

## Annex 2: The Human Right to Privacy: A Gender Perspective<sup>1</sup>

### **‘Gender issues arising in the digital era and their impacts on women, men and individuals of diverse sexual orientations gender identities, gender expressions and sex characteristics’ – A Report of Consultation by the SRP Thematic Taskforce ‘Privacy and Personality’.**

1. The framework for examining the right to privacy from a gender perspective is found in Universal Declaration of Human Rights, Article 12; the International Covenant on Civil and Political Rights, Article 17; Resolutions of the United Nations’ General Assembly and Human Rights Council, and the international human rights legal framework.
2. The UN Human Rights Council<sup>2</sup> and the General Assembly<sup>3</sup> have noted that “violations and abuses of the right to privacy in the digital age may affect all individuals, including with particular effects on women, as well as children and persons in vulnerable situations, or marginalized groups”. They called on States “to further develop or maintain, in this regard, preventive measures and remedies for violations and abuses regarding the right to privacy in the digital age that may affect all individuals, including where there are particular effects for women, as well as children and persons in vulnerable situations or marginalized groups.”
3. In 1994, the United Nations Human Rights Committee in *Toonen v. Australia* determined that it is a violation of the right to privacy to criminalise consensual same-sex relations between adults. In 2017, the Committee reiterated that the right to privacy covers gender identity.<sup>4</sup> The importance of the right to privacy is evidenced by its referencing in decisions which de-criminalise consensual relations between same sex couples.
4. In India in 2018, the Supreme Court struck down Section 377 of the Indian Penal Code, which punished same-sex relations with imprisonment, as discriminatory and unconstitutional.<sup>5</sup> Over 70 countries however, still criminalise consensual same-sex relations thereby infringing the privacy rights of same sex couples.<sup>6</sup>
5. While not an absolute right, the right to privacy is essential to the free development of an individual's personality and identity. It is a right that goes to the innate dignity of the person, and it facilitates the enjoyment of other human rights.<sup>7</sup> It is a right of all, not restricted to the public sphere, and is an issue about the common good as much as it is about individual rights.<sup>8</sup>
6. Privacy, as a necessary precondition for the protection of fundamental values including liberty, dignity, equality, and freedom from government intrusion, is also an essential ingredient for

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<sup>1</sup> The term ‘gender’ is used here to recognise society’s attribution of roles to biological characteristics. The term is not a synonym for ‘women’ but inclusive of sexual orientation, gender identity, gender expression and sex characteristics.

<sup>2</sup> HRC resolution 34/7

<sup>3</sup> UNGA (2014). Right to privacy in the digital age, A/RES/71/199 [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/71/199](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/199) United Nations High Commissioner for Human Rights (2014). The right to privacy in the digital age, A/HRC/27/37. [www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37\\_en.pdf](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf); United Nations High Commissioner for Human Rights (2018). The right to privacy in the digital age, A/HRC/39/29. [www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/A\\_HRC\\_39\\_29\\_EN.docx](http://www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/A_HRC_39_29_EN.docx); Human Rights Council (2015). The right to privacy in digital age, A/HRC/RES/28/16. p.4 (OP 4f) [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/28/16](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/28/16) Human Rights Council (2017). The right to privacy in the digital age, A/HRC/RES/34/7, p4. [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/34/](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/34/)

<sup>4</sup> Communication No. 2172/2012 2 December 2011, views 17 March 2017, CCPR/C119/D/2172/2012.

<sup>5</sup> [https://www.sci.gov.in/supremecourt/2016/14961/14961\\_2016\\_Judgement\\_06-Sep-2018.pdf](https://www.sci.gov.in/supremecourt/2016/14961/14961_2016_Judgement_06-Sep-2018.pdf)

<sup>6</sup> Hon. Sayed Naveed Qamar, MP, New Legislation introduces Transgender Rights in Pakistan, *The Parliamentarian*, 2018, Issue three, p211.

<sup>7</sup> The General Assembly, the UN High Commissioner for Human Rights and special procedure mandate holders have recognised privacy as a gateway to the enjoyment of other rights (UNGA resolution 68/167, A/HRC/13/37; Human Rights Council resolution 20/8).

<sup>8</sup> Solove, D The Digital Person, 2004, p186

democratic societies and requiring strong protections.<sup>9</sup> The Human Rights Council has adopted resolutions highlighting the interdependent and mutually reinforcing relationship between democracy and human rights.<sup>10</sup>

7. Living a life of dignity is essential for a human being to fulfil the liberties and freedoms that are the cornerstone of democracies. Privacy is a form of dignity.
8. Privacy is a form of freedom built into social structures, and privacy advocacy is part of the broader political struggle for equality, citizenship rights and democracy. The human right to privacy is a limit on the exercise of power whether of States or non-State actors. By enabling personal choice, association and expression, and by protecting civil and socio-economic freedoms and equality, privacy can help secure the legitimate political rights of individuals to participate in democracies fully and without hindrance.<sup>11</sup>
9. Understanding this human right from a gender perspective raises a spectrum of issues<sup>12</sup> requiring examination of lived experiences of privacy in its many forms - positive and negative, over physical, psychological, sexual, patrimonial and moral dimensions, both online and offline. The privacy experiences of all individuals arising from their gender, sexual orientation, sex characteristics and gender identity, are pertinent.
10. Relevantly, the Yogyakarta Principles, a set of international principles relating human rights to sexual orientation and gender identity, were supplemented in 2017 for information and communication technologies, and Additional State Obligations including Principle 6 for Privacy.<sup>13</sup>
11. The mandate of the Special Rapporteur on the right to privacy (SRP) entails the integration of a gender perspective throughout its work.<sup>14</sup> In promoting a better understanding of privacy in the digital age and the gender experience of privacy, the SRP has convened 'Privacy, Personality and Information Flows' regional consultations. The first (Western countries) in July 2016 in New York; the second (Middle East and Northern Africa) in Tunisia in May 2017, the third (Asia) in September 2017 in Hong Kong, and the fourth (Latin America) is planned for May 2019.
12. Further work has been undertaken via an online consultation seeking advice on:<sup>15</sup>
  - a) Gender issues arising in the digital era in the Thematic Action Streams (Privacy and Personality; Security and Surveillance; Big Data and Open Data; Health Data, and the Use of Personal Data by Corporations)? What challenges need to be addressed and what positives can be promoted more widely?
  - b) Has the digital era produced new or significantly different gender based experiences of privacy? If so, what are these?
  - c) What are the gendered impacts of privacy invasions on women, men and individuals of diverse sexual orientations gender identities, gender expressions and sex characteristics, arising from the loss of the right to privacy, for example but not limited to, health issues, discrimination in employment or other areas?
  - d) What are good practices in law and service delivery models that address gender based differences in the enjoyment of the right to privacy?

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<sup>9</sup> OPC Submission to Innovation, Science and Economic Development Canada for its National Digital and Data Consultations, November 23, 2018: [https://www.priv.gc.ca/en/opc-actions-and-decisions/submissions-to-consultations/sub\\_ised\\_181123/](https://www.priv.gc.ca/en/opc-actions-and-decisions/submissions-to-consultations/sub_ised_181123/)

<sup>10</sup> Eg Resolutions 19/36 and 28/14 on "Human rights, democracy and the rule of law" at <http://www.un.org/en/sections/issues-depth/democracy/index.html#DHR>

<sup>11</sup> Lever, A., Privacy Rights and Democracy: A Contradiction in Terms? Contemporary Political Theory 5. 2006, 142-162

<sup>12</sup> Franklin, M., Submission 2018

<sup>13</sup> <https://yogyakartaprinciples.org/principles-en/yp10>

<sup>14</sup> <https://www.ohchr.org/EN/Issues/Privacy/SR/Pages/SRPrivacyIndex.aspx>

<sup>15</sup> <https://www.ohchr.org/EN/Issues/Privacy/SR/Pages/SRPrivacyIndex.aspx>, April 2018.

13. Twenty submissions were received from individuals, civil society, academics and regulators.<sup>16</sup> This report is a compilation of submissions received by the mandate as well as ancillary research and, save for the Recommendations, does not necessarily represent the views of its lead author, Dr Elizabeth Coombs, Chair, UN SRP Thematic Action Stream ‘Privacy and Personality’, nor those of the SRP, Professor Joseph A. Cannataci.

## Submissions and Ancillary Research

14. The gender manifestations of ‘experienced privacy’ documented in submissions, are grouped under the most applicable Thematic Action Stream, though many issues are relevant to all. One such issue is the response of States to incursions into privacy based on gender and gender identity; described variously as supportive, as weak or even punitive towards individuals whose privacy has been infringed because of their gender or gender identity.
15. Submissions advocated an intersectional analysis of economic forces, class, religion, race with the gender continuum in order to identify areas of interest outside mainstream dominant issues, or groups,<sup>17</sup> and recognition of the linkage between the right to privacy and democracy.<sup>18</sup>

### A. Thematic Action Stream ‘Privacy and Personality’

16. The safe environment provided by privacy enables the person to develop without self-imposed limitations arising from concerns of being misunderstood or judged.<sup>19</sup> Privacy also enables intimate relationships, and space to deliberate on moral and ethical choices enabling the full development of personhood and personality, including the exercise of personal responsibility. Personal development requires all dimensions of privacy, not just informational privacy.
17. Digital technologies were seen to have had enormous effect upon privacy through amplifying the experiences of the non-digital world. Cybermisogyny<sup>20</sup> and cyber-abuse of individuals of non-binary gender have been enabled by new technologies to challenge privacy and exert existing forms of aggression based on gender and gender identity<sup>21</sup> with infinitely far greater reach, durability, and impact than previously.
18. Social patterns were seen also to be replicated with, for example, women already active in physical (offline) political and civic life, more likely to be connected, and three times more likely (controlling for education, age and income) to be exercising their right to freedom of expression online, or on important or controversial issues than other women.<sup>22</sup>
19. The carryover into the online world of existing gender stereotypes, sex based characterisations and constrained roles was said to be illustrated by Virtual Personal Assistants (VPAs) such as Siri (Apple); Alexa (Amazon) and Cortana (Microsoft) amongst others.<sup>23</sup> These tools’ technological appropriation of female voices, female names and female characterisations are seen to reproduce discriminatory gender norms positioning women in inferior social positions: servile assistants with no right to say ‘no’, and moreover, ‘free of messy things like autonomy, emotion, and dignity’.<sup>24</sup> VPA use in homes and workplaces is increasing rapidly with the number of countries where Amazon’s Alexa, is available, doubling. More than 28,000 smart home devices now work

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<sup>16</sup> Joint submissions and three confidential submissions were received.

<sup>17</sup> APC Submission 2018; Op cit Franklin.

<sup>18</sup> For example, Privacy Commissioner of Canada, Submission 2018

<sup>19</sup> Ibid

<sup>20</sup> LEAF 2014, <http://www.westcoastleaf.org/our-publications/cybermisogyny/>

<sup>21</sup> Eastern European Coalition for LGBT+ Equality’s submission, ‘Gender Perspectives on Privacy in Eastern Partnership Countries and Russia’, 2018.

