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LEAF is a national, charitable, non-profit organization, founded in 1985. LEAF works to advance the substantive equality rights of women and girls in Canada through litigation, law reform and public education using the *Canadian Charter of Rights and Freedoms*.

This publication was created as part of LEAF’s Technology-Facilitated Violence (TFV) Project. The TFV Project brings together feminist lawyers and academics to conduct research and produce publications imagining legal responses to TFV against women and gender-diverse people that are informed by equality principles. The project also supports and informs LEAF’s law reform efforts and potential upcoming interventions concerning TFV.

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This report was researched and written by **Cynthia Khoo**, a technology and human rights lawyer and researcher. Cynthia holds an LL.M. (Concentration in Law and Technology) from the University of Ottawa, where she worked on cases as junior counsel at the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC). Her paper on platform liability for emergent systemic harm to historically marginalized groups received the inaugural Ian R. Kerr Robotnik Memorial Award for the Best Paper by an Emerging Scholar at We Robot 2020. She has managed a sole practice law firm, Tekhnos Law, and obtained her J.D. from the University of Victoria. Her work and expertise span across key areas of technology and human rights law and policy, including privacy and surveillance, equality and freedom from discrimination, online censorship and freedom of expression, intermediary liability, algorithmic decision-making, and technology-facilitated violence.

The report was overseen and coordinated by **Rosel Kim**, Staff Lawyer at LEAF; **Pam Hrick**, Executive Director and General Counsel at LEAF; and **Megan Stephens**, former Executive Director and General Counsel at LEAF.

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# Recommendations

This report has developed six overarching priorities to guide law reform, which were synthesized from the law and literature reviewed throughout this report. The recommendations set out in this Part are animated by those priorities to address platform liability for technology-facilitated gender-based violence, abuse, and harassment (TFGBV).

While there is a role for all levels of government, other decision-makers, and platform companies themselves to play in addressing TFGBV, these priorities and recommendations are aimed primarily at the Canadian federal government. This reflects the report's focus on legislative reform at the federal level.

Before presenting the priorities and recommendations, it bears repeating that TFGBV is not wholly a new phenomenon. It is a technological evolution of traditional intersecting systems of oppression, including sexism, racism, colonialism, ableism, transphobia, and homophobia. All of these pre-date digital platforms and the Internet itself. Systemic oppressions and violence against women, girls, and gender-diverse people would not disappear even if all digital platforms were shut down tomorrow. This injustice will continue unabated so long as these root causes are not substantively addressed at systemic and institutional levels.

Addressing the root causes of systemic oppression requires social, cultural, and political change. The core harms of TFGBV will not be eradicated unless all levels of government and civil society also act decisively to end *other forms of* gender-based violence, abuse, and harassment. As with TFGBV, the law plays an important but ultimately limited role in the broader matrix of meaningful solutions, and must be contextualized as such to avoid complacency when it comes to pursuing non-legal solutions to TFGBV and gender-based violence, abuse, and harassment.

The recommendations set out here concern platform liability for TFGBV *alone*. They are proposed with the specific context and concerns of TFGBV in mind, including the fundamental right to equality and other human rights of, in addition to the overall wellbeing of, those impacted by TFGBV. The recommendations should thus not be seen as arguments for platform liability in other, unrelated areas in which the federal government has also expressed an interest in platform regulation, such as media industry funding, copyright, or Canadian cultural policy.

Finally, the recommendations also only apply to digital platforms as defined in Section 3.1.1 ("What Are Digital Platforms?") of this report, i.e., application-layer and content-layer intermediaries such as social media platforms and video-sharing websites. They are not necessarily intended to apply to Internet intermediaries that operate at a more infrastructural level, such as Internet service providers, which have been excluded from the scope of this report.

