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Clothing Optional?: Nudity and the Law of the Australian Beach

THEODORE BENNETT*

Abstract

This article comprises the first detailed legal analysis of nudity on the Australian beach. It provides an overview of the formal law around public nudity on Australian beaches and unpacks both the cultural significance and practical operation of regulation within this context. It begins by demonstrating how the Australian beach is a particularly dense nexus of cultural meaning and significance, within which general cultural anxieties about public nudity are amplified. It then sets out the formal legal apparatus that performs the regulatory work that responds to these anxieties, including State/Territory offences relating to public exposure, public behaviour and bathing dress. However, the law ‘in the books’ about beach nudity diverges in significant ways from the law ‘in action’, and this analysis unpacks the practical side of the law of the Australian beach in terms of policing discretion, the application of legal standards of decency and propriety, and social patterns of nude beach use. The formal designation of certain spaces by some States/Territories as ‘free beaches’—where it is not against the law to be nude— is argued to constitute the symbolic containment, rather than endorsement, of public nudity.

I Introduction

I began writing this article at the end of yet another swelteringly hot Australian summer. For many Australians a swim at one of the nation’s many beaches is a key means of keeping cool during these warmer months, but throughout the year the beach remains a popular location for a range of activities including surfing, sunbathing, exercising, picnicking, etc. However, in addition to constituting a space for relaxation and recreation the beach is also a space governed by regulation. One particularly longstanding and contentious regulatory issue is the extent to which a person can display their body at the beach, and this issue has seen marked change over time.

In the early 1800s concerns about nudity led to blanket bans on daytime bathing at some Sydney beaches.¹ These bans were subsequently replaced by prohibitions that allowed but restricted beach use on ‘modesty’ grounds,

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¹ Leone Huntsman, *Sand in our Souls: The Beach in Australian History* (Melbourne University Press, 2001) 28.

including prohibitions on mixed bathing and prohibitions on undressing at the beach.² In subsequent years patrolling ‘beach inspectors’ upheld requirements that swimming costumes sufficiently covered the body of beachgoers, including parts of the arms and legs.³ The introduction of the bikini to Australian beaches was a flashpoint of concern in the 1940s,⁴ but eventually it too was allowed. With such brief clothing becoming acceptable attire at the beach, by the 1970s the contours of contention around bodily display coalesced around the issue of nudity. Public support for allowing nudity on Australian beaches grew during this time and some jurisdictions began to designate specific beaches as spaces where public nudity was lawful.⁵ Such beaches are referred to by various names, including ‘nude beaches’ and ‘nudist beaches’, but this article will refer to them as ‘free beaches’. This choice of terminology reflects that there is no requirement that a person making use of such a beach be either nude or a nudist, but instead can make a ‘free’ decision to choose whether or not to be nude without fear of criminal legal repercussions (though the exact legal status of nudity on these beaches is more complex and will be discussed in detail in Parts III-IV below). However, the issue of nudity on Australian beaches has not been laid to rest. Political skirmishes continue to break out about whether nudity should be allowed at certain beaches,⁶ and a number of the ‘free beaches’ have subsequently been disestablished over time.⁷ The extent to which the body can be displayed on Australian beaches is thus a regulatory issue marked by both ongoing significance and ongoing turbulence.

Yet despite all of this, the laws around nude beach use have raised barely a ripple within legal academia. This article comprises the first detailed legal analysis of nudity on the Australian beach.⁸ The purpose of

² Ibid 59–61.

³ Douglas Booth, *Australian Beach Cultures: The History of Sun, Sand and Surf* (Frank Cass, 2001) 45–48.

⁴ Ibid 48–52; Robert Drewe, *The Beach: An Australian Passion* (NLA Publishing, 2015) 113–118.

⁵ Magnus Clarke, *Nudism in Australia: A First Study* (Deakin University Press, 1982) 217. The first Australian beach to be legally designated in this way was Maslin Beach in South Australia in 1975: at 289.

⁶ See, eg, Flip Prior, ‘Broome Nudist Beach Under Review’, *The West Australian* (online, 3 March 2011) <<https://thewest.com.au/news/wa/broome-nudist-beach-under-review-ng-ya-178568>>; Anthony Templeton, ‘Queensland Nudist Beach Request Gets Shot Down in Parliament’, *The Courier-Mail* (online, 4 May 2017) <<https://www.perthnow.com.au/news/qld/queensland-nudist-beach-request-gets-shot-down-in-parliament-ng-0517c59ad3a1b71e50580cca7da4d2c1>>; Libby Bingham, ‘Naturists Won’t Give Up On First Nude Beach’, *The Advocate* (online, 11 July 2016) <<https://www.theadvocate.com.au/story/4022746/naturists-wont-give-up-on-first-nude-beach/>>; Rachel Clun, ‘“Totally Gutted”: Local Angry as Nude Beach Set to Stay in Byron Bay’, *The Sydney Morning Herald* (online, 22 November 2018) <<https://www.smh.com.au/national/nsw/totally-gutted-locals-angry-as-nude-beach-set-to-stay-in-byron-bay-20181122-p50hmi.html>>.

⁷ See Douglas Booth, ‘Nudes in the Sand and Perverts in the Dunes’ (1997) 21(53) *Journal of Australian Studies* 170 with specific regard to the laws in New South Wales.

⁸ Though this issue has recently attracted the attention of some Australian legal commentators the contributions to date have been very brief in nature. See Rick Sarre, ‘Avoid a Bum Steer this Summer: Here’s what Australian Law says about Public Nudity’, *The Conversation*, 2

this analysis is two-fold: firstly, to provide an overview of the formal law around public nudity on Australian beaches, and, secondly, to unpack the cultural significance and practical operation of regulation within this context. In order to ground this analysis, this article draws on legal material about public order criminal offences, sociological and historical work dealing with social nudity in Australia, and cultural studies commentary on the beach as a particular kind of Australian space. The broad scope of this analysis is necessary because of the cultural importance of the beach within Australian society as well as the fact that, as legal academia has long recognised, close examination of an area of law will typically reveal that there are ‘distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man [sic] and those that in fact govern them’.⁹ These distinctions are particularly evident when analysing nudity on Australian beaches as clear divergences open up between the formal content of the laws relating to public nudity (beach law ‘in the books’) and the ‘living law’ of how nudity at the beach actually takes place and how it is policed and judged (beach law ‘in action’).¹⁰ The analysis is structured across the following three Parts. Part II contextualises the law in this area by engaging with the cultural meanings that attach to the Australian beach and to public nudity. Part III identifies the formal legal structures that govern the legal status of nudity on Australian beaches, focusing on the overlapping patchwork of State/Territory-based criminal offences that prohibit certain kinds of public exposure, public behaviour and bathing dress, as well as the legal exemptions granted to designated ‘free beaches’. Part IV unpacks how the legal rules discussed in Part III are suspended, modified or otherwise operate in unpredictable ways in their practical application to nude beach use in Australia.

Before the analysis can progress, some qualifications are required. This article is concerned solely with laws about nudity itself and only insofar as this nudity occurs within the context of the beach. Its focus is on nude beachgoers who may want to bathe, sunbathe or otherwise avail themselves of the space of the beach in much the same way as clothed beachgoers.¹¹ These nude beachgoers may include lifestyle nudists, aesthetes in search of a more even tan, those who enjoy the feel of sun/sand/sea on their bare skin,

January 2019. <<https://theconversation.com/avoid-a-bum-steer-this-summer-heres-what-australian-law-says-about-public-nudity-107525>>; Craig Burgess, ‘Wilful Exposure’ (2016) 41(3) *Alternative Law Journal* 200. A very small number of legal analyses of nude beach use exist in relation to other jurisdictions. See, eg, George J Eigenhauser Jr, ‘Criminal Sanctions Against Nude Sunbathing in California’ (1978) 1 *Criminal Justice Journal* 491; Richard B Kellam and Teri Scott Lovelace, ‘To Bare or not to Bare: The Constitutionality of Local Ordinances Banning Nude Sunbathing’ (1986) 20 *University of Richmond Law Review* 589.

⁹ Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 12 *American Law Review* 12, 15.

¹⁰ Lawrence M Friedman and Joanna L Grossman, ‘A Private Underworld: The Naked Body in Law and Society’ (2013) 61 *Buffalo Law Review* 169, 180.

¹¹ By ‘nude’ this article means simply without clothing. Though many people who engage in ‘nude’ bathing or sunbathing at the beach may still wear certain personal effects, such as a hat, sunglasses, a watch, sandals, jewellery, etc, these kinds of ‘[a]dornments’ seem to occupy a ‘liminal’ position in that it is unclear whether or not they culturally ‘count as clothes’; Ruth Barcan, *Nudity: A Cultural Anatomy* (Berg, 2004). A person wearing just these kinds of personal effects will nonetheless be referred to as being ‘nude’ for the purposes of this article.

etc. This article will not deal with atypical beach behaviour that could potentially involve nudity (such as public sex) nor will it deal with nudity in other contexts (such as public protests).¹² It will also not deal with the issue of female toplessness as this is a particular kind of partial nudity that warrants its own individual analysis.¹³ This article will also not address the law of the beach in relation to the Australian Capital Territory because this jurisdiction is effectively landlocked.¹⁴

II Cultural Context

Australia's national anthem aptly describes it as a country 'girt by sea'. The combined coastline of Australia 'amounts to a national outline of 59,736 kilometres',¹⁵ and contains an estimated '10,685 beaches'.¹⁶ More than simply a physical space, however, the beach is also richly resonant within Australian culture. Properly understanding the regulation of public nudity on Australia beaches requires an appreciation of this broader context, which in turn necessitates unpacking the meanings that inhere in the beach as a cultural space and the ways in which the dynamics of the beach deflect the broader cultural anxieties that attach to public nudity.

A *The Australian Beach*

The beach is so popular with Australians that commentators have described it as being not only 'a national preoccupation',¹⁷ but a 'national institution'.¹⁸ Whilst the number of visitors to Australian beaches may ebb and flow with the changing of the seasons, it nevertheless retains a place of perennial importance for the cultural psyche. This is because the role of the beach in Australian life is not just practical but is also intensely symbolic, that is '[t]he Australian beach is simultaneously a real and an

¹² On the issue of nudity and public protests see generally Ruth Barcan, 'Female Exposure and the Protesting Woman' (2002) 8(2) *Cultural Studies Review* 62; Brett Lunceford, *Naked Politics: Nudity, Political Action, and the Rhetoric of the Body* (Lexington Books, 2012).

¹³ For reasons including that the regulation of female toplessness in public spaces connects with the related issue of breastfeeding in public and that the law here potentially discriminates in terms of sex/gender when it comes to differentially legalising the exposure of male and female chests. For discussion of these kinds of issues in the context of North America: see, eg, Reena N Glazer, 'Women's Body Image and the Law' (1993) 43 *Duke Law Journal* 113; Danielle Moriber, 'A Right to Bare All? Female Public Toplessness and Dealing with Laws that Prohibit' (2010) 8 *Cardozo Public Law, Policy and Ethics Journal* 453; Chantal Morton, 'When Bare Breasts are a "Threat": The Production of Bodies/Spaces in Law' (2011) 23 *Canadian Journal of Women and the Law* 600; Carmen M Cusack, 'Boob Laws: An Analysis of Social Deviance within Gender, Families, or the Home (Etudes 2)' (2012) 33(2/3) *Women's Rights Law Reporter* 197.

