



Canadian
human rights
commission

Commission
canadienne des
droits de la personne

**BILL C-59, *AN ACT RESPECTING NATIONAL SECURITY
MATTERS***

**SUBMISSION TO THE HOUSE OF COMMONS STANDING
COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY BY**

THE CANADIAN HUMAN RIGHTS COMMISSION

JANUARY 18, 2018

I. INTRODUCTION

The Canadian Human Rights Commission (CHRC) welcomes the opportunity to provide comments on Bill C-59 *An Act respecting national security matters* (Bill C-59).

Respect for human rights enhances national security. The CHRC commends the government on Bill C-59's inclusion of human rights and clear requirements for Charter-compliant conduct in this proposed national security regime, as well as its improvements in oversight, review and reporting processes.

In addition to the recommendations below, the CHRC also supports the positions taken by certain organizations, before the House of Commons Standing Committee on Public Safety and National Security (SECU): the privacy implications as expressed by the Office of the Privacy Commissioner; the commentary on international human rights responsibilities expressed by Amnesty International Canada; the broader *Canadian Charter of Rights and Freedoms* (Charter) implications as discussed by Professors Craig Forcese and Kent Roach; and the concerns about significant adverse effects on infants, children, and families under the Secure Air Travel Act (SATA) as submitted by the "No Fly List Kids" organization.

II. CHRC CONSIDERATIONS REGARDING BILL C-59

a. Primacy of the Canadian Human Rights Act (CHRA)

Mention of the Charter in the preamble of Bill C-59 and in the amended statutes is commendable. It is, however, inconsistent and does not include mention of the CHRA. The CHRA is quasi-constitutional legislation, and is another of the most fundamental statutes in Canada's human rights framework. Given its broad application and fundamental nature, the requirement to carry out activities under Bill C-59 in accordance with the CHRA should be better highlighted, particularly in the preambles which frame the statutes and in those sections where Charter application is also mentioned. These additions would be consistent with the purpose of Bill C-59, and with the wording of the recently passed *Preclearance Act, 2016*.

Recommendation 1: That Bill C-59, and the statutes that it enacts, include mention of the *Canadian Human Rights Act* in their preambles and in any other clauses that require Charter compliance and safeguards of human rights and freedoms.

b. CHRC concerns with the No Fly List and its administration

The CHRC has a number of concerns with the operation of the No Fly List, including the risk of racial profiling, the impact of the use of sex and/or gender identifiers, the inappropriate collection or use of data that may further embed discriminatory biases, and the adverse effects on children.

The CHRC echoes the concerns raised by others that the amended section 8(1) of the SATA would maintain the lowest legal threshold possible for including an individual on the No Fly List (“reasonable grounds to suspect”). This could profoundly impact an individual’s equality rights and may especially place individuals at unreasonable risk of discrimination related to their age, race, religion, or national or ethnic origin.

Across Canada, concerns continue to be raised that racial and religious profiling by police, security agencies, and other authority figures is a daily reality, reducing public trust, and resulting in harmful impacts on Black, Muslim, Indigenous, racialized, and other communities¹. The CHRC notes that, while many security organizations may have policies to prevent discriminatory practices such as racial or religious profiling, few have been actively demonstrating that these policies are followed². In addition, the CHRC is aware that new technologies are increasingly being used to identify individuals, to collect and analyze data, and to assist decision making. These new technologies must be developed and used in a manner that fully integrates human rights protections. The CHRC urges the development of methods to gather data, and to compile and assess this data within a human rights framework. This would enable each agency and the Review Agency to: show that actions and decisions are based on objectively justifiable criteria and not discriminatory factors; prevent or address systemic barriers; regularly revise methods and leverage new technologies while ensuring human rights protections; and demonstrate a measure’s necessity and effectiveness if challenged.

