Brief on Bill C-20:
An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments

Presented to the
House of Commons Standing Committee on
Public Safety and National Security

Submitted by the
International Civil Liberties Monitoring Group

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About the International Civil Liberties Monitoring Group

The International Civil Liberties Monitoring Group (ICLMG) is a national coalition of Canadian civil society organizations that was established after the adoption of the *Anti-Terrorism Act* of 2001 in order to protect and promote human rights and civil liberties in the context of Canada's counterterrorism activities and the so-called "War on Terror." The coalition brings together 45 NGOs, unions, professional associations, faith groups, environmental organizations, human rights and civil liberties advocates, as well as groups representing immigrant and refugee communities in Canada.

Our mandate is to defend the civil liberties and human rights set out in the Canadian Charter of Rights and Freedoms, federal and provincial laws (such as the Canadian Bill of Rights, the *Canadian Human Rights Act*, provincial charters of human rights or privacy legislation), and international human rights instruments (such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

Active in the promotion and defense of rights within their own respective sectors of Canadian society, ICLMG members have come together within this coalition to share their concerns about national and international anti-terrorism legislation, and other national security measures, and their impact on civil liberties, human rights, refugee protection, minority groups, political dissent, governance of charities, international cooperation and humanitarian assistance.

Finally, further to its mandate, the ICLMG has intervened in individual cases where there have been allegations of serious violation of civil liberties and human rights. The ICLMG has also intervened to contest proposed legislation, regulations and practices that contravene the Canadian Constitution, other Canadian laws and international human rights standards. This includes submitting briefs and appearing before House and Senate committees, including in regard to *The Preclearance Act, 2016*, the *Act to establish the National Security and Intelligence Committee of Parliamentarians*, and the *National Security Act, 2017*, and participating as an intervenor in the Commission of Inquiry into the case of Maher Arar and contributing to the policy recommendations that flowed from it.

Introduction

The International Civil Liberties Monitoring Group (ICLMG) works to protect and promote human rights and civil liberties in the context of Canada's counterterrorism activities and the so-called "War on Terror." Central to this work has been advocating for effective review and complaints mechanisms for Canada's national security agencies in order to ensure accountability, transparency, redress, and ultimately, substantial and systemic reform in counterterrorism and national security activities.

It is in this context that we share our comments and recommendations on Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, which would reform the existing review and complaints mechanism for the Royal Canadian Mounted Police (RCMP) and create, for the first time ever, a dedicated review and complaints process for the activities of the Canada Border Services Agency (CBSA). It would do so by reforming the existing Civilian Review and Complaints Commission (CRCC), renaming it the Public Complaints and Review Commission (PCRC).

Significant change was brought about with the establishment of the National Security and Intelligence Review Agency (NSIRA) in 2019, creating the first overarching body empowered to review Canada's national security activities. Importantly, this included the national security related activities of the CBSA, subjecting this federal law enforcement agency to any form of independent review for the first time.

However, NSIRA was never intended to provide complete coverage of CBSA's activities, and considerable gaps remain in accountability and review of Canada's immigration and border policing activities.

First, NSIRA was not empowered to accept complaints from the public regarding CBSA's national security related activities. This was a significant omission, which ICLMG raised during committee hearings studying NSIRA's implementing legislation, Bill C-59. This means that the CBSA remains Canada's only federal law enforcement agency without an independent complaints investigation mechanism. Second, CBSA's scope is much broader than national security activities, meaning that a large amount of its operations would remain outside the purview of NSIRA's reviews and investigations. Finally, NSIRA is tasked with reviewing the entirety of Canada's national security framework, with a specific focus on the Canadian Security Intelligence Service (CSIS) and the Communications Security Establishment (CSE), as well as other statutory obligations. None of these statutory obligations mandates a specific review of the CBSA, meaning that the Agency would not receive the specific scrutiny that it requires.

Beyond independent review and investigation of public complaints of the CBSA, it has been clear for many years that the review and complaints process for the RCMP has also been in dire need of reform. Long delays in review and investigation completion, often caused by refusal on the part of the RCMP to respond to interim reports, undermined the credibility of the review process; this was further worsened by the RCMP not following through on implementing recommendations, along with the under-resourcing of the Civilian Review and Complaints Commission (CRCC).

While the creation of NSIRA provided the potential for some easing of these concerns at the RCMP, specifically by taking on national security-related review and complaints investigations, it again could not address the deep-seated concerns of the overall review and accountability of the RCMP.

Bill C-20 would address many of these concerns, the most crucial being the ongoing and inexcusable absence of an independent review body for the CBSA. However, there remain key areas where the bill continues to fall short and would require amendment at committee. Further, the study of Bill C-20 presents an important opportunity to examine whether the hybrid NSIRA-CRCC review and complaints investigation of the RCMP has proven effective and where there are areas for improvement. Finally, while not included in the legislation, we would urge the committee to also examine the resourcing needed for the newly proposed Public Complaints and Review Commission to carry out its expanded mandate.

Our brief will examine the following points:

1. Complaints process
2. Referrals of national security complaints and reviews
3. Rules mandating the discontinuance of complaints investigations and reviews
4. Investigational independence
5. Recourse and remedies
6. Restrictions on judicial review
7. Reporting, transparency and other concerns

A summary of our recommendations is in Annex 1 at the end of this document.

1. Complaints process

Bill C-20 would create a system for the public to file complaints regarding the conduct of RCMP and CBSA employees in the performance of their duties.