<sup>22</sup> <http://webfoundation.org/docs/2015/10/QROinfographic.png>

<sup>23</sup> Loideain, N.N. and Adams, R. Submission, 2018; <https://medium.com/pcmag-access/the-real-reason-voice-assistants-are-female-and-why-it-matters-e99c67b93bde>

<sup>24</sup> Cross, K., ‘When Robots are an Instrument of Male Desire’ (2016): <<https://medium.com/the-establishment/when-robots-are-an-instrument-of-male-desire-ad1567575a3d>, cited in Loideain, N.N. and Adams, R. ‘From Alexa to Siri and the GDPR: The Gendering of Virtual Personal Assistants and the Role of EU Data Protection Law’

with Alexa, six times as many as at the beginning of 2018, and 100 plus distinct products have Alexa.<sup>25</sup>

20. The contribution of privacy to ‘personality’ was described in submissions in terms of how digital technologies are used by individuals, as well as State and non-State actors, according to gender or gender identity.<sup>26</sup>
21. The starting point is that access to digital technologies varies by gender.<sup>27</sup>

### **Digital Gender Divide**

22. Not everyone has equal opportunity to benefit from the internet’s potential for economic, social, cultural, civic, and political advancement.<sup>28</sup> In two out of every three countries worldwide, there are more men using the internet than women. In Africa, this gender gap has increased since 2013.<sup>29</sup> Not surprisingly, the ability to protect privacy online differs across men and women because of the disparity in digital skills and confidence. Young women in the Philippines for example, are reported as saying that only when they became more experienced users, did they realise the risks to privacy arising from social media.<sup>30</sup>
23. For others, such as LGBTQI individuals the ‘digital divide’ can take the form of inability to access online content due to mandated internet filtering.<sup>31</sup>
24. The ability to access the internet fully contributes to differences in the development of ‘personality’ in the digital era. Only 21% of women on average, used the internet to look for information on their legal rights and women are half as likely as men to speak out online, and a third less likely to use the internet to look for work (controlling for age and education).<sup>32</sup>

### **Digital technology - social media, apps and smart devices**

25. Submissions recognised the benefits of smart devices, apps, search engines and social media platforms to women and LGBTQI individuals, but also their capacity to infringe users’ privacy. Submissions indicated that those most at risk were women, young girls, children, LGBTQI individuals and communities especially transgender individuals, activists, gay teachers, Human Rights Defenders, sex workers, and high profile women/journalists.
26. Around the world, women have found a smartphone or safe, ‘respectable’ public access facilities can reduce cultural constraints and enable personal development through the privacy and autonomy provided.<sup>33 34</sup>
27. Access to digital technologies however, was reported to threaten traditional patriarchal structures with resulting impacts upon the exercise of human rights.<sup>35</sup> In Northern India for example, the use of mobile phones and apps like WhatsApp and Facebook by women and girls, prompted village

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<sup>25</sup> [https://www.wired.com/story/amazon-alexa-2018-machine-learning/?CNDID=55579454&CNDID=55579454&bxid=MzLzOTYzNTY0NzkwS0&hasha=927130c618501d6be2fbb6e421cf251&hashb=b500cbfde5454948121e66079daed34f611b0ccc&mbid=nl\\_122018\\_gadgetlab\\_list3\\_p1&utm\\_brand=wired&utm\\_mailing=Gadget%20Lab%20NL%20122018\\_Daily%20list%20\(1\)&utm\\_medium=email&utm\\_source=nl](https://www.wired.com/story/amazon-alexa-2018-machine-learning/?CNDID=55579454&CNDID=55579454&bxid=MzLzOTYzNTY0NzkwS0&hasha=927130c618501d6be2fbb6e421cf251&hashb=b500cbfde5454948121e66079daed34f611b0ccc&mbid=nl_122018_gadgetlab_list3_p1&utm_brand=wired&utm_mailing=Gadget%20Lab%20NL%20122018_Daily%20list%20(1)&utm_medium=email&utm_source=nl)

<sup>26</sup> “Online Reputation, What are they saying about me?”, Policy and Research Group, Privacy Commissioner of Canada, January 2016: [https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/or\\_201601/](https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/or_201601/)

<sup>27</sup> UN Women Global Pulse references gaps in women’s access to ICTs and other technologies as 11.6% globally; 32.9% in Least Developed Countries.

<sup>28</sup> <https://www.technologyreview.com/the-download/608887/the-un-says-the-global-digital-divide-could-become-a-yawning-chasm/>

<sup>29</sup> AccessNow , The gender of surveillance: How the world can work together for a safer internet, 6 February, 2018, <https://www.accessnow.org/gender-surveillance-world-can-work-together-safer-internet/>, 31 October 2018 viewed

<sup>30</sup> [http://webfoundation.org/docs/2015/10/womens-rights-online\\_Report.pdf](http://webfoundation.org/docs/2015/10/womens-rights-online_Report.pdf)

<sup>31</sup> [https://www.ohchr.org/Documents/Issues/Women/WRGS/GenderDigital/HRBDT\\_submission.pdf](https://www.ohchr.org/Documents/Issues/Women/WRGS/GenderDigital/HRBDT_submission.pdf)

<sup>32</sup> Ranging from 52% Bogota, Colombia to 19% Lagos, Nigeria <http://webfoundation.org/docs/2015/10/WROinfographic.png>

<sup>33</sup> GSMA, Vital Wave Consulting and the Cherie Blair Foundation for Women, “Women & Mobile: A Global Opportunity” <[https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2013/01/GSMA\\_Women\\_and\\_Mobile-A\\_Global\\_Opportunity.pdf](https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2013/01/GSMA_Women_and_Mobile-A_Global_Opportunity.pdf)>

<sup>34</sup> Intel, “Women and the Web: Bridging the Internet Gap and Creating New Global Opportunities in Low and Middle-Income Countries” 2012 <https://www.intel.com/content/dam/www/public/us/en/documents/pdf/women-and-the-web.pdf>

<sup>35</sup> [http://webfoundation.org/docs/2015/10/womens-rights-online\\_Report.pdf](http://webfoundation.org/docs/2015/10/womens-rights-online_Report.pdf)

leaders to ban their use. The connectivity and relative privacy the mobile phones provided, enabled women and girls to access information from external sources, develop relationships as they chose, make financial decisions, all of which increased personal development and the exercise of other human rights including freedom of expression.<sup>36</sup> Despite the Indian Supreme Court's criticism, the mobile phone bans are said to remain restricting enjoyment of human rights for these women/girls.<sup>37</sup> It is interesting to note that research indicates that in contrast to other countries, Indian men (34%) are much more likely than women (15%) to own smartphones – a gap of 19 percentage points. And reportedly, India's gender gap is growing: the gap in 2018 is 10 points wider than it was five years ago (then, 16% of men and 7% of women owned smartphones).<sup>38</sup>

28. The internet was reported as the single most influential force on the lives of LGBTQI people facilitating private interactions with others, reducing social isolation and enabling personal development.<sup>39</sup> Reliance on the internet brings privacy risks which vary according to gender, for example, LGBTQI youth who use the internet more frequently to engage in social media and networking than non-LGBTQI peers, are more likely than non-LGBTQI youth to be bullied or harassed online (42% vs. 15%).<sup>40,41</sup>
29. Fears around the dangers of the internet have seen protective strategies introduced to reduce these risks but potentially affecting personal development of some. The Children's Internet Protection Act in the USA, for example, aims to protect children from online dangers by requiring computers from K-12 and public libraries to have internet filters. Concerns have been raised however, about the filters reducing LGBTQI youth's access to information on gender identity.<sup>42</sup>
30. In Canada, the eGirls Project investigated the relationship between gender, privacy and equality in online social networking of girls and young women. While social media enables social connections, it also amplifies societal norms. Rather than enabling the exploration of new forms of self and autonomy, social media maintained and augmented existing sex role stereotypes by reinforcing existing societal norms, intensifying commercial surveillance; and increasing surveillance by family members and peers.<sup>43</sup>
31. Dating apps can provide private and uniquely empowering ways to communicate within a safe community.<sup>44,45</sup> But fake accounts on LGBTQI dating apps and other social media platforms were reported as being used by State and non-State actors to lure gay men, expose them, entrap them, arrest or subject them to cruel and degrading treatment, or blackmail.<sup>46</sup> Countries where these practices were said to occur were Azerbaijan, the Russian Federation, and Belarus<sup>47</sup> and also the

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<sup>36</sup> APC Submission 2018; Kovac, A. Reading Surveillance through a Gendered lens: Some Theory, February 2017.

<https://genderingsurveillance.internetdemocracy.in/theory/>

<sup>37</sup> Centre for Communication Governance, National Law University Delhi (CCG NLU) Submission 2018.

<sup>38</sup> Pew Research Center, 'Smartphone Ownership Is Growing Rapidly Around the World, but Not Always Equally', 2018.

[http://www.pewglobal.org/2019/02/05/smartphone-ownership-is-growing-rapidly-around-the-world-but-not-always-equally/?utm\\_source=Pew+Research+Center&utm\\_campaign=e8c3c7f83d-](http://www.pewglobal.org/2019/02/05/smartphone-ownership-is-growing-rapidly-around-the-world-but-not-always-equally/?utm_source=Pew+Research+Center&utm_campaign=e8c3c7f83d-EMAIL_CAMPAIGN_2019_02_07_06_57&utm_medium=email&utm_term=0_3e953b9b70-e8c3c7f83d-400369205)

[EMAIL\\_CAMPAIGN\\_2019\\_02\\_07\\_06\\_57&utm\\_medium=email&utm\\_term=0\\_3e953b9b70-e8c3c7f83d-400369205](http://www.pewglobal.org/2019/02/05/smartphone-ownership-is-growing-rapidly-around-the-world-but-not-always-equally/?utm_source=Pew+Research+Center&utm_campaign=e8c3c7f83d-EMAIL_CAMPAIGN_2019_02_07_06_57&utm_medium=email&utm_term=0_3e953b9b70-e8c3c7f83d-400369205)

<sup>39</sup> Joint submission of Kazakhstan Feminist Initiative "Feminita", ODR Intersectional rights, "Stimul" LGBT Group and Transgender Legal Defense Project (Russia), Richard Lusimbo, MPact Global Action for Gay Men's Health and Rights, Transgender Europe TGEU, Federatie van nederlandse verenigingen tot integratie van homoseksualiteit - COC Nederland, and the International Lesbian, Gay, Bisexual, Trans and Intersex Association ILGA, 2018.

<sup>40</sup> Holt, D. B., 'LGBTIQ Teens Plugged in and Unfiltered: How Internet Filtering Impairs Construction of Online Communities, Identity Formation, and Access to Health Information, Santa Clara Digital Commons Law Library Collections, 2009.

<sup>41</sup> The privacy of non-binary gender individuals can be repeatedly infringed in the physical world also in ordinary, everyday activities, for example, in the USA, a federal directive requiring public schools to let transgender students use bathrooms consistent with their gender identity was overturned<sup>41</sup> giving rise to concerns of 'outings' breaching transgender students' privacy, and exposing them to risks of psychological and physical violence.

<sup>42</sup> Holt OpCit; <http://www.onlinepolicy.org/media/schoolblocking030623.shtml>

<sup>43</sup> Steeves, V., and Bailey, J., (2014). Living in the Mirror: Understanding Young Women's Experiences with Online Social Networking. In Emily van de Muelen (Ed.), *Expanding the Gaze: Gender, Public Space and Surveillance*. Toronto: University of Toronto Press.

