

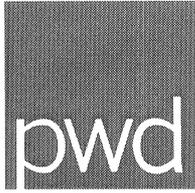
**INQUIRY INTO COMMUNITY BASED SENTENCING  
OPTIONS FOR RURAL AND REMOTE AREAS AND FOR  
DISADVANTAGED POPULATIONS**

**Organisation:** People with Disability Australia Incorporated  
**Name:** Ms Alanna Clohesy  
**Position:** Deputy Director, Advocacy  
**Telephone:** 02 9319 6622  
**Date Received:** 1/04/2005

---

**Theme:**

**Summary:**



people with disability

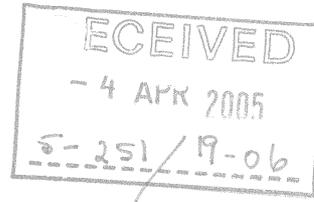
ABN 98 879 981 198

**People with Disability Australia Incorporated**

**Postal Address:** PO Box 666  
Strawberry Hills NSW 2012  
**Street Address:** Ground Floor, 52 Pitt Street  
Redfern NSW 2016  
**Phone:** 02 9319 6622  
**Toll Free:** 1800 422 015  
**Fax:** 02 9318 1372  
**TTY:** 02 9318 2138  
**Toll Free TTY:** 1800 422 016  
**Email:** [pwd@pwd.org.au](mailto:pwd@pwd.org.au)  
**TIS:** 13 14 50 **NRS:** 1800 555 677

29 March 2005

The Hon. Christine Robertson, MLC  
Chairperson  
Standing Committee on Law and Justice  
NSW Legislative Council  
Parliament House,  
Macquarie Street  
SYDNEY NSW 2000



Dear Ms Robertson

**Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations**

We write in response to the above Inquiry.

**1. About PWD**

People with Disability Australia Incorporated (PWD) is a national cross-disability rights and advocacy organisation in Australia. PWD represents the rights and interests of people with all kinds of disability.

PWD is a non-profit, non-government organisation whose vision is of a socially just, accessible and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are respected and celebrated.

PWD's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWD also has a large associate membership of other individuals and organisations committed to the disability rights movement.

**2. Summary**

PWD believes that:

- For many people with cognitive disability (including acquired brain injury, intellectual disability, and psychiatric disability) currently in, or at risk of entering jails or detention centres, a custodial sentence is a less appropriate sentencing option than a tailored and flexible community based sentencing option.
- Detention in custody, where but for the existence of appropriate community sentencing options and social infrastructure a person would have been sentenced to a community based option, amounts to cruel, inhuman or degrading treatment or punishment in contravention of international law.
- For custodial sentences to become truly the sentence of last resort, the state must address all failings and inequities in the community based sentencing regime, and in the governmental and community structures that support it.
- There is currently a huge unmet need for improved access to both generic human services and disability services capable of providing appropriate accommodation or supports to offenders with disability in the community.
- Where government agencies have failed to fund or provide sufficient or accessible infrastructure to support community based sentencing of offenders with disability, such agencies may be in breach of their obligations under state and federal anti-discrimination legislation.
- Current community based sentencing options discriminate against many people with disability in their eligibility and accessibility. Resulting poor quality outcomes, including non-compliance with discriminatory conditions imposed upon offenders with disability, can lead to unnecessary harm to offenders, and to the integrity of the criminal justice system.
- The cost to government of properly meeting the needs of offenders with disability, through the provision of appropriate community based sentencing options and the service infrastructure necessary to support them, is likely to be recovered in the long term.