Sections 38 and 52 of Bill C-20 lay out who may submit a complaint, and on what grounds, stating that the PCRC, CBSA or RCMP may reject a complaint if:

- The complainant is not the individual at whom the conduct was directed; [1]
- The complainant is not the guardian, tutor or otherwise appointed to act on behalf of the individual;[2]
- The complainant is not a person who was a direct witness to the conduct or its effects;[3]
- The complainant does not have written permission to make the complaint from the individual at whom the conduct was directed; [4]

[1] Bill C-20, ss. 38(1)(b)(i), 52(1)(b)(i)
[2] *Ibid.* ss. 38(1)(b)(ii), 52(1)(b)(ii)
[3] *Ibid.* ss. 38(1)(b)(iii), 52(1)(b)(iii)
[4] *Ibid* ss. 38(1)(b)(iv), 52(1)(b)(iv)

- The complainant has not suffered loss, damage, distress, danger or inconvenience as a result of the conduct;[5]
- The complaint is trivial, frivolous, vexatious or made in bad faith;[6]

The proposed system is too restrictive in terms of who can submit a complaint and on what grounds, and it grants broad discretion to the PCRC, RCMP and CBSA to reject a complaint out of hand. In order to ensure that the complaints system is robust, these restrictions should be narrowed.

a. Third party and systemic complaints

While the ability for third parties to file complaints is welcome, we believe it is too narrow. The proposed rules would only allow a third party to submit a complaint if they were a direct witness to the conduct or effects, or have the written consent of the individual at whom the conduct was directed. However, in the context of both policing and of immigration and border enforcement, this presents an unacceptable barrier to being able to bring third party complaints.

This is particularly relevant in the context of immigration and border-related complaints. Individuals without clear legal status in Canada are likely to be reticent to confront authorities, under fear of repercussions or retaliation. They may also be in situations where they have been detained, or possibly expelled from Canada, and unable to adequately seek out third party support – particularly in order to provide written consent.

This also applies for those who may wish to bring a complaint against the RCMP, or against the CBSA under other aspects of its activities. For example, individuals under investigation, who have been detained or facing charges may also be reticent to bring a complaint forward.

It is especially true given that, similarly to the current process for the CRCC, initial investigations will be carried out by either the RCMP or the CBSA themselves;[7] this only heightens potential concerns of repercussions or reprisals for having filed a complaint.

To address this, Bill C-20 should be amended to allow for the granting standing to a third party to bring a complaint.

Further, along with hearing from third parties, Bill C-20 should be modified to explicitly allow for the submission of systemic complaints by the public.

Currently, Bill C-20 only allows for complaints related to the "performance of any duty or function" of an RCMP or CBSA employee.[8] This means that complaints would only be allowed regarding individual action, and not regarding overall systemic problems at either agency. This is a major oversight in the legislation.

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[5] *Ibid.* ss. 38(1)(b)(v), 52(1)(b)(v)
[6] *Ibid.*, ss. 38(1)(a), 52(1)(a)
[7] Civilian Review and Complaints Commission, "Complaints and Review Process," Government of Canada, last modified: 2021-02-09. Online at: https://www.crcc-ccetp.gc.ca/en/complaint-and-review-process
[8] Bill C-20, ss. 33(1), 33(2)

This is a concern we also identified and raised during the study of the complaints mechanism for NSIRA and have seen first-hand how the exclusion of third party and/or systemic complaints results in delays in addressing key issues. In 2021, we raised concerns around the need to investigate systemic bias at the Canada Revenue Agency, but were unable to formally file a complaint with NSIRA; nearly two years later, NSIRA chose to initiate its own review of this issue.[9] While there is no guarantee NSIRA would have accepted our systemic complaint, we do know for certain that it was impossible to submit it through formal channels because of limitations in the legislation.

Other reviews of police oversight in Canada have also highlighted the importance of third party, systemic complaints, including the review of Ontario's police oversight system by Justice Tulloch:

> 126. There may be times when third parties have valid conduct, policy, or service complaints. For example, a legal clinic or community group may hear from multiple clients about a particularly troubling police practice. It should be encouraged to file a complaint about that practice, even though it is not directly affected by the impugned policy or service.[10]

Under Bill C-20, the current system under the CRCC would be maintained, whereby systemic reviews can only take place upon referral by the Minister of Public Safety or upon a decision by the PCRC itself.[11] In response to concerns about this limitation, we have been informed that organizations could write to the Commission in order to raise systemic concerns; however, the lack of a clear, legislated process for doing so opens up the possibility of overly-broad discretion and inconsistent decision-making. Instead, Bill C-20 should be amended to allow for the public to file systemic complaints with the PCRC.

Recommendation 1: Amend ss. 38 and 52 to allow for public-interest third party complaints.

Recommendation 2: Amend s. 33 to allow for the submission of systemic complaints.

b. "Trivial, frivolous, vexatious or made in bad faith"

Sections 52(1)(a) and 38(1)(a) would allow a complaint to be rejected if it is considered "trivial, frivolous, vexatious or made in bad faith." While many of these grounds are understandable and defined in law, the inclusion of "trivial" raises concerns. There are many occasions where the

[9] National Security and Intelligence Review Agency, "Notification of NSIRA's Review of CRA's Review and Analysis Division (RAD)," 8 March 2023. Online at: https://nsira-ossnr.gc.ca/wp-content/uploads/Notification-Letter-Canada-Revenue-Agency-EN.pdf

[10] The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review*, Ontario, 2017. [Tulloch Report]

[11] Bill C-20, ss. 28(1), 28(2)

impact of an interaction with a law enforcement officer could appear trivial to an outside perspective, but carries significant impact for the individual. For example, we have often heard from individuals referred to secondary screening who are delayed in travelling with their family. While some may see a few hours delay in vacation travel to be trivial, for the individual involved it can be highly traumatizing, with individuals reporting that it can be humiliating, lead to fear when traveling, impact family relations, etc. This may not always be obvious to a person who has never experienced this kind of situation, and could lead to the screening out of legitimate complaints.

