Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru

Submission

William Maley

1.1. I am Professor of Diplomacy at the Asia-Pacific College of Diplomacy at The Australian National University. While I make this submission in my personal capacity, I am drawing on a lengthy background of research and writing on refugee issues. I was a Visiting Research Fellow in the Refugee Studies Programme at the University of Oxford in 1997, and my publications in this area include 'Improving Australia's Refugee Resettlement Policy', *Policy*, vol.5, no.3, Spring 1989, pp.20-22; 'Refugees, Multiculturalism, and Duties Beyond Borders', in Chandran Kukathas (ed.), *Multicultural Citizens: The Philosophy and Politics of Identity* (Sydney: Centre for Independent Studies, 1993) pp.175-190; 'Refugees and Forced Migration as a Security Problem', in William T. Tow, Ramesh Thakur and In Taek Hyun (eds.), *Asia's Emerging Regional Order: Reconciling 'Traditional' and 'Human' Security* (Tokyo: United Nations University Press, 2000) pp.142-156; 'Security, People-Smuggling and Australia's New Afghan Refugees', *Australian Journal of International Affairs*, vol.55, no.3, November 2001, pp.351-370; 'Refugee Policy: Towards a Liberal Framework', *Policy*, vol.18, no.3 Spring 2002, pp.37-40; 'A New Tower of Babel? Reappraising the Architecture of Refugee Protection', in Edward Newman and Joanne Van Selm (eds), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (Tokyo: United Nations University Press, 2003) pp.306-329; 'Asylum-Seekers in Australia's International Relations', *Australian Journal of International Affairs*, vol.57, no.1, April 2003, pp.187-202; 'Political Transitions and the Cessation of Refugee Status: Some Lessons from Afghanistan and Iraq', *Law in Context*, vol.22, no.2, April 2005, pp.156-186; and 'Refugee Diplomacy', in Andrew F. Cooper, Jorge Heine and Ramesh Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (Oxford: Oxford University Press, 2013) pp.675-690.

1.2. My observations in this submission are informed by concern about the developments on Nauru that were highlighted in the Moss report, but they largely fall under term (g) of the Committee's Terms of Reference, namely 'any related matters'. The burden of my observations is that problems such as those exposed by the Moss report are the product of a fundamentally-flawed *system* of offshore processing, rather than simply misconduct by named individuals; and that the Committee should not hesitate to address the systemic problems of offshore detention and processing. I address three specific issues, namely the *choice of Nauru as an offshore processing centre*; *accountability and impunity*; and the attempt to induce refugees to move *from Nauru to Cambodia*.

The choice of Nauru as an offshore processing centre

2.1. In 2002, a leading Australian specialist on the Pacific wrote of the so-called 'Pacific Solution' that the 'vulnerable and small societies of the Pacific did not just *happen* to be approached by Australia; they were approached *because* they were vulnerable and dependent on Australia'.[1] He also noted that the process by which the Pacific Solution was put in place was anything but transparent: 'The fact that the Nauruan population heard about the decision on the BBC and not from its own government was a source of considerable dissension in Nauru'.[2] This is important to note, because it helps explain a number of problems that have lingered as Australia has made use of Nauruan territory.

2.2 Nauruan involvement in the Pacific Solution has from the outset been a product of processes in which the subliminal message from the Australian Government has consistently been that *the end justifies the means*. On occasion this has come very close to involving corruption. Specifically, pursuant to the First Administrative Arrangement with Nauru of September 2001, Australia paid over $1 million to cover outstanding hospital accounts for treatment in Australia of Nauruan citizens.[3] To commit to cover *future* hospital accounts in Australia for Nauruans might legitimately be called 'aid' (since the category of potential beneficiaries is defined only by their citizenship), but to pay outstanding accounts from the *past* is best described as 'bribery' (since it relieved a *specific* group of individuals, including quite possibly members of the Nauruan political leadership, of the burden of private debts).[4] This was part of the price that had to be paid to secure Nauruan cooperation. This sent an extremely unfortunate signal in a micro-state in which the level of public probity and the quality of governance was already exceptionally poor. The plainest indicator of this was that Nauru in 2002 was subject to 'countermeasures' as a result of its being included on the List of Non-Cooperative Countries and Territories maintained by the OECD Financial Action Task Force on Money-Laundering: as *The New York Times* put it, 'Nauru operates as an offshore tax haven and stands accused of laundering around $70 billion in Russian mafia money'.[5] Turmoil in Nauru's political and judicial systems in recent years provides very little basis for confidence that that the quality of governance has improved significantly.

