

2017

THE LEGISLATIVE ASSEMBLY  
FOR THE AUSTRALIAN CAPITAL TERRITORY

---

(As presented)

(Caroline Le Couteur)

# Crimes (Invasion of Privacy) Amendment Bill 2017

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# Crimes (Invasion of Privacy) Amendment Bill 2017

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## A Bill for

An Act to amend the *Crimes Act 1900*

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

- 1 **1 Name of Act**
- 2 This Act is the *Crimes (Invasion of Privacy) Amendment Act 2017*.
- 3 **2 Commencement**
- 4 This Act commences on the day after its notification day.
- 5 *Note* The naming and commencement provisions automatically commence on
- 6 the notification day (see [Legislation Act](#), s 75 (1)).
- 7 **3 Legislation amended**
- 8 This Act amends the *Crimes Act 1900*.
- 9 **4 Offences against Act—application of Criminal Code etc**
- 10 **Section 7A, note 1**
- 11 *omit*
- 12
  - section 61B (Intimate observations or capturing visual data etc)
- 13 **5 Section 7A, note 1**
- 14 *insert*
- 15
  - section 72C (Non-consensual intimate observations etc)
- 16
  - section 72D (Non-consensual distribution of intimate images or
- 17 documents)
- 18
  - section 72F (Threat to capture or distribute intimate image or
- 19 document)
- 20
  - section 72G (Court may order rectification)
- 21 **6 Intimate observations or capturing visual data etc**
- 22 **Section 61B**
- 23 *omit*

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**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 or young person 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 or young person; and

(c) the child or young person 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**

**9 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—

(a) the person gives free and voluntary agreement; and

(b) the other person—

(i) knows the agreement was freely and voluntarily given; or

(ii) is satisfied on reasonable grounds that the agreement was freely and voluntarily given.

(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

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

8 **10 Section 67 (3)**

9 *omit*

10 subsection (1) (a) to (j)

11 *substitute*

12 subsection (1A)

13 **11 New section 67 (4)**

14 *insert*

15 (4) In this section:

16 *sexual offence consent provision* means any of the following:

- 17 (a) section 54;  
18 (b) section 55 (3) (b);  
19 (c) section 60;  
20 (d) section 61 (3) (b);  
21 (e) section 66A (2) (c).

1 **12 New part 3A**

2 *insert*

3 **Part 3A Invasion of privacy**

4 **72A Definitions—pt 3A**

5 (1) In this part:

6 *capture*, an image or document—a person *captures*, an image or  
7 document of another person if the person captures an image or  
8 document of the other person by any means in such a way that—

- 9 (a) a recording is made of the image or document; or  
10 (b) the image or document is capable of being transmitted in real  
11 time with or without retention or storage in a physical or  
12 electronic form; or  
13 (c) the image or document is otherwise capable of being  
14 distributed.

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

18 *distribute*—

- 19 (a) includes—  
20 (i) communicate, share, show, exhibit, send, supply, upload  
21 or transmit; and  
22 (ii) make available for access by another person; but



1 (b) does not include distribution by a person solely in the person's  
2 capacity as an internet service provider, internet content host or  
3 a carriage service provider.

4 **Examples—par (a)**

5 1 if an intimate image is on a mobile phone, showing the phone with the image  
6 displayed on it to another person

7 2 printing an intimate image and putting it up on a community notice board

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

11 ***engaged in a private act*** means—

12 (a) in a state of undress; or

13 (b) using the toilet, showering or bathing; or

14 (c) engaged in an act of a sexual nature; or

15 (d) in a position, pose or scenario of a sexual nature or context that  
16 a reasonable person would not expect to be made public.

17 ***intimate image or document***, in relation to a person—

18 (a) means an image or other document that shows, visually or  
19 otherwise—

20 (i) the person's genital or anal region whether covered by  
21 underwear or bare; or

22 (ii) for a female, or a transgender or intersex person who  
23 identifies as a female—the person's breasts whether  
24 covered by underwear or bare; or

25 (iii) the person engaged in a private act; and

1 (b) includes an image or document, in any form, that has been  
2 altered to appear to show any of the things mentioned in  
3 paragraph (a).

