



THE CAYMAN ISLANDS LAW REFORM COMMISSION



BULLYING: LEGISLATION, POLICY OR BOTH?

FINAL REPORT

5TH NOVEMBER, 2020

THE CAYMAN ISLANDS LAW REFORM COMMISSION

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ACKNOWLEDGEMENTS

The Law Reform Commission extends thanks to all stakeholders and the general public for the valued contribution leading up to the conclusion of this Final Report on the incidence of bullying in schools.

FINAL REPORT

BULLYING: LEGISLATION, POLICY OR BOTH?

INTRODUCTION

1. In accordance with section 12 of the Law Reform Commission Law (2019 Revision), the Law Reform Commission (the Commission) submits for the consideration of the Honourable Attorney General its Final Report entitled “**Bullying: Legislation, Policy or Both?**”.
2. This Final Report contains recommendations which seek to respond to the issues that relate to bullying behaviour in public and private schools and is supported by the “*Education (Amendment) Bill, 2020*” and the “*Anti-Bullying (Schools) Regulations, 2020*”.

RESEARCH AND CONSULTATION PROCESS

3. The research of the Commission into the issue of bullying in schools included an examination of –
 - (a) what constitutes bullying;
 - (b) the different types of bullying;
 - (c) the causes of bullying;
 - (d) the legal issues to consider when dealing with bullying;
 - (e) the persons who should be held accountable for bullying;
 - (f) bullying legislation in other jurisdictions; and
 - (g) policies that assist in the regulation of bullying conduct.
4. The research findings of the Commission resulted in the formulation for consultation of –
 - (a) an Issues Paper, entitled – “Bullying: Legislation, Policy or Both?”;
 - (b) an *Education (Amendment) Bill, 2019*; and
 - (c) an *Anti-Bullying (Schools) Regulations, 2019*.
5. The Issues Paper was published for general public comment and was also forwarded to –
 - the Cayman Islands Law Society (now Cayman Islands Legal Practitioners Association);
 - the Ministry of Education, Employment & Gender Affairs (now Ministry of Education, Youth, Sports, Agriculture and Lands);
 - the Family Resource Centre;
 - the Save Our Youth Foundation;
 - the Department of Children and Family Services; and
 - the United Against Bullying Foundation.
6. Stakeholders and members of the general public were accordingly invited to respond to the issues and questions identified in the Issues Paper.
7. The consultation period on the Issues Paper commenced on 20th January, 2016 and concluded on 2nd May, 2016. During the period, the Commission acceded to requests by various stakeholders

to extend the time for submission of comments. By the end of the consultation period, the Commission received responses from the following persons and organisations -

- Christen Suckoo of Ministry of Education, Employment & Gender Affairs;
- Cindy Blekaitis of Employee Assistance Programme;
- Deborah Bodden of Cayman Islands Human Rights Commission;
- George Roper of Save Our Youth Foundation;
- Gerry Robinson;
- Joan West-Dacres of National Drug Council;
- United Against Bullying Foundation; and
- A Private Individual.

8. Submissions received by the Commission on the Issues Paper were relied upon in the formulation of the proposed *Education (Amendment) Bill, 2019* and *Anti-Bullying (Schools) Regulations, 2019*, both of which were published for general public comment and were specifically forwarded to –

- the Cayman Islands Legal Practitioners Association;
- the Ministry of Education, Youth, Sports, Agriculture and Lands;
- the Family Resource Centre;
- the Save Our Youth Foundation;
- the Department of Children and Family Services; and
- the United Against Bullying Foundation.

9. Stakeholders and members of the general public were invited to respond to the provisions of the *Education (Amendment) Bill, 2019* and *Anti-Bullying (Schools) Regulations, 2019*.

10. The consultation period on the proposed legislation commenced on 17th July, 2019 and concluded on 16th September, 2019. During the period, the Commission acceded to requests by the various stakeholders to extend the time for submission of comments. By the end of the consultation period, the Commission received responses from the following persons and organisations –

Organisations-

- The Alex Panton Foundation;
- Cayman Islands Legal Practitioners Association;
- National Drug Council;
- Colours Cayman;
- Cayman Islands Government Primary School Principals;
- United Against Bullying Foundation;
- Ministry of Education, Youth, Sports, Agriculture and Lands; and
- Human Rights Commission.

