Canadian Council for Refugees | Conseil canadien pour les réfugiés

Bill C-20: An Act establishing the Public Complaints and Review Commission

Submission to the Senate

4 October 2024

The Canadian Council for Refugees (CCR) – Who we are

The Canadian Council for Refugees (CCR) is a leading voice for the rights, protection, sponsorship, settlement, and well-being of refugees and migrants, in Canada and globally. The CCR is driven by its approximately 200 member organizations working with, from and for these communities from coast to coast to coast.

The CCR has a long history of advocating to the government for an external complaints mechanism for the Canada Border Services Agency (CBSA). The CCR's perspective is informed by our members, many of which are active in the field supporting people in immigration detention, accompanying people at interviews with the CBSA and engaging with people who report on their experiences at Ports of Entry or in inland interactions with the CBSA.

The CCR's focus is on people whose migration is forced and who therefore exhibit multiple vulnerabilities. We strive to bring forward the perspective of people engaging with the CBSA in contexts where they do not have counsel present, and who are often not well-placed to advocate for themselves.

Overview: Bill C-20 at the Senate – a key opportunity to secure accountability for human rights at the CBSA

CCR welcomes Bill C-20 as a long overdue measure to ensure CBSA oversight. The bill offers a crucial opportunity to address injustices experienced by many vulnerable people, particularly racialized communities, and for the government to achieve its objective of improving oversight for the CBSA.

A number of concerns that we raised when Bill C-20 was first tabled have been addressed through important amendments adopted by the House of Commons. Nevertheless, there remain a few important weaknesses in the bill that stand in the way of it serving as a mechanism to effectively protect human rights and ensure accountability. Some of the final changes needed are in fact simply to ensure that the clear intent of the House amendments is not undermined by other aspects of the legislation.

By addressing these few remaining core concerns, the Senate can play an essential role in ensuring that the legislation is effective, rather than a well-intentioned reform that misses the mark. Amendments in the Senate responding to CCR's recommendations will receive widespread support from our members as well as wider civil society. CCR also supports the collective brief submitted by the International Civil Liberties Monitoring Group and other major human rights organizations.

We urge the Senate not to miss this opportunity to make historic legislation.

CCR has five priority recommendations to the Senate regarding Bill C-20.

1. Adopt language used by Canadian courts to ensure that "third parties" include NGOs.
2. Ensure removal orders of a complainant can be delayed pending an investigation.
3. Provide redress measures when a complaint is determined to be well-founded.
4. Clarify that complaints can address patterns of behaviour not just individual incidents.
5. Provide that serious incidents are immediately investigated by the Commission.

CCR notes that the first two recommendations are essential for the bill to achieve its objectives. The other three are linked and provide additional important ways to strengthen the new oversight mechanism.

Recommendations in Detail

1. "Third parties" must be defined more clearly in order to include NGOs

We are pleased to see that Bill C-20 has been amended to clarify that third parties, including NGOs, can bring complaints (s. 33(1)) and request a review of specified activities (s. 28(1)).

A system dependent on complaints of abuse from affected individuals cannot be effective in the context of the immigration enforcement system where those most at risk of suffering abuse are least able to bring forward a complaint. Many people who experience mistreatment by the CBSA are unlikely to make a formal complaint for a wide range of reasons, including lack of secure status, fear of the consequences, lack of language access or support, and having a major focus on other pressing life priorities such as getting released from detention or avoiding deportation. NGOs will thus have a crucial role to play in ensuring accountability of the CBSA with respect to the treatment of the most vulnerable.

However, we are concerned that a further amendment that was made to the bill may unintentionally narrow the definition of third parties so far that in practice few NGOs will qualify. S. 38 (b.1) states that the CBSA may refuse to investigate a complaint if:

> *"the complaint is from a third party that is not directly concerned by the subject matter of the complaint"*

It is not clear how Parliament intends the words "directly concerned" to be interpreted. Indeed, it seems contradictory since, by definition, a third party is only indirectly affected.

Legal interpretations of "directly concerned" in other contexts suggest the words are generally construed very narrowly and therefore may effectively exclude most NGOs, nullifying the improvements to the Bill made in the House to include them.

- Will an NGO that regularly visits people in a CBSA detention centre be considered "directly concerned" if it makes a complaint about problematic conduct by a CBSA officer that it has learned about in the course of its visits?
- Will an NGO serving undocumented persons be considered "directly concerned" if it makes a complaint based on reports shared by clients of abuse by a CBSA officer?

