

## 165. Distributing prohibited visual recordings: s 227B

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### 165.1 Legislation

[Last reviewed: January 2025]

*Criminal Code*

[Section 227B](#) – Distributing prohibited visual recordings

[Section 207A](#) – Definition of ‘distribute’, ‘prohibited visual recording’ and – relevant to that definition – the terms ‘visually record’, ‘private act’ and ‘private place’

[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

### 165.2 Commentary

[Last reviewed: January 2025]

The defendant must have:

- (1) Distributed a prohibited visual recording of another person;
- (2) Without that person’s consent; and
- (3) Having reason to believe it to be a prohibited visual recording.

Definitions of ‘distribute’ and ‘prohibited visual recording’ are set out in s 207A, together with definitions of ‘visually record’, ‘private act’, and ‘private place’ that are relevant to the definition of ‘prohibited visual recording’.

*Consent – offences committed on or after 23 September 2024*

Section 227B(2) *Criminal Code* contains a definition of ‘consent’ for the purposes of s 227B. 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 227B is not ‘consent’ as defined more broadly in s 348 for the purpose of offences in Chapter 32, the definition of consent in s 227B (2) reflects the wording of s 348(1) of the *Criminal Code*, 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.

*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 227B. 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 227B(2), 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 the 2024 amendment, the definition of ‘consent’ in s 227B(2) 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 227B is an offence in Chapter 22.

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

*Defence in s 227C of the Criminal Code*

A person will not be criminally responsible for conduct which would otherwise constitute an offence against s 227B if, at the time of the offence, 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 prohibited visual recording is of (s 227C(2));

provided their conduct was reasonable in the circumstances for the performance of the person’s 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.

### 165.3 Suggested Directions

[Last reviewed: January 2025]

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

1. **The defendant distributed a prohibited visual recording of [the complainant].**

[Refer to the definition of ‘distribute’ in s 207A as applicable. Refer to the definition of ‘prohibited visual recording’ (and related definitions) in s 207A, as applicable].

2. **The defendant had reason to believe that the recording was a prohibited visual recording.**

**The prosecution must satisfy you beyond reasonable doubt that at the time of the defendant distributing the recording, the defendant *had reason to believe* that the recording was a prohibited visual recording.**

**The defendant’s state of mind as to the recording being a prohibited visual recording must have been more than a mere suspicion that the recording was a prohibited visual recording, but it is not required that the defendant be shown to have known that the recording was a prohibited visual recording.**

**It is sufficient for the prosecution to prove that the circumstances were such that the defendant had *reason to believe* that the recording was a prohibited visual recording.**

[Refer to the evidence relevant to a consideration of whether the defendant had reason to believe that the recording the defendant distributed was of the nature of a prohibited visual recording. In some cases, it may be necessary to again refer to applicable aspects of the definition of ‘prohibited visual recording’ (and related definitions)].

3. **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).

*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 a prohibited visual recording, 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 visual recording was reasonable in the circumstances for the performance of those duties.**

**For the defence to apply, the defendant must have distributed the visual recording, 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 visual recording was in the course of their duties as a law enforcement officer].

**For the defence to apply, the defendant’s conduct in distributing the visual recording 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 visual recording 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 visual recording, acting in the course of the defendant's duties as a law enforcement officer;**  
  
or
2. **the defendant's conduct in distributing the visual recording 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 a prohibited visual recording of another person, where:**

1. **The person was, at the time of the distribution of the visual recording, acting in the course of the person's duties in relation to [the lawful custody of/a supervision order for] the person the visual recording was of;**  
  
**and**
2. **The person's conduct in distributing the prohibited visual recording was reasonable in the circumstances for the performance of those duties.**

**For the defence to apply, the defendant must have distributed the visual recording, 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 visual recording 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 visual recording 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 defendant's visual recording of the complainant was reasonable for the performance of the defendant's duties].

(See the examples contained in s 227C(2)(b) under the heading 'Examples of conduct that may be reasonable for the performance of duties').

**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 visual recording, 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 visual recording 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.**