



#CyberMisogyny

Using and strengthening
Canadian legal responses
to gendered hate and
harassment online

June 2014



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Produced by West Coast LEAF

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OVERVIEW

The term “cyber misogyny” encapsulates the diverse forms of gendered hatred, harassment, and abusive behaviour directed towards women and girls online. It offers a more nuanced way of describing behaviours often lumped into the catch-all term “cyberbullying” in mainstream discourse, a term which tends to erase the sexist, racist, homophobic, transphobic, and otherwise discriminatory nature of the behaviour and ignores the context of power and marginalization in which it occurs.

In this report, we analyze five common manifestations of cyber misogyny, which were raised as particularly important by anti-violence organizations, youth-serving agencies, and students during the conversations that informed this report.

These five areas are:

- “Revenge porn”;
- Non-consensual sharing of intimate images among youth;
- Child sexual exploitation;
- Cyberstalking; and
- Gender-based hate speech online.

Each chapter addresses one of these issues. In each chapter, we illustrate the problem using fictionalized stories and real-world examples, as well as research and statistics demonstrating their scale and gendered nature. We then provide an overview of the current legal responses available to victims of these forms of cyber misogyny under criminal, civil, and human rights law. We also make recommendations for ways in which Canadian and BC law and policy could be strengthened to better protect the equality rights of women, girls, and other vulnerable communities online.

Our 35 recommendations are also listed in Appendix A.

We analyze five common manifestations of cyber misogyny, which were raised as particularly important by anti-violence organizations, youth-serving agencies, and students during the conversations that informed this report.

INTRODUCTION

The Internet has become the place where people can express misogyny with little personal cost. It is the new frontier for hate.

CYBER MISOGYNY IS A NEW TERM FOR AN OLD PROBLEM. Sexual harassment of women, hate speech targeting sexual minorities, stalking and threats directed at former lovers—these are problems that have been with us for generations. What’s new is the breadth of opportunities to perpetuate harassment and abuse online, and to hide behind the cloak of anonymity the Internet provides. In real space, where people’s identities are known, laws and social norms help keep misogynistic and discriminatory speech in check; employees can be fired, students can be disciplined, and hatemongers can be prosecuted for their words and actions. But on the Internet, lawlessness reigns. Bigots act destructively because they are confident they will not get caught. Misogynists advocate rape and threaten violence against women because the public reaction is generally, “boys will be boys,” especially on the Internet. The Internet has become the place where people can express misogyny with little personal cost. It is the new frontier for hate.¹

At the same time, the Internet offers incredible and positive opportunities to connect, create, play, and learn. Social media has helped bring down repressive governments, mobilize citizens to take action, and provide space in which people separated by geography can support and learn from one another. On average, Canadians spend 34 hours a month online.² We meet our partners, buy groceries, apply for jobs, and connect with our friends and communities, all through the medium of online space. Children’s play and social development increasingly takes place online, and youth spend much of their time chatting, sharing images and playing interactive games online. Using technology is all but a prerequisite for success in the modern world, and few of us can imagine how we would live without it. Given the prevalence of technology in our lives, we need a discussion about how best to maintain and foster its creative potential, while also stemming the proliferation of gendered hate and harassment that technology facilitates.

1 Danielle Keats Citron, “Misogynistic Cyber Hate Speech,” Testimony at the British Parliament, House of Commons (27 October 2011).

2 Susan Krashinsky, “How Canadians are using the Internet differently” *The Globe and Mail* (1 April 2014), www.theglobeandmail.com/report-on-business/industry-news/marketing/canada-shifts-to-mobile-screens/article17762060/.

These discussions are beginning to happen, and the problem of “cyberbullying” has taken hold in the public consciousness in the aftermath of a number of suicide deaths of teens subjected to months of torment and sexualized harassment and abuse online. But too often, analyses of the problem of “cyberbullying” erase its sexist, racist, homophobic, transphobic, and otherwise discriminatory nature, and ignore the context of power and marginalization in which it occurs. The term “cyberbullying” also suggests that online harassment and abuse is only a problem for children and youth, when we know that misogynist hate speech and threatening behaviour online greatly affects adult women, too. Research on “cyberbullying” clearly demonstrates the extent to which members of minority ethnic groups, the LGBTQ community, and people with disabilities are disproportionately targeted for online bullying.³ Kids perceived as “different” are much more vulnerable to harassment and abuse online, and ending “cyberbullying” will require all of us to consider how we create and participate in a culture—both online and off—that embraces diversity and difference and refuses to tolerate exclusion and discrimination.

Law has a crucial role to play in this endeavour. Holding harassers and hatemongers legally accountable for their actions will serve an important educational function by denouncing these behaviours and sending the message that they will not be tolerated. Law can deter online harassment’s harms by raising the costs of noncompliance beyond its expected benefits; it can also remedy such harms with monetary damages, injunctions and criminal convictions.⁴ When the law treats cyber misogyny as the discriminatory and sexist conduct that it is, it will encourage women and girls to come forward and demand its redress, rather than suffering in silence.

It was not that long ago that overt sexism, discrimination and violence against women were almost completely unaddressed in Canadian law. No term even existed to describe sexual harassment in the workplace until the 1970s, despite the prevalence of the practice, and commentators simply suggested that workplace harassment involved a private arena where such behaviour was to be expected.⁵ Similarly, law and society failed to treat domestic violence against women as a legal problem requiring state intervention, and for centuries, a man’s battering of his wife was protected as part of the “private sphere of family life”; a “private problem, neither serious nor criminal.”⁶ For centuries, women faced this pervasive abuse at home and in the workplace with little means of recourse. It was not until feminist lawyers and activists pressured policymakers and the courts to take these problems and the harms they caused seriously that women began to gain legal protection from sexual harassment and violence committed against them by their intimate partners. Since the beginning of law’s recognition of these inequalities in the 1970s, homes and workplaces have become safer spaces for women.

Law can deter online harassment’s harms by raising the costs of noncompliance beyond its expected benefits; it can also remedy such harms with monetary damages, injunctions and criminal convictions.

3 See e.g., UNICEF Innocenti Research Centre, “Child safety online: Global challenges and strategies” (Florence: UNICEF, 2011).

4 Danielle Keats Citron, “Laws expressive value in combating cyber gender harassment” (2009) 108(3) Mich LR 373 at 376-7.

5 *Ibid.*

6 *Ibid* at 394.

Women's voices must help shape the direction of our future online world; cyber misogyny acts to silence women's voices and push their perspectives out of the discussion. Protecting women's right to freedom of speech requires that this discrimination be urgently addressed.

Feminist activists around the world are pressing for similar changes to the way we view cyber misogyny. Far from being harmless locker-room talk or merely “boys being boys,” online hate and harassment against women and girls has real world consequences for their safety, security, and equality rights, and causes real and tangible harms. Just as society has rejected the notion that “a man’s home is his castle” in which he is free to beat and abuse his wife, so too must we reject the notion that the Internet is an anarchic “Wild West” that must be left unregulated in order to foster its full potential. Quite the contrary. Misogynist and hateful expression is not the kind of free speech Canada’s *Charter of Rights and Freedoms* seeks to protect; instead, these forms of expression undermine women’s participation in public spaces and discourse, violate their rights to equality and freedom from discrimination, and contribute to a culture in which violence and hatred against women are normalized. These outcomes are the very antithesis of the reasons we protect freedom of expression in our Constitution. It is a perversion of the intent of the *Charter* to use the rights it contains to create a safe space for the exploitation and abuse of women and girls.

Vigorous public debate and the freedom to present conflicting, controversial, and even offensive political visions and ideals are the foundations of any democratic state. The Internet facilitates the dissemination of ideas and provides space for discussion, debate, and disagreement. This is an essential and valuable role. But the value of that discussion and debate will be significantly lessened if women are excluded from participating by threats of sexual violence and other forms of gendered harassment and hate, which today is all too often the case. Women’s voices must help shape the direction of our future online world; cyber misogyny acts to silence women’s voices and push their perspectives out of the discussion. Protecting women’s right to freedom of speech requires that this discrimination be urgently addressed.

Free speech and online privacy rights are rightly held concerns among Canadians. Revelations of government over-reach and corporate invasions of privacy, which seem to proliferate by the day, cause concern and mistrust among the public. We share many of these concerns. It is essential that the public conversation around online privacy rights be informed by an analysis that puts equality at the centre, and which prioritizes safety, security and dignity for women, girls, and other groups vulnerable to online hatred and harassment. To this end, we recommend the creation of a new office, independent of government but housed within the federal Ministry on the Status of Women, which will focus attention on the intersectional equality rights of women and girls online, and work with community, academics, government, and other experts to advance a vision of the Internet that protects both liberty and equality, privacy and accountability, and which can respond to violations of these rights in an effective and vigorous way. The position will conduct research, facilitate dialogue, and make recommendations to government about appropriate legal responses to the challenges of protecting and promoting the equality of women, girls, and other vulnerable communities online. This is an urgent need, and we recommend that this office commence operations within one year.

RECOMMENDATION 1: Create a new office, independent of government but housed within the federal Ministry on the Status of Women, to conduct research, facilitate dialogue, and make recommendations to government about appropriate legal responses to the challenges of protecting and promoting the equality of women, girls, and other vulnerable communities online.

In this paper, we analyze five common manifestations of cyber misogyny: “revenge porn”; the non-consensual sharing of intimate images among youth; child sexual exploitation; cyberstalking; and gender-based hate speech online. These problems affect children, teens and adults, and were identified as particularly relevant by anti-violence organizations, youth-serving agencies, and students during the conversations that informed this report. In each chapter, we consider examples of the problem, provide an overview of the current legal responses available, and make recommendations for ways that laws and policies could be strengthened to better protect the equality rights of women, girls, and other vulnerable communities online.

Our 35 recommendations are also listed in Appendix A.

Like feminist activists around the world who are working to make the Internet a safer place for women, girls, sexual minorities, and other vulnerable groups, we refuse to believe that the Internet cannot be a driver of women’s equality, or that online spaces cannot be made safer for marginalized groups. We have more faith in the Internet’s potential, and in each other, than that.

“REVENGE PORN” AND THE NON-CONSENSUAL DISTRIBUTION OF INTIMATE IMAGES

Kayla Laws emailed photos to herself from her cell phone, never intending for anyone else to see them. Three months later, her email was hacked.

My girlfriend and I were playing around and took some pictures of ourselves posing topless. I emailed them to myself and didn't even share them with anybody, but now they're posted on the Internet! How did this happen, and how do I get them down?!

IN OCTOBER 2011, 24 YEAR-OLD KAYLA LAWS snapped some photos of herself in front of her bedroom mirror.⁷ One of them showed her left breast. She emailed them to herself from her cell phone, never intending for anyone else to see them. Three months later, her email was hacked, and nine days after that, the photo showing her breast was posted to the notorious “revenge porn” website Is Anyone Up, which brags of 300,000 daily viewers. She got the news at work from a distressed friend: “Kayla, you are topless on a website.” Feeling confused and violated, she erupted into tears.

So began her mother Charlotte's two year investigation into the website's owner, 27 year-old Hunter Moore, dubbed “the most hated man on the internet” by a BBC reporter in 2012. Moore called himself a “professional life ruiner.” His thousands of devoted followers, who identify themselves, after Charles Manson, as “The Family,” facilitate this life-ruining by forwarding the embarrassing photos — which are often posted along with identifying information including the subject's full name, city, workplace, social media pages, boss's email address and parents' phone number — to the subject's family members, friends, and business contacts. Women have lost jobs, economic opportunities, and personal relationships, faced public humiliation and exposure, and endured stalking and harassment as a result of

⁷ This story is described by Kayla's mother on Jezebel, “One woman's dangerous war against the most hated man on the Internet” (22 November 2013), <http://jezebel.com/one-womans-dangerous-war-against-the-most-hated-man-on-1469240835> and by Carole Cadwalladr, “Charlotte Laws' fight with Hunter Moore, the internet's revenge porn king” (30 March 2014), www.theguardian.com/culture/2014/mar/30/charlotte-laws-fight-with-internet-revenge-porn-king.

having their intimate images posted online. Several women and girls have killed themselves over revenge porn, and studies by the US-based Cyber Civil Rights Initiative show that 47 per cent of victims contemplate suicide, and 93 per cent suffered significant emotional distress as a result of non-consensual distribution of their nude or sexually intimate images.⁸

Research conducted by the Cyber Civil Rights Initiative also shows that revenge porn is disturbingly common: one in 10 ex-partners has threatened to expose a risqué photo of their ex, and 60 per cent of them follow through on their threats.⁹ Moreover, it is a highly gendered problem: 90 per cent of revenge porn victims in the study were women. Usually, revenge porn involves an angry ex-boyfriend who posts images or videos that he and his ex created together, or which she shared with him in a gesture of intimacy. Sometimes, like in the cases of Audrie Pott and Rehtaeh Parsons, the images were captured during what can only be described as sexual assault.¹⁰ It can also involve surreptitious recordings using hidden cameras. In Kayla Laws' case, her computer was hacked and the images were stolen. Regardless of how the images are obtained, the impacts of their distribution can be devastating.

Charlotte Laws devoted day and night to getting her daughter's photo off the Internet. She wrote to Moore and asked him to remove it in accordance with the *Digital Millennium Copyright Act*, which protects self-created materials including photographs. He ignored her. She wrote to his attorney, his hosting service and his Internet Service Provider. She contacted the police, who "basically said that Kayla shouldn't have taken the photo,"¹¹ and in desperation, she called the FBI. "If a hacker hadn't been involved, there would have been no case to answer and the site would still be up," she says. "But because there was, they took it seriously." Finally, the photo came down. Her campaign didn't end there, however, and she spent two years compiling evidence from more than 40 victims all over the world and reaching out to women who were being targeted to offer sympathy and advice. In January 2014, Moore was arrested and indicted for conspiracy, unauthorized access to a protected computer, and aggravated identity theft. He faces up to 42 years in prison.

As of May 2, 2014, ten US states—New Jersey, Alaska, Texas, California, Idaho, Utah, Wisconsin, Virginia, Georgia, and Arizona—have laws that treat non-consensual distribution of nude or sexually explicit images as a crime in itself, but no federal law yet prohibits it as such.¹² Some states have strong anti-voyeurism laws, but these only protect victims whose images were taken without their knowledge or consent, not victims who consented to give

Research conducted by the Cyber Civil Rights Initiative shows that revenge porn is disturbingly common: one in 10 ex-partners has threatened to expose a risqué photo of their ex, and 60 per cent follow through: 90 per cent of revenge porn victims in the study were women.

8 "Revenge Porn by the Numbers," *End Revenge Porn* www.endrevengeporn.org/revenge-porn-infographic/.

9 Natalie Webb, "End revenge porn infographic" (3 January 2014) www.cybercivilrights.org/end_revenge_porn_infographic.

10 Three boys pled guilty to sexually assaulting Audrie Pott and admitted to taking and circulating photos of the assault, which led Ms. Pott to hang herself eight days later. See Kris Sanchez, "3 boys plead guilty to sexually assaulting Audrie Pott" *NBC Bay Area* (15 January 2014), www.nbcbayarea.com/news/local/3-Boys-Plead-Guilty-to-Sexually-Assaulting-Audrie-Pott-240379051.html. In Rehtaeh Parsons' case, however, the two boys accused of taking and circulating a photo of one of them, naked from the waist down, with his groin pressed against Ms. Parson's naked behind while she was leaning out the window and vomiting from intoxication, have not been charged with sexual assault, but are facing child pornography charges. Under s. 273.1 of the *Criminal Code*, consent is not a defence to a charge of sexual assault when the person is incapable of giving consent, because they are too intoxicated to do so, for example.

11 Cadwalladr, *supra* note 7.

12 Mary Anne Franks, "Criminalizing Revenge Porn: A Quick Guide" *End Revenge Porn* (2014), www.endrevengeporn.org/guide-to-legislation.

Unless the images qualify as child pornography or are accompanied by additional aggravating factors, usually no criminal action is taken against those who post intimate images without the consent of the person depicted.

their pictures to an intimate partner for private use. Federal and state laws prohibiting harassment and stalking only apply if the victim can show that the non-consensual image sharing is part of a larger pattern of conduct directed at the victim with intent to distress or harm, which will not apply to the many purveyors of intimate images motivated by a desire for money or notoriety.

In Canada, similar problems abound in applying existing laws to cases of “revenge porn.” A Cybercrime Working Group established by the Federal/Provincial/Territorial Ministers responsible for Justice and Public Safety has looked into the legal responses available to victims of “revenge porn” and found that while Canadian law enforcement receive complaints about the non-consensual distribution of intimate images on a regular basis, unless the images qualify as child pornography or are accompanied by additional aggravating factors, usually no criminal action is taken against those who post intimate images without the consent of the person depicted.¹³

Bill C-13, the *Protecting Canadians from Online Crime Act*

In November, 2013, the Conservative government tabled federal legislation that would make it a criminal offence to knowingly publish, distribute, transmit, sell, make available, or advertise an image of a person that shows the person exposing their breasts, genitals, or anal region, or depicts them engaged in explicit sexual activity (what’s referred to as an “intimate image”).¹⁴ Dubbed the *Protecting Canadians from Online Crime Act*, Bill C-13 is described by the Conservative government as a response to the kinds of “cyberbullying” behaviour that led teens like Amanda Todd and Rehtaeh Parsons to take their lives.¹⁵

In addition to creating a new offence of non-consensual distribution of intimate images, the Bill would also allow a court to order the seizure of intimate images and issue an order compelling the custodian of the computer system on which the image is made available (i.e., an Internet Service Provider) to delete the material.¹⁶ These powers only apply in respect of Internet Service Providers (ISPs) that are located within the jurisdiction of the courts; a Canadian court cannot compel a foreign ISP to remove material. The Bill also allows the court to prohibit someone convicted of the offence from using the Internet or other digital network for a period of time determined by the court.¹⁷

13 CCSO Cybercrime Working Group, “Report to the Federal/Provincial/Territorial Ministers responsible for Justice and Public Safety: Cyberbullying and Non-Consensual Distribution of Intimate Images” (June 2013) at 14 [“CCSO Report”].

14 Bill C-13, *An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act*, 2nd Sess, 38th Parl, 2013, cl 3 (first reading 20 Nov 2013).

15 Department of Justice, “Government introduces legislation to crack down on cyberbullying” (20 November 2013), www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32994.html.

16 Clauses 4 and 5.

17 Clause 3.

While the addition of a provision to the *Criminal Code* outlawing the non-consensual distribution of intimate images is welcome and necessary, the government has attached broad law enforcement provisions to the Bill, which have raised significant privacy concerns from a broad range of stakeholders, including Carol Todd, mother of Amanda Todd, a 15 year-old BC girl who committed suicide after facing sexual extortion and sexualized harassment when a topless photo of her was circulated throughout her community.¹⁸ Numerous Opposition MPs, community organizations, internet privacy experts and concerned citizens have called on the government to split the bill into two and to pass the provisions that address cyber misogyny, while subjecting the lawful access provisions to further scrutiny and debate. These proposals have been flatly rejected by the Conservatives.¹⁹ However, in light of the Supreme Court of Canada's recent decision in *R v Spencer* (2014 SCC 43), it appears that some provisions of Bill C-13 are likely unconstitutional, namely, those expanding the scope of warrantless, voluntary disclosure of personal information by ISPs to law enforcement. It is extremely unfortunate that government has made important legal reforms that would protect the rights of women and girls contingent on also enacting privacy infringing provisions that are likely unconstitutional.

A recent Saskatchewan case demonstrates the need for immediate action to make the non-consensual distribution of intimate images a criminal offence. In *R v Maurer*,²⁰ the accused was acquitted of theft and mischief charges after posting nude images of his ex online. The judge found that while the accused's conduct in the case was "despicable," the elements of the offences charged had not been made out. The judge observed that, while Bill C-13 has been proposed to fill this legislative gap, it is not yet law and cannot be applied.

Making the non-consensual distribution of intimate images a criminal offence is a needed and overdue legal reform. Its passage will send a strong message to would-be abusers and hackers that such behaviour is criminal in nature and will not be ignored. It would also strengthen the legal response to these kinds of cases, and encourage victims to come forward when they have been targeted. It should be passed immediately.

RECOMMENDATION 2: Pass Clause 3 of the *Protecting Canadians from Online Crime Act* to make it a criminal offence to knowingly publish, distribute, transmit, sell, make available, or advertise an image of a person that shows the person exposing their breasts, genitals, or anal region, or depicts them engaged in explicit sexual activity.

RECOMMENDATION 3: Split the *Protecting Canadians from Online Crime Act* into two in order to pass the provisions addressing cyberbullying quickly, while subjecting the provisions which may unduly infringe privacy to further scrutiny and debate.

Numerous Opposition MPs, community organizations, internet privacy experts and concerned citizens have called on the government to split the bill into two and to pass the provisions that address cyber misogyny, while subjecting the lawful access provisions to further scrutiny and debate.

18 See Jesse Kline, "A bigger surveillance state won't stop 'cyberbullying'" *National Post* (26 May 2014), <http://fullcomment.nationalpost.com/2014/05/26/jesse-kline-a-bigger-surveillance-state-wont-stop-cyberbullying/>.

19 Susana Mas, "Cyberbullying bill won't be split in 2, Peter MacKay says" *CBC News* (26 May 2014), www.cbc.ca/news/politics/cyberbullying-bill-won-t-be-split-in-2-peter-mackay-says-1.2654659.

20 2014 SKPC 118.

I took a sexy selfie and sent it to my boyfriend. Now he's mad at me and threatening to share it with all his Facebook friends. I think he may have already sent it to a few people.

REASONABLE EXPECTATION OF PRIVACY

For the criminal offence created by Clause 3 of Bill C-13 to be made out, the person depicted in the intimate image must have had a reasonable expectation at the time the image was created that the image would be kept private, and must retain that reasonable expectation of privacy at the time the image is distributed.

There can be little doubt that a person who creates an intimate image and shares it with a partner has a reasonable expectation that it will be kept private. If that privacy is breached and the image is spread, the offence will be made out. However, a model who intentionally poses for a naked photo knowing it will be posted online, for example, would not have a reasonable expectation that the photo would not be more widely shared. In essence, she has consented to its further distribution. However, unless a person consents to having their image more widely distributed, if it was initially taken and shared with an expectation that it would be kept private, that expectation remains reasonable on an ongoing basis, including at the time that it is distributed. The only circumstances in which a woman's reasonable expectation of privacy would be present at the time a photo was taken but could disappear by the time the photo was distributed is where she changes her mind about how she wants the photo used.

RECKLESSNESS

In addition, for the offence to be made out, the person depicted in the image must not have consented to its distribution, or the accused must have been reckless as to whether the person consented. "Recklessness" has been defined by the Supreme Court of Canada as the conduct of one who, "aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk."²¹ Sharing an intimate photo of someone, whether it was received from the person depicted or forwarded by someone else, without taking any steps to ascertain whether the person depicted consents to its further distribution, is captured by the new provision.

For example, if someone forwards an image of a naked woman without being reasonably assured that the woman posed for the photo with the intention of the photo being distributed to others, they would be caught by the legislation. If it is clear and obvious that the photo was intended for distribution (that is, a model was posing for a photograph for publication in a magazine), then the photo may be freely distributed subject only to copyright laws.

²¹ *Sansregret v The Queen*, [1985] 1 SCR 570 at para 16.

At least one lawyer has expressed concern that the recklessness standard is too low and risks “criminaliz[ing] behaviour that is not blameworthy: someone find[ing] a picture online of someone naked and forward[ing] it to a friend.”²² However, someone’s desire to share a naked photo with a friend online should not trump the dignity, human rights and privacy interests of the person depicted. The recklessness standard as defined by the Supreme Court of Canada, together with the requirement that there be a reasonable expectation of privacy in the images, will ensure that the morally blameless are not targeted, while women’s security, privacy, and equality rights are protected.

CONSENT

In addition to being a violation of privacy and trust, the non-consensual sharing of nude or sexually intimate images is very much akin to a sexual assault.²³ Creating a sexualized image and sharing it with a partner can be a very intimate sexual act. Breaching the privacy and trust of the person depicted by sharing it beyond the eyes of those for whom it was intended violates their personal autonomy, dignity, and human rights. The law of consent is instructive for understanding how this offence should be interpreted.

As the Supreme Court of Canada made clear in *R v JA*, “sexual acts performed without consent and without an honest belief in consent constitute the crime of sexual assault.”²⁴ Consent is defined in s. 273.1(1) of the *Criminal Code* as “the voluntary agreement of the complainant to engage in the sexual activity in question.” Moreover, section 273.2(b) states that, in order to raise a defence to a charge of sexual assault, an accused must not only believe that the complainant communicated their consent, but must also have taken reasonable steps to ascertain whether they were consenting to engage in the sexual activity in question at the time it occurred.

Additionally, it is no defence to a charge of sexual assault that the accused believed that the complainant consented when that belief arose from the accused’s recklessness or wilful blindness. In sum, the Court in *JA* concluded that the law “requires ongoing, conscious consent to ensure that women and men are not the victims of sexual exploitation.”²⁵

The Court’s analysis should also apply to cases involving the non-consensual distribution of intimate images, and “sexual activity” must be understood to include the sharing of sexualized or intimate images. While the subject of the image has consented to the taking of the image and the initial sharing of the image with someone of their choosing, they have not consented to the subsequent sharing of the image beyond that person. *They have not consented to the sexual activity in question* (the sharing of a sexually explicit image of themselves) at the time that activity occurred.

In addition to being a violation of privacy and trust, the non-consensual sharing of nude or sexually intimate images is very much akin to a sexual assault.

