HUMAN RIGHTS ACTION GROUP

WRITTEN SUBMISSIONS TO THE STANDING SENATE COMMITTEE ON NATIONAL SECURITY AND DEFENCE: BILL C-70

Prepared by: Sarah Teich
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EXECUTIVE SUMMARY:

On May 6, 2024, the Minister of Public Safety, Democratic Institutions and Intergovernmental Affairs tabled Bill C-70: An Act respecting countering foreign interference (Bill C-70). In Part 1, important amendments to the CSIS Act include the ability to disclose information to non- governmental entities when it is essential to the public interest and that interest clearly outweighs any of the privacy concerns that could result from disclosure (s 19 (2) (d)). Further, disclosure to any person or entity in the interest of building resiliency against threats to the security of Canada also becomes a possibility under the proposed amendments, if certain requirements are met, including that no personal information is to be disclosed (s 19 (2.1)). These are encouraging amendments, particularly the amendment to section 19 (2) (d). The remaining amendments to the CSIS Act appear aimed at adjusting the legislation with regard to "datasets" with which the Service engages, and expanding the Service's ability to carry out its functions, including outside Canada. A new section 29 would mandate a parliamentary review of the CSIS Act every five years. It remains a limitation that Bill C-70 does not propose the addition of a definition of "transnational repression" to the CSIS Act or to any of the other pieces of legislation it proposes to amend or enact.

In Part 2, Bill C-70 proposes amendments and additions to section 20 of SOIA which are significant. Under the new section 20 (1), every person who "at the direction of, for the benefit of or in association with, a foreign entity or a terrorist group, induces or attempts to induce, by intimidation, threat or violence, any person to do anything or to cause anything to be done" could be found to have committed an offence. Section 20 (2) broadens the extraterritorial application of this offence, and sections 20.1 (1), 20.2 (1), 20.3 (1), and 20.4 (1) create additional offences. Critically, section 20.4 (1) could help protect vulnerable political processes such as nomination contests from foreign interference. Finally, proposed amendments to section 22 of SOIA widen the Act's preparatory offences and raise the maximum penalty for their commission. The proposed amendments to the Criminal Code are focused on the offence of sabotage. The offence of sabotage in section 52 (1) would be amended and two new offences created to prohibit sabotage in relation to essential infrastructure and devices. Bill C-70 does not propose the addition of a specific foreign interference offence to the Criminal Code, nor does it propose that refugee espionage or online harassment or digital violence be criminalized.

In Part 3, Bill C-70 would amend the *Canada Evidence Act* and makes consequential amendments to other Acts to create a general scheme to deal with information relating to international relations, national defence or national security. Finally, Part 4 would enact the *Foreign Influence Transparency and Accountability Act*. This Act is an encouraging development, and mirrors similar legislation in other countries.

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I. AMENDMENTS TO THE CANADIAN SECURITY INTELLIGENCE SERVICE (CSIS) ACT

In our *Combatting Transnational Repression and Foreign Interference in Canada* report, we noted that the "CSIS Act does not provide a clear definition of transnational repression".[1] Bill C-70 does not propose the addition of a definition of "transnational repression" in the CSIS Act or in any of the other pieces of legislation it proposes to amend or enact.

We noted in our report that the Business Council of Canada "recommended that the Act be amended, among other things, to enable CSIS to share information with non-governmental stakeholders, where such disclosure would be 'in the public interest' and subjected to 'all necessary safeguards and oversight.'"[2] Bill C-70 does propose amendments to the disclosure provisions in section 19. At present, section 19 reads as follows:

