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ATTORNEY-GENERAL
MINISTER FOR THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT
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MEMBER FOR MOLONGLO

Ms Sophie Dunstone
Secretary
Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dunstone

Thank you for the opportunity to comment on a revised version of the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013.

On 7 May 2013, I provided comments on an earlier version of the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013. The revised Bill addresses one of the concerns I raised in that letter, namely, it criminalises a misrepresentation about one's age to a person under the age of 16 years instead of a person under the age of 18 years. This revision is consistent with ACT law which provides that the age of consent is 16 years.

I note that the other concerns I raised in my letter of 7 May 2013 remain relevant to the revised Bill and attach a copy of that letter for your information.

Yours sincerely

Simon Corbell MLA
Attorney-General

19.2.14

ACT LEGISLATIVE ASSEMBLY

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MEMBER FOR MOLONGLO

Senator the Hon Trish Crossin
Chair
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator Crossin

Inquiry into the Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013

Thank you for the opportunity to comment on the *Criminal Code Amendment (Misrepresentation of Age to a Minor) Bill 2013* (the Bill).

The proposed new offence at section 474.40(1) would criminalise a misrepresentation about one's age to a person under the age of 18 years with the purpose of encouraging a physical meeting with a person under the age of 18 years. I am concerned that the elements of the proposed offence may capture a broad range of conduct that is not cause for significant concern for the safety or welfare of children.

While it is appropriate in some circumstances to criminalise activity which is not illegal but is a step toward the commission of a particular offence, there must be a sufficient connection between the legal and illegal activity to warrant a legislative response.

Other offences which criminalise such preparatory behaviour, such as the offence of possessing a controlled precursor (for example, a cold and flu tablet) with the intention of manufacturing and selling a controlled drug (section 612(5) of the *Criminal Code 2002 (ACT)*) also criminalises a non-illegal activity but only where it is done with the intention or for the purpose of carrying out specific activity which *is* illegal.

The proposed new offence at section 474.40(1) is in some respects comparable to the offence at section 272.20 of the *Criminal Code Act 1995 (Cth)* which provides that it is an offence to 'do an act' with the intention of 'preparing for or planning' specified child sex offences. While the nexus between the initial non-illegal activity (any act) and the illegal activity (a specified child sex offence) relies on the prosecution proving beyond reasonable doubt that the person had an 'intention

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of preparing for or planning' the illegal activity. By contrast, the non-illegal activity in the proposed new offence at section 474.40(1) is not connected in any way to any illegal activity.

The proposed new offence at section 474.40(2) is more similar to the offence at section 272.20 of the *Criminal Code Act 1995* in that it creates a nexus between the non-illegal activity (misrepresenting age) to illegal activity (committing an offence). However, unlike section 272.20, the proposed new offence at section 474.40(2) does not specify a particular illegal activity or category of illegal activity (such as child sex offences).

The proposed new offences at section 474.40 refer to contact between an adult and a person aged under 18 years. However, in the ACT an adult can engage in sexual activity with a young person where the young person is 16 or 17 years old. I also note that current offences at sections 474.26 and 474.27 of the *Criminal Code Act 1995* (Cth) only apply to children and young people under the age of 16 years.

The current offences at sections 474.26 (Using a carriage service to procure persons under 16 years of age) and 474.27 (Using a carriage service to "groom" persons under 16 years of age) of the *Criminal Code Act 1995* (Cth) appear to capture behaviour of concern that the proposed new section includes. Paragraphs 474.27(1)(a) and (c) are particularly relevant in this regard:

(1) A person (the *sender*) commits an offence if:

- (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and
- (c) the sender does this with the intention of making it easier to procure the recipient to engage in sexual activity with the sender; and
- (d) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (e) the sender is at least 18 years of age.

It is significant that the offence does not require proof that the communication be indecent so it would appear to capture a communication in which the adult misrepresents their age. The Commonwealth Director of Public Prosecutions' view on any difficulties in prosecuting this offence may be instructive.

The ACT Government is committed to enhancing protections for children and young people in relation to sexual behaviour by adults. The Government appreciates the tragedy of the particular case which precipitated the preparation of this Bill and the issues surrounding online predatory behaviour toward children and young people. However I am of the view that the Bill proposes to address activity which goes beyond the scope of what can reasonably be criminalised and that existing offences in the *Criminal Code Act 1995* (Cth) may be adequate to address these issues.

Yours sincerely

Simon Corbell MLA
Attorney-General

7.5.13