOUNCEMENTS

68. The Government of New Zealand announced a number of policy changes which would necessarily follow from the Immigration Amendment Bill 2012 if enacted.

69. Whilst a review of these policy changes, technically, may not be the subject of the Committee's direct enquiry, UNHCR believes they also need to be taken into account because:

    (a) They can only be empowered through the enactment of the Bill's primary provisions designating someone as part of a mass arrival group; and

    (b) They disclose the 'deterrence' objective and punitive consequences of such a designation for refugees affected by the designation.

70. Broadly, the Policy changes establish a temporary period of protection (3 years) following which a recognised refugee would have to re-establish his/her need for refugee protection. During this period, a refugee would be denied the same rights of family reunion accorded to other refugees arriving by other means to New Zealand.

71. These Policy changes raise very important questions of compliance with New Zealand's obligations under the 1951 Convention[25] and other human rights instruments to which it is party.

D.1 Three Years of Temporary Protection Status following Recognition as a Refugee

72. The policy announcements would require a Convention refugee to re-establish his/her need for international refugee protection three years after the original determination by the New Zealand Government, with permanent residence not granted unless this reassessment is approved.

73. UNHCR is concerned that the grant of temporary protection (for a period of three years), which is usually reserved for dealing with overwhelming, unexpected mass influx situations in the face of generalized violence or human rights abuse, does not provide certainty or finality to recognized refugees and misunderstands the cessation clauses of the 1951 Convention in respect of refugees who have been recognized by individualized RSD procedures.

74. UNHCR advises that:

> The Committee has examined the special problems of international protection which arise in situations of mass or large-scale influxes of asylum-seekers, and has acknowledged the

[25] Above n4

> value of temporary protection as a pragmatic and flexible method of affording international protection in such situations.[26]
>
> …
>
> The Executive Committee has stressed the fundamental importance of the provisions of the 1951 Refugee Convention and 1967 Protocol, and the exceptional character of the use of the device of temporary protection. While accepting that the suspension of status determination procedures may be necessary in situations of mass influx, the Committee has affirmed that the implementation of temporary protection must not diminish the protection afforded to refugees under the above instruments.[27]

75. The 1951 Convention recognizes that refugee status may end under certain clearly defined conditions. This means that once an individual is determined to be a refugee, their status is maintained unless they fall within the terms of the cessation clauses or their status is cancelled or revoked. Under article 1C of the 1951 Convention, refugee status may cease either through the actions of the refugee (contained in sub-paragraphs 1 to 4), such as by re-establishment in his or her country of origin, or through fundamental changes in the objective circumstances in the country of origin upon which refugee status was based (sub-paragraphs 5 and 6).[28]

76. Article 1C envisages cessation based on both individual acts of recognized refugees and also on a general change in conditions in the country of origin. This means the trigger for cessation of status must be based either on a change in personal circumstances of refugees or changed circumstances in the country of origin.[29] In UNHCR's view;

> there is no place within the scheme of the [1951] Convention that a person recognized as a refugee be required to re-assert a claim for recognition under Article 1A(2) or, on any view, for that recognition to lapse.[30]

77. Due to the fact that cessation results in the withdrawal of rights, and the serious consequences that may have, UNHCR considers that, at the very least, the evidentiary burden of proof should lie with the authorities in the country of asylum to establish that the grounds for cessation have been clearly made out.[31] A full determination procedure, with review and appeal rights would need to accompany any review (and possible loss of refugee status) at the end of 3 years.

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[26] UN High Commissioner for Refugees, *UNHCR Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx*, 15 September 2000, available at: http://www.unhcr.org/refworld/docid/437c5ca74.html [accessed 8 June 2012], 3.

[27] Ibid, 4.

[28] UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, HCR/GIP/03/03 (10 February 2003), [1] <http://www.unhcr.org/refworld/docid/3e50de6b4.html>.

[29] UN High Commissioner for Refugees, *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH of 2004 - Outline of submissions on behalf of the Office of the United Nations High Commissioner for Refugees (as Amicus Curiae)*, 8 June 2006, [23] available at: http://www.unhcr.org/refworld/docid/4b614d092.html [accessed 8 June 2012]

[30] Ibid, [20].

[31] See, eg, UNHCR, Global Consultations Lisbon Expert Roundtable, *Summary Conclusions – Cessation of Refugee Status*, 3-4 May 2001, [27]: 'If in the course of the asylum procedure there are fundamental changes in the country of origin, the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable.'

