

# Court Justice, 8: Drink Driving and the Law

The most recent episode of Court Justice: Sydney dealt with drink driving and the law.

An average of over 20,000 people come before the NSW local courts each year for [drink driving offences](#), and in this episode, a young man has a great deal to lose as a result of his decision to drink and then drive.

In the first case, Magistrate McIntyre stood in judgment of 22-year old delivery driver Joseph Walker, who pleaded guilty to mid range drink driving while on his P-plates. Joseph is the sole breadwinner in his family, and his job relies entirely on having a driver licence.

But it wasn't Joseph's first offence – he previously pleaded guilty to low range drink driving and received the benefit of a 'non conviction order' – which means the magistrate on that occasion did not record a criminal conviction or disqualify him from driving.

However, Joseph would not be so fortunate on this occasion – in fact, magistrates are prohibited from giving a second non conviction order where a person is guilty of a further drink driving offence within 5 years.

## **Zero tolerance for P-platers**

"Zero means zero means zero," said the magistrate. She convicted him, fined him \$500 and disqualified him from driving for 9 months – hoping to deter him from reoffending.

The magistrate's decision cost Joseph an enormous amount. He lost his licence and his job. Given he is the only person in his household earning an income, his future and that of his

family are in jeopardy.

Joseph appeared remorseful as he left the courtroom. "The last six years, of me working hard to get ahead in this company ... it's over. It's gone. I should have left my car at home."

### **90% of drink drivers are men**

One in five deaths on Australian roads are caused by drink drivers.

Young men are the most likely to put others' lives at risk, but men of all ages are more likely to drink and drive than women. Indeed, statistics suggest that 90% of drink drivers are men.

Magistrate O'Brien heard the case of 63-year old retired businessman Colin Grey, who got into his car after a tiff with his wife, having had a few glasses of wine over dinner.

Colin was stopped by a road side RBT, and may have appeared more drunk than he actually was due to his problems with balance. He was charged with mid range drink driving, and like most people, he pleaded guilty before the court.

Colin's clean criminal history and excellent driving record worked heavily in his favour, but the magistrate made it clear there is no excuse for drink driving – as it puts the lives of innocent people at risk.

On this occasion, His Honour gave Colin the benefit of a 'section 10 bond' (now [conditional release order](#) without conviction).

'You have to understand Mr Grey,' cautioned the magistrate, "this is a once in a lifetime opportunity."

### **A serious crime**

Appearing next was 20-year old Ali Hassan, who came before

Magistrate Richardson.

Ali failed to appear at his previous court date and was convicted in his absence of two offences – [driving while disqualified](#) and mid-range drink driving. He had been disqualified three months earlier for driving under the influence of an illicit drug.

Ali represented himself and received a further two-year disqualification period, a \$600 fine and an 18-month good behaviour bond under [section 9 of the Crimes \(Sentencing Procedure\) Act](#).

The magistrate warned Ali that, if he offends a third time, the court will have little option but to send him to prison.

Indeed, if a person offends during the period of a good behaviour bond the court will normally revoke his or her bond, resentence them for the original offence and the bond will be an aggravating factor during sentencing for the fresh offence.

### **People of all backgrounds**

People of all socioeconomic and cultural backgrounds find themselves before the court for drink driving.

[Chief Magistrate, Judge Graeme Henson](#), says many people think drink driving is a social issue, but it is actually a very serious criminal offence and people are sent to prison for it.

“A [low-range drink driving offence](#) is sometimes an error of judgement, but when you get into mid-range territory – you know that when those people come before you in court, you know they should not have been behind the wheel. Sadly, some of them end up dead, or some of them end up killing someone else. A small percentage of them, end up in gaol.”

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# Court Justice, Sydney 7: Repeat Offenders

The seventh instalment of Court Justice, Sydney advised that “fifty-six percent of defendant who appear at the Downing Centre will reoffend within ten years”.

Downing Centre Local Court Magistrate Chris O’Brien believes there are two primary reasons for this: either they are undeterred by the previous penalty, or they are so disadvantaged that they do not have the capacity to change.

The latest episode of Court Justice, Sydney took a look at matters involving repeat offenders.

## Revolving door

Appearing before Magistrate McIntyre was thirty-two year old Michael Bullivant.

Just a week out of prison, Michael was back before the court on a charge of possessing stolen goods, after trying to sell a stolen iPad to fellow residents of a homeless shelter.

As Michael was already on good behaviour bonds, his defence lawyer asked for him to be assessed for an [Intensive Corrections Order](#) (ICO), informing the court he has been “ten weeks clean” and in the process of arranging permanent accommodation for himself.

An ICO is an alternative to a prison sentence, and would require Michael to undertake mandatory [community service punishment](#) work and regular drug testing as a way of helping him to rehabilitate.

The magistrate commended Michael for his efforts towards rehabilitation and acceded to the defence lawyer's request, revoking Michael's previous bonds and referring him for an ICO assessment.

But several days later, Michael appeared in court via video link from Surry Hills Police Station having been arrested the previous day for shoplifting.

His lawyer applied for Michael's release on bail, but faced an uphill battle due to the fact Michael was already on conditional liberty – meaning it became a [‘show cause’](#) matter requiring the lawyer to demonstrate why Michael's detention was not justified.