Individuals-

- Dr. John Epp;
- James Reeves;

- Parent “Stop and Now”;
- Shane Blake, Counsellor of Cayman Prep and High School;
- Colleen Coles, Teacher of Cayman Prep and High School;
- Jason Webster, Policy Coordination Unit, Cabinet;
- Jonelle Campbell, Parent; and
- Paulette Smith, Concerned Citizen.

ISSUES EXAMINED

Definition of Bullying

11. In the Issues Paper, the Commission pointed out that bullying behaviour among children and adolescents was becoming more recognised world-wide and noted that various mediums such as print and electronic media highlighted the occurrences of bullying. It was indicated that as a consequence, numerous studies were conducted at a global level into bullying behaviour and several initiatives were developed and implemented in various jurisdictions to manage this type of conduct. The areas of focus included types of bullying that occur (whether it be direct, indirect or sexual) and the prevalence, impact, and demographic differences of bullying.

(a) Bullying

12. Bullying was 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.¹ Bullying occurs when one individual or a group targets another individual repeatedly over time, using physical, verbal or psychological aggression to dominate the victim.² 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.

13. Bullying behaviour 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.³

14. 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.⁴

15. The examination by the Commission emphasised that the Cayman Islands are not immune to bullying conduct and that incidents of bullying occur locally and in many different forms. The Government, through the Ministry of Education, Youth, Sports, Agriculture and Lands has

¹Developmental Continuum of Bullying prepared by Pepler and Craig, 2000.

²“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).

³Craig, W. M. (1998). The relationship among bullying, victimization, depression, anxiety, and aggression in elementary school children. *Personality and Individual*.

⁴Beran, T. & Lupart, J. The Relationship Between School Achievement and Peer Harassment in Canadian Adolescents: The Importance of Mediating Factors.

articulated its policy commitment to deal with school discipline and behaviour including behaviour relating to bullying. The Commission also took note of the efforts of several local organisations⁵ 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.

16. When the issue of bullying is raised, often times some of the common statements⁶ 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”.
17. 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.⁷ Victims of bullying may experience headaches, trouble sleeping, anger, suicidal tendencies, substance abuse and academic challenges.
18. Given these serious consequences, the Commission supported the view that every instance of bullying or conduct which may evolve into bullying can no longer be dismissed as just “kids joking around”.⁸

(b) Cyberbullying

19. The Commission extended its research to the advancements in technology which 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 includes spreading rumours, making harmful comments and posting or circulating pictures or videos without permission. This can include, texting, sexting, sending nude or suggestive photos.⁹ Indeed, the common ways of engaging in cyberbullying are through social networks, instant messaging, websites, email or other electronic media. Given the ability of cyberbullying 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”.
20. The Commission noted that 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 negative effect on the school climate and relationships, even if it originates off school property.¹⁰

⁵For 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.

⁶Langevin, M. (2004). *New Bullying Bylaw Targets Bystanders*.

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

⁸Nova Scotia Department of Education (2011).

⁹ 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>.

¹⁰Dan Olweus, *Bullying at School*, *supra*.

Causes of Bullying

21. The Commission reviewed several studies¹¹ which have suggested that children who engage in bullying are at risk of developing long-term problems with aggression, anti-social behaviour and substance abuse. It was found that some of the factors that contribute to bullying are –

(a) Isolation

22. 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.¹²

(b) Parenting

23. 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 can give rise to bullying. 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.¹³ As a result, children who bully lack the social skills, perceptions and responsibility that would allow them to be less aggressive and self-centred in their interactions with others.

(c) Technology

24. Arguably the inescapable technology of today has perhaps been a significant contributor to bullying. Technology allows young people, in particular, to have fewer inhibitions online and as such they may exhibit different personalities whilst online.¹⁴ It has been contended that technology has levelled the playing field and the “computer nerds” can get even with their bullies by harassing them online.¹⁵

Legal Consequences of Bullying

25. The Commission questioned whether the legal consequences of bullying behaviour are fully understood or appreciated. Bullying, it was 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.¹⁶

(a) Bullying and the Criminal Law

¹¹2010 report produced by the Ontario Ministry of Children and Youth Services.

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

¹³Michael Ungar, *ibid.*

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

¹⁵*Ibid.*

¹⁶Eric Roher, “Problems.com: The Internet and Schools” (2002) 12 Educ Law J 53.

