# Bill C-22:

# An inadequate, worrisome and insufficient bill

**Submitted to the**
**Senate Standing Committee on National Security and Defense**

**In the context of the study of Bill C-22, *An Act to establish the National Security and Intelligence Committee of Parliamentarians and to make consequential amendments to certain Acts***

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## Introduction

The International Civil Liberties Monitoring Group (ICLMG) was created in 2002 with the specific mandate of monitoring the impact of anti-terrorism legislation and other measures on the rights and freedoms of Canadians.

Since then we have raised serious concerns over a series of so-called anti-terrorism measures that have had the cumulative effect of eroding the values of a free and democratic society in Canada, values such as liberty, the rule of law and the principles of fundamental justice.

Over the last 15 years we have appeared before parliamentary committees on many occasions and intervened at the Supreme Court to express our critical views on several issues that continue to be problematic today.

Tabled in June 2016, Bill C-22, the *National Security and Intelligence Committee of Parliamentarians Ac*t, aims to create the long-awaited committee to examine Canada's national security activities. As all other Five Eye countries already have such a committee, it is, in theory, a welcome addition to our inadequate national security oversight and review apparatus. Unfortunately, on paper, the bill falls short in many respects, which we discuss below.

However, before discussing the problematic aspects of C-22, we want to make it clear that the creation of a Committee of Parliamentarians on National Security to ensure the democratic oversight of national security agencies and operations must be seen as a complimentary mechanism, not a substitute, for an independent expert review and complaint body.

A committee of parliamentarians should focus on broad oversight of the national security regime and operations, and related policy matters. It will not have the resources or capacity to carry out thorough, after-the-fact reviews and investigate complaints. Parliamentarians are busy with their parliamentary obligations and cannot develop the expertise nor allocate the time and energy to carry out detailed in-depth reviews and investigations.

As far back as 2006, the Arar Commission concluded that our national security review system was clearly inadequate. With the new powers established through the *Anti-Terrorism Act, 2015*, the accountability regime has become even more obsolete. It is time to completely reform and renovate Canada's oversight and accountability regime to meet the challenges of the contemporary world of national security activities.

What is needed is a new, integrated and single Security and Intelligence review body with the mandate, resources and expertise to conduct detailed reviews and to investigate complaints over all law enforcements, intelligence agencies and government departments involved in national security. We have seen this kind of body endorsed both by the recent report on Canada's national security framework by the Standing

Committee on Public Safety and National Security, as well as by the public response to the Ministry of Public Safety's consultation on national security.

This kind of expert and independent review and complaint body would contribute enormously to inform the work of the proposed Committee of Parliamentarians. Canada is taking an all-of-government approach to security. This must be matched by an all-of-government approach to review and accountability.

## Analysis of Bill C-22

The ICLMG supports the creation of a committee composed of parliamentarians on national security. As an organization, we have advocated for such a body for the past several years. We have also undertaken work to examine and publicize the kinds of oversight bodies found internationally. As mentioned above, Canada remains the only Five Eyes country without such an oversight body.

However, since it was introduced, we have held serious concerns regarding Bill C-22. We presented a similar brief to the House of Commons Standing Committee on Public Safety and National Security. Like others, we were encouraged to see the committee integrate many of the recommendations presented during hearings as amendments to the bill.

Many of those amendments have since been removed, though. And while some minor improvements have been made, we maintain our serious reservations over multiple aspects of the bill.

### 1) Parliamentary Committee or Committee of Parliamentarians?

Currently, the committee would be a Committee of Parliamentarians, and not a Parliamentary Committee. As will be shown in the forthcoming sections, many of the concerns we present could be addressed through forming this committee as a Joint Special Committee of Parliament. That structure would bring the following changes:

- Ensure the committee's independence from the Executive and the Prime Minister's office, and that it is ultimately responsible to Parliament;
- Allow for the committee to elect its own chairperson;
- Allow the committee to call for people to testify and papers to be produced;
- Grant members parliamentary privilege (limited only by secrecy oaths deemed necessary).

As a special joint committee, other specific regulations for this committee could be made. Many of these issues were addressed in the 2004 Interim Committee of Parliamentarians on National Security report on this very issue. While we do not endorse all the recommendations in that report, it makes a strong case for why a

parliamentary committee would be a better alternative than a committee of parliamentarians.