Amendments are needed to ensure that "third parties" are not defined in an overly restrictive manner. We recommend that the requirement to be "directly concerned" be replaced by a requirement that the third party have a "genuine interest" in the matter, which is a well-established test to determine which organizations should be granted public interest standing before the courts.

Over the years the Canadians courts have developed a way of interpreting "genuine interest" that enables NGOs and other third parties to be granted standing to bring important legal cases forward, while closing the door on "frivolous" or "mere busybody" litigants. The potential role for third party complainants under Bill C-20 is similar in important respects to that of public interest litigants, so it would make sense to use a similar legal test. Then all involved could refer to the extensive existing caselaw to understand how to interpret who should be recognized as a third party.[1]

By adopting the "genuine interest" test for third party determination, Parliament would also ensure that this test applies to which "third parties" may request a specified activity review under section 28(1), since Parliament may be presumed to intend the same definition of "third party" for those requests as for making complaints.

Recommendation

1.1 Amend subsection 28(1) of the bill to provide that a complaint need not be investigated if "(b.1) the complaint is from a third party that ~~is not directly concerned by~~ does not have a genuine interest in the subject matter of the complaint."

[1] See in particular *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607

2. Ensure that a removal order can be delayed pending investigation of a complaint

It is essential for the effective functioning of the complaints mechanism that there be a possibility of interim measures to suspend removal while a complaint is being investigated. Without measures to suspend the removal of the complainant, many serious complaints will never be meaningfully addressed, and complainants will be denied justice. In some cases, there will be devastating impacts, up to risk to life, for complainants who face deportation from Canada in part as a result of CBSA misconduct.

Currently the bill, at s. 84, specifically says that the making of a complaint cannot prevent the normal operation of immigration legislation and that it must not delay or prevent removal, or allow a person to remain in Canada beyond the time authorized.

This is a crucial flaw in the bill.

The legislation must afford the option for a stay of removal, for four reasons.

i) Some of the worst allegations of abuse by the CBSA occur in the removal process. If no stay of removal is allowed, it follows that these abuses will almost never be subject to meaningful review, since the person affected will generally be outside Canada, either before they can even make a complaint, or while the complaint is being investigated.

ii) The bill must provide safeguards against the scenario in which the CBSA might expedite removal of a person who is making a complaint. From the perspective of reputational self-interest, it is in the CBSA's interests for the person alleging mistreatment to be far away.

iii) There is also the risk that CBSA officers might use removal as a form of retribution against the person making a complaint. Given that CBSA officers have enormous latitude in terms of which removals are prioritized, or whether to grant a deferral of removal, this is not a far-fetched concern. This could also have a chilling effect on others.

> *Example: a CBSA officer behaves in an aggressive and racist manner towards a person who has a removal order but has not yet been scheduled for removal. The person decides to make a complaint about the officer. After the officer has been informed of the complaint made against them, the officer schedules the person's removal (or asks a colleague to do so). The person is removed from Canada and does not pursue the complaint as they are focused on managing their return to their country of origin. Other people hear about this person's removal soon after making a complaint and decline to make complaints about similar experiences with this officer because they fear that they will be removed more quickly if they make a complaint.*

A stay of removal as an interim measure offers safety for people who have suffered abuse to make a complaint. If submitting a complaint can be of no possible benefit to the person, while bringing some risk of trouble, most people with insecure status will be disinclined to make a complaint.

iv) The possibility of a stay of removal ordered by the Commission will reduce pressures on the Federal Court, which already hears many applications for judicial stay of removal. Where there is a serious complaint before the Commission, it is important to ensure that the key witnesses remain in Canada so that the complaint can be investigated. Simplifying the issuance of the stay of removal will be more cost-effective than requiring expensive Federal Court processes.

We recognize that it would be necessary to ensure that people who have not suffered mistreatment do not have an incentive to make a complaint simply to avoid removal. This could be addressed through a triage that would exclude frivolous complaints from benefitting from a stay of removal.

Recommendation

2.1 Delete s. 84 (which says that the complaint cannot delay or prevent immigration enforcement activities, such as removal) and replace with the following: "The Commission shall direct the Canada Border Services Agency to suspend the removal of a complainant or witness, or to take any other reasonable steps, in order to protect the integrity of an investigation or to ensure access to a remedy."

2.2 In the alternative, amend s. 84 to say "Except as ordered under s. 84.1, the making of a complaint under subsection 33(1) or (2) or section 36, the investigation into a complaint made under any of those provisions or the review of a complaint under section 57 is not to" etc.

