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Submission:

**Justice & Community Safety Directorate: Review of Offences
Against Vulnerable People.**

Submitted by email to:

Justice & Community Safety Directorate
ACT Government
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Submission: Justice & Community Safety Directorate: Review of Offences Against Vulnerable People.

This submission has been prepared by the ACT Mental Health Consumer Network (the Network) in response to the invitation from the Justice & Community Safety Directorate (JCSD).

The Network is a consumer-led peak organisation representing the interests of mental health consumers in the ACT in policy and decision-making forums. The Network is committed to social justice and the inclusion of people with experience of mental illness. Run by consumers for consumers, our aim is to advocate for services and supports for mental health consumers which better enable them to live fuller, healthier, and more valued lives in the community.

A consumer e-Forum was held, and additional feedback was sought via email in relation to the JCSD Review of Offences Against Vulnerable People (the Review). Written and verbal feedback was received from several consumers. This submission incorporates both the written and verbal feedback received.

Acknowledgement of Country

We wish to acknowledge the traditional owners and custodians of the land upon which we sit. We pay our respects to their Elders past, present and emerging, and extend this respect to other Indigenous Australians who may be reading this submission. We recognise the ongoing contributions of all Indigenous peoples to ACT society and Australia more broadly.

Acknowledgement of people with lived experience

We also acknowledge people with lived and living experience of mental illness as consumers and their important lived experience expertise and ongoing contributions to the mental health sector.

General comments

The Network welcomes this opportunity to contribute to the JCSD Review of Offences Against Vulnerable People (the Review). Presenting the Review to our consumers required us to make some adjustments to the questions so that our feedback would be appropriate to our consumers' experience and expertise. To this end, we presented reformulated versions of questions 1 & 2 but did not present

question 3 as issues relating to children exceed the Network's topical purview. For the purposes of this submission, our presentation of consumer perspectives will be divided into two sections. Each section will be titled per the respective reformulated questions used during the consultation. We have included with our submission a discussion of the reasoning for and reformulations of the Review questions in a separate section following the conclusion. This being noted, the Review proved a robust subject for consumers and resulted in a positive and wide-ranging discussion.

Q.1: In what ways is the definition of 'vulnerable person' limiting of who might be protected by the new offences?

Discussions focused initially on the first half of the definition of a vulnerable person contained in section 36(A)5 of the *Crimes Act 1900* (ACT) (the Act) whereby a vulnerable person is an adult person with a disability as defined in the *Disability Services Act 1991* (ACT) (the DS Act). Consumers considered this definition of disability and raised several concerns about this aspect of the legislation. In the discussion that follows it is assumed, unless specified otherwise, that any and all references to persons-qua-vulnerable and/or persons with disability, are an adult of 59 years or younger. Issues arising from the bifurcation of the vulnerable person definition between adults of 59 years and younger or adults of 60 years and older will be treated later.

Consumers expressed concerns about the strictness of the definition of disability contained in the DS Act. At the outset, consumers noted that the strict definition of a vulnerable person as an adult person with disability immediately precludes the application of these offences to victims who are vulnerable exclusively in the sense of social or other vulnerabilities. For instance, while a person who is houseless or without a fixed residence is highly vulnerable due to their social circumstances, such general social factors are not considered by the disability definition and are therefore not directly relevant for the purposes of the new offences.

Consumers interpreted the definition of disability contained in the legislation as requiring a person to satisfy all clauses. If this is the case, to fail to meet one of the clauses of this definition would thereby disqualify a person from being considered as a vulnerable person for the purposes of the new offences. In view of this, consumers discussed the disability definition and highlighted aspects of clauses (b) and (c)(i) that could exclude vulnerable people in circumstances where an elevated duty of care might otherwise be expected.

Consumers expressed concern that clause (b) of the disability definition introduces a question of ‘temporary vs. permanent impairment’ that may result in people not being protected by the new offences. Discussing this, consumers used the example of a recovering stroke victim. Strokes can cause a range of serious impairments that a person can recover from through rehabilitative therapies over the course of one or several years. During their recovery, a person may have a substantially reduced capacity for communication, learning, or mobility that arises from their impairment, and, as a result, be receiving ongoing support services. However, because the impairment caused by the stroke are not permanent, this person would not satisfy clause (b) and therefore would not meet the definition of having a disability for the purposes of the offences. In these circumstances, it is possible that the new offences may not be enforceable, even if all other clauses and conditions of the offences are satisfied.

