

SPEECH

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Questioner	Responder
Speaker Henderson, Sen Sarah	Question No.

Senator HENDERSON (Victoria) (19:00): I move:

That the Senate take note of the reports.

I'm pleased to speak to the Parliamentary Joint Committee on Human Rights' scrutiny reports 8 and 9 of 2020, which were presented out of session on 1 July and 18 August 2020. These reports contain a technical examination of the compatibility of legislation with Australia's obligations under international human rights law. The committee considered 18 new bills and 99 instruments during this period and reported on 12 bills and instruments, including legislation previously commented on, in these two scrutiny reports.

During this COVID pandemic, the committee has continued to meet regularly via teleconference so that it can fulfil its important role in scrutinising legislation. These reports include the committee's consideration of several COVID-19 related bills and instruments. For example, the committee corresponded with the Minister for Health in relation to the Privacy Amendment (Public Health Contact Information) Bill 2020. In report 8, the committee concluded that the bill, which established privacy protection for users of the COVIDSafe app, constituted a proportionate limit on the right to privacy, noting in particular the number of useful safeguards to protect data associated with app users. The committee also recommended a small number of targeted amendments to further improve these privacy protections, including recommending that state and territory health authorities which have received COVIDSafe app data must delete it as soon as they can and as soon as it's no longer required for contact tracing.

These reports also continue the committee's important scrutiny function in relation to non-COVID-19 related legislation. For example, the committee's report No. 9 of 2020 sets out the committee's extensive consideration of the Australian Security Intelligence Organisation Amendment Bill 2020. This bill seeks to amend ASIO's compulsory-questioning powers. Currently, ASIO is only able to use questioning and detention powers to investigate terrorism offences, which has limited ASIO's capacity to investigate a range of steadily worsening security challenges, such as in relation to espionage and foreign interference. The bill also repeals ASIO's current detention powers and retains a broader compulsory-questioning power. The report notes that these proposed amendments, which are directed towards protecting Australia's national security, raise some complex human rights law issues.

The committee sought a considerable amount of information from the minister in order to inform its consideration and thanks the minister for the detailed response he provided. The committee considers that these powers seek to achieve the vitally legitimate objective of ensuring ASIO can gather information in relation to national security to keep Australia and Australians safe. The committee notes the minister's extensive advice as to the safeguards present, in relation to a number of these measures, which help to protect human rights. However, in some instances the committee considers that, as drafted, there are questions as to whether such safeguards are sufficient such that the measure would in all instances constitute a proportionate limit on rights. The committee's report includes a number of recommendations for potential amendments to the bill which would assist the proportionality of specific measures with respect to human rights.

In addition, report 9 of 2020 sets out the committee's consideration of the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020. This bill will amend the Migration Act to allow the minister to determine that a thing is a 'prohibited thing' in immigration detention and amend search and seizure powers in those facilities. As the report sets out, these proposed amendments are designed to ensure that the Department of Home Affairs can provide a safe and secure environment for staff, detainees and visitors in immigration detention facilities which likely promotes the right to security of the person.

The proposed measures also appear to engage other human rights, but any limitation on rights may be permissible if demonstrated to be reasonable, necessary and proportionate. In this respect, the committee noted that the bill

is intended to address the concerning issue of mobile phones and other internet-capable devices being used to coordinate and facilitate escape efforts, organise criminal activities and facilitate the movement of drugs and other contraband within detention facilities.

In reference to Border Force officers not having appropriate powers, the committee noted the submission of the Department of Home Affairs to the Senate inquiry into the bill, which stated in part:

A convicted child sex offender who is looking at child abuse material on his phone in plain sight cannot have his phone removed.

As evidenced by Senator Keneally's social media posts on 11 August on this issue, this is clearly not a point that is properly understood by some members of the Labor Party.

The committee found that measures in the bill which remedy this current position are vital to the safety and lawful operation of detention centres. The committee thanks the minister for his detailed response, which greatly assisted in the committee's consideration of these measures. The committee has suggested some targeted recommendations to assist in the proportionality of the search and seizure measures with respect to human rights.

In closing, I do wish to respond to the criticisms of Senator McKim, who has criticised coalition members of the committee for handing down reports which don't always in every respect follow the legal advice. We very much value the legal advice, but in our parliamentary democracy committee members are required to independently consider the human rights implications of bills and instruments, and the role of committee members is not simply to rubber-stamp that advice, as Senator McKim appeared to be suggesting in his contribution yesterday in this place.

Under my chairmanship, the committee now transparently reports on the legal advice it receives and distinguishes the legal advice in each report from the considerations of committee members. In determining whether a measure in a bill or instrument constitutes a permissible limitation on a specific human right, committee members are required to weigh up the minister's response, the legal advice and other relevant information which may be available to the committee. Any committee member may dissent on a report, and there were a number of dissenting reports before I was appointed chair, and I think that's an important point to make.

I just want to draw on one example, as it's clear, on the face of our scrutiny of the ASIO bill, that coalition committee members rejected the legal advice in a number of respects, including in relation to the power to prohibit a person from using a specific legal representative, and that the advice was that this constituted a breach of the right to a fair trial. The committee—I'm talking about the majority of the committee—considered the minister's advice and the argument that ASIO or, more correctly, the prescribed authority should be able to have the power to exclude a legal practitioner who may, for instance, be under investigation for serious criminal offences and whose presence may otherwise compromise the integrity of ASIO's questioning process, and it was the view of the majority that the option for the person being questioned to select another lawyer did not, of itself, breach a right to a fair trial. That's just one of the examples that I've given in relation to the basis on which the committee doesn't always follow to the letter the legal advice.

I do encourage all parliamentarians to carefully consider the committee's analysis and, with these comments, I commend these reports to the chamber.

Question agreed to.