ICLMG speaking notes on Bill C-59

Presented to the Standing Senate Committee on National Security and Defence

May 6, 2019

Thank you for inviting the International Civil Liberties Monitoring Group to present today regarding Bill C-59.

As a point of information, last Friday we submitted a more detailed, written brief to the committee.

Our position on Bill C-59 is that while it brings some important, positive changes to the national security landscape, these are being overshadowed due to the government not going far enough to address existing problems, along with the introduction of new laws that raise troubling concerns for civil liberties and human rights in Canada.

First, I'd like to focus on the positive: the new review and oversight mechanisms, namely the National Security and Intelligence Review Agency, and the Intelligence Commissioner, and ways we can build on these proposed bodies.

Dating back to the O'Connor inquiry, the ICLMG has advocated for an overarching review body for Canada's national security agencies and activities. We are glad to see it come about with NSIRA.

However, we have also learned many lessons from the Security and Intelligence Review Committee's role as CSIS watchdog. As NSIRA is largely modeled on the current SIRC legislation, we can look to it for areas of improvement.

While NSIRA will have a broader mandate, it will have the same number of members as SIRC. We instead suggest appointing a minimum 5 members and maximum 8 (other than the chair). While the real test may be in the amount of resources allocated to the committee, more members will allow for both the necessary staffing to conduct thorough reviews. NSIRA members should also come from a broad range of backgrounds, including from the human rights and civil liberties fields.

Next, NSIRA would be limited to only accepting complaints regarding CSIS, the CSE and the RCMP. To ensure clear accountability, NSIRA should accept complaints about all national security agencies. At a minimum, this should include the CBSA and Global Affairs Canada.,

NSIRA should also be granted the power to make binding recommendations based on its findings. Finally, it should have the power to award compensation, for example for legal fees, to complainants in cases where abuse was found.

The Intelligence Commissioner is an important new addition to national security oversight. To carry out its work, we believe the IC should be a full-time role. The Commissioner should also be granted the power to place conditions on approved authorizations. Like others, we also believe the Commissioner should play a role in approving active and defensive CSE cyber activities.

For both NSIRA and the IC, to ensure independence, we believe nominations should be approved by 2/3 of MPs, on recommendation of the Governor in Council.

While we welcome the new review and oversight bodies, there are areas of C-59 that continue to raise deep concerns.

First, it is problematic that Bill C-59 does not rescind more aspects of the Anti-terrorism Act of 2015.

Of primary concern are the threat reduction powers introduced to the CSIS Act in 2015. While Bill C-59 moves to restrict these powers, we have deep reservations about granting active, operational powers to an intelligence agency which go beyond those necessary for intelligence gathering. CSIS was created in 1984 in large part to separate the real-world interventions of law enforcement from secret intelligence gathering operations.

There is a degree of transparency to the work that a law enforcement agency carries out. Their goal is to eventually go to trial, where, normally, their actions would be revealed and the legality of these actions determined. However, CSIS' work does not necessarily lead to an arrest. This means that their operations that do not require a warrant - a determination that CSIS would make - would never go to any court. And those that do require a warrant would still rarely, if ever, be subject to public scrutiny or an adversarial process. This includes not just the contents of the warrant, but also how it is eventually carried out. Despite efforts to put in place safeguards, we dispute the necessity of these powers.

Our same concerns apply to provisions granting CSIS employees or designated individuals immunity for acts or omissions that would otherwise constitute a crime, and would ask that this section of the bill be removed.

In both cases, we see the potential for the grave violation of charter rights and freedoms, with very little and unconvincing information given to justify why such powers are needed.

On data collection: we have made multiple recommendations in our brief based on concerns about the expansion the CSE and CSIS' powers to collect and retain non-threat related

information, such as “unselected information” and publicly available information. There has been much debate on publicly available information. In regards to the CSE, the definition must be further restricted to exclude hacked or unlawfully divulged information, and should also restrict information available for purchase. For CSIS, there is no definition of “publicly available information” in the CSIS Act, raising serious concerns about what they will, or won’t, be allowed to collect. Publicly available information must be defined.

Regarding the disclosure of Canadians’ information, we have also proposed further modifications to SCISA/SCIDA, particularly in narrowing the overly-broad definition of activities that undermine the security of Canada, and to ensure there is an actual exception for political activity, dissent and artistic expression in the act. At the same time, we once again question why such a sweeping new act was needed in C-51 and continue to urge parliamentarians to repeal SCISA in favour of simpler rules focused on privacy protection.

Regarding the No Fly List, we support the call for a redress system, and are pleased to see progress on that front. However, this will not address the fundamental flaws underlying the Secure Air Travel Act. We cannot support a tool that operates in secret and does not afford those listed the opportunity to mount an adequate defense. We are willing to discuss modifications to the regime, but maintain our call that SATA be repealed. There are multiple tools in the criminal code that can achieve a similar goal, and which also afford individuals the right to due process in a court of law.

Finally, I haven’t spoken at length about the CSE Act. It is a complex act, and we make multiple proposals in our brief. However, I would like to add our support to the calls to suspend active cyber powers until further study can be done. At a minimum, we support the call for the Intelligence Commissioner to be given a role in approving any active cyber activities.

Thank you again for inviting us and for your attention to our concerns.