



New South Wales

# Crimes Amendment (Intimate Images) Bill 2017

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Crimes Act 1900* to create new offences to address the non-consensual sharing of intimate images (also known as revenge porn). The Bill provides that it will be an offence for a person to intentionally record or distribute, or threaten to record or distribute, an intimate image of another person without that person's consent. The maximum penalty will be imprisonment for 3 years or 100 penalty units, or both.

The Bill is part of the Government's response to the report by the Legislative Council Standing Committee on Law and Justice entitled "Remedies for the serious invasion of privacy in New South Wales" published in March 2016.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days appointed by proclamation.

## Schedule 1      Amendment of Crimes Act 1900 No 40

**Schedule 1 [2]** inserts proposed Division 15C into Part 3 of the *Crimes Act 1900*. Proposed section 91N defines certain words and expressions used in the Division. **Intimate image** is defined to mean an image of a person's private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy and includes an altered image that appears to show a person's private parts, or a person engaged in a

private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy. **Private parts** include a person's genital area or anal area (whether bare or covered by underwear) and breasts of a female person or of a transgender or intersex person identifying as female.

Proposed section 91O provides for the meaning of consent in the proposed offences.

Proposed section 91P makes it an offence to intentionally record an intimate image of another person without the consent of that person and knowing the person did not consent to the recording (or being reckless as to whether the person consented).

Proposed section 91Q makes it an offence to intentionally distribute an intimate image of another person without the consent of that person and knowing the person did not consent to the distribution (or being reckless as to whether the person consented).

Proposed section 91R makes it an offence to threaten to record or distribute an intimate image of another person without the consent of that person and intending to cause that other person to fear the threat will be carried out.

The maximum penalty for each offence is imprisonment for 3 years or 100 penalty units or both. The approval of the Director of Public Prosecutions will be needed for a prosecution for any of the offences against a person under the age of 16 years.

Proposed section 91S enables a court that finds a person guilty of an offence against proposed section 91P or 91Q to order the person to take reasonable action to remove, delete or destroy the intimate image concerned. It will be an offence to contravene such an order, with a maximum penalty of imprisonment for 2 years or 50 penalty units or both.

Proposed section 91T contains certain exceptions to the offences. The exceptions apply to conduct done for genuine medical or scientific purposes, law enforcement or legal proceedings and to conduct that a reasonable person would consider to be acceptable.

**Schedule 1 [3]** makes it clear that the new offences of intentionally recording or intentionally distributing an intimate image without consent are offences of specific intent under Part 11A of the *Crimes Act 1900*. This means that evidence that the accused person was intoxicated at the time of the offence may be taken into account in determining whether the person had the required intent for the offence. This is consistent with the general rule for offences of specific intent as expressed in section 428B of the *Crimes Act 1900*.

**Schedule 1 [1]** amends the definition of **private parts** in an offence relating to voyeurism for consistency with the definition used in the proposed Division.

## Schedule 2 Amendment of other Acts

**Schedule 2.1** amends the *Child Protection (Working with Children) Act 2012* to provide that a risk assessment is required under that Act for a person who is convicted of an offence under proposed section 91P, 91Q or 91R of the *Crimes Act 1900* where the offence is committed against a child while the person was an adult.

**Schedule 2.2** amends the *Crimes (Domestic and Personal Violence) Act 2007* to provide that the new offences under proposed sections 91P, 91Q and 91R of the *Crimes Act 1900* are **personal violence offences** under the *Crimes (Domestic and Personal Violence) Act 2007* for the purposes of apprehended violence orders.

**Schedule 2.3** amends the *Criminal Procedure Act 1986* to provide that the new offences under proposed sections 91P, 91Q and 91R of the *Crimes Act 1900* are indictable offences listed in Table 2, that is, they are to be dealt with summarily unless the prosecutor elects to have them dealt with on indictment. The maximum fine that may be imposed by the Local Court when dealing with the new offences will be 50 penalty units.



New South Wales

# Crimes Amendment (Intimate Images) Bill 2017

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New South Wales

# Crimes Amendment (Intimate Images) Bill 2017

No. , 2017

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## A Bill for

An Act to amend the *Crimes Act 1900* to create offences relating to the non-consensual recording and distribution of intimate images; and for other purposes.