### **3. About young people with disability in detention and on community based orders**

Horrifying statistics establishing the gross overrepresentation of young people with disability in the criminal justice system are found in the Department of Juvenile Justice's *Young People in Custody Health Survey 2004*. This report identifies that:

- 84% of inmates reported symptoms consistent with a psychiatric, personality and psychosocial disorder, and 55% reported symptoms consistent with two clinical disorders.
- 10% of inmates had an intellectual disability.
- 32% of young male inmates had mild hearing loss.
- Physical injury had resulted in a disabling condition in 34% of young men and 28% of young women.
- 68% of inmates had been injured by a fellow detainee in the previous 12 months.
- 45% had unresolved side effects (memory loss, poor concentration).
- 66% had experienced some form of abuse or neglect during childhood.
- Young people in custody have difficulty comprehending, problem solving, and communicating using language or numbers.

The authors have concluded, inter alia:

- That inmates have considerable chronic (and acute) health and disability related needs.
- That offence focussed interventions need to be responsive to these needs.
- Appropriate interventions require more effective engagement with 'community partners'. (*Some Disability Findings 2004*)

It is generally accepted that the profile of young offenders on community based orders is likely to be similar, and that many of them will have considerable health and disability related needs, and that any offence focussed interventions, including conditions placed upon community based orders, will need to be responsive to those needs.

These findings indicate a clear need for individually tailored community based sentencing options, and for greater cooperation and involvement of government and community agencies in the pre and post sentencing phases.

**Inquiry Process:** PWD believes that this Inquiry must address community based sentencing of juvenile offenders and adult offenders separately, to ensure that the different circumstances and rights of children, young people, and adults as offenders are adequately weighed in the Inquiry's determinations. Further, the disability related needs of young offenders with disability who would be eligible for community based sentencing options must be clearly elaborated. To this end, we call upon this Inquiry to seek detailed information on this matter from the Department of Juvenile Justice, Department of Health, Department of Ageing, Disability and Home Care (DADHC), and the Senior Officer's Group on Intellectual Disability and the Criminal Justice System (below).

#### **4. About adults with disability in custody and on community based orders**

Not surprisingly, the statistics indicating a horrifying overrepresentation of adult offenders with disability in the criminal justice system are similar to those above.

A 1988 study of the prison population indicated that 13% had an intellectual disability. More recently, a study of *Mental Illness Among New South Wales Prisoners* (Corrections Health Service, 2003) has found that:

- 74% of prison inmates experienced mental illness in the preceding twelve months.
- The twelve-month prevalence of psychosis in NSW inmates was thirty times higher than in the general community.
- The prison system is not coping as it lacks resources and cannot handle the demand.

In the foreword to the study, the chief executive officer of Corrections Health wrote:

*What is clear from this report is that the mental health needs of the prisoner population are considerable compared with those of the general community and that a large unmet need exists.*

Homelessness, stigmatisation, increased drug use, and inadequate community mental health facilities were among “probable reasons for the high number of mentally ill people in prison”.

The study also found that better facilities would allow magistrates to divert those charged with minor crimes into treatment. The report recommended, inter alia:

- Court liaison services in NSW should be expanded to include all magistrate courts to facilitate the diversion into mental health care of those with a mental illness who have been charged with minor crimes.
- The number of secure forensic psychiatric beds in the community should be increased.

#### **5. Imprisonment as the last resort**

PWD fully supports the presumption, applied by the courts when sentencing, that imprisonment is a last resort, and that therefore community based sentencing options should always be considered first.

PWD believes that reasons ought to be given, whenever a custodial sentence is imposed, why other sentencing options other than the imposition of a custodial sentence are not appropriate in the circumstances. Currently the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2) provides:

*A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender and make a record of, its reasons for doing so, including:*

*(a) its reasons for deciding that no penalty other than imprisonment is appropriate...*

PWD considers that the provision should be extended to refer to sentences of greater than 6 months duration and to require reasons to be given and recorded whenever an offender has been identified in proceedings as being a minor or as having a disability. Consequential amendments to the sentencing laws applying to juvenile offenders may have to be made. We call upon this Inquiry to make a recommendation to this effect.