> **19 (1)** Information obtained in the performance of the duties and functions of the Service under this Act shall not be disclosed by the Service except in accordance with this section.
> **(2)** The Service may disclose information referred to in subsection (1) for the purposes of the performance of its duties and functions under this Act or the administration or enforcement of this Act or as required by any other law and may also disclose such information,
> **(a)** where the information may be used in the investigation or prosecution of an alleged contravention of any law of Canada or a province, to a peace officer having jurisdiction to investigate the alleged contravention and to the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged contravention may be taken;
> **(b)** where the information relates to the conduct of the international affairs of Canada, to the Minister of Foreign Affairs or a person designated by the Minister of Foreign Affairs for the purpose;
> **(c)** where the information is relevant to the defence of Canada, to the Minister of National Defence or a person designated by the Minister of National Defence for the purpose; or
> **(d)** where, in the opinion of the Minister, disclosure of the information to any minister of the Crown or person in the federal public administration is essential in the public interest and that interest clearly outweighs any invasion of privacy that could result from the disclosure, to that minister or person.

Bill C-70, if passed, would amend section 19 (2) (d) to replace the words "any minister of the Crown or person in the federal public administration" to "any person or entity". This means that information may be disclosed to anyone, not just a public official, if the disclosure "is essential in the public interest" and if "that interest clearly outweighs any invasion of privacy that could result from the disclosure".[3] Further, Bill C-70 would add a section 19 (2.1), which would read:

> **(2.1)** For the purpose of building resiliency against threats to the security of Canada, the Service may also disclose information referred to in subsection (1) to any person or entity if all of the following conditions are met:
> **(a)** where the information has already been provided to a federal department or agency that performs duties and functions to which the information is relevant;
> **(b)** the information does not contain any personal information, as defined in section 3 of the Privacy Act, of a Canadian citizen, a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act or any individual in Canada;
> **(c)** the information does not contain the name of a corporation incorporated or continued under the laws

[1] Sarah Teich et al. "Combatting Transnational Repression and Foreign Interference in Canada: A Paper by Secure Canada and Human Rights Action Group (September 2023) at 132 [TNR Report].
[2] Ibid at p 133.
[3] Bill C-70: An Act respecting countering foreign interference (first reading, 6 May 2024), s 19 (2) (d) [Bill C-70].

of Canada or a province or the name of a Canadian entity.

These are encouraging amendments, particularly the amendment to section 19 (2) (d). The addition of section 19 (2.1) may be less significant, as the requirements that "the information does not contain any personal information … of a Canadian citizen, a permanent resident … or any individual in Canada" or "the name of a corporation incorporated or continued under the laws of Canada or a province or the name of a Canadian entity", in practice, may limit the ability of any disclosure to identify specific threat actors.

The remaining portions of Bill C-70 that propose amendments to the CSIS Act appear to be aimed at adjusting the legislation with regard to "datasets" with which the Service engages, and expanding the Service's ability to carry out its functions, including outside Canada. For instance, Bill C-70 proposes the addition of section 16 (1.1) which would allow CSIS to provide the kind of assistance described in section 16 (1) by collecting, from within Canada, information or intelligence that is located outside Canada if the assistance is directed at a person or thing in Canada or at an individual who was in Canada and is temporarily outside Canada. Bill C-70 further proposes the addition of sections 20.3 and 20.4 which would allow the CSIS Director or any employee designated by them for the purpose, to make applications to a judge for a preservation order and a production order, respectively, which may be made in respect of information, records, documents or things located outside of Canada. The warrant provisions would be updated. A new subsection 21 (3.2) would allow a judge to "authorize the collection, from within Canada, of information or intelligence that is located outside Canada". The addition of section 22.21(1) would give a judge the ability to issue a warrant to authorize activities outside of Canada to enable CSIS to investigate a threat to the security of Canada. Finally, a new section 29 would mandate a parliamentary review of the CSIS Act five years from the day on which the section comes into force, and after each subsequent fifth anniversary.

