CANADIAN CIVIL LIBERTIES ASSOCIATION
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Submission to the Standing Committee on Public Safety and National Security Regarding Bill C-20, An Act Establishing the Public Complaints and Review Commission

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About the Canadian Civil Liberties Association

The Canadian Civil Liberties Association ("CCLA") is an independent, non-governmental, non-partisan, non-profit, national civil liberties organisation. Founded in 1964, CCLA and its membership promote respect for and recognition of fundamental human rights and civil liberties. For over fifty years, CCLA has litigated public interest cases before appellate courts, assisted Canadian governments with developing legislation, and published expert commentary on the state of Canadian law.

PART I: Introduction and Background

Federal police and security agency oversight is a pressing issue in Canada. Presently, the Civilian Review and Complaints Commission (CRCC) oversees the Royal Canadian Mounted Police (RCMP), while the Canada Border Services Agency (CBSA) has no independent review and complaint mechanism. Given the increased securitization of borders in recent years and the CBSA's broad police-like and security powers, this lack of oversight raises concerns about the accountability of border agents. Civil society organizations have long called for an independent oversight, review, and complaints mechanism for the CBSA in light of the death of detainees held in CBSA custody, interrogation tactics of CBSA officers, and breaches of privacy rights by information sharing with external bodies.

The RCMP's civilian complaint and review body, on the other hand, has its own challenges. Critics have long argued that the CRCC is ineffective at providing meaningful independent oversight due to its limited mandate and resources. The Commission can only make recommendations, which the RCMP is not bound to adopt.[1] Moreover, the Commission's first step in a review is to refer the complaint of police misconduct back to the RCMP for investigation, which gives the impression that the CRCC merely oversees the RCMP's internal discipline and that "police investigating police" remains the de facto practice.[2] Other issues such as a lack of funding and long delays further prevent the CRCC from being a meaningful and robust oversight body.[3]

First Nations, Inuit, and Metis communities (collectively, "Indigenous communities") have been particularly negatively affected by inadequate accountability for police and security agency misconduct. A growing number of research studies and commissions of inquiry have found that Indigenous peoples are not only under-protected by the police but have also in some cases been subject to outright police abuse.[4] The systemic and personal racism suffered by Indigenous peoples both historically and today has caused them to be deeply distrustful of Canadian law enforcement and security agency authorities.[5] Enhancing police accountability would be a crucial element in repairing the relationship between Indigenous peoples and Canada.

This is now the third time that the federal government has tabled legislation to enhance oversight for the RCMP, and introduce independent oversight for the CBSA. While many civil society organizations and communities have welcomed the intent behind the previous bills, the overall feedback has been that the past proposals did not go far enough, and that amendments were necessary to put in place truly independent, effective police and CBSA oversight. We strongly

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[1] Catharine Tunney, "RCMP watchdog's misconduct reports caught in limbo, stalling their release", *CBC News* (7 June 2020), online: < www.cbc.ca/news/politics/rcmp-complaint-watchdog-1.5594861>.
[2] Alex Ballingall, "Who investigates complaints about the RCMP? In '99.9%' of cases, it's the RCMP", *Toronto Star* (17 June 2020), online: < www.thestar.com/politics/federal/2020/06/17/who-investigates-complaints-about-the-rcmp-in-999-of-cases-its-the-rcmp.html>.
[3] Catharine Tunney, "RCMP watchdog's misconduct reports caught in limbo, stalling their release", *CBC News* (7 June 2020), online: < www.cbc.ca/news/politics/rcmp-complaint-watchdog-1.5594861>.
[4] David H. Wright, "Report of the Commission into Matters Relating to the Death of Neil Stonechild", (October 2004).
[5] Ontario, The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review*, (Queens Printer for Ontario, 2017) ("Tulloch Report").

urge this Committee to finally make the necessary changes, and put in place truly effective, independent oversight for federal law enforcement.

In particular, our brief elaborates on five areas we believe can be improved in the Bill:

1. The need for independent investigations;
2. The importance of removing unnecessary barriers to filing and investigating complaints, and mandatory complaint initiation where serious death or injury results;
3. The importance of independent, unbiased and transparent disciplinary processes;
4. Complainants must be meaningfully informed of, and involved in, the investigation and disciplinary process; and
5. The need for statutory support for robust individual investigations, policy complaints and systemic investigations.

Further details on each of these points, and 18 specific recommendations to address identified issues, are provided below. A list of all recommendations is included at the end of our brief.

1. Investigations of law enforcement or security agency misconduct must be independent and free from bias or the appearance of bias: police should not investigate police, and the Commission should be able to appoint a wide and diverse range of members

Investigations into and findings regarding police complaints must be free from actual or perceived bias. It is not possible to achieve this if police are investigating themselves.

Currently, the vast majority of complaints are investigated by the RCMP. Although the CRCC currently has the power to investigate a complaint instead of the RCMP, in practice this rarely happens. In 2020, the head of Nunavut's legal aid service called the existing CRCC "fundamentally flawed as a model for civilian oversight" because all it provided, in practice, was "some sort of oversight over internal discipline."[6]

Multiple reports and reviews have criticized misconduct complaints and investigatory structures that rely on police investigations.[7] Justice Tulloch (as he then was), for example, criticized the Ontario police oversight body's (the Office of the Independent Police Review Director, or "OIPRD") limited role in complaint investigation in his extensive report into the Ontario police complaints regime. He recommended that the OIPRD be the sole body to investigate complaints, and suggested that with appropriate resources this could be accomplished in five years, as follows:

> 149. The fact that so few complaints are independently investigated by the OIPRD erodes public confidence in the complaints process. During my consultations, many members of

[6] Thomas Rohner, "RCMP civilian oversight agency has 'no teeth' and is 'fundamentally flawed' says lawyers", *CBC* (2 July 2020), online: <www.cbc.ca/news/canada/north/civilian-review-and-complaints-commission-weak-1.5633986>.

[7] See, for example, Ontario, Stephen Lewis, *Report of the Advisor on Race Relations to the Premier of Ontario*, *Bob Rae*, (Toronto: Advisor on Race Relations, 1992) at 7-8; Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling*, (Queens Printer for Ontario, 2003) recommendation 11 at 71; Ontario Human Rights Commission, *Policy on eliminating racial profiling in law enforcement*, (Queens Printer for Ontario, 2019).

> the public were surprised to learn that a complaint made to an independent body about a police officer's conduct could be referred back to that same officer's police force for investigation.
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> 150. A commonly expressed view at my consultations was that "the police should not be investigating police." Nonetheless that is the current state of affairs. The OIPRD is largely a screening body and not an investigative one.
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> …
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> 153. In my view, the preferred approach is for all public conduct complaints to be received, reviewed, and investigated by the OIPRD. Independent and impartial investigation of complaints will help foster public trust in not only the complaints system, but policing more generally.
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> 154. Many of the people with whom I spoke expressed a strong desire to have an independent, civilian body investigating police misconduct rather than police services themselves. Irrespective of issues of actual bias, they noted the potential for a perception of bias when police officers investigate other police officers in their same force.
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> 155. I recognize that having the OIPRD conduct all public conduct complaint investigations will require a commitment of time and resources. Nonetheless, I believe it is an achievable goal toward which the OIPRD can work over time.

Similarly, the Ontario Human Rights Commission ("OHRC'), which has recommended a fully independent investigative process in Ontario, has said that in "consulting with Black, Indigenous and other racialized communities, the OHRC has found that there is a deep distrust of the current public complaints process. In particular, there is a clear apprehension of bias where police officers of the same service are tasked with investigating the conduct of their fellow officers."[8]

Unfortunately, Bill C-20 ignores these types of recommendations as well as the criticisms of the RCMP's existing inadequate complaints investigation structure. Instead of putting in place truly independent, civilian investigation of police and security agency misconduct, it retains the limited powers in the current police complaints system and extends the CRCC's flawed oversight model to the CBSA.

