NSW's Longest Serving Chief Magistrate Set to Retire

New South Wales' Chief Magistrate, Judge Graeme Henson AM, has announced he will be retiring in August 2021 after 33 years on the bench.

Judge Henson is the state's longest serving Chief Magistrate, having spent the past 15 years as the head of Local Court in New South Wales.

The judge is well known for his 'straight talking' and 'no-nonsense' style, as well as his contributions to the legal profession as a whole.

Passionate about justice

Throughout his career, Judge Henson has been a tireless campaigner for greater efficiency in the delivery of justice, gender parity on the bench, transparency in the court process, and the adoption of technology in a profession that is traditionally resistant to change.

He has also been a champion in supporting the mental wellbeing of magistrates by highlighting their heavy workloads and pressures, which can lead to stress and depression.

Over the years, Judge Henson has lobbied the state government to provide sufficient funding to the court hierarchy's busiest jurisdiction, in order to ensure the Local Court is able to achieve timely justice for all involved.

COVID-19

Since March 2020, the judge has steered the Local Court system through the challenges presented by COVID-19 – issuing directions and implementing a number of innovative measures to ensure the wheels of justice continued to turn in incredibly

difficult circumstances.

Moving with the times

The judge also participated in the Foxtel series Court Justice, which was filmed in the Downing Centre Local Court in 2017, giving audiences a 'fly-on-the-wall' experience of court proceedings in Australia's busiest courthouse.

The objective of the move was to help the public to better understand how the court process works and the various roles of those involved – including magistrates, criminal defence lawyers and police prosecutors.

Looking after those on the bench

In 2012, Judge Henson campaigned for a range of entitlements for magistrates, including a minimum two-week court break over the holiday season, as well as mid-year break for the Local Court Conference.

He has also championed extended long service leave, greater carers' leave entitlements and free travel on public transport.

An exceptional career

His Honour Judge Henson was admitted to the Bar in 1980.

He spent two years working for the Office of the Director of Public Prosecutions between 1986 and 1988, before being appointed a Local Court Magistrate.

The judge was appointed Deputy Chief Magistrate in 1994, Chief Magistrate of the Local Court in 2006, and a judge of the District Court in 2010 – the same year he was made a Member of the Order of Australia (AM).

He is a member of the Governing Council of the Judicial Conference of Australia and the Judicial Commission of New

South Wales.

Judge Henson is also a member of the Wollongong University Faculty of Law Committee and the Anglican Aged Care Board.

He will retire as Chief Magistrate on 27 August.

His replacement is yet to be announced.

The Offences of Child Sexual Assault and Incest in New South Wales

By Sonia Hickey and Ugur Nedim

The story of the Colt family made international headlines in 2012 when Police discovered about 40 relatives all living in an uninsulated shed, old caravans and tents on a NSW property near near Boorowa, New South Wales, with no electricity, running water or toilets.

At the time, twelve children were removed from the family and taken into care. Genetic testing was undertaken which showed that all but one of the children were the product of incest. It was documented at the time that the family comprised four incestuous generations.

Charges dropped

After a long investigation, police eventually charged several members of the Colt family in 2018.

However, in June this year, just as the men were about to face trial, prosecutors dropped a series of child sexual assault

charges against three male members of the family, Frank, Charlie and Cliff Colt (all pseudonyms).

Frank has, however, been found guilty of sexually assaulting a 17-year-old relative in the back seat of his car during a visit to the family farm near Yass in 2010. He still faces two allegations of sexually assaulting a child under 10, one of sexually assaulting a child aged 10 to 14 and another of sexually assaulting a person older than 16. He's also accused of indecently assaulting a child.

Cliff no longer faces any charges related to sexually assaulting a child under 10, but is still accused of sexually assaulting a person aged 10 to 14, two counts of indecently assaulting a child and one count of indecent assault.

Trial in Downing Centre District Court

Charlie Colt still faces six charges; sexual intercourse with a child under the age of 10, sexual intercourse with a child aged between 10 and 14, three counts of indecent assault against a child and one count of indecent assault.

In court earlier this week, Charlie Colt appeared by video link and pleaded not guilty to sexual intercourse with a person under the age of 10 and indecently assaulting a person under 16 years of age, between 2010 and 2012.

The court heard a police interview from 2012 in which the complainant, who was six at the time, took a "small, skinny stick" from a gun bag kept inside his tent and sexually assaulted her with it.

"I screamed really loud because it hurt", she said in the interview.

"He didn't say anything … just laughed."

The penalties for child sex offences in New South Wales

The law regards the act of having sexual intercourse with a person at least 10 but less than 16 years of age as a criminal offence under section 66C of the Crimes Act 1900 (NSW).

The law also regards that people under the age of 16 years are not able to give consent to sexual intercourse in NSW.

