Brief on Bill C-41

An Act to amend the Criminal Code and to make consequential amendments to other Acts

Presented to the
Standing Senate Committee on Human Rights

Submitted by the
International Civil Liberties Monitoring Group

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1. Introduction

On March 9, 2023, the Minister of Public Safety introduced Bill C-41, *An Act to amend the Criminal Code and to make consequential amendments to other Acts*. The proposed legislation is in response to concerns that counterterrorism provisions of Canada's *Criminal Code* have inhibited the provision of international assistance, including humanitarian aid,[1] in areas controlled by an organization deemed by Canada's *Criminal Code* to constitute a terrorist group which results in the likelihood of requiring the assistance organization to provide direct or indirect financial or other forms of support that would benefit the terrorist group.

Legislation in this area has long been required, and we are pleased to see concerns around the government's proposed authorization process contained in the initial version of Bill C-41 were taken seriously at the House of Commons Standing Community on Public Safety and National Security (SECU). This includes the decision to amend the bill to create an exemption to subsections 83.03(1) and (2) of the *Criminal Code* for the provision of humanitarian aid.

This is an important recognition that the overly broad nature of Canada's anti-terrorism laws unjustifiably creates a risk that those providing crucial international assistance could be charged with terrorism violations.

However, as was raised at SECU, and as we raised in the brief we submitted,[2] an exemption for humanitarian activities carried out exclusively by humanitarian organizations means that other international assistance organizations who provide vital services – including those detailed under subsections 83.032(1)(a) to (f) – must still apply for an authorization. Our coalition's membership is made up of both humanitarian and international assistance organizations, and we believe it is crucial that both of these vital sectors are provided guarantees that their work will not be criminalized, and that this is achieved through an impartial, transparent and efficient process.

Given this, we remain concerned regarding certain provisions of the authorization process and the impact that it would have on these organizations and their crucial activities.

In the following brief, we focus on two key areas: security reviews carried out by the Minister of Public Safety under s. 83.032(10) of Bill C-41 and information sharing between the Minister and other prescribed entities under the auspices of assisting the Minister "in the administration and enforcement of sections 83.031 to 83.0392" (s. 83.038).

Below we set out the context for these concerns, followed by specific recommendations for amendments to the bill.

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[1] In this brief, we use "international assistance" to encompass the both humanitarian aid as well as other vital international assistance and development activities, including those listed in 83.032(1) of Bill C-41, including humanitarian aid.

[2] "Brief on Bill C-41," International Civil Liberties Monitoring Group, 14 April 2023. Online: https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR12347270/br-external/InternationalCivilLibertiesMonitoringGroup-e.pdf

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We believe that amendments to the bill will provide the greatest reassurance to, and protection for, organizations applying for authorizations.

However, we recognize and understand the urgency of responding to the crisis in Afghanistan and other regions of the world. In the eventuality that amendments are not adopted, we urge committee members and the government to explore options to address these concerns in the form of regulations governing the authorization process, as detailed in s. 83.0391 (and specifically 83.0391(b)).

Moreover, these areas (among others) should be prioritized during the one-year review of the bill for eventual legislative amendments, as described in ss. 83.0392(2) and (3).

2. Context: counterterrorism and international assistance

While the situation in Afghanistan brought the issue of the risk faced by humanitarian and other organizations working in complex political situations to the forefront of public debate, it is one that existed before the Taliban seized power in 2021. International assistance organizations that work in any area where a terrorist group operates face the risk that their interactions with members of these groups, or face levies or tariffs that could go to benefit these groups, place them at the same kind of risk. This is a direct result of Canada's overly-broad anti-terrorism laws, which while prohibiting broad categories of activities that may benefit a terrorist group, provide no clear defense for groups carrying out beneficial activities in proximity to these groups or their members, or in regions controlled by these groups.[3]

Despite this risk, the situation in Afghanistan is, to our knowledge, the first instance where the Canadian government has formally stated that a foreign government is considered a terrorist group, and that therefore any funding or other forms of assistance that go to this government is considered terrorist financing.