Under C-20, the default presumption is that the RCMP would investigate complaints against itself, and the CBSA would investigate complaints against itself.[9] Although the Bill sets out that

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[8] Ontario Human Rights Commission Submission to the Standing Committee on Justice Policy Bill 68, Comprehensive Ontario Police Services Act: Ontario Human Rights Commission Submission to the Standing Committee on Justice Policy Bill 68, Comprehensive Ontario Police Services Act | Ontario Human Rights Commission (ohrc.on.ca).
Ontario Human Rights Commission, *Ontario Human Rights Commission Submission to the Standing Committee on Justice Policy Bill 68, Comprehensive Ontario Police Services Act*, (Queens Printer for Ontario, 2019).

[9] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 37(1-2) (second reading 25 November 2022).

the PCRC can take over an investigation the RCMP or CBSA started[10] or could investigate a complaint it received directly,[11] these are powers that the existing – and inadequate – civilian police oversight mechanism already possesses.[12]

In several Canadian jurisdictions, law enforcement oversight bodies are an office of the legislature[13] or report to a minister who is not also responsible for law enforcement organizations.[14] Reporting directly to the legislature, or at minimum to a Minister that does not have responsibility for the agencies being overseen, has been recommended as a best practice in numerous reports.[15] The independence of the PCRC is further undermined as the body would report to the Minister of Public Safety – the same Minister responsible for both the RCMP and the CBSA. This reporting structure creates at a minimum the appearance of a conflict of interest, and in specific instances may give rise to an actual conflict of interest. Oversight reports identifying individual or systemic misconduct by the RCMP or CBSA would also, in serious cases, require a response from the responsible Minister.

Finally, we note that the Commission cannot appoint individuals who are not permanent residents or Canadian citizens to be members. The positioning of this provision, which follows the prohibitions on current or former RCMP makes it appear that the intent is to ensure unbiased, independent investigations. This is an unfortunate inference and an unnecessary statutory limitation. Individuals who might need or be subject to policing services should be eligible for appointment to the commission – indeed, this is the very heart and purpose of civilian oversight. Similarly, individuals with a variety of immigration statuses, and who therefore may find themselves interacting with immigration authorities, should also be eligible to be commission members. Similar provincial police oversight statutes make no mention of individuals' immigration status. The statutory restriction under s. 2(c) should be removed.

> **Recommendation 1: The preferrable approach is for all complaints to be received, reviewed, and investigated by the PCRC. To provide time for this transition to happen, Bill C-20 should be amended to eliminate CBSA- and RCMP-led investigations within five years.**
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> **Recommendation 2: The Commissioner of the PCRC should be an officer of Parliament. At a minimum, the PCRC should neither report to, nor receive budgetary allocation from, any Minister that directly oversees the RCMP and the CBSA.**

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[10] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 38(2-3) (second reading 25 November 2022).
[11] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 51(1) (second reading 25 November 2022).
[12] *RCMP Act*, RSC 1985, c. R-10 ss. 45.53(1), 45.6(2) [RCMP Act].
[13] "About Us" (last visited 20 December 2022) online: *Office of the Police Complaint Commissioner, British Colombia, Canada* <opcc.bc.ca/about-us/>.
[14] "About Us" (last visited 20 December 2022) online: *Office of the Independent Police Review* <www.oiprd.on.ca/about-us/>.
[15] Ontario, Stephen Lewis, *Report of the Advisor on Race Relations to the Premier of Ontario*, *Bob Rae*, (Toronto: Advisor on Race Relations, 1992) at 10; Ontario, The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review*, (Queens Printer for Ontario, 2017) at para 35; United Nations Office on Drugs and Crime, *Handbook on police accountability, oversight and integrity*, UNODC, 2011, at 50-51.

Recommendation 3: Section 2(c), which prevents individuals from being appointed to the Commission if they are not Canadian citizens or permanent residents, is arbitrary and discriminatory; it should be removed.

2. Remove unnecessary barriers to receiving and investigating valid misconduct complaints

As currently drafted, the RCMP, CBSA or Commission would have the discretion to reject a public complaint without investigation if any of the following situations apply:

- The complainant is not the individual at whom the conduct was directed; [16]
- The complainant does not have written permission to make the complaint from the individual at whom the conduct was directed; [17]
- The complainant is not a person who was a direct witness to the conduct or its effects;[18]
- The complainant has not suffered loss, damage, distress, danger or inconvenience as a result of the conduct;[19]
- The complaint is trivial, frivolous, vexatious or made in bad faith;[20]

Each of these provisions presents concerningly broad, and frequently unnecessary, barriers to having complaints investigated. The specific issues with each are addressed in more detail below.

Bill C-20 contains a large number of criteria that a complaint must meet before it is accepted for investigation. The vast majority of these barriers are unnecessary and would operate to prevent the consideration of valid and serious allegations of law enforcement misconduct. Even where an investigative body approaches these restrictions with a nuanced and purposive legal interpretation, they will give the law enforcement bodies (or the individuals) under investigation strong legal arguments to try to end important investigations by challenging an investigative body's jurisdiction or powers. Ultimately, they will mean that many instances of identified misconduct by RCMP and CBSA agents will remain uninvestigated and unaddressed.

Most of the exclusionary provisions in C-20 appear to have been simply adopted from the existing oversight regime set out in the *RCMP Act*.[21] The existing statutory framework has

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[16] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 52(1)(b)(i), 38(1)(b)(i) (second reading 25 November 2022).
[17]Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 52(1)(b)(iv), 38(1)(b)(iv) (second reading 25 November 2022).
[18] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 52(1)(b)(iii), 38(1)(b)(iii) (second reading 25 November 2022).
[19] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 52(1)(b)(v), 38(1)(b)(v) (second reading 25 November 2022) .
[20] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 52(1)(a), 38(1)(a) (second reading 25 November 2022).
[21] *RCMP Act*, RSC 1985, c. R-10, s. 45.53(2). Section 45.53(2) of the *RCMP Act* states that the Commission may refuse to deal with the complaint if, in the Commission's opinion, the complaint:

> (a) has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under this Act or any other Act of Parliament;

already led to a very substantial proportion of public complaints being 'screened out' without any investigation or consideration of their merits. In 2021-2022, for example, over a third of the public complaints filed with the CRCC were rejected without investigation because they "did not meet the criteria set out in Part VII of the RCMP Act."[22] The CRCC noted that this "included a large number of complaints from individuals who were not directly involved or physically present during the incident."[23] These may have been complaints that identified extremely serious police misconduct, but they were not investigated because they had not been filed by the "right" person.

Bill C-20 adopts and expands upon the existing statutory screening criteria, creating unnecessary and harmful barriers to identifying and remedying police and security agency misconduct.

All three entities may also decide to discontinue an investigation of a complaint if, in its opinion, it is "not necessary or reasonably practicable to continue to investigate the complaint."[24]

There are also situations in which the law prohibits various entities from dealing with complaints. The Commission, for example, *must* refuse to deal with a complaint if:

- The complaint concerns any decision under Part IV of the *RCMP Act* or disciplinary measures taken or not taken by the CBSA President;[25] or
- The complaint concerns an activity that is closely related to national security.[26]

The Commission, RCMP and CBSA must also 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 other federal, provincial or territorial Act;[27] or

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(b) is trivial, frivolous, vexatious or made in bad faith; or
(c) is from an individual who
(i) is not an individual at whom the conduct was directed,
(ii) is not the guardian, tutor, curator, mandatary in case of incapacity or any other person authorized to act on behalf of the individual at whom the conduct was directed,
(iii) did not see or hear the conduct or its effects as a result of not being physically present at the time and place that the conduct or its effects occurred,
(iv) has not been given written permission to make the complaint from the individual at whom the conduct was directed, or
(v) has not suffered loss, damage, distress, danger or inconvenience as a result of the conduct.

