



# CAYMAN ISLANDS LAW REFORM COMMISSION

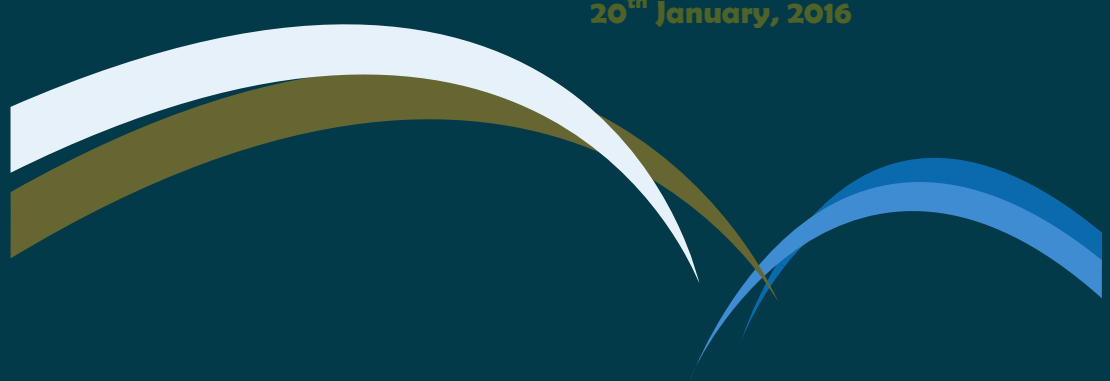


**Bullying:**

**Legislation, Policy or Both?**

**Issues Paper**

**20<sup>th</sup> January, 2016**



# **The Cayman Islands Law Reform Commission**

**Chairman:** **Mr. Ian Paget-Brown, Q.C.**

**Members:** **Ms. Cheryll Richards, Q.C.**  
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**Mr. Kenneth Farrow, Q.C.**  
**Mr. Huw Moses, OBE**

**Director:** **Ms. Cheryl Ann Neblett**

**Senior Legislative Counsel:** **Mr. José Griffith**

**Administrative Secretary:** **Mrs. Kimberly Allen**

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## **Bullying: Legislation, Policy or Both?**

### **Introduction**

1. Bullying behaviour among children and adolescents is unfortunately becoming more recognised world-wide. Various mediums such as print and electronic media highlight the occurrences of bullying. As a consequence, numerous studies have been conducted at a global level into bullying behaviour and several initiatives developed and implemented in various jurisdictions to manage this type of conduct. Areas of focus include types of bullying that occur, (whether it be direct, indirect or sexual), prevalence, impact, and demographic differences.
2. The Cayman Islands are not immune to this type of conduct. Incidents of bullying occur locally and in many different forms. The Government, through the Ministry of Education has articulated its policy commitment to deal with school discipline and behaviour including behaviour relating to bullying. We also take note of the efforts of several local organisations<sup>1</sup> to place the issue of bullying on their agenda in order to sensitise the public to the impact of bullying and the measures to deal with and prevent the occurrences of bullying.
3. The Law Reform Commission (LRC) believes in the importance of this issue and treats its examination of this topic as a continuation of the LRC agenda relating to abuse and violence that may occur within interpersonal relationships. We believe that a comprehensive response to bullying requires us to answer the questions of whether bullying should be dealt with firmly through legislation, governmental policy or both.
4. The LRC is cognisant that bullying is not just an issue among young people. Adults can also be victims of bullying as displayed in the workplace, at home and other similar settings. However, for purposes of this Issues Paper we will be dealing with bullying within the school context.

### **Bullying and Cyberbullying**

5. When the issue of bullying is raised, often times some of the common statements<sup>2</sup> are that- “bullying is a normal part of childhood”; “children who bully suffer from low self-esteem”; “victims really ought to figure out how to stand up for themselves”; or “he has brought bullying on himself by provoking the bullies or making himself look weak and defenceless”.
  - (a) *Bullying*
6. Bullying has been described as the most common form of violence in society and arguably what drives a culture of violence where the most powerful dominate the least powerful.<sup>3</sup> Bullying occurs when one individual or a group targets another individual repeatedly over time, using

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<sup>1</sup>For example, the Family Resource Centre has been involved in several initiatives which seek to bring the conduct to the fore and encourage our society to stand up to bullying in all its forms. The Save Our Youth Foundation is another example of an organisation involved in initiatives aimed at outreach to the general student population. The Family Support Unit of the Royal Cayman Islands Police Service has also itself been engaged in efforts to raise awareness on issues such as bullying in recognition of the impact the conduct has on families.

<sup>2</sup>Langevin, M. (2004). New Bullying Bylaw Targets Bystanders.

<sup>3</sup>Developmental Continuum of Bullying prepared by Pepler and Craig, 2000.

physical, verbal or psychological aggression to dominate the victim.<sup>4</sup> The repeated incidents create an imbalance of power between bully and victim. This power may be acquired by physical size and strength, by status within a peer group, by knowing the victim's weaknesses or by recruiting support from other children.