And add "84.1 Notwithstanding anything in this Act, the Commission shall direct the Canada Border Services Agency to suspend the removal of a complainant and/or witness to protect the integrity of an investigation and/or to ensure access to a remedy."

3. Ensure redress measures are available for a well-founded complaint

We also urge that Bill C-20 be amended to offer measures of redress for a person who, following investigation of the complaint, has been found to have been harmed.

These should include recommendations of immigration measures (for example, to halt removal) and financial compensation.

We note that the availability of financial remedies would increase the interest of people who have suffered mistreatment in making a complaint. We would also expect that the financial consequences of actions would provide greater motivation to the CBSA to address the problems identified in the Commission's reports.

Recommendations

The following recommendations assume the deletion of relevant parts of s. 84 per recommendation 2.1 above.

3.1 Add to Bill C-20 provisions empowering the Commission to make recommendations of immigration measures (for example, to halt removal or to facilitate the re-admission to Canada of the person), in addition to s. 67-68 relating to recommendations for disciplinary measures.

3.2 Add to Bill C-20 provisions empowering the Commission to make recommendations for other measures of redress including financial compensation (with no cap for damages).

3.3 Add to Bill C-20 provisions empowering the Commission to lead a mediation process to allow the complainant to express what measures of redress would be most meaningful to them.

4. Clarify that complaints can address patterns of behaviour—i.e. systemic issues

Bill C-20 is narrowly focused on addressing bad behaviour by an individual officer. The scope of complaints about the CBSA is defined as follows:

> *Any individual may make a complaint concerning the conduct, in the exercise of any power of the Agency or the performance of any of its duties or functions under the Canada Border Services Agency Act, of any person who, at the time that the conduct is alleged to have occurred, was a CBSA employee.* S. 33(2)

The CCR is concerned about the need to address issues that go beyond a single officer. Abuses by individual officers certainly require oversight, but many of the problems observed by our members arise from an internal culture that promotes mistreatment, or from the way in which CBSA policies are applied or misapplied by a number of officers. The following are some examples of systemic issues of concern:

- Patterns of CBSA officials denying that newly arrived people made a refugee claim before a removal order was issued.[2]
- Practices of systematically shackling people when detained.
- Profiling of people for secondary inspection (on arrival at the border or at an airport), or for detention.
- Strategically scheduling arrests on a Thursday with a view to a removal on Sunday (meaning that the person will not have the benefit of a detention review where the legality of their detention can be challenged, since although detention reviews are required to be held after 48 hours, no detention reviews are held on the weekend.)

We also underline the need for accountability related to systemic racism. All Canadian institutions are affected by racism: it is a particularly urgent concern in immigration enforcement, because of the immense power imbalance that exists between immigration enforcement officials and people without secure status in Canada. Most of those with the least security are racialized. Some examples of situations where racism is commonly observed in CBSA activities include:

- Racialized people arriving in Canada, at an airport or land border, are more often subjected to secondary examination.
- Racialized people are more likely to be detained (on all grounds, including identity, flight risk, danger to the public) and subjected to harsher conditions when released from detention.
- Racialized people within Canada are more likely to be stopped by CBSA officials and asked for proof of status.
- Racialized persons are more likely to be found inadmissible on security and criminality grounds.

Under Bill C-20, it should be possible to address systemic issues through:

a) an individual complaint, if the Commission chooses on its own initiative to look at whether there is a systemic problem, or

b) a "specified activity review", as provided for under section 28 ((2): "For the purpose of ensuring that the activities of the Agency are carried out in accordance with the Canada Border Services Agency Act, any ministerial directions made under that Act and any policy, procedure or guideline relating to the operation of the Agency, the Commission

[2] The law prevents a person making a refugee claim after a removal order has been issued. The CCR has therefore been very concerned in the past on receiving reports from several people arriving at the same airport and during the same time period who alleged that they had stated to the officer that they wanted to make a refugee claim before the removal order was made.

may, on the request of the Minister or a third party or on its own initiative, conduct a review of specified activities of the Agency and provide a report to the Minister and the President on the review".)

We therefore welcomed the amendment introduced in the House to spell out that third parties are empowered to request a "specified activity review."

NGOs such as the CCR are well-placed to identify potential systemic problems including areas where the CBSA's activities may not be carried out "in accordance with the Canada Border Services Agency Act, any ministerial directions made under that Act and any policy, procedure or guideline relating to the operation of the Agency" (as specified in subsection 28(2)).