¹⁴ Although it should be noted that the Jervis Bay Territory is located on the coast and is governed by the laws of the Australian Capital Territory: *Jervis Bay Territory Acceptance Act 1915* (Cth) s 4A.

¹⁵ A tally which is inclusive of the Australian mainland, Tasmania and other Australian coastal islands: Drewe (n 4) 9.

¹⁶ Elizabeth Ellison and Lesley Hawkes, 'Australian Beachspace: The Plurality of an Iconic Site' (2016) 15(1) *Borderlands* [online] 1, 7.

¹⁷ Booth, *Australian Beach Cultures: The History of Sun, Sand and Surf* (n 3) 3.

¹⁸ John Fiske, Bob Hidge and Graeme Turner, *Myths of Oz: Reading Australian Popular Culture* (Routledge, 2016 ebook ed, 1987) 53.

imagined space'¹⁹ that Australians inhabit. Despite the physical and geographic differences between individual beaches within Australia, certain unifying images and concepts of the beach— including the yellow-and-red colours of the lifeguards, the international allure of Bondi Beach, the disappearance of Harold Holt, the ever-looming threat of sharks— are indelibly imprinted into the cultural imaginary. The beach is the subject of 'massive, obsessive inscription' in our cultural texts, and 'a vast anthology could be compiled of beach scenes from literature, cinema, photography, painting, theatre, television drama and documentary, newspapers, and magazines'.²⁰ Thus, in much the same way that the continent of Australia is geographically 'surrounded by beaches', notions of the beach also 'cultural[ly] envelope' the lives of Australians.²¹

One key aspect of the cultural image of the Australian beach is its 'egalitarian' nature,²² that is in the quintessentially Australian model of allowing everyone a 'fair go' the beach is figured as a space that is open to, and accepting of, all different kinds of people. The beach is conceptualised as a 'space of equality' and is typically depicted 'as a place where everybody can enjoy themselves',²³ regardless of age, gender, race, religion, etc. And yet, this 'mythic ideal' of egalitarianism does not map unproblematically onto the space of the beach.²⁴ Economic distinctions (such as those based on swimwear brands), aesthetic hierarchies (based on fitness, tanning and different shapes/sizes of embodiment),²⁵ and dynamics of inclusion/exclusion based on familiarity and localism,²⁶ all work to undercut the notion of the beach as entirely egalitarian space. A more fundamental inequality also plays itself out because the cultural significance of the beach means that ways of being on the beach have been indexed to broader notions about what it means to be 'Australian'.²⁷ Although clearly there is no 'monolithic, monocultural ideal of Australianness',²⁸ it is nevertheless the case that certain kinds of partisan claims about Australian identity have been figured on and through the beach. For example, the early bans on beach bathing and the subsequent

¹⁹ Ellison and Hawkes (n 16) 3.

²⁰ Meaghan Morris, 'On the Beach' in Lawrence Grossberg, Cary Nelson and Paula A Treichler (eds) *Cultural Studies* (Routledge, 1992) 450, 459.

²¹ Booth, *Australian Beach Cultures: The History of Sun, Sand and Surf* (n 3) 1.

²² Liz Ellison, 'On the Beach: Exploring the Complex Egalitarianism of the Australian Beach' in Anna-Margaretha Horatschek, Yvonne Rosenberg and Daniel Schäbler (eds) *Navigating Cultural Spaces: Maritime Places* (Brill, 2014) 221.

²³ *Ibid* 224.

²⁴ *Ibid* 225.

²⁵ *Ibid* 224–225.

²⁶ Clifton Evans, "'The local boys': violence, care, masculinity and the riots' in Greg Noble (ed) *Lines in the Sand: The Cronulla Riots, Multiculturalism and National Belonging* (Institute of Criminology Press, 2009) 185.

²⁷ As Taylor notes, the cultural iconography of the beach is 'consistently deployed to signify Australian identity': Affrica Taylor, 'Australian bodies, Australian sands' in Greg Noble (ed) *Lines in the Sand: The Cronulla Riots, Multiculturalism and National Belonging* (Institute of Criminology Press, 2009) 111, 111. For example, '[t]he legendary figure of the lifesaver, arguably the most recognisable Australian beach body, is regularly touted on civic occasions to embody the Australian spirit': at 111.

²⁸ Huntsman (n 1) 164.

insistence on body-covering beach clothing can be understood as the re-inscription of English notions of gentility and modesty on Australian colonial communities.²⁹ As another example, the race riots at Cronulla Beach in 2005 drew on the symbolic power of beach space to undergird claims of white Australian entitlement and authenticity.³⁰ Indeed, the recognition of the beach as being also the jurisdictional ‘border’ or ‘boundary’³¹ for the Australian nation state reveals that who can come to (or leave from) the beach is an issue that is deeply and inextricably interwoven with questions around im/migration, citizenship and belonging. In these ways, the egalitarian ideal of the beach is placed under pressure by the fact that the beach has ‘a positive cultural value and a historical image which is *already* involved in the critical debates and political conflicts of contemporary Australia’.³²

This ‘nexus’ between the physical space of the beach, experiences of being on the beach and Australian identity,³³ reveals that the regulations that govern Australian beaches perform a particular kind of cultural work. These regulations simultaneously validate and invalidate certain way of being on the beach, and in doing so they delimit how Australian identity is figured through this culturally important space. In particular, the prohibitions on nudity at Australian beaches that will be discussed in Part III operate in ways that symbolically disclaim the legitimacy of alternative cultural practices linked to other nationalities, such as the greater ‘tolerance of public nudity (e.g. in parks, pools or bathhouses)’ which characterises many ‘European countries’,³⁴ as well as the subcultural practices of local groups within Australia, such as lifestyles nudists. Read in this way, the regulation of the beach is not only a practical but also a cultural form of policing, with the law of the beach operating on and through Australia’s shoreline to shore up a particular conception of what it means to be Australian.

B Public Nudity on the Beach

Humanity’s use of clothing is driven not just by practical needs, such as protection from the elements, but also by cultural imperatives. Clothing is

²⁹ Indeed the beach is bound up with images and concepts about the imposition of colonial rule, as Morris identifies, ‘[m]ost traditional narrative accounts of Australia always began at the beach: until the 1970s white historians regularly assumed that only when the convicts arrived on “the fatal shore” did time and “history proper” begin in “the timeless land”’: Morris (n 20) 459.

³⁰ Taylor (n 27). As Ellison notes regarding the Cronulla Riots, ‘the violence did not happen arbitrarily on the beach. The beach appeared to represent an active image of Australian identity for the Anglo-Australian rioters’: Ellison (n 22) 226. Similar themes echo through Hartley and Green’s description that ‘[w]hat was at stake’ in the Cronulla Riots ‘was culture – the use of the beach and the right way to ‘be’ Australian’: John Hartley and Joshua Green, ‘The Public Sphere on the Beach’ (2006) 9(3) *European Journal of Cultural Studies* 341, 352.

³¹ Ellison (n 22) 223. See Ellison and Hawkes (n 16) 6.

³² Morris (n 20) 460 (emphasis in original).

³³ Taylor (n 27) 111.

³⁴ Barcan, *Nudity: A Cultural Anatomy* (n 11) 166.

³⁴ Ellison (n 22) 223.

a key marker of the distinction between humans and the other animals,³⁵ and is deeply imbricated with social history, identity formation, religion, inter-personal communication, etc. Cultural expectations around the wearing of clothing differ across various social spaces and within or near the space of the modern Australian beach clothing that may be considered inappropriate in other spaces becomes unremarkable.³⁶ Practical reasons partly account for this— less clothing enables more freedom of movement on the beach and more ready access to its sensorial pleasures (the warm sun, soft sand, cool water, etc)— but cultural dynamics are also at work.

Standards around acceptable clothing at Australian beaches have become significantly more permissive over time: '[o]ne hundred years ago a person wearing the sort of bathing costume considered perfectly normal on Australian beaches today would have been instantly arrested and charged'.³⁷ But whilst the wearing of a relatively minimal amount of clothing may now be culturally and legally authorised at the beach, what little clothing is still required takes on particular importance. As Clarke identifies, 'although the remaining [swimming] costume may be only one millimetre thick and a few centimetres in extent, there still exists a vast psychological and social distance to be crossed in the removal of these final few centimetres.'³⁸ There is also potentially a vast legal distance here, from lawfulness to criminality, as will be discussed in Part III below. This remaining clothing is regarded as so important because its presence, however scant, prevents the wearer from being nude. It is true that each person will likely be 'naked at some time during the course of each day—in bed, in the shower or bath, during sex, when changing clothes', and may very well 'view the naked body every day— that of their partner, their children or themselves— and find nothing very remarkable in the sight'.³⁹ However, it is also true that 'for the overwhelming majority of Australians, there exist ... clear and universally recognised cut-off points' for acceptable nudity.⁴⁰ These cut-off points exist because nudity has a wealth of different and conflicting associations within Western society, some of which are positive but many of which are profoundly negative including links to shame, humiliation, savagery, vulnerability, sin and criminality.⁴¹ One clear delineation for these cut-off points is nudity in the presence of others that lacks some pressing practical rationale such as medical examination or use of changing facilities.⁴² This kind of public nudity 'is,

³⁵ Clarke (n 5) 20.

³⁶ Barcan, *Nudity: A Cultural Anatomy* (n 11) 17.

³⁷ *Wurramura v Haymon; Pregelj v Haymon* (1987) 44 NTR 1, 5.

³⁸ Clarke (n 5) 10–11.

³⁹ *Ibid* 10.

⁴⁰ *Ibid*.

⁴¹ Barcan, *Nudity: A Cultural Anatomy* (n 11) ch 3.

⁴² For an extended discussion of where these cut-off points exist see Rob Cover, 'The Naked Subject: Nudity, Context and Sexualization in Contemporary Culture' (2003) 9(3) *Body & Society* 53, 56–58.

by and large, forbidden to adults— except in strictly circumscribed conditions or as a theatrical, subversive or criminal possibility⁴³.

The association between public nudity and criminalisation is particularly pertinent to this analysis. Various prohibitions against public nudity can be found across Western countries such as Australia, the United Kingdom and the United States of America. A number of rationales have been offered for these laws, including concerns about: hygiene, that public nudity may ‘pos[e] significant risks to public health’;⁴⁴ offense, that the sight of a person’s naked body would cause members of the public to experience an ‘unpleasant mental state’ like disgust, anger or fear;⁴⁵ harm, that being exposed to naked bodies may have negative effects on children;⁴⁶ and, sexual immorality, that public nudity is about exposure for deviant sexual gratification.⁴⁷ Whilst these rationales are touted in support of prohibitions against public nudity generally they bleed through into concerns about beach nudity specifically. In particular, concerns about sexual immorality are evident in relation to discussions about nudity at the beach, with claims of ‘voyeurism’⁴⁸ and ‘sexual deviance’⁴⁹ commonly used to condemn beach nudity. This kind of concern relies on a ‘strong set of discursive connections between nudity, sex and immorality’ that exist within Western culture,⁵⁰ revealing that ‘[u]neasiness with nudity is, in part, related to unease about sex’.⁵¹ Indeed, prohibitions against public nudity have been argued to constitute a type of compulsory sexual modesty.⁵² The fact that nudist groups, and nude beachgoers, may strongly disavow any sexual component to their nudity is subsumed by Western culture’s ‘almost automatic’ equation between the naked body and sexualisation.⁵³

It is debatable whether or not these rationales are accurate or compelling justifications for the criminalisation of public nudity.⁵⁴ For example,

⁴³ Ruth Barcan, ‘“The Moral Bath of Bodily Unconsciousness”: Female Nudism, Bodily Exposure and the Gaze’ (2001) 15(3) *Continuum: Journal of Media & Cultural Studies* 303, 303.