If the victim is aged under 10 years

Section 66A of the Crimes Act 1900 (NSW) prohibits a person from having sexual intercourse with a person under the age of 10. Anyone guilty of this offence will face a maximum penalty of life imprisonment.

If the victim is aged from 10 to 14 years

Section 66C(1) of the Crimes Act 1900 (NSW) prohibits a person from having sexual intercourse with another person aged 10 or more, but less than 14 years. Anyone guilty of this offence will face a maximum penalty of up to 16 years imprisonment. This offence also carries a 'standard non-parole period' of 7 years imprisonment.

If the offence is considered to be aggravated, the maximum penalty increases to 20 years imprisonment, with a 'standard non-parole period' of 9 years imprisonment.

Section 66C(5) outlines a list of aggravating factors, and includes any one or more of the following features at the time of the offence:

- Victim was deprived of his/her liberty;
- Victim's home was broken into with an intention to commit a serious offence carrying a penalty of up to 5 years imprisonment or more;
- Victim suffered a cognitive impairment, was intoxicated, or had a serious physical disability;
- Victim was under the offender's authority. i.e. parental or teacher and student relationship;

- There were others present at the time of the offence;
- The victim was threatened with injury;
- Victim sustained an assault resulting in some actual bodily harm.

Incest laws in NSW

Section 78A of the Crimes Act 1900 (NSW) prescribes a maximum penalty of eight years' imprisonment for anyone who 'has sexual intercourse with a close family member who is of or above the age of 16 years'.

A 'close family member' is defined as a parent, son, daughter, sibling (including a half-brother or half-sister), grandparent or grandchild, being such a family member from birth.

'Sexual intercourse' is defined by section 61H of the Act as:

- sexual connection occasioned by the penetration to any extent of the genitalia of a female person or the anus of any person by any part of the body of another person, or any object manipulated by another person, except where the penetration is carried out for proper medical purposes, or
- sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
- cunnilingus, or
- the continuation of any of the above.

Section 78B sets down a maximum penalty of two years in prison for attempting to commit incest.

Section 78C(1) contains a statutory defence to the charge where the defendant 'did not know that the person with whom the offence is alleged to have been committed was related to him or her, as alleged.'

In addition to this statutory defence, an accused person may

be able to rely on other legal defences such as duress (being forced to commit the act) or even automatism (an involuntary act) to defeat the charge.

Section 78C(2) makes it clear that consent is not a defence to the charge.

Finally, section 78F provides that a prosecution for incest, or attempted incest, cannot be commenced without the approval of the NSW Attorney-General.

COVID-19 and the NSW District Court: There's Light at the End of the Tunnel

By Sonia Hickey and Ugur Nedim

All jury trials in New South Wales were suspended in mid-March over concerns about the spread of COVID-19.

By the end of March, all judge-alone trials had also been suspended, along with many local court hearings and a number of other matters.

Over the past several weeks, many case-types cases such as a range of sentencing hearings have been conducted in a 'virtual' environment', with the court relying on the use of email, text and video-link.

But now, as the pandemic begins to show signs of easing and health authorities gain increasing confidence that life can return to some sort of 'normal', the New South Wales District Court has announced that juries will also resume on 15 June

2020 at Sydney's Downing Centre District Court and the Sydney West Trial Courts in Parramatta, as well as Newcastle District Court.

Health safeguards

The courts have assured that appropriate measures will be put in place to ensure physical distancing and protect the health of juries and others involved in court proceedings.

Potential jurors will be screened upon entry with a temperature check, before they fill in a required questionnaire. Anyone who is unwell should apply for an exemption from service.

In the courtroom itself, there is a designated jury box where – previously – jury members would sit for the duration of the trial. However, this rule has been relaxed, and jurors will be able to spread out across the courtroom.

The maximum number of people within the courtroom will be strictly limited so that people don't have to be near one another. Hand sanitisers, wash stations and individualised meals will be provided, and there will be an increase in commercial cleaning.

Selection of jurors and the appearance of other parties in the case will be by audio visual link.

The important role of juries

Juries are a critical part of the criminal justice system.

Trial by jury and the premise of being 'innocent until proven guilty' are fundamental rights, and the right to a trial by jury in the higher courts is one of the few rights guaranteed by the Commonwealth Constitution (section 80).

And for juries to function well, members of the community who are called to jury duty must take an active and engaged role

in the process.

In New South Wales, about 250,000 people are summoned each year to participate in jury duty, randomly selected from the electoral role.

Typically, a jury is made up of 12 jurors but sometimes juries of 15 are empanelled in cases expected to last more than three months.

Most criminal cases in the District and Supreme Courts are determined by a jury.

In the New South Wales District Court alone, there are about 1000 jury trials a year. Some large civil law cases and coronial inquests may also require a jury, although in these cases the numbers are usually limited.

How are jurors selected?

Jurors are selected from a large pool of potential jurors.

