Voyeurism as a Criminal Offence:

A Response to a Department of Justice Consultation Paper

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Nova Scotia Advisory Council on the Status of Women

PO Box 745 Halifax NS B3J 2T3

Phone: 902-424-8662 / 1-800-565-8662

Fax: 902-424-0573

e-mail: nsacsw@gov.ns.ca

Internet: http://www.gov.ns.ca/staw

Advancing equality, fairness & dignity for all women in Nova Scotia

The **Nova Scotia Advisory Council on the Status of Women** was established by provincial statute in 1977. The Council's mandate under the *Advisory Council on the Status of Women Act* is to advise the Minister Responsible for the Status of Women and to bring forward the concerns of women in Nova Scotia.

The Council's work touches on all areas of women's lives, including:

- family life
- economic security
- legal rights
- sexuality
- health
- education
- paid & unpaid work
- violence

Council works toward the inclusion of women who face barriers to full equality because of race, age, language, class, ethnicity, religion, disability, sexual orientation, or various forms of family status.

We are committed to voicing women's concerns to government and the community through policy research, information services, and community outreach.

Voyeurism as a Criminal Offence: A Response to a Department of Justice Consultation Paper

The Nova Scotia Advisory Council on the Status of Women is pleased to present our recommendations in response to the Consultation Paper on Voyeurism as a Criminal Offence. The Advisory Council was established by provincial statute in 1977. The Council's mandate is to advise the Minister Responsible for the Status of Women and to bring forward to government the concerns of women in Nova Scotia. Our work touches on all areas of women's lives.

The Advisory Council believes that offences related to voyeurism should be added to the Criminal Code. Increased use of new technologies for viewing, for recording and for distributing pornographic material has meant that the occurrence of voyeurism is on the rise. At the same time, voyeurism is under-reported because victims do not necessarily know that they have been watched or recorded. Voyeurism is also of concern because research suggests that 20% of perpetrators go on to commit sexual assault. Including voyeurism in the Criminal Code is, therefore, in the interest of protecting harm to unwitting victims and of preventing further criminal acts such as sexual assaults.

Voyeurism is a serious offence which can inflict much harm on (often) unwitting victims and it should be dealt with as such under the law. In our view, voyeurism is both a serious invasion of privacy and a form of sexual exploitation. At the same time voyeurism can be a tool for control, humiliation, intimidation, and sexual harassment of women.

In many ways, however, voyeuristic recording, and the viewing and distribution of voyeuristic material is only the tip of the iceberg when it comes to how new technologies, particularly the Internet, are being used for the purposes of making and distributing pornographic or obscene material. This kind of activity not only constitutes an invasion of privacy but is also sexual exploitation of women.

We have a number of comments in response to the questions in the consultation paper which we hope that the Department of Justice will consider as it responds to the issue and drafts legislation.

I Criminal voyeurism as an office

How should the criminal voyeurism offence be defined?

The consultation document argues that creating voyeurism as an offence must involve a consideration of the harm involved. It argues that harm can be assessed in terms of a breach of the right to privacy that "citizens enjoy in a free and democratic society" or it can be conceptualized as a sexual offence.

The document notes that although there has been an attempt to introduce privacy legislation which, amongst other things, might protect the privacy of individuals in relation to the activities of the state as well as the activities of other individuals, such overarching privacy legislation does not, as yet, exist in Canada.[1] Although concerns about protection of privacy arise as elements of some specific offences in the Criminal Code, there is no criminal offence in the Code relating to the breach of privacy *per se*. The strongest provisions occur under the *Canadian Charter of Rights and Freedoms* in the context of a reasonable expectation of privacy in relation to the individual citizen and the State. Under Sections 7 and 8 of the *Charter*, a balance has been sought between the right to privacy of complainants and accused in the use of evidence in criminal trials. Some international instruments to which Canada is a signatory also have the purpose of extending the "right to be protected from arbitrary or abusive interference with their privacy". In relations between individuals, however, the protection of rights has so far generally been limited to civil remedies.[2]

As a sexual offence, the paper argues that harm arises from both the purpose and the nature of voyeurism. Voyeurism usually occurs for the purpose of the sexual arousal of the voyeur and the nature of voyeurism is said to generally involve the viewing or recording of sexualized parts of the body or sexual activity. In this scenario, the policy justification for prohibiting voyeurism would be that it prevents sexual exploitation of a private citizen by another private citizen, even if the victim is not aware of it, because the sexual exploitation occurs "the moment that the voyeur observes or records the victim".

