

## Threats to distribute intimate images: s 229A

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### Legislation

Section 229A of the Criminal Code relevantly provides-

- (1) A person commits a misdemeanour if—
- (a) the person makes a threat to another person to distribute an intimate image or prohibited visual recording of the other person—
    - (i) without the other person’s consent; and
    - (ii) in a way that would cause the other person distress reasonably arising in all the circumstances; and
  - (b) the threat is made in a way that would cause the other person fear, reasonably arising in all the circumstances, of the threat being carried out.

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Maximum penalty—3 years imprisonment.

- (2) A person commits a misdemeanour if—
- (a) the person makes a threat to another person (**person A**) to distribute an intimate image or prohibited visual recording of another person (**person B**)—
    - (i) without person B’s consent; and
    - (ii) in a way that would cause either person A or person B distress reasonably arising in all the circumstances; and
  - (b) the threat is made in a way that would cause person A fear, reasonably arising in all the circumstances, of the threat being carried out.

Maximum penalty—3 years imprisonment.

### Commentary

Section 229A was inserted by the *Criminal Code Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Act 2019* (Qld) and commenced on 21 February 2019.

The offence prohibits the threat to distribute, without consent, an intimate image or prohibited visual recording of another person, in a way that would cause distress reasonably arising in all of the circumstances. The threat may be made either to the subject of the intimate image or prohibited visual recording, or to a third person.

The definition of consent, contained in s 229A(5), mirrors that defined in s 348(1) of the Criminal Code.

For both ss 229A(1)(a)(i) and (2)(a)(i), a child under the age of 16 years is incapable of giving consent.

If a person is convicted of the offence the court may order the person to take reasonable action to remove, retract, recover, delete or destroy an intimate image or prohibited visual recording involved in the offence within a stated period: see s 229AA.

The offence carries a maximum penalty of 3 years imprisonment so the offence can only be tried on indictment in exceptional circumstances: see ss 552BA and 552D of the *Criminal Code*.

The sample direction below is for a charge under s 229A(1) and will need to be adapted if the defendant is charged under s 229A (2) with threatening A to distribute an image or recording of B.

## Draft direction

The elements of the offence that the prosecution must prove beyond a reasonable doubt are -

First, the defendant made a threat to [A] to distribute an intimate image or prohibited visual recording of the person [A].

“Distribute” includes-

- (a) communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not; and
- (b) make available for access by someone, whether by a particular person or not; and
- (c) enter into an agreement or arrangement to do any of those things; and
- (d) attempt to distribute.

“Intimate image”, of a person-

- (a) means a moving or still image that depicts –
  - (i) the person engaged in an intimate sexual activity that is not ordinarily done in public; or
  - (ii) the person’s genital or anal region, when it is bare or covered only by underwear; or
  - (iii) if the person is female or a transgender or intersex person who identifies as female - the person’s bare breasts; and
- (b) includes an image that has been altered to appear to show any of those things; and
- (c) includes an image depicting those things, even if the thing has been digitally obscured, if the person is depicted in a sexual way.

“Prohibited visual recording”, of a person, means—

- (a) a visual recording of the person, in a private place or engaging in a private act, made in circumstances where a reasonable adult would expect to be afforded privacy; or
- (b) a visual recording of the person’s genital or anal region, when it is bare or covered only by underwear, made in circumstances where a reasonable adult would expect to be afforded privacy in relation to that region.

Secondly, the threat to distribute is without the consent of [A].

“Consent” means consent freely and voluntarily given by a person with cognitive capacity to give the consent.

Thirdly, the threat to distribute is in a way that would cause [A] distress reasonably arising in all the circumstances.

**Fourthly, [A] fears the threat will be carried out. The fear must be caused by the way the threat is made; and, reasonably arise in all the circumstances.**

**You would consider the circumstances surrounding the threat, and the relationship, if any, between the person who makes the threat and the other person.**