

Submissions on Government of Canada's Technical Paper re: Proposed Approach to Online Harms

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We have prepared this submission in response to the call for comments on the [Government of Canada's Technical Paper](#) relating to its proposed approach to online harms, dated 29 July 2021. The submission is grounded first and foremost on key principles from the [UN Convention on the Rights of the Child](#) (CRC). It is also based on the authors' decades of involvement in researching and advocating for the rights of young people, especially in a digitally networked world, including Canadian research findings from: The eQuality Project,ⁱ The eGirls Projectⁱⁱ and MediaSmarts' Young Canadians in a Wired World Project (YCWW).ⁱⁱⁱ

GENERAL COMMENTS

As a signatory to the CRC, Canada is obligated to ensure that its laws *provide* children with access to their rights, *protect* children from harm (including protection from discrimination (Art. 2(2)), and enable children to *participate* in decisions that affect them. Networked media play an important role in meeting these obligations as the CRC guarantees children:

- the right to free expression, including the right to access information and ideas from a range of national and international sources through a child's preferred choice of media (Arts. 13 and 17)
- the right to free association (Art. 15)
- the right to education (Art. 28), especially education that supports the child's personal and cultural identity and values (Art. 29)
- the right to play (Art. 31)
- the right to participate in cultural and artistic life (Art. 31)
- the right to privacy (Art. 16)^{iv}

Networked media are therefore useful tools for advancing child rights because they provide access to a wealth of cultural, educational and artistic information, and create new avenues for community-building, education, play and artistic expression.

Simultaneously, however, networked media also facilitate distribution of hateful content, non-consensual distribution of intimate images, child sexual abuse imagery and other forms of harmful content that circumscribe children's ability to fully benefit from access to networked media, as well as their rights to full societal participation in a seamlessly integrated online/offline world. The rights of children from communities marginalized by racism, sexism, homophobia, transphobia, colonialism, ableism and other systemic oppressions and their intersections are particularly likely to be negatively affected by harmful online content, directly undermining their right to *protection* from discrimination.

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Further, the commercial model driving networked platforms has constrained the potential of networked media to advance children’s rights, precisely because online communication service providers (OCSP) seek to collect as much information as possible from users so their behaviours and attitudes can be commodified. As Shosana Zuboff notes:

... young life now unfolds in the spaces of private capital, owned and operated by surveillance capitalists, mediated by their ‘economic orientation,’ and operationalized in practices designed to maximize surveillance revenues. These private spaces are the media through which every form of social influence—social pressure, social comparison, modeling, subliminal priming—is summoned to tune, herd, and manipulate behavior in the name of surveillance revenues” (Zuboff, 2019, p. 456).

The information that is collected is then processed by algorithms that categorize children for commercial purposes, with two problematic results. First, algorithms tend to privilege extreme representations because they attract more views and therefore generate more revenue (Berger & Milkman, 2012). This degrades the networked public sphere, making it more difficult for children, especially those belonging to marginalized communities, to participate in social and political discourse. Second, algorithms tend to (re)produce discrimination grounded in racism, sexism, homophobia, transphobia, colonialism, ableism and other systemic oppressions and their intersections, and to do so in non-transparent and therefore non-accountable ways (Burkell & Bailey, 2016-2018).

The lack of privacy at the heart of the commercial model and its related discriminatory impacts are further exacerbated by the fact that policymakers – who are seeking to protect children – have typically relied upon surveillance and punishment to curb individual bad actors. The over-privileging of this particular approach to *protection* has often made it more difficult for children to *participate* in networked spaces (Steeves, 2012). Again, this is particularly harmful for young Canadians from marginalized communities that are already under-served and over-policed. For example, networked media can be an important source of both information and community for LGBTQ youth (Craig and McInroy, 2014) and our most recent data (unpublished) suggest that commercial and protective surveillance are making it increasingly difficult for LGBTQ youth to explore their sexuality online precisely because they know they are being watched.

In order to balance their rights to *provision*, *protection* and *participation*, our young research participants call for correctives that will reduce the structural harassment that too often defines their online interactions (Bailey & Steeves, 2015; Bailey & Steeves, 2017; Brisson-Boivin, 2019). This would require the enforcement of existing laws that deal with illegal content (e.g. criminal prosecutions against those who utter threats or advocate genocide, or post intimate images without consent), new regulations that will hold platform companies to account for the ways that they contribute to online harms, as well as policy initiatives to support them in dealing with online harms (Bailey & Burkell, 2020) (including by funding community organizations that serve youth), and to proactively address the systemically discriminatory root causes of many forms of online harm, through research, educational and other similar initiatives (Bailey, 2015).