Finally, the paper argues that it is possible to assess harm in terms of a common ground argument: specifically there is an intersection of harm arising from the state's interest in protecting the privacy of individuals and its interest in preventing sexual

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[1] Senator Finestone introduced "An Act to guarantee the human right to privacy" (Bill S-21) as a private member's Bill in 2001. Although the Bill went to First Reading it was referred to the Standing Committee on Social Affairs, Science and Technology. While it was debated at Second Reading in 2001 the debate was later adjourned.

[2] These remedies may be stronger in some provinces than in others. For example privacy legislation exists in British Columbia, Saskatchewan, Manitoba and Newfoundland and within the Civil Code of Quebec, as well as the Quebec Charter of Rights. Voyeurism as a Criminal Offence: A Consultation Paper, p.7.

exploitation. These coalesce where “the breach of privacy also involves a breach of the citizen’s sexual or physical integrity.”

In defining voyeurism as an offence for the purposes of the Criminal Code, therefore, the document argues there are two ways of conceptualizing the offence: first, in relation to a specific intent to commit voyeurism for sexual purposes, and second, in relation to viewing or recording “specified sexual organs, body parts or explicit sexual activities” specifically “for the purpose of violating the physical or sexual integrity of the victim”.

It is proposed that elements of the first branch of the offence would include the sexual purpose of the offence, its surreptitious and intentional nature, viewing or recording a person by any means, and doing so in a place and circumstances where there would be a reasonable expectation of privacy. It is proposed in the consultation paper that elements of the second offence would exclude the sexual purpose of the offence but, similar to the first branch of the offence, it would include the surreptitious and intentional nature of viewing or recording where there would a reasonable expectation of privacy. The description of the offence in the paper adds that the person recorded would be in a state of nudity or undress (specifically, exposing the breast, sexual organs or anal region, or engaged in explicit sexual activity).

We recognize that the rationale for these two elements is because of the difficulties of establishing a sexual purpose to the offence if there is no physical contact and the fact that the purpose of the act may not always be directly sexual but to generate visual representations for commercial sale, or to harass, intimidate or humiliate a victim. Nevertheless, we must question the definition of the offence under the second element. Specifically, we think that the criteria associated with “viewing the victim” are inadequate.

We are aware, for example, of cases of voyeurism in which the victim has been viewed or recorded in bathrooms or toilets which may have involved removing or loosening items of clothing, but which did not necessarily involve exposing the parts of the body identified above. According to a recent media report, recordings include up-skirt photos of women in public places as well as in change rooms. In some cases, the images may not involve nudity or undress. The purpose of the voyeur in these cases may be “sexual” but given the deviancy associated with some voyeurism, it may not be “sexual’ in the usual definition of the term. Moreover, in these circumstances, whether the purpose of the voyeur was “sexual” or not may be irrelevant if the result for the victim was an invasion of personal privacy, humiliation or intimidation.

One solution might be to include wording such as “a state of nudity or undress where the breast, sexual organs or anal region are exposed *or at risk of being exposed*”. Another solution would be to explicitly include the idea of unwanted viewing or recording of body parts in situations or places where there would be a reasonable expectation of privacy (i.e., change rooms, bathrooms, toilets) or where there was a reasonable expectation that particular parts of the body would not be publicly exposed to view (i.e., on an escalator).

Secondly, we raise the questions of what "surreptitiously and intentionally" means? Is a man who hangs over a bathroom partition in a public washroom in order to watch someone using the toilet doing so surreptitiously? It may also be the case, for example, that a videotape of sexual activity could be made with consent for private use but the tape is subsequently distributed without consent. In this case, there is nothing "surreptitious" about the viewing and recording, but privacy is violated and sexual exploitation is achieved through its distribution.

The Consultation Paper suggests that the voyeurism offence is intended to capture those who produce voyeuristic images for personal use and those who receive and send those images to others but it is not intended to "capture the activities of persons who simply consume voyeuristic images." Possession of voyeuristic material, therefore would not be criminalized. However, no rationale is presented for this distinction and we have to question why possession is excluded. The question is raised "can you legally possess something which is not legally for sale?" Possession of stolen property, for example, is an offence, as is possession of child pornography.

Would the range of activity proposed for the distribution scheme be appropriate?

We agree that distribution of voyeuristic material is amplified when the visual representations are transmitted or distributed to other persons and that this should be part of the voyeurism offence under the Criminal Code. However, by making the surreptitious nature of making the recording a key defining factor for the offence, it is also made a key defining factor for the offence of distribution. As discussed above, this places limits on other possible scenarios. For example, in situations where a recording was originally made with the consent of the victim, but not for the purposes of distribution, its subsequent distribution or a threat to distribute recordings of an intimate or sexual nature would be excluded (even though the intention of distribution may be monetary gain, or more personal motives such as to control, humiliate or harass an intimate partner).