Bail was ultimately refused and Michael was later sentenced to a minimum of four months in prison.

### **Convicted in his absence**

Fifty-six year old Donald Cormier missed his previous court date and was sentenced in his absence for stealing a wheelchair worth \$200, and intimidating police.

During his arrest, Donald became highly agitated and was detained under the [Mental Health Act](#) in hospital for several hours as a result. He said outside the courtroom that he obtained permission from the owner of the wheelchair to take it, with a view to giving it to a friend in need.

Despite the fact Michael had prior convictions, Chief Magistrate Judge Graeme Henson described the present offences as on the lower end of the scale.

His Honour recorded convictions but exercised discretion under [section 10A](#) of the Crimes (Sentencing Procedure) Act 1999 to impose no further penalty.

Donald appeared grateful as he left the courtroom.

## **Traffic record**

Twenty-eight year old father of three Rory Jones appeared before Magistrate Chris O'Brien and pleaded guilty to [driving whilst suspended](#).

He had three prior matters of a similar nature on his record which had been disposed of without a criminal conviction.

His Honour remarked, "You've had a lot of good fortune in these matters, Mr Jones and it is about to run out."

The magistrate recorded a conviction for the offence, imposed a fine of \$500 and disqualified him from driving for twelve months.

## **Bail variation**

Forty-three year old Alexander Cruishank came before Deputy Chief Magistrate Mottley seeking to vary his [bail conditions](#), over a charge of possessing stolen goods.

He requested a change of address, change of reporting police station and to reduce his reporting once per week.

Alexander has been in and out of prison for twenty years, but Her Honour granted his request and ordered that he report to police every Sunday.

[Despite crime rates being on the decline overall](#), Australia's prison population has increased due to a range of factors including: longer prison terms being imposed, tougher bail laws and continuing high rates of [recidivism](#)

In New South Wales, almost half of inmates leaving prison will be back within two years, which means that in many ways, [simply sending people to gaol is not working](#) and Australia's justice system could benefit from a greater emphasis on prevention and diversion.

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# Court Justice, Sydney 6: Drugs and the Law

This week's episode of Court Justice, Sydney dealt with drug-related crimes.

While drug use is nothing new in Australia, the magistrates in Downing Centre Local Court say they are dealing with more ice-related crimes than ever before.

Of the four cases before the court this week, two relate to ice, the third to possession of cocaine, and the fourth demonstrated just how hard it can be to put a life back together after it's been affected by addiction.

## Case one:

Paul Farah, a 24-year old plumber, was caught [driving under the influence of an illicit substance](#). When pulled over, police also found 0.7grams of ice hidden in a bag of grapes, resulting in an additional charge of [drug possession](#).

Paul pleaded guilty to both charges and came before Magistrate Wahlquist in Downing Centre Local Court.

Paul has had a drug addiction for about three years. His problem is so severe that his employer deposits his salary into his parents' bank account, who give him a small living allowance.

Paul lives at home with his parents and his concerned father, Michael, has turned up to support his son in court.

Paul was already on a Section 9 good behavior bond at the time of the offences, for being in possession of ecstasy. The latest

offences are therefore a breach of that bond.

Paul's defence encouraged his client to find a rehabilitation facility and begin to deal with his addiction, and he ensures that Paul undertakes urine testing weekly to prove he has remained clean.

In the result, the Magistrate records convictions against Paul for the offences. He is fined \$700 and disqualified from driving for 7 months for the drug driving offence, and fined \$300 for drug possession.

### **Case two:**

54-year old tradesman Dean Matthews pleaded guilty before Judge Henson to possession of 0.2 grams of cocaine, and represented himself.

Police pulled up behind his car and found a small quantity of cocaine within. Matthews admitted that his decision to purchase the drug was out of 'stupidity'.

Judge Henson exercised his discretion under a non conviction order of the Crimes (Sentencing Procedure) Act not to record a conviction against Matthews' name – instead placing him on an 18-month good behaviour bond.

### **Case three:**

Adam Reynolds a long-term drug user with an equally long history of court appearances.

Police attended Reynolds' home after claims of a burglary. On arrival, they saw Reynolds injecting himself with drugs. When told by police to stop, Reynolds responded "I'm allowed to drugs in my own house."

Reynolds pleaded guilty to drug possession before Magistrate Grogan who pointed out that it is not legal to use illicit drugs anywhere.



His Honour recorded a conviction and fined Reynolds \$800.

#### **Case four:**

Magistrate Milledge heard the case of Anastacia Downes, a former drug user who is trying to turn her life around.

Downes has an extensive criminal history including fraud and property offences, and pleaded guilty to five traffic offences including [driving whilst suspended](#), driving an unregistered motor vehicle, driving with incorrect number plates and driving an uninsured motor vehicle, each of which carry a maximum penalty of \$2,200.

Downes' drug addiction cost her a great deal – her marriage, her children, her livelihood. However, the Magistrate showed compassion after hearing that Downes has remained conviction-free since 2007 and is trying to get her life back together.