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**The Legislature of New South Wales enacts:**

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**1 Name of Act**

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This Act is the *Crimes Amendment (Intimate Images) Act 2017*.

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**2 Commencement**

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This Act commences on a day or days to be appointed by proclamation.

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## Schedule 1 Amendment of Crimes Act 1900 No 40

### [1] Section 91I Definitions

Omit the definition of *private parts* from section 91I (1). Insert instead:

*private parts* means:

- (a) a person's genital area or anal area, whether bare or covered by underwear, or
- (b) the breasts of a female person, or transgender or intersex person identifying as female.

### [2] Part 3, Division 15C

Insert after Division 15B:

## Division 15C Recording and distributing intimate images

### 91N Definitions

(1) In this Division:

*distribute* includes:

- (a) send, supply, exhibit, transmit or communicate to another person, or
- (b) make available for viewing or access by another person, whether in person or by electronic, digital or any other means.

*engaged in a private act* means:

- (a) in a state of undress, or
- (b) using the toilet, showering or bathing, or
- (c) engaged in a sexual act of a kind not ordinarily done in public, or
- (d) engaged in any other like activity.

*image* means a still or moving image, whether or not altered.

*intimate image* means:

- (a) an image of a person's private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, or
- (b) an image that has been altered to appear to show a person's private parts, or a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy.

*private parts* means:

- (a) a person's genital area or anal area, whether bare or covered by underwear, or
- (b) the breasts of a female person, or transgender or intersex person identifying as female.

*record* an image means record, take or capture an image, by any means.

(2) A person may be regarded as having distributed an image to another person whether or not the other person views or accesses the image.

### 91O Meaning of consent in intimate image offences

(1) This section applies to all offences under this Division.

(2) A person consents to the recording of an intimate image if the person freely and voluntarily agrees to the recording of the intimate image.

(3)	A person consents to the distribution of an intimate image if the person freely and voluntarily agrees to the distribution of the intimate image.	1 2
(4)	A person who consents to the recording or distribution of an image on a particular occasion is not, by reason only of that fact, to be regarded as having consented to the recording or distribution of that image or any other image on another occasion.	3 4 5 6
(5)	A person who consents to the distribution of an image to a particular person or in a particular way is not, by reason only of that fact, to be regarded as having consented to the distribution of that image or any other image to another person or in another way.	7 8 9 10
(6)	A person who distributes an image of himself or herself is not, by reason only of that fact, to be regarded as having consented to any other distribution of the image.	11 12 13
(7)	A person does not consent to the recording or distribution of an intimate image:	14 15
(a)	if the person is under the age of 16 years or does not otherwise have the capacity to consent, including because of cognitive incapacity, or	16 17
(b)	if the person does not have the opportunity to consent because the person is unconscious or asleep, or	18 19
(c)	if the person consents because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or	20 21 22
(d)	if the person consents because the person is unlawfully detained.	23
(8)	This section does not limit the grounds on which it may be established that a person does not consent to the recording or distribution of an intimate image.	24 25
<b>91P</b>	<b>Record intimate image without consent</b>	26
(1)	A person who intentionally records an intimate image of another person:	27
(a)	without the consent of the person, and	28
(b)	knowing the person did not consent to the recording or being reckless as to whether the person consented to the recording,	29 30
	is guilty of an offence.	31
	Maximum penalty: 100 penalty units or imprisonment for 3 years, or both.	32
(2)	A prosecution of a person under the age of 16 years for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions.	33 34 35
<b>91Q</b>	<b>Distribute intimate image without consent</b>	36
(1)	A person who intentionally distributes an intimate image of another person:	37
(a)	without the consent of the person, and	38
(b)	knowing the person did not consent to the distribution or being reckless as to whether the person consented to the distribution,	39 40
	is guilty of an offence.	41
	Maximum penalty: 100 penalty units or imprisonment for 3 years, or both.	42
(2)	A prosecution of a person under the age of 16 years for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions.	43 44 45

