

**SUBMISSION TO THE
STANDING COMMITTEE ON JUSTICE & HUMAN RIGHTS
REGARDING ONLINE HATE**

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9 MAY 2019

1. This submission¹ argues that it is essential to develop a comprehensive national strategy with respect to technology facilitated hate, violence and harassment. That strategy must be designed to safeguard the right of members of marginalized communities, including women and young people, to full and equal participation in Canadian society. The submission:
 - a. provides a brief overview of technology facilitated hate, violence and harassment;
 - b. explains why reinstatement of s. 13 of the *Canadian Human Rights Act* is an integral component of a multi-pronged national strategy; and
 - c. recommends elements necessary for creating an effective multi-pronged national strategy.
- A. SOCIAL, TECHNOLOGICAL AND LEGAL CONTEXT**
2. Hate propagation poses two issues of pressing concern in a constitutional democracy committed to equally valuing and protecting freedom of expression, equality, Indigenous rights and multiculturalism:
 - a. it gives rise to “grave psychological and social consequences to individual members of the targeted group from the humiliation and degradation caused by hate propaganda”; and
 - b. it creates “harmful effects on society at large by increased discord and by affecting a subtle and unconscious alteration of views concerning the inferiority of targeted groups”.²
3. Hate propagation effects these results through “[r]epresentations vilifying a person or group ... [that] seek to abuse, denigrate or delegitimize them, to render them lawless, dangerous or unworthy or unacceptable in the eyes of audience.”³ In addition to the immediate effects of this form of discrimination, the vilification and dehumanization of target groups and their members that are often hallmarks of hate propagation can work to pave the way for future discrimination, intolerance and violence.⁴
4. Moreover, hate propagation undermines the ability of targeted groups and their members to

respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy. Indeed, a particularly insidious aspect of hate speech is that it acts to cut off any path of reply by the group under attack. It does this not only by attempting to marginalize the group so that their reply will be ignored: it also forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy.⁵

5. Over the last decade Canada, like many other nations around the world, has experienced significant economic and political upheaval likely to leave many who are suffering as a result of these dislocations grasping for explanations. These are the kinds of conditions in which empathy and respect can too easily be eclipsed by scapegoating “other” identifiable groups as the source of the problem.⁶ Manifestations of hatred against marginalized groups are evident both offline and online.
6. Police-reported hate crime increased by 47% from 2016 to 2017 – reaching an all time high.⁷ Forty-three percent of all reports related to race or ethnicity (up 32% from the prior year), while 41% were based on religion (up by 83% from the prior year) and 10% on sexual orientation (rising from 176 incidents in 2016 to 204 in 2017).⁸ The number of hate crimes rose for all racial groups between 2016 and 2017 with Blacks being the most commonly targeted group.⁹ Hate crimes against members of the Muslim faith increased 151% from 2016 to 2017, while those against members of the Jewish faith increased from 221 to 360 in the same period.¹⁰ Fifty-three percent of hate crimes motivated by sexual orientation involved a violent offence, compared with 47% of incidents targeting ethnicity and 24% of incidents motivated by religion.¹¹
7. Growth in hate-motivated crime, anti-immigrant sentiment, anti-LGBTQ2SI movements, and white nationalism is not isolated to Canada, but is also a concern in many other countries around our increasingly interconnected globe.¹²
8. Hate motivated behaviours, however, are not isolated to “real space” as any distinction between our offline and online worlds increasingly begins to blur, if not disappear. In many ways the internet and other digital communications technologies offer us an unprecedented and often public window into the heights and depths of our own humanity,¹³ as well as the capacity of corporations to manipulate and shape our understandings of and interactions with the world around us (as detailed below in paragraph 14).
9. Online hate propagation includes both generalized attacks on identifiable groups¹⁴ and attacks targeted at individuals on the basis of their actual or perceived membership in an identifiable group or groups.¹⁵ Lesbians, Black women, Indigenous women, and Muslim women are among the targeted groups at issue in human rights cases in Canada.¹⁶
10. Online attacks on individuals (sometimes referred to as “cyberbullying”) have become a central area of public and policymaker concern. In many cases, these attacks are founded on group-based hatred and discrimination, including in relation to women, racialized persons, religious minorities and members of the LGBTQ2SI community. As Professor Danielle Keats Citron has put it:

These assaults terrorize victims, destroy reputations, corrode privacy, and impair victims' ability to participate in online and offline society as equals.¹⁷

11. Similarly, those involved in “cyberbullying” research with respect to young people have emphasized the degree to which membership in a minority ethnic group, the LGBTQ2SI community or being disAbled may expose youth to a greater risk of being targeted.¹⁸ For example, an EGALE study released in 2011 showed that 23% of gay boys and 47% of transgendered students who responded to their survey said that they had been victims of online harassment, as compared to only 5.6% of the heterosexual students who responded to the survey.¹⁹
12. Research in these areas also emphasizes the heightened impact that online attacks can have on targets related both to the breadth of dissemination and to the pervasive presence of online media in everyday life.²⁰ As Keats Citron describes it with respect to targeted women:

Such harassment has a profound effect on targeted women. It discourages them from writing and earning a living online. It interferes with their professional lives. It raises their vulnerability to offline sexual violence. It brands them as incompetent workers and inferior sexual objects. The harassment causes considerable emotional distress. Some women have committed suicide.²¹
13. Online service providers are increasingly becoming involved in removing offending content and hate groups from their platforms,²² particularly following online streaming of the tragic mass killing of Muslims in two New Zealand mosques several weeks ago.²³ While these actions are laudable, these privately-made determinations relating to the content of the public sphere serve to demonstrate the urgent need to develop a transparent, accountable and comprehensive publicly-led national strategy. This is particularly so given that online service providers are also engaging in data collection and profiling practices that themselves open Canadians up to discrimination.²⁴
14. The current-data-for-services model of the internet incents disclosure of information that sets users (especially young people) up for harassment. Online service providers (and the corporations to whom they sell user data) profile and categorize users based on their data for purposes of behaviourally-targeted advertising involving predictions about who they are and who they ought to be that are often premised on narrow mediatized stereotypes. When young people try to reproduce these stereotypes in order to attract the “likes” and “friends” set up by platforms as numeric markers of success, they are opened up to conflict with others who monitor, judge and sometimes stalk them and their self-representations.²⁵ Corporate data practices have also recently been clearly implicated in fomenting social divisions in order to, among other things, manipulate election results.²⁶
15. Our evolving socio-technological context strongly suggests that Canada’s legal responses to online hate propagation should also include a human rights based approach. Indeed, the Nova Scotia Task Force on Bullying and Cyberbullying recommended involvement of human rights commissions to assist in resolving these harassment-based issues.²⁷ Similarly, Keats Citron, writing from a US perspective, has called for civil rights recourse for online hate and harassment.²⁸

16. Canada once had such legal recourse in the form of s. 13 of the *Canadian Human Rights Act*. The Federal Court of Appeal affirmed the constitutionality of s. 13 in 2014.²⁹ Moreover, in 2013 the Supreme Court of Canada affirmed in *Whatcott* the pressing and substantial purposes of human rights restrictions on dissemination of group-based hate.³⁰

B. REINSTATE S. 13 OF THE *CANADIAN HUMAN RIGHTS ACT*

17. Consistent with its international obligations, Canada has taken a multi-faceted approach to this pressing social equality issue, including a variety of criminal, human rights and administrative law restrictions that seek to provide co-equal respect for equality and freedom of expression.³¹ Reinstatement of section 13 should be seen as an integral component of a multi-pronged approach to these issues in an increasingly digitally connected world because:

- a. access to the hate propaganda-related provisions of the *Criminal Code* is circumscribed by requiring the consent of the Attorney General to initiate prosecution. In contrast, under s. 13, group members were entitled to file a complaint without any prior state authorization;
- b. full carriage of criminal prosecutions lies with the crown, in a contest between the individual and the state characterized by “a deeply entrenched prioritizing of liberal values” often at the expense of substantive equality concerns.³² In contrast, human rights mechanisms offer complainants a greater degree of control in a forum expert not only on issues of individual rights, but also the equality rights of socially vulnerable groups;
- c. in criminal prosecutions, punitive rather than restorative remedies tend to predominate. Human rights mechanisms offer the unique opportunity for forward-looking, conciliatory remedies and educative reform, insofar as that is possible given the vitriol that often characterizes these kinds of attacks. Forward-looking mediated resolutions of s. 13 cases have resulted in letters of apology and renunciation of the impugned materials, as well as agreements to remove content and to close impugned accounts,³³ and
- d. criminal proceedings related to hate propaganda require proof of intent, which equality-seeking communities have identified as a deterrent to seeking legal redress for hate crimes.³⁴ In contrast, s. 13, as a human rights provision, is not aimed at proof of blameworthy intent, but at identifying and providing redress for the *effects* of this discriminatory practice on its targets and on society as a whole.

C. DEVELOP A MULTI-PRONGED NATIONAL STRATEGY

18. We recommend development of a multi-pronged approach that recognizes that while *legal* responses can serve to publicly communicate the place and value of marginalized groups in the community, including women and young people, law alone will not meaningfully respond to the needs and aspirations of *all*. Instead, law should form part of a comprehensive national

strategy that:

- a. directly engages women and young people from a wide spectrum of social locations and ages in the policy-making process³⁵ in order to ensure that the impacts of interlocking axes of discrimination that inform the lived realities of members of these groups are meaningfully integrated;
- b. moves toward approaches focused on the responsibility of the community, individual perpetrators and corporations, rather than shifting it onto women and young people themselves;
- c. improves the responsiveness of criminal legal avenues by:
 - i. ensuring that law enforcement officers are properly trained and resourced in receiving and evaluating complaints about tech-facilitated attacks, and are clear that industry terms of service do not in any case override criminal law; and
 - ii. ensuring that judges are familiarized with the social context relevant to tech-facilitated hate, harassment and violence, including the seamless integration of “online/offline” in girls’ and women’s lives and the right of girls and women to participate in our digitally networked society free of violence and discrimination;
- d. ensures that enhancing the participation of marginalized groups, including women and young people, by eliminating barriers to their participation does not become an excuse for unnecessary expansion of police powers and surveillance;
- e. enhances support available to targets of tech-facilitated attacks to quickly and inexpensively address them by considering development of a centralized administrative agency with expertise in the areas of communications technology, tech-facilitated hate, harassment, violence, and discrimination, learning from models such as Australia’s eSafety Commissioner and New Zealand’s NetSafe, and existing agencies in Manitoba and Nova Scotia;
- f. recognizes the importance of the proactive role that law can play in addressing underlying discrimination and pre-existing inequality that incubates harassment of, violence against and disrespect for the privacy and autonomy of members of marginalized communities, including women and young people by:
 - i. reinstating a federal human rights based complaint mechanism (e.g. the previously repealed s. 13 of the *CHRA*) and promoting and providing resources for human rights based educational responses to address discriminatory behaviours and structures (including privacy-disrespecting practices of technology corporations); and
 - ii. implementing education law and curriculum focused explicitly on the discriminatory behaviours and structures that underlie tech-facilitated hate, harassment and violence, and on members of marginalized communities’ equal rights to public participation, privacy, free expression and autonomy;

- g. recognizes and addresses the role that the “data in exchange for services” commercial model that currently characterizes digital networks plays in shaping the environment in ways that create and maintain barriers to full and equal participation by members of marginalized communities. Regulation of online service providers should be improved to mandate greater transparency and accountability in their collection, use and distribution of users’ data, and in their responses to complaints about tech-facilitated attacks. These measures will become increasingly urgent as service providers continue to move toward machine-based algorithmic decision-making, which will compromise their ability to provide explanations for their decisions in terms understandable to humans; and
- h. recognizes and values grassroots community knowledge and collaboration as essential to the development of responses to limitations on marginalized community members’ full participation that are meaningful to community members from a wide spectrum of social locations by:
 - i. actively engaging community organizations in policy-making processes and ensuring them adequate resources to participate on a equal footing with industry in these processes; and
 - ii. providing funding and other resources to these organizations to support their research, and individual and collaborative initiatives.