## Priorities for Law Reform in Platform Liability for TFGBV

The **first priority** is to recognize that there is indeed a need for law reform to address platformed TFGBV. Regulating or placing certain kinds of liability on digital platforms is appropriate and necessary, given their role in facilitating TFGBV. However, creating a platform liability framework must be done thoughtfully and with a clear focus on TFGBV specifically, while building in substantive equality and intersectionality principles. Any platform liability framework enacted must be human rights-centred, principled, and proportionate to the specific objectives at the heart of the regime. Where TFGBV is concerned, a more robust legal response would be justified given its devastating and systemic harms to historically marginalized groups.

The **second priority** is to recognize that proportionate limitations on freedom of expression are constitutionally justified, both to uphold the right to equality and freedom from discrimination, as well as to give full effect to core values underlying the right to free expression. This approach is consistent with Supreme Court of Canada jurisprudence. For women, girls, and individuals from intersecting historically marginalized and systemically oppressed communities, TFGBV is a pervasive and devastating component of sustained inequality. This priority also requires recognizing, as Canadian courts have, that such groups are as vulnerable to private abuses of power as they are to state abuses of power. For that reason, there is room for the state to legislate limitations on certain freedoms to address systemic discrimination, violence, and abuse by private, non-state actors.

The **third priority** is to guarantee that legal reforms that address TFGBV build in victim/survivor-centered, trauma-informed, and intersectional feminist perspectives. This must include substantive consultation with those impacted by TFGBV—notably, members of historically marginalized and vulnerable groups. This will be essential to guarding against the adoption of legal approaches that are inconsistent with the goals, aspirations, and lived experiences of members of these communities.

The **fourth priority** is to ensure expedient, practical, and accessible remedies for those targeted by TFGBV, particularly where it causes clear and immediate harm, as with the non-consensual distribution of intimate images (NCDII). For some instances of TFGBV, requiring a court order to support a platform takedown request is unrealistic and unworkable; the damage would already be done by the time the individual targeted was able to obtain such an order. The focus should be on providing effective remedial relief and support to those subjected to TFGBV. Moreover, to be accessible and effective, remedies must provide options for individuals who do not wish to engage, come into contact with, or have their information passed on to law enforcement or the criminal justice system.

The **fifth priority** is to provide due process mechanisms to users who wish to contest platforms' content moderation decisions (whether a decision to leave up or take down content). These must be made available by platform companies themselves, with an appeal process before an independent TFGBV-specialized regulator. Such processes acknowledge the complexity of platform regulation and content moderation, as well as the beneficial impacts of the Internet, including for historically marginalized and systemically oppressed groups, while safeguarding users' freedom of expression where it may be inadvertently unduly infringed.

The **sixth priority** is to require transparency from platform companies regarding their content moderation policies and decisions, as well as the outcomes of such policies and decisions concerning TFGBV. Without more and better data providing insights into how such policies and decisions are made and implemented, governments, regulators, and the public will be stymied in influencing how the general public is governed and affected by digital platforms.

## Recommendations

This report proposes 14 recommendations for the Canadian federal government to implement. They are organized into the following categories:

- recommendations emphasizing the importance of centering human rights, substantive equality, and intersectionality in legal reforms, particularly as it impacts victims/survivors of TFGBV;
- specific legislative reforms that the federal government should enact, establishing new legal regimes and a new TFGBV-specialized agency;
- certain legal obligations that the government should place on digital platform companies to enhance regulators' and the public's ability to hold them accountable for TFGBV; and
- specific areas of TFGBV-related research, education, and training that the government should support through funding.