II. AMENDMENTS TO SECURITY OF INFORMATION ACT (SOIA) AND THE CRIMINAL CODE

Amendments to SOIA

In our *Combatting Transnational Repression and Foreign Interference in Canada* report, we detailed the importance of reviewing and adjusting sections 3, 19 and 20 of SOIA. Regarding section 19, which prohibits economic espionage, we described the potential loophole created by the fact that it is a defence to this offence that a person "acquired [the information] in the course of the person's work and is of such a character that its acquisition amounts to no more than an enhancement of that person's personal knowledge, skill or expertise". We noted that based on the availability of this defence, it is unclear whether the current wording of section 19 would effectively prohibit the types of foreign interference occurring in academia and other relevant sectors.[4]

Regarding section 20 – which prohibits any person from, "at the direction of, for the benefit of or in association with a foreign entity or a terrorist group, induc[ing] or attempt[ing] to induce, by threat, accusation, menace or violence, any person to do anything or to cause anything to be done (a) that is for the purpose of increasing the capacity of a foreign entity or a terrorist group to harm Canadian interests; or (b) that is reasonably likely to harm Canadian interests" – we noted in our report that this may not be sufficient to prohibit acts of transnational repression against individuals absent an amendment to section 3 (2) to designate, as harmful to Canadian interests, the targeting of a person in Canada by virtue of

[4] TNR Report, supra note 1 at p 121.

their membership in, or affiliation with, a particular diaspora community.[5]

We also noted with regard to section 24 – which provides that any prosecution under SOIA requires the consent of the Attorney General – that clarity as to when such consent would be granted or withheld is important in pursuit of transparency and access to justice for victims.[6]

Bill C-70 does not propose any amendments to sections 3 (2) or 19. Bill C-70 also makes no reference to when Attorney General consent will be granted or withheld. However, Bill C-70 proposes that section 20 be amended as follows, essentially creating five offences:

(1) **Section 20 (1): Every person commits an offence who, at the direction of, for the benefit of or in association with, a foreign entity or a terrorist group, induces or attempts to induce, by intimidation, threat or violence, any person to do anything or to cause anything to be done.** This is broader than the original version of section 20, as it no longer needs to be tied to harming Canadian interests. Further, section 20 (2) broadens the extraterritorial application of this offence. In the current version of SOIA, section 26 (1) provides that "[a] person who commits an act or omission outside Canada that would be an offence against this Act if it were committed in Canada is deemed to have committed it in Canada if the person is (a) a Canadian citizen; (b) a person who owes allegiance to Her Majesty in right of Canada; (c) a person who is locally engaged and who performs his or her functions in a Canadian mission outside Canada; or (d) a person who, after the time the offence is alleged to have been committed, is present in Canada." Per Bill C-70, section 20 (2) would provide that "... a person who commits an act referred to in subsection (1) while outside Canada is deemed to have committed it in Canada if (a) the victim is in Canada; or (b) the victim is outside Canada and (i) the person or the victim or both are (A) a Canadian citizen, (B) a person who is ordinarily resident in Canada, (C) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act,* (D) a person who owes allegiance to His Majesty in right of Canada, or (E) a person who is locally engaged and who performs their functions in a Canadian mission outside Canada". Jurisdiction would also exist per section 20 (2) if the victim is outside Canada and is a person described in any of clauses (i)(A) to (E) above, and if the intimidation, threat or violence is in relation to the victim's child, relative, or intimate partner (as defined in section 2 of the *Criminal Code*) and the child, relative or partner is in or outside Canada. The one clause that is not present in section 20 (2) that is present in section 26 (1) is that extraterritorial jurisdiction is established when the perpetrator, after the time the offence is alleged to have been committed, is present in Canada. Notably, section 26 (3) would continue to apply to section 20 (1) to require that an accused person be present during criminal proceedings, with only limited exceptions – which will naturally limit Canada's exercise of extraterritorial jurisdiction for this and other offences.