Downes' is fined \$50 for each of three traffic offences, and disqualified from driving for 3 months for driving whilst suspended.

Anastacia was grateful for the outcome. "I really felt that the Magistrate showed a lot of empathy... she showed genuine interest in what she had in front of her. She has given me an out."

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## **Court Justice Episode 5: Family Support During**

# Sentencing

Two men and a woman pleaded guilty and faced the music in [Downing Centre Local Court](#) in episode 5 of Court Justice, Sydney.

All of them were fortunate to have their family members in court to support them through the frightening and potentially life-changing sentencing process.

## **Drink driving**

First up was Nicholas Rundall, who tested positive to having twice the legal limit of alcohol in his bloodstream while driving home after work drinks one Friday evening.

Supported by his parents in court, Nicholas pleaded guilty to [mid-range drink driving](#) and came before Magistrate Chris O'Brien for sentencing.

Nicholas' defence lawyer submitted to the court that her client started his car and began driving, but after a short time decided that he would get a cab instead.

Rather than pull over at the nearest safe place, Nicholas turned his car around and began driving it back to where his journey began – and that's when he was stopped by police.

Nicholas had pleaded guilty to another drink driving offence just three years earlier, which increased the applicable penalties and forced the magistrate to consider the possibility of a prison sentence.

His latest disqualification from driving would have a significant impact on his entire family, as Nicholas often drove his father, a disabled war veteran, to medical appointments.

And while personal circumstances can certainly influence the

ultimate penalty, in this instance Magistrate O'Brien's message was clear:

"I am not going to gaol you today, but you need to understand that you're right on the edge. You are very close. If you come back here to court again, that's exactly what will happen to you."

Instead, Nicholas was convicted and fined \$900 and disqualified from driving for 7 months.

He was also placed on an 18-month good behaviour bond under [section 9 of the Crimes \(Sentencing Procedure\) Act](#).

If he breaches that bond by committing another offence, he will be brought back to court and re-sentenced for his drink driving offence, and the fact he was on a bond will be considered an aggravating feature of the new offence.

When he is allowed to resume driving, Nicholas will be placed on the [alcohol interlock program](#) – which (for mid-range drink driving) means he will need to have an alcohol testing device fitted to his car for a further 2 years.

## **Drug possession**

As her anxious mother sat beside her in court, 22-year old Ebony Bagnall pleaded guilty to single count of possessing 0.2 of a grams of 'ice'. The offence carries a maximum penalty of 2 years' imprisonment.

"We [could never have seen this coming](#)", her mother said. "As a parent, you have all these hopes and dreams for your child and then they choose to go down this road. It's heartbreaking."

Despite having been dependent on ice for 2 years, it was the first time Ebony was before a court.

Ebony's lawyer told the court her client's habit has not only put her on the wrong side of the law, but has seriously

jeopardised her health. As a diabetic, the drug has affected Ebony so badly she has had stints in intensive care.

Her mother, who remained staunchly by her side, believes that residential rehabilitation is the only answer. Ebony was on a waiting list for professional residential help. In the meantime, she is tackling her addiction head on and says she had been clean for 24 days by the time she faced court.

Around a quarter of a million Australians are regular ice users. Unlike other so-called party drugs, like cocaine and ecstasy which tend to be consumed over the weekend, [research suggests that ice use is prevalent](#) throughout the week.

Ebony is young, has taken proactive steps to deal with her addiction and has strong family support.

Despite these factors, and the fact it is her first offence and the quantity of the drug was small, Magistrate Price saw fit to impose a 12-month good behaviour bond under section 9 – which means she will have a criminal conviction (contrary to what was posted on the TV screen during the show). In other words, His Honour did not exercise his discretion to deal with the matter without recording a criminal conviction, which he could have done under ‘[section 10](#)’ (now [section 10 dismissal](#) or [conditional release order](#)).

Ebony and her mother appeared relieved as they left court – hoping the ordeal would be the impetus for Ebony to beat her addiction.

## **Offences against police**

[Resisting arrest](#), [escaping lawful custody](#) and [assaulting a police officer](#) were the charges accepted by young Bradley Price after a night of heavy drinking at the Mardi Gras with his partner Jai.

The couple argued during the evening and Jai called police to

complain that Bradley was harassing him. When police arrived, Bradley swore and became violent – leading to the trio of criminal charges.

Bradley's partner Jai was with him in court, and so was Bradley's mother. She said Bradley is otherwise a good kid, and what happened at Mardi Gras was well out of character.

After pointing out that offences against police carry harsh penalties, Magistrate Greenwood convicted Bradley of all three and imposed a total of \$1,210 in fines.

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## Court Justice 4: Prison is the Last Resort

Episode 4 of Court Justice, Sydney took a look at the difficult decisions magistrates have to make when sentencing offenders.

The three cases illustrated just how tough these decisions can be, when all factors are taken into account.

Before Downing Centre Local Court this week were a 20-year old French man who pleaded guilty to a 'king hit' that fractured his victim's face, an unemployed father of five in breach of a community service order, and a drug and alcohol addicted man who breached his suspended sentences.

### The king hit

French national Julian Giueridos pleaded guilty to [assault occasioning actual bodily harm](#) after administering a 'king hit' to the back of his victim's head outside a Sydney casino. The victim suffered multiple fractures to the face.

