

Brief to the Standing Committee on Public Safety and National Security

With respect to:

OUR SECURITY, OUR RIGHTS
NATIONAL SECURITY GREEN PAPER, 2016



NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)

DECEMBER 14, 2016

ABOUT THE NATIONAL COUNCIL OF CANADIAN MUSLIMS (NCCM)

The National Council of Canadian Muslims (NCCM) was founded in 2000 as an independent, non-partisan, non-profit grassroots organization to be a leading voice for Muslim civic engagement and the promotion of human rights.

The NCCM's mandate is to protect human rights and civil liberties, challenge discrimination and Islamophobia, build mutual understanding between Canadians, and promote the public interests of Canadian Muslim communities. We work to achieve this mission through our work in community education and outreach, media engagement, anti-discrimination action, public advocacy and coalition building.

The NCCM has testified before several parliamentary committees on important legislation, including previous iterations of the *Anti-Terrorism Act, 2015*; has participated in the Arar Commission, the Air India Inquiry, and the Iacobucci Internal Inquiry; and has appeared before the Supreme Court of Canada on cases of national importance.

The NCCM regularly provides media commentary on issues affecting Canadian Muslims. It offers frequent seminars and workshops on Islamic practices and issues of religious accommodation, and produces a number of publications, which include guides outlining Islamic religious practices for journalists, employers, educators, and health care providers. Our publications are regularly requested by government departments, local and national media outlets, police services, hospitals, schools, businesses, and various NGOs.

The NCCM documents and resolves discrimination and bias-related complaints. It produces reports on anti-Muslim sentiment and reports its findings annually to the ODIRH of the Organization for Security and Co-operation in Europe (OSCE). It has also presented findings at national and international conferences. The NCCM is federally incorporated and is funded primarily through private donations from Canadians. The NCCM does not accept donations from foreign organizations or governments.

On October 20, 2016, the NCCM presented the community impact of harmful legislation in a meeting with federal Public Safety Minister Ralph Goodale and Justice Minister Jody Wilson-Raybould.

The NCCM has consistently called for the *Anti-terrorism Act, 2015* to be repealed on the basis that it increases the risk of violating the rights of innocent Canadians while failing to enhance national security.

OVERVIEW

In March 2015, the NCCM testified before the House of Commons Standing Committee on Public Safety and National Security (SECU) on Bill C-51, the *Anti-terrorism Act, 2015* (the "Act"). NCCM has taken principled opposition to the Act from the beginning. We echo the view of the overwhelming majority of experts in the field that the Act represents a greater danger to Canadians than is justified in the name of fighting terrorism.

The NCCM has always supported the government's responsibility to ensure national security. But Canadian Muslims know well that national security policy that fails to abide by the standards established in the *Canadian Charter of Rights and Freedoms* (the "Charter") abandons the very values on which Canadian democracy is built. Canadian Muslims are proud to be "Charter Canadians", but we expect the *Charter* to protect us as much as it protects any other Canadian.

Based on what is known about the last 15 years, it is clear that the Canadian security establishment does not afford Canadian Muslims the same *Charter* respect and protection as other Canadians. Through direct and indirect actions, Canadian security agencies lost the trust and confidence of Canadian Muslim communities. Little has been done to address revelations about errors, lies, unreliability and sloppiness in information gathering and information sharing within the security establishment, which have caused many Canadian Muslims and their families hardship and harm. The principal recommendations of the Arar Commission Inquiry and others have been unheeded and are not adequately reflected in the Act or addressed in the Green Paper.

Canadian Muslims are just as concerned about security as other Canadians. We face the same risk of untimely death or injury at the hands of terrorists as any Canadian. In fact, globally, the *overwhelming majority* of victims of extremist violence have been Muslims. Being a population with global connections, Canadian Muslims are threatened and impacted by global terrorism as much, if not more, than other Canadians. We thus have a high interest in Canada developing a strong and sound national security policy.

NCCM agrees with the plurality of experts who state that more power to security agencies does not necessarily mean more security for Canadians. National security errors and red herrings not only put innocent people at risk of suspicion and stigma, they also divert resources from focusing on actual threats or engaging in other activities to promote safety and security within Canadian society. Canadian Muslims are not only disproportionately affected by national security errors and excesses, but they also bear the brunt of social impact when xenophobia and Islamophobia surge. Promoting security for all Canadians must include protecting Canadian Muslims and other targeted minorities against discrimination and hate crimes by some elements within society.