26. The Commission 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 and questioned:

- (a) whether such an act, should, without more, be made criminal and thus attract criminal sanctions; or
- (b) whether the degree of criminality should 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.¹⁷

27. It was noted that 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*¹⁸ 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.¹⁹ The purpose of the offence is to protect the privacy a person has in his or her nudity or sexual activity.

28. 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.

29. 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;
- Uttering threats;
- Intimidation;
- Mischief in relation to data;
- Unauthorized use of a computer;
- Identity fraud;
- Extortion;
- False messages, indecent or harassing telephone calls;
- Counselling suicide;
- Incitement of hatred; and
- Defamatory libel.

30. Some of these offences are covered in the Cayman Islands *Penal Code*²⁰, *Information Communications Technology Authority Law*²¹ and the *Computer Misuse Law*.²²

¹⁷See Penal Code (2013 Revision).

¹⁸R.S.C., 1985, c. C-46.

¹⁹This offence came into force on March 10, 2015.

²⁰(2013 Revision).

²¹(2011 Revision).

²²(2015 Revision).

(b) Bullying and the Civil Law

31. In applying the law of negligence to the various responsibilities of the Government and school boards, the Commission submitted 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.
32. 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 is to be educated in a safe and non-discriminatory environment.

(c) Bullying and School Jurisdiction

33. The Commission discussed the complex issue of 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.
34. 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.
35. 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.
36. 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.

(d) Cyberbullying, Defamation and Free Speech

37. The Commission noted 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, in enforcing regulation on bullying, 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.
38. 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.²³

39. 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 Islands Constitution²⁴.
40. The Commission however found that 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

41. The Commission put forward the view that bullying should also be examined from a human rights perspective. The Commission submits 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 Articles 3 and 26 of the Universal Declaration of Human Rights 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 United Nations Convention on the Rights of the Child (Articles 19, 28, 29 and 40);
 - the International 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).
42. In particular, Article 29(1) of the United Nations Convention on the Rights of the Child (UNCROC) 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,

²³Shaheen 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.

²⁴Order, 2009.

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.

43. Essentially, Article 29 of UNCROC 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. As pointed out by the Committee on the Rights of the Child, “children do not lose their human rights by virtue of passing through the school gates.”²⁵

44. 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 rights²⁶ 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.

45. There are several other Articles in the UNCROC 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).

46. The signing and ratification of the UNCROC by the United Kingdom²⁷ 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”²⁸ and to ensuring 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.”²⁹

²⁵See online at: <https://www1.umn.edu/humanrts/crc/comment1.htm>.

²⁶United Nations Committee on the Rights of the Child (2001).

²⁷Signed 19th April, 1990 and Ratified 16th December, 1991.

²⁸UNTS 1577/3; Ratified by Canada 1992, Can TS 1992 No 3 at Article 3.

²⁹Article 12, Convention on the Rights of the Child.

47. 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

48. The Commission determined that the Cayman Islands Constitution³⁰ is consistent with the various international conventions with respect to the right to education and personal liberty and as such the Government is duty bound to act accordingly. 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 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.

49. 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

50. Section 13 of the *Education Law, 2016* 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. The Commission however questions 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. The Commission posed the question – “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?”

51. Under the Children Law³¹ “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.

52. 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 behaviour.

Bullying Legislation in Other Jurisdictions

53. The Commission examined the position in several jurisdictions, notably Canada, the United States and Australia, which have undertaken substantive measures on bullying.

³⁰Order 2009.

³¹(2012 Revision).

(a) Canada

54. In Canada, bullying is dealt with under the *Education Act, 2007*³² and *Accepting Schools Act, 2012*³³.

(b) United States

55. 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 policies.

(c) Australia

56. The Commission noted that in Australia, 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* in June 2011.³⁴ This report dealt with the issue of bullying. 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.

57. 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.³⁵

(d) United Kingdom

58. The United Kingdom does not currently have laws pertaining to school bullying. Instead, authorities interpret various laws 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.³⁶ For example, the *Protection from Harassment Act (1997)* may be of use if the bullying occurs frequently. Other Acts relevant to bullying within the school system include: the *Criminal Justice & Public Order Act (1994)* and the *Malicious Communication Act (1988)*.

Policies

59. The Commission noted 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.³⁷ Perhaps “the best approach is to build upon a child’s assets and invest your energies in fostering healthy social relationships”.³⁸

³²Education Amendment Act (Progressive Discipline and School Safety), SO 2007, C. 14.