In its own description of the public complaints process the CPCC states that it accepts complaints about the on-duty conduct of RCMP members from individuals who were directly involved in the matter, who witnessed the conduct itself, or who are authorized to act on behalf of the complainant. https://www.crcc-ccetp.gc.ca/en/complaint-and-review-process

[22] Canada, Civilian Review and Complaints Commission for the RCMP, *Annual Report 2021-2022,* (Ottawa: Minister of Public Works and Government Services, 2022).
[23] Canada, Civilian Review and Complaints Commission for the RCMP, *Annual Report 2021-2022,* (Ottawa: Minister of Public Works and Government Services, 2022).
[24] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 53(1)(b) (second reading 25 November 2022).
[25] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 52(2), 52(3) (second reading 25 November 2022).
[26] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 52(8) (second reading 25 November 2022).
[27] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 38(2), 47(2), 52(4), 52(5) (second reading 25 November 2022).

- Dealing with the complaint would compromise or seriously hinder the administration or enforcement of program legislation, or the investigation or prosecution of any offence.[28]

Finally, the Bill sets out time limits that apply to the filing of complaints. A complaint will be rejected if it is filed more than one year after the day in which the impugned conduct was alleged to have occurred and the PCRC, CBSA or RCMP does not have to grant an extension.[29]

a. Unnecessary restrictions on who can file a complaint

Bill C-20 gives authority to the RCMP, CBSA and Commission to reject the vast majority of "third party" complaints – complaints filed by individuals who were not directly involved in the matter either as the subject of or direct witness to the law enforcement conduct. Only third parties who have the written consent of the directly impacted individual have a clear path to have a complaint investigated.

As noted above, the CRCC has used similar provisions in the current *RCMP Act* to reject, without investigation, a substantial portion of the complaints it has received. However, there should be no "wrong" person when it comes to identifying law enforcement misconduct and wrongdoing. Third party complaints will frequently be the only way that serious misconduct can come to light.

Individuals who have been subjected to or directly witnessed law enforcement or security agency misconduct will frequently be in an extremely vulnerable state. They may be under investigation, facing criminal charges or deportation, and/or incarcerated, and many are understandably reluctant to draw any negative attention from law enforcement by signing their name to a formal complaint. Police and CBSA agents also disproportionately interact with various marginalized and vulnerable communities, including individuals who do not speak English as their first language, newcomers, individuals with precarious immigration status or awaiting the determination of their application for asylum, racialized persons, and individuals facing addiction and/or mental health issues. Depending on their individual circumstances, these individuals also may face significant barriers to filing complaints on their own behalf, or providing written authorization to others to do so.

The ability of third parties to lodge complaints is particularly important for effective CBSA oversight, as individuals who have been mistreated may be refouled, deported or refused entry at the border. The fact that an individual is no longer present in Canada, and therefore has even more significant barriers to accessing and pursuing a misconduct complaint, should not bar the investigation of reliable information regarding alleged misconduct. CBSA engages with many marginalized and vulnerable people whose refugee and/or immigration status in Canada is precarious. Such individuals in many cases, might not be aware of the process to file a

[28] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 46(2), 52(6), 60(1), 38XXX (second reading 25 November 2022).
[29] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 33(3-5) (second reading 25 November 2022).

complaint or may be reluctant to file complaints on their own in fear of negative repercussions on their immigration status.

The essential role that third party complaints plays in police and security agency oversight has been recognized by multiple independent reviews. In his report into Ontario's police oversight system, for example, Justice Tulloch highlighted the importance of having broad third party complaints provisions:

> 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.
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> 127. These complaints promote effective and accountable policing. They should not be screened out simply because the complainant is not directly affected.
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> 128. Misconduct is misconduct, no matter who reports it. And a policy or service concern should not be minimized simply because the person reporting it was not directly affected by it.
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> 129. In his 2005 report, Chief Justice LeSage supported allowing third party complaints. I agree with his recommendation. Third party individuals or organizations may bring valuable insight and resources into a consideration of police conduct and practices.

These recommendations have been followed in multiple Canadian jurisdictions, and there are numerous examples of police oversight regimes with broad provisions accepting third party complaints. In British Columbia, for example, the *Police Act* specifies that third parties can make complaints.[30] Similarly, in Manitoba the legislation governing the Law Enforcement Review Agency's complaint process specifically states that "the complaint may be filed notwithstanding that the alleged disciplinary default has affected some person other than the complainant, but has not affected the complainant."[31]

Bill C-20 should be amended to follow these examples, remove barriers to filing complaints, including making room for third party complaints.

b. 'Trivial' complaints

Under Bill C-20, the RCMP, CBSA and Commission would be able to screen out "trivial" complaints without investigation. This is in addition to their authority to refuse to investigate frivolous, vexatious, or bad faith allegations.

Many of the interactions that may be seen by law enforcement as "trivial" can have very significant impacts on individuals. A short investigative detention that does not result in any

[30] *Police Act*, RSBC 1996, c. 367, s. 78(1).
[31] *The Law Enforcement Review Act*, CCSM 2012, c L75, s.6(2).

charges can be intensely humiliating and traumatic, particularly when a racialized individual has experienced multiple such interactions based on their race. Rude, condescending, sharp or dismissive behaviour, which may be dismissed as 'trivial' in individual instances, can easily escalate situations and lead to unnecessary use of force. They can also be indicative of discriminatory assumptions that a law enforcement officer holds. These patterns of behaviour should be tracked and addressed – something that cannot happen when a complaint is dismissed without investigation.

Although it is standard to allow law enforcement oversight bodies to screen out frivolous or vexatious complaints, comparable provincial legislation does not provide the authority to screen out "trivial" complaints.[32]

c. The complaint could be "adequately" or "more appropriately" dealt with under a process set out in any other federal, provincial or territorial Act

Bill C-20 contains an exclusivity clause which requires the PCRC, RCMP or CBSA to screen out a complaint if it has been or could have been adequately dealt with, or could more appropriately be dealt with, according to another legal process.[33] This exclusion allows the PCRC, RCMP and CBSA to screen out legitimate complaints and refer them to alternate processes that may not even adjudicate them or might delay the process of adjudication. As the Canadian Association of Refugee Lawyers (CARL) has pointed out,[34] there is no reason why multiple agencies cannot adjudicate different aspects of a matter. For example, whether CBSA's behaviour was misconduct under its own rules and regulations is a separate issue from whether that behaviour violated the *Canadian Human Rights Act*.[35]

Similar provincial legislation has narrower grounds, focusing only on whether there is a "more appropriate" process elsewhere, as opposed to Bill C-20's language of an "adequate" alternative. At a minimum, the language should be amended to provide a more focused inquiry as to whether there is a preferable and viable alternate procedure available for complaint investigation and redress.

d. Terminating a complaint where it is "not necessary or reasonably practicable" to continue the investigation

Bill C-20 gives the PCRC, RCMP or CBSA the discretion to terminate the investigation of complaints if it is not "necessary or reasonably practicable" to investigate them.[36] Public Safety

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[32] *Police Services Act*, R.S.O 1990, c. P.15, s. 60(4); *Police Act*, RSBC 1996, c. 367, s. 109(1); *The Law Enforcement Act*, CCSM 2012, c. L75, s. 13(1); *Police Act*, RSA 2000, c. P-17, s. 43(7).
[33] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 52(4-5), 53(2) (second reading 25 November 2022).
[34] Canadian Association of Refugee Lawyers (2020). *Getting CBSA Accountability Right – amendments to Bill C-3*. Available at: https://cclaorg.sharepoint.com/:w:/s/CCLAGeneralFiles/EQWt8bs4Xq1BrqGSTPVYYiIB4qGPSpfyj_XOcobD8GefJA?e=yTbQTr.
[35] *Canadian Human Rights Act*, RSC 1985, c. H-6.
[36] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 38(e), 53(1)(b) (second reading 25 November 2022).