⁴⁴ Bouke de Vries, ‘The Right to be Publicly Naked: A Defence of Nudism’ (2018) *Res Publica* 1, 12.

⁴⁵ *Ibid* 13.

⁴⁶ Jeffrey C Narvil, ‘Revealing the Bare Uncertainties of Indecent Exposure’ (1995) 29 *Columbia Journal of Law & Social Problems* 85, 108. Though there is no ‘convincing scientific proof’ of this alleged kind of ‘harmfulness’: at 109.

⁴⁷ Vries (n 44) 15.

⁴⁸ Fiske, Hidge and Turner (n 18) 63.

⁴⁹ Booth, *Australian Beach Cultures: The History of Sun, Sand and Surf* (n 3) 75.

⁵⁰ Barcan, *Nudity: A Cultural Anatomy* (n 11) 113.

⁵¹ *Ibid* 3.

⁵² Anita L Allen, ‘Disrobed: The Constitution of Modesty’ (2006) 51 *Villanova Law Review* 841.

⁵³ Barcan, *Nudity: A Cultural Anatomy* (n 11) 3.

⁵⁴ For a recent statement of the case for the decriminalisation of public nudity see Vries (n 44). McNamara is of the opinion that ‘many’ of the public order crimes in Australia, a category that includes most of the prohibitions applicable to public nudity, ‘would not “measure up” according to the normative standards espoused by normative criminal theorists’: Luke McNamara, ‘Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform’ in Thomas Crofts and Arlie Loughnan (eds) *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 33, 45.

Feinberg regarded public nudity as a borderline example of whether offense could justify criminalisation.⁵⁵ In his famous thought-experiment about offense in public places he sketched out a situation that involved imagining oneself riding a bus and being confronted by other passengers who partake in a wide range of potentially disagreeable conduct, including farting, trying to engage you in boring conversation, eating vomit, desecrating a flag, masturbating, having sex, etc.⁵⁶ Of the 31 examples of potentially disagreeable conduct included within this thought-experiment, Feinberg concluded that ‘one of the least unsettling experiences’ would be to share the bus with an ‘otherwise well-behaved nude passenger’.⁵⁷ Indeed, if one were to imagine sharing a beach rather than bus with an otherwise well-behaved nude beachgoer, what level of offense (if any) would this entail and would this offense be sufficient to warrant a criminalising response from the state?

This article, however, will not engage further with normative questions about the legitimacy of the scope of criminalisation in relation to public nudity on Australian beaches. This article aims instead to provide an account of how criminalisation currently operates in relation to beach nudity. It is sufficient for these purposes to note here that the legal prohibitions against nudity that currently exist are animated by a broad and wide-ranging set of negative cultural meanings that are discursively linked to public nudity. The cultural anxieties that these meanings generate attach generally to public nudity but become amplified within the context of the beach as it is a space where the line between ‘acceptable’ clothed bodies and ‘unacceptable’ nude bodies is thinner than in other social contexts. These anxieties are then amplified further by the particular cultural importance that the beach has taken on in Australia and the indexical links that exist between ways of being on the beach and Australian identity. Prohibitions against public nudity are deployed (justifiably or not) to manage these cultural anxieties about public nudity and, in doing so, blanket the Australian beach with regulation.

III Beach Law in the Books

It is important to note at the outset that because criminal law is left largely to the States under the *Australian Constitution*, there is no singular overarching federal law governing public nudity and, similarly, no monolithic federal “‘crime’ of nude bathing’”.⁵⁸ Instead, the laws that regulate nudity on Australian beaches cover beachgoers with an excess of potentially applicable offences, some of which address public nudity in general and some of which are more specific to nudity within the beach context. This formal legal apparatus includes State/Territory offences that

⁵⁵ Joel Feinberg, *The Moral Limits of the Criminal Law Volume 2: Offense to Others* (Oxford Scholarship Online, 2016).

⁵⁶ *Ibid* 10–13.

⁵⁷ *Ibid* 14.

⁵⁸ Clarke (n 5) 219.

relate to certain kinds of public exposure, certain kinds of public behaviour and bathing dress, as well as local government bylaws.

Three factors complicate the setting out of the formal law of the beach in relation to nudity. Firstly, much of the relevant law here comprises summary criminal offences. Summary offences are those offences triable summarily before a magistrate, they are typically less serious than those offences triable on indictment before a judge and jury and carry comparatively minor penalties (such as a fine).⁵⁹ Because the processing of summary offences is routinised through the Magistrates Courts and Local Courts there is limited reporting of cases and limited judicial consideration. Accordingly, summary offences tend to be ‘poorly understood and rarely the subject of judicial scrutiny or academic explanation’.⁶⁰ Secondly, not only do an overlapping series of relevant offences regulate nudity at the beach, but the names and exact wordings of these offences vary significantly across States/Territories. The setting out below has grouped different offences together based on the nature of the elements that make up each offence. Thirdly, beyond these State/Territory-based offences a further network of local government regulatory schemes also operates to regulate nudity within the confines of local beaches. As Bronitt and McSherry identify, although ‘they have less legal visibility’ nevertheless ‘[l]ocal by-laws and council regulations play a significant role in the abatement of a wide range of nuisances’ and ‘impose a wide range of restrictions on the use of ... public spaces’.⁶¹ This includes beach spaces. This Part focuses predominantly on State/Territory offences relating to public nudity at the beach because of their greater gravity and visibility. However, it should be noted that some local governments maintain generalised regulations around public nuisances and specific regulations around bathing that may also prohibit public nudity at local beaches.⁶²

⁵⁹ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) 113. There is also a category of ‘hybrid offences’ which are capable of being tried either way: at 113. Three of the offences discussed below are ‘hybrid offences’ rather than summary offences, namely indecent act under *Criminal Code Act 1899* (Qld) s 227 and obscene act in public and indecent act in public, under *Criminal Code* (WA) ss 202 and 203, respectively. Because of its low maximum penalty, a charge under *Criminal Code Act 1899* (Qld) s 227 will be dealt with summarily due to s 552BA unless an intervening factor such as ‘the nature or seriousness of the offence’ or ‘exceptional circumstances’ precludes this under s 552D. It seems unlikely that a case involving simple nudity at the beach would warrant proceeding on indictment. Similarly, *Criminal Code* (WA) ss 202 and 203 both contain a summary conviction penalty, and will likely be dealt with summarily unless the court decides a charge under either of these sections should be dealt with on indictment due to the considerations found in s 5(3), such as the seriousness of the offence.

⁶⁰ Julia Quilter and Luke McNamara, ‘Time to Define “The Cornerstone of Public Order Legislation”’: The Elements of Offensive Conduct and Language Under the *Summary Offences Act 1988* (NSW) (2013) 36 *UNSW Law Journal* 534, 534.

⁶¹ Bronitt and McSherry (n 59) 912.

⁶² For example in Western Australia see *Local Law Relating to Reserves, Shores and Beaches 2001* (City of Nedlands) s 5(1)(i) which provides that ‘[o]n a reserve, foreshore or beach, a person shall not ... bathe, swim, wade, sun bathe, or wander unless properly clothed’; and in South Australia see the Berri Barmera Council, ‘Unclad Bathing Policy’ <https://www.berribarmera.sa.gov.au/webdata/resources/files/Unclad%20Bathing%20Policy_2.pdf> which notes the ‘undertaking of unclad bathing could be constituted as a public annoyance’ under *By Law No. 3 – Local Government Land* s 3.2.

Furthermore, there are also some instances where local government regulations purport to allow public nudity at local beaches in ways that may abut the State/Territory offences discussed here — this issue will be picked up in Part IV below.

With these complications acknowledged, this Part will schematise the formal State/Territory laws that regulate nudity on Australian beaches. This Part begins by setting out the relevant offences that can be used to prohibit public nudity at the beach, including those offences that specifically prohibit a person from exposing certain parts of their body, that more generally prohibit a person from engaging in certain types of behaviour, and that narrowly target appropriate bathing dress. This Part ends by identifying how the scope of these offences is limited by the legal designation of certain public spaces as ‘free beaches’.

A *Public Nudity Offences*

The exposure and behavioural offences that will be discussed below require that the exposure/behaviour in question occurs either in, or in view of, a public place. Whilst different legislative definitions of ‘public place’ or ‘place of public resort’ exist across the jurisdictions, the criteria they use are quite broad, including any place that is ‘open to’ or ‘used by the public’,⁶³ that is a ‘place of public recreation or resort’,⁶⁴ or that the public is ‘permitted’ either ‘access’ or ‘free access’ to.⁶⁵ As such, any beach that is generally open and accessible to members of the public will likely constitute a ‘public place’ for the purposes of these offences (as will, potentially, any carparks, access pathways and toilet/changing facilities that service that beach). Because privately-owned beaches that explicitly exclude the public are a rarity in Australia,⁶⁶ many Australian beaches will likely be ‘public places’.

1 *Exposure Offences*

New South Wales, the Northern Territory, Queensland, Tasmania and Victoria all maintain offences that prohibit a person from exposing certain parts of their body in a public place. In New South Wales and Tasmania these offences are written in largely similar terms, with both jurisdictions making it an offence for a person to ‘wilfully and obscenely’ expose their ‘person’ within, or within view of, a public place.⁶⁷ In the Northern

⁶³ *Summary Offences Act 1988* (NSW) s 3; *Summary Offences Act 2005* (Qld) sch 2.

⁶⁴ *Police Offences Act 1935* s 3 (Tas); *Summary Offences Act 1966* s 3 (Vic).

⁶⁵ *Summary Offences Acts* 5 (NT), *Summary Offences Act 1953* (SA) s 4, *Criminal Code* (WA) s 1.

⁶⁶ Huntsman attributes this both to the fact that historically ‘under English common law the Crown reserved, to a depth of 100 feet (30 metres) adjoining the highwater mark, water frontage on the sea coast’ as well as to ‘a widely-held conviction that the public should have free access to the beaches, as a cultural right transcending mere law’: Huntsman (n 1) 84.

⁶⁷ *Summary Offences Act 1988* (NSW) s 5; *Police Offences Act 1935* (Tas) s8(1A)(a). Though the New South Wales section uses the phrase ‘his or her person’ whilst the Tasmanian section uses the phrase ‘his person’, due to the operation of the *Acts Interpretation Act 1934* (Tas) s 24A the reference to one particular male gender also includes ‘every other gender’.

Territory it is an offence for a person to ‘offen[d] against decency by the exposure’ of their ‘person’ within, or within view of, a public place.⁶⁸ The use of the word ‘person’ within these types of offences is a ‘euphemism of long standing’ that refers to the genitalia.⁶⁹ The Queensland offence is written more bluntly, making it an offence for a person in a public place (or able to be seen from a public place) to ‘wilfully expose his or her genitals’.⁷⁰ The Victorian offence is markedly different from the other offences discussed so far, in that it requires that a person not only ‘exposes (to any extent)’ their ‘genitals’ and that this be done either ‘in, or ... within view of, a public place’, but also that that person ‘intends’ to expose their genitals and that this ‘exposure is sexual’.⁷¹ This final element means that Victoria’s offence section will not apply to the kind of nudity that is the focus of this article.

