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**West Coast LEAF's Submission to the  
Standing Committee on Justice and Human Rights on  
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***

**Introduction**

West Coast LEAF is pleased to offer this submission to the House Standing Committee on Justice and Human Rights to assist its members in their consideration of the issues raised by Bill C-13. In our submission, this Committee should recommend the immediate passage of the portions of the Bill that address “cyberbullying” behaviours, but should subject the majority of the Bill’s provisions, which greatly expand state surveillance and law enforcement powers, to comprehensive scrutiny and analysis.

**West Coast LEAF's expertise on “cyberbullying” and its gendered nature**

West Coast LEAF formed in 1985, the year the equality guarantees of the *Canadian Charter of Rights and Freedoms* came into force. Our mission is to achieve equality by changing historic patterns of discrimination against women through BC-based equality rights litigation, law reform and public legal education. West Coast LEAF is an incorporated non-profit society and federally registered charity, and an affiliate of LEAF National. We are governed by an elected Board of Directors and supported by members, volunteers, and staff.

In September 2013, West Coast LEAF began a project seeking to understand the current legal responses to cyber misogyny in Canada, and to develop recommendations for improving existing laws to better protect the safety, security and equality rights of women and girls online. Cyber misogyny is the term we are using to describe various online behaviours involving hate speech, harassment and abuse aimed at women or girls. While “cyberbullying” has become a commonly used term in Canada and around the English-speaking world, it is vital to recognize that bullying does not operate independently from sexism, racism, homophobia, transphobia, and other forms of discrimination. The term “cyber misogyny” better captures the gendered and often sexualized nature of the harassment and abuse women and girls are subjected to online, and exposes the behaviour as much more insidious and systemic than the youthful mocking and teasing that the term “bullying” implies. Cyber misogyny involves discrimination, sexual harassment and hate speech against females, and it is crucial not to obscure these realities through the use of a generic term like bullying.

West Coast LEAF's cyber misogyny project has involved consultations and focus groups with youth, community-based service providers, anti-violence organizations, university sexual assault centres, law

enforcement, educators, and others with direct experience and expertise in the issues raised by cyber misogyny. In addition to a report and set of recommendations on appropriate legal responses to cyber misogyny, we are developing a workshop and legal guide to help people understand their rights and responsibilities online. The new workshop will complement our successful “No Means No” workshop, which offers youth an opportunity to discuss issues of consent, power, gender stereotypes, and media literacy, among others. We deliver this workshop to hundreds of youth in dozens of British Columbia schools each year. The new cyber misogyny materials and resources will be publicly available in June, 2014.

### **The issue of cyber misogyny requires a gendered analysis**

What is generically referred to as “cyberbullying” is very often sexual harassment and gender-based hate speech perpetrated online. Women and girls (as well as other vulnerable members of our communities) are disproportionately targeted for sexist harassment and abuse; as the Report of the CCSO Cybercrime Working Group to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety (the “MacKay Report”) concludes:

Bullying often results from, and reinforces, discrimination. Marginalized groups may be targeted for issues of racism, sexism, able-ism, xenophobia, and homophobia, among other identities, and are generally considered to be at a higher risk for bullying.<sup>1</sup>

LGBTQ children and youth are also at particular risk. A 2011 UNICEF Report on child online safety states:

Research from Canada and the United Kingdom identifies children who are at risk of being bullied offline (for example, children who are perceived as ‘different’ such as minority ethnic groups, lesbian, gay, bisexual or transgender (LGBT) young people, overweight children, or those with disabilities) to be at greater risk of being bullied online than other children.<sup>2</sup>

Mounting social science evidence suggests that girls are more likely than boys to be targeted by sexualized online bullying; they are more likely to receive threats of sexual violence,<sup>3</sup> and to be harassed and threatened for being (or perceived as being) sexually active or sexually promiscuous.<sup>4</sup> Patterns of harassing behaviour online also reveal gender differences; recent Canadian research shows that boys are more likely than girls to harass someone in an online game, make fun of someone’s race, religion or ethnicity, make fun of someone’s sexual orientation, or sexually harass someone.<sup>5</sup> In the same study, thirty-one percent of students reported that someone had threatened them online. Boys were more likely to make online threats, and girls were more than twice as likely as boys to see online threats as a serious problem.<sup>6</sup>

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<sup>1</sup> MacKay Report, at 16.

