Brief to the Standing Committee on Justice and Human Rights regarding *Bill C-13, An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act (Protecting Canadians from Online Crime Act)*

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A) Canadian Civil Liberties Association (CCLA)

The Canadian Civil Liberties Association (CCLA) is a national, non-profit, non-partisan and non-governmental organization supported by thousands of individuals and organizations from all walks of life. CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. CCLA’s major objectives include the promotion and legal protection of individual freedom and dignity. For the past 50 years, CCLA has worked to advance these goals, regularly appearing before legislative bodies and all levels of court. As a defender of fundamental rights, including freedom of expression, the right to privacy and the right to be free from unreasonable state intrusion, we make submissions to this Committee to express our concerns about certain aspects of Bill C-13.

B) Bill C-13: Protecting Canadians from Online Crime Act

The Bill before the Committee makes a number of changes to the Criminal Code and other statutes, purporting to be “protecting Canadians from online crime”. Although the Bill has been touted as the government’s response to the very real problem of cyberbullying, there is little in the legislation itself that in fact addresses this problem.

Cyberbullying is a concern to many Canadians and, indeed, CCLA shares the view that local, provincial and federal governments have a role to play in addressing this ongoing challenge. The use of the criminal law to deal with this problem is a blunt instrument and one that, we predict, will not be particularly effective in addressing the root causes of the problem. It may also lead to criminalizing the victims just as much as the perpetrators. We share the views of the CCSO Cybercrime Working Group Report that the Criminal Code already contains a number of provisions that can address the most serious cases of cyberbullying, with the exception of a general prohibition on the non-consensual distribution of intimate images. As set out further below, we believe the new offence that has been introduced in Bill C-13 is overly broad opening the door to capture lawful activity and as such, violates freedom of expression in a manner that is not reasonably justified. We recommend, at a minimum, that a malicious intent requirement be added to this new offence.

Most of Bill C-13 is dedicated to increasing police investigative powers. To the extent that some gaps have been identified in the ability of investigators to deal with online crime, such measures may be appropriate. In our view, however, the provisions of C-13 do not strike an appropriate balance between investigative necessity and personal privacy rights. One provision in particular – granting civil and criminal immunity for those preserving data and producing documents - threatens to undermine rights to privacy that are already in a fragile state. CCLA cannot support the Bill without substantial amendments to the investigative powers provisions.
C) The Non-Consensual Distribution of Intimate Images

The Bill proposes to add a new offence regarding distribution of intimate images without the consent of the individual depicted. While there are certainly real harms and a great deal of embarrassment that may flow from the distribution of these images, the creation of a new criminal offence is an extreme response that should be carefully considered. CCLA wishes to flag a number of its concerns about the creation of this new offence.

The new offence criminalizes expression. Even expression that is hurtful, embarrassing or deeply offensive is protected by the Canadian Charter of Rights and Freedoms and may only be limited in a manner that is both reasonable and demonstrably justified in a free and democratic society. In our view, the proposed offence as broadly written, limits freedom of expression in a manner that is unreasonable on a number of counts, as we explain below:

First, the offence does not require malicious intent. In light of the ubiquity of intimate images that are floating around in cyberspace, the absence of a malicious intent requirement means that individuals could be held criminally responsible simply for posting, sharing or sending an intimate image that is already “out there” online (perhaps first posted by the individual depicted) and that depicts someone they don’t even know.

Second, the definition of what constitutes an “intimate image” is also problematic. As currently written, this provision criminalizes the distribution of photos of an infant’s bath time play to family members and friends. The fact that cases of this kind are unlikely to be prosecuted does not render the breadth of the provision less troubling.

Third, the use of the “reasonable expectation of privacy” standard in defining what constitutes an intimate image may pose difficult challenges to the courts charged with interpreting and applying the law. The concept of a reasonable expectation of privacy, used to give meaning to the right to be free from unreasonable search and seizure pursuant to s. 8 of the Charter, is a complex one that has been the subject of much judicial discussion and consideration. The section 8 Charter jurisprudence addresses the privacy interests that individuals have as against the state. In the context of the proposed offence, the privacy interests at issue relate to the expectations of privacy that people have vis-à-vis other individuals and society at large. While this concept has been used and applied in interpreting the relatively new offence of “voyeurism” under the Criminal Code, it will be much more difficult to interpret and apply when the images at issue were not created by the accused and could have emanated from any number of sources.

Fourth, CCLA is concerned about the orders that may be imposed on individuals convicted of the new offence, particularly orders that prohibit the offender from using the Internet or other digital

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network. Such a condition, which may be imposed without terms that the its scope or duration, is draconian. Prohibiting individuals from accessing the Internet may effectively isolate them from friends and family, significantly hamper their ability to access information and communicate with the world around them, and negatively impact the employment prospects and educational opportunities for an offender. CCLA believes that this section must be significantly narrowed and include a maximum prohibition period of one year.