The case presented a tough decision for Magistrate Greg Grogan, who was responsible for upholding the community's expectation of tough punishments for offences involving alcohol-fuelled violence.

Mr Guieridos appeared genuinely remorseful and presented evidence to prove his good character to the court. The defendant had his whole life ahead of him and the magistrate was tasked with deciding whether he should be sent to prison.

In making that determination, the magistrate had to consider a whole range of factors, including the seriousness of the offence, the need to deter others and also to deter Mr Guieridos, the defendant's prior good character, his plea of guilty and expressions of remorse and so on.

His Honour decided that the appropriate [penalty](#) was three months in prison, which was ultimately reduced on appeal to two-year good behaviour bond.

Those who feel their penalties in the Local Court are too severe have the right to lodge a '[severity appeal](#)' to the District Court (which, incidentally, is located in the same building as the Local Court).

A District Court judge cannot impose a more severe penalty than the Local Court magistrate unless he or she issues a warning to the defendant to the effect that if he or she proceeds with the appeal, a harsher sentence may be imposed. This is known as a '[Parker warning](#)'.

For this reason, it is extremely common for those who are sent to prison by a Local Court magistrate choose to appeal their sentences to the District Court.

### **The revoked community service order**

During the second case of the week, Deputy Chief Magistrate Chris O'Brien remarked:

“Courts take no pleasure in sending people to gaol. Gaol is a horrible place. It is the ultimate punishment, the ultimate consequence ... but sometimes there is no alternative.”

Before the court was unemployed father of five, Phillip Rusianos who, 12 months prior to his current appearance, had pleaded guilty to disposing of stolen goods.

As an alternative to prison, Mr Rusianos had been ordered to undertake [community service as punishment](#), but he failed to complete it, which brought him back before the court.

Rusianos’ criminal defence lawyer asked the magistrate to consider a range of factors, including a relationship breakdown and other life struggles.

However, His Honour was unimpressed by the defendant’s failure to comply with the community service order and sentenced him to four months in prison.

That penalty was ultimately quashed on appeal and replaced by a six month ‘suspended sentence’ – meaning the defendant avoided going to prison despite the breach.

## **The blackout**

Magistrate Jane Mottley looked pained as she read through defendant James Stewart’s lengthy criminal history, who was before the court for urinating on a train, resisting an officer and offensive language.

Mr Stewart did not actually remember the day in question. He remembered collecting his niece and nephew from Sydney airport, but consumed so much alcohol that he could not recall what else happened on their journey home, except that he woke up in Surry Hills Police station facing criminal charges.

Mr Stewart said his problems with drugs and alcohol started when he was just 12 years old. He acknowledged it was the primary reason behind his brushes with the law.

But as Her Honour waded through the defendant's detailed history, it became evident he had already been given multiple good behaviour bonds across a range of offences including: resisting officers, assault occasionally actual bodily harm and driving whilst disqualified.

Moreover, the current offences breached existing section 12 bonds, also known as a suspended sentence.

"The facts of the resist officer in execution of duty don't portray that as being the most grave example of an offence of resisting an officer – but it's resisting officers in execution of duty nonetheless, and it places him in breach of those section 12 good behaviour bonds" the magistrate remarked.

"I can't take no action. That would be, that would be manifestly inadequate. Yet another suspended sentence is just not an option".

Her Honour then took an adjournment to consider the matter further, before noting that Mr Stewart had spent several months in custody as a result of the present offences and had undertaken court-ordered rehabilitation, achieving "remarkable" results.

She ultimately decided not to send him to prison.

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## **Court Justice 3: The Protesters, the Stolen Car**



# and the Airtasker

Those who appear before our courts come from all walks of life.

The third episode of Court Justice Sydney took a look at the trials and tribulations of a group of Christian protesters, two young men in a stolen car, and a man whose drug addiction has led to a downward spiral.

First up in front of Judge Henson were five Christian protesters arrested in front of [Malcolm Turnbull's](#) office, where they were demonstrating against Australia's treatment of refugees.

The police 'fact sheet' outlined that although their protest was peaceful and respectful, their crime was refusing to leave. It was the first offence for four of the group, and the third for one of them.

After hearing the reasons for the demonstration – which was Australia's treatment of refugees, and detained children in particular – Judge Henson reminded the group that protesting is not a right in Australia, but a privilege, and that those who break the law put themselves at the mercy of the courts.

All five members of the group pleaded guilty. Taking all factors into account, His Honour exercised his discretion under [section 10 dismissal](#) or [conditional release order](#) of the Crimes (Sentencing Procedure) Act 1999 not to record a criminal conviction against their names.

In another courtroom, Jake Mann and Stuart Moat faced charges relating to driving a stolen car.

The two men were visiting Sydney from Melbourne, when they were detected in a stolen vehicle. During the ensuing search, police found a balaclava, gloves and a cash register till in

the boot of the car. They also found \$400 in cash on the men.

Both men pleaded not guilty to the charges, informing the court that they were in Sydney to make a video clip and didn't know the car was stolen.

