



Federation of
Community Legal Centres
VICTORIA

**Submission by the
Federation of Community Legal Centres (Victoria) Inc
to the Department of Justice**

Draft Family Violence Bill 2007

A.	Introduction	2
B.	Summary of Recommendations	2
C.	Background	3
D.	The Victorian Charter	5
	1. <i>Overview of the Victorian Charter</i>	5
	2. <i>Relevance of International and Comparative Jurisprudence</i>	6
	3. <i>Equal Protection of the Law</i>	6
	4. <i>Protection from Cruel, Inhuman or Degrading Treatment</i>	9
	5. <i>Protection of children</i>	11
E.	The situation in New South Wales	12

A. Introduction

- 1 This submission is made by the Federation of Community Legal Centres Vic. Inc ('the Federation'). The Federation is the peak body for 52 Community Legal Centres ('CLCs') across Victoria, including both generalist and specialist centres. CLCs provide free legal advice, information, assistance, representation and community legal education to more than 100,000 Victorians each year. The Federation also works on strategic research, casework, policy development and social and law reform activities. The day-to-day work of CLCs reflects a 30-year commitment to social justice, human rights, equity, democracy and community participation.
- 2 This submission has been prepared with expert input from the Human Rights Law Resource Centre and the Mallesons Human Rights Law Group.
- 3 This submission examines and discusses the draft Family Violence Bill 2007 (Vic). Specifically, the submission addresses question 10 of the *Family Violence Bill 2007: Discussion Paper*: 'What are your views on the proposed definition of informal care relationship?'¹. It considers the following proposed definitions in the Bill:
 - (a) 'family violence', contained in clause 6;
 - (b) 'family member', contained in clause 9; and
 - (c) 'informal care relationship', contained in clause 12.

B. Summary of Recommendations

- 4 The Federation recommends that:
 - (a) Clause 6(1) of the Bill be amended so that it reads:
 - (1) **Family violence** includes domestic violence and is behaviour by a person towards a family member of that person, or towards another person if a care relationship exists between them, if that behaviour – ...
 - (b) Clause 6(1)(e) be amended so that it reads:
 - (e) in any other way controls or dominates the family member, or another person if a care relationship exists between them, and causes that family member, or another person if a care relationship exists between them, to feel fear.
 - (c) Clause 6(2)(a), (c) and (d) be amended to include, along with 'family member', 'another person if a care relationship exists between them and the person';
 - (d) Clause 9(1)(f) be deleted; and
 - (e) Clause 12 be amended by:
 - (i) deleting the word 'informal' from the heading and subsection (1); and
 - (ii) deleting sub-clauses (3)-(5).

¹ Department of Justice, *Family Violence Bill 2007: Discussion Paper* (2007), 15-16.

C. Background

5 The Victorian Government has been active in addressing family violence in recent years. In 2002, the Statewide Steering Committee to Reduce Family Violence ('**the Steering Committee**') was established to provide advice on the development of a multi-agency and integrated response to family violence.

6 In March 2006, the Victorian Law Reform Commission ('**VLRC**') published its *Review of Family Violence Laws Report* ('**Report**'). The Report examined the *Crimes (Family Violence) Act 1987* (Vic) and recommended that the Act be replaced by completely new legislation. The VLRC indicated that the existing system of intervention orders had certain shortcomings:

[t]he *Crimes (Family Violence) Act 1987* is used to obtain intervention orders for people involved in neighbourhood and other community disputes and in stalking matters, as well as for family violence. This has led to confusion among people working with the legislation, one consequence of which has been that family violence matters are sometimes not treated seriously.²

7 Accordingly, the VLRC recommended the enactment of legislation that dealt exclusively with family violence.

8 Part of the Victorian Government's response to the reports of the Steering Committee and the VLRC is comprised of the draft Family Violence Bill 2007 (Vic) ('**Bill**') and the associated *Family Violence Bill 2007: Discussion Paper* ('**Discussion Paper**').

9 The Bill provides for the making of interim and final family violence orders.³ These orders will replace the existing system of intervention orders. As is presently the case with intervention orders, under the Bill various conditions are able to be imposed on a respondent. These include excluding the respondent from a protected person's residence, prohibiting the respondent from damaging a protected person's property and prohibiting the respondent from approaching, telephoning or contacting a protected person.⁴

10 The definition of 'family violence' is limited in clause 6 to 'behaviour by a person towards a family member'. Among other things, clause 9 of the Bill defines family member in relation to a person to include 'a person who is in an informal care relationship with the person.'