(2) **Section 20.1 (1): Every person commits an offence who, while outside Canada, at the direction of, for the benefit of or in association with, a foreign entity or a terrorist group, induces or attempts to induce, by intimidation, threat or violence, any person outside Canada to do anything or to cause anything to be done (a) that is for the purpose of increasing the capacity of a foreign entity or a terrorist group to harm Canadian interests; or (b) that is reasonably likely to harm Canadian interests.** The wording of this offence is similar to the wording of the current, as yet unamended, section 20 of SOIA, as it is tied to harming Canadian interests. Interestingly, subsection 20.1 (2) clarifies that "[i]f any of the facts referred to in

[5] Ibid at pp 123-124.
[6] Ibid at p 137.

paragraph 20(2)(b) apply to either the person who is alleged to have committed an act referred to in subsection (1) or the victim, the person who is alleged to have committed the act is to be prosecuted under subsection 20(1)." In other words, if the perpetrator or victim is a Canadian citizen, resident, person owing allegiance to His Majesty, or a person locally engaged and performing functions in a Canadian mission outside Canada, the offence would be prosecuted under section 20 and not section 20.1. The clarification contained in subsection 20.1 (2) raises the question of when this offence would ever, in practice, apply. For an offence to be prosecuted in Canada in compliance with principles of international law, there must be some tie-in to Canada. Even prosecutions under Canada's universal jurisdiction law, the *Crimes Against Humanity and War Crimes Act*, requires some link to Canada. It is likely, therefore, that section 20.1 would apply only when the perpetrator, after the time the offence is alleged to have been committed, is present in Canada. This may be the only possible link to Canada that is not contained in the clauses of section 20 (2).

(3) **Section 20.2 (1): Every person who commits an indictable offence under this or any other Act of Parliament at the direction of, for the benefit of or in association with, a foreign entity is guilty of an indictable offence and is liable to imprisonment for life.** It is unclear why this offence, unlike the above two offences, excludes the words "or a terrorist group".

(4) **Section 20.3 (1): Every person commits an indictable offence who, at the direction of, for the benefit of or in association with, a foreign entity, knowingly engages in surreptitious or deceptive conduct or omits, surreptitiously or with the intent to deceive, to do anything if the person's conduct or omission is for a purpose prejudicial to the safety or interests of the State or the person is reckless as to whether their conduct or omission is likely to harm Canadian interests.** Likewise, it is unclear why this offence excludes the words "or a terrorist group". It is also significant that this offence is tied to harming Canadian interests or interests of the State.

(5) **Section 20.4 (1): Every person commits an indictable offence who, at the direction of, or in association with, a foreign entity, engages in surreptitious or deceptive conduct with the intent to influence a political or governmental process, educational governance, the performance of a duty in relation to such a process or such governance or the exercise of a democratic right in Canada.** It is unclear why this offence excludes the words "or a terrorist group". It is also significant that this offence is largely tied to governance. Nonetheless, the phrase "or the exercise of a democratic right in Canada" may signal somewhat broader application and cover certain acts of transnational repression committed against human rights defenders, when a perpetrator engages in surreptitious or deceptive conduct with intent to influence one's exercise of one's democratic right(s) in Canada. The definitions of "educational governance" and "political or governmental process" contained in section 20.4 (4) are significant. That "political or governmental process" includes "(f) the nomination of a candidate or the development of an electoral platform by a political party" is particularly important given the susceptibility of nomination contests to foreign interference. The definition of "political or governmental process" further includes "(a) any proceeding of a legislative body; (b) the development of a legislative proposal; (c) the development or amendment of any policy or program; (d) the making of a decision by a public office holder or government body, including the awarding of a contract; (e) the holding of an election or referendum".