The element of ‘exposure’ is common to all of these offences and this word has been interpreted in light of its ordinary meaning as found in the *Macquarie Dictionary* entry for the word ‘expose’, which means ‘to present to view, exhibit, display and “to display the genitals to expose one’s self”’.⁷² It has been suggested that in order to satisfy the exposure element there must ‘be a real risk; that is not a too remote or fanciful risk, of a member of the public seeing the exposed genitals’.⁷³ It is not necessary for there to be evidence that any particular person actually saw the exposed genitals, it is legally sufficient to demonstrate that the circumstances were such that they could have been seen by a member of the public.⁷⁴

Whilst the element of exposure is shared across all of these offences, the different jurisdictions each require something else as well, some combination of the additional elements of wilfulness, obscenity or indecency.⁷⁵ For a person to ‘wilfully’ expose themselves means either that they deliberately intended to expose themselves or that even though

⁶⁸ *Crimes Act 1900* (ACT) s 393; *Summary Offences Act* (NT) s 50. Though the Australian Capital Territory section uses the phrase ‘his or her person’ whilst the Northern Territory section uses the phrase ‘his person’, due to the operation of the *Interpretation Act* (NT) s 24 the reference to one particular male gender also includes all persons.

⁶⁹ The Law Reform Commission of Western Australia, *Project No 85: Police Act Offences* (1992) para [6.24]. In *R v Eyles* [1997] NSWSC 452 (1 October 1997), whilst the ‘full extent and meaning of the word “person”’ was not decided, it was held that this term included both ‘a man’s penis and other genitals’: at 8. It was also observed that the offence of obscene exposure in NSW ‘has always applied to both male and female persons’ and that ‘[i]n the case of both males and females, the parts of the body which are capable of being employed for the purpose of obscene exposure are limited. The concepts of obscenity and exposure in a practical sense restrict the potential operation of the provision’: at 7. Cf the English case of *Moloney v Mercer* [1972] 2 All ER 22 where ‘person’ was held to specifically mean ‘penis’ due to the particular statutory history of the relevant English law.

⁷⁰ *Summary Offences Act 2005* (Qld) s 9.

⁷¹ *Summary Offences Act 1966* (Vic) s 19(1).

⁷² *Winston v QPS* [2015] QDC 306, [3].

⁷³ *Ibid* [19].

⁷⁴ *R v Eyles* (n 69); *R v Benson, ex parte Tubby* (1882) 8 VLR (L) 2.

⁷⁵ One peculiar element is unique to the Queensland wilful exposure offence, namely that there is a lack of a ‘reasonable excuse’ for the exposure: *Summary Offences Act 2005* (Qld) ss 9(1) and (2). In *Winston v QPS* (n 72) a man who was bathing naked for recreational purposes at a beach locally-known, but not legally designated as a ‘free beach’, was held not to have a ‘reasonable excuse’: at [30]–[34].

they may not have intended to expose themselves exposure should have been ‘foreseen as a likely consequence’ of their conduct.⁷⁶ Accordingly, a person can satisfy this element even if they went nude on a beach without intending to be seen by anyone else, as long as it can be shown that ‘with reckless disregard [they] disrobe[d] in a public place in a way that creates a real risk that [their] genitals will be seen by another person.’⁷⁷ Whether exposure is ‘obscene’ turns on the meaning of ‘obscenity’, a word with a long history within criminal law. The concept of obscenity has appeared in a number of different criminal offences over the years, including in historical censorship laws relating to publications, films and the like,⁷⁸ and has evolved in meaning over time. The contemporary legal test for whether something is ‘obscene’ is whether it falls outside ‘the generally accepted bounds of decency’,⁷⁹ or ‘transgress[es] contemporary standards of propriety’.⁸⁰ This overlaps to a large degree with the legal test for whether something is ‘indecent’⁸¹ — a recent convergence given that historically these two words were taken to be importantly distinct — which has been defined to mean something that ‘offends against the recognized standards of propriety’,⁸² that constitutes a ‘substantial breach of decorum’,⁸³ or that ‘offend[s] the standards of decency ... generally accepted in the community’.⁸⁴ As the English Court of Criminal Appeal has described, the difference between these two terms could now be said to be one of degree and not of type: ‘[t]he words “indecent or obscene” convey one idea, namely offending against the recognised standards of propriety, indecent being at the lower end of the scale and obscene at the upper end of the scale.’⁸⁵ These developments also indicate that the historical grounding of this area of law in notions of corruption, depravity and ‘Christian moral

⁷⁶ *R v Lockwood* (1981) Qd R 209, 216 (Lucas ACJ).

⁷⁷ *Winston v QPS* (n 72) [24].

⁷⁸ Cases involving the judicial consideration of the meaning of ‘indecent’ and ‘obscene’ within the specific censorship context have, nevertheless, been held to be instructive of the meaning of these terms within the criminal law more generally: *Moloney v Mercer* (n 69) 211; *Cullen v Meckelenberg* [1977] WAR 1, 5.

⁷⁹ *Crowe v Graham* (1968) 121 CLR 375, 395 (Windeyer J).

⁸⁰ *Cullen v Meckelenberg* (n 78) 7.

⁸¹ *R v Stanley* [1965] 2 QB 327, 333.

⁸² *Moloney v Mercer* (n 69) 209.

⁸³ *Norley v Malthouse* [1924] SASR 268, 269–270.

⁸⁴ *Crowe v Graham* (n 79) 403–404 (Owen J). The standard to be applied here is that of ‘the average contemporary Australian ... not the standard of the judge himself as a private individual’: *Attorney-General (SA) v Huber* (1971) 2 SASR 142, 168 (Hogarth J). This standard is not ‘petrified... inflexible and unchanging’ rather it is the ‘notions of today’s community to which we must have regard, not to the notions of the last century’s, the last decade’s, or even last year’s, community’: at 206 (Wells J).

⁸⁵ *R v Stanley* (n 81) 333. Accordingly, ‘[o]bscenities are always indecent but all indecency is not obscene’: *Crowe v Graham* (n 79) 392 (Windeyer J). Or as Bray put it in his summary of Windeyer J’s judgement: ‘obscenity is only an intensified form of indecency’: J J Bray, ‘The Juristic Basis of the Law Relating to Offences Against Public Morality and Decency’ (1972) 46 *The Australian Law Journal* 100, 105.

standards', has given way to 'secular' tests for indecency/obscenity based on 'prevailing community standards'.⁸⁶

Australian courts have held that public nudity is neither inherently indecent nor inherently obscene under these legal tests. Instead, 'when it comes to the law and naked bodies, context is everything.'⁸⁷ This position was staked out in two early cases involving actors whose nudity was part of a theatrical production. In *Attorney-General (SA) v Huber*, a 1971 case involving an application for an injunction to prevent the planned performance of the play "Oh! Calcutta!", Hogarth J held at the preliminary hearing that: '[w]hether nudity of itself is indecent must depend on circumstances'.⁸⁸ This position was affirmed in the final decision, in which Wells J commented that 'nudity *per se* is very far from being indecent in all circumstances'.⁸⁹ Similarly, in *Cullen v Meckelenberg*, a 1977 case involving an obscene exposure charge brought against an actor for his performance in "Equus", Brinsden J held that '[n]udity *per se* is not obscene, nor is the wilful exposure of the penis. It is the circumstances in which the exposure takes place and before whom, that may render an exposure obscene.'⁹⁰

The resulting question is whether public nudity at the Australian beach is indecent or obscene: to what extent (if any) does such nudity, understood in context, contravene prevailing community standards of decency and propriety? In a court of law, this formal legal question would be resolved by a judicial officer or jury applying these standards to the case before them. The application of these standards by judicial officers has resulted in a series of unpredictable and sometimes contradictory outcomes in practice, as will be discussed in Part IV below when the analysis turns to how these offences 'in the books' translate into action.

2 *Behavioural Offences*

In addition to the specific offences based on the element of exposure, an array of offences of broader application also potentially apply to cases involving public nudity. These generalised offences 'operate as "backstops" and "gap fillers"' in the laws around the maintenance of public order,⁹¹ and they prohibit public behaviour (described variously as behaving, engaging in conduct or doing an act) of certain kinds (described variously as indecent, obscene, offensive, insulting, disorderly, a nuisance or disturbing of the public peace). Figure 1 sets out the behavioural offences in each Australian jurisdiction that could apply to cases involving nudity at the beach.

⁸⁶ Simon Bronitt and Henry Mares, 'Sex' in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 620, 620–621.

⁸⁷ Sarre (n 8).

⁸⁸ *Attorney-General (SA) v Huber* (n 84) 147 (Hogarth J).

⁸⁹ *Ibid* 207 (Wells J).

⁹⁰ *Cullen v Meckelenberg* (n 78) 7 (Brinsden J).

⁹¹ Bronitt and McSherry (n 59) 910.

Figure 1: *Offences with a behavioural element that could be used to prohibit public nudity.*

Jurisdiction	Offence
NSW	Offensive conduct: <i>Summary Offences Act 1988</i> (NSW) s 4
NT	Offensive, &c., conduct: <i>Summary Offences Act</i> (NT) s 47
QLD	Public nuisance: <i>Summary Offences Act 2005</i> (Qld) s 6 Indecent acts: <i>Criminal Code Act 1899</i> (Qld) s 227
SA	Disorderly or offensive conduct or language: <i>Summary Offences Act 1953</i> (SA) s 7 Indecent behaviour: <i>Summary Offences Act 1953</i> (SA) s 23
TAS	Public nuisance: <i>Police Offences Act 1935</i> (Tas) s 13 Prohibited behaviour: <i>Police Offences Act 1935</i> (Tas) s 21
VIC	Obscene, indecent, threatening language or behaviour etc. in public: <i>Summary Offences Act 1966</i> (Vic) s 17 Disorderly conduct: <i>Summary Offences Act 1966</i> (Vic) s 17A
WA	Disorderly behaviour in public: <i>Criminal Code</i> (WA) s 74A Obscene act in public: <i>Criminal Code</i> (WA) s 202 Indecent act in public: <i>Criminal Code</i> (WA) s 203

Specific legal meanings attach to each of the terms used to describe the relevant kind of unlawful behaviour. The legal meanings of the terms ‘indecent’ and ‘obscene’ have already been set out above. As other examples, under Queensland law the term ‘disorderly’ ‘denote[s] “a substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people”’, whereas ‘offensive’ means ‘displeasing, annoying or insulting’.⁹² It has been judicially suggested in Queensland that ‘[n]ude sunbathing in a public place on a beach within view of areas to which the general public has resort is conduct which potentially (depending upon time, place and circumstance) is capable of being regarded as disorderly or offensive, even by contemporary standards’.⁹³ However, despite the law’s use of such a wide range of different terms and definitions within these behavioural offences, in Walsh’s appraisal she identifies that the ‘fair degree of overlap between these discrete definitions ... tend[s] to suggest that the distinctions between them are largely illusory.’⁹⁴

⁹² Tamara Walsh, ‘Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses’ (2005) 24 *The University of Queensland Law Journal* 123, 131–132.

⁹³ *Andrews v Rockley* [2008] QDC 104, [19].

⁹⁴ Walsh (n 92) 132.

