

LEGISLATIVE RESPONSES TO CYBERBULLYING IN CANADA

Introduction

The rate of cyberbullying¹ in Canada has been persistently high relative to other industrialized countries for the past decade² and its consequences for our children³ and youth have become increasingly clear. Bullying in all of its forms, including cyberbullying, can have significant and lifelong physical and mental health impacts on children, as well as many other personal and social consequences for both child victims and perpetrators.

Canada's response to cyberbullying has been one of fragmentation, with inconsistent approaches to legislation, programs and practices. The following offers an overview of recent legal approaches to curb cyberbullying in Canada, and provides a brief child rights-based analysis of these developments, where applicable.

UNICEF Canada believes that there is a proper role for legislation, but favours a comprehensive approach that places much greater emphasis on prevention (particularly information and education for young people) and progressive discipline. Legislation should focus on the duty of responsible authorities to support all children to develop positive relationships and to prevent and respond to bullying; and sanctions should be appropriately developed considering children's developmental stages and needs, with legal sanctions reserved for the most extreme cases.

Provincial Responses

Cyber-Safety Act, 2013 (Nova Scotia)

Proclaimed on May 10, 2013, Nova Scotia's *Cyber-Safety Act* seeks to directly address and prevent cyberbullying, both on and off school grounds, by holding both bullies and their parents to account. Among other measures, it creates: a Cyber SCAN investigative unit to investigate complaints of cyberbullying; the jurisdiction for courts to issue a protection order for victims of cyberbullying; a new tort of cyberbullying; and the authority for courts to hold parents liable for damages where the cyberbullying is perpetrated by their minor children.

While we commend the purpose behind Nova Scotia's *Cyber-safety Act* (Bill 61) in promoting the protection and safety of children, UNICEF Canada remains concerned about the potential unintended consequences for some young people being subjected to greater exposure to criminal liability and prosecution. Legal sanctions may be appropriate in the most extreme cases, but have a tendency to be applied inappropriately in cases where less punitive measures would be most appropriate to resolve the behaviour.

UNICEF Canada also has a number of reservations with this legislation regarding the provisions holding parents liable in cases of cyberbullying. For instance, there is often a digital/generational divide in technological knowledge and access between children and parents, as well as environmental (e.g., single-parent families, new immigrant families), language and financial barriers that may prevent parents from being aware of such events. Where similar statutes exist in other provincial jurisdictions (e.g., applied to acts of

Cyberbullying

Though a form of bullying, cyberbullying wields an increased reach and scope of impact through: less visibility to responsible adults in a child's life, a capacity to intrude day or night, an increased audience and an indelible permanent record.

¹ Cyberbullying, a form of bullying, is generally known as the use of electronic communication for deliberate, repeated and hostile behaviour by an individual or group intending to cause harm to others.

² UNICEF's recent Report Card 11, *Child well-being in rich Countries: A comparative overview*, is available at: <http://www.unicef.ca/en/discover/article/child-well-being-in-rich-countries-a-comparative-overview>.

³ References in this document to "children" include all persons below age 18, consistent with the definition in article 1 of the United Nations Convention on the Rights of the Child.

vandalism), case law has established parental liability narrowly and only where it can be demonstrated that parents have clearly been aware of their children's behaviours.

Bill 212 - *The Human Rights Code Amendment Act (Bullying)* (Manitoba)

The introduction of Manitoba's Bill 22 (*The Human Rights Code Amendment Act (Bullying)*) in September 2013 seeks to amend the province's *Human Rights Code* to make bullying an offence that can be heard by the Manitoba Human Rights Commission. The proposed legislation defines bullying broadly and recognizes that bullying can take a variety of forms, including cyberbullying.

The Bill is seen by some as the creation of a middle ground, allowing bullying situations to be addressed through mediation rather than automatically becoming a criminal offence. It is also thought to be one approach to address any gaps left by the province's simultaneously proposed anti-bullying legislation (see reference to Bill 18 below) concerning schools, as bullying often happens beyond school grounds.

This 'middle ground' approach recognizes the benefits of mediation processes in some circumstances of bullying and that criminal prosecutions are not the answer for every case.

Legislative Responses in Education

Since legislation, policy and practice related to education is set by provinces and territories, provincial and territorial governments have a key role to play in protecting children from cyberbullying. Among other provinces, Alberta, Quebec, Manitoba, Nova Scotia and Ontario have created legislative responses to cyberbullying intended to help victims and their families and to ensure that school administrators have the necessary tools to prevent and/or respond to cyberbullying on and off school property. Direct reference to the role of preventive education/awareness, progressive discipline, diversity and respect are key elements in provincial education legislation, which each of the following provincial statutes set out to do:

Amendments to Alberta's *Education Act*, scheduled to enter into force in Fall 2015, will require all students to refrain from and report bullying, whether or not it takes place within the school building, during the school day or by electronic means.

