

**18 September 2011**

**Reference:**

**Parliament of Australia *Inquiry into Australia's agreement with Malaysia in relation to asylum seekers, which was referred by the Senate on 17 August 2011 to the Legal and Constitutional Affairs Committee.***

**Submission by Dr Harvey Stern**

I submit to *The Legal and Constitutional Affairs Committee* that no Labor MP is bound by the decision of Caucus supporting the Government's proposal to send asylum seekers to Malaysia for processing.

In fact, under the rules of the Party, not only are Labor MPs under no obligation to vote for legislation that proposes to send asylum seekers offshore for processing, Labor MPs are actually required to vote against such legislation (not only in parliament, but also in Caucus).

To explain:

The ALP's National Platform 2009, chapter 7, paragraph 157 reads (in part):

*"Protection claims made (by asylum seekers) in Australia will be assessed by Australians on Australian territory".*

Caucus had no authority to make the decision supporting the Government's proposal to send asylum seekers to Malaysia for processing because to adopt a position that directly conflicts with the party's platform is in violation of Paragraph 5 (d) (iii) of Part B (Rules) of the ALP's constitution which reads:

*The Federal Parliamentary Labor Party shall have authority in properly constituted Caucus meetings to make decisions directed towards establishing the collective attitude of the Parliamentary Party to any question or matter in the Federal Parliament, subject to:*

*(iii) no attitude being expressed which is contrary to the provisions of the Party Platform or any other decision of National Conference or National Executive.*

The ALP is a democratic organisation whose policy is made by National Conference (ALP Federal Constitution, part A paragraph 6) following consideration of "resolutions originating from branches, affiliated unions and individual party members" (ALP Federal Constitution, part A, paragraph 7).

To this end, every member of Caucus has signed the Parliamentary Candidate's Pledge "to do my utmost to carry out the principles embodied in the Platform".

Furthermore, Paragraph 5 (b) of Part B (Rules) of the Constitution of the Australian Labor Party reads:

*"(b) The National Conference shall be the supreme governing authority of the Party and its decisions shall be binding upon every member and every section of the Party".*

On Friday 16 September, the Government released its proposed legislation, revealing a number of features that further undermine the human rights of asylum seekers and, in so doing, further conflict with the party's platform.

For example, Michelle Grattan (*Labor strips asylum rights in a bid to revive swap deal*, The Age, September 17, 2011) reports that, according to new government legislation to revive the Malaysian people swap, "the rules of natural justice do not apply".

This conflicts with Chapter 7, Paragraph 146, of the ALP's platform which refers, in relation to the Migration Act, to Labor ensuring that the principles of natural justice are upheld.

In the same article, Michelle Grattan also reports that the legislation removes the requirement for a child's best interests to be the primary consideration in whether he or she is sent offshore.

This conflicts with the United Nations Convention on the Rights of the Child, which Australia has ratified. The convention states that in all actions concerning children the best interests of the child shall be a primary consideration.

This aspect of the legislation therefore conflicts with Paragraph 147 of the ALP's platform which states that, under Labor, Australia will adhere to its obligations under international instruments to which it is a party.

One therefore concludes that Caucus had no authority to make the decision to support the Government's proposal to send asylum seekers to Malaysia, and that furthermore, not only are Labor MPs under no obligation to vote for legislation that proposes to send asylum seekers offshore for processing, Labor MPs are actually required to vote against such legislation.