This novel legal interpretation has been criticized[4] by leading legal experts for several reasons, including that this interpretation would result in any individual in Afghanistan who pays taxes, tariffs, or otherwise provides benefits to the government, being liable for criminal prosecution, including Afghans who have been resettled in Canada since 2021. This interpretation also creates an elevated risk for aid organizations operating in, or individuals living in, other regions under the control of what could be considered a terrorist group.

[3] Canadian Bar Association letter to Ministers Lametti and Mendicino, re: Report of the House of Commons Special Committee on Afghanistan and Canada's Anti-Terrorism Legislation, 22 July 2022. Online at: https://www.cba.org/CMSPages/GetFile.aspx?guid=b7386a78-e843-4470-b77e-0c43221e440c

[4] See for example, letter from S. Choudry et al. to Minister Lametti, re: Section 83.08(b) of the Criminal Code and extrication of individuals from Afghanistan, 4 May 2022. Online at: https://www.ourcommons.ca/Content/Committee/441/AFGH/Brief/BR11826867/br-external/LandingsLLP-e.pdf

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We agree with this critique of the government's interpretation of terrorism financing laws; however, we also recognize that the broad nature of Canada's anti-terrorism laws allow for this risk to persist.

Finally, we are also concerned that an authorization regime does not address the central problem at the heart of this issue: that Canada's overly broad counter-terrorism laws allowed for this situation to occur in the first place. The ICLMG, among others, has long raised concerns that the inherent vagueness and political nature of "terrorism" will continue to have unintended consequences, including on Canada's international human rights and humanitarian obligations, evidenced by the current restrictions on the provision of aid. While an exemption regime may provide a route forward, it avoids how counter-terrorism laws create areas and entities that are considered 'no go,' and continue to primarily, and unjustly, impact majority-Muslim countries and regions. We renew our call for the government to fundamentally revisit its approach on counter-terrorism laws and their enforcement. This is why, in our original submission on Bill C-41, we argued for an exemption regime that covered not just humanitarian aid but other forms of international assistance.

It is clear though, in the current context, that a legislative remedy is required to provide certainty to Canadian international assistance organizations that they will not face criminal charges for carrying out their vital and often lifesaving activities. We hope that our suggestions below help to ensure that, under the proposed system, organizations are able to continue to efficiently provides vital assistance in a timely and independent manner, and to limit the securitization of the provision of international assistance.

3. Key concerns with current version of Bill C-41

A. Ministerial risk assessments under s. 83.032(10)

The grounds on which the Minister of Public Safety may evaluate an application are unacceptably broad. For example, in section 83.032(10)(a), the minister may assess whether any person involved in carrying out a proposed activity has an "links" to a terrorist group.

"Links" is not defined anywhere in the legislation, nor does it carry any legal weight. This is much too discretionary. For example, would distant family ties, former work or school associates, or membership in the same religious community or congregation be considered links? In our work, we have seen how each of these types of "links" have been identified by security agencies as being grounds for suspicion, despite being based solely on guilt by association. The example of Afghanistan, a Muslim majority country, is apt in this instance, as we have specifically documented how Muslims in Canada are subject to this exact kind of guilt by association, leading to increased surveillance, loss of security clearances and employment, visits to campus organizations and homes, travel advisories and watchlists, and more. This includes the sharing of information which has led to rendition, arbitrary detention and torture based on unproven allegations of "links," as in the case of Maher Arar, as well as the cases Abdullah

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Almalki, Ahmad El Maati and Muayyed Nureddin, Abousfian Abdelrazik and Mohamedou Ould Slahi.

Such vague language also leads to inconsistency, where other factors – including political priorities, international affairs or conscious and unconscious biases – that have nothing to do with the merits of an application could impact the decision. For example, tangential "links" to human rights activists deemed a terrorist group by a friendly state could lead to a decision to deny an application, whereas such "links" may be overlooked in other circumstances. Given the security-related nature of such decisions, explicit reasons will likely not be made public, making it difficult to assess or even challenge.

