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CCSO CYBERCRIME WORKING GROUP

**Report to the Federal/Provincial/Territorial Ministers
Responsible for Justice and Public Safety**

**Cyberbullying and the Non-consensual Distribution of
Intimate Images**

June 2013

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Executive Summary

At their October 2012 meeting, Federal/Provincial/Territorial (FPT) Ministers responsible for Justice and Public Safety directed senior officials to identify potential gaps in the *Criminal Code* on cyberbullying and the non-consensual distribution of intimate images and report back to Deputy Ministers. This work was assigned to the Coordinating Committee of Senior Officials (CCSO), Criminal Justice, Cybercrime Working Group (CWG). A Sub-Group on Cyberbullying was established in January 2013, and is co-chaired by the Department of Justice Canada and the Ontario Ministry of the Attorney General.

At their April 24, 2013 meeting, FPT Ministers directed officials to expedite this work and to submit a final report to FPT Deputy Ministers in June 2013. This work was conducted in two parts: the Sub-Group completed the analysis of the issue of cyberbullying in April 2013 and the analysis of the non-consensual distribution of intimate images was undertaken by the CWG and CCSO plenary in April-May 2013.

The Report is divided into two parts: the first part of the report addresses the issue of cyberbullying and includes information relating to the scope of the problem, the impact of cyberbullying on victims, existing legislative and policy responses and options for *Criminal Code* reform to address the issue.

The second part of the Report addresses the issue of the non-consensual distribution of intimate images and contains information about the scope of the problem, existing *Criminal Code* responses and options for a new *Criminal Code* offence.

With respect to cyberbullying, the Working Group considered the scope of the behaviour involved, the existing *Criminal Code* offences and the jurisprudence interpreting those offences. The Working Group also reviewed academic and other research reports on the issue of bullying and cyberbullying. The Working Group recommends that the *Criminal Code* be amended to modernize certain existing offences to deal with harassment through electronic media, as well as the investigative powers for law enforcement, to ensure that all acts of cyberbullying carried out through the use of new technologies can be effectively investigated and prosecuted. Should the proposed changes be made, the Working Group concluded that crimes involving telecommunications, such as cyberbullying and the non-consensual distribution of intimate images, could be more effectively and efficiently investigated. The Working Group concluded that existing *Criminal Code* offences generally cover most serious bullying behaviour and a new specific *Criminal Code* offence of bullying or cyberbullying is not required.

On the issue of the non-consensual distribution of intimate images, the Working Group and CCSO reviewed related literature and existing *Criminal Code* offences and concluded that there is a gap in the *Criminal Code's* treatment of this conduct. The Working Group recommends that a new criminal offence addressing the non-consensual distribution of intimate images be created, including complementary amendments relating to, for example, the forfeiture of items used in the commission of the offence and restitution to permit the victim to be compensated for any costs associated with having the images removed from the Internet.

Finally, the Working Group acknowledges that cyberbullying is, in fact, a recent manifestation of the longstanding social problem of bullying. The Working Group believes that a multi-faceted approach should be taken, which would include modernizing the *Criminal Code*. In that vein, the

Working Group recommends that all levels of government continue to adopt and support a multi-pronged approach to addressing these issues.

Introduction

Cyberbullying and the non-consensual distribution of intimate images are related social phenomena, the latter often being referred to as a type of cyberbullying. The core activities of both types of behaviour are not new (i.e., bullying and vengeful breaches of privacy), but the manner in which they are being carried out (i.e., via electronic means) has increased the reach and the scope of their impact.

Cyberbullying involves the use of information and communication technologies that support deliberate, hostile, and often repeated behaviour by an individual or group that is intended to hurt others. Although it is possible for anyone to be the victim of cyberbullying, as with bullying more generally, children and youth are the most common perpetrators and targets of this type of conduct.

The non-consensual distribution of intimate images involves the sharing of intimate images, often of a former partner, with third parties (either via the Internet or otherwise) without the consent of the person depicted in the image. Often the motivation is to take revenge against their former partner. Its effect is a violation of the former partner's privacy in relation to images, the distribution of which is likely to be embarrassing, humiliating, harassing, or degrading to that person.

Cyberbullying and the non-consensual distribution of intimate images is gaining increased attention across Canada, due in part, to a number of high profile cases reported in the media in which these activities were cited as factors in teen suicide.¹

I. Cyberbullying

Bullying is not a new phenomenon, but the widespread adoption of new communications technologies has enabled the migration of bullying behaviour to cyberspace, a phenomenon widely characterized as "cyberbullying." Cyberbullying is of growing concern to parents, police, educators and the public in general because of its increased prevalence and the fact that it has been implicated as a factor in a number of teen suicides.

Bullying behaviour involves the systematic abuse of power through unjustified and repeated acts intended to hurt or inflict some form of harm.² Its impact can be direct (physical and verbal teasing) or indirect (relational, such as social exclusion and spreading nasty rumours).³ Bullying is increasingly a problem for young persons and educators, especially given the heightened use

¹ Notably, the recent cases of 17-year-old Rehtaeh Parsons from Nova Scotia and 15-year-old Amanda Todd from British Columbia have received extensive media attention in Canada.

² Leanne Lester et al., "Problem behaviours, traditional bullying and cyberbullying among adolescents: longitudinal analyses" (2012) 17: 3-4 *Emotional and Behavioural Difficulties* 435 at 436.

³ *Ibid*, at 443.

of new technologies which permits easy and wide distribution of communication.⁴ Traditionally, bullying behaviour was typically associated with school settings; however, this is no longer the case as new technologies allow for victimization to occur outside of school and at any time of the day.⁵

At present, there is no universally accepted definition of what constitutes cyberbullying, although common elements can be found in many of the definitions examined. The Senate Standing Committee on Human Rights Report entitled, *Cyberbullying Hurts: Respect for Rights in the Digital Age*⁶ (Senate Report) acknowledges the difficulty in achieving consensus upon a single definition of cyberbullying, primarily because there is no common understanding of what comprises this activity. The Senate Report found support for the notion that cyberbullying is a form of traditional bullying, and noted that cyberbullying includes acts intended to intimidate, embarrass, threaten or harass the targeted victims.

Cyberbullying takes on various forms, including using emails, instant messaging, and text messages to send harassing and threatening messages or posting such messages in chat rooms, on “bash boards” and on other social networking websites. Another common method of cyberbullying is the online posting or electronic distribution of embarrassing pictures or videos. It may also involve the creation of websites that mock, torment and harass the intended victim or victims. Some websites can even be used by cyberbullies to create online polling or voting booths, allowing users of the website to vote on things such as the “ugliest” or “fattest” classmate.⁷

A recent Quebec study reveals that 1 in 3 high school students have been subjected to some form of bullying or cyberbullying.⁸ In Statistics Canada’s *Self-reported Internet Victimization in Canada, 2009*⁹ (based on the General Social Survey (GSS) on Victimization), it reported that 7% of Internet users aged 18 or older had been the victim of cyberbullying in their lifetime. The most common form of cyberbullying involved threatening or aggressive e-mails or instant messages, reported by almost three-quarters (73%) of cyberbullying victims, followed by hateful comments by over half (55%) of the victims. Eight percent of adults surveyed had their identity assumed by someone who then sent threatening e-mails. Internet users of chat sites and social networking sites were almost three times more likely to experience cyberbullying than Internet users who did not use these sites. The majority of adults over 25 years old were cyberbullied by a stranger (49%). Individuals between 15 and 24 years old were most likely to be bullied by a friend,

⁴ Michael A. Couvillon and Vessela Ilieva, “Recommended Practices: A Review of Schoolwide Preventative Programs and Strategies on Cyberbullying” (2011) 55:2 Preventing School Failure 96 at 96-97.

⁵ Justin W. Patchin and Sameer Hinduja, “Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying” (2006) 4:2 Youth Violence and Juvenile Justice 148 at 150.

⁶ Canada, Standing Senate Committee on Human Rights, *Cyberbullying Hurts: Respect for Rights in the Digital Age*, (Ottawa) online: <http://www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf> (last accessed: May 24, 2013).

⁷ See: <http://www.cyberbullying.ca/>. See also Media Smarts’ website on “How Kids Cyberbully”, online: <http://mediasmarts.ca/cyberbullying/how-kids-cyberbully>.

⁸ L’Enquête québécoise sur la santé des jeunes du secondaire 2010-2011: Tome 2 -Le visage des jeunes d’aujourd’hui: leur santé mentale et leur adaptation sociale, Institute de la statistique du Québec, p. 30, online: www.stat.gouv.qc.ca (last accessed May 24, 2013).

⁹ 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>.

classmate or an acquaintance (64%). Men were more likely to be bullied by a stranger than women (46% versus 34%), and women were more likely than men to be bullied by a classmate or co-worker (13% versus 6%).

The survey also asked adult respondents whether any of the children or youth (aged 8 to 17) living in their household had been the victim of cyberbullying or child luring. The results showed that 9% of adults living in a household that includes a child knew of a case of cyberbullying against at least one of the children in their household. Of these adults, 74% responded that the cyberbullying was in the form of threatening or aggressive e-mails or instant messages. This was followed by hateful comments sent by e-mail or instant messaging or posted on a website (72%), and having someone use the child's identity to send threatening messages (16%). Most adults responded that the children were bullied by someone they knew, such as a classmate (40%), a friend (20%) or acquaintance (11%), rather than by a stranger (21%).

Moreover, the GSS found that relatively few incidents of cyberbullying were reported to the police (7% of adults and 14% of children). The GSS noted "given that cyberbullying is not always criminal in nature and, thus, may not warrant reporting to police, other measures may be more appropriate." Data indicated that victims were more likely to block messages from the sender (60%), leave the Internet site (51%), or report the situation to their Internet or e-mail service provider (21%). In addition to this, testimony provided to the Standing Senate Committee indicates other reasons for not reporting cyberbullying may include fear of escalation, ineffectual responses in the past and fear of being deprived of access to their technology.