SPECIFIC PROVISIONS

Paragraph 2

- The definition of private communication should be consistent with young people’s understanding of privacy as the inter-subjective negotiation of the boundary between self and other (Steeves, 2015). From this perspective, young people’s privacy rights do not

disappear just because they have posted information on an app or service that an OCSP defines as “public”.

Paragraph 8

- The five types of content are very different and each category requires a specialized approach, which may well merit entirely separate regulatory regimes for each one. For example, while a 24-hour takedown rule could be very important and effective in the context of clear cases of the non-consensual sharing of intimate images, it would provide very little time for meaningfully addressing the nuances of what could be captured by “terrorist content”. It is particularly important to take a nuanced approach to these different types of content, given the potential for a direct line to law enforcement and/or CSIS (under Paragraph 20). Sharing information without the consent of the individuals directly affected by certain kinds of content may further erode what is often an already-eroded sense of agency; it is likely also to play into pre-existing discriminatory stereotypes that disproportionately expose members of many marginalized communities to greater surveillance and punishment.
- Translating *Criminal Code* definitions of harm, that often seek to balance rights by distinguishing between public and private communications, may be difficult. Drafters should take young people’s understanding of online privacy into account to ensure that regulations do not shut down important avenues for young people to communicate. This is especially true of members of marginalized groups who are already over-policed and, frequently more at risk of being censored.
- Drafters should conduct a child rights assessment review to ensure that all types of content that are included in any future legislation take children’s special interests into account. For example, child sexual exploitation provisions should expressly exclude sexual information in the best interests of a child (especially for members of marginalized communities such as LGBTQ youth).

Paragraph 10

- Algorithms may or may not be able to identify harmful content, depending on the category of harm. Again, a one-size-fits-all approach is unlikely to address the nuances of each type of content.
- Given the evidence that algorithms (re)produce discrimination, it is crucial that strong measures be enacted to ensure that automated decision-making processes are both transparent and accountable.

Paragraph 12

- Internal safeguards and/or *ex post facto* oversight will not protect the best interests of the child because neither can counterbalance the demands of the OCSP business models to monetize and nudge young people. We need proactive public administrative bodies that young people can access for both intervention and support in relation to harmful content posted on OCSPs. Young people should be able to access that support without having to first “exhaust” all other private avenues (as per paragraph 50).

Paragraph 14

- Requiring OCSPs to issue reports is a necessary first step towards transparency and accountability. It will be important to require OCSPs to itemize how they monetize harmful content, and to avoid reframing the business model as protective merely because it facilitates surveillance. It will also be important to require OCSPs to produce data that sheds light on the social locations of the communities that are targeted, any intersecting axes of discrimination involved, who the perpetrators/sources are (where possible), and the content of the material that has been evaluated to facilitate the identification of any discriminatory trends in content and in OCSP approaches to content.

Paragraphs 20-33

- Considering the disproportionate impacts the proposals in these paragraphs could have on members of Black, Indigenous and other over-policed and over-surveilled marginalized communities who have strong historic reasons for not wanting to involve law enforcement agencies in their lives, reforms should be focused on providing support for those targeted by harmful content instead of the creation of a direct pipeline from the OCSP to law enforcement.
- At the very least, the informed consent of adults targeted by content such as non-consensual distribution of intimate images should be required to be obtained prior to disclosure to law enforcement. This will be especially important for targeted individuals whose agency has already been undermined by online content, and/or who are members of communities with strong historic reasons not to trust law enforcement agencies.

Paragraph 35

- The Digital Safety Commissioner should have a stronger mandate to directly support affected community members and proactive powers to call platforms to account (i.e. not just complaints based and after the fact).

Paragraph 48

- The small size of the Digital Recourse Council will make it difficult to ensure the Council has appropriate community input. Especially since the lived experience of the harm will vary according to the context of the content, provisions should be added to insure meaningful representation of affected communities.

Paragraph 50

- Persons should be able to initiate a complaint with the Digital Recourse Council without first exhausting the internal OSCP complaints process. Young people repeatedly report that OSCP processes are ineffective and slow, so being forced to wait until after jumping through so many hoops in order to obtain a remedy will be meaningless to most.

Paragraph 59

- Balancing young people's rights to *provision*, *protection* and *participation* requires an open and active public debate and full transparency with respect to commercial practices (especially those that involve algorithms). Hearings should accordingly only be held *in*

camera in the most unusual of circumstances. In particular, protecting confidential commercial interests should never by itself be enough to justify an *in camera* hearing.

Paragraph 83

- While the Digital Safety Commissioner and the Digital Recourse Council should have the power to redact the names of complainants and posters, this power should never extend to commercially sensitive information. Redacting commercial information would restrict the transparency that is required to hold OSCP's accountable.