<sup>2</sup> UNICEF Innocenti Research Centre, “Child Online Safety: Global Challenges and Strategies” (Florence: UNICEF, 2011) at 3.

<sup>3</sup> Danielle Keats Citron, “Cyber Civil Rights” (2009) 89 B.U.L. Rev. 61 at 64.

<sup>4</sup> *Ibid* and Mary Anne Franks, “Unwilling avatars: Idealism and discrimination in cyberspace” (2011) 20 Colum. J. Gender & L. 224.

<sup>5</sup> Valerie Steeves, “Young Canadians in a wired world, Phase III: Cyberbullying: Dealing with online meanness, cruelty and threats” (Media Smarts, 2014) at 9-10.

<sup>6</sup> *Ibid* at 4.

Lest we think that online bullying is a teenage rite of passage that youth will grow out of, a 2011 study conducted by the Harvard School of Public Health found that boys who are bullies as youth are nearly four times as likely as non-bullies to grow up to physically or sexually abuse their female partners.<sup>7</sup> Moreover, misogynous behaviour online is not just perpetrated by youth; Statistics Canada reports that 7% of Internet users over the age of 18 have experienced “cyberbullying”.<sup>8</sup>

The consequences for women and girls of this misogyny and harassment can be dire. The Supreme Court of Canada recently reflected on “the relentlessly intrusive humiliation of sexualized online bullying”<sup>9</sup> and its consequences, including loss of self-esteem, anxiety, fear and school drop-outs, as well as increased risk of suicide and self-harm.<sup>10</sup>

Hatred and harassment expressed online also act to exclude women and girls from online spaces, inhibiting their rights to express themselves freely and participate in public life. For women whose careers depend on their internet presence, it can put their livelihoods at risk, damage their reputations, and undermine their ability to promote their work. Gender-based hate and harassment online also put women’s safety and security at risk, exposing them to stalking, identity theft, and threats of or actual physical violence. The emotional, psychological, economic, and physical impacts of cyber misogyny cannot be overstated. As one victim of misogynous vitriol, threats and harassment via Twitter told reporters: “I will never be the same.”<sup>11</sup>

The equality rights of women and girls, protected by Canadian human rights law and international treaties to which Canada is party, require a comprehensive set of legal and non-legal responses to these behaviours and their ramifications. West Coast LEAF is concerned that Bill C-13 only addresses a small portion of the problem of cyber misogyny.

### **Cyber misogyny involves a broad range of behaviours, requires a comprehensive national strategy**

The range of gendered hate, harassment and abusive behaviour directed towards women and girls online is vast. As Danielle Keats Citron, noted expert in cyber misogyny, describes:

On social networking sites, blogs, and other Web 2.0 platforms, destructive groups publish lies and doctored photographs of vulnerable individuals. They threaten rape and other forms of physical violence. They post sensitive personal information for identity thieves to use. They send damaging statements about victims to employers and manipulate search engines to highlight those statements for business associates and clients to see. They flood websites with violent sexual pictures and shut down blogs with denial-of-service attacks. These assaults terrorize victims, destroy reputations, corrode privacy, and impair victims’ ability to participate in online and offline society as equals.<sup>12</sup>

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<sup>7</sup> Chelsea Conaboy, “Study ties bullying, domestic violence” *The Boston Globe* (13 June 2011) online: <<http://news.harvard.edu/gazette/story/2011/06/study-ties-bullying-domestic-violence/>>.