After hearing the evidence, the [NSW magistrate](#) found the men guilty of being in a stolen conveyance.

In the third case, Jake Henderson, a habitual drug user, faced court for what he said was possibly the twentieth time.

He represented himself before magistrate Keogh, accused of possessing house-breaking implements, after police arrested him in the early hours of the morning during a routine patrol through an industrial estate.

Jake pleaded not guilty, contending that he never intended to do anything unlawful and informing police that the tools in his possession – including a socket set, a pair of pliers and a driver – were used for an 'Airtasker' job earlier that day.

The magistrate explained that it was unnecessary for police to prove that Jake broke into a property or even intended to break into a property – it was enough for them to establish that the tools could be used to do so. Under the relevant section of the law, the onus then shifts to the defendant who must prove on the balance of probabilities that the items were possessed for a lawful purpose.

Jake nervously took the stand and began to give his version of the events. But in doing so, he naïvely disclosed to the court that he purchased drugs earlier that day.

The magistrate, concerned that Jake was incriminating himself for a charge of drug possession, stopped the proceedings in order for Jack to obtain legal advice. When the case resumed, Jake requested a certificate under [section 128](#) of the Evidence Act in order to protect against being prosecuted as a result

of his admission.

The application was granted without opposition, and Jake proceeded to testify that he was at the location to buy drugs. However, he was unable to discharge his onus of proving that he the tools were in his possession for a lawful purpose.

This was because police had confiscated Jake's phone which allegedly contained evidence of the Airtasker job, and Jake did not request access to the phone or its contents in the lead-up to the hearing.

Unable to discharge his onus, Jake was found guilty and received an 18 month good behaviour bond.

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## **Court Justice, Episode Two: Alcohol and Crime**

In episode two of the fly-on-the-wall documentary series of what goes on in Australia's busiest courthouse, cameras followed three cases involving alcohol that came before the Downing Centre Local Court.

Alcohol is a factor in 40% of all crimes. [It costs the Australian economy around \\$15 billion each year](#) through loss of life (\$4.135 billion), workforce reduction and absenteeism (\$3.579 billion) and road accidents (\$2.202 billion).

**Daniel: Smashed a poker machine and urinated on it.**

The first case is that of Daniel, who had been drinking heavily at the races all day.

In the late afternoon, Daniel smashed a poker machine and then

urinated on it. He has no recollection of the events, but with a previous record including a conviction for [affray](#), Daniel was apprehensive about his fate.

In the result, the magistrate opted for a 12-month good behaviour bond in lieu of prison time, fined him \$1,200 and ordered him to pay damages of \$1,825.

For Daniel, this is the equivalent of one month's wages.

### **Two young men from the UK beat up a café owner**

In the second case, two young holiday makers from the UK beat up café staff after a night of drinking, because one of them didn't like the meal he'd ordered, saying it was 'too spicy'.

After being refused a refund for the chicken sandwich, the young men, both in Australia on holiday visas, faced the prospect of being kicked out of the country for their alcohol-fuelled attack.

They both faced charges of assault and property damage and their lawyer asked for the Judge to consider a [good behavior bond](#).

Magistrate Milledge refused that request, saying the victim deserved better justice given that he suffered facial injuries and damage to one shoulder and his ribs.

"The community is sick to death of young yahoos flexing their muscle when something doesn't please them", Her Honour remarked.

The two young men were ordered to participate in [forum sentencing](#) – where they will have to face their victim, apologise and agree on a punishment.

The men were also each ordered to pay a \$700 fine.

**Rasha:** [Low range drink driving NSW](#)

In the third case, Rasha, a loan manager who needs her car for work, pleaded guilty to [low-range drink driving](#) after being pulled over by police and registering blood alcohol concentration of 0.06.

One in four deaths on Australia's roads involve drink driving, and alcohol is a factor in more than 2,000 car accidents every year.

Unfortunately for Rasha, she has twice been convicted of drink driving, and the magistrate showed no leniency the third time. She disqualified Rasha from driving and fined her \$660.

As a result of having no driver's licence, Rasha also lost her job.

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## **Court Justice, Sydney: The Boxer, the Neighbour and the Graffiti Artist**

Australian TV viewers got a glimpse of what really goes on behind the doors of Sydney's busiest courthouse last night as the first episode of [Court Justice, Sydney](#) aired on Foxtel.

The series showcases a selection of cases that come before the [Downing Centre Local Court list](#). It's the first time television crews have been allowed access to the courtrooms, where large numbers of cases are heard every day.

Producers say the series intends to demonstrate that the reasons people find themselves in court are not always clear cut, and magistrates often have a difficult job to do.

Film makers were given time with magistrates, court staff, defendants and complainants, and several courtrooms were decked out with small fixed-rig cameras to capture the highs and lows of court proceedings.

## **The Boxer**

Episode One covered the trials and tribulations of three defendants – a championship boxer, a graffiti artist and an alleged nuisance neighbour.

Boxer Garth Wood rose to fame in 2010 when he defeated Anthony Mundine by knock out. It was also his fists that led to charges of '[affray](#)' after a late night altercation in Sydney, when he punched a man who was violent against his friend.