³³ S.O. 2012, C. 5.

³⁴ See online at: https://www.aph.gov.au/Help/Federated_Search_Results?q=high-wire%20act

³⁵*Cox v NSW*, [2007] NSWSC 471.

³⁶The Dignity at Work Bill has been proposed to specifically address workplace bullying.

³⁷Shaheen Shariff, *Confronting Cyberbullying*, *supra*.

³⁸Dr. John LeBlanc of Dalhousie Medical School.

60. In this regard, the Commission is of the view that 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.
61. It is submitted that such policies must start from the public education system.³⁹ All young people in the Cayman Islands are legally obliged to come into contact with institutions of learning. In this respect, the Commission questioned whether reading, writing and mathematics should be the most fundamental skills that need to be taught in school or whether equal or greater emphasis should be placed on educating children about rights, responsibilities, empathy, respect, inclusiveness and diversity.
62. The Commission submitted that school policies and programs may need to be adapted to reflect an approach to learning which promotes more parental involvement, increases adult supervision, engages the school leadership and sends a firm message to the community that bullying issues will be addressed appropriately and in a timely and just manner.

RESPONSES TO THE ISSUES PAPER

63. Following upon the examination of the issues for consideration, the Commission raised several questions in order to gauge the views of respondents on whether bullying should be dealt with by legislation, policy or both. The relevant questions and answers provided by respondents are presented in **Appendix 1**.
64. The views of individual respondents varied. One stated that behaviour policy to control bullying behaviour in the schools is sufficient and that mandating legislation will leave no room for discussion.
65. Another respondent indicated that the current system has been failing due to the fact that schools are not mandated by law to comply with any prescribed policy to address the bullying behaviour. The respondent explained that after their child experienced several incidents of bullying, the school only addressed it in what was referred to as a “piecemeal fashion”. It was felt that a general Anti-Bullying Policy that is not only applicable to public and private schools, should be adopted along with the requirement for teachers, students and guardians to be properly educated and trained on how to address bullying behaviour.
66. Organisational responses likewise varied. The Save Our Youth Foundation was of the view that bullying behaviour should not be singled out without underlining the issues that affect students such as gangs, violence, juvenile delinquency issues, teen pregnancy, etc. The Foundation did not support having legislation to address this type of behaviour.
67. The Human Rights Commission expressed the views that legislation should be introduced to deal with bullying and cyberbullying and that bullying behaviour is a human rights issue. The Human Rights Commission touched on the obligation that the state has, which is to provide an education to every child and further to protect a child’s physical and mental wellbeing whilst in the state’s

³⁹Bill Belsey, Presentation to the Senate Committee on Human Rights dealing with cyberbullying, *supra*.

care. Additionally, the Human Rights Commission expressed that the importance attached to education should be explicitly provided in the preamble of the law.

68. The Commission relied on its examination of the issues and responses to the questions posed in the Issues Paper to formulate the consultation *Education (Amendment) Bill, 2019* and the *Anti-Bullying (Schools) Regulations, 2019*. The Bills are attached as **Appendix 2** and **Appendix 3** respectively.
69. Attached as **Appendix 4** is a table which reflects the comments from stakeholders on the Bills and the actions taken by the Commission in response to the comments. As a general note, the responses to the legislation were mixed. Some respondents viewed the proposals as a significant step in the correct direction and suggested a few refinements. Others viewed the proposals as impractical, difficult to administer and not addressing the core issue.

RECOMMENDATIONS FOR REFORM

70. Further to the views emerging from the consultation process and drawing from the modern legislative models adopted by other jurisdictions, the Commission recommends a legislative framework to address bullying in schools in the form of amendments to the *Education Law, 2016* and which will be supported by regulations that focus on the formulation of anti-bullying policies and establishment of administrative measures.