78. UNHCR is concerned, in this regard, that there is no clear legal framework to conduct any reassessment, or whether such an application would comprise a "subsequent claim" in accordance with section 4 of the principal Act. Additionally, the policy would impose an unnecessary burden on the public resources of New Zealand to complete a reassessment of the case. This does not appear to be consistent with the stated objective of the Immigration Amendment Bill 2012 to enable the effective and efficient management of a mass arrival group, and may represent an inefficient use of public funds.

79. UNHCR considers that, in principle, recognition as a refugee or protected person should offer finality and certainty to a refugee and/or protected person (as well as their families). Ordinarily, recognition would lead to some form of grant of long term legal status equivalent to permanent residence and to citizenship within a prescribed period.

80. Refugees must be assured that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in their country of origin so the cessation clauses of the 1951 Convention should be applied restrictively. The legislation and procedures should require clear and compelling evidence which satisfies the objectively identifiable criteria outlined in Article 1C and which demonstrates the existence of a settled and durable situation incompatible with a real chance of persecution.

81. Even though the 1951 Convention permits the ending of refugee status, if the conditions for cessation under Article 1C are met, UNHCR is of the view that a refugee's status should not, in principle, be subject to frequent review to the detriment of his or her sense of security, which international protection is intended to provide, and that a refugee who, or whose family, has suffered under atrocious forms of persecution should not be expected to repatriate. The proviso to Article 1C of the 1951 Refugee Convention makes it clear that refugee status should be retained even where there have been improvements in the country of origin.

82. In summary, UNHCR's main concerns about this Policy change, requiring a reassertion of refugee status after 3 years, are that:

(a) The period of 3 years, and possibly much longer if further review and appeal rights are exercised, will require very considerable public resources and a drain on public administration – objectives the principal Amending Bill is seeking to avoid;
(b) The reassertion of refugee status will impact negatively on a refugees' psycho-social health and impede (and delay) their ability to eventually settle in New Zealand. Their long term ability to become successful and contributing members of New Zealand society will be undermined – an objective being sought by New Zealand Refugee Settlement Strategy;
(c) It is contrary to normal principles of good administration to achieve certainty and finality of process;
(d) Refugees would not be entitled to be reunified with their family members (see next section);

(e) It applies only to persons designated as members of a "mass arrival group'. The suspension does not apply to other refugees so is discriminatory, punitive based on the manner of arrival and therefore arbitrary.

83. The only discernable justification for the differentiated treatment of "mass arrival group" members, when compared to more favourable treatment of other refugees, is to serve the stated objective of deterrence of the principal Bill. In UNHCR's view, this amounts to discriminatory and arbitrary treatment as it is not linked to any necessary or legitimate purpose.

84. In UNHCR's view it would be inconsistent with New Zealand's obligations of non-discrimination under the International Covenant on Civil and Political Rights[32], customary norms of international law relating to non discrimination and, arguably, Articles 3 and 31 of the 1951 Convention as it could amount an unjustified penalty.

RECOMMENDATION 5:

On the basis of the concerns set out in paragraph 82 of this Submission, UNHCR recommends that the Government of New Zealand resile from any policy that suspends or delays the legitimate rights of refugees to enjoy the full range of rights to which they are entitled under the 1951 Convention.

The use of this policy to deter asylum-seekers and refugees, and to penalise those who arrive in a prescribed way to New Zealand, is inconsistent with important commitments under the 1951 Convention and international human rights law and should not be implemented, in the event the Bill is enacted.

[32] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.unhcr.org/refworld/docid/3ae6b3aa0.html [accessed 8 June 2012]

D.2 Suspension and Limitations on the Right to Family Reunification

85. Linked to the temporary protection status described above, the Government has also announced policy changes that suspend the right of family reunification to immediate family members for refugees who have arrived in a "mass arrival group" until the grant of permanent residence. At a minimum, this would be for a period of at least 3 years from the date refugee status was recognised and after a mandatory reassessment of refugee status. In all likelihood, this policy change would lead to the long term separation of refugees from their immediate family members, including spouses and dependent children.

86. This policy change raises very serious questions about the deterrent objectives and penalty consequences of the Bill. It also raises serious questions about its compliance with New Zealand's international obligations under the1951 Convention and other applicable human rights law.

87. In principle, all Convention refugees, including refugees who are granted temporary protection in the country of asylum, are entitled to defined rights and obligations as specified in articles 2 - 34 of the 1951 Convention, as well as basic human rights and humanitarian standards.[33] In particular, Article 34 of the 1951 Convention requires that Contracting States shall 'as far as possible facilitate the assimilation and naturalization of refugees.'