Finally, Bill C-70 would amend section 22 of SOIA to widen the Act's preparatory offences. Currently, section 22 (1) provides that "[e]very person commits an offence who, for the purpose of committing an offence under subsection 16(1) or (2), 17(1), 19(1) or 20(1), does anything that is specifically directed towards or specifically done in preparation of the commission of the offence…" Per Bill C- 70, section 22 (1) would be amended to provide that anything specifically directed towards or specifically done in preparation of

the commission of an offence *except* for the offences contained in subsection 13(1) or 18(1), would be an offence. This widens the list substantially to include also the offences contained in subsections 4(1)-(4); 5(1)-(2); 6; 7; 14(1); and 21(1)-(2). Further, the proposed amendment to subsection 22 (2) would increase the maximum penalty from two to five years for a preparatory offence under subsection 22 (1). Notably, the maximum penalties for the new offences in section 20 are significantly higher than five years. The offences contained in sections 20 (1), 20.1 (1), 20.2 (1), 20.3 (1), and 20.4 (1) all carry with them a maximum imprisonment of life.

Amendments to the Criminal Code

We note in our *Combatting Transnational Repression and Foreign Interference in Canada* report that "there is no specific foreign interference offence in the Criminal Code of Canada".[7] Bill C-70 does not propose the addition of a specific foreign interference offence to the *Criminal Code*. In our report we recommended that Canada criminalize refugee espionage and online harassment or digital violence.[8] Bill C-70 does not propose that either of these be added to the *Criminal Code*.

The amendments to the *Criminal Code* contained in Bill C-70 are minor. The offence of sabotage contained in section 52 (1) would be adjusted, and two additional offences added. Currently, section 52 (1) provides that it is an offence for any person to do "a prohibited act for a purpose prejudicial to (a) the safety, security or defence of Canada, or (b) the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada". The amendment would change the words "for a purpose prejudicial to" to "with the intent to endanger". The two new offences would be prohibiting sabotage against essential infrastructure, and sabotage involving a device. They would be contained in sections 52.1 (1) and 52.2 (1), respectively. They read:

> **52.1 (1)** Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who interferes with access to an essential infrastructure or causes an essential infrastructure to be lost, inoperable, unsafe or unfit for use with the intent to
>
> **(a)** endanger the safety, security or defence of Canada
>
> **(b)** endanger the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada; or
>
> **(c)** cause a serious risk to the health or safety of the public or any segment of the public.
>
> ...
>
> **52.2 (1)** Every person commits an offence who makes, possesses, sells or distributes a device intending that it be used or knowing that it will be used, in whole or in part, to carry out an offence under subsection 52(1) or 52.1(1).

Further, a section 52.3 would be added, which would state, "[n]o proceeding for an offence under subsection 52(1), 52.1(1) or 52.2(1) shall be instituted without the Attorney General's consent". As described above, we noted in our report that if the Canadian government wants to enhance the ability of victims to seek redress, it should develop clear public policy outlining when consent will or will not be provided by the Attorney General, including in relation to criminal offences that might apply to acts of transnational repression. Bill C-70 does not address this issue.

[7] Ibid at p 114.
[8] Ibid at p 135-137.

III. ENACTMENT OF THE FOREIGN INFLUENCE TRANSPARENCY AND ACCOUNTABILITY ACT

In our *Combatting Transnational Repression and Foreign Interference in Canada* report, we assert that the government "should ensure that it follows through in the development and implementation of a Foreign Agents Registry, which would align us with our allies."[9] Bill C-70 proposes the creation of a Foreign Influence Transparency Registry.

The proposed Act explicitly recognizes in its preamble the negative effect that efforts by foreign states or powers and their proxies to influence political and governmental processes in Canada has on certain communities, the growing consensus in Canada and among its allies that registries are necessary, the importance of making the registry publicly accessible, and the need for an independent public office holder to administer and enforce the Act. The Act applies to a specific list of political or governmental processes:

> **Application**
> **4** This Act applies to arrangements relating to any of the following political or governmental processes:
> **(a)** federal political or governmental processes;
> **(b)** provincial or territorial political or governmental processes;
> **(c)** the political or governmental processes of
> **(i)** a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982, or
> **(ii)** any other entity that represents the interests of First Nations, the Inuit or the Métis.[10]