7. Bullying behavior can start at a young age. It may take the form of a small push or name calling during kindergarten. As a child progresses in age towards the teen and adult stages, the form of bullying may change and take the form of playground bullying, sexual harassment, gang violence, date violence, assault, marital violence, child abuse, workplace harassment and elderly abuse.<sup>5</sup>
8. More frequently, bullying behaviour among school students involves teasing, social exclusion and may also include physical violence, threats, theft, sexual harassment, racial harassment, public humiliation and the destruction of property.<sup>6</sup>
9. The effect of the conduct is that it causes fear, intimidation, humiliation, distress and harm to another person's body, feelings, self-esteem or reputation.<sup>7</sup> Victims of bullying may experience headaches, trouble sleeping, anger, suicidal tendencies, substance abuse and academic challenges. Given these serious consequences, every instance of bullying or conduct which may evolve into bullying is or can no longer be dismissed as just "kids joking around".<sup>8</sup>

*(b) Cyberbullying*

10. Advancements in technology have facilitated the emergence of cyberbullying whereby the victim is subjected to bullying conduct through the use of technological means. This type of conduct is also referred to as "electronic bullying" or "online bullying" which occurs through the use of technology and includes spreading rumors, making harmful comments and posting or circulating pictures or videos without permission. This can include, texting, sexting, sending nude or suggestive photos.<sup>9</sup> Indeed, the common ways of engaging in cyberbullying are through social networks, instant messaging, websites, email or other electronic media. Given the ability of cyber bullying conduct to spread very quickly and the fact that it can be done anonymously or through impersonation, this type of conduct has the potential to be very destructive. Perhaps even more destructive than "playground bullying".
11. The destruction or damage caused by cyberbullying has an element of longevity due to the fact that harmful comments and pictures can remain posted online and continue to be viewed and circulated for an indefinite period of time. As a result, the victim is exposed to hurtful material on a daily basis and this may cause psychological pressure. Such behaviour, in turn, can have a

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<sup>4</sup>"Bullying and Victimization", National Crime Prevention Centre, 1997; "Bullying In Schools", Ron Banks, ERIC, 2000; School-Wide Prevention of Bullying, U.S. Department of Education, (2001).

<sup>5</sup>Craig, W. M. (1998). The relationship among bullying, victimization, depression, anxiety, and aggression in elementary school children. *Personality and Individual*.

<sup>6</sup>Beran, T. & Lupart, J. The Relationship Between School Achievement and Peer Harassment in Canadian Adolescents: The Importance of Mediating Factors.

<sup>7</sup>Dan Olweus, *Bullying at School: What We Know and What We Can Do* (Oxford: Blackwell, 1993).

<sup>8</sup>Nova Scotia Department of Education (2011).

<sup>9</sup> Margaret Jackson, Wanda Cassidy & Karen Brown, "You Were Born Ugly and You Die Ugly Too: Cyberbullying as Relational Aggression", In *Education*, online: <http://www.ineducation.ca>.

negative effect on the school climate and relationships, even if it originates off school property.<sup>10</sup>

### Causes of Bullying

12. Studies<sup>11</sup> have suggested that children who engage in bullying are at risk of developing long-term problems with aggression, anti-social behaviour and substance abuse. What therefore are some of the factors that contribute to bullying? We list below what may be three of the main contributors.

(a) *Isolation*

13. In many cases, the targets of bullies are young people who are already isolated or ostracized because they are different from the majority of students. This difference can be based upon gender, race, origin, disability, class or any other characteristics which set them apart. Not “fitting in” at school and not being part of the “in crowd” exacerbates that feeling of exclusion and exposes that person to bullying conduct.<sup>12</sup>

(b) *Parenting*

14. Another contributing factor to bullying is the failure of parents or guardians in children’s lives to properly instill core values and empathy and to teach young people to take responsibility for their own actions. It could well be that adults in the families, schools and broader community within which our children grow and develop have failed to nurture in them the attitudes and skills essential to a civil society.<sup>13</sup> As a result, children who bully lack the social skills, perceptions and responsibility that would allow them to be less aggressive and self-centered in their interactions with others.

(c) *Technology*

15. Arguably the inescapable technology of today has perhaps been a significant contributor to bullying. Technology has changed how we interact. The electronic penetration in the Cayman Islands is all too obvious. We can easily observe people focused on their electronic devices, totally oblivious to the real people around them. This also holds true of modern day meetings where many people appear attached to the iPhone, Samsung Galaxy, BlackBerry or equivalent device.
16. Technology allows young people, in particular, to have fewer inhibitions online and as such they may exhibit different personalities whilst online.<sup>14</sup> It has been contended that technology has leveled the playing field and the “computer nerds” can get even with their bullies by harassing them online.<sup>15</sup>

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<sup>10</sup>Dan Olweus, *Bullying at School*, *supra*.

