

## 121. Child Stealing: s 363

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### 121.1 Legislation

[Last reviewed: April 2025]

*Criminal Code*

[Section 363](#) – Child-stealing

[Section 22](#) – Ignorance of the law—bona fide claim of right

[Section 391](#) – Definition of **stealing**

### 121.2 Commentary

[Last reviewed: April 2025]

Section 363 of the Criminal Code contains, in effect, two offences. For the first (offence A), the Defendant must have:

- (1) forcibly or fraudulently taken or enticed away or detained;
- (2) a child under the age of 16 years;
- (3) with intent to
  - a. deprive the parent, guardian or other person who had lawful care of the child of possession of the child; or
  - b. steal any article upon or about the person of the child.

For the second (offence B), the Defendant must have:

- (1) received or harboured;
- (2) a child under the age of 16 years;
- (3) knowing the child to have been so taken or enticed away or detained;
- (4) with intent to
  - a. deprive the parent, guardian or other person who had lawful care of the child of possession of the child; or
  - b. steal any article upon or about the person of the child.

*Forcibly or fraudulently took or enticed away or detained; received or harboured*

The case law on the meaning of these various terms is limited and generally quite old. In most cases, no further direction on their meaning is likely to be required.

Case law indicates that to ‘take’ a child, the Defendant must have in some way contributed to the child’s leaving the possession of the parent or arranged or actively participated in the child’s leaving. There must, in other words, be a causal relationship between the conduct of the Defendant and the departure of the child: (*R v*

*Stanton* (1981) 3 A Crim R 294). In *R v Johnson* [1957] St R Qd 594, [595]; Philp J held that supplying taxi and railway tickets to a child was sufficient to constitute ‘taking.’ Following a review of many older authorities, White J in *Moore v Police* [2008] SASC 76 (in a case concerning the similar offence of child abduction under s 80 of the *Criminal Law Consolidation Act 1935* (SA)) stated at [38] that: ‘the prosecution must prove that the accused has taken an active part in the departure of the child from the possession of her parent or guardian. It does not have to prove that the taking was by force, either actual or constructive and, as already noted, it does not have to prove that the taking was against the child’s consent. It does have to prove some conduct amounting to a substantial interference with the “possessory relationship” between the parent or guardian and the child.’

In *R v Awang* [2004] QCA 152; [2004] 2 Qd R 672, a case concerning s 355 of the *Criminal Code*, Williams JA held at [21] that the term ‘detain’ should be given its ordinary and natural meaning. His Honour noted that it has a variety of meanings including ‘keep in confinement’, ‘hold back, delay, stop’.

The taking or enticing or detaining must be forcible or fraudulent. The words forcibly and fraudulently refer to the means used to take, entice away or detain. The force or fraud may be practiced on the child or parent or guardian: *R v Bellis* (1893) 62 LJMC 155. The fraud or deception may be a misrepresentation of fact, such as entitlement to the child, or misrepresentation of the Defendant’s intention, such as falsely representing an intention to return the child. What is important is that the deception bares a causal link to the taking or enticing the child.

### *Intention*

#### **See the direction on intention at Chapter 59 – Intention.**

If the intent in question is to deprive a parent or other person of possession, then it may be observed that child stealing is an offence against their possessory rights, noting that the term ‘parent’ includes adoptive parents to the exclusion of any natural parent: s363(3). While there must be an intention to deprive the parent or other person of the possession of the child, it is not necessary that the Defendant intended to permanently deprive the parent or other person of possession. Intention to only temporarily deprive is sufficient: (*R v Baille* (1859) 8 Cox CC 238; *R v Timmins* (1860) Bell CC 276).

If the intent in question is to steal any article upon or about the person of the child, reference should be made to the elements of stealing (set out in s 391 of the *Criminal Code*) and, where relevant, the defence of claim of right under s 22.

### *Defence*

It is a defence to either ‘offence A’ or ‘offence B’ above to prove that the Defendant claimed in good faith a right to the possession of the child. Alternatively, in the case of a child, not being an adopted child, whose parents were not married to each other at the time of conception and have since not married each other, it is a defence to prove

that the Defendant is the child's mother or claimed in good faith to be the child's father: s363(2).

The Defendant must prove that at the relevant time he or she in good faith believed he or she had a right to take possession of the child. In this context, the term 'in good faith' simply means honestly. The term 'claimed' does not mean that the Defendant has to make an express claim out loud at the time.

The onus is on the Defendant to prove the defence on the balance of probabilities: (*R v Seery* [1995] QCA 389). It is suggested that the authorities on the interpretation of s 22 may be applicable to the interpretation of s 363(2): (*R v Campbell* [2009] QDC 61 (McGill DCJ)).

### 121.3 Suggested Direction

[Last reviewed: April 2025]

#### A. Offence A (s363(1)(a))

**The prosecution must prove beyond reasonable doubt that:**

1. **The Defendant [took/enticed/detained] the Complainant.**
2. **The [conduct constituting the taking or enticing or detaining] was forcible or fraudulent. The word fraudulent refers to the means used to take, entice away or detain. The means used must involve some deception or false pretence or some other trickery.**
3. **The Complainant was at the time under 16 years.**
4. **The Defendant intended to** (refer to either of the following intentions as relevant):
  - (a) **deprive the parent, guardian or other person who had lawful care of the Complainant or possession of the Complainant; or**
  - (b) **steal any article upon or about the person of the Complainant.**

**Child stealing is an offence against the possessory rights of a parent or other person having the lawful care of the child. There must be an intention to deprive the parent or other person of the possession of the child. (Where relevant, the following may be added) It is not necessary that the Defendant intended to permanently deprive the parent of the Complainant of possession. It would be sufficient to intend to only temporarily deprive the parent of possession of the Complainant.**

*B. Offence B (s363(1)(b))*

**The prosecution must prove beyond reasonable doubt that:**

- 1. The Defendant [received or harboured] the Complainant.**
- 2. The Complainant was at the time under 16 years.**
- 3. The Defendant knew the Complainant had been taken or enticed away or detained.**
- 4. The Defendant intended to (refer to either of the following intentions as relevant):**
  - (a) deprive the parent, guardian or other person who had lawful care of the Complainant of possession of the Complainant; or**
  - (b) steal any article upon or about the person of the Complainant.**

(If raised by the defence, either of the following may be added):

**It is a defence to prove that the Defendant claimed in good faith a right to the possession of the Complainant.**

**OR**

**In the case of a Complainant, not being an adopted child, whose parents were not married to each other at the time of conception and have since not married each other, to prove that the Defendant is the Complainant's mother [or claimed in good faith to be the Complainant's father].**