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.

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.

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.

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.

Uber Driver Guilty of Negligent Driving Causing Death

By Ugur Nedim and Sonia Hickey

32-year old Uber driver Nazrul Islam is facing up to 18 months in prison after a Magistrate in Downing Centre Local Court found him guilty of negligent driving occasioning death.

The court heard that Mr Islam had been working for 21 hours before the incident and, despite testifying he had seven hours of sleep, it was not continuous rest.

Magistrate Mary Ryan found that the circumstances of 30-year old Englishman Samuel Thomas' death suggested that Islam was "much more fatigued thank he admitted", and her Honour was not convinced the driver had slept during his breaks for as long as he claimed.

Mr Thomas had been drinking at a birthday party with colleagues in Strathfield, before he caught the Uber towards Pitt Street with friends Stephen Ronning and Greg Hensman.

When the car stopped at a red light, Thomas opened the door and got out, and was immediately hit by a bus.

Her Honour noted that the sound of the door opening could be heard in footage played in court, and that opening the door automatically switched the car's internal light on, which woke the other intoxicated passengers. She found that these facts would have alerted a reasonably prudent driver to remain stationary.

Instead, Mr Islam accelerated when the light went green and Mr Thomas was half way out the door.

Negligent driving

Negligent driving is established where the prosecution is able to prove beyond reasonable doubt that a driver or rider of a motor vehicle departed from the standard of care for others that would be expected of a reasonably prudent driver or rider in the circumstances; R v Buttsworth (1983) 1 NSWLR 658.

This is known as an 'objective test' which looks at what a reasonable and practicable driver would have done in the given situation.

It requires an assessment of all relevant circumstances known

to the driver or rider at the time, rather than a determination as to what, given the benefit of hindsight, would have been the best course of action.

Driving in the absence of 'due care and attention' can amount to negligent driving, provided the act was causing the inattention was deliberate or arose from an error of judgment; Sprigg v Police [2011] SASC 10.

The maximum penalty for negligent driving occasioning death where it is a motorist's first major traffic offence in five years is 18 months' imprisonment and/or a fine of $3,300, plus three years off the road which can be reduced by a court to a minimum of 12 months.

Fatigue on New South Wales Roads

Fatigue is one of the top three killers on New South Wales Roads, and collisions caused by fatigue are twice as likely to be fatal.

Being tired at the wheel can seriously impair the ability to drive, with research suggesting that being awake for about 17 hours has a similar effect on cognitive function as a blood alcohol content (BAC) of 0.05.

Calls for reform

There are calls for greater regulation of the ride-share industry, with critics of the current situation saying governments should step in and impose more rules rather than continue to essentially sit on their hands.

Shortly after Mr Islam was charged last year, Uber implemente a policy that would automatically log drivers off for six hours after they have been online and driving for 12 hours.

But there are concerns that drivers can still drive for up to 15 hours, despite the automatic log off feature within the app, because it stops calculating when a driver is stopped at

traffic lights or for a passenger pickup.

A recent report suggests that many Uber drivers are working for less than the minimum wage, so may be pushing themselves beyond safe physical and mental limits to make ends meet..

Uber has not publicly commented on the death of Mr Thomas, except to say the company is committed to 'driver and passenger safety.'

Is Public Nudity a Crime in New South Wales?

Canterbury-Bankstown rugby league players Adam Elliot and Asipeli Fine were each fined $25,000 by the club and charged by police with the crime of obscene exposure after allegedly being naked on the balcony of the Harbour View Hotel at The Rocks during 'Mad Monday' Celebrations in early September this year.

Today, Mr Elliot appeared with his defence lawyer in Downing Centre Local Court where his case was adjourned until 21 November 2018.

Mr Fine's lawyer appeared on his behalf and adjourned the case to the same date.

It is expected the defendants will formally enter their pleas at that time.

In the event of a not guilty plea, the case is likely to be set down for a defended hearing – which is when evidence including photographs of the alleged conduct is expected to be tendered before the magistrate makes a determination.

Before that time, the defendants' lawyers can send written 'representations' to police requesting the withdrawal of the charges and setting out the reasons for that request.

In the event of a guilty plea, the matter will proceed to a sentencing hearing at which time the magistrate will determine the appropriate penalty, which in the case of an obscene exposure charge where the defendants have already been fined and shamed is likely to be:

- A section 10(1)(a) dismissal without a conviction,
- A conditional release order, or
- A fine.