<sup>11</sup>2010 report produced by the Ontario Ministry of Children and Youth Services.

<sup>12</sup>Michael Ungar, *We Generation: Raising Socially Responsible Kids* (Toronto: McClelland and Stewart, 2009).

<sup>13</sup>Michael Ungar, *ibid*.

<sup>14</sup>Bullying.org presentation to Senate Human Rights Committee on bullying and cyberbullying by President Bill Belsey, 12 December, 2011.

<sup>15</sup>*Ibid*.

## Legal Issues to Address When Dealing With Bullying

17. The legislation in the Islands should reflect our core values and principles and indicate acceptable behavior in our society. One of the important roles of legislation is to change attitudes and values about what is inappropriate and blameworthy conduct.<sup>16</sup> For example, laws which deal with drunk driving, wearing seatbelts and smoking in public are illustrative of this point.
18. The LRC questions whether the legal consequences of bullying behaviour are fully understood or appreciated. Bullying, it is submitted, prompts several legal concerns and is interlinked with a number of areas of law, such as criminal law, civil law, constitutional law, human rights law, administrative law and education law.<sup>17</sup>

### (a) *Bullying and the Criminal Law*

19. We have referred to bullying as an occurrence when one individual or a group targets another individual repeatedly over time, using physical, verbal, or psychological aggression to dominate the victim. Should such an act, without more, be made criminal and thus attract criminal sanctions or should the degree of criminality be based on whether the bullying behaviour crosses the line into the criminal sphere and involves conduct which amounts to acts such as assault, criminal harassment, or possession of child pornography?<sup>18</sup>
20. In Canada, there has been an increase of cyberbullying in the form of distributing intimate or sexual images without the consent of the person in the photo or video. It is now an offence under Canada's *Criminal Code*<sup>19</sup> to share intimate images of a person without the consent of the person in the image. This law applies to everyone, including persons under the age of eighteen. The purpose of the offence is to protect the privacy a person has in his or her nudity or sexual activity.
21. The Law gives the court authority to order the removal of intimate images from the Internet if the images were posted without the consent of the person or persons in the image.
22. Anyone convicted of distributing an intimate image without consent could face serious legal consequences. For example:
  - imprisonment for up to five years;
  - their computer, cell phone or other device used to share the image could be seized; and
  - they could be ordered to reimburse the victim for costs incurred in removing the intimate image from the Internet or elsewhere.
23. Several other *Criminal Code* offences also deal with bullying, including cyberbullying. Depending on the exact nature of the behaviour, the following current offences could be charged:
  - Criminal harassment;

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<sup>16</sup>Honourable Roy McMurtry and Dr. Alvin Curling, Review of the Roots of Youth Violence (2008).  
<http://www.children.gov.on.ca/htdocs/English/topics/youthandthelaw/roots/crossroads.aspx>.

<sup>17</sup>Eric Roher, "Problems.com: The Internet and Schools" (2002) 12 Educ Law J 53.

<sup>18</sup>See Penal Code (2013 Revision).

<sup>19</sup>This offence came into force on March 10, 2015.

- Uttering threats;
- Intimidation;
- Mischief in relation to data;
- Unauthorized use of computer;
- Identity fraud;
- Extortion;
- False messages, indecent or harassing telephone calls;
- Counselling suicide;
- Incitement of hatred; and
- Defamatory libel.

24. Some of these offences are covered in our Penal Code<sup>20</sup>, Information Communications Technology Authority Law<sup>21</sup> and the Computer Misuse Law.<sup>22</sup>

(b) *Bullying and the Civil Law*

25. In applying the law of negligence to the various responsibilities of the Government and school boards it can be argued that these entities owe a duty of care to the students under their care and supervision. In other words, individuals and agencies, such as school boards and departments of education are required to take reasonable steps to counter foreseeable risks of injury to those to whom a duty of care is owed. In this case, that duty would be owed to the children in the school and in particular to that child who is being bullied.

26. Under the Canadian Nova Scotia Education Act there is a statutory duty imposed on all schools to attend to the care and safety of the students within their control. These statutory duties are also supplemented by the common law duty of reasonable care in accordance with the standard of the “reasonable and prudent parent”.<sup>23</sup> That is, the school should act in a manner reflective of what a parent would do under similar circumstances.

27. Ultimately, in the Cayman Islands, whether school boards or the Government can be subjected to legal action for a failure to protect students from bullying is a matter of civil law and the extent of the duty owed to students to be educated in a safe and non-discriminatory environment.

(c) *Bullying and School Jurisdiction*

28. A very important issue relates to a school’s jurisdiction or authority to deal with bullying outside of school hours and away from school property. This question is particularly pertinent with respect to cyberbullying, given that electronic bullying often occurs away from school property, for example, by means of the use of a home computer or a mobile phone. Research has shown that before the introduction of legislation, school authorities in other jurisdictions have usually been cautious in extending their jurisdiction beyond the school premises and in particular to student computer activities at home.