Efforts at community engagement to combat 'radicalization' must link combating discrimination within mainstream society with promoting integration among Muslim youth. It is increasingly politically popular to demand that Canadian Muslims adapt and demonstrate fidelity to 'Canadian values' without concomitant assurances of security, inclusion and equality. The Green Paper does little to assure Canadian Muslims that our participation in any national security strategy will result in our members and communities being made more secure.

The Green Paper calls for strengthening the security establishment without providing any evidence or reasons to support why this strengthening is either necessary or wise. For the prior Conservative

government, the assumptions were clear: it believed that law and order was the appropriate response to most problems. The current government was elected on a promise to do things differently, to be more reflective of the values of Canadians and respectful of the *Charter*. Canadian Muslims need to know that a government claiming to represent them is doing to keep the powers of the security establishment in check, rigorously applying *Charter* standards. The risks of abuse are too great, and the record of past abuse too extensive.

None of this is to say that Canadians should be left without national security law enforcement. NCCM believes that existing criminal law provides sufficient tools to deal with all forms of crime. The Green Paper's Prevention strategy is laudable, but any potential benefit from it will be negated by the incursions on rights included in powers of threat reduction, information sharing, no-fly listing, and speech banning. If the government wishes to collaborate with communities on prevention, it needs to build trust and confidence first, not sow fear and suspicion. For many young Canadian Muslims, documented and admitted involvement of intelligence and enforcement agencies in rendition and other human rights abuses have bred a lack of confidence in the Canadian security establishment.

PRIMARY SOLUTION:

I Community-Based Engagement

One of the features of the previous government's approach to national security policy was its unwillingness to build relationships of trust and mutual interdependence with Canadian Muslim communities. If the government were seriously concerned that some young members of the Canadian Muslim community were being radicalized and recruited into violent activity, it makes no sense why the government treated community organizations like NCCM with contempt and refused to take an interest in the grassroots members. In a climate of distrust of security agencies, a strengthening of law enforcement is unlikely to yield effective community engagement. Genuine engagement with Canadian Muslims as partners in national security is a necessary prerequisite to any other aspect of counter terrorism or counter radicalization activity.

To that end, the NCCM supports the Green Paper's acknowledgement of the utility of community outreach and counter-radicalization efforts, including the creation of the Office of Community Outreach and Counter-radicalization Coordinator. By far the most effective, and least costly, approach to combating radicalization to criminal violence is delivered at the grassroots level within communities. Community-based solutions are the best defence against radicalization, by "dissuading at-risk individuals from going further down the path of extremism before they commit a crime."¹

Canadian Muslim communities and community leaders have been at the forefront of confronting radicalization to criminal violence. The NCCM, for example, has worked in conjunction with the Islamic Social Services Association (ISSA) on the "United Against Terrorism" handbook, which challenges extremist messages of violence, addresses responsible citizenship, and advises Canadians on what to do if they suspect someone is being radicalized to violence.

The work done by Canadian Muslim communities, however, has been patchwork. What is needed is a planned and synchronized effort that recognizes the multi-faceted nature of the problem, and which harnesses expertise and resources from a variety of sources. There is a need for coordinated national

¹ Kenny, Colin, "Ten signs that someone is becoming radicalized to violence," online: <<http://colinkenny.ca/en/p106133>>.

support of grassroots' activities in areas like counselling, de-radicalization/re-purposing initiatives, education, and social media messaging.

The NCCM is willing to partake in public consultations and work with the federal government at the grassroots partnership level to develop and implement a national coordinated strategy for community-based initiatives.

