

EXPOSURE DRAFT

Caroline Le Couteur

(Prepared by Parliamentary Counsel's Office)

Crimes (Invasion of Privacy) Amendment Bill 2017

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Crimes (Invasion of Privacy) Amendment Bill 2017

A Bill for

An Act to amend the *Crimes Act 1900*

The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 Name of Act

This Act is the *Crimes (Invasion of Privacy) Amendment Act 2017*.

2 Commencement

This Act commences on the day after its notification day.

Note The naming and commencement provisions automatically commence on the notification day (see [Legislation Act](#), s 75 (1)).

3 Legislation amended

This Act amends the [Crimes Act 1900](#).

**4 Offences against Act—application of Criminal Code etc
Section 7A, note 1**

omit

- section 61B (Intimate observations or capturing visual data etc)

5 Section 7A, note 1

insert

- section 72C (Non-consensual intimate observations etc—generally)
- section 72D (Non-consensual intimate observations etc—intimate body areas)
- section 72E (Non-consensual distribution of intimate documents)
- section 72G (Threat to distribute intimate document)
- section 72H (Court may order rectification)

**6 Intimate observations or capturing visual data etc
Section 61B**

omit

7 New section 66A*insert***66A Consenting young people—exception to s 64, s 65 and s 66 offences**

- (1) This section applies to an offence under the following provisions:
 - (a) section 64 (1);
 - (b) section 65 (1);
 - (c) section 66 (1);
 - (d) section 66 (2).
- (2) The provision does not apply to a person if—
 - (a) the child the subject of the offence was 10 years old or older at the time of the offence; and
 - (b) there is not more than 2 years difference in age between the person and the child; and
 - (c) the child consented to the act constituting the offence.

Note For offences against s 64 (1) and s 65 (1), the defendant has an evidential burden in relation to the above matters (see [Criminal Code](#), s 58).

8 Section 67 heading*substitute***67 Meaning of *consent*—sexual offence consent provisions****EXPOSURE DRAFT**

9 **Consent**
Section 67 (1)

substitute

- (1) For a sexual offence consent provision, **consent** of a person to an act mentioned in the provision by another person means free and voluntary agreement expressed or communicated with a positive action by the person giving the consent to the other person.
- (1A) Without limiting the grounds on which it may be established that consent is negated, the consent of an act mentioned in a sexual offence provision is negated if that consent is caused by—
- (a) the infliction of violence or force on the person or on a third person who is present or nearby; or
 - (b) a threat to inflict violence or force on the person or on a third person who is present or nearby; or
 - (c) a threat to inflict violence or force on, or to use extortion against, the person or another person; or
 - (d) a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
 - (e) the effect of intoxicating liquor, a drug or an anaesthetic; or
 - (f) a mistaken belief as to the identity of the other person; or
 - (g) a mistaken belief as to the nature of the act, whether by fraud, deceit or failure to provide reasonable information about the nature of the act; or
 - (h) a fraudulent misrepresentation of any fact made by the other person, or by a third person with the knowledge of the other person; or

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- (i) the abuse by the other person of the other person's position of authority over, or professional or other trust in relation to, the person; or
- (j) the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
- (k) the unlawful detention of the person.

10 Section 67 (3)

omit

subsection (1) (a) to (j)

substitute

subsection (1A)

11 New section 67 (4)

insert

(4) In this section:

sexual offence consent provision means any of the following:

- (a) section 54;
- (b) section 55 (3) (b);
- (c) section 60;
- (d) section 61 (3) (b);
- (e) section 66A (2) (c).

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12 New part 3A

insert

Part 3A Invasion of privacy

72A Definitions—pt 3A

In this part:

capture visual data—a person ***captures visual data*** of another person if the person captures moving or still images of the other person by a camera or any other means in such a way that—

- (a) a recording is made of the images; or
- (b) the images are capable of being transmitted in real time with or without retention or storage in a physical or electronic form; or
- (c) the images are otherwise capable of being distributed.

device does not include spectacles, contact lenses or a similar device when used by someone with impaired sight only to overcome the impairment.

distribute—

- (a) includes—
 - (i) communicate, share, show, exhibit, send, supply, upload or transmit; and
 - (ii) make available for access by another person; but
- (b) does not include distribution by a person solely in the person's capacity as an internet service provider, internet content host or a carriage service provider.

intimate body area, of a person, means—

- (a) the person's genital or anal region whether covered by underwear or bare; or
- (b) for a female or a transgender or intersex person who identifies as a female—the person's breasts whether covered by underwear or bare.

intimate document, in relation to a person, means a document that shows, visually or otherwise—

- (a) the person engaged in sexual activity; or
- (b) the person in a sexual manner or context; or
- (c) an intimate body area; or
- (d) an area of the person's body that, in the person's circumstances, is private in nature.