4 **Examples—document**

- 5 1 an email  
6 2 a text message or other forms of electronic private messaging  
7 3 an audio recording

8 (2) For subsection (1), definition of *distribute*, a person is taken to have  
9 distributed an image or document whether or not the image or  
10 document is viewed or accessed, or is capable of being viewed or  
11 accessed, by another person.

12 (3) For subsection (1), definition of *engaged in a private act*, whether  
13 an individual is *engaged in a private act* depends on the individual's  
14 circumstances.

15 **Examples—individual's circumstances for state of undress**

- 16 • for a person with disability—parts of the person's body that are normally  
17 covered being uncovered  
18 • for a person with cultural or religious beliefs that require certain kinds of  
19 body coverings—the person not wearing the covering  
20 • for a transgender person—parts of the person's body that the person  
21 considered to be markers of the person's previous gender that are normally  
22 covered being uncovered

23 **72B Meaning of consent—pt 3A**

24 (1) For this part, *consent* of a person to an intimate act by another  
25 person, means—

26 (a) the person gives free and voluntary agreement; and

27 (b) the other person—

28 (i) knows the agreement was freely and voluntarily given; or

29 (ii) is satisfied on reasonable grounds that the agreement was  
30 freely and voluntarily given.

- 1 (2) Without limiting the grounds on which it may be established that  
2 consent is negated, the consent of a person to an intimate act by  
3 another person is negated if that consent is caused by—
- 4 (a) the infliction of violence or force on the person or on a third  
5 person who is present or nearby; or
- 6 (b) a threat to inflict violence or force on the person or on a third  
7 person who is present or nearby; or
- 8 (c) a threat to inflict violence or force on, or to use extortion  
9 against, the person or another person; or
- 10 (d) a threat to publicly humiliate or disgrace, or to physically or  
11 mentally harass, the person or another person; or
- 12 (e) the effect of intoxicating liquor, a drug or an anaesthetic; or
- 13 (f) a mistaken belief as to the identity of the other person; or
- 14 (g) a mistaken belief as to the nature of the act, whether by fraud,  
15 deceit or failure to provide reasonable information about the  
16 nature of the act; or
- 17 (h) a fraudulent misrepresentation of any fact made by the other  
18 person, or by a third person with the knowledge of the other  
19 person; or
- 20 (i) the abuse by the other person of the other person's position of  
21 authority over, or professional or other trust in relation to, the  
22 person; or
- 23 (j) the person's physical helplessness or mental or cognitive  
24 incapacity to understand the nature of the act in relation to  
25 which the consent is given; or
- 26 (k) the unlawful detention of the person.
- 27 (3) Also, a person does not consent to an intimate act by another person  
28 only because the person—
- 29 (a) consented to the intimate act on another occasion; or

- 1 (b) consented to the intimate act being done by someone else; or  
2 (c) consented to the intimate act being done in another way to the  
3 way the intimate act was done by the other person; or  
4 (d) for the distribution of an intimate image or document—  
5 distributed the image or document to another person.
- 6 (4) If a person consented to an intimate act by another person during an  
7 intimate relationship with the other person and the relationship ends,  
8 consent is taken to have been withdrawn when the relationship  
9 ended.
- 10 (5) If a young person consents to an intimate act by another young  
11 person and there is not more than 2 years difference in age between  
12 the young people, consent is not negated only because of the young  
13 people's age.
- 14 **Example**  
15 a 15 year old and a 14 year old consensually exchanging intimate images of each  
16 other by text message
- 17 *Note* An example is part of the Act, is not exhaustive and may extend, but  
18 does not limit, the meaning of the provision in which it appears (see  
19 [Legislation Act](#), s 126 and s 132).
- 20 (6) If it is established that a person who knows the consent of another  
21 person to an intimate act has been caused by any of the means set  
22 out in subsection (2), the person is taken to know that the other  
23 person does not consent to the intimate act.
- 24 (7) In this section:
- 25 *intimate act*, by a person (X) in relation to another person (Y),  
26 means—
- 27 (a) the observation, or capture of an intimate image or document  
28 by X of Y; or
- 29 (b) the distribution by X of an intimate image or document relating  
30 to Y.