Once jurors are told about the case, they can leave the selection process if they believe that they cannot be 'impartial. Each potential juror is given a number and once 12 numbers have been called, the prosecution and each accused person can 'challenge' three potential jurors (the prosecution can challenge three potential jurors per accused person).

Under current guidelines – which may change – this selection process will now occur by audio-visual link.

In New South Wales no information about jurors, such as their background, profession or their views about any subject, is provided.

Once the selection is complete, all others who have come for jury duty are dismissed.

The role of the jury

The role of the jury in any trial is to hear the evidence and decide on guilt or innocence. They are called the 'fact-finders' in the case.

The judge's role is the arbiter of the law, which involves summing up the case and directing the jury as to the law.

Jury service in New South Wales is regulated by the Jury Act 1977 (NSW).

That Act sets out the rules regarding qualification as jurors, jury selection and discharge, and also contains the offences that apply to jurors who engage in misconduct and others who seek to influence jurors or disclose their identity.

Prison Inmates Will Be Released Early Amidst Coronavirus Fears

The management and process forward for many cases is now under review as the Local Court adapts to health policy recommendations to help stop the spread of coronavirus.

While aiming to strike a balance between sensible policy while also ensuring access to Justice, the Local Court has decided to review a number of operational issues, including how to manage its case load during Coronavirus.

These new rules supersede announcements made earlier this month, as the Local Court adapts to evolving decisions being made by the State and Federal Governments. The full list of new adjustments can be found here.

Under the new stipulations many matters as possible will be dealt with by Audio Visual Links, with unprecedented measures being taken to avoid the need for defendants to have to appear in court, with new rules which enable their legal representative to appear on their behalf, via email.

Like all other sectors of Australian Society right now, the courts are scrambling to respond to the potential threat of the spread of Coronavirus by ensuring that people don't mix together unless absolutely necessary.

New focus and reliance on technology

And it's a test in many ways for the Justice system, which is so people-oriented, and one that could potentially change it forever, bringing about a re-think of how much can be done using technology that allows people and lawyers and court staff remote access, while still getting the job done.

Some inmates will be released

In recent days The New South Wales Government has granted newpowers to the corrections minister to release or parole inmates nearing the end of their non-parole periods, or considered on a case-by-case basis whether inmates should be released earlier on in their sentences, as fears mount that already overcrowded prisons would struggle to contain a coronavirus outbreak, given that Australian prisons are currently operating at well over 100% of their design capacity:

The move comes on the back of a letter signed by more than 370 academics, lawyers, barristers and former magistrates warning governments that prisons face "an uncontrollable outbreak … because COVOID-19 spreads quickly in closed spaces … and prisons are commonly epicentres for infectious diseases."

Corrections NSW will not have the power to release inmates sentenced for serious crimes like murder, terrorism or sexual

offences, and in all cases must "consider the risks to community safety, the protection of domestic violence victims, and the impact on any victim before releasing an inmate."

To abate public concerns about those who might be released posing a threat to the public, it's important to remember that there are sensible guidelines around release and that in fact, large numbers of the people already in prison shouldn't necessarily be there anyway: 77% of people entering and 33% of people in prison are on remand and 30% are on sentences of less than 12 months.

Being 'on remand' means a person is detained in a prison until a later date when a trial or sentencing hearing will take place. Many prisoners on remand have not been convicted of a criminal offence and are awaiting trial following a not guilty plea.

The Aboriginal Legal Service (ALS) welcomed the move, because Indigenous inmates are most at-risk. Indigenous people make up 27 percent of the prison population and in many cases, already suffer chronic illnesses or disabilities. Of course many Indigenous people behind bars are also there for relatively minor offences, including unpaid fines, assault, public nuisance, and break and enter.

There are also calls to release frail and elderly and juvenile offenders who are currently behind bars

Globally, governments are considering or already implementing early release to contain the virus, Ireland is planning to release prisoners with less than 12 months to serve, as were some US and UK jurisdictions. In some US jurisdictions, charges for minor offences have also been dropped to avoid court cases altogether at this point in time.

Every state and territory in Australia has already banned prison visits in an effort to reduce the spread of Covid-19.

Downing Centre District Court to Deliver Justice Over Tragic Hospital Mix-Up

The families of two babies affected by a fatal gas mix up at a Sydney hospital are still waiting for those responsible to be held accountable.

The sentencing hearing of gas installer Christopher Turner has been adjourned while the Attorney General makes a decision about whether to provide him with indemnity.

Criminal proceedings

It was every parent's nightmare. Two small babies were given nitrous oxide – also known as 'happy gas' – instead of oxygen in a gas mix up at Bankstown-Lidcombe hospital in 2016. The gas is toxic to babies. Newborn John Ghanem died, while Amelia Khan was left with permanent brain damage.

The mix up occurred because nitrous oxide was incorrectly connected to the oxygen outlet in the resuscitation unit of one of the hospital's operating theatres.