Recommendation 3: Amend ss. 52(1)(a) and 38(1)(a) to remove "trivial".

c. Who can accept complaints

Finally, there is an important and unacceptable discrepancy in s. 33 regarding to whom a member of the public can file a complaint. In s. 33(7), a complaint regarding the RCMP can be made to either the PCRC, to the provincial police oversight body, or to *any member* of the RCMP. However, s. 33(8) states that a complaint regarding the CBSA can only be submitted to the PCRC or to the CBSA itself. We can think of no justification for this additional limit on filing a complaint regarding the CBSA, and believe that similarly to the RCMP, a person should be able to notify and lodge a complaint with any employee of the CBSA.

Recommendation 4: Amend s. 33(8)(b) to read, "the Agency or any current CBSA employee".

2. Referrals of national security complaints and reviews

Since 2019, the CRCC has been required to refer complaints and reviews regarding national security to NSIRA. Bill C-20 would maintain this process, obliging the PCRC to refer (or discontinue) complaints and reviews regarding the national security activities of both the RCMP and the CBSA to NSIRA.[12]

When NSIRA was established, it was unknown how the new relationship between it and the CRCC would play out. The last three years have shed some light on the process, and highlighted areas of necessary improvement, some of which should be addressed in Bill C-20; others are non-legislative matters, but which we believe would still be of value for the committee to consider during this study.

Currently, the only public information regarding the referral of reviews or complaints from the CRCC to NSIRA is contained in the Memorandum of Understanding (MoU) signed between the

[12] *Ibid.*,ss. 31(1), 31(2), 52(8), 53(4)

CRCC and the RCMP, last updated in 2022.[13] From our research, there is no public documentation regarding the relationship between the CRCC and NSIRA.

The CRCC-RCMP MoU outlines that the RCMP's National Public Complaints Directorate will be the "initial and primary point of contact for National Security related public complaints," and that, "the CRCC may consult with the RCMP in order to make the determination that the complaint is closely related to National Security." It details that the CRCC will inform complainants within 10 days of referring a complaint to NSIRA. Finally, if a complaint is not initially identified as being national security related, but later is found to be, the "RCMP and the CRCC will conduct discussions to establish if those complaints are closely related to National Security."

Beyond this, no further information regarding the process for assessing whether a complaint should be referred to NSIRA is included; unsurprisingly, the MoU is completely silent in regard to the process for referring an activity review to NSIRA.

Nor do we find more information in CRCC's annual reports which, while documenting the number and types of complaints received, including the number of those dismissed, are silent on how many complaints have been referred to NSIRA. More information can be gleaned from NSIRA's annual reports, which shows that between 2019 and 2021 (the last year for which an annual report was available), it received 5 referrals per year, for a total of 15.[14] This is in comparison to the more than 2,200 complaints that the CRCC receives per year that meet the criteria for investigation.[15]

There is no reason to believe that this very low number of referrals indicates anything other than a low number of complaints in regard to the RCMP's national security related activities. However, it is impossible to properly assess this without more information regarding the interpretation of "national security," the process for evaluation, and transparency overall regarding the number of referrals being made.

This will become even more important once CBSA review and complaints become part of the PCRC. The CBSA's mandate of border protection, by definition, intersects more prominently with national security and counterterrorism concerns. Decisions impacting individuals regarding searches, screening, inadmissibility and more all may have a national security component to them. That said, given that many of these activities are carried out as part of CBSA employees' everyday duties, would they be best investigated by NSIRA or the PCRC?

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[13] Civilian Review and Complaints Commission, "Memorandum of Understanding between the CRCC and the RCMP," 19 April 2022. Online at: https://www.crcc-ccetp.gc.ca/en/mou-crcc-and-rcmp

[14] National Security and Intelligence Review Agency, *Annual Report 2021*, 18 July 2022, pp. 81-82. Online at: https://nsira-ossnr.gc.ca/wp-content/uploads/Annual-Report-2021-PDF.pdf [NSIRA Annual Report 2021]; NSIRA, *Annual Report 2020*, 18 October 2021, pp.74-75. Online at: https://www.nsira-ossnr.gc.ca/wp-content/uploads/Annual-Report-2020-October-18-2021-FINAL-for-the-Prime-Minister-English-for-printing-1.pdf; NSIRA, *Annual Report 2019*, 20 November 2020, p. 83. Online at: https://www.nsira-ossnr.gc.ca/wp-content/uploads/2020/12/AR-NSIRA-Eng-Final.pdf

[15] Civilian Review and Complaints Commission, "Annual Report 2021-22," June 2022, p. 10. Online at: https://www.crcc-ccetp.gc.ca/pdf/ar-ra21-22-eng.PDF

Finally, there is a lack of clarity within Bill C-20 itself. In s. 31, the PCRC is obliged to refer any review that is "related to national security" to NSIRA. However, in s. 58 the PCRC is only obliged to refer a complaint that is "**closely** related to national security." It is unclear why there is this difference of wording when considering a review as opposed to a complaint, or what "closely related" would signify (as opposed to simply "related"). Moreover, while there is the requirement that if, during the investigation of a complaint, the PCRC concludes that the complaint relates to national security, it must refer it to NSIRA. However, there is no reciprocal rule that if NSIRA concludes that a complaint initially referred to it by the PCRC is not in fact related to national security, to be able to refer it back to the PCRC. As a result, such a complaint would simply be terminated. These are important points that require clarification, and should be shared publicly.