1            *young person* means a child 10 years old or older but younger than  
2            16 years old.

3        **72C        Non-consensual intimate observations etc**

- 4            (1) A person (the *offender*) commits an offence if—
- 5                    (a) the offender observes with the aid of a device, or captures an  
6                    intimate image or document of, another person (the *affected*  
7                    *person*); and
- 8                    (b) a reasonable person would, in all the circumstances, consider  
9                    the observation or capture to be an invasion of the affected  
10                  person’s privacy.

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

13            **Examples—par (a)**

- 14                    1    using binoculars  
15                    2    using a remotely-controlled drone  
16                    3    using a ladder  
17                    4    using a mobile phone to photograph a woman’s underwear under her skirt or  
18                    down the front of her blouse

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

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

23        **72D        Non-consensual distribution of intimate images or**  
24        **documents**

- 25            (1) A person (the *offender*) commits an offence if—
- 26                    (a) the offender distributes an intimate image or document relating  
27                    to another person (the *affected person*); and

1 (b) a reasonable person would, in all the circumstances, consider  
2 the distribution of the intimate image or document to be an  
3 invasion of the affected person's privacy.

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

6 **Examples—par (a)**

7 1 a person posts an image of another person engaged in sexual activity on a  
8 social media website without the other person's consent

9 2 a person digitally alters an image of a person's face onto another person's  
10 body and the altered image is uploaded onto a pornographic website

11 3 a person texts an image of an ex-partner who is naked to the ex-partner's  
12 new partner

13 4 a person shares an image on a 'revenge porn' website of another person  
14 engaged in sexual activity when it is reasonable to assume that the other  
15 person in the image did not consent to the image being posted on the site

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

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

20 **72E Exceptions to offences—s 72C and s 72D**

21 (1) Section 72C (1) does not apply to—

22 (a) an observation of an image or document that was previously  
23 captured; or

24 (b) an observation or capture of an image or document—

25 (i) by a person who believed on reasonable grounds that the  
26 affected person consented to the observation or capture;  
27 or

28 (ii) by a person who did not know, and could not reasonably  
29 be expected to have known, that the observation or  
30 capture was without the affected person's consent; or

- 1 (iii) by a law enforcement officer acting reasonably in the  
2 performance of the officer's duty; or
- 3 (iv) by a licensed security provider acting reasonably in  
4 carrying on a security activity authorised under the  
5 security provider's licence; or
- 6 (v) of a child or other person incapable of giving consent in  
7 circumstances in which a reasonable person would regard  
8 the observation or capture as acceptable; or
- 9 (vi) for a scientific, medical or educational purpose; or
- 10 (vii) by a person in the course of reasonably protecting  
11 premises owned by the person; or
- 12 (viii) if a reasonable person would consider the observation or  
13 capture acceptable having regard to the following:
- 14 (A) the nature and content of the observation, image or  
15 document;
- 16 (B) the circumstances in which the observation or  
17 capture occurred;
- 18 (C) the age, intellectual capacity, vulnerability or other  
19 relevant circumstances of the affected person;
- 20 (D) the extent to which the observation or capture  
21 invaded the affected person's privacy; or

1 (ix) in circumstances or for a purpose prescribed by  
2 regulation.

