



## Amnesty International's Submission to the Standing Committee on Public Safety and National Security (SECU):

### *Review of Bill C-20: An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*

2 June 2023

#### I. Amnesty International

Amnesty International<sup>1</sup> (Amnesty) is a global movement of more than 10 million people campaigning for a world where human rights are enjoyed by all. Amnesty conducts research and leads efforts to advance international human rights at both the international and national levels, and is recognized as an accurate, independent, and credible source of research and analysis of human rights conditions around the world.

Amnesty International Canadian Section (English Speaking)<sup>2</sup> (Amnesty Canada) is one of two membership bodies and registered not-for-profits representing Amnesty International members and supporters in Canada. The other Canadian section is Amnistie internationale Canada francophone.

#### II. Overview

Amnesty welcomes the introduction of Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*,<sup>3</sup> ("Bill"), which would create the Public Review and Complaints Commission (Commission) to provide independent oversight of the Canada Border Services Agency (CBSA or "Agency"). Such independent oversight is long overdue; the CBSA, despite its sweeping powers, remains the only major law enforcement agency without independent civilian oversight.<sup>4</sup>

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<sup>1</sup> Amnesty International, Homepage, <https://www.amnesty.org/end>.

<sup>2</sup> Amnesty International Canadian Section (English Speaking), Homepage, <https://www.amnesty.ca>.

<sup>3</sup> Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-20/first-reading> [Bill C-20].

<sup>4</sup> Amnesty International Canada, *Canada: "I Didn't Feel Like a Human in There": Immigration Detention in Canada and its Impact on Mental Health*, 17 June 2021, AMR 20/4195/2021, <https://www.amnesty.org/en/documents/amr20/4195/2021/en/> [I Didn't Feel Like a Human in There], citing Dale Smith, "Oversight at the border," *The Canadian Bar Association*, 28 January, 2020, <https://nationalmagazine.ca/enca/articles/law/hot-topics-in-law/2020/oversight-at-the-border> (accessed May 16, 2021). See also Meghan Potkins, "Calls for more oversight of border agents following death at Calgary airport," *Calgary Herald*, 10 August, 2018, <https://calgaryherald.com/news/local-cnews/calls-for-more-oversight-of-cbsa-following-death-at-calgary-airport> (accessed May 16, 2021).

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#### National Office:

312 Laurier Avenue East, Ottawa, ON K1N 1H9  
Tel: (613) 744-7667 Fax: (613) 746-2411  
info@amnesty.ca

#### Toronto Office:

1992 Yonge Street, 3rd floor, Toronto ON M4S 1Z7  
Tel: (416) 363-9933 Fax: (416) 363-3103  
toronto@amnesty.ca

#### Vancouver Office:

Suite 430, 319 West Pender, Vancouver, BC V6B 1T3  
Tel: (604) 294-5160 Fax: (604) 294-5130  
vancouver@amnesty.ca

In 2021, Amnesty International and Human Rights Watch released a joint report on immigration detention and its impact on mental health.<sup>5</sup> It found that in the absence of independent oversight, the CBSA's unchecked exercise of its broad mandate and enforcement powers had repeatedly resulted in human rights violations in the context of immigration detention.<sup>6</sup> As a result, our organizations recommended that the government establish an independent civilian oversight body responsible for overseeing, reviewing policies of, and investigating CBSA, which would have the authority to order meaningful remedies and penalties and initiate its own reviews and investigations, not be driven solely by complaints, and allow for third parties to make complaints regarding matters relating to individual cases as well as CBSA policies and practices.

In the context of our work on immigration detention and our recommendation to the government, we share our recommendations on Bill C-20. While the Bill also contemplates oversight of the Royal Canadian Mounted Police, Amnesty International's submissions focus exclusively on CBSA oversight.

### **III. Codifying Violations of International Human Rights Standards and Placing People Outside the Reach of Oversight**

Section 110 amends the *Canada Border Services Agency Act*,<sup>7</sup> by stating:

The Agency may enter into an agreement or arrangement with the government of a province respecting the detention of persons on behalf of the Agency only if the Minister is of the opinion that there is in the province an independent individual or body that is empowered to receive and deal with the complaints about the treatment and conditions of detention of detained persons.