11 Clause 12 defines 'informal care relationship' as follows:

12 Meaning of *informal care relationship*

(1) An *informal care relationship* exists between persons if a person is or was dependent on another person (a *carer*) who helps the person in an activity of daily living (a *personal care activity*).

...

(2) The personal care activity must be required, or have been required, because of a disability, illness or cognitive impairment relating to the person.

(3) A relationship in which the personal care activity is or was provided under an arrangement the person entered into with someone other than the carer is not an informal care relationship, whether or not a fee is or was paid for the care.

² Victorian Law Reform Commission, *Review of Family Violence Laws Report* (2006) xxii.

³ Draft Family Violence Bill 2007 (Vic) cl 26, 50.

⁴ Draft Family Violence Bill 2007 (Vic) cl 58.

...

- (4) If the person entered into an arrangement with the carer and a fee is or was paid, or is to be paid, to or at the discretion of the carer under the arrangement for the personal care activity, the relationship existing between the persons is not an informal care relationship, unless it is alleged that the circumstances relating to the arrangement or fee include an act of family violence.
- (5) In this section -
- fee** does not include -
- (a) a pension or allowance in a carer's own name from the Commonwealth Government for providing care to a person; or
 - (b) an amount of money paid to a carer for goods purchased for the person that is not more than the purchase price of the goods; or
 - (c) an amount of money paid to a carer for reimbursement of the carer's out-of-pocket expenses.

12 Under the Bill, a disabled, ill or cognitively impaired individual will be able to obtain a family violence order against an abusive carer where that carer is unpaid and the care relationship was initiated directly between the carer and the person requiring the care. Excluded from the definitions contained in the Bill are all paid carers, and carers arranged by third parties, for example by volunteer organisations.⁵

13 The inclusion of the concept of 'informal care relationship' is contrary to the recommendations of the Report. The VLRC highlighted concerns that people with disabilities are particularly vulnerable to abuse by family members and carers, noting research finding that in particular a high proportion of women with a disability experience abuse by their carers.⁶ For this reason, among other things, in recommendation 17 of the Report, the VLRC recommended that the definition of 'family member' include 'a person who has or has had a relationship with the original person involving the original person's dependence or partial dependence on that person for paid or unpaid care.'⁷

14 This discrepancy was acknowledged in the Discussion Paper:

The VLRC recommended that a 'person who has or has had a relationship with the original person involving the original person's dependence or partial dependence on that person for paid or unpaid care' should be covered by the definition of family member.⁸ This is to ensure that people with a disability can obtain protection under the legislation from carers who would not otherwise come within the definition of family member but may be in a powerful position due to the other person's dependence on them for intimate physical care and practical support. These relationships often occur in a domestic or residential setting and share many of the characteristics of other family relationships.

However, other regulatory or contractual remedies may already be available for persons experiencing abuse in these situations, for example:

- in paid care arrangements, the contract may be terminated
- in unpaid care arrangements, organised by volunteer groups such as Rotary, the arrangements may be terminated

⁵ Draft Family Violence Bill 2007 (Vic) cl 12 (3).

⁶ Victorian Law Reform Commission, above n 2, 110-11.

⁷ Ibid 112.

⁸ Ibid.

- for people with disabilities in care provided by the Department of Human Services, the Disability Services Commissioner may use powers to investigate complaints and make referrals to a court or tribunal or body it considers has the power to resolve the matter
- for elderly people the government has committed to an older persons legal service, expected to aid elderly people in abuse situations.

However, persons in informal and unpaid care arrangements do not necessarily have other avenues to turn to. Therefore it is proposed to expand the definition of family member to include informal care relationships where the carer is unpaid and the relationship is not auspiced by another organisation. This is based on the definition of carer included in Queensland's *Domestic and Family Violence Protection Act 1989*. The draft Bill includes a definition of informal care relationship at clause 12.⁹

D. The Victorian Charter

1. Overview of the Victorian Charter

15 The Victorian Parliament has recently enacted the *Charter of Human Rights and Responsibilities Act 2006* ('**Charter**'). The Charter enshrines a body of civil and political rights derived from the *International Covenant on Civil and Political Rights* ('**ICCPR**').¹⁰ Relevantly, the substantive rights recognised in the Charter include the rights to:

- equal protection of the law;
- protection from cruel, inhuman or degrading treatment or punishment; and
- protection of children.