Recommendation 5: That a definition of "national security" be added to s. 2(1) of Bill C-20; alternatively, that a working definition be included in a MoU between NSIRA and the new PCRC.

Recommendation 6: That s. 10 of Bill C-20 be amended to allow the PCRC to make rules related to the process for referring national security related complaints and reviews to NSIRA and that these rules be shared publicly on the PCRC website; alternatively, that Bill C-20 be amended to require the PCRC to enter into a MoU with NSIRA, and that the MoU be shared publicly.

Recommendation 7: That s. 13(2) be amended to require information regarding the number and nature of complaints and reviews that the PCRC has referred to NSIRA be included in the commission's annual report.

Recommendation 8: That the committee determine the best path to amend the NSIRA Act to allow the review agency to refer complaints back to the PCRC if it determines that, while the complaint is well-founded, that it is not closely related to national security.

We would also expect that with the integration of the CBSA into the PCRC, the number of complaints accepted by the PCRC, as well as those referred to NSIRA, will increase dramatically. It would be important for the committee to inquire as to whether the current and projected resourcing for both review bodies will be sufficient to address this new workload.

Finally, given the importance of NSIRA's review and complaints findings to the overall functioning of the RCMP and CBSA, it is likely they would be of value to the PCRC when conducting their own investigations and reviews, even if they are not specifically national security related. However, nothing currently indicates that information is being between the CRCC and NSIRA, nor that this would change with the establishment of the PCRC. While this working relationship may not be an area for legislative solutions, we believe that raising it during the study of Bill C-20 would help ensure the integrity of the review and complaints process.

3. Rules mandating the discontinuance of complaints investigations and reviews

It is important that the newly proposed PCRC is able, and mandated, to examine the broadest number of complaints and reviews possible to adequately ensure accountability within the RCMP and the CBSA. We are therefore concerned about overly broad requirements for the PCRC to reject or discontinue investigations of complaints or reviews. There are two areas of concern that we have identified in the bill.

a. "Adequately or more appropriately" addressed under another procedure

Section 52(5) of Bill C-20 states:

> The Commission must refuse to deal with a complaint if the complaint has been or could have been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under any Act of Parliament — other than this Act — or any Act of the legislature of a province.

This is also reflected in other sections that oblige the PCRC not to investigate a complaint made by an RCMP or CBSA employee for the same reasons.[16]

This is a greater restriction than currently exists for the CRCC. In s. 45.53(2)(a) of the *RCMP Act*, the decision to refuse a complaint on these grounds is discretionary, reading "the Commission *may* refuse" not "*must* refuse" (emphasis added).[17]

This is an unacceptably broad requirement for refusing a complaint. There is no reason that the PCRC should be required to reject a complaint on the grounds that another "adequate" procedure exists. There is no guarantee that this other procedure would necessarily accept the complaint or that it would handle the complaint in the way that the complainant is seeking out.

While the argument that a complaint should be dealt with a procedure that could "more appropriately" address the concern is perhaps stronger, there remains no reason why the PCRC should be obliged to reject a complaint simply because such a procedure exists. There is no reason why two government bodies could not or should not adjudicate on the same issue. A finding by the PCRC would be different, and result in different recommendations, than a review by the Canadian Human Rights Commission, for example.

Both requirements create an unacceptable barrier to an individual's ability to seek out redress for harm caused by either the CBSA or the RCMP.

Moreover, they present a barrier that does not exist in legislation for other review bodies. For example, the *NSIRA Act* contains no such provision for complaints regarding the CSE or CSIS. This causes an unfairness in complaints handling in two ways:

[16] Bill C-20 ss. 38(2), 47(2)
[17] *RCMP Act*, ss. 2(a)

First, if this requirement is applied by the PCRC upon receipt of a complaint, some national security related complaints regarding the RCMP and CBSA would never make it to NSIRA (since NSIRA cannot directly accept public complaints related to these two agencies), whereas similar complaints regarding CSIS and the CSE would be considered by the agency, therefore creating a double standard.

Second, and more likely, this filtering requirement will be considered after the decision to send a national security related complaint to NSIRA. This would create yet another double standard, in that national security related complaints would receive a full hearing, where non-national security related complaints would be rejected based on the "adequate" or "more appropriate" provisions.

Recommendation 9: That Bill C-20 be amended to remove the requirement to terminate complaint investigations that could be dealt with under other processes or Acts, and to instead grant the PCRC discretion to refuse to terminate an investigation where there exists another "comparable, reasonably available and more appropriate" process. Further, the bill should allow for complainants to challenge such a decision within a reasonable amount of time following the communication of the PCRC's decision.

b. Reviews or investigations that "compromise or seriously hinder" the investigation or prosecution of any offence or the administration or enforcement of program legislation

Bill C-20 also contains multiple clauses that would reject or terminate both reviews and complaints investigations if carrying them out would, in the case of both the RCMP and the CBSA, "compromise or seriously hinder the investigation or prosecution of any offence," or, additionally for the CBSA, "compromise or seriously hinder the administration or enforcement of program legislation."[18] "Program legislation" in particular is wide-ranging and includes the *Excise Act*, the *Special Import Measures Act*, the *Customs Act*, the *Customs Tariff*, the *Immigration and Refugee Protection Act*, the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, the *Feeds Act*, the *Fertilizers Act*, the *Health of Animals Act*, among others.[19]

These requirements are once again overly broad and unnecessary. Even though a complainant would be allowed to appeal to the PCRC should the RCMP or CBSA decide to reject or discontinue an investigation, it would still result in the rejection of well-founded complaints that deserve investigations. It will also unduly limit the ability of the PCRC to carry out reviews of the activities of both agencies.