<https://egirlsproject.ca/>; <http://www.equalityproject.ca/>

<sup>44</sup> Name withheld Submission 2018 referencing Horres, V. "Online and Enabled: Ways the Internet Benefits and Empowers Women

<sup>45</sup> Horres, V. "Online and Enabled: Ways the Internet Benefits and Empowers Women

<sup>46</sup> Joint submission of Kazakhstan Feminist Initiative et al. 2018.

<sup>47</sup> <https://www.thedailybeast.com/the-hunted-gays-of-putins-russia-vicious-vigilantes-and-state-bigotry-close-up?ref=scroll>.

Ukraine and Moldova.<sup>48</sup> Access to justice and protection was stated to be limited as survivors feared further breaches of privacy and safety through reporting these crimes. It was said authorities in Egypt, Lebanon and Iraq used evidence of dating app use to prosecute or blackmail gay men.<sup>49</sup> In Iran, apps were reported to be used by non-State actors to obtain intimate images for extortion purposes.<sup>50</sup>

32. It was reported the media, including new media, in for example, Uganda and Peru, publish the personal information of LGBTQI people, and of Human Rights Defenders, risking their safety.<sup>51</sup>
33. The internet not only creates contemporary stories but can carry forward in perpetuity those of the pre-digital era, and associated violations of privacy. Even if inaccurate, or private, or plain offensive, removing images and stories from public access can be difficult if not impossible. In a case involving a young girl submitted on a confidential basis, investigation of 'take down' options butted against constraints arising from other rights such as freedom of expression, public interest considerations, jurisdictional issues, corporate business models, professional interests versus professional ethics, and the passage of time – none of which worked in the best interest of the then child, and now, the grown woman.<sup>52</sup>

### **Gender identity and its recognition**

34. The recognition of gender identity, autonomy and bodily integrity and its expression, featured in a number of submissions. These expressed the view the digital era has seen an increase in transgender individuals disproportionately subject to breaches of their privacy and gender identity through inadequate privacy protections for legal gender recognition of name changes in identity documents.<sup>53</sup>
35. The importance of privacy in identity recognition has been recognised by the European Court of Human Rights which has found States in violation of Article 8 of the European Convention on Human Rights for lacking legal gender recognition procedures that avoid violating the right to privacy of transgender people.<sup>54</sup>
36. It was reported that the Ukraine and Russia have slightly easier procedures for identity change<sup>55</sup> but concerns were raised regarding the lack of automatic or swift update of name and gender marker across identity documents. Some countries, such as South Caucasus and the Republic of Moldova, are reportedly lacking an explicit law on gender identity, or clear parameters for changing the gender marker.<sup>56</sup>
37. The online availability of public records, judicial notices and decisions concerning gender identity raised privacy concerns. Submissions raised the ability of Big Data and search engines to identify vulnerable individuals by increasing access to public records and registers once only held locally as hard copy.
38. Of particular concern were the records of legal gender recognition judicial procedures.<sup>57</sup> Countries mentioned in this regard were Russia, Chile and Peru. It was reported that search engines of judicial databases have enabled the access of highly specific and sensitive details of the sex

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<sup>48</sup> Eastern European Coalition for LGBT+ Equality Submission, 2018.

<sup>49</sup> Joint submission of Kazakhstan Feminist Initiative et al; APC Submission 2018; <https://www.madamasr.com/en/2016/04/29/feature/politics/11-sentenced-to-3-12-years-in-prison-for-homosexuality/>

<sup>50</sup> Eastern European Coalition for LGBT+ Equality Submission, 2018.

<sup>51</sup> Joint submission of Kazakhstan Feminist Initiative et al. 2018.

<sup>52</sup> Osgoode School of Law, confidential submission December 2018.

<sup>53</sup> Eastern European Coalition for LGBT+ Equality Submission, 2018.

<sup>54</sup> L. v Lithuania; A.P. (2008), Garçon and Nicot v France (2017)

<sup>55</sup> Op cit Eastern Coalition, 2018.

<sup>56</sup> Two cases from Georgia at European Court of Human Rights <http://women.ge/en/news/newsfeed/195/To-the-Government-of-Georgia-and-To-UN-IE-on-protection-against-violence-and-discrimination-based-on-SOGI-Victor-Madrigal-Borloz>

<sup>57</sup> Joint submission of Kazakhstan Feminist Initiative et al. 2018.

characteristics of intersex children, addresses, details of genitalia and surgical procedures, amongst other information.<sup>58</sup>

39. In Canada, online databases of legal decisions in Canada are not indexed by search engines, and thus do not come up in search results. “Globe24h” however, re-published online, Canadian court and tribunal decisions containing personal information and allowed indexing by search engines, and charged individuals a fee to have their personal information removed. Complaints to the Federal Privacy Commissioner against Globe24h had strongly gendered dimensions. Action taken to stop this practice was confirmed by the Federal Court of Canada.<sup>59</sup>
40. For intersex individuals, privacy intrusions can commence literally from birth with intersex babies subjected to sex reassignment surgery and hormone treatment to assign them a certain sex. ‘Normalising’ surgery on intersex infants can impact a range of human rights, including the right to privacy as it extends to the right to personal autonomy/self-determination in relation to medical treatment. Infant surgery puts decision making in the hands of third parties and can have adverse impacts on personal development.<sup>60</sup>
41. Countries were reported to be responding in a variety of ways. Colombia has limited the authority of parents of intersex children to authorise medically unnecessary genital plastic surgery due to concerns of the social and psychological impacts if the parents and physicians assign the wrong sex to a child. In August 2018, the Californian Legislature passed a resolution seeking the halt of non-consensual medical procedures that cosmetically “normalize” variations in intersex children’s sex characteristics.<sup>61</sup>
42. Privacy incursions arising from identity documents can mean ordinary everyday activities such as travel, banking, medical appointments impose frequently deeply embarrassing and distressing privacy infringements that limit the enjoyment of life and constrain personal development in ways not experienced by individuals of binary genders.

#### **Technologically facilitated violence**

43. Digital technology and smart devices (smartphones, iPads, security cameras, etc.) provide almost limitless ways to harass, control or monitor others.<sup>62</sup> Technologically facilitated violence combines issues of gender inequality, sexualised violence, internet regulation, internet anonymity, privacy, copyright and ethics. The Special Rapporteur on Violence Against Women, in her 2018 report outlined the many forms of online gender-based violence violating women’s and girls’ rights to privacy.<sup>63</sup>
44. Release of personal information on social networks can control, harass or blackmail others. Most widely known is the phenomenon of ‘revenge porn’ which involves sharing private sexual images and recordings of a person without consent, to cause harm. Generally seen as affecting women more than men, research in Australia has found that females and males are equally likely to experience image based abuse, while people who identified as lesbian, gay or bisexual were more likely to be victims (36%) than heterosexuals (21%).<sup>64</sup>
45. While technological forms of privacy incursions by strangers occurs online, domestic violence increasingly involves interconnected technologies.<sup>65</sup>

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<sup>58</sup> Ibid.

<sup>59</sup> <https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2015/pipeda-2015-002/>

<sup>60</sup> Larson, S. Intersexuality and Gender Verification tests: The Need to Assure Human Rights and Privacy, *Pace International Law Review* 23(6) 2011.

<sup>61</sup> <https://www.usatoday.com/story/news/nation/2018/08/28/intersex-surgeries-children-california-first-state-condemn/1126185002/>

<sup>62</sup> De Justica Submission 2018.

<sup>63</sup> Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, 2018

<sup>64</sup> RMIT University, *Not Just ‘Revenge Pornography’: Australians’ Experience of Image-Based Abuse*, May 2017.

<sup>65</sup> UCL and Privacy International, ‘Gender and IoT’, <https://www.ucl.ac.uk/steapp/research/themes/digital-policy-laboratory/gender-and-iot>

46. Smart-home technologies in particular, facilitate cyber-domestic violence through new ways to harass, to monitor what people are doing at home,<sup>66</sup> or their communications.<sup>67</sup> Changing thermostat controls, monitoring via location data or sleep apps, camera surveillance, controlling the lights or music in the home, or ringing a doorbell remotely, are behaviours which intimidate and control. Abusers may have sole access to the device, making it difficult or impossible for the victim to change the settings. Sometimes legal protections such as ‘no contact’ type orders, do not address this abuse<sup>68</sup> and while family violence orders can include technology facilitated abuse, the lack of police enforcement of breaches can render inclusion of technological abuse, ineffective.<sup>69</sup> Typically directed at women and dependents,<sup>70</sup> these actions impede the enjoyment of privacy and personal development.
47. Online spaces are also public places where sexual harassment of women and girls is rife.<sup>71</sup> The general online harassment of and encroachment on the privacy of women or ‘cybermisogyny’ proliferates on digital platforms.<sup>72</sup> It was reported Twitter is the main platform for promoting hate campaigns against women and for dissemination of sexual content, while Facebook sees most attacks on women who defend their rights.<sup>73</sup>
48. There is a growing body of international, regional and national research on digital abuse directed at women and some also examining this form of abuse against gender diverse individuals and communities. The role the right to privacy plays (or does not play) in this digital abuse however, is rarely subjected to close examination.
49. One study in Europe, by the Fundamental Rights Agency, found violence against women an extensive human rights abuse. The report did not examine the nature of the human rights abused however, but its survey of 42,000 women across 28 Member States of the EU helpfully documents the prevalence, types and consequences of gender violence, and the role played by new technologies in such abuse.<sup>74</sup>
50. The body of research provides relevant and important contextual information as well as insights into how online abuse is manifested according to gender. In relation to the former issue, research from the United States of America for example, indicated differing gender perspectives on issues such as assistance and prevention by authorities, specifically:<sup>75</sup>
- a) Women are more likely than men to say that law enforcement currently does not take online harassment incidents seriously enough (46% vs. 39%), to see online harassment as a major public issue problem (70% women vs, 54% men), and, 50% women say that offensive content online is too often excused as not being a big deal, whereas 64% of men say that many people take this type of content too seriously;
  - b) Women are much more likely than men to say people should be able to feel welcome and safe in online spaces (63% to 43%), whereas men are more likely to say it is important for people to be able to speak their minds freely online (56% to 36%); and

<sup>66</sup> Bowles, N. (2018, 23 June). Thermostats, Locks and Lights: Digital Tools of Domestic Abuse. *New York Times*. [www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html](https://www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html)

<sup>67</sup> SpyWare technologies allow abusers to know what victims have been searching, Mason, C. and Magnet, S., *Surveillance Studies and Violence Against Women*, *Surveillance & Society* 10(2) 2012; APC p13

<sup>68</sup> Bowles, Nellie Thermostats, Locks and Lights: Digital Tools of Domestic Abuse, 2018 *New York Times* <https://www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html>

<sup>69</sup> Hadeel Al-Alosi, *Cyber-Violence: Digital Abuse in the Context of Domestic Violence*, *UNSW Law Journal* 40(4) 2017.

