

165A. Distributing intimate images: s 223

165A.1 Legislation

[Last reviewed: January 2025]

Criminal Code

[Section 223](#) – Distributing intimate images

[Section 207A](#) – Definition of ‘distribute’ and ‘intimate image’

[Section 227C](#) – Persons who are not criminally responsible for offences against ss 223, 227A and 227B

Evidence Act 1977 (Qld)

[Part 6B Division 3](#) – Jury directions related to sexual offences

165A.2 Commentary

[Last reviewed: January 2025]

The defendant must have:

- (1) Distributed an intimate image of another person;
- (2) Without that person’s consent;
- (3) In a way that would cause the person distress reasonably arising in all the circumstances.

Definitions of ‘distribute’ and ‘intimate image’ are set out in s 207A. It is immaterial whether the person who distributes the intimate image intends to cause, or actually causes, the other person distress: *Criminal Code*, s 223(3).

Section 223(1) contains, by way of example, a non-exhaustive list of circumstances to be considered in determining whether distress would be reasonably arising.

Consent – offences committed on or after 23 September 2024

Section 223(5) contains a definition of ‘consent’ for the purposes of s 223. The definition was amended by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld), effective 23 September 2024. It states that:

Consent means free and voluntary agreement by a person with the cognitive capacity to make the agreement.

While consent for the purposes of s 223 is not 'consent' as defined more broadly in s 348 of the *Criminal Code* for the purpose of offences in Chapter 32, the definition of 'consent' in s 223(5) reflects the wording of s 348(1), with the addition of an express requirement that the person must have the cognitive capacity to make the agreement. See further **Chapter 59B – Consent Offences after September 2024** as applicable.

Section 223(2) provides that a child under the age of 16 years is incapable of giving consent for the purposes of s 223.

Consent – offences committed prior to 23 September 2024

The *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) does not contain a transitional provision as concerns the amendments to the offence provisions in Chapter 22 of the *Criminal Code*, including s 223. The transitional provision enacted as s 761 *Criminal Code* refers to 'former provisions' and 'new provisions' with reference to Chapter 32 only. Consequently, the definition of 'consent' in s 223(5), as currently in force, may be understood to apply only to offences committed on or after 23 September 2024 when the amendments to that provision commenced (see *Rodway v R* ([1990](#)) [169 CLR 515](#)).

Prior to that date, the definition of 'consent' in s 223(5) had also reflected the wording in s 348(1) of the *Criminal Code*, as it then was.

Further Jury Directions related to 'sexual offences' – Part 6B Division 3 of the Evidence Act 1977 (Qld)

[Part 6B Division 3](#) of the *Evidence Act 1977* (Qld), as enacted by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld), applies in relation to a trial that relates wholly or partially to a 'sexual offence', irrespective of when the offence was committed, when the defendant was charged or when the proceeding started (see s 161 of the *Evidence Act 1977* (Qld)). 'Sexual offence' is defined in the [Schedule 3](#) Dictionary to the *Evidence Act 1977* (Qld) to include an offence against a provision of Chapter 22 of the *Criminal Code*. Section 223 is an offence in Chapter 22.

See further **Chapter 66A – Jury directions related to sexual offences** as applicable.

Defence in s 223(4) of the Criminal Code

A defence is provided for within s 223(4). It is a defence to an offence against s 223 to prove that the conduct that is alleged to constitute the offence was engaged in for a genuine artistic, educational, legal, medical, scientific or public benefit purpose, and that the person's conduct was, in the circumstances, reasonable for that purpose.

The defendant has the onus of proving the defence in s 223(4), on the balance of probabilities.

The terms of the defence have some similarity with:

- the defence in s 228E(2) as relates to offences against ss 228A, 228B, 228C, 228D, 228DA, 228DB or 228DC of the *Criminal Code*; and
- the defence in s 228K, as relates to offences against ss 228I and 228J of the *Criminal Code*.

Defences in s 227C of the Criminal Code

Additionally, a person will not be criminally responsible for conduct which would otherwise constitute an offence against s 223, if at the time the person was acting in the course of their duties:

- i) as a law enforcement officer (s 227C(1)); or
- ii) in relation to the lawful custody or supervision order of the person whom the intimate image is of (s 227C(2));

provided their conduct was reasonable in the circumstances for the performance of the duties.

'Law enforcement officer' is defined in s 1 of the *Criminal Code*.

Section 227C(3) contains definitions for the terms 'lawful custody' (to include specified detention under the *Mental Health Act 2016* (Qld)) and 'supervision order', for the purposes of s 227C.

165A.3 Suggested Directions

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The prosecution must prove each of the following elements of the offence beyond a reasonable doubt –

- 1. The defendant distributed an intimate image of [the complainant].**

[Refer to the definition of 'distribute' in s 207A, as applicable. Refer also to the definition of 'intimate image' in s 207A, as applicable].

- 2. The distribution occurred without [the complainant's] consent.**

'Consent' means free and voluntary agreement by a person with the cognitive capacity to make the agreement.

(Where the factual circumstances may warrant a more fulsome direction on issues relevant to a consideration of this element, reference to **Chapter 59B – Consent Offences after 23 September 2024** as applicable, may assist)

(If applicable, add): **A child under the age of 16 years is incapable of giving consent to the distribution of an intimate image of themselves.**

3. **The distribution occurred in a way that would cause the [the complainant] distress, reasonably arising in all the circumstances.**

It is not necessary for the prosecution to prove that the defendant intended to cause [the complainant] distress, or that [the complainant] was in fact caused distress. The prosecution must satisfy you that distress would be reasonably arising in all the circumstances.

[Refer to circumstances as may be relevant to a consideration of whether distress would be reasonably arising in all the circumstances. See the examples contained within s 223(1) under the heading *Examples of circumstances for subsection (1)(b)*].