16 The Victorian Charter establishes a 'dialogue model' of human rights protection which seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy. The dialogue between the various arms of government — namely, the legislature, the executive (which includes 'public authorities') and the courts — is facilitated through a number of mechanisms, including:

- prior to introduction to parliament, bills must be assessed for the purpose of consistency with the human rights contained within the Charter, and a Statement of Compatibility tabled with the Bill when it is introduced to Parliament;
- all legislation, including subordinate legislation, must be considered by the parliamentary Scrutiny of Acts and Regulations Committee for the purpose of reporting as to whether the legislation is incompatible with human rights;
- public authorities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process;
- so far as possible, courts and tribunals must interpret and apply legislation consistently with human rights and should consider relevant international, regional and comparative domestic jurisprudence in so doing;

⁹ Department of Justice, above n 1, 15-16.

¹⁰ Opened for signature on 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976).

- (e) the Supreme Court has the power to declare that a law cannot be interpreted and applied consistently with human rights and to issue a Declaration of Inconsistent Interpretation. The Government must respond to such a Declaration within six months; and
- (f) the Victorian Equal Opportunity and Human Rights Commission has responsibility for monitoring and reporting on the implementation and operation of the Victorian Charter and also for conducting community education regarding the Charter.

17 The Charter came partly into force on 1 January 2007 and will become fully justiciable on 1 January 2008.

2. **Relevance of International and Comparative Jurisprudence**

18 Section 32(2) of the Charter states that:

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

19 The Explanatory Memorandum to the Charter suggests that section 32(2) 'will operate as a guide' and goes on to state that:

a court or tribunal may examine international conventions, international customs as evidence of a general practice accepted as law, the general principles of law recognised by civilised nations, and (as subsidiary means) judicial decisions and teachings of the most highly qualified publicists of various nations.¹¹

20 It also suggests that decisions of the International Court of Justice, the European Court of Human Rights ('**European Court**'), the Inter-American Court of Human Rights and United Nations treaty monitoring bodies (including the Human Rights Committee ('**HRC**')) will be particularly relevant.¹² Judgments of domestic and foreign courts, particularly the Australian Capital Territory, Canada, New Zealand, South Africa and the United Kingdom, may also be relevant.¹³

3. **Equal Enjoyment of Human Rights and Equal Protection of the Law**

21 Section 8(2) of the Charter provides that:

Every person has the right to enjoy his or her human rights without discrimination.

This requires that all persons be equally and effectively protected against differential treatment in any area falling within the 'wide ambit' of human rights such as, relevantly to the Bill, the right to life and the right to liberty and security of person.¹⁴

¹¹ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic), 23.

¹² Ibid.

¹³ Ibid.

¹⁴ *R (on the application of Clift) v Secretary of State for the Home Department* [2006] UKHL 54 (13 December 2006). See also *Stec v United Kingdom* (2005) 41 EHRR SE 295, [38].

22 Section 8(3) of the Charter states that:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

23 Section 8 of the Charter is modeled on article 26 of the ICCPR and is also informed by, and closely related to, article 2(1) of the ICCPR. General Comment 18 of the HRC authoritatively states that:

the term 'discrimination' should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. [emphasis added]

24 International and comparative jurisprudence illustrates the broad range of issues covered by the right to equal protection of the law and the prohibition of discrimination. The criterion of 'other status' is broad and may be used as 'a general yardstick of reasonableness, objectivity and proportionality of legislative acts'.¹⁵ Indeed, the HRC has consistently stated that any differentiation of treatment that is not justified by reasonable and objective grounds may constitute discrimination.¹⁶

25 The application of the protections contained in the Bill depends on whether an individual's carer is paid or unpaid, or the manner in which the care is arranged. The Federation submits that such a distinction is not based on any reasonable or objective grounds. An individual who is partially or totally dependent on a carer remains a vulnerable person and entitled to the equal enjoyment of human rights and the equal protection of the law, irrespective of the basis on which their care is provided. Whether a person's carer is a family member or not, is paid or unpaid, is arranged directly or through someone else is irrelevant to the person's particular vulnerability.