22 David Fraser, “Opening statement to the House of Commons Justice and Human Rights Committee on Bill C-13” (5 May 2014), <http://blog.privacylawyer.ca/2014/05/my-opening-statement-to-house-of.html>.

23 See Steph Guthrie, “Transferrable consent: On Bill C-13, surveillance and cyber sexual assault” (6 May 2014), <http://stephguthrie.com/2014/05/06/transferable-consent-on-bill-c-13-surveillance-and-cyber-sexual-assault/>.

24 *R v JA*, 2011 SCC 28 at para 1.

25 *Ibid* at para 3.

As with a charge of sexual assault, an accused should be under an obligation to take reasonable steps to ascertain whether the person depicted in an intimate image consents to having that image more widely shared. As described above, recklessness should be no more a defence to a charge of non-consensual distribution of a sexually explicit image than it is to a sexual assault.

Using and Strengthening Existing Laws to Address “Revenge Porn” and Other Forms of Online Harassment and Abuse

While passing Bill C-13’s provisions criminalizing the non-consensual distribution of intimate images is essential, there are also ways to strengthen existing laws and legal options to better protect those targeted by online harassment and abuse. Existing *Criminal Code* offences have been used in some situations of revenge porn and cyber misogyny, although these offences usually require the presence of additional aggravating conduct beyond the non-consensual distribution of intimate images.

Criminal Options

CRIMINAL HARASSMENT (S. 264)

Criminal harassment is the most frequent charge in cases involving non-consensual distribution of intimate images. Section 264(2) defines harassment as (a) repeatedly following someone; (b) repeatedly communicating with someone either directly or through another person; (c) besetting or watching someone’s home or workplace; or (d) engaging in threatening conduct towards someone or a member of their family. Subsections (b) and (d) are most relevant to cases of cyber misogyny.

Importantly, the behaviour is only criminal when it causes the target to reasonably fear for their safety or the safety of someone they know. Whether the complainant’s fear is reasonable must be assessed in the context and circumstances of each case. In determining the reasonableness of the fear, the court will look at the victim’s circumstances and the nature of the relationship between the victim and the accused.²⁶ Considering the circumstances of the victim is necessary in order to protect members of society who are the most vulnerable.²⁷ Courts have underlined the importance of taking into account the gender of the victim, the history and circumstances surrounding their relationship with the accused, as well as any differences in their size, strength, and socialization.²⁸ Evidence of intimate partner violence occurring prior to the harassment is also relevant.²⁹

²⁶ See e.g. *R v Chaves*, [2007] OJ No. 1551 (QL) (ONCJ).

²⁷ *R c Gauthier*, 2005 CanLii 15652 (QC CS).

²⁸ *R v Lafreniere*, [1994] 22 WCB (2d) 519, OJ No 437 (QL) (ONCJ).

²⁹ *R v SB*, [1996] 30 WCB (2d) 450, OJ No 1187 (QL) (ONCJ); *R v Di Puccio*, 2007 ONCJ 643, [2007] OJ No 5239 (QL).

A “reasonable fear for safety” can include both physical and emotional or psychological safety, and the offence will be made out when the psychological integrity, health or well-being of the victim has been interfered with in a substantial way.³⁰ In *R v Hau*, the BC Supreme Court reiterated that the provision must provide protection from threats to psychological safety, not just physical safety, holding that “[a] series of transactions undertaken by an accused, when he or she is reckless as to the impact of these acts on the complainant, which have the effect of putting a person in reasonable fear for their emotional or psychological well-being will be caught under s. 264.”³¹ To restrict the offence too narrowly to include only the risk of physical harm “would ignore the very real possibility of destroying a victim’s psychological and emotional well-being by a campaign of deliberate harassment.”³² These provisions have been upheld as a reasonable limit on the freedom of expression rights protected by section 2(b) of the *Charter*.³³

The accused must have known that their conduct would harass the complainant, or have been reckless as to whether the complainant was being harassed by the behaviour. Evidence that the accused was asked to stop their behaviour is evidence that they knew the conduct was harassing, and continuing to pursue contact after having been asked to stop is a relevant consideration in favour of conviction.³⁴ If the accused’s conduct persists after a police warning, for example, he or she cannot be said to have been unaware that the complainant felt harassed.³⁵ However, the victim does not have to be forceful in rebuffing the accused’s attention,³⁶ and an accused need not be warned that his or her conduct is criminal before that conduct actually becomes criminal.³⁷

A number of cases of “revenge porn” have resulted in convictions for criminal harassment. In *R v Korbut*, the accused carried out what the judge called a “premeditated, escalating campaign in the form of deliberate, callous and vindictive harassment”³⁸ against the complainant after their relationship ended. He published embarrassing texts and website links to explicit photos and videos they had made together, sent a sexually explicit video to the complainant’s new partner, and created a fake profile for the complainant on a dating website that contained some of the intimate photos. The judge found that his actions were designed to engender fear in the complainant and dissuade her from continuing her new relationship. He was convicted and sentenced to imprisonment for 90 days for this criminal harassment.

Similarly, in *R v Fader*,³⁹ the accused was found guilty of criminal harassment for conduct which included sending sexually explicit photos and videos to the complainant’s new

Evidence that the accused was asked to stop their behaviour is evidence that they knew the conduct was harassing, and continuing to pursue contact after having been asked to stop is a relevant consideration in favour of conviction.

30 *R v Sillipp*, [1995] 172 AR 174, 30 Alta LR (3d) 335 (ABQB).

31 [1996] 31 WCB (2d) 50, BCJ 1047 (QL) (BCSC) at para 63.

32 *R v Gowing*, [1994] OJ 2743 (QL) (ONCJ). This definition of “safety” to include emotional and psychological well-being was affirmed by the BC Court of Appeal in *R v Goodwin* 1997 CanLII 3717 (BCCA).

33 *R v Sillipp* (1995), 99 CCC (3d) 394 at 413 (Alta QB), aff’d 1997 ABCA 346, leave to appeal to SCC refused, [1998] SCCA No3 (QL).

34 *R v Sihota*, [2008] 79 WCB (2d) 702, OJ No 4061 (QL) (ONSC). See also *R v Bell*, 2009 ONCJ 312, [2009] OJ No 2820 (QL), where only those communications made after the date on which the complainant told the accused to stop contacting her were found to constitute harassment.

35 *R v Pennell* [2007] 73 WCB (2d) 737, OJ No 1654 (QL) (ONSC).

36 *R v Ryback* (1996), 105 CCC (3d) 240 at para 41 (BCCA).

37 *R v Rehak* (1998), 125 Man R (2d) 181, 6 WWR 661 (MBQB).

38 2012 ONCJ 691 at para 17.

39 2009 BCPC 61.

boyfriend, threatening to send nude pictures of her to people who knew her, and posting pictures and her contact information to an adult dating site, which resulted in people contacting her. The judge found that the accused was motivated by jealousy and anger and had embarked on a course of action designed to make her life miserable, and that the complainant reasonably feared for her psychological safety as a result.

However, in *R v Hassan*,⁴⁰ the accused was acquitted on all counts of criminal harassment related to threats to distribute and the actual distribution of intimate photographs of his ex-girlfriend, which he had mailed to several people she knew. While his actions were characterized as “inappropriate and extremely nasty,” the judge found that the Crown had not established that she “feared for her safety (psychological or physical) or that of anyone known to her.”⁴¹ The accused was, however, convicted of one count of extortion for his threats to distribute the intimate images of his ex-girlfriend in an attempt to keep the relationship going and compel her to comply with his wishes (see below for a description of the offence of extortion).

EXTORTION (S. 346)

In some circumstances of cyber misogyny, a perpetrator uses intimidation and scare tactics in order to get their way. They may threaten to post or share an intimate or sexualized image of someone in order to compel them to do something, like stay in a relationship or share additional images. The offence of extortion occurs when someone uses threats, accusations, menacing behaviour or violence in order to obtain anything. This “anything” has been broadly interpreted, and could include attempts to obtain sexual favours or to compel the victim to do something she does not want to do. The term “sextortion” has been recently coined to describe this type of sexualized, extortive behaviour.⁴²

In *R v Hassan*,⁴³ the accused had threatened to distribute sexually explicit photos of his ex-girlfriend in an attempt to keep their relationship going and compel her to end a new relationship. He was convicted of extortion and sentenced to 18 months of house arrest and a further three years probation. In *R v Walls*,⁴⁴ the accused pleaded guilty to extortion after threatening to distribute intimate images of a young woman in order to induce her to have sex with him. They had met online and during the course of their relationship, the 15 year-old girl had shared intimate images via webcam with him. They had also had consensual sex. Two years after their relationship ended, the accused contacted the girl using Windows Messenger and asked her to have sex with him again, and led her to believe that he had kept the intimate videos of her. He told her he would dispose of the videos if she agreed to have sex with him, and when she refused, he threatened to make the videos available to others. She contacted police, and he was charged with extortion. In sentencing the accused, the judge found that it was irrelevant that he did not, in fact, actually have the intimate videos

40 [2009] OJ No 1378 (ONSC), aff'd 2011 ONCA 834.

41 *Ibid* at paras 31-32.

42 Jennifer Dunning, “Amanda Todd, sextortion, and cyberbullying” *CBC* (13 November 2013), www.cbc.ca/newsblogs/yourcommunity/2013/11/amanda-todd-and-sextortion.html

43 [2009] OJ No 1378, aff'd 2011 ONCA 834.

44 2012 ONCJ 835.

he claimed to have, since he had deliberately fostered the belief that he did in order to secure her cooperation. He was sentenced to a 15 month conditional sentence.

In sum, extortion charges can and have been used successfully to prosecute perpetrators of cyber misogyny when they use threats to compel the complainant to do something. As *Walls* makes clear, it does not matter whether they actually follow through on the threats, or even that they are capable of doing so. Simply using threats, accusations, menace or violence to obtain something is a criminal offence.

INTIMIDATION (S. 423)

Similar to the offence of extortion, the offence of intimidation is committed when someone uses violence, threats, or other intimidating behaviour for the purpose of compelling someone to do something they have a lawful right not to do, or to refrain from doing something they have a lawful right to do. The main distinction between intimidation and extortion is that the offence of extortion requires that the accused was attempting to obtain something, while intimidation only requires that the accused was attempting to influence or coerce someone's behaviour or choices. The offence is also distinct from the offence of criminal harassment (discussed above), in that there is no requirement that the intimidating conduct reasonably led someone to fear for their physical or psychological safety.

Intimidating behaviour for the purpose of this section includes:

- Using violence or threats of violence towards a person or their spouse, common-law partner or children;
- Doing damage to someone's property;
- Threatening a person or a relative of theirs that violence, injury or punishment will be inflicted on them or their relative, or that their property will be damaged;
- Persistently following someone;
- Hiding property that belongs to someone, or depriving or hindering them in their use of their property;
- Besetting or watching a place where a person resides, works, carries on business or happens to be ("besetting" means to occupy or surround a place with a hostile intent, to continuously "hang around" a place, and to bother or intimidate people with a lawful right to be there⁴⁵); and
- Following, blocking or obstructing someone on a highway.

This section would clearly apply to cyber misogyny situations involving threats of violence or "punishment" that are made in an attempt to coerce someone to do or not do something or to behave in a certain way.

Extortion charges can and have been used successfully to prosecute perpetrators of cyber misogyny when they use threats to compel the complainant to do something.

⁴⁵ See *Great Canadian Railtour Company Ltd. v Teamsters Local Union No. 31*, 2012 BCCA 238.

UTTERING THREATS (S. 264.1)

Under this section, it is an offence to make a threat to (a) cause death or bodily harm to someone; (b) burn, destroy or damage someone's property; or (c) kill, poison or injure an animal someone owns. The threat can be communicated or conveyed in any manner, and a judge will assess whether a reasonable person would understand that the message conveyed was a threat. The threat does not have to be directed at a particular person, but simply an ascertainable or identifiable group.⁴⁶ The intended victim need not even be aware of the threat. In addition, the offence does not require that the threatener have any intention to carry out or act on the threat.⁴⁷

For the offence to be made out, the accused must mean to convey a threat; the accused must have intended to intimidate, and intended that the threat be taken seriously. It is not necessary that the recipient of the threats actually felt intimidated by them or took them seriously.

A threat to cause "bodily harm" means a threat to cause "any hurt or injury to a person that interferes with the health or comfort of the person that is more than merely transient or trifling in nature."⁴⁸ Threats to rape,⁴⁹ sexually assault, and molest someone have all been held to constitute a threat to cause bodily harm.⁵⁰

For the offence to be made out, the accused must mean to convey a threat; the accused must have intended to intimidate, and intended that the threat be taken seriously.⁵¹ It is not necessary that the recipient of the threats actually felt intimidated by them or took them seriously. All that needs to be proven is that they were intended by the accused to have that effect.⁵² Judges will consider the context in which the words were uttered and the situation of the recipient of the message in order to determine whether a reasonable person would perceive them as a threat.

VOYEURISM (S. 162)

Section 162 makes it an offence to surreptitiously observe—including by mechanical or electronic means—or to make a visual recording of a person exposing their genitals, anal region or breasts, or engaged in explicit sexual activity, in circumstances where that person has a reasonable expectation of privacy. Surreptitious observation is an offence whether or not a recording is made, capturing both "peeping Tom" scenarios and scenarios in which a camera is hidden in a place where people have a reasonable expectation of privacy, such as a public washroom or someone's bedroom, for example. Whether someone has a reasonable expectation of privacy would be determined by a judge in light of all the circumstances in which the recording was made.

It is an offence to print, copy, publish, distribute, circulate, sell, advertise or make available a recording you know was obtained through a voyeuristic act, or to have a recording in your possession for such a purpose.

46 Eric Roher, "Confronting Facebook, Youtube and Myspace: Cyberbullying in Schools" *Canadian Teachers' Federation Economic & Member Services Notes* (2007), www.ctf-fce.ca/Research-Library/CyberFacebook.pdf.

47 *Ibid.*

48 *Criminal Code*, s 2.

49 *R v McCraw*, [1991] 3 SCR 72.

50 *R v Wedzin*, 2012 NWTSC 89.

51 *R v O'Brien*, 2013 SCC 2.

52 *Ibid* at para 13.

The voyeurism offence would apply in situations of cyber misogyny when an image or recording is made surreptitiously in situations where someone has a reasonable expectation of privacy. However, most of the time when an intimate image is *shared* without consent, the image was *taken* with the consent of the person depicted, and was not taken surreptitiously. Nothing in section 162 prohibits the subsequent dissemination of a photo or video that was created consensually.

OBSCENE PUBLICATION (S. 163)

Section 163 makes it an offence to produce, publish or distribute any obscene thing, including but not limited to written matter, pictures, models, or phonograph records.

Section 163(8) elaborates upon Parliament's definition of what constitutes obscenity. It states that a publication is deemed to be obscene if a dominant characteristic of the publication is the undue exploitation of sex, or the combination of sex and at least one of crime, horror, cruelty or violence. What constitutes the "undue exploitation of sex" will be a question for the judge to determine by reference to community standards of tolerance and the risk of harm entailed by the conduct in question.⁵³

The prohibition on obscenity was upheld by the Supreme Court of Canada in *R v Butler*,⁵⁴ where the Court held that, although the prohibition limited the freedom of expression rights guaranteed by section 2(b) of the *Charter of Rights and Freedoms*, it could be justified under section 1 of the *Charter* as a reasonable limit. Mr. Justice Sopinka, writing on behalf of the Court, said that there was sufficient evidence that depictions of degrading and dehumanizing sex do harm society, and, in particular, adversely affect attitudes toward women. This threat to equality resulting from exposure to certain types of violent and degrading material, the Court said, simply cannot be ignored.

Most non-consensually distributed images are unlikely to meet the threshold of obscenity as defined in s. 163(8) and interpreted by the courts. In a typical situation, the image or recording depicts consensual sexual activity that does not involve cruelty or violence and does not degrade, demean, or dehumanize the participants. It is the distribution that is exploitative, not the image itself. While potentially relevant, the offence is unlikely to apply in most cases of cyber misogyny.

UNAUTHORIZED USE OF A COMPUTER (S. 342.1 & 342.2)

Hunter Moore, described in the introduction to this chapter as the owner of a notorious revenge porn site and the "most hated man on the Internet," has been charged in the US for crimes similar to those contained in s. 342.1 and 342.2 of the *Criminal Code*. These provisions criminalize unauthorized entry (e.g., "hacking") into any private account or computer system. This would include services such as email and social media accounts. The provisions

⁵³ See *R v Butler*, [1992] 1 SCR 452; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120, 2000 SCC 69; and *R v Labaye*, [2005] 3 SCR 728, 2005 SCC 80.

⁵⁴ [1992] 1 SCR 452.

also make it an offence to possess, sell or distribute a device that could be used to commit this offence in circumstances where it is reasonable to infer that the device will be used to commit the offence. Despite this provision, “keyloggers” are widely available for purchase online and in retail stores.⁵⁵ These devices can be surreptitiously installed on a computer to capture all of the user’s keystrokes, copy emails that are sent and received, duplicate web browser history, and send a complete record of the computer’s use to the hacker via email.⁵⁶

Responding to these invasions of privacy is of critical importance to the safety and equality rights of women and girls. In a survey of BC anti-violence workers, 82 per cent reported concerns that perpetrators of violence can intercept communications between themselves and the women they’re serving, and 62 per cent were concerned that the ways in which they communicate with women might negatively affect women’s safety and privacy and that of their children. Eighty-four per cent of anti-violence workers across Canada reported that they work with women and their children to make safety plans around their use of technology.⁵⁷

RECOMMENDATION 4: Enforce section 342.2 of the *Criminal Code* (“Unauthorized Use of a Computer”) by banning distribution and sale of keyloggers and other devices used to invade the privacy of computer users. (See also Recommendation 28 in Chapter 4 on Stalking regarding the use of web applications that also invade privacy).

MISCHIEF IN RELATION TO DATA (S. 430(1.1))

This section of the *Code* addresses alteration or destruction of information stored in a computer system; it also addresses unlawful interference with a user’s legitimate access to such a system. The provision makes it an offence to destroy or alter data on a computer; this could apply to someone who hacks into an email or social media account and obtains an image that they subsequently alter and post online.

IDENTITY THEFT AND IDENTITY FRAUD (SS. 402.1, 402.2 AND 403)

Section 402.2 of the *Criminal Code* makes it an offence to obtain or possess another person’s identity information in circumstances giving rise to a reasonable inference that the information is intended to be used to commit an indictable offence involving fraud, deceit, or falsehood. “Identity information” is defined in s. 402.1 to include demographic information such as name, address, and date of birth, as well as user names, passwords, and credit or debit card numbers.

55 See, for example, The Spy Store Vancouver, “Computer Security and Cell Phone Surveillance,” www.thespystore.ca/products/computer-security-surveillance/.

56 Ken Dunham & David Fewer, “Canadian legal remedies for technology-enabled violence against women” (2013) *Safety Net Canada* at 43. Full report with the author. Executive summary available www.bcsth.ca/sites/default/files/SNC_Executive%20SummaryLegalRemedies2013_2.pdf.

57 “Technology Misuse & Violence Against Women Infographic” BC Society of Transition Houses (2013), http://bcsth.ca/sites/default/files/SNC/SNC_TechMisuse-Infograph2013-English.pdf.

Identity fraud involves fraudulently impersonating another person with intent to gain an advantage, to obtain property, or to cause disadvantage to the person being impersonated or another person (s. 403).

A stalker or abuser may be able to obtain a considerable amount of identity information about their intended victim using the Internet and social media sites. Many revenge porn cases involve vindictive exes posting sexually explicit images of their targets online accompanied by the target's name, address, phone number, links to her social media accounts, and other identifying information.⁵⁸ Some have involved postings to Craigslist and other sites that purport to be from the woman depicted, disclosing her address and inviting men to come over for sex. One woman reported that more than 50 men showed up at all hours of the day and night, claiming to have seen the post and looking for sex.⁵⁹

Identity fraud was one of several charges laid against an internet predator in Canada who solicited nude photos from children aged 11 to 16 and, if they refused, hacked into their Facebook accounts and sent messages to their friends pretending to be them, soliciting more naked images.⁶⁰ When some of the youth did send him nude photos in exchange for his promise to give them back control over their accounts, he distributed the images to their friends and tried to extort additional images. He pled guilty to a number of offences including child pornography, internet luring, extortion, invitation to sexual touching, and identity fraud, and was sentenced to 11 years in prison.

Identity fraud was one of several charges laid against an internet predator in Canada who solicited nude photos from children aged 11 to 16 and, if they refused, hacked into their Facebook accounts and sent messages to their friends pretending to be them, soliciting more naked images.

FALSE MESSAGES (S. 372(1))

If an instance of cyber misogyny involves the conveying of false messages, it may contravene s. 372(1) of the *Criminal Code*. This section makes it an offence to convey information known to be false by letter, telegram, telephone, cable, radio, or otherwise, with intent to injure or alarm. For example, posting a sexually explicit photo of someone along with the suggestion that they are available for sex or are looking for a date could breach this section.

Bill C-13, the *Protecting Canadians from Online Crime Act*, would remove the references to telegrams, telephones, cables and radios and substitute the broader and more inclusive term "any means of telecommunication."⁶¹ Although subsection 372(1) already includes the words "or otherwise" in the list of prohibited means of communicating false messages, this amendment would clarify that false messages conveyed using the Internet, text message, social media platforms, etc., are captured by the provision.

RECOMMENDATION 5: Pass Clause 18 of the proposed Bill C-13, *Protecting Canadians from Online Crime Act* to ensure false messages conveyed by any means of telecommunications technology are captured.

⁵⁸ Laws, *supra* note 7.

⁵⁹ Kashmir Hill, "Using craigslist to crowdsource revenge" *Forbes* (6 January 2010), www.forbes.com/sites/kashmirhill/2010/06/01/using-craigslist-to-crowdsource-revenge/.

⁶⁰ *R v Mackie*, 2013 ABPC 116.

⁶¹ Clause 18.

DEFAMATORY LIBEL (SS. 300 AND 301)

Defamatory libel is matter published, without a lawful reason, that is likely to injure the reputation of someone by exposing them to hatred, contempt or ridicule, or that is designed to insult someone. There are two types of defamatory libel in the *Criminal Code*: “simple” defamatory libel (s. 301), and defamatory libel that is known to be false (s. 300). Publishing a defamatory libel can result in a sentence of up to two years’ imprisonment. Publishing a defamatory libel that is known to be false can result in a sentence of up to five years’ imprisonment. It is also an offence to publish or threaten to publish a defamatory libel in an attempt to extort money. Material that is true, or that the publisher reasonably believes to be true, and which is published for the benefit of the public interest will not be considered defamatory libel.

While these provisions could apply in cases of cyber misogyny, it is very rare for charges to be brought under these sections. The cases considering these provisions highlight the challenges of using the criminal law in cases involving speech and expression. The Supreme Court of Canada has upheld the offence of publishing a defamatory libel known to be false (s. 300) as a reasonable limit on free speech rights under section 1 of the *Charter*;⁶² however, several provincial courts of appeal have struck down the “simple” defamatory libel provision (s. 301) as an unjustifiable limit on freedom of expression.⁶³ The courts of BC have not ruled on this question.

Sections 751 and 751.1 provide that the successful party in a defamatory libel case is entitled to costs from the unsuccessful party. This is contrary to the general rule that an accused in a criminal case is only entitled to costs where they can prove that the Crown has shown “a marked and unacceptable departure from the reasonable standards expected of the prosecution.”⁶⁴ The Federal/Provincial/Territorial Cybercrime Working Group has expressed concern that these provisions may “result in Crown reluctance to pursue prosecutions under the defamatory libel provisions.”⁶⁵ A unanimous resolution of the Uniform Law Conference of Canada in 2009 recommended the repeal of sections 751 and 751.1.⁶⁶ An alternative approach would be to restrict the scope of the provision to cases involving private prosecutions (as was the case until a 1954 amendment).

RECOMMENDATION 6: Repeal sections 751 and 751.1 of the *Criminal Code*, which provide that the successful party in a defamatory libel case is entitled to costs from the unsuccessful party, or restrict their application to cases involving only private prosecutions for defamatory libel.

62 *R v Lucas*, [1998] 1 SCR 439.

63 *R v Prior* (2008), 231 CCC 3rd 12 (NLTD); *R v Gill* (1996), 29 OR 3rd 250 (Gen Div); *R v Lucas* (1995), 129 Sask. R. 53 (QB).

64 *R v 974649 Ontario Inc.*, [2001] 3 SCR 575.

65 CCSO Report, *supra* note 13 at 11.

66 *Ibid.*

Restitution in criminal cases can only be ordered where there are readily ascertainable losses related to categories outlined in section 738 of the *Criminal Code*. For example, where a victim suffered loss or destruction of property due to the offence, physical or psychological harm as a result of the offence, or incurred costs to re-establish their identity in the case of an offence under section 402.2 (identity theft) or section 403 (identity fraud), the court can order restitution. In a case involving the non-consensual distribution of intimate images, it is possible that a victim could incur costs relating to the removal of these images from the Internet, but there is currently no authority to permit a court to order restitution in these situations.

Bill C-13, clause 24, would amend the restitution provision of the *Criminal Code* and allow victims of the new offence of non-consensual sharing of intimate images to recover reasonable and readily ascertainable expenses they have incurred to remove the intimate image from the Internet or other digital network. This is an important reform that aims to compensate victims for direct costs incurred as a result of criminal behaviour. It should be broadened to include expenses incurred to remove any criminal communication from the Internet, including harassing, threatening, or hateful content. However, even then, this measure provides compensation to victims only after they have already incurred the expenses. Victims of cyber misogyny offences who have low incomes may be unable to afford the costs associated with removing harmful content from the Internet. Support through BC's Crime Victim Assistance Program should be extended to these individuals to assist them to pay these costs.