Affray is an offence under [section 93C](#) of the Crimes Act 1900 (NSW) which carries a maximum penalty of 10 years' imprisonment. For the defendant to be found guilty, the prosecution must prove that he or she used, or threatened, unlawful violence towards another and the conduct would cause a reasonable person to fear for his or her personal safety.

[Self-defence](#), which includes the defence of another person, is a complete defence to the charge.

On the night of the incident, Mr Wood had been out drinking with mates. As they were leaving to go home, two of the men got into a fight – the complainant (or alleged victim) punched Mr Wood's friend who toppled from a ledge to the footpath.

Mr Wood ran to his friend's defence. He told the court that the attacker had taken off his shirt and was swearing and behaving violently. Wood gave evidence that he thought the man was going to jump down on his friend "WWE style", and his instinct was to immediately stop the man from doing so by punching him.

"When he came at me, I punched him," Mr Wood told the court.

Magistrate Jacqueline Milledge found that the prosecution had failed to negate the possibility of self-defence, and accordingly found Mr Wood not guilty.

### **Nuisance neighbour**

Single mother Bridget Campbell was facing charges of [contravening an Apprehended Violence Order](#) (AVO) taken out by her neighbour Ramon Ashourian.

The two are community housing tenants and have been in dispute for some time. Mr Ashourian claimed Ms Campbell breached her AVO by calling out and threatening him from her apartment.

He produced a recording of a female – alleged to be Ms Campbell – calling him a “pussy” and threatening that her friend would beat him.

Ms Campbell’s defence lawyer submitted that the tape was “contrived”, or made up. He questioned the credibility of Mr Ashourian’s claims that he felt very afraid and intimidated, as the alleged incident occurred at 4am yet he waited until 7pm to contact police.

Magistrate Megan Greenwood found Mr Ashourian to be an unreliable witness and dismissed the charge against Ms Campbell.

### **Street art is expensive**

In the final case of the evening, 29-year old street artist Timothy Turner pleaded guilty to graffiti-related offences after being arrested at a railway yard with a group of other people.

Mr Turner has a history of graffiti offences and Deputy Chief Magistrate Chris O’Brien showed little sympathy, at one point telling him that he simply did not believe his claim that he did not intend to use the graffiti implements that were found in his possession.

On the first charge – ‘enter a building with intent’ – His Honour recorded a conviction against Mr Turner and ordered him to undertake 150 hours of community service.

On the second charge – possess graffiti implement with intent – Mr Turner was placed on a good behaviour bond under [section 9 of the Crimes \(Sentencing Procedure\) Act 1999](#) for a period of 15 months. And on the third charge – being in the rail corridor – he was convicted and fined \$1,000.

There are nine more 30-minute episodes of the series to screen. Those who work within the criminal justice system hope the observational viewing will educate the public and act as a deterrent to would-be offenders.

As the Chief Magistrate explained: “Research shows that [confidence in the criminal justice system](#) is higher amongst people who understand how it works and this program will give the community an insight into how magistrates make their decisions.”

[Studies also show](#) that untrained members of the public who are given all of the facts of a case will normally hand-down penalties equivalent to, or more lenient than, those delivered by magistrates and judges, discrediting claims by radio shock-jocks and tabloid newspapers that the judiciary is ‘soft on crime’.

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# Don't Speak During a Police Search!

By Paul Gregoire and Ugur Nedim



NSW police executed a search warrant at the home of Brenton Van der Vegt in the NSW town of Bourke on 8 February 2012. They did so after receiving information that the man may have been in possession of child abuse material.

At the time, Mr Van der Vegt was living alone, having separated from his wife after the rocky breakdown of their marriage.

During the search, police located files containing child abuse material on Mr Van der Vegt's computer, as well as several discs with similar material on them.

The material was found in a locked gun safe, along with a number of other pornographic discs. Several of these discs contained sexual material with unknown adults. One contained Van der Vegt and his ex-wife together, while six of the discs contained "young children in sexual settings."

Mr Van der Vegt was subsequently charged with two counts of [possessing child abuse material](#), under [section 91H](#) of the NSW Crimes Act 1900, which carries a maximum penalty of 10 years imprisonment.

At a jury trial in the [NSW District Court in Sydney](#), Mr Van der Vegt pleaded not guilty to both offences.

His [criminal lawyers](#) argued their client had unwittingly downloaded the child abuse material onto his computer, and his ex-wife had planted the discs into his gun safe. They submitted their client only owned the discs that featured adult pornography.

### **The computer files**

At trial, Mr Van der Vegt's ex-wife admitted that she deleted child abuse material, after she'd accidentally come across it. She said she'd done so on 20 October 2011 after their separation, not in June 2010 while they were still together,

as the defence team argued.

Van der Vegt's ex-wife explained that at the time she deleted the material, the pair were negotiating a settlement of their matrimonial property.

Despite being a child care welfare worker and it being mandatory for her to report such material, the defendant's ex-wife decided not to notify authorities straight away, so as not to prejudice the settlement negotiations.

Instead, she claimed to have reported it to police several days after the settlement was finalised.