ADDITIONAL MEASURES:

II. Strengthen Review and Oversight

While the *Act* purports to enhance national security by strengthening the powers of national security agencies, it does so with minimal oversight and at a high cost to the *Charter* rights and freedoms of Canadians. This is of particular concern to Canadian Muslims, who are more likely than others to find themselves targeted by national security investigations. The Arar Commission concluded that the "potential for infringement on the human rights of innocent [Muslim and Arab] Canadians" is higher in national security enforcement due to the stricter scrutiny to which members of these groups are subjected. Thus, any deficiencies in the *Act* or its enforcement will disproportionately affect Canadian Muslims.

a) Parliamentary National Security Committee

The NCCM supports the new government's proposal to establish a parliamentary, all-party, national security committee to provide regular oversight of national security agencies. The committee's focus should be on the "overall efficiency and effectiveness of Canada's security and intelligence community, laws and policies."² The committee should have full access to secret information in order to engage in thorough review.

As stated by Prime Minister Trudeau, "this committee should not be a parliamentary committee, but a committee of parliamentarians." As elected officials, parliamentarians would bear the onus of providing ongoing, and much-needed, oversight of national security operations in order to ensure that individual rights and freedoms are not being breached. The committee should maintain an ongoing discourse with civil society to ensure the work of the national security institutions is cognizant of the social impact it produces.

b) Renewal of the Security Intelligence Review Committee (SIRC)

The NCCM welcomes the proposed for SIRC to review all, as opposed to some, of the operations performed by CSIS. With the previous government's abolition of the office of the Inspector General of CSIS, there is a pressing need to augment the powers of SIRC such that this oversight body has the resources and authority to effectively supervise the activities of CSIS.

SIRC has never had the capacity to examine CSIS's total range of conduct. Historically, it has only examined past activities, and has not conducted any real-time monitoring. Moreover, it is disproportionately under-funded and under-staffed as compared to CSIS. In 2014, SIRC employed an Executive Director and 17 staff members and had a budget of \$2.8 million. This is a tiny fraction of

² Roach, Kent and Craig Forcese. "A Three-Part System to Modernize Canada's Inadequate Review of National Security," online: <<http://ssrn.com/abstract=2714498>>

CSIS's operational budget of \$516 million.³ The NCCM is concerned that SIRC will not be able to do more than a partial review of CSIS's new powers under the *Act*.

Additionally, SIRC's ability to review is constrained by legal limitations that prevent it from investigating when government agencies collaborate. The Arar Commission concluded that review bodies could not adequately oversee information sharing between institutions when their jurisdiction remained "stovepiped" or "siloeed."⁴ In its present condition, SIRC is ill-equipped to effectively oversee the activities of CSIS. It requires a renewed mandate for SIRC to engage in global oversight and review of all agencies and agency sharing, so as to avoid the "stovepipe" problem.

c) Creation of a "super SIRC"

To better coordinate national security agencies, the NCCM would also recommend that the government form a unified, whole-of-government committee, or "super SIRC," similar to the Five Eyes intelligence partners. A "super SIRC" could be mandated to review all national security activities in government, including information sharing.

As noted by the Arar Commission, the "super SIRC" would allow for the formation of "statutory gateways" for collaboration between federal departments and agencies, in order to close accountability gaps. This "super SIRC" could include the review bodies for CSIS, CSE, and RCMP, in addition to the 17 other federal departments implicated by the *Act*. It could also be a focal point for complaints.

The NCCM maintains, however, that this unified, whole-of-government committee should remain independent of Parliament, reporting to and being appointed by the Parliamentary national security committee.

In the case of all three oversight committees, Parliamentary, SIRC, and "super SIRC," the NCCM would welcome the appointment and involvement of Canadian Muslims, in order to ensure a balance of fundamental rights and freedoms with collective security measures.

In addition, the NCCM supports the government's proposal to limit the powers of the Communications Security Establishment (CSE) by requiring a warrant to engage in the surveillance of Canadians. Under the law as it currently stands, the activities of the CSE could capture the private communications of law-abiding Canadians.

d) Mandatory Legislative Review

The *Act* creates extraordinary powers that should be viewed, at best, as a 'necessary evil' in a liberal democracy. The revelations from the Arar Commission demonstrate the terrible impact of errors in the use of extraordinary powers. Not only is the individual's life destroyed but so are those of his loved ones, while a minority community is scapegoated. The NCCM urges the government to consider the potential effects of the *Act* on the Muslim community. The risks are known; what is needed is robust review.