General statements about prevalence rates of cyberbullying are difficult to make, as research indicates that rates of cyberbullying vary considerably depending on numerous factors.¹⁰ Nonetheless, it is clear from recent Canadian studies on the nature and prevalence of cyberbullying, that cyberbullying occurs frequently and is a widespread phenomenon affecting predominately youth but also some adults.¹¹

The Senate Report also highlighted that youth who belong to minority groups or who are perceived to be different are at increased risk of being targeted, such as those who have a disability, are overweight, are members of ethnic minority groups and those who identify as, or are perceived to be, lesbian, gay, bisexual or transgendered.

Cyberbullying can be particularly destructive because it can spread to so many people worldwide, instantaneously, anonymously or through impersonation, and may remain online indefinitely. Children and youth who are victimized by cyberbullying are at an increased risk of experiencing psychological harm, such as chronic stress, academic and acting out problems (e.g.,

¹⁰ These factors include, the type of informant assessed (e.g. victims, peers, teachers), the definition and instrument on which assessment is based, the age group investigated, gender of participants, and rate of Internet and mobile phone use. See Nandoli von Marées and Franz Petermann, "Cyberbullying: An increasing challenge for schools" (2012) 33:5 *School Psychology International* 467 at 469.

¹¹ According to a recent online survey of 422 Canadian teenagers conducted by Ipsos Reid, one-in-five (20%) teens indicated they have witnessed someone they know being bullied on social networking sites and nearly one-in-ten (8%) stated that they themselves have been victims of online bullying on social networking sites. One-in-seven (14%) of the teenagers surveyed indicated that they had been victims of mean or inappropriate comments on social networking sites.

weapon carrying).¹² Cyberbullying may cause victims to feel helpless, which in turn can lead to school violence and suicidal ideation.¹³ These effects are thought to result from the major role that electronic communications play in the social lives of Canadians (particularly youth),¹⁴ the extensive audience reached through electronic communications, and the permanence of cyberspace (which includes the general lack of control a person has over material once it becomes available online).

Responses to Cyberbullying

Traditionally, bullying has been addressed through non-legislative means that include education, public awareness, and family and community support. This multi-pronged approach has been adopted across Canada as well as internationally. It reflects the need for comprehensive responses by all levels of government, educators, non-governmental organizations, the police and community groups.

The Government of Canada through its various departments and agencies have, for a number of years, recognized the benefits of a multi-pronged approach and have developed programs in the area of prevention, knowledge development and stakeholder engagement. These programs are run through or supported by the Royal Canadian Mounted Police (RCMP), the Public Health Agency of Canada, the National Crime Prevention Centre (NCPC), Public Safety Canada and Justice Canada. Programs such as the RCMP's WITS (Walk Away, Ignore, Talk it Out, Seek Help), is an example of cross-sector collaboration as it was developed in partnership with the University of Victoria, PREVNet (Promoting Relationships and Eliminating Violence Network), and the Rock Solid Foundation (not for profit crime prevention organization from Victoria). The NCPC also addresses cyberbullying and bullying through numerous projects it funds in relation to youth violence. In relation to education, the NCPC has produced a number of publications that address bullying, and federal funding supports the education programs at the Canadian Centre for Child Protection. Many of these departments and agencies are also involved with outreach activities to ensure that all relevant stakeholders are consulted and engaged.

Many of the provinces and territories have taken a similar approach to combating bullying and cyberbullying and recognize that the issue is effectively addressed through programs, which focus on the cause of this behaviour. For example, since 2004 Manitoba has had *The Safe Schools Charter*, which requires every school in the province to have a code of conduct that protects students from bullying, abuse, discrimination and other anti-social behaviour.

British Columbia announced its ERASE (Expect Respect and a Safe Education) strategy in 2012. This is a comprehensive, multi-pronged approach to promote positive mental health and wellness and prevent bullying and violent behaviour in schools. As part of the ERASE strategy, British

¹² William V. Pelfrey, Jr. and Nicole L. Weber, "Keyboard Gangsters: Analysis of Incidence and Correlates of Cyberbullying in a Large Urban Student Population" (2013) 34:1 *Deviant Behavior* 68 at 72; Faye Mishna et al., "Risk factors for involvement in cyberbullying: Victims, bullies and bully-victims" (2012) 34 *Children and Youth Services Review* 63 at 63.

¹³ William V. Pelfrey, Jr. and Nicole L. Weber, "Keyboard Gangsters: Analysis of Incidence and Correlates of Cyberbullying in a Large Urban Student Population" (2013) 34:1 *Deviant Behavior* 68 at 71-72.

¹⁴ Research indicates that 98% of Canadian youth access the Internet and communication technologies on a daily basis. Faye Mishna et al., "Risk factors for involvement in cyberbullying: Victims, bullies and bully-victims" (2012) 34 *Children and Youth Services Review* 63 at 63.

Columbia launched two websites directed at education and reporting: www.erasebullying.ca and reportbullyingbc.edudata.ca/apps/bullying.

In Ontario, the Ministry of Education has implemented a Comprehensive Action Plan for Accepting Schools to prevent bullying and cyberbullying and improve Internet safety which, in addition to the *Accepting Schools Act* (highlighted below), includes an Expert Panel to provide advice on resources and practices to support effective implementation and a public awareness campaign. Select initiatives to prevent and respond to cyberbullying in Ontario include the [Kids Help Phone](#), and the [CyberCops \(Air Dogs/Mirror Image\)](#), [Connect\[ED\]](#) and [Youth Connected](#) educational or school-based programs.

Nova Scotia has recently launched two new programs: Speak Up, An Action Plan to Address Bullying and Cyberbullying Behaviour which is a comprehensive initiative covering all aspects bullying from a sociological perspective; and RAISP (Restorative Approaches In Schools Program) which targets bullying in a school context and promotes fostering stronger relationships between school system participants, including students, teachers, administrators and parents.

The above-noted programs are only a sample of the initiatives that these provinces offer in relation to cyberbullying and bullying. Many other jurisdictions address the issue in a similar manner and these programming responses are sometimes supplemented through targeted legislative responses.

Provincial and Territorial Legislation

Amendments to Alberta's *Education Act* received Royal Assent on December 10, 2012 and is scheduled to come into force on September 1, 2015, and require all students to "refrain from, report, and not tolerate bullying or bullying behaviours directed towards others in the school, whether or not it occurs within the school building, during the school day or by electronic means."

Manitoba's *Public School Amendment Act (Reporting Bullying and Other Harm)* came into force in April 2012. Further, on December 4, 2012, the Minister of Education for Manitoba introduced Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*, which would provide, among other things, a definition of bullying and require each school board to establish a respect-for-human-diversity policy, which must accommodate student activities including student gay-straight alliances.

Nova Scotia enacted Bill 30, *Promotion of Respectful and Responsible Relationships Act*, which amended the *Education Act* (May 17, 2012) to define cyberbullying, establish provincial school codes of conduct, and require data collection and monitoring of reported incidents. This is partly in response to the recommendations in the March 2012 report of the Cyberbullying Task Force, entitled, *Respectful and Responsible Relationships: There's No App for That*. On April 25, 2013, Nova Scotia enacted the *Cybersafety Act* (not yet in force) which would, among other things, create a Cyber SCAN investigative unit to investigate complaints of cyberbullying, create a protection order for victims of cyberbullying, create a tort of cyberbullying and clarify that where the cyberbullying is being done by a minor, parents could be liable for damages.

In Ontario, the *Accepting Schools Act*, amendments to the *Education Act*, which came into force on September 1, 2012, among other things, requires: school boards to establish bullying prevention and intervention plans, and to provide programs, interventions and other supports for students affected by bullying, whether as a victim, perpetrator or witness; permits schools to expel pupils who repeatedly bully and pose an unacceptable risk to the safety of other pupils; and requires schools to support gay and straight alliance clubs.

Quebec's Bill 56, *An Act to prevent and stop bullying and violence in school* came into force on June 15, 2012 and requires schools to implement an anti-bullying plan and would give principals the authority to expel repeat offenders.

In addition to provincial legislative responses, some municipalities (Edmonton¹⁵ and Hanna,¹⁶ Alberta) have enacted by-laws in an attempt to deal with harassing-type behaviour when it occurs in a public place.

Recommendation 1

The Working Group acknowledges the benefits of a multi-pronged, multi-sectoral approach to the issue of cyberbullying and recommends that all levels of government continue to build on their initiatives to address the issue of cyberbullying in a comprehensive manner.

Existing *Criminal Code* Responses to Cyberbullying

There is no specific provision in the *Criminal Code* for cyberbullying, or even bullying more generally. Bullying captures a wide range of behaviour, most of which does not amount to criminal conduct, for example, name calling, teasing, belittling and social exclusion. However, when the bullying behaviour reaches the level of criminal conduct, the *Criminal Code* contains several provisions that can address this behaviour.

Depending on the nature of the activity involved, a number of *Criminal Code* offences may apply to instances of bullying or cyberbullying,¹⁷ including:

- criminal harassment (section 264)
- uttering threats (section 264.1);
- intimidation (subsection 423(1)),
- mischief in relation to data (subsection 430(1.1));
- unauthorized use of computer (section 342.1);
- identity fraud (section 403);
- extortion (section 346);
- false messages, indecent or harassing telephone calls (section 372);

¹⁵ City of Edmonton, By-law 14614, *Public Places Bylaw*, (4 April 2012) s. 8.

¹⁶ Town of Hanna, By-Law No. 964-2012, *Anti-Bullying Bylaw*, (13 November 2012), part III.

¹⁷ *R. v. DH*, [2002] BCJ No 2454, [2002] BCJ No 2136; *R. v. G.J.M.*, 1996 CanLII 8699 (NS CA); *R. v. Wenc*, 2009 ABPC 126; aff'd 2009 ABCA 328.

- counselling suicide (section 241);
- defamatory libel (sections 298-301);
- incitement of hatred (section 319); and,
- child pornography offences (section 163.1);

Bullying behaviour that amounts to actual attacks on persons or to property may also be caught by a number of provisions including assault (sections 265-273) and theft (sections 322-344). Bullying behaviour that amounts to threats or harassment that causes a person to fear for their safety or that of others known to them is covered by sections 264 and 264.1 (criminal harassment and uttering threats). (See Annex 3 for examples of cases where existing offences were used to prosecute bullying behaviour).