**Recommendation:** The *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(2) should be amended to refer to sentences of greater than 6 months duration and to require reasons to be given and recorded whenever an offender has been identified in proceedings as a minor or as having a disability.

It is envisaged that courts placed under such an obligation would record their reasons for not applying a community based sentencing option, and that where, as for many juvenile offenders and offenders with disability, the inappropriateness of a community based option is related to the unavailability of community resources to support that option, that the court would make specific reference to that fact. In this way it is anticipated that the issue of the unmet need for appropriate resources in rural and remote areas, and for these disadvantaged populations, would be highlighted on a daily basis in our courts, and that governmental action to address the need for such resources would follow.

For courts to be in a position to so state their reasons, they would need, however, to be in receipt of appropriate information at the pre-sentencing phase of proceedings. The NSW Law Reform Commission has previously made recommendations in this regard. It is our understanding that those recommendations have not been implemented in full or across the state. With this in mind, we call upon this Inquiry to invite verbal or other testimony addressing the issue of implementation of the NSW Law Reform Commission's recommendations numbered 36 and 37, dealing with pre-sentence reports and information that a court is able to request of government departments regarding services for offenders with disability (NSW Law Reform Commission Report 80 *People with an Intellectual Disability and the Criminal Justice System* 1996, pp 309-315) Such testimony should be invited from Department of Corrective Services, Department of Juvenile Justice, NSW Probation and Parole Service, Legal Aid Commission, and disability representative agencies.

**Inquiry Process:** PWD believes that this Inquiry must invite verbal or written testimony addressing the issue of implementation of the NSW Law Reform Commission's recommendations numbered 36 and 37, dealing with pre-sentence reports and information that a court is able to

request of government departments regarding services for offenders with disability (NSW Law Reform Commission Report 80 *People with an Intellectual Disability and the Criminal Justice System* 1996, pp 309-315)

## 6. Human rights of people with disability

The Australian Law Reform Commission has recently summarised Australia's obligations under international law in the area of sentencing as follows (ALRC, *Sentencing of Federal Offenders: Issues Paper 29*, pars 3.2-3.4):

Minimum standards and safeguards in relation to criminal justice systems are contained in the *International Covenant on Civil and Political Rights* (ICCPR)[3] and the Second Optional Protocol to the Covenant on the abolition of the death penalty;<sup>[4]</sup> the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* (CAT);<sup>[5]</sup> and the *Convention on the Rights of the Child 1989* (CROC).<sup>[6]</sup>

Australia is a party to all these instruments and any federal, state or territory legislation, policy or practice that is inconsistent with them will place Australia in breach of its international obligations. The first Optional Protocol to the ICCPR,<sup>[7]</sup> to which Australia is also a party, allows individual Australians to lodge complaints about alleged breaches of the ICCPR with the United Nations Human Rights Committee.

The international instruments listed above include a number of principles relevant to sentencing:

- no one should be subject to arbitrary detention,<sup>[10]</sup> that is, detention that does not have an adequate legal basis or is otherwise unreasonable, inappropriate or unjust.<sup>[11]</sup> The detention must also be proportionate;<sup>[12]</sup> and
- no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment at the hands of the state.<sup>[13]</sup>

The CROC, Article 40(4) also requires that alternatives to detention are available to ensure that children are dealt with in a manner appropriate to their wellbeing and proportionate to their circumstances and the offence.

Where, primarily because of the non-existence of appropriate community based sentencing options and/or the community resources necessary to support them, a person is detained in custody, such detention is very likely to be held to be unreasonable, inappropriate, unjust and disproportionate in the context of contemporary Australian society, and to amount to cruel, inhuman or degrading treatment or punishment in contravention of international law. We call upon this Inquiry to so find:

**Finding:** That any imposition of a custodial sentence that could reasonably have been avoided through adequate provision or funding by the state of appropriate community based sentencing options, or of the governmental and community infrastructure necessary to support them, amounts to a breach of Australia's human rights obligations under international law.