In order to avoid being mired in the legal minutiae of the particular wording of each individual offence, this section will gesture broadly to those offences that seem likely to apply to a situation involving nudity on the beach.⁹⁵ In particular, it will focus on those jurisdictions that have not yet been addressed in detail because they lack a relevant exposure offence, namely South Australia, Victoria and Western Australia. Despite this lack it seems clear that public nudity is nevertheless prohibited in each jurisdiction through their behavioural offences. This is most obvious in Victoria where s 17 of the *Summary Offences Act 1966* (Vic) provides that: ‘Any person who in or near a public place or within the view ... of any person being or passing therein or thereon ... behaves in a riotous indecent offensive or insulting manner ... shall be guilty of an offence’.⁹⁶ The following subsection clarifies that this offence applies to public nudity, as it notes that ‘behaviour that is indecent offensive or insulting includes behaviour that involves a person exposing (to any extent) the person’s anal or genital region.’⁹⁷ In South Australia s 23 of the *Summary Offences Act 1935* (SA) provides that: ‘A person who behaves in an indecent manner ... in a public place, or while visible from a public place ... is guilty of an offence.’⁹⁸ It is no coincidence that when South Australia enacted legislation allowing for public nudity at designated ‘free beaches’ the provision providing for this was inserted immediately after the s 23 offence as s 23A.⁹⁹ This targeted placement suggests that the s 23 offence is understood as otherwise criminalising public nudity. Western Australia historically had an exposure offence within s 66(11) of the *Police Act 1892* (WA) that prohibited the wilful and obscene exposure of the person within a public place. Following a review by the Western Australian Law Reform Commission,¹⁰⁰ many of the offences within the *Police Act 1892* (WA) were repealed and modernised versions were inserted into the *Criminal Code* (WA).¹⁰¹ Section 203 of the *Criminal Code* (WA) was intended to be a functional replacement of the exposure offence,¹⁰² even though it is

⁹⁵ Though, there are a series of difficult, and important, legal issues to be teased out by close examination of these kinds of public order offences. For example, determining whether any of these offences across the jurisdictions contain a *mens rea* element and, if so, how it operates: Quilter and McNamara (n 60). As another example, whether a ‘reasonable excuse’ exists for the behaviour in question operates like a defence to s 4 *Summary Offences Act 1988* (NSW) and as an element of the offence in s 21 *Police Offences Act 1935* (Tas).

⁹⁶ *Summary Offences Act 1966* (Vic) s 17(1)(d).

⁹⁷ *Ibid* s 17(1A).

⁹⁸ *Summary Offences Act 1935* (SA) s 23(1)(a).

⁹⁹ The section was inserted by the *Police Offences Act Amendment Act 1975* (SA) s 2.

¹⁰⁰ The Law Reform Commission of Western Australia (n 69).

¹⁰¹ *Criminal Law Amendment (Simple Offences) Act 2004* (WA).

¹⁰² Explanatory Memorandum, Criminal Law Amendment (Simple Offences) Bill 2004, 10–11. Though the shift from ‘obscene’ to ‘indecent’ as the relevant legal standard is a clear difference and thus s 202, rather than s 203, appears to be the closer legal equivalent. Furthermore, both the ss 202 and 203 offences include a provision that creates a defence if it can be ‘prove[n] that it was for the public benefit that the act complained of should be done’. It is unlikely that this would apply to situations involving nudity at the beach, as notions of public benefit here seem weak. When creating this defence, parliament may have had in mind situations involving public nudity of the kind that occurred in *Cullen v Meckelenberg* (n 78),

written as a behavioural offence instead. This newer section provides that: ‘A person who does an indecent act ... in a public place or in the sight of any person who is in a public place ... is guilty of a crime’.¹⁰³ The behavioural offences from these three jurisdictions are all clearly capable of being used to prohibit public nudity at the beach despite their lack of a specific exposure element. This is reflective of the general principle that the very broad scope of the behavioural offences across the various jurisdictions means that they are all capable of this kind of regulatory work.

3 *Bathing Offences*

A final set of offences deals specifically with setting standards for appropriate dress within a bathing context. Such bathing offences exist within Tasmania and New South Wales. In Tasmania s 14 of the *Police Offences Act 1935* makes it an offence for any person in, or within sight of, a public place to either ‘sunbathe’ or to ‘bathe in any river, lake, harbour or stream’ unless that person ‘is decently clothed’.¹⁰⁴ In New South Wales s 633 of the *Local Government Act 1993* (NSW) sets out the powers of local councils to regulate bathing in and around their bodies of water, including any ‘public bathing place’.¹⁰⁵ This section makes it an offence for any person to be nude in public view in any such bathing place.¹⁰⁶

B *The ‘Free Beach’ Exemptions*

This selection of overlapping criminal offences prohibiting public nudity does not formally apply in an even way to each and every single beach, even those within the same State/Territory. This is because some Australian jurisdictions have legally designated certain beaches as ‘free beaches’ where the typical prohibitions against public nudity are modified. However, not all jurisdictions have done this, indeed neither Western Australia nor Queensland have instituted any specific State-based legal mechanism that allows for the designation of a ‘free beach’.

The Northern Territory and Victoria have both established ‘free beaches’ by way of stand-alone legislation. The *Nudity Act* (NT) allows for areas to be declared ‘free areas’¹⁰⁷ wherein it is not an offence to be nude.¹⁰⁸ Casuarina Beach is the sole declared free area.¹⁰⁹ The *Nudity (Prescribed Areas) Act 1983* (Vic) allows for areas to become ‘prescribed areas’ by way of a notice published in the Government Gazette, and also allows for ‘prescribed times’ to be set for the use of each area.¹¹⁰ It is not an offence

as it was explicitly envisaged that this defence ‘may apply to theatrical performances etc’: Explanatory Memorandum, Criminal Law Amendment (Simple Offences) Bill 2004, 11.

¹⁰³ *Criminal Code* (WA) s 203(1)(a).

¹⁰⁴ *Police Offences Act 1935* (Tas) s 14(1).

¹⁰⁵ *Local Government Act 1993* (NSW) s 633(1).

¹⁰⁶ *Ibid* s 633(2).

¹⁰⁷ *Nudity Act* (NT) s 3.

¹⁰⁸ *Ibid* s 5.

¹⁰⁹ *Nudity Regulations* (NT).

¹¹⁰ *Nudity (Prescribed Areas) Act 1983* (Vic) s 2.

to be nude within a prescribed area during the prescribed time.¹¹¹ The prescribed areas (whose prescribed times are all ‘any time’) are Point Impossible Beach,¹¹² Southside Beach,¹¹³ and Sunnyside North Beach.¹¹⁴ Campbell’s Cove was a prescribed area until 2015.¹¹⁵

South Australia has established ‘free beaches’ by way of a specific section contained within a broader piece of criminal law legislation. Section 23A of the *Summary Offences Act 1953* (SA) provides that ‘being in an unclad state’ either ‘in an area dedicated or reserved under an Act for unclad bathing’ or the ‘waters adjacent’ to this, ‘is not of itself an offence against an Act or law’ in South Australia. No such areas are dedicated or reserved under the *Summary Offences Act 1953* (SA) or its regulations, or under any other legislation passed by the South Australian Parliament. However, South Australian local government bylaws do allow for nudity within certain beach areas, including at Pelican Point and Maslin Beach.¹¹⁶

The capacity for ‘free beaches’ to be designated in New South Wales and Tasmania is limited in scope. In New South Wales the bathing offence under s 633 of the *Local Government Act 1993* (NSW) does not apply at a place either if a local council notice allows for ‘nude bathing’ there or if the place is a ‘designated beach’ under the Act.¹¹⁷ Councils have exercised their power to allow for nude bathing¹¹⁸ at a small number of beaches, including Armands Beach and Tyagarah Beach.¹¹⁹ The ‘designated beaches’ under the Act are places where local councils cannot prohibit nude bathing,¹²⁰ and include Lady Bay Beach, Cobblers Beach, Obelisk Beach, Werrong Beach and Samurai Beach.¹²¹ In Tasmania the bathing offence under s 14 of the *Police Offences Act 1935* does not apply if the

¹¹¹ *Ibid* s 3.

¹¹² Victoria, *Victoria Government Gazette*, No 125, 30 November 1983, 3880, as amended by Victoria, *Victoria Government Gazette*, No 143, 12 December 1984, 4395.

¹¹³ Victoria, *Victoria Government Gazette*, No 92, 5 November 1986, 4256, which seemed to replace the earlier beach near Point Addis within the same shire of Barrabool that had previously been recognised in Victoria: *Victoria Government Gazette*, No 125, 30 November 1983, 3880; amended by Victoria, *Victoria Government Gazette*, No 143, 12 December 1984, 4395; and ultimately revoked by Victoria, *Victoria Government Gazette*, No 92, 5 November 1986, 4255.

¹¹⁴ Victoria, *Victoria Government Gazette*, No 92, 5 November 1986, 4256.

¹¹⁵ Victoria, *Victoria Government Gazette*, No 92, 5 November 1986, 4255; but revoked by Victoria, *Victoria Government Gazette*, No G 39, 1 October 2015, 2097.

¹¹⁶ Local governments in South Australia have authority to create bylaws under *Local Government Act 1999* (SA) s 246. The Berri Barmera Council has recognised Pelican Point by way of an ‘Unclad Bathing Policy’ <<https://www.berribarmera.sa.gov.au/webdata/resources/files/Unclad%20Bathing%20Policy.2.pdf>> that exercised *By Law No. 3 – Local Government Lands* 3.2. The City of Onkaparinga has recognised Maslin Beach by way of *Foreshore By-law 2016* s 9.2.

¹¹⁷ *Local Government Act 1993* (NSW) s 633(2).

¹¹⁸ *Ibid* ss 633(3)–(4).

¹¹⁹ The Bega Valley Shire Council declared Armands Beach to be a ‘free beach’ in 1993: ‘Armands Beach’, *VisitNSW* (Web Page) <<https://www.visitnsw.com/destinations/south-coast/merimbula-and-sapphire-coast/bermagui/attractions/armands-beach>>. The Byron Shire Council permits nude bathing at Tyagarah Beach: ‘Tyagarah Beach’, *Byron Shire Council* (Web Page, 2019) <<https://www.byron.nsw.gov.au/Community/Recreation/Parks-and-reserves/Tyagarah-Beach>>.

¹²⁰ *Local Government Act 1993* (NSW) s 633(4B).

¹²¹ *Local Government Act 1993* (NSW) s 633(6).

‘appropriate council’ has authorised nude bathing in that place.¹²² Apparently, no local councils have exercised their authority under this section to allow for nude bathing on any Tasmanian beaches.¹²³ An underlying legal issue means that these provisions in New South Wales and Tasmania do not appear to entirely exempt public nudity within these spaces from legal consequences. Unlike in the Northern Territory, South Australia, and Victoria, these provisions do not suspend the operation of all criminal offences that prohibit public nudity: all they do is suspend the operation of the relevant bathing offences. Because an overlapping series of criminal offences regulate public nudity on the beach, including the exposure and behavioural offences identified above, the suspension of the bathing offences alone may not be sufficient to create a genuinely ‘free beach’ in New South Wales and Tasmania.

IV Beach Law in Action

As the analysis has progressed through Part III it has become apparent that a variety of overlapping offences regulate nudity on Australian beaches, with certain exemptions carved out for a small number of ‘free beaches’ that are unevenly distributed around Australia’s coastline. But Part III’s formalistic presentation of the beach law ‘in the books’ needs to be complemented by an appreciation of how these prohibitions translate into the beach law ‘in action’, that is, by a broader account that incorporates an understanding of how nude beach use and regulatory forces operate in practice.

