

GLOBAL INFORMATION SOCIETY WATCH 2015

Sexual rights and the internet



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
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Global Information Society Watch 2015

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CANADA

CRIMINALISING, REDRESSING AND EMPOWERING: CANADIAN LEGAL RESPONSES TO CYBER MISOGYNY



Alternatives

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Introduction

Cyber misogyny is a new spin on an old problem. It is the technology-enabled manifestation of the long-standing issue of violence against women. Though the term escapes a universal definition, it is commonly understood to comprise the different forms of online gender-based hate speech, sexual harassment, and abusive behaviours targeting women and girls.¹ The five most common manifestations of cyber misogyny are so-called revenge porn, non-consensual sharing of intimate images, child sexual exploitation, cyber stalking, and gender-based hate speech online.² Advocates for safer online spaces for women and girls insist on distinguishing cyber misogyny from cyber bullying in order not to erase the discriminatory and gendered nature of the behaviour. According to numbers from the United Nations, an estimated 95% of online aggressive behaviour, harassment, abusive language and denigrating images are aimed at women and come from current or former male partners.³ Online violence is therefore tied to the larger social problems of sexism and misogyny, while the online space, with its anonymity, affordability and wide reach, allows for the proliferation of misogynistic abuse.

This report aims to provide an overview of the tools available to women and girls within Canada's legislative body, from criminal law recourse to avenues for civil redress. In doing so, it hinges on issues of freedom of expression, privacy rights, and state surveillance.

Policy background

The terminology around technology-enabled violence against women entered mainstream discourse in Canada following the high profile cases of teens committing suicide after a prolonged period of online abuse and sexual harassment. On 10 October 2012, 15-year-old Amanda Todd from British Columbia committed suicide after years of bullying following the distribution of topless pictures of her. A few months later, in April 2013, 17-year-old Rehtaeh Parsons committed suicide after photos of her alleged gang rape by four boys at the age of 15 circulated in her school.

Public outrage at the deaths morphed into conversations about online violence. Often, however, these conversations are articulated around the notion of cyber bullying and therefore gloss over the systemic roots of the violence. Canadian feminist activists have worked to highlight the social hierarchies and relations of power at the roots of the sexual violence online. In parallel, a public conversation on the effectiveness of existing legal tools to address this problem took place, holding perpetrators of technology-enabled sexual violence legally responsible for their conduct and calling for redress for their victims.

Criminalising

Canada's legal landscape features no definition of cyber misogyny, and no criminal offence specifically prohibits it. Instead, a wide range of existing legal tools and mechanisms can be used to address one manifestation of cyber misogyny or another. In other words, depending on the nature of the cyber misogyny activity, a number of offences in the criminal code can be used to prosecute the perpetrators.

Among the offences used to prosecute cyber misogyny are criminal harassment,⁴ extortion,⁵ intimidation,⁶ uttering threats,⁷ voyeurism,⁸ publication of obscenity,⁹ false messages,¹⁰ counselling

1 West Coast LEAF. (2014a). *#CyberMisogyny: Using and strengthening Canadian legal responses to gendered hate and harassment online*. www.westcoastleaf.org/wp-content/uploads/2014/10/2014-REPORT-CyberMisogyny.pdf

2 For a definition and examples of each manifestation, see West Coast LEAF. (2014a). Op. cit.

3 Association for Progressive Communications. (2010). *How Technology is Being Used to Perpetrate Violence Against Women – And to Fight It*. <https://www.apc.org/en/system/files/How+Technology+is+Being+Used+to+Perpetrate+Violence+Against+Women+%E2%80%93+And+to+Fight+it.pdf>

4 Criminal Code, RSC 1985, c C-46, s. 264

5 Criminal Code, s. 346

6 Criminal Code, s. 423

7 Criminal Code, s. 264.1

8 Criminal Code, s. 162

9 Criminal Code, s. 163

10 Criminal Code, s. 372(1)

suicide¹¹ and defamatory libel.¹² Offences related to the way the technology is used include the unauthorised use of a computer,¹³ “mischief” in relation to data,¹⁴ identity theft and identity fraud.¹⁵ With relation to online sexual exploitation of minors, some existing offences are child pornography,¹⁶ luring of a child using the internet,¹⁷ sexual exploitation¹⁸ and making sexually explicit material available to a child.¹⁹

This approach is both palliative and limited. It is palliative because, in the absence of specific criminal offences related to online violence against women, the onus is left on the prosecutors and the victims to find the best legal option. It is limited because most existing criminal offences require a specific additional conduct, besides online violence against women, before deeming it prosecutable.

