



Sentencing Conference 2010  
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### **Sentencing by Videolink: The West Australian Experience**

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In Western Australia we use video sentencing a lot. Not because we prefer it, but simply because we have to, and the reason why lies in the demographics of Western Australia. Most of you would be generally aware of that but I'll give you a little detail.

Western Australia, of course, occupies a bit over a third of continental Australia. It has a population of a bit over 2,000,000 people, which is about 10% of the population of Australia. But it's worse than that because 75% of that population is resident in metropolitan Perth. That means that almost a third of the continent is occupied by about 500,000 people, a significant proportion of whom live in the southwest corner because that is leafy and temperate.

The areas involved are vast; the Kimberley alone is bigger than the state of Victoria. The population centres are quite small, notwithstanding the vastness of the areas; Broome has a population of less than 10,000 people, depending on whether it's the wet or the dry. But it's a thousand kilometres from Broome to Kununurra, so even though they are in the same district the distances are vast. Within that area of the Kimberley there are about 34 or 35 Aboriginal languages, of which 27 are regularly spoken. You can go to a place like Balgo and find people who speak four languages, the fourth of which is English.

There are no custodial facilities for women or children outside metropolitan Perth, although there are some women in Broome Prison simply because they want to stay on-country and stay close to family. That in itself can create some issues, as became evident to me when I was trying a case in Bunbury last year. The case was one of aggravated armed robbery involving a juvenile and an older woman. Both were convicted. Because there were no custodial facilities in Bunbury the adult had to be taken to Perth. The State conceded the juvenile shouldn't receive a custodial sentence so I gave her bail and she was to remain in Bunbury.

The question there was, where are we going to have the sentencing hearing? If we were to go back to Bunbury it would mean that, after pre-sentence reports had been prepared, I and the adult would have to come back from Perth, she in a prison bus, and so forth. On the other hand, if we were to hold it in Perth the juvenile and her lawyer, who was Bunbury-based, would have to come up from Bunbury. So in the end we decided that the least worst alternative was to hold the hearing in Perth but with the juvenile and her lawyer appearing by video from Bunbury. I was a bit nervous about it, but it seemed to work out okay in the end.

There are no Supreme- or District Court judges resident outside Perth, and of course the vastness of the areas involved makes transport very difficult. That is exacerbated by the fact that a disproportionate amount of the crime in Western Australia comes from the remote areas, particularly the Kimberley.

If you want to take somebody who is incarcerated in Perth to Kununurra that is a five-day trip on a prison bus, overnighing respectively at Greenough Prison, Carnarvon Lock-up, Roebourne Prison Broome Prison and then Kununurra. So it is five days up and five days back in a prison bus. It is not something you do very readily, and of course these problems are not confined to the North. They exist in the eastern part of the state and the Western Desert area too where, tragically, the year before last, many of you will be aware, we had a terrible incident where a man died in the back of a prison van, being transported from Laverton to Kalgoorlie, quite unnecessarily as it happened. And, again, the distances in those areas are vast: Warburton is 1,100 kilometres from Kalgoorlie. Warakurna is another 400 kilometres further on, so the distances involved are just horrendous. The population is sparse, the judicial officer is very remote.

We have magistrates in Albany, Bunbury, Geraldton, Carnarvon, Port Hedland, Broome, Kununurra, Northam and Kalgoorlie, but that's it. So, outside those areas there are no resident magistrates. The magistrates have to travel on circuit so they are quite often not in those major towns. Just to make things worse we now have a thing called 'fly in/fly out', which means that a lot of the resource developments in the north are being operated by people who are flown up and down from Perth. So you never know where they are going to be at the time you're scheduling a hearing.

The practicalities of all that, basically, have dictated that in many instances we have to sentence by video and we use video quite significantly. It is much more often done in the Magistrates Courts, although it is done in the Superior Courts fairly regularly. But the issues that arise when we do it basically can be identified in the following way. Firstly, it can encourage misbehaviour by an accused person because they are not present in the court. They are in a remote place. They don't seem to feel the same constraints. You will get, not uncommonly, invective, perhaps some furniture abuse, and things of that sort. They feel less constrained when they are being sentenced. There are significant problems with language difficulties in a lot of areas of Western Australian courts, but those problems seem worse somehow when you're doing it by video. There seems to be less opportunity to address those language difficulties.

There is, quite often, a problem with access to legal advice, because the offender will be in a place where there are no lawyers. There are in fact no private lawyers between Geraldton and Broome in Western Australia. It is only the Aboriginal Legal Service and Legal Aid between those two places, so providing legal access can be difficult. The way we overcome that sometimes is, if the lawyer is where the judge or magistrate is, then the judge or magistrate will rise and the lawyer will use the videolink to communicate with the client during the course of the hearing. Again, that's not terribly satisfactory because, understandably, there are concerns about confidentiality. That is why I think there has been some resistance from the legal profession to sentencing by video, although I think it's also fair to say that that culture is changing. The profession is becoming more receptive of the proposition.

Generally we find that accused people prefer it. If they are in custody it means that they are not woken up early, put in a prison bus, and dragged into Perth, or sometimes over much larger distances. So generally they prefer to be sentenced by video. The only exception there is where being present will mean that they can be reunited with family. So that if they are in prison in Perth, and their family are in Broome, they will resist video sentencing because they want a trip back up to Broome where they can be reunited with family.

We have on occasions looked at the possibility of beaming the sentencing process into a remote community because, of course, some of the offences are committed in remote communities. On one occasion I had a trial in Broome, the offence occurred in Kalumburu, and I enquired as to the prospect of beaming the sentencing hearing into the facility in Kalumburu so that people in Kalumburu could see what had happened. The advice I got was that that would be dangerous. It would raise significant security issues because of the tension between the family of the victim and the family of the accused in Kalumburu. It would create a real headache for the local police and they would much prefer that I did not do it. So I didn't. I am not entirely convinced however, and I think we need to have a bit more of a look at those possibilities.

On occasions, in minor matters magistrates actually sentence by telephone if there is no video link-up available. Under the Act, they can only do that if a fine or some lesser sentence is to be imposed. It just seems practical to get on with it. The demography that I have referred to really raises these practical issues.

I don't like sentencing by video. It seems to me to disengage people from the process. It's particularly bad with Aboriginal people. I much prefer the model of Koori Court, Circle Court, Murri Court, Nunga Community Courts, call them what you will, in which Aboriginal people are required to engage in the process. But, tragically, it has to be said that where we are applying a conventional court system in Western Australia in sentencing Aboriginal people. They are, under that system, almost entirely disengaged from the process. If you sit in the back of a Magistrates' Court in remote Western Australia and look at the Aboriginal defendants, they will be looking at the floor, looking at the wall, shuffling their feet, looking anywhere other than where the magistrate is. They will be entirely disinterested in the process. Quite often that will be because they don't understand the language that's being used, but also the outcome of the process is largely irrelevant to them. They know that at the end of the process either a fine will be imposed, which they have no capacity to pay, or they will go back into prison. So they don't really care what's happening and they don't really engage in the process.

So, against that harsh reality, it doesn't seem to me to matter that much whether you conduct what is essentially an irrelevant process in their presence or by video. What we really need to do is to make the process more relevant. We're not going to do that by using video. We have to do that by using systems that require people to engage. But until that time comes, until government gives us the resources to do that, we make the most of our limited resources by using video links.