³ Roach, Kent and Craig Forcese and Leah Sherriff. "Bill C-51 Backgrounder #5: Oversight and Review: Turning Accountability Gaps into Canyons?" online: < <http://ssrn.com/abstract=2571245> >

⁴ Roach, Kent and Craig Forcese. "Bill C-51 Backgrounder #3: Sharing Information and Lost Lessons from the Maher Arar Experience" online: < <http://ssrn.com/abstract=2565886> >

As it stands, the *Act* does not provide for a mandatory 3-5 year review of its operation, nor does it contain sunset clauses to allow for further legislative action. Sunset clauses allow the government to re-examine the usefulness of legislation after a set period of time and to seek a renewed legislative mandate. A sunset clause allows the government to affirm or revise its position rather than be tethered to legislation that proves ineffective or harmful. A sunset clause also allows a government to distance itself from the negative, unintended consequences that often flow from extraordinary powers legislation by allowing the law to expire.

The NCCM supports the new government's proposal for a full statutory review of the *Act* every three years, as well as instituting a sunset clause on certain provisions. These provisions, however, have not yet been identified. We strongly encourage the government to review, in particular, the effects of the *Security of Canada Information Sharing Act* and the *Safe Air Travel Act* on Canadians, as well as the new *Criminal Code* offence of advocating and promoting terrorism in general. This would ensure that extraordinary powers do not become normalized without evidence of effective security enhancement and mitigation of harm to civil liberties. Parliament should revisit the *Act* at regular intervals and confirm official support to renew these extraordinary powers.

e) *Accountability in Information Sharing*

The *Act* creates the *Security of Canada Information Sharing Act*, which authorizes government agencies and institutions to disclose information to other government institutions that have jurisdiction or responsibilities in respect to "activities that undermine the security of Canada." The context of "activities that undermine the security of Canada" is broad and difficult to define, and could result in constitutional violations against innocent Canadians, including innocent Canadian Muslims.

The government proposed that the Federal Privacy Commissioner be required to provide the government with an annual report on information sharing between departments and agencies, which would be made public. The NCCM is supportive of this amendment, but does not think that it goes far enough. The NCCM urges the government to implement the recommendations made in the Arar Commission⁵ with respect to information sharing by the RCMP, which could also be adapted by other government departments:

- The RCMP should ensure that, whenever it provides information to other departments and agencies, whether foreign and domestic, it does so in accordance with clearly established policies respecting screening for relevance, reliability and accuracy and with relevant laws respecting personal information and human rights.
- The RCMP should never share information in a national security investigation without attaching written caveats in accordance with existing policy. The RCMP should review existing caveats to ensure that each precisely states which institutions are entitled to have access to the information subject to the caveat and what use the institution may make of that information. Caveats should also generally set out an efficient procedure for recipients to seek any changes to the permitted distribution and use of the information.
- The RCMP's information-sharing practices and arrangements should be subject to review by an independent, arms-length review body.

⁵ Arar Commission Report at 334-342.

III End No-Fly Lists

No-fly lists have a devastating impact on those who are wrongly named. Canadian Muslims and their families are the most adversely affected by the list, the consequences of which damage their personal and professional interests. Meanwhile, there is no data as to the effectiveness of no-fly lists to prevent or thwart attacks. For this reason, use of no-fly lists should be reduced only to cases where there are very strong grounds to know that an individual poses a danger. Any alternative results in racial profiling and the imposition of discriminatory limits on constitutional mobility rights that are not justifiable.

While the *Act* creates a mechanism to challenge a listing, it is an ineffective tool. First is the problem that a person can never know with certainty that they are on the list. Second, a listed person is not given any information about how or why they were placed on the list. Third, while a listed person may ask to have their name removed, the Minister is not bound to reply to the request. Fourth, the onus rests on the listed person to demonstrate not only that the Minister was wrong to put their name on the list, but that the Minister acted unreasonably in so doing. Given the lack of access to information prescribed in the *Act*, the onus is virtually impossible for a listed person to meet.

Thus, the review process fails to provide meaningful protection against error and puts Canadian Muslims at disproportionate risk of having their constitutional rights violated through false designations with no real opportunity for correction.