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<sup>20</sup>(2013 Revision).

<sup>21</sup>(2011 Revision).

<sup>22</sup>(2015 Revision).

<sup>23</sup>W MacKay & L Sutherland, *Teachers and the Law*, 2nd ed (Toronto: Emond Montgomery Publications Ltd, 2006) at chapters 1 and 2.



29. Due to the lack of boundaries, cyberbullying can be damaging and as such a definition of school jurisdiction is important if schools are to effectively respond to the growing problems of bullying and cyberbullying.
30. Legislation and court decisions in the United States and Canada have moved in the direction of giving schools authority over bullying activities that occur away from the school ground in situations where there is a significant connection between the off-school behaviour and the school's atmosphere.
31. If the activity negatively affects the school climate, then the school may have authority to deal with the behaviour, even though it technically takes place away from the school.
32. In the Supreme Court of Canada, in the case of *R v M (MR)*<sup>24</sup> it was held that in balancing student rights against the disruption or order in schools, it is important to note that school authorities have the burden of showing that there is likely to be a detrimental impact on the school climate in some form and that students do have rights to free speech and privacy. These latter rights are particularly relevant to online activities and do impose some limits on responding to cyberbullying.
33. Under the *Education Act*, schools have authority to discipline students for behaviour that occurs off school property if such actions have an effect on the school climate.<sup>25</sup> In this context, a positive school climate exists when all members of the school community feel safe, comfortable, and accepted.

(d) *Cyberbullying, Defamation and Free Speech*

34. When dealing with cyberbullying we have to note that information on the Internet travels through several computer systems between the author and recipients. There are a variety of intermediaries such as blogs, web pages and e-mails, all of which can be stored on various servers. The information can be easily and repeatedly recalled. This may give rise to many internet intermediary liability issues. As such, we have to examine the difference between defamation in a physical setting and internet defamation in the virtual realm. Further, we have to determine to whom liability is to be attached and at what stage of the process.
35. The capacity of the Internet to replicate any defamatory message lends credence to the notion that "the truth rarely catches up with a lie." The issue that therefore arises with respect to libel law is how to protect a person's reputation without adversely impacting the potential of the Internet as a medium of public discourse.<sup>26</sup>
36. If the cyberbullying takes the form of defamatory actions which are not a legitimate form of public discourse such conduct will not be protected by the guarantees of freedom of speech in the Cayman Constitution.

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<sup>24</sup>[1998] 3 SCR 393.

<sup>25</sup>*Education Act*, RSO 1990, c E2, ss 300.4, 306, 310.

<sup>26</sup>Shaheen Shariff & Leanne Johnny, "Cyber-Libel and Cyberbullying: Can Schools Protect Student Reputations and Free Expression in Virtual Environments" (2007) 16:3 Educ Law J 307.

37. However, other forms of cyberbullying may be defended as free speech and fair comment. For example, words such as “nobody likes you” or “I wish you would die”. It is in this regard that there are legal and constitutional limits on the regulation of online activities in the schools and beyond. Equally, there are important issues of privacy and how far school authorities can go in invading the lives of a student off school premises and in cyber-space. While it is recognised that freedom of expression is not an “absolute right” and some limits must be placed on such rights when there is a conflict with social values, any legislation purporting to deal with cyberbullying must balance an individual’s right to free speech against the need to provide victims of cyberbullying with adequate remedies without infringing on a person’s right to liberty.

(e) *International Conventions, the Constitution and the Right to Education*

(i) *International Conventions*

38. The LRC is of the view that bullying should also be examined from a human rights perspective. We believe that bullying, in all its forms, encompasses a range of human rights issues. A child’s right to education and to personal security are established in the Universal Declaration of Human Rights (Articles 3 and 26) and codified in a number of international human rights treaties. These treaties include-

- the International Covenant on Economic, Social and Cultural Rights (Article 13);
- the Convention on the Rights of the Child (Articles 19, 28, 29 and 40);
- the Convention on the Elimination of All Forms of Racial Discrimination (Articles 5 and 7); and
- the Convention on the Rights of Persons with Disabilities (Articles 14, 16 and 24).

39. In particular, Article 29(1) of the Convention on the Rights of the Child provides that States Parties agree that the education of the child shall be directed to-

- the development of the child’s personality, talents and mental and physical abilities to their fullest potential;
- the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- the development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; and
- the development of respect for the natural environment.

40. Essentially, Article 29 suggests that a school which allows bullying or other violent and exclusionary practices to occur is not one which meets the requirements of Article 29 of the UNCROC. As pointed by the Committee “children do not lose their human rights by virtue of passing through the school gates.”<sup>27</sup>

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<sup>27</sup><https://www1.umn.edu/humanrts/crc/comment1.htm>.

