



Image-based abuse in NSW: the new legal framework

This fact sheet summarises the Ask LOIS webinar on this topic, presented by Jessica Raffal, Solicitor, Women's Legal Service NSW

This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This factsheet looks at:

- What is "image-based abuse"?
- The previous NSW criminal law
- The new offences created by the Crimes (Intimate Images) Amendment Act 2017

What is Image-Based Abuse?

Image-based abuse (IBA) occurs when nude, sexual or otherwise intimate images are recorded, distributed, or threatened to be distributed, without the consent of those pictured. It includes real and altered still and video images.

Terminology

- Image-based abuse
- Non-consensual sharing of intimate images
- Revenge porn

The term "image based abuse" (IBA) is preferable for several reasons.

"Revenge porn" is problematic term for two main reasons. First, revenge is not always or even usually the motivation. Motivations for sharing intimate images can include a wide range of motivations, including a desire to control, to harm or humiliate, financial motivations etc. Second, terming the images "pornography" is inaccurate (an image need not be "pornographic" to be intimate and private) and offensive, and inappropriately shifts the focus away from the act of non-consensual sharing onto the "salacious" content of the image.

"Image-based abuse" is preferable because it captures the reality that this is a form of abuse, which often occurs alongside other forms of abuse such as physical, emotional, financial domestic violence.

Previous criminal provisions

Previously had to rely on Division 15B, Voyeurism and related offences:

- 91J: Voyeurism
- 91K: Filming a person engaged in private act
- 91L: Filming a person's private parts
- 91M: Installing device to facilitate observation or filming

These provisions were not designed to address IBA and were ill-suited to do so.

They are chiefly concerned with filming without consent for the purpose of sexual gratification, which only amounts to a small percentage of incidents of IBA. They do not capture the vast majority of incidents of IBA



(they don't address distribution at all), and also don't target what it is we find so troubling and offensive about IBA behaviours.

Crimes (Intimate Images) Amendment Act 2017

Creates new Division 15C under the *Crimes Act 1900* – Recording and Distributing Intimate Images, which contains four new offences:

- 91P: Record intimate image without consent
- 91Q: Distribute intimate image without consent
- 91R: Threaten to record or distribute intimate image
- 91S: Fail to comply with a court order for rectification

91P: Record intimate image without consent

A person who intentionally records an intimate image of another person:(a) without the consent of the person, and (b) knowing the person did not consent to the recording or being reckless as to whether the person consented to the recording, is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 3 years, or both

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.

91Q: Distribute intimate image without consent

A person who intentionally distributes an intimate image of another person:(a) without the consent of the person, and (b) knowing the person did not consent to the distribution or being reckless as to whether the person consented to the distribution, is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 3 years, or both

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.

91R: Threaten to record or distribute intimate image without consent

A person who threatens to record or distribute an intimate image of another person: (a) without the consent of the other person, and (b) intending to cause that other person to fear that the threat will be carried out, is guilty of an offence.

A threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional.

A person may threaten to distribute an image whether or not the image exists.

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.

Maximum penalty: 100 penalty units or imprisonment for 3 years, or both



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.

91S: Fail to comply with a court order for rectification

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. A person who, without reasonable excuse, contravenes an order made under this section is guilty of an offence.

Maximum penalty: 50 penalty units or imprisonment for 2 years, or both (summary offence unlike previous three offences which are all indictable)

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.

S91N: Definitions

"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.

"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.

"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.

"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.

S91O: Consent

- Consent must be free and voluntary
- Consent to a particular instance of recording or distribution does not mean consent for other instances
- A person does not consent to recording or distribution:



- 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
- if the person does not have the opportunity to consent because the person is unconscious or asleep, or
- 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
- if the person consents because the person is unlawfully detained

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.

Quiz Questions

- Q: If a woman sends a nude photo of herself to her boyfriend and she does not tell him not to show the photo anyone else, and he then shares that photo on a private group chat of his friends, has he committed an offence?
- A: Yes. S91Q does not require actual knowledge that the person does not consent to the distribution, it is sufficient to be reckless as to whether the person consent to the distribution (e.g. not bothering to ask, in circumstances where there is no good reason to believe the person consented). Also, “distribute” is defined broadly, and includes sharing to private group messages (or even sending to one other person).
- Q: A man hints to his partner he will post a video of the two of them having sex to her Facebook page, though he does not come right out and threaten explicitly. He does not really have such a video, he just wants to scare her a bit. Has he committed an offence?
- A: Yes. S91R(3) A threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional. (4) A person may threaten to distribute an image whether or not the image exists.
- Q: If a person is found guilty of recording and distributing an intimate image without consent, and then the court orders that he remove the image from websites to which the image has been posted, and he fails to do this, what is the **maximum total possible sentence** of imprisonment he can receive?
- A: 8 years. 3 for recording under s91P, 3 for distributing under s91Q, 2 for failing to comply with a court order for rectification under s91S.
- Q: A man uses “deepfake” technology to take a photo of his ex-partner’s face and combine it with video pornography to make it look as though she is having sex in the video. He posts this image to various porn websites. Has he committed an offence?
- A: Yes. S91N: “image” means still or moving image, whether or not altered. “Intimate image” includes “an image that has been altered to appear to show a person’s private parts, or a person engaged in a private act.”
- Q: A man takes a picture of his partner when she is not wearing her hijab. He posts this picture on his Facebook page against her express wishes. Has he committed an offence?
- A: Unclear. While the Div 15C provisions do not expressly address images shares contrary to cultural expectations, it is possible to argue that the current definition of intimate image does cover this circumstance. The intimate image is not of someone’s private parts as defined in section 91N, so it would be necessary to show that it is of a person “engaged in a private act”, which is defined to include a person in a “*state of undress*” in circumstances in which a *reasonable person would*

reasonably be expected to be afforded privacy. Legally it's possible to import an individual person's traits, such as religion and gender, into the notion of a "reasonable person", so we could take "reasonable person" in this case to mean "reasonable Muslim woman". And then it will turn on the question of whether not wearing a hijab is a "state of undress".