For example, cyber stalking, though not legally defined, is often prosecuted as criminal harassment.²⁰ However, harassment is only criminal under Canadian law if the target has “reasonable fear” for her safety or the safety of someone she knows. This fear includes the risk of physical as well as psychological or emotional harm, and is left to the appreciation of the court on the basis of the submitted evidence. Embarrassment, humiliation, and breach of privacy are not necessarily equated with “fear” by the courts.²¹

A few of these problems were rectified when the federal Protecting Canadians from Online Crime Act came into force in March 2015.²² To use the same example, cyber stalking can now be prosecuted as a harassing and indecent communication. Before the changes, only communications made by telephone calls, regardless of how indecent or harassing they were, could constitute a criminal offence. The criminal provisions related to false information and indecent communication were also modernised by the Act to include any means of tele-

communications, thereby extending them to online communications.

The main change to the Act is the creation of a new criminal offence. Canadian law now explicitly criminalises the publication of intimate images without the consent of the person depicted. Intimate images are defined as a “photographic, film or video recording” in which a person is nude, exposing intimate regions or “engaged in explicit sexual activity”. For the publication to constitute a criminal offence, the person depicted must have a “reasonable expectation” of privacy, meaning that they expected the image would be kept in the private sphere. This new offence fills a gap in Canadian criminal law. It used to be that the distribution without prior consent of intimate images of an adult could only be prosecuted in the presence of additional aggravating factors, while child pornography provisions were applied if the depicted person is a minor.²³

Advocacy groups for women’s rights welcomed the changes brought by the Act, but described them as a limited response to a broader societal issue that focuses only on the application of criminal law.²⁴ Moreover, the sections of the Act infringing on privacy raised numerous concerns. Indeed, the federal government made the provisions of the Act related to online violence contingent on increased state surveillance.²⁵

Moreover, given the lack of a definition for technology-enabled violence against women in the legal landscape, there is a corresponding lack of clarity as to the procedures and investigation process in these cases.²⁶ It is important to ensure a gender-sensitive approach to enforcement and implementation of criminal laws applied to cyber misogyny as well as proper training on how to handle technology-enabled cases of violence against women.²⁷

Redressing

Though criminal activity is under federal jurisdiction, provinces in Canada have the powers to enact legislation affecting education and civil law, two fields under provincial jurisdiction.

11 Criminal Code, s. 241

12 Criminal Code, s. 298-301

13 Criminal Code, s. 342.1, 342.2

14 Criminal Code, s. 430(1.1)

15 Criminal Code, s. 402.1, 402.2, 403

16 Criminal Code, s. 163.1

17 Criminal Code, s. 172.1

18 Criminal Code, s. 151-153

19 Criminal Code, s. 171.1

20 Criminal Code, s. 264

21 CCSO Cybercrime Working Group. (2013). *Report to the Federal/ Provincial/Territorial Ministers Responsible for Justice and Public Safety – Cyberbullying and the Non-consensual Distribution of Intimate Images*. www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii

22 www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6830553&File=4

23 CCSO Cybercrime Working Group. (2013). Op. cit.

24 West Coast LEAF. (2014b). Submissions 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.

25 Ibid.

26 Women’s Legal and Human Rights Bureau. (2015). *From impunity to justice: Domestic legal remedies for cases of technology-related violence against women*. Association for Progressive Communications. www.genderit.org/resources/impunity-justice-domestic-legal-remedies-cases-technology-related-violence-against-women

27 Ibid.

Provinces can establish torts (civil wrongs). This option allows women and girls to take positive actions to stop the abuse through court-issued injunctions and to seek damages (monetary compensation) for the harm endured. There seems to be no tort of harassment, but women and girls can obtain civil redress for violation of their rights through the torts of defamation and invasion of privacy.²⁸ Legal options for civil redress raise questions of access to justice, because civil law suits are often time-consuming, open to public scrutiny, expensive, and sometimes not covered by provincial legal aid regulations.²⁹

With regards to public scrutiny, some advocates have called for enhanced privacy protections for women and girls when technology-enabled violence is part of a case, maintaining that it should be considered by courts to be a prerequisite to ensuring the proper administration of justice.³⁰

Nova Scotia's newly created Cyber-safety Act (CSA),³¹ enacted three weeks after the suicide of Rehtaeh Parsons, introduces a tort of cyber bullying.³² The adopted definition of cyber bullying is not restricted to minors and therefore makes it possible to use it for the benefit of adults.³³ The CSA allows a person to request the court to issue a protection order prohibiting a person from engaging in cyber bullying, confiscating any electronic devices and discontinuing a person's internet access.³⁴ It also empowers the court to award damages³⁵ and renders parents legally liable for their children's online conduct.³⁶ The legislation creates the Cyber SCAN investigative unit tasked with the investigation of cyber bullying complaints and granted data collection powers.³⁷

Several Canadian provinces have also passed legislation amending their respective Education Acts to address online violence. In Québec, the Edu-

cation Act and An Act Respecting Private Education require schools to establish an anti-bullying plan and give principals the authority to expel students who pose a risk to the safety of others. Similar provisions were included in 2012 in Ontario's Education Act.³⁸ Some provincial laws include a specific reference to a particular kind of discrimination. For example, Manitoba's Public Schools Amendment Act (Safe and Inclusive Schools) provides a definition of bullying and requires schools to implement a respect-for-human-diversity policy.³⁹ Reference to discrimination provides a useful element for a legal framework to address cyber misogyny because of the gendered nature of the conduct.