As currently drafted, the new offence created by Bill C-13 casts too wide a net and the recklessness standard that it employs is much too low for an offence that criminalizes such a broad range of expression.

D) Investigative Powers

The investigative powers included in Bill C-13 give rise to a number of very serious concerns, particularly in light of information that has recently emerged about the extent to which government institutions are already requesting and receiving personal information from telecommunications service providers and internet service providers, without prior judicial authorization.

i) Immunity Provision – s. 487.0195

CCLA is pleased that many of the more intrusive provisions from prior incarnations of the legislation have been dropped, but we remain concerned about several aspects in the Bill and, in particular, s. 487.0195(1) and (2). This section purports to grant immunity from any criminal or civil liability to any person who preserves data or provides a document to law enforcement where there is no legal prohibition on doing so. On its face, this provision appears to be redundant – it simply states that an individual will not incur liability for doing something that is not prohibited by law. The Minister has made statements indicating that this section doesn’t do anything new, and is simply there for greater clarity. CCLA takes issue with this characterization and wishes to caution the Committee against allowing this provision to go forward.

Contrary to the Minister’s statements, the immunity provision could have far-reaching implications and is deeply problematic. In particular, this provision seeks to exploit some of the confusion and ambiguity around the legality of disclosing personal information to law enforcement without a warrant. It also seeks to take advantage of the ambiguity in existing privacy legislation and the evolving nature of what constitutes a reasonable expectation of privacy in light of increasingly advanced and privacy-invasive technologies. Currently the federal private sector privacy legislation, the Personal Information Protection and Electronic Documents Act (PIPEDA), requires that corporations that collect personal information in the course of their commercial activities not disclose that information without the knowledge and consent of the individual. There are a number of significant exceptions to this rule, many of which are drafted in extremely broad terms and include providing information to government
agencies including law enforcement officials in a wide variety of circumstances. There remains differing interpretations on the permissible scope of these exceptions, and, in light of this ambiguity, corporations may take a more cautious and privacy-protective approach to customer data out of fear of liability. A cautious approach is certainly warranted given that law enforcement has the expertise and ability necessary to seek out a search warrant. The immunity provision is a blatant attempt to incentivize private corporations to cooperate with law enforcement even when doing so poses a genuine risk to customer privacy and may not serve any compelling state objective. This provision should be moved from the Bill.

ii) *Reasonable suspicion*

A number of the new investigative powers included in Bill C-13 allow for the preservation of data and the production of documents based on the low standard of “reasonable grounds to suspect”. This standard has been found to be appropriate in certain contexts where the reasonable expectation of privacy is relatively low. Bill C-13, however, uses this standard to authorize warrants for transmission and tracking data.² This kind of data can be highly invasive and provide a detailed and intimate profile of an individual. Indeed, many studies have suggested that, in some cases, the information that can be gleaned from this kind of data is greater than actually monitoring the content of communications.³ CCLA believes that warrants for this kind of information should only be granted on the stricter standard of reasonable grounds to believe. In addition, the provisions establishing the rules around production orders for both tracking and transmission data appear to require only that the data will assist in an investigation. Given the invasive nature of these kinds of orders, a higher standard, such as a standard of investigative necessity, would be more appropriate.

iii) *Public officer*

The Bill includes a change to the definition of a “public officer” who, along with a peace officer, may take steps to obtain all kinds of orders, including production orders related to tracking and transmission data. The *Criminal Code* currently defines “public officer” by way of a closed list of individuals, while Bill C-13 would amend the definition to include “a public officer who is appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament”. This is a substantial broadening of the existing list. There has been no compelling evidence provided to demonstrate why the current scheme doesn’t work and why a larger number of individuals should be able to seek these invasive orders from a judge or justice of the peace. CCLA believes this proposed change should be abandoned.

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² In particular, see proposed ss. 487.015, 487.016, 487.017 of the *Criminal Code*, s. 20 of Bill C-13.
iv) **Prohibitions on disclosure**

The new order powers created by Bill C-13 may result in the disclosure of significant amounts of personal information. The Bill includes a provision for keeping confidential the very existence of these orders throughout their duration, subject to judicial authorization. CCLA appreciates that investigative integrity may require that these orders remain confidential for some time, but believes that proactive disclosure of their existence should be required once confidentiality is no longer required.

E) **Conclusion**

As set out above, CCLA has serious concerns about Bill C-13. In particular, the new offence related to the non-consensual distribution of intimate images places unreasonable restrictions on freedom of expression, as currently drafted. Further, a number of the investigative powers included in C-13 intrude into core areas of personal privacy without a compelling purpose. CCLA recommends that the Committee consider substantial amendments to the Bill in line with the specific suggestions we have outlined above.