

Bill C-22: An inadequate, worrisome and insufficient bill

**Submitted to the
Standing Committee on Public Safety and National Security**

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*

**Ottawa, Ontario
November 14, 2016**

**International Civil Liberties Monitoring Group
338 Somerset West
Ottawa, Ontario
K2P 0J9
613-241-5298
iclmg.ca**

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.

Recently tabled Bill C-22, the *National Security and Intelligence Committee of Parliamentarians Act*, aims to create the long-awaited committee to look over Canada's national security activities. As all the other Five Eyes already have such a committee, it is, in theory, a welcome addition to our inadequate national security oversight and review apparatus. Unfortunately, on paper, it falls short in many respects that 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 after-the-fact thorough 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 contained in C-51, 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 (a 'Super SIRC') 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. This kind of expert and independent review and complaint body would also contribute enormously to inform the work of the proposed Committee of Parliamentarians. Canada is taking a all of

government approach to security. This must be matched by a all of government approach to review and accountability.

Analysis of Bill C-22

While ICLMG supports the creation of a committee of parliamentarians on national security, we have the following serious concerns with Bill C-22:

1) Oversight or review mandate?

The mandate of the Committee needs to be clarified. The Committee's mandate as defined in Bill C-22 is to "review" legislation and activities. However, the review bodies' mandate is to review (as their name suggests), meaning 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 is supposed to be an oversight committee that ensures that not only 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.

2) 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 "reviews". Will they be able to subpoena individuals? Will they be able to inspect sites and offices? We do not wish the powers to be narrowly defined but we would expect some clarity on what their powers are at a minimum.

3) Unacceptable limits to the review

Under s. 8, the committee is mandated to review any national security or intelligence activity of any agencies or departments. However, the Minister responsible for the department that the Committee wants to review can refuse to be reviewed altogether if they determine that it would be "injurious to national security".

Under s. 13, the committee can seek information from any Canadian agencies and departments so long as such information relates to its national security mandate. Despite the fact that the committee members will have security clearance, there are a number of categories of information to which the committee is not entitled under s. 14 such as cabinet confidences, ongoing defence intelligence activities and ongoing law enforcement investigation information, the identity of human sources and other classes of information. Moreover, the Minister may refuse to provide special operational information or information which would be injurious to national security

We believe that this effectively removes a lot of the Committee's power and capabilities. Its members will be sworn to secrecy and will have top level security clearance, therefore they should be able to see sensitive information they believe they need to properly scrutinize national security activities. This is a problematic feature as we have seen the national security excuse being used many times in order to hide embarrassing actions, use secret evidence against an accused individual, and avoid accountability.

Furthermore, s. 31 states that a Minister's decision to stop a review 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. There should be a mechanism in place so the Committee can appeal this decision and effectively fulfill its mandate of oversight

4) 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". The Committee can write special reports if necessary that will only be submitted to the Prime Minister or the Minister concerned.

Even more troubling, section 21.5 states that the Prime Minister can direct the Committee to submit a revised version of a report that does not contain "information the disclosure of which would be injurious to national security, national defence or international relations" according to the Prime Minister before the report can be tabled to Parliament.

We find this provision to be highly problematic since the committee is created to review the activities of national security agencies that are ultimately responsible to the executive and its head, the Prime Minister. There is an appearance of a conflict of interest in this legislative scheme which could be avoided if the committee was responsible to Parliament.

5) The Government is appointing the members to oversee... the Government

The Committee will have no more than 2 Senators and 7 members of the House of Commons, including no more than 4 members from the governing party. Therefore, when/if the Committee has 9 members, the members from the government party will be in minority. However, the Committee who will be charged with overseeing federal departments and national security agencies for which the government is politically responsible will be composed of members 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 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.

6) Are the Committee's recommendations binding?

Nowhere in the legislation is it specified if the Committee's recommendations are binding or not. We fear this means they are not, just like all the recommendations from the review bodies. It goes without saying that they should be binding if we are to have real accountability.

7) 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 and we worry that the line will most likely be drawn by the government and the agencies either through pressure by members from the government party and/or after the fact causing the members to censor themselves by fear of crossing that line.

Moreover, members have to take an oath of secrecy, they will be permanently bound to secrecy, and they cannot rely on their parliamentary privilege to protect them if they disclose something the government or the departments didn't want them to disclose. 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 this should be enough to fix the situation. We are skeptical 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? This could lead to serious gaps in oversight.

8) 9 members to review 20 departments and agencies?

Although the UK parliamentary oversight committee is also composed of 9 members, it only oversees 3 agencies. The US House Committee on Intelligence is composed of 21 members, and the Senate Committee on Intelligence has 15 members. 9 members seems insufficient to oversee the activities of about 20 departments and agencies in Canada.

Finally, 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 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 4 billion dollars and employ just under 34 000 people.

Recommendations

In conclusion, we recommend that to complement and assist the 'oversight' work of the Committee of Parliamentarians, a robust, overarching and independent 'Review and Complaint' body must also be created.

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

- The Committee of Parliamentarians should be accountable to and report to Parliament, not to the Prime Minister;
- There should be a provision requiring the committee to immediately report all suspected wrongdoing, including violations to Canadians' rights, to the appropriate minister and the Attorney General;
- The committee should have full access to all necessary information, with the reasonable exception of cabinet confidences;
- Section 8(b) currently allowing any minister to block an investigation into a particular issue or activity of their department by asserting risk to national security should be removed;
- 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;
- 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 the existing review bodies should be strengthened by requiring, at a minimum, that the review bodies immediately provide the committee with key reports:
 - Special reports from the RCMP Civilian Review and Complaints Commission
 - Reports of potential noncompliance from the CSE commissioner
 - SIRC briefings for the Minister of Public Safety
 - Special reports from SIRC to the Minister of Public Safety.