### A. Centering Human Rights, Substantive Equality, and Intersectionality

1. **Apply a principled human rights-based approach to platform regulation and platform liability, including giving full effect to the right to equality and freedom from discrimination.** Such an approach would be rooted in Canadian human rights and constitutional law, in addition to Canada's obligations under international human rights instruments. This involves understanding that the *Charter of Rights and Freedoms* creates a non-hierarchical matrix of rights, where giving full effect to the right to equality and freedom from discrimination constitutionally justifies proportionate limitations on other rights, such as freedom of expression.
2. **Ensure that legislation addressing TFGBV integrates substantive equality considerations and guards against exploitation by members of dominant social groups to silence expression by members of historically marginalized groups.** Groups and individuals in power have often used seemingly salutary law to silence members of historically marginalized communities from speaking out, such as in the case of defamation law and victims/survivors of sexual assault. Similarly, abusive users have often gamed and manipulated platforms' content moderation features to silence or shut down the accounts of users from historically marginalized groups. Platform companies themselves have regularly implemented content moderation policies and decisions that failed to take historical context and substantive equality into account, which resulted in under-removal of abusive content and over-removal of content that spoke out against such abuse. Any proposed legislation must avoid a harmful formal-equality approach (treating all users and circumstances the same, regardless of context or social location), and additionally, must account for and build in safeguards against the high likelihood of abuse of process by those with power and privilege, so that the new system cannot be used as another tool to perpetuate further acts of TFGBV.
3. **When pursuing legislative or other means of addressing TFGBV, consult substantively with and take into account the perspectives and lived experience of victims, survivors, and those broadly impacted by TFGBV.** This must include intersectional considerations such as the intersecting impacts of racial discrimination or transphobia. For example, mechanisms such

as ‘real name’ policies and identity verification have been shown to operate against historically marginalized and vulnerable individuals. This includes those who have escaped or are hiding from situations of intimate partner violence, sex workers who rely on pseudonymity for safety, or activists and human rights defenders living under authoritarian regimes. Those who have been targeted or otherwise impacted by TFGBV have valuable and hard won insights to share about potential consequences of regulation that may be overlooked by government actors and other potential stakeholders who have not been negatively impacted by TFGBV.

## B. Legislative Reforms

4. **Establish a centralized expert regulator for TFGBV specifically, with a dual mandate: a) to provide legal remedy and support to individuals impacted by TFGBV on digital platforms, including regulatory and enforcement powers; and b) to develop research and provide training and education on TFGBV to the public, relevant stakeholders, and professionals.** Recommendations about specific features of the TFGBV-specialized agency include the following:
  - a. **Mandate:** Expressly define the regulator’s mandate to be focused on TFGBV. This must clearly articulate that TFGBV is rooted in, and includes, all forms of intersecting systemic oppressions, such as misogyny, racism, colonialism, homophobia, transphobia, and ableism. Women, girls, and gender-diverse individuals may be simultaneously targeted based on other characteristics protected under equality and non-discrimination law—for example, ethnicity, disability, and/or socioeconomic status. The mandate may go beyond strictly gender-based harms, to include technology-facilitated violence, abuse, and harassment that is not based on gender but based on being Black, Indigenous, or otherwise racialized, for instance. The regulator and associated legal framework must at all times recognize that individuals who belong to two or more historically marginalized communities are targeted in ways particular to the *intersection* and distinct from the experiences of individuals who belong solely to any one historically marginalized group. The unifying principle that should apply to constrain the boundaries of the mandate is that the sole focus is on addressing technology-facilitated violence, abuse, and harassment which targets members of historically marginalized groups, with the core objective of advancing substantive equality and upholding these groups’ human rights. The legislation must prohibit any ‘mission creep’ that would expand the regulator’s mandate or functions to other issue areas that the government may be interested in addressing through platform regulation.
  - b. **Definition of TFGBV:** Clearly and specifically define the types of behaviours that constitute TFGBV, based on the intersectional understanding of the term described in (a), and which are therefore within the purview of the regulator to address. Ensure that the behaviours included provide an ‘intelligible standard’ by which to identify content that is and is not captured by the law.
  - c. **Remedial, Adjudicative, and Enforcement Function:** Set up the regulator as a remedial and adjudicative complaints body and create a resolution process available to individuals being subjected to TFGBV (as defined in the statute). The resolution process must prioritize speed, practicality, and accessibility for those individuals. The