It has been a complex case, with a report conducted by the Chief Health Officer finding that that a series of errors led to the babies being given the wrong gas, including failings in the installation of the piping, mislabelling, and improper post installation procedures – including that the requirement of an anaesthetist being present when the lines were checked.

Following the catastrophe, an extensive audit of all medical gas outlets installed in NSW Health facilities was conducted.

Installer Christopher Turner pleaded guilty not complying with health and safety duty under the Work Health and Safety Act.

He is being criminally prosecuted by Safework NSW but is also involved in the case Safework NSW is bringing against gas company BOC.

Safework NSW had also originally intended to prosecute the hospital, but dropped charges at the end of last year based on the fact that prior to the incident involving the gas mix up the hospital had a good health and safety record

At the time, instead of prosecution, SafeWorkNSW spokesman opted to ensure the entire South-Western Sydney Local Heath District would upgrade its contractor management system, implement a risk information system and create a health and safety literacy program.

Amelia Khans' parents are also filing a civil suit because their young daughter now requires a feeding tube and around-the-clock nursing care.

Sentencing adjourned

Downing Centre District Court judge David Russell adjourned proceedings the day he was expected to hear evidence from Mr Turner as well as an impact statement from the Khan family after Mr Turner's lawyers asked the NSW Attorney-General for indemnity, so that any evidence given in this matter cannot be used against him during the BOC trial.

As Judge Russell granted the adjournment, he apologised to the families involved acknowledging the delay would cause them further trauma.

The Sydney District Court in the Downing Centre is considering the sentence to give to the independent contractor who installed the oxygen at the hospital, but until the NSW Attorney-General makes his decision, the sentencing has been

put on hold.

Indemnity

The specific situations in which the Attorney General may grant ind

\emnity to a defendant are explained in section 32 of the Criminal Procedure Act 1986 (NSW) which provides that:

(1) The Attorney General may, if of the opinion that it is appropriate to do so, grant a person an indemnity from prosecution (whether on indictment or summarily)—

(a) for a specified offence, or

(b) in respect of specified acts or omissions.

(2) If the Attorney General grants such an indemnity, no proceedings may thereafter be instituted or continued against the person in respect of the offence or the acts or omissions.

(3) Such an indemnity may be granted conditionally or unconditionally.

(4) Such an indemnity may not be granted in respect of a summary offence that is not a prescribed summary offence, unless the Attorney General has consulted the Minister administering the enactment or instrument under which the offence is created.

Police and Security Guards

are ‘Thugs’

By Ugur Nedim and Sonia Hickey

A Sydney man has been sentenced in Downing Centre Local Court after an incident at a nightclub in the city earlier this year.

32-year oldf Keiren Patrick Noonan, an actor and electrician who once appeared on Home and Away, told the court that the security guards and police officers were heavy-handed on the night he was arrested at Cargo Bar in King Street Wharf, Darling Harbour.

He said that when the guards directed him to leave the bar for being intoxicated, he told them he just wanted to finish his drink, but they became aggressive and grabbed the drink from his hand.

He said that a scuffle began when plain clothes police officers approached and tried to arrest him, during which a female officer’s nose was broken.

He ultimately pleaded guilty to assaulting two police officers on the basis of ‘recklessness’ rather than any intention to hurt them during the arrest, and was sentenced to a 12-month community correction order and given a $750 fine.

Remorse and explanation

While admitting he was sorry the female officer was injured, Mr Noonan maintained the incident was not entirely his fault, telling media outside court:

“I’m a convicted criminal now, for something … that I didn’t do, to be honest. It’s a disgrace that you can’t even go out in the city anymore and enjoy a few drinks with your friends without … being harassed by this gang that’s dressed in blue and these bouncers that are just super thugs.”

Heavy enforcement

A strong presence of security guards and police officers has been a feature of Sydney night life since lock out laws were introduced in February 2014. with the objective of reducing alcohol-fuelled violence.

The legislation requires 1.30am lockouts and 3am last drinks at bars, pubs and clubs in the Sydney CBD entertainment precinct.

Lockout laws could be relaxed by Christmas

However, a NSW Parliamentary Committee recently recommended that the 1.30am lockouts and 3am alcohol service cut-offs be relaxed from licensed venues in the CBD and on Oxford Street.

The report did not go so far as to recommend changes in Kings Cross, saying the suburb had 'not yet sufficiently changed to warrant a complete reversal.'

The NSW Government is expected to relax lockout laws in the Sydney CBD as a result.

The charge of assaulting police in NSW

Assaulting a police officer is an offence under section 60 of the Crimes Act which carries a maximum penalty of 5 years in prison

To establish the offence, the prosecution must prove beyond reasonable doubt that you assaulted, threw a missile at, stalked, harassed or intimidated a police officer.