Suggested further direction where the defence under s 227C(1) is raised on the evidence

If the prosecution have satisfied you of each of the elements of the offence beyond a reasonable doubt, there is a further matter that you must consider before you can find the defendant guilty of the offence.

The law provides that a person will not be criminally responsible for the distribution of an intimate image, where:

1. **The person was, at the time of the distribution a law enforcement officer and acting in the course of the person's duties;**
and
2. **The person's conduct in distributing the image was reasonable in the circumstances for the performance of those duties.**

For the defence to apply, the defendant must have distributed the image, acting in the course of the defendant's duties as a law enforcement officer.

[Direct the jury as to the limb(s) of the definition of 'law enforcement officer' in s 1 of the *Criminal Code* as relevant].

[Refer to the evidence relevant to a consideration of whether the defendant's distribution of the image was in the course of their duties as a law enforcement officer].

For the defence to apply, the defendant's conduct in distributing the image must also have been reasonable, in the circumstances, for the performance of those duties.

[Refer to circumstances as may be relevant to a consideration of whether the distribution of the image was reasonable for the performance of the defendant's duties as a law enforcement officer].

Remember, the onus of proof is on the prosecution. It is for the prosecution to satisfy you beyond reasonable doubt that the defence does not apply. If the prosecution satisfy beyond reasonable doubt that:

- 1. the defendant did not distribute the image, acting in the course of the defendant's duties as a law enforcement officer;**

or

- 2. the defendant's conduct in distributing the image was not reasonable, in the circumstances, for the performance of the defendant's duties as a law enforcement officer;**

then the prosecution will have satisfied you that the defence does not apply.

Suggested further direction where the defence under s 227C(2) is raised on the evidence

If the prosecution have satisfied you of each of the elements of the offence beyond a reasonable doubt, there is a further matter that you must consider before you can find the defendant guilty of the offence.

The law provides that a person will not be criminally responsible for the distribution of an intimate image of another person, where:

- 1. The person was, at the time of the distribution of the image, acting in the course of the person's duties in relation to [the lawful custody of / a supervision order for] the person the image was of;**

and

- 2. The person's conduct in distributing the image was reasonable in the circumstances for the performance of those duties.**

For the defence to apply, the defendant must have distributed the image, acting in the course of the defendant's duties in relation to [the lawful custody of / a supervision order] for [the complainant];

[Refer to circumstances of the other person being in 'lawful custody' (noting the inclusive definition in s 227C(3)), where relevant].

[Refer to definition of 'supervision order' in s 227C(3), where/as relevant].

[Refer to the evidence relevant to a consideration of whether the defendant's distribution of the image was in the course of their duties in relation to the lawful custody of / a supervision order for the complainant].

For the defence to apply, the defendant's conduct in distributing the image must also have been reasonable, in the circumstances, for the performance of those duties.

[Refer to circumstances as may be relevant to a consideration of whether the distribution of the image was reasonable for the performance of the defendant's duties].

(See the examples contained in s 227C under the heading "Examples of conduct that may be reasonable for the performance of duties" (note the stated examples are not directly related to distribution of an intimate image)).

Remember, the onus of proof is on the prosecution. It is for the prosecution to satisfy you beyond reasonable doubt that the defence does not apply. If the prosecution satisfy beyond reasonable doubt that:

- 1. the defendant did not distribute the intimate image, acting in the course of the defendant's duties in relation to [the lawful custody of/ a supervision order] for [the complainant];**

or

- 2. that the defendant's conduct in distributing the image was not reasonable, in the circumstances, for the performance of the defendant's duties;**

then the prosecution will have satisfied you that the defence does not apply.

Suggested further direction in relation to defence in s 223(4), where applicable

If the prosecution have satisfied you of each of the elements of the offence beyond a reasonable doubt, there is a further matter that you must consider before you can find the defendant guilty of the offence.

The law provides that it is a defence to the charge for a person to prove that the person

- a) engaged in the conduct that is alleged to constitute the offence for a genuine artistic, educational, legal, medical, scientific or public benefit purpose; and**
- b) the person's conduct was, in the circumstances, reasonable for that purpose.**

As I have said, the prosecution has the onus of proving the elements of the offence beyond a reasonable doubt.

Where the prosecution have done so, for a defendant to then rely upon this defence, the onus is on the defendant to satisfy you that the defence here applies. However, the defendant need only satisfy you that the defence applies on the balance of probabilities.

If the defendant satisfies you on the balance of probabilities that the defence applies, then the defendant will have a defence to the charge and you would find the defendant not guilty.

For the defence to apply, the defendant's conduct in distributing the intimate image must have been done for a genuine [artistic/educational/legal/medical/scientific/public benefit] purpose.

[Refer to evidence of genuine purpose and related to distribution of image being done for that purpose].

If you are not satisfied on the balance of probabilities that the distribution was done for a genuine [artistic/educational/legal/medical/scientific/public benefit] purpose, then the defence is not available to the defendant, and you would find the defendant guilty of the offence.

If you are satisfied on the balance of probabilities that the distribution was done by the defendant for a genuine [artistic/educational/legal/medical/scientific/public benefit] purpose, you need also consider whether you are satisfied on the balance of probabilities that the defendant's conduct in distributing the image was, in the circumstances, reasonable for that purpose.

[Refer to circumstances as may be relevant to a consideration of whether the distribution of the intimate image was reasonable for the genuine artistic/ educational/ legal/ medical/ scientific or public benefit purpose].

If you are not satisfied on the balance of probabilities that the defendant's conduct in distributing the image was, in the circumstances, reasonable for that purpose, then the defence is not established, and you would find the defendant guilty of the offence.