regulator should provide both legal remedies and solutions outside the legal system where appropriate. Under no circumstances should police or law enforcement be informed or involved without the express and informed consent of the victim/survivor. The regulator should be granted powers to provide declaratory relief and issue orders to platform companies that fall under the legislation, enforced through administrative penalties. Individuals being victimized by TFGBV must have access to the agency's resolution process and support systems even if they have not yet used the platforms' internal processes to address abuse. Individuals who have already undergone a platform's internal process and wish to contest the platform's decision may appeal the decision to the regulator, which will then begin an adjudicative process that results in a binding decision on the platform. Both the individual who submitted a complaint *and* the person whose content is the subject of the complaint must be able to appeal the platform's decision—whether the decision was to take down *or* leave up the content.

- d. **Training, Education, and Research Function:** Establish the regulator with a robust training, education, and research wing, parallel to and with as much if not more funding and resources than the remedial, adjudicative, and enforcement wing. This function of the regulator would involve providing a range of training and education resources to members of the public; to community-based organizations and frontline support workers addressing TFGBV, gender-based violence, and intimate partner and dating violence; and to law enforcement, legal professionals, schools, and other relevant institutions. The agency would also be responsible for consulting historically marginalized groups impacted by TFGBV and frontline organizations serving them, as well as liaising with platform companies, to develop best practices for industry, support regulatory compliance, and ensure that the regulator and its processes are meeting the needs of victims/survivors of TFGBV. In addition, part of the agency's mandate would be to conduct or commission and publish further research regarding TFGBV, of the kind described in Recommendation 14 below.
- e. **Expertise and Capacity:** Staff the agency with personnel who are well-versed in TFGBV or related issues. Individuals in an executive, management, or frontline support role must have prior expertise and/or experience in addressing TFGBV, intimate partner violence, racial injustice, and/or other forms of systemic oppression and how they can be furthered through technology, and appropriately supporting those impacted by TFGBV. The regulator must be sufficiently resourced to build further internal expertise and capacity regarding all aspects of TFGBV, including the technosociological aspects of digital platforms, the way platform features are exploited and gamed by users to perpetrate TFGBV, and the lived experiences of those subjected to and impacted by TFGBV—both online and offline (including understanding the increasing meaninglessness of such a dichotomy).
- f. **Consultation:** Consult extensively—in setting up this agency, its mandates, and its processes—with historically marginalized groups, those who have been or are impacted by TFGBV, technology and human rights experts, gender equality advocates, community-based groups, and lawyers and researchers who specialize in TFGBV.
- g. **Oversight and Statutory Review:** Put in place oversight and accountability mechanisms for the regulatory body itself, and include statutorily mandated periodic

reviews of the governing legislation, to ensure that it is meeting its victim/survivor-centered mandate.

