**Attachment 1**

## Detailed concerns about the revived offshore processing regime

The following are some of the main points of detailed concern with the offshore processing regime which militate against the extension of that regime by the 2012 UMA:

- Accommodation on Nauru and Manus Island is poor and new housing needs to be completed. Clearly asylum seekers have been sent to these places prematurely regardless of the predictable effects on their health. Processing has not yet begun, the Minister stating that it will begin early next year. These physical conditions, together with the heightened uncertainty due to delay in processing their claims, is leading to the kinds of mental health effects that are known to result from detention for over 3 months in circumstances of great uncertainty about the future. The risk of this is greater in the case of those who have already suffered torture or other trauma, and the UNHCR has expressed doubts about "the reliability and comprehensiveness of Australia's pre-transfer assessments".[38] Among other matters, there were 40 people on hunger strike when the UNHCR visited the facility (para 56). These factors have also been severely criticised by Amnesty International which says that conditions on Nauru "were tougher than at any mainland detention centre and responsible for a 'terrible spiral' of self-harm, hunger strikes and suicide attempts".[39] It has been reported that the asylum seeker Omid, who was brought back to Australia for medical treatment during a hunger strike, has been returned to the above conditions.[40] At the same time the Australian Human Rights Commissioner, Professor Gillian Triggs, has stated "that to detain people on this remote island, and delaying by at least six months their processing, and where they're advised that they will be kept there for five years, is an egregious breach of international human rights law"[41] (and see below for further remarks by the AHRC on breaches of international obligations). In the light of these claims from respected sources, it would be irresponsible in the extreme to expand the category of those subject to this regime while these appalling results are occurring.

- It is still not clear exactly when processing of refugee claims will commence, who precisely will be conducting them, and how appeals will be dealt with (a tribunal is contemplated in the Nauru *Refugees Convention Act* 2012, in Part 3). We are told that the Nauruan government will be responsible for making decisions, doubtless to avoid legal scrutiny from Australian courts and human rights and Ombudsman agencies, but there are no details of how and when decision makers will be engaged and under what terms and conditions. Nor have we any clear view of how the process will work in practice – will the success rate of primary decisions and appeal decisions be similar to those in

[38] UNHCR Nauru Report, note 5 above, para 58.
[39] Michael Gordon, "Nauru: 'terrible spiral' of despair revealed", *Sydney Morning Herald*, 21 November 2012. Amnesty's claims match what the media has been reporting and are credible – they are not thrown into doubt by Amnesty's opposition to the offshore processing policy, as the Minister has claimed.
[40] Refugee Action Coalition (NSW), "Refugee groups condemn hunger striker, Omid, being forced back to Nauru", 10 December 2012, at: www.refugeeaction.org.au .
[41] Bianca Hall and Ben Doherty, "Nauru a 'breach of rights'", *The Age*, 7 November 2012.

Australia? As was shown on Nauru last time, there is a real danger of *refoulement* occurring when decision making and administrative review are out of sync with the decisions of the RRT and the courts in Australia.[42] Nor is it clear to what extent the Nauruan court system will be able or prepared to review decisions on refugee status. The Committee cannot judge the fairness and effectiveness of the regime without information on its operation in practice.

- Very importantly, there is no indication yet by the Government how it will apply the "no advantage" principle, including what length of time recognised refugees will have to wait for resettlement, whether the waiting time will differ according to the different transit countries asylum seekers have come from, whether individuals will, as it were, get credit for time they have already been waiting, and what weight will be given to need and vulnerability. What will happen to those already rcognised as refugees by the UNHCR? The absence of clarity is not surprising since it is virtually impossible to determine appropriate comparators. As the UN High Commissioner for Refugees, Antonio Guterres, wrote to the Minister on 5 September 2012 in connection with the designation of Nauru as a "regional processing country":

  > The time it takes for resettlement referrals by UNHCR in South-East Asia or elsewhere may not be a suitable comparator for the period that a Convention State whose protection obligations are engaged should use. Moreover it will be difficult to identify such a period with any accuracy, given that there is no 'average' time for resettlement. UNHCR seeks to resettle on the basis of need and specific categories of vulnerability not on the basis of a 'time spent' formulation.