Examples—document

- 1 a digitally altered image
- 2 a text message
- 3 an audio recording

Examples—par (d)

- 1 if a Muslim woman usually wears a hijab in public, parts of the woman's body that are usually covered by the hijab
- 2 if a person is changing in the change room of a gymnasium, parts of the person's body that are usually clothed about which the person may feel particularly self-conscious because of age, weight, injury, surgical procedure or gender transition

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

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72B Meaning of *consent*—pt 3A

- (1) For this part, *consent* of a person to an intimate act by another person, means free and voluntary agreement expressed or communicated with a positive action by the person giving the consent to the other person.
- (2) Without limiting the grounds on which it may be established that consent is negated, the consent of a person to an intimate act by another person is negated if that consent is caused by—
 - (a) the infliction of violence or force on the person or on a third person who is present or nearby; or
 - (b) a threat to inflict violence or force on the person or on a third person who is present or nearby; or
 - (c) a threat to inflict violence or force on, or to use extortion against, the person or another person; or
 - (d) a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person; or
 - (e) the effect of intoxicating liquor, a drug or an anaesthetic; or
 - (f) a mistaken belief as to the identity of the other person; or
 - (g) a mistaken belief as to the nature of the act, whether by fraud, deceit or failure to provide reasonable information about the nature of the act; or
 - (h) a fraudulent misrepresentation of any fact made by the other person, or by a third person with the knowledge of the other person; or
 - (i) the abuse by the other person of the other person's position of authority over, or professional or other trust in relation to, the person; or

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- (j) the person's physical helplessness or mental incapacity to understand the nature of the act in relation to which the consent is given; or
 - (k) the unlawful detention of the person.
- (3) The consent of a young person to an intimate act by another young person is not presumed to be negated only because of the age of the young person giving consent.

Example

two 15 year olds consensually exchanging intimate images of each other by text message

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

- (4) If it is established that a person who knows the consent of another person to an intimate act has been caused by any of the means set out in subsection (2), the person is taken to know that the other person does not consent to the intimate act.

- (5) In this section:

intimate act, by a person (***X***) in relation to another person (***Y***), means—

- (a) the observation, or capturing of visual data by ***X*** of an intimate body area of ***Y***; or
- (b) the distribution by ***X*** of an intimate document relating to ***Y***.

young person means a child 10 years old or older but younger than 16 years old.

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72C Non-consensual intimate observations etc—generally

- (1) A person (the *offender*) commits an offence if—
- (a) the offender observes with the aid of a device, or captures visual data of, another person (the *affected person*); and
 - (b) a reasonable person would, in all the circumstances, consider the observing or capturing of visual data to be—
 - (i) an invasion of privacy of the affected person; and
 - (ii) indecent.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

Examples—par (a)

- using binoculars
- using a remotely-controlled drone
- using a ladder

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

- (2) Strict liability applies to subsection (1) (b) (i).
- (3) Absolute liability applies to subsection (1) (b) (ii).
- (4) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that the defendant—
 - (a) believed on reasonable grounds that the affected person consented to the defendant observing or capturing visual data of the affected person; or

- (b) did not know, and could not reasonably be expected to have known, that the observing or capturing of visual data of the affected person was without consent.

Note The defendant has a legal burden in relation to the matters mentioned in s (4) (see [Criminal Code](#), s 59).

72D Non-consensual intimate observations etc—intimate body areas

- (1) A person (the *offender*) commits an offence if—
 - (a) the offender observes with the aid of a device, or captures visual data of, an intimate body area of another person (the *affected person*); and
 - (b) a reasonable person would, in all the circumstances, consider the observing or capturing of the visual data to be an invasion of privacy of the affected person.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

Example—par (a)

using a mobile phone to take photos of a woman's underwear under her skirt or down the front of her blouse

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

- (2) Strict liability applies to subsection (1) (b).
- (3) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that the defendant—
 - (a) believed on reasonable grounds that the affected person consented to the defendant observing or capturing visual data of the intimate body area of the affected person; or

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- (b) did not know, and could not reasonably be expected to have known, that the observing or capturing of visual data of the intimate body area of the affected person was without consent.

Note The defendant has a legal burden in relation to the matters mentioned in s (3) (see [Criminal Code](#), s 59).

72E Non-consensual distribution of intimate documents

- (1) A person (the *offender*) commits an offence if—
 - (a) the offender distributes an intimate document relating to another person (the *affected person*); and
 - (b) a reasonable person would, in all the circumstances, consider the distribution of the intimate document to be an invasion of privacy of the affected person.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

Examples—par (a)

- 1 a person posts an image of another person engaged in sexual activity on a social media website without the other person's consent
- 2 a person digitally alters an image of a person's face onto another person's body and the altered image is uploaded onto a pornographic website
- 3 a person texts an image of an ex-partner who is naked to the ex-partner's new partner
- 4 a person shares an image on a 'revenge porn' website of another person engaged in sexual activity when it is reasonable to assume that the other person in the image did not consent to the image being posted on the site

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

- (2) Strict liability applies to subsection (1) (b).