## 7. Community based sentencing options in NSW – community service orders as an example

PWD strongly supports maximising the availability of Community Service Orders (CSOs) to offenders with disability, and within rural and remote communities.

The NSW Law Reform Commission in Report 80 *People with an Intellectual Disability and the Criminal Justice System* 1996, pp 407-412 and Discussion Paper 35 at paras 11.67-11.70 has canvassed the many ways in which offenders with an intellectual disability “are denied the rights or options available to those without an intellectual disability because of a lack of support services, or because the options are not geared towards the needs of people with an intellectual disability”. PWD reiterates the comments there made, and observes that in the decade since the publishing of Report 80 little has changed for offenders with cognitive disability.

By way of example, we refer to the situation for offenders with disability seeking to access, or participating in, community sentence orders. The following comments suggest a range of serious problems in need of urgent remedy. They are by no means exhaustive of all the problems confronting offenders with disability seeking to access, or participating in, community based sentencing options.

To obtain as detailed a picture as possible of these problems across the full range of communities and the spectrum of community based sentencing options, we call upon this Inquiry to seek detailed information on these matters from the Departments of Juvenile Justice, Health, Ageing, Disability and Home Care (DADHC), the Legal Aid Commission, disability peak and representative agencies, and the Senior Officer's Group on Intellectual Disability and the Criminal Justice System (below).

**Inquiry Process:** PWD believes that this Inquiry must invite verbal or other testimony specifically addressing the issue of how to maximise the non-problematic participation of offenders with disability across the range of community based sentencing options, and across communities, from the Departments of Juvenile Justice, Health, Ageing, Disability and Home Care (DADHC), the Legal Aid Commission, disability peak and representative agencies, and the Senior Officer's Group on Intellectual Disability and the Criminal Justice System (below).

## *Eligibility Criteria*

The *Crimes (Sentencing Procedure) Act 1999* (NSW) s 86(1) sets out the requirements for assessing the suitability of an offender for community service work. The provision makes no mention of the particular circumstances of offenders with disability, notwithstanding the gross overrepresentation of offenders with disability in the criminal justice system (above). An appropriate reference would appear to be needed in light of the findings of a survey of judicial officers that disclosed prima facie discriminatory attitudes of some magistrates who believed that physical or cognitive impairments render some offenders unsuitable for CSOs. (Quoted in Report 80, p 407)

**Recommendation.** Section 5(2), and any other statutory provisions establishing eligibility criteria for community based sentencing options, should be amended to make clear that the existence of any disability should not of itself be considered sufficient reason to assess an offender as unsuitable for community service work or other community based sentencing option.

## *Conditions*

The *Crimes (Administration of Sentences) Regulation 2001* (NSW) reg 205 sets out the standard conditions in respect of each community service order. While not inappropriate conditions for a person of average competency or worldly experience, the conditions do pose problems for persons with little or no literacy, many people with cognitive disability, or for many people with disability who have limited social supports.

For example, on the whole there is a need for the standard conditions to be written in plain or easy English, and in other formats accessible to people with disability including Compic, Braille, audio etc.

More specifically, the provisions that require an offender to provide or read written notices, are conditions that in all likelihood have little reasonable prospects of being fulfilled by many offenders with little or no literacy or intellectual disability (reg 205(d) and (m)). An offender with acquired brain injury may not recall them. And they may not be capable of compliance by an offender with psychiatric disability where community based mental health services supporting such people are absent.

Similarly, Regulation 205(g) providing that “the offender must comply with such standards of dress, cleanliness and conduct as the assigned officer or supervisor may from time to time determine” raises distinct barriers to compliance for many offenders with disability, who through poverty and lack of social supports may lack the necessary standard of clothing and the support that they need to maintain adequate personal hygiene. In this context, a condition that on its face appears reasonable may nonetheless indirectly discriminate against many offenders with disability.