26 The Federation notes that the right to equal protection of the law imposes a *positive duty* on the part of governments. Indeed, sections 8(2) and 8(4) of the Charter, read together, impose a substantive obligation on the Victorian Government to take positive steps and adopt special measures to address the needs of people experiencing disadvantage so as to enable them to realise all of their rights and freedoms. The existence of a positive obligation to ensure the protection of such a right has been expressed by both the HRC and the European Court.¹⁷ It is also of note that the Charter provides that an 'act', includes a 'failure to act', thereby making it unlawful for a public authority to fail to act in a way that is compatible with human rights pursuant to section 38.

27 The Federation also notes that this positive obligation may extend to ensuring that private persons or entities are also covered by such special measures. In its General Comment No. 31, the HRC stated that:

¹⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised ed, 2005).

¹⁶ UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989), [13].

¹⁷ See, eg, UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) and *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 278.

the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights ...

- 28 The Federation is concerned that the current definitions contained in the Bill may result in a failure to protect equally all persons who, through disability, illness or cognitive impairment, require, and are dependent upon, a carer. The result is likely to be that some vulnerable people who are victims of abuse will be protected, whereas others will not. The Federation therefore submits that the proposed definition of 'family violence' in the Bill should be amended to ensure that it is consistent with section 8 of the Charter. While for certain purposes it may be appropriate to distinguish between carers based on the nature of their engagement, such distinctions do not provide any reasonable or appropriate basis of distinction for the purposes of ensuring the right to protection of vulnerable individuals.
- 29 The segregation of carer relationships under the proposed Bill is simply not justified in light of its purposes. It defeats the VLRC's recommendation that 'a person who has or has had a relationship with the original person involving the original person's dependence or partial dependence on that person for paid or unpaid care' should be covered in the scope of the Bill. This recommendation clearly recognises that whether a carer is paid or unpaid is irrelevant to the need to protect a vulnerable person who depends upon them. It is that protection which is the very purpose of including carers within the scope of the Bill. The purpose of the Bill, to protect vulnerable individuals from abuse, is thwarted by drawing an arbitrary distinction based on irrelevant aspects of the nature of a care arrangement.
- 30 The Federation submits that, in light of the adoption of other recommendations from the Report, the VLRC's recommendation in this regard should also be adopted.
- 31 The reasons for excluding arranged or paid carers from the definition of family member are set out above in paragraph 14. The Department states that remedies other than a family violence order are available to individuals experiencing abuse from carers in these categories, and implies such remedies would provide adequate protection. These remedies include terminating the contract in the case of paid care arrangements, or terminating the relationship in the case of unpaid arrangements. Persons in the care of the Department of Human Services may complain to the Disability Services Commissioner.
- 32 The Federation submits that the remedies cited by the Department represent an inadequate protection for vulnerable individuals suffering abuse at the hands of their carers. In particular:
- (a) these remedies do not provide the individual with the immediate protection from further abuse that would be facilitated by an interim family violence order;
 - (b) these remedies may require the individual to have continued contact with the abusive carer (for example, in order to terminate the contract);
 - (c) terminating the carer relationship may not prevent the abuse from recurring, as the abusive carer may continue to enter the individual's property or harass the individual, even after the care relationship has been terminated; and

- (d) the legal consequences for continuing to perform a contract for care of a person are not the same as the legal consequences for failing to comply with a family violence order.

33 The Federation is of the view that there is no basis for potentially imposing a court order supported by the weight of the criminal law on an informal carer, but not one who is paid for those services, or whose services are arranged. No distinction exists for a disabled, ill or cognitively impaired person who faces abuse by a carer, whether paid, unpaid, arranged through a third party or arranged directly.

4. Protection from Cruel, Inhuman or Degrading Treatment

34 Section 10(2) of the Charter is modeled on article 7 of the ICCPR and provides that a person must not be treated or punished in a cruel, inhuman or degrading way. In its General Comment No. 20, the HRC stated that:

It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

35 The purpose of the right is to protect both the dignity and the physical and mental integrity of the individual.¹⁸ Threats of violence may constitute inhuman treatment where they are sufficiently real and immediate. The right is clearly capable of extending to protection from domestic violence, as recognised in the following cases:

- (a) In *A v United Kingdom*,¹⁹ a claim was brought on behalf of a child that the United Kingdom was responsible for protecting that child from domestic violence perpetrated by the child's stepfather. The European Court held that the right to protection from inhuman treatment requires State Parties to take measures to ensure that such ill-treatment was not administered by private individuals. The European Court stated:

Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.