We would also like to note that other jurisdictions also began with a committee of parliamentarians, most importantly the UK in the form of the Intelligence and Security Committee (ISC). But after nearly a decade of work, criticism regarding a lack of independence led to the committee being reconstituted as a committee of parliament. While there are still questionable restrictions on the appointment of members (decided on by the Prime Minister, but voted on by members of parliament), and the ability of the Prime Minister to control the information the committee discloses to parliament, it is a marked improvement from the previous version.

The Canadian government has said that we must allow the Canadian version of the committee to develop on its own, earn trust and even learn from its mistakes before granting it further independence. However, we strongly disagree: As we have seen in the UK since the reforms to the ISC, and the example of oversight committees in the United States, both the integrity of the public representatives on the committee and the oaths of secrecy they must take are enough to ensure the confidentiality and security of the information handled by the committee. There is no reason to repeat the mistakes of the UK before us.

Recommendation 1: That the committee be established as a Joint Special Committee of Parliament, based in and responsible to the houses of Parliament.

**2) Oversight or review mandate?**

The mandate of the Committee needs to be clarified. As defined in Bill C-22, the committee is to “review” legislation, activities and matters referred to the committee. However, examining existing review bodies’ mandates demonstrate what is meant by review: they investigate, after the fact and often based on a complaint, to find if the national security activities have been done in respect of the law and ministerial directives.

The Committee, however, is established as an oversight committee that ensures not only that the agencies are acting efficiently and that their actions are respectful of the law, but also that the legislation regulating national security activities is respectful of the Charter of Rights and Freedoms and our international human right obligations. This is an important role, but must not be confused with acting as a review body.

Recommendation 2: Clarify the role of the committee between oversight and review, and amending section 8 accordingly.

**3) Unspecified powers**

We are concerned that the legislation does not specify the powers the Committee – and its Secretariat/staff – will have to get the answers they need in the conduct of their work. Will they be able to inspect sites and offices? Will they be able to send for people, papers and records as parliamentary committees are able to? This last point is particularly important. We believe that the committee should have the power to compel the production of documents or the appearance of witnesses as needed to do their work.

While we do not wish the committee's powers to be narrowly defined, at a minimum we would expect some clarity on what their powers are.

Recommendation 3: Details of the committee's powers should be included in the establishing statutes.

Recommendation 4: A new provision granting the committee the power to summon witnesses, compel testimony on oath or solemn affirmation, and require the production of all necessary documents should be added (possibly in article 13).

**4) Unacceptable limits to reviews**

Under s. 8 of the bill, the committee is mandated to review any national security or intelligence activity of any agency or department. However, the Minister responsible for the department in question can refuse the review altogether if they determine that it relates to an "ongoing operation" and would be "injurious to national security."

First, it is problematic that such exceptions are placed under the mandate of the committee. This places greater emphasis on the exclusions than they should garner. Rather, they should be clearly labeled as exceptions to the committee's mandate to review Canada's national security and intelligence operations.

Ultimately, though, such restrictions place undue restraints on the ability of the committee to carry out their work. "Injurious to national security" is not defined in that section, and even with the precision of "ongoing operation" this exception gives too great leeway to block the committee's work. The committee members will be security cleared, will be sworn to lifelong secrecy, and will not have the protection of parliamentary privilege. The risk of abuse or leaks is minimal (as has been demonstrated with the minimal amount of leaks in other jurisdictions with less restrictions, such as the United States). If committee members believe a matter is worth investigating, they should be able to pursue it without further hindrance.

Recommendation 5: Section 8 should be amended to remove all references to ministerial exclusions from the "Mandate" chapter of the law; instead, they should be placed in another, specific chapter. These exclusions should also be further restricted, as the current wording that the committee cannot examine an activity if it "is an ongoing

operation and the appropriate Minister determines that the review would be injurious to national security" remains overly broad.

**5) Unacceptable limits to accessing information**

Even if the committee's ability to pursue an investigation was guaranteed, their work would still remain threatened by the restrictions on what information they can access.

Section 13 allows committee members to seek information from any Canadian agencies and departments so long as such information relates to its national security mandate.

Despite the fact that committee members will have security clearance, there are a number of categories of information to which the committee is not entitled under s. 14. This includes cabinet confidences, information related to ongoing law enforcement investigations, the identity of human sources and other classes of information.