41. A child or young person who is bullied, abused or assaulted has rights, regardless of the age of their perpetrator or where the incident occurs. Any failure to treat bullying, abuse and violence seriously because it occurs between students and within schools, is a violation of a child's human rights<sup>28</sup> and the right to education is compromised if a child or young person does not feel safe at school or is absent from school for any significant period of time due to bullying conduct.
42. There are several other Articles in the United Nations Convention on the Rights of the Child which speak to the key human rights pertaining to children and young people at school. These articles stipulate that every student has the right to-
- have their best interests considered when decisions are made (Article 3);
  - protection from physical, emotional and sexual harassment or abuse from peers or others while in the school environment (Article 19);
  - be treated with respect and dignity by other people (preamble, Articles 2, 29 and 40);
  - be disciplined in ways which are positive (Articles 3, 28, 37 and 40);
  - express their views, have a say in matters which affect them, present their side of a story and be treated fairly (Articles 2, 12-14 and 40);
  - have matters of privacy protected (Article 16);
  - be free from discrimination of any sort (Article 2);
  - learn and interact in a safe environment (Article 3);
  - have their family informed and involved in matters that affect them (Article 5); and
  - be taught, and have demonstrated to them, respect for the rights of others and their responsibilities (Article 29).
43. The signing and ratification of the United Nations Convention on the Rights of the Child by the UK<sup>29</sup> signals that the Cayman Islands are bound by a broad set of values regarding children and the kind of environment they need in order to fully develop to the best of their potential. This should also serve as a reminder that Government should be committed to safeguarding "the best interests of the child"<sup>30</sup> and to ensure that "the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child."<sup>31</sup>
44. Furthermore, the commitments with regard to education in particular include a commitment to providing education that is directed to: "the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality..." Implicit in this should be preparing the child to be a safe and responsible citizen.
- (ii) *Constitution Order, 2009*
45. The Cayman Islands Constitution<sup>32</sup> is consistent with the various conventions with respect to the right to education and personal liberty. Section 20 requires Government to reasonably provide every child with primary and secondary education. It further provides that every person who is the parent or legal guardian of a child shall be entitled to have his or her child educated at his or

<sup>28</sup>United Nations Committee on the Rights of the Child (2001).

<sup>29</sup>Signed 19<sup>th</sup> April, 1990 and Ratified 16<sup>th</sup> December, 1991.

<sup>30</sup>UNTS 1577/3; Ratified by Canada 1992, Can TS 1992 No 3 at Article 3.

<sup>31</sup>Article 12, Convention on the Rights of the Child.

<sup>32</sup>Order 2009.

her own expense unless a law otherwise provides, in a private school and, in such a school, to ensure the religious and moral education of his or her child.

46. Further, section 17 provides that the Legislature shall enact laws to provide every child and young person under the age of eighteen with such facilities as would aid their growth and development and to ensure that every child has the right to be protected from maltreatment or abuse and that the child's best interests are paramount.

(iii) *Education Law*

47. Section 13 of the *Education Law (2010 Revision)* reinforces the right to make education compulsory for all children of school age. Further, parents have a duty to cause a child of school age to attend a suitable school every day on which such school is open. We question whether a parent would run afoul of the law if he removes his child from school because of his dissatisfaction with how the issue of bullying is being dealt with by the authorities. Arguably, if a child fails to attend school due to bullying, then the parent is liable to prosecution unless perhaps that parent receives the requisite approval to provide the child with appropriate tutoring at home. Is the law, without more, saying that a parent should expose a child to bullying conduct without any clear sense that the issue of bullying will be dealt with in a manner which does not adversely impact the child's education?

48. Under the *Education Modernisation Law, 2009*, which is not in force, in addition to repeating the compulsory requirement for education as obtains under the current Education Law, section 41 provides for a child abuse reporting policy. Every school or early childhood institution shall have a written Child Abuse Reporting Policy which shall comply with the Children Law. The Child Abuse Reporting Policy for a school or early childhood institution shall apply in relation to anything that happens-

- (a) at the school or institution; and
- (b) while a student or child is engaged in activities away from the premises of the school or institution, arranged as activities of that school or institution; and each school or institution may decide that it shall apply at other times and in other places when the school or institution considers it appropriate for the protection of students and children.

49. Under the Children Law<sup>33</sup> "abuse" or "neglect", in relation to a child includes physical or emotional abuse of the child, or neglect of the child, to the extent that the child has suffered, or is likely to suffer, physical or psychological injury detrimental to the child's wellbeing; or the child's physical or psychological development is in jeopardy.

50. These provisions seem to place the Government under an obligation to ensure that bullying, which falls within the realms of abuse, is dealt with in the interests of that child and also to ensure that the bully himself receives the appropriate intervention to address the behavior.

51. Further, section 40 of the Education Modernisation Law provides that any person who causes or creates a nuisance or disturbance on the premises of any school or otherwise acts on school premises in a manner disruptive of the education provided in a school or injurious to students or

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<sup>33</sup>(2012 Revision).

persons employed to work at the school commits an offence and is liable on summary conviction to a fine of five thousand dollars. Does this provision extend to bullying conduct?