Empowering

Law can play a crucial role in addressing cyber misogyny by holding perpetrators legally accountable for their actions, denouncing and deterring abusive conduct online, and remedying the suffered harm.⁴⁰ Yet, given the breadth of online abusive behaviour targeting women and girls, no single legislative response can address it fully. Moreover, three comments must be made as to the use of laws to halt technology-enabled violence against women.

First, legislative provisions, criminal or civil, can only respond after the fact, once the cyber misogyny has occurred and harmed women and girls.⁴¹ Second, the existence of legal tools does not guarantee that they are enforced and implemented.⁴² Third, provisions that protect and victimise women and girls are rarely articulated in a way that empowers them.

In that context, it is imperative to develop a comprehensive and systematic approach to ensure that laws and policies addressing cyber misogyny respond to the actual experiences of women and girls, monitor enforcement of those policies, and foster prevention initiatives that aim to change attitudes.

This would serve to shift the role of women and girls from victims who need protection from the state to empowered actors in their own experiences. It can take the form of open consultations with women and girls who experience cyber misogyny, popular education initiatives to foster secure online

28 Korte, C. A., & Gatensby, A. H. (2015). *No Man's Land: Cyberbullying and the Canadian Legal Landscape*. clcnw.com/uploads/articles/75/no-mans-land.pdf?1428588648

29 West Coast LEAF. (2014a). Op. cit.

30 Safety Net Canada. (2013). *Executive Summary: Canadian Legal Remedies for Technology-Enabled Violence Against Women*. www.bcsth.ca/sites/default/files/SNC_Executive%20SummaryLegalRemedies2013_2.pdf

31 Cyber-safety Act, SNS 2013, c 2. www.canlii.org/en/ns/laws/stat/sns-2013-c-2/latest/sns-2013-c-2.html

32 For a detailed overview of the CSA, see: Nyst, C. (2014). *Technology-related violence against women: Recent legislative trends*. Association for Progressive Communications. <https://www.apc.org/en/pubs/technology-related-violence-against-women-%E2%80%93-recent>

33 Cyber-safety Act, s. 2

34 Cyber-safety Act, ss. 2, 5, 8, 9

35 Cyber-safety Act, ss 21, 22

36 Cyber-safety Act, ss 22(3)

37 Cyber-safety Act, s. 26; cyberscan.novascotia.ca

38 CCSO Cybercrime Working Group. (2013). Op. cit.

39 Ibid.

40 West Coast LEAF. (2014a). Op. cit.

41 Ibid.

42 Fascendini, F., & Fialova, K. (2011). *Voices from digital spaces: Technology-related violence against women*. Association for Progressive Communications. <https://www.apc.org/en/node/14236>

behaviour and increase autonomy as a technology user, and the implementation of measures to ensure participation of women and girls in the development of policies related to cyber misogyny.

Action steps

The following action steps are suggested for Canada:

- Create a dedicated office tasked with data collection, research, and recommendations on implementing and creating laws and policies addressing cyber misogyny.
- Conduct an extensive review of Canada's legislative body to define the gaps in the legal response to cyber misogyny before creating new laws.
- Include the input and experiences of women and girls in drafting legislation through consultations.
- If there is a legal gap, focus on redress over criminalisation.
- Increase and promote public awareness and prevention campaigns aimed at empowering women and girls – for example, media literacy and cyber security workshops – instead of implementing control and data collection measures.

Sexual rights and the internet

The theme for this edition of Global Information Society Watch (GISWatch) is sexual rights and the online world. The eight thematic reports introduce the theme from different perspectives, including the global policy landscape for sexual rights and the internet, the privatisation of spaces for free expression and engagement, the need to create a feminist internet, how to think about children and their vulnerabilities online, and consent and pornography online.

These thematic reports frame the 57 country reports that follow. The topics of the country reports are diverse, ranging from the challenges and possibilities that the internet offers lesbian, gay, bisexual, transgender and queer (LGBTQ) communities, to the active role of religious, cultural and patriarchal establishments in suppressing sexual rights, such as same-sex marriage and the right to legal abortion, to the rights of sex workers, violence against women online, and sex education in schools. Each country report includes a list of action steps for future advocacy.

The timing of this publication is critical: many across the globe are denied their sexual rights, some facing direct persecution for their sexuality (in several countries, homosexuality is a crime). While these reports seem to indicate that the internet does help in the expression and defence of sexual rights, they also show that in some contexts this potential is under threat – whether through the active use of the internet by conservative and reactionary groups, or through threats of harassment and violence.

The reports suggest that a radical revisiting of policy, legislation and practice is needed in many contexts to protect and promote the possibilities of the internet for ensuring that sexual rights are realised all over the world.

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