This kind of broader account is necessary for two key reasons. Firstly, as noted in the Introduction, legal academia has long recognised that close examination of an area of law will typically reveal that there are ‘distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man [sic] and those that in fact govern them’.¹²⁴ The crucial importance of paying attention to the complexities, specifics and context of the criminal law, and not just the statutory wording of offence provisions, has been highlighted by recent Australian commentary on the dynamics of criminalisation.¹²⁵ McNamara has drawn attention to the need for commentators to deal with both the ‘law creation dimensions’ as well as ‘operational dimensions’ of criminalisation, because the ‘actual parameters of a crime’ are the sum of both its definition within statute as well the use that is made of it by legal actors.¹²⁶ Secondly, many of the offences that apply to public nudity that were discussed in Part III fall within broader category of ‘public order’ offences. The range of public order offences is ‘highly diversified’, including public drunkenness,

¹²² *Police Offences Act 1935* (Tas) s 14(1).

¹²³ Ted O’Connor, ‘Nudist Groups Withdraws Proposal for Dedicated Tasmanian Beach’, ABC News (online, 11 July 2016) <<https://www.abc.net.au/news/2016-07-11/nudist-group-withdraws-proposal-for-dedicated-tasmanian-beach/7586982>>.

¹²⁴ Pound (n 9) 15.

¹²⁵ See generally McNamara (n 54).

¹²⁶ *Ibid* 41 (emphasis in original).

public urination, and unlawful assembly,¹²⁷ as well as the exposure and behavioural offences. What unites this category of offences is its ostensible aim: ‘the preservation of order in public places in the interests of the amenity and security of citizens, and so that they may exercise, without undue disturbance, the rights and freedoms involved in the use and enjoyment of such places’.¹²⁸ The nature of public order offences has been argued to ‘encourage (and demand)’ a context-based analysis that engages with how they operate in practice.¹²⁹ This is because these offences tend to be broadly-worded and subject to a wide scope of policing discretion.

The case of *Winston v QPS* is a good illustration of the need to engage not only with the law ‘in the books’ but also the law ‘in action’ when it comes to analysing nudity at the beach.¹³⁰ In this case a man was convicted of a wilful exposure offence for bathing nude at Alexandria Bay, a beach located in Queensland which is a jurisdiction that has no legally-designated ‘free beaches’. However, the trial court accepted as background to the case that the man had:

[D]eliberately sought a location where it was common for persons to sunbathe and swim naked. In this regard, he made a number of inquiries, including attending an information centre at Noosa on three different occasions where he was advised that the beach had been known as a ‘nudist beach’ for a period of some 30 years.¹³¹

Indeed, at the time the offence was committed there were ‘approximately 20 people on the beach, about 15 of whom were unclothed’,¹³² and the appellate court acknowledged that the man had not been seen naked by any clothed person other than the police officer who charged him.¹³³ Whilst the man was convicted of the offence, ultimately he faced no punishment and no conviction against him was recorded.¹³⁴ This case neatly encapsulates a number of the key themes that will underlie the discussion in this Part, including the important role that police and judicial officers play in translating the formal law into practice, the uneasy mixing of localised social norms and general legal prohibitions around public nudity at the beach, and the unpredictable outcomes that these dynamics can generate. These themes will be developed through this Part’s analysis of beach law ‘in action’ as it engages with the exercise of policing discretion, the application of indecency/obscenity tests, and the complex links between social patterns of nude beach and the ‘free beaches’.

¹²⁷ Bronitt and McSherry (n 59) 860.

¹²⁸ *Coleman v Power* [2004] HCA 39, [32] (Gleeson CJ). These kinds of offences have ‘a common thread of punishing and deterring behaviour likely to annoy, disturb or upset average members of the community. Expressed differently, the relevant provisions can be regarded as requiring conformity to standards accepted by a wide range of people in society’: *Police v Pfeifer* (1997) 68 SASR 285, 8 (Doyle CJ).

¹²⁹ McNamara (n 54) 44. Indeed, as Bronitt and McSherry note, ‘[o]ffences against public order must be understood in the context of their enforcement’: Bronitt and McSherry (n 59) 862.

¹³⁰ *Winston v QPS* (n 72).

¹³¹ *Ibid* [8].

¹³² *Ibid*.

¹³³ *Ibid* [9].

¹³⁴ *Ibid* [2].

A Policing Discretion

Many of the criminal offences discussed in Part III, especially the behavioural offences, fall squarely within the description of public order offences that are ‘vague and open-ended, with the characterisation of the behaviour left to the discretion of the police in the first instance, and subsequently to the discretion of magistrates’.¹³⁵ These offences are worded in such broad ways ‘as to make it impossible for “desk-top” analysis to point to the line between criminal and non-criminal behaviour’.¹³⁶ How exactly, for example, does one draw a clear line between those contexts where public nudity is decent and those where it is indecent? Is all public nudity offensive, insulting or a nuisance, or just some forms of public nudity? As the answers to these kinds of questions are not clearly set out in the formal law, police officers are effectively ‘given the statutory powers to define the limits of the behaviour’ that does or does not contravene these offences when it comes to the law’s enforcement.¹³⁷ In a practical sense the ‘[p]olice are given the responsibility of deciding ... whether the circumstances of a person found in a state of undress amount to indecent or disorderly conduct, or involve an obscene or lewd act’.¹³⁸ Given this wide discretionary latitude involved in policing public nudity, there is a wide scope for variation in policing decisions.

This variation is evident in decisions as to whether to charge someone with an offence for being nude and also in decisions about what to charge them with. Sarre opines that the most likely ‘law enforcement scenari[o]’ in relation to beach nudity is not the arrest and charging of a nude beachgoer with an offence, but rather a more minimal intervention involving asking them to cover parts of their body.¹³⁹ Indeed, police discretion to not intervene is exercised very broadly in relation to organised events like the Nude Solstice Swim, an annual naked beach swim held in Tasmania as part of the Dark Mofa arts festival which in 2019 involved around 2,000 participants.¹⁴⁰ Non-interventionist approaches may not always be followed by police. Police can sanction nudity through means other than charging nude beachgoers, utilising broad regulatory powers such as the issuing of move-on notices to people in public places. The case law also suggests that police do sometimes charge beachgoers simply for

¹³⁵ David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (The Federation Press, 6th ed, 2015) 518.

¹³⁶ McNamara (n 54) 46.

¹³⁷ Doreen J McBarnet, *Conviction: Law, the State and the Construction of Justice* (Macmillan Press, 1981) 32.

¹³⁸ Sarre (n 8).

¹³⁹ *Ibid.*

¹⁴⁰ ‘Record Number of Solstice Swimmers Bare All in Hobart’, *SBS News* (online, 22 June 2019) <<https://www.sbs.com.au/news/record-number-of-solstice-swimmers-bare-all-in-hobart>>. Police had initially warned organisers to cancel the planned inaugural swim in 2013, but ended up supporting the swim: Tim Douglas, ‘Nude Swim for Dark Mofa Festival Gets Tasmania Police Go-Ahead’, *The Australian* (online, 21 May 2013) <<https://www.theaustralian.com.au/arts/nude-swim-for-dark-mofa-festival-gets-tasmania-police-go-ahead/news-story/f044cfd06916d6a8065576335c9444ed>>.

being nude, indeed police sometimes deliberately patrol certain beaches in order to locate and charge nude beachgoers.¹⁴¹ In situations where charges are laid, the fact that an overlapping series of prohibitions apply to public nudity means that authorities can pick-and-choose which specific offence to charge. For example, the 2008 case of *Andrews v Rockley* involved the appeal against conviction of a man who had been caught by passing police whilst he was sunbathing nude at a beach.¹⁴² The man here was charged and (initially) convicted of a public nuisance offence under s 6 of the *Summary Offences Act 2005* (Qld), rather than the exposure offence under s 9. As another example, in the 1983 case of *Featherstone v Fraser* a woman who was sunbathing naked at Thompson's Bay was charged and (initially) convicted under the now-repealed *Offences in Public Places Act 1979* (NSW) with an offence involving 'causing serious alarm or affront' under s 5 rather than the obscene exposure offence under s 6.¹⁴³

Another key example of how policing discretion leads to divergence between the beach law 'in the books' and 'in action' is the way that the *prima facie* neutrality of the exposure offences is undercut by discriminatory practical enforcement. Burgess has noted that in Queensland '[t]here are many instances of men being prosecuted for wilful exposure ... but seemingly none concerning women',¹⁴⁴ and that when women are charged for public nudity this is typically done through the set of behavioural 'offences relating to public nuisance, trespass or disorderly behaviour'.¹⁴⁵ (Whilst Burgess' analysis here is framed as being about public nudity in general, a significant portion of his discussion focuses on nudity at the beach.) Burgess identifies a legal issue as underlying this disparity, namely the fact that the Queensland exposure-based offence requires one to expose their 'genitals' in public.¹⁴⁶ He explains that the biological differences between (typical) male and female genitalia means that when a male person is nude their genitalia is more readily visible to observers, and that disparities in enforcement may result from these biological differences being dealt with unevenly by the relevant law.¹⁴⁷ Ultimately, he suggests that for the law here to be of more equitable application to both men and women, the Queensland exposure offence could be amended to make it an offence to simply be 'naked' rather than to expose one's 'genitals'.¹⁴⁸

The scope of what it at issue here, however, is broader than Burgess addresses. Whilst Queensland's exposure offence may use the blunt word 'genitals', the exposure offences in New South Wales, the Northern Territory and Tasmania all likely raise the same issue as Queensland due to the fact that the word 'person', which appears in each of these offences,

¹⁴¹ See, eg, *Police v Wenzel* [2008] QMC 11.

¹⁴² *Andrews v Rockley* (n 93).

¹⁴³ (Unreported Judgement, NSW Supreme Court, Yeldham J, 16 November 1983).

¹⁴⁴ Burgess (n 8) 200.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.* 201.

is legally interpreted to mean the genitals. Indeed, when discussing the historical Western Australian exposure offence, the Law Reform Commission of Western Australia accepted that given the elements of this offence, and ‘given the anatomical differences between the genitals of males and females, it is an offence which is rarely likely to be committed by a female’.¹⁴⁹ Furthermore, whilst there certainly are reported cases of female nudity at the beach attracting criminal legal attention,¹⁵⁰ the preponderance of the reported case authorities identified in this article involve male nudity across both the exposure as well as the behavioural offences. This discrepancy may partly result from the legal issue Burgess has identified, it may also partly result from the fact that more men than women appear willing to engage in social nudity in front of others, with the history of organised nudism in Australia testament to the disproportionate interest of males in joining nudist groups.¹⁵¹ But further underlying all of this is the social reality that different sets of cultural associations and understandings attach to male nudity when compared to female nudity.

Certain kinds of naked bodies more intensely provoke the cultural anxieties around public nudity that were discussed in Part II. As Barcan has observed, ‘the nakedness of real-life male bodies in public space is much more “dangerous” than that of female bodies’.¹⁵² The ready conflation of nudity with sexuality within Western culture combines with the cultural trope of the ‘flasher’ to code male public nudity as necessarily both sexualised and threateningly exhibitionistic, with the public exposure of the penis being seen as akin to brandishing a ‘weapon’.¹⁵³ By contrast, the ‘naked female body’ in public is more likely regarded as vulnerable, ‘to be seen as in danger rather than dangerous’.¹⁵⁴ In this way, the public exposure of the female body is ‘considered if not less criminal, then certainly less *dangerous* than exposure of the penis’.¹⁵⁵ As a result, even after addressing any structural sex-based inconsistencies that might be hidden within the language of the exposure offences, it may nevertheless be the case that the police’s wide discretionary powers in relation to the law here are still more readily exercised against nude male bodies at the beach because of the differential cultural coding of male and female nudity.