### **The discs in the gun safe**

The defence submitted that Van der Vegt had no knowledge of the child abuse discs being in the safe, and that his ex-wife had placed them in there. Her motive, they said, was "bitterness" and revenge due to their acrimonious separation.

His ex-wife testified that she had no knowledge of where the safe was, nor where the keys were. She gave evidence that she was only aware that her former husband was "talking about getting" a safe.

The woman acknowledged that she had accessed the defendant's house without permission while he was away, by deceiving his real estate agent in order to obtain a key. She also admitted taking property whilst there.

During cross examination, she accepted that she had the capacity to access the computer and burn discs when she was at the residence.

### **Police search**

The police search of Van der Vegt's house was captured on video camera. The recording along with the transcript were submitted as evidence. The two senior constables cautioned Van

der Vegt prior to executing the search warrant.

NSW police senior constable Campbell found the discs whilst searching the safe. They were in similar containers labelled in the defendant's handwriting. As the discs were taken out of the safe, Campbell and Van der Vegt had a verbal exchange regarding the contents.

The officer stated that the first two discs were labelled "mixed video." Van der Vegt then said, "Mate, as far as I am aware, mostly adult by the look of it, it's adult." The officer confirmed that he meant pornography, and when more discs were produced, the defendant said they were the "same thing."

Police found the defendant's fingerprint on one of the discs that featured child abuse material.

Van der Vegt decided to take the witness stand at trial. In cross examination, the he prosecution put it to him that he had never said words to the effect of, "'Look, I've never seen that DVD before in my life", or otherwise denied knowing about them. The defendant conceded this.

In its closing submissions, the prosecution emphasised this point – highlighting to the jury that Van der Vegt did not deny knowing about the discs or say that he had accidentally downloaded the material. This, according to the prosecution, was a recent invention that was entirely inconsistent with the defendant's statements to police during the search.

## **The verdict**

As is customary in jury trials, [District Court](#) Judge Toner directed the jury that the defendant must be presumed innocent unless the prosecution had proved to its "satisfaction [beyond reasonable doubt](#) he was guilty as charged." His Honour also reminded them that his ex-wife had lied to the real estate agent to gain access to the property.

On 6 June 2014, the jury found Mr Van der Vegt not guilty on the first count of possessing child abuse material relating to what was found on the computer. However, they found him guilty on the second count of possessing the material that was found on the discs locked in the gun safe.

## **Appealing the conviction**

Mr Van der Vegt appealed his conviction to the NSW Court of Criminal Appeal (NSWCCA), which heard the case on [15 August 2016](#). He didn't appeal his sentence, as he had already served the term in its entirety by the date of the appeal.

The sole ground of appeal was that a miscarriage of justice had taken place, as the prosecution had "impugned" Van der Vegt's [right to silence](#) during the search.

The appellant's lawyers argued that, during the cross examination and closing submissions, the jury had been asked to make an adverse inference against Van der Vegt's silence regarding the discs containing the child abuse material, as he'd made no direct mention of them while police were questioning him.

Van der Vegt's barrister Grant Brady took particular issue over the prosecution's remark, "At no point in time did he say I've never seen that before, because he knew what was in them and he knew what was on them."

Mr Brady argued that the jury could only understand this as the prosecution stating that Van der Vegt "had demonstrated a consciousness of guilt by reason of his silence."

The barrister also took issue over the brevity of the process for displaying the discs during the search, and that they weren't individually presented to his client.

## **The NSWCCA's findings**

NSWCCA Justice Button did not "accept that any miscarriage of

justice has occurred in this case,” as Van der Vegt had not “exercised his right to silence at all during the search.”

His Honour noted that the conversation between Van der Vegt and police during the search had been a continuous one, with no significant pauses.

“In particular, it is not the case that the applicant spoke freely with regard to the discs that showed sexual activities of adults,” His Honour continued, “but then remained silent with regard to the discs containing child abuse material.”

Mr Van der Vegt was found to have neither exercised his right to silence partially or completely, the justice reasoned. That right had not therefore been impugned during the trial.

To the contrary, what was said in the witness box by Van der Vegt was inconsistent with what he had said to police at his home.

For these reasons, Justice Button dismissed Mr Van der Vegt’s appeal.

### **Dilution of the right to silence in NSW**

[On 1 September 2013](#), NSW passed a law which inserted [section 89A](#) into the state’s Evidence Act.

That section provides that during “official questioning” by police for a “serious indictable offence” (ie one which carries a maximum penalty of at least five years’ imprisonment), an unfavourable inference can be drawn from the suspect’s failure or refusal to mention a fact that:

- He or she could reasonably have been expected to mention at the time, and
- That is later relied on in his or her defence.

“[Official questioning](#)” means questioning by an investigating official in connection with the investigation of the

commission or possible commission of an offence, and includes questioning during an investigation, interview or search.

However, the section only applies if:

- A “special caution’ was given to the suspect, containing words which inform him or her of the effect of failing to disclose facts which may be relevant,
- That caution was given before the failure or refusal to mention the relevant facts,
- The caution was given in the presence of an Australian legal practitioner (lawyer) who was acting for the suspect at that time, and
- The suspect had been given the opportunity to consult a lawyer.