  Mr Guterres went on to say:

  > Finally, the 'no advantage test' appears to be based on the longer term aspiration that there are, in fact, effective 'regional processing arrangements' in place. We share this aspiration. However, for the moment, such regional arrangements are very much at their early conceptualization. In this regard, UNHCR would be concerned about any negative impact on recognized refugees who might be required to wait for long periods in remote island locations.[43]

  Whatever form the principle is given, it will result in unnecessarily placing already recognised refugees in limbo rather than beginning to help with their integration into the Australian community. Rights to protection have been exchanged for unlimited government discretion as to who will be admitted.

- There are detailed guidelines concerning Pre-transfer Assessments, on a case by case basis, together with an Assessment Form, to ascertain if the person concerned has particular vulnerabilities that would affect his or her transfer offshore.[44] However, the UNHCR has expressed concern about the rigid pro-

[42] See Submission 115 and supplementary submissions by refugee advocate Marion Le, made to this Committee as then constituted in connection with the 2006 DUA.
[43] Formal advice provided by the UN High Commissioner for Refugees on 5 September 2012, and tabled by the Minister in the House of Representatives on 10 September 2012 at the time of the presentation of his designation of Nauru as a regional processing country. See UNHCR media release, 10 September 2012, available from www.unhcr.org.au .
[44] Available from DIAC's website: www.immi.gov.au

forma template that appears to restrict the scope of questioning etc. It recommends review of the Pre-transfer assessment process to take vulnerabilities fully into account of those who may have suffered torture or trauma, including assessment of facilities on transfer (paras 58–61, and Key Recommendation D). (The UNHCR report found there were a number of transferees suffering from torture and trauma who could have been expected to be screened out.)

- The Minister has made discretionary exemptions of certain classes of people under s 198AE of the Migration Act, concerning detained crew members who have not made protection claims and detained persons who have applied to be removed from Australia and who don't have ongoing protection claims.[45]

  The Minister has also issued Guidelines concerning circumstances in which he may wish to consider exercising his discretionary public interest power under s 198AE. Those circumstances are very restricted. The Minister states that he does not wish to consider exercising this power in any other circumstances (clause 23), though he states that he could if he wished. Only the Department may request the Minister to exercise this non-compellable and non-reviewable power (clauses 25–26). The Minister's expectation is that "offshore entry persons" who are liable to be taken to an offshore country "should be so taken unless there are good reasons for this not to be the case" (clause 19).

  The circumstances in which the Minister has said he will consider exercising his power under s 198AE to exclude "offshore entry persons" from being taken offshore are limited to: (1) where not reasonably practicable in the foreseeable future because of personal characteristics, which would include permanent physical or mental impairments (the Assessment Guidelines refer to taking into account special considerations such as torture and trauma); (2) a credible *refoulement* claim; (3) an unaccompanied minor whose best interests (assessed within the Department, not by the Minister) are to remain in Australia, so long as that consideration is not outweighed by other (unspecified) primary considerations; (4) there are family members in Australia who will not be taken to the offshore country; (5) "operational reasons" for it not being reasonably practicable to take certain classes of people offshore, including "capacity" in the regional processing countries.

  It remains to be seen how well the assessment guidelines are carried out in fact, and how the Minister will use the public interest power. (The exceptions wouldn't now include regional refugees arriving on the mainland.)

- Given that the Minister has refused to exempt children or unaccompanied minors as a class – on the ground that to do so would encourage people smugglers to send out "boatloads" of unaccompanied minors – we have grave fears about the effects on children and unaccompanied minors of isolation, uncertainty and prolonged exile. Professor Mary Crock's work has already shown that unaccompanied minors are at great risk of trauma and mental illness from detention in Australia.[46] Some of us are aware from our own

[45] Its details are summarised in the Pre-transfer Assessment Form available from DIAC's website: www.immi.gov.au ; it will be table in 2013.
[46] See the two volumes by Mary Crock et al, entitled *Seeking Asylum Alone*, with differing subtitles, Themis Press, Sydney, nd (2006?).

