

Addressing Cyberconduct

A Brief to the Department of Justice Canada



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Canadian Teachers' Federation
Fédération canadienne des enseignantes et des enseignants

Brief to the Canadian Ministry of Justice: Addressing Cyberconduct

Introduction

The Canadian Teachers' Federation (CTF) is the national voice of teachers representing over 220,000 teachers in primary and secondary schools across Canada. We are a national, bilingual umbrella organization, made up of 16 provincial and territorial Member organizations and one Affiliate Member.

We are appreciative of the opportunity to provide input to possible changes to the *Criminal Code of Canada* on issues related to the use of the internet and computer technology. The focus of our discussion, will be on issues related to the misuse and abuse of the technologies, or "cybermisconduct" directed toward students and teachers such as on-line harassment, cyberbullying and internet defamation.

We realize there are elements of existing criminal law, human rights legislation and the section of defamatory libel that can be applied to inappropriate use of electronic communications. In reality, however, they are not effectively applied. Hence the need for changes to existing legislation that specifically address the problems of online harassment, defamation and bullying that the new technological environment has facilitated. These changes would require: 1) a clarification of the application of existing law to cybermisconduct, and; 2) the development of new provisions that address elements of today's environment that existing law has never contemplated.

Studies are showing that in this new age of internet technology, cyberbullying and other forms of harassment is widespread amongst students from early school years to post-secondary. In a recent survey conducted by Associate Professor Faye Mishna from the Faculty of Social Work at the University of Toronto, 20% of students surveyed in grades 6 and 7 reported they had been cyberbullied. Somewhat paradoxically, 35% reported that they had bullied others online in the previous three months, and 28% reported watching someone as they were bullied online. Despite the obvious attraction to those who wish to remain anonymous, many of the students in the same survey (68%) who had been cyberbullied reported that they were bullied by a friend or a student at their school or another school. In the recent 2008 CTF National Issues in Education Poll, 34% of Canadians indicated they had knowledge of elementary-secondary students in their community being cyberbullied in the last year.

As well, incidents where teachers are the targets of cyberabuse continue to grow. In the survey conducted by Faye Mishna, 20% of the educators surveyed reported being threatened or harassed online. In the CTF survey cited above,

1 in 5 Canadians reported being aware of some elementary-secondary school teachers in their community being victims of cyberbullying.

Since some forms of cyberbullying may be criminal acts under the *Criminal Code*, Canadian courts are voicing serious concerns about the implications of bullying and intimidation in schools. Under Canadian law, it is a crime to communicate repeatedly with someone if your communication causes him or her to fear for their safety or the safety of others.

In 2007, the Ontario government introduced changes to the provisions of its Education Act applicable to suspension, expulsion and discipline. The changes became effective February, 2008. For the first time, bullying was listed as a specific infraction that could lead to suspension or expulsion. The legislation also broadens the scope of action beyond the school to include out of school activities. The documents accompanying the legislation make it clear that victims of bullying can include any member of the school community and the definition of bullying extends to cyberbullying.

Amendments to existing legislation may also be necessary to address the ability to block or remove illegal content on the Internet. The difficulty of identifying the origin of anonymous material, and the problems related to the distribution of illegal materials on the Internet are of concern to schools across the country. We believe it is necessary to have greater access to information held by Internet Service Providers, and a clear definition of cybermisconduct as a criminal offence.

We have consulted our Member organizations on these issues and many, in turn, have consulted legal counsel. A summary of their comments follows:

Criminal Code Amendments

The existing criminal law can be applied, to some extent, to address online harassment, cyberstalking and cyberbullying. Existing law currently includes hate propaganda, obscenity, criminal harassment, defamatory libel and communicating threats. The criminal harassment provisions apply most directly.

“Criminal Harassment: A Handbook for Police and Crown Prosecutors” available on the Department of Justice Canada’s website provides more details concerning possible applications of these provisions to cyberconduct.

In practice, though, criminal charges under section 264 of the Criminal Code are rare to address cases of online harassment directed at students and teachers.

Legislative amendments could therefore be considered to make the potential application of section 264 more explicit.

Defamatory Libel

Section 298 of the Criminal Code is rarely used. However, civil action for defamation can be taken regarding defamatory words that may have been posted against a student or teacher.

While it could be possible to consider more widespread use of defamatory libel provisions of the Code, balanced against this is the practical reality that these provisions are in disuse and it is perceived that their use is a heavy handed response.

Another approach could be to develop less serious offenses specifically directed at online harassment and/or defamation, and responsive to the need for a government reaction to this type of conduct.

Maybe the Code's existing provisions concerning false messages and indecent, harassing phone calls could provide a model for such an approach.

False Messages

Section 372 of the Code, under the section heading "Forgery and Offences Resembling Forgery" contains the following provisions:

False messages

372. (1) Every one who, with intent to injure or alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio or otherwise information that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Indecent telephone calls

(2) Every one who, with intent to alarm or annoy any person, makes any indecent telephone call to that person is guilty of an offence punishable on summary conviction.