While some of the exclusions under s. 14 may be appropriate, the largest problem arises under s. 16. This section once again allows ministers wide discretion in limiting the work of the committee, this time by denying access to information on two grounds: first, that it constitutes special operational information, as defined in subsection 8(1) of the *Security of Information Act* (*SIA*); and second, that the provision of the information would be injurious to national security.

In the former case, "special operational information" is a vast category, including:

> (c) the means that the Government of Canada used, uses or intends to use, or is capable of using, to covertly collect or obtain, or to decipher, assess, analyze, process, handle, report, communicate or otherwise deal with information or intelligence, including any vulnerabilities or limitations of those means;
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> (d) whether a place, person, agency, group, body or entity was, is or is intended to be the object of a covert investigation, or a covert collection of information or intelligence, by the Government of Canada;
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> (f) the means that the Government of Canada used, uses or intends to use, or is capable of using, to protect or exploit any information or intelligence referred to in any of paragraphs (a) to (e), including, but not limited to, encryption and cryptographic systems, and any vulnerabilities or limitations of those means; or
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> (g) information or intelligence similar in nature to information or intelligence referred to in any of paragraphs (a) to (f) that is in relation to, or received from, a foreign entity or terrorist group.

We would argue that these are exactly the areas the committee of parliamentarians must be examining, and to exclude them – along with other components of s. 8 of the *SIA* – will be highly detrimental to the committee's work.

In the latter situation, we once again see ministers granted extreme leeway in defining what is injurious to national security. However this time, unlike in s. 8 of Bill C-22, there is not even the precision that it must relate to an ongoing activity. Once again, the committee will be security cleared and vowed to secrecy under threat of prosecution. Furthermore, governments and agencies have used the excuse of national security many times in the past to hide embarrassing actions, to justify the use of secret evidence against an accused individual, and to avoid accountability. To deny the committee members access on the grounds of national security – the very area they are investigating – is to block them from doing the essence of their work.

Recommendation 6: The bill, particularly sections 14 and 16, must be amended to allow the committee full access to all necessary information, with the reasonable exception of cabinet confidences.

**6) No right to judicial recourse**

Section 31 states that a Minister's decision to either stop a review or refuse to provide information for national security reasons is final and if the Committee is dissatisfied with the decision, it cannot bring the matter before the courts. This kind of unbridled ministerial power is very unusual in our legal system. As in other cases, should the government refuse to disclose information on the grounds of national security, the decision should be open to review (as in, for example, an Access to Information request). In this case, we would suggest the review be carried out by a security-cleared federal court judge. Such judicial recourse should also prevail in cases where the Prime Minister requires revisions to committee reports before they can be tabled in Parliament. Such recourse is necessary to ensure the integrity of the oversight process.

Recommendation 7: A new provision allowing for the judicial review of ministerial decisions to limit investigations, restrict access to documents and/or information, and the Prime Minister's vetting of committee reports, should be added.

**7) The Committee's reports are submitted to the Prime Minister – not Parliament – who can censor them**

Each year the Committee must submit to the Prime Minister a report of the reviews it conducted during the preceding year, containing the Committee's findings and its recommendations, "if any." This report would eventually be tabled in parliament. The Committee can also write special reports, if necessary. However, such special reports may only be submitted to the Prime Minister or the Minister concerned and are not tabled with Parliament.

Even more troubling is that s. 21(5), which states that the Prime Minister can direct the Committee to revise their annual report to remove any information he or she deems as "information the disclosure of which would be injurious to national security, national defence or international relations" before the report can be tabled to Parliament.

Section 21(5.1), added at the Committee stage, does improve on the original wording of the bill. It states revised reports must be marked as such, that the sections revised must also be marked and the reasons for the revision must be provided.

However, while a helpful stopgap, we feel that this does not go far enough. Section 21 remains highly problematic. The committee is being created to review the activities of national security agencies that are ultimately responsible to the executive and its head, the Prime Minister. Thus, having the Prime Minister review any final reports creates, at a minimum, the appearance of a conflict of interest in this legislative scheme. This would be avoided if the committee were responsible to Parliament.

Recommendation 8: Along with previous recommendations that the committee should be responsible to parliament, and that judicial oversight be implemented, the committee should be allowed to submit its reports directly to parliament and be trusted to maintain the appropriate level of confidentiality of sensitive information.