<sup>8</sup> Samuel Perreault, “Self-reported Internet victimization in Canada, 2009” (September 15, 2011) Juristat, Canadian Centre for Justice Statistics, catalogue no. 85-002-x, online: <<http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11530-eng.pdf>>.

<sup>9</sup> *AB v Bragg*, 2012 SCC 46 at para 14.

<sup>10</sup> At para 21.

<sup>11</sup> “Blog death threat sparks debate” *BBC News* (27 March 2007), <http://news.bbc.co.uk/2/hi/6499095.stm>.

<sup>12</sup> Danielle Keats Citron, “Cyber Civil Rights” (2009) 89 B.U.L. Rev. 61 at 64.

Given the breadth of abusive behaviours and ramifications for victims that can be captured under the umbrella term “cyberbullying”, it is clear that no single response can meaningfully address all of these issues. Moreover, because cyber misogyny reflects and reinforces sexist and discriminatory attitudes that may be widely held in society, tackling the issue in a comprehensive way will involve much more than punitive responses. A comprehensive, national strategy that identifies specifically what kinds of behaviours, practices and consequences need to be addressed, and develops responses tailored to the specific problems identified, would provide a better framework for addressing both systemic and individual issues leading to and flowing from cyber misogyny. Such a strategy should incorporate a variety of responses including school policies aimed at inclusion and respect for diversity, human rights education for adults and youth, educational initiatives that teach attackers positive and pro-social behavioural skills, restorative practices and, in some cases, punitive approaches.

Bill C-13 is a very limited response to a broad and diverse issue. While it is described by government as a response to “cyberbullying”, Bill C-13 only provides for criminal sanctions, and only for certain kinds of behaviour: hate speech based on sex, age, national origin and mental or physical ability; false, indecent and harassing communications using a telecommunications system; and non-consensual distribution of intimate images. These amendments aim to tackle only a small aspect of the problem of cyber misogyny, and do so solely through application of the criminal law. As set out above, much more must be done to protect the equality and security rights of women and girls online. Moreover, what protections the amendments do offer come at the expense of new surveillance provisions with potentially profound implications for individual privacy rights.

However, West Coast LEAF does support the three aspects of the proposed bill that address “cyberbullying”, and which we believe will make a difference to the equality and security rights of women and girls subjected to hatred and misogyny online.

First, with respect to the addition of “sex” to the hate speech provisions of the *Criminal Code* (Clause 12), we fully endorse our sister organization LEAF’s submission to this Committee. However, passage of Bill C-13 must not have the effect of undermining or conflicting with Bill C-279’s addition of “gender identity” to those same provisions, an amendment that has been endorsed by a majority of the House of Commons on two occasions and is pending final approval in the Senate.<sup>13</sup>

Second, the modernization of the provisions relating to the sending of false information, indecent remarks or harassing messages to include any means of telecommunication (Clause 18) is an important and overdue amendment that will make it easier to lay charges in cases of cyber misogyny. West Coast LEAF is in full support of these amendments and their proclamation into law.

### **Prohibition of non-consensual distribution of intimate images is a needed amendment**

The third aspect of Bill C-13 that West Coast LEAF endorses is Clause 3, which creates a new offence of knowingly publishing, distributing, transmitting, selling, making available, or advertising an image of a person that shows the person exposing their breasts, genitals, or anal region, or depicts them engaged in explicit sexual activity (an “intimate image”). For the offence to be made out, the person depicted in the 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 of the

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<sup>13</sup> Bill C-279, *An Act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)*.

offence. 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.

The sharing of sexualized images without the consent of the person or persons depicted has become a wide-spread problem in Canada, due in part to the ease with which people may now take and share images using smartphones, screen cameras and web applications. In addition to being a violation of trust, this behaviour also constitutes what some have referred to as “cyber-sexual assault”.<sup>14</sup> While they are not equivalent, the analogy between the non-consensual distribution of a sexually explicit image and a sexual assault is apt. The law of consent, set out in the *Criminal Code* and developed in the common law,<sup>15</sup> is instructive for understanding how the offence should be interpreted.