Amendments to the Education Law, 2016 to facilitate an Anti-Bullying Policy

71. In relation to the *Education Law, 2016* the Commission recommends the following amendments as contained in the proposed *Education (Amendment) Bill, 2020* to make provision for the introduction of an Anti-Bullying Policy.
72. The *Education Law, 2016* does not contain an enabling provision to address an Anti-Bullying Policy. The Commission therefore recommends an amendment to the Education Law⁴⁰ to require every school to put in place a written Anti-Bullying Policy based on national policy and other prescribed requirements, that includes the disciplinary penalties to be imposed or other disciplinary action to be taken against persons subject to the legislation and the procedures for the enforcement of the disciplinary penalties or other action.
73. It is also recommended that policy oversight measures be included as a means to ensure that the policy formulated by a school meets the minimum requirements of the legislation. In this regard, schools should be required to submit their Anti-Bullying Policy for approval by –
- (a) the Department, in the case of a Government school;
 - (b) the governing body of an assisted or independent school; and
 - (c) the Ministry of Education and the Education Council.
74. In order to facilitate the effective implementation of an Anti-Bullying Policy it is recommended that Cabinet be empowered to make regulations prescribing –
- (a) the contents of an Anti-Bullying Policy;

⁴⁰2016.

- (b) the reporting and notification requirements;
- (c) the investigation procedures in relation to bullying;
- (d) the type and form of the disciplinary penalties to be imposed or other disciplinary action to be taken;
- (e) the procedures for the enforcement of the disciplinary penalties or other disciplinary action;
- (f) all matters that may be necessary for giving effect to any disciplinary mechanisms; and
- (g) the submission of reports on bullying.

Introduction of Anti-Bullying Regulations

75. In support of amendments to the Education Law⁴¹ the Commission recommends the introduction of regulations which will take the form of the proposed *Anti-Bullying (Schools) Regulations, 2020*.

76. It is proposed that the regulations contain the following definitions -

Definitions

(1) Bullying

77. The Commission recommends that bullying be defined as any repeated conduct by a student where the conduct is intended by that student to have or that student ought to know that the conduct would likely have the effect of —

- (a) causing physical, emotional, psychological or social harm to another student;
- (b) placing another student in reasonable fear of physical, emotional, psychological or social harm;
- (c) placing another student in reasonable fear of damage to that student’s property;
- (d) creating an intimidating, threatening, hostile or abusive educational environment for another student;
- (e) disrupting the academic progress of another student;
- (f) damaging the reputation of another student; or
- (g) infringing on the rights of another student to participate in school activities.

78. For purposes of the definition it is proposed that conduct include any verbal, written, electronic or physical action. It is also proposed that in making a determination as to whether any repeated conduct properly constitutes an act of bullying, all the circumstances surrounding the conduct should be taken into account.

(2) Parent, School Staff, and Student

79. For legislation to be effective, several categories of persons need to fall within the scope of the regulations both in terms of vulnerability and accountability. These include parents, school staff and students. In order to provide certainty with respect to the persons covered under the legislation it is proposed to define:

- (a) “parent”, as including a legal guardian;

⁴¹2016.

- (b) “school staff” as a person employed to work at the school or a person who volunteers their time to provide a service at the school; and
- (c) “student” as a person who is enrolled or attends classes at a school.

Contents of an Anti-Bullying Policy

80. While the Commission believes that a school should be permitted to formulate an Anti-Bullying Policy which is consistent with that school’s circumstances, the Commission recommends that at minimum, an Anti-Bullying Policy should contain key inescapable provisions in order for the policy to be relevant and enforceable. In particular, it is proposed that the contents of an Anti-Bullying Policy should include provisions which -

- (a) Contain prohibitions in relation to –
 - (i) the places where bullying may occur;
 - (ii) the use of telecommunication networks to facilitate different forms of bullying;
 - (iii) the use of written or verbal communication or unwanted physical contact to facilitate bullying; and
 - (iv) retaliating against someone who reports bullying conduct.
- (b) Establish procedures and where relevant, strategies for —
 - (i) reporting, (whether or not anonymously) and investigating bullying;
 - (ii) restoring a sense of safety for a victim of bullying and assessing the victim’s need for protection; and
 - (iii) providing counselling or referrals to appropriate services for students, family members and other persons affected by bullying.
- (c) Provide for the delivery of anti-bullying programmes, interventions and other support mechanisms to the school staff, students and parents by social workers, psychologists or other professionals who have relevant training and qualifications.
- (d) Provide, where relevant, for the education and training of students, parents and school staff about –
 - (i) bullying, the anti-bullying policies of the school and how parents can provide support and reinforce such anti-bullying policies within the household;
 - (ii) actions required to be taken by school staff to prevent and respond to bullying behaviour;
 - (iii) the systems for the anonymous reporting of acts of bullying or retaliation;
 - (iv) the connection between mental issues and bullying conduct; and
 - (v) strategies for promoting a positive school climate.
- (e) Promote a positive school climate that is inclusive and accepting of all students irrespective of sex, race, colour, language, religion, social class, political or other opinion, national or social origin, association, age, mental or physical disability, property, birth, sexual orientation, gender identity or other status.
- (f) Require the utilisation of surveys to collect information on school bullying from its students, school staff and parents of the students at least once every year.

