

September 2018

Privacy International's submission on the consultation 'Gender perspectives on privacy'

In response to the consultation on 'Gender perspectives on Privacy' by the UN Special Rapporteur on the right to privacy, Privacy International submit the following observations. The organisation is publishing in October 2018 a report on the topic, which it will share with the Rapporteur as soon as it is released.

1. What gender issues arise 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?

As a necessary condition to define boundaries, protect human dignity and enable autonomy, the right to privacy can be particularly important for women and queer persons, influencing most aspect of their lives, preventing them from being victims of discrimination, unwanted exposure, unlawful surveillance, and harassment, among other harms.

A gender perspective is also necessary to address power imbalances in the exercise of the right to privacy, making sure that it does not become an excuse from providing proper redress when this right is affected.

Within that context, we would like to draw your attention to particular issues and challenges that we believe should be addressed. Previous research on the topic, as well as our on-going research, document a reality in which traditional systems of oppression that are based on gender discrimination can find new manifestations in the information age.

Of particular concern to us is the issue of online gender-based violence. While it may take many forms, it consists at its core – as documented by the Special Rapporteur on violence against women, its causes and consequences – of a violation of women and queer people's right to privacy across several dimensions, including their psychological integrity through the invasion of their personal sphere with unwanted communications and the exposure of their personal data through doxing (publication of personal data with to facilitate harassment) or the non-consensual capture or sharing of sexual images.

This violence goes hand in hand with a heightened experience of interpersonal surveillance carried out by peers (social surveillance) which is even higher for women and queer people that also falls within other categories of discrimination such as their social class, ethnicity or sexual orientation.

With the expansion of data exploitation and the increasing reliance on artificial intelligence, binary and patriarchal prejudices on gender are being further enforced¹. Gender and sexual orientation are often used as the basis for the profiling of individuals, with negative consequences for women and queer people.

Privacy International and its partner organisations have been also researching on the intersection of gender and privacy² and in particular how applications aimed at quantifying physical data is also leading to new trends in the commodification of female bodies³

A gender lens is also useful to keep challenging outdated conceptions of privacy that focuses only on protecting physical spaces from unlawful interference of the State. The right to privacy should not be interpreted in order to shield perpetrators of these kinds of violence⁴, particularly when in many cases this kind of violence is exercised in a context of surveillance.

Privacy International is currently partnering with computer and social sciences researches to explore the implications of Internet-connected appliances and devices (Internet of Things) on gender-based domestic violence, exploring how technologies such as ‘smart’ meters, locks, and cameras expand domestic violence victim’s risk trajectories further⁵.

We also find gender issues around the introduction of large identification systems by states: many of those systems enforce a binary perspective on gender, all of them promoting a rigid idea of gender (for instance that one could only have one gender at a time, equating gender with biological sex, or forcing people to reveal their sex or gender, even when it is not necessary). As a result, people who do not conform to certain categories risk discrimination.

We fear that the challenges that women and queer people face as a consequence will worsen as more of such digital identity systems are introduced without adequate safeguards to respect and protect their privacy. Of particular concern is the adoption of technologies like the creation of public immutable ledgers to implement these systems.

2. Has the digital era produced new or significantly different gender-based experiences of privacy? If so, what are these?

¹ In particular, AI-powered face recognition technologies can be used to pretend or claim to infer sexual orientation, and to stalk adult actresses. See: “Advances in AI are used to spot signs of sexuality” <https://www.economist.com/science-and-technology/2017/09/09/advances-in-ai-are-used-to-spot-signs-of-sexuality>. Also “People are using this facial-recognition app to stalk adult actresses” <https://thenextweb.com/russian/2016/12/15/people-using-facial-recognition-app-stalk-adult-actresses/>

² See: Special briefing for International Women’s Day 2017, Privacy International. <https://privacyinternational.org/feature/1171/international-womens-day-2017-pi-network-highlight-reel>

³ MENSTRUAPPS – How to turn your period into money (for others). Available in <https://chupadados.codingrights.org/en/menstruapps-como-transformar-sua-menstruacao-em-dinheiro-para-os-outros/>

⁴ Until the second half of last century, in the United States and other jurisdictions, the legal system kept differentiating between regular assault and battery, and the one perpetrated inside a house or a family. See more in “The Rule of Love”: Wife Beating as Prerogative and Privacy https://digitalcommons.law.yale.edu/fss_papers/1092/

⁵ Project available in <https://www.ucl.ac.uk/steapp/research/projects/digital-policy-lab/dpl-projects/gender-and-iot>

The digital era has provided new spaces for the expression of female and queer voices and the way in which they can explore and express their sexuality. However, as we highlighted above the existences of those online spaces has been met with updated or new forms of oppression, including but not limited to social surveillance and the harassment through the violation of women and queer people's privacy.