Manitoba's *Public School Amendment Act (Reporting Bullying and Other Harm)* came into force in April 2012. Further, in December 2012, the Minister of Education for Manitoba introduced Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*, which would provide, among other things, a definition of bullying and require each school board to establish a 'respect for human diversity' policy, which must accommodate student activities.

Nova Scotia enacted Bill 30, *The Promotion of Respectful and Responsible Relationships Act*, which amended the *Education Act* in May 2012. It defines cyberbullying, establishes provincial school codes of conduct, and requires data collection and monitoring of reported incidents.⁴

In Ontario, the *Accepting Schools Act*, amendments to the *Education Act*, which came into force in September 2012, requires school boards to establish bullying prevention and intervention plans, and to provide programs, interventions and other supports for students affected by bullying, whether as victims, perpetrators or witnesses; authorizes schools to expel pupils who repeatedly bully and pose an unacceptable risk to the safety of other pupils; and requires schools to support gay and straight alliance clubs.

⁴ This is partly in response to the recommendations in the March 2012 report of the Cyberbullying Task Force, *Respectful and Responsible Relationships: There's No App for That*, available at: http://itlaw.wikia.com/wiki/Respectful_and_Responsible_Relationships:_There's_No_App_for_That.

In Quebec, Bill 56, *An Act to prevent and stop bullying and violence in school*, came into force on June 15, 2012 and requires schools to implement an anti-bullying plan, while conferring upon principals the authority to expel repeat offenders.

In many cases, such legislative developments are part of a broader public strategy to address bullying, involving law enforcement and civil society organizations. In at least one community, a local government has imposed a bylaw to impose sanctions against acts of bullying.

Federal Responses

Federal Working Group Recommendations

The recent report, *Cyberbullying and the Non-consensual Distribution of Intimate Images*,⁵ developed by the Federal/Provincial/Territorial Cybercrime Working Group (CWG), explored the scope of cyberbullying in Canada, its impact on victims, existing legislative and policy responses, as well as options for *Criminal Code* reform to address the issue.

UNICEF Canada was pleased with the CWG's conclusions that the *Criminal Code* offences generally cover most serious bullying behaviour (by people of all ages) and its recommendation that a new specific *Criminal Code* offence of bullying or cyberbullying is not required. The CWG also identified that, given the challenges presented by the current digital environment, the *Criminal Code* could be enhanced.

The CWG concluded that a gap exists in the *Criminal Code* regarding the non-consensual distribution of intimate images and recommended the creation of a new criminal offence to address this void. In our view, this approach is preferable to charging youth with the offence of possessing, making, accessing or transmitting child pornography, as this should only be reserved for the most extreme cases.

UNICEF Canada also supports the Federal working group's recommendation that if the Federal government moves to legislate in this area, the provinces and territories should be engaged and consulted on any legislative proposals. This is a multilayered issue that requires careful and comprehensive consultation and greater cross-national consistency.

Bill C-540 - An Act to amend the Criminal Code

The introduction of federal (Private Member's) Bill C-540, *An Act to amend the Criminal Code (non-consensual making or distributing of intimate images)*, is intended to curb cyberbullying and includes a number of proposals using criminal law. However, UNICEF Canada has a number of concerns with this approach to closing perceived legal gaps and imposing tougher punishments against children convicted of the proposed offences.

The swift introduction of Bill C-540 does not allow for the kind of comprehensive, and necessary, consultation with provinces and territories recommended in the Federal CWG report. It also fails to take into account the recommendations of the December 2012 Standing Senate Committee on Human Rights' study on cyberbullying, *Cyberbullying Hurts: Respect for Rights in the Digital Age*.⁶ Considering the rush to legislative proposals and the implications for young people, consultation is particularly important to ensure legislative changes are evidence-based and appropriate.

Bill C-540 proposes maximum penalties far in excess of those recommended by the Federal working group. More specifically, the Bill's present form sets 10 years imprisonment for an indictable offence and 18 months for a summary conviction offence, compared to the CWG's recommendation of 5 years and 6 months respectively.

⁵ Available at: <http://www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/pdf/cndii-cdncii-eng.pdf>.

⁶ Available at <http://www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf>.

Of further concern, Bill C-540 circumvents the working group's recommendation that the creation of the offence of the non-consensual distribution of intimate images should be based on the policy objective of protecting against privacy violations – not on the policy objective of protecting against particular conduct undertaken with a specific intent (e.g., a malicious intent). The proposed amendments in Bill C-540 require proof of malicious intent while reversing the onus onto the accused to demonstrate the absence of malice, thereby inviting a potential *Charter* challenge.

Criminal Code of Canada

While there remains no specific provision in the *Criminal Code* for bullying, including cyberbullying, these acts can be consonant with a wide range of criminal behaviour contained within several provisions of the *Code*. Depending on the nature of activity involved, the following provisions may apply in such cases:

- criminal harassment (section 264);
- uttering threats (section 264.1);
- intimidation (subsection 423(1));
- mischief in relation to data (subsection 430(1.1));
- unauthorized use of computer (section 342.1);
- identity fraud (section 403);
- extortion (section 346);
- false messages, indecent or harassing telephone calls (section 372);
- counseling suicide (section 241);
- defamatory libel (sections 298-301);
- incitement of hatred (section 319); and,
- child pornography offences (section 163.1).

