

Episode 36: Summary

Episode name: Trolling, cyberbullying and catfishing

Guest(s): Judge Paul Conlon SC and Kent Park

What area(s) of law does this episode consider?

Criminal law, in the context of catfishing and addressing instances of harassment and abuse conducted through internet services.

Judge Paul Conlon SC discusses the legal reforms which are being explored in the increasingly complex and ever-evolving issue of tackling harassment and abuse occurring on social media and via the internet. This episode considers the Office of the eSafety Commissioner, a new government taskforce set up with the role of promoting online safety education for Australian young people, educators and parents as well as provides a mechanism, effective or otherwise, for victims of cyberbullying and online harassment to report illegal or offensive content, and how the law might change to create more tools for combatting online harassment.

In the second part of the episode, Kent Park discusses the legal complexities surrounding incidents of 'catfishing' where individuals create fake profiles online and present themselves as someone else in order to obtain some personal satisfaction or benefit whether that's sexual, violent, financial or otherwise.

Why is this topic relevant?

Sadly, we know that Australia has one of the highest suicide rates per capita in the world, and that suicide is the leading cause of death for all Australian aged between 15-44 years of age. And victims of cyberbullying are said to be twice as likely to attempt suicide and self-harm.

In Judge Paul Conlon SC's professional and personal experience assisting victims of cyberbullying and advocating for more effective legal responses to cyberbullying, he has observed the enormous harm that cyberbullying and trolling can have on the psychological wellbeing of even the most strong-willed adults.

Under the current laws activities such as online domestic abuse, child sex exploitation, stalking, violent extremism and other activities of a criminal nature are typically of a severity and a repeated nature to create sufficient evidence to enable a successful prosecution at State or Federal level. As such the existing criminal codes are sufficient to combat such criminal activity. However, cyber bullying does not often occur in a way that makes it a criminal offence and as such, makes prosecuting online trolls much harder.

Legislative changes were announced in December 2020, following the recording of our episode with Judge Paul Conlon SC. New laws proposed by the federal government in December 2020 could see individuals facing fines of up to \$110,000 and companies up to \$550,000 if they fail to take down abusive content within 24 hours. The new legislation will hand the eSafety Commissioner new powers, ranging from enforcement powers to issuing formal warnings or fines. The new powers will also enable the eSafety Commissioner to compel online platforms to provide more user account information, to try and better establish the identities of perpetrators.

The issue of cyberbullying, online harassment and abuse continues to prove a highly dangerous occurrence in modern society and will only grow more prevalent and pervasive an issue the longer it goes unchecked.

Catfishing is an equally important cybercrime issue and can have similarly devastating effects just like cyberbullying. Considering our modern day reliance on the internet for everything from storing our work or keeping up with family, from making new friends to finding life partners, it's no surprise that frauds, sexual predators and vengeful individuals have used the rise of online dating sites, chat rooms and social media platforms to manipulate others. Perpetrators prey on specific people or types of people in order to gain some personal satisfaction or gain, whether sexual, violent, financial or otherwise. In 2013 the ACCC estimated that of the \$90 million Australians lost to fraud, 30% of that amount was related to catfishing, highlighting the ever increasing prominence of this issue and the lack of appropriate legal solutions for victims. Currently catfishing can only be prosecuted under section 13 of the *Crimes (Domestic and Personal Violence) Act* or section 192E of the *Crimes Act* regarding 'obtaining financial benefit by deception', meaning many instances of catfishing result in no legal consequence for the perpetrator.

What legislation is considered in this episode?

Criminal Code Act 1995 (Cth) s 474

- This section of the Commonwealth Criminal Code provides that a person can be charged with using a carriage service to menace, harass or cause offence.
- This provision could naturally be used to bring about successful prosecution to a majority of cyberbullying offences, except for the fact that the law still generally requires that there to be an intention to cause harm, making it a lot harder to prosecute instances of harassment and bullying conducted through social media.

Crimes Amendment (School Protection) Act 2002 (NSW) s 60E

- Section 60E makes it an offence to assault, stalk, harass or intimidate any school or staff while attending the school.
- NSW is currently the only Australian jurisdiction to enact legislation that is specifically directed at addressing cyberbullying in schools

Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13

- This provision relates to the offence of 'stalking or intimidation with intent to cause fear of physical or mental harm' and has a maximum penalty of 5 years imprisonment.
- The prosecution is required to prove that the perpetrator actually intended to cause fear of physical or mental harm, meaning in catfishing cases it is impossible to prove where the identity of the perpetrator is unknown.