In addition to the possibility of unacceptable decisions by the Minister of Public Safety, it could also cause organizations seeking authorizations to heighten their own sensitivity to accusations of links to terrorism. This would likely lead to their own screening of staff and partners based on these criteria, impacting who is hired and which groups are partnered with, all in order to avoid "guilt by association." Some groups may simply end up refraining from applying for authorizations altogether in order to avoid such discretionary screening, resulting in the reduction of international assistance to populations in need.

Similarly, 83.032(10)(b) contains language which is much too discretionary by setting a low threshold of "likelihood" that an applicant or person involved in the applicant's activities will act to benefit a terrorist group. Instead, the evaluation should be fact based, as opposed to predicting the likelihood of what an individual will or will not do.

Finally, in 83.032(10)(c), the Minister may also take into account not just whether an applicant or any person involved *is* being investigated for a terrorism offence, but whether that person *has* been investigated, or *has ever* been charged with a terrorism offence. The simple fact of being investigated, for example, is not a factual indication of having committed a terrorist activity. This provision is another an entryway for discriminatory and overly discretionary decision making.

For example, we know that people of color, and particularly Muslims, are more likely to be charged with a terrorism offence in Canada. According to a study in *Criminal Law Quarterly*, as of 2019, 98% of terrorism charges had been against Muslims.[5] Security agencies have also admitted the presence of systemic racism and Islamophobia in their activities, but there are concerns that little has been done to substantially address this issue. In another example, it has been widely documented that Muslim-led organizations in Canada face disproportionate scrutiny from the CRA, leading to investigations of their operations and their staff for ties to terrorism. Despite these investigations not resulting in terrorism charges, these organizations could be viewed as already being disqualified from obtaining an authorization based solely on being investigated due to unproven allegations based in systemic Islamophobia.

[5] Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada between September 2001 and September 2018" (2019) *Criminal Law Quarterly*. Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3325956

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Recommendation 1:

That the security assessment portion of Bill C-41 be amended to limit the criteria for assessment:

> **83.032(10)** In conducting a security review, the Public Safety Minister must assess the impact of granting the authorization on the financing of terrorism, and in doing so may consider, among other factors,
> **(a)** whether the applicant or any person who is to be involved in carrying out the activity proposed in the application
> **(i)** is a member of a Listed Entity; or
> **(ii)** is a Listed Entity; or
>
> **(b)** the Public Safety Minister has a reasonable belief that the applicant or any person who is to be involved in carrying out that activity will be knowingly acting for the direct benefit of, at the explicit direction of or in direct association with a terrorist group in carrying out the activity.
>
> ~~(c) whether the applicant or any person who is to be involved in carrying out that activity is being or has been investigated for having committed a terrorism offence or has ever been charged with a terrorism offence.~~

Alternatively:

- That regulations be formulated in order to narrowly define the criteria that the Minister can assess under s.83.032(10);
- And that these concerns be considered, and appropriate legislative amendments be adopted, upon the one-year review of the provisions of this bill.

B. Assistance to the Minister and information sharing

Section 83.038 allows nine entities, as well as any others prescribed by regulation, to assist the Minister of Public Safety "in the administration and enforcement of sections 83.031 to 83.0392." This includes allowing these entities to collect information from, and disclose information to, the Minister of Public Safety and each other.

This raises concerns about the likeliness of over-disclosure of information between entities, as well as the possible use of this information in ways not intended by the legislation, for several reasons.

We are heartened that our recommendations to restrict the use of this information to administration and enforcement of the authorization process has been adopted (s.83.03(2)) and that the Minister must take reasonable steps to ensure compliance (s.83.038(3)).

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However, documented instances of Canada's national security agencies unlawfully retaining information and using it for purposes beyond what it was originally collected for[6] raise concerns that more regulation is necessary to give force to this provision, beyond the Minister taking reasonable steps.