It goes on to create an exception to this requirement if the Minister is of the opinion that there is an urgent need to provide for the detention of persons on a temporary basis.

Amnesty International acknowledges that the CBSA currently enters into agreements and arrangements with provincial governments to house people detained on immigration grounds in provincial jails; however, this Bill is, to our knowledge, the first attempt at explicitly codifying the practice in legislation. Amnesty has repeatedly and unequivocally called for an end to the use of provincial jails for immigration detention, which is a violation of international human rights standards.<sup>8</sup> Provinces have taken note of the concerns expressed by Amnesty and others; British Columbia, Alberta, Saskatchewan, Manitoba, and Nova Scotia have all announced an end to their immigration detention agreements and arrangements with CBSA, with some explicitly citing concerns about the practice.<sup>9</sup> Codifying the practice of using

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<sup>5</sup> *I Didn't Feel Like a Human in There*, *supra* note 4.

<sup>6</sup> *Ibid*, p. 80.

<sup>7</sup> *Canada Border Services Agency Act*, SC 2005, c 38.

<sup>8</sup> *Ibid*; Amnesty International Canada, *2022 Human Rights Agenda: Recentering Human Rights in Canada*, 9 December 2022, <https://amnesty.ca/what-you-can-do/2022-human-rights-agenda-for-canada/>; Amnesty International, *Canada: Human Rights in Peril*, Submission to the 44th Session of the UPR Working Group, March 2023, AI Index: AMR 20/6627/2023; Amnesty International Canada, "Canada: Abuse, Discrimination in Immigration Detention", 17 June 2021, <https://www.amnesty.org/en/latest/press-release/2021/06/canada-abuse-discrimination-immigration-detention/>.

<sup>9</sup> Amnesty International Canada, "Half of Canada's provinces now ending immigration detention in provincial jails: Saskatchewan announced end to agreement with CBSA", 14 April 2023, <https://amnesty.ca/human-rights-news/half-of-canadas-provinces-now-ending-immigration-detention-in-provincial-jails-saskatchewan-announces->

provincial jails for immigration detention represents a step in the wrong direction by the federal government. We encourage the government to follow the lead of these provinces by ending the practice and call on the government to avoid steps that further entrench it.

In addition to Amnesty's concerns about this Bill codifying a practice that violates international human rights standards, Amnesty is also concerned that section 110 allows many people in immigration detention to be placed beyond the reach of the Commission. One of the most significant powers that a state (and in this case, CBSA) has is to deprive individuals of their liberty. CBSA has the power to deprive people of their liberty on immigration grounds and to determine whether people in immigration detention are held in Immigration Holding Centres or provincial prisons. Oversight can act as a check and balance on the exercise of these broad powers, and yet this provision would push people facing one of the most restrictive forms of confinement (imprisonment in a provincial jail) outside of the reach of the CBSA's oversight body. Although sections 30 and 63 appear to contemplate the possibility of joint reviews with a provincial oversight body, the Commission would have no jurisdiction over the conduct, practices, and policies of provincial jail staff.

According to section 110, as long as a province has some sort of oversight mechanism, CBSA can enter into agreements with provinces to use its jails for immigration detention. There is no requirement to consider the adequacy of the provincial oversight mechanism, including whether it has sufficient powers, adequate resources, or the ability to conduct systemic reviews. The mere existence of an oversight mechanism is sufficient to satisfy section 110 and to allow people to be placed outside of the reach of the Commission. In addition to concerns about the adequacy of the provincial oversight mechanisms that people in immigration detention might have access to, Amnesty is concerned that this will create confusion for people in immigration detention in provincial jails. They may be required to make separate complaints to separate bodies for conduct related to the decision to detain and site of detention, and for treatment while in a provincial jail.