3 **Example—subpar (v)**

4 taking a photograph or movie of a naked newborn relative

5 **Example—subpar (vi)**

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

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

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

13 (2) Section 72D (1) does not apply to the distribution of an intimate  
14 image or document—

15 (a) by a person who believed on reasonable grounds that the  
16 affected person consented to the distribution; or

17 (b) by a person who did not know, and could not reasonably be  
18 expected to have known, that the distribution was without the  
19 affected person’s consent; or

20 (c) by a law enforcement officer acting reasonably in the  
21 performance of the officer’s duty; or

22 (d) for a lawful and common practice of law enforcement, criminal  
23 reporting or a legal proceeding; or

24 (e) for the purpose of reporting unlawful conduct to a law  
25 enforcement officer; or

26 (f) for a scientific, medical or educational purpose; or

27 (g) in the public interest; or

28 (h) if a reasonable person would consider the distribution  
29 acceptable having regard to the following:

30 (i) the nature and content of the document;



- 1 (ii) the circumstances in which the document was distributed;  
2 (iii) the age, intellectual capacity, vulnerability or other  
3 relevant circumstances of the affected person;  
4 (iv) the extent to which the distribution invaded the affected  
5 person's privacy; or  
6 (i) in circumstances or for a purpose prescribed by regulation.

7 **Example—par (a)**

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

10 **Example—par (f)**

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

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

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

19 (4) In this section:

20 ***affected person***—

- 21 (a) in relation to an offence against section 72C (1)—see  
22 section 72C (1) (a); or  
23 (b) in relation to an offence against section 72D (1)—see  
24 section 72D (1) (a).

25 ***law enforcement officer*** means—

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

1            *licensed security provider* means a person who holds a licence  
2            under the *Security Industry Act 2003*.

3            *security activity*—see the *Security Industry Act 2003*, section 7.

4        **72F        Threat to capture or distribute intimate image or**  
5        **document**

- 6            (1) A person (the *offender*) commits an offence if—
- 7                    (a) the offender threatens a person (the *threatened person*) to  
8                    capture or distribute an intimate image or document relating to  
9                    the threatened person or another person (an *affected person*);  
10                   and
- 11                   (b) a reasonable person would, in all the circumstances, consider  
12                   the capture or distribution of the intimate image or document to  
13                   be an invasion of the affected person’s privacy if the threat was  
14                   carried out; and
- 15                   (c) the offender made the threat—
- 16                            (i) intending the threatened person to fear that the threat  
17                            would be carried out; or
- 18                            (ii) being reckless about whether or not the threatened person  
19                            would fear that the threat would be carried out.

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

- 22            (2) In a prosecution for an offence against this section—
- 23                    (a) a threat may be made by any conduct whether explicit,  
24                    implicit, conditional or unconditional; and
- 25                    (b) it is not necessary to prove that the other person actually feared  
26                    that the threat would be carried out; and

1 (c) a person may be found guilty even if carrying out the threat is  
2 impossible.

3 **Examples—par (c)**

- 4 1 the image or document does not exist  
5 2 the image or document is not in the possession or control of the offender  
6 3 technical limitations prevent the offender from capturing or distributing the  
7 image or document

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

11 **72G Court may order rectification**

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

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

21 **72H DPP's approval for prosecution of children**

- 22 (1) A prosecution of a person under the age of 18 years for an offence  
23 against section 72C, section 72D or section 72F must not be  
24 commenced without the DPP's approval.  
25 (2) In this section:

26 *DPP* means the director of public prosecutions appointed under the  
27 [Director of Public Prosecutions Act 1990](#).

1 **13 Dictionary, note 2**

2 *insert*

- 3 • document

4 **14 Dictionary, new definitions**

5 *insert*

6 *capture*, an image or document, for part 3A (Invasion of privacy)—  
7 see section 72A.

8 *consent*—

9 (a) for sections 54, 55 (3) (b), 60, 61 (3) (b) and 66 (2) (c)—see  
10 section 67 (1); or

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

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

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

14 *engaged in a private act*, for part 3A (Invasion of privacy)—see  
15 section 72A.

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

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## Endnotes

**1 Presentation speech**

Presentation speech made in the Legislative Assembly on 2 August 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](http://www.legislation.act.gov.au).

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