[1]Greg Fry, 'The "Pacific solution"?', in in William Maley, Alan Dupont, Jean-Pierre Fonteyne, Greg Fry, and James Jupp, *Refugees and the Myth of the Borderless World* (Canberra: 'Keynotes' no.2, Department of International Relations, Research School of Pacific and Asian Studies, Australian National University, 2002) pp.23-31 at p.26
[2]Ibid., p.27.
[3]*House of Representatives Hansard*, 12 March 2002, p.1104.
[4]To the best of my knowledge, no document has ever been put in the public domain to establish that the Government of Nauru had any *contractual* obligation to pay the outstanding accounts. *Prima facie*, it remained the responsibility of individual Nauruans to do so.
[5]See 'Tiny Pacific Island Is Facing Money-Laundering Sanctions', *The New York Times*, 6 December 2001.

2.3. Furthermore, ordinary citizens of Nauru have no particular 'ownership' of the policy that has led to their country being used as a place to accommodate those whom the Australian government does not want. Those who have been found to be refugees and 'settled' in the Nauruan community have reportedly experienced antagonism, threats, and even physical violence.[6]

2.4. With a dysfunctional Nauruan Government, a Nauruan population containing at least some elements hostile to refugees, and an Australian Government guided by the nostrum that the end justifies the means, it is very difficult to see how the piecemeal recommendations of the Moss review could have any hope of dealing effectively with the problems that have manifestly arisen.

Accountability and impunity

3.1. Great liberal thinkers have long warned of the danger that power could be abused if not subject to proper checks and balances. One example that obviously comes to mind is Lord Acton's famous statement in 1887 that power tends to corrupt and absolute power corrupts absolutely.[7] In Australia, the cases of Cornelia Rau and Vivian Alvarez provide potent illustrations of what can happen if the powers of officials are not properly monitored or constrained.[8]

3.2. These dangers become even more acute in remote settings such as Nauru. In principle, Nauru has a Westminster system of government (see *Harris* v. *Adeang* [1998] NRSC 1 at 2, per Donne CJ). Such a system involves not only accountability of ministers to parliament, but also respect for the principle of the rule of law. In Westminster systems, diverse mechanisms have been developed to give effect to these, such as the opportunity for judicial review of administrative action to ensure that such action has been undertaken legally. This reflects the historical development of writs such as *Habeas Corpus*, *Prohibition*, *Certiorari*, *Mandamus*, and *Quo Warranto* as devices for preventing the abuse of power. More recently, offices such as that of the Ombudsman have been developed to investigate complaints from the aggrieved.[9]

[6]Karl Mathiesen, 'Refugees living on Nauru say they want to return to detention to flee violence', *The Guardian* (Australia), 31 December 2014.
[7]John Emerich Edward Dalberg-Acton, First Baron Acton, *Historical Essays and Studies* (London: Macmillan & Co., 1907) p.504.
[8]See *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (Canberra: Commonwealth of Australia, 2005); *Inquiry into the Circumstances of the Vivian Alvarez Matter: Report under the Ombudsman Act 1976 by the Commonwealth Ombudsman, Professor John McMillan, of an inquiry undertaken by Mr Neil Comrie AO APM* (Canberra: Report no.081, Commonwealth Ombudsman, September 2005).
[9]On these mechanisms, see Ian Thynne and John Goldring, *Accountability and Control: Government Officials and the Exercise of Power* (Sydney: The Law Book Company, 1987); Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Basingstoke: Palgrave Macmillan, 2003).