A "political or governmental process" is defined under section 2 as including "any proceeding of a legislative body"; "the development of a legislative proposal"; "the development or amendment of any policy or program"; "the making of a decision by a public office holder or government body, including the awarding of a contract"; "the holding of an election or referendum"; and "the nomination of a candidate or the development of an electoral platform by a political party".[11]

While it is significant that the proposed Act recognizes the disproportionate impact of foreign interference on certain communities in Canada, and emphasizes public awareness, the purpose of FITAA as currently drafted would be to ensure that interference activities are not carried out in relation to certain political and governmental processes. The Act, and therefore the registry, would therefore only be applicable to the political or governmental processes listed in section 4. This means that transnational repression that is unrelated to political or governmental processes would not be captured in the public registry and could not be investigated by the Commissioner.

Importantly, section 5(1) of the FITAA would require that a person who enters into an arrangement with a foreign principal register within 14 days of entering into the arrangement and provide updates as to that arrangement:

> **5 (1)** A person who enters into an arrangement with a foreign principal must, within 14 days after the day on which they enter into the arrangement, provide the Commissioner with the information specified in the regulations.

[9] Ibid at p 139.
[10] Bill C-70, supra note 3 at p 76-77.
[11] Ibid at p 75.

> **(2)** The person must, in accordance with the regulations, also provide the Commissioner with updates on any information they have provided under this section.

Pursuant to section 6, this registration requirement does not apply to foreign nationals who hold a passport that contains a valid diplomatic, consular, official or special representative acceptance issued by the Chief of Protocol for the Department of Foreign Affairs, Trade and Development; employees of a foreign principal who is acting openly in the employee's official capacity; or those included in a class of persons specified in the regulations.

It is important to note that pursuant to section 5, the kind of information that must be registered with the Commissioner will be outlined in regulations that have yet to be made.

In our report we recommended the creation of a Commissioner of Foreign Influence. As to the Commissioner's duties and responsibilities, we recommended:

> "A commissioner of foreign influence could develop a code of conduct with specific reference to what is expected for diplomatic and consular personnel. It could also include a prohibition against spying on opposition in Canada to the home government or paying others to do so. The foreign influence commissioner should be able to receive both publicly and privately complaints of violations of the code of conduct committed by any person or entity, including violations by foreign embassies and consulates.
> Like the Lobbying Commissioner, a foreign influence commissioner should be obliged to report annually to Parliament and have the power to report at any time on matters of such urgency or importance that they should not await annual reporting. The reports should set out the extent of compliance with the Code, including complaints and their recommended disposition.
> A foreign influence commissioner could also be obligated to provide updates to relevant authorities on specific cases of transnational repression and foreign interference, including those involving Canadians detained in foreign states, such as Huseyin Celil."[12]

Per Bill C-70, the Governor in Council would appoint a Foreign Influence Transparency Commissioner, to be responsible for the administration and enforcement of the Act under section 9 (1).[13] Under section 8 (1), it would be the duty of the Commissioner to establish and maintain a registry that contains the information provided under section 5 and that registry must be publicly accessible.[14] It would be prohibited to "knowingly provide any false or misleading information to the Commissioner or to any person acting on the Commissioner's behalf or under the Commissioner's direction".[15]

It is encouraging that the proposed Act allows for administrative monetary penalties and criminal punishment. As such, Bill C-70 allows for civil and criminal penalties to be imposed under the proposed Act, similar to mechanisms that exist in other jurisdictions, including the US and Australia. It is encouraging that the Commissioner would be able to conduct investigations and would be given the powers to compel witness attendance and document production. However, it remains to be seen whether enforcement will prove to be challenging. **Foreign interference and transnational repression may be carried out with the involvement of proxies and proxy organizations, and the provision of indirect benefits, which may present challenges in investigations and enforcement.**

[12] TNR Report, supra note 1 at 131.
[13] Bill C-70, supra note 3 at p 78.
[14] Ibid at p 77-78.
[15] Ibid at p 77.