Canada has clarified that this exclusion is intended to cover cases where the complainant has ceased communication with the PCRC or made it difficult for the proceedings to continue. However, the phrase "not necessary or practicable" does not specifically target that contingency and is overly broad.

It is reasonable to conclude an investigation if, after all reasonable investigative efforts have been made, there is insufficient evidence to sustain the allegations. This will mean that, at the end of the investigation, the allegations were unable to be substantiated. There is no good reason to maintain a separate, overly broad provision enabling the termination of investigations.

e. Compromising or seriously hindering the administration or enforcement of program legislation, or the investigation or prosecution of any offence

Bill C-20 has a variety of mandatory provisions preventing or ending complaint investigations where doing so would "compromise or seriously hinder" the investigation or prosecution of any offence or the administration or enforcement of a wide range of statutes, including the *Immigration and Refugee Protection Act*, the *Customs Act*, the *Excise Act*, and many others.[37] The Commission also has the discretion to suspend all activity with respect to a complaint if, in its opinion, "continuing it would compromise or seriously hinder an ongoing civil or administrative proceeding."[38]

There are times where an investigation into police or security agency misconduct may be paused to prevent interference with an ongoing criminal investigation or prosecution into the same actions. No legislative provisions, aside from the discretion to depart from any mandatory legislative timelines, are necessary for this temporary pause to take place.[39] There are some examples of provincial statutes where civilian investigative bodies are given the discretion to suspend investigations if doing so would compromise an ongoing criminal investigation or

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[37] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. s. 37(3), 37(4), 46(2), 52(6), 60(1) (second reading 25 November 2022). Program legislation is defined with reference to s. 2 of the *Canada Border Services Agency Act*, which states:

> *program legislation* means any other Act of Parliament or any instrument made under it, or any part of such an Act or instrument,
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> - (a) that the Governor in Council or Parliament authorizes the Minister, the Agency, the President or an employee of the Agency to administer and enforce, including the *Excise Act*, the *Special Import Measures Act*, the *Customs Act*, the *Customs Tariff*, the *Immigration and Refugee Protection Act*, the *Excise Act, 2001* and the *Select Luxury Items Tax Act*;
> - (b) that the Governor in Council or Parliament authorizes the Minister, the Agency, the President or an employee of the Agency to enforce, including the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, the *Feeds Act*, the *Fertilizers Act*, the *Health of Animals Act*, the *Plant Protection Act*, the *Safe Food for Canadians Act* and the *Seeds Act*;
> - (c) under which the Minister or another minister authorizes the Agency, the President or an employee of the Agency to administer a program or carry out an activity; or
> - (d) under which duties or taxes collected and paid pursuant to the *Customs Act* are imposed. (législation frontalière)

[38] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 60(2) (second reading 25 November 2022).

[39] Police complaints regimes in Ontario and Alberta, for example, do not have any statutory provisions requiring complaints to be suspended or investigations to cease on this basis.

prosecution.[40] The best examples of legislative language also specify that the ultimate concern here is that a misconduct investigation may prejudice a criminal investigation into or prosecution of the same police officer misconduct.[41]

The provisions in C-20 go far beyond giving discretion to pause investigative timelines where there is also a criminal investigation or prosecution targeting the same actions. Unlike other legislative examples, which are about preserving the integrity of criminal proceedings targeting police officers, C-20's provisions seem aimed at ensuring that the investigation of police and CBSA misconduct will not interfere generally with these agencies' enforcement or administrative work. C-20's provisions do not suspend investigations – they terminate them. They are mandatory, not discretionary. And they do so in light not just of ongoing criminal investigations and proceedings but also a wide range of CBSA investigative activities. Indeed, even the effective CBSA *administration* of a statute or program will take mandatory precedence over the most serious CBSA misconduct complaint.

This highly problematic interpretation is bolstered by s. 84 of C-20, which explicitly states that misconduct complaints and investigations are not to delay or prevent any investigations, actions under any program legislation, removal proceedings, extradition proceedings, or extend any person's stay in Canada beyond the authorized period.[42]

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[40] *Police Act*, RSBC 1996, c 367, s. 179(4) ("The police complaint commissioner or an adjudicator may suspend proceedings under this Part if, in the police complaint commissioner's or adjudicator's opinion, continuation of the proceedings would prejudice a criminal investigation or prosecution"); *The Law Enforcement Review Act*, CCSM 2012, c L75, s. 12(1.1) ("Notwithstanding subsection (1), if the Commissioner is satisfied that immediate investigation of a complaint would unreasonably interfere with an ongoing criminal investigation, the Commissioner may delay the investigation of the complaint for such period as the Commissioner considers reasonable in the circumstances.").

[41] More precise statutory language can be found in Ontario's Bill 68, *An Act with respect to community safety and policing,* 1st Sess, 42nd Leg Ontario, 2019 (assented to 26 March 2019), c.1, cl 163**:**

> **Postponement due to criminal investigation or proceeding**
> **163** (1) Subject to subsections (2) and (3), if a matter that is or may be the subject of an investigation under this Part is or becomes the subject of an investigation of an offence under a law of Canada, a province or a territory, or the prosecution of such an offence, the Complaints Director may postpone the commencement of the investigation under this Part, or suspend it, for as long as is necessary in the Complaints Director's opinion to avoid interfering with the investigation or prosecution.
> **Same, if Crown Attorney, prosecutor consulted re criminal investigation**
> (2) If a matter that is or may be the subject of an investigation under this Part is or becomes the subject of an investigation of an offence referred to in subsection (1) and a Crown Attorney or prosecutor has been consulted, the Complaints Director shall, if advised by the Crown Attorney or prosecutor to do so, postpone the commencement of the investigation under this Part, or suspend it, for as long as is necessary in the Crown Attorney or prosecutor's opinion to avoid interfering with the investigation.
> **Same, if Crown Attorney, prosecutor advises re prosecution**
> (3) If a matter that is or may be the subject of an investigation under this Part is or becomes the subject of the prosecution of an offence referred to in subsection (1), the Complaints Director shall consult a Crown Attorney or prosecutor and, if advised by a Crown Attorney or prosecutor to do so, postpone the commencement of the investigation under this Part, or suspend it, for as long as is necessary in the Crown Attorney's or prosecutor's opinion to avoid interfering with the prosecution.

[42] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 84 (second reading 25 November 2022).

These provisions are inappropriate. There may be many complaints about ongoing illegality and misconduct on the part of law enforcement officials who are engaged in active criminal investigations or enforcement activities. Identifying serious law enforcement misconduct will frequently "compromise" and "seriously hinder" subsequent prosecutions, for example by excluding illegally obtained evidence or prompting a judicial stay of proceedings. Inquiring into concerning, ongoing conduct may also have a material impact on law enforcement activities in active investigations. This is entirely appropriate. Not all investigative techniques or enforcement activities are lawful. In fact, it would be manifestly irresponsible and negligent to prevent or end any investigation into serious misconduct or illegalities simply because uncovering and stopping misconduct might "compromise" or "seriously hinder" an investigation or prosecution.