<sup>70</sup> ‘Stalked within your own home’: Woman says abusive ex used smart home technology against her, *CBC*, Nov 1, 2018 <https://www.cbc.ca/news/technology/tech-abuse-domestic-abuse-technology-marketplace-1.4864443>; Nellie Bowles “Thermostats, Locks and Lights: Digital Tools of Domestic Abuse” *New York Times*, June 23, 2018 <https://www.nytimes.com/2018/06/23/technology/smart-home-devices-domestic-abuse.html?smid=tw-nytimes&smtyp=cur>.

<sup>71</sup> UK Parliament, House of Commons, Women and Equalities Committee, ‘Sexual harassment of women and girls in public places’, October 2018, para 108, <https://publications.parliament.uk/pa/cm201719/cmselect/cmwomeq/701/70111.htm>

<sup>72</sup> LEAF op cit.

<sup>73</sup> APC Submission, 2018; Women’s Institute of Mexico City

<sup>74</sup> European Union Agency for Fundamental Rights, *Violence against Women: an EU-wide survey. Main Results*. 2015. <https://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report>

<sup>75</sup> Ibid

- c) Men are somewhat more likely than women to believe that improved policies and tools from online companies are the most effective approach to addressing online harassment (39% vs. 31%), while women are more likely to favour stronger laws (36% vs. 24%).
51. In terms of how online abuse is manifested according to gender, the same research indicated significant differences between females and males with 11% of women harassed because of their gender, compared with 5% of men.<sup>76</sup>
52. Different organizations in Latin America have issued reports on gender and privacy in the digital age.<sup>77</sup> It was reported that despite the frequency of cyberbullying across Latin America, substantive studies have occurred only in Mexico, Brazil and Argentina.<sup>78</sup> In Mexico, 4.5 million children and adolescents aged 12 to 19 were reported to have been victims of cyberbullying<sup>79</sup> notably females.
53. In Brazil, 65% of complaints received by the NGO Safernet, on cyberbullying and offences related to women.<sup>80</sup> In Colombia, the Karisma Foundation undertook research on online violence against women journalists, finding online attacks are deeply personal in nature, demeaning and sexualised, and which can be seen to involve infringements of informational and physical privacy. Female Human Rights Defenders also are the targets of such attacks.<sup>81</sup>
54. A study of Canadian criminal law cases involving technology-facilitated voyeurism found a clear gender issue with the accused typically male, and the victims usually women and girls.<sup>82</sup>
55. Women who have been trafficked also experience technology-facilitated privacy abuses by clients and traffickers, who are reported to use images and recordings to induct and retain women in the trade by threatening disclosure to children, family members, friends, teachers, employers, police, child protection services, Courts and taxation agencies.<sup>83</sup>
56. Invasions of privacy and online violence are higher also for men who do not conform to conventional masculine norms or stereotypes and for people who identify as lesbian, gay, or bisexual. Race or ethnicity can also be a risk factor, for example black American internet users have a 7% higher risk factor compared to 3% of white users.<sup>84</sup>
57. Digital abuse based on gender also affects the exercise of other rights with, for example, women reportedly also suffering online censorship and profiling in campaigns targeting activists and journalists.<sup>85</sup> Additionally, activists seeking rights equality for the LGBTQI community were said

<sup>76</sup> 44% of men and 37% of women reported facing some form of online harassment with men somewhat more likely than women to have been called offensive names (30% vs. 23%) or to receive physical threats (12% vs. 8%). Women, especially young women, receive sexualized forms of online abuse at much higher rates than men. Some 21% of women ages 18 to 29 have been sexually harassed online, more than double that of men in the same age group (9%). Further, 53% of young women say that someone has sent them explicit images they did not ask for (compared with 37% of young men). Pew Research, *Men, women experience and view online harassment differently*, 2017; [http://www.pewresearch.org/fact-tank/2017/12/28/10-things-we-learned-about-gender-issues-in-the-u-s-in-2017/?utm\\_source=Pew+Research+Center&utm\\_campaign=56eb70a58b;EMAIL\\_CAMPAIGN\\_2017\\_12\\_26&utm\\_medium=email&utm\\_term=0\\_3e953b9b70-56eb70a58b-400369205](http://www.pewresearch.org/fact-tank/2017/12/28/10-things-we-learned-about-gender-issues-in-the-u-s-in-2017/?utm_source=Pew+Research+Center&utm_campaign=56eb70a58b;EMAIL_CAMPAIGN_2017_12_26&utm_medium=email&utm_term=0_3e953b9b70-56eb70a58b-400369205)

<sup>77</sup> De Justicia Submission September 2018. Eg. the joint report of Fundación Karisma (Colombia), Coding Rights (Brazil), Asociación por los Derechos Civiles (Argentina), Derechos Digitales (Chile), R3D (Mexico), Hiperderecho (Peru) and Internet Lab (Brazil); Coding Rights (Brazil).

<sup>78</sup> Report on the Situation in Latin America on Gender-Based Violence in Electronic Media

<sup>79</sup> National Women's Institute 2016.

<sup>80</sup> NGO Safernet, 2016

<sup>81</sup> SR correspondence eg [https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24199;https://www.outrightinternational.org/sites/default/files/TransRpt\\_Colombia\\_En.pdf](https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24199;https://www.outrightinternational.org/sites/default/files/TransRpt_Colombia_En.pdf)

<sup>82</sup> Bailey, Jane and Mathen, Carissima, Technologically-Facilitated Violence Against Women and Girls: If Criminal Law Can Respond, Should It? (November 23, 2017). Ottawa Faculty of Law Working Paper No. 2017-44. Available at SSRN: <https://ssrn.com/abstract=3043506> or <http://dx.doi.org/10.2139/ssrn.3043506>

<sup>83</sup> Project Respect submission to Australian Senate Legal and Constitutional Affairs References Committee Inquiry into the 'Phenomenon colloquially referred to as 'revenge porn'  
[https://d3n8a8pro7vhmx.cloudfront.net/projectrespect/pages/15/attachments/original/1453939756/Revenge\\_Porn\\_Submission.pdf?1453939756](https://d3n8a8pro7vhmx.cloudfront.net/projectrespect/pages/15/attachments/original/1453939756/Revenge_Porn_Submission.pdf?1453939756)

<sup>84</sup> Irish Civil Liberties Council Submission 2018; <sup>84</sup> Amnesty International 'Troll Patrol', 2018, <https://decoders.amnesty.org/projects/troll-patrol/findings>

<sup>85</sup> de Justicia op cit

to face significant threats online in response to their gender equality advocacy exercised via their rights to freedom of expression and political views.<sup>86</sup> The right to education is implicated in the reported release in China, of nude photos (required as part of collateral for student loans), of young female students, for financial gain by organised loan sharking criminal activity.<sup>87</sup>

## **B. Thematic Action Stream ‘Security and Surveillance’**

58. Submissions indicate gender experiences of surveillance can be broadly State-led; commercial; domestic or lateral, and even participatory in nature. The increasing interdependencies – economic and political<sup>88</sup> - between these forms of surveillance mean an individual can experience more than one form of surveillance.
59. Surveillance unless undertaken lawfully, proportionately and necessarily represents infringements of the human right to privacy. Factors such as race, class, and gender all help determine who is watched in society, and the right to privacy has been unequally distributed according to these factors.<sup>89</sup>
60. While State powers of surveillance are extensive, they are inextricably tied to the private sector. The technology that makes mass surveillance possible was developed through collaboration between governments and private corporations, and the surveillance powers of the State are increasingly exercised through private technology.<sup>90</sup> Communication carriers, social media applications, and search engines function as huge information reservoirs for States who have recognised the value of information held by companies on service users and their contacts, and have sought access to it, including by legislative means.
61. Such surveillance is facilitated by the movement of major platform providers into the role of identity management via online identity authentication. Almost every website, app and service now require login details, and accept identity credentials as authentic following logon via Facebook or Google accounts.<sup>91</sup> Facebook has 60% of this ‘social log on’ market and has become the de facto provider of identity validation in the non-Chinese parts of the internet.<sup>92</sup> Identity validation provides access to vast amounts of information to compile profiles of individuals and groups in which gender would be a variable, enabling deep insights into the behaviours of individuals, families, groups and communities.
62. Surveillance technologies utilised by companies, such as GPS tracking, can facilitate abuse and enable the monitoring and targeting of communications to individuals and groups. Some submissions raised concerns about the use by States of this information to target individuals and groups according to their gender, pointing to the higher surveillance of those who identify as LGBTQI.<sup>93</sup>
63. State surveillance of the LGBTQI community was seen to be facilitated in some countries, through legislation. For example, some fear the Anti-Cybercrime Law enacted in Egypt in mid-August 2018, to regulate internet activities, could be used to prosecute LGBTQI people and groups for social media content that “violates the family principles and values upheld by Egyptian society” (Article 25). Violations carry penalties of a minimum of six-months imprisonment and/or fines of EGP50,000–100,000.<sup>94</sup>

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<sup>86</sup> harassment (75%), intimidating online comments (63%) and blocked websites or filtering software preventing information access (54%).

<sup>87</sup> Pushkarna, N. and Ren, MM., Submission 2018 referencing Constable, P. (2016).

[https://www.washingtonpost.com/news/worldviews/wp/2016/06/16/loan-sharks-in-china-offer-student-loans-for-nude-photos-giving-new-meaning-to-naked-greed/?noredirect=on&utm\\_term=.9f1be4224c01](https://www.washingtonpost.com/news/worldviews/wp/2016/06/16/loan-sharks-in-china-offer-student-loans-for-nude-photos-giving-new-meaning-to-naked-greed/?noredirect=on&utm_term=.9f1be4224c01); <https://www.zerohedge.com/news/2018-12-14/chinese-millennials-secured-loans-nude-photos>; [http://www.academia.edu/26833351/Extortion\\_Racketeering\\_in\\_the\\_EU\\_Vulnerability\\_Factors](http://www.academia.edu/26833351/Extortion_Racketeering_in_the_EU_Vulnerability_Factors).

<sup>88</sup> Zuboff, S., *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, 2019.

<sup>89</sup> Franks, M.A., *Democratic Surveillance*, *Harvard Journal of Law & Technology*, Volume 30, Number 2 Spring 2017

<sup>90</sup> *Ibid.*

<sup>91</sup> *The Economist* Essay, Christmas Edition, December 2018

<sup>92</sup> *Ibid.*

<sup>93</sup> APC Submission, 2018.