experience of how a prolonged period of detention and uncertainty on Nauru under the Howard Government affected young people. Chilout has called for the Minister "to stop the removal of children from Australia to immigration detention on Manus and other offshore processing centres", and, if that is not done for there to be "transparent standards ensuring the health and safety of the children and oversight by an independent commissioner". There is no sign of either of these steps being taken. Moreover, Chilout comments that:

> The accommodation in Nauru is wholly inappropriate: asylum seekers are living in flooded tents, in 42 degree heat, within an atmosphere of increasing desperation. With asylum seekers on hunger strike and one man reputedly at death's door in his tent, Nauru is clearly no place for children.[47]

Chilout is also concerned with the level of education as part of the PNG system "as a 2010 Report shows PNG education has been 'grossly neglected'". The article asks a number of questions including "when will families be processed?", and expresses concern that:

> The no advantage test means children and families could be marooned on these islands for five years or more. How will the agencies [such as Save the Children and the Salvation Army and others] cope with the mental health ramifications of this long-term detention?

It calls for "an immediate stop to the removal of children and their families to overseas detention facilities, until the long-term care and safety is assured".[48]

- In addition, the UNHCR guidelines on best interest determinations refers to the view of the Committee on the Rights of the Child's that "'efforts to find durable solutions for unaccompanied or separated children' outside their country of origin 'should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated". On the basis of that view, the Guidelines conclude that: "It follows that a BID should be undertaken as early as possible in the displacement cycle."[49] This is clearly at odds with what is proposed under the Regional Processing regime, where at the moment it may be months before the processing of refugee status claims will occur, and after a successful claim it could be years before resettlement occurs.

  The UNHCR Guidelines stress the importance of monitoring care arrangements, commenting:

  > During the time they remain separated from their families or care-givers, children must be able to live in a safe and protective environment, where they are properly cared for. Interim care should provide unaccompanied and separated children with the emotional and physical care that their parents would normally provide. (at p 35)

  There is no sign that the offshore processing regime can or will do anything close to this.

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[47] Both Chilout quotations are from Chilout's newsletter of 28 November 2012.
[48] Ibid.
[49] *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, p 32, at the UNHR website: www.unhcr.org .

- Again, the earlier submission to this Committee by the group of legal academics headed by Associate Professor Jane McAdam in relation to its inquiry into the Malaysian Arrangement, raised the issue of "a broad non-*refoulement* norm whenever 'irreparable harm' may occur to a child. This includes protection arising under article 6 of the Convention on the Rights of the Child, which concerns the life, survival and *development* of the child. The Committee set out a number of protection criteria which must be fulfilled, including the appointment of a guardian, access to education and so on" (original emphasis). As the group commented about the Malaysian Arrangement, it "does not appear that unaccompanied minors will have (a) guardian in Malaysia and it is not clear how their vulnerability will be addressed".[50] It appears no clearer under the new regime.

- Finally, Human Rights Watch has condemned the inclusion of children in the offshore processing regime, for many of the reasons given above, including: "The government has stated that it will transfer unaccompanied migrant [asylum seeker] children – children typically between the ages of 13 and 17 who travel without parents or other caregivers – to Manus and Nauru without exemption. Yet all unaccompanied migrant children are entitled under international law to guardianship and legal assistance with their asylum claims."[51]

  In these circumstances, there are again strong grounds for refusing to extend the offshore processing regime further to encompass future mainland arrivals, who may include unaccompanied minors or separated children.

- Arrangements with Nauru. We would have liked to comment on the Minister's "Statement about arrangements that are in place, or are to be put in place, in Nauru for the treatment of persons taken to Nauru", presented to Parliament at the time of the tabling of the Minister's designation of Nauru as a regional processing country. This is clearly a crucial document for the assessment of the whole regime, but we have so far found it difficult to obtain a copy. It is not included with other documents in the Minister's media release on this matter. The public's difficulty in obtaining some relevant documents shows a lack of transparency.