For example, complaints or reviews regarding serious, ongoing, or systemic misconduct would almost by their nature lead to the possible hindrance of investigations, given that it could require disciplinary measures against RCMP or CBSA officers, lead to disclosure of activities that could compromise the possibility of convictions, or uncover investigatory or enforcement processes or

[18] Bill C-20, ss. 37(3), 37(4), 46(2), 52(6), 60(1)
[19] *Canada Border Services Agency Act*, ss. 2(a) to (d)

activities that violate the law or fundamental freedoms. While there may be a case for some discretion, termination of investigations or reviews should not be mandatory based on these unacceptable grounds. Moreover, the decision to do so should not be taken by the agencies under investigation (RCMP or CBSA).

Other legislation, including the *National Security and Intelligence Committee of Parliamentarians Act*, also adds a temporal aspect to a similar clause: it mandates that reviews that would hinder "ongoing" investigations or prosecutions should be suspended, and that once a review would no longer be deemed a hindrance, the committee be informed so it can resume its study.[20] Such provisions should also be included in Bill C-20 for those occasions where a suspension may be required.

As mentioned earlier, the requirement to reject reviews or investigations for compromising or being a serious hindrance of "the administration or enforcement of program legislation" presents even greater concern, given the breadth of activity covered and the possibility that large swathes of complaints or reviews could be deemed to impact these activities. Once again, the bill allows the CBSA to halt an investigation based on its own opinion that this threshold has been met. The serious hindrance of program legislation could arise in multiple ways, including a small department lacking resources to respond to a complaint investigation, the requirement to suspend, or review how, the administration of a particular program is carried out, etc.

Finally, we agree with suggestions put forward by others, including the Canadian Civil Liberties Association, that the ultimate concern should be that any investigation of a complaint does not interfere with an investigation or prosecution related to the conduct of said complaint, and not on the ability of the RCMP or CBSA to carry out their activities; redress for complaints cannot be held up because the responding body believes an investigation into its conduct should not proceed.

Recommendation 10: That provisions regarding the rejection or termination of reviews or complaints based on the premise that they "compromise or seriously hinder" the investigation or prosecution of any offence or the administration or enforcement of program legislation be modified to instead allow for an investigation or review to be suspended should such a review or investigation interfere with a legal proceeding in regards to the conduct that is the subject of the complaint. Barring this, that reviews and investigations are only *suspended*, pending the confirmation that they can be restarted, and that such decisions are made by the PCRC and not by the body that is the subject of the investigation.

4. Investigational independence

It is crucial that any complaint investigation process be impartial and independent. This is the cornerstone to ensure accountability in Canada's federal law enforcement activities.

[20] *National Security and Intelligence Committee of Parliamentarians Act*, ss. 8(1)(b)

Unfortunately, much like the current system with the CRCC, Bill C-20 falls terribly short. The proposed process would see both the RCMP and the CBSA serve as the primary investigating body for complaints into their respective agencies.

Currently, the CRCC addresses this in their MoU with the RCMP: the CRCC "may request, in writing, the RCMP to assign an investigator from a separate detachment or division." The CRCC is required to provide their rationale for this request. The RCMP then has 10 days to respond; should the RCMP deny this request, they must provide their own rationale. There is no process for further challenging the RCMP's decision.

As reported by the Toronto Star in 2020, 99.9% of investigations of public complaints received by the CRCC are investigated by the RCMP itself.[21] Only if the complainant says they are unsatisfied with the RCMP's investigation does the CRCC consider it and, if it agrees with the complainant, initiate its own investigation. Only a small fraction of complainants refers the RCMP's response back to the PCRC. While it is impossible to know why, our experience is that any barrier to complaints – for example, placing the onus on the complainant to follow-up with the PCRC after a possibly lengthy process with the RCMP – will reduce the effectiveness of the process.

This is a clearly unacceptable approach. Instead, complaints investigations must be carried out by a neutral and impartial actor. Our recommendation is that investigations be carried out by the PCRC itself.

While we recognize that empowering the PCRC to carry out initial investigations would be resource intensive, it is impossible to ensure independent and credible review otherwise. The government should implement a plan that would provide resources and build up an investigative unit within the newly PCRC to be launched within five years of the commission's establishment. This would reflect a similar recommendation made in Justice Tulloch's review of the police oversight in Ontario.[22]

While not part of Bill C-20, we would also note that a similar process is in place for NSIRA, where complaints are first reviewed by the agency that is the subject of the complaint. We believe that, similar to the PCRC, NSIRA should be the primary investigative body for national security related complaints, and encourage the committee to examine ways to amend the *NSIRA Act* to make that the case.

Barring the PCRC taking on the role of initial investigator, the PCRC chairperson should be provided the power to follow-up on complaints after an RCMP investigation if they believe there are discrepancies or concerns. This would take the sole responsibility of challenging an RCMP or CBSA investigation off the complainant and allow for greater assurance of a thorough investigation of complaints where needed.