Bill C-13 would allow victims of the new offence of non-consensual sharing of intimate images to recover reasonable and readily ascertainable expenses they have incurred to remove the intimate image from the Internet or other digital network.

RECOMMENDATION 7: Pass clause 24 of Bill C-13 to permit restitution for costs associated with the removal of intimate images from the Internet or other digital network, and broaden the provision to provide restitution for costs associated with the removal of any criminal content from the Internet.

RECOMMENDATION 8: Expand the mandate of the Crime Victim Assistance Program to provide low income victims of cyber misogyny with financial support to pay the costs associated with removing an intimate image or other criminal communication from the Internet.

Civil Remedies

I just found out that someone created a fake Facebook profile using my picture and a slightly different spelling of my name! The page says all sorts of humiliating and degrading things about me: that I'm ugly and gross, and so stupid I had to cheat on my provincial exams. Whoever's behind it is messaging my friends pretending to be me, and making it look as if it's ME who's saying these things. I'm furious and so embarrassed, and I'm worried that people I'm applying to for jobs and university will see it and think I'm a cheater.

As described above, there are a number of provisions of the *Criminal Code* that can apply to cyber misogyny offences. There are also options under the civil law available to victims of cyber misogyny to let them take action to stop abusive behaviour and obtain compensation for the harms they have suffered. One advantage of a civil action is that the burden of proof is lower: a plaintiff in a civil case need only prove her case on a balance of probabilities, while in a criminal case, the Crown must prove the case beyond a reasonable doubt. Another advantage is that the plaintiff retains control over the case and can make their own decisions about how to proceed, and can seek monetary damages for the damage the defendant's actions have caused, as well as court costs if they are successful. However, launching a civil action in court can be expensive and time-consuming, and may be difficult to do without the assistance of a lawyer. There is no legal aid in BC for these types of cases. People who do not speak English fluently, who do not have the benefit of higher education, who have disabilities, or who are otherwise marginalized may face additional hurdles in accessing justice in these cases.

Victims should also be aware that court proceedings are generally open to the public and may be reported on by the media. While requests for anonymity and publication bans are possible, they are difficult to obtain and may be resisted by media lawyers.⁶⁷ Complainants should also be aware that they will likely have to testify in order to establish their claim, which can be potentially embarrassing or re-traumatizing. The support of a lawyer will be extremely helpful; support from friends, family, and/or professional counselors and other support workers will also be essential.

⁶⁷ In *AB v Bragg*, 2012 SCC 46, the complainant, a young girl, had to fight all the way to the Supreme Court of Canada to protect her anonymity in a defamation case she had brought against a cyber misogynist who created a fake and abusive Facebook profile using her photo and an altered version of her name. Ultimately, the SCC agreed that she could proceed anonymously using initials, and that any identifying content on the fake Facebook page could not be reported on by the media.

NOVA SCOTIA'S CYBERBULLYING SAFETY ACT

Nova Scotia's new *Cyberbullying Safety Act*,⁶⁸ passed in the weeks after the death of Rehtaeh Parsons, creates a new civil action for "cyberbullying," which it defines as "any electronic communication through the use of technology including...computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way."⁶⁹ Its application is not restricted to youth; adults may benefit from the Act's provisions as well.

The Act allows families and victims to obtain prevention orders from the court to ban a person from contacting a victim, talking about them online, or using any form of electronic communication. It provides that victims can sue cyberbullies and, if the cyberbully is a minor, their parents can be held responsible for the damages. The Act also creates Canada's first cyber-investigative unit and provides for significant search and seizure powers permitting the investigative unit, without notice to the alleged cyberbully, to enter homes, remove computers and cellphones, and obtain records of everything the individual has done on the Internet, including obtaining all text messages they have sent and received.

The prevention order provisions were applied for the first time in February 2014 in a case involving negative and threatening comments posted on Facebook about the Chief of the Pictou First Nation.⁷⁰ The order compels the defendant to cease posting the derogatory comments and to remove any existing posts from the site.

This law was passed very quickly after the suicide of Rehtaeh Parsons, whose nude image, depicting an alleged sexual assault against her, was circulated widely throughout her community. It involved little consultation, and at least one prominent lawyer has questioned whether the Act's sweeping provisions are constitutional and expressed doubts that the broad definition of "cyberbullying" contained in the Act will be found to be minimally impairing of *Charter*-protected free speech rights.⁷¹ The Nova Scotia government's desire to enact a law to hold online abusers accountable is admirable. The creation of a cyber-investigative unit and prevention orders to combat harassing behaviour online are both important measures. Providing for damages and compensation from an abuser is also essential. However, if the legislation is found to be unconstitutional, it will be of little benefit to anyone.

RECOMMENDATION 9: The BC government should enact legislation creating a "cyberbullying" tort, allowing victims to sue for "cyberbullying," defined more narrowly than the Nova Scotia legislation to include repeated electronic communication through the use of technology, including computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, extreme distress or other damage or harm to another person's physical or psychological health. The new law should include a power for judges to make prevention orders and orders compensating the victim for the harms they have suffered.

68 SNS 2013, c 2.

69 Section 2.

70 "Judge orders end to Facebook cyberbullying," *CBC News* (11 February 2014), www.cbc.ca/news/canada/nova-scotia/judge-orders-end-to-facebook-cyberbullying-under-new-law-1.2531764.

71 David Fraser, "New cyberbullying law half-baked" *The Chronicle Herald* (15 August 2013), <http://thechronicleherald.ca/opinion/1147871-new-cyberbullying-law-half-baked>.

DEFAMATION

Cyber misogyny may be defamatory in cases where false and harmful material has been published that would “tend to lower the plaintiff’s reputation in the eyes of a reasonable person.”⁷² The law of defamation is “a tool for protecting personal reputations,”⁷³ and published material that harms someone’s reputation will likely be found to be defamatory.

The freedom to communicate and exchange ideas on the Internet is essential to our public discourse. However, while freedom of expression is a fundamental right protected by s. 2(b) of the *Charter*, the courts have been clear that “the right to free expression does not confer a licence to ruin reputations.”⁷⁴ Because the Internet is a powerful medium for all kinds of expression, it is also a potentially powerful vehicle for expression that is defamatory. The Internet has tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. It can be published and republished with ease. The greater potential for anonymity amplifies even further the ease with which a reputation can be harmed online. The rapid expansion of the Internet and social networking companies like Facebook and Twitter has created a situation where “everyone is a potential publisher, including those unfamiliar with defamation law. A reputation can be destroyed in the click of a mouse, an anonymous email or an ill-timed Tweet.”⁷⁵

While freedom of expression is a fundamental right protected by s. 2(b) of the *Charter*, the courts have been clear that “the right to free expression does not confer a licence to ruin reputations.”

In *Davis v Singerman*,⁷⁶ for example, Ms. Singerman posted a status update on her Facebook account, viewable only to her 18 friends, insinuating that Ms. Davis was an unfit mother. The Court awarded damages of \$5,000, and would have awarded more if it had found that Ms. Singerman had intended to cause Ms. Davis harm.

In another example, *AB v Bragg Communications*,⁷⁷ the plaintiff, a 15 year-old girl, discovered that someone had created a fake Facebook profile using her photo and a modified version of her name. The profile referenced her appearance, her weight, and included explicit references to her allegedly preferred sexual acts. With the help of counsel, AB obtained the poster’s Internet Protocol (IP) address from Facebook, and sought a court order compelling the Internet Service Provider (ISP) to disclose the identity of the customer connected to the IP address provided by Facebook. The judge found that she had made out a prima facie case of defamation, accepting that the words used in the sexualized attack referred to AB and would tend to lower her reputation in the eyes of reasonable people.

Having established that a prima facie case of defamation had been made out, the Nova Scotia Supreme Court granted her application for disclosure of the customer information, while taking into account the privacy and freedom of expression interests of the anonymous

⁷² *Grant v Torstar Corp.*, 2009 SCC 61, [2009] 3 SCR 640.

⁷³ *Bou Malhab v Diffusion Métromédia CMI Inc.*, 2011 SCC 9, [2011] 1 SCR 214 at para 1.

⁷⁴ *Grant v Torstar*, *supra* note 72 at para 58.

⁷⁵ Bryan G. Baynham, Q.C., and Daniel J. Reid, “The Modern-Day Soapbox: Defamation in the Age of the Internet,” in *Defamation Law: Materials prepared for the Continuing Legal Education seminar, Defamation Law 2010* (2010), at p. 3.1.1, cited with approval in *Crookes v Newton*, 2011 SCC 47, [2011] 3 SCR 269 at para 38.

⁷⁶ 2014 QCCS 70.

⁷⁷ 2012 SCC 46.

poster.⁷⁸ In deciding to grant her application for disclosure of the customer information,⁷⁹ the court was mindful of the privacy interests and free speech rights of Internet users, but held that there is no reasonable expectation of privacy or anonymity in cases involving the publication of defamatory materials.⁸⁰ “Anonymity is not an automatic shield for defamatory words”⁸¹ and “there is no compelling public interest in allowing someone to libel and destroy the reputation of another, while hiding behind a cloak of anonymity.”⁸² Where a *prima facie* case of defamation is established and there is no compelling interest that would favour anonymity, the expectation of anonymity is not a reasonable one, and courts are likely to grant the disclosure.⁸³

The Supreme Court of Canada has said that if one person writes a libel, another repeats it, and a third approves what is written, they are all potentially liable for defamation.⁸⁴ Both the person who originally utters the defamatory statement and the individual who expresses agreement with it are liable for the injury. Since social media sites like Facebook often allow users to publicly share or comment on content posted by others, it appears that someone who “likes” or shares a defamatory post, or who comments approvingly on it, could be at risk of liability for defamation.⁸⁵

In order to be defamatory, the material has to be “published,” meaning it has to be conveyed to at least one person other than the plaintiff. What constitutes “publication” in the online context has been subject to recent debate and judicial scrutiny. In *Crookes v Newton*, the Supreme Court of Canada ruled that a hyperlink, by itself, should not be seen as a “publication” of the content to which it refers.⁸⁶ The Court decided that hyperlinks simply communicate that something exists, but they do not inherently communicate its content. Therefore, publishing a hyperlink to a defamatory website or document is not sufficient to ground an action in defamation.⁸⁷

Although publishing a hyperlink to defamatory content may not in itself be defamation, any additional commentary that introduces or contextualizes the hyperlink could be found to be defamatory. Moreover, there are a wide variety of ways in which defamatory material may be communicated, including through writing, dissemination of an image, or even “by way of a symbolic ceremony, dramatic pantomime, mime, brochure, gesture, handbill, letter, photograph, placard, poster, sign, or cartoon.”⁸⁸

78 2010 NSSC 215.

79 Known as a *Norwich Order*.

80 At para 21.

81 *Ibid.*

82 *Ibid* at para 20.

83 See also *York University v Bell Canada Enterprises*, [2009] 99 OR (3d) 695, 2009 CanLii 46447 (ONSC).

84 *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 176, 24 OR (3d) 865.

85 Wayne MacKay and Elizabeth J Hughes, “The legal dimensions of bullying and cyberbullying” (February 2012, Schulich School of Law) at 11.

86 2011 SCC 47, [2011] 3 SCR 269.

87 MacKay and Hughes, *supra* note 85 at 11.

88 Raymond E Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, loose-leaf (Toronto: Carswell, 1994) at 7.3, cited with approval in *Crookes v Newton*, *supra* note 75 at para 19.

A person accused of defamation may defend themselves by saying that the statement was true, that it was a fair comment (a genuine criticism, and not a personal attack), or that they innocently reproduced the statement without knowing what it was.⁸⁹

A civil claim for the tort of defamation is a promising legal remedy for victims of cyber misogyny. However, suing in civil court can be extremely costly and time-consuming, and can be very difficult without the assistance of a lawyer. Legal expertise is particularly important in cases where the alleged defamer is unknown and has been posting the defamatory content anonymously over the Internet.

RECOMMENDATION 10: Create a category of legal aid referral allowing victims of sexualized cyber misogyny to access the advice and representation of a lawyer to make a claim for defamation.

INVASION OF PRIVACY

The absence of reported cases on point likely reflects the difficulties inherent in accessing the courts to bring forward a claim of this nature. Improving access to justice and legal aid in civil cases will assist victims of cyber misogyny to assert their privacy rights.

In BC it is a tort (a civil wrong) for a person to purposely violate the privacy of another.⁹⁰ Proof of harm or damage to the plaintiff is not required for a successful claim. Determination of whether an invasion of privacy has occurred will involve a contextual assessment of all of the circumstances of the case. The nature and degree of privacy to which a person is entitled is “that which is reasonable in the circumstances, giving due regard to the lawful interests of others.”⁹¹ In determining whether a violation of privacy has been committed, “regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.”⁹²

Listening in on and recording phone calls,⁹³ dissemination of private email correspondence by a third party,⁹⁴ and reading documents addressed to someone else⁹⁵ have been held by the courts to constitute a breach of the privacy rights protected by the *Privacy Act*. While there do not appear to have been any cases yet decided on this issue, it seems clear that someone who shares an intimate image without the consent of the person depicted has committed an invasion of privacy. A person has a very reasonable expectation that their intimate images will be kept private, and violation of this privacy right should be treated very seriously by the courts. The absence of reported cases on point likely reflects the difficulties inherent in accessing the courts to bring forward a claim of this nature. Improving access to justice and legal aid in civil cases will assist victims of cyber misogyny to assert their privacy rights.

RECOMMENDATION 11: Create a category of legal aid referral allowing victims of sexualized cyber misogyny to access the advice and representation of a lawyer to make a claim for invasion of privacy.

89 MediaSmarts, “Cyberbullying and the Law” <http://mediasmarts.ca/background/cyberbullying-law-fact-sheet>.

90 *Privacy Act*, RSBC 1996 c 373, s 1(1).

91 *Ibid* s 1(2).

92 *Ibid* s 1(3).

93 *Watts v Klaemt*, 2007 BCSC 662.

94 *Nesbitt v Neufeld*, 2010 BCSC 1605.

95 *Fillion v Fillion*, 2011 BCSC 1593.

To make a successful claim for the tort of intentional infliction of mental suffering, the plaintiff must prove on a balance of probabilities that there has been flagrant or outrageous conduct that was calculated to produce harm, and which has resulted in a visible and provable illness in the plaintiff.⁹⁶ This is a very high threshold, and the courts have warned that the tort of intentional infliction of emotional suffering is a difficult one to prove.⁹⁷ The impugned conduct must be “outrageous,” “intolerable,” “extreme,” and “outside the bounds of decency” to attract liability, and this will be determined on a case-by-case basis. The courts have emphasized that “not every insult will yield liability” as it is not the role of the courts to “protect from unkind comments.”⁹⁸ The conduct must exceed all bounds usually tolerated by a decent society and must be of such a nature that it is calculated to cause and does cause mental distress of a serious kind.⁹⁹

Certainly, the psychological and emotional impacts of cyber misogyny can be deeply disturbing to victims, and may result in symptoms of post-traumatic stress, depression, and other forms of significant mental suffering. If the behaviour is sufficiently egregious and its impacts on the victim can be shown to rise to the level of a “visible and provable illness” or “recognizable physical or psychopathological harm,”¹⁰⁰ then this may be a useful cause of action for victims of cyber misogyny to make use of to obtain compensation and prevent further intrusions.

However, the threshold for what constitutes a “visible and provable illness” may be difficult for plaintiffs to meet in cases where their suffering takes the form of depression, grief or anxiety which does not rise to what a judge sees as a sufficient level. Grief, sorrow or emotional distress are not in themselves compensable. The courts have said that there must be some recognizable psychiatric or psychosomatic condition attributable to the defendant’s breach of the duty of care owed to the plaintiff.¹⁰¹ This may be a barrier for those who suffer significant psychological repercussions as a result of cyber misogyny, but who cannot convince a judge that they have suffered a “provable illness.”

In the US, victims can sue for “intentional infliction of emotional distress.” Plaintiffs must show that they have suffered severe or extreme emotional distress, but the level of distress does not have to rise to the level of a provable psychiatric illness.¹⁰² Removing the requirement on victims to prove they have suffered a psychiatric illness would lessen the requirement for expert medical testimony at trial, which can be very costly and can constitute a barrier to access to justice.

Victims of cyber misogyny and revenge porn have used this cause of action and successfully sued their online abusers in US courts for intentional infliction of emotional distress. In one

The courts have emphasized that “not every insult will yield liability” as it is not the role of the courts to “protect from unkind comments.”

96 *Prinzo v Baycrest Centre for Geriatric Care*, [2002] OR (3d) 474 at para 43, 215 DLR (4th) 31 (ONSC).

97 *Amaral (Litigation guardian of) v Canadian Musical Reproduction Rights Agency Ltd.*, [2007] CCEL (3d) 244, OJ No. 4266 (QL).

98 *Nolan v Toronto (Metropolitan) Police Force*, [1996] OJ No 1764 at para 68 (QL) (ONCJ).

99 *Ibid* at para 70.

100 *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263.

101 *Beaulieu v Sutherland*, [1986] CCLT 237, 37 ACWS (2d) 100 (BCSC).

102 See *Mainland Sawmills Ltd. et al v IWA — Canada, et al*, 006 BCSC 1195, [2006] ACWS (3d) 543.

case, a woman sued her ex-boyfriend after he posted her nude photographs on twenty-three adult websites next to her contact information, stating she was interested in a “visit or phone call.”¹⁰³ He also created an online advertisement that said she wanted “no strings attached” masochistic sex. Numerous men left her frightening voice mails, and she suffered anxiety and a bout of shingles. A judge awarded her \$425,000 for intentional infliction of emotional distress, defamation, and public disclosure of private fact.

There is significant debate in Canada as to whether a tort of “harassment” exists that is akin to the American tort of intentional infliction of emotional distress.¹⁰⁴ To date, the existence of a tort of harassment has not been accepted in Canadian law;¹⁰⁵ however, courts have said that “the door does not appear to be entirely closed on the possibility of this tort’s existence.”¹⁰⁶ The Federal Court has affirmed that if such a tort *was* to exist in Canada, its elements would mirror those of the American tort of intentional infliction of emotional distress: 1) outrageous conduct by the defendant, 2) the defendant’s intention of causing or reckless disregard of causing emotional distress, 3) the plaintiff’s suffering of severe or extreme emotional distress, and 4) the actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.¹⁰⁷

RECOMMENDATION 12: Enact legislation creating a new civil wrong of “harassment,” akin to the American tort of “intentional infliction of emotional distress,” the elements of which are 1) outrageous conduct by the defendant, 2) the defendant’s intention of causing or reckless disregard of causing emotional distress, 3) the plaintiff’s suffering of severe or extreme emotional distress, and 4) the actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.

APPROPRIATION OF PERSONALITY

The tort of appropriation of personality provides a civil remedy to someone whose image or likeness is used for commercial purposes without their permission (for example, to sell a product). Someone cannot commercially exploit another’s name or likeness without their permission.¹⁰⁸ While most Canadian cases involve celebrities, the courts have held that the tort can also apply in cases involving non-celebrities.¹⁰⁹ Individuals have a proprietary right to the exclusive use of their own identity, as represented by their name, reputation or likeness.¹¹⁰

¹⁰³ *Taylor v Franko*, No. 09-00002 JMS/RLP, 2011 WL 2746714 (D. Haw. June 12, 2011). See also *Doe v Hofstetter*, No. 11-cv-02209-DME-MJW, 2012 WL 2319052, (D. Colo. June 13, 2012) (awarding plaintiff damages for intentional infliction of emotional distress where the defendant posted the plaintiff’s intimate photographs online, e-mailed them to her husband, and created fake Twitter accounts displaying them).

¹⁰⁴ See e.g. *Lynch v Westario Power Inc.*, [2009] OJ 2927, 2009 Carswell Ont 4057 (ONSC); *Savino v Shelestowsky*, 2013 ONSC 4394, [2013] 4 CCLT (4th) 94.

¹⁰⁵ *Brazeau v Canada (Attorney General)*, 2012 FC 648.

¹⁰⁶ *Savino v Shelestowsky*, 2013 ONSC 4394 at para 15.

¹⁰⁷ Set out in *Mainland Sawmills*, *supra* note 102 at para 16 and endorsed in *Brazeau*, *supra* note 105.

¹⁰⁸ *Hay v Platinum Equities Inc.*, 2012 ABQB 204.

¹⁰⁹ *Ibid.*

¹¹⁰ *Joseph v Daniels* [1986] BCLR (2d) 239, (1986) 11 CPR (3d) 544 (BCSC).

This common law tort has been codified in the BC *Privacy Act*, which describes it as “unauthorized use of [the] name or portrait of another.”¹¹¹ Under the *Privacy Act* it is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of property or services without consent.¹¹² In May, 2014, the BC Supreme Court certified a class action against Facebook brought by a Vancouver woman, who claims that Facebook’s practice of featuring its users in an advertising product called “Sponsored Stories” violates these provisions of the *Privacy Act*.¹¹³ Companies pay Facebook a fee so that when users “like” their pages, that information is published to the user’s friends as proof of their endorsement. One of the key issues in the case will be whether BC users of social media websites run by foreign corporations have the protection of the BC *Privacy Act*. Another will be whether Facebook’s terms of use and the online tools it provides to its users constitute consent to use the person’s name and portrait for advertising purposes. Facebook has said it will appeal the certification ruling.¹¹⁴

No matter the outcome of this case, the tort described by the *Privacy Act* only protects people from *commercial* use of their name or likeness, such as when someone’s image or name is used to market a product. If the elements of the tort were broadened to capture non-commercial but privacy-invading uses of someone’s image or likeness, the tort could apply against revenge porn websites, for example, which post stolen or non-consensually obtained images in order to humiliate and shame those depicted.

RECOMMENDATION 13: Broaden the tort described in s.3(2) of the *Privacy Act* (“unauthorized use of name or portrait of another”) to include the unauthorized use of someone’s name or image for the purpose of harassing, humiliating, distressing or exposing them to ridicule or contempt.

COPYRIGHT LAW

In 2012, Canada’s *Copyright Act* was changed to treat photographs in the same way as any other “artistic work” such as paintings or drawings.¹¹⁵ Copyright law gives the owners of artistic works certain exclusive rights to exploit their works, such as reproducing or selling them. In the case of photography, this means that the copyright owner of a photograph can, in most cases, prevent others from copying that photograph. With the exception of photographs taken during the course of employment, the photographer will always be the owner of the copyright in a photograph.

The majority of “revenge porn” cases involve images or videos that were initially created by the victim. Victims own the copyright to this intimate content, and can enforce those rights against harassers who post or distribute the content online without their consent.

The majority of “revenge porn” cases involve images or videos that were initially created by the victim. Victims own the copyright to this intimate content, and can enforce those rights.

¹¹¹ S 3

¹¹² S 3(2).

¹¹³ *Douez v Facebook Inc.*, 2014 BCSC 953.

¹¹⁴ “Facebook class action lawsuit launched by Vancouver woman,” *CBC News* (30 May 2014) www.cbc.ca/news/canada/british-columbia/facebook-class-action-lawsuit-launched-by-vancouver-woman-1.2660461.

¹¹⁵ RSC 1985 c C-42, s 2.

This includes sending copyright notices to Internet Service Providers hosting infringing content.¹¹⁶

Jurisdictional Challenges

One of the most difficult challenges in “revenge porn” cases is the issue of jurisdiction. Canadian authorities have limited ability to force non-Canadian companies, Internet service providers and social media platforms to remove harmful content, which is typically hosted on servers located outside of Canada.

One of the most difficult challenges in “revenge porn” cases is the issue of jurisdiction. Canadian authorities have limited ability to force non-Canadian companies, Internet service providers and social media platforms to remove harmful content, which is typically hosted on servers located outside of Canada. While many ISPs will voluntarily remove and destroy offending images and content that is brought to their attention, it can be extremely difficult for victims of cyber misogyny and revenge porn to make this happen. Bill C-13, the *Protecting Canadians from Online Crime Act*, creates some legal powers for judges to control non-consensually shared intimate images and to order them removed from websites,¹¹⁷ but only when the material in question is hosted on Canadian servers, which is uncommon.¹¹⁸

Recently, however, a Nova Scotia judge issued an order under the province’s new Cyber-safety Act demanding information from Google, Facebook, Instagram, Pinterest, Snapchat and Canada’s BCE Inc. in order to determine the identity of a cyberbully.¹¹⁹ The case involves a young woman in Halifax who has received threatening and harassing messages from an unknown person or persons accused of hacking her social media accounts. The court order is seeking records that could identify the accused cyberbully, including home addresses, email addresses, user names, given names, account names and IP addresses. It is the first order of its kind in Canada, and the first time a cyberbullying law has been used to reach beyond Canada’s borders in this way.

Even court rulings can be difficult to enforce outside of the jurisdiction in which they are made. A Vancouver teacher whose ex-girlfriend stole nude images of him from his computer and posted offensive and defamatory statements about him online, accusing him of being a pedophile and a child molester, has had little luck enforcing court orders issued by the courts of Malaysia, where the pair met and were living at the time.¹²⁰ A judge found the woman guilty of defamation and ordered her to pay the victim \$66,000 in damages, but the harassment continued. The judge then ordered her imprisoned for contempt of court, but she fled the country and has continued her campaign of abuse. The court also ordered search engine providers Google, Yahoo and Bing to block the victim’s name from being searchable, but that has also proved unenforceable; he’s sent the court order to all three companies, but said he’s had no positive response. “There are people out there who

116 Jonathon W. Penney, “Deleting revenge porn” (November–December 2013) *Policy Options* 53.

117 Bill C-13, *supra* note 14 at cls 4 and 5.

118 Penney, *supra* note 116.

119 Michael MacDonald, “Nova Scotia cyberbullying unit seeks data from Facebook, Google” *The Globe and Mail* (2 June 2014), www.theglobeandmail.com/news/national/nova-scotia-cyberbullying-unit-seeks-personal-data-from-facebook-google/article18955261/.