- MOUs with Nauru and Papua New Guinea. It is of concern that the MOUs are stated not to be legally binding – whatever the technical position in international law – and that the MOU with Nauru states only that Australia will conduct activities in respect of the MOU "in accordance with its Constitution and all relevant domestic laws" (clause 4 of "Guiding Principles"). However, the MOU with Papua New Guinea states in addition that "All activities undertaken in relation to this MOU will be conducted in accordance with international law and the international obligations of the respective Participant" (clause 4). Clearly Australia should act in relation to Nauru according to the standard in the PNG MOU in order not to develop differential standards in the operation of the two centres. In any case, we

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[50] Note 31 above, p 26.
[51] Human Rights Watch, News, "Australia: End Offshore Transfer of Migrant Children", 24 November 2012: www.hrw.org/news/2012/11/24/australia-end-offshore-transfer-migrant-children .

believe that these processing centres are being established contrary to international law on the transfer of asylum seekers

- One of the most troubling aspects of the offshore regime is that the Government has already had to make provision for the onshore presence of asylum seekers for whom there are expected to be no places in the two Regional Processing Centres.[52]

    - The first concern is that it immediately exposes the system to differential treatment of asylum seekers depending on where each ends up. We submit that those processed in the community in Australia are always likely to be in a more advantageous situation than those in isolation in Nauru or Manus Island, even those granted a bridging visa "until issued with a protection visa in accord with the no-advantage principle". The Minister says that "they will still be subject to potential future transfers to Nauru or Papua New Guinea at a date when increased capacity becomes available". What will be the impact on such people, or the value in doing this? Clearly the Minister is compelled to make it up as he goes along because of the continued strong flow of arrivals (see Maley and Mathew article referred to in the next point), with all the dangers that brings of contradictions, difficulties and inequities.

    - The second concern is for those in Australia who will, according to the Minister, not be permitted to work[53] in order to keep their conditions in line with those on Nauru and Manus Island, but will have a welfare payment of some 89% of Special Benefits. This will be the case even after they are found to be refugees. (Expert Panel member, Paris Aristotle, points out that this measure is not in the Panel's Report.) This exposes them and their families to poverty, uncertainty, and potential loss of incentive and ability to integrate well into the community. As Professor William Maley and Professor Penelope Mathew have publicly maintained, this is contrary to Australia's obligations under Article 17(1) of the Refugee Convention and under other human rights instruments.[54] Australia will therefore be in breach of its obligations to implement in good faith the treaties it signs. This is a dangerous political and constitutional position and will undermine Australia's case for others to treat refugees more humanely.

      The absence of opportunities for work on Nauru and Manus Island is itself a disgraceful feature of the regime, and may be contrary to Nauru's obligations under the Refugee Convention (Art. 17(1)). Papua New Guinea still has a reservation concerning that article.

- Furthermore, the institution of the new offshore processing regime has led the Government to "(re)institute a freeze on status processing. Asylum seekers are languishing in detention centres on both Christmas Island and mainland

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[52] Minister for Immigration, Chris Bowen, "Sri Lankan returns, … 'no advantage' principle for people onshore, humanitarian intake", Doorstop interview, Sydney, Thursday, 22 November 2012, p 3, see Minister's Media Releases: www.minister.immi.gov.au .

[53] Or study or volunteer. Building self-reliance and self-esteem are not an issue it seems.

[54] William Maley and Penelope Mathew, "Bowen's asylum line is illegal", *Canberra Times*, Opinion, 27 November 2012.

Australia that are fast reaching capacity."[55] The AHRC Commissioner, Professor Gillian Triggs, has strongly attacked the conditions on Christmas Island including severe overcrowding, the prison-like nature of the facilities, and the culturally difficult shared living conditions of single adult men and families with children.[56]

The above factors all strongly support the proposition that the Committee should not recommend the passage of this Bill under the present circumstances.

[55] Professor Mary Crock in Symposium referred to in note 35 above.
[56] ABC, PM with Mark Colvin, "Commission slams conditions on Christmas Island": www.abc.net.au/pm/content/2012/s3653264.htm?