

164. Observations or Recordings in Breach of Privacy: s 227A(2)

164.1 Legislation

[Last reviewed: December 2024]

Criminal Code

[Section 227A](#) – Observations or Recordings in Breach of Privacy

[Section 207A](#) – definitions for this chapter

[Section 227C](#) – Prescribes circumstances where a person will not be criminally responsible for conduct which otherwise constitutes an offence against Section 227A.

164.2 Commentary

[Last reviewed: December 2024]

Pursuant to s 227A(2), the defendant must have:

- (1) Observed or visually recorded another person's genital or anal region;
- (2) In circumstances where a reasonable adult would expect to be afforded privacy in relation to that region;
- (3) Without consent of the other person; and
- (4) When the observation or visual recording is made for the purpose of observing or visually recording the other person's genital or anal region.

Section 227A(3) defines 'genital or anal region' for the purposes of s 227A to mean the person's genital or anal region when it is 'bare or covered only by underwear'.

The section includes an example for s 227A(2), being 'using a mobile phone in a public place to take photos of women's underwear under their skirts without their consent'.

Consent – offences committed on or after 23 September 2024

Section 227A(3) contains a definition of 'consent' for the purposes of s 227A. 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 227A is not consent as defined more broadly in s 348 for the purpose of offences in Chapter 32 of the *Criminal Code*, the definition of

consent in s 227A(3) 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.

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 227A. The transitional provision enacted as s 761 of the *Criminal Code* refers to ‘former provisions’ and ‘new provisions’ with reference to Chapter 32 only. Consequently, the definition of ‘consent’ in s 227A(3), 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 227A(3) 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 227A 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 227A 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.

164.3 Suggested Direction

[Last reviewed: December 2024]

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

1. **The defendant [observed/visually recorded] [the complainant’s] genital or anal region in circumstances where a reasonable adult would expect to be afforded privacy in relation to that region.**

[Refer to the definitions of ‘observe’ and ‘visually record’ in s 207A, as applicable. Refer also to the definition of ‘genital or anal region’ in s 227A(3), if required].

[Refer to circumstances as may be relevant to a consideration of whether the observation/visual recording occurred in circumstances where a reasonable adult would expect to be afforded privacy in relation to their genital or anal region].

2. **The [observation/visual recording] was made for the purpose of [observing/visually recording] [the complainant’s] genital or anal region.**

[Refer further to the definition of ‘genital or anal region’ in s 227A(3), if required].

3. **The [observation/visual recording] was done 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, and as applicable, direct the jury in relation to the circumstances where criminal liability will not arise, pursuant to s 227C: see 163.5 and 163.6 below).

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

The law provides that a person will not be criminally responsible for the [observation/visual recording] of another person, where:

- 1. The person was, at the time of the [observation/visual recording] a law enforcement officer and acting in the course of the person's duties;**
and
- 2. The person's conduct in [observing/visually recording] the other person was reasonable in the circumstances for the performance of those duties.**

For the defence to apply, the defendant must have made the [observation/visual recording] of [the complainant], 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 observation/visual recording of the other person was made in the course of their duties as a law enforcement officer].

For the defence to apply, the defendant's conduct in [observing/visually recording] [the complainant] 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 conduct in observing/visual recording the other person 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 make the [observation/visual recording] acting in the course of the defendant's duties as a law enforcement officer;**
or
- 2. the defendant's conduct in [observing/visually recording] [the complainant] 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 [observation/visual recording] of another person, where:

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

and
- 2. The person's conduct in [observing/ visually recording] the other person was reasonable in the circumstances for the performance of those duties.**

For the defence to apply, the defendant must have made the [observation/ visual recording] of [the complainant], 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 complainant being in 'lawful custody' (noting the inclusive definition in s 227C(3), where relevant)].

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

[Refer to the evidence relevant to a consideration of whether the defendant's observation/visual recording of the complainant 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 [observing/visually recording] [the complainant] 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 observing/visually 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 you beyond reasonable doubt that:

1. **the defendant did not make the [observation/visual recording] of [the complainant], 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 [observing/ visually recording] [the complainant] 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.