Crimes Act 1900 (NSW) s 192E

- Section 192E relates to the offence of fraud where (1) a person who by any deception dishonestly (a) obtains property belonging to another, or (b) obtains any financial advantage or causes any financial disadvantage.
- In relation to catfishing, this section offers a legal avenue for those who have suffered a financial loss due to catfishing, but obviously does not cover other deleterious incidents of catfishing that do not involve money, such as abuse, or where the perpetrator seeks to gain personal gratification, personal information or sexual images from the victim.

Criminal Code Amendment (Protecting Minors Online) Bill 2017 (Cth)

What are the main points?

- This Bill was colloquially referred to as 'Carly's law' following the tragic murder of 15-year-old Carly Ryan in 2007 by a middle-aged man who befriended her online after posing as a teenage musician. This provision makes it a crime for an adult to use a carriage service to commit an act in preparation for, or planning to, cause harm to or engage in or procure sexual activity with a minor. Importantly, this will include those who misrepresent their age.
- The offence carries a maximum of 10 years imprisonment.
- The Office of the eSafety Commissioner revealed in its 2018/2019 report that its 'Civil Penalties Scheme' which it had set up in September 2018 received 849 reports of online image-based abuse in the eight months following its commencement. In those eight months the Commissioner issued just one removal notice, three formal warnings and eight informal warnings.
- The sheer prevalence of cyberbullying and the fact that a significant percentage of the instances of cyberbullying involve young people make regulating the activity a more difficult and complicated task.
- While the words 'cyberbullying' and 'trolling' are sometimes used interchangeably, they are quite different. Trolling is quite often performed by a person without a clear relationship to their intended recipient. Their goal is to anger people by provoking a reaction out of them for their own entertainment. Cyberbullying, on the other hand, is more targeted and usually involves people who are familiar to each other, with the person bullying having a clear intention to cause harm to specific people repeatedly rather than a one-off incident.
- There are generally two types of catfishing:
 - Where the perpetrator causes mental harm or stalks the victim (prosecutable under s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)); and
 - Where the perpetrator seeks to obtain property from the victim (prosecutable under s 192E of the *Crimes Act 1900* (NSW)).
- Catfishing incidents usually occur over a period of a few months or years while the perpetrator gains the trust of the victim, often in the context of showing a romantic interest towards the victim in order to emotionally manipulate them and create a false sense of an actual relationship. Whilst many victims of catfishing feel embarrassed and other people wonder how they could have fallen for it, it's important to remember that catfish perpetrators are manipulative and insecure individuals that often prey on an individual's deepest desires and emotional needs, over an extended period, for their own satisfaction. It's important to recognise victims are just that: victims.
- The biggest issue in regards to catfishing cases is the anonymity of the perpetrator, which can also present jurisdictional issues whether they are located overseas and have hidden their online identity using a VPN. Even in cases where catfishing has occurred and the perpetrator's identity is known, the conduct may not have a corresponding offence with which to bring a case before the courts, such as with Renae Marsden.

What are the practical takeaways?

- When technology advances more rapidly than the legislation intended to regulate its use, it is important that legislators and policy makers are proactive in their response to the changing needs of society.
- Any effective legal solution to the issue of cyberbullying would need to strike a careful balance between protecting the safety and wellbeing of would-be victims and protecting the freedom of speech of social media users and lawful freedom of enterprise of the private host companies.
- Raising public awareness of cyberbullying is important in addressing the issue. However, since public vigilance to cyberbullying cannot be maintained indefinitely or be applied to every single instance of cyberbullying, any awareness raising campaign is toothless against the effectiveness of advocacy in flagging the importance of enacting legal reforms to address cyberbullying.
- The ACCC's Scamwatch report for 2020 recorded that \$40 million out of a total of \$175 million lost by Australians due to online scams fell within the category of 'dating and romance scams', the second largest category after investment scams.
- Imposing stricter identity and personal information requirements for social media platforms remains an ongoing area of debate as the legislature and academics in this field must consider the benefit of identifying online fraudsters against the public's right to privacy.
- The current eSafety Commissioner and other experts in this field have suggested that the best approach to deal with catfishing moving forward is to focus on better prevention rather than prosecution methods, by educating, particularly young people, about the tactics of online perpetrators and the importance of not sharing personal information.

Show notes

[Exposure Draft – Online Safety Bill 2020 \(PDF download\)](#)

[Fact Sheet – Online Safety Bill 2020 \(PDF download\)](#)

[60 Minutes Interview – Erin Molan](#)

[Dolly Everett Campaign – The Project](#)