- h. **Sequestered from Law Enforcement:** Prohibit the regulatory body from being used as a conduit for automatically transmitting information to law enforcement agencies. Any transmission of information must be done with the express informed consent of the victim/survivor, and only under certain circumstances clearly delineated in the legislation—for example, where the regulator has reasonable grounds to believe that the conduct at issue may constitute a criminal offence. The regulator must also have a legal duty to evaluate the situation based on principles of substantive equality and intersectionality. Any automatic ‘off-ramp’ to law enforcement or data sharing will guarantee that the body becomes inaccessible and unavailable to many who may need it the most, due to heightened risks of discrimination and state abuse related to engagement with the criminal justice system, for members of historically marginalized groups.
5. **Enact one or more versions of the current ‘enabler’ provision in subsections 27(2.3) and 27(2.4) of the *Copyright Act*, adapted to specifically address different forms of TFGBV, including ‘purpose-built’ platforms.** Recommendations for specific aspects of the provision(s) include the following:
  - a. Draft the provisions to capture ‘purpose-built’ platforms that exist predominantly to host, solicit, generate, and/or facilitate TFGBV by users.
  - b. Clearly and specifically define what constitutes TFGBV for the purposes of being captured by the legislation, taking into account intersectional considerations.
  - c. Consider beginning with enabler provisions that capture only the most clearly defined and easily identifiable forms of TFGBV with pressing substantive harms, such as NCDII and expression that constitutes hate speech under current civil and criminal laws.
  - d. The provisions might attribute liability in one of two ways, where a platform is found to have met the test for being an ‘enabler’ of TFGBV as defined in the legislation:
    - i. Direct liability for the underlying offence (e.g., applying existing criminal liability for NCDII, or applying criminal or statutory human rights liability for hate speech, as if the platform were the speaker); or
    - ii. A new ‘enabler liability’ specific to the provision. This may be preferred only in situations where the underlying user activity does not already constitute a civil action or criminal offence, but collectively amounts to systemic harm requiring a legal response. This would justify targeting the platform for institutional liability even if the individual users would not be liable individually.
6. **Enact a law that allows for victims/survivors of TFGBV to obtain immediate removal of certain clearly defined kinds of content from a platform *without* a court order, such as NCDII.** Not requiring victims/survivors to obtain a court order would take into account the practical reality of TFGBV, as well as its devastating and human rights-violating impacts. Requiring a court order would be completely unworkable in providing timely and meaningful

remedies to victims/survivors in practice (especially when combined with ongoing access-to-justice concerns).

7. **Ensure that legislation to address TFGBV focuses solely on TFGBV (including intersectional considerations)—do not dilute, compromise, or jeopardize the constitutionality of such legislation by ‘bundling’ TFGBV with other issues that the government may wish to also address through platform regulation.** Such other issues may require alternative approaches and attract different analyses of constitutionality under the *Charter of Rights and Freedoms*. Examples might include disinformation, terrorism outside of white supremacist extremism, or non-TFGBV-related defamation. Most of these issues, at best, do not primarily engage the right to equality, and at worst, introduce a high risk of state action that threatens equality. Their respective contexts involve legally significant departures from the context of TFGBV, impacting the constitutional analysis of a given limitation on platform-facilitated user expression. This includes differences in the equities and the nature of the relationship between the state and individuals impacted by the law.

### C. Legal Obligations for Platform Companies

8. **Require platform companies to provide to users *and non-users* clearly visible, easily accessible, plain-language complaint and abuse reporting mechanisms to expediently address and remedy instances of TFGBV.** These complaint procedures and content moderation processes should also include due process mechanisms, such as appealing a decision to remove or leave up content, subject to victim- and survivor-centred considerations. Making platform resolution processes available to *non*-users is critical because individuals targeted by TFGBV may not themselves be users of platforms where the abuse is occurring. Moreover, such individuals should not be deemed subject to a platform’s terms of use if they access a platform’s resolution services to respond to TFGBV. Platforms’ data deletion and retention policies must centre the needs of victims/survivors of TFGBV, including, for example, offering the option of total deletion of NCDII across the platform *and* any parent, sibling, or subsidiary platform companies where the NCDII is also found (to reduce the ‘whack-a-mole’ burden on victims/survivors), or disabling public access to content but retaining it on the back end for evidentiary purposes where the impacted individual wishes, in contemplation of potential legal action. Where an individual has opted for total deletion, the platform should provide them with a formal incident report that documents details of the complaint for evidentiary purposes for the person’s records and in case they decide to proceed with legal action.
9. **For ‘purpose-built’, ‘enabling’, or otherwise TFGBV-dedicated platforms, and where a clearly delineated threshold of harm is met, provide that an order to remove specific content on one platform will automatically apply to any of that platform’s parent, subsidiary, or sibling platform companies where the same content also appears.** The purpose of this power is to reduce the burden on victims/survivors of having to undergo multiple resolution processes to obtain a remedy on a case-by-case basis, where the same substantively harmful content is involved and where time may be of the essence, such as in the case of NCDII. It also aligns accountability with those who commercially benefit from such content regardless of which of their platforms is involved. That this remedy is only available by way of an order through the regulator, requires meeting a threshold of harm, and is limited to a



set of platforms that by definition excludes ‘platforms of general application’, is to safeguard against the possibility that the remedy is misused to efficiently shut down and silence expression by members of historically marginalized groups.