<sup>94</sup> Joint International Submission, 2018; <http://www.loc.gov/law/foreign-news/article/egypt-president-ratifies-anti-cybercrime-law/>

64. State surveillance against the LGBTIQI community was reported in Azerbaijan and Belarus.<sup>95</sup> Action against reported breaches was said to rarely start or quickly closed.<sup>96</sup> The ‘Anti-propaganda Law’ in the Russian Federation was said to have made intrusions into private lives, a systematic occurrence<sup>97</sup> with the law being used by non-State actors to target LGBTIQI school teachers with 13 cases of wrongful dismissal documented.<sup>98</sup>
65. While State surveillance is generally presented as targeting males,<sup>99</sup> counter-terrorism measures for instance, have been said to disproportionately affect women and transgender asylum-seekers, refugees and immigrants.<sup>100</sup>
66. Females can expect that nearly every detail of their intimate lives will be subject to multiple forms of surveillance by state as well as private actors, from domestic violence to sexual objectification to reproduction. The story of how Target identified a teenage girl as pregnant before her parents knew, is now almost part of folklore.<sup>101</sup>
67. Commercial use of personal data available to business has seen products developed that also maintain this flow of information via ‘participatory surveillance’<sup>102</sup> or ‘self-surveillance’, marketed by gender groupings. Investors are reported to be concentrating money in ‘wellbeing’ apps such as those aimed at women’s reproductive functioning.<sup>103</sup> The data supplied by users is potentially available for monitoring purposes and/or on-sold without the individuals’ consent or knowledge, and fed into algorithmic models which in turn, determine marketing ‘itches’, depict societal norms and shape behaviours.<sup>104</sup>
68. Women are subject to more lateral and domestic surveillance than men and this varies according to culture and religious backgrounds. While technology can extend women’s contacts and opportunities, technology provides enhanced opportunities for others to monitor their activities.<sup>105</sup>
69. Surveillance experienced by some young women can involve State surveillance of their activism, raising amongst other matters, the question of expectations of privacy in public spheres.<sup>106</sup> In Ireland, the case of Dara Quigley was described as capturing the intersection of State authorised CCTV surveillance, image-based sexual abuse, gendered harassment, and existing legislation and law enforcement norms.<sup>107</sup>
70. Much surveillance now relies upon vast quantities of data, Dataveillance<sup>108</sup> combines data and surveillance to describe systematic data-based surveillance practices that involve sorting and aggregating large quantities of data to monitor, track and regulate people and populations, and which can be effected according to gender/gender identity.

### C. Thematic Action Stream ‘Big Data and Open Data’

<sup>95</sup> Eastern European Coalition for LGBT+ Equality Submission, 2018.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Privacy International 2017

<sup>100</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Scheinin, M. to UNGA 64<sup>th</sup> Session, A/64/211, 3 August 2009.

<sup>101</sup> BusinessInsider, February 2012, <https://www.businessinsider.com/the-incredible-story-of-how-target-exposed-a-teen-girls-pregnancy-2012-2>

<sup>102</sup> Lupton, D., Quantified sex: a critical analysis of sexual and reproductive self-tracking using apps. *Culture, Health & Sexuality*, 17 (4), pp. 440-453 [http://www.canberra.edu.au/researchrepository/file/25d1310f-2c5d-4ca5-9e8e-c17f1a140cb1/1/full\\_text\\_postprint.pdf](http://www.canberra.edu.au/researchrepository/file/25d1310f-2c5d-4ca5-9e8e-c17f1a140cb1/1/full_text_postprint.pdf); <http://www.canberra.edu.au/researchrepository/items/25d1310f-2c5d-4ca5-9e8e-c17f1a140cb1/1/>

<sup>103</sup> The Guardian, Technology, Weigel, M., ‘Fitbit for your period? The Rise of Fertility Tracking’, 23 March 2016.

<sup>104</sup> Op cit. Lupton; ‘New App Changing the Way Women Relate to Reproductive Health’; APC Submission, 2018.

<https://www.womenshealth.northwestern.edu/blog/new-app-changing-way-women-relate-reproductive-health>; Diana-Ashley Krach, ‘Best apps for reproductive health now that we’re basically on our own’ 26 Jan 2017 <https://www.sheknows.com/health-and-wellness/articles/1131535/best-apps-for-reproductive-health/>

<sup>105</sup> Mason, C. and Magnet, S. *Surveillance Studies and Violence against Women, Surveillance and Society*, 10(2), pps105-118, 2012: 116 [https://www.academia.edu/3561802/Surveillance\\_and\\_Violence\\_Against\\_Women](https://www.academia.edu/3561802/Surveillance_and_Violence_Against_Women)

<sup>106</sup> APC Submission 2018.

<sup>107</sup> Irish Council for Civil Liberties Submission, 2018.

<sup>108</sup> Clarke, R., <http://www.rogerclarke.com/DV/CACM88.html>; APC Submission, 2018.

71. The SRP's reports and consultations have noted the differential effects of Big Data upon privacy according to gender and its interaction with other issues such as Indigenous Sovereignty Rights.<sup>109</sup>
72. Almost all data in industrialised countries whether employment, financial, retail, lifestyle, socially related are recorded digitally, interconnected and networked. Many, if not most, companies using digital technology for service delivery, collect identifying information about individuals, their gender, their social networks, online (e.g. browser history, interests and preferences) and offline activities (e.g. purchases, location tracking, microphone recording on mobile devices). Companies also collect data externally compiled by other parties through public sources (e.g. public databases, data scraping), purchasing from third parties (e.g. data brokers), receiving consumer data through business partnerships, or swapping lists. In addition, data brokers amalgamate and on-sell information about consumers from other companies and data brokers.<sup>110</sup>
73. In 2018, UN Women in conjunction with Global Pulse reported Big Data could help close the gender gap for the 2030 Agenda for Sustainable Development while acknowledging the potential privacy risks from the use of data, even if de-identified.<sup>111</sup>
74. Big data techniques can enable marketing at a micro-level, and technologies such as mobile geo-fencing, have the capacity to target people by gender. The use in the US by Anti-Choice groups of mobile geo-fencing technology to target anti-choice ads at women attending abortion clinics was raised as a non-consensual, predatory, unethical invasion of women's privacy against which legal protections appear absent.<sup>112</sup>
75. Data processing can affect structural and societal interests, particularly as data modelling such as predictive policing or social intervention, increasingly transcends the individual to focus on groups or communities. Societal biases relating to gender roles and identities can be embedded in such programs and systems via automated decision-making.<sup>113</sup> Poor and working-class people are targeted by new tools of digital poverty management with automated eligibility systems within which women on welfare are one of the most privacy poor groups in society.<sup>114 115</sup> Complex integrated databases collect their most personal information, predictive models and algorithms weigh them for risk and potential problems; vast complexes of social service, law enforcement, and neighbourhood surveillance make their every move visible for government, commercial, and public scrutiny.<sup>116</sup>
76. Sorting people into categories according to gender frequently in combination with other factors, and assigning values and risk ratings can have real consequences for opportunities in life, constraining personal development.<sup>117</sup> The growth in the collection, storage and manipulation of data has increased the possibilities of privacy breaches. When these occur, even if they are not based on gender, breaches can have a more severe impact on women, and LGBTIQI people due to associated discrimination.
77. Data analytics resulting in inferences being drawn about individuals or groups according to gender and which lead to discrimination, are contrary to human rights law.

#### **D. Thematic Action Stream 'Health Data'**

78. An important issue for all is the protection of their health data.

<sup>109</sup> A/73/345712 <https://www.ohchr.org/EN/Issues/Privacy/SR/Pages/AnnualReports.aspx>

<sup>110</sup> CPRC Submission 2018.

<sup>111</sup> UN Women Global Pulse 'Gender Equality and Big Data', 2018 at <https://www.unglobalpulse.org/sites/default/files/Gender-equality-and-big-data-en-2018.pdf>

<sup>112</sup> Coutts, S., *Anti-Choice Groups Use Smartphone Surveillance to Target 'Abortion-Minded Women' During Clinic Visits*, 2016 [rewire.news/article/2016/05/25/anti-choice-groups-deploy-smartphone-surveillance-target-abortion-minded-women-clinic-visits/](http://rewire.news/article/2016/05/25/anti-choice-groups-deploy-smartphone-surveillance-target-abortion-minded-women-clinic-visits/)

<sup>113</sup> Bridges, K.M., *The Poverty of Privacy Rights*, Stanford University Press, 2017.

<sup>114</sup> Ibid

<sup>115</sup> The Guardian, Gomes, L.H., Parents Next: single mothers say they were forced to allow 'sensitive' data to be collected, 27 January 2019.

<sup>116</sup> Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor, Virginia Eubanks, St. Martin's Press 2018.

<sup>117</sup> Lyon, D. (ed) *Surveillance as Social Sorting, Privacy, Risk and Social Organisation*, 2003:1

[http://www.felfel.is/sites/default/files/2016/Lyon,\\_D.\\_\(2003\).Surveillance\\_and\\_social\\_sorting%26\\_computer\\_codes\\_and\\_mobile\\_bodies%20\(1\).pdf](http://www.felfel.is/sites/default/files/2016/Lyon,_D._(2003).Surveillance_and_social_sorting%26_computer_codes_and_mobile_bodies%20(1).pdf)

79. A particular concern for LGBTQI people is the non-consensual sharing of health data particularly HIV status.<sup>118</sup> There have been grounds for these fears. The Grindr app for example, has been found to contain trackers and share personal information with various third parties, including users' HIV status.<sup>119</sup>
80. Studies have shown LGBTI individuals tend to have poorer access to health services than heterosexuals and that the intersection of multiple social identities reveal important gaps in health care experience.<sup>120</sup> Transgender inclusive healthcare can profoundly increase the quality of life for transgender people.<sup>121</sup> Fears of humiliation or discrimination from loss of privacy however, can result in avoidance of health services or their restricted use affecting health outcomes.<sup>122</sup> For transgender individuals, intake forms collecting legally identifying information such as name and gender marker, can present privacy incursions which do not arise for binary gender patients.<sup>123</sup> Privacy experiences in health care settings have been found to influence health service usage, and consequently possess public health impacts.
81. Violations of women's right to privacy during childbirth can be a powerful disincentive to seeking care for subsequent deliveries.<sup>124</sup> A review of 65 studies from 34 countries<sup>125</sup> found lack of informed consent for medical procedures; lack of physical privacy, and breach of confidentiality (for example, HIV status) in Kenya, South Africa and the United Kingdom made women avoid or fear facility-based delivery due to anxiety about HIV tests taken without consent or inadequate physical privacy. Muslim parents' views of maternity services have been found to be determined by their ability to retain their privacy in accordance with religious beliefs.<sup>127</sup>
82. Technologies such as Google street view, can effect health service usage by women. It was reported for example, in Australia, that concerns about being identified resulted in women not using a women's health clinic after viewing online, protesters outside the facility.<sup>128</sup>
83. Lastly, gender verification in sports was raised as invading women's physical and medical privacy more than that of male competitors.<sup>129</sup>

#### **E. Thematic Action Stream 'Use of Personal Data by Corporations'**

84. There is growing recognition that the private sector has obligations under human rights law as in the UN "Protect, Respect and Remedy" Framework.<sup>130</sup>
85. The concentration of digital communication in globally dominant, privately owned social media platforms with business models dependent upon advertising revenue, which are largely unregulated operations, has made privacy however defined, more difficult to guarantee.<sup>131</sup> <sup>132</sup> <sup>133</sup>

<sup>118</sup> Op cit Kazakhstan Feminist Initiative "Feminita", et al.

<sup>119</sup> APC Submission, 2018.

<sup>120</sup> Hsieh, N. Ruther, M., 'Despite Increased Insurance Coverage, Nonwhite Sexual Minorities Still Experience Disparities In Access To Care', Health Affairs, Vol 36, No. 10, October, 2017.

<sup>121</sup> Transgender Healthcare, Consultation Document, Office of the Deputy Prime Minister, Ministry for Health, April 2018. Malta.