- (g) Require the maintenance of a record of relevant information and statistics on acts of bullying or retaliation in school and reports of bullying.
- (h) Require the imposition of disciplinary penalties against a student who engages in bullying or retaliation as a result of a report made about bullying including —
 - (i) detention;
 - (ii) suspension;
 - (iii) expulsion; and
 - (iv) exclusion.
- (i) Provide for appropriate action to be taken against a student who —
 - (i) witnesses conduct which may constitute bullying or retaliation and fails to make a report to the school leader or a member of the school staff; or
 - (ii) makes a false allegation of bullying or retaliation knowing there is no basis to make the allegation.

Notification of an Anti-bullying Policy

81. The Commission recommends that a school's Anti-Bullying Policy be brought to the attention of school staff, students and parents by providing these persons with a copy of the policy and also posting the policy on the school walls and official website of the school.

Role of the Department, governing body and school leader

82. The Commission recommends the introduction of provisions which identify the role of the Department, in the case of public schools and the governing body, in the case of independent and assisted schools when dealing with the prevention of bullying. In this regard, it is proposed that the role of the Department and government body should include the establishment of –
- (a) procedures to ensure compliance with the regulations;
 - (b) oversight mechanisms to ensure that anti-bullying policies are implemented and observed;
 - (c) systems to receive and deal with reports from schools on incidents of bullying; and
 - (d) training opportunities in preventing and responding to bullying.

83. The role of a school leader with regard to an Anti-Bullying Policy should also be made clear in regulations. It is proposed that a school leader shall be responsible for the implementation and oversight of the regulations and the policies to respond to bullying.

School staff and student reporting

84. The Commission recommends the imposition of a reporting obligation, in written form, on school staff in the exercise of that school staff member's general duty of care towards a student who is or was being subjected to bullying or retaliation.
85. It also recommended that an obligation should be imposed on a student to report to the school leader or member of the school staff any act of bullying or act of retaliation witnessed by that student, or that has come to that student's attention.

Investigations

86. An important element of any anti-bullying legislative framework are the investigative mechanisms to ensure effectiveness of the policy. In this regard, it is recommended that a school leader, on receiving any report on bullying shall –
- (a) immediately investigate the circumstances surrounding the conduct and take such measures as are appropriate to protect the victim during the course of the investigation;
 - (b) within twenty-four hours of receiving a report, notify the parents of the affected parties with respect to the details of the conduct; and
 - (c) if deemed necessary, refer a bullying incident to the Department or the governing body for guidance.
87. It is also recommended that a school leader should be required, within seventy-two hours of concluding an investigation, to communicate the outcome of the investigation to the persons who made the report unless the school leader is of the opinion that it would be inappropriate to do so.
88. Further, it is recommended that the communication refer to matters such as findings, protective measures and disciplinary penalties with respect to the conduct.
89. Where an incident of bullying or retaliation involves students from more than one school, it is recommended that the school leader first informed of the bullying or retaliation, within twenty-four hours, notify the school leader of the other school so that both schools may take appropriate action.
90. In circumstances where the instruction is that a parent participate in a bullying intervention program and that parent refuses, it is recommended that the school leader be empowered to notify the relevant authority so that appropriate action may be taken against the parent.

Disciplinary action against school leader and staff - Government, Independent and Assisted Schools

91. The Commission is cognisant that without appropriate sanctions to ensure compliance with any legislative framework the objective of the regulation would be compromised. The Commission therefore recommends the following –
- (a) A school leader or a member of the school staff within a Government school who fails, without reasonable cause, to comply with their obligations under the regulations and the Anti-Bullying Policy of the school should be liable to such disciplinary action as may be determined by the Department including —
 - (i) in the case of a member of the school staff who is a civil servant, action permissible under the *Public Service Management Law (2018 Revision)* and the *Personnel Regulations (2019 Revision)*; and

- (ii) in the case of all other members of the school staff, suspension or termination of service.
- (b) A school leader or a member of the school staff within an independent and assisted school who fails, without reasonable cause, to comply with their obligations under these regulations and the Anti-Bullying Policy of the school should be liable to such disciplinary action as may be determined by the governing body of that school including the suspension or termination of service of the school leader or the member of the school staff.