An 'assault' is where:

1. You caused the officer to fear immediate and unlawful violence, or made unauthorised physical contact with the officer,
2. The officer did not consent, and

3. Your actions were intentional or reckless

An action is considered to be against a police officer even though the officer is not on duty,

if it is carried out due to:

1. Actions by the officer while executing his or her duty, or
2. The fact the officer was a police officer.

The maximum penalty increases to 7 years in prison where you inflicted ‘actual bodily harm’ upon the officer, which is harm that is more than ‘transient or trifling’. Actual bodily harm includes lasting cuts, bruises and abrasions.

The maximum increases to 12 years in prison where you inflicted ‘grievous bodily harm’ on the officer, which is ‘very serious harm’.

The Crimes Act stipulates that grievous bodily harm includes, but is not limited to:

1. Any permanent or serious disfigurement
2. The destruction of a foetus, other than by a medical procedure, and
3. Any grievous bodily disease

The courts have found that broken bones which require surgery and permanent injuries can amount to grievous bodily harm.

The defences to the charge include self-defence, duress, and necessity.

Magistrate Criticises Police Over Heavy-Handed Arrest of Sydney Icon

A Magistrate in Downing Centre Local Court described the conduct of police officers during the arrest of beloved Sydney icon Danny Lim as "awful", finding that the words on the sandwich board he was wearing were "cheeky" but did not amount to offensive conduct under the criminal law.

The case

Mr Lim, aged in his mid-70s, was issued with a $500 criminal infringement notice for offensive behavior in January for wearing a sign saying "SMILE CVN'T! WHY CVN'T?"

Police alleged that a person described only as "as woman" called them to say she was offended by the sign.

They arrested Mr Lim and issued him with a $500 criminal infringement notice, which the elderly man decided to challenge in court.

The crime of offensive conduct

Section 4 of the Summary Offences Act 1988 (NSW) provides that "a person must not conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school."

The offence is different to 'offensive language' which is a crime under section 4A of the same Act – indeed, the legislation makes it clear that a person cannot be found guilty of offensive conduct merely by using offensive language.

It is a defence to a charge of offensive conduct where a

person has a “reasonable excuse for conducting himself or herself in the manner.”

The maximum penalty for offensive conduct is 3 months in prison or a fine of $660. A conviction for the offence results in a criminal record.

The Summary Offences Act doesn’t list or define what is considered “offensive.” So we must turn to the common law to gain an understanding the word in the context of criminal law.

In the classic 1951 Victorian Supreme Court (VSC) case of *Worcester v Smith*, Justice O’Bryan found that something is offensive if it is “… calculated to wound the feelings, arouse anger or resentment or disgust in the mind of a reasonable person.”

Under the law, conduct can be “hurtful or blameworthy or improper” and offend “against standards of good taste or good manners,” but may still not be enough to amount to offensive under the criminal law.

The hypothetical ‘reasonable person’ is the measure by which a court determines whether something is criminally offensive. This ‘person’ is said to exercise average care, skill and judgement in conducting themselves, is reasonably contemporary and not thin-skinned.

Under these rules, a person’s behaviour may seem to be offensive to some but insufficient to pass the threshold of criminally offensive.

The hearing of Mr Lim

It is under these rules that Mr Lim’s case proceeded to a Local Court hearing.

During the hearing, Her Honour Magistrate Milledge was highly critical of the attitude and conduct of police, pointing out that the “overwhelming opinion” of people in the public square

was that Mr Lim is harmless and that they took no offence to the sign.

Bodycam footage of the arrest captured the officers officers telling the large crowd “a number of complaints” had been received about the sign, although there was no evidence of this before the court.

After a number of bystanders tried to intervene by saying Mr Lim’s sign was not offensive, one officer called bystanders “pathetic” and labelled them as “social justice warriors”.

Indeed after the footage was posted online, more than 150 people surrounded a Sydney police station to protest against the treatment meted out to the elderly Mr Lim by our ‘boys in blue’.

Mr Lim takes the stand

Mr Lim testified in court that his intention was never to offend, but to make people smile and think.

“When you go to Barangaroo on Monday, Tuesday or Saturday they don’t smile,” he told the court. “We need Australia to smile again.”

He said his various “CVN’T” signs had become his trademark after a fine was overturned in court for a similar board about Tony Abbott in 2015.

Mr Lim disagreed that, in a roundabout way, he was using the c-word, saying that only a few people out of thousands that would come across his sign would think it was offensive.

On this point, Mr Lim’s lawyer pointed to the play on words offered by popular fashion label FCUK.

Police Prosecutor, Rick Manslley, told the court that the c-word was objectively offensive. “How can the court say the standards of society have sunk so low?” he submitted.

The law prevails

Magistrate Milledge ultimately found that the view of the person who called the police was not enough to prove the case against Mr Lim beyond reasonable doubt, as required under the law.