- (b) In *Z. v United Kingdom*,²⁰ the applicants were again children who had been ill-treated, this time by their natural parents. The children were taken into state care 4½ years after government social services officials first became aware of their ill-treatment. The European Court held that States had obligations under the ECHR to provide effective protection of children and other vulnerable persons and that this should include taking reasonable steps to prevent ill-treatment where authorities had or ought to have had knowledge of it.

¹⁸ See, for example, *Ireland v The United Kingdom* (1979-80) 2 EHRR. 25.

¹⁹ (1999) 27 EHRR 611.

²⁰ (2002) 34 EHRR 3. See also *Kontrova v Slovakia* [2007] ECHR 7510/04 (31 May 2007), where the European Court of Human Rights found that the right to life had been breached where the State did not take adequate steps or measures to intervene or protect the lives of children in circumstances in which the mother had reported serious domestic violence and threats by her husband.

36 As identified by these cases and in General Comment No. 20, the right of an individual to protection from cruel, inhuman and degrading treatment may, in certain circumstances, require governments to take positive measures to protect particularly vulnerable individuals. Indeed, in its Report, the VLRC recognised that positive measures may need to be taken to protect certain vulnerable groups:

the international community has recently recognised the duty on States to take all necessary measures to prevent and punish human rights abuses committed by private individuals. This responsibility is sometimes referred to as an international legal obligation to exercise 'due diligence' to respect, protect and fulfill each individual's human rights.²¹

37 In its Preamble, the Bill specifically recognises that 'family violence is predominantly committed by men against women, children and other vulnerable persons'.²² Women and children who are dependent on a carer are particularly vulnerable to both family and carer violence. In this respect, the Federation notes that Australia has ratified the following international human rights instruments:

- (a) the *UN Convention on the Elimination of all Forms of Discrimination Against Women*²³ ('CEDAW') and the *Declaration of the Elimination of Violence Against Women*,²⁴ and
- (b) the *UN Convention on the Rights of the Child*²⁵ ('CROC').

38 Australia has also recently signed the *UN Convention on the Rights of Persons with Disabilities* ('Disability Convention').²⁶ Article 16 of the Disability Convention provides that governments 'shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse'. The Disability Convention also contains specific provisions relating to:

- (a) the full and equal enjoyment by women with disabilities of all human rights and fundamental freedoms;²⁷
- (b) the full and equal enjoyment by children of all human rights and fundamental freedoms;²⁸ and
- (c) the obligation of governments to put in place 'effective legislation and policies ... to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted'.²⁹

²¹ Victorian Law Reform Commission, above n 2, 8. See also *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, E/CN.4/2006/61 (2006).

²² Draft Family Violence Bill 2007 (Vic) Preamble para (b).

²³ Opened for signature 18 December 1979, [1983] ATS 9 (entered into force 27 August 1983).

²⁴ GA Res 48/104, UN Doc A/RES/48/104 (1993).

²⁵ Opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990).

²⁶ Opened for signature 30 March 2007, [2006] ATNIF 15.

²⁷ Article 6 of the Disability Convention.

²⁸ Article 7 of the Disability Convention.

²⁹ Article 16(5) of the Disability Convention.

39 In light of the recognition in these international instruments of particularly vulnerable groups, the Federation submits that it is incumbent on the Victorian Government to extend the proposed definitions in the Bill to include all individuals who are partially or totally dependent on a carer. In recognising the particular vulnerability of this group, positive measures must be taken to ensure that all individuals who are partially or totally dependent on a carer are not exposed to treatment that may constitute cruel, inhuman or degrading treatment.

40 Clause 12(3) of the Bill provides that where a carer operates under an arrangement entered into through another person, the relationship is not considered to be an informal care relationship, whether or not a fee is paid. The HRC has said:

It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.³⁰

The proposed sub-clause would exclude all state-based or state-regulated care arrangements. Whether carers are employed by the State or by private contractors engaged by the State or otherwise, the obligation of the State to provide an effective legal framework to prevent contraventions by those carers of the rights of vulnerable individuals is not diminished. Recent statements by commentators concur with the HRC that the scope of States' obligations under international law in respect of Article 10 requires the State to protect individual rights whether or not a particular service is state-operated or operated by private contractors.³¹

41 The Federation submits that the definitions in the Bill do not go far enough to protect the right of individuals in many care relationships from ill-treatment at the hands of those upon whom they depend. The proposed definitions raise concerns in relation to Australia's obligations under the ICCPR, CEDAW, CROC and the Disability Convention.