The Principle of family unity is of special significance and importance to refugees.

88. The principle of family unity is enshrined in international law as the natural and fundamental unit of society and entitled to protection by society and the State.[34]

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[33] UNHCR, ExCom Conclusion No. 22 (XXXII), *The Protection of Asylum-Seekers in Situations of Large-Scale Influx*, (1981), [1]-[2]; UNHCR, *Commentary on the Draft Directive on Temporary Protection in the Event of a Mass Influx*, [6]

"Among the standards adopted by the Committee on the treatment of beneficiaries of temporary protection in matters within the field of civil and political rights, are:
(i) that they should not be penalized or exposed to any unfavorable treatment solely on the ground that their presence in the country is considered unlawful;
(ii) that they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order;
(iii) that they should be provided with appropriate documentation, where appropriate in cooperation with UNHCR;
(iv) that they should not be subjected to cruel, inhuman or degrading treatment and should generally enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights;
(v) that they should not be discriminated against on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity;
(vi) that they should be considered as persons before the law, enjoying free access to courts of law and other competent administrative authorities;
(vii)that the unity of their family should be respected and they should be given all possible assistance for the tracing of relatives."

[34] , ICCPR, Above n30, Articles 17 and 23; Above n22, 1989 CRC, Articles 3, 9, 10, 16 and 22; and UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 25 July 1951, A/CONF.2/108/Rev.1, http://www.unhcr.org/refworld/docid/40a8a7394.html [accessed 8 June 2012]

UNHCR's Executive Committee (ExCom) has underlined on several occasions the need for the unity of the refugee's family to be protected. In particular, when the principal applicant is recognized as a refugee, other members of the family unit should normally also be recognized as refugees. Family unity issues should be treated as a matter of priority,[35] and family reunification should be facilitated in the State where a refugee is a lawful resident provided that there is no other country where the family could live together.[36]

89. UNHCR supports the family reunification of (a) the "nuclear family", consisting of husband and wife and their dependent children; (b) other dependent members of the family unit (including dependent parents of adult refugees, other dependent relatives, and other dependent members of the family unit); and (c) other relatives in need of resettlement.[37]

90. The principle of dependency should be considered flexibly and include members of an extended family group if they have a close dependency (or primary caregiving relationship). <u>The principle of reunification should be considered in culturally sensitive and case specific way that reflects the real nature of the bonds of kinship, responsibility and dependency</u>.

> Given the disruptive and traumatic factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival. These families may not fit neatly into preconceived notions of a *nuclear* family (husband, wife and minor children). In some cases the difference in the composition and definition of the family is determined by cultural factors, in others it is a result of the refugee experience. A broad definition of a family unit – what may be termed an extended family – is necessary to accommodate the peculiarities in any given refugee situation, and helps minimize further disruption and potential separation of individual members during the resettlement process.
>
> The principle of dependency requires that economic and emotional relationships between refugee family members be given equal weight and importance in the criteria for reunification as relationships based on blood lineage or legally sanctioned unions.[38]

91. In this context, UNHCR has a number of important concerns about the legal and human impact of the policy changes that will be activated by the Bill:

    a. The proposed restrictions on family reunion are incompatible with the letter and spirit of the 1951 Convention, and its ultimate goal of providing durable solutions

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[35] UNHCR, ExCom Conclusion No. 88 (XLX), *Protection of the Refugee's Family*, (1999), (b) (iii) and (iv); and ExCom Conclusion No. 24 (XXXII), *Family Reunification*, (1981), [2] and [5].

[36] UNHCR, ExCom Standing Committee, *Family Protection Issues*, EC/49/SC/CRP.14 (4 June 1999), [13] <http://www.unhcr.org/refworld/docid/4ae9aca00.html>.

[37] UNHCR, ExCom, Sub-Committee of the Whole on International Protection, *Note on Family Reunification*, EC/SCP/17, (13 August 1981), [5].