The breadth of the provision also leaves open the possibility that the RCMP, CBSA or Commission will determine it cannot investigate a serious and complex complaint because of RCMP or CBSA resource constraints. Systemic investigations in particular often take up significant amounts of time and resources on the part of the entity under investigation. Investigations or serious misconduct will often require interviewing multiple law enforcement witnesses. Diverting resources to adequately deal with a serious or systemic complaint that has come to light may be critically necessary, in particular when addressing systemic issues, yet may in some circumstances, "seriously hinder" program administration or investigative activities, or "compromise" ongoing law enforcement investigations or program legislation administration or enforcement. The answer to this problem is not to mandatorily end the investigation, but rather ensure that adequate resources are provided to enable adequate oversight.

f. Activities related to national security

Bill C-20 contains a broad exclusionary clause preventing it from reviewing any "activity that is related to national security," and requiring the Commission to refer all such matters to the National Security and Intelligence Review Agency ("NSIRA").[43] The scope of this mandatory referral is, as written, extremely broad and would preventing the Commission from accepting complaints even where the Commission is the most appropriate body to provide oversight and remedy.

Although NSIRA will be better placed to review some national security related complaints, this will not always be the case. An individual may complain about excessive use of force during an arrest that is related to national security. It is unlikely that this type of standard police or security agency misconduct allegation would substantially benefit from the access to confidential information and inter-agency jurisdiction of NSIRA. Provincial law enforcement oversight bodies are tasked with overseeing the national security-related activities of municipal and provincial police services. The Commission should have the latitude to do the same where it would be the most appropriate and effective body to do so.

It is our understanding that this provision, which is also in the current *RCMP Act*, does not currently operate as a complete prohibition on accepting national security-related matters.

[43] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 31 (second reading 25 November 2022).

Instead, the CRCC exercises its discretion to determine whether NSIRA, in light of its particular powers, would be better placed to investigate a particular complaint. Not all complaints "related" in some way to national security are referred.

The law should reflect and support this more nuanced approach. In fact, Bill C-20 does already contain a broad obligation for the PCRC and NSIRA to "take all reasonable steps to cooperate with each other to avoid any unnecessary duplication of work by them in relation to the fulfilment of their respective mandates."[44] This statutory obligation is sufficient to address concerns about jurisdictional overlap. Maintaining the current broad and mandatory language in C-20 risks giving rise to unnecessary and unproductive disputes between the RCMP, CBSA and the Commission regarding the scope of its powers to investigate standard police or security agency misconduct complaints that have a marginal or irrelevant connection to national security activities.

Individuals with a complaint that is related to the national security activities of the RCMP or CBSA should be informed that they can choose to complain to the Commission or to NSIRA. Referrals to NSIRA against the complainant's wishes should be mandatory only when lack of access to national security information, or jurisdiction to review other national security agencies, would significantly hamper the complaint investigation.

g. Complaint timelines

Bill C-20 sets out a presumptive time limit for filing complaints. Section 33 states that complaints must be received within one year of the alleged incident, although the Commission, RCMP or CBSA may extend that time limit if they are "of the opinion that there are good reasons for doing so and that it is not contrary to the public interest."[45]

While it can be appropriate to decline to deal with complaints where there has been an undue delay in filing, the use of a firm time limit, with unstructured discretion to issue an extension, is inappropriate in this context.

Individuals who have experienced mistreatment at the hands of law enforcement will frequently have extremely valid reasons for delaying the filing of a complaint. Their lives are often in a state of crisis for extended periods while they engage with the criminal legal or immigration system. They may only learn of the misconduct after receiving disclosure or further information through a legal proceeding. They may be incarcerated, or be facing charges or deportation orders. Complainants may also face personal circumstances – including for example histories of trauma, language barriers, and health challenges amongst others – that can be significant barriers to recognizing misconduct, knowing what avenues are available to complain about rights violations, and following through with an official complaint. In this context, strict time limits on

[44] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 85 (second reading 25 November 2022).
[45] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 33(3-5) (second reading 25 November 2022).

filing complaints will tend to disadvantage those individuals who face the greatest jeopardy and disadvantage.

Other similar statues have recognized this reality and provide statutory criteria to structure the use of the oversight body's discretion to reject complaints due to unreasonable delay. Ontario's *Police Services Act*, for example, states that the oversight body (the "OIPRD") may decide not to deal with a complaint made by a member of the public if the complaint is made more than six months after the facts on which it is based occurred. When deciding to screen out a complaint due to delay, the statute specifically requires the oversight body to consider whether the complainant is a minor or is under a disability within the meaning of the *Accessibility for Ontarians with Disabilities Act,* whether the complainant is or was subject to criminal proceedings, and whether, having regard to all the circumstances, it is in the public interest for the complaint to be dealt with.[46] On the OIPRD's website it specifically states that there is no "time limit" for filing a complaint.[47] If a complaint is received more than six months after the alleged incident, the OIPRD may ask the complainant to provide reasons for the delay in filing and will consider all relevant circumstances, including when the complainant first learned of the alleged misconduct, the reason for delay, and the severity of the complaint.[48] In light of the diverse and often challenge circumstances complainants frequently face, Ontario's legislation provides a more appropriate legal structure for the exercise of discretion (although six months remains too short of a period as a cut-off to refuse a complaint).

h. Chairperson-initiated complaints

Section 36 of Bill C-20 outlines that the Chairperson may initiate a complaint into the conduct of an RCMP or CBSA employee where reasonable grounds to do so exist. In addition to this discretionary power, the Chairperson should be obligated to assess whether reasonable grounds exist to initiate a complaint in any incident where an interaction with a CBSA or RCMP employee results in serious injury or death. Given the gravity of an incident where serious or injury or death occurs, if reasonable grounds to initiate a complaint exists in these circumstances, the Chairperson should be required to initiate a complaint.

Recommendation 4: Unnecessary barriers to filing complaints should be removed. Specifically:

a) Third parties should have unrestricted ability to file complaints;

b) The word 'trivial' should be deleted from s. 38(1)(a);

c) There should be no mandatory termination of complaints that could have been dealt with under other processes or Acts; rather, discretion should be afforded to refuse to investigate or continue with a complaint only

[46] *Police Services Act*, R.S.O 1990, c.1, s. 60.
[47] "Screening Complaints" (last visited 20 December 2022) online: *Office of the Independent Police Review* <www.oiprd.on.ca/complaints/screening-complaints/>.
[48] "Screening Complaints" (last visited 20 December 2022) online: *Office of the Independent Police Review* <www.oiprd.on.ca/complaints/screening-complaints/>.

where there is another "comparable, currently available and clearly more appropriate" statutory process;

d) The provisions allowing for termination of a complaint where it is "not necessary or reasonably practicable" to continue the investigation should be deleted;

e) All provisions preventing or terminating the investigation of complaints due to their impact on the administration or enforcement of program legislation, or the investigation or prosecution of any offence should be replaced with more targeted language allowing for complaint investigation to postponed or suspended if it would interfere with a criminal investigation or prosecution into the same conduct. The following language should be adapted and incorporated into Bill C-20:

> **Postponement due to criminal investigation or proceeding**
> (1) If a matter that is or may be the subject of an investigation under this Part is or becomes the subject of an investigation of an offence under a law of Canada, a province or a territory, or the prosecution of such an offence, the Complaints Director may postpone the commencement of the investigation under this Part, or suspend it, for as long as is reasonably necessary to avoid interfering with the investigation or prosecution.
>
> (2) In making a determination on whether to postpone or suspend the commencement of an investigation under this Part, the Complaints Director will consider all relevant factors, including but not limited to the advice of the Crown Attorney or prosecutor overseeing an investigation or prosecution;

f) Mandatory referrals to NSIRA should be amended to allow for complainants to select the appropriate forum. Individuals with a complaint that is related to the national security activities of the RCMP or CBSA should be informed that they can choose to complain to the Commission or to NSIRA. Referrals to NSIRA against the complainant's wishes should be mandatory only when lack of access to national security information, or jurisdiction to review other national security agencies, would significantly hamper the complaint investigation.

g) There should be no "time limit" on filing a complaint. Instead, the body receiving the complaint should have structured discretion to decline to investigate a complaint if the conduct occurred more than two years ago. Discretion should be exercised taking into account all relevant circumstances, including when the complainant first learned of the alleged misconduct, the reason for delay, and the severity of the complaint. Timelines should be automatically suspended during the time that the complainant was facing criminal charges or has unresolved or outstanding immigration or refugee matters. If upon receiving the complaint the CBSA, RCMP or PCRC is of the opinion that there may have been an undue delay in filing the complaint, the complainant should

be given an opportunity to provide any relevant information before a final decision is made.