52. Based on the provisions in the Conventions, Constitution, the Children Law and both Education Laws we may need to re-examine whether we are fully compliant from the perspective of having systems and mechanisms in place to ensure that the education of our children is not compromised as a result of bullying and other forms of disruptive behaviour. Perhaps a human rights approach to this issue may offer a way to address bullying in a more definitive and comprehensive manner.

### **Bullying Legislation in Other Jurisdictions**

53. Several jurisdictions, notably Canada, the United States and Australia, have undertaken substantive measures on bullying. Earlier, we discussed specific provisions in the US and Canada. The foregoing seeks to highlight in a more general terms the position in these jurisdictions.

#### *(a) Canada*

54. Over time, Ontario has made several important changes to its education laws and policies to deal with bullying. The Ontario *Education Act, 2007*<sup>34</sup> was amended to provide for –

- the addition of “bullying” to the list of infractions for which suspension may be considered;
- the institution of a mandatory procedure for reporting of infractions to principals and parents; and
- the extension of the right to discipline students for actions that occur off school property, as long as they have an effect on the school climate.

55. Additionally, the legislation requires school staff to report serious student incidents and other types of incidents which might have a negative effect on the school climate, to the Principal. This legislation also requires the Principal to inform the parents of the victimised student.<sup>35</sup>

56. Ontario also introduced the *Accepting Schools Act, 2012* which requires school boards to take a proactive approach to combat bullying. It sets out a definition of bullying and mandates school boards to promote equity and an inclusive education policy. The Act also requires all school boards to develop guidelines relating to bullying and school discipline. Incidents of repeated or severe bullying would be grounds for the expulsion of a student.

57. The legislation further provides for the creation of a “Bullying Awareness Week” and requires school boards to support students in activities and organisations that promote gender equality, anti-racism, awareness and understanding of people with disabilities.

#### *(b) United States*

58. In the United States, legislation addressing bullying in a school context is common and many states have some form of legislation requiring school districts to implement bullying prevention

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<sup>34</sup>Education Amendment Act (Progressive Discipline and School Safety), SO 2007, C 14.

<sup>35</sup>Education Amendment Act (Keeping our Kids Safe at School), 2009 SO 2009, C 17.

policies.

59. In constitutional law terms, the United States constitutional provisions dealing with free speech, privacy, due process rights, as well as search and seizure come into play when developing and implementing this type of legislation with respect to public schools.
60. Although freedom of speech is protected in the United States, the law gives schools the authority to regulate certain types of speech in order to protect the children in their care.<sup>36</sup> Schools are seen as acting in the place of a parent in connection with school activities. Teachers and principals have fairly broad search and seizure rights in the context of public schools. For example, as long as they have a reasonable suspicion that a search of a pupil's cell phone will provide evidence of a criminal offence or breach of a school rule then that might constitute a legal justification for such a search.<sup>37</sup>
61. Some school districts have legislation dealing with off-site bullying. Massachusetts<sup>38</sup> has enacted a strict law responding to cyberbullying. The legislation applies to behaviour on and off the school premises that "creates a hostile environment at school for the victim, infringes on the rights of the victim at school or materially and substantially disrupts the education process or the orderly operation of a school."
62. Schools are required to have anti-bullying plans. In these plans, there must be clear reporting procedures for students, staff, and parents, and anonymous reporting procedures. There must be a range of disciplinary methods available, balancing the needs for accountability and teaching appropriate behaviour, as well as strategies for protecting a victim from retaliation and restoring the victim's sense of safety.

(c) *Australia*

63. By way of illustration as to how Australia has approached this issue, we note that in June 2011, the Joint Select Committee on Cyber-Safety tabled its report on the Inquiry into cyber-safety entitled *High-Wire Act: Cyber-Safety and the Young*.<sup>39</sup> The mandate of the Committee was to review broadly the online environment for Australian children. The Committee made a number of recommendations in relation to cyberbullying and safety in schools, including the following:
  - a definition of cyberbullying to be used by all Australian government departments and agencies and encourage its use nationally;
  - that a legislative approach be developed to enable schools to deal with bullying incidents out of school hours; and
  - that options be explored to have youth teach others and parents about cyberbullying and cyber safety.
64. With respect to human rights, this is a matter which the Australian Human Rights Commission has been addressing from an educational approach to combatting cyberbullying.

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<sup>36</sup>See *Brown v Entertainment Merchants Association* 131 S Ct 2729 (2011) allowing violent video games.

<sup>37</sup>*New Jersey v TLO*, 469 US 325 (1985), 105 S Ct 733.

<sup>38</sup>Part I, Title XII, Chapter 71, Section 370.

<sup>39</sup>See online: <http://www.egov.vic.gov.au/focus-on-countries/australia/trends-and-issues-australia/information-and-communications-technology-australia/cyber-security-australia/high-wire-act-cyber-safety-report.html>>.