Further, where an offender with disability is required to participate in a development program at an attendance centre as a condition of their CSO, the curricula and delivery of development programs and subjects may be inaccessible to an offender with disability, or delivered in a discriminatory manner, i.e. in a manner or formats that cannot be understood.

**Recommendation:** That the Inter-departmental committee referred to above be specifically charged with the responsibility of reviewing the eligibility criteria, conditions imposed, and implementation of all community based sentencing options with a view to making recommendations directed to eliminating any direct or indirect discrimination towards offenders with disability.

**Recommendation:** Courts as part of the conditions imposed on a CSO should be permitted to order that an attendance centre ensure that the curricula and delivery of development programs and subjects are accessible to an offender with disability and delivered in a non-discriminatory manner.

Such an order is necessary to ensure that attendance centres are aware of the need to tailor their programs to meet the needs of offenders with disability. In making such an order a court would also be stipulating in effect that an attendance centre do no more than is already required of them under state and federal anti-discrimination legislation.

It is also noted (Discussion Paper, p7) that CSOs are not widely used in some regional areas as the Probation and Parole Service is unable to provide adequate supervision either due to insufficiency of local staffing, or a lack of places in an appropriate program. It is further noted (Discussion Paper, p7) that *“the higher level of support and supervision required by offenders with special needs can also be an impediment to a court imposing a CSO on such an offender”*. PWD does not consider these reasons to be adequate in the context of contemporary Australian society.

PWD also considers that any failure of the Probation and Parole Service to provide supervision to offenders with disability as result of the “the higher level of support and supervision required” is discriminatory under both state and federal anti-discrimination legislation, and impermissible as a matter of law.

Further, PWD considers that consistency in sentencing can never be achieved in NSW if people in rural and remote regions are not, to the maximum extent possible, able to receive the same community based penalties as those offenders in major centres and metropolitan NSW who have committed offences of the same degree of seriousness.

**Recommendation.** This Inquiry should invite verbal testimony addressing the issue of implementation of the NSW Law Reform Commission’s recommendations numbered 58 and 59 dealing with access to community sentence orders and the creation of a Special Offenders’ Service within the Probation and Parole Service (NSW Law

**8. The unmet need for human services to support community based sentencing options for offenders with disability**

There is a widespread need for improved access to both generic human services and disability services that are capable of providing appropriate accommodation and other supports to offenders with disability in the community, including support coordination/case management, clinical intervention, education and training, mental health services, accommodation and related support, and alcohol and other drug services. (*The Missing Services Report*, 1985; NSW Law Reform Commission Report 80 *People with an Intellectual Disability and the Criminal Justice System*, 1996; Simpson J, Green J, and Martin M, *The Framework Report*, 2001; amongst others)

While these reports present a convincing argument that many offenders with cognitive disability would be more appropriately sentenced to community based options if appropriate support services were in place, we are unaware of any data that can tell us exactly the number of people with cognitive impairment who have been inappropriately sentenced to be detained in custody because of an absence of, or inaccessibility of, such services. We believe, however, that the NSW Law Reform Commission's recommendations (above) that courts be at liberty to require information from relevant government departments, and to require pre-sentence reports when dealing with an offender with cognitive disability, may permit the creation of such data.

It is our belief that most magistrates and judges would want to pass as appropriate a sentence as possible, and that where the most appropriate sentencing option is not available primarily due to a lack of adequate services outside a prison, that those judges and magistrates after being provided with the relevant information would in all likelihood comment on that fact when passing sentence. It would be a relatively simple matter for researchers, courts, prosecuting authorities, the Legal Aid Commission, or disability advocates to then collate such data.

This is of course not sufficient in and of itself. In our view, the government agencies implicated in the above reports and others of the past decade, including Juvenile Justice, DADHC, Health, Housing, and Corrective Services, should be required to establish a transparent process for implementation of these reports' recommendations.