**8) The Government is appointing the members to oversee… the Government**

The Committee will have no more than three Senators and eight members of the House of Commons, including no more than five members from the governing party. Therefore, when/if the Committee has 11 members; the members from the governing party will be in minority. However, all committee members will continue to be appointed by the Governor in Council on the recommendation of the Prime Minister. The Chair is also selected by the Prime Minister rather than elected by the other committee members.

In the UK, the Prime Minister nominates the parliamentary oversight members, and although Parliament is able to approve or reject these nominations – which is not the case in Bill C-22 – UK human rights organizations have pointed out that members are often too closely aligned with government and too close to those it is charged with scrutinizing, which has the potential to damage public confidence in its independence and the reliability of its reports.

Recommendation 9: Committee members should be elected by their respective chambers of Parliament. This could be accomplished by amending the bill. However, to ensure independence of the committee from the government and Prime Minister, establishing the committee as a parliamentary committee would be a stronger solution.

Recommendation 10: Committee members should elect the chair of the committee.

**9) Are the Committee's recommendations binding?**

Nowhere in the legislation is it specified if the Committee's recommendations are binding or not, simply that it may table reports which will be referred to the appropriate parliamentary committee for consideration (likely the SECU and SECD committees). Even in the case of special reports sent directly to ministers or the Prime Minister, no enforcement mechanism is explicitly stated. We fear this means that none of the committee's recommendations will be binding, as is the case for recommendations made by existing review bodies (such as SIRC). Even then, these binding recommendations have done little to instil changes or improvements to the national security apparatus. All recommendations must be binding, and the committee able to follow-up on these recommendations, if we are to have real accountability.

Recommendation 11: The committee should be granted power to make binding recommendations.

**10) What can the Committee members disclose?**

Bill C-22 is very confusing and intimidating when it comes to what the members can disclose while exercising their powers or performing their duties. The bill states that members cannot disclose anything except for the purpose of their oversight work, however we find this to be very vague. We worry that the line of what can or cannot be disclosed will likely be drawn by the government and national security agencies, either through pressure exerted by committee members from the government party on their committee colleagues before reports are issued or statements made, and/or pressure placed after the fact, causing committee members to censor themselves for fear of crossing that line.

Moreover, members must take an oath of secrecy, will be permanently bound to secrecy, and cannot rely on their parliamentary privilege to protect them if they disclose information the government wanted kept secret. In an interview with CTV News, Public Safety Minister Ralph Goodale stated that any issues or abuses detected using classified information will be disclosed to the Prime Minister and no one else and that this should be enough to fix any situation. We are sceptical that this will be the case. What happens if nothing is changed? What is the Committee's recourse to put pressure on the government to correct and repair the abuses if the members cannot disclose them to Parliament and the public for fear of reprisal? The government has said that the committee members will be able to use the "bully pulpit" to denounce and embarrass the government of the day into action. But when what they can disclose is so limited, we question whether they will have the security, support or confidence to do so. Even if they are able to exercise that power, we question whether it will be an effective tactic, as we have not observed it being useful in other contexts. This issue could lead to serious gaps in oversight.

Recommendation 12: Ensure committee members maintain parliamentary privilege by removing article 12.

### 11) Unintended consequences for Access to Information?

Section 35 of Bill C-22 presents consequential amendments to the *Access to Information Act*. It states that the Secretariat of the committee "shall refuse to disclose any records requested under [the *Access to Information Act*] that contains information obtained or created by it or on its behalf in the course of assisting" the Committee of Parliamentarians. This is an overly broad exclusion. The Access to Information Act already limits the divulging of information related to national security and defence. By granting blanket exclusion to all records relating to this committee, the government is essentially creating a new class of exclusions. There is also the possibility for abuse: if/when information from any department is provided to or used to create documents for the Committee of Parliamentarians, it could then be viewed as automatically excluded, thereby limiting access to information that otherwise would have been available.

At a time when the government has pledged to improve the country's Access to Information regime – one which independent experts have long said is out-dated and difficult to navigate – such regressive changes in the name of national security are worrisome.

Recommendation 13: Section 35, creating a blanket exception in the Access to Information Act for materials created by or for the Committee, should be removed.

### 12) Eleven members to review 20 departments and agencies?

Although the UK parliamentary oversight committee is composed of only nine members, it only oversees three agencies. The US House Committee on Intelligence is composed of 21 members, and the US Senate Committee on Intelligence has 15 members. Eleven members seems insufficient to oversee the activities of about 20 departments and agencies in Canada.