The issue of the use of sex and/or gender identifiers has recently been at the forefront of human rights in Canada, especially following the passage of Bill C-16. The CHRC fully supports the rights of individuals to be recognized and treated with dignity and respect, regardless of their gender identity or expression. The CHRC urges that any use of names and sex and/or gender identifiers in the SATA, and any regulations or procedures which flow from Bill C-59, be reviewed to ensure full compliance with the CHRA, and that the agencies plan and take steps to coordinate with federal and provincial identification and security systems, to eliminate any systemic discrimination faced by individuals based on their gender identity or expression. This includes consideration of issues faced by individuals who are transitioning or have transitioned.

¹ Ontario Human Rights Commission, *Under suspicion: Research and consultation report on racial profiling in Ontario* (2017); Commission des droits de la personne et des droits de la jeunesse du Québec, *Racial Profiling and Systemic Discrimination of Racialized Youth : Report of the Consultation on Racial Profiling and its Consequences, One Year Later: Taking Stock* (June 14, 2012).

² Canadian Human Rights Commission, *Human Rights Accountability in National Security Practices: A Special Report to Parliament*, Nov. 2011, available at <http://www.chrc-ccdp.gc.ca/sites/default/files/chrc-specialreport-28112011.pdf>.

Recommendation 2: That Parliamentarians revisit the proposed legal threshold of “reasonable grounds to suspect” for inclusion on the No Fly List.

Recommendation 3: That Bill C-59 require the development of methods to collect and assess individual data within a human rights framework, to ensure that activities do not result in racial or religious profiling, or have a disproportionate impact related to any prohibited ground of discrimination in the CHRA. This should include any data gathering or analysis using new technologies such as biometrics, predictive analytics, algorithms, or artificial intelligence.

Recommendation 4: That Bill C-59 ensure full compliance with CHRA protections on the basis of gender identity or expression, and require coordination in the use and sharing of identity documents which use sex and/or gender identifiers across federal and provincial agencies, as well as with other states and international partners.

c. Complaints and recourse

The CHRC submits that a number of improvements could be made to Bill C-59, regarding complaints and recourse generally, and regarding the role of the CHRC.

The CHRC notes that section 26 of the NSIRA Act requires the Review Agency to seek the CHRC’s human rights expertise to investigate complaints “if appropriate.” While this mirrors the current provision of the CSIS Act, it appears that the CHRC’s expertise has rarely, if ever, been sought under the existing legislation. We do not wish to provide an exhaustive list of what would meet the threshold of appropriateness. However, to improve access to justice, we submit that some criteria should be established – in negotiation with the CHRC - in order to provide clarity and guidance on how this phrase will be interpreted and implemented.

In addition, Bill C-59 is silent on what form any case-related consultation with the CHRC might take, and how it is to be considered. The CHRC submits that, to ensure adequate representation of human rights issues within the national security regime, the CHRC input should be made available to all parties involved in the complaint, and the decision-maker should be required to consider this input from the CHRC when making a decision.

The CHRC is also concerned about the appeals process of the SATA. We note that there is currently no provision to allow a Special Advocate to represent the rights of individuals appealing the No Fly List, during secret proceedings. As a result, these individuals are denied important due process rights. This, combined with the low legal threshold, may especially negatively affect individuals in vulnerable circumstances. The CHRC submits that Special Advocates should be made available to ensure access to justice.

Recommendation 5: To direct the Review Agency to negotiate, within a reasonable time, a Memorandum of Agreement with the CHRC on the development and publication of guidance and criteria for the interpretation and implementation of the “if appropriate” clause.

Recommendation 6: That Bill C-59 be amended to ensure that the CHRC’s comment or opinion provided to the Review Agency must be provided to all parties (including any Special Advocate) and taken into consideration by the decision-maker.

Recommendation 7: That the use of Special Advocates be required in secret proceedings for recourse and any appeals process.

Recommendation 8: That Bill C-59 require all decision-makers to have in-depth knowledge of human right protections, and that this be demonstrated through job descriptions, the hiring process, and ongoing regular training for all decision-makers.

d. Human Rights Accountability

Requirements on the government and its agencies to report publicly – both nationally and internationally - on human rights impacts, have been largely absent from the national security regime in Canada. This absence has the potential to negatively affect public trust.