Amnesty is also concerned about the exception contained in section 110, which allows CBSA to, on a "temporary basis", enter into immigration detention agreements or arrangements with provincial governments in the absence of a provincial oversight mechanism, if the Minister is of the opinion that there is an "urgent need". Given the importance of oversight, it is unacceptable that this Bill contemplates the possibility of placing a significant portion of people in immigration detention beyond the reach of *any* independent oversight. In light of Amnesty's call on Canada to immediately abolish immigration detention in provincial jails and to get on the path to abolishing all forms of immigration detention in Canada, Amnesty strongly urges that this exception be removed.

*Amnesty recommends that section 110 be amended to:*

- Ensure that the Agency may only enter into an agreement or arrangement respecting the detention of persons on behalf of the Agency if the Commission is of the opinion that the Commission would be able to maintain oversight of the conditions of detention.
- Remove the exception in section 110(4).

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[end-to-agreement-with-cbsa/](#); Government of Alberta, "Alberta ends agreement to hold immigration detainees", 18 January 2023, <https://www.alberta.ca/release.cfm?xID=86398B767B343-B7BD-D4D9-199029E4EB0872D3>; British Columbia Public Safety and Solicitor General, "Minister's statement on ending immigration detention arrangement with CBSA", 21 July 2022, <https://news.gov.bc.ca/releases/2022PSSG0050-001139>.

#### **IV. Independence**

The Commission should be fully independent of the CBSA and be sufficiently resourced to conduct investigations and hearings. While section 33(8) allows individuals to make complaints about CBSA conduct to either the Commission or CBSA, section 37 requires that CBSA first investigate the complaint unless otherwise notified by the Commission. Given the significant power CBSA can wield over individuals, including those in immigration detention, individuals may be reluctant to lodge complaints against CBSA if such complaints might be investigated by the CBSA, due to fear of reprisals or concerns that investigations will be biased. In addition, complainants may feel pressured to consent to “informally” resolving the complaint with CBSA under section 43(1).

In order for the Commission to adequately and independently investigate complaints, it must be allocated sufficient resources by Parliament. The Commission must also be sufficiently resourced to conduct reviews on its own initiative, which are important in identifying organizational issues that lead to systemic reforms. Under the proposed legislation, the Commission would only be able to conduct a review on its own initiative if it is satisfied that sufficient resources exist and that the handling of individual complaints would not be compromised.<sup>10</sup> Investigation of individual complaints should not take priority over systemic reviews; the Commission must be sufficiently resourced to carry out both.

Finally, Amnesty International considers that in order to be independent, the Commission should report to and have its budget allocated by Parliament, rather than the Minister of Public Safety and Emergency Preparedness, who is responsible for CBSA. Currently, section 28(4) requires the Commission to give notice to the Minister before conducting a review on its own initiative; this requirement should be removed. All reporting, including reporting under section 72(1), should be directly to Parliament.

*Amnesty recommends that the Bill be amended to ensure that:*

- All complaints are investigated by the Commission.
- The Commission is sufficiently resourced to adequately and independently investigate complaints and to conduct reviews on its own initiative.
- The Commission reports to and has its budget allocated by Parliament rather than the Minister of Public Safety and Emergency Preparedness.

#### **V. Participation by Third Parties**

Bill C-20 inappropriately limits participation by third parties, including civil society organizations. For example, sections 38(1)(b) and 52(1)(b) allow CBSA and the Commission to refuse to deal with complaints made by third parties who did not witness the conduct or were not appointed to act on behalf of or given permission by the individual at whom the conduct was directed. Individuals may be afraid of lodging complaints against CBSA for fear of reprisals and may face barriers to lodging complaints or consenting to complaints being lodged on their behalf while in detention or after deportation.

Third parties could help to address this limitation, by lodging complaints about individual incidents. In addition, third parties might be aware of a pattern of behaviour faced by multiple individuals and could

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<sup>10</sup> Bill C-20, *supra* note 3, s. 28(3).

help to shed light on systemic issues (to be discussed in additional detail below). A complaint made by a third party should not be perceived as less reliable or less worthy of investigation. Allowing for third party complaints can help to ensure that misconduct and systemic issues do not go uninvestigated and unaddressed.

