



Custodial Transport Forum

After Dinner Address

The Hon Wayne Martin
Chief Justice of Western Australia

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I would like to commence this evening by acknowledging the traditional owners of these lands, the Noongar people, and by paying my respects to their Elders past and present.

It is a pleasure and an honour to have been invited to address the inaugural Custodial Transport Forum. It is particularly pleasing to note that all Australian jurisdictions, some jurisdictions overseas, and a number of different agencies are represented here this evening. The opportunity which this Forum provides for the interchange of ideas and experiences can only help to improve the way in which this important custodial function is performed.

It is also, I think, particularly fitting that the inaugural Forum has been held in Western Australia. That is not just because Perth is such a great city to visit - even in the middle of winter - but because custodial transport is such a big issue in this State.

Western Australia occupies almost one-third of a continent. It is the second largest subnational jurisdiction in the world, in terms of

geography. Our population of about 2,000,000 is miniscule compared to our geographical area. Of that population, about three quarters live in Perth. This means that the rest of this State is very sparsely populated indeed, with the consequence that roads and transport systems generally are not comparable to those which are found in densely populated jurisdictions, and the distances to be covered are vast - often across hostile terrain in an unforgiving climate.

And to compound these issues, regrettably, regional Western Australia provides a disproportionately large amount of the crime which is dealt with in our courts, and a correspondingly disproportionately large number of persons who are arrested and imprisoned. This is, of course, a reflection of the gross over-representation of Aboriginal people in the justice system of this State - a subject of which I have spoken many times. But tonight is all about transport, so I will resist the temptation to rant once more about the steadily worsening position in relation to Aboriginal imprisonment rates. It is sufficient to say that, for all these reasons, Western Australia is a particularly appropriate place to hold the inaugural Forum addressing custodial transport.

The History of Custodial Transport

Of course, Australia itself owes its origins to custodial transport. Following the American War of Independence, America ceased to be an appropriate destiny for Britain's unwanted felons. By 1784, the prison hulks on the Thames estuary and the prisons themselves were filled to bursting. Even Newgate Prison, which was rebuilt at the time, was so over-crowded that 300 convicts had to be taken from Newgate and put on a hulk in Portsmouth Harbour. After transporting those prisoners to an island in West Africa was rejected, Botany Bay was chosen in part so that convict labour could be used to establish a base of strategic importance having regard to the increasing French influence in the far east. Captain Arthur Phillip was chosen to lead the first fleet to Port Jackson and on 6 January 1787, the first convicts were loaded from the Woolwich hulks - the men onto the ship *Scarborough*, and the women were put aboard *Lady Penrhyn*. However, they sat there for 2 months awaiting the assembly of the rest of the fleet. In the result, 736 convicts set out in the first fleet; most of them were Londoners. The majority (431) had been sentenced for minor theft, another 93 for breaking and entering, 71 for highway robbery, 44 for stealing cattle or sheep, 31 for robbery with violence, or mugging, and the rest for miscellaneous other offences. The second oldest woman on the first fleet, Elizabeth Beckford, was 70 years of age. She was sentenced to 7 years transportation for stealing 12 pounds of

Gloucester cheese. The oldest female convict in the first fleet was Dorothy Handland, who was 82 years of age when she received 7 years transportation for perjury. In 1789, after surviving the horrendous journey, she hanged herself from a gum tree at Sydney Cove, becoming Australia's first recorded suicide. Thomas Hawell received the same sentence for stealing one live hen to the value of tuppence, and one dead hen, also to the value of tuppence. Elizabeth Pawley, who was 22, raided a kitchen in Norfolk, taking a bit of bacon, flour, raisins and butter. She was sentenced to hang but was reprieved and sentenced to transportation instead. Thomas Chaddick was sent to Australia for stealing 12 cucumber plants.

The youngest boy sentenced to transportation was John Hudson who was 9 years of age. He had stolen some clothes and a pistol. The youngest girl was Elizabeth Hayward, aged 13, who had stolen a linen gown and a silk bonnet worth 7 shillings.

There has been a temptation to romanticise the composition of the convicts sent to Australia by supposing that they comprised political prisoners, ladies of the night, and other colourful characters. Unfortunately, the truth is rather more bland and it must be acknowledged that the founding stock of our nation were mainly petty thieves.