The CHRC has previously commented that, without a clear legislative obligation and framework to assess the national security regime as a whole, it is very difficult to assess consistently whether human rights are in fact protected in this regime³. The CHRC commends the progress demonstrated in Bill C-59 which improves organizational and Review Agency reporting. In our view, systemic human rights accountability can be significantly improved with a few small amendments to these reporting requirements.

Recommendation 9: That Bill C-59 be amended wherever annual reporting is required, to include the following content: the impact on rights protected under the Charter and the CHRA.

Recommendation 10: That Bill C-59 be amended to add the following to the contents of the annual report of NSIRA: the impact on rights protected under the Charter and the CHRA; the number of complaints it receives that raise CHRA prohibited grounds of discrimination as a factor in the complaint; and the number of section 26 requests it makes to the CHRC.

³ See CHRC publications such as: www.chrc-ccdp.gc.ca/eng/content/human-rights-accountability-national-security-practices-page-1.

Recommendation 11: That Bill C-59 be amended to ensure that, as part of the review cycle and report: the impact on rights protected under the Charter and the CHRA, be included; time limits cannot be extended unreasonably; the CHRC be invited to provide comment; stakeholder groups be invited to provide input; and the government prepare and table in Parliament, responses to CHRC and stakeholder input.

III. OTHER CONSIDERATIONS

The CHRC has consistently raised concerns about the fact that Canada has not ratified the Optional Protocol to the Convention Against Torture (OPCAT), within Canada's national security regime. We repeat our call for ratification of this important international human rights instrument, which should form a key part of monitoring and oversight of a nation's security regime.

Recommendation 12: That the Government of Canada ratify the OPCAT, and establish an independent and effective National Preventive Mechanism.

IV. SUMMARY OF RECOMMENDATIONS

The CHRC recommends:

1. That Bill C-59, and the statutes that it enacts, include mention of the *Canadian Human Rights Act* in those clauses that require Charter compliance and safeguards of human rights and freedoms.
2. That Parliamentarians revisit the proposed legal threshold of "reasonable grounds to suspect" for inclusion on the No Fly List.
3. That Bill C-59 require the development of methods to collect and assess individual data within a human rights framework, to ensure that activities do not result in racial or religious profiling, or have a disproportionate impact related to any prohibited ground of discrimination in the CHRA. This should include any data gathering or analysis using new technologies such as biometrics, predictive analytics, algorithms, or artificial intelligence.
4. That Bill C-59 ensure full compliance with CHRA protections on the basis of gender identity or expression, and require coordination in the use and sharing of identity documents which use sex and/or gender identifiers across federal and provincial agencies, as well as with other states and international partners.
5. To direct the Review Agency to negotiate, within a reasonable time, a Memorandum of Agreement with the CHRC on the development and publication of guidance and criteria for the interpretation and implementation of the "if appropriate" clause.

6. That Bill C-59 be amended to ensure that the CHRC's comment or opinion provided to the Review Agency must be provided to all parties (including any Special Advocate) and taken into consideration by the decision-maker.
7. That the use of Special Advocates be required in secret proceedings for recourse and any appeals process.
8. That Bill C-59 require all decision-makers to have in-depth knowledge of human right protections, and that this be demonstrated through job descriptions, the hiring process, and ongoing regular training for all decision-makers.
9. That Bill C-59 be amended wherever annual reporting is required, to include the following content: the impact on rights protected under the Charter and the CHRA.
10. That Bill C-59 be amended to add the following to the contents of the annual report of NSIRA: the impact on rights protected under the Charter and the CHRA; the number of complaints it receives that raise CHRA prohibited grounds of discrimination as a factor in the complaint; and the number of section 26 requests it makes to the CHRC.
11. That Bill C-59 be amended to ensure that, as part of the review cycle and report: the impact on rights protected under the Charter and the CHRA, be included; time limits cannot be extended unreasonably; the CHRC be invited to provide comment; stakeholder groups be invited to provide input; and the government prepare and table in Parliament, responses to CHRC and stakeholder input.
12. That the Government of Canada ratify the OPCAT, and establish an independent and effective National Preventive Mechanism.