10. **Require platform companies to undergo independent audits (which could be conducted by the new TFGBV agency) and publish comprehensive annual transparency reports.** These reports should provide qualitative information and granular data in both human- and machine-readable formats. The data should be broken down by demographics (particularly gender and race) to the extent possible, regarding the platform’s internal content moderation policies and practices, and regarding the prevalence of and efforts to address TFGBV, as well as the results of those efforts. In drafting this requirement, the government should consult current literature and experts regarding transparency reports in the fields of platform regulation, content moderation, and algorithmic accountability.
11. **When determining legal obligations for digital platforms, account for the fact that platforms vary dramatically in size, nature, purpose, business model (including non-profit), extent of intermediary role, and user base.** This does not mean that different platforms should be held to different standards of liability—marginalized users of smaller or less influential platforms are as deserving of equality and freedom of expression as are marginalized users of larger or more dominant platforms. Rather, it means that it may be appropriate to adopt an element of flexibility and context-sensitivity in establishing *what* platforms are required to do to fulfill any established regulatory obligations. Consider as well regulating by *function* as opposed to *entity category*, as some digital platforms may otherwise fall into multiple categories if they offer a variety of intermediary services to users.

## D. Research, Education, and Training

12. **Fund, make widely available, and mandate (where appropriate) education resources and training programs in TFGBV, which include information on how to support those who are subjected to TFGBV.** These resources must be developed in collaboration with those who have subject matter expertise and/or lived experience with TFGBV. These resources should be provided to members of the public; to community-based organizations and frontline support workers addressing TFGBV, gender-based violence, and intimate partner and dating violence; and to law enforcement, legal professionals, schools, and other relevant institutions. People who access the resources should learn about, for instance, technological literacy; the broader social context in which TFGBV is grounded; preventing TFGBV; challenging or refraining from victim-blaming; the lived experiences of those impacted by TFGBV; and providing a trauma-informed and victim/survivor-centred response in cases of TFGBV. This recommendation applies with particular force to police agencies and law enforcement, and such education and training should be mandatory for these entities at both the federal and provincial /territorial levels. The new TFGBV-specialized agency could be responsible for specialized education and training aimed at actors within the legal system, in addition to broader public education and training, though funding must also go to community-based organizations and others who are qualified to create and provide training and education resources to the public or other groups.

13. **Fund frontline support workers and community-based organizations working to end, and supporting victims/survivors of, gender-based violence, abuse, and harassment, specifically to enhance their internal expertise, resources, and capacity to support those impacted by TFGBV (which often accompanies gender-based violence and abuse).** In addition, fund community-based organizations to systematically track incidents of TFGBV over time in order to evaluate the impacts of relevant laws and other response systems to TFGBV. The new TFGBV-specialized regulator could administer such funding, in partnership with community-based organizations.
14. **Fund further empirical, interdisciplinary, and law and policy research by TFGBV scholars, other TFGBV experts, and community-based organizations on TFGBV and the impacts of emerging technologies on those subjected to TFGBV.** In the context of platform liability for TFGBV specifically, such research might begin with a focus on the prevalence and causes of ‘wrongful leave-ups’ of reported content constituting TFGBV, in contrast to research that focuses on ‘wrongful takedowns’ of reported content that was not abusive. Research in this area could also involve collecting further empirical data on the impacts of different platform liability models on the experiences of historically marginalized groups subjected to TFGBV. The new TFGBV-specialized regulator could be tasked with setting up and administering a research grants program similar to the Contributions Program at the Office of the Privacy Commissioner of Canada, as well as commissioning research from subject-matter experts to inform further law reform, policy-making, and future government responses to TFGBV.