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[21] Ballingall, Alex. "Who investigates complaints about the RCMP? In '99.9%' of cases, it's the RCMP," *The Toronto Star*, 17 June 2020. Online at: https://www.thestar.com/politics/federal/2020/06/17/who-investigates-complaints-about-the-rcmp-in-999-of-cases-its-the-rcmp.html

[22] Tulloch Report at par. 149

Recommendation 11: That the PCRC be made the sole investigating body for the public complaints it accepts regarding the RCMP and the CBSA, and that the government develop and implement a plan for PCRC to take control of all investigations within five years of its creation.

Recommendation 12: That, alternatively, Bill C-20 be amended to allow the Chairperson to initiate reviews of completed complaints investigations that were carried out by the RCMP or the CBSA.

5. Recourse and remedies

The lack of strong, mandatory recourse and remedy powers for federal oversight and review bodies, particularly those reviewing law enforcement and national security agencies, is a long-standing issue that we have raised on multiple occasions, most recently in regards to the *NSIRA Act*. This also applies to current CRCC powers: it cannot initiate disciplinary hearings, make binding orders or enforce other forms of remedies (provide financial compensation, delay enforcement proceedings, etc.).

Time after time, we have seen review body recommendations either rejected, or accepted but never or only partially implemented. To ensure true accountability, we require review bodies with teeth.

While Bill C-20 does not currently address this issue, it provides an opportunity to rectify this problem through amendments.

a. Interim measures

With the integration of the CBSA into the ambit of the PCRC, it will be important to consider the specific situation of migrants and asylum seekers. Many of those who raise concerns with CBSA actions are in a situation where they face deportation from Canada, or are fearful that the filing of a complaint could lead to the hastening of their deportation. Clearly, being removed from the country presents an unacceptable barrier to completing the complaints process.

However, s. 84 in Bill C-20 explicitly states that complaints, investigations and reviews of complaints cannot delay a series of immigration enforcement measures, including deportation, or any form of investigation under any federal or provincial Act.

Such a provision does not currently exist in the *RCMP Act*; we see no justification for including it in the bill.

Recommendation 13: Strike s. 84 from Bill C-20 and amend the bill to explicitly allow the PCRC to allow for a stay of removal or other interim remedies. Alternatively, allow for the filing of an accepted complaint with the PCRC to be used in the filing for a judicial stay of removal.

b. Redress, remedies and orders

Currently, at the conclusion of the investigation of complaints, the CRCC is able only to make non-binding recommendations to initiate a disciplinary proceeding or impose a disciplinary measure. At the conclusion of a review, it is only able to make non-binding recommendations for changes in policy and procedure.

This leaves the implementation of a disciplinary hearing or measure, or change in policies, purely at the discretion of the RCMP or CBSA, creating a clear conflict in accountability and placing in doubt whether concrete remedies will be put in place following the findings of the commission. Such a system instills doubt in the public about the relevance, efficiency and integrity of review bodies – which in turn diminishes the public's confidence in law enforcement and national security agencies.

In order to ensure a robust complaints and review system, and ensure the integrity and public trust in such a system, the PCRC must be granted stronger powers for redress, remedies and binding orders.

This could include the ability to initiate hearings and invoke disciplinary measures, which is already an existing practice in other law enforcement oversight bodies, including in Ontario and British Columbia.

Recommendation 14: That sections 67 and 68 of Bill C-20 be amended to allow the PCRC to:

a) Initiate, or require the initiation, of a disciplinary process at the conclusion of complaint hearings
b) Order certain forms of redress, particularly in the form of halting removals from Canada or allowing re-entry
c) Recommend financial redress or awards for founded complaints

Recommendation 15: That s. 28 be amended to allow the PCRC to make binding policy recommendations.

Recommendation 16: That s. 72 be amended to allow for the initiation of a disciplinary process if actions have not been taken to respond to and implement PCRC recommendations.

c. Transparency and consistency in investigations and disciplinary proceedings

It is crucial that throughout and at the conclusion of investigations into complaints, the complainant is involved and kept informed. However, this is not currently the case in Bill C-20. Also of concern are inconsistent rules between the obligations for the RCMP and the CBSA.

First, while interim reports into complaints are provided to the RCMP and to the CBSA for comment and input, no such process is envisioned for complainants. This places complainants at a disadvantage and should be modified to allow complainants to also have the opportunity to review and provide input into interim reports regarding their complaint.

Recommendation 17: Amend s. 64 of Bill C-20 to require the sharing of interim reports with complainants and to allow for them to provide feedback.

Second, while the bill allows for complainants to be informed of the outcome of RCMP code of conduct hearings, there is no provision for complainants to be informed of the outcome of any other disciplinary process regarding an RCMP officer, or any disciplinary process at all regarding a complaint in relation to a CBSA employee. This is despite ss. 67 and 68 requiring the RCMP and CBSA to inform the Minister and the PCRC whether or not a disciplinary process was initiated, or a disciplinary measure imposed.

Recommendation 18: That s. 67(2) be amended to require that a complainant be informed whether or not a disciplinary process was initiated following a recommendation by the PCRC, and why.

Recommendation 19: That s. 67 be amended to include a new section (3) that requires the PCRC and the complainant to be informed of the outcome of any disciplinary process initiated following a recommendation of the PCRC.