<b>91R</b>	<b>Threaten to record or distribute intimate image</b>	1
(1)	A person who threatens to record an intimate image of another person:	2
(a)	without the consent of the other person, and	3
(b)	intending to cause that other person to fear that the threat will be carried out,	4
	is guilty of an offence.	5
	Maximum penalty: 100 penalty units or imprisonment for 3 years, or both.	6
(2)	A person who threatens to distribute an intimate image of another person:	7
(a)	without the consent of the other person, and	8
(b)	intending to cause that other person to fear that the threat will be carried out,	9
	is guilty of an offence.	10
	Maximum penalty: 100 penalty units or imprisonment for 3 years, or both.	11
(3)	A threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional.	12
(4)	A person may threaten to distribute an image whether or not the image exists.	13
(5)	In proceedings for an offence against this section, the prosecution is not required to prove that the person alleged to have been threatened actually feared that the threat would be carried out.	14
(6)	A prosecution of a person under the age of 16 years for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions.	15
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<b>91S</b>	<b>Court may order rectification</b>	23
(1)	A court that finds a person guilty of an offence against section 91P or 91Q may order the person to take reasonable actions to remove, retract, recover, delete or destroy any intimate image recorded or distributed by the person in contravention of the section within a period specified by the court.	24
(2)	A person who, without reasonable excuse, contravenes an order made under this section is guilty of an offence.	25
	Maximum penalty: 50 penalty units or imprisonment for 2 years, or both.	26
(3)	An offence against this section is a summary offence.	27
<b>91T</b>	<b>Exceptions</b>	28
(1)	A person does not commit an offence against section 91P or 91Q if:	29
(a)	the conduct alleged to constitute the offence was done for a genuine medical or scientific purpose, or	30
(b)	the conduct alleged to constitute the offence was done by a law enforcement officer for a genuine law enforcement purpose, or	31
(c)	the conduct alleged to constitute the offence was required by a court or otherwise reasonably necessary to be done for the purpose of legal proceedings, or	32
(d)	a reasonable person would consider the conduct of the accused person acceptable, having regard to each of the following (to the extent relevant):	33
(i)	the nature and content of the image,	34
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(ii) the circumstances in which the image was recorded or distributed,	1 2
(iii) the age, intellectual capacity, vulnerability or other relevant circumstances of the person depicted in the image,	3 4
(iv) the degree to which the accused person's actions affect the privacy of the person depicted in the image,	5 6
(v) the relationship between the accused person and the person depicted in the image.	7 8
(2) In this section:	9
<i>law enforcement officer</i> means a police officer or other person who exercises law enforcement functions under a law of this State, another State, a Territory or the Commonwealth.	10 11 12
<b>[3] Section 428B Offences of specific intent to which Part applies</b>	13
Insert in paragraph (b) of the Table, after the matter relating to section 91:	14
91P (intentionally record intimate image)	15
91Q (intentionally distribute intimate image)	16

<b>Schedule 2</b>	<b>Amendment of other Acts</b>	1
<b>2.1</b>	<b>Child Protection (Working with Children) Act 2012 No 51</b>	2
<b>[1]</b>	<b>Schedule 1 Assessment requirement triggers</b>	3
	Insert after clause 1 (4):	4
	(4A) A person has been convicted of an offence under section 91P, 91Q or 91R (1) or (2) of the <i>Crimes Act 1900</i> , being an offence committed against a child while the person was an adult.	5 6 7
<b>[2]</b>	<b>Schedule 1, clause 1 (5)</b>	8
	Omit “and (4)”. Insert instead “, (4) and (4A)”.	9
<b>2.2</b>	<b>Crimes (Domestic and Personal Violence) Act 2007 No 80</b>	10
	<b>Section 4 Meaning of “personal violence offence”</b>	11
	Insert “91P, 91Q, 91R,” after “87,” in section 4 (a).	12
<b>2.3</b>	<b>Criminal Procedure Act 1986 No 209</b>	13
<b>[1]</b>	<b>Section 268 Maximum penalties for Table 2 offences</b>	14
	Omit “or 61O (1) or (1A)” from section 268 (2) (a).	15
	Insert instead “, 61O (1) or (1A), 91P, 91Q or 91R (1) or (2)”.	16
<b>[2]</b>	<b>Schedule 1 Indictable offences triable summarily</b>	17
	Omit “or 61O (1) or (1A)” from clause 1 of Table 2.	18
	Insert instead “, 61O (1) or (1A), 91P, 91Q or 91R (1) or (2)”.	19