The requirement for the presence of a lawyer has effectively meant that lawyers rarely attend police interviews anymore, as this can jeopardise their clients’ right to silence.

It has created a situation where suspects no longer benefit from the protection of lawyers during interviews, leaving them susceptible to police pressure and making it more likely that they will speak with police – usually to their detriment.

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## **NSW Courts Are Overflowing, Overworked and Delayed**

By Paul Gregoire and Ugur Nedim

Over the last four years, the NSW criminal courts have seen a marked increase in delays and workloads, according to the latest NSW Bureau of Crime Statistics and Research (BOCSAR) [figures](#).

These increases have been spurred on by the rapid growth in arrests that police have been carrying out over this same period.

NSW police are making more arrests despite the fact that [crime rates](#) in this state have dropped to a forty year low. Crime across NSW has either declined or remained stable in most major categories over the two year period ending December 2016.

“Last year NSW police put more than 244,000 people before the NSW courts, an increase of 14 percent on the corresponding figure for 2012,” [Dr Don Weatherburn](#), director of BOCSAR [wrote in a statement](#). “That’s close to the record set just after the heroin epidemic peaked in 2001.”

As Dr Weatherburn [has pointed out](#), crime rates in NSW have actually been declining since 2001, after the heroin drought began. The doctor believes the shortage of this drug was a major contributing factors that led to the drop in crime.

## **NSW District Court**

When a person is charged with a [strictly indictable offence](#), they will ultimately appear at a committal hearing in the Local Court.

This hearing is to decide whether the prosecution has enough evidence for the case to be sent to the District or Supreme Court to be heard by a judge and jury. This is referred to as being committed for trial.

The latest BOCSAR figures found that the median delay in the NSW District Court between being committed for trial and the finalisation of the trial rose by 56 percent between 2012 and 2016. This was an increase from 243 days to 378 days.

The time between arrest and finalisation of a trial rose to 714 days, which was up from 512 in 2012.

## Overworked courts

There's also been a substantial increase in the workload of the NSW District Court over this same period.

The number of matters committed for trial rose by 35.4 percent, while those committed for sentence increasing by 37.6 percent.

Being 'committed for sentence' is when a person enters a plea of guilty in the Local Court, and they're subsequently sent to a higher court to be sentenced.

Between 2012 and 2016, the number matters that were finalised by a trial increased by 39.7 percent, while the number finalised by a sentence rose by 36.1 percent.

The increase in workload for the NSW District Court has primarily come from cases involving [illicit drug offences](#), [sexual assault](#) and related offences, and theft and related offences.

There were an additional 577 defendants on drug offence charges whose cases were finalised before the court. There were an extra 283 defendants on sexual assault charges that had finalised court appearances. And there were 225 more defendants on theft offences.

## NSW Local Court

There's also been a substantial increase in the workload of the NSW Local Court in recent years.

There were 18,445 more cases finalised by the local courts last year, than in 2012 – a 17 percent increase.

The increase in the NSW Local Court workload is primarily attributed to three types of offences.

The first is an increase in traffic and vehicle regulatory



offences – these include people accused of driving while their licences are disqualified or suspended. There were an additional 8,976 defendants on these types of charges.

Justice procedure offences, or bond breaches, were the second highest contributor. There were an additional 6,177 defendants on these sorts of charges.

Acts intended to cause injury or assault were the third highest. These accounted for an extra 2,747 cases that were finalised before the local courts.

### **Increasing numbers on remand**

Over the period 2012 to 2016, there was a substantial increase in the proportion of defendants being refused bail – a 19.8 percent increase. In 2012, 5.9 percent of defendants were refused bail, while in 2016, the figure rose to 7 percent.

BOCSAR custody statistics [released earlier this month](#) outline that at the end of March this year, the adult prison population in this state was 12,955 people – an all-time high.

A whopping 58 percent of this increase is attributed to a rise in the numbers of inmates on remand – those who've been refused bail and are waiting on their cases to be finalised. Many of these people will eventually be released after their charges are withdrawn or thrown out of court.

In 2016, 2,638 defendants had their bail refused in all levels of the courts: Supreme, District, Local and Childrens.

Of these remand inmates, 173 were eventually found not guilty on all charges. This means these people were kept in detention with long waits for court appearances, even though, in the end, they were found to have done nothing wrong.

Recidivism rates in NSW are getting [close to 50 percent](#), meaning that almost half the people behind bars, return to prison within two years. So detaining innocent people inside

prison for prolonged periods means they're more likely to return to prison after they've been released.

In effect, the NSW prison system is potentially producing its own revolving door prisoners.

### **Increasing incarceration**

There's also a rise in the number of people being sentenced to prison. The proportion of convicted offenders who were given prison sentences increased by 22 percent. It was up from 8.4 percent in 2012 to 10.2 percent in 2016.

As NSW police arrest more people, and the courts send more behind bars, the NSW government is making sure there will be enough room for them. Last year, the government announced that it is investing \$3.8 billion to fund [an extra 7,000 prison beds](#) in this state.

This is an almost 50 percent increase in the capacity of NSW adult correctional facilities. So it seems the government is set to continue on with its tough on crime stance and fill up these new prison beds, despite the fact that crime is actually falling.