GENERAL RECOMMENDATIONS

- The government should not proceed to enact any provisions recommended in the Technical Paper without first conducting open, widespread, and intersectionally-diverse consultation. In particular, young people need to be directly engaged in the policy development process, in keeping with their CRC right to *participate* in decisions that affect them.
- Any reforms should take into account the fact that public bodies, such as administrative agencies, are better able than corporations to balance public/private and rights/harms. They are more accountable due to their public nature, and their actions will be directly constrained by the *Charter*.
- Once a draft Bill is available, the government should conduct a child rights impact assessment to ensure that reforms respect all of the media and anti-discrimination rights set out in the CRC.

All of which is respectfully submitted:



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ⁱ [The eQuality Project](#) is a 7-year SSHRC funded partnership focused on better understanding young people's experiences with privacy and equality in digitally networked environments. This submission draws in particular from findings in our [2017 report](#) prepared for the Law Commission of Ontario entitled *Defamation Law in the Age of the Internet: Young People's Perspectives*. That report was based on interviews that eQuality Project researchers conducted with 20 young people aged 15-21 in Ontario in February and March of 2017. The purpose of the interviews was to explore young people's attitudes toward and experiences with online defamation, reputation, anonymity, and the benefits and drawbacks of existing mechanisms for addressing online defamation. The interview discussion guide, consent documents, recruitment text and method of analysis were approved by the University of Ottawa Research Ethics Board.

ⁱⁱThe eGirls Project was a 3-year SSHRC funded partnership development initiative focused on better understanding the experiences of girls and young women in digitally networked environments. In January and February of 2013 researchers with The eGirls Project held a series of interviews and focus groups with girls and young women between the ages of 15 and 22. All participants used interactive online media (such as social networking, blogging and/or user generated video sites) as a regular part of their social lives. Half of our sample resided in an urban Ontario setting and half resided in a rural Ontario setting. We interviewed six girls aged 15-17 and six young women aged 18-22, for 60-90 minutes each. An additional 22 participated in four focus group discussions, as follows: (1) seven girls aged 15-17 living in the urban setting; (2) five girls aged 15-17 living in the rural setting; (3) six young women aged 18-22 living in the urban setting and (4) four young women aged 18-22 living in the rural setting. Focus group discussions were approximately 90 minutes in length. A professional research house recruited our participants on the basis of sex, age (either 15-17 or 18-22) and location of residence (urban or rural). While participants were not recruited on the basis of self-identification with regard to other aspects of their identities, such as race, ethnicity, gender identity or sexual orientation, our participant group included members of racialized, linguistic, and various religious groups. In the interviews and the focus groups, we explored, among other things, the types of visual and textual representations the participants used online to express their identity as young women, and the benefits and pitfalls they experience on social media. We also asked for their views on the issues and policy responses focused upon by policymakers and explored their understandings of networked privacy and equality. With participant permission, the interviews and focus groups were audiotaped and transcribed by our research assistants for analysis. The transcripts were then subjected to a thematic qualitative analysis. All identifying information was removed from the transcripts, and pseudonyms are used below to identify participants: for a full report see *eGirls eCitizens*, Jane Bailey and Valerie Steeves (eds) online: <https://press.uottawa.ca/open-access/egirls-ecitizens.html>.

ⁱⁱⁱ MediaSmart's Young Canadians in a Wired World project began in 2000-2001 with interviews of parents and children, and a survey of approximately 5,500 Canadian students aged 10 to 17, to examine children's use and perceptions of the Internet. In 2004-2005, Steeves became the lead researcher for the project, and conducted a similar study, broadening the technology to other forms of networked communications, including cell phones and

gaming platforms. In 2012-2013, Steeves again returned to the field, conducting 12 qualitative focus group sessions (four each in Calgary, Toronto and Ottawa) with a total of 66 young people aged 11-17 and 21 parents of children and youth aged 11-17 and a quantitative survey of 5,436 children and youth aged 10-17 from across the country, as well as conducting interviews with 10 key informant teachers from across the country to get a better understanding of the impact of the full range of networked technologies in the classroom. In 2020, Steeves worked with Brisson-Boivin and McAleese and conducted three focus group sessions, in Ottawa, Toronto and Halifax respectively, with 34 young people aged 11 to 17 and 8 parents with children aged 11 to 17 to explore what is and what is not working for young people in networked spaces. For a full report of each phase of YCWW, see <http://mediasmarts.ca/research-policy>.

^{iv} See Steeves, Valerie. (2018). Snoops, Bullies and Hucksters: What Rights Do Young People Have in a Networked Environment? In Nancy A. Jennings and Sharon R. Mazzarella (eds.), *20 Questions about Youth and the Media*. New York: Peter Lang.