According to section 59(7), only parties and “any other person who satisfies the Commission that they have a substantial and direct interest in a complaint” have the right to participate in public hearings.<sup>11</sup> The requirement to have a substantial interest is sufficient; the requirement to have a direct interest should be removed. Section 44(1) similarly prevents third parties from making representations regarding the impact of the conduct of a CBSA employee. These are unnecessary restrictions that would prevent third parties with significant knowledge and expertise from providing submissions on patterns or systemic impacts of CBSA conduct.

*Amnesty recommends that the Bill be amended to:*

- Remove subsections 38(1)(b) and 52(1)(b).
- Explicitly allow third parties to make complaints.
- Explicitly allow third parties to make representations under section 44(1).
- Remove the requirement in 59(7) for parties to have a “direct” interest in the complaint.

## **VI. Limitations on Complaints, Reviews and Investigations**

Bill C-20 contains various limitations on complaints, reviews, and investigations, which are overly restrictive and unnecessary.

### Systemic and Policy Reviews

Amnesty welcomes the inclusion of section 28, which allows the Commission to conduct reviews on the compliance of CBSA’s activities with the *Canada Border Services Agency Act*, and its policy, procedures, or guidelines on its own initiative. However, because the reviews would be limited to considering compliance, the Commission could not consider the impacts of and rights violations that are incorporated into CBSA’s policy, procedures, and guidelines. For example, CBSA policy discriminates against people with mental health disabilities by indicating that they may be detained in provincial jails rather than Immigration Holding Centres to facilitate “access to specialized care”.<sup>12</sup> However, the Bill as currently written would only permit the Commission to consider whether CBSA is following its policy.<sup>13</sup>

The Bill should be expanded to explicitly allow the Commission to consider the actual content and impacts of CBSA’s policies, procedures, guidelines, and practices, including whether they comply with international and domestic human rights law and standards. In addition, the Bill should explicitly allow for individuals and third parties, including civil society organizations, to formally raise systemic and policy complaints.

### Limitation Period

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<sup>11</sup> *Ibid*, s. 59(7).

<sup>12</sup> *I Didn’t Feel Like a Human in There*, *supra* note 4, p. 4. See also Canada Border Services Agency, “Detentions,” <https://www.cbsa-asfc.gc.ca/security-securite/detent/menu-eng.html>.

<sup>13</sup> Bill C-20, *supra* note 3, s. 28(2).

Section 33(3) requires that a complaint be made within one year after the day on which the conduct is alleged to have occurred. While section 33(5) contemplates an extension of the time limit if “there are good reasons for doing so” and “it is not contrary to the public interest”, the initial time limit should be expanded. People may be reluctant to launch a complaint until their immigration matters are resolved or they are out of immigration detention due to fear of retaliation and may need time to address other more immediate needs or to process the trauma of their interactions with CBSA. People held in immigration detention, including in provincial jails, may also face practical difficulties in launching a complaint to the Commission within the one-year limitation period. For example, they may be placed in solitary confinement, not be aware of their right to complain, not feel comfortable drafting a complaint while under constant surveillance,<sup>14</sup> not be able to speak or write in English or French, or struggle to launch a complaint due to lack of accommodations for a disability.

#### Trivial, Frivolous, Vexatious, or Bad Faith Complaints

Sections 38(1)(a) and 52(1)(a) allow for complaints to be rejected if they are “trivial, frivolous, vexatious or made in bad faith”. While Amnesty acknowledges that some complaints may need to be screened out, it is concerned that the inclusion of “trivial” may lead to the inappropriate rejection of complaints, particularly for racialized people and those who experience additional and intersecting forms of discrimination. Interactions may seem “trivial” in isolation, particularly for individuals who do not have frequent and negative interactions with various law enforcement agencies. However, the cumulative impact of seemingly “trivial” interactions can have significant impacts on individuals and their mental health. Allowing complaints that may appear “trivial” to be rejected might obscure patterns of racial and other forms of discrimination. “Trivial” should be removed from sections 38 and 52.