[38] UNHCR, Annual Tripartite Consultations on Resettlement, *Background Note for the Agenda Item: Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, 1-2.

to refugees, because it delays the regularization of permanent legal status and, therefore, access to naturalization procedures;

b. The restrictions on family reunion are a significant infringement on affected refugees' right to private life, including family unity. Where children are separated, or prevented from being reunified by this Policy, then issues arise in relation to compliance with the Convention on the Rights of the Child;

c. Family separation is proven to exacerbate the needs of an individual's family abroad, particularly women-at-risk and unaccompanied minors. It is also damaging to the psychosocial health and wellbeing of affected refugees.

d. UNHCR's experience of similar policies in other jurisdictions has shown that temporary permits that suspend full refugee rights and prevent family reunion can lead to other family members trying to join their families by undertaking risky journeys to reunite since there are no legal means available to them. Paradoxically, this is the very result the Bill endeavours to prevent.

e. The serious limitations on family reunion for members of a "mass arrival group''"are not imposed on other refugees. The inferior level treatment and rights of this former group can only be explained by reference to the objectives of deterrence in the Bill.

f. UNHCR is of the clear view that this differentiated treatment is discriminatory based on the manner of arrival, unjustified and contrary to important principles of refugee and international human rights law to which New Zealand is a party.

g. These include possible and serious incompatibility with:

    i. Customary principles of international law relating to non-discrimination;
    ii. Articles 3 and 31 of the 1951 Convention (including the Recommendation B of the Conference of Plenipotentiaries relating to family unity);
    iii. Articles 2, 3 and 26 of the International Covenant on Civil and Political Rights;
    iv. The Convention on the Rights of the Child, in particular Articles 2(2), 3, 4, 5, 9, 10 and 16.

RECOMMENDATION 6:

UNHCR concludes and recommends:

1. **That the intention of the policy announcement to suspend the family reunification of "mass arrival group" refugees for a period of 3 years and probably much longer is inconsistent with a number of human rights instruments to which New Zealand is party (see para. 91(g) of the Submission);**

2. **The policy option should not be pursued in the event the principal Bill is enacted.**

3. **The principle of family unity must be fully respected and applied consistently throughout the refugee procedure and all refugees recognized under the 1951 Convention should be entitled to apply for family reunification in a timely way and which does not discriminate on the basis of the manner of arrival.**

4. **The limitation on family reunification to immediate (nuclear) family members should be removed and a definition that respects cultural or traditional customs of other communities should be respected if a clear dependency and responsibility is made out between members of an extended family.**

5. **The objective of deterrence and penalizing certain refugees, based solely on the manner of their arrival, has no legitimate place in any policy relating to principles of family reunion for refugees under the 1951 Convention.**

III. CONCLUSION

92. UNHCR believes that the Immigration Amendment Bill 2012, and its accompanying policy announcements, raise a number of important concerns that require deeper consideration as they affect New Zealand's international legal obligations to protect refugees.

93. UNHCR would welcome the opportunity to address the Government of New Zealand, and the Transport and Industrial Relations Committee, on the implications of the proposed legislative amendments[39] as required.

UNHCR Regional Representation for Australia,
New Zealand, Papua New Guinea and the Pacific
Canberra, 8 June 2012

[39] Above, n2

SUMMARY OF UNHCR'S RECOMMENDATIONS:

RECOMMENDATION 1:

UNHCR recommends that the Committee review all the provisions of the Bill to ensure that considerations of deterrence and penalty are excised entirely from the operative parts of the Bill and that only elements that are genuinely required to meet the operational exigencies of a mass arrival are included.

RECOMMENDATION 2:

UNHCR recommends that the Committee closely review whether the low threshold of 11 or more persons constitutes a "mass arrival group" is an appropriate level to trigger the detention and other arrangements anticipated by the Bill and recommends a more flexible definition and higher 'trigger' level which can be seen, objectively, as necessary and proportionate to the exigencies of any given "mass arrival group" arriving.

RECOMMENDATION 3:

UNHCR recommends that the Committee:

1. **Examine whether alternatives to mandatory detention, including open reception centres with reporting and other conditions of residence, are more appropriate than the scheme proposed by the Bill.**

2. **Explore better safeguards to ensure that vulnerable individuals, particularly victims of torture or trauma, single women and persons suffering from severe disabilities are not included in mass arrival warrants without careful support plans being in place and unless alternative reception arrangements are determined not to be available.**

3. **Review whether families with children can be excluded from a mass arrival group and offered more appropriate reception and treatment.**

4. **Review whether the definition of 'unaccompanied minor' in Section 317A(5) is appropriate and properly reflects customary or traditional family relations and responsibilities.**

5. **Conversely, review whether children designated as 'accompanied' can properly be subject to detention.**

6. **Overall, enquire whether New Zealand's responsibilities to all children, pursuant to the Convention on the Rights of the Child, can be met under the detention**

provisions proposed in the Bill.