Harassing telephone calls

(3) Every one who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls to that person is guilty of an offence punishable on summary conviction.

Section 372 (1) deals with an indictable offence with an existing usage consistent with its present appearance under the heading "forgery and forgery-like offences". It would seem appropriate to introduce a new Section dealing with cyberspace, rather than to attempt to bend the existing language to a new use.

Sections 372 (2) and (3) covering indecent and harassing telephone calls seem out of place under their present heading. However, it would be reasonable to amend them at least to cover forms of electronic communication other than the telephone.

It may be also be appropriate to consider the introduction of additional hybrid or summary conviction offences directly addressing the posting of false information on the Internet with the intent to cause injury or insult to another person.

Hate Propaganda

The Criminal Code's provisions regarding hate propaganda would, in extraordinary circumstances, be directly engaged by conduct arising in schools. However, it is notable that these provisions, along with the Criminal Code's sections on child pornography, contain recently introduced provisions expressly aimed at securing information concerning the identity of persons posting materials on the internet, as well as a process for the removal from the internet of materials that may constitute hate propaganda or child pornography [Code Sections 320.1 and 164.1].

Section 320.1 reads as follows:

320.1 (1) If a judge is satisfied by information on oath that there are reasonable grounds for believing that there is material that is hate propaganda within the meaning of subsection 320(8) or data within the meaning of subsection 342.1(2) that makes hate propaganda available, that is stored on and made available to the public through a computer system within the meaning of subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to:

- (a) give an electronic copy of the material to the court;
- (b) ensure that the material is no longer stored on and made available through the computer system; and
- (c) provide the information necessary to identify and locate the person who posted the material.

Section 320.1 empowers a court to order the provision of information necessary to identify the person who posted the material. This may be useful for students and teachers in that many of the defamatory messages are posted anonymously.

Section 320.1 also sets out a procedure under which an opportunity is given to the person who posted the material to appear to oppose an order to delete the material, and in which a hearing is held for the court to determine whether to order the deletion of the materials or to rescind the order not to make them available through the computer system.

Consideration might be given to amendments to the Code that would extend provisions of this nature to any potential violation of the Criminal Code involving materials made available to the public through a computer system.

We note, however, that the RCMP have recently complained that the warrant process under 164.1 is too slow, and that certain internet service providers have relied on this law to refuse police requests for user identification information not supported by warrant.

The development of effective blocking provisions is of primary importance if the substantive law in this area is to have real world impact. There are two reasons for this. First, much of the material that constitutes online harassment, defamation or bullying is posted anonymously. Second, the removal of materials from circulation on the internet requires action by internet intermediaries including: the website on which materials are posted; the internet service providers that host that website, and; the search engines that host copies of external websites on their own servers. The result is that illegal on-line materials continue in public circulation well past the point at which they are removed from an originating website.

Recommendations

CTF has recently developed policy on cyberconduct and cyberbullying. The guiding principles are based on the premise that safe and caring schools that promote healthy workplaces for teachers and healthy learning environments for children and youth should be a national priority. Individual rights to freedom of information and the right to free thought, belief, opinion and expression, including freedom of the press and other media of communication, must be balanced with the rights and responsibilities of children and youth and those who are placed in positions of trust to protect them.

CTF policy speaks strongly to the need for education as a key element in addressing, preventing and protecting students and teachers from cyber-related harm. It also speaks to the roles and responsibilities of parents and guardians, schools, school boards and school districts, teachers, students, teacher organizations, ministries of education and government.

We are pleased that the Federal Ministry of Justice is examining this issue in addition to other possible forms of criminal behaviour that are facilitated by the Internet.

Canadian teachers are seeking the support of the Federal Ministry of Justice in recognizing the extreme impact of the misuse of technology, manifested in cybermisconduct and cyberbullying by:

- supporting public awareness campaigns that focus on appropriate cyberconduct and the prevention of cyberbullying;
- supporting amendments to the regulatory framework for the rating of films and video games to reduce the possibility of excessively violent products being sold to children and youth.
- supporting amendments to the *Criminal Code of Canada* that make it clear that the use of information and communication technology to convey a message that threatens death or bodily harm, or perpetuates fear and intimidation in another, constitutes a punishable offence under the *Criminal Code*;
- helping to enact new *information and communication technology / cybermisconduct and cyberbullying* legislation that protects teachers, students and others from harm;
- With respect to the last two points above, this brief makes specific suggestions on the following sections of the *Criminal Code*:
 - Section 264; Harassment
 - Section 298; Defamatory Libel
 - Section 372 (1), (2), (3); False Messages
 - Sections 320.1 & 164.1; Hate Propaganda

It is unreasonable and impractical to expect individual teachers or parents of a student who is the victim of cybermisconduct or cyberbullying to engage in very expensive litigation to protect the individual from persistent cybervictimization. CTF is asking Parliament to deliver a clear message that this reprehensible conduct is a crime which the state will prosecute.

We thank you again for the opportunity to provide input on this important issue.