While some cases involve obtaining an intimate image by hacking into the subject’s computer, more often, the subject has consented to share the image with someone, such as a sexual partner, for private use, and that person has shared the image with others, despite the subject’s expectation that the image would be kept private.

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.”<sup>16</sup> Consent for the purposes of sexual assault 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 her consent, but must also have taken reasonable steps to ascertain whether she was 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.”<sup>17</sup>

The Court’s analysis should also apply in cases of non-consensual sharing of intimate images/cyber-sexual assault. While the subject of the image has consented to the taking of the image and the initial sharing of the image with someone of her choosing, she has not consented to the subsequent sharing of the image beyond that person. She has not consented to the sexual activity in question (the sharing of a sexually explicit image of herself) at the time that activity occurred.

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. Recklessness, 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”,<sup>18</sup> 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. Other speakers before this Committee have 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

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<sup>14</sup> Steph Guthrie, “Transferrable consent: On Bill C-13, surveillance and cyber sexual assault” (6 May 2014), online: <<http://stephguthrie.com/2014/05/06/transferable-consent-on-bill-c-13-surveillance-and-cyber-sexual-assault/>>.

<sup>15</sup> *R v Ewanchuk*, [1999] 1 SCR 330, *R v JA*, 2011 SCC 28.

<sup>16</sup> *R v JA*, 2011 SCC 28 at para 1.

<sup>17</sup> *Ibid* at para 3.

<sup>18</sup> *Sansregret v The Queen*, [1985] 1 SCR 570 at para 16.

forward[ing] it to a friend”.<sup>19</sup> With respect, someone’s “right” to share a naked photo with a friend online should not trump the dignity and privacy interests of the person depicted. In our submission, 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.

Although the non-consensual distribution of an intimate image is very much akin to a sexual assault, it is not currently treated as such and is not expressly prohibited in Canadian criminal law. The offence proposed in Clause 3 is needed to fill this gap.

The Federal/Provincial/Territorial Working Group on Cybercrime reported that Canadian law enforcement officers receive complaints about the non-consensual distribution of intimate images on a regular basis, but unless the intimate images qualify as child pornography, or are accompanied by additional aggravating features or conduct, there is likely no criminal action that can be taken.<sup>20</sup> Existing *Criminal Code* offences, including voyeurism, obscene publication, criminal harassment, extortion, and defamatory libel do not adequately address the harm that is caused by the non-consensual sharing of intimate images. For example, the offence of voyeurism only applies if the image is taken surreptitiously; in situations of non-consensual sharing, the images were taken with the awareness and consent of the person depicted. The offence of obscene publication only applies if the image depicts violence *and* sex, which is not a typical situation. Criminal harassment requires that the victim actually fear for their physical or psychological safety or the safety of someone known to them. The result of this type of conduct is usually the humiliation caused by the breach of privacy, but not necessarily a fear for one’s safety. Although existing criminal offences may apply in certain situations, they are not adequately responsive to the non-consensual distribution of intimate images.

### **The offence should clarify the application of Canada’s child pornography laws to children under 18**

In cases where an image depicts a person under the age of 18 engaged in explicit sexual activity or the dominant purpose of the recording is the depiction for a sexual purpose of that person’s sexual organs or anal region, the image constitutes child pornography and is captured by the *Criminal Code*’s child pornography provisions (section 163.1). It is an offence to make, possess, access, or distribute child pornography.<sup>21</sup> This includes emailing, texting, or posting the image online.