120 Kathy Tomlinson, “Teacher ‘powerless’ to stop ex-girlfriend’s cyberstalking” *CBC News* (6 May 2013), www.cbc.ca/news/canada/british-columbia/teacher-powerless-to-stop-ex-girlfriend-s-cyberstalking-1.1314610.

could help me out and I've been through the proper channels to be helped out," he told media. "And people just ignore it."¹²¹

In 2012, owners of a bed and breakfast in Nova Scotia won a damage award from the Supreme Court of Nova Scotia against a Mississippi blogger who made a number of defamatory and homophobic comments and posted doctored, sexualized photos of them online.¹²² In June, 2014, they won a second case against the blogger for copyright infringement and were awarded a further \$390,000 in compensation for the "outrageous and highly reprehensible" abuse they have suffered.¹²³ However, a Mississippi court refused to enforce the 2012 order, finding that the judgment of the Nova Scotia court was unenforceable because Canadian law provides less stringent protections for freedom of speech than United States laws, and the defendant would not have been found liable for defamation in a domestic court. The blogger has also snubbed an injunction issued by the Nova Scotia court, and has continued to defame the couple. As the judge in the second action put it: "it is abundantly clear that Mr. Handshoe feels entirely immune from the orders of this Court. In fact it is not an overstatement to say that Mr. Handshoe 'snubs his nose' at all judicial officers and institutions of Nova Scotia."¹²⁴

These jurisdictional challenges are not unique to cyber misogyny and revenge porn crimes. The cross-border nature of the Internet creates significant tensions in national legal systems defined by geographical boundaries.

Canada has signed, but not ratified, the Convention on Cybercrime (also known as the Budapest Convention), the first international treaty seeking to address Internet and computer crime by harmonizing national laws, improving investigative techniques, and increasing cooperation among nations. It addresses issues including infringements of copyright, computer-related fraud, child pornography, hate crimes, and violations of network security. It also contains a series of powers and procedures such as the search of computer networks and lawful interception. These international dialogues between governments, international experts and community stakeholders will be essential to ensuring the safety, equality, privacy and rights of all Internet users.

Canada has signed, but not ratified, the Convention on Cybercrime, the first international treaty seeking to address Internet and computer crime.

¹²¹ *Ibid.*

¹²² *Trout Point Lodge Ltd. v Handshoe*, 2012 NSSC 245.

¹²³ *Trout Point Lodge Ltd. v Handshoe*, 2014 NSSC 62.

¹²⁴ *Ibid* at para 9.

TEEN “SEXTING” AND SEXUALIZED ONLINE BULLYING

Researchers found that many Canadian youth are engaged in “sexting” behaviour; boys are significantly more likely than girls to be sent a sext created for them.

IN A RECENT CANADIAN STUDY involving a total of 5,436 students in grades 4-11 from all provinces and territories across the country, researchers found that many youth are engaged in “sexting” behaviour: creating sexy, nude, or partially nude images of themselves and sending them to others via cell phone.¹²⁵ Eight per cent of students in grades 7-11 with access to a cell phone have sent a sext of themselves to someone else, and 24 per cent report that someone has sent them a sext of him or herself. The numbers rise as students get older; grade 11 students are much more likely than grade 7 students to send sexts of themselves or to be sent a sext that the creator made for them. Boys are significantly more likely than girls to be sent a sext created for them (32 per cent compared to 17 per cent of girls).

These aspects of sexting don’t cause youth much concern; it’s the non-consensual forwarding of nude or sexualized images that can cause humiliation and shame and lead to depression, anxiety, ostracism and despair. Just under one quarter of the teens who said they had sent a sext of themselves to someone else reported that the person who received the sext forwarded it to someone else. Thirty per cent of students in grade 11 reported receiving a forwarded sext. Interestingly, sexts created by boys are more likely to be forwarded than sexts of girls (26 per cent compared to 20 per cent of girls). Boys are more likely to be the ones doing the forwarding, and are more than twice as likely to receive a sext forwarded to them from someone other than the original creator.

These numbers accord with similar studies in the US, which report that about 1 in 5 teens have engaged in some kind of sexting, either sending, receiving, or forwarding sexually suggestive emails or text messages with a nude or nearly-nude photo.¹²⁶ All of these studies

¹²⁵ Valerie Steeves, “Young Canadians in a Wired World, Phase III: Sexuality and Romantic Relationships in the Digital Age” Mediasmarts.ca (2014), <http://mediasmarts.ca/ycww/sexuality-romantic-relationships-digital-age>.

¹²⁶ Cox Communications and the National Center for Missing and Exploited Children, “Teen Online and Wireless Safety Survey: Cyberbullying, Sexting, and Parental Controls” (Research findings delivered at the National Teen Summit on Internet and Wireless Safety, Washington, DC, 24 June 2009) cited in Bailey and Hanna, *infra*. See also National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com, “Sex and Tech: Results from a Survey of Teens and Young Adults” (2008), www.thenationalcampaign.org/sextech/PDF/SexTechSummary.pdf at 2 [Sex and Tech].

show that sexting has become a fairly common practice among teens and young people, and a part of their sexual exploration.¹²⁷

The US surveys also showed gendered patterns to teen sexting. Girls were more likely to send sexualized texts than boys, and while most teens say their reason for sending a sext was because someone had asked them to or for fun, girls were more likely to report being pressured by a boy to send a sext than were boys to report having been pressured by a girl.¹²⁸

Given the hyper-sexualization of girls in mainstream media and the extreme social pressures placed on women and girls to be “pretty” and “sexy” (within a very narrow conception of what these terms describe), it is not surprising that girls are more likely to send sexts and to be pressured by the opposite sex to do so. As Bailey and Hanna describe:

A mediatized corporate culture that promotes pole dancing for tots, thong underwear for ten-year-old girls, pouty-lipped baby dolls dressed in fishnets and g-strings, teen-aimed retail ads created to resemble amateur pornography, musical icons selling perfume and clothes using the imagery of sexualized, baby-like Asian girls, and video games that award points for rape sells a hypersexualized and exploitative understanding of girlhood that parallels in many respects the mainstream sexual objectification of women more generally. ...

*Viewed in this context, adolescent and teen engagement in sexting can be understood as a part of the exploration of sexuality and identity in a mass-mediated society that immerses children and youth in, and encourages the early adoption of, pre-packaged conceptions of femininity and sexuality as keys to social success.*¹²⁹

Social scorn is disproportionately heaped on girls who engage in sexting, with devastating consequences.

Moreover, sending a sext seems to place girls at a greater risk of negative social stigma than boys. As noted in one survey, “some teens brand [sexualized] images [sent by cell phone], particularly images of girls, as inappropriate and make judgments about the people who appear in them,” with one high-school boy stating that sexting was “common only for girls with ‘slut’ reputations” and another noting that sending sexts makes girls look “slutty.”¹³⁰

Social scorn is disproportionately heaped on girls who engage in sexting, with devastating consequences. After Jesse Logan’s ex-boyfriend forwarded a nude photo she had sent him during their relationship to the whole school, she was tormented and harassed as a “whore” and a “slut”; she committed suicide several months later. Thirteen year-old Hope Witsell took her own life after a topless photo she sent to a boy she liked was forwarded to students at her own and neighbouring schools, subjecting her to a campaign of vulgar name calling and abuse. While Amanda Todd and Rehtaeh Parsons’ tragic suicides are not necessarily examples of suicides due to “sexting” (Amanda Todd was subjected to extortion and blackmail by an internet predator; the image circulated of Rehtaeh depicted an alleged sexual assault),

127 National Campaign to Prevent Teen and Unplanned Pregnancy and Sex and Tech, *supra* note 126 at 2.

128 Sex and Tech, *supra* note 126.

129 Jane Bailey and Mouna Hanna, “The gendered dimensions of sexting: Assessing the applicability of Canada’s child pornography provisions” (2011) 23 CJWL 405 at 414.

130 Amanda Lenhart, “Teens and Sexting: How and Why Minor Teens Are Sending Sexually Suggestive Nude or Nearly Nude Images Via Text Messaging,” *Pew Internet and American Life Project* (2009), www.pewinternet.org/2009/12/15/teens-and-sexting.

their cases also demonstrate the profound impacts of the shame, humiliation, stigma and trauma that can result when an intimate image is circulated without its subject's consent.

Using and Strengthening Existing Laws to Address Youth “Sexting” and Sexualized Online Bullying

SEXTING AND CANADA’S CHILD PORNOGRAPHY LAWS

“If you are underage and send your boyfriend a picture of you that shows some nudity, by definition you’ve created (child pornography), and you’ve distributed it—and now he has it so he’s in possession of it, so that’s three offences right there.”—Ontario Provincial Police officer¹³¹

When sexting involves youth under 18, it may contravene the *Criminal Code*. An image that depicts a person under the age of 18 engaged in “explicit sexual activity” or which has as its dominant characteristic the depiction, for a sexual purpose, of a youth’s sexual organs or anal region, constitutes child pornography and is captured by the *Criminal Code*’s child pornography provisions (s. 163.1). It is an offence to make, possess, access, or distribute child pornography.¹³² This includes emailing, texting, or posting the image online.

If there are reasonable grounds, a judge can issue a warrant of seizure of any material from a computer system presumed to constitute child pornography. The Internet Service Provider or custodian of the system may be ordered to remove the material, provide the court with electronic copies of it and/or provide information on the identity and location of the person who posted it. If the material is proven to be child pornography, the custodian may be ordered to delete the material.¹³³

The purpose of Canada’s child pornography laws is to catch pedophiles and predators who abuse and exploit children, and to prevent the harms associated with the distribution of images of children being abused.¹³⁴ However, the provisions can apply much more broadly than that. According to the law, sharing a naked photo of a person under 18 for a sexual purpose, *even if it’s a photo of yourself*, is a criminal offence. The age of the person who possesses the image and whether they are close in age to the person depicted makes no

131 Jennifer O’Brien, “Teen Sexting Exploding,” *London Free Press* (24 March 2011), www.lfpress.com/news/london/2011/03/23/17732536.html.

132 *Criminal Code* s 163.1(2)-(4).

133 “Online safety overview” *Family Online Safety Institute* (26 February 2014), www.fosigrid.org/canada/canada-government.

134 Parliamentary Information and Research Service, *The Evolution of Pornography Law in Canada* by Lyne Casavant and James R Robertson (Ottawa: Library of Parliament, 2007), www.parl.gc.ca/Content/LOP/researchpublications/843-e.htm.

difference to whether someone may be charged with a child pornography offence; nor does the fact that the person depicted has consented to taking and sharing the image with someone whom they want to have it. Youth under 18 are deemed unable to consent to participation in pornography.¹³⁵ Thus sexting, a rather common practice among youth, can result in child pornography charges, both against a youth who distributes an image without the consent of the youth depicted, and, at least on the face of s. 163.1, against a youth who takes a sexually explicit photo of themselves and shares it with someone whom they want to have it.

In the United States, prosecutors have taken action not only against those who abuse the trust and confidence of a peer by widely distributing nude or sexually explicit photos intended for the original recipient's eyes only, but have also prosecuted or threatened with prosecution teen girls victimized by unauthorized redistribution of sexualized photos they had sent to trusted intimates; young teen girls whose semi-clad images ended up on the cell phones of their peers; and sexually intimate teen partners who consensually made sexually explicit photos and had kept them private.¹³⁶

Canadian authorities have not been as quick as authorities in the United States to turn to the criminal law to address the consensual sharing of intimate images of teens by other teens. In 2011, when police became aware of widespread sexting at some high schools in Sydney, Nova Scotia, they did not lay charges, even though Cape Breton Regional Police said that more than 50 students had been sending hundreds of explicit photos to each other.¹³⁷ Instead the police and the school board cooperated, with the school board sending a letter to parents warning them of the potential consequences of sexting.

While police and prosecutors do often exercise their discretion not to apply the child pornography laws against youth, child pornography charges *have* been laid against Canadian teens for electronically distributing nude pictures of other youth. A 16 year-old girl from Saanich, BC, was recently convicted for possessing and distributing child pornography after forwarding explicit photos of her boyfriend's former girlfriend to other youth.¹³⁸ Two male teens have been charged with child pornography offences in connection with the Rehtaeh Parsons case, and several male youth have been charged with possession and distribution of child pornography for spreading nude images of female youth via cell phone.¹³⁹

Sexting can result in child pornography charges, both against a youth who distributes an image without the consent of the youth depicted, and, at least on the face of s. 163.1, against a youth who takes a sexually explicit photo of themselves and shares it with someone whom they want to have it.

135 Department of Justice, "Age of Consent to Sexual Activity: General Questions," Government of Canada (10 May 2013), www.justice.gc.ca/eng/rp-pr/other-autre/clp/faq.html.

136 Jane Bailey and Mouna Hanna, *supra* note 129 at 408.

137 Daniel Schwartz, "The fine line between 'sexting' and child pornography," *CBC News* (13 August 2013) www.cbc.ca/news/canada/the-fine-line-between-sexting-and-child-pornography-1.1367613.

138 Dirk Meissner, "BC teen guilty of child pornography," *Canadian Press* (10 January 2014), www.huffingtonpost.ca/2014/01/10/bc-sexting-teen-guilty-child-pornography-victoria_n_4576779.html. The girl's lawyer has told media that he will be challenging the constitutionality of applying the provision to youth.

139 Heather Rivers, "Charges stem from 'sexting' incident," *Woodstock Sentinel-Review* (17 March 2014), www.woodstocksentinelreview.com/2014/03/17/charges-stem-from-sexting-incident; Stephen Kimber, "Why are we using child pornography laws to charge children?" *Rabble.ca* (14 January 2014), <http://rabble.ca/blogs/bloggers/skimber/2014/01/why-are-we-using-child-pornography-laws-to-charge-children>.

EXCEPTIONS TO THE APPLICATION OF THE CHILD PORNOGRAPHY LAWS

In *R v Sharpe*,¹⁴⁰ the Supreme Court of Canada considered the intention behind Canada's child pornography law in a constitutional challenge to the provisions which argued that they violate the *Charter* right to freedom of expression. The Court upheld the law, but carved out two exceptions to its application: 1) "self-created expressive material," and 2) "private recordings of lawful activity," on the basis that these can be "deeply private forms of expression" raising "little or no risk of harm to children."

The first exception for "self-created expressive material" includes written material or visual representations created by someone alone, and held by that person alone, exclusively for his or her own personal use. This would protect written or visual expressions of thought, created by a single individual, and held by that person for his or her eyes only. A teenager's confidential diary would fall within this category, as would any other written work or visual representation confined to a single person in its creation, possession and intended audience.¹⁴¹

The second exception for "private recordings of lawful sexual activity" would include a visual recording, created by or depicting a person, provided it does not depict unlawful sexual activity and is held by that person exclusively for their own private use. It would protect:

- Auto-depictions, such as photographs taken by a child or adolescent of him- or herself alone, kept in strict privacy and intended for personal use only;
- Recordings of sexual activity, provided that the following conditions are met:
 - The person possessing the recording must have personally recorded or participated in the sexual activity in question.
 - That activity must not be unlawful; all parties must have been capable of consenting and must have actually consented to the sexual activity in question, thus precluding the exploitation or abuse of children.
 - All parties must also have consented to the creation of the record.
 - The recording must be kept in strict privacy by the person in possession, and intended exclusively for private use by the creator and the persons depicted therein.¹⁴²

¹⁴⁰ 2001 SCC 2.

¹⁴¹ *Ibid* at para 115.

¹⁴² *Ibid* at para 116.

My boyfriend and I (we're both 17) made a video together of us having sex. It was my idea — it was fun and we were both totally into it. But someone told me that this is child pornography and I should delete it from my hard drive right away. I don't want to delete it, but I sure don't want to be charged as a child pornographer either!

The Court in *Sharpe* was clear that a teenage couple would not fall within the child pornography law's purview for creating and keeping sexually explicit pictures featuring each other alone, or together engaged in lawful sexual activity, provided these pictures were created together and shared only with one another.¹⁴³ However, it does seem that a person under 18 who created a nude or sexually explicit image of themselves that they then shared with another person who was not present at the time the image was made (as is done through sexting), even if that person was an intimate partner, *would* fall afoul of the criminal provisions.¹⁴⁴

To date, there have been no prosecutions in Canada against minors involved in *voluntarily* sending sexually explicit images of themselves to others, despite the fact that such a charge is theoretically possible. Crown prosecutors have a duty to act solely in the public interest when deciding whether to initiate or continue a prosecution.¹⁴⁵ Given the harsh penalties and extreme stigma attached to a conviction as a child pornographer, and the fact that the law's underlying purpose is to protect children and youth from sexual exploitation, and not to criminalize teens for engaging in private, consensual sexual exploration, it seems unlikely that such a prosecution would be in the public interest.¹⁴⁶

However, as legal expert and professor Jane Bailey has argued, “even the technical potential for prosecution presents equality issues.”¹⁴⁷ The possibility of prosecution may have the effect of discouraging girls whose images are redistributed without their consent from pursuing legal redress out of fear that they themselves could be held criminally liable for initially sending the sexually explicit image. The person who circulated the image without consent could use the threat of prosecution to dissuade the victim from seeking police assistance to have the image removed from the Internet; simply knowing that there is a chance that she too could be prosecuted could be enough to prevent a victim from coming forward. Additionally, the technical possibility of prosecution of girls in this situation may dissuade authorities from prosecuting harmful unauthorized redistributions on the basis that, technically, both parties violated the law. As a result, the child pornography law is “susceptible to being used in a way that compounds the negative social stigma already

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¹⁴³ *Ibid.*

¹⁴⁴ See Bailey and Hanna, *supra* note 129.

¹⁴⁵ In addition, s. 163.1(6) provides that “No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence does not pose an undue risk of harm to persons under the age of eighteen years.”

¹⁴⁶ Bailey and Hanna, *supra* note 129 at 438.

¹⁴⁷ *Ibid* at 439.

Researchers found that young people feel strongly that no one should ever be charged with sex offences or placed on the sex offender register for age-appropriate sexting. We agree.

disproportionately borne by girls whose sexualized self-representations are distributed beyond their intended recipient. Further, it may discourage reporting and prosecution of the very kinds of exploitative and abusive redistributions that the provision ought to be addressing.”¹⁴⁸

Youth can consent to engage in sexual activity with one another,¹⁴⁹ yet Canada’s child pornography laws do not acknowledge youths’ capacity to consent to taking a naked picture of themselves and sharing it with their intimate partners. In international surveys, youth themselves have expressed their disagreement with this approach. In one 2012 Australian study, involving about 1,000 young people mostly in their mid-teens, researchers found that sharing a nude or sexy photo of someone else without their permission was seen as the most harmful cyber behaviour (71.3 per cent said it was very harmful and another 19.6 per cent said it was harmful).¹⁵⁰ Researchers also found, however, that young people feel strongly that no one should ever be charged with sex offences or placed on the sex offender register for age-appropriate sexting. We agree. Laws designed to prevent and punish child sexual exploitation and its attendant harms should not be enforced against youth engaged in consensual sexting.

A number of US states have now amended their child pornography legislation to exempt youth from prosecution under these provisions.¹⁵¹ Canada should follow suit.

RECOMMENDATION 14: Amend the *Criminal Code* provisions criminalizing the production and distribution of child pornography (s. 163) so as to make clear that they do not apply to a person under 18 who creates a nude or sexually explicit image of themselves and shares it with someone of their choosing.

¹⁴⁸ *Ibid.*

¹⁴⁹ The age of consent for sexual activity in Canada is 16 (18 if the sexual activity occurs in a relationship of authority, trust or dependency). There is an exception for youth who are close in age; a 14 or 15 year old can consent to sexual activity with a partner as long as the partner is less than five years older and there is no relationship of trust, authority or dependency or any other exploitation of the young person. A 12 or 13 year old can consent to sexual activity with another young person who is less than two years older and with whom there is no relationship of trust, authority or dependency or other exploitation of the young person.

¹⁵⁰ Kelly Tallon, Ahram Choi, Matthew Keeley, Julianne Elliott and Debra Maher, “New Voices / New Laws: School-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour” (November 2012) National Children’s and Youth Law Centre and Legal Aid NSW, www.lawstuff.org.au/__data/assets/pdf_file/0009/15030/New-Voices-Law-Reform-Report.pdf.

¹⁵¹ See Elizabeth C. Eraker, “Stemming sexting: Sensible legal approaches to teenagers’ exchange of self-produced pornography” (2014) 25(1) Berkeley Tech LJ, <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1837&context=btlj>.

My friend and I took some pictures of ourselves posing topless, and we sent them to a couple of boys we liked. Now these guys are threatening to spread them all over school, and they're saying there's nothing we can do about it because WE were the ones who took the pictures and therefore we created child pornography. I want to tell the Principal about this and ask her to make the guys delete the photos, but I don't want to get in trouble or risk the police finding out that I created child pornography.

The online sharing of intimate and sexually explicit images without consent can be devastating to both youth and adults, leading to harassment, shaming, humiliation, stalking and threats. The horrifying impact on youth of having their privacy, dignity, and security rights violated in this way was tragically illustrated by Rehtaeh Parsons' suicide after months of torment when images of her allegedly being sexually assaulted were distributed among her peers. No child should have to endure such a violation.

Child pornography charges, however, are inappropriate against youth engaged in sexting behaviour in most instances, even when the sharing is done without the consent of the person depicted. Given the significant and lasting repercussions for youth convicted of a child pornography offence, including mandatory minimum sentences, potential listing on the sex offender registry and a DNA databank order, not to mention the life-long stigma of being labeled a child pornographer, these charges are best reserved for the offences to which they were designed to apply: the harmful sexual exploitation of children by pedophiles.

RECOMMENDATION 15: Amend the *Criminal Code* provisions criminalizing the production and distribution of child pornography (s. 163) such that youth under 18 who distribute intimate images of other youth without the consent of the person(s) depicted are not charged under these provisions except in extreme circumstances (for example, where the distribution of the image is done for profit or the production or distribution of the images involves sexual exploitation).

RECOMMENDATION 16: Amend the *Criminal Code* child pornography provisions to state that when youth under 18 are criminally prosecuted for sharing intimate images of other youth without consent, they are to be charged under the new offence of "Non-consensual Distribution of Intimate Images" created by Bill C-13.

The horrifying impact on youth of having their privacy, dignity, and security rights violated in this way was tragically illustrated by Rehtaeh Parsons' suicide.

Human Rights Law and the Responsibility of Schools

INTERNATIONAL HUMAN RIGHTS LAW

The United Nations *Convention on the Rights of the Child* covers a wide range of children's needs and interests, framed in terms of human rights. In its preamble, the Convention affirms such aspirations as raising children in accordance with "the spirit of peace, dignity, tolerance, freedom, equality and solidarity." It confirms that children have the same "inherent dignity" as any other person, and emphasizes in Article 3 that in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." It also sets out specific rights, such as "the right of the child to the enjoyment of the highest attainable standard of health" (Article 24) and the right to not be subjected to "arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation" (Article 16). Article 28 requires States Parties not only to make education accessible to all children, but also "to ensure that school discipline is administered in a manner consistent with the child's human dignity."

Article 17 calls upon States Parties to "ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health." It also calls for "the development of appropriate guidelines for the protection of children from information and material injurious to his or her well-being," while being mindful of other rights, such as freedom of expression, as well as the responsibilities of parents. This provision therefore calls for children to be educated in a manner that encourages their sense of freedom, but that also ensures that the information they receive is suitable for their age.¹⁵²

Additionally, Article 19 affirms that states have an obligation to take all appropriate measures (whether legislative, administrative, social or educational) to protect children from all forms of physical or mental violence. The United Nations Committee on the Rights of the Child has stated that Article 19 applies to: "Psychological bullying and hazing by adults or other children, including via information and communication technologies (ICTs) such as mobile phones and the Internet (known as 'cyberbullying')." ¹⁵³

In 2007, the Senate Standing Committee on Human Rights outlined a number of ways in which Canada could take action to better implement the *Convention on the Rights of the*

152 Senate of Canada, Standing Senate Committee on Human Rights, *Cyberbullying Hurts: Respect for Human Rights in the Digital Age* (December 2012) (Chair: Hon. Mobina Jaffer), www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf. [Cyberbullying Hurts]

153 Committee on the Rights of the Child, *General comment No.13 (2011), The right of the child to freedom from all forms of violence*, CRC/C/GC/13, UNCRCOR, (2011) at 10, www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf. "Hazing" refers to rituals and other activities involving harassment, violence or humiliation which are used as a way of initiating a person into a group.

Child.¹⁵⁴ The Senate Committee noted witnesses' concerns that Canada was not living up to its treaty obligations with respect to bullying and that greater effort was necessary to "take all appropriate legislative, administrative, social and educational measures" as called for by Article 19. The report recommended a national strategy to combat bullying that should include a national education campaign to teach children, parents, and teachers about bullying, and to promote conflict resolution and effective intervention strategies.