Recommendation 5: Mandatory complaint initiation where an interaction with an RCMP or CBSA employee resulted in serious injury or death and reasonable grounds exist to investigate the conduct.

3. Initiation of the disciplinary processes and disciplinary adjudication must be conducted in an independent, unbiased and transparent manner

Under Bill C-20 the PCRC does not have any power to charge or discipline RCMP or CBSA employees. Instead, the PCRC can make non-binding recommendations to initiate a disciplinary proceeding or impose a disciplinary measure.[49] Similarly, while C-20 would create offences to ensure compliance with the act, the PCRC has no authority to lay charges for these offences.[50]

As a result, pursuant to C-20, CBSA and RCMP will retain full discretion to decide whether to initiate discipline and which processes will be pursued. For the RCMP, this may take the form of a conduct meeting, which takes place in private, or a more formal conduct hearing, which is open to the public. In both instances the determination of whether there has been a violation of the Code of Conduct, and the appropriate "conduct measure" to impose, is made by an RCMP member or an RCMP appointee. Discipline within the CBSA is controlled by CBSA Professional Standards and CBSA Labour Relations.[51]

These disciplinary processes are subject to considerably less independent control and oversight than other comparable Canadian law enforcement oversight regimes. In Ontario, for example, the OIPRD has the power to provide direction to a Chief of Police regarding how to deal with a complaint, including directing the Chief to hold a disciplinary hearing.[52] Even absent such specific direction, a finding that a complaint is substantiated legally triggers the police disciplinary process, and a formal disciplinary hearing must be called if the OIPRD determines that "serious misconduct" took place.[53] In British Columbia, if the civilian oversight Commissioner disagrees with certain disciplinary findings, they can appoint a retired judge to review the matter and, if appropriate, convene and oversee a disciplinary hearing.[54]

Reports looking into the existing Ontario police oversight regime have recommended making Ontario's existing process *more* independent. Justice Tulloch, for example, recommended that Ontario's civilian police oversight body be given the additional authority to lay disciplinary

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[49] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 67, 68 (second reading 25 November 2022).
[50] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 88-91 (second reading 25 November 2022).
[51] Canada, Canada Border Services Agency, *Misconduct Investigations and Disciplinary Measures Statistics*, (Ottawa: CBSA, 2021).
[52] *Police Services Act*, R.S.O 1990, c.1, s. 71(3).
[53] *Police Services Act*, R.S.O 1990, c.1, ss. 68(5), 68(6), 68(10).
[54] *Police Act*, RSBC 1996, c. 367, s. 117.

charges, including charges that come to light during or in connection with its investigation.[55] Upon charges being laid, he urged that an independent public complaints prosecutor be given carriage of the file, and the matter heard before a truly independent adjudicator.[56] Similar recommendations were made in the 2005 Le Sage report.[57]

> **Recommendation 6: The PRCC should have the authority to lay disciplinary charges, including charges that come to light during or in connection with its investigations. Adjudication of serious charges should be pursued by an independent prosecutor, and should be adjudicated before a truly independent adjudicator. At a minimum, the PRCC should have the authority to require that the disciplinary process be initiated, that a hearing be held in the case of substantiated misconduct of a serious nature, and to order a new independent adjudicator preside over a new disciplinary hearing if warranted as is the case in British Columbia.**

4. Complainants must be meaningfully informed of, and involved in, the investigation and disciplinary process

In order for the public to have confidence in the public oversight of law enforcement, all impacted parties must be kept informed of, and have meaningful input into, both the investigation and the disciplinary process.

Bill C-20 provides a general obligation to keep a complainant and the relevant RCMP officer or CBSA employee informed of the progress of an investigation.[58] Once the investigation reaches the stage of investigative findings and recommendations, however, the CBSA and RCMP have significantly greater rights to comment on and respond to preliminary investigative findings than complainants. Section 64 requires that, after a PCRC investigation, an interim report be sent to the CBSA or RCMP for their response. The complainant is not given the same opportunity, and only the law enforcement response must be considered before the PCRC issues a final report with findings and recommendations.[59] This is the only report that must also be sent to the complainant, and the Bill specifies that "all of the findings and recommendations … are final and are not subject to appeal to or review by any court."[60]

Complainants have almost no rights to information about or participation in the disciplinary process. Section 44(1) of Bill C-20 gives complainants the opportunity to provide the equivalent

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[55] Ontario, The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review*, (Queens Printer for Ontario, 2017) at para 61, recommendation 7.25.
[56] Ontario, The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review*, (Queens Printer for Ontario, 2017) recommendation 8.1.
[57] Patrick J. LeSage, *Report on the Police Complaints System in Ontario* (Toronto: Ministry of the Attorney General, 2005) at 80.
[58] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 48, 55 (second reading 25 November 2022).
[59] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 64(3) (second reading 25 November 2022).
[60] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 65 (second reading 25 November 2022).

of a victim impact statement, that may be considered during an RCMP disciplinary hearing.[61] There is no similar requirement to consider this information in the CBSA disciplinary process. Bill C-20 also proposes to amend the *RCMP Act* to require that complainants be notified of the RCMP's final disciplinary decision and what, if any conduct measures have been imposed – although this notice need only be provided "as soon as feasible after a decision … or the time for appealing any decision" has passed.[62] Again, no similar amendments are being made to require this for CBSA disciplinary outcomes. There are no other requirements to keep complainants involved and informed. Neither the RCMP nor the CBSA needs to notify a complainant of proposed disciplinary responses for their comment, provide complainants with updates on the disciplinary process or arguments being made, notify them of hearing dates, afford them party status in hearings, or otherwise seek their input or facilitate their participation.

The secrecy surrounding the RCMP and CBSA disciplinary processes contrast starkly with other law enforcement disciplinary proceedings. In Ontario, for example, all formal disciplinary hearings are presumptively open to the public, and if the complainant is a member of the public he or she is automatically a full party to the proceeding.[63] Ontario law also requires that all decisions after a hearing be made public.[64] Municipal police disciplinary processes in British Columbia also afford more notice and participation to complainants. In that province, the disciplinary authority must provide the complainant with a copy of the final investigation report as well as "early notice of next steps", including what misconduct is being considered, and whether or not the discipline authority's evaluation of the evidence and the range of disciplinary or corrective measures being considered.[65] If the disciplinary authority has decided that the conduct concerned constitutes misconduct, complainants have a statutory right to provide written or oral submissions to the disciplinary authority regarding the complaint, the adequacy of the investigation and/or the disciplinary or corrective measures that would be appropriate.[66]

Recommendation 7: Complainants should be given a copy of an interim investigative report, no matter what body is leading the investigation, and have the ability to provide comments on the report prior to a final report being issued.

Recommendation 8: Complainants should have a right to regular updates regarding the disciplinary process, as they do with the complaints process.

Recommendation 9: Complainants should be given advanced notice of the position of the disciplinary authority regarding whether or not misconduct occurred, appropriate next steps, and the range of penalties that are being considered. Complainants should be able to make written or oral submissions to the disciplinary authority before a final decision is reached.