7. **Give close consideration to the issues set out in para.58 of the Submission.**

<u>RECOMMENDATION 4</u>:

1. **UNHCR recommends that the circumstances under which a suspension of RSD processing may be contemplated, implemented and withdrawn, and the entitlement to rights of any person who is the subject of a suspension, should be <u>clearly specified in the principal Act rather than contained in subsidiary regulations</u>.**

2. **The introduction of any suspension should be strictly time bound and objectively justified on the basis of a rapidly evolving situation in a country of origin.**

3. **The use of suspensions for any purpose of deterrence or penalty would not be appropriate.**

4. **Any decision to suspend the processing of asylum claims should be accompanied by adequate procedural and substantive safeguards as to the treatment of people affected. In respect of the duration and regular review of the suspension, such safeguards would include; protection from *refoulement*, appropriate reception arrangements and special attention to the needs of vulnerable people, notably children.**

<u>RECOMMENDATION 5</u>:

On the basis of the concerns set out in paragraph 82 of this Submission, UNHCR recommends that the Government of New Zealand resile from any policy that suspends or delays the legitimate rights of refugees to enjoy the full range of rights to which they are entitled under the 1951 Convention.

The use of this policy to deter asylum-seekers and refugees, and to penalise those who arrive in a prescribed way to New Zealand, is inconsistent with important commitments under the 1951 Convention and international human rights law and should not be implemented, in the event the Bill is enacted.

<u>RECOMMENDATION 6</u>:

UNHCR concludes and recommends:

1. **That the intention of the policy announcement to suspend the family reunification of "mass arrival group" refugees for a period of 3 years and probably much longer is inconsistent with a number of human rights instruments to which New Zealand is party (see para. 91(g) of the Submission);**

2. **The policy option should not be pursued in the event the principal Bill is enacted.**

3. **The principle of family unity must be fully respected and applied consistently throughout the refugee procedure and <u>all refugees</u> recognized under the 1951 Convention should be entitled to apply for family reunification in a timely way and which does not discriminate on the basis of the manner of arrival.**

4. **The limitation on family reunification to <u>immediate (nuclear) family members</u> should be removed and a definition that respects cultural or traditional customs of other communities should be respected if a clear dependency and responsibility is made out between members of an extended family.**

5. **The objective of deterrence and penalizing certain refugees, based solely on the manner of their arrival, has no legitimate place in any policy relating to principles of family reunion for refugees under the 1951 Convention.**

Attachment A

UNHCR's Standing to Comment

1. New Zealand is a Contracting State to the *1951 Convention relating to the Status of Refugees* and the *1967 Protocol relating to the Status of Refugees* (collectively, "the 1951 Refugee Convention").[40]

2. UNHCR has the duty of supervising the application of the 1951 Refugee Convention pursuant to the preamble and articles 35 and 36 of the 1951 Convention, articles II and IIII of the 1967 Protocol, and the *1950 Statute of the Office of the United Nations High Commissioner for Refugees* ("the UNHCR Statute").[41] These instruments call for cooperation between Governments and UNHCR in dealing with refugee problems, including in respect of laws and regulations which they may adopt.

3. The Office's supervisory role is complemented by the conclusions reached by consensus by UNHCR's Executive Committee ('ExCom').[42] Although not binding, ExCom Conclusions constitute expressions of opinion which are broadly representative of the views of the international community. New Zealand plays an active role in the work of ExCom.

4. UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ("the Handbook")[43] provides guidance to government officials concerned with the determination of refugee status in the various Contracting States. UNHCR also issues legal positions on specific questions of international refugee law. The Handbook and the Guidelines are intended to guide government officials, judges, practitioners, as well as UNHCR staff.

5. More generally, UNHCR's Thematic Guidelines are developed by drawing on the 1951 Refugee Convention, ExCom Conclusions, and general human rights treaties, including the *1966 International Covenant on Civil and Political Rights* (1966 ICCPR), the *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984 CAT) and the *1989 Convention on the Rights of the Child* (1989 CRC).

6. UNHCR's *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* ("UNHCR's Detention Guidelines"),[44] issued in February 1999 (and which are currently under review), establish the applicable minimum standards which apply to all refugees, asylum-seekers and stateless persons who are being considered for, or who are in, detention or detention-like situations.

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[40] The term '1951 Refugee Convention' is used to refer to the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

[41] UN General Assembly, Resolution 428 (V) of 14 December 1950.

[42] ExCom Members are elected by the United Nations Economic and Social Council (ECOSOC) on the basis of their (a) demonstrated interest in and devotion to the solution of refugee problems; (b) widest possible geographical representation; and, (c) membership of the United Nations or its specialized agencies.

[43] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/ENG/REV.3 (December 2011).

[44] UNHCR, *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (26 February 1999)