At the same time, as highlighted by both the CWG and Bill C-540, a gap remains in the *Criminal Code*'s treatment of non-consensual 'sexting'.

(Emerging) International Responses

As we know, the issue of cyberbullying is not unique to Canada and affects children and youth around the world. While there are many benefits to consulting and engaging with other jurisdictions in Canada, it is also highly beneficial to learn from the experiences of other jurisdictions abroad such as Australia, New Zealand, the United States and the United Kingdom as they also grapple with this complex issue. For instance UNICEF's report, *Child Safety Online: Global Challenges and Strategies*,⁷ distils current international research about cyberbullying to equip policymakers, professionals, families and business to respond.

While a detailed analysis of international policy responses is beyond the scope of this document, we highlight below an instructive report and recommendations proposed for a state government in Australia:

Law Reform Committee Report on Sexting – Australia

In May 2013, Victoria's Law Reform Committee released the final report for its 'Inquiry into Sexting',⁸ prompted by media reports of youth being charged with child pornography offences

⁷ Available at:

http://www.unicef.ca/sites/default/files/imce_uploads//TAKE%20ACTION/ADVOCATE/DOCS/Child_Safety_online_Global_challenges_and_strategies.pdf

⁸ Available at:

http://www.parliament.vic.gov.au/images/stories/committees/lawreform/isexting/LRC_Sexting_Final_Report.pdf

stemming from the transmission of explicit images of themselves or their peers, and public concerns that youth charged with such offences would become registered sex offenders.

The report sets out 14 recommendations for action by the Victorian Government, a number of which align, in principle, with UNICEF Canada's position on responding to the issue of cyberbullying, as highlighted throughout this document. Such recommendations include taking steps to:

- Periodically commission research to examine qualitative and quantitative aspects of sexting practices by children;
- Ensure all schools adopt holistic, integrated programs for internet and communications technologies awareness and safety into the school curriculum;
- Continue to encourage current and pre-service teachers to take part in professional development programs focusing on cybersafety education;
- Ensure that educational and media campaigns directed toward sexting focus on the appropriateness of the behaviour of people who distribute intimate images or media without consent, rather than on the person who initially creates the intimate images or media; and,
- Consider establishing a body ('Digital Communications Tribunal') to deal with complaints about harmful digital communications.

Position of UNICEF Canada

In summary, while "anti-bullying" legislation is on the rise in Canada, it is only one part of the solution, and where such legislation focuses on education and prevention, there is a greater chance that it will be successful. Where such legislation, however, focuses on imposing tougher punishments against cyberbullies, it is more likely to have serious negative consequences for minor youth and should be designed to provide for the developmental stage of adolescence, progressive consequences, and the most serious or extreme cases.⁹

The focus of public response should be on effective education of young people and other responsible actors. A 'systems' approach to strengthening the protective environment is integral to addressing bullying and cyberbullying. Most importantly, a 'systems' approach is rights-based, inclusive and requires less focus on punishment and more on education, awareness and prevention to help our children become more informed and responsible citizens online.

The December 2012 Senate study on cyberbullying heard from dozens of Canadians of all ages and found no evidence that tougher punishments would end cyberbullying or prevent it. Since most cyberbullies are children and youth, we would be punishing young people without any assurance that other youth would be discouraged from engaging in similar behaviour. That same Senate Committee report called for: the federal government to coordinate a national anti-bullying strategy with provincial and territorial counterparts; the implementation of restorative justice programs (including mediation between victim and bully); and a strong collaboration with industry to make the Internet safer for children.

There is also the concern that this growing constellation of anti-bullying legislation is being developed and implemented in a fragmented capacity without the sharing of best practices and evidence-informed research from one jurisdiction to another. Cyberbullying is a national issue and is not unique to specific provinces or territories. For this reason, there is a need for greater consultation and collaboration throughout this process and for the development of a coherent national strategy to address bullying and cyberbullying.

⁹ See also UNICEF Canada OP ED at <http://www.theglobeandmail.com/commentary/new-laws-and-tougher-punishments-wont-end-cyberbullying-we-need-to-get-involved/article11744424/>.

The need for a national, unified approach to these issues further demonstrates the importance of establishing an independent national Children's Commissioner who would be best suited to research, collect necessary data and disseminate appropriate education and awareness materials.

In UNICEF's recent Report Card 11, Canadian children ranked 21st of 29 nations in incidence of bullying. Canada must examine what other countries with lower rates, such as Italy, Sweden and Spain, are doing right, so we can prevent more pain, loss and senseless death.

Finally, while Canada's *Criminal Code* largely addresses the criminal conduct associated with cyberbullying, we encourage the federal government and provincial/territorial governments to use a standardized Child Rights Impact Assessment (CRIA) process before further legislation, policy and practice are developed on this and other issues concerning children in order to achieve better outcomes and avoid unintended negative consequences.