Recommendation 20: That s. 68(2) be amended to require a complainant be informed whether or not a disciplinary measure was imposed following a recommendation by the PCRC, and why.

Recommendation 21: That s. 97 also be amended to require the CBSA to report to both the PCRC and the complainant the outcome and any possible follow-up options following a disciplinary procedure.

6. Restrictions on judicial review

Section 65 of Bill C-20, which would maintain the privative clause already found in s. 45.77 of the *RCMP Act*, reads as follows:

Final and conclusive
65 All of the findings and recommendations that are contained in the Commission's final report under subsection 58(2) or 64(3) are final and are not subject to appeal to or review by any court.

We can see no reasonable justification for barring a complainant from seeking out judicial review of a decision made by the PCRC. Such a clause is not seen in other federal national security review legislation, including the *NSIRA Act*.

Recommendation 22: That s. 65 be removed from Bill C-20.

7. Reporting, transparency and other concerns

While Bill C-20 includes improved requirements for public reporting and transparency in the review process, there remain areas of concern that require attention.

a. Reports

It is essential that the PCRC is empowered to publish as much information related to its reviews and investigations as possible. However, current provisions of Bill C-20 limit this.

For example, s. 12 on "special reports" and s. 28(7) on "specified activity reports" provide only that a summary of any such reports be made public. What should be included in such a summary is not defined, and could lead to important details being left out. Instead, these reports should be published in whole, subject to the limitations laid out in ss. 15(1)(a) and (b).

Recommendation 23: Amend s. 12 and s. 28(7) to allow for the public release of full reports.

We applaud the new requirement in s. 13(2)(d), which mandates that annual reports from the PCRC include disaggregated race-based data regarding complainants. However, disclosure of race-based data alone will not allow for a comprehensive understanding of who are making complaints, particularly if the goal is to understand which communities are making complaints, which are not, and what actions the PCRC should take in response to these findings. For example, our work demonstrates that Muslims face specific forms of discrimination in immigration and policing systems; race-based data alone would not capture this. Nor would it allow for an analysis based on gender identity, sexual orientation or age. Instead, we would suggest that it be amended to "disaggregated demographic-based data" or possibly a list of enumerated categories of data that could be modified or supplemented by regulation.

Recommendation 24: That s. 13(2) be amended to read "disaggregated demographic-based data"; alternatively, that it be amended to include an enumerated list of demographic categories that could be modified or supplemented by regulation.

b. Specified Activity Reviews

The ability to carry out reviews of specified activities, as provided for in s. 28 of Bill C-20, is essential to ensure robust accountability. However, current requirements seriously hinder the independence and ability of the PCRC to carry out such reviews.

In s. 28(3), the bill stipulates that:

> In order to conduct a review on its own initiative, the Commission must be satisfied that:
> (a) sufficient resources exist for conducting the review and the handling of complaints under Part 2 will not be compromised; and
> (b) no other review or inquiry has been undertaken on substantially the same issue by a federal or provincial entity.

Section 28(4) requires that the PCRC provide advance notice to the Minister that it has met these requirements.

Both (3) and (4) present undue restrictions on the PCRC.

Requirement (3)(a) is an unacceptable hindrance on the independence of the PCRC to determine its review work. Reviews should not be made secondary to complaints investigations. This is especially true given that a systemic issue could be the driving force behind multiple complaints, therefore making it imperative (and more efficient) to address the systemic issue rather than individual complaints. Further, such a condition would allow future governments to purposefully underfund the PCRC in order to limit its ability to carry out reviews. While requirement 3(b) is more reasonable, we believe that the PCRC should be trusted to decide at its own discretion whether it is valuable to conduct a review, regardless of other bodies having examined the same issue. For example, the PCRC may bring a different perspective, have different aspect, or may have concerns about how this other study was carried out. We propose that 3(b) also be removed. Alternatively, it should be only be in regard to timing, and be amended to apply to "recently" undertaken reviews or inquiries.

With these modifications, there should be no need to inform the Minister that the PCRC has met any of these requirements. At a maximum, the PCRC should be required to simply inform the Minister of the nature of the review it is undertaking.

Recommendation 25: Remove s. 28(3); or, alternatively, remove 28(3)(a) and modify 28(3)(b) to read "no other review or inquiry has been <u>recently</u> undertaken on substantially the same issue by a federal or provincial entity.

Recommendation 26: Amend s. 28(4) to read: Before conducting a review on its own initiative, the Commission must give a notice to the Minister as to the nature and topic of the review.

c. Access to information for PCRC and NSIRA

Section 16 of Bill C-20 states:

> Right of access
> 16(1) Subject to sections 17 and 19, the Commission is entitled to have access to any information under the control, or in the possession, of the RCMP or the Agency that the Commission considers is relevant to the exercise of its powers, or the performance of its duties and functions, under this Part and Part 2.
>
> Duty to comply
> (2) If access is requested under subsection (1), the RCMP or the Agency, as the case may be, must comply with the request within the prescribed time following the day on which the request is made.
>
> Access to records
> (3) The entitlement to access includes the right to examine all or any part of a record and to be given a copy of all or any part of a record.