There has also been discussion regarding the composition of the committee. Currently, it is unclear whether it will be mandatory to maintain the balance of 8 MPs and 3 senators for the committee to function. We believe there are benefits to having a mixed-member committee, with both senators and members of parliament. At a minimum, the senators should make up one-third of the members of the committee. Some have suggested an equal membership of MPs and senators on the committee, as was proposed in the previously cited 2004 report. We agree that the longer tenure of senators will be helpful in ensuring that the committee develop a level of expertise and continuity, but we cannot ignore the accountability that comes with elected officials who must face the public every four years. While we are not opposed to greater senate presence on the committee, we are unsure it would further increase accountability.

Further, there is nothing in Bill C-22 that guarantees that the committee will be adequately resourced with sufficient funding, staff and expert assistance. We also do not know yet how often the members will meet. Since the committee reports to the Prime Minister, it would appear that the Privy Council Office would be responsible for appropriating funds. In short, the funding of the committee is left to the discretion of the Prime Minister.

We expect the Committee to have the membership, staff and financial resources proportional to the ones allotted to the national security entities it is mandated to oversee in order to be able to truly fulfill its duties. As a reminder, CSEC, CSIS and the RCMP together have a budget of nearly four billion dollars and employ just under 34,000 people.

It is true that a large committee may be cumbersome, and therefore underlines the need to adequate staffing and resources, as well as the creation of an expert, independent review mechanism that would both carry out its own investigations, but also support the Committee of Parliamentarians.

Recommendation 14: That the wording of section 4(2) be modified to guarantee senators at a minimum 1/3 of seats on the committee.

Recommendation 15: The bill should clearly state how the level of funding and staff for the committee will be determined, to ensure that it has the resources needed to carry out its work.

Recommendation 16: There should be a general provision that defines the terms for cooperation and information-sharing between the Committee and a new independent Review and Complaint mechanism yet to be created. Until such a Review and Complaint body is created, the terms of cooperation with existing review bodies should be strengthened by requiring, at a minimum, that the review bodies immediately provide the committee with key reports:

A. Special reports from the RCMP Civilian Review and Complaints Commission;
B. Reports of potential noncompliance from the CSE commissioner;
C. SIRC briefings for the Minister of Public Safety;
D. Special reports from SIRC to the Minister of Public Safety.

## Recommendations

In conclusion, we believe that a Committee of Parliamentarians will strengthen oversight of our national security agencies, but that bill C-22 must be greatly strengthened in order to ensure that the oversight is effective and meaningful.

Our first, and strongest, recommendation is that a robust and overarching and independent “Review and Complaint” body must also be created to complement and

assist the oversight work of the Committee of Parliamentarians, regardless of the amendments and modifications to Bill C-22.

We also believe that, fundamentally, any national oversight committee must be accountable and report to Parliament and not to the Prime Minister. So long as the committee is linked to the Prime Minister's Office, questions of independence and transparency will persist regardless of the efforts of the members of the committee.

Bearing in mind our other concerns, the establishment of this committee as a parliamentary committee rather than a committee of parliamentarians, would ensure that the committee is responsible to Parliament, would have many of the necessary powers and would – most importantly – remain completely independent of the government of the day and the Prime Minister's Office.

We therefore advocate for the following amendments to Bill C-22:

Recommendation 1: That the committee be established as a Joint Special Committee of Parliament, based in and responsible to the houses of Parliament.

Recommendation 2: Clarify the role of the committee between oversight and review, and amending section 8 accordingly.

Recommendation 3: Details of the committee's powers should be included in the establishing statutes

Recommendation 4: A new provision granting the committee the power to summon witnesses, compel testimony on oath or solemn affirmation, and require the production of all necessary documents should be added (possibly in article 13).

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Recommendation 8: Along with previous recommendations that the committee should be responsible to parliament, and that judicial oversight be implemented, the committee should be allowed to submit its reports directly to parliament and be trusted to maintain the appropriate level of confidentiality of sensitive information.

Recommendation 9: Committee members should be elected by their respective chambers of Parliament. This could be accomplished by amending the bill. However, to ensure independence of the committee from the government and Prime Minister, establishing the committee as a parliamentary committee would be a stronger solution.

Recommendation 10: Committee members should elect the chair of the committee.

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