Under s. 163.1, 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 perpetrator and whether they are close in age to the victim makes no difference to whether someone may be charged with a child pornography offence; nor does the fact that the person depicted has consented to the taking and sharing of the image. Youth under 18 are deemed unable to consent to participation in pornography. Thus, a rather common practice among youth known as ‘sexting’ – often involving the sharing of sexually explicit images via text message or other forms of online communication – 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 a technical reading 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. One Ontario Provincial Police officer described his perception of the legal implications of sexting as follows: “If you are underage and send your boyfriend a picture of

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<sup>19</sup> David Fraser, “Opening statement to the House of Commons Justice and Human Rights Committee on Bill C-13” (5 May 2014), online: <<http://blog.privacylawyer.ca/2014/05/my-opening-statement-to-house-of.html>>.

<sup>20</sup> MacKay report, *supra* note 1 at 14.

<sup>21</sup> S. 163.1(2)-(4).

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."<sup>22</sup>

Studies show that sexting has become a common practice among teens and young people, and a part of their sexual exploration.<sup>23</sup> However, it has led to child pornography charges in some countries, even against teens who were romantically involved and consensually exchanged the intimate photos. 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 seemingly intent on maintaining privacy in relation to apparently consensually made sexually explicit photos.<sup>24</sup>

Canadian authorities have not been as quick as authorities in the United States to turn to the criminal law to address the 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> Without a doubt, the online sharing of intimate and sexually explicit images can be devastating to the youth depicted, 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 Parson's 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.

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<sup>22</sup> Jennifer O'Brien, "Teen Sexting Exploding", *London Free Press* (24 March 2011) online: <<http://www.lfpress.com/news/london/2011/03/23/17732536.html>>.

<sup>23</sup> National Campaign to Prevent Teen and Unplanned Pregnancy and Cosmogirl.com, "Sex and Tech: Results from a Survey of Teens and Young Adults" (2008), online: <<http://www.thenationalcampaign.org/sextech/PDF/SexTechSummary.pdf>> at 2.

<sup>24</sup> Jane Bailey and Mouna Hanna, "The gendered dimensions of sexting: Assessing the applicability of Canada's child pornography provision" (2011) 23 CJWL 405 at 408.

<sup>25</sup> Daniel Schwartz, "The fine line between 'sexting' and child pornography", *CBC News* (13 August 2013) online: <<http://www.cbc.ca/news/canada/the-fine-line-between-sexting-and-child-pornography-1.1367613>>.

<sup>26</sup> Dirk Meissner, "BC sexting teen guilty of child pornography" *Huffington Post BC* (9 May 2014) online: <[http://www.huffingtonpost.ca/2014/01/10/bc-sexting-teen-guilty-child-pornography-victoria\\_n\\_4576779.html](http://www.huffingtonpost.ca/2014/01/10/bc-sexting-teen-guilty-child-pornography-victoria_n_4576779.html)>. The teen's lawyer has told media that he will challenge the constitutionality of the conviction.

<sup>27</sup> Heather Rivers, "Charges stem from 'sexting' incident" *Woodstock Sentinel Review* (17 March 2014) online: <<http://www.woodstocksentinelreview.com/2014/03/17/charges-stem-from-sexting-incident>>; and Stephen Kimber, "Why are we using child pornography laws to charge children?" *Rabble* (14 January 2014) online: <<http://rabble.ca/blogs/bloggers/skimber/2014/01/why-are-we-using-child-pornography-laws-to-charge-children>>.

In West Coast LEAF's submission, however, child pornography charges 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. Bill C-13 offers a better alternative in cases of non-consensual image sharing among youth.

However, it is also important for the law to reflect the fact that youth are engaging in consensual 'sexting' that is not harmful and should not be captured as a form of child pornography. Again, the issue comes down to one of consent. Youth can consent to engage in sexual activity with one another,<sup>28</sup> yet Canada's child pornography laws do not acknowledge youths' capacity to consent to taking a naked image 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 percent said it was very harmful and another 19.6 percent said it was harmful).<sup>29</sup> 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. In our submission, laws designed to prevent and punish child sexual exploitation and its attendant harms should not be enforced against youth engaged in consensual sexting, i.e., the sharing of their own intimate images rather than the non-consensual sharing of someone else's image.