65. In terms of civil liability for schools, there have been several cases in Australia of schools being held liable for bullying or harassment suffered by their employees or students.<sup>40</sup>

(d) *United Kingdom*

66. The United Kingdom does not currently have laws pertaining to school bullying. Instead, authorities interpret the law to make the case that it is applicable to bullying, and these can generally be drawn from workplace laws. However, there is no workplace bullying law.<sup>41</sup> For example, the *Protection from Harassment Act (1997)* may be of use if the bullying occurs frequently. Examples of such behaviours include: making regular phone calls at an individual's home during unsocial hours or during a leave of absence. Thus, the Act is essentially used to protect individuals from stalkers; however, it has been used against bullies in the workplace. Given that this Act considers bullying in the workplace to be inappropriate and criminal, it seems reasonable to interpret this law as being applicable within the school environment. Other Acts relevant to bullying within the school system includes: the *Criminal Justice & Public Order Act (1994)* and the *Malicious Communication Act (1988)*.

### **Policies**

67. The LRC appreciates that Legislation is not the only prescription that may deal with bullying. Commentators may argue that legislators, due to fear of the unknown impose unnecessary regulations to deal with an issue due to discomfort or a lack of understanding about the particular issue. In this case, it may be contended that a lack of understanding about bullying and the cyber-world has caused the reaction of trying to contain and control the conduct rather than teaching children how to responsibly manage their behaviour.<sup>42</sup> Perhaps “the best approach is to build upon a child's assets and invest your energies in fostering healthy social relationships”.<sup>43</sup>
68. In this regard, stakeholder partnerships and networks are crucial in educating the relevant persons and implementing preventative measures in response to bullying. In establishing these partnerships, clear policies have to be developed from the Government level with respect to bullying.
69. These policies, it is submitted, must start from the public education system.<sup>44</sup> All young people in the Cayman Islands are legally obliged to come into contact with institutions of learning. Should reading, writing and mathematics be the most fundamental skills that need to be taught in school or should equal or greater emphasis be placed on educating children about rights, responsibilities, empathy, respect, inclusiveness and diversity?
70. School policies and programs may need to be adapted to reflect an approach to learning which promotes more parental involvement, increased adult supervision, engage the school leadership and send a firm message to the community that bullying issues will be addressed appropriately

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<sup>40</sup>*Cox v NSW*, [2007] NSWSC 471.

<sup>41</sup>The Dignity at Work Bill has been proposed to specifically address workplace bullying.

<sup>42</sup>Shaheen Shariff, *Confronting Cyberbullying*, *supra*.

<sup>43</sup>Dr. John LeBlanc of Dalhousie Medical School.

<sup>44</sup>Bill Belsey, Presentation to the Senate Committee on Human Rights dealing with cyberbullying, *supra*.

and in a timely and just manner.

### **Questions for Consideration**

71. Having regard to the issues identified in this paper, the LRC seeks responses with respect to the following questions-
- (a) Should legislation be introduced to deal with bullying and cyberbullying? If so, should the relevant provisions form part of the Education Law or be the subject of discrete legislation?
  - (b) Should the Education Law, in an effort to further demonstrate the importance attached to education, explicitly provide that the Ministry of Education aims to build and maintain a positive and inclusive school environment and promote school safety and discipline along with bullying awareness and prevention?
  - (c) Should legislation define bullying as repeated behaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property?
  - (d) Should the jurisdiction of the school to deal with bullying be defined in a manner that provides that a principal shall have jurisdiction to discipline a student if he believes that the student has engaged in misconduct including bullying or cyberbullying activities, while at school, at a school-related activity or in other circumstances away from the school where engaging in the activity will have a detrimental impact on the school climate?
  - (e) Should bullying be treated as a human rights issue? If so, should the Ministry of Education and the Human Rights Commission develop a protocol whereby issues of bullying and cyberbullying in schools can be referred to the Human Rights Commission?
  - (f) Will a policy which provides that a perpetrator of bullying is to be excluded from school be a violation of a student's right to education and if so, should appropriate facilities be put in place to ensure that the education of the bully is not compromised notwithstanding his conduct?
  - (g) Is there a need to implement policies which require the perpetrator of bullying conduct to undergo counselling before returning to school?
  - (h) Should bullying be treated as a criminal offence under the Penal Code?
  - (i) Should bullying attract criminal and civil penalties?
  - (j) What should be the penalty if a victim is injured, suffers mental distress or commits



suicide as a result of the bullying?