These new experiences of privacy reinforce the importance of allowing internet users to access services safely and when possible anonymously. For that reason, Internet Service Providers must be encouraged to minimise the amount of data retained in their systems and upholding the highest standards of security when collecting data that may affect women and queer people.

The implementation of data retention of traffic monitoring in a network can create specific harms to women and queer people, including the facilitation of surveillance, stalking and sexual violence, and enabling ways of discrimination based on gender or sexual preferences.

3. 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?

The cases we have observed as part of our research on gender and privacy included difficulties for trans persons to access health services that matched their needs, when that access is tied to a rigid identity system. Similarly, the reliance on rigid identity systems meant trans people facing jail sentences were sent to jail units that did not match the gender they identified as, thus putting them at particularly heightened risks of rape and violence. Both issues are covered in our forthcoming report to be published later this year.

Identification and health records have also been the cause of women being unable to access sexual and reproductive care, particularly in countries where abortion is totally or partially criminalised. There is evidence that State have accessed those records and ordered healthcare professionals to inform them of their performed procedures in order to question and/or prosecute the women involved⁶.

The threat of social surveillance also acts as a deterrent in the exploration of sexual identity, and it is made worse by the normalisation of 'real name policies'⁷. Social surveillance is facilitated by companies that provide online services while failing to protect the users' anonymity, as was observed with the case of the "People You May Know"⁸ feature of Facebook, which exposed sex workers and "outed" them to their families and friends.

⁶ Prison or death. Professional secrecy as a fundamental guarantee in abortion cases. Available in: <https://www.dejusticia.org/en/publication/carcel-o-muerte-el-secreto-profesional-como-garantia-fundamental-en-casos-de-aborto/>

⁷ Identity, discrimination, and the challenge of ID. Available in: <https://privacyinternational.org/feature/2274/identity-discrimination-and-challenge-id>

⁸ Facebook changes story, now says phone location not used to recommend friends. Available in: <https://privacyinternational.org/examples-abuse/1839/facebook-changes-story-now-says-phone-location-not-used-recommend-friends>

Further research is required to fully document the extent of the impact of data exploitation on women and queer people, but cases have already emerged showing that the use of artificial intelligence in the advertisement of certain job offers meant women did not get to access those opportunities, including positions that require background in engineering⁹.

4. What are good practices in law and service delivery models that address gender-based differences in the enjoyment of the right to privacy?

Ratification and implementation of human rights instruments concerning privacy (e.g. modernised CoE Convention 108) and right of women (e.g. the UN Convention on the Elimination of Discrimination against Women, and regional instruments such as the Conventions of Istanbul and Belem do Pará); adopt and implement constitutional privacy protections for privacy, personal data and gender equality; and of specific laws and policies to guarantee these rights are fundamental pre-conditions to respect and protect the right to privacy without discrimination.

On **gender identity and ID systems**, while broader discussions are needed, laws allowing the trans community to change their name and gender without having to provide psychiatric and physical evaluations (as passed in Argentina, Colombia, Denmark and Ireland) is a positive model we would like to see adopted in more countries, as well as allowing people to leave their gender “unspecified” on their ID.

On the **exercise of the right to privacy from a gender perspective**, one of the main challenges to address gender differences in the enjoyment of the right to privacy has to do with how privacy laws regarding data protection or non-consensual use of images are implemented and enforced.

In the case of **data protection laws**, data protection agencies and judicial authorities need to embed a gender perspective in the understanding of the law. This would require the implementation of policies and guidelines interpreting the content on certain provisions, such as the grounds for processing of personal data, from a gender perspective. Such policies and guidelines would expand for instance on the need for an explicit, freely given and unambiguous consent; legitimate interest of a data subject when they are woman or queer persons; or to ensure the necessity for data processing for a contract.

In the case of **non-consensual use of sexual images**, the problems reside not only on the lack of specific laws, but in how the law is enforced by the police, public prosecution services, and courts. In many cases, they do not investigate reports from victims, question their motives, or revictimize them in their procedures. A gender perspective on the enforcement of these would help on properly serving the victims of these violations.

⁹ ACLU Says Facebook Ads Let Employers Favor Men Over Women. Available in: <https://www.wired.com/story/aclu-says-facebook-ads-let-employers-favor-men-over-women/>