42 The Federation strongly supports the inclusion of all domestic care relationships in the Bill to ensure that it is consistent with section 10 of the Charter.

5. Protection of children

43 Subsection 17(2) of the Charter is modeled on article 24 of the ICCPR and provides that 'every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child '.

44 In its General Comment No. 17, the HRC stated:

Article 24 of the International Covenant on Civil and Political Rights recognizes the right of every child, without any discrimination, to receive from his family, society and the State the protection required by his status as a minor. Consequently, the implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant.

³⁰ UN Human Rights Committee, *General Comment 20*, (10 March 1993), [2].

³¹ See eg Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed, 2004), 276; Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 *Melbourne Journal of International Law* 1, 13.

45 Article 19(1) of CROC states:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) **or any other person who has the care of the child**.. [emphasis added]

46 The Federation submits that the Bill must at least be amended to include all children who are dependent on a carer whether or not they are disabled, ill or cognitively impaired. This is consistent with the right of children to protection under section 17(2) of the Charter and Australia's obligations under CROC and the ICCPR.

47 In addition to the submission in paragraph 42, the Federation submits that the Bill should be amended so that the only relevant attribute required before a person can obtain an order is dependence on a carer. Otherwise, the Bill fails to protect the rights of those who are in a vulnerable position due to dependence on a carer but are not disabled, ill or cognitively impaired. This is in line with provisions enacted in New South Wales.

E. The situation in New South Wales

48 The Federation is of the view that similar legislation concerning family violence in New South Wales offers a preferred approach to the inclusion of carers along with family members to be covered by the Bill.

49 The *Crimes Act 1900* (NSW) provides for the making of apprehended domestic violence orders in similar situations and against similar people as those contemplated in the Bill.³² In that legislation, a definition of 'domestic relationship', rather than 'family member', is used.

50 No distinction is drawn between unpaid and paid carers, or between carers organised directly or by arrangement with a third party. A person is considered to have had a domestic relationship with another person if the person 'has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person.'³³ There is no equivalent concept to the proposed 'informal care relationship'.

51 The New South Wales position is a reflection of the particular vulnerability of disabled people to abuse by their carers, whether paid or unpaid. In its discussion paper, *Apprehended Violence Orders: A Review of the Law*, the Criminal Law Review Division of the Attorney-General's Department of New South Wales highlighted this concern:

The main concern would be in relation to people with disabilities - especially women - who are particularly vulnerable to abuse. Women with disabilities are more likely to be abused than any other group of women. As stated in a National Committee on Violence Against Women study, '[w]omen with disabilities are more often in positions of powerlessness and dependence, which increases their likelihood of being abused.'³⁴ For example, women with intellectual disabilities are almost three times more likely to be physically assaulted, and ten times more likely to be sexually assaulted, than non disabled women.

³² See *Crimes Act 1900* (NSW) Pt 15A, Div 2.

³³ *Crimes Act 1900* (NSW) s 562B(f).

³⁴ National Committee on Violence Against Women, *Access to Services for Women with Disabilities who are Subjected to Violence* (1993), 2.

Many people with disabilities form relationships that are recognised under the current definition of a domestic relationship. However, many people with disabilities live in domestic situations which are not currently recognised, such as group homes, institutions, boarding houses and transition houses. People in these situations - especially if they are isolated and need assistance with day-to-day functions - are vulnerable to abuse from other residents as well as from workers. They are also less likely to have access to the legal system and appropriate services.

People with disabilities or older people who do not require institutional or semi-institutional care may similarly be vulnerable to abuse from a 'carer' (paid or unpaid) who is not a relative, spouse, intimate partner or household member. In fact, dependence on a carer places people at a significant risk of abuse, yet such a relationship on its own would currently not be defined as domestic.³⁵

- 52 The Federation considers that the approach taken in New South Wales offers a more common sense approach to the situation of domestic violence that would also ensure compliance with the Victorian Charter.

³⁵ Attorney-General's Department of NSW, Criminal Law Review Division, *Apprehended Violence Orders: A Review of the Law* (1999) <http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_avo> as at 17 October 2007.