Submission to the Statutory Review of the *Crimes (Domestic and Personal Violence) Act 2007*

About the Intellectual Disability Rights Service
The Intellectual Disability Rights Service (IDRS) is a specialist legal advocacy service for people with intellectual disability. We work with and for people with intellectual disability to exercise and advance their rights.

We do this by: providing legal advice, casework and support; advocating for improvements to laws and policies affecting people with intellectual disability; providing assistance to legal and other professionals supporting people with intellectual disability and providing information to service providers and the community about the rights and needs of people with intellectual disability.

IDRS is a community legal centre. It receives its main funding from the NSW Department of Family and Community Services and the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs.

Issues Addressed in this Submission
This submission addresses the following issues relating to the *Crimes (Domestic and Personal Violence) Act 2007* (the Act):

1. Definitions of 'domestic violence offence' and 'domestic relationship'
2. Effectiveness of the Act where a defendant has Impaired Capacity
    a) Provisional orders
    b) Interim orders
    c) Participation in proceedings
    d) Final orders

1. Definitions of 'domestic violence offence' and 'domestic relationship'
We submit that the relationships covered by section 5(e) of the Act should continue to be considered domestic relationships so that a long-term resident of a residential facility who experiences violence perpetrated by another person living long-term in the same residential facility continues to benefit from an obligation on the part of the police to apply for an apprehended domestic violence order (ADVO). However, we draw your attention to the concerns we raise in part 2 of this submission.

We believe that there should be careful consideration of the operation of the Act as regards the relationship between care workers and adult persons in their care referred to in section 5(f). We assume that the intention of the legislation is to protect people whose situations and characteristics make them particularly vulnerable to experiencing violence perpetrated by others. We submit that persons dependent on the ongoing care of others are particularly vulnerable in this way. Further, a person dependent on the care of others is likely to be unable to apply for an apprehended violence order (AVO) on their own behalf. It may be difficult, or impossible, for the person to communicate with police or a chamber registrar, or to travel to a police station or court, without assistance. For these reasons, we submit that it is essential the obligations on police officers under sections 27 and 49 of the Act to apply for orders should clearly extend to situations where police suspect or believe a person dependent on the care of another has been, or is, or is likely to be the victim of an act of violence committed by the person's carer.

We submit that the interaction between the definition of 'domestic violence offence' in section 11 of the Act and the reference to carer-type relationships in the section 5(f) definition of 'domestic relationship' needs clarification. The legislation as presently expressed does not clearly require police to apply for an ADVO in circumstances where they suspect or believe a person under the care of one or more others has been or is the victim of a personal violence offence perpetrated by a carer.

In fact, police frequently interpret the legislation as obliging them to apply for an ADVO on behalf of a carer against a vulnerable person dependent on care, even against the express wishes of the carer.

Case Study: N

Our client N was a 19-year-old woman who lived in a group home. She had been diagnosed with mild-moderate intellectual disability. She suffered trauma and abuse as a child and had profound deficits in her ability to regulate her emotions and manage interpersonal relationships.

N became upset when she thought a staff member was spending too much time with another resident with whom N did not get along. N yelled at the staff member and used her body to stop the staff member exiting the room.

The police were called and formed the view that they were obliged to apply for an ADVO, even though the staff member did not want an apprehended violence order (AVO) made.

A carer is likely to be able to apply for an order against a person dependent on their care, should the carer feel it necessary to do so for their own safety and protection.

We submit that the definitions in the legislation should be amended to make it clear that:

a) a person dependent on the ongoing care of one or more others should benefit from an automatic application for an ADVO where police suspect or believe a domestic violence offence has been or is being committed or is likely to be committed against that dependent person by their carer(s); but
b) police have discretion as to whether to apply for an AVO to protect a carer.

This may mean that a personal violence offence committed by a carer against a person dependent on that carer's ongoing paid or unpaid care should not fall within the definition of 'domestic violence offence', and/or that the definition of 'domestic relationship' requires appropriate amendment.

2. Effectiveness of the Act where a Defendant has Impaired Capacity

Proceedings about the making of AVOs, and the operation of AVOs, pose many problems for defendants with impaired capacity. Impaired capacity may involve inability to:

- Understand the nature, terms or effect of an order
- Understand the potential consequences of breaching an order
- Understand, or be able to participate in, the process involved in the making of an order, and/or
- Effectively comply with an order.

Where a defendant has impaired capacity, the making of an order does not effectively prevent problematic behaviour. Such behaviour is more likely to be effectively addressed, and protection of others is more likely to be achieved, by the development and implementation of appropriate support and/or treatment plans. These may involve education, counselling, medical treatment, drug and alcohol rehabilitation, adjustments to living situations and/or improved social engagement.

In light of this, we submit that various amendments should be made to the Act.

a) Provisional Orders

We submit that section 27 of the Act should be amended to provide that an application for a provisional order need not be made if the person against whom the order would be made has impaired capacity in the sense outlined above. A police officer investigating

an incident should have discretion as to whether to make an application for a provisional order in such circumstances.

Case Study: W

W was 39 years old and lived in a supported accommodation unit. He had been diagnosed as having moderate intellectual disability and intermittent explosive disorder. His most profound deficits were in relation to communication. He had very limited understanding of relationships with women.