We appreciate the amendment as signaling Parliament's intention that the Commission draw on the knowledge and expertise of relevant organizations, such as the CCR. However, we are aware that the Commission will not have the capacity to undertake more than a few specified activity reviews, and it must consider areas requiring review of both the RCMP and the CBSA.

We therefore urge that the bill be amended to clarify that complaints can be made about patterns of behaviour by several officials.

Section 2 of the bill contains various interpretation provisions, including clarification that decisions taken or not taken in relation to the level of service are deemed to be conduct for the purposes of making a claim (s. 2(3) for the RCMP, s. 2(5) for the CBSA).

In a similar way, a provision could be added to section 2 to clarify that patterns of behaviour by one or several officers could be the subject of a complaint under subsections 33(2) and 36(2).

Recommendation

4.1 Add to section 2 of the bill a sub-section confirming that complaints under subsections 33(2) (complaint against the CBSA) and 36(2) (Chairperson-initiated complaint against the CBSA) may be complaints about a pattern of behaviour by one or several officers.

5. Ensure all serious incidents are immediately investigated by the Commission

Bill C-20 provides that complaints may be made to the Commission or to the CBSA (s. 33(8)), and that the complaint must first be examined by the CBSA (s. 37) – unless the Commission decides otherwise.

We support this provision allowing for the Commission to undertake the initial investigation whenever they elect to, but it is imperative the Bill be amended to also ensure that this is the standard process whenever there is a fatality or other serious incident involving the CBSA, without requiring a complaint.

Currently Bill C-20, at section 111, amends the Canada Border Services Agency Act to require the CBSA Chairperson to investigate any serious incidents, defined to include actions of officers that "may have resulted in serious injury to or the death of any person."

Serious incidents deserve review by an independent body. An initial investigation by the CBSA will delay the investigation by the independent body. The CBSA will be perceived as having bias, making it inappropriate that it investigates itself.

The legal requirement for the CBSA to investigate serious incidents would appear to make it unlikely that the Commission would ever exercise its discretion to examine a complaint itself without first having the CBSA examine it, if the complaint concerns a serious incident, since this would mean two investigations being conducted in parallel. This seems perverse, since incidents involving serious injury or death are those that most call out for systematic and rapid investigation by the Commission, as an independent body, rather than preliminary investigation by the CBSA.

It would also be unfair to require a person who is complaining about a serious incident (such as an injury to themselves, or death of a family member) to complain first to the CBSA and then following the report from the CBSA, to need to request a review by the Commission (which is the process set out in the legislation - Section 56), in order for there to be an independent investigation of the serious incident. Those affected as well as Canadian society as a whole deserve a robust system of independent accountability in the wake of serious incidents, without requiring a complaint or a request for a review.

The following recommendation has been made to the Government of Canada by the jury at the recent inquest into the death of Abdurahman Hassan[3]:

Establish an independent oversight body to:

a. Review and investigate conditions of detention for immigration detainees,
b. Receive complaints about the conditions of detention, and
c. Investigate critical incidents and fatalities involving immigration detainees.

[3] Office of the Chief Coroner (OCC) for Ontario, https://www.ontario.ca/page/2023-coroners-inquests-verdicts-and-recommendations#section-0

CCR therefore recommends that the legislation provide a framework requiring that the Commission undertake the initial investigation of serious incidents at all locations where the CBSA carries out its work, in place of the current amendments to the CBSA Act regarding serious incidents.

Recommendations

5.1 Delete section 111 of the bill (amendments to CBSA Act relating to "Serious Incidents").

5.2 Amend subsection 37(2) to add a provision requiring the Commission to investigate any incidents involving a fatality, a serious injury or other serious incident (without requiring a complaint, or prior investigation by the CBSA).

5.3 Include in the amendment to subsection 37(2) direction that the Commission should take into account the vulnerability of the person in evaluating the seriousness of the incident.

CONCLUSION

The Senate has an important opportunity to ensure that vulnerable refugees and migrants have a meaningful way to address mistreatment by the CBSA. Our key recommendations for the Senate are those identified above.

For reference, there are also a wider number of potential reforms which the CCR recommends – these can be found in our earlier brief on C-20.[4]

We look forward to appearing before the Senate Committee studying the bill and discussing our recommendations further.

[4] Submission to the House Standing Committee on Public Safety and National Security
https://ccrweb.ca/sites/ccrweb.ca/files/2023-06/CCR-C-20-submission-May-2023.pdf