The *Criminal Code* also protects against some conduct that could cause injury to the reputation of a person or expose him to hatred, contempt or ridicule, either through publishing a libel (section 301) or publishing a libel known to be false (section 300). In recent years, various levels of court, including the Supreme Court of Canada, have provided guidance with respect to these provisions, and their relationship with the right to freedom of expression. In *R.v.Lucas*¹⁸, the Supreme Court of Canada upheld the offence of publishing a libel known to be false (section 300), stating it was a reasonable limit under section 1 of the *Charter*.

However, with respect to section 301, several provincial courts of appeal have struck down the provision as not being a reasonable limit on freedom of expression under the *Charter*.¹⁹ The jurisprudence relating to these sections highlights the limited reach of the criminal law as it pertains to speech and expression, which is the essence of the bullying and cyberbullying behaviour not currently covered by the criminal law.

The recent Supreme Court of Canada decision in *Saskatchewan (Human Rights Commission) v. Whatcott*²⁰ illustrates the limits that can be placed on free speech. The Court held that the legislative prohibitions in the *Saskatchewan Human Rights Act* prohibiting hate speech infringe section 2(b) of the *Charter*, but are justified under section 1. However, the Court struck the words, “ridicules, belittles, or otherwise affronts the dignity of” from the *Act* as those words rendered the prohibition of speech overbroad. The *Whatcott* decision calls into question the feasibility of creating an offence to cover behaviour that is often implicated in cases of bullying and cyberbullying.

The offences of general application listed above apply equally to conduct that occurs via the Internet with one exception: section 372 (false messages, indecent telephone calls, harassing telephone calls) contains three offences that are relevant to the bullying context, but they refer only to older forms of communications technology. For example, the offences of indecent telephone calls in subsection 372(2) and harassing telephone calls in subsection 372(3) only apply when the means of communication used is the telephone; false messages in subsection 372(1) contains a more open-ended list of modes of communication but it is not clear whether it would be interpreted to include cyber-communications/electronic communications. There have

¹⁸ *R.v.Lucas* [1998] 1 SCR 439.

¹⁹ *R.v.Prior*, (2008), 231 C.C.C. 3rd. p.12; *R.v.Gill*,(1996), 29 O.R. 3rd. 250 (Gen. Div.); *R.v. Lucas*, (1995), 129 Sask. R. 53 (Q.B.). [Note: there was no appeal from the finding in *R.v.Lucas* that this section is unconstitutional. The Supreme Court only considered the constitutionality of section 300.]

²⁰ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 [*Whatcott*].

been several attempts to modernize the language of section 372, most recently through Bill C-30²¹ (*The Protecting Children from Internet Predators Act*), to ensure that these offences apply to acts committed by any means of telecommunication, including via the Internet. As well, those proposals would have expanded subsection 372 (2) to cover not only making an indecent communication *to* the person they were intending to alarm or annoy but making the communication *to any other person*. This would expand the coverage of section 372 to include certain types of communications, for example, when the communication is broader than just between two people which may be useful in addressing some cyberbullying done through distribution of communications to a broader audience.

Comparative International Legislative Responses

Most state governments in the United States have passed laws that allow school authorities to discipline students who engage in cyberbullying conduct. Some states have also enacted criminal laws creating misdemeanor offences for cyberbullying. While many resemble Canada's criminal harassment provisions, others appear to extend beyond "typical" harassing or stalking behaviour and directly address behaviour that causes distress to minors or school pupils. Australia, New Zealand, and the United Kingdom do not have stand-alone offences of cyberbullying. Australia and the United Kingdom rely on an offence similar to Canada's section 372 (false messages, indecent or harassing telephone calls). New Zealand is reportedly considering introducing two new offences to address the issue, including counselling suicide and "using a communications device to cause harm". (See Annex 2 for more details).

Conclusions on Cyberbullying

In examining the adequacy of these provisions and international perspectives, in responding to cyberbullying, the Working Group reached the following conclusions:

- Bullying/cyberbullying manifests itself in such a broad range of behaviour that it should not and cannot be addressed through a single, stand-alone offence prohibiting all manifestations of bullying/cyberbullying behaviour generally;
- The *Criminal Code* responds to bullying behaviour at the upper end of the bullying spectrum, including cyberbullying, by addressing specific manifestations of such criminal conduct such as uttering threats and criminal harassment.

The Working Group does, however, believe that there are a number of *Criminal Code* amendments that could be made to enhance existing criminal law responses to bullying, including cyberbullying. Two of these recommendations support legislative reform already proposed by the government and the third relates to a Uniform Law Conference of Canada unanimous resolution (2009).

²¹ *The Protecting Children from Internet Predators Act*, (1st Sess., 41st Parl., 2012). The Minister of Justice has indicated it would not be proceeding further.

(1) Section 372

Section 372 (false messages, indecent telephone calls, harassing telephone calls) contains three offences applicable to the bullying context, but, as they are currently drafted, they cannot be effectively used in a cyberbullying context because they prohibit conduct which is committed through older technology. For example, subsection 372(1) prohibits, with intent to alarm or injure another person, the sending of false information via letter, telegram, telephone, cable, radio or otherwise. While it is arguable that “or otherwise” could be interpreted to include a broader range of technology than that which is currently listed, it is not clear. Subsection 372(3) prohibits, without lawful excuse and with intent to harass any person, making or causing to be made repeated telephone calls. As currently drafted, these offences may not apply in situations of cyberbullying if the information is conveyed via text or email as these means are not specifically referenced in the provision. The Working Group supports amending these offences to modernize the language to generally refer to any means of telecommunication, which would make this offence useful in a cyberbullying context.

Recommendation 2

The Working Group recommends that the three offences contained in section 372 (false messages, indecent phone calls, harassing phone calls) of the *Criminal Code* be modernized, to make clear that these offences can be committed through the use of electronic communications, and to ensure that the scope of the communication can be broader than just to one person.

(2) Sections 751 and 751.1 (costs to successful party in case of libel)

Some Working Group members expressed concern that sections 751 and 751.1 may be acting as an impediment to defamatory libel prosecutions. Defamatory libel occurs when someone injures the reputation of another through the publication of information. If the information is known to be false, then the more appropriate offence may be defamatory libel known to be false. This offence may apply in the context of cyberbullying. However, sections 751 and 751.1 provide a regime whereby the successful party in cases of libel is entitled to costs from the unsuccessful party. This may result in Crown reluctance to pursue prosecutions under the defamatory libel provisions.

The general rule is that a party to a criminal case, whether successful or unsuccessful, is not entitled to costs.²² They are only usually available where the accused can show “a marked and unacceptable departure from the reasonable standards expected of the prosecution”.²³

Sections 751 and 751.1 have been part of the *Criminal Code* since 1892. The original section²⁴ provided for costs to a successful party in the case of libel only in private prosecutions. The requirement that it be a private prosecution was removed in the 1954 revision.²⁵ The 2009

²² *R. v. M.(C.A.)*[1996] 1 S.C.R. 500, at para. 97 cited in *R.v. Brown* 2009 ONCA 633.

²³ *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575(“974649”), at para. 87.

²⁴ *Criminal Code of Canada*, 1892, c. 29, s. 828.

²⁵ *Criminal Code of Canada*, 1954, c. 51, s. 631.

resolution of the Uniform Law Conference of Canada put forward by Ontario, and adopted unanimously, proposed the repeal of sections 751 and 751.1. An alternative approach would be to return the scope of the provision to its former form by having it apply only to “private prosecutions.”

Although it is unclear what the impact of section 751 is on the number of prosecutions for defamatory libel, the Working Group recommends that further consideration be given to amending or repealing sections 751 and 751.1 of the *Criminal Code*.

Recommendation 3

The Working Group recommends that consideration be given to the repeal or amendment of section 751 (costs to successful party in case of libel) and 751.1 (recovery of costs-libel).

(3) Investigative Powers in the Internet Context

Cyberbullying and the non-consensual distribution of intimate images takes place primarily in the online world. Police estimate that 80% of major crimes leave behind or implicate electronic or telecommunications evidence. However, anytime police investigate crimes, many of which involve new technologies or crimes, they are mostly using investigative powers that are out of date and have been barely modernized since the advent of the Internet. The investigation of offences committed via the Internet, or that involves electronic evidence, would especially benefit from the availability of modern investigative tools.

Cyberbullying occurs in cyberspace, and the electronic evidence needed to obtain convictions of cyberbullying must be obtained from Internet service providers, content hosts and other social media services. The ability to preserve and obtain such evidence is crucial to every online investigation, and currently Canada’s investigative powers are not robust enough to address the demands of cyber investigations. In this regard, Canada lags far behind its international partners.

The Federal Government has previously introduced legislative reforms to address the issue of modern technology and criminal investigations, but these have not yet been enacted.²⁶ These proposed reforms would have created new *Criminal Code* procedural tools, such as a scheme pertaining to the preservation of computer data, as well as new judicial production orders and warrants to obtain transmission data and to allow the police to trace the path of a communication to determine the originating service provider involved in the transmission of a specified communication. Complementary amendments would also have been made to ensure that those procedural powers are included in the *Competition Act*. The *Mutual Legal Assistance in Criminal Matters Act* should also reflect the new procedural powers, thereby widening the scope

²⁶ Legislation which includes these investigative powers has been introduced in the House of Commons on four occasions; Bill C-46, *Investigative Powers for the 21st Century Act* (40th Parliament, 2nd Session), Bill C-51, *Investigative Powers for the 21st Century Act* (40th Parliament, 3rd Session), Bill C-50, *Improving Access to Investigative Tools for Serious Crimes Act* ((40th Parliament, 2nd Session), and most recently Bill C-30, *the Protecting Children from Internet Predators Act* in the current Parliament. The Government announced that the provisions in Bill C-30 pertaining to basic subscriber information and to the requirement for telecommunication service providers to build intercept capability within their systems would not go forward. Those provisions do not form part of the Working Group’s recommendation.

of assistance that Canada can provide to its treaty partners in fighting serious crimes at an international level, including computer-related criminality.