All of which is respectfully submitted,



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The Canadian Women’s Foundation concurs in this submission:



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* We are full professors at the University of Ottawa (Bailey in the Faculty of Law (Common Law) and Steeves in the Department of Criminology). Together we co-lead The eQuality Project, a 7-year initiative funded by a Social Sciences and Humanities Research Council of Canada (SSHRC) Partnership Grant. The eQuality Project focuses on how online behavioural profiling contributes to an environment that sets young people from marginalized communities up for harassment, conflict and violence. We previously co-led The eGirls Project, a 3-year initiative funded by a SSHRC Partnership Development Grant, which focused on girls' and young women's experiences relating to privacy, equality and gender performance on social media. In addition, Dr. Steeves is the Lead Researcher for MediaSmarts' Young Canadians in a Wired World research project, Canada's largest longitudinal study of the experiences of young Canadians in networked environments.

¹ This submission incorporates content from submissions previously filed with: The Minister of Innovation, Science Economic Development re: National Digital and Data Consultations (2018), the [Special Rapporteur on Violence Against Women re: Regulating Online Violence and Harassment Against Women](#) (2018) (co-authored with Suzanne Dunn); the Standing Committee on Access to Information, Privacy and Ethics (2017); the OPC's [Call for Submissions on Online Reputation](#) (2016); the House of Commons Standing Committee on Justice & Human Rights re: Bill C-13 (2014); and the Senate Standing Committee on Justice and Human Rights re: Bill C-304 (2013).

² *Saskatchewan Human Rights Commission v William Whatcott* 2013 SCC 11 at para 73 [Whatcott]

³ *Ibid* at para 41.

⁴ Alexander Tsesis, *Destructive Messages: How Hate Speech Pave the Way for Harmful Social Movements* (New York: New York University Press, 2002).

⁵ *Whatcott*, *supra* note 2 at para 75.

⁶ Jane Bailey, "Twenty Years Later *Taylor* Still Has it Right" (2010) 50 SCLR (2d) 1 at 3-4 [Bailey].

⁷ Statistics Canada, *Police-reported Hate Crime, 2017*, The Daily (2018-11-29), online: <https://www150.statcan.gc.ca/n1/en/daily-quotidien/181129/dq181129a-eng.pdf?st=vdp4Uz1A> at 1.

⁸ *Ibid* at 3-4.

⁹ *Ibid* at 3.

¹⁰ *Ibid* at 4.

¹¹ *Ibid* at 4.

¹² Southern Poverty Law Center, "Global Hate: Hate Travels", *Intelligence Report* (Spring 2019), online: <https://www.splcenter.org/fighting-hate/intelligence-report/2019/global-hate-hate-travels>; Hannah Mason-Bish and Loretta Trickett, "Introduction to the special issue of the politics of hate: community, societal and global responses" (2019) 71(3) *Crime, Law and Social Change* 241-243.

¹³ Bailey *supra* note 6 at 3.

¹⁴ League for Human Rights of B'nai Brith Canada, "2012 Audit of Antisemitic Incidents" (B'nai Brith Canada National Office, 2012), online: <http://www.bnaibrith.ca/audit2012/> at 16; Douglas MacMillan, "Twitter Aids Rise of Web-Based Hate Forums, Report Finds" *Bloomberg News* (7 May 2013), online: <http://www.bloomberg.com/news/2013-05-07/twitter-aids-rise-of-web-based-hate-forums-report-finds.html>.

¹⁵ Danielle Keats Citron, "Cyber Civil Rights" (2009) 89 *Boston University L Rev* 61-125 [Keats Citron].