We continue to recommend that provisions should be added to require that the information collected or disclosed for the purposes of administering or enforcing this act is retained only so long as is necessary in order to be used for its intended purposes and then be disposed of. This will provide another bulwark against potential misuse, either unintentional or intentional.

We are also concerned that s. 83.038(1)(j) does not specify that only Canadian entities can be added to the list of assisting organizations. This leaves open the possibility that foreign entities, over which the Canadian government has no control, could be added by regulation. This raises further concerns about information shared being used in unexpected or unintended ways, including in ways that could pose a danger to Canadian organizations, their staff and their partners. It also once against raises concern about the real or perceived securitization of Canadian aid and the possibility that international assistance becomes an unwilling, or possibly unwitting, arm of Canada's national security surveillance apparatus.

For example, if the Minister requests or discloses information about conditions on the ground or about the vetting of staff or international partners, it could be shared with foreign agencies. Once in the hands of foreign agencies, it is impossible to track the ways the information is used, despite the power of the Minister to talk "all reasonable steps" to ensure the information is only used for its intended purpose. Once the information leaves Canada, it falls outside of our jurisdiction. Foreign agencies or governments could then take action based on this sensitive information in ways that may not respect human rights or even undermine the stated goal of this regime, being the provision of international assistance.

Finally, particular protections must be placed on any use of personal information, including but not limited to that of staff, partners, donors, and individuals served on the ground. Strict rules on use, disposal, notification and correction of erroneous information must be enacted.

[6] See, for example: Jim Bronskill, "CSIS broke law by keeping sensitive metadata, Federal Court rules," The Canadian Press, 3 November 2016. Online: https://www.cbc.ca/news/politics/csis-metadata-ruling-1.3835472; "New Revelations of Spy Agency's Unlawful Activities and Misleading Courts Shows Need for Concrete Action and Accountability," International Civil Liberties Monitoring Group, 2 September 2020. Online: https://iclmg.ca/new-revelations-of-csis-misleading-courts/; Greg McMullen, "Pulling Back the Curtain on Canada's Mass Surveillance Programs – Part Two: The CSE Secret Spying Archive," BC Civil Liberties Association, 16 March 2023. Online: https://bccla.org/2023/03/pulling-back-the-curtain-on-canadas-mass-surveillance-programs-part-two-the-cse-secret-spying-archive/

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Recommendation 2:

That Bill C-41 be amended to place limits on information collection and disclosure by and to entities assisting the Minister of Public Safety in the administration and enforcement of sections 83.031 to 83.0392, including in regard to disclosure to foreign entities, limits on retention and use, and the protection of personal information. Proposed amendment:

> **Assistance to Public Safety Minister**
> **83.038 (1)** The following entities may assist the Public Safety Minister in the administration and enforcement of sections 83.031 to 83.0392, including by collecting information from and disclosing information to that Minister and each other:
>
> […]
>
> **(j)** any other Canadian entity prescribed by regulation.
>
> […]
>
> **Disposal of information**
> **(4)** The Minister shall retain the information disclosed to them under subsection (1) only so long as is reasonably necessary for the administration and enforcement of sections 83.031 to 83.0392, and will then dispose of the information
>
> **(5)** Any entity to which the Minister discloses information under subsection (2) will retain the information only so long as is necessary to assist the Minister, and once that assistance is complete will dispose of the information
>
> **Personal information**
> **(6)** If any of the information disclosed under subsection (1) or (2) is personal information as defined in section 3 of the *Privacy Act*, the Minister must alert the individual of the disclosure and the information contained in the disclosure, and provide the individual with the opportunity to correct any error this information may contain

Alternatively:

- That regulations be adopted setting out requirements for:
  - The disposal of information when retention is no longer necessary;
  - The proper handling of personal information, including for individuals to be informed about the use, assess the accuracy of, and request correction to, their personal information;
- And that these concerns be considered, and appropriate legislative amendments be adopted, upon the one-year review of the provisions of this bill.

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