¹⁴⁹ The Law Reform Commission of Western Australia (n 69) [6.25].

¹⁵⁰ Including the exposure offence cases of *Valle v Whyte* (Supreme Court of Western Australia, Wallace J, 29 November 1983) and *Re D’Espiney* (District Court of New South Wales Special Jurisdiction, Shillington J, 2 June 1988).

¹⁵¹ Clarke (n 5) 234–244.

¹⁵² Barcan, *Nudity: A Cultural Anatomy* (n 11) 110.

¹⁵³ Ibid 185.

¹⁵⁴ Ibid 110.

¹⁵⁵ Barcan, ‘Female Exposure and the Protesting Woman’ (n 12) 64 (emphasis in original). Though it may be that the ‘danger’ of the naked female body is culturally constructed as danger of a different kind, namely its capacity to apparently incite uncontrollable male sexual responses: Friedman and Grossman (n 10) 174.

B *Standards of Decency and Propriety*

When deciding whether or not to utilise the broad range of potentially applicable criminal prohibitions in relation to a particular instance of beach nudity, police officers are acting as ‘arbiters’ of whether that conduct is offensive, indecent, obscene, a nuisance, etc.¹⁵⁶ This discretionary decision-making is opaque because it is carried out ‘largely beneath the threshold of judicial supervision’,¹⁵⁷ and so it is difficult to determine how and why these decisions are made. However, where charges are laid in particular instances of beach nudity and when such charges are contested (and their outcomes possibly even appealed), judicial officers then become the arbiters of the relevant legal tests. The resulting visibility opens up judicial decision-making here to scrutiny, and this section will focus on the handling of the standards of decency and propriety that inhere in the legal tests of indecency/obscenity. The formal content of these tests was outlined in Part III above but, when it comes to applying these tests in practice, judicial decisions have proven to be inconsistent and somewhat unpredictable.

Because public nudity is neither inherently indecent nor obscene, judicial decision-makers are required to consider how nudity operates within its context in order to determine whether it is actually indecent or obscene. However, as we have seen in Part II, the beach provides an idiosyncratic context as it is a space where typical culturally-accepted boundaries around clothing and the exposure of the body are relatively looser than in other spaces, and it is also a space that is heavily symbolically invested with cultural significance to Australians. So what have the courts made of the beach context? There are only a handful of reported judicial decisions dealing with this issue, many of which centre around the historical exposure offence from Western Australia¹⁵⁸ and/or deal with nudity that is closely proximate to the beach rather than directly on the beach (such as nudity in nearby sand dunes or carparks). Furthermore, all of the cases involve consideration of an exposure offence with an obscenity element and the element of indecency has only been addressed in *obiter dicta*. Nevertheless, working through these cases reveals a variety of ways in which judicial decision-makers have engaged with standards of decency and propriety on the beach.

In the 1983 WA Supreme Court case of *Valle v Whyte* a woman successfully appealed against her conviction for an obscene exposure offence for posing for naked photographs in the sand dunes between Mullaloo Beach and the nearby road.¹⁵⁹ At trial the magistrate had regarded this as a clear-cut case, treating it as a given that it was ‘an offence to

¹⁵⁶ McNamara (n 54) 48.

¹⁵⁷ David Brown et al (n 135) 260.

¹⁵⁸ This offence was contained in the *Police Act 1892* (WA) s 66(11), which prohibited ‘Any person wilfully and obscenely exposing his person in any street or public place, or in the view thereof, or in any place of public resort’. It was repealed by *Criminal Law Amendment (Simple Offences) Act 2004* (WA) s 57.

¹⁵⁹ *Valle v Whyte* (n 150).

display the naked body' in such a way.¹⁶⁰ However, the appellate court disagreed, granting the appeal against conviction because the trial magistrate's 'absolute condemnation' of the woman's nudity had not demonstrated the proper application of the test for obscenity, namely its requisite consideration of 'the circumstances and the setting' of the nudity and the 'standards of the community in respect of such a case'.¹⁶¹ The quashing of her conviction presupposes that it was possible that the woman's nudity may not have been found to be obscene if this test had been properly applied. However, the 2002 case of *Erkens v Grono* suggests instead that public nudity proximate to the beach will be obscene.¹⁶² This case involved an appeal against sentence for a conviction for an obscene exposure offence brought against an elderly man who was seen standing next to his van at a Fremantle beach, wearing only a shirt and touching his penis (it was not found that he was masturbating). Whilst refusing the application that this conviction be spent, Miller J described 'the wilful exposure by a male person of his genitals in a carpark at a popular beach' as being 'a serious matter. Members of the public are entitled to expect that they can attend such locations ... without encountering cases of such exposure.'¹⁶³ This outcome is consonant with the 1988 New South Wales Local Court decision in *Police v Smithson*, where a man was charged with an obscene exposure offence for walking naked through the sandhills between Wanda and Boat Harbour beaches.¹⁶⁴ In this case, McMahon M found that because this area was 'open to and used by walkers and joggers' who could not have been said to have voluntarily agreed to see the man's naked body, the offence was proven as such conduct 'amount[ed] to obscene exposure within the bounds of contemporary community standards'.¹⁶⁵

If beach nudity is obscene then *ipso facto* it is also indecent because the threshold test for indecency is lower than that for obscenity. But for this same reason if nudity at the beach is not obscene it may nonetheless still be indecent. Whilst no reported case has directly addressed the issue of indecency in the context of beach nudity this was the subject of passing comment in the 1971 case of *Moloney v Mercer*.¹⁶⁶ Here Taylor J was tasked with determining whether a woman who performed a striptease at a Kings Cross club committed a (since-repealed) indecent exposure offence. Citing favourably the 3rd edition of *Halsbury's Laws of England*, Taylor J extracted the quotation that '[b]athing in a state of nudity in a place near to which persons frequently pass is indictable',¹⁶⁷ before adding the

¹⁶⁰ Ibid [4].

¹⁶¹ Ibid.

¹⁶² [2002] WASCA 184.

¹⁶³ *Valle v Whyte* (n 150) [7].

¹⁶⁴ (1988) Petty Sessions Review 3709.

¹⁶⁵ Ibid 3713.

¹⁶⁶ *Moloney v Mercer* (n 69). This offence was contained in the *Summary Offences Act 1970* (NSW) s 11, which provided that '[a] person whose person is indecently exposed in or within view of a public place or a school is guilty of an offence'. It was repealed by *Summary Offences (Repeal) Act 1979* (NSW) s 3.

¹⁶⁷ *Moloney v Mercer* (n 69) 209.

comment that behaviour that ‘would offend against decency in a public place such as a crowded surfing beach may not offend against decency in a theatre or other place of entertainment.’¹⁶⁸ The particularisation of the hypothetical beach here as being a ‘crowded surfing beach’ leaves open as much as it resolves: how is the decency and propriety of public nudity to be determined at a sparsely-populated beach, a sunbathing beach or some other kind of beach?

Indeed, the beach has not been taken to provide one indivisible type of context in which to situate public nudity but rather a range of differentiated beach contexts have inflected the judicial application of relevant standards of decency and propriety. In particular, when nudity occurs on or near a beach known for nude bathing this has been regarded as a relevant consideration in some cases, presumably because members of the public at such a beach will be less likely to be shocked, offended or insulted at the sight of nudity there. Indeed, other members of the public may themselves ‘be in the same state of undress’.¹⁶⁹ Crucially, though, the beaches discussed here are not the legally-designated ‘free beaches’ identified in Part III, they are simply beaches that are known socially within the local community as nude bathing beaches. (This issue of conflict between legally and socially recognised ‘free beaches’ will be discussed below in this Part.) For example, in the 1988 case of *Re D’Espiney* a woman was initially convicted of an obscene exposure offence for bathing nude at Bondi Beach.¹⁷⁰ This conviction was quashed on appeal, with Shillington DCJ explaining that:

I think it is of significance ... that the alleged obscenity took place in an area where topless bathing was permitted. This is an area to which those who would be offended by such conduct need not go to and I think that is a matter which must be taken into account. It seems to me that ... it could not be said that to expose the person in such an area could be regarded as obscene having regard to the rights which were recognised there.¹⁷¹

A similar kind of reasoning seems to have influenced the 1983 case of *Hildebrandt v Boom*, in which the WA Supreme Court dismissed an appeal against a man’s acquittal for an obscene exposure charge.¹⁷² In this case, the man had followed a group of women and girls from Warnbro Beach into the nearby dunes. One adult woman saw him standing some 8 metres behind the group with his bathers around his knees and his penis in his hand (it was not found that he was masturbating). The trial magistrate acquitted the man on the basis that this conduct did not rise to the level of obscenity, and the appellate court confirmed that there had been no error in the magistrate’s reasoning.¹⁷³ The appellate court specifically noted in the summary of relevant facts that the man’s conduct occurred in ‘sandhills

¹⁶⁸ Ibid 209–210.

¹⁶⁹ Burgess (n 8) 201.

¹⁷⁰ *Re D’Espiney* (n 150).

¹⁷¹ Ibid 1.

¹⁷² (Supreme Court of Western Australia, Rowland J, 5 August 1983).

¹⁷³ Ibid 3–4.

[that] lead from a public beach ... [to] another beach ... known for nude bathing'.¹⁷⁴

It is difficult to extract a clear set of principles from the judgements set out here. Some of these cases suggest that nudity on or near the context of the beach is likely to be obscene whereas other cases suggest that it is not. Nudity may be indecent at some types of beaches and not at others, though it is unclear how and why these divisions are made. The proximity of a beach that is socially-recognised as a nude bathing beach is taken to be an exculpatory factor even where such a beach is not a legally-designated 'free beach'. Indeed, the loosening of certain social restrictions on clothing at these beaches has been judicially read as a much more expansive loosening of standards of decency and propriety generally, with slippage occurring between the acceptance of female toplessness on a particular beach and complete nudity in *Re D'Espiney*¹⁷⁵ and between the acceptance of nude bathing on a particular beach and nudity coupled with genital holding in nearby sand dunes in *Hildebrandt v Boom*.¹⁷⁶ The lines of reasoning that the formal law of the beach follows in practice when it comes to determining the indecency/obscenity of public nudity are thus neither entirely clear nor predictable.

C *Nude Beach Use and the 'Free Beaches'*

Another key point of divergence between the beach law 'in the books' and 'in action' has been alluded to above, namely that the list of legally-designated 'free beaches' only partially maps onto the social patterns of nude beach use that are understood and accepted in practice. A number of the current designated 'free beaches' were historically spaces that local communities and authorities unofficially took to be places where nudity was allowed. Here well-worn social patterns of nude beach usage fed through into determinations about why certain locations were chosen to become designated 'free beaches'. For example, Booth has described Lady Bay Beach as being a '*de facto* nudist haun[t]' by the mid-1970s, well before it became as a legal 'free beach' under s 633 of the *Local Government Act 1993* (NSW).¹⁷⁷ However, there are other beaches that have established social patterns of nude bathing that are not explicitly legally recognised.¹⁷⁸ Some of these beaches constitute a 'second order' of

¹⁷⁴ *Hildebrandt v Boom* (n 172) 2.

¹⁷⁵ *Re D'Espiney* (n 150).

¹⁷⁶ *Hildebrandt v Boom* (n 172).

¹⁷⁷ Booth, *Australian Beach Cultures: The History of Sun, Sand and Surf* (n 3) 55.