In its 2007 report, the Senate Committee also recommended that the federal government enact legislation to establish an independent Children's Commissioner to monitor the implementation of the *Convention* and to advocate for the rights of children in Canada. The Committee repeated this recommendation in its 2011 report on child sexual exploitation, drawing attention to how the office could be of particular benefit in Canada's efforts to deal with the sexual exploitation of youth. The Committee reiterated the call in its 2012 report on cyberbullying.¹⁵⁵

Articles 12 to 15 of the *Convention* stipulate that in the appropriate circumstances, children have the right to be heard in matters that affect their well-being. Canada has an obligation to protect and promote this right. However, there is currently no national mechanism for hearing from and responding to children or for reporting on how their rights are being respected. The United Nations Committee on the Rights of the Child has emphasized that the establishment of national human rights institutions for advancing children's rights, such as a Children's Commissioner, is part of a State Party's obligations to ensure the implementation of the *Convention*.¹⁵⁶ It has also expressed its regrets that such an institution has not been established at the federal level in Canada.¹⁵⁷

A federal Children's Commissioner would consult with children and youth, advocate for them, and ensure that their voices are heard. The Commissioner would work to ensure that youth have the information and supports they need, and could serve as a resource for children and youth seeking information on their rights. The Commissioner could also conduct independent research, looking into patterns and trends regarding cyberbullying, identifying root causes, reviewing best practices in other jurisdictions, and spearheading initiatives for reform. The office could also convene stakeholder dialogues to ensure that young people's voices and interests are present in important policy conversations related to cyberbullying. The office could be particularly helpful in hearing from and engaging Indigenous youth, especially since many of the issues affecting them fall under federal jurisdiction.

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¹⁵⁴ Senate of Canada, Standing Senate Committee on Human Rights, *Children: The Silenced Citizens, Effective Implementation of Canada's International Obligations with Respect to the Rights of Children* (April 2007) (Chair: Hon. Raynell Andreychuk), www.parl.gc.ca/Content/SEN/Committee/391/huma/rep/rep10apr07-e.pdf. [*Silenced Citizens*]

¹⁵⁵ *Ibid* at p. 89.

¹⁵⁶ Committee on the Rights of the Child, *General Comment No. 2: The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child*, CRC/GC/2002/2, UNCRCOR, 32 Sess, (2002) at para 1, www2.ohchr.org/english/bodies/crc/docs/GC2_en.doc.

¹⁵⁷ Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Canada*, CRC/C/15/Add.215, UNCRCOR, (2003), at para 14-15.

RECOMMENDATION 17: Create a federal Children’s Commissioner to act as an independent national advocate for children’s rights.

DOMESTIC HUMAN RIGHTS LAW AND THE RESPONSIBILITY OF SCHOOLS

Schools have an obligation to maintain a positive and non-discriminatory environment in which students can learn and flourish.

When instances of cyber misogyny or bullying involve school-age youth, it may be possible to argue that the school has been negligent and has breached its duty of care towards the student. Canadian courts have long recognized that schools owe a duty of care to their students, and have held that the standard of care owed by a school to a student is that of a “reasonably prudent or careful parent.”¹⁵⁸ Under the law of negligence, individuals and agencies, including school boards and Ministries of Education, must take reasonable steps to counter foreseeable risks of injury to those to whom a duty of care is owed.¹⁵⁹ Comprehensive policies for dealing with discrimination, harassment and abusive behaviour, and effective enforcement of those policies, are necessary in order to meet this standard of care. If a student could show that their school breached the standard of care and that they suffered injury or harm as a result, they could make a successful claim for damages from the school on the basis that the school had been negligent.

Schools also have an obligation to maintain a positive and non-discriminatory environment in which students can learn and flourish. In *Ross v New Brunswick School District 15*, the Court highlighted the important role school boards play in ensuring and maintaining the school as a safe environment in which to learn:

*A school is a communication center for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must therefore be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it.*¹⁶⁰

Mr. Ross was a teacher who, during his off-duty time, published and distributed documents, letters and pamphlets that contained racist and discriminatory comments against Jews. The Board of Inquiry found that Mr. Ross’s off-duty comments denigrated the faith and belief of Jews and that the School District was in breach of New Brunswick’s *Human Rights Act* because it had failed to discipline Mr. Ross in a meaningful way. By an almost indifferent response to the complaints and by continuing his employment, the School Board effectively silently condoned Mr. Ross’s out-of-school activities and writings. The Supreme Court of Canada upheld the Board of Inquiry decision.

Following *Ross*, the BC Court of Appeal found in *Jubran v North Vancouver School District* that the North Vancouver School District was liable under the BC *Human Rights Code* for

158 *Myers (Next friend of) v Peel County Board of Education*, [1981] 2 SCR 21, 123 DLR (3d) 1.

159 Report of the Nova Scotia Task Force on Bullying and Cyberbullying, “Respectful and Responsible Relationships: There’s no app for that” (29 February 2012) at 53 [MacKay Report].

160 [1996] 1 SCR 825 at para 42.

failing to take proper preventive measures and engage in school-wide education regarding discriminatory bullying on the basis of sexual orientation.¹⁶¹ Schools have a duty to maintain a non-discriminatory environment, the Court said, and to ensure that students are not subjected to discriminatory harassment. That environment is mandated by the special position educational institutions occupy in fostering the values of our society and by the *Human Rights Code*, which requires those who provide services to the public to do so in a non-discriminatory way, so as to foster the full participation of individuals in the life of British Columbia, in a climate of understanding, mutual respect and equality of dignity and rights.

The decisions in these cases emphasize that creating and maintaining a positive and non-discriminatory learning environment may require that some limits be placed on free speech and privacy rights, even when the behaviour occurs outside the classroom. The cases also impose a positive duty on schools to intervene and to take proactive action. This is particularly significant in cases of cyber misogyny and online harassment and abuse, as this type of behaviour often occurs after school and on weekends, and involves the use of home computers and cell phones. On the basis of *Ross* and *Jubran*, schools have an obligation to take action to address this behaviour as part of their obligation to maintain a positive and non-discriminatory learning environment.

In 2012, the Senate Standing Committee on Human Rights heard from over 60 witnesses regarding a variety of issues related to cyberbullying. The issue of schools' authority to intervene in cases of online harassment and abuse was raised by a number of speakers, who expressed concern that teachers and administrators lack clear guidance on how to respond to issues of cyberbullying, particularly when it is occurring away from school property.¹⁶²

In 2007, Ontario amended its *Education Act* to give schools the authority to discipline students for behaviour that happens off school property if the behaviour has an effect on the "school climate."¹⁶³ At least one Ontario student has been expelled for harassing and threatening another student via Facebook, behaviour which took place off of school premises, on the basis of the school's authority to discipline a student for the effects of off-school activity on the school climate.¹⁶⁴ In 2012, Ontario also passed the *Accepting Schools Act*, which further amends the *Education Act* and requires school boards and schools to prevent and punish bullying and support student efforts to promote understanding and respect for all, such as through the creation of gay-straight alliances and organizations promoting gender equity, anti-racism, and understanding and respect for people with disabilities.¹⁶⁵

161 2005 BCCA 201, (2005) DLR (4th) 294.

162 Cyberbullying Hurts, *supra* note 152 at 63-5.

163 RSO 1990, c E2, ss 300.4, 306, 310. Section 310 provides: A Principal shall suspend a pupil if he or she believes that the pupil has engaged in any of the following activities while at school, at a school-related activity or in other circumstances where engaging in the activity will have an impact on the school climate: 1. Possessing a weapon, including possessing a firearm; 2. Using a weapon to cause or to threaten bodily harm to another person; 3. Committing physical assault on another person that causes bodily harm requiring treatment by a medical practitioner; 4. Committing sexual assault; 5. Trafficking in weapons or in illegal drugs; 6. Committing robbery; 7. Any other activity that, under a policy of the board, is an activity for which a Principal must suspend a pupil, and therefore in accordance with this Part, conduct an investigation to determine whether to recommend to the board that the pupil be expelled.

164 *RT v Durham Catholic District School Board*, 2008 CFSRB 94.

165 SO 2012, c C-5 s 12.

Alberta's proposed Act describes students' responsibilities with respect to bullying: they are to refrain from, report, and not tolerate bullying behaviour, whether or not it occurs within the school building, during school hours, or by electronic means.

Alberta has added a definition of "bullying" to its new *Education Act*, which is expected to become law in 2015, and which some have said provides the strongest response to cyberbullying in the country.¹⁶⁶ The proposed Act defines "bullying" as repeated and hostile or demeaning behaviour in a school community which is intended to cause harm, fear or distress to one or more other individuals in the school community, including psychological harm or harm to an individual's reputation. The Act also describes students' responsibilities with respect to bullying: they are to refrain from, report, and not tolerate bullying behaviour, whether or not it occurs within the school building, during school hours, or by electronic means.

Nova Scotia has also recently amended its legislation to make it clear that principals must take action against students for bullying behaviour that negatively affects their schools, even when the incidents occur off the school grounds and after school hours.¹⁶⁷

RECOMMENDATION 18: Amend BC's *Education Act* to create a legislated duty on principals, vice-principals and teachers to take disciplinary action in cases of harassing, abusive, and misogynist behaviour, whether it occurs on or off school property or before, during or after school hours, when such behaviour has a negative impact on the maintenance of a positive school climate and students' ability to feel safe and to learn at their school.

In many ways, BC lags far behind other provinces in terms of protecting students' right to a safe learning environment free from discrimination. In the fall of 2007, the BC *School Act* was amended making it mandatory for boards of education to establish codes of conduct in accordance with provincial standards, and to ensure that schools within their school district implement the codes.¹⁶⁸ The provincial standards require that the codes of conduct address specific forms of discrimination, including discrimination on the basis of sex and sexual orientation. However, only 17 of the province's 60 school districts have complied with this directive and created the requisite code of conduct.¹⁶⁹ Only half of BC's school districts have policies in place for addressing homophobia and discrimination against LGBTQ students,¹⁷⁰ and individual school boards continue to fight against hostile parent groups to have anti-discrimination measures approved.¹⁷¹

Moreover, the Ministerial Order creating the provincial standards for these codes of conduct¹⁷² is insufficient to ensure that all students are protected. Boards are directed to include a statement in their code of conduct addressing the prohibited grounds of discrimination set out in the BC *Human Rights Code* in respect of discriminatory publications and discrimina-

166 Teresa Haykowsky, "Legal responses to cyberbullying: The 'Unsupervised Public Playground'" *lawnow.org* (1 July 2013), www.lawnow.org/legal-responses-to-cyberbullying/#sthash.bSqHzlMS.dpuf.

167 *Education Act*, SNS 1995-96, c 1 s 122.

168 RSBC 1996, c 412 s 85(1.1).

169 Kate Webb, "Anti-homophobic bullying policies linked to drop in teen binge drinking," *Metro News* (15 August 2013), <http://metronews.ca/news/vancouver/768155/anti-homophobic-bullying-policies-linked-to-drop-in-teen-binge-drinking>.

170 Natasha Barsotti, "Half of BC's school districts now address homophobia" *Xtra* (24 April 2014), <http://dailyxtra.com/vancouver/news/half-bc%E2%80%99s-school-districts-now-address-homophobia>.

171 "Schools' gender identity policy sparks debate in Vancouver" *CBC News* (14 May 2014), www.cbc.ca/news/canada/british-columbia/schools-gender-identity-policy-sparks-debate-in-vancouver-1.2643554.

172 Ministerial Order (M276/07): *Provincial Standards for Codes of Conduct Order* (2007).

tion in accommodation, service and facility in the school environment.¹⁷³ However, the BC *Human Rights Code* does not name “gender identity” as a prohibited ground of discrimination. A Bill proposed in 2011 that would have added gender identity and gender expression to the list of prohibited grounds has yet to become law. This means that transgender communities are not explicitly protected by BC’s human rights law, and the government does not require schools’ codes of conduct to identify transgender students as a group protected from discrimination.

According to EGale Canada, a national charity promoting LGBTQ rights, generic safe school policies that do not include specific measures on homophobia are not effective in improving the school climate for LGBTQ students.¹⁷⁴ LGBTQ students from schools with anti-homophobia policies reported significantly fewer incidents of physical and verbal harassment due to their sexual orientation: 80 per cent of LGBTQ students from schools with anti-homophobia policies reported never having been physically harassed versus only 67 per cent of LGBTQ students from schools without anti-homophobia policies.

As West Coast LEAF has recommended previously,¹⁷⁵ government must take urgent action to ensure that every school district in the province has effective measures in place to address homophobic and transphobic bullying and harassment in BC schools.

RECOMMENDATION 19: The BC government should place a six-month deadline for all remaining school districts to comply with the *School Act*’s requirement to develop a code of conduct that addresses bullying and discrimination, including discrimination on the basis of sex, sexual orientation, gender identity and gender expression.

RECOMMENDATION 20: The BC government should amend the *Human Rights Code* to offer explicit protection to transgender individuals by adding “gender identity and gender expression” to the list of prohibited grounds of discrimination in all of the Code’s sections.

In 2012, the BC government launched its ERASE (Expect Respect and a Safe Education) Bullying Strategy, a ten-point strategy that seeks to address bullying and other harmful behaviours. The elements of the plan include a five-year, multi-level training program for educators and community partners to help them proactively identify and address threats; online tools, including a Smartphone app, for kids to report bullying anonymously; dedicated safe school co-ordinators in every school district; provincial guidelines for threat assessments; online resources for parents; and focusing one of the existing six provincial teacher professional development days on anti-bullying. These measures are important and welcome. However, the strategy fails to account for the ways in which bullying targets and disproportionately impacts particularly marginalized groups, and the ways in which sexism, homophobia, transphobia, racism, classism and ableism, among other forms of discrimination, drive much of what gets called “cyberbullying.” Addressing these underlying forms of

173 *Ibid*, cl 6.

174 EGale Canada Human Rights Trust, “Every class in every school,” <http://egale.ca/every-class/>.

175 See “West Coast LEAF calls on Christy Clark to implement a province-wide anti-homophobic bullying policy for BC schools” <http://westcoastleaf.org/index.php?pageID=193&parentid=29>.

One way of promoting a culture of respect, acceptance and ethical behaviour in schools is for schools, school boards and education ministries to make sure that human rights and non-discrimination are an essential part of school curricula throughout a child's education.

discrimination is essential to creating a respectful and safe educational experience for all students.

One way of promoting a culture of respect, acceptance and ethical behaviour in schools is for schools, school boards and education ministries to make sure that human rights and non-discrimination are an essential part of school curricula throughout a child's education. In addition, education about good "digital citizenship," a concept encompassing "the various moral and ethical responsibilities we all have, both as members of our communities and as global citizens engaging with each other through technology"¹⁷⁶ is also crucial.

The Senate Committee on Human Rights heard many concerns expressed over the fact that positive social behaviour and values are not sufficiently taught in Canadian schools.¹⁷⁷ For instance, Alisha Virmani, a youth leader for the Canadian Red Cross, said:

When I was in elementary school, there was not a lot being taught, as part of the traditional education curriculum, in terms of compassion and normal social skills. A lot of the skills are assumed for children to develop, and it is assumed that these skills are taught by their parents. Much of the time there are missing links there and the actual education for children is not put in place.

Many witnesses stressed that teaching these social skills and fostering a respect for human rights and the values of digital citizenship is a key element in addressing cyberbullying. Christian Whalen, the Acting Child and Youth Advocate from the Office of the Ombudsman of New Brunswick, felt that "creating a general culture around children's rights is not an easy thing to do, but it is probably the best way to respond to the breakdown of harmonious and responsible relationships which others have described."¹⁷⁸

Articles 28 and 29 of the UN *Convention on the Rights of the Child* address a child's right to education and explicitly state that this education shall be directed to, among other things: "[t]he development of respect for human rights and fundamental freedoms," as well as "[t]he preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples." If Canada is to fully meet its obligations under the *Convention*, then those responsible for education will need to account for how they are teaching respect for human rights and digital citizenship.¹⁷⁹

RECOMMENDATION 21: The provincial government must place the promotion of human rights education and digital citizenship at the centre of its initiatives to address cyberbullying, and include these subjects in the prescribed curriculum for all BC schools.

¹⁷⁶ *Silenced Citizens*, supra note 154 at 60.

¹⁷⁷ *Cyberbullying Hurts*, supra note 152 at 60-2.

¹⁷⁸ *Silenced Citizens*, supra note 154 at 60.

¹⁷⁹ *Ibid* at 90.

ONLINE SEXUAL EXPLOITATION OF CHILDREN AND YOUTH

I met this guy online. He's a bit older — I'm 16, he's 24. We chatted and Skyped and he was really nice to me — he told me I'm beautiful and made me feel really special. One time when we were chatting online, he asked me to take my shirt off and I did... I felt a bit weird about it, but he was so nice and complimentary and he made me feel good. But now he wants me to do more, and he's getting more insistent, and saying things like, if I don't take off my clothes and do, like, a performance for him, he's going to put my topless photo up online. I don't know what to do.

BC RCMP were alerted at least five times over the course of nearly two years about the sexual extortion of Amanda Todd, but apparently little was done.

THIS SCENARIO IS SIMILAR to the ordeal suffered by Amanda Todd, a BC teen who committed suicide after enduring two years of extortion and blackmail, allegedly at the hands of a serial sexual predator operating from the Netherlands.¹⁸⁰ She was targeted after she flashed a group by webcam while on a live-streaming chat site. The perpetrator captured a screen shot of her topless and used it to repeatedly try to blackmail her into exposing herself again via webcam. The image was also posted to an internet pornography site and sent to her Facebook friends. BC RCMP were alerted at least five times over the course of nearly two years about the sexual extortion, but apparently little was done.¹⁸¹ "I would highly recommend that Amanda close all her Facebook and email accounts at this time," a constable wrote to the then 14-year-old's mother after she brought the fourth extortion attempt, made via Facebook, to police attention. "If Amanda does not stay off the internet and/or take steps

180 Andrew Nguyen, "Amanda Todd: Man arrested in Netherlands in Canadian's online bullying" *Toronto Star* (17 April 2014), www.thestar.com/news/gta/2014/04/17/amanda_todd_man_arrested_in_netherlands_in_connection_with_canadians_online_bullying.html.

181 "Halifax teen charged with extortion over Facebook photo threats" *CBC News* (15 November 2103), www.cbc.ca/news/canada/nova-scotia/halifax-teen-charged-with-extortion-over-facebook-photo-threats-1.2428384.

to protect herself online ... there is only so much we as the police can do.”¹⁸² Although Ms. Todd suggested that police could try “baiting” the predator, a strategy used successfully by the Ontario Provincial Police’s integrated child exploitation unit in which police assume the victim’s online accounts in an attempt to identify and locate the perpetrator, this strategy was never pursued in Amanda’s case.

Canada implemented a National Strategy for the Protection of Children from Sexual Exploitation on the Internet in May 2004, and it was renewed in February 2009.¹⁸³ However, Amanda’s case demonstrates that best practices may not be adequately shared or implemented across jurisdictions, and the RCMP’s capacity to investigate and track down internet predators is not be as robust as it could be.

RECOMMENDATION 22: The Government of Canada should continue to improve its national policing strategy in cases of online sexual exploitation of youth through co-ordination, oversight, evaluation and training to ensure that best practices, information, and resources are shared and implemented.

Cybertip.ca is a national tipline for reporting online sexual exploitation of youth. The service collects and analyzes tips received by the public regarding the online sexual exploitation of children and works to prevent and provide public education on the topic of online child sexual exploitation.

Online child sexual exploitation includes child pornography, luring, child prostitution, child sex tourism and child trafficking. The number of online child sexual exploitation reports received by Cybertip.ca has increased substantially from 179 reports in 2002/2003 to 7,913 reports in 2009/2010.

Between September 2002 and June 2010, Cybertip.ca received 39,783 reports of online child sexual exploitation. Child pornography accounted for 90.2% of online child sexual exploitation reports received by Cybertip.ca between September 2002 and June 2010. Child luring accounted for 7.4% and child prostitution accounted for 1.3% of reports received by Cybertip.ca during this time period.

Websites were the most common type of technology used in online child sexual exploitation reports received by Cybertip.ca, accounting for 80.5% of all technology types used in the perpetration of child sexual exploitation between September 2002 and June 2010. Other common types of technology used in the commission of online child sexual exploitation included email and text communications.

Sexual exploitation of children is a gross violation of their right to respect for their human dignity and physical and mental integrity. The *Convention on the Rights of the Child* affirms the status of all children as equal holders of human rights and empowered actors in the realization of their rights, and it includes the right to protection from all forms of violence and exploitation, including sexual exploitation. Fulfillment of states’ human rights obligations

182 “Amanda Todd suicide: RCMP repeatedly told of blackmailer’s attempts” *CBC News* (15 November 2013), www.cbc.ca/news/canada/amanda-todd-suicide-rcmp-repeatedly-told-of-blackmailer-s-attempts-1.2427097.

183 CyberTip.ca, “Canada’s National Strategy” https://www.cybertip.ca/app/en/contact/partners-national_strategy.

under international law requires effective protection for all children from all forms of sexual exploitation.¹⁸⁴

Using and Strengthening Existing Laws to Protect Children and Teens from Sexual Exploitation

CHILD PORNOGRAPHY (S. 163.1)

In Chapter 2 on youth “sexting,” we discussed the application of Canada’s child pornography provisions to instances of sexting — the sharing of sexual images between youth via cell phone or the Internet — and concluded that application of the child pornography laws was not appropriate in those circumstances. The intention of the child pornography laws is to catch predators and child abusers who sexually exploit children and adolescents, not to deal with the widespread consensual and non-consensual sharing of images among youth. In Chapter 2, we argue that youth under 18 should not be subjected to the sex offender registration and mandatory imprisonment associated with child pornography offences, and that youth who consensually share intimate images of themselves with their intimate partner(s) should not be caught by the criminal law at all. In the context of online sexual exploitation and extortion of youth, however, the application of the criminal child pornography laws is entirely appropriate.

The widespread use of the Internet has greatly facilitated the sharing and distribution of child pornography. The Internet is being used as a medium to send images and video around the world of actual children being exploited and abused.¹⁸⁵ It is not just the creation and production of child pornography that is harmful to children; its possession and consumption are harmful, too. The Supreme Court of Canada in *R v Sharpe* described five ways in which harm might arise from the possession of abusive images:¹⁸⁶

1. Child pornography promotes cognitive distortions such that it may normalize sexual activity with children in the mind of the possessor, weakening inhibitions and potentially leading to actual abuse.
2. Child pornography fuels fantasies that incite offenders.
3. Prohibiting the possession of child pornography assists law enforcement efforts to reduce the production, distribution and use that result in direct harm to children.
4. There is ‘clear and uncontradicted’ evidence that child pornography is used for grooming and seducing victims.
5. To the extent that most child pornography is produced using real children, the viewer is in a sense an accessory after the fact to an act of child abuse by providing a market for it.

The intention of the child pornography laws is to catch predators and child abusers who sexually exploit children and adolescents, not to deal with the widespread consensual and non-consensual sharing of images among youth.

184 Working Group of Canadian Privacy Commissioners and Child and Youth Advocates, “There ought to be a law: Protecting Children’s Online Privacy in the 21st Century” (19 November 2013), www.gnb.ca/0073/PDF/Children%27sOnlinePrivacy-e.pdf [Privacy Commissioners’ Report].

185 *Ibid* at 10.

186 2001 SCC 2 at paras 87-92.

An Act Respecting the Mandatory Reporting of Internet Child Pornography by Persons who Provide an Internet Service makes it mandatory for those who supply an Internet service to report online child pornography. Under this legislation, those who provide Internet services to the public are required to:

- Report tips they receive regarding websites where child pornography may be publicly available to the Canadian Centre for Child Protection (through its Cybertip.ca program); and
- Notify police and safeguard evidence if they believe that a child pornography offence has been committed using an Internet service that they provide.

Suppliers of Internet services are not required to send personal subscriber information under this statute.

A number of Canadian provinces have amended their child protection legislation to make it mandatory for a person who has encountered child pornography to report it. Manitoba was the first province to pass such an amendment;¹⁸⁷ Nova Scotia has followed suit,¹⁸⁸ and Ontario has also passed similar legislation, though it is not yet in force.¹⁸⁹ BC's *Child, Family and Community Services Act (CFCSA)* does not create an express duty to report all instances of child pornography, but it does impose a duty to report a child in need of protection.¹⁹⁰ One reason a child may be in need of protection is if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child.¹⁹¹

It is essential that children who are being sexually abused or exploited are brought to the attention of the Ministry of Children and Families and are protected from further harm, as is currently provided for in the *CFCSA*. However, we are concerned that because of the way child pornography is currently defined to include images that youth create themselves, a mandatory reporting provision risks targeting youth involved in consensually sharing nude or sexually explicit photos of themselves with other youth. We recommend an amendment to the *CFCSA* to provide for mandatory reporting of child pornography that meets the definition we propose in Chapter 2, Recommendation 14, which excludes images that youth have created and shared themselves.

RECOMMENDATION 23: Amend the *Child, Family and Community Services Act* to create a duty to report instances of child pornography to the Ministry of Children and Family Development in cases where it is reasonable to believe that the child did not consent to the creation or distribution of the image or recording.

187 *The Child and Family Services Act*, SM 1985-86, c 8.

188 *Child Pornography Reporting Act*, SNS 2008, c 35.

189 *An Act to Amend the Child and Family Services Act to Protect Ontario's Children*. Assented to December 10, 2008, www.e-laws.gov.on.ca/html/source/statutes/english/2008/elaws_src_s08021_e.htm.

190 *Ibid* at s 14.

191 *Ibid* at s 13(1)(c).