- (k) Should bullying be looked at as a matter which involves mental health concerns requiring that the Health Services Authority and Education Ministry partner with other relevant organisations to produce policy guidelines for prevention, identification and intervention on bullying issues within school, sport, recreation and other youth organisations?
- (l) Is there a need to legally oblige schools to ensure that victims of bullying and their families are involved in decisions affecting their right to education and their right to personal security?
- (m) Should there be a legal requirement for an employee of a school to report to the principal misconduct involving bullying and cyberbullying that may have a detrimental effect on the school climate?
- (n) Should the Education Law be amended to include a provision requiring that the principal investigate promptly, reports of bullying and take appropriate action as deemed necessary after having informed parents or guardians of the misconduct and the investigation?
- (o) Should the Education Law be amended to include a provision requiring parents to take reasonable steps to be aware of their children's online activities to the extent that such activities may detrimentally affect the school climate?
- (p) Is there a need for universal policies formulated by the Ministry of Education to ensure that clear guidance is given to school officials about what constitutes bullying and cyberbullying, the types of off-site behaviour that will be captured, the appropriate actions to take in each circumstance and the use of the internet, cell-phone and other digital devices?
- (q) Should the Education Law be amended to require school boards to develop and implement policies, responses and programs to address bullying and cyberbullying behaviours, consistent with the Ministry of Education's definitions and policies with respect to bullying and cyberbullying?
- (r) Should the Ministry of Education create or adopt online safety programs for primary and high school students and their parents or guardians with the view to changing attitudes and values and making such programs a prerequisite for continued access to school computers?
- (s) Is there a need to assess what are the short and long-term effects of bullying on victims and aggressors and what impact policies which exist in schools have on the number of occurrences of bullying and the academic progress of both the victim and aggressors?

- (t) Is there a need for the Ministry of Education, universities and colleges to establish measures for collecting data to determine the scope and prevalence of bullying and cyberbullying in order to assess the effectiveness of any current programs aimed at bullying?
- (u) Is there a need for policies which require the Ministry of Education, the RCIPS and Internet service providers to work together to develop a protocol to facilitate police access to information during the investigation of bullying and cyberbullying cases?
- (v) Should the Ministry of Education, in collaboration with the policing authorities, explore and support educational initiatives in which schools and police co-operate in delivering youth-focused programs?
- (w) Is there a need for schools to apply restorative justice principles and develop behaviour management programmes that allow for all students to be managed and relational issues to be dealt with within the school?
- (x) Should the Ministry of Education create an anti-bullying website and social media platform, for the purpose of disseminating information, sharing resources and providing online learning tools for young children, parents and the community?
- (y) Should the Ministry of Education organise annual conferences on bullying and cyberbullying and include issues such as poverty, race, gender, disabilities and mental health so as to sensitise the young on the issues of human differences which often times are the reasons for bullying conduct?
- (z) Should all sports, recreation and other organisations working with children and funded or otherwise supported by Government be required to adopt and publish formal policies and protocols addressing bullying and cyberbullying issues and provide education and training sessions on identification, intervention, policy and protocols with respect to bullying and cyberbullying, as part of training for all employees, volunteers, and officials working with children in the above organisations?
- (aa) Should service organisations, internet service providers, media organisations, charitable organisations and private sector partners examine the issues of bullying to forge partnerships and networks in order to provide an effective community response to bullying?
- (bb) Should the Ministry of Education create or adopt programs to improve technological and digital literacy for parents and community members to assist in reducing the gap between adults and young persons with respect to the forms and language of social media and virtual reality?

- (cc) Should the Ministry and school associations partner to create a digital and printed parents' guide to combating bullying and cyberbullying that will be made available to parents upon school registration?
- (dd) Should the Ministry of Education examine current curriculum offerings to identify opportunities to incorporate programmes relating to emotional learning, mental health literacy, inclusive education, restorative justice approaches and anti-bullying strategies, as part of mandatory teacher education?
- (ee) Should the Ministry incorporate into all aspects of the school curriculum from kindergarten to the end of high school a focus on teaching social competence, positive interpersonal skills, anger management, nonviolent communication and conflict resolution?

### **Conclusion**

72. The problem of bullying is complex. Consequently, any intervention to address the issues should extend to all of those involved: victims, bullies, school staff, parents, the Government and the broader society. It is in this regard that perhaps there is a need for a strategic and comprehensive approach that consists of both legislation and policy formulated to ultimately prevent the incidence of bullying.

**Stakeholders and members of the general public are invited to comment on the issues identified in this Paper. In instances where there is an awareness of specific measures in place to address any of the questions raised, our research would be informed if details with respect to those measures are provided in your submissions.**

**The Paper may be viewed on the following website: [www.lrc.gov.ky](http://www.lrc.gov.ky). Unless marked to the contrary, the LRC will assume that comments received are not confidential and that respondents consent to our quoting from, or referring to, their comments and attributing their comments to them, and to the release or publication of their submissions.**

**Requests for confidentiality or anonymity will be respected to the extent permitted by the Freedom of Information Law, 2007.**

**Submissions should be forwarded in writing by post or hand no later than 2<sup>nd</sup> May, 2016 to the Director of the Law Reform Commission, 4<sup>th</sup> Floor Government Administration Building, Portfolio of Legal Affairs, 133 Elgin Avenue, George Town, Grand Cayman, P.O. Box 136, Grand Cayman KY1-9000 or emailed to [cilrc@gov.ky](mailto:cilrc@gov.ky)**