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- ¹⁶ See, for example: *Schnell v Machiavelli and Associates Emprize Inc.* 2002 CanLII 1887 (CHRT) at para 94-98; *Warman v Guille* 2008 CHRT 40 (CanLII); *Association of Black Social Workers v Arts Plus* (1994), 24 CHRR D/513 (NS Bd Inq); *Warman v Western Canada for Us*, 2006 CHRT 52 (CanLII); *Warman v Kouba*, 2006 CHRT 50 (CanLII); *Warman v Beaumont*, 2007 CHRT 49 (CanLII); *Warman v Northern Alliance*, 2009 CHRT 10 (Can LII).
- ¹⁷ Keats Citron, *supra* note 15 at 64.
- ¹⁸ See, for example: UNICEF Innocenti Research Centre, “Child Safety Online: Global challenges and strategies” (Florence: UNICEF, 2011) at 3, online: Unicef Canada <http://www.unicef.ca/sites/default/files/imce_uploads/TAKE%20ACTION/ADVOCATE/DOC/S/Child_Safety_online_Globa_challenges_and_strategies.pdf>.
- ¹⁹ Senate, Standing Committee on Human Rights, *Cyberbullying Hurts: Respect for Rights in the Digital Age* (Canada: December 2012) at 30 [Senate Report].
- ²⁰ *Ibid* at 17.
- ²¹ Keats Citron, *supra* note 15 at 375.
- ²² See, for example: Raffy Boudjikianian, “Banned by Facebook, shunned by politicians, Soldiers of Odin hold event at Royal Canadian Legion branch” CBC News (2 May 2019), online: <https://www.cbc.ca/news/canada/edmonton/soldiers-of-odin-legion-1.5119042>.
- ²³ BBC News, “Christchurch shootings: 49 dead in New Zealand mosque attacks” (15 March 2019), online: <https://www.bbc.com/news/world-asia-47578798>.
- ²⁴ See, for example: Office of the Privacy Commissioner of Canada, “Facebook refuses to address privacy deficiencies despite public apologies for ‘breach of trust’”, News Release (25 April 2019), online: https://www.priv.gc.ca/en/opc-news/news-and-announcements/2019/nr-c_190425/, and Safiya Nobel, *Algorithms of Oppression: How Search Engines Reinforce Racism*. (NYU Press: New York, 2018).
- ²⁵ Jane Bailey, “A Perfect Storm: How the Online Environment, Social Norms, and Law Shape Girls’ Lives”, Jane Bailey and Valerie Steeves (eds) *eGirls, eCitizens*. (Ottawa: University of Ottawa Press, 2015) at 46.
- ²⁶ Carole Cadwalladr, “‘I made Steve Bannon’s psychological warfare tool’: meet the data war whistleblower” *The Guardian* (18 March 2018), online: <https://www.theguardian.com/news/2018/mar/17/data-war-whistleblower-christopher-wylie-facebook-nix-bannon-trump>.
- ²⁷ A. Wayne MacKay, “Respectful and Responsible Relationships: There’s No App for That” (Nova Scotia Task Force on Bullying and Cyberbullying: 2012) at 44.
- ²⁸ Danielle Keats Citron, *Hate Crimes in Cyberspace*. (Harvard University Press: Cambridge MA, 2014).
- ²⁹ *Marc Lemire v Canadian Human Rights Commission, Richard Warman, The Attorney General of Canada* 2014 FCA 18.
- ³⁰ *Whatcott*, *supra* note 2.
- ³¹ Bailey, *supra* note 6 at 18 [Bailey].
- ³² Rosemary Cairns Way, “Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible?” (2005) 4 JL & Equality 203 at para 38.
- ³³ Bailey, *supra* note 6 at 16.
- ³⁴ Andrea Slane, “Combatting Hate on the Internet: Current Canadian Efforts and the Recommendations of Non-Governmental Organizations to Improve Upon Them” (Paper for the Department of Justice, December 2007) at 23.

³⁵ Under Article 3 of the UN Convention on the Rights of the Child children have the right to participate in processes that affect them and to have their best interests protected. Further, the UN Committee on the Rights of the Child requires signatory states to “pay special attention to the girl child to be heard, to receive support, if needed, to voice her view and her view be given due weight”: UN Committee on the Rights of the Child, 2009 at para 77.