Another instance of the ‘temporary vs. permanent’ issue that consumers considered was where a person with a permanent psychiatric impairment receives treatment that results in a substantially reduced capacity that in turn creates a need for ongoing support. For instance, the treatment of some psychiatric conditions can produce physical impairments such that a person may require ongoing in-house support for tasks involving fine-motor skills such as cooking, cleaning, and/or personal hygiene. Here, the cause of a person’s impairment for which a need for continuing support is established is not the permanent psychiatric impairment in and of itself, but rather the treatment which is temporary insofar as medications may be changed. Given the phrasing of the definition, consumers expressed concern that the offences might not be enforceable in such circumstances.

Clause (c)(i) also raised issues for consumers insofar as how the phrase ‘substantially reduced capacity’ is interpreted in practice may result in cases where a victim, who otherwise satisfies all other criteria of the offences, is determined to be insufficiently impaired for the new offences to be applicable. While consumers recognised that it is the natural purview of the justice system to determine such matters, they nevertheless noted that when a victim’s primary, or even sole, impairment is psychiatric in nature, clause (c)(i) appears to establish a high bar for who may be considered a vulnerable person for the purpose of the offences.

From this discussion, consumers agreed that defining a vulnerable person as an adult with a disability per the DS Act establishes a restrictive test for people who are 59 years or younger. In particular, consumers emphasised that it is the conjunction of clauses (b) and (c)(i) together that creates a relatively inflexible standard wherein

adults of 59 years old or younger whose impairments are not permanent, and which do not sufficiently impair their communication, learning, or mobility, will not be protected by these offences. As one consumer articulated, this standard may result in a situation where an adult of 59 years or younger who suffers severe physical impairments from a major car crash may not be protected by these new offences if their impairments are determined to not be permanent or sufficiently substantial.

In contrast, consumers noted that, once a person reaches 60 years of age, a broader definition of who may be considered a vulnerable person comes into effect. While consumers did not take issue with this broader definition, they observed that it serves to create an age-based bifurcation that seems more arbitrary than reasonable. For instance, using the previously discussed example of a recovering stroke victim, consumers highlighted that this bifurcated definition opens the possibility for charges of differing severity to be brought against a defendant depending on whether the plaintiff is 59 or 60 years old at the time the offences were perpetrated.

Taking both parts of the definition of a vulnerable person together, consumers agreed that the definition establishes an uneven and restrictive category of who may or may not be considered a vulnerable person for the purposes of the new offences. Through the examples discussed, consumers detailed several aspects of the definition that may result in situations where victims who might otherwise be expected to be protected by these new offences may not be.

Q.2: Do you think this definition of ‘responsible for providing care’ is sufficient to protect vulnerable people under the Act?

In this section, unless stated otherwise, discussion of the definition of ‘responsible for providing care’ assumes that the person for whom care is being provided satisfies all clauses of the definition of a vulnerable person as per section 36A(5) of the Act.

Consumers acknowledged that protecting vulnerable people in formal care relationships where roles, responsibilities and services are explicitly outlined is a particular focus of the new offences. In this context, consumers felt that this aspect of the definition was generally sufficient to the purpose insofar as it establishes a baseline that focuses on the control that a person has over a vulnerable person’s needs.

Consumers interpreted the definition of ‘responsible for providing care’ as being potentially applicable in public settings. This aspect of the definition was discussed in isolation from wider legal architecture governing the criminal liability of public employees for crimes committed while acting in their capacity as public employees. Consumers highlighted that the abuse, neglect, and failure to protect vulnerable persons from abuse and neglect, has been a longstanding and ongoing issue in public organisations such as prisons, hospital wards and police custody. In view of this, consumers expressed strong concerns for the protection of vulnerable people whose care needs are subject to the authority of a public organisation. For instance, if a public employee abuses or neglects a vulnerable person over whose care needs they exercise control and who is under the auspices of a public organisation for which the employee works, would the new offences come into effect? If so, consumers considered this aspect of the definition to be a positive feature.

Consumers were also concerned about how the definition might be operationalised in situations where a care relationship is informal and not explicitly outlined per a service arrangement and/or formal contract. Consumers discussed a range of social situations in which a person may become responsible for providing care to a vulnerable person through convenience and/or circumstance. For instance, in some cases a defendant may also satisfy the definition of a vulnerable person and/or both parties may lack the resources and skills to provide or acquire appropriate care. A common feature of the examples discussed involved situations where an informal care relationship arises as a consequence of circumstances beyond either party’s control. Consumers noted that without clarification in the legislation regarding how the definition may be interpreted in cases involving informal care relationships could result in situations where the new offences are not applied when they should be, or are applied when they should not be. This being said, consumers recognised that this aspect of the legislation would likely be refined as case law regarding the new offences develops in the years ahead.