She accurately applied the law, noting the test is that of the "hypothetical reasonable person."

"It's not someone who is thin-skinned, who is easily offended," she remarked. "It's someone who can ride out some of the crudities of life. [The sign is] provocative and cheeky but it is not offensive."

Police conduct

Magistrate Milledge, a former police prosecutor herself, admonished senior constable Ashley Hans for describing "a gathering of ordinary citizens" as "pathetic" and "social justice warriors."

Her Honour described the conduct of police as "awful" adding, "That attitude has no place in the modern constabulary."

She noted that Mr Lim was compliant at all times, and that the use handcuffs used and ripping his sign off, which caused bruising and bleeding to the elderly man's wrists, was "unnecessary and heavy handed" and that officer Hans' statement that Mr Lim was "bullshitting" when he yelped in pain as he was lifted off the ground in handcuffs was inappropriate.

Sydney Parents Avoid Prison for Child Neglect

By Sonia Hickey and Ugur Nedim

A Sydney couple who inadequately nourished their baby for the first 19 months of her life have avoided prison time, despite the girl facing life-long health issues as a result.

The parents were charged with failing to provide the necessities of life last year, after their daughter had a seizure and was admitted to Sydney Children's Hospital.

The couple, who cannot be named for legal reasons, pleaded guilty to the charge.

Failing to provide the necessities of life

Failing to provide the necessities of life is an offence under section 44 of the Crimes Act 1900 (NSW) which carries a maximum penalty of 5 years in prison.

To establish the offence, the prosecution must prove beyond reasonable doubt that:

1. The defendant was under a legal duty to provide another with the 'necessities of life'
2. He or she intentionally or recklessly failed to provide the person with those necessities,
3. The failure caused serious injury to, or created the likelihood of serious injury to, or endangered the life of, the person to a legal duty was owed, and
4. The defendant did not have a 'reasonable excuse' for the conduct.

Necessities of life include sufficient nutrition, shelter, and required medical care.

Failure of parent to care for child

A similar offence titled failure of parent to care for child is contained in section 43A of the Crimes Act, which prescribes a maximum penalty of 5 years in prison where the prosecution is able to prove that:

1. The defendant had parental responsibility for a child
2. He or she intentionally or recklessly failed to provide the child with the necessities of life, and
3. He or she did not have a 'reasonable excuse' for the conduct.

A 'child' is defined as a person under the age of 16 for the purposes of the section.

A person cannot be charged with an offence under both section 44 and 43A for the same act or omission.

Defences to the either offence include duress and necessity.

Sentencing hearing

During the sentencing proceedings in Downing Centre District Court, Judge Sarah Hugget remarked:

"It is the responsibility of every parent to ensure the diet they choose to provide to their children … is one that is balanced and contains sufficient essential nutrients for optimal growth. This child was severely malnourished, underweight and undersized, and delayed as far as age-appropriate milestones were concerned."

She sentenced each parent to an 18 month intensive correction order.

The court heard that for the first 19 months of her life, the child was fed a conservative vegan diet, which ultimately consisted of oats with olive oil, rice milk, vegetables, rice, potatoes and tofu, and her snacks consisted of a mouthful of

fruit or two sultanas.

Hospital tests revealed the baby had multiple severe nutritional deficiencies and Osteopenia, or thin bones. Medical staff testified that her bones had not developed since birth.

Through a victim impact statement, the child's foster carer, who met the toddler when she was just 19 months old, said was shocked to see how far behind her growth milestones she had fallen. In her statement, she said the girl looked like a three-month-old baby, weighing only 4.89 kilograms and had no teeth.

While the carer said the girl became more interactive with play and cuddles, her height and weight remained disproportionate, and she is traumatised by routine medical procedures such as blood tests, which she must now undergo regularly to ensure that her health is monitored carefully.

In an investigation into the girl's medical history, doctors found an absence of immunisations, no follow-up check-ups after she was born and no birth certificate or Medicare number.

Health experts also testified that the mother was suffering depression since the baby was born, and while the judge accepted this may suggest that she had diminished culpability, she was critical of the child's father who, she said, could have taken the child to a doctor much sooner, and should have realised that the baby was not developing at the same rate as other babies the same age.

The toddler's two older brothers, aged six and four, are also in government care and were also on vegan diets. The three have since been united and are in the care of a relative. Both parents have supervised access to the children.

Sydney Magistrate on Trial for Allegedly Sexually Abusing Teenage Boy

68-year old Sydney Magistrate Graeme Curran is currently on trial in Downing Centre District Court for nine counts of indecent assault, arising from allegations he sexually abused a teenage boy nearly four decades ago.

In his opening statement to the jury, Crown Prosecutor Mark Hobart SC submitted that between 1981 and 1983, Mr Curran performed a number of sexual acts upon the boy, who was aged 13 to 15 at the time.