#### Duty to Refuse Complaints and Investigations

Sections 38(2), 47(2) and 52(5) state that complaints must not be dealt with and investigations must not be commenced if they could have been adequately or more appropriately dealt with according to another procedure provided for under any Act of Parliament or a legislature of a province. There is no consideration of whether a complaint has actually been made to another mechanism, whether the complaint was adequately addressed, or whether the Commission might handle the complaint in a way that is more acceptable to the complainant. This restriction is unnecessary and should be removed.

Sections 37(4), 46(2), 52(6), and 60(1) require that complaints not be dealt with, investigations not be commenced, and existing investigations be suspended if they could compromise or seriously hinder the administration or enforcement of program legislation or the investigation or prosecution of any offence. The “administration or enforcement of program legislation” is extremely broad; investigations that require resources or participation by CBSA employees could be deemed to compromise or hinder the administration of program legislation. As recommended by other organizations, provisions regarding the rejection or termination of reviews or complaints should be modified to allow for (not require) the temporary suspension of complaints and investigations only if they could interfere with a legal proceeding related to the complaint.

*Amnesty recommends that the Bill be amended to:*

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<sup>14</sup> *I Didn't Feel Like a Human in There*, supra note 4, p. 2.

- Allow the Commission to consider the actual content and impacts of – and not just compliance with – CBSA’s policies, procedures, guidelines, and practices, including whether they comply with international and domestic human rights law and standards.
- Explicitly allow for individuals and third parties, including civil society organizations, to formally raise systemic and policy complaints.
- Increase the default limitation period for making complaints set out in section 33.
- Remove the word “trivial” in sections 38 and 52.
- Remove the restrictions in sections 38(2), 47(2) and 52(5) on dealing with and investigating complaints if they could have been adequately or more appropriately dealt with according to another procedure.
- Remove the broad restrictions found in sections 37, 46, 52 and 60 on dealing with and investigating complaints if they could compromise or hinder the administration or enforcement of program legislation or the investigation or prosecution of any offence. Limit such restrictions to the temporary suspension of complaints and investigations only if they could interfere with a legal proceeding related to the complaint.

## **VII. Power to Recommend the Delay of Removal, Extradition and other Action and to Permit an Individual to Enter or Remain in Canada**

Section 84 states that a complaint, the investigation into a complaint, or the review of a complaint is not to, *inter alia*, delay any action taken under any program legislation or prevent any such action from being taken, delay any removal proceedings or prevent the enforcement of a removal order, delay extradition proceedings or prevent extradition, or permit any individual to enter or remain in Canada beyond the period of authorization. While Amnesty recognizes that filing a complaint might not automatically lead to a delay of action, removal, or extradition or permit unauthorized individuals to remain in Canada, there might be instances where the Commission should be able to make recommendations to this effect.

For example, the Commission’s ability to conduct a full and thorough investigation or hearing is likely to be impeded by the removal of the complainant; the absence of the complainant due to removal from Canada could lead to practical difficulties for the Commission to gather first-hand accounts, evidence, testimony, or any other information from the complainant that is relevant to an investigation and would limit the complainant’s ability to participate in a hearing. This could then lead to the complaint being refused or discontinued if an investigation is seen as not “reasonably practicable” under sections 38(1)(e) or 53(1)(b).

This restriction may also impact the number of complaints submitted to the Commission from individuals subject to CBSA misconduct, as they may not feel it is worthwhile or have the capacity to make a complaint when they are facing imminent removal or extradition. As a result, the Commission might have limited oversight over issues related to removal or extradition.

To facilitate investigations and hearings, the Commission should be able to recommend the delays enumerated in section 84(a-e) when it considers it to be appropriate in the circumstances.

*Amnesty recommends that the Bill be amended to*

- Empower the Commission to recommend the action enumerated in section 84(a-e) until a later date that it deems appropriate, such as the completion of the investigation into a complaint.