Discussion of the definition in the context of informal care relationships raised a wider concern relating to the application of the new offences. Namely, consumers stated that the inappropriate interpretation of the definition and enforcement of the new offences could incidentally expand the range of instruments through which poverty is criminalised by the justice system. On this point, consumers noted and approved of section 36C(3)(a) which provides scope for a defence against charges of neglect on the basis that the defendant’s conduct that was ‘reasonable in all circumstances’. Nevertheless, consumers expressed caution in this area and stressed that all care must be taken to avoid further criminalisation of poverty.

Conclusion

Consumers approved of the new offences in principle and welcomed the opportunity to provide feedback on the legislation. At the heart of consumers' concerns was the conflation of 'vulnerable person' with an adult with disability as defined by the DS Act. Consumers found the definition to be overly restrictive for adults of 59 years or younger, and uneven overall given the more generous definition applicable to people of 60 years of age or older. Consumers agreed that improvements to the legislation could be made by disentangling the definition of a vulnerable person from the definition of disability in the DS Act. For instance, a revised definition could use an assessment of the person's capacities and needs at the time of the offence, rather than on a binary conception of temporary vs. permanent disability.

As it stands, consumers recognised that the capacity of the new offences to protect vulnerable people will depend to a certain extent on how key passages of the legislation are interpreted and applied in practice. In this regard, 'substantially reduced capacity', 'permanent or likely to be permanent', and 'control over any aspect of the care needed by a vulnerable person' are likely to be the most challenging facets, especially in cases involving mental health conditions and informal care relationships.

Question formulation for public consultation.

The Network appreciated the opportunity to provide consumer feedback on this important piece of legislation, especially in light of ongoing issues throughout many sectors of Australian society regarding the abuse and neglect of vulnerable people.

While preparing the Review for consultation it became apparent that the phrasing of the questions presented an issue of feedback scope for both the Network and consumers. Namely, as phrased, both questions asked respondents to evaluate how two different definitions had affected the *effectiveness of the new offences*. Here, the crux of the issue arises: Upon what evidentiary bases might the effectiveness of an offence be assessed by an ordinary community member? Undoubtedly, legal scholarship has much to say on the merits of different methods and approaches to assessing the effectiveness of criminal offences. For instance, a comparative longitudinal study of rates of publicly reported offences and offence prosecutions might shed light on the deterrence effects of the new offences. Clearly, the Review did not expect public respondents to tender such feedback and consumers could not provide more than speculative opinion on the question as phrased. In the absence of access to specific data and specialised legal expertise,

the Network decided that seeking consumer feedback regarding how the definitions might include or exclude people from being protected by the new offences was the most reasonable avenue of enquiry.

To this end the Network presented reformulated versions of both questions to consumers for their feedback. These were written as follows:

1. In what ways is the definition of 'vulnerable person' limiting of who might be protected by the new offences?
2. Do you think this definition of 'responsible for providing care' is sufficient to protect vulnerable people under the Act?

The Review, its terms, and the relevant definitions and passages of legislation were circulated to consumers in advance of the consultation session. During the consultation, the Network presented each question and associated definition alongside prompts so as to elicit useful feedback from consumers. We have included a copy of the discussion prompts used for the consultation at the end of this submission.

ACTMHCN Consumers Consultation Handout.

Discussing Crimes against Vulnerable People.

In what ways is the definition of 'vulnerable person' limiting of who might be protected by the new offences?

For instance, does this definition of 'vulnerable person' exclude any people who should be included; or include any people who should not be included?

“Under section 36A(5) of the *Crimes Act 1900*, a *vulnerable person* is an adult person with a disability as defined in the *Disability Services Act 1991*, or a person who is 60 or older and has a disorder, illness, disease, or impairment that substantially impairs their physical or mental capacity.”

disability, in respect of a person, means a disability—
(a) that is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of those impairments; and,
(b) that is permanent or likely to be permanent; and,
(c) that results in—
 (i) a substantially reduced capacity of the person for communication, learning or mobility; and,
 (ii) the need for continuing support services; and,
(d) that may or may not be of a chronic episodic nature.

Do you think this definition of 'responsible for providing care' is sufficient to protect vulnerable people under the act?

a defendant is responsible for providing care to a vulnerable person—
(a) if the defendant exercises control over any aspect of the care needed by the vulnerable person; and,
(b) regardless of whether the care of the vulnerable person is short-term or long-term care.

Do you have any concerns about the definition of 'responsible for providing care'?

Do you have any concerns about the types of caring relationships described in the offences?