We believe that the problem here relates to the lack of force behind the protection of privacy in Canada. There appears to be a relatively high expectation of privacy amongst Canadians in relation to the release of personal information, but these expectations are likely much higher in the performance of personal or intimate acts or activities--situations where there certainly should be a reasonable expectation of privacy. We believe, therefore, that the issue of personal privacy, or the reasonable expectation of it, be given more consideration in this and in other government legislation.

II Defences

Should a defence or defences be created for a criminal voyeurism offence?
Should a defence or defences be created for the distribution offence?
Should the defence or defences be limited in any way, and if so, how?

We agree that there should be a "public good" defence for the commission of voyeurism and for the distribution office, but that this defence be given a purposive interpretation. This should include both branches of the offence. Since we question the assumption that possession of voyeuristic material should not be an offence, we believe that consideration should be given to a purposive interpretation of a "public good" defence relating to possession.

Besides the public good of lawful surveillance by police and others involved in the prosecution of offences under the Criminal Code, it can reasonably be argued that visual surveillance in commercial establishments for the lawful protection of private property or for personal security reasons could be justified as long as it is for the public good. If our reservations (see above) about how the "sexual purpose" of the offence is defined in the Consultation Paper are taken seriously, it may not necessarily be the case that individuals who use surveillance for a legitimate purpose would necessarily be protected unless a purposive interpretation of the public good is included in the law. We believe, therefore, that "public good" be given a purposive interpretation and that this include legitimate surveillance for the purposes of criminal investigation and surveillance, and for protecting property and for personal security purposes.

In the other examples of possible purposive interpretations of public good cited from Chief Justice McLachlin's remarks in the *R. v. Sharpe* case, we believe that where possession of voyeuristic material is for research purposes or to address its "political or philosophical aspects" the purposive public good definition should also include the necessity of an ethics review in keeping with the protocols outlined in the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*.[3]

III Penalties

Should proposed legislation establish hybrid offences for each of the offences?

We agree that the proposed legislation establish hybrid offences for each of the offences of recording, viewing or possession, and distribution as the offences are likely to include a large range of behavior and harm. We would favour summary procedures for a viewing or possession offences if the maximum sentence were increased to eighteen months.

[3]See www.sshrc.ca

Should the penalty for committing the offence of criminal voyeurism by recording be higher than that for viewing?

Should the penalty for distribution of voyeuristic materials be higher than the penalty available for the viewing or recording of voyeuristic material?

We believe that the penalty for recording should be higher than for viewing and that, depending on the form of distribution, the penalty for distribution should be higher than the penalty for viewing or recording.

What would be appropriate penalty ranges for the various offences?

Again, given the large range of behavior and harm potentially involved in this offence, we believe that the penalty ranges for the various offences under voyeurism should be flexible and generally the same as for making, possessing, distributing or selling child pornography., i.e., for an indictable offence up to ten years. In keeping with our previous recommendation, we would also call for summary convictions of up to eighteen months.

In addition, we suggest that the proposed offences be made eligible for applications for longer term offender status under Section 753.1(2)(a) of the Criminal Code and that the proposed offences be included as being eligible for the taking of DNA samples since there is evidence to suggest that 20% of voyeurs had been convicted of a sexual assault.

IV Conclusion and Additional Recommendations

In conclusion we would like to make some additional comments and recommendations:

1) Research should be conducted to gather more information about how voyeurism is experienced by and affects victims. We note, for example, that the offence of voyeurism has largely been defined and constructed from the point of view of the perpetrator of the offence. This kind of research would help to broaden and deepen our understanding of the offence and its harm to victims. It would also help to determine the kind of victim support services which ought to be provided in these cases.

2) As mentioned in the introduction to this Brief, we believe that voyeurism is only the tip of the iceberg in terms of how new technology, particularly the Internet, is being used to increase activities which are already criminal offences such as stalking, enticement of minors, or child pornography. We believe that law enforcers must find better technological, regulatory and legal means to bring such offenders to justice.

3) Finally, the production and distribution of obscene and pornographic material by and through the Internet has reached such massive proportions that despite vigilance by parents or filters of various kinds, it is not only easily accessible but is difficult to avoid for anyone using the internet on a regular basis. Unsuspecting children, as well as adults, can be bombarded with unwanted sexually explicit and pornographic material any time they

open a web-site. We believe that the Department of Justice, our law enforcers and other regulatory agencies should be doing more to control the distribution of this kind of explicit material through the Internet because it can be unsafe and unhealthy for children and adolescents and because it is unsolicited and unwanted by many adults.