Child sexual abusers and predators have greater and easier access to children than ever before through the expansion of online communication tools including email, instant messaging, online games with interactive chat functions and social networking sites, to name a few. Based on data gathered in youth and adult criminal courts, the number of cases and charges of child luring processed by youth and adult criminal courts has increased over the last several years. In 2003/2004, there were 9 cases of child luring processed by youth and adult criminal courts, with a total of 26 charges. In 2008/2009, there were 50 cases of child luring with a total of 194 charges.¹⁹² Based on findings from police-reported data, there were 464 incidents of child luring reported to the police between 2006 and 2007. Approximately 60% of individuals accused of child luring in 2006 and 2007 were males aged 18 to 34.

People who engage in online child luring take advantage of children sharing their personal information on the Internet. Using personal information that a child has posted online, lurers forge a “bond” with the child and gradually steer conversation topics to those of a sexual nature, which may include sharing online pornographic material, as part of the grooming process.¹⁹³ These conversations can quickly escalate to the lurer pressuring the child to meet, with the express or intended aim of engaging in sexual activity with the child. In 2002, the *Criminal Code* was amended to include new offenses that would help combat the luring of youth under the age of 18 by making it illegal to communicate with children over the Internet for the purpose of committing a sexual offence.

Section 172.1 of the *Criminal Code* directly responds to the threat posed by online luring of children and youth. The section prohibits the use of computers to communicate with underage persons for the purpose of facilitating the commission of specified sexual offences. As the Supreme Court of Canada puts it, the legislation was “adopted by Parliament to shut that door on predatory adults who, generally for a sexual purpose, troll the Internet for vulnerable children and adolescents. Shielded by the anonymity of an assumed online name and profile, they aspire to gain the trust of their targeted victims through computer ‘chats’ — and then to tempt or entice them into sexual activity, over the Internet or, still worse, in person.”¹⁹⁴

The Ontario Court of Appeal described the purpose of s. 172.1 as follows:

The language of s. 172.1 leaves no doubt that it was enacted to protect children against the very specific danger posed by certain kinds of communications via computer systems. The Internet is a medium in which adults can engage in anonymous, low visibility and repeated contact with potentially vulnerable children. The Internet can be a fertile breeding ground for the grooming and preparation associated with the sexual exploitation of children by adults. One author has described the danger in these terms:

Using personal information that a child has posted online, lurers forge a “bond” with the child and gradually steer conversation topics to those of a sexual nature.

192 Government of Canada, “Cyber-related crime targeted at children and youth: Online child sexual exploitation” www.victimsworld.gc.ca/res/r510.html.

193 Privacy Commissioners’ Report, *supra* note 184 at 10.

194 *R v Legare*, 2009 SCC 56 at para 2.

For those inclined to use computers as a tool for the achievement of criminal ends, the Internet provides a vast, rapid and inexpensive way to commit, attempt to commit, counsel or facilitate the commission of unlawful acts. The Internet's one[to]many broadcast capability allows offenders to cast their nets widely. It also allows these nets to be cast anonymously or through misrepresentation as to the communicator's true identity. Too often, these nets ensnare, as they're designed to, the most vulnerable members of our community — children and youth. ...

*Cyberspace also provides abuseintend adults with unprecedented opportunities for interacting with children that would almost certainly be blocked in the physical world. The rapid development and convergence of new technologies will only serve to compound the problem. Children are the frontrunners in the use of new technologies and in the exploration of social life within virtual settings.*¹⁹⁵

As these judicial statements make clear, the courts take very seriously the sexual exploitation of vulnerable youth by internet predators, and understand the unique and potentially dangerous nature of the Internet in light of the access and opportunity it provides to adults intent on committing abuse. As Mr. Justice Fish put it in delivering the SCC's judgment in an internet luring case in 2009, "The Internet is an open door to knowledge, entertainment, communication — *and exploitation*."¹⁹⁶

The essence of the offence is the communication with a young person via computer for the purpose of facilitating the commission of one of the secondary offences listed in the section, all of which involve the sexual exploitation of youth. It is aimed at preparatory conduct that would not otherwise qualify as an attempt to commit one of the underlying offences. It criminalizes conduct that *precedes* the commission of the sexual offences to which it refers, and precedes even an attempt to commit them. Nor must the offender meet or intend to meet the victim with a view to committing any of the specified secondary offences. According to the Supreme Court of Canada, "[t]his is in keeping with Parliament's objective to close the cyberspace door before the predator gets in to prey."¹⁹⁷

In the context of s. 172.1(1), "facilitating" the commission of one of the secondary offences listed in the section includes helping to bring it about and making it easier or more probable — for example, by "luring" or "grooming" young persons to commit or participate in the prohibited conduct; by reducing their inhibitions; or by prurient discourse that exploits a young person's curiosity, immaturity or precocious sexuality. As Hill J. explained in *R v Pengelley*:¹⁹⁸

... computer communications may serve to sexualize or groom or trick a child toward being receptive to a sexual encounter, to cultivate a relationship of trust, or to undertake a process of relinquishing inhibitions, all with a view to advancing a plan or desire to physical sexual exploitation of a young person.

¹⁹⁵ *R v Alicandro*, 2009 ONCA 133 at para 36.

¹⁹⁶ *Legare*, *supra* note 194 at para 1.

¹⁹⁷ *Ibid* at para 25.

¹⁹⁸ [2009] OJ No 1682 (QL) (SCJ) at para 96.

Importantly, sexually explicit language is not an essential element of the offences created by s. 172.1. Its focus is on the intention of the accused at the time of the communication by computer. Sexually explicit comments may suffice to establish the criminal purpose of the accused. But the courts have recognized that those who use their computers to lure children for sexual purposes often groom them online by first gaining their trust through conversations about their home life, their personal interests or other innocuous topics.

Internet luring of children is punishable as either a summary or indictable offence depending on the severity of the behaviour, and attracts a minimum sentence of imprisonment for 90 days.

It is no defence that the accused believed that the victim was over the age of consent unless the accused took reasonable steps to ascertain the victim's age. Evidence that the young person was represented to the accused as under the relevant age is deemed to be proof, in the absence of evidence to the contrary, that the accused believed that the person was under that age.

SEXUAL EXPLOITATION (SS. 151-153)

Sexual exploitation laws are different for youth under 16 and for youth aged 16 and 17. Under s. 153, it is a criminal offence for a person to touch, for a sexual purpose, the body of a young person, when the accused is in a position of trust or authority towards the young person, is a person with whom the young person is in a relationship of dependency, or is in a relationship with the young person that is exploitative of them. It is also an offence to invite, counsel or incite a young person, for a sexual purpose, to touch the body of any other person, including the accused, or to touch themselves.¹⁹⁹ A "young person" is defined as anyone under the age of 18.

Sexual exploitation of a person under 16 is prohibited by sections 151 and 152 of the *Criminal Code*. These provisions are similar to s. 153, but do not require that the accused be in a relationship of trust, authority, dependency, or which is exploitative of the young person in order for the offence to be made out. No matter what the nature of the relationship, it is an offence to touch someone under the age of 16 for a sexual purpose, and to invite, counsel or incite someone under 16, for a sexual purpose, to touch the body of any other person, including the accused, or to touch themselves. There are exceptions to this rule when the people involved are close in age. Youth aged 12 and 13 can give consent to sexual touching or an invitation to sexual touching when the person is less than two years older than them, and youth aged 14 or 15 can give consent when the person is less than 5 years older than them, provided that the person is not in a position of trust or authority and is not a person with whom they are in a relationship of dependency or exploitation.²⁰⁰

A judge may infer that an accused is in a relationship with a young person that is exploitative from the nature and circumstances of the relationship, including the age of the young

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¹⁹⁹ *Criminal Code* s 153(1)(b). It is also a crime for such a person to himself touch a young person for a sexual purpose (s. 153(1)(a)).

²⁰⁰ *Ibid* s 150.1.

person; the age difference between the accused and the young person; the evolution of the relationship; and the degree of control or influence by the accused over the young person.²⁰¹

It is no defence for the accused to say that he was mistaken about the age of the victim unless he took all reasonable steps to ascertain her age.

The invited touching need not take place for the offence to be made out; the invitation or incitement is sufficient to establish the offence. The offence is focused solely on “touching,” and an invitation to someone to expose their breasts, genitals, or anal region for a sexual purpose is not prohibited by the section. The offence was conceived of long before webcams, web-chats, and other means of communication existed that could give sexual predators access to vulnerable youth for sexually exploitative purposes. Given that the provision is intended to protect young people from sexual exploitation, the provision should also prohibit invitations and incitement to perform this type of sexually explicit behaviour in the context of an exploitative relationship involving significant age difference and power imbalance between the parties.

RECOMMENDATION 24: Amend sections 152 and 153 of the *Criminal Code* to include inviting, counselling or inciting, for a sexual purpose, a young person (a person under 16 for the purposes of s. 152, and a person aged 16 or 17 for the purposes of s. 153) to expose their breasts, genitals, or anal region.

MAKING SEXUALLY EXPLICIT MATERIAL AVAILABLE TO A CHILD (S. 171.1)

Another potentially relevant section of the *Criminal Code* in cases involving internet luring and online sexual exploitation of youth is s. 171.1, which makes it an offence to transmit, make available, distribute or sell sexually explicit material to an underage youth for the purpose of facilitating the commission of a sexual offence. Sexually explicit materials include images and videos depicting nudity or explicit sexual activity, as well as written material or audio recordings whose dominant characteristic is the description, presentation or representation, for a sexual purpose, of explicit sexual activity.

PROTECTING YOUTH IN THE JUSTICE SYSTEM

In its report entitled *The Sexual Exploitation of Children in Canada: the Need for National Action*,²⁰² the Senate Standing Committee on Human Rights noted how intimidating court proceedings can be for children, in particular when they provide testimony about abuse or other elements of their private life. While there are several options available to make it easier for children to testify in court, such as allowing a judge to exclude members of the courtroom or impose publication bans on the identity of victims and witnesses, or by allowing a victim or witness to testify behind a screen or by videotape, the Committee recommended

²⁰¹ *Ibid* s 153(1.2).

²⁰² Senate of Canada, Standing Senate Committee on Human Rights, *The Sexual Exploitation of Children in Canada: The Need for National Action* (November 2011), www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep03nov11-e.pdf.

that “that the Government of Canada improve the criminal justice system so that it better recognizes and accommodates the needs of child victims of sexual exploitation before, during, and after court proceedings.”²⁰³ The Committee also recommended investment in adequate victim services for children to help them throughout their experiences with the criminal prosecution process or any other court proceedings.

In *AB v Bragg*,²⁰⁴ the Supreme Court of Canada considered a young complainant’s right to keep her identity private while pursuing a defamation action against someone who had created a fake and sexually abusive Facebook profile using her image and a variation of her name, overturning decisions of the trial court and Court of Appeal. The Court granted her request to proceed using a pseudonym and held that only non-identifying information related to the case could be publicized by the media. The Court found that AB’s privacy interest was tied to her age and to the need to protect youth from the “relentlessly intrusive humiliation of online sexualized bullying.”²⁰⁵ Moreover, the Court recognized that the likelihood of victims of online harassment and abuse reporting and seeking protection from the justice system will be “greatly enhanced if the protection can be sought anonymously.”²⁰⁶ However, the plaintiff had to fight this case all the way to the Supreme Court of Canada, an expensive and time-consuming process. It is hoped that this important precedent from the Court will ensure that future victims of sexualized harassment will not have to take such extreme measures to maintain their privacy, dignity and rights.

RECOMMENDATION 25: Government should engage in consultation with youth, youth advocates and justice system professionals to determine what steps should be taken to promote reporting by youth of online harassment, and to ensure that youth are protected throughout all steps of any court proceeding. These conversations would be facilitated by the office of the Children’s Commissioner as recommended in Recommendation 17.

RECOMMENDATION 26: Government must invest in adequate victim services for children to help them throughout their experiences with the criminal prosecution process or any other court proceedings.

In AB v Bragg, the Supreme Court of Canada considered a young complainant’s right to keep her identity private while pursuing a defamation action against someone who had created a fake and sexually abusive Facebook profile; the Court granted her request to proceed using a pseudonym.

203 See chapter 7.

204 2012 SCC 46.

205 *Ibid* at para 14.

206 *Ibid* at para 25.

CYBERSTALKING

Like its more traditional counterpart, cyberstalking is a tool of intimidation used by abusers to maintain power and control over their victims.

This guy is totally obsessed with me. We went on a few dates and I added him as a friend on Facebook, but now he won't leave me alone. He comments on everything I post and if I mention I'm going out somewhere, he's always there. It's creeping me out.

CYBERSTALKING IS A NEW METHOD FOR AN OLD PROBLEM. It is commonly defined as “threatening behaviour or unwanted advances directed at another using the Internet and other forms of online communications.”²⁰⁷ In practice, it can include monitoring email communications directly or through spyware or keystroke logging hardware; sending messages intended to insult, threaten or harass; disrupting online communications by flooding a victim's online accounts with unwanted messages or by sending a virus; using the victim's online identity to send false messages to others or to purchase goods and services; and using online sites to collect a victim's personal information and whereabouts.²⁰⁸

Like its more traditional counterpart, cyberstalking is a tool of intimidation used by abusers to maintain power and control over their victims. Technology, including social networking sites and global positioning systems, facilitates stalking behaviour by making it easier for perpetrators to keep tabs on the activities and whereabouts of their targets, and to communicate with them repeatedly via email, instant messages, voicemails and texts. Among youth, “digital dating abuse” is a new term being used to describe situations in which one partner in a romantic relationship uses social media and/or other technologies, such as cell phones, to control or harass the other.²⁰⁹ A study conducted by MTV found that more than

207 Canadian Resource Centre for Victims of Crime, (2011) www.crcvc.ca/docs/cyberstalking.pdf.

208 Jordan Fairbairn et al., *Sexual violence and social media: Building a framework for prevention* (Crime Prevention Ottawa, August 2013) at 13.

209 *Ibid* at 14.

half the youth surveyed had experienced abuse through social and digital media, and 76% felt that digital abuse was a serious problem for people their age.²¹⁰

My ex was abusive, controlling and manipulative throughout our marriage. Now that I've left him, he's shifted his controlling and intimidating behaviour to the Internet. He posts rants about what a terrible mother I am on Facebook, and sends me threatening texts about how he's going to get custody of our kids and report me to social services. I've tried to block him online, but he always finds a way to learn where I am and what I'm doing. I want it to stop.

Statistics from the U.S. Justice Department and other sources suggest that 850,000 American adults, mostly women, are targets of cyberstalking each year.²¹¹ Forty per cent of women have experienced dating violence delivered electronically, including harassing text messages and disturbing information about them posted on social media sites. Twenty per cent of online stalkers use social networking to keep tabs on their victims.

Cyberstalking often accompanies the end of a relationship and can be a tool used by abusers to control women after they leave abusive relationships. For women fleeing domestic violence, "feeling safe from an abuser no longer has the same spatial or geographic boundaries that it used to because information and communication technologies enable abusers to contact, track and communicate with women wherever they are, at any time, resulting in the erosion of feelings of safety for women fleeing abuse."²¹² Researchers interviewing women who had left or were attempting to leave abusive relationships found that electronic communications played a significant role in nine out of ten domestic violence situations.²¹³ In addition to tracking through email, text messaging and social media, this study also identified issues with location-based technologies and online data aggregation such as FourSquare, Google Latitude, and Google Buzz. A survey of domestic violence survivors by a UK-based charity found that 48% had been harassed or abused online by their ex-partner after leaving the relationship, and 38% reported online stalking.²¹⁴ The researchers conclude that online harassment and cyberstalking is part of a spectrum of domestic violence and abusive behaviour, and is inextricably linked with real-life physical and psychological violence against women.

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210 A Thin Line.org "MTV-Associated Press Poll Digital Abuse Survey" (2011), www.athinline.org/pdfs/MTV-AP_2011_Research_Study-Exec_Summary.pdf.

211 "Cyberstalking: Trauma even more intense than in-person harassment: Expert" *The Huffington Post* (8 June 2011), www.huffingtonpost.ca/2011/08/06/trauma-from-cyberstalking-more-intense_n_920088.html.

212 Tammy Hand et al., "The Use of Information and Communication Technologies to Coerce and Control in Domestic Violence and Following Separation, Report no. 6" (2009) *Australian Domestic and Family Violence Clearinghouse*.

213 J Dimond et al., "Domestic violence and information communication technologies" (2011) 23 *Interacting with Computers* 413, cited in Fairbairn et al., *supra* note 208 at 17.

214 Alexandra Topping, "Online trolling of women is linked to domestic violence, say campaigners" *Guardian*, (3 September 2013), www.theguardian.com/society/2013/sep/03/online-trolling-women-domestic-violence.

**“When you leave
you think you
have a chance of
a new life without
them, but when
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online it’s like they
are in the room.”**

There are frequent stories in the media of women being tracked, harassed or blackmailed through social media by their ex partners. In a highly publicized Canadian case in 2006, an Alberta man was sentenced to a year in jail after being convicted of criminal harassment for using the Internet to turn his ex-girlfriend’s life upside-down.²¹⁵ Jonathan Barnes, then 32, used Internet keyloggers — a type of surveillance software — and fake email addresses in his harassment campaign, which included hacking into his ex-girlfriend’s cell phone and bank accounts, and sending embarrassing pictures of her to her friends, co-workers and family. He pled guilty to criminal harassment, uttering threats to damage property, and being unlawfully in a dwelling, as well as breaches of no-contact and other bail orders, and was sentenced to 20 months of jail time.²¹⁶

In another example, a September 2013 story in the *Guardian* described how a woman was continually harassed by her abusive ex-partner online.²¹⁷ He monitored her whereabouts on Facebook despite her high privacy settings, created anonymous social media accounts to contact her and her friends and family, and sent messages to her new partner through others. The victim commented on her experience: “When you leave you think you have a chance of a new life without them, but when they contact you online it’s like they are in the room. ... Being bullied online brings it all back — you can heal from a punch in the face, but the mental torture never goes away.”

Local front-line anti-violence workers report similar stories. In a focus group on the subject, staff from Battered Women’s Support Services shared stories of how women were abused by their ex-partners through different types of social media and online platforms.²¹⁸ One woman’s ex-partner constantly created new email addresses in order to continue to send her harassing messages. Another hacked into her Facebook account in order to send messages to her friends and family telling his side of the story of their relationship, while also using his own Facebook account to send harassing messages to her and her contacts. Another woman’s ex-partner was more passive-aggressive. Instead of directly contacting her, the person continually checked her LinkedIn profile, with the knowledge that she would be able to see whenever someone viewed her profile. Then, her ex would go after the same job contracts as her.

Tracking a woman’s whereabouts and communicating with her repeatedly online are often accompanied by other forms of cyber misogyny discussed in this report, including distributing intimate images or threatening to do so, sending threatening and hateful messages, and posting abusive and defamatory content online. This section focuses on the following aspects of cyberstalking: repeated communications, monitoring of whereabouts, and tracking or following someone’s movements.

215 “Cyberstalker sentenced to one year” *CBC News* (16 March 2006), www.cbc.ca/news/canada/cyberstalker-sentenced-to-one-year-1.583770.

216 *R v Barnes*, 2006 ABCA 295 at para 1.

217 Alexandra Topping, “How domestic violence spreads online” *Guardian* (3 September 2013), www.theguardian.com/society/2013/sep/03/domestic-violence-spreads-online-watching.

218 Jessica West, “Cyber-Violence against Women,” Battered Women’s Support Services (May 2014), www.bwss.org/wp-content/uploads/2014/05/CyberVAWReportJessicaWest.pdf.

Using and Strengthening Existing Laws to Address Cyberstalking

Unlike many other jurisdictions, there is no specific offence of cyberstalking in Canada's *Criminal Code* and no legal definition of the problem. However, criminal harassment charges are frequently brought against cyberstalkers for repeatedly communicating with someone using the Internet. While the creation of a separate offence of "cyberstalking" could be useful in terms of naming the problem more clearly and providing notice to potential offenders that such behaviour is criminal, robust enforcement of the Code's existing provisions should also suffice to target this behaviour.

CRIMINAL HARASSMENT (S. 264)

Canadian courts have held that repeated and unwanted communications via email, text message, online chat and voicemail may all constitute criminal harassment.²¹⁹

Section 264(2) defines harassment as (a) repeatedly following someone; (b) repeatedly communicating with someone either directly or through another person; (c) besetting or watching someone's home or workplace; or (d) engaging in threatening conduct towards someone or a member of their family. "Repeatedly" following or communicating with someone means "more than once, but not necessarily more than twice."²²⁰ With respect to besetting (loitering in a manner that is intimidating or antagonizing) or watching someone's home or workplace or engaging in threatening conduct, one instance is sufficient to trigger the provision.

As discussed in more detail in Chapter 1 dealing with "revenge porn," behaviour is criminal under s. 264 when it causes the target to reasonably fear for their physical or psychological safety or the safety of someone they know. The nature of the relationship between the victim and the accused, including any history of violence and power imbalance, are relevant to the question of whether the victim's fear is reasonable.²²¹ Courts have noted that the intimidation caused by harassment is a real form of harm, and unlike with more conventional modes of harassment, the victim of cyberstalking is less able to escape or hide from their tormentor.²²²

The accused must have known that their conduct would harass the complainant, or have been reckless as to whether the complainant was being harassed by the behaviour. Evidence that the accused was told to stop their behaviour will be relevant to the question of whether they knew that the behaviour was harassing; however, the victim does

With respect to besetting (loitering in a manner that is intimidating or antagonizing) or watching someone's home or workplace or engaging in threatening conduct, one instance is sufficient to trigger the provision.

219 *R v Wenc*, 2009 ABPC 126, aff'd 2009 ABCA 328; *R v Greenberg*, 2009 ONCJ 28.

220 *Ohenhen*, [2005] OJ No 4072 (QL).

221 *R v Chaves*, [2007] OJ No 1551 (QL); *R v SB*, [1996] OJ No 1187 (QL) (ONCJ); *R v Di Pucchio*, 2007 ONCJ 643.

222 *R v Wenc*, 2009 ABPC 126 at para 36.

not have to be forceful in rebuffing the accused's attention,²²³ and an accused need not be warned that their conduct is criminal before that conduct actually becomes criminal.²²⁴

In some circumstances, stalking may start with conduct that seems more annoying than dangerous, and the conduct may be legal and even socially acceptable when it's just done once or twice (for example, sending gifts or letters, posting on someone's Facebook page, etc.). But when it's done continually and against someone's wishes, it may become intimidating and cause the victim to fear for their physical or psychological safety. If they feel safe to do so, people feeling harassed or stalked by someone should let the person know that the behaviour is unwelcome and they would like it to stop, or ask another trusted person to do so. If the behaviour persists, the accused can no longer claim that he did not know his behaviour was harassing the complainant. This will be relevant information if the case goes to trial.

HARASSING AND INDECENT TELEPHONE CALLS (SS. 372(2) AND (3))

Subsections 372(2) and (3) of the *Criminal Code* make it an offence to make indecent telephone calls to someone with the intent to alarm or annoy them. It also makes it an offence to make repeated phone calls to someone with an intent to harass them. It is still an offence if the indecent message is left on a person's voicemail.

Harassing or indecent communications made by means other than telephone calls (e.g.: emails, texts, instant messages or social media posts) are not captured by this section. Bill C-13, the *Protecting Canadians from Online Crime Act*, would remove the reference to telephone calls in ss. 372(2) and (3) and replace it with the broader term "a means of telecommunication."²²⁵ This should make it easier to lay charges for offences related to cyber misogyny and cyberstalking, regardless of the transmission method or technology used.

RECOMMENDATION 27: Pass Clause 18 of the proposed *Protecting Canadians from Online Crime Act* (Bill C-13) to criminalize harassing or indecent communications made using any form of telecommunications technology (this recommendation was also made Chapter 1, Recommendation 5).

INVASION OF PRIVACY (SS. 184-193)

Part VI of the *Criminal Code* is entitled "Invasion of Privacy," and section 184 prohibits interception by a third party of private communications conducted in person or via telecommunication. This would capture electronic bugging of a physical space or wiretapping of telecommunications. It is an offence to use or disclose an intercepted private communication (s. 193). The courts have said that the purpose of s. 193 is "to criminalize actions of a person who in some improper way gains access to private communications and then discloses

223 *R v Ryback* (1996), 105 CCC (3d) 240 at para 41 (BCCA), leave to appeal refused, [1996] SCCA No 135 (QL).

224 *R v Rehak* (1998) 125 Man R (2d) 181 (QB).

225 Bill C-13, *supra* note 14 at cl 18.

those communications. It would, for example, make it a criminal offence for a person to ‘hack’ into someone’s phone or computer and intercept their communications if they then disclosed those communications.”²²⁶

There are a number of smartphone applications on the market that allow abusers to monitor victims’ online communications, text messages, and even their geographic location.²²⁷ In the US, legislation has been recently proposed to tackle the creators and marketers of these “stalking apps” and to put an end to their availability.²²⁸ Canada should follow suit to ensure these opportunities to stalk and monitor online activities are not available to abusers.

RECOMMENDATION 28: Enact legislation banning the marketing and sale of “stalking apps” that allow for the monitoring of people’s online activities, communications, and geographic location.

RESTRAINING ORDERS/PROTECTION ORDERS AND PEACE BONDS

A restraining order, now referred to in BC as a protection order, is a court order that seeks to protect someone by prohibiting another person from doing certain things. In BC, protection orders are granted under the authority of the *Family Law Act*²²⁹, and are available to someone who can establish that their safety or security is at risk from family violence carried out by a family member. For people with very low income, a legal aid lawyer may be able to assist with an application for a protection order.²³⁰

A protection order can prohibit all sorts of behaviour, including online harassment and cyberstalking.