Being denied boarding or routinely referred for extra screening produce significant constraints on constitutional rights and freedoms, which tend to impede the travel of Canadian Muslims more than others. As a result, Canadian Muslims are made to feel that they are presumed to be dangerous passengers. The Green Paper does nothing to address the risks and burdens of 'flying while Muslim', which experts equate to the burdens of 'driving while Black'. Because the no-fly list may be shared with foreign entities, this produces a spiralling web of exclusion from air travel and stigmatization around the world. The result is that a listed person can be literally grounded indefinitely and branded a 'suspected terrorist' with no hope of relief.

The NCCM maintains that no-fly lists have not been demonstrated to achieve greater benefit to security than harm to personal liberty and as such should be reevaluated. There must be more transparent and rights-respecting means to ensure aviation security.

If a no-fly list is to be maintained, at minimum, a listed person should have a meaningful opportunity to contest their designation. NCCM supports the proposal requiring the government to fully review all appeals by Canadians on the no-fly list.

IV Repeal Overbroad Speech and Thought Crimes

The new crimes associated with "terrorist propaganda" are imprecise and overbroad. They create too much enforcement discretion, which puts perfectly lawful and non-violent conduct within the purview of the *Criminal Code*. This risks criminalizing dissent by chilling or punishing legitimate political and other speech, which attract high levels of *Charter* protection. It is unclear why new crimes are necessary given existing provisions regarding terrorism in the *Criminal Code*. Furthermore, adding "terrorist propaganda" to a customs tariff under the *Act* puts excessive discretion in the hands of customs officials that is susceptible to unconstitutional abuse.

The NCCM also urges the government to repeal the overbroad crimes including “activities that undermine the security of Canada” in the *Security of Canada Information Sharing Act*, as well as the new offence in the *Criminal Code*, s.83.221. The language of this offence, as well as the definitions in the Act, do not create new tools for enforcement. Rather, they create new risks for chilling legitimate speech and political activism. These provisions directly undermine the democratic goals that justify counter-terrorism law and policy in the first place. This is especially true within Canadian Muslim communities, who are disproportionately affected by expression-based offences.⁶

CONCLUSION

The NCCM believes that the *Act* is unnecessary to ensure the safety and security of Canadians, while the threat it poses to civil liberties and the equality rights of all Canadians, and in particular to Canadian Muslims, is disproportionate to any purported benefit. The *Act* should therefore be repealed in its entirety.

The government should review the recommendations made in the Arar Commission report with respect to information sharing by government departments and bring any legislative or policy approach in line with those recommendations.

Where the government can innovate most constructively is through investing in community-based solutions, which are incompatible with a ‘law and order’ approach. More power to security agencies and stricter laws will not counter the phenomenon of radicalization. Discrimination, despair and fear create the conditions for radicalization. The most effective approach to combating the appeal of radical ideologies is to deliver on the promises of Canadian democracy and inclusion. This begins by developing informed social policy and to pursue a broad consultative strategy to address its root causes. The NCCM would be a willing partner to the federal government in this regard.

SUMMARY OF RECOMMENDATIONS:

1. The NCCM urges the government to repeal the *Act* in its entirety.
2. In the alternative, if the *Act* is not repealed, the social and constitutional costs may be reduced through the following measures:
 - Rescind the previous government’s torture directives, which permit the use and sharing of information with foreign regimes that practice torture
 - Increased and continued focus on community-based solutions to combat radicalization. This should include greater transparency in how the government intends to address the issue of violent extremism and credibly engage with communities.
 - Greater oversight through a Parliamentary national security committee, expanding the powers of SIRC, and the formation of a “super SIRC” to coordinate national security agencies.
 - Full statutory review of the *Act* every three years, as well as the establishment of a sunset clause on certain provisions.

⁶ Roach, Kent and Craig Forcese. “Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence,” online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560006>

- Consistent information sharing between government departments and agencies, as well as the adoption of the Arar Commission recommendations.
- Abandon current no-fly lists or at minimum, require the government to meaningfully review all appeals by Canadians on the no-fly list. There needs to be more information and clarity regarding the newly established Passenger Protect Inquiries Office to provide redress for individuals who find themselves unjustly listed on no-fly-lists
- Narrow overbroad definitions in the *Act*.