We are aware that a Senior Officer's Group on (intellectual) disability and criminal justice has been meeting for some time. While we applaud the principle of interagency cooperation and coordination on this issue, there does not appear to have been much progress made by this Group towards the resolution of the various critical issues that are before it. Lest there be some injustice in this assessment, we urge this Inquiry to recommend that the Group produce and publish a progress report on its deliberations and

achievements to date. If the Group is making substantial progress, this report will improve public confidence in the area.

**Recommendation:** That the Senior Officer's Group on Intellectual Disability and the Criminal Justice System produce and publish a progress report on its deliberations and achievements within two months of the date of this Inquiry's report.

We are also firmly of the view that reform in this area ought to be undertaken on the basis of a partnership between government and the community. Government agencies do not have all of the expertise or the sheer determination that is required to achieve the necessary reform. In our view the Senior Officer's Group ought to be reconstituted as an Inter-departmental Committee under an independent expert Chair, and include non-government experts, including representatives of appropriate disability groups. It ought to be specifically charged with the development and publication of a strategic action plan to resolve the many issues in this area, and be required to develop and publish regular progress reports against this plan. We urge this Inquiry to make a recommendation to this effect.

**Recommendation:** That the Senior Officer's Group be reconstituted as an Inter-departmental Committee under an independent expert Chair, and include non-government experts, including representatives of appropriate disability groups, and that it develop and publish a strategic action plan and develop and publish regular progress reports against this plan.

While there have been some positive developments within DADHC in relation to the eligibility of some offenders for assistance, and in relation to the development of clinical and casework services in particular, even these positive developments are severely inhibited by the failure to develop appropriate accommodation options. In the absence of appropriate supported accommodation it is often impossible, or very difficult, to provide the necessary clinical and casework services to reduce or eliminate offending and other behaviour that place a person with cognitive disability at risk of entering/re-entering the criminal justice system. This situation represents neither sound policy and planning, nor sound expenditure of public funds.

Those positive developments that have occurred in relation to offenders are confined to people with intellectual disability eligible for assistance from DADHC's direct services. This typically excludes people with a primary diagnosis of brain injury or psychiatric disability, even though these groups are clearly identified in the target group for assistance under the *Disability Services Act, 1993* (NSW) (section 5). It also typically excludes people with so-called 'borderline' intellectual disability, and people who may have dual impairments, where the primary impairment is not assessed to be intellectual. Consequently, many people in critical need are unable to obtain assistance from DADHC, and many find themselves the subject of intractable 'turf wars' between DADHC and NSW Health in which both agencies assert that the

person is the responsibility of the other. This is an absurd situation that must be resolved.

While there might be some historical basis for DADHC's direct services to be primarily limited to the area of intellectual disability, this arrangement ought to be urgently reassessed in light of contemporary needs. In our view, people with cognitive disability in contact with the criminal justice system ought to be a direct responsibility of DADHC no matter what the nature, origin or severity of their impairment.

**Recommendation:** That DADHC be required and funded to fulfil its statutory mandate under the *Disability Services Act, 1993* (NSW) (section 5) by providing its full range of direct services to people with acquired brain injury and people with psychiatric disability, particularly those at risk of entering/re-entering the criminal justice system, and that the mandate of the Senior Officer's Group be similarly extended.

Concern may arise regarding the cost of implementation of the recommendations contained in this submission. However, it has been found that the cost to government of properly meeting the needs of offenders with intellectual disability, both juvenile and adult, in the criminal justice system is likely to be recovered in the long term. (Law Reform Commission Report 80 *People with an Intellectual Disability and the Criminal Justice System* 1996, p 367).

## 9. Conclusion

We thank you for the opportunity to provide this submission. We welcome any opportunity to further elaborate on these matters.

Further information or clarification may be obtained from Matthew Keeley, Senior Legal Officer.

Yours sincerely

**ALANNA CLOHESY**  
Deputy Director, Advocacy