<sup>122</sup> NPR, Robert Wood Johnson, T.H. Chan School of Public Health 'Discrimination in America: Views and Experiences of LGBT Americans, November, 2017, p30.

<sup>123</sup> Malta Times, Saturday April 7, 2018 'New Health care clinic for transgender people in pipeline', p5.

<sup>124</sup> The Universal Rights of Childbearing Women Charter

<sup>125</sup> M. A. Bohren, J.P. Vogel, E.C. Hunter, O. Lutsiv, S.K. Makh, J.P. Souza, C. Aguiar, F.S. Coneglian, A. Luiz, A. Diniz, Ö. Tunçalp, D. Javadi, O.T. Oladapo, R. Khosla, M.J. Hindin, A.M. Gülmezoglu, 'The Mistreatment of Women during Childbirth in Health Facilities Globally: A Mixed-Methods Systematic Review', PLOS Medicine | DOI:10.1371/journal.pmed.1001847 June 30, 2015 . de Justica; APC

<sup>126</sup> 11 countries sub-Saharan Africa, 5 Asia, 2 Oceania, 4 Europe, 5 Middle East and North Africa, 2 North America, and 5 Latin America.

<sup>127</sup> The Maternity Alliance, *Experiences of Maternity Services: Muslim Women's Perspectives*, November 2004.

<sup>128</sup> C. Wahlquist, Protect us from anti-abortion protesters, say women's clinics in WA, The Guardian International Edition, 25 January, 2018.

<sup>129</sup> Larson, S., Intersexuality and Gender Verification tests: The Need to Assure Human Rights and Privacy, Pace International Law Review 23(6) 2011, in McKee, K. Submission 2018.

<sup>130</sup> The Charter of Human Rights and Principles for the Internet, Internet Rights and Principles Dynamic Coalition UN, Internet Governance Forum, 2014.

<sup>131</sup> Australian Competition and Consumer Commission, 'Preliminary Report of Inquiry into Digital Platforms', 2018.

<sup>132</sup> Zuboff, S., The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power, 2019.

<sup>133</sup> UK Parliament, House of Commons Committee, Disinformation and 'fake news': Final Report, February 2019.

86. It is no surprise then, that research has found 91% of adults agree or strongly agree that consumers have lost control of how personal information is collected and used by companies.<sup>134</sup>
87. This lack of control is exacerbated by the automated decision-making used by digital platforms and which can produce outcomes affecting genders differently. Legal action, still ongoing, was reported against Facebook for allegedly allowing landlords and brokers to exclude ads from being displayed based on the user's gender.<sup>135</sup>
88. Concern was expressed at the increased number of social media pages and groups promoting violence against women, showing intimate images without consent, sexism, and harmful gender stereotypes. Concern was also expressed at the amount of community pressure it took to have these pages removed.<sup>136</sup> Although pages, such as those involving children, or hate speech have been taken down, for example by Facebook after official representations<sup>137</sup> or under Codes of Conduct.<sup>138</sup>
89. It was reported that it is unknown how social media platforms make decisions following the receipt of complaints of online violence, and the types and number of cases reported by country, or the actions taken.
90. Amnesty International has found that Twitter failed to adequately investigate reports of violence and abuse and has repeatedly called on Twitter to release "meaningful information about reports of violence and abuse against women, as well as other groups, on the platform, and how they respond to it."<sup>139</sup>
91. One submission reported positive action by the app Grindr to reduce mis-use aimed at entrapment of gay men,<sup>140</sup> however, the common response of digital platforms (Facebook, Twitter, media, etc.) with respect to victims of online gender-based violence was reported as impunity and opacity. The general feeling of victims regarding companies' response to gender violence, was reported as one of abandonment.<sup>141</sup>
92. Reliance upon social media platforms to self-regulate is problematic. Some submissions noted that there has been no campaign by Internet platforms to prevent gender based infringements of privacy or gender-based violence regionally or globally; little proactive technological assistance, for example, through apps providing information of services, or, of using design choices, Terms of Service (ToS) and tools for reporting ToS violations.<sup>142</sup>
93. Combined with the lack of State sanction, there is the sense that online gender-based privacy incursions are tolerated.<sup>143</sup> The loss of privacy leads many victims, frequently women, to silence or censor themselves affecting their enjoyment of other human rights such as freedom of expression, and of association.<sup>144</sup>

[https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/1791/179103.htm#\\_idTextAnchor000](https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/1791/179103.htm#_idTextAnchor000)

<sup>134</sup> Rainie, L. The state of privacy in post-Snowden America. Pew Research Centre. <http://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/>

<sup>135</sup> CPRC Submission citing 'Money' CNN News in March 2018.

<sup>136</sup> AWAVA Submission, 2018.

<sup>137</sup> [http://www.huffingtonpost.com.au/2017/10/23/facebook-shuts-down-vile-rape-and-violence-group-linked-to-adf-troops\\_a\\_23253443/](http://www.huffingtonpost.com.au/2017/10/23/facebook-shuts-down-vile-rape-and-violence-group-linked-to-adf-troops_a_23253443/); <http://www.sbs.com.au/news/article/2017/10/24/facebook-closes-rape-meme-page-adf-troops-link> AWAV Submission, 2018; Zuckerberg, D. 2018.

<sup>138</sup> EU Code of Conduct, 'Countering illegal hate speech online', 4 February 2019 [http://europa.eu/rapid/press-release\\_MEMO-19-806\\_en.htm](http://europa.eu/rapid/press-release_MEMO-19-806_en.htm)

<sup>139</sup> Op cit Amnesty International 2018

<sup>140</sup> Op cit Kazakhstan Feminist Initiative "Feminista", et all. Submission 2018.

<sup>141</sup> Electronic Media cited in De Justica Submission, 2018

<sup>142</sup> Report on the Situation in Latin America on Gender-Based Violence Exercised by Electronic Media, in de Justica, Submission, 2018.

<sup>143</sup> Op cit de Justica

<sup>144</sup> Op cit Amnesty International 2018; APC Submission, 2018.

94. The difficulty of identifying hidden gender based losses of privacy and therefore of pinpointing the harms that follow privacy violations, has increased with the ever-growing ability to collect and process data using algorithms and AI, combined with the wider focus on large groups or society as a whole, rather than individuals.
95. The reported harms to individuals arising from gender based technological infringements of privacy include:
- a. Extension of patriarchal or abusive controls<sup>145</sup>
  - b. Silencing of women's and girl's voices in public<sup>146</sup>
  - c. Stigmatisation, humiliation and social isolation
  - d. Mental health issues and even suicide<sup>147 148</sup>
  - e. Reputational impacts<sup>149</sup>
  - f. Stalking, bullying and harassment, both online and offline
  - g. Economic harm through loss of professional reputation, reduction in job opportunities
  - h. Discrimination in employment, services received including possible loss of access to personal data if accounts are suspended or terminated
  - i. 'Outing' frequently introducing further privacy breaches and abuse, particularly for trans-women and trans-people of colour.<sup>150</sup>
  - j. Physical danger, hate crime
  - k. Arrest, imprisonment, or execution in some jurisdictions
96. Experiences of privacy infringements are not homogeneous; incursions can have a greater impact on LGBTQI people due to associated discrimination, and resulting negative self-esteem and depression.<sup>151</sup> Women report higher levels of emotional stress from their experiences of online violence.<sup>152</sup> Transgender individuals can experience some specific, unique risks such as 'outing', and abuse directly arising from privacy infringements upon their gender identity.<sup>153</sup> For culturally and linguistically diverse women there is the added shame that may come from their cultural or religious community, or families back in their home countries experiencing violence, shame and other harmful reprisals which is particularly pertinent for trafficking victims.<sup>154</sup>
97. Australian research on "revenge porn" revealed the damaging psychological toll on victims, with those threatened or experiencing "sextortion" and whose images had been distributed, the most severely affected by depression and/or anxiety.<sup>155</sup>
98. Surveillance has serious, well-documented effects, ranging from loss of employment and educational opportunities, restrictions on the freedom to move, associate, or dress as one wishes, interference with parenting abilities, and loss of general confidence.<sup>156</sup>
99. These harms raise questions about the societal effects of undermining human rights. Privacy harms to individuals which constrain their personal development affect society overall. In this

<sup>145</sup> APC Submission October 2018

<sup>146</sup> Op cit UK Parliament.

<sup>147</sup> Op cit Pushkarn and Ren.

<sup>148</sup> Op cit FRA.

<sup>149</sup> "Online Reputation, What are they saying about me?", a Discussion Paper Policy and Research Group, Office of the Privacy Commissioner of Canada, January 2016: [https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/or\\_201601/](https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/or_201601/).

<sup>150</sup> Case submissions to TGEU.

<sup>151</sup> GLSEN (2013), *Out Online: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth on the Internet*. Jt Intl Submission -

<sup>152</sup> Pew Research, Men, women experience and view online harassment differently, 2017; [http://www.pewresearch.org/fact-tank/2017/12/28/10-things-we-learned-about-gender-issues-in-the-u-s-in-2017/?utm\\_source=Pew+Research+Center&utm\\_campaign=56eb70a58b](http://www.pewresearch.org/fact-tank/2017/12/28/10-things-we-learned-about-gender-issues-in-the-u-s-in-2017/?utm_source=Pew+Research+Center&utm_campaign=56eb70a58b);

EMAIL\_CAMPAIGN\_2017\_12\_26&utm\_medium=email&utm\_term=0\_3e953b9b70-56eb70a58b-400369205

<sup>153</sup> Gender Perspectives on Privacy in Eastern Partnership Countries and Russia by the Eastern European Coalition for LGBT+ Equality

<sup>154</sup> Project Respect, 'Project Respect submission to the Senate Legal and Constitutional Affairs References Committee Inquiry into the 'Phenomenon colloquially referred to as 'revenge porn', which involves sharing private images and recordings of a person without their consent, with the intention to cause that person harm'. Australia, 2016.

<sup>155</sup> RMIT University, *Not Just 'Revenge Pornography: Australians' Experience of Image-Based Abuse*, May 2017.