The Working Group strongly recommends that the Federal Government enact investigative tools and procedures which will enable law enforcement to keep pace with modern technology, similar to those elements which have previously been introduced by the Federal Government (see Footnote 26). These proposals would, for example, concretely assist police to respond to criminal harassment that occurs on the Internet, through the preservation of relevant data. Today, when police seek evidence of such crimes, the service provider may have deleted the relevant data before police can access it. The data preservation authority would allow police to freeze the data so that evidence is not lost. This approach would be balanced with privacy protections, including a requirement for judicial authority to access the data and requirements for deletion of the data, when the material is no longer needed for investigative or prosecution purposes. The amendments would ensure that the level of safeguards increases with the level of privacy interest involved.

Amending the *Criminal Code* to streamline the process for obtaining related court orders and warrants when applying for an authorization to intercept private communications would permit related applications to be made simultaneously, to the same judge, and for them to be simultaneously and automatically sealed. The issuance by the same judge of related authorizations, orders and warrants ensures that the judge in question has full oversight of the case, enhancing the safeguard of judicial scrutiny. These enhanced techniques could be used in the context of existing offences relating to activities that could constitute cyberbullying (such as section 372) and it is proposed that police have the ability to intercept private communications in the context of investigation of the non-consensual distribution of intimate images.

Recommendation 4

The Working Group recommends that the investigative powers contained in the *Criminal Code* be modernized. Specifically, the Working Group recommends that an approach consistent with recent proposed amendments on this subject to better facilitate the investigation of criminal activity, including activity that is conducted via telecommunication be introduced and implemented as part of any legislative package responding to cyberbullying. These amendments should include, among others:

- **Data preservation demands and orders;**
- **New production orders to trace a specified communication;**
- **New warrants and production orders for transmission data;**
- **Improving judicial oversight while enhancing efficiencies in relation to authorizations, warrants and orders;**
- **Other amendments to existing offences and investigative powers that will assist in the investigation of cyberbullying and other crimes that implicate electronic evidence.**

II. Non-Consensual Distribution of Intimate Images

Introduction

The non-consensual distribution of intimate images (including videos) can occur in various situations involving adults and youth, including relationship breakdown and cyberbullying. During the relationship, the partners may exchange or take intimate photos of themselves for their personal use, but when the relationship breaks down, one of the former partners may provide/distribute the intimate images to the other partners' family, friends, employers etc., or may post such images on the Internet, in order to seek revenge on their former partner. Young people are increasingly consensually exchanging intimate images, which may later become fodder for humiliating cyberbullying attacks, with these images spreading quickly and often uncontrollably. Often these images are originally intended for an individual or only a small number of other people but are disseminated more widely than the originator consented to or anticipated. The effect of this distribution is a violation of the depicted person's privacy in relation to images, the distribution of which is likely to be embarrassing, humiliating, harassing, and degrading or to otherwise harm that person.

Extent of Non-Consensual Distribution of Intimate Images

There is limited data on the extent and the nature of this activity. Much of what is known about this behaviour is anecdotal and comes from the United States. A recent survey of adults between the ages of 18 and 54²⁷ found that 1 in 10 ex-partners have threatened to expose intimate photos of their ex on-line, and according to the survey, these threats have been carried out in 60% of the cases. With respect to young people, an online survey of 1,280 respondents (653 teens aged 13-19 and 627 young adults aged 20-26) in 2008 commissioned by the National Campaign to Prevent Teen and Unplanned Pregnancy found that 20% of teens and 33% of young adults had sent nude pictures of themselves via text or email (a practice referred to as "sexting").²⁸ A 2012 study published in the American journal *Archives of Pediatric and Adolescent Medicine* that surveyed 948 high school students in Texas, also found that 28% of the respondents had engaged in sexting.²⁹ A third recent study of 606 high school students at a single private school, representing nearly the entire student body, found that nearly 20% sent a sexually explicit image of themselves, and that 25% indicated that they had *forwarded* such an image to others.³⁰

The Working Group has also received anecdotal reports that Canadian law enforcement 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/conduct there is likely no criminal action that can be taken.

²⁷ McAfee (2013), "Lovers Beware: Scorned Exes May Share Intimate Data And Images" [Press Release] Online: <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx> (last accessed May 24, 2013).

²⁸ "Sex and Tech: Results from a survey of teens and young adults," (2008), National Campaign to Prevent Teen and Unplanned Pregnancy, available online: http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf

²⁹ Temple, Jeff et al, "Teen Sexting and its Association with Sexual Behaviours," *Archives of Pediatrics & Adolescent Medicine* 166(9) (2012): 828-833.

³⁰ Strassberg DS et al, "Sexting by high school students: an exploratory and descriptive study," *Archives of Sexual Behavior* 42(1) (2013): 15-21.

Legislative Responses to the Non-Consensual Distribution of Intimate Images

Comparative International Perspectives

Only the state of New Jersey in the United States has a criminal offence³¹ that addresses this conduct specifically. That offence prohibits the distribution of photos or videos of nude persons or persons engaging in sexual conduct, unless the person depicted in the photo consents to the distribution.

Several Australian states have enacted various laws which deal with elements of the non-consensual distribution of intimate images, though many of these offences are extensions of the criminal harassment provisions or voyeurism-type offences.

New Zealand's Law Reform Commission recently recommended amendments to the covert filming provisions of the *Crimes Act, 1961*³² to criminalize the publication of an intimate image by the person who made the image without consent of the person depicted. The Government has since rejected this recommendation, on the basis that this behaviour will be covered by other offences, what is not covered should be dealt with under civil remedies, and the proposal was an "uncomfortable fit" with the other covert filming offences which require a lack of knowledge of the filming itself.³³

Germany has a criminal offence of "violation of intimate privacy by taking photographs" which includes a prohibition on unlawfully and knowingly making available to third parties a picture that was created with the consent of another person and thereby violating their privacy (See Annex 2 for more detail).

Existing Criminal Code Offences

Existing *Criminal Code* offences can be used in some situations, although these usually require the presence of additional conduct which may not be present in most cases involving the non-consensual distribution of intimate images. In certain circumstances, section 162 (voyeurism), section 163 (obscene publication), section 264 (criminal harassment), section 346 (extortion), and sections 298-300 (defamatory libel) may apply.

In cases where the intimate 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).

Although the child pornography provisions address the distribution of intimate images of children under the age of 18 years, some Working Group members believe that section 163.1 is

³¹ *N.J. Code of Criminal Justice* (tit.2c) §14-9c.

³² *Crimes Act* (N.Z.) 1961/43.

³³ N.Z., Memorandum to Cabinet presented to the Social Policy Committee, "Harmful Digital Communication" (March 21, 2013). online: (<http://www.justice.govt.nz/publications/global-publications/h/harmful-digital-communications-cabinet-social-policy-committee-paper>) (last accessed May 23, 2013).

too blunt an instrument to address the core behaviour at issue, especially in situations where the perpetrator is also under the age of 18.

In relation to adults, there are concerns relating to the ability of the criminal law to respond to this behaviour, absent additional aggravating features that may bring the conduct at issue within the scope of existing offences.³⁴ Existing offences 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, and in the situation at issue, the images are most often taken with the consent of the person depicted. The offence of obscene publication would only apply if the image depicted was one of violence and sex, which is not a typical situation. Criminal harassment requires that the victim actually fear for their safety or the safety of someone known to them. The result of this type of conduct is usually embarrassment or 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 do not address the identified harm and therefore are not adequately responsive to the non-consensual distribution of intimate images.

The Working Group agrees that there is a gap in the criminal law as it relates to the non-consensual distribution of intimate images. To address this gap, the Working Group recommends that a new criminal offence of non-consensual distribution of intimate images be enacted.

Policy Basis for a New Offence

The Working Group considered two approaches to addressing this issue: (1) whether the objective of the offence should be to protect against specified conduct undertaken with a specific intent (e.g., malicious intent), or (2) whether the objective of the offence should be to protect against privacy violation. There was consensus that having a specific intent element may make the offence more difficult to prove, whereas, a privacy-based offence would not require proof of a specific intent, i.e. proof of intent to distribute the images without the consent of the person depicted would suffice. In addition, a privacy-based offence more closely aligns with the existing voyeurism offence, which protects similar privacy interests.

While the objective of the proposed offence is protection of privacy, the recommendation should not be interpreted as failing to acknowledge the related negative consequences such as the harassment and humiliation often felt by victims in these situations. Where there is evidence that the accused was motivated by malicious intent, the courts could consider this as an aggravating factor on sentencing.

³⁴ See for example, the case of *R.v.Hassan*, [2009] OJ No 1378, aff'd 2011 ONCA 834 where the accused was acquitted on all counts of criminal harassment related to threats to distribute, and actual distribution of, intimate photographs of his former girlfriend, the complainant, which he mailed to several people known to her. The court found, despite his actions, the fact that the victim did not actually fear for her safety meant the case of criminal harassment was not made out.

Essential Elements of the Offence

The Image is an Intimate Image

The Working Group recognizes that it would be inappropriate to criminalize the distribution of photos that are simply embarrassing or unflattering. The term “intimate images” is intended to refer to images that relate to the core of a person’s privacy interest. Such images are generally understood to depict explicit sexual activity or nudity or partial nudity that is captured on film or video consensually. The Working Group agrees that a new offence should protect similar privacy interests as the existing offence of voyeurism (i.e., nudity or explicit sexual activity in circumstances that give rise to a reasonable expectation of privacy). The Working Group discussed whether the definition of “intimate image” should require that the person depicted have a reasonable expectation of privacy in the image, taking into account the circumstances in which the image was made.

The Working Group agreed that the existence of an expectation of privacy in a particular image depends on two factors: the content (i.e., nudity or explicit sexual activity); and, the circumstances in which the image was made (i.e., taken in private), similar to the voyeurism offence. There was some discussion of whether an expectation of privacy may attach to an image of “non-private” sexual activity that was taken by a third party. For example, a couple engages in explicit sexual activity at a party and a bystander takes a video of them. Does the couple have an expectation of privacy in the image given that their behaviour did not take place in private? A judge would have to make this determination based on the nature of the circumstances in which the image was taken. Furthermore, the voyeurism offence may apply in this type of scenario, if the circumstances indicate that the image was taken surreptitiously.