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[61] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 44(1) (second reading 25 November 2022).
[62] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 97, modifying the *RCMP* Act by inserting ss. 45.171, 45.172 (second reading 25 November 2022).
[63] *Police Services Act*, R.S.O 1990, c.1, s. 83(3).
[64] *Police Services Act*, R.S.O 1990, c.1, s. 86.
[65] *Police Act*, RSBC 1996, c 367, s. 112.
[66] *Police Act*, RSBC 1996, c 367, s. 113.

Recommendation 10: If a matter proceeds to a formal disciplinary hearing, complainants should have automatic party standing.

Recommendation 11: The CBSA disciplinary process should be overhauled so that it incorporates the levels of transparency, independence, fairness and complainant participation that exist in other law enforcement disciplinary regimes.

5. Support for robust individual investigations, policy complaints and systemic investigations

a. Off-duty conduct

Bill C-20, like the *RCMP Act* before it, restricts individual complaints to the on-duty conduct of RCMP and CBSA officials.[67] Despite the fact that off-duty actions may constitute misconduct,[68] such incidents would not be subject to the complaints mechanism. The scope for complaints is also solely focused on conduct; there is no clear statutory path for individuals or groups to complain about illegal or inappropriate RCMP or CBSA policies.

b. Systemic investigations

Systemic investigations and policy complaints are essential to effective police and security agency oversight. Police and security agency oversight mechanisms that rely solely on individual complaints can be inefficient. They are wholly reactive – requiring individuals to be subject to misconduct before an investigation can take place. Rights violations that are experienced by a large number of individuals as a result of accepted policy or operational practice are reduced to isolated instances, an approach that will often put recommendations that would prompt widespread institutional changes out of scope. In order to have effective police oversight, therefore, independent bodies must be able to conduct systemic investigations and investigate policy-based, as opposed to solely individual conduct-based, complaints.

The existing *RCMP Act* has extremely narrow provisions allowing for systemic investigations, and also creates unnecessary statutory barriers to this essential oversight activity. Complaint-based investigations are also currently statutorily limited to issues with an individual RCMP member's conduct while in the performance of policing duties. Unfortunately, these problems are replicated by the provisions in Bill C-20.

Furthermore, while the Commission can initiate its own review, the scope of that review is significantly constrained. Chairperson-initiated complaints are similarly restricted to on-duty "conduct".[69] There are other provisions allowing the Commission to review "specified activities"

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[67] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, ss. 33(1-2) (second reading 25 November 2022).
[68] SOR/2014-281, s 18.
[69] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 36(1) (second reading 25 November 2022).

– a nebulous term that is not defined in the Bill.[70] No matter how this term is interpreted, the Commission, will only be able to inquire into whether law enforcement "activities" are carried out in accordance with the relevant governing statutes (*CBSA Act*, *RCMP Act*, and/or the *Witness Protection Program Act*), and any associated regulations, ministerial directions, or policies. This is a very narrow scope for a systemic review, as it seemingly limits the Commission's ability to consider compliance with other essential legal safeguards including the *Charter of Rights and Freedoms*, privacy and human rights legislation, or other directly applicable laws governing and constraining law enforcement powers. Because the review power directs the Commission to consider the compliance of "specified activities" with a select number of laws and policies, it also runs the risk of constraining the Commission's ability to review the legality or appropriateness of the law enforcement policies themselves.

In addition to the substantively narrow scope of the systemic investigative powers there are also unnecessary procedural barriers to initiating these reviews. Section 28(3) states that in order to conduct a review on its own initiative, the Commission must be satisfied that "sufficient resources exist for conducting the review and the handling of complaints under Part 2 will not be compromised; and … no other review or inquiry has been undertaken on substantially the same issue by a federal or provincial entity."[71] While the Commission should strive to avoid duplication of oversight work, this is usually a common sense factor that is considered during the exercise of an oversight body's discretion – not a legal requirement. If broadly interpreted, for example, it could be argued that the Commission does not have the ability to undertake follow up reviews on the same topic to see if progress has been made. The Commission will also have a different focus than other oversight bodies (eg. human rights commissions or privacy commissioners) and may also have greater or different access to information and evidence. Preventing these investigations via a mandatory statutory provision unnecessarily and unhelpfully binds the Commission's discretion to conduct systemic investigations.

Finally, the Commission is legally obligated to "give a notice to the Minister indicating that the Commission is satisfied that the conditions … have been met and setting out the rationale for conducting the review" before it can conduct a review on its own initiative.[72]

While considerations of resourcing and impact should certainly be factors an oversight body considers when deciding whether to start a systemic investigation, elevating these considerations to statutory preconditions is an unnecessary and excessive barrier. Oversight and accountability bodies frequently need to make difficult decisions about how to allocate scarce resources. Sometimes, engaging in systemic reviews can be more effective than waiting for individual complaints to raise widespread police or security agency misconduct. The statutory scheme as currently drafted clearly signals that individual complaints should always take priority over systemic investigations. Although this may often be the case, elevating this principle to a legally-

[70] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 28 (second reading 25 November 2022).
[71] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 28(1) (second reading 25 November 2022). See also *RCMP Act*, RSC 1985, c. R-10, s. 45.34(2).
[72] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 28(3) (second reading 25 November 2022). See also *RCMP Act*, RSC 1985, c. R-10, s. 45.34(3).

binding precondition is inappropriate. Oversight bodies should be free to make the difficult determinations about how to effectively pursue their broad mandate without unnecessary procedural or legal barriers.

The requirement to provide a certification to the Minister also increases the chances of inappropriate political interference. Oversight agencies are dependent on the government for their funding. Requiring them to certify in writing to the Minister that they have sufficient funds to adequately deal with individual complaints may raise concerns that this will be used to justify government refusals for future budget increases – or even risk budget cuts if they are seen to be taking on 'additional' or 'optional' oversight activities within their existing budgetary envelope.

c. Public reports

Finally, the Commission is only obligated to provide a "summary" of these reports to the public.[73] The Commission is obliged to take steps to ensure the report does not contain information that would damage international relations or would compromise or seriously hinder the administration or enforcement of program legislation or the investigation or prosecution of any offence.[74] The publication of even the summary can be indefinitely delayed if the Minister considers it "appropriate" to given the RCMP or CBSA more time to comment.[75] There is no reason to limit public disclosure to a summary, to have such broad language censoring its content, or allow it to be subject to indefinite delay at the behest of a Minister.

Systemic investigation reports are regularly published by law enforcement oversight bodies – indeed, publishing these reports is essential to fulfilling the oversight function of transparency and accountability. The most essential of these reports are highly critical of a range of practices, conduct and policies – and therefore may very appropriately impact investigations, enforcement activities, or even where appropriate international relations. The restrictions in C-20 are not only unnecessary, they fundamentally undermine the independence of essential law enforcement oversight functions.

Other Canadian jurisdictions give much broader latitude to oversight bodies to investigate policy complaints and systemic issues,[76] and with greater transparency, and independent reviews have specifically recommended that systemic reviews be accompanied by a written report with recommendations that is provided both to the public, with copies going to the relevant law enforcement bodies.[77]

The Commission should be required to make all reports on systemic reviews public, subject only to any redactions necessary to protect individual privacy or other privileged and confidential

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[73] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 28(7) (second reading 25 November 2022).
[74] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, 15(1)(a) (second reading 25 November 2022).
[75] Bill C-20, *An Act establishing the Public Complaints and Review Commission and amending certain Acts and statutory instruments*, 1st Sess, 44th Parl, 2021, s. 28(8) (second reading 25 November 2022).
[76] See, for example, *Police Services Act*, R.S.O 1990, c.1, ss. 57, 58(1)(a).
[77] Ontario, The Honourable Michael H. Tulloch, *Report of the Independent Police Oversight Review*, (Queens Printer for Ontario, 2017) at para 254.

information. In our experience with other systemic investigation reports that do not engage with national security, these documents can be written in a manner that allows for full and complete public disclosure. The Minister should not be able to prevent publication; the RCMP or CBSA should be obligated to submit their comments within the 60 day time limit, the report should be published and note that comments were not received.