Unfortunately, this does not appear to be the current practice of the RCMP in regards to NSIRA or the CRCC. Currently, the RCMP requires both bodies to make requests for documents, which RCMP staff then search for and provide the resulting documents and information to them. This raises significant concern in the independence and rigor of the review process. As NSIRA noted in their 2021 Annual Report:

> In lieu of direct access to RCMP IT systems, NSIRA currently relies on the RCMP's NSERC team to collect relevant information. NSIRA … looks forward to working toward direct access to RCMP IT systems or alternate independent verification processes that provides NSIRA with independent confidence in the reliability and completeness of the information it has access to.[23]

While this issue cannot be more clearly stated than it is in s. 16 of Bill C-20, we would urge the committee to raise this with officials during committee hearings and consider ways to ensure that the requirements to provide direct access to documents to the PCRC will be fulfilled going forward, and to also follow-up on this issue in regard to NSIRA access as well.

Also in regards to access to information, s. 17(2)(a) allows the PCRC to access information subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege, when carrying out Specified Activity Reviews. However, 17(2)(b) forbids such access to privileged documents when carrying out a complaints investigation. Provisions are already in place for such information to not be made public, so it is unclear why it would be accessible for activity review and not complaint investigations.

Finally, both ss. 17(2)(a) and (b) state the PCRC can access information "if that information is relevant and necessary to the matter before the Commission." However, it is unclear who will

[23] NSIRA Annual Report 2021, p. 35

make the determination of that information is "relevant and necessary." Such a decision should not be solely at the discretion of the body that is being investigated. To resolve this, Bill C-20 should include provisions for a dispute resolution mechanism.

Recommendation 27: That s. 17(2)(b) be amended to read, "privileged information, **including** information subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege […]".

Recommendation 28: Amend Bill C-20 to provide a mechanism to adjudicate disputes of information that is "relevant and necessary."

d. Five-year review of the bill

The integration of the CBSA into the new PCRC will be a significant undertaking, particularly given that it will subject the CBSA to outside review for the first time since its creation more than 20 years ago. The lack of a robust internal investigation system within the CBSA, a likely very significant increase in the number of complaints received by the PCRC, and the possible learning curve in regards to reviewing and monitoring a border services agency, will all present challenges to the establishment of this new body.

While we do not doubt that the staff of the PCRC will be up to the task, it is more than likely that there will be a need for adjustments and modifications.

Given all this, including a statutory requirement for a review of Bill C-20 would ensure there is appropriate follow-up.

Recommendation 29: That Bill C-20 be amended in Part 4 to add:

Review

93 The Committee of the House of Commons responsible for public safety matters must,

(a) within five years after the day on which the *PCRC Act* comes into force commence a comprehensive review of the provisions and operation of this Act, and complete the review within one year; and

(b) within three months after the day on which the review is completed, submit a report to the House of Commons setting out its findings.

Annex 1: Recommendations

Recommendation 1: Amend ss. 38 and 52 to allow for public-interest third party complaints. (p. 6)

Recommendation 2: Amend s. 33 to allow for the submission of systemic complaints. (p. 6)

Recommendation 3: Amend ss. 52(1)(a) and 38(1)(a) to remove "trivial". (p. 7)

Recommendation 4: Amend s. 33(8)(b) to read, "the Agency or any current CBSA employee" in order for the public to submit complaints to CBSA employees. (p. 7)

Recommendation 5: That a definition of "national security" be added to s. 2(1) of Bill C-20; alternatively, that a working definition be included in a MoU between NSIRA and the new PCRC. (p. 9)

Recommendation 6: That s. 10 of Bill C-20 be amended to allow the PCRC to make rules related to the process for referring national security related complaints and reviews to NSIRA and that these rules be shared publicly on the PCRC website; alternatively, that Bill C-20 be amended to require the PCRC to enter into a MoU with NSIRA, and that the MoU be shared publicly. (p. 9)

Recommendation 7: That s. 13(2) be amended to require information regarding the number and nature of complaints and reviews that the PCRC has referred to NSIRA be included in the commission's annual report. (p. 9)

Recommendation 8: That the committee determine the best path to amend the NSIRA Act to allow the review agency to refer complaints back to the PCRC if it determines that, while the complaint is well-founded, that it is not closely related to national security. (p. 9)

Recommendation 9: That Bill C-20 be amended to remove the requirement to terminate complaint investigations that could be dealt with under other processes or Acts, and to instead grant the PCRC discretion to refuse to terminate an investigation where there exists another "comparable, reasonably available and more appropriate" process. Further, the bill should allow for complainants to challenge such a decision within a reasonable amount of time following the communication of the PCRC's decision. (p. 11)

Recommendation 10: That provisions regarding the rejection or termination of reviews or complaints based on the premise that they "compromise or seriously hinder" the investigation or prosecution of any offence or the administration or enforcement of program legislation be modified to instead allow for an investigation or review to be suspended should such a review or investigation interfere with a legal proceeding in regards to the conduct that is the subject of the complaint. Barring this, that reviews and investigations are only *suspended*, pending the confirmation that they can be restarted, and that such decisions are made by the PCRC and not by the body that is the subject of the investigation. (p. 12)

Recommendation 11: That the PCRC be made the sole investigating body for the public complaints it accepts regarding the RCMP and the CBSA, and that the government develop and implement a plan for PCRC to take control of all investigations within five years of its creation. (p. 14)

Recommendation 12: That, alternatively, Bill C-20 be amended to allow the Chairperson to initiate reviews of completed complaints investigations that were carried out by the RCMP or the CBSA. (p. 14)

Recommendation 13: Strike s. 84 from Bill C-20 and amend the bill to explicitly allow the PCRC to allow for a stay of removal or other interim remedies. Alternatively, allow for the filing of an accepted complaint with the PCRC to be used in the filing for a judicial stay of removal. (p. 15)

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