<sup>156</sup> Franks, M.A., Democratic Surveillance, *Harvard Journal of Law & Technology*, Volume 30, Number 2 Spring 2017

way, privacy is an issue that concerns what type of society we want to construct for the future.<sup>157</sup> For example, the extreme forms of online abuse and the invasion of the personal and familial privacy inflicted upon high-profile women, discourage girls and women from participating in politics and adversely affecting gender representation in democratic institutions.<sup>158</sup>

### **Addressing gender based differences in the enjoyment of the right to privacy**

100. Submissions indicated good practices that protect privacy from a gender perspective range from legislative reform, legal decisions by Courts, community programs to educational resources. Some examples were provided of overarching frameworks such as the Inter-American Human Rights System's American Convention on Human Rights, with provisions protecting dignity, good name and equality, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Pará) protecting the rights to integrity, security, equality and life of women, among others.
101. Submissions raised how legislation around the world, is determining experiences of privacy according to gender and gender identity.
102. In India, the Supreme Court in several judgments over the past 60 years has acknowledged the gendered aspects of privacy.<sup>159</sup> For instance, the Court has held that a mother's right to privacy cannot be violated by mandating the disclosure of the name and particulars of the biological father of her child for the child's passport. The right to privacy of victims of sexual assault was upheld when the Court condemned performing of Per Vaginal ("two finger" tests) on rape victims in order to verify if the victim was habituated to sexual intercourse. The Supreme Court has held also that the identity of the victims (typically women or young girls) of rape should not be disclosed in any manner, except with court authorisation.
103. Privacy, self-identity, autonomy and personal integrity were upheld by the Indian Supreme Court as rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India that the State is bound to recognise and protect, in a petition filed by the National Legal Services Authority (NALSA). In 2017, the landmark judgment of the Court in *Puttaswamy v. Union of India* reaffirmed the right to privacy as a core value with Chandrachud J. recognising that sexual orientation is an essential component of the right to privacy.<sup>160</sup>
104. In Canada, the Federal Office of the Privacy Commissioner has asked the Canadian Federal Court to clarify whether the *Personal Information Protection and Electronic Documents Act* s5(3) provides for a right to de-indexing on request in certain cases following a consultation addressing online reputation.<sup>161</sup>
105. Around the world, legislative responses to 'revenge porn' have been introduced, for example Malta in 2016.<sup>162</sup> While seen as positive State responses, it was pointed out that such legislation does not guarantee the prevention of online image abuse against women in all situations involving the collection and distribution of images of genitalia. A submission from Australia illustrated this point<sup>163</sup> where it has been argued that a statutory cause of action for serious invasion of privacy, would be a better legislative response.<sup>164</sup> In other parts of the world, issues around ownership of an image have made prosecution of 'revenge porn' cases difficult.<sup>165</sup>

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<sup>157</sup> Solove, D.J., 'Conceptualizing Privacy', California Law Review, 90. Pps 1087-155 in J.A. Cannataci. 'The Individual and Privacy Volume 1', Ashgate, 2015.

<sup>158</sup> AWAVA Submission, 2018.

<sup>159</sup> CCG NLU Submission 2018.

<sup>160</sup> Op cit CCGNLU.

<sup>161</sup> Federal Office of the Privacy Commissioner Submission 2018, [https://www.priv.gc.ca/en/opc-news/news-and-announcements/2018/an\\_181010/](https://www.priv.gc.ca/en/opc-news/news-and-announcements/2018/an_181010/).

<sup>162</sup> <https://cis-india.org/internet-governance/blog/revenge-porn-laws-across-the-world>

<sup>163</sup> Confidential submission by complainant, under pseudonym, Australia.

<sup>164</sup> Australian Privacy Foundation <https://privacy.org.au>

<sup>165</sup> Farries, E and Sturm, T., Feminist legal geographies of intimate-image sexual abuse: Using copyright logic to combat the unauthorized distribution of celebrity intimate images in cyberspaces, Environment and Planning A: Economy and Space 0(0) 1–21, 2018.

106. The characteristics of privacy and gender respectful frameworks were described as including:
- a) evidence-based policy framework incorporating international, regional and national human rights frameworks, and addressing the structural factors that give rise to gender inequities in the enjoyment of the right to privacy<sup>166 167 168 169</sup>
  - b) governance frameworks with tools such as impact assessments, that include gender impacts
  - c) promotion of encryption, pseudonymity and anonymity,<sup>170 171</sup> and education to increase the technological and data safety capacities of vulnerable groups<sup>172</sup>
  - d) utilisation of Civil Society Organisations' (CSOs) experience and community knowledge of gendered privacy by involving them in policy formulation, implementation and evaluation, and education initiatives.
107. Good practices specifically for sexual orientation and gender identity privacy issues were seen to be encapsulated in the Yogyakarta Principles+10 entailing:<sup>173</sup>
- a) Adoption of all necessary legislative, administrative and other measures to guarantee the right to enjoy privacy, intimate decisions and human relations, including consensual sexual activity between persons over the age of consent, without arbitrary interference;
  - b) Repeal of all laws criminalising consensual sexual activity between people of the same sex over the age of consent, and ensuring the same age of consent applies to sexual activity between individuals of both same and different sexes;
  - c) Not criminalising sexual activity carried out consensually between people of the same sex over the age of consent;
  - d) Repeal of laws prohibiting or criminalising the expression of gender identity;
  - e) Release of all people detained under pretrial detention or on the basis of a criminal sentence, if their detention is related to consensual sexual activity between people over the age of consent, or to their gender identity;
  - f) Ensuring the right to decide, under ordinary conditions, the disclosing of information concerning sexual orientation or gender identity, and protect against arbitrary or unwanted disclosure or threatened disclosure of it.
108. Examples were provided of Court decisions in Colombia for example, where the Constitutional Court has played an important role in addressing the relationship between gender and privacy especially in cases of sexual and reproductive rights and of people with diverse sexual orientation and gender identity,<sup>174</sup> specifically:
- a. The right to an image constitutes an autonomous right protected by Article 14 of the Constitution. The dynamic aspects of the right to image, "constitute a form of self-determination of the subject and, therefore, are framed within the scope of protection provided by the fundamental right to the free development of the personality" (P.C. Article 16) (Sentence T-634/13).
  - b. Inability in judicial processes for sexual violence, to request certain evidence imposes re-victimization and the violation of their right to privacy. (Sentence T-453 of 2015)

<sup>166</sup> APC Submission 2018.

<sup>167</sup> De Justica Submission 2018.

<sup>168</sup> Op cit Loideain and Adams; <https://medium.com/pcmag-access/the-real-reason-voice-assistants-are-female-and-why-it-matters-e99c67b93bde>

<sup>169</sup> Op cit FRA, p53.

<sup>170</sup> UNESCO, Human rights and encryption, 2016; <https://www.enisa.europa.eu/about-enisa/structure-organization/national-liaison-office/news-from-the-member-states/nl-cabinet-position-on-encryption>

<sup>171</sup> Special Rapporteur on the on the promotion and protection of the right to freedom of opinion and expression, David Kaye, May 2015. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/095/85/PDF/G1509585.pdf?OpenElement>

<sup>172</sup> Dodge, A. R. Evolution of Technology Abuse. Presentation in Gender and Cyberspace Workshop at the Meridian 180 Global Summit, Chinese University Hong Kong, Hong Kong, June 2018.

<sup>173</sup> Joint CSO Submission 2018; AccessNow The gender of surveillance: how the world can work together for a safer internet, February, 2018 <https://www.accessnow.org/gender-surveillance-world-can-work-together-safer-internet/>

<sup>174</sup> Op cit De Justica.

- c. A woman's decision to voluntarily terminate her pregnancy under the conditions of sentence C-355 of 2006, belongs to the private or intimate sphere, and is not a matter of public or general interest. (Judgment T-841 of 2011, among others)
  - d. Guardianship judges must reserve the identity of women and girls who apply for amparo their right to the IVE, regardless of whether the amparo is granted or denied. (Sentence T-841 of 2011, among others)
  - e. Health professionals and personnel who receive requests for voluntary termination of pregnancy must offer full guarantees of confidentiality and to respect women's right to privacy and dignity. (Sentence T-388 of 2009).
  - f. Proving a person's gender identity requires voluntary communication. (Sentence T-099 of 2015)
  - g. Authorities must take appropriate and necessary measures to guarantee the confidentiality and security of the personal data of same-sex couples and define the conditions for processing the database in which they are included. (Judgment T-444 of 2014).
  - h. Adoption of privacy protocols to protect intersex children that omit identifying details.<sup>175</sup>
109. Examples provided of support programs, education and resources, included:
- a. training for front-line agencies on how abusive individuals misuse technology and how survivors can use technology safely and privately, and technical expertise provided to practitioners, policy makers, and technologists on technology-facilitated abuse issues impacting women, for example by Safety Net Australia.<sup>176</sup>
  - b. collaborative projects such as Recharge Women's Technology Safety and SmartSafe, the expanded Recharge project with legal guides and referral information<sup>177</sup> for all states and territories, and online training programs (Australia).<sup>178</sup>
  - c. preventative response model where healthy relationships have been mandated in health curriculum to teach respect, boundaries and appropriate expectations and behaviour (California, USA).
  - d. educational resources and training sessions for law enforcement and anti-violence workers, focusing on technology and the safety and privacy of women and children experiencing domestic violence and survivors of sexualized violence (*Safety Net Canada: Technology, Privacy, Safety and Violence Against Women, Youth and Children*).<sup>179</sup>
  - e. practical and appropriate ways for service providers to collect information about sexual orientation, sex and gender, without breaching privacy, and increasing knowledge of the LGBTIQI community (Australia).<sup>180</sup>
  - f. chatroom for lesbian, gay, bi, trans(gender), hetero, questioning, pan, non-binary, queer, intersex or asexual young people under 18 years, developed by and for young LGBTIQI people ('Jong & Out' project, COC Netherlands).<sup>181</sup>

<sup>175</sup> Constitutional Court of Colombia. Case [T-450A/13](#), [T-1025-02](#), [T-675-17](#).

<sup>176</sup> <https://wesnet.org.au/safetynet/>;

<sup>177</sup> <http://www.smartsafe.org.au/support-overview>

<sup>178</sup> <http://www.wlsnsw.org.au/recharge/>; <http://www.smartsafe.org.au/tech-safety-hub/resources/research>; <http://www.smartsafe.org.au/legal-guides>; <https://wesnet.org.au/safetynet/training/>

<sup>179</sup> "Safety Net Canada: Technology, Privacy, Safety and Violence Against Women, Youth and Children", Privacy Commissioner of Canada July, 2013 [https://www.priv.gc.ca/en/opc-actions-and-decisions/research/funding-for-privacy-research-and-knowledge-translation/completed-contributions-program-projects/2012-2013/p\\_201213\\_04/](https://www.priv.gc.ca/en/opc-actions-and-decisions/research/funding-for-privacy-research-and-knowledge-translation/completed-contributions-program-projects/2012-2013/p_201213_04/)

<sup>180</sup> A Guide to LGBTIQI-inclusive data collection, 2017 The Canberra LGBTIQI Community Consortium ACT, Australia.

<sup>181</sup> Op cit Kazakhstan Feminist Initiative, 96.8% of users found the website safe and reliable, 91.4% would recommend the website to other young people.