Reporting to the Department, governing body, Ministry and Education Council

92. As an overarching oversight mechanism, the Commission recommends that a school leader –

- (a) Update or revise the anti-bullying policies and procedures of the school in accordance with a written request made by the Department, the governing body, the Ministry or the Education Council.
- (b) At the end of each school term but not later than the commencement of the subsequent school term, submit a written report to the Department, in the case of a government school or to the governing body, in the case of an assisted and an independent school, containing details of —
 - (i) all reported incidents of bullying or retaliation;
 - (ii) the outcome of the bullying and retaliation investigations;
 - (iii) the disciplinary penalties imposed or other disciplinary action taken against a student;
 - (iv) the measures utilised to counsel the victim and the person who engaged in the bullying;
 - (v) the measures and outcome of the measures employed to prevent a recurrence of the bullying;
 - (vi) the measures imposed against a school leader, a member of the school staff or a parent for acting in contravention of the regulations; and
 - (vii) any other matter that may be required by the Department or the governing body.
- (c) Submit the report to the Ministry and Education Council for review and any other action that the Ministry, after consultation with the Education Council, deems appropriate.

Transitional provisions

93. Lastly, the Commission recommends the introduction of transitional provisions. It is proposed that such provisions provide that a school which was registered under the *Education Law, 2016* prior to the commencement of the regulations should, within nine months after the date of the commencement of the regulations —
- (a) ensure that the school’s Anti-Bullying Policy is formulated in accordance with the regulations; and
 - (b) where relevant provide the Department, the governing body, the Ministry and the Education Council with a copy of the school’s Anti-Bullying Policy.

CONCLUSION

94. The Commission understands that the problem of bullying is complex. Most children are exposed to some form of bullying in schools due to the unequal balance of power and influence that is so common in youth relationships and peer groups.
95. Research consistently shows that bullying increases in late childhood and peaks in early adolescence, specifically during middle school. Bullying in schools also typically takes place in unstructured settings such as the cafeteria, hallways, and playground during recess.
96. Students need school to be a positive climate where they feel safe. This reduces their own stress and potential aggression, allowing them to focus on the learning necessary for them to be successful in their lives.
97. The sentiments of respondents over the consultation period and also the views expressed by commentators in other public fora have been generally similar. The majority consensus is that the prevalence of bullying is exceptionally high in schools and social gatherings alike and that the physical, mental and emotional harm often caused by bullying conduct frequently leads to permanent damage for victims. Victims may equally face additional problems which result from the lack of treatment or counselling for the effects caused by bullying conduct.
98. The recommendations of the Commission seek to show that there are actions that students and school staff can take to prevent bullying in schools and to create a more positive school climate. The culture of school violence cannot be impacted by only working with bullies and victims alone. It takes consistent and united action by everyone — students, school staff, administrators, parents and Government.
99. The Commission’s legislative proposals are intended to guide that process. It is in this regard that the Commission supports an approach that consists of both legislation and policy as proposed and formulated to ultimately prevent the incidence of bullying.
100. Accordingly, the Commission recommends for consideration the *Education (Amendment) Bill, 2020* and the *Anti-Bullying (Schools) Regulations, 2020*. These are attached as **Appendix 5** and **Appendix 6** respectively.

APPENDIX 1
PUBLIC RESPONSES TO THE ISSUES PAPER

APPENDIX 2

CONSULTATION:
EDUCATION (AMENDMENT) BILL, 2019

APPENDIX 3

CONSULTATION:
ANTI-BULLYING (SCHOOLS) REGULATIONS, 2019

APPENDIX 4

PUBLIC RESPONSES TO THE CONSULTATION:

EDUCATION (AMENDMENT) BILL, 2019
AND
ANTI-BULLYING (SCHOOLS) REGULATIONS, 2019

APPENDIX 5
PROPOSED:
EDUCATION (AMENDMENT) BILL, 2020

APPENDIX 6

PROPOSED:
ANTI-BULLYING (SCHOOLS) REGULATIONS, 2020