



February 10, 2017

Canada's National Security Framework

The Canadian Bar Association appreciates the opportunity to participate in the Public Safety and National Security Committee's study of the national security framework in Canada. The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. We have offered our views and expertise at many stages in the development and critique of Canada's national security and anti-terrorism regime in the past and remain committed to doing so going forward. Our most [recent submission](#) in response to the Ministers of Justice and Public Safety *Green Paper* (December 2016) was prepared by the CBA with contributions from the Criminal Justice, Immigration Law, Charities and Not-for-Profit Law, and Privacy and Access Law Sections, with assistance from the Legislation and Law Reform Directorate at the CBA office, and approved as a public statement of the CBA.

The CBA agrees that protecting the safety and security of Canadians, and preserving Canadians' constitutional values are equally fundamental responsibilities of the federal government. We noted that the *Green Paper* seemed to favour implementation of the most controversial sections of Bill C-51, despite the government's commitment to carefully reconsider that Bill.

A summary of recommendations from the CBA's 2016 submission follows:

1. The CBA recommends that agency review bodies have a mandate at least as broad as the agency's mandate, with tools to review any of the agency's activities.
2. The CBA recommends the creation of:
 - a national security committee of Parliamentarians with a mandate to examine national policies and the overall functioning and framework of the national security infrastructure, and
 - an overarching national security review and complaints commission, resourced to act as a comprehensive review mechanism to address systemic issues in a consistent and coherent way across national security agencies.
3. The CBA recommends that research funding to develop an evidence base for informed policy decisions to prevent radicalization be extended to academics, community organizations and others to encourage a participatory or partnership approach to research in this area.
4. The CBA recommends that the judicial warrant provisions in sections 12.1(3) and 21.1 of Bill C-51 be amended so that CSIS warrants can never violate the *Charter*. The use of the section 21.1 warrant should only be used to justify action that would otherwise be contrary to Canadian law but not to justify any *Charter* violation.

5. The CBA recommends amending section 12.2 to prohibit CSIS from arbitrarily detaining an individual and to clarify that 'bodily harm' includes psychological harm.
6. The CBA recommends that *SCISA* include effective mechanisms to enforce the principles outlined in section 4.
7. The CBA recommends that regulations be enacted under *SCISA* requiring records to be kept of disclosures made under *SCISA*, as well as records of subsequent use and disclosure of information received pursuant to *SCISA*.
8. The CBA recommends that section 5(1) be amended to allow a government institution to disclose information to a designated recipient institution only where the information is both relevant to the recipient institution's mandate respecting national security and "strictly necessary" to fulfill that mandate.
9. The CBA recommends that Schedule 3 to *SCISA* be amended to list not only the names of potential recipient institutions and their designated heads, but also the specific sections of the statutes supervised or implemented by those institutions that may conceivably relate to national security concerns.
10. The CBA recommends that section 6 of *SCISA* be narrowed so as to prohibit subsequent disclosure of information to the private sector and foreign governments and to limit subsequent use by recipient institutions for the purpose of ensuring national security.
11. The CBA recommends clarifying the interaction of the *Privacy Act* and the proposed *SCISA*.
12. The CBA recommends that *SCISA* include safeguards to ensure that any shared information is reliable.
13. The CBA recommends that the federal government:
 - provide an objectively discernible basis for additions to and removals from the no-fly list,
 - curtail warrantless search powers, and
 - add effective safeguards for those wrongly placed on the list, including a process for expeditious removal.
14. The CBA recommends a return to the previous legal thresholds for recognizance with conditions and terrorism peace bond, and the application of a sunset clause for these provisions. In the alternative, we recommend additional procedural safeguards.
15. The CBA recommends deleting the advocacy offence under section 83.221 and that section 22 of the *Criminal Code* prohibiting counselling an offence be interpreted as adequately and fairly addressing the objects of that offence.
16. The CBA recommends that the definition of 'terrorist propaganda' be limited to material that counsels the commission of a terrorist offence or that instructs the commission of a terrorist offence.
17. The CBA recommends that the criteria for a deletion order should include a mental fault requirement, and defences should be provided to exclude legitimate public interest, education or religious discussion activities.

18. The CBA recommends that the *Charities Registration (Security Information) Act* provide an appeal of the single judge's determination under section 6 to allow another judge to assess the reasonableness of the initial determination to balance national security concerns with the impact on the impugned charity.
19. The CBA recommends consideration be given to ensuring those listed have resources to respond effectively to allegations, whether it be financially or through a full and frank disclosure of claims against the entity.
20. The CBA recommends that the federal government:
 - amend section 83.19(2) of the *Criminal Code* on facilitation, to eliminate the strict liability element of the offence and require the Crown to prove criminal intent.
 - create an exception for the delivery of humanitarian aid that incidentally supports a member of a terrorist group (for example, a charity that delivers medical supplies to a hospital that treated a member of a terrorist group would not be subject to prosecution).
 - institute a clear *mens rea* requirement to the *Charities Registration (Security Information) Act*.
 - amend the *Charities Registration (Security Information) Act* so the Federal Court judge to whom a certificate is referred shall not find the certificate to be reasonable where an applicant or registered charity establishes that it has exercised reasonable due diligence to avoid the improper use of its resources.
 - amend the *Charities Registration (Security Information) Act* to allow an appeal to the Federal Court of Appeal of a decision by a Federal Court judge that a referred certificate is reasonable.
 - develop Canadian guidelines for charities operating abroad or domestically so those charities can show due diligence in complying with anti-terrorism legislation.
21. The CBA recommends that judicial authorization remain the norm for release of BSI to law enforcement, with an administrative provision for exceptional circumstances.
22. The CBA recommends that *Criminal Code* sections 487.12 and 487.13 be used to address data retention before further measures are considered.
23. The CBA recommends that a security-cleared lawyer be retained in all situations pertaining to national security when intelligence is either being used in a proceeding or withheld from an individual and the individual's Charter protected rights may be potentially compromised.