- g. ‘European AI Alliance’ to assist in compiling ethical guidelines on AI development which will draw from the rights and principles of the EU Charter, including data protection.
- h. personal data of trans and intersex persons in court documentation: in Russia, several courts removed decisions revealing personal data of trans persons upon request.<sup>182</sup>
- i. awareness raising among community members by providing practical booklets, seminars, trainings and media publications (Local defenders ‘Coming Out’ LGBT Group and ‘Stimul’ Initiative Group, Russia).<sup>183</sup>

## Conclusions

110. The Universal Declaration of Human Rights calls on “every individual and every organ of society” to promote and respect human rights.<sup>184</sup> States, companies, religious bodies, civil society, professional organisations all have important roles to play.
111. Protection for the privacy of individuals is a hallmark of States that value rights.<sup>185</sup> While privacy rights are not costless, or free of risks to governments, the challenges are outweighed by their contribution to democracy.<sup>186</sup>
112. Individuals’ experience of digital technologies and privacy is influenced by their gender and gender identity, in combination with factors such as ethnicity, beliefs, culture, race, age, economic self-sufficiency, legal and political frameworks.<sup>187</sup>
113. Privacy facilitates for all individuals, the full enjoyment of human rights, but is particularly important for women and children, individuals of diverse sexual orientations, gender identities, gender expressions and sex characteristics<sup>188</sup>, who face inequality, discrimination or marginalisation due to gender, sexual orientation, gender identity or expression.
114. Gender based breaches of privacy are a systemic form of denial of human rights; discriminatory in nature and frequently perpetuating unequal social, economic, cultural and political structures. Solutions focussing solely on individual victims are insufficient; inequalities in power, information, technology and economic standing need to be addressed at international, regional and domestic levels.
115. The virtual space is important for the construction of individual identity, but particularly so for members of the LGBTQI community. Identity is an integral part of personhood which is nurtured by the right to privacy. Formal recognition of identity is essential to effectively negotiating the modern world. As digital identity programs become mandatory in many parts of the world, the risks of discrimination on the grounds of sexual orientation, gender identity, gender expression and sex characteristics, are likely to increase.
116. While digital technologies enable users to participate in the public sphere, exercise human rights, find and create information, and engage with people and interests,<sup>189</sup> these benefits were

<sup>182</sup> Joint International LGBTI Submission, 2018.

<sup>183</sup> Gender Perspectives on Privacy in Eastern Partnership Countries and Russia *Prepared by the Eastern European Coalition for LGBT+ Equality* 2018 e.g. <http://comingoutspb.com/news/kak-ne-stat-zhertvov-vymogatelstva-na-podstavnom-svidanii/>; <https://meduza.io/feature/2016/04/25/obschestvo-dobrota-novyeh-ohotniki-na-geev>.

<sup>184</sup> Preamble, [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)

<sup>185</sup> Op cit Lever, A, referencing Westin, A.

<sup>186</sup> Op cit Lever, A.

<sup>187</sup> Privacy Commissioner of Canada, 2018, [https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/por\\_2016\\_12/](https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/por_2016_12/)

<sup>188</sup> <https://www.ohchr.org/en/issues/discrimination/pages/bornfreeequalbooklet.aspx>

<sup>189</sup> APC Submission 2018.

reported as differentially available due to structural inequity and discriminatory gender norms that fall heavily upon women, non-binary gender and cis-normativity individuals, the poor, and minority religious or cultural communities.

117. The use of the internet to target individuals according to gender generally involves infringing the right to privacy. Privacy harms extend beyond the individual to impact society as a whole. The loss of confidence of individuals to share ideas and to assemble undermines societies and democracy. Technological tools such as encryption, are critical to protect digital communications and thereby the enjoyment of human rights.
118. Protection of privacy can prevent discrimination. The role of States in preventing such discrimination includes actively protecting privacy in policy development, legislative reform, service provision, regulatory action, NGO and CSO support, and provision of education. These responses need to be based on the experiences of those affected and include females, males, transgender women and men, and people who are intersex, and others who identify as outside the gender binary and cis-normativity.
119. Protection of personal information online should be a priority with adoption of GDPR equivalent provisions (or better), in countries not party to the regulation.<sup>190</sup> Gender should be a key consideration for the development and enforcement of data protection frameworks.
120. Transparency and accountability is needed in how private companies are using personal data collected about users,<sup>191</sup> and how they respond to reports of online harassment. Promoting greater gender diversity among those shaping online experiences is important for proactive steps to make products and platforms safer, more socially-responsible and accountable.
121. Even in a public or semi-public setting, individuals should be able to expect that certain aspects of their privacy will not be violated<sup>192</sup> and to expect meaningful redress against, protection from, and consequences for, the perpetrator(s) of such privacy breaches.
122. **Further research is needed to understand better the interaction between privacy and gender** with specific research for example, on the experiences of all members of the LGBTQI community with regard to safety issues arising from app use.<sup>193</sup>
123. The recommendations on privacy and gender have been made by the Special Rapporteur on Violence Against Women and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, amongst others, are supported.

## Recommendations

### United Nations bodies:

- (a) All relevant special procedures and other mechanisms of the Human Rights Council and human rights treaty bodies should integrate gender and privacy into the implementation of their respective mandates.

### Member States to:

- (b) Adopt an intersectional approach which recognises the specific benefits, experiences and threats to privacy according to gender, and overarching privacy and human rights principles.

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<sup>190</sup> C, submission 2018

<sup>191</sup> Op cit Australian Competition and Consumer Commission.

<sup>192</sup> Irish Civil Liberties Council Submission 2018, Office of the Privacy Commissioner of Canada Factum in the Jarvis SCC hearing, [https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37833/FM060\\_Intervener\\_Privacy-Commissioner-of-Canada.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37833/FM060_Intervener_Privacy-Commissioner-of-Canada.pdf).

<sup>193</sup> Clarke, R. Safeguards against Unpleasant Cyberspace Behaviour: Targets not Victims, and Self-Help before Criminalisation, Preliminary Draft 2 February 2016

- (c) Undertake an assessment of their legal frameworks for prevention and punishment of privacy breaches based on gender, against relevant laws and treaties at global, regional and national levels to ensure these do not discriminate on the basis of gender and adequately protect all, regardless of gender, gender identity and sex characteristics.
- (d) Adopt policies, legal and regulatory frameworks providing comprehensive protection for the use and development of secure digital communications, including by promoting strong encryption and anonymity-enhancing tools, products and services.
- (e) Promote meaningful internet access and bridge any digital gender divides through relevant mechanisms including building digital skills and appropriate online behaviour.
- (f) Take all necessary legislative, administrative and other measures to prevent, investigate and punish breaches of privacy perpetrated on the basis of the gender, sexual orientation or gender identity of the victim.

**In countering violence, States to:**

- (g) Review and strengthen policies, legal and regulatory frameworks to address privacy violations leading to gender-based violence in digital contexts.
- (h) Increase primary prevention programs including education about gender; promoting and mainstreaming gender equality with guidelines for key aspects such as consent and inappropriate data practices; promote community awareness and support for victims, and challenge cultures of victim-blaming.
- (i) Reform criminal and civil laws to achieve consistent and uniform legislation to address cyberspace violence based on gender and gender identity, and provide civil regimes for redress that provide greater control to those concerned, and which adequately respond to technology-facilitated abuse, including use of online content to cause harm.
- (j) Explore third party liability options for platforms including social media networks, that permit the redistribution of private images and the continuation of harassment.
- (k) Ensure adequate consultation regarding legislation changes with victims and activists to ensure legislative changes meet the needs for justice.
- (l) Promote training for magistrates, lawyers, police, frontline workers and service providers on technology facilitated gender violence; review and improve existing investigation techniques and models with, for example, liaison-officers trained to investigate and respond to instances of assault using leading international practices, and provide technical support, counselling and advice services for victims.
- (m) Sustainably fund service providers for continuing service provision, training and resource development.
- (n) Privacy and data protection regulators, governments and other stakeholders to systematically consider the gender experience of privacy and how this defines necessary privacy protections, and to work with other authorities addressing human rights issues.

**In responding to the identity issues raised, States to:**

- (o) Implement Principle 6 of the Yogyakarta Principles+10 to protect the privacy of persons regardless of sexual orientation and gender identity.
- (p) Uphold the obligations to ensure that requirements for individuals to provide information on their sex or gender are relevant, reasonable and necessary as required by the law for a legitimate purpose in the circumstances where it is sought, and that such requirements respect all persons' right to self-determination of gender, and ensure that changes of the name or gender marker, as long as the latter exists, is not disclosed without the prior, free, and informed consent of the person concerned, unless ordered by a court.
- (q) Take all necessary legislative, administrative and other measures to fully respect and legally recognize each person's self-defined gender identity.
- (r) Develop, enact and implement a comprehensive legislative system for recognizing gender identity allowing transgender people to obtain legal recognition of their gender and to change their legal name and gender, including on official documents, through a quick, accessible and transparent procedure.

- (s) Provide guidance and training, particularly for front line service providers, on gender identity, on ending gender based discrimination and any other new measures taken allowing transgender people to obtain legal recognition of their gender.
- (t) design and implement a protocol for the definition of the military situation of trans people, in order for their gender identities to be recognised and for those who want to provide military service to be protected.

**In relation to surveillance and gender, States to:**

- (u) Enshrine the principles of gender-equality and non-discrimination in the design and implementation of all surveillance measures.
- (v) Undertake all appropriate measures to investigate, document and monitor the gendered impacts of surveillance infringements of privacy for women and lesbian, gay, bisexual, transgender and intersex individuals, including reporting to inter-governmental organisations.
- (w) Renounce the use of gender stereotypes for profiling, and promote human rights training to reduce the stigma, harassment and discrimination arising from profiling practices.
- (x) Implement policies and procedures that, amongst other human rights concerns, specifically address gendered and privacy implications of potentially sensitive CCTV footage, including relevant training of data controllers and those who can access the footage.
- (y) Implement data protection and security protocols to prevent the abuse, redistribution, or degrading treatment of captured images, including Privacy Impact and Risk Assessments and governance protocols with embargoes on face surveillance or other algorithmic analysis of captured surveillance without judicial permission and independent oversight.
- (z) Sanction egregious image-based sexual assault by law enforcement officials by both internal disciplinary and external disciplinary means. Create protocols for victim redress, and ongoing communication with victims' families.

**In addressing gender privacy issues, Corporations to:**

- (aa) Meet the 'UN Guiding Principles on Business and Human Rights' to respect the human rights of all persons effected by their practices by conducting due diligence including gender assessments, to prevent and human rights violations, mitigating adverse effects, and providing access to remedy for all who experience privacy violations.
- (bb) Enshrine the principles of gender-equality and non-discrimination in the design and implementation of all services including by renouncing the use of gender stereotypes for profiling, and promoting human rights training to reduce any stigma, harassment and discrimination arising from profiling practices.
- (cc) Take all necessary legal, administrative and other measures to fully respect and legally recognize each person's self-defined gender identity.
- (dd) Provide guidance and training, particularly for front line staff, on gender identity, and any other new measures taken allowing transgender people to obtain legal recognition of their gender, and end gender based discrimination within business operations.
- (ee) Engage more women and LGBTQI persons in the design, development and regulation of digital technologies to enable technical solutions to mitigate risks of mis-use of their technologies and to secure privacy and gender identities in digital contexts.
- (ff) Provide greater transparency of and access to data profiles, and monitor these for gender bias by, for example, algorithmic auditing.
- (gg) Implement a privacy by design/default approach using a gendered analysis, and embed users' meaningful consent into all aspects of the data life cycle use.
- (hh) Make it easier to report abuse (in local languages) and to respond to such reports in a timely manner.

- (ii) Limit data collection to restrict further data processing, prevent unnecessary access to and exploitation of data by utilising technological means and considering privacy in the design of systems.
- (jj) Resist requests for user data that do not comply with international human rights standards such as lawfulness, proportionality and necessity.

**For the UNSRP to:**

- (kk) Examine further the interactive dynamics between the right to privacy and gender experiences by engaging with the research, CSO/NGO and regulatory communities to explore the role infringements of the right to privacy play in gender based violence and discrimination, and how such infringements affect the enjoyment of other human rights.

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For Consultation