Recommendation 12: Individuals should be able to file complaints about off-duty actions that may constitute misconduct.

Recommendation 13: There should be a clear statutory right for individuals to file policy complaints.

Recommendation 14: The scope of the PCRC's investigations and reports should not be limited to compliance with a limited number of Acts, regulations and policies; any language limiting its mandate in this way should be deleted.

Recommendation 15: The term "specified activities" should not be used. The relevant section and provisions should be amended to make it clear that the PCRC has the authority to examine and review issues of a systemic nature that are the subject of, or that may give rise to, complaints made by members of the public.

Recommendation 16: Section 28(3), requiring the Commission to give notice to the Minister before initiating a systemic investigation, should be deleted.

Recommendation 17: The PCRC should be required to make all systemic reports public; the RCMP or CBSA should be required to submit comments within the available time frame.

Recommendation 18: The PCRC should not be prevented from publishing information that would be "injurious to international relations or would compromise or seriously hinder the administration or enforcement of program legislation or the investigation or prosecution of any offence"; s. 15(1)(a) should be deleted.

Summary of areas of concern and recommendations

1. **Investigations of law enforcement or security agency misconduct must be independent and free from bias or the appearance of bias: police should not investigate police, and the Commission should be able to appoint non-permanent residents as members**

   Recommendation 1: The preferrable approach is for all complaints to be received, reviewed, and investigated by the PCRC. To provide time for this transition to happen, Bill C-20 should be amended to eliminate CBSA and RCMP-led investigations within five years.

   Recommendation 2: The Commissioner of the PCRC should be an officer of Parliament. At a minimum, the PCRC should neither report to, nor receive budgetary allocation from, any Minister that directly oversees the RCMP and the CBSA.

   Recommendation 3: Section 2(c), which prevents individuals from being appointed to the Commission if they are not Canadian citizens or permanent residents, is arbitrary and discriminatory; it should be removed.

2. **Remove unnecessary barriers to receiving and investigating valid misconduct complaints**

   Recommendation 4: Unnecessary barriers to filing complaints should be removed. Specifically:

   a) Third parties should have unrestricted ability to file complaints;

   b) The word 'trivial' should be deleted from s. 38(1)(a);

   c) There should be no mandatory termination of complaints that could have been dealt with under other processes or Acts; rather, discretion should be afforded to refuse to investigate or continue with a complaint only where there is another "comparable, currently available and clearly more appropriate" statutory process;

   d) The provisions allowing for termination of a complaint where it is "not necessary or reasonably practicable" to continue the investigation should be deleted;

   e) All provisions preventing or terminating the investigation of complaints due to their impact on the administration or enforcement of program legislation, or the investigation or prosecution of any offence should be replaced with more targeted language allowing for complaint investigation to be postponed or suspended if it would interfere with a criminal investigation or prosecution

into the same conduct. The following language should be adapted and incorporated into Bill C-20:

> **Postponement due to criminal investigation or proceeding**
> (1) If a matter that is or may be the subject of an investigation under this Part is or becomes the subject of an investigation of an offence under a law of Canada, a province or a territory, or the prosecution of such an offence, the Complaints Director may postpone the commencement of the investigation under this Part, or suspend it, for as long as is reasonably necessary to avoid interfering with the investigation or prosecution.
>
> (2) In making a determination on whether to postpone or suspend the commencement of an investigation under this Part, the Complaints Director will consider all relevant factors, including but not limited to the advice of the Crown Attorney or prosecutor overseeing an investigation or prosecution;

f) Mandatory referrals to NSIRA should be amended to allow for complainants to select the appropriate forum. Individuals with a complaint that is related to the national security activities of the RCMP or CBSA should be informed that they can choose to complain to the Commission or to NSIRA. Referrals to NSIRA against the complainant's wishes should be mandatory only when lack of access to national security information, or jurisdiction to review other national security agencies, would significantly hamper the complaint investigation.

g) There should be no "time limit" on filing a complaint. Instead, the body receiving the complaint should have structured discretion to decline to investigate a complaint if the conduct occurred more than two years ago. Discretion should be exercised taking into account all relevant circumstances, including when the complainant first learned of the alleged misconduct, the reason for delay, and the severity of the complaint. Timelines should be automatically suspended during the time that the complainant was facing criminal charges or unresolved or outstanding immigration or refugee matters. If upon receiving the complaint the CBSA, RCMP or PCRC is of the opinion that there may have been an undue delay in filing the complaint, the complainant should be given an opportunity to provide any relevant information before a final decision is made.

Recommendation 5: Mandatory complaint initiation where an interaction with an RCMP or CBSA employee resulted in serious injury or death and reasonable grounds exist to investigate the conduct.

3. Initiation of the disciplinary processes and disciplinary adjudication must be conducted in an independent, unbiased and transparent manner

Recommendation 6: The PCRC should have the authority to lay disciplinary charges, including charges that come to light during or in connection with its investigations. Adjudication of serious charges should be pursued by an independent prosecutor, and should be adjudicated before a truly independent

adjudicator. At a minimum, the PCRC should have the authority to require that the disciplinary process be initiated, that a hearing be held in the case of substantiated misconduct of a serious nature, and to order a new independent adjudicator preside over a new disciplinary hearing if warranted as is the case in British Columbia.

4. Complainants must be meaningfully informed of, and involved in, the investigation and disciplinary process

Recommendation 7: Complainants should be given a copy of an interim investigative report, no matter what body is leading the investigation, and have the ability to provide comments on the report prior to a final report being issued.

Recommendation 8: Complainants should have a right to regular updates regarding the disciplinary process, as they do with the complaints process.

Recommendation 9: Complainants should be given advanced notice of the position of the disciplinary authority regarding whether or not misconduct occurred, appropriate next steps, and the range of penalties that are being considered. Complainants should be able to make written or oral submissions to the disciplinary authority before a final decision is reached.

Recommendation 10: If a matter proceeds to a formal disciplinary hearing, complainants should have automatic party standing.

Recommendation 11: The CBSA disciplinary process should be overhauled so that it incorporates the levels of transparency, independence, fairness and complainant participation that exist in other law enforcement disciplinary regimes.

5. Support for robust individual investigations, policy complaints and systemic investigations

Recommendation 12: Individuals should be able to file complaints about off-duty actions that may constitute misconduct.

Recommendation 13: There should be a clear statutory right for individuals to file policy complaints.

Recommendation 14: The scope of the PCRC's investigations and reports should not be limited to compliance with a limited number of Acts, regulations and policies; any language limiting its mandate in this way should be deleted.

Recommendation 15: The term "specified activities" should not be used. The relevant section and provisions should be amended to make it clear that the PCRC

has the authority to examine and review issues of a systemic nature that are the subject of, or that may give rise to, complaints made by members of the public.

Recommendation 16: Section 28(3), requiring the Commission to give notice to the Minister before initiating a systemic investigation, should be deleted.

Recommendation 17: The PCRC should be required to make all systemic reports public; the RCMP or CBSA should be required to submit comments within the available time frame.

Recommendation 18: The PCRC should not be prevented from publishing information that would be "injurious to international relations or would compromise or seriously hinder the administration or enforcement of program legislation or the investigation or prosecution of any offence"; s. 15(1)(a) should be deleted.