The offence of obscene exposure in NSW

Section 5 of the Summary Offences Act 1988 (the Act) prescribes a maximum penalty of six months in prison and/or a fine of $1,100 for anyone who, 'in or within view from a public place or school, wilfully and obscenely exposes his or her person'.

Wilful

Wilful has been defined as having the requisite intent, which means the prosecution must prove beyond reasonable doubt that the exposure was on purpose rather than by accident, by the act of another person or through mere negligence.

So, if there is some evidence that any exposure of the genitalia of the rugby league players was unintentional, the prosecution would then need to exclude any reasonable possibility of this beyond a reasonable doubt.

Obscene

Whether exposure is 'obscene 'is determined by contemporary standards of decency, although the courts have held that exposure of the penis and/or testicles amounts to obscene, and that section 5 is capable of applying to female genitalia as

well.

However, there is commentary to suggest it is unlikely that exposure of the female breasts would suffice in the present day, and that the act of breastfeeding almost invariably would not.

Public place

Public place is defined by section 3 of the Act as, 'a place (whether or not covered by water), or a part of premises, that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons'.

The definition certainly encompass licensed premises, regardless of whether they are only made available at the time to a certain class of persons.

In any event, the activity of the rugby league players – if they have been correctly identified – is said to have been captured from outside the hotel.

Case law

In that regard, the NSW Supreme Court in the case of R v Eyles [1977] NSWSC 452 found that the prosecution only needs to prove that the exposed area *could have been seen* by a person who was *in a public place*, not that the defendant was in a public place at the time of the exposure or that the exposure was actually seen by anyone.

That case involved a man who was alleged to have been masturbating behind a fence on his own property. There was no evidence the man's penis was seen by anyone, although it could have been seen by someone who was in a public place and his act was established through evidence of his mannerisms and the

fact he seen was naked from the waist up.

Legal defences

Apart from the requirement that the prosecution must prove each of the elements (or ingredients) of an obscene exposure charge beyond reasonable doubt, defendants may also seek to rely upon legal defences of duress or necessity.

Nude bathing

It should be noted that section 633(2) of the Local Government Act 1993 prescribes a maximum penalty of $1,100 for being 'in public view in the nude in any place (other than a designated beach)'.

At present, the only 'designated beaches' in NSW (also known as 'nudist beaches') are:

- Lady Bay (Lady Jane) Beach,
- Cobblers Beach,
- Obelisk Beach,
- Werrong Beach, and
- Samurai Beach.

Clothing is optional at those beaches.

Rugby League Players Charged with Obscene Exposure

Two Canterbury-Bankstown NRL players will face Downing Centre Local Court over their actions on 'Mad Monday', and a third has been given a criminal infringement notice (CIN) after

allegedly being photographed and videoed naked, drunk and vomiting at the Harbour View Hotel at The Rocks in Sydney.

Criminal charges

Adam Elliott and teammate Asipeli Fine have been charged with obscene exposure, while the player who received the CIN has not been named.

The licensee of the hotel has also been issued with five penalty notices under the Liquor Act, including two for permitting indecent behaviour on licensed premises.

Hefty financial penalties

The club itself imposed fines on four players: Elliott and Fine have each been fined $25,000 (with $10,000 suspended), while Marcelo Montoya and Zac Woolford received fines of $10,000 (with $5000 suspended).

The incident has also resulted in a significant financial blow to the club, with the NRL imposing a record fine of $250,000 for bringing the game into disrepute. It has also lost major sponsor in Jaycar and a deal that's reportedly worth around $500,000.

Too harsh?

A number of sports commentators are shaking their heads at the severity of the consequences for the players themselves, pointing out that more serious acts have resulted in substantially lower fines.

One of those events involved NRL players and a dog, another of accusations of gang rape and yet another of wife-beating.

There are continual episodes of on-field violence as well as drug scandals and allegations of match fixing, all of which do reflect well upon players or the game as a whole.

Some might even suggest that players should be given some leeway after a high-pressured season, and that their antics aren't much worse than some corporate Christmas Parties.

Nevertheless, Bulldogs chief Andrew Hill has acknowledged the conduct was a 'poor reflection of both the club and the game', adding that 'these are good people who have acted in an immature and juvenile way. They have accepted responsibility for their actions and have apologised to the club for their behaviour'.

Mr Hill has pledged to 'put steps in place to make sure that this situation never happens again.'

The NRL has issued a statement saying the fine of $250,000 sends a strong signal that such conduct will not be 'tolerated on this occasion – or in the future.'