Family violence can include physical, sexual, psychological or emotional abuse, including intimidation, harassment, coercion or threats in respect of persons, pets or property. It can also include stalking, intentional damage to property, and unreasonable restrictions on a family member’s financial or personal autonomy.²³¹ To obtain a protection order, the applicant must prove on a balance of probabilities that one or more of these forms of family violence is likely to occur, and that their safety and security is likely at risk.²³²

A protection order can prohibit all sorts of behaviour, including online harassment and cyberstalking; communicating with the victim; being at or near their home, school or place of employment; following them; or possessing a weapon, as well as any other terms the court considers necessary in order to protect the victim. Unless otherwise ordered, protection orders expire one year after they are made.

In deciding whether to issue a protection order, the court must consider a number of risk factors, including the history of family violence; whether the violence is repetitive or

²²⁶ *The Globe and Mail et al v Her Majesty the Queen*, 2013 ONSC 6836.

²²⁷ See e.g. “HelloSpy,” www.hellospy.com.

²²⁸ See National Network to end Domestic Violence, “Senate bill would ban staking apps and save women’s lives” (4 June 2014), <http://nnedv.org/news/4296-senate-bill-would-ban-stalking-apps-and-save-women-s-lives.html>.

²²⁹ SBC 2011, c 25, s 183.

²³⁰ Legal Services Society, “Financial Eligibility” (July 2013), www.lss.bc.ca/assets/media/factSheets/Financial_eligibility.pdf.

²³¹ *Family Law Act*, SBC 2011 c 25 s 2.

²³² Note that anyone can apply for a protection order on behalf of a person who is at risk of family violence; the court can also issue a protection order on its own volition.

escalating; whether it exhibits a pattern of coercive and controlling behaviour; the nature and circumstances of the relationship between the victim and the offender (e.g.: a recent separation or intention to separate); increased risk to the victim as a result of the offender's mental health or substance use issues; and the particular vulnerabilities of the victim, including pregnancy, age, health or economic dependence.²³³

Breach of a protection order is a criminal offence and can be enforced by police under s. 127 of the *Criminal Code*. Section 188(2) of the *Family Law Act* provides:

A police officer having reasonable and probable grounds to believe that a person has contravened a term of [a protection order] may

- (a) take action to enforce the order, whether or not there is proof that the order has been served on the person, and
- (b) if necessary for the purpose of paragraph (a), use reasonable force.

Police failure to enforce a protection order may serve to embolden an abuser, and he may escalate his behaviour if he believes there will be no consequences for doing so.

Because the police have discretion as to whether to enforce a protection order (the officer “may take action to enforce the order”), sometimes police do not act to enforce the orders. This can be very problematic. Police failure to enforce a protection order may serve to embolden an abuser, and he may escalate his behaviour if he believes there will be no consequences for doing so. Anecdotal reports shared by family law lawyers suggest that judges and police officers often do not take harassment via text messages and social media seriously, and instead advise women simply to “stay off the Internet.”²³⁴ Importantly, however, there have been cases where harassing and inappropriate communications via text message and email have contributed to a finding that family violence is occurring.²³⁵ While the dynamics of violence are complex and it is possible that situations may arise in which a victim does not want a particular term of a protection order to be strictly enforced (e.g., a no-contact clause in a situation in which some communication is necessary in order to make arrangements or decisions involving a child), in most cases, when a breach of a protection order is brought to the attention of police, the protection order should be enforced.

RECOMMENDATION 29: Amend s. 188(2) of the *Family Law Act* to provide that a police officer *shall* take action to enforce a term of a protection order where there are reasonable and probable grounds to believe that a person has contravened it, unless there are compelling reasons why the person whom the order is intended to protect does not want the term enforced.

Importantly, protection orders are only available against a “family member,” defined as someone you are or were married to or living with, or who is the parent or guardian of your child.²³⁶ Protection orders are not available in situations of dating violence, for example, regardless of the victim's legitimate safety concerns. This is a significant shortcoming in the law.

²³³ *Family Law Act*, *supra* note 231 s 184.

²³⁴ Personal communication, on file with the author.

²³⁵ See *DJF v VJF*, 2013 BCSC 2019 and *JCP v JB*, 2013 BCPC 297.

²³⁶ *Family Law Act*, *supra* note 231 s 2.

RECOMMENDATION 30: Amend the definition of “family member” in the *Family Law Act*, for the purpose of applications for protection orders, to include a person with whom the applicant has had a dating relationship.

Unlike a protection order issued under the *Family Law Act*, someone who feels threatened or at risk can go to police to seek a peace bond for protection from anyone, including someone they have had only a dating relationship with but have never lived with.²³⁷ Police will investigate the situation and, if they deem it to be warranted, will forward the case to Crown counsel. The accused may agree to stay away from the victim, but if they do not cooperate, they will be required to attend a hearing and may be ordered to stay away. A peace bond expires after one year. Breach of a peace bond is a criminal offence.

While obtaining a peace bond can be a useful way for many victims of online harassment, stalking and threats to put a stop to the behaviour, for individuals wary of approaching police for assistance, it will provide little assistance. Indigenous women in particular experience barriers to their ability to report violence against them to law enforcement. A 2013 Human Rights Watch report documents how Indigenous women are both under-protected by and face direct abuse by police.²³⁸ This abuse, for some women, has defined their relationship with law enforcement, discouraging them from reporting any violence that they face. The Missing Women’s Commission of Inquiry also exposed the ways in which Indigenous women have often not been adequately protected by police, finding that “systemic bias by the police” contributed to the deaths and disappearances of dozens of women from Vancouver’s Downtown Eastside and around the Highway of Tears.²³⁹ Women with precarious immigration status also face barriers to reporting violence against them to police, for fear of deportation.²⁴⁰ Protection orders under the *Family Law Act*, described above, are an important supplement to the protections offered by peace bonds issued under the *Criminal Code*.

²³⁷ *Criminal Code* s 810.

²³⁸ Human Rights Watch, “Those who take us away: Abusive policing and failures in protection of Indigenous women and girls in Northern British Columbia” (2013), www.hrw.org/sites/default/files/reports/canada0213webwcover.pdf.

²³⁹ Missing Women Commission of Inquiry, by Wally T Oppal, *Forsaken: The Report of the Missing Women Commission of Inquiry* (Vancouver: Ministry of Attorney General of British Columbia, 2012).

²⁴⁰ Sheryl Burns, “Single mothers without legal status in Canada: Caught in the intersection between immigration law and family law” YWCA Vancouver (March 2010).

HATE SPEECH AND ADVOCATING GENDER- BASED VIOLENCE ONLINE

The Internet has become a popular forum among hate groups because of its ease, effectiveness, low cost, wide reach, and anonymity for the speaker.

MESSAGES PROMOTING HATE AND GLORIFYING VIOLENCE against women proliferate on the Internet. Indeed, the Internet has become a popular forum among hate groups because of its ease, effectiveness, low cost, wide reach, and anonymity for the speaker.²⁴¹ Courts have recognized the proliferation of hate speech on the Internet,²⁴² but Canadian laws protecting vulnerable groups from hateful speech have been slow to keep up with technology and fail to offer protection to those who bear much of the brunt of misogynist, racist, homophobic and transphobic vitriol online.

Despite years of advocacy and numerous recommendations, prohibition of gender-based hate speech has never been included in Canada's criminal law, and with recent changes to the *Canadian Human Rights Act*, it is no longer prohibited at all under Canadian federal law. Further, while advocates in some provinces have successfully advocated for the addition of "gender identity" as a prohibited ground of discrimination in provincial human rights codes,²⁴³ these calls have fallen on deaf ears in others, including BC, and federally, the progress to implement protection from hatred and discrimination for transgender Canadians has been agonizingly slow.

There can be no doubt that women and girls are targeted with extreme amounts of hateful and misogynist messaging online. The LGBTQ community, people with disabilities, and racialized communities are also disproportionately affected. In the Statistics Canada 2009 General Social Survey on Victimization, 16 per cent of respondents reported having come across hatred or promotion of violence against an identifiable group on the Internet.²⁴⁴

241 R Delgado and J Stefancic, *Understanding Words that Wound* (Boulder: Westview Press, 2004), at 125, referring to E Phillips Marsh, "Purveyors of Hate on the Internet: Are We Ready for Hate Spam?" (2000) 17 Ga St UL Rev 379, at 387. See also D Matas, *Bloody Words: Hate and Free Speech* (Winnipeg: Bain & Cox, Publishers, 2000), at 149.

242 *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 72. See also *Lemire v Canadian Human Rights Commission*, 2014 FCA 18 at para 62.

243 Human rights legislation in Manitoba, Ontario, Nova Scotia and the Northwest Territories contains explicit protection from discrimination on the basis of gender identity. See EGALÉ, "FAQ — Gender Identity and Canada's Human Rights System" (2013), <http://egale.ca/all/faq-gender-identity>.

244 Statistics Canada, *Police-reported hate crime in Canada, 2011* by M Allen and J Boyce (Ottawa: Statistics Canada Juristat, 2013), www.statcan.gc.ca/pub/85-002-x/2013001/article/11822-eng.pdf at 13.

Fifty-seven per cent of reports involved targeting ethnic or religious groups, 21 per cent targeted gays and lesbian, 16 per cent targeted women, 15 per cent targeted Aboriginal people, and 14 per cent targeted immigrants.

Additionally, a 2011 study conducted by EGALÉ showed that 30 per cent of female sexual minority students, 23 per cent of gay male students, and 40 per cent of transgender students who responded to the survey said that they had been targeted online, compared to only 5.7 per cent of heterosexual student respondents.²⁴⁵ American studies also show that LGBTQ communities are disproportionately impacted by online bullying, harassment and hate. Research conducted by the Gay, Lesbian and Straight Education Network found that LGBT youth were nearly three times as likely as non-LGBT youth to say they had been bullied or harassed online (42 per cent vs. 15 per cent) and twice as likely to say they had been bullied via text message (27 per cent vs 13 per cent). One in four LGBT youth (26 per cent) said they had been bullied online specifically because of their sexual orientation or gender expression in the past year, and 1 in 5 (18 per cent) said they had experienced bullying and harassment for these reasons via text message. LGBT youth were four times as likely as non-LGBT youth to say they had been sexually harassed online (32 per cent vs. 8 per cent) and three times as likely to say they had been sexually harassed via text message (25 per cent vs. 8 per cent).²⁴⁶

As detailed by West Coast LEAF's national sister organization LEAF in submissions to the House of Commons Standing Committee on Justice and Human Rights regarding Bill C-13,²⁴⁷ hate expression has targeted and continues to target women in Canada, increasingly on the Internet and through social media. Vicious hate propaganda has portrayed lesbians as predators, intending to lure and abuse children.²⁴⁸ Black women have been portrayed as oversexed, diseased, prostitutes, animal-like, and stupid;²⁴⁹ Indigenous women as degraded and dispensable "squaws";²⁵⁰ Muslim women wearing niqabs as terrorists intending to destroy and debase our society and as "sick[ening]".²⁵¹ Against persons with disabilities, hatemongers have advocated eugenics and euthanasia.²⁵² Misogynist and hateful commentary proliferates on "men's rights" websites, comparing feminists to

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245 See evidence presented by Helen Kennedy, Executive Director of EGALÉ Canada, before the Senate Standing Committee on Human Rights (Fifth meeting on: Issue of Cyberbullying in Canada with regard to Canada's international human rights obligations under Article 19 of the UN Convention on the Rights of the Child, 41st Parl, 1st Sess, No 14 (4 June 2012) at 37-42.

246 Gay, Lesbian and Straight Education Network, "Out Online: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth on the Internet" (10 July 2013), <http://glsen.org/press/study-finds-lgbt-youth-face-greater-harassment-online>.

247 Submissions of the Women's Legal Education and Action Fund to the House of Commons Standing Committee on Justice and Human Rights Respecting the Committee's Review of Bill C-13 (June 2014).

248 *Schnell v Machiavelli Emprize*, 2002 CanLII 1887 (CHRT) at para 40; E Faulkner, "Homophobic Hate Propaganda in Canada" (2006/07) *Journal of Hate Studies* 5:63, <http://guweb2.gonzaga.edu/againsthate/journal5/GHS107.pdf> at 77-79.; see *Pardy v Earle*, 2011 BCHRT 101 for an example of a vitriolic, profanity-laced attack against lesbians.

249 *Warman v Guille*, 2008 CHRT 40 at paras 83, 119; *Association of Black Social Workers v Arts Plus* (1994), 24 CHRR D/513 (NS Bd Inq).

250 *Warman v Western Canada for Us*, 2006 CHRT 52 at para 19; see also Amnesty International, "No More Stolen Sisters" (London, UK, 2009), www.amnesty.ca/amnestynews/upload/AMR200122009.pdf at 5-6; Aboriginal Justice Inquiry of Manitoba, *The Changing Image of Aboriginal Women*, ch 13, vol 1 (Manitoba: The Aboriginal Justice Implementation Commission, 1999), www.ajic.mb.ca/volumel/chapter13.html#5.

251 *Warman v Kouba*, 2006 CHRT 50 at para 47; *Warman v Beaumont*, 2007 CHRT 49 at paras 16, 18.

252 *Warman v Northern Alliance*, 2009 CHRT 10 at para 22.

Nazis²⁵³ and likening them to terrorists.²⁵⁴ In 2011, anti-women messages were displayed on campus posters and transmitted through e-mails, resulting in the closing of a university women's centre due to student leaders' fear for their safety.²⁵⁵

Hatred and misogyny directed towards women online is a pernicious and growing problem. It involves threats of sexual violence, doctored photographs of women being suffocated and abused, postings of women's home addresses alongside suggestions that they should be raped, and technological attacks that shut down feminist blogs and websites.²⁵⁶ A 2006 study showed that individuals writing under female names received twenty-five times more sexually threatening and malicious comments than others writing under male names,²⁵⁷ and a Pew Internet and American Life Project study attributed a nine per cent decline in women's use of chat rooms to menacing sexual comments.²⁵⁸ As one victim explained, it does not take many rape threats to "make women want to lay low."²⁵⁹ Highlighting the gendered and sexualized nature of the abuse, another victim noted that "men may be told that they're idiots, but they aren't called 'whores'."²⁶⁰

Gender-based hatred online can have devastating real-life consequences not only for women's sense of safety and security, but for their careers and reputations as well. In 2007, well-known blogger and software developer Kathy Sierra was subject to threats of rape and strangulation on her blog and via email, and doctored photos of her being suffocated by lingerie and lying with a noose beside her were widely circulated online.²⁶¹ Other posters revealed her home address and Social Security number. Terrified, Ms. Sierra cancelled public appearances and shut down her blog, missing out on potential career opportunities and putting her livelihood at risk. As she explained to the BBC: "I will never feel the same. I will never be the same."²⁶²

Other women who have dared to take a public stance on feminist causes have also been subjected to extreme hatred, misogyny and abuse online. After leading a successful campaign to ensure that an image of a woman stayed on British currency after Elizabeth Fry was replaced by Winston Churchill, Caroline Criado-Perez was subjected to rape and death threats via Twitter, receiving some 50 abusive tweets an hour at the height of the abuse.²⁶³ Criado-Perez spoke out against the hatred and harassment, and helped bring about arrests

253 A Voice for Men, "The original feminazis?" (2012), www.avoicemen.com/mens-rights/false-rape-culture/the-original-feminazis-fake-rape-cases-1945/.

254 Change.org, "It's [sic] time to class feminism as a terrorist group" www.change.org/en-GB/petitions/the-government-its-time-to-class-feminism-as-a-terrorist-group.

255 L D'Amato, "Two UW centres closed following anti-female messages," *The Record* (19 February 2011), www.therecord.com/news/local/article/489999--two-uw-centres-closed-following-anti-female-messages.

256 Danielle Keats Citron, "Cyber Civil Rights" (2009) 89 BUL Rev 61.

257 Robert Meyer and Michael Cukier, *Assessing the Attack Threat due to IRC Channels*, in *Proceedings of the International Conference on Dependable Systems and Networks* 467 (2006), www.enre.umd.edu/content/rmeyer-assessing.pdf.

258 "Female bloggers face harassment" (June 2007) 5 Women in Higher Education at 5.

259 Jessica Valenti, "How the web became a sexists' paradise" *The Guardian* (6 April 2007), www.theguardian.com/world/2007/apr/06/gender.blogging.

260 *Ibid.*

261 Danielle Citron, "The changing attitudes toward cyber gender harassment: Anonymous as a guide?" *Forbes* (27 April 2014), www.forbes.com/sites/daniellecitron/2014/04/27/the-changing-attitudes-towards-cyber-gender-harassment-anonymous-as-a-guide/.

262 "Blog death threat sparks debate" *BBC News* (27 March 2007), <http://news.bbc.co.uk/2/hi/6499095.stm>.

263 Gavia Baker Whitelaw, "How can Twitter make it easier to report hate speech?" *The Daily Dot* (29 July 2013), www.dailymdot.com/lifestyle/twitter-hate-speech-rape-threats/.

and a change to Twitter's policy on reporting abuse.²⁶⁴ But too often, women victimized by hatred and misogyny online are simply pushed out of online spaces; like Kathy Sierra, they shut down their blogs and websites, stop participating in online forums, and deactivate their social media accounts in order to protect themselves and their families. Like all victims of hate speech, "the negative effects of hate messages are real and immediate for the victim."²⁶⁵ While men also experience abuse online, the gendered and sexualized nature of the vitriol directed at women cannot be ignored.

Unfortunately, no matter how serious the harms that online misogyny and hate directed towards women inflicts, the public tends to trivialize it.²⁶⁶ It is dismissed as harmless locker-room talk, its perpetrators as juvenile pranksters and its victims as overly sensitive complainers. Some consider cyber misogyny an inconvenience that its targets should ignore or defeat with couterspeech. Others suggest that it's simply the nature of the Wild West of the Internet. While the arguments differ, the underlying message is the same: women need to tolerate this misogyny or opt out of life online.²⁶⁷

The refusal by feminists around the world to put up with this harassment and abuse, however, is changing norms and causing Internet Service Providers, social media platforms, and the governments with the power to regulate them to take notice. A recent statement from the Council of Europe's Commissioner for Human Rights addresses the proliferation of hate speech against women, particularly on the Internet, and calls for hate speech against women to be specifically tackled.²⁶⁸ The Commissioner urges national action to prohibit gender hatred, noting "Hate speech against women is a long-standing, though underreported problem in Europe that member states have the duty to fight more resolutely."

Other sections of this report address individual communications and behaviour targeting women and girls, behaviour which may well expose them to hatred and contempt. In this section, we look at hate speech that targets women *as a group* and on intersecting grounds.

While the arguments differ, the underlying message is the same: women need to tolerate this misogyny or opt out of life online.

264 Dera Kerr, "Twitter 'report abuse' button now live on all platforms" *CNET* (28 August 2013), www.cnet.com/news/twitter-report-abuse-button-now-live-on-all-platforms/

265 MJ Matsuda, "Outsider Jurisprudence: Toward a Victim's Analysis of Hate Messages," in MH Freedman and EM Freedman, eds, *Group Defamation and Freedom of Speech* (Westport, Conn.: Greenwood Press, 1995).

266 Danielle Keats Citron, "Law's expressive value in combating cyber gender harassment" (2009) 108 (3) *Mich LR* 373.

267 *Ibid.*

268 Nils Muižnieks, "Hate speech against women should be specifically tackled," *The Council of Europe Commissioner's Human Rights Comment* (March 6 2014), <http://humanrightscomment.org/2014/03/06/hate-speech-against-women/>.

Using and Strengthening Existing Laws to Address Gender-Based Hate Speech Online

ADVOCATING GENOCIDE AND CRIMINAL HATE SPEECH (SS. 318 AND 319)

Private speech is not covered by the provisions; the act of promoting hatred can only be committed by communicating statements other than in a private conversation, and inciting hatred is only prohibited if statements are communicated in a public place.

Sections 318 and 319 of the *Criminal Code* make it a criminal offence to advocate genocide, publicly incite hatred or wilfully promote hatred against an “identifiable group.” Currently, the *Code* defines “identifiable groups” as including those distinguished by colour, race, religion, ethnic origin or sexual orientation. Advocating genocide against women and inciting or promoting hatred of women is not captured by these provisions. Bill C-13, the *Protecting Canadians from Online Crime Act*, would remedy this defect in the law by adding sex, as well as national origin, age, and mental or physical disability, to the list of “identifiable groups” protected from hate speech and advocacy of genocide by the *Code*. A bill currently before the Senate would also add “gender identity” to the protected grounds, offering protection to transgender individuals.

Advocating genocide means to promote the destruction, in whole or in part, of an identifiable group either by killing members of that group or by deliberately inflicting conditions of life calculated to bring about its physical destruction.²⁶⁹ Rape and sexual violence committed in the context of war and conflict have been found to constitute acts of genocide under international human rights law.²⁷⁰

The *Criminal Code* provisions are intended to prohibit the public distribution of hate propaganda. Private speech is not covered by the provisions; the act of promoting hatred can only be committed by communicating statements other than in a private conversation, and inciting hatred is only prohibited if statements are communicated in a public place. Online communications that advocate genocide or wilfully promote or incite hatred outside of private spaces like emails and private chats are likely to fall within the provisions.

In its recent judgment in *Saskatchewan (Human Rights Commission) v Whatcott*,²⁷¹ the Supreme Court of Canada described some of the ways in which hate speech causes harm to individuals, to the targeted group, and to society at large. Hate speech lays the groundwork for later, broad attacks on vulnerable groups, ranging from discrimination, to ostracism, to violence and, in the most extreme cases, to genocide. As stated by Justice Rothstein for the unanimous Court in *Whatcott*:

Hate speech is, at its core, an effort to marginalize individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. When people are vilified as blameworthy or undeserving, it is easier to justify discriminatory treatment. The objective of [laws prohibiting

²⁶⁹ *Criminal Code* s 318(2).

²⁷⁰ *The Prosecutor v Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgment (2 September 1998) (International Criminal Tribunal for Rwanda). See also: *Genocide Watch*, “Rape as an Act of Genocide” (20 April 2012), www.genocidewatch.org/rapeasgenocide.html.

²⁷¹ *Whatcott*, *supra* note 242.

*hate speech] may be understood as reducing the harmful effects and social costs of discrimination by tackling certain causes of discriminatory activity.*²⁷²

Justice Rothstein also considered an appropriate definition of hate speech and how the courts should go about interpreting the meaning of “hatred.” The question the courts must ask is whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred.²⁷³ “Hatred” must be interpreted as being restricted to extreme manifestations of the emotion, which rise to the level of “detestation” and “vilification,” and not to expression which, “while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.”²⁷⁴ The court must focus its inquiry on the likely effects of the expression: “Is the expression likely to expose the targeted person or group to hatred by others?”²⁷⁵ In finding that the hate speech provisions then contained in the *Canadian Human Rights Act* were constitutional and a justifiable limit on freedom of expression, Justice Rothstein concluded:

*The repugnancy of the ideas being expressed is not, in itself, sufficient to justify restricting the expression. The prohibition of hate speech is not designed to censor ideas or to compel anyone to think “correctly.” Similarly, it is irrelevant whether the author of the expression intended to incite hatred or discriminatory treatment or other harmful conduct towards the protected group. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination.*²⁷⁶

In 2013, the federal government repealed section 13 of the *Canadian Human Rights Act*,²⁷⁷ which provided an additional means of addressing hate speech on the Internet. Moreover, section 13 included women in its protections from hate speech. It prohibited communication by means of a telecommunication undertaking (including the Internet) of messages that are likely to expose a person to hatred or contempt on the basis of: race, national/ethnic origin, colour, religion, age, sex, sexual orientation, marital status, disability, or conviction for which a pardon has been granted, and was one of the main tools used by anti-hate groups in fighting online hate. Section 13 was repealed by Bill C-304 and is no longer in force as of June 2014. This limits the options available to address the harms caused by Internet hate targeting vulnerable groups.

BC’s provincial human rights law also prohibits publishing, issuing or displaying a statement, publication, notice, sign, symbol, emblem or other representation that indicates discrimination or an intention to discriminate against a person or class of persons, or which is likely to expose a person or a group or class of persons to hatred or contempt because of their race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age.²⁷⁸ However, provincial human rights tribunals do

²⁷² *Ibid* at para 71.

²⁷³ *Ibid* at para 56.

²⁷⁴ *Ibid* at para 57.

²⁷⁵ *Ibid* at para 58.

²⁷⁶ *Ibid*.

²⁷⁷ *An Act to Amend the Canadian Human Rights Act (Protecting Freedom)*, SC 2013, c 37.

²⁷⁸ *BC Human Rights Code*, RSBC 1996, c 240, s 7.

not have jurisdiction over materials published on the Internet.²⁷⁹ The Internet is a form of telecommunication, and the Constitution gives the federal government sole jurisdiction to regulate telecommunications in Canada.²⁸⁰

With the repeal of section 13 of the *Canadian Human Rights Act* and the inapplicability of provincial human rights law to hate speech promulgated via the Internet, it is more important than ever for the hate propaganda provisions of the *Criminal Code* to apply to hate against women.

RECOMMENDATION 31: Pass Clause 12 of Bill C-13, the *Protecting Canadians from Online Crime Act*, which adds sex, national origin, age, and mental or physical disability to the list of “identifiable groups” protected from hate speech and advocacy of genocide by the Code, so that gender-based hate is recognized and treated as a criminal offence.

RECOMMENDATION 32: Pass Bill C-279, *An Act to Amend the Canadian Human Rights Act and the Criminal Code* (Gender Identity) to add gender identity as a distinguishing characteristic protected from hate speech and advocating genocide under the Code.