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- (3) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that the defendant—
- (a) believed on reasonable grounds that the affected person consented to the defendant distributing the intimate document; or
 - (b) did not know, and could not reasonably be expected to have known, that the distribution of the intimate document relating to the affected person was without consent.

Example—par (a)

A person takes part in a public art event in which participants are naked. A news broadcaster publishes an image of the naked person participating in the event.

72F Exceptions to offences—s 72C to s 72E

- (1) Section 72C (1) and section 72D (1) do not apply to—
- (a) an observation made by viewing data that was previously captured; or
 - (b) an observation or capturing of visual data—
 - (i) by a law enforcement officer acting reasonably in the performance of the officer’s duty; or
 - (ii) by a licensed security provider acting reasonably in carrying on a security activity authorised under the security provider’s licence; or
 - (iii) of a child or other person incapable of giving consent in circumstances in which a reasonable person would regard the observing or capturing of visual data as acceptable; or
 - (iv) for a scientific, medical or educational purpose; or

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- (v) by a person in the course of reasonably protecting premises owned by the person; or
- (vi) in circumstances or for a purpose prescribed by regulation.

Example—subpar (iii)

taking a photograph or movie of a naked newborn relative

Example—subpar (iv)

a patient consents to her doctor taking an image of a mole on her breast for the purpose of showing another doctor for a second opinion

Note 1 The defendant has an evidential burden in relation to the matters mentioned in s (1) and s (2) (see [Criminal Code](#), s 58).

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see [Legislation Act](#), s 126 and s 132).

- (2) Section 72E (1) does not apply to the distribution of an intimate document—
 - (a) by a law enforcement officer acting reasonably in the performance of the officer’s duty; or
 - (b) for a lawful and common practice of law enforcement, criminal reporting or a legal proceeding; or
 - (c) for the purpose of reporting unlawful conduct to a law enforcement officer; or
 - (d) for a scientific, medical or educational purpose; or
 - (e) in the public interest; or

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(f) in circumstances or for a purpose prescribed by regulation.

Example—par (b)

a doctor providing medical advice to a female patient about a mole on the patient's breast, emails an image of the mole to another doctor for a second opinion

(3) Nothing in this section prevents a person being found guilty of an offence under or because of the [Criminal Code](#), part 2.4 (Extensions of criminal responsibility).

(4) In this section:

law enforcement officer means—

- (a) a police officer; or
- (b) a member of the staff of the Australian Crime Commission established by the [Australian Crime Commission Act 2002](#) (Cwlth).

licensed security provider means a person who holds a licence under the [Security Industry Act 2003](#).

security activity—see the [Security Industry Act 2003](#), section 7.

72G Threat to distribute intimate document

A person (the ***offender***) commits an offence if—

- (a) the offender threatens a person (the ***threatened person***) to distribute an intimate document relating to the threatened person or another person (an ***affected person***); and
- (b) a reasonable person would, in all the circumstances, consider the distribution of the intimate document to be an invasion of privacy of the affected person if the threat was carried out; and

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(c) the offender made the threat—

- (i) intending the threatened person to fear that the threat would be carried out; or
- (ii) being reckless about whether or not the threatened person would fear that the threat would be carried out.

Maximum penalty: 200 penalty units, imprisonment for 2 years or both.

72H Court may order rectification

- (1) This section applies if a person is found guilty of an offence against section 72C, section 72D or section 72E.
- (2) The court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate document involved in the offence within a stated period.
- (3) The person commits an offence if the person fails to comply with the order.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

72I DPP's approval for prosecution of children

- (1) A prosecution of a person under the age of 16 years for an offence against section 72C, section 72D or section 72E must not be commenced without the DPP's approval.
- (2) In this section:

DPP means the director of public prosecutions appointed under the *Director of Public Prosecutions Act 1990*.

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13 Dictionary, note 2*insert*

- document

14 Dictionary, new definitions*insert*

capture visual data, for part 3A (Invasion of privacy)—see section 72A.

consent, for part 3A (Invasion of privacy)—see section 72B (1).

device, for part 3A (Invasion of privacy)—see section 72A.

distribute, for part 3A (Invasion of privacy)—see section 72A.

intimate body area, of a person, for part 3A (Invasion of privacy)—see section 72A.

intimate document, in relation to a person, for part 3A (Invasion of privacy)—see section 72A.

Endnotes**1 Presentation speech**

Presentation speech made in the Legislative Assembly on 2017.

2 Notification

Notified under the [Legislation Act](#) on 2017.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

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