W formed a relationship with a female neighbour. Unfortunately, it turned sour. W would follow the woman and ask her why she did not want to be friends with him. It was alleged that on one occasion he threw an empty Coke can towards her. Police became involved and successfully applied for a provisional apprehended personal violence order (APVO) against W. He did not understand it. He believed he and the neighbour were boyfriend and girlfriend. He continued to approach her in the street and get upset and yell at her when she refused to talk to him. Police were called. W was arrested and refused bail. He was sent to prison where he remained on remand for over 3 months. He became very disorientated and confused. He did not know why he was in custody and it appeared he had not been able to shower properly or brush his teeth – tasks with which support staff had helped him prior to him being in custody.

At this point IDRS became involved in the case. We helped link W with support services offered through the Department of Family and Community Services and worked with his guardian to find alternate accommodation away from the protected person. W's new support program included the introduction of new behaviour intervention strategies and counselling about relationships.

We also obtained an expert report that indicated W had no understanding of the AVO.

We were able to negotiate with the police, who withdrew the application for a final AVO. The criminal charges against W were dismissed under s32 Mental Health (Forensic Provisions) Act 1990 (NSW).

W's case illustrates:

- the ineffectiveness of a provisional AVO against a person with impaired capacity to prevent problematic behaviour towards the person alleged to be in need of protection, and

- the potential detrimental consequences of a provisional order against a person with impaired capacity, namely arrest, criminal charges, substantial time in custody (even if only on remand) and associated negative effects on physical and mental health.

We submit that impaired capacity in the sense outlined above should be referred to in section 27 of the Act as a 'good reason' under s27(4)(b) not to make an application

b) Interim Orders

For similar reasons, we submit that section 22 of the Act should be amended to explicitly provide that circumstances in which it may be inappropriate to make an interim AVO include those where a defendant has impaired capacity in the sense outlined above. It is particularly important that the court is required to consider the impact of a defendant's impaired capacity on the likely effectiveness of any interim AVO, as a significant number of defendants are unrepresented in interlocutory proceedings and will not raise issues of capacity themselves.

c) Participation in Proceedings

In proceedings where an AVO is sought, it may be the case that a defendant who has impaired capacity is unable to properly participate in the process of the making of an order and that therefore the entire proceedings are substantially and unreasonably unfair to the defendant. This was an argument made by counsel for the appellant in the NSW District Court case of *Farthing v Phipps*[1].

In the *Phipps* case, reference was made to the standard for assessing whether an accused is fit to stand trial in a criminal matter. That standard is the test of unfitness set out in *R v Presser*[2] (the Presser test), being:

> *whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him. He needs … to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all of the various court formalities. He needs to be able to understand … the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer the charge.*

[1] [2010] NSWDC 317
[2] [1958] VR 45 at 48

Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must … have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.

In *Phipps*, Lakatos SC DCJ considered whether the Presser test applied to an application under the Act for an ADVO. His Honour stated in his written reasons for judgment:[3]

It is certainly true that the attributes of a hearing for an order under this Act have relevant similarities to many criminal proceedings. This includes the giving of evidence and the cross-examination in the relevant case. It is no quantum leap to suggest that to exercise the rights under this Act similar cognitive and intellectual abilities may be required to be used by a party to it. Accordingly, there is much merit in the appellant's argument that a minimum standard of intellectual capacity as referred to in Presser should also apply. There is also much to be said for that proposition and notions of fairness and justice. However, in my view the Presser test in terms applies to committal proceedings whether conducted on indictment or summarily. Its extension to committal proceedings, which are an adjunct in my view of criminal proceedings in any event, is one which can fairly be described as intricately connected with criminal proceedings.

Notwithstanding these notions of fairness, in my opinion it is inappropriate for a Judge of the District Court to extend the application of the common law in the way which the appellant seeks. That in my view is the province of the legislature or the higher courts.

We submit that the legislature should, as His Honour suggested, provide in the Act for a minimum standard of intellectual capacity on the part of a defendant in order for proceedings to run. Where that minimum standard is not reached, proceedings should be permanently stayed.

d) Final Orders

In the *Phipps* case, having decided that he could not apply the Presser test, Lakatos SC DCJ went on to consider whether there was any other reason why an AVO should not be made. His Honour stated:[4]

[3] Ibid at paras 32-33

Section 17 … allows a court … to take into account any other relevant matter in determining whether or not to make an order… The Act proceeds on the basis that an order by the Court directed to the defendant would be understood by that defendant and acted upon … (I)f the Court concludes that the making of an order will not have the desired primary effect, then that will be a substantial reason in accordance with s17 not to make the order. Furthermore, if the Court concludes that a person against whom the order is made cannot properly comprehend the terms of its order, so that the effect might be that he or she unwittingly breaches the order and therefore exposes him or herself to imprisonment, that in my view would also be a sufficient other reason why an order should not be made.

We submit that sections 17 and 20 of the Act should be amended to specifically require a court to consider any impaired capacity of a defendant in deciding whether or not to make an AVO. The making of an order is unlikely to serve to protect anyone if the defendant does not understand the order and its terms, or lacks the ability to comply with it.

Intellectual Disability Rights Service Inc
18 November 2011

Per:

Margot Morris
Principal Solicitor

Janene Cootes
Chief Executive Officer

[4] Ibid at paras 33-37