

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.