The conditions in which convicts were transported to Australia were appalling. Prisoners were fitted with short rigid bolts between the ankles - about 9 inches long, which incapacitated them. They would normally be chained to another prisoner, and confined to the hold during the entire period of the journey. The holds were overcrowded with very little ventilation. Disease and infestation were rife. The mortality rate on the second fleet was a disgrace. Of 1,000 prisoners who sailed from Portsmouth, 267 died at sea and another 150 shortly after landing. That is more than 40% of the consignment¹.

The Transport of Convicts to Western Australia

Western Australia had been founded in 1829 on the basis that it would be populated by free settlers. That was thought to be an advantage, because it avoided what was described in those days as the "convict stain". However, as the other colonies became disenamoured of transportation, and the fledging Swan River colony saw the need for cheap indentured labour and in particular for the Empire's resources that supported convict settlements, the Legislative Council of Western Australia passed an ordinance permitting transportation. The first boatload of convicts arrived at Fremantle on the *Scindian* at the beginning of June in 1850. Western Australia was the last place to receive English convicts, but

¹ I am indebted to Robert Hughes "*The Fatal Shore*" for this information.

received some 9,000 until transportation ceased in 1868. Over that period, convicts accounted for more than half of the population increase in the colony.

The conditions of prisoner transport within the colony were not much better than those applying to transport to the colony. Perhaps the grimmest example from the 19th century involves the tragic death of an Aboriginal man, Thackabiddy, near Carnarvon in 1884. Thackabiddy was suspected of sheep stealing. Although no warrant was issued for his arrest, he was confronted by some station owners who were armed with rifles and revolvers. Thackabiddy had a spear, two kylies and a throwing board. In circumstances which were never fully explained, Thackabiddy was shot through the throat. He was then chained to a horse by a chain affixed around his neck. It was intended that he be made to walk about 130 miles to the nearest police station in Carnarvon in that condition. On the way, there was another altercation, the circumstances of which were again never fully explained, which resulted in Thackabiddy being shot again - this time through the ankle. After that, he was dragged along the ground by the chain affixed around his neck for almost a mile, before he was tied with his hands behind a tree. He was then abandoned and he died. A police constable who came upon the scene described it in the following terms:

"I followed the tracks on till I came to the deceased native. I found the body lying on its left side, with its back to the tree. The elbows were tied tightly behind the back with a police strap. There was a chain fastened around his neck. I examined the body, upon which I found the following wounds: - One through the chin and into the neck, one across the arm, a bruise on the face, a bullet hole right through one of the ankles, and a raw patch on each shoulder, which appeared to have been produced by dragging. I took the body to Carnarvon, where it was buried with the chain around the neck."

Charles Clifford, who had dragged Thackabiddy behind the horse, and tied him to the tree and abandoned him, was charged with manslaughter. Justice Sir Edward Stone, who later became Chief Justice, presided over the trial which commenced in the Supreme Court at Perth on 9 January 1884. The trial opened with controversy about the matter having been remitted to Perth, instead of being tried in Geraldton. The press had asserted that the government had brought pressure on the chairman of the Geraldton Quarter Sessions to cause him to remit the matter to Perth, because it was thought that Clifford might receive a more favourable jury in Geraldton. The Attorney General, Alfred Hensman, who later became a judge of the Supreme Court, opened the case with a resolute denial of those assertions. I digress to observe that Hensman was a colourful character, whose disputes with Governor Broome were legendary and ultimately led to him leaving office and the two men managed to argue about whether he had resigned or been sacked. He later sued Winthrop

Hackett, the publisher of *The West Australian*, and obtained £800 damages - a prince's ransom in those days.

Returning to Thackabiddy's case, the Attorney General gave an impassioned closing address. It is described by the Reverend John Gribble in his book appropriately entitled "*Dark Deeds in a Sunny Land*" in the following terms:

"The Attorney General ... insisted upon the inalienable and incontrovertible right of the black man to obtain the same amount of legal protection and justice as that accorded to one possessed of a skin of a lighter hue, since both were subjects of Her Royal and Imperial Majesty, and therefore stood on level ground before the majesty of the law. He concluded a most impassioned speech, by calling upon the jury to decide the case upon its merits, just as if the wretched victim had been one of their own colour, kindred and race."

In his address to the jury, Justice Stone expressed the firm conviction that Clifford should have been indicted for murder instead of manslaughter - although the Reverend Gribble described this as "a most impartial address".

If there was any deliberate intervention for the purpose of transferring the trial to Perth to obtain a jury less favourably disposed to Clifford, it didn't work. After 20 minutes deliberation, the jury returned a verdict of not guilty. Justice Stone then addressed Mr Clifford, advising him that

although he had been acquitted, unless he mended his ways, he was bound to reappear in court. It seems a fair inference that Justice Stone did not share the jury's view.