The Working Group agreed that these “non-private” images should be afforded protection in appropriate cases, depending upon the circumstances in which the image was made. One approach for consideration could be the creation of a “for greater certainty provision” clarifying that engaging in sexual activity in non-private circumstances does not in and of itself waive a privacy interest in the image.

The Working Group further agreed that the person(s) depicted should be a real and identifiable person: cartoons and other creative works that do not impact the depicted person’s privacy interest would be excluded. However, there was considerable concern that altered images could provide an easy defence to the accused if the definition of intimate image is too restrictive (i.e., the offence should not require that the image be unaltered). The Working Group suggested that the identity of the person depicted could be verified by various means and not only by the victim’s face (i.e. including by other identifying information such as text).

The definition of an intimate image should be crafted in a manner that does not create a hurdle to a successful prosecution.

The advantage of this approach to defining “intimate image” is that it is consistent with definitions of similar material in related offences. However, this approach also raises a difficult question regarding the issue of potential overlap between the proposed offence and the existing child pornography offences.

Overlap with Existing Offences

Child pornography includes visual representations of explicit sexual activity or a visual representation of which the dominant characteristic is the depiction, for a sexual purpose, of the sexual organs of persons under the age of 18. The definition of child pornography also includes written and audio materials. It is an offence under section 163.1 to, among other things, make, distribute, possess and make available child pornography.

In *R.v.Sharpe*³⁵, the Supreme Court of Canada established a “personal use” exception to the child pornography provisions. This exception permits two youths who engage in lawful sexual activity, to consensually record their own lawful sexual activity as long as that recording is made or possessed for their own “personal use.” The material remains child pornography, but the youth can lawfully possess it for their personal use. Once that same material goes beyond their personal use (e.g., one of the youth sends it to a friend) it is captured by the child pornography provisions.

The Working Group acknowledged that an intimate image, as proposed, would also constitute child pornography if the person depicted is under 18 years of age. This raises questions as to what options should be available to deal with an adult or young offender who may have distributed an intimate image of a person who is under the age of 18. Should the offender be charged with a child pornography offence? Or should the police and/or Crown have the option of proceeding under the proposed new offence, which would be a less serious and less stigmatizing offence?

Provincial and Territorial (PT) and Public Prosecution Service of Canada (PPSC) members of the Working Group and plenary indicated that currently, in these situations, police and prosecutors are sometimes reluctant to charge child pornography in cases involving images depicting persons under 18 years of age primarily because of the stigma that can attach to a charge of child pornography (for both the offender and victim). In their view the harm resulting from the distribution of intimate images (i.e., breach of privacy) is qualitatively different from the harm resulting from the distribution of child pornography (i.e., sexual exploitation of children).

Some members of the Working Group expressed the view that the child pornography provisions (especially when applied to cases involving older teens) were not designed to address this type of behaviour. The prevalence of this activity among young adults and youth has been fuelled by the growth in social media and it is becoming increasingly evident that these types of cases are being dealt with differently by police, Crown and the courts than “typical child pornography cases.”³⁶ There is a risk that if a judge feels that a case is more appropriately one of non-consensual distribution of intimate images but child pornography is charged, the result may be a judicial expansion of the *Sharpe* personal use exception to the child pornography provisions resulting in more of this type of behaviour being excluded from the child pornography offence.³⁷

³⁵ *R.v.Sharpe*, [2001] 1 S.C.R. 45, para 116.

³⁶ *R.v.Walsh*, 2006 CanLII 7393 (ON CA) at para. 60.

³⁷ See, e.g., *R. v. Keough*, [2011] A.J. No. 89 (Q.B.), *R. v. Barabash*, [2012] A.J. No. 191 (Q.B.), *R. v. Cockell*, [2013] A.J. No. 466 (C.A.) for examples of cases where the courts have interpreted this personal use exception in the context of new technologies.

Further, PT and PPSC members cautioned against creating a new offence that is too narrowly defined or “watertight,” especially with regard to the age of the person depicted in the image. In particular, there was concern that excluding images that constitute child pornography from the scope of the proposed offence could result in situations, where no prosecution for either offence is possible, or where a prosecution proceeds under one section but fails because a doubt was raised about whether the person depicted was over or under 18 at the time the image was created. Effectively, to proceed under a narrowly defined new offence, the Crown would be required to prove beyond a reasonable doubt that the person depicted was not under 18 when the image was created (i.e., that the image was not child pornography). In situations where the age of the person cannot be established, neither offence could be successfully prosecuted. Such a situation could arise, if the complainant cannot remember whether the image was created before or after he or she turned 18.

Some federal representatives of the Working Group identified potential risks associated with creating overlap between the two offences.

Failing to exclude child pornography from the proposed new offence could undermine the child pornography provisions in a number of ways. In the short term, such an approach could provide an opportunity or an incentive for accused to plead to the less serious new offence, particularly given that the offence of distribution of child pornography carries a mandatory minimum penalty. This could result in increased pressure on busy Crown prosecutors to accept pleas to the lesser offence even in cases where the more serious child pornography charges were warranted. The concern was raised that, over time, if cases involving older teens are being more often resolved by resorting to the proposed new offence, the broad scope of the child pornography offences may be questioned.

The Working Group agreed that the new offence should not weaken existing offences, particularly those that address child pornography. However, all the PT and PPSC members preferred an approach that would allow police and/or Crown prosecutors to exercise their discretion as to which charge to pursue depending on the facts and circumstances of the case.

In that vein, the Working Group recommends that the proposed new offence should take into account how to provide prosecutors with appropriate flexibility while maintaining the integrity of related offences.

Act Elements

The Working Group agrees that the offence should capture all ways in which intimate images may be shared, either through physical delivery, making available, social networking, email, or word of mouth advertising, etc. This may include the publication, advertisement, distribution, transmission or making available of an intimate image to another person.

Further, the distribution of the images, in whatever form, would be done without the consent of the person depicted in the image.

Mental Elements

The proposed offence should require two mental elements. Firstly the accused must intentionally or knowingly distribute the images (i.e., not inadvertently).

Secondly, the accused should have knowledge that the depicted person did not consent to the distribution of the image, or be reckless as to whether or not the person did not consent. In recommending the mental element of recklessness, the Working Group is relying on Supreme Court of Canada jurisprudence holding that recklessness is found where a person is subjectively aware that there is danger that his conduct could bring about the result prohibited by the criminal law, and nevertheless persists, despite the risk.³⁸

The Working Group agrees that there should be a defence, similar to the public good defence in the voyeurism offence.

Penalty

The Working Group recommends that the maximum penalty for the proposed offence be set at 5 years imprisonment punishable on indictment and 6 months imprisonment, on summary conviction, consistent with the penalty for voyeurism, which is also based on the protection of privacy.

Recommendation 5

The Working Group recommends that a new criminal offence of non-consensual distribution of intimate images be developed.

Recommendation 6

The Working Group further concludes that in creating a new offence, consideration should be given to providing prosecutors with appropriate flexibility while maintaining the integrity of existing offences.

Recommendation 7

The Working Group recommends that the maximum penalty for the proposed new offence be set at 5 years imprisonment punishable on indictment and 6 months imprisonment on summary conviction.

³⁸ *Sansregret v. The Queen*, [1985] 1 S.C.R. 570.

Complementary Amendments

Warrant of Seizure

The public availability of intimate images distributed non-consensually continues to harm those depicted in the images by violating the depicted persons' privacy. Although in many cases Internet Service Providers and others who receive such images will voluntarily remove and/or destroy them, situations may arise in which a court order is required to ensure their removal. There is currently no provision that would permit a court to order the removal of non-consensual intimate images from the Internet.

The Working Group recommends that a Warrant of Seizure be enacted (similar to section 164.1 for child pornography and voyeuristic material) to permit a judge to order the removal of intimate images from Internet services hosted in Canada. Further, it is recommended that consideration be given to whether or not the warrant of seizure should apply to situations where prior consent was given to the original distribution of the intimate image, but consent was subsequently withdrawn.

The Working Group recognized the challenges associated with removing offending material from the Internet, especially since much of the impugned material ends up on Internet servers hosted outside Canada and therefore outside the jurisdiction of our courts. However, despite those associated challenges, the warrant of seizure would be a useful tool in many situations.

Forfeiture

The *Criminal Code* permits the court to order forfeiture (section 164.2) of things used in the commission of a child pornography offence (section 163.1), luring a child (section 172.1) or arranging a sexual offence against a child (section 172.2). The purpose of this power is to remove the tools used to commit any of these offences to prevent and deter an accused from perpetrating further criminal acts against a child. While it may be possible to use the *Criminal Code* provisions relating to seizure and forfeiture of offence-related property (sections 490 to 490.3), there was some discussion as to whether there was any benefit to creating a stand-alone forfeiture provision for the new offence.

The Working Group recommends that the *Criminal Code* be clear that the court may order forfeiture of things used in the commission of the proposed new offence. This may result in the forfeiture of cell phones, computers, or other related equipment if they were used in the commission of the offence.

Restitution

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. To address this concern, the Working Group recommends that section 738 of the *Criminal Code* be amended to permit restitution for costs associated with the removal of the intimate images from the Internet, or elsewhere.

Recognizance/Peace Bonds

One American survey indicated that one in ten ex-partners have threatened to release intimate photos of their ex on-line, and this threat was carried out in 60% of the cases.³⁹ This indicates that at least in some cases, individuals may have reason to believe that their former partner will distribute intimate images without their consent before the actual distribution takes place. The Working Group recognized that prevention of the distribution of the intimate image would be the victim's preferred outcome therefore, the Working Group recommends further consideration of whether section 810 (Recognizance Order) should be amended to clearly permit a judge to issue a peace bond if they are satisfied that an individual has a reasonable fear that the new offence of the non-consensual distribution of intimate images will be committed.

Spousal Testimony

Unless a legislative amendment to the *Canada Evidence Act* (CEA) is made, the spouse of a person accused of distributing intimate images will not be eligible to testify for the Crown. This could include situations in which a third party was the victim of the privacy violation, as well as situations in which the accused's spouse was the victim.