3.3. In practice, only the shell of a Westminster system of accountable government and the rule of law is left in Nauru. The most serious compromising of the system came with the forced departure of the Chief Justice of Nauru in 2014, prompting Professor George Williams to remark that 'The rule of law in Nauru lies in tatters'.[10] Nauru also lacks a transparent political culture. Probing questions are not welcomed. As word began to spread in the late 1990s of Nauru's banking services for the Russian mafia, a *Washington Post* report shed some light on Nauru's approach to transparency: 'Nauru's president, Rene Harris, also declined to comment on the island's offshore services. "What's it got to do with you?" he asked angrily before hanging up'.[11] It is hardly surprising that in 2014, Nauru reportedly imposed an $8,000 non-refundable visa fee for journalists seeking to visit the country.[12]

3.4. The location of a refugee processing centre on Nauru has also allowed the Australian government to benefit from the weaknesses in accountability associated with poor governance and the collapse of the rule of law on Nauru. Offshore processing serves to put the treatment of refugees who remain Australia's responsibility under international law beyond the reach of Australian courts and other accountability devices. [13] This is partly a result of the notion that Nauru is a 'sovereign state' and therefore bears responsibility for activities carried out on its territory. Modern theories of sovereignty, however, recognise that sovereignty is multidimensional and very rarely absolute.[14] It is also a result of Australia's willingness to benefit from the breakdown of accountability on Nauru. The response of the Australian Government to the moves against the Chief Justice was notably muted, prompting an eminent legal scholar to remark that 'The Australian government does not miss the absence of judges in Nauru. It simply allows both governments to have their way, and makes offshore processing easier. Law is now only for governments, not people, and certainly not refugees'.[15] The weakening of accountability creates opportunities for abuses to develop. The possibility that the Australian Government has been complicit in the erosion of accountability in Nauru is alarming.

[10]George Williams, 'Australia must defend the rule of law in Nauru', *The Age*, 28 January 2014.
[11]David S. Hilzenrath, 'Tiny Island Shelters Huge Cash Flows', *The Washington Post*, 28 October 1999.
[12]Bridie Jabour and Daniel Hurst, 'Nauru to increase visa cost for journalists from $200 to $8,000', *The Guardian* (Australia), 9 January 2014.
[13]It is well established that 'transferring asylum seekers "offshore" cannot divest the receiving State of its international obligations': Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007) p.408.
[14]See William Maley, 'Trust, Legitimacy, and the Sharing of Sovereignty', in Trudy Jacobsen, Ramesh Thakur and Charles Sampford (eds), *Re-envisioning Sovereignty: The End of Westphalia?* (Aldershot: Ashgate, 2008) pp.287-300
[15]Ben Saul, 'Constitutional crisis: Australia's dirty fingerprints are all over Nauru's system', *The Guardian* (Australia), 21 January 2014.

3.5. *It would be very useful if the Committee were to use its powers of investigation to determine whether any member of a Nauruan government has benefited personally from the decision to cover outstanding hospital accounts for treatment in Australia; and whether any member of the Australian Government, or Australian official, played a role in advising the Nauruan Government to remove members of the Nauruan judiciary or impose prohibitively-expensive visa fees on journalists.*

From Nauru to Cambodia

4.1. Just as the Select Committee has been commencing its investigations, detailed reports have surfaced of apparent attempts by the Australian Government to encourage refugees on Nauru to accept an offer of resettlement to Cambodia.[16] I have received a copy of a document entitled 'Settlement in Cambodia' which appears to have been circulated on Nauru; and I have no reason to doubt that it is authentic: it bears all the hallmarks of a text prepared by either the Department of Immigration and Border Protection or one of its contractors. It is a deeply-disturbing document, which points to a willingness to mislead refugees in ways that some would see as reckless, and others would see as scandalous.