## **VIII. Limitations on Redress, Remedies, and Appeal**

### The Commission's Powers

While section 28 contemplates the Commission including recommendations regarding the adequacy, appropriateness, sufficiency or clarity of any policy, procedure or guideline, it is unclear whether such recommendations are binding. The section should be amended to clearly state that its recommendations are binding. In the alternative, and at the very least, the legislation should ensure that recommendations are taken seriously by obliging written responses within a reasonable timeframe that identify how accepted recommendations are being implemented and provide detailed reasons as to why recommendations are only partially implemented or rejected. A similar requirement is found in section 58. This information will enable the Commission to conduct effective follow up.

Section 67 enables the Chairperson of the Commission to recommend that a disciplinary process be initiated if one has not occurred. However, such recommendations are not binding, which limits the power and efficacy of the Commission. The Commission should be empowered to initiate and conduct its own disciplinary process, or, at the very least, the recommendation to initiate a disciplinary process should be binding. In addition, the Chairperson should be able to make recommendations regardless of whether a disciplinary process has already occurred, as a previous disciplinary process may have been inadequate or biased.

Section 68 enables the Chairperson to recommend that disciplinary measures be imposed, but only if disciplinary measures have not already been imposed *and* if the person was the subject of more than one complaint under the Act that resulted in a finding that the conduct may have resulted in serious injury, death, or may have constituted an offence. This is unnecessarily restrictive; the Chairperson should be able to recommend disciplinary measures that it considers appropriate in all cases. In addition, and contrary to section 68(2), such measures should be binding.

Finally, the Bill does not speak to the Commission's powers to order financial redress and other remedies for founded complaints.

### Inability to Appeal or Judicially Review Findings

Section 65 states that all of the findings and recommendations contained in the Commission's final reports are not subject to appeal or review by any court. This is an unnecessary restriction that should be removed.

*Amnesty recommends that the Bill be amended to:*

- Empower the Commission to make binding recommendations, including under sections 28, 67, and 68.
- Empower the Commission to initiate and conduct disciplinary proceedings under section 67.
- Remove restrictions on the Commission's ability to recommend that a disciplinary process be initiated and that disciplinary measures be imposed under sections 67 and 68.
- Explicitly empower the Commission to order financial redress and other remedies for founded complaints.



## **IX. Transparency**

### Public Transparency

Amnesty International welcomes the provisions of the Bill that contemplate public reporting, including sections 12(3) and 28(7). However, such reports should be made available to the public in their entirety (with appropriate redactions and limitations, as necessary), rather than mere summaries.

Amnesty also welcomes the requirement to have annual reports that contain data about complainants. In addition to requiring disaggregated race-based data in section 13(2)(f), reports should be required to contain other demographic data, including on disability, gender identity, sexual orientation, age, religion, and country of origin, given the intersecting forms of discrimination that people face on these grounds. To facilitate such reporting, section 45(1) should require that records of complaints received, withdrawn, resolved, and rejected contain disaggregated demographic data, which would be helpful in uncovering systemic bias and discrimination.

Reporting on actions taken in response to recommendations set out in reports and recommendations for disciplinary proceedings, including reports made pursuant to section 72(1), should be public with identifying information removed.

### Transparency for the Complainant

Complainants should receive a copy of the interim report that the Commission sends to CBSA on completion of an investigation or hearing in accordance with section 64(1), which sets out findings and recommendations with respect to the complaint. Currently, section 64(1) only requires the Commission to share the interim report with CBSA, and the complainant is only entitled to receive the final report under section 64(3).

*Amnesty recommends that the Bill be amended to*

- Require that the entirety of reports be made public (after necessary redactions are made) under sections 12(3) and 28(7).
- Explicitly require annual reports under section 13(2)(f) to contain demographic data in addition to race-based data, including on disability, gender identity, sexual orientation, age, religion, and country of origin.
- Explicitly require that records collected under section 45(1) of complaints received, withdrawn, resolved, and rejected contain demographic data.
- Require that reports made pursuant to section 72(1) are made public (after necessary redactions are made).
- Require that complainants receive a copy of the interim report contemplated in section 64(1).