To ensure that this offence can be successfully prosecuted where the accused's actions were in relation to their own spouse, as well as where the testimony of the accused's spouse is critical for proving an offence in relation to a third party's privacy violation, the Working Group recommends that the new offence be included as an exception to the rules in the CEA which would otherwise normally apply.

The issue of spousal testimony generally and in particular in relation to child pornography offences is also currently actively under consideration by CCSO, and a report on these issues is before FPT Deputy Ministers.⁴⁰

Recommendation 8

The Working Group recommends making complementary amendments relating to the proposed offence of non-consensual distribution of intimate images including warrant of seizure, forfeiture, restitution, peace bonds, and spousal testimony.

³⁹ *Supra*, note 27.

⁴⁰ Spousal Testimony in Criminal Cases Report from CCSO Plenary to Deputy Minister, June 2013.

Further Consultation

The Working Group agreed that the issue of cyberbullying and the non-consensual distribution of intimate images are multi-faceted and present many challenges for police, Crowns, judges, policy makers and others. Given this, many members of the Working Group expressed a strong interest in being further consulted on this issue, if the Federal Government undertakes to legislate in this area. Further consultation will ensure identification of critical issues and broad input into the development of a legislative response to these issues.

Recommendation 9

The Working Group recommends that the Federal Government engage and consult, if possible, with the provinces and territories on legislative proposals should the Federal Government legislate in this area.

Annex 1: Recommendations

Recommendation 1

The Working Group acknowledges the benefits of a multi-pronged, multi-sectoral approach to the issue of cyberbullying and recommends that all levels of government continue to build on their initiatives to address the issue of cyberbullying in a comprehensive manner.

Recommendation 2

The Working Group recommends that the three offences contained in section 372 (false messages, indecent phone calls, harassing phone calls) of the *Criminal Code* be modernized, to make clear that these offences can be committed through the use of electronic communications, and to ensure that the scope of the communication can be broader than just to one person.

Recommendation 3

The Working Group recommends that consideration be given to the repeal or amendment of section 751 (costs to successful party in case of libel) and 751.1 (recovery of costs-libel).

Recommendation 4

The Working Group recommends that the investigative powers contained in the *Criminal Code* be modernized. Specifically, the Working Group recommends that an approach consistent with recent proposed amendments on this subject to better facilitate the investigation of criminal activity, including activity that is conducted via telecommunication be introduced and implemented as part of any legislative package responding to cyberbullying. These amendments should include, among others:

- Data preservation and demand orders;
- New production orders to trace a specified communication;
- New warrants and production orders for transmission data and tracking;
- Improving judicial oversight while enhancing efficiencies in relation to authorizations, warrants and orders;
- Other amendments to existing offences and investigative powers that will assist in the investigation of cyberbullying and other crimes that implicate electronic evidence.

Recommendation 5

The Working Group recommends that a new criminal offence of non-consensual distribution of intimate images be developed.

Recommendation 6

The Working Group further concludes that in creating a new offence, consideration should be given to providing prosecutors with appropriate flexibility while maintaining the integrity of existing offences.

Recommendation 7

The Working Group recommends that the maximum penalty for the proposed new offence be set at 5 years imprisonment punishable on indictment and 6 months imprisonment on summary conviction.

Recommendation 8

The Working Group recommends making complementary amendments relating to the proposed offence of non-consensual distribution of intimate images including warrant of seizure, forfeiture, restitution, peace bonds, and spousal testimony.

Recommendation 9

The Working Group recommends that the Federal Government engage and consult, if possible, with the provinces and territories on legislative proposals should the Federal Government legislate in this area.

Annex 2: International Legislative Responses to Cyberbullying and Non-Consensual Distribution of Intimate Images

I. Cyberbullying

United States

In 2010, Arkansas passed a new criminal offence (class B misdemeanor) of cyberbullying⁴¹ which criminalizes the transmission, sending, or posting of a communication by electronic means with the purpose of frightening, coercing, intimidating, threatening, abusing, harassing, or alarming another person if this action was in furtherance of severe, repeated, or hostile behaviour toward the other person. This offence is punishable by up to 90 days imprisonment.

Kentucky has also enacted a class B misdemeanor offence of “harassing communications” which prohibits electronic communication with the intention to intimidate, harass, annoy, or alarm another person. This offence only applies to students who harass other students.⁴² This offence is punishable by up to 90 days imprisonment and a \$250 fine.

Louisiana also criminalizes cyberbullying a person under the age of 18.⁴³ The offence is made out if there is transmission of any electronic textual, visual, written, or oral communication with the malicious and wilful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen. The law also creates exceptions for Internet and telecommunication providers, as well as for “religious free speech” under the Louisiana Constitution and is punishable by up to 6 months imprisonment and/or a \$500 fine.

In May 2013, Maryland passed “Grace’s Law” which makes it an offence to use electronic communication to maliciously engage in a course of conduct that inflicts serious emotional distress on a minor or places a minor in reasonable fear of death or serious bodily injury.⁴⁴ The offence is punishable by up to 1 year in prison and/or \$500 fine. The law excludes communications that are for “peaceable activity intended to express a political view or provide information to others.”

Mississippi does not have an offence of cyberbullying, but does have a law making it an offence to impersonate someone on-line for the purpose of harming, intimidating, threatening or defrauding them.⁴⁵ This offence is punishable by imprisonment between 10 days and 1 year and/or a fine of between \$250-\$1,000.

In 2008, Missouri amended its criminal harassment offence to include cyberbullying-type behaviour.⁴⁶ Harassment now includes communicating with a person under 17 years of age

⁴¹ *Arkansas Code*, tit. 5, §71-217.

⁴² *Kentucky Revised Statutes*, Chapter 525.080.

⁴³ *Louisiana Revised Statutes*, Chapter 14:40.7.

⁴⁴ *Code of Maryland*, Criminal law, tit. 3, subtit. 8, §3-805.

⁴⁵ *Mississippi Annotated Code* § 97-45-33.

⁴⁶ *Missouri Revised Statutes*, Chapter 565.090.

without good cause, recklessly frightening, intimidating or causing emotional distress and, without good cause, engaging in any other act with the purpose to frighten, intimidate, or cause emotional distress to another person. The offence further requires that the person actually frightens, intimidates or causes emotional distress.

In Montana, an offence of “violating privacy in communications” covers not only the recording of conversations between persons without consent, but also makes it illegal to harass people using electronic communications.⁴⁷

Nevada has a dedicated cyberbullying law that makes it an explicit criminal offence to engage in such conduct towards pupils or employees of a school district through threats of bodily harm or death with the intent to intimidate, harass, frighten, alarm, or distress the victim.⁴⁸ The offence is punishable by up to 1 year imprisonment and/or a \$2,000 fine.

Finally, North Carolina has a very detailed offence of cyberbullying which prohibits activity such as building a fake website, posing as a minor in an Internet chat room, posting a real or doctored image of a minor on the Internet with the intent to harass the minor or their parents, and making any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a minor.⁴⁹ The penalty for this offence depends on whether the offender is a minor or an adult. In the case of minors, it is punishable by up to 60 days imprisonment. If the accused pleads guilty, they may instead be discharged and placed on probation. If the offender is an adult, the offence may be punishable by up to 120 days imprisonment.

Australia (Commonwealth)

The model code section 474.17 of the *Criminal Code Act 1995* (Cth) makes it an offence to use a carriage service—including the Internet, social media services or a telephone—in such a way that reasonable persons would regard it as being, in all the circumstances, menacing, harassing or offensive. The reasonable person test is an objective test, which allows community standards and common sense to be considered in determining whether the conduct is in fact menacing, harassing or offensive. This offence is punishable by up to three years imprisonment.

New Zealand

In response to the New Zealand Law Commission Report released last year,⁵⁰ the Minister of Justice has reportedly announced⁵¹ that she intends to introduce legislation that would create two

⁴⁷ *Montana State Code*, tit.45, Chapter 8, §213.

⁴⁸ *Nevada Revised Statutes*, Chapter 392.915.

⁴⁹ G.S. § 14-458.1.

⁵⁰ Law Commission of New Zealand, “Harmful Digital Communications: The adequacy of the current sanctions and remedies,” August 2012, online:

http://www.lawcom.govt.nz/sites/default/files/publications/2012/08/ministerial_briefing_-_harmful_digital_communications.pdf (last accessed: May 23, 2013)

⁵¹ Simon Collins, “Govt speeds cyberbullying laws”, *The New Zealand Herald* (4 April 2013), online: http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10875273 (last accessed: May 24, 2013).

new criminal offences specifically intended to address cyberbullying.⁵² While the details of the legislation are not yet known, the Law Reform Commission recommended creating offences of inciting suicide and “using a communications device to cause harm” which would prohibit the sending of messages to another person that are grossly offensive, indecent, obscene, menacing or knowingly false, and intended to cause substantial emotional distress to the recipient. The Minister of Justice has indicated that she intends to introduce legislation similar to that which was recommended by the Law Commission, but she has not yet done so.

II. Non-consensual Distribution of Intimate Images

United States

The State of New Jersey has created an offence⁵³ which prohibits the distribution of photos or videos of nude persons or persons whose intimate parts are exposed or who are engaging in sexual conduct, unless the person depicted in the photo consents to the disclosure, punishable by between three and five years. Statutory defences to this offence are provided, including consent of the person and another lawful purpose (e.g., corrections officers sharing such videos internally for security or training purposes, or disclosing videos of nude persons in change rooms to law enforcement for the purpose of investigating shoplifting).

Australia

Several Australian states have enacted various laws which deal with elements of the non-consensual distribution of intimate images, but many of the offences are much broader in scope.

Victoria State recently amended its stalking offence⁵⁴ to encompass bullying conduct, including non-consensual distribution of intimate images. While not created specifically to address the non-consensual distribution of intimate images, the scope of the prohibited behaviour is broad and includes publishing on the Internet “other material relating to the victim” and acting in any way that could reasonably be expected to cause mental harm to the victim. This offence also deems that the requisite intent is met if the offender knows or in all the particular circumstances ought to have known that the conduct would likely cause harm or arouse such apprehension of harm and that the harm actually results. This offence is punishable by a maximum term of 10 years imprisonment.