Modern Times

Moving forward to contemporary times, I am pleased to acknowledge that there has been a considerable improvement in the arrangements for the transport of prisoners in Western Australia since Thackabiddy's day. This is not to say that there is not room for further improvement, and hopefully one of the outcomes of this Forum will be such improvement. No doubt over the course of the Forum, you will be discussing issues relating to minimum standards for transport vehicles, vehicle design, incident management and other measures designed to ensure the health and safety of all concerned in custodial transport. There is of course a vitally important human dimension to your deliberations, arising from the fact that prisoner transport involves taking people who have no capacity to refuse from one place to another. As all human transport involves a degree of risk, the lack of consent creates a duty to ensure that risk is minimised.

However, from my perspective, the main problem with custodial transport in Western Australia is that there is simply far too much of it. It

has been reported that for each of the first 4 years over which the government contracted out the position of custodial transport services in Western Australia, the contractor, on average, transported over 50,000 persons in custody and covered over 2,000,000 kilometres doing so. Those figures would presumably exclude transport by police which is significant in some of the more remote areas.

Public attention was drawn to issues relating to custodial transport in this State following the tragic death of Mr Ian Ward after he was transported by a van which was to take him from Laverton to the Eastern Goldfields Regional Prison on 27 January 2008. As those events are likely to be the subject of a Coronial Inquiry in due course, it is not appropriate for me to make any further comment upon them.

However, as a result of those events, I created a Committee which labours under the unwieldy title of "The Transport of Persons in Custody Working Group". I chair that Committee. Its membership includes the Chief Judge of the District Court, the Chief Magistrate, a Children's Court Magistrate, the General Manager of Legal Aid, the Director of Legal Services of the Aboriginal Legal Service of Western Australia, representatives of the Department of the Attorney General, the Department of Corrective Services, the Office of the Custodial Inspector

and the WA Police. The objective of the Group is fairly simply - it is to take all practicable steps to reduce the amount of prisoner transport in Western Australia.

Now, even a Judge is capable of understanding that if you want to reduce the transport of prisoners in custody, there are really two ends of the issue that need to be tackled. The first is reducing the amount of people in custody, and the second is avoiding the need for them to be transported.

At its first meeting, the Working Group tackled the first issue - that is, the number of people in custody. Of course, there is not much that can be done administratively in relation to sentenced prisoners despite the fact that contrary to popular belief, the imprisonment rate in Western Australia has more than doubled over the past 20 years. But there are a significant number of persons, often Aboriginal, who are transported large distances because bail has been refused, and there is no adequate custodial facility where they have been arrested. Often such persons will be arrested in a town or community which does not have a resident Magistrate. Sometimes, such as in the East Kimberley or the Western Desert, they will be arrested more than 1,000 kilometres from the nearest resident Magistrate. The original decision in respect of the grant of bail will be made by the local police sergeant and if the decision is to refuse

bail, reviewed by a Justice of the Peace, if such a Justice is available. If the Justice of the Peace confirms the decision of the police to refuse bail, the prisoner will then be transported, perhaps over a very long distance, to somewhere where he or she can be appropriately detained and brought before a court. That is precisely what happened in Mr Ward's case.

Not uncommonly, when that person is brought before the Magistrate, bail is granted, which then gives rise to the problem of "stranding", to which I will return.

Experience tells us that in cases in which the police are opposed to the grant of bail, it is very unlikely that the local Justice of the Peace will grant bail over police opposition. I mean no disrespect to Justices of the Peace in making that observation - their contribution is essential to the administration of justice in our State - particularly in regional and remote communities. But they are not trained in law and have only limited exposure to the justice system. It is natural that they are likely to defer to an experienced police officer. By contrast, legally qualified Magistrates are accustomed to making bail decisions every day, and very experienced at evaluating the various issues that have to be taken into account in respect of such decisions.

The strategy upon which the Working Group resolved was to endeavour to implement arrangements which will enable bail decisions to be made by a Magistrate before a prisoner is transported any significant distance, wherever that is practicable. The President of the Children's Court has issued a Practice Direction to ensure that occurs in the case of juveniles who are arrested, and arrangements have been made for duty Children's Court Magistrates to be made available by audio visual link from Perth to review any bail refusal at short notice.