¹⁷⁸ See, eg, the various lists of nude beaches recommended by websites such as in Phillip Tang, 'The Best Nudist Beaches in Australia', *Lonely Planet* (Web Page, December 2014) <<https://www.lonelyplanet.com/australia/travel-tips-and-articles/the-best-nudist-beaches-in-australia/40625c8c-8a11-5710-a052-1479d2765486>>; Hannah Hempenstall, 'Top 5 Nude Beaches in Australia', *Who* (Web Page, 7 November 2018) <<https://www.who.com.au/nude-beach-australia-top-5-nudist-beaches>>; Nikki Black, 'Nude Beach Etiquette and Rules', *New Idea* (Web Page, 11 December 2018) <<https://www.newidea.com.au/nude-beach-etiquette-rules-best-australian-nudist-beaches>>. See also the list of 'free beaches' maintained by the Australian Nudist Federation: 'Australian Beaches', *Australian Nudist Federation* (Web Page) <<http://www.ausnatural.org.au/where-to-go/beaches>>. Whilst these lists include many

unofficial ‘free beaches’ which have ‘not be[en] legally recognised but which ha[ve] become accepted by local police authorities as “established” through their use by large numbers of people’.¹⁷⁹ Other beaches are locations where nudity is not clearly accepted but rather is practiced under the radar of authorities. These kinds of situations can lead to tension between nude beachgoers and the relevant authorities when the wide scope of police discretion is intermittently exercised in order to lay charges for public nudity.¹⁸⁰ They can also lead to inconsistency and unpredictability in the practical application of the formal law, such as the case of *Winston v QPS* discussed above.¹⁸¹

Additional complexities and contradictions in the law’s application emerge at the site of certain beaches where overlapping sets of regulations do not merge seamlessly. For example, as discussed in Part III, Western Australia has no designated ‘free beaches’ at a State level: unlike many other jurisdictions it has no stand-alone piece of legislation nor any specific statutory section within a broader Act that allows for a ‘free beach’ to be designated. Despite this, a small number of Western Australian local government bodies recognise a ‘free beach’ within their council boundaries, with the City of Nedlands even erecting notices to this effect with regard to North Swanbourne Beach (see Figure 2 below).¹⁸² Whilst the ability to regulate public conduct on their local beaches clearly falls within the general scope of the legislative power of local governments,¹⁸³ the legal status of nudity on these beaches remains somewhat unclear. Whilst a local council may be able to suspend the typical operation of their own bylaws that would otherwise make nudity on a council beach an offence, they may not be able to do the same with regard to State criminal offences. Any local council law made under the legislative authority granted by the *Local Government Act 1995* (WA) ‘is inoperative to the extent that it is inconsistent’ with either the *Local Government Act 1995* (WA) ‘or any

of the legally-designated ‘free beaches’ identified in Part III above, these lists also include a number of additional beaches where nudity may be socially-accepted.

¹⁷⁹ Clarke (n 5) 284.

¹⁸⁰ For example in 2018, a man who received a spent conviction for a summary offence charge for being nude at a beach in Tyagarah, suggested that the police officers involved in the case were ‘over-policing nudity’ and encouraged others to contest such charges: Tom Livingstone, ‘Naturist Beats Offensive Behaviour Charge — Encourages Others to Get Their Gear Off’, *Nine News* (Web Page, 16 June 2018) <<https://www.9news.com.au/national/byron-bay-nudist-encourages-others-to-get-gear-off/0c305ac9-f6af-4a47-9545-8c2165229b31>>.

¹⁸¹ *Winston v QPS* (n 72). Another example is *Police v Wenzel* in which a man was charged with wilful exposure for sunbathing nude at a Third Bay, a location that the man contended had ‘been a nude beach for some 30 years’: *Police v Wenzel* (n 141) [6].

¹⁸² Other examples include Port Kennedy Beach in the City of Rockingham, which has been recognised since 1988: Vanessa Schmidt, ‘Warnbro: Naturists Say Perverts at Nude Beach Giving all Users a “Bad Rap”’, *Kwinana Courier* (Web Page, 5 August 2016) <<https://www.communitynews.com.au/kwinana-courier/news/warnbro-naturists-say-perverts-at-nude-beach-giving-all-users-a-bad-rap/>>; and the part of Cable Beach known as ‘North of the Rocks’ in the shire of Broome: Erin Parke, ‘Broome Nudists Battle to Keep Slice of Beach as Naturism’s Popularity Declines’, *ABC News* (Web Page, 24 July 2016) <<https://www.abc.net.au/news/2016-07-24/is-public-nudity-on-the-wane-in-australia/7653938>>.

¹⁸³ *Local Government Act 1995* (WA) ss 3.1; 3.5.

other written law,¹⁸⁴ which would include the prohibitions applicable to public nudity such as the *Criminal Code* (WA) s 203 ‘indecent act’ offence. ‘Inconsistency’ here has been taken to mean ‘lacking in harmony, lacking in agreement or [being] at variance’.¹⁸⁵ However, it is not necessarily the case that the particularisation of a specific beach as being a place where nudity is allowed is actually at variance with the ‘indecent act’ provision because this offence does not prohibit public nudity in general but rather only public nudity that is ‘indecent’ having regard the context in which it occurs. Local government recognition of a place as a ‘free beach’ will be a relevant contextual factor to be considered when applying the legal test for ‘indecent’ and strongly signals that standards of decency and propriety are not contravened by public nudity that occurs there. Indeed, to continue the example of North Swanbourne Beach, several important contextual factors would need to be weighed up when analysing the potential ‘indecent’ of public nudity at this location, including that nudity there has been historically accepted by the local council for decades, that the beach is ringed with signs designating its status as ‘clothing optional’ and notifying members of the public about this, that the casual beachgoer would understand these local regulations as making nudity on the beach lawful, and that the beach has even recently been described in Parliament by the Western Australian Attorney-General as being ‘Perth’s nudist beach’.¹⁸⁶

¹⁸⁴ Ibid s 3.7.

¹⁸⁵ *Gnech Building Co and Town of Claremont* [2018] WASAT 77, [150]–[155].

¹⁸⁶ Western Australia, *Parliamentary Debates*, Assembly, 14 August 2018, 13 (John Quigley, Attorney-General).

Figure 2: Local council sign located at the southern boundary of North Swanbourne Beach, Western Australia.



The implications of this line of legal analysis are not just confined to Western Australia. In any Australian jurisdiction where a case about beach nudity involves an offence with an element of indecency/obscenity, or that otherwise requires consideration of the context in which the nudity occurred, if local authorities have tacitly, implicitly or even expressly allowed nudity to occur on the beach in question then this will need to be weighed up as a potentially exculpatory contextual factor. Indeed, as we have seen in this Part's discussion above of the application of the legal tests for indecency/obscenity, in some cases judicial consideration has already been given to whether nudity is socially accepted at certain beaches. Local government recognition and social acceptance signal a more permissive context for public nudity and in doing so alter the applicable contextual tests to be applied to nudity at a particular beach. Accordingly, for example, whilst local councils in New South Wales and Tasmania may only formally have limited statutory authority to authorise nude bathing by way of suspending the operation of bathing offences, granting such authorisation could have practical legal effects that reverberate more widely through the broader set of offences around public nudity. The list of designated 'free beaches' contained in Part III's formal summary of the law is thus not practically complete without the understanding that additional beaches exist where nudity is effectively or indeed actually lawful in practice.

Taking a step back from the specifics of the laws that operate around the 'free beaches', there remains a lingering question about the broader

structural role such beaches play in relation to the regulation of public nudity. If nudity is generally prohibited on the Australian beach as a way of managing the cultural anxieties discussed in Part II, then the existence of designated ‘free beaches’ initially appears to be at odds with this position. However, as the discussion in Parts III and IV has shown, the formal legal list of designated ‘free beaches’ provides neither an exhaustive nor possibly even an accurate account of beaches where it is lawful to be nude. This lack of precision belies any claim that the designation of ‘free beaches’ functions declaratively and instead reveals that it functions demarcatively. That is, the ‘free beach’ designations are not so much the endorsement of public nudity within these spaces but rather the symbolic containment of public nudity to these spaces. These beaches are few in number, relatively small in size, and are typically ‘geographically secluded’,¹⁸⁷ making them simultaneously both difficult to access and hidden from casual beachgoers. The existence of these beaches corrals and segregates those people who may wish to be publicly nude, ‘effectively confin[ing] [them] to the geographic and social margins’.¹⁸⁸ In this way, the designated ‘free beaches’ constitute the repudiation of beach nudity through its selective legal legitimation within a short list of predetermined, preset spaces. The designated ‘free beaches’ should thus be understood as constituting an ‘act of social partition’ that ‘preserve[s] and perpetuate[s]’ the devaluation of nudity,¹⁸⁹ and not as some form of validation. These ‘free beaches’ are not really ‘free’ from law but rather remain saturated with legality, they are legal tools of selective containment that operate alongside the prohibitions against nudity on other beaches as part of a broader schema of regulation around public nudity. However, as we have seen in the analysis here, social patterns of nude beach use are not so easily contained. In practice, beach nudity spills out of the designated ‘free beaches’ and onto a series of other beach spaces, some of which have effectively become ‘free beaches’ in practice due to policing non-enforcement, local government recognition/tolerance, and social acceptance.

V Conclusion

The beach plays a practical role in the lived experience of many Australians and symbolic notions of the beach also play a key role in the cultural life of Australian society. The laws that regulate the Australian beach are thus a matter of special significance, and how much of the body can be displayed at the beach has proven to be a particular regulatory issue of historical and ongoing concern. During the course of this article’s analysis of the law of the Australian beach, it has found that a surfeit of regulation covers those who appear on the beach with a “deficit” of clothes. An overlapping series of State/Territory offences based on exposure elements, behavioural elements and bathing dress, as well as local government

¹⁸⁷ Booth, ‘Nudes in the Sand and Perverts in the Dunes’ (n 7) 175.

¹⁸⁸ *Ibid* 179.

¹⁸⁹ *Ibid* 175.

regulations, all work to formally regulate public nudity at the beach, and they do so in response to broader cultural anxieties about public nudity that are amplified within the specific beach space. In practice, these offences operate in unclear and unpredictable ways due to the wide scope of policing discretion in their enforcement and the wide scope of judicial decision-making when determining the applicable standards of decency and propriety. Some States/Territories have formally designated certain beaches as 'free beaches' wherein nudity is purportedly lawful, but in practice social patterns of nude beach use, policing discretion, and local government regulations also work to effectively authorise nudity on an additional set of further beaches. Furthermore, the formally designated 'free beaches' should not be understood as constituting the legal endorsement of public nudity but rather its symbolic containment, and thus they are simply another symptom of the underlying cultural anxieties that animate law's prohibitions on public nudity more generally.

This article has provided an overview of the formal law around public nudity on Australian beaches and has unpacked the cultural significance and practical operation of regulation within this context. As the first detailed legal analysis of nudity on the Australian beach, it has laid the groundwork for future academic engagement in this area. Indeed, further future engagement in this area of law is clearly warranted by the cultural importance of the beach and the key questions that still remain to be addressed, including whether the extent of criminalisation of beach nudity revealed in this article is justifiable under normative accounts of the legitimate limits of criminal law. However, any future work in this area must take into consideration the complex and interconnected legal mechanisms and social relations that operate around nude beach use. Understanding the law of the Australian beach involves engaging with not only the formal content of the relevant law but also the practical policing and application of this law, social patterns of beach use, the cultural meanings associated with clothes/nudity, and notions of Australian identity.