These acts, it is alleged, included performing a 'ritual' of running his hands up and down the boy's body with 'extra time' on the genital area while the pair were in bed naked together, attempting to put his tongue down the boy's throat, masturbating the boy on a beach and performing oral sex upon him.

The prosecution alleges Mr Curran, a solicitor at the time, groomed the boy by spending lavishly on sailing trips, hotel rooms and even buying his parents a car and paying their bills.

Mr Curran's criminal defence barrister, Peter Boulten SC, admitted the pair often slept together but said they were always fully clothed.

He made clear that his client vehemently denies the allegations of improper conduct, telling the jury:

“Graeme Curran was a very close friend of the family and he became almost unconsciously a father figure”.

“He had a very affectionate relationship with [the parents] and all of their children, and he was a very generous and kind and caring part of the family.”

The barrister suggested the complainant had become ‘mixed up’ over the years, noting that the allegations became ‘bigger and better’ over time.

He foreshadowed the defendant testifying in his own defence.

The trial continues before Judge Anthony Rafter and a jury of twelve.

Indecent assault

Indecent assault is an offence under section 61L of the Crimes Act 1900 (NSW) which comes with a maximum penalty five years’ imprisonment if tried in a higher court such as the district court, or two years if the case remains in the local court.

To be found guilty, the prosecution must prove each of the following ‘elements’ beyond reasonable doubt:

1. **The defendant assaulted the complainant**

In the context of the section, an assault is the deliberate and unlawful touching of another person. The slightest touch is sufficient to amount to an assault and it does not have to be a hostile or aggressive act or one that caused the complainant fear or pain.

2. **The assault was indecent**

Indecent means contrary to the ordinary standards of respectable people in the community, and it must have a sexual connotation or overtone.

3. **The assault was committed without the complainant’s**

consent

Consent involves the conscious and voluntary permission by the complainant to the defendant to touch the complainant's body in the manner that the defendant did.

Consent or the absence of consent can be communicated by the words or acts of the complainant.

4. **The defendant knew the complainant was not consenting**

The defendant must have known was not consenting. This is not a question of what a reasonable person would have realised, thought or believed, but what the defendant knew.

It is important to note that a person under the age of 16 cannot provide consent, and an indecent act will be regarded as an indecent assault in the absence of consent.

Aggravated indecent assault is an offence under section 61M of the Crimes Act.

To be found guilty, the prosecution must prove the above four 'elements' beyond reasonable doubt as well as at least one of the following 'aggravating circumstances'.

1. the defendant was the company of another person/s,
2. the complainant is under the authority of the defendant,
3. the complainant has a serious physical disability, or
4. the complainant has a cognitive impairment.

The maximum penalty is seven years' imprisonment, or ten years if the complainant is under the age of 16.

Sexual touching

In December 2018, the offence of indecent assault was replaced by 'sexual touching' in New South Wales.

The offence of sexual touching is now contained in section 61KC of the Crimes Act 1900.

The section states that a person is guilty of sexual touching if he or she, without the consent of the complainant and knowing that consent is absent, intentionally:

- sexually touches the complainant, or
- incites the complainant to sexually touch him or her, or
- incites a third person to sexually touch the complainant, or
- incites the complainant to sexually touch a third person.

'Sexual touching' is defined by section 61HB of the Act as touching another person with any part of the body or with anything else, or through anything, including anything worn by either person, in circumstances where a reasonable person would consider the touching to be sexual.

The section provides that the matters to be taken into account when deciding if touching is sexual include whether:

- the area of the body touched or doing the touching is the person's genital area, anal area or – in the case of a female person, or a transgender or intersex person identifying as female – the person's breasts, or
- the defendant's actions are for sexual arousal or sexual gratification, or
- any other aspect of the touching, or the circumstances surrounding the touching, make it sexual.

Touching is not sexual if it was carried out for genuine medical or hygienic purposes.

What are the penalties for sexual touching?

The maximum penalty for sexual touching is 5 years in prison if the case is dealt with in the District Court, or 2 years if it remains in the Local Court.

The maximum penalty increases to 10 years if the offence was

committed against a child who was at least 10 years of age but under 16.

The maximum penalty is 16 years if the child was under the age of 10.

What does the prosecution have to prove?

For a person to be guilty of sexual touching, the prosecution must establish each of the following matters:

- That the defendant touched the complainant or incited another to do so,
- That the touching was sexual,
- That consent was not given to the touching, and
- That the defendant knew consent was not given, or was reckless as to whether consent was given.

The prosecution will fail if it cannot prove each of these elements beyond reasonable doubt.

What are the defence to sexual touching?

In addition to the requirement that the prosecution must prove each element (or ingredient) of the offence, it must also disprove any of the following defences if properly raised:

- Duress, which is where you were threatened or coerced,
- Necessity, where the act was necessary to avert danger, and
- Self-defence, where you engaged in the act to defend yourself or another, and
- Lawful correction of a minor.