There are some practical difficulties in implementing the same arrangements in relation to adult offenders throughout the State. However, the Working Group is committed to that course, and has the support of the government in that regard. Steps are being taken to implement the necessary procedures as soon as appropriate resources can be made available. Essentially, the procedure will be that in cases in which the police refuse bail, attempts will be made to bring the matter before the nearest regional Magistrate by audio visual communication, or telephone if audio visual is not available, as soon as possible and before the prisoner is transported. If, for some reason, the regional Magistrate is not available, the question of bail will be referred to a Perth-based Magistrate who will deal with the matter by audio visual link, or phone if audio visual is not available. Through this means, we hope to avoid

custodial transport in cases in which bail is ultimately granted. So, by this means, persons who are to be granted bail will be released from custody before the need for their transport arises.

The next strategic direction which has been pursued by the Working Group has been to minimise the need for transport of persons who are detained in custody, either before or after sentence. The policy which has been endorsed by all courts is that a prisoner in custody should only be physically required in court if he or she is to be tried or sentenced - and in some instances, sentencing by audio visual means has proven quite satisfactory. In all other instances, audio visual means are to be used to secure the "virtual" presence of the prisoner in court.

In order to implement this strategy, there has been a general review of the audio visual facilities available in the courts throughout Western Australia. The number and standard of our audio visual facilities in regional courts has been improved significantly over the last 12 months or so, and in metropolitan Perth there has been a huge improvement in our access to those facilities following the opening of the District Court Building. Every criminal court in that building is now audio visually enabled.

However, just as it takes two to tango, there must be two ends to every audio visual communication. Obviously it is not much use having 25 audio visually equipped courts in Perth wanting to utilise the audio visual equipment to secure the "virtual" presence of persons in custody at 10 am, if each prison only has one audio visual facility. Accordingly, we are hoping to expand the number of audio visual facilities in our prisons and detention centres.

We have also realised that a lot of prisoner transport is simply unnecessary. Quite often, due to a breakdown in communication or a failure to comprehend the reason for a court appearance, a prisoner might be transported vast distances from the north of the State to appear in court in Perth when his or her physical presence was quite unnecessary. Sometimes this can involve transport over 4 days coming to Perth, and 4 days returning to Roebourne or Broome Prison. With a view to reducing these incidents, the Department of Corrective Services is investigating a proposal to designate an officer in each custodial facility who will be charged with the responsibility of investigating and reviewing any proposed prisoner transport before it occurs, for the purpose of ascertaining whether it can be avoided by, for example, the use of audio visual facilities. My expectation is that the review will show that the cost

of providing such a resource will be more than covered by the savings to be incurred as a result of reducing prisoner movements.

Stranding

I have already mentioned the related problem of prisoner "stranding" following release from custody at the expiration of a sentence or by reason of the grant of bail or an acquittal. Some years ago, there were issues about which, if any, agency would bear the cost of repatriation of such persons. Sometimes the failure to resolve those issues meant that the person would remain stranded, until, of course, they got into trouble and were re-arrested. The issue of responsibility for the cost of repatriation is now largely resolved, as there is statutory power for the Commissioner of Corrective Services to fund that cost. However, there are still problems identifying people who need to be repatriated. Accordingly, the Working Group has implemented a strategy of inviting all legal representatives to raise any stranding issue before the court, where a person is about to be released, so the Magistrate or Judge can conduct appropriate inquiries to ascertain whether travel arrangements have been made. In default, the court custody contractor has been instructed to inquire of any person who is about to be released in respect of their proposed travel arrangements, and to refer any issues arising as a result of those inquiries to the Department of Corrective Services.

Achievements

Despite the difficulties which confront custodial transport in a State which is as vast and as sparsely populated as Western Australia, I am pleased to report that steady progress is being made in this area. Prison-court-prison transfers declined during 2006/07 by 14%. The Children's Court has implemented the new procedures to which I have referred. New and improved audio visual technology is being rolled out around the State, and I am confident that greater use of that technology has the capacity to substantially reduce the number of prisoner movements.

Of course, many prisoner movements will be unavoidable. That is why I am so encouraged by this Forum, which will provide an important opportunity to improve the systems in place for the management of transport of persons in custody. Despite a rather brutal history of custodial transport to and within Australia, this Forum can address, and hopefully resolve the very real risks and dangers associated with the transportation of persons in custody.

I would also like to acknowledge the importance of the provision of custodial transport services. The attendance of persons in custody at courts for trial or sentencing, access to medical services and prisoner

leave for compassionate purposes are all essential components of our contemporary custodial arrangements. It is vital that those prisoner movements be undertaken safely, humanely and efficiently. I am confident this Forum will enhance the achievement of those important objectives.