4.2. Specifically, the document contains the claim that Cambodia is 'a safe country, free from persecution and violence', where one can enjoy 'all the freedoms of a democratic society including freedom of religion and freedom of speech'. Cambodia is said to be a country which 'does not have problems with violent crime', and where 'police maintain law and order'. The document also maintains that 'Cambodia has a high standard of health care, with multiple hospitals and General Practitioners'.

4.3. These claims are radically inconsistent with assessments supplied by the Department of Foreign Affairs and Trade (DFAT) on its Smart Traveller website. On the issue of security, it states that 'Opportunistic crime is common in Cambodia … Assaults and armed robberies against foreigners have occurred, and foreigners have been seriously injured and killed … Foreigners have been the target of sexual assault in Cambodia … The level of firearm ownership in Cambodia is high, and guns are sometimes used to resolve disputes … Banditry and extortion, including by military and police personnel, continue in some rural areas … Some people were killed and a large number injured in separate protests in Phnom Penh in late 2013 and early 2014 …'.

[16]Heath Aston, 'Safe and inexpensive: Government spruiks relocation from Nauru to Cambodia in fact sheet to asylum seekers', *The Sydney Morning Herald*, 16 April 2015.

4.4. On the issue of health care, DFAT bluntly states that 'Health and medical services in Cambodia are generally of a very poor quality and very limited in the services they can provide. Outside Phnom Penh there are almost no medical facilities equipped to deal with medical emergencies … In the event of a serious illness or accident, medical evacuation to a destination with the appropriate facilities would be necessary'.

4.5. These negative assessments are shared by virtually all those who are knowledgeable about Cambodia. Cambodia's slide towards dictatorial rule under Prime Minister Hun Sen began in the late 1990s.[17] Professor the Hon. Gareth Evans, AC QC, former Senator, Australian Foreign Minister, President of the International Crisis Group, and now Chancellor of The Australian National University, wrote in 2014 that 'while preserving a democratic facade, Hun Sen has ruled, for all practical purposes, as an autocrat, showing scant regard for rights of free expression and association and resorting to violent repression whenever he has deemed it necessary to preserve his and his party's position … For far too long, Hun Sen and his colleagues have been getting away with violence, human rights abuses, corruption, and media and electoral manipulation without serious internal or external challenge … I have resisted strong public criticism until now, because I thought there was hope for both him and his government. But their behaviour has now moved beyond the civilised pale. It is time for Cambodia's leaders to be named, shamed, investigated, and sanctioned by the international community'.[18]

4.6. In a review of Cambodia in 2014 written for the prestigious US journal *Asian Survey*, Professor Duncan McCargo recently wrote that 'As an impoverished country with a poor human rights record, Cambodia is a completely unsuitable host for the resettlement of asylum seekers'.[19]

4.7. *It would be very useful if the Committee were to use its powers of investigation to determine who exactly in the Department of Immigration and Border Protection or its contractors was involved in the preparation of the document entitled 'Settlement in Cambodia'; what role, if any, did the Department of Foreign Affairs and Trade play in shaping a text which is radically at odds at some key points with what the Department of Foreign Affairs and Trade says in its Smart Traveller website; and whether some claims in the document are so at odds with reality as to give rise to the question of whether the APS Code of Conduct has been violated.*

[17]See John M. Sanderson and Michael Maley, 'Elections and Liberal Democracy in Cambodia', *Australian Journal of International Affairs*, vol.52, no.3, November 1998, pp.241-253.
[18]Gareth Evans, 'It's time to name and shame Cambodia's corrupt Hun Sen regime', *The Australian*, 3 March 2014.
[19]Duncan McCargo, 'Cambodia in 2014: Confrontation and Compromise', *Asian Survey*, vol.55, no.1, January-February 2015, pp. 207-213 at p.212.

Professor William Maley, AM FASSA

The Hedley Bull Centre
130 Garran Road
Acton ACT 2601