Under section 320.1 of the *Criminal Code*, a judge has the authority to order the removal of hate propaganda from a computer system that is available to the public. Such authority extends to all computer systems located within Canada.

Sections 320 and 320.1 of the *Criminal Code* provide that a judge may, on reasonable grounds, issue an order for the confiscation of hate propaganda in any form, including data on a computer system. Hate propaganda is defined in section 320(8) as any writing, sign or visible representation advocating or promoting genocide, or the communication of which would be an offence under the hate speech provisions in section 319.

The consent of the provincial Attorney General is required prior to instituting a proceeding under the hate speech laws, including the seizure and confiscation provisions (ss. 318(3), 319(6), 320(7) and 320.1(8)). This additional and discretionary hurdle to prosecuting hate speech offences may constitute a barrier to access to justice for vulnerable groups targeted by hate propaganda. The assessment of whether a hate speech proceeding should be instituted should follow the ordinary process, with the usual safeguards in place, namely, the duty of the Crown to pursue prosecution when it is in the public interest to do so.

RECOMMENDATION 33: Remove the requirement for the Attorney General’s consent before hate speech prosecutions can be initiated.

²⁷⁹ *Elmasry and Habib v Rogers Publishing and MacQueen* (No. 4), 2008 BCHRT 378.

²⁸⁰ *Constitution Act*, 1867, 30 & 31 Vict, c 3 (UK), reprinted in RSC 1985, App II, No 5, at s 92(10).

As noted above, in 2013, the federal government repealed the hate speech provision (s. 13) in the *Canadian Human Rights Act*²⁸¹ (CHRA), which provided an additional means of addressing hate speech on the Internet. It prohibited communication by means of a telecommunication undertaking (including the Internet) of messages likely to expose a person to hatred or contempt on the basis of race, national/ethnic origin, colour, religion, age, sex, sexual orientation, marital status, disability, or conviction for which a pardon has been granted. The repeal takes effect in June, 2014.

While the reforms proposed to broaden the hate protections in the *Criminal Code* to protect women, people with disabilities, the elderly, racial minorities and transgender communities from hate under the criminal law are essential, protection for vulnerable groups under federal human rights law is also critical. There are a number of reasons why the *Criminal Code* is insufficient to protect vulnerable groups from hatred — both online and off — and why federal human rights legislation also has an important role to play.

Those who file human rights complaints are often the most vulnerable members of our society. As stated by Justice Sopinka of Supreme Court of Canada, “[human rights legislation] is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed.”²⁸²

The purpose of the CHRA is to “give effect to the principle that every individual should have the right equal with others to make for themselves the lives that they are able and wish to have — free from discrimination.”²⁸³ In this way, by its very existence, the legislation sends a message to Canadians about what discrimination is and what values it protects. Canadians would know, for example, that discriminatory and hateful speech against them is not allowed. They could feel safe knowing that Canadian human rights legislation prohibits expression that makes their equality impossible.²⁸⁴

The CHRA facilitates access to justice for groups vulnerable to being targeted with hateful speech. In the human rights context, complaints are filed with an expert human rights body structured to be sensitive to the needs of protected groups. Under the *Criminal Code*, victims are required to contact police and lay an information (a foreign and often alienating process which many Canadians are unaware is even available to them).²⁸⁵ Charges of illegal behaviour must be laid by police officers or crown prosecutors and subsequent trials involve the use of strict evidentiary rules aimed at determining guilt. In the human rights context, individuals can file complaints if they believe they have been discriminated against — they are not required to have an intermediary agent of the state determine whether their complaints

Those who file human rights complaints are often the most vulnerable members of our society.

281 RSC 1985, c H-6.

282 *Zurich Insurance Co v Ontario (Human Rights Commission)*, [1992] 2 SCR 321.

283 CHRA, *supra* note 281 s 2.

284 Submission of Women's Legal Education and Action Fund to the House of Commons Standing Committee on Justice and Human Rights on the Committee's Review of s.13 of the *Canadian Human Rights Act* (18 December 2009), http://leaf.ca/wordpress/wp-content/uploads/2011/09/Submission_to_JUST_Committee2009.pdf. [LEAF Submission, 2009]

285 *Ibid.*

are legitimate. Human rights legislation therefore provides an important avenue to access to justice for vulnerable individuals and groups, who can access the protective mechanisms of the legislation without depending on the determination of the Attorney General.

Additionally, the purpose and goals of human rights legislation differ significantly from those of the criminal law. The purpose of human rights legislation is educational and remedial: the aim is to educate the discriminator about the impact and deleterious effects of discrimination and to put the complainant back into the position she or he would have been in had the discriminatory act not occurred. Because of this, the scope of remedial measures available in human rights schemes is broad and allows for careful crafting — remedies can be designed to suit the particular facts of a case. For example, remedies can include cease and desist orders, financial compensation, training programs for respondents and apologies, which are all the more important given the vulnerability and social situation of many complainants.²⁸⁶ As stated by Chief Justice Dickson in an important hate speech case:

*The process of hearing a complaint made under s. 13(1) and, if the complaint is substantiated, issuing a cease and desist order reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance. In addition, although criminal law is not devoid of impact upon the rehabilitation of offenders, the conciliatory nature of the human rights procedure and the absence of criminal sanctions make s. 13(1) especially well suited to encourage reform of the communicator of hate propaganda. While recognizing that discrimination weakens the fabric of our society, s. 13(1) itself is aimed at redressing the harm caused by discriminatory expressive acts against complainants.*²⁸⁷

This focus on redressing the harm caused by discriminatory speech, rather than on punishment of a perpetrator, is of critical importance. While many of those targeted by hate speech will seek criminal sanctions against those who have harmed them, some will find the process unsatisfying: in criminal matters, the victim of an offence is not always heard from, has no control over the progress of the case, and does not receive compensation. A criminal conviction and jail sentence for the hatemonger may feel like a hollow victory in light of the harm suffered by the victim. A failure to provide appropriate remedies to those who suffer from harm caused by hate speech can compound the harm and the effects of the discrimination.²⁸⁸

RECOMMENDATION 34: Reinstate section 13 of the *Canadian Human Rights Act*.

²⁸⁶ *Ibid.*

²⁸⁷ *Canada (Canadian Human Rights Commission) v Taylor*, [1990] 3 SCR 892.

²⁸⁸ LEAF Submission, 2009, *supra* note 284.

In examples cited throughout this report, individuals targeted by harassment, cyberstalking, revenge porn and hate speech have faced often insurmountable obstacles to getting the harmful content removed from the Internet. Holding Internet Service Providers (ISPs) liable for copyright infringement, for example, is only possible where the ISP knowingly enables the infringement; if they merely provide “passive connections” for content and are acting solely as intermediaries for their users and subscribers, they are generally not liable for content that infringes copyright.²⁸⁹ However, if they have been given notice that the material is infringing and refuse to take it down, they may be said to have “authorized” the material and thus bear some responsibility.

In the US, section 230 of the *Communications Decency Act* exempts ISPs from liability for user-generated content. In the US, the protection afforded to ISPs is even broader. It provides statutory immunity for online services, including blogs, forums and ISPs, who publish defamatory content, so long as that content is authored by a third party. This immunity applies even if the ISP receives notice of the defamatory material. Section 230 doesn’t give websites *carte blanche* to host any and all user-generated content—immunity does not apply to violations of child pornography, obscenity, criminal or intellectual property laws. In response to calls to narrow or get rid of section 230, thus allowing victims to hold revenge porn websites responsible for the content they host, commentators raise the spectre that to do so would also allow public figures to sue Wikipedia over misleading content or businesses to sue Yelp, in addition to individual reviewers, for libel based on negative reviews.²⁹⁰ In April 2014, a group of revenge porn victims lost an appeal of their attempts to hold GoDaddy, which hosted revenge porn website Texxxan.com, liable for the content on the site, alongside the site operators themselves.²⁹¹ The Court held that because GoDaddy had nothing to do with the content at issue, it could not be held liable, even if the content was illegal.

In 2013, the UK Court of Appeal ruled that Google, as host of a site called Blogger.com, had potential liability for defamation by failing to take down or disable access to defamatory content once it had received notice that it is hosting such content.²⁹² In May, 2014, a landmark ruling of the European Union Court of Justice ordered Google to amend search results at individuals’ request to protect people’s “right to be forgotten.” The Court said that links to irrelevant and outdated data should be erased on request. In response to the ruling, Google has created a form allowing Europeans to ask to have data about them removed from search results. Google has said it will assess each request and balance “privacy rights of the individual with the public’s right to know and distribute information.”²⁹³

In examples cited throughout this report, individuals targeted by harassment, cyberstalking, revenge porn and hate speech have faced often insurmountable obstacles to getting the harmful content removed from the Internet.

289 *SOCAN v CAIP*, 2004 SCC 45. See also the *Copyright Act* RSC 1985, c. C-42.

290 Amanda Levendowsky, “Our best weapon against revenge porn: Copyright law?” *The Atlantic* (4 February 2014), www.theatlantic.com/technology/archive/2014/02/our-best-weapon-against-revenge-porn-copyright-law/283564/.

291 *GoDaddy.com LLC v Hollie Touns et al.*, No. 09-13-00285-CV (Texas, Ninth District Court of Appeals).

292 *Tamiz v Google*, [2013] EWCA Civ 68.

293 “Google sets up ‘right to be forgotten’ form after EU ruling” *BBC News* (30 May 2014), www.bbc.com/news/technology-27631001.

Court orders aren't always necessary to get websites and social media platforms to remove harmful content, especially when that content is bad for business. In August 2013, Women, Action & the Media (WAM!), the Everyday Sexism Project and author Soraya Chemaly launched a campaign to call on Facebook to take effective action to end gender-based hate speech on its site. Facebook had long allowed pages advocating violence against women on their site, claiming they did not violate the site's terms of use and fell under the heading of "humour." An excerpt from the campaign's letter to Facebook describes some of the horrifying content:

Specifically, we are referring to groups, pages and images that explicitly condone or encourage rape or domestic violence or suggest that they are something to laugh or boast about. Pages currently appearing on Facebook include Fly Kicking Sluts in the Uterus, Kicking your Girlfriend in the Fanny because she won't make you a Sandwich, Violently Raping Your Friend Just for Laughs, Raping your Girlfriend and many, many more. Images appearing on Facebook include photographs of women beaten, bruised, tied up, drugged, and bleeding, with captions such as "This bitch didn't know when to shut up" and "Next time don't get pregnant."

These pages and images are approved by your moderators, while you regularly remove content such as pictures of women breastfeeding, women post-mastectomy and artistic representations of women's bodies. In addition, women's political speech, involving the use of their bodies in non-sexualized ways for protest, is regularly banned as pornographic, while pornographic content — prohibited by your own guidelines — remains. It appears that Facebook considers violence against women to be less offensive than non-violent images of women's bodies, and that the only acceptable representation of women's nudity are those in which women appear as sex objects or the victims of abuse. Your common practice of allowing this content by appending a [humor] disclaimer to said content literally treats violence targeting women as a joke.²⁹⁴

They called on Facebook to take three critical and immediate actions:

1. Recognize speech that trivializes or glorifies violence against girls and women as hate speech and make a commitment that they would not tolerate this content.
2. Effectively train moderators to recognize and remove gender-based hate speech.
3. Effectively train moderators to understand how online harassment differently affects women and men, in part due to the real-world pandemic of violence against women.

The campaigners targeted companies who advertise on Facebook's site, capturing shots of their ads appearing next to the hateful and misogynist content and calling on them to pull the ads. Dozens of companies including Nissan, Dove, and many others responded to the call and pulled their ads, and they let Facebook know why. Within a week, Facebook had agreed to work with the campaigners to address the concerns, and committed to evaluating and updating its policies, guidelines and practices relating to hate speech, improving

294 WAM!, "Open letter to Facebook" *Women Action and Media* (21 May 2013), www.womenactionmedia.org/facebookaction/open-letter-to-facebook/.

training for its content moderators, and increasing accountability for creators of misogynist content.²⁹⁵ Progress has been slow, but Facebook and campaigners continue to work together to address content that glorifies, promotes or makes light of rape, domestic violence or other forms of gendered violence.²⁹⁶

Other campaigns against social networking sites have also led to policy changes, although they are often small and slow-moving changes. *Ask.fm*, a site predominantly used by teenagers, changed its safety policies after its anonymous question feature was linked to the suicides of a number of users in 2013.²⁹⁷ While the anonymous question feature remains, its company disclaimer “strongly encourages” users to turn it off. Twitter also eventually bowed to public pressure and introduced a “report abuse” button for individual tweets in August, but not before arguing long and hard against doing so based on the practicalities of sifting through so much information.

These are some of the most lucrative companies in the world. They generate millions, even billions of dollars in profit, and attract some of the brightest and most creative minds to come and work with them. As the EU “right to forget” case shows, they can respond to orders to change their practices. The capacity is there; what’s missing is the incentive or requirement to make change.

Moreover, some of these sites are primarily marketed to teenagers, who are particularly vulnerable to misogynist and hateful harassment and abuse. Developers who set up platforms that facilitate abusive bullying and the transmission of misogynist content must be held responsible for monitoring this content and protecting users—young users in particular. It is a matter of consumer protection and product safety.

As the EU “right to forget” case shows, these companies can respond to orders to change their practices. The capacity is there; what’s missing is the incentive or requirement to make change.

RECOMMENDATION 35: Extend the protections afforded by the *Canada Consumer Product Safety Act* (or enact parallel legislation under the jurisdiction of the Canadian Radio-television Telecommunications Commission (CRTC)) to provide enhanced consumer protection via mobile and ISP provider Terms of Service, including:

- A uniform provider response protocol for reports of malicious or unlawful conduct targeting children and youth under 16;
- Zero tolerance policy for users violating Terms of Service provisions respecting harassment, abuse, threats, hate speech, defamation or other criminal conduct;
- Automatic suspension of service and mandatory reporting for communications constituting or encouraging criminal transmissions from or featuring a child or youth;
- Liability for damages respecting abusive, hateful or criminal transmissions from accounts for which the provider has received a prior complaint.

295 WAM!, *Women Action and Media* (28 May 2013), www.womenactionmedia.org/fb agreement/.

296 WAM!, “Update on the #FBrape campaign process” *Women Action and Media* (3 July 2013), www.womenactionmedia.org/2013/07/03/update-on-fbrape-campaign-progress/

297 Holly Baxter, “Who’s more evil – Facebook or Google?” *The Guardian* (25 October 2013), www.theguardian.com/commentisfree/2013/oct/25/evil-facebook-google-beheading-email-abuse.

CONCLUSION

The varied nature of cyber misogyny and the diverse ways in which it manifests mean that there is no single quick-fix, and a wide range of strategies will be required in order to address it.

CYBER MISOGYNY IS A PERNICIOUS and multi-faceted problem that demands response from legislators and policy-makers. In this report, we have overviewed the ways in which Canadian law can apply to hold harassers and hatemongers legally accountable for their actions online. We have also issued 35 calls to action — recommendations for legal reform that will better protect the equality, safety, security and human rights of women, girls, and other groups vulnerable to abuse online.

The varied nature of cyber misogyny and the diverse ways in which it manifests mean that there is no single quick-fix, and a wide range of strategies will be required in order to address it. Educational measures, restorative practices, and community leadership to model respectful relationships and contribute to a culture that welcomes diversity and difference are all components of what is required.

Law also has a crucial role to play. Holding harassers and hatemongers legally accountable for their actions will serve an important educational function by denouncing these behaviours and sending the message that they will not be tolerated. Law can also deter online harassment, and can remedy its harms with monetary damages, injunctions and criminal convictions. When the law treats cyber misogyny as the discriminatory and sexist conduct that it is, rather than dismissing it as “boys being boys” or an inevitable outcome of participating in online interactions, it will encourage women and girls to come forward and demand redress and accountability.

Preventing and ultimately ending cyber misogyny is the goal. Even the best laws can only respond to harmful, hateful behaviour after the fact, when much of the damage has already been done. But we have seen how changes in the way the law responds to sexual harassment in the workplace and violence against women in the home have contributed to making these spaces safer for women, and we believe that, when appropriate laws are crafted to apply in online spaces, the same will happen. But first, we must reject the notion that the Internet is some sort of anarchic “Wild West” where harassment and gendered hate are inevitable, and where anonymity and freedom to express hatred and vitriol reign

supreme. Instead, we call for a vision of the Internet that prioritizes freedom of expression by fostering a culture in which *everyone* can feel safe to participate, and where no one is pushed out of the conversation by threats, intimidation, or hateful and misogynist conduct.

The Canadian public and people around the world will no doubt continue the current conversations about Internet privacy, freedom of speech, government responsibility and corporate accountability for years to come. It is essential that the public conversation around these issues be informed by an analysis that puts equality at the centre, and which prioritizes safety, security, dignity and rights for women, girls, and other groups vulnerable to online hatred and harassment.

CONCLUSION

LIST OF RECOMMENDATIONS

RECOMMENDATION 1: Create a new office, independent of government but housed within the federal Ministry on the Status of Women, to conduct research, facilitate dialogue, and make recommendations to government about appropriate legal responses to the challenges of protecting and promoting the equality of women, girls, and other vulnerable communities online.

Criminal Responses to Cyber Misogyny

These recommendations are directed to the federal government:

RECOMMENDATION 4: Enforce section 342.2 (“Unauthorized Use of a Computer”) of the *Criminal Code* by banning distribution and sale of keyloggers and other devices used to invade the privacy of computer users.

RECOMMENDATION 5 & 27: Pass Clause 18 of the proposed Bill C-13, *Protecting Canadians from Online Crime Act* to ensure false messages conveyed by any means of telecommunications technology are captured.

RECOMMENDATION 6: Repeal sections 751 and 751.1 of the *Criminal Code*, which provide that the successful party in a defamatory libel case is entitled to costs from the unsuccessful party, or restrict their application to cases involving only private prosecutions for defamatory libel.

RECOMMENDATION 8: Expand the mandate of the Crime Victim Assistance Program to provide low income victims of cyber misogyny with financial support to pay the costs associated with removing an intimate image or other criminal communication from the Internet.

RECOMMENDATION 28: Enact legislation banning the marketing and sale of “stalking apps” that allow for the monitoring of people’s online activities, communications, and geographic location.

Civil Responses to Cyber Misogyny

These recommendations are directed to the BC government:

RECOMMENDATION 9: The BC government should enact legislation creating a “cyberbullying” tort, allowing victims to sue for “cyberbullying,” defined more narrowly than the Nova Scotia legislation to include repeated electronic communication through the use of technology, including computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, extreme distress or other damage or harm to another person’s physical or psychological health. The new law should include a power for judges to make prevention orders and orders compensating the victim for the harms they have suffered.

RECOMMENDATION 10 & 11: Create new categories of legal aid referral allowing victims of sexualized cyber misogyny to access the advice and representation of a lawyer to make claims for defamation and invasion of privacy.

RECOMMENDATION 12: Enact legislation creating a new civil wrong of “harassment,” akin to the American tort of “intentional infliction of emotional distress,” the elements of which are 1) outrageous conduct by the defendant, 2) the defendant’s intention of causing or reckless disregard of causing emotional distress, 3) the plaintiff’s suffering of severe or extreme emotional distress, and 4) the actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.

RECOMMENDATION 13: Broaden the tort described in s.3(2) of the *Privacy Act* (“Unauthorized Use of Name or Portrait of Another”) to include the unauthorized use of someone’s name or image for the purpose of harassing, humiliating, distressing or exposing them to ridicule or contempt.

RECOMMENDATION 29: Amend s. 188(2) of the *Family Law Act* to provide that a police officer shall take action to enforce a term of a protection order where there are reasonable and probable grounds to believe that a person has contravened it, unless there are compelling reasons why the person whom the order is intended to protect does not want the term enforced.

RECOMMENDATION 30: Amend the definition of “family member” in the *Family Law Act*, for the purpose of applications for protection orders, to include a person with whom the applicant has had a dating relationship.

Non-Consensual Distribution of Intimate Images

These recommendations are directed to the federal government:

RECOMMENDATION 2: Pass Clause 3 of the *Protecting Canadians from Online Crime Act* to make it a criminal offence to knowingly publish, distribute, transmit, sell, make available, or advertise an image of a person that shows the person exposing their breasts, genitals, or anal region, or depicts them engaged in explicit sexual activity.

RECOMMENDATION 3: Split the *Protecting Canadians from Online Crime Act* into two in order to pass the provisions addressing cyberbullying quickly, while subjecting the provisions which may unduly infringe privacy to further scrutiny and debate.

RECOMMENDATION 7: Pass clause 24 of Bill C-13 to permit restitution for costs associated with the removal of intimate images from the Internet or other digital network, and broaden the provision to provide restitution for costs associated with the removal of *any* criminal content from the Internet.

RECOMMENDATION 14: Amend the *Criminal Code* provisions criminalizing the production and distribution of child pornography (s. 163) so as to make clear that they do not apply to a person under 18 who creates a nude or sexually explicit image of themselves and shares it with someone of their choosing.

RECOMMENDATION 15: Amend the *Criminal Code* provisions criminalizing the production and distribution of child pornography (s. 163) such that youth under 18 who distribute intimate images of other youth without the consent of the person(s) depicted are not charged under these provisions except in extreme circumstances (for example, where the distribution of the image is done for profit or the production or distribution of the images involves sexual exploitation).

RECOMMENDATION 16: Amend the *Criminal Code* child pornography provisions to state that when youth under 18 are criminally prosecuted for sharing intimate images of other youth without consent, they are to be charged under the new offence of “Non-Consensual Distribution of Intimate Images” created by Bill C-13.

Human Rights of Youth

These recommendations are directed to the federal government:

RECOMMENDATION 17: Create a federal Children's Commissioner to act as an independent national advocate for children's rights.

These recommendations are directed to the BC government:

RECOMMENDATION 18: Amend BC's *Education Act* to create a legislated duty on principals, vice-principals and teachers to take disciplinary action in cases of harassing, abusive, and misogynist behaviour they become aware of, whether it occurs on or off school property or before, during or after school hours, when such behaviour has a negative impact on the maintenance of a positive school climate and students' ability to feel safe and to learn at their school.

RECOMMENDATION 19: Place a six-month deadline for all remaining school districts to comply with the *School Act*'s requirement to develop a code of conduct that addresses bullying and discrimination, including discrimination on the basis of sex, sexual orientation, gender identity and gender expression.

RECOMMENDATION 20: Amend the *Human Rights Code* to offer explicit protection to transgender individuals by adding "gender identity and gender expression" to the list of prohibited grounds of discrimination in all of the Code's sections.

RECOMMENDATION 21: Place the promotion of human rights education and digital citizenship at the centre of its initiatives to address cyberbullying, and include these subjects in the prescribed curriculum for all BC schools.

Sexual Exploitation of Youth

These recommendations are directed to the federal government:

RECOMMENDATION 22: Continue to improve the national policing strategy in cases of on-line sexual exploitation of youth through coordination, oversight, evaluation and training to ensure that best practices, information, and resources are shared and implemented.

RECOMMENDATION 24: Amend sections 152 and 153 of the *Criminal Code* ("Invitation to Sexual Touching and Sexual Exploitation") to include inviting, counselling or inciting, for a sexual purpose, a young person (a person under 16 for the purposes of s. 152, and a person aged 16 or 17 for the purposes of s. 153) to expose their breasts, genitals, or anal region.

RECOMMENDATION 25: Engage in consultation with youth, youth advocates and justice system professionals to determine what steps should be taken to promote reporting by youth of online harassment, and to ensure that youth are protected throughout all steps of any court proceeding. These conversations would be facilitated by the office of the Children's Commissioner as recommended in Recommendation 17.

RECOMMENDATION 26: Invest in adequate victim services for children to help them throughout their experiences with the criminal prosecution process or any other court proceedings.

This recommendation is directed to the provincial government:

RECOMMENDATION 23: Amend the *Child, Family and Community Services Act* to create a duty to report instances of child pornography to the Ministry of Children and Family Development in cases where it is reasonable to believe that the child did not consent to the creation or distribution of the image or recording.

Hate Speech and Human Rights

These recommendations are directed to the federal government:

RECOMMENDATION 31: Pass Clause 12 of Bill C-13, the *Protecting Canadians from Online Crime Act*, which adds sex, national origin, age, and mental or physical disability to the list of “identifiable groups” protected from hate speech and advocacy of genocide by the Code, so that gender-based hate is recognized and treated as a criminal offence.

RECOMMENDATION 32: Pass Bill C-279, *An Act to Amend the Canadian Human Rights Act* and the *Criminal Code* (Gender Identity) to add gender identity as a distinguishing characteristic protected from hate speech and advocating genocide under the Code.

RECOMMENDATION 33: Remove the requirement for the Attorney General’s consent before hate speech prosecutions can be initiated.

RECOMMENDATION 34: Reinstate section 13 of the *Canadian Human Rights Act*.

RECOMMENDATION 35: Extend the protections afforded by the *Canada Consumer Product Safety Act* (or enact parallel legislation under the jurisdiction of the Canadian Radio-television Telecommunications Commission (CRTC)) to provide enhanced consumer protection via mobile and ISP provider Terms of Service, including:

- A uniform provider response protocol for reports of malicious or unlawful conduct targeting children and youth under 16;
- Zero tolerance policy for users violating Terms of Service provisions respecting harassment, abuse, threats, hate speech, defamation or other criminal conduct;
- Automatic suspension of service and mandatory reporting for communications constituting or encouraging criminal transmissions from or featuring a child or youth;
- Liability for damages respecting abusive, hateful or criminal transmissions from accounts for which the provider has received a prior complaint.



JOIN THE CONVERSATION

 **#CyberMisogyny**

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