Queensland’s *Criminal Code Act 1899*⁵⁵ contains an offence which prohibits the distribution of prohibited visual recordings of another person without the consent of the subject. As this law prohibits distribution without consent (as opposed to making the recording without consent), it

⁵² N.Z., Memorandum to Cabinet presented to the Social Policy Committee, “Harmful Digital Communication” (March 21, 2013). online: (<http://www.justice.govt.nz/publications/global-publications/h/harmful-digital-communications-cabinet-social-policy-committee-paper>) (last accessed May 23, 2013).

⁵³ *N.J. Code of Criminal Justice* (tit.2c) §14-9c.

⁵⁴ *Crimes Act 1958*, (Vic.) s.21A.

⁵⁵ *Criminal Code Act 1899* (Qld.), s.227B.

seems that it would still apply even if the subject consented to the recording being made. This offence is punishable by up to 2 years imprisonment.

Australia's Capital Territory's stalking provision⁵⁶ appears to also address distribution of intimate images, albeit not as directly. Stalking in this offence requires an intent, or recklessness, to cause apprehension, fear of harm, or harassment of the victim (which includes psychological harm), as well as at least two occasions of a prohibited behaviour, including: sending electronic messages about the stalked person to anybody else; or making electronic messages about the stalked person available to anybody. Electronic messages about the stalked person could include posts to social media or other websites, as well as any such photo attachments to those messages.

On May 9, 2013, South Australia enacted a new offence distribution of an invasive image.⁵⁷ An "invasive image" is defined as a moving or still image of a person engaged in a private act (a sexual act not ordinarily done in public or using the toilet) or in a state of undress such that the person's bare genital or anal region is visible. An invasive image does not include an image of a person under the age of 16. The offence is made out if the person distributed an invasive image, knowingly or with reason to believe that the other person did not consent to the distribution. The maximum penalty is 2 years imprisonment or a \$10,000 fine. There are three available statutory defences: if the distribution was connected to law enforcement, if it was for a medical, legal or scientific purpose, or if the image was filmed by a licensed private investigator.

New Zealand

New Zealand's *Crimes Act 1961*⁵⁸ contains a provision prohibiting the publication, import/export, sale, or distribution of "intimate visual recordings." However, the definition of this term appears to exclude recordings that are made with the consent of the subject, which renders it more similar in nature to Canada's voyeurism offence. The Law Reform Commission has recently recommended amending this offence to have it apply to persons who make consensual intimate images and then distribute them without the consent of the person depicted.⁵⁹ The Government has indicated they are not moving forward with this recommendation on the basis that this behaviour will be covered by other offences, what is not covered should be dealt with under civil remedies, and it was an "uncomfortable fit" with the other covert filming offences which require a lack of knowledge of the filming itself.⁶⁰

⁵⁶ *Crimes Act 1900* (A.C.T.), s35.

⁵⁷ *Summary Offences Act 1953* (Aus), Part 5. S. 26C

⁵⁸ *Crimes Act 1961* (N.Z.) 1961/43, s.216J.

⁵⁹ N.Z., Law Reform Commission, "The News Media Meets "New Media": Rights, Responsibilities, and Regulation in the Digital Age. online: http://www.lawcom.govt.nz/project/review-regulatory-gaps-and-new-media?quicktabs_23=report (last accessed May 23, 2013).

⁶⁰ *Supra*, note 55.

Germany

Germany has an offence of “violation of intimate privacy by taking photographs”.⁶¹ This offence covers three types of behaviour, the first two being similar to Canada’s voyeurism offence.⁶² The third prohibits behaviour of unlawfully and knowingly making available to third parties a picture that was created with the consent of another person located in a dwelling or a room especially protected from view and thereby violating his intimate privacy.

United Kingdom

The *Communications Act, 2003*⁶³ creates an offence that could potentially apply to certain instances of distributing intimate images.

Specifically, that statute makes it an offence to send, or cause to be sent, by means of public electronic communications “a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.” This offence is punishable on summary conviction with up to six months imprisonment and/or a fine.

Additionally, the UK has recently promulgated a revised definition of “stalking” in the *Protection of Freedoms Act 2012*⁶⁴) that may also allow for prosecutions for distributing intimate images of another person online. That law defines stalking as:

a course of conduct, which is in breach of section 1(1) of the *Protection from Harassment Act 1997* (i.e., a course of conduct which amounts to harassment) and the course of conduct amounts to stalking.

The *Protection from Harassment Act 1997*⁶⁵ lists a number of behaviours that are indicia of stalking, including (in addition to following, spying, etc.):

- ...
- (c) publishing any statement or other material relating or purporting to relate to a person, or purporting to originate from a person,
- (d) monitoring the use by a person of the Internet, email or any other form of electronic communication.

The above two indicia, (i.e., conduct prohibited by the *Protection from Harassment Act 1997* and publishing any statement, etc..) if coupled with the other elements necessary for criminal harassment in UK law (i.e., defendant knew or ought to have known the conduct would harass the victim), could act to criminalize the distribution of intimate images, which would meet the definition of “material... relating or purporting to relate to a person.”

⁶¹ (Germany) StGB§ 201A.

⁶² The elements of these two offences include: Unlawfully creating or transmitting pictures of another person located in a dwelling or a room especially protected from view and thereby violating their intimate privacy; or using or making available to a third party a picture created in the above manner.

⁶³ *Communications Act, 2003* (U.K.), s. 127.

⁶⁴ *Protection of Freedoms Act 2012* (U.K.), s. 111.

⁶⁵ *Protection from Harassment Act 1997*, s. 2A.

Stalking is punishable as a summary conviction offence in the UK (up to six months imprisonment and/or a fine), though an aggravated form of the offence is also available where the conduct “causes another serious alarm or distress which has a substantial adverse effect on his or her usual day-to-day activities.” In such a case, stalking could be prosecuted as an indictable offence punishable by up to 5 years imprisonment.

Annex 3 – Reported Canadian Cases

I. Reported Cases Involving, Bullying and Cyberbullying

In *AB v Bragg Communications*,⁶⁶ the Supreme Court of Canada highlighted the need to protect young victims from the inherent harms of cyberbullying as these cases are brought through the justice system. The case involved a 15-year-old female victim of bullying via Facebook who requested to proceed anonymously in her application for an order requiring disclosure of the perpetrators' identities so that she could potentially name them in an action for defamation. The 15-year-old girl found out that someone had posted a fake Facebook profile using her picture, and her picture was accompanied by unflattering comments about her appearance and included sexually explicit references. Her request for anonymity and a publication ban was refused by the Nova Scotia Supreme Court, and that decision was upheld on appeal by the Nova Scotia Court of Appeal. In the Supreme Court of Canada's judgement, Justice Abella referred to the 2012 *Report of the Nova Scotia Task force on Bullying and Cyberbullying* and noted that the girl's privacy interests are tied to the relentlessly intrusive humiliation of sexualized online bullying.⁶⁷ The Court found that while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernible harm. The ruling allowed the teenager to pursue the case using only her initials but did not impose a publication ban with respect to the non-identifying Facebook content.⁶⁸

In *R v. DH*, [2002] BCJ No 2454, [2002] BCJ No 2136⁶⁹, the accused and two other teenagers approached Dawn Marie Wesley, a grade 9 student, and threatened to beat her up. The next day, she hanged herself shortly after the three teenagers called her. Her suicide note said that she was threatened by bullies and believed death was her only escape. The accused was charged with uttering a threat and convicted of this offence. Two girls from her school were also charged with uttering threats. One girl was acquitted and the other girls were convicted of criminal harassment.

R. v. G.J.M., 1996 CanLII 8699 (NS CA), involved a 14-year-old accused. The accused and his friend pestered the slightly younger and smaller complainant for money and food in a hamburger shop. The accused was not satisfied with the money that the complainant gave him and so he followed the complainant onto the street, making threatening comments. The complainant reported being "really scared". The accused was convicted of criminal harassment, and the appeal from his conviction was dismissed by the Nova Scotia Court of Appeal.⁷⁰

The case of *R. v. Wenc*, 2009 ABPC 126; aff'd 2009 ABCA 328 involved two men who entered into an intimate relationship after meeting online. Shortly after the complainant terminated the relationship, the accused began harassing him through repeated phone calls and voice mail

⁶⁶ *AB v Bragg Communications*, [2012] 2 SCR 567.

⁶⁷ *Ibid.* at paras 20-27.

⁶⁸ *Ibid.* at para. 31.

⁶⁹ See also *R v. DW*, [2002] BCJ No. 627.

⁷⁰ *R. v. G.J.M.*, 1996 CanLII 8699 (NS CA).

messages, as well as numerous e-mail and fax messages. The accused used false identities and third-party computers, making the process of tracing the source of the harassment difficult and lengthy, and also spread false online rumours that the complainant was spreading HIV, sent nude photographs of him to their friends and assumed the identity of the complainant in chat rooms, causing strangers to come to the victim's residence expecting sexual encounters. The accused was convicted of criminal harassment.

In *R v. Greenberg*, 2009 ONCJ 28, the accused was charged with criminal harassment for repeatedly communicating with the complainant, primarily over MSN but also by email and by cell phone. The accused was 23-years-old and the complainant was 19-years-old. They were university students in the same program when they began a "on again/off again" relationship which lasted approximately 18 months.⁷¹ When the complainant ended the relationship, the accused was unable to let go of the relationship, was jealous of her relationship with a mutual friend and was attempting to control the complainant's actions. She blocked him from MSN several times, but had unblocked him to ask for help with her homework, then blocked him again. He repeatedly communicated with her by various means for almost 3 weeks notwithstanding her demands to stop. The MSN communications were transcribed and uncontested. The judge observed that "he intended to harass her and succeeded in doing so. I accept that the complainant feared for her safety. In all the circumstances, especially having regard to the defendant's mood swings, that fear is reasonable." The accused was found guilty of criminal harassment.