It is important to bear in mind that, like everyone else, Mr Curran is presumed innocent until and unless he is proven to be guilty in a court of law.

Rugby League Players Avoid Criminal Convictions for Obscene Exposure

As previously reported, Canterbury-Bankstown Rugby League players Adam Elliot and Asipeli Fine were charged with obscene exposure after allegedly being filmed engaging in simulated sex acts while naked and intoxicated in view of the public at the Harbour View Hotel in The Rocks during 'Mad Monday' celebrations on 3 September 2018.

Pleas of guilty

Each of the players pleaded guilty to the charge and came before her Honour, Deputy Chief Magistrate Mottley in Downing Centre Local Court earlier this week.

It has been reported that agreed facts handed-up to the court outlined that the pair were seen on CCTV footage removing their shirts, after which 'Fine can be seen tensing and slapping himself on the back of his shoulder with friends cheering him on'.

'About 5.25pm, Fine removes his pants and underwear and walks around the terrace area fully naked. At one point Fine picks up a stool and places it over his right shoulder before moving it over his left shoulder whilst at the same time placing his hand on and off his penis.'

Mr Elliott is said to have then removed his pants before climbing onto a table and dancing, before he is helped back down.

“At the same time, Fine can be seen raising a bench stool above his head whilst thrusting his pelvis backwards and forwards, moving his penis up and down,”

“At 5.27pm Elliott removes his underwear and begins to climb up onto a stool in the nude.”

The pair are said to have then dressed themselves, before Mr Fine gets back on the table.

“Fine lowers his underwear and a club member begins to pour liquid, believed to be water, onto his penis, which pours down into a schooner glass, placed on a table underneath his penis,” the facts say.

“Fine does not discourage this action but continues chanting and cheering with the crowd.”

The judgment

Her Honour noted the pair had already received substantial fines and incurred damage to their reputations.

She described the conduct as “fuelled by alcohol, stoked along by the crowd” but nevertheless “disgraceful by any standard of decency.”

“The conduct that brings you before the court was clearly reckless,” her Honour remarked.

She ultimately placed each of the men on conditional release orders for a period of two years without recording criminal convictions against their names.

What is a conditional release order?

On 24 September 2018, conditional release orders replaced good behaviour bonds under section 10(1)(b) of the Crimes (Sentencing Procedure) Act 1999 (now conditional release order without conviction).

Conditional release orders are a way for a person who pleads guilty or is found guilty of a criminal or major traffic offence to avoid a harsh penalty, or even a criminal conviction altogether, provided they comply with the conditions of the order.

How can I get a conditional release order?

The new law is contained in section 9 of the Act which states:

“9(1) Instead of imposing a sentence of imprisonment or a fine (or both) on an offender, a court that finds a person guilty of an offence may make a conditional release order discharging the offender, if:

(a) the court proceeds to conviction, or

(b) the court does not proceed to conviction but makes an order under Section 10 bond (now conditional release order without conviction).

(2) In deciding whether to make a conditional release order with a conviction, the sentencing court is to have regard to the following factors:

(a) the person’s character, antecedents, age, health and mental condition,

(b) whether the offence is of a trivial nature,

(c) the extenuating circumstances in which the offence was committed,

(d) any other matter that the court thinks proper to consider.”

This means a conditional release order is more likely where an offence less serious, there were reasons behind its commission and the defendant is otherwise a person of good character.

That said, conditional release orders are not restricted to

specific categories of offences – rather, a court can order a CRO for any offence.

CROs cannot be made in the absence of the defendant.

What conditions can be placed on a conditional release order?

A CRO must contain the following conditions:

- That the defendant not commit any further offences,
- That the defendant must attend court if called upon to do so.

A person will only normally be called upon to attend court if he or she breaches the order.

Additional conditions that can be placed on a CRO are:

- To participate in rehabilitation programs or receive treatments,
- Abstain from alcohol, drugs or both,
- Not associate with particular persons,
- Not frequent or visit particular places,
- Come under the supervision of community corrections officers or, in the case of young persons, juvenile justice officers.

A CRO cannot include:

- A fine,
- Home detention,
- Electronic monitoring,
- A curfew, or
- Community service work.

Can conditions be changed?

The defendant or a community corrections officer can apply to a court to revoke, amend or add conditions to a CRO at any time after it is ordered.

However, the mandatory conditions must remain in place.

How long can a conditional release order last?

A CRO can last for up to two years.

What happens if I breach my conditional release order?

If it is suspected that a CRO condition has been breached, the defendant may be ordered to attend court to determine whether a breach has in fact occurred.

If a breach is established, the court may:

- take no action
- add, change or revoke conditions, or
- revoke the CRO in its entirety.

If the CRO is revoked, the defendant will be resentenced for the original offence.