Is alcohol to blame?

Some might say that is rhetoric that we've heard before. Undoubtedly, excessive alcohol consumption played a role in the men's misconduct on Mad Monday.

This is in spite of the NRL has implemented an alcohol management strategy with the help of the Australian Drug Foundation to ensure 'a whole of game approach to responsible drinking, from the grassroots clubs through to the NRL.'

But the fact of the matter is that the NRL still attracts large sums of money from alcohol sponsorship, from ads during play and in the breaks in between, in signage and on the field – and by and large the community is increasingly uncomfortable, not just with alcohol sponsorship in sport, but seeing players adversely affected by the drug.

Serious consequences for players

For Adam Elliott and Asipeli Fine, the party might have been fun, but the hangover continues.

Both are due to appear in the Downing Centre Court in Sydney on 24 October, and many will be keeping a keen eye on the outcome.

Obscene Exposure in NSW

Section 5 of the Summary Offences Act 1988 (NSW) makes it an offence punishable by up to 6 months' imprisonment and/or a fine of $1,100 for a person to 'wilfully and obscenely expose his or her person… in or within view from a public place or school'.

To establish the offence, the prosecution must prove the players:

- Exposed themselves in an obscene manner, and
- Did so within view of a public place or school.

Bodily exposure is regarded as 'obscene' if it is offensive by the standard of a reasonable person at the time. The nature of exposure considered to be obscene can change over time – so whereas it might have extended to a thong bikini at the turn of the century, it would not do so in the present day.

Obscene exposure is not necessarily limited to the genitals, and the prosecution is not required to prove that a person actually saw the conduct.

A 'public place' is broadly defined by section 3 the Act to encompass premises open to or used by the public, regardless of whether they are:

- ordinarily open to the public; or
- payment is required to enter; or
- open to only a class of persons.

The definition certainly extends to licensed premises.

Wife of Terrorist Recruiter Found Guilty of 'Disrespectful Behaviour'

By Sonia Hickey and Ugur Nedim

In the first case prosecuted under new provisions that make it a crime to act disrespectfully in court without necessarily going so far as to act in contempt of court, a devout Muslim woman has been found guilty of engaging in disrespectful behaviour after repeatedly refusing to stand for a judge.

Moutiaa El-Zahed's prosecution was brought in the wake of legislation introduced in 2016 which makes it an offence to engage in conduct such as refusing to stand in court, yelling at judges and ignoring their directions.

The NSW law was the first of its kind in Australia. It comes with a maximum penalty of 14 days in prison and/or a $1,100 fine and is embodied in the following legislation:

- Section 131 of the Supreme Court Act 1970,
- Section 200A of the District Court Act 1973,
- Section 24A of the Local Court Act 2007, and
- Section 103A of the Coroners Act 2009.

The provisions were introduced after a number of Islamic defendants refused to stand for judges in court, on the basis of their beliefs that they are only required to stand before God.

Circumstances of the case

Ms El-Zahed is the wife of convicted Islamic State recruiter

Hamdi Alqudsi, who is currently serving a prison sentence for arranging seven men to travel to Syria to fight for extremists.

She was charged last year with nine counts of engaging in disrespectful behaviour on the basis that she did not stand when District Court Judge Audrey Balla came in and out of court during a civil hearing in 2016.

Ms El-Zahed and her sons took civil proceedings against the Commonwealth and NSW governments for assault, false imprisonment and wrongful arrest after a high-profile terrorism raid on their home 2014. She reported punched in the head during the raid and that her teenage sons were jostled violently, restrained and handcuffed in their bedrooms.

Police defended the claim and, when the case went to court, Ms El-Zahed refused to remove her niqab (a full head covering) when entering the witness stand. Judge Audrey Balla offered her opportunity to give evidence by video-link from another room, but she refused as her face would still be seen by male lawyers in the courtroom.

The judge also offered to close the court, but Ms Elzahed declined the offer and then elected not to attend court at the time she was scheduled to give evidence.

Judge Bella also challenged Ms El-Zahed for failing to follow court protocol of standing when the judge enters and leaves the courtroom. At the time, her lawyer told the court that Ms Elzahed, “won’t stand for anyone except Allah, which I’m not particularly happy with, Your Honour.”

The judge responded with a warning that Ms El-Zahed could face criminal charges for refusing to comply.

Ms El-Zahed was later charged with nine charges of engaging in disrespectful behaviour.