II. Reported Cases Involving the Non-Consensual Distribution of Intimate Images

Criminal Harassment

In *R v. Korbut*, 2012 ONCJ 522; 2012 ONCJ 691, the accused had an extra-marital relationship with the complainant, and after the relationship ended, carried out a "premeditated, escalating campaign in the form of deliberate, callous and vindictive harassment"⁷² against the complainant. The accused stole the complainant's diaries, address book and cell phone. He subsequently published highly embarrassing texts and website links to numerous sexually explicit photos and videos that the former couple had made, sent a sexually explicit video to the complainant's new partner and created a fake profile for the complainant on a dating website which included some of the photos, among other things. The judge accepted that the accused's conduct in circulating the damaging publications caused the complainant to fear for her safety.⁷³ The accused was convicted of criminal harassment and theft under \$5,000. He was sentenced to a 90-day intermittent imprisonment for criminal harassment and a 6 month conditional concurrent sentence for theft under \$5,000, and 3 years probation.

⁷¹ *R v. Greenberg*, 2009 ONCJ 28 at para. 2.

⁷² *R v. Korbut*, 2012 ONCJ 691 at para. 17.

⁷³ *Ibid* at para. 24.

In *R v. Fader*, 2009 BCPC 61, the accused was found guilty of criminal harassment for conduct that included sending sexually explicit pictures and videos of the complainant to the complainant's new boyfriend, threatening to send nude pictures of her to numerous people who knew her, and posting pictures of her and her contact information on an adult dating website, which resulted in people contacting her. The judge found that the accused was motivated by jealousy and anger and embarked upon a course of conduct, the motive of which was to make her life miserable."⁷⁴

In *R v. Barnes*, [2006] AJ No 965, aff'd 2006 ABCA 295, the accused used his computer skills to obtain details of the complainant's personal life, steal her identity and electronically distribute her nude photographs. He continued to do so despite a no-contact order, even while living overseas, where he fled after warrants for his arrest were issued. The complainant described his relentless campaign of harassment as a systematic attempt to destroy her life. The accused admitted that his intentions were to embarrass the complainant and create problems for her.⁷⁵ The judge characterized the particular type of harassment endured as "cyber stalking" and observed that "[a]n important consideration is that cyber stalking can cause harm to people in their essential lives."⁷⁶ The accused pleaded guilty to one count of criminal harassment and to several other charges. He was sentenced to 20 months incarceration and his appeal of this sentence was dismissed.

In *R. v. T.C.D.*, 2012 ABPC 338, the accused turned 18-years-old one day after her co-accused, a male young offender, distributed nude photographs of the 14-year-old female complainant. The accused and complainant were friends until they both got involved with the co-accused. The co-accused had received nude photographs of the complainant by text. After the complainant and co-accused had a falling out, the accused provided the co-accused with the names and phone numbers of the people at her school to be sent the photographs, and later attended the complainant's high school for the purpose of bullying her by taunting her and calling her names. The judge found that this caused the complainant to fear for her safety. The accused entered a guilty plea to the charge of criminal harassment, and the Crown withdrew the charges relating to child pornography. The Crown characterized the situation as one of bullying, and the judge accepted as an aggravating factor in sentencing the Crown's submissions that this form of criminal harassment by people sending nude photographs to other people is becoming more and more prevalent in schools, noting further that this is criminal activity occurring in the community at large. The accused was given a suspended sentence and placed on probation for 12 months.

Extortion

R v. Walls, 2012 ONCJ 835, is a case where the accused threatened to distribute intimate images of the complainant in order to induce her to engage in sex. The accused was 18-years-old and the complainant was 15-years-old when they met online. They had a relationship and the complainant shared intimate webcam images with the accused. They also met in person on at least one occasion where they had consensual sex. After the relationship ended, they remained in

⁷⁴ *R v. Fader*, 2009 BCPC 61 at para. 25.

⁷⁵ *R v. Barnes*, [2006] AJ No 965 at para. 50.

⁷⁶ *Ibid* at para. 1.

touch, and two years later the accused contacted the complainant using Windows Live Messenger. The accused asked the complainant on several occasions to have sex with him again, and led her to believe that he had kept naked images of her in the form of videos. He stated that he would dispose of the videos if she would agree to have sex with him, and when she continued to refuse his requests he indicated that he would keep the videos he made of her and make them available for others to view. The complainant then contacted the police. The accused pleaded guilty to one count of extortion. In sentencing the accused, the judge found it “irrelevant that he did not, in fact, possess the images of her that he claimed to have. He deliberately fostered that impression in her, in order to secure her cooperation.”⁷⁷ The accused was sentenced to 15 months conditional sentence of imprisonment.

In *R v. Hassan*, [2009] OJ No 1378, aff'd 2011 ONCA 834, the accused was acquitted on all counts of criminal harassment related to threats to distribute, and actual distribution of, intimate photographs of his former girlfriend, the complainant, which he mailed to several people known to her. While the actions of the accused were characterized as “inappropriate and extremely nasty,” it was not established that she “feared for her safety (psychological or physical) or that of anyone known to her.”⁷⁸ The accused was, however, charged and convicted of one count of extortion. The accused had threatened to distribute the salacious photographs of the complainant, prior to actually doing so, to keep the relationship going and to compel her to comply with his wishes. He was sentenced to a term of 18 months, served under house arrest, followed by a further period of 3 years probation.⁷⁹

Child pornography

*R v. T.M.M.*⁸⁰ (is an unreported decision concerning the dissemination of sexually explicit photographs of a youth by a youth over a cell phone. This case is discussed in *R v. Schultz*.⁸¹

In *T.M.M.*, the accused pleaded guilty to a charge under s. 163(1)(a) of the *Code*. The Crown proceeded summarily on the charge. When the accused was 17 and the complainant was 15, the latter took certain explicit photographs of herself and sent them to the accused over her cell phone. She later discovered that the pictures were appearing on other people’s cell phones. The accused denied having disseminated them. After the accused turned 18, he showed the photographs to two other teenage girls. The Crown recommended that the court suspend the passing of sentence and that the accused be put on probation for one year. Apparently, there were difficulties with proof of the possession and distribution of child pornography charges and so they were dropped. The accused did not have a criminal record. He was granted a conditional discharge.

⁷⁷ *R v. Walls*, 2012 ONCJ 835 at para. 26.

⁷⁸ *R v. Hassan*, [2009] OJ No 1378 at paras. 31-32.

⁷⁹ *Ibid* at para. 11.

⁸⁰ *R.v.T.M.M.* (1 October 2007), Alberta file no. 070356779P1 (unreported).

⁸¹ *R v. Schultz*, 2008 ABQB 679 at para. 102.

In the case of *R v. Schultz*⁸² the accused was 20 years old and the complainant was 16 years old when they had a relationship and photographed themselves posing and engaging in various sexual acts. After the relationship ended, the accused posted on a social networking site, Nexopia, the complainant's age, full name and offered to provide nude photographs to anyone who asked for them. He subsequently posted nude photographs of her on his webpage on several occasions to embarrass and humiliate her. The complainant had some of the images removed by contacting Nexopia and deleting them herself. She also contacted the RCMP and filed a complaint. The accused pled guilty to one count of transmitting child pornography and was sentenced to 12 months incarceration followed by 2 years probation.

Similarly, in *R v. Walsh*, 2006 CanLII 7393 (ON CA), the accused was 22 years old at the time he took photographs of the 15 year old complainant and himself engaging in consensual sex. The complainant later terminated their relationship. The accused was devastated by this and proceeded to make a collage of photographs of the complainant, including graphic sexual pictures that showed her face but not his, and which included her name and place of residence. He e-mailed the collage to various friends and acquaintances of the complainant. He also saved it in a shared folder on two peer-to-peer sharing programs. A friend of the complainant maliciously e-mailed the collage to the complainant's father, and a student at her school placed a printed copy of the collage in her locker. The accused pleaded guilty to the making and distribution of child pornography. The Court of Appeal reduced his initial sentence of incarceration for 2 years followed by 3 years probation with time already served (8 months in custody prior to his being granted parole) and the probation order was maintained. The Court of Appeal commented that "the circumstances of the case were vastly different from the typical child pornography case."⁸³ The Court of Appeal further noted the observations made by the Court when the accused was granted bail that "this is not the more typical situation where an offender is using the Internet as a business or a hobby to view or distribute child pornography. This was a one time, immature and very unfortunate response to a personal life event."⁸⁴

R v. Dabrowski, 2007 ONCA 619 involved an appeal by the Crown with respect to two charges of possession and distribution of child pornography of which the accused was acquitted. The accused was 28 years old when he had a short relationship with the complainant, a 14 year old girl. Both the accused and the complainant decided to videotape some of their sexual activities. Sometimes they were alone when the filming took place and on other occasions the accused's young male friends were present. After the relationship ended, the accused gave the videotapes to one of his young friends for "safekeeping". The accused threatened the complainant that he would show the videotapes to her family and friends and put them up on a website if she failed to "follow his rules".⁸⁵ The complainant's family found out about the videotapes and the complainant went to the police. The trial judge acquitted the accused on the three pornography offences he was charged with by applying the "private use" exception set out by the Supreme Court of Canada in *R v. Sharpe*, 2001 SCC 2. The Ontario Court of Appeal found that the trial judge failed to make a finding about whether the accused threatened to show the videotapes to the complainant's family and friends, and that the threat issue had to be considered in order to

⁸² *R v. Schultz*, 2008 ABQB 679 at paras. 2-12, 65.

⁸³ *R v. Walsh*, 2006 CanLII 7393 (ON CA) at para. 60.

⁸⁴ *Ibid.* at para. 61.

⁸⁵ *R v. Dabrowski*, 2007 ONCA 619 at para. 18.

determine whether the “private use” exception applied.⁸⁶ A new trial on the charges of possession and distribution of child pornography was ordered.

In *R v. M.K.*, [2004] OJ No 2574, the 20 year old accused used his cell phone to take nude pictures of his underage girlfriend without her knowledge. The accused posted those images on his website which caused the complainant to be very distraught. The accused pleaded guilty to the charges of criminal harassment, mischief to property, mischief in relation to data and distributing child pornography. The judge found that his conduct was “serious in that it was, at least in part, very intrusive and, in fact, malicious.”⁸⁷ The accused was sentenced to 6 months imprisonment and 2 years probation. (This case occurred before the enactment of the offence of voyeurism).

⁸⁶ *Ibid.* at paras. 25-27.

⁸⁷ *R v. M.K.* [2004] OJ No 2574 at para. 2.