In *R v Sharpe*,<sup>30</sup> 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, "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

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<sup>28</sup> The age of consent for sexual activity in Canada is 16. 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.

<sup>29</sup> 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*, online: <[http://www.lawstuff.org.au/\\_\\_data/assets/pdf\\_file/0009/15030/New-Voices-Law-Reform-Report.pdf](http://www.lawstuff.org.au/__data/assets/pdf_file/0009/15030/New-Voices-Law-Reform-Report.pdf)>.

<sup>30</sup> 2001 SCC 2.



category, as would any other written work or visual representation confined to a single person in its creation, possession and intended audience.<sup>31</sup>

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 lawful 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.<sup>32</sup>

The Court 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.<sup>33</sup> 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 created, even if that person was an intimate partner, would fall afoul of the criminal provisions.<sup>34</sup>

To date, there do not seem to have been any prosecutions in Canada against minors involved in voluntarily sending sexual 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. Given the harsh penalties and extreme stigma attached to a conviction as a child pornographer, and that fact that the law’s underlying purpose is to protect children from sexual exploitation, not to criminalize teens for engaging in private, consensual sexual exploration, it seems unlikely that such a prosecution would be in the public interest.<sup>35</sup>

However, as legal expert and professor Jane Bailey has argued, “even the technical potential for prosecution presents equality issues” for women and girls.<sup>36</sup> 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 to a trusted intimate. 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

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<sup>31</sup> At para 115.

<sup>32</sup> At para 116.

<sup>33</sup> At para. 116

<sup>34</sup> See Bailey and Hanna, *supra* note 24.

<sup>35</sup> *Ibid* at 438.

<sup>36</sup> *Ibid* at 439.

enough to prevent victims from coming forward. Moreover, 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.<sup>37</sup> As a result, “the provision is susceptible to being used in a way that compounds the negative social stigma already 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.”<sup>38</sup>

In West Coast LEAF’s submission, in the context of its response to cyberbullying and cyber misogyny in Bill C-13, Parliament should take this opportunity to amend the *Criminal Code* to clarify that

- the provisions criminalizing the production and distribution of child pornography do not apply to a youth who creates a nude or sexually explicit image of herself and shares it with someone of her choosing;
- youths’ capacity to consent to the distribution of intimate images of themselves to other youth should be recognized at law;
- youth who distribute intimate images of other youth without the consent of the person(s) depicted should be charged under the new offence of non-consensual distribution of intimate images, and should not be charged under the *Criminal Code*’s child pornography provisions except in extreme circumstances (for example, where the distribution of the images is done for profit or the production or distribution of the images involves sexual exploitation);

### **The provisions of Bill C-13 dealing with cyber misogyny should be passed without delay**

Like many Canadians concerned about the devastating impacts of cyberbullying and online misogyny, West Coast LEAF is deeply disappointed that Bill C-13 ties the government’s response to these issues to increased state surveillance and law enforcement powers more generally. To protect the rights and interests of vulnerable children and youth, government should be addressing the issue of cyberbullying as an agenda of its own, without making these protections contingent on increased state surveillance on a broad scale.

In our submission, this Committee should recommend passage of the clauses of this Bill that actually deal with cyberbullying and online misogyny: the provisions broadening the protections from hate speech; criminalizing the non-consensual distribution of intimate images; and modernizing the provisions dealing with false, indecent and harassing communications. It is apparent from the public statements of all parties and the debates in the House of Commons that these portions of the Bill would pass easily. The aspects of the Bill with implications for individual privacy warrant a much more comprehensive analysis and debate. The clauses that expand police surveillance powers and remove all civil and criminal liability for anyone who voluntarily discloses another person’s information to police upon request are particularly concerning. It is essential that the privacy implications of these provisions are broadly canvassed and analyzed, and that an appropriate balance is struck between individual privacy rights and the need to take enforcement action against perpetrators of cyber misogyny.

Thank-you for considering West Coast LEAF’s submission on Bill C-13.

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*