Continuing refusal

When the proceedings came before Magistrate Carolyn Huntsman for a defended hearing in Downing Centre Local Court, Ms El-Zahed continued her refusal to stand – remaining seated when her Honour entered the courtroom, when she exited for the morning adjournment and when she re-entered to deliver her judgment.

Found guilty

Ms El-Zahed was ultimately found guilty of all nine charges.

In delivering her judgement, Magistrate Huntsman remarked: “I am satisfied the defendant repeatedly and intentionally failed to stand for the judge in District Court proceedings and in doing so intended to communicate lack of respect to the court and judge”.

“El-Zahed’s son, George, stood for the judge when she was seated behind him and the defendant well knew the expected behaviour was to stand for the judge when they entered or left the courtroom.”

“There is no evidence before this court that she genuinely held any religious beliefs [and] there is no evidence that the teachings of Islam compelled this conduct,” her Honour remarked.

The Magistrate rejected defence submissions that the legislation is unconstitutional.

The matter returns to court in June for sentencing.

Singer Sentenced for Exposing Himself on Red Carpet

By Zeb Holmes and Ugur Nedim

Musician Kirin J Callinan has pleaded guilty to wilful and obscene exposure after 'flashing' photographers on the Aria red carpet.

The 32-year-old Australian singer lifted his kilt and exposed his penis after being encouraged to do so on the Arias Red Carpet.

The paparazzi recorded the moment outside Star Casino in Sydney, and Callinan subsequently received a notice to attend Downing Centre Local Court to answer the charge.

Consequences

Callinan's impulsive act had consequences over and above the criminal proceedings.

Brisbane rapper Sian Vandermuelen, who performs as Miss Blanks sought the singer's removal from the summer Laneway festival.

Callinan was dropped from the lineup as a result, with Vandermuelen telling Triple J's Hack program such conduct "shouldn't be tolerated" and that the decision to remove his was "great".

"For me to be the first trans woman of colour in a festival that's been running for ten years, to be touring it nationally in all cities, it's important to me that there's safety, it's important to my community that it's safe," she added.

Laneway's triple j Unearthed competition winner for Melbourne, Angie McMahon, was not surprised by Laneway's decision.

“I think it’s a pretty understandable move for festival organisers to take off somebody who is a bit of a risk in terms of offending a lot of people,” Ms McMahon said.

Music critic, Bernard Zuel, said the removal was “unprecedented” for a festival, calling it a “harsh” punishment.

“The behaviour that supposedly initiated this at the ARIAs was in effect non-threatening, certainly not directed at anyone in particular and was seen by very few people,” he remarked.

Sentencing submissions

Mr Callinan pleaded guilty to the charge and his criminal lawyer submitted that his client was remorseful for his actions – as evidenced by his early plea – that his reputation had been tarnished and that he had lost money as a result.

“He also lost the opportunity to travel through Russia [to play the FIFA World Cup] and he’s lost an opportunity with Amazon,” the lawyer added.

“He was wearing a kilt and there were some among the media group who were making light of the fact he was wearing a kilt and suggested he lift his kilt. It was momentary, it was up and down and at least one camera caught that,” he told the court.

“Why did he do it? He did it as an error of judgement, he did it in a jovial mood, he didn’t do it to shock anyone.”

The sentence

Deputy Chief Magistrate Chris O’Brien was ultimately persuaded to exercise his discretion under section 10 dismissal or conditional release order of the Crimes (Sentencing Procedure) Act 1999 and not impose a criminal conviction upon Callinan, provided he enter into a 12 month good behaviour bond.

Obscene exposure

Section 5 of the Summary Offences Act 1988 (NSW) contains the offence of obscene conduct, providing that:

"A person shall not, in or within view from a public place or a school, wilfully and obscenely expose his or her person."

The maximum penalty is six months in prison and/or a fine of $1,100.

To be found guilty, the prosecution must prove all of the following ingredients beyond reasonable doubt:

- You exposed yourself in an obscene way,
- You had a requisite intention to do so, and
- You did so within sight of the public place or a school.

For exposure to be obscene, it must relate to the anus or genitalia of a male or female, or in certain circumstances the breasts of a female. The context of the exposure is important when determining whether it is obscene.

For example, the exposure of breasts at a beach is unlikely in the present day and age to amount to an obscenity. The standards of a reasonable person are relevant when making the assessment.

Section 3 of the Act defines a public place as a place (whether or not covered by water), or a part of premises, "that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons".

It is a broad definition which relates to a range of private properties including shopping centres, cinemas, religious buildings and the like.