

151. Wilfully exposing a child under 16 years to an indecent object: s 210(1)(e)

151.1 Legislation

[Last reviewed: November 2024]

Criminal Code

[Section 210\(1\)\(e\)](#) – Indecent treatment of children under 16

[Section 229](#) – Knowledge of age immaterial

[Section 636](#) – Evidence of blood relationship

151.2 Commentary

[Last reviewed: November 2024]

The defendant must have:

- (1) Wilfully exposed;
- (2) A child under the age of 16;
- (3) To an indecent object or other specified indecent thing;
- (4) Without legitimate reason.

Relevant definitions for this offence are at s 1 of the *Criminal Code* ('Crown Law Officer' and 'person with an impairment of the mind'). Note that the extended definitions of 'lineal descendant' at s 222(5), (7A) and (7B) apply only to the offence of incest, and therefore do not apply to s 210.

The facilitation of proof provision at s 636 of the *Criminal Code* applies to facilitate proof that a complainant is the lineal descendent of the defendant.

'Wilfully'

The sample direction on the term 'wilfully' for the purposes of ss 210(1)(d) & (e) has been taken from the ruling in *R v Lockwood; ex-parte Attorney-General* [\[1981\] Qd R 209](#) which was concerned with the meaning of the term for the purposes of s 469 of the *Criminal Code* (wilful damage). While there is some debate as to whether the term should be extended to recklessness for the purposes of these provisions, there is no known case determining the issue. In any event, the usual allegation is of deliberation.

In *R v T* [\[1997\] 1 Qd R 623](#), 630 it was confirmed that for the purposes of the recklessness direction, the word 'likely' means a substantial chance, one that is real and not remote.

'Legitimate reason'

The concept of 'legitimate reason' in ss 210(1)(e) & (f) is believed to have been derived from the *Protection of Children Act 1978* (UK) in which, during debate on the Bill, Lord Scarman said '[t]his phrase really embraces a question of fact on which the courts and juries are well able to reach a sensible decision in determining the meaning'. 'Legitimate reason' is a wider concept than an authorisation, justification or excuse, and so it will not be appropriate to limit the phrase to those matters, or to direct in those terms where they are raised.

An issue arises as to where the onus of proof lies where there is interaction between the prosecution's proof of the element of 'without legitimate reason' and the reversal of the onus for the purposes of proof of defences raised by s 210(5) and (5A), where there is overlap between the two. For example, where the defence case is that an indecent object was shown to the complainant in the belief that the complainant was of or above the age of 16 years and would not have otherwise been shown, does the onus of proof shift to the defendant? The issue is unresolved by any direct appellate authority, however the reasoning applied in *R v Shetty* [2005] 2 Qd R 540, [13]-[14] (followed in *R v Addley* [2018] QCA 125) suggests that in such a case the prosecution would have to prove beyond reasonable doubt that the object was shown without any, including that, legitimate reason rather than the defendant having to prove the defence on the balance of probabilities.

Defences and aggravations

See s 210(5) and subs (5A) for defences available to a person charged with this offence. The onus of proving the defence is on the defendant on the balance of probabilities. Note however that the defence at s 210(5A) provides a defence to liability on the circumstance of aggravation only. See further the observations below concerning the applicability of the defences to ss 210(1)(e) and (f) where the prosecution must prove a lack of legitimate reason.

By the operation of s 229, a defendant cannot raise an excuse concerning the age of the complainant based on the operation of s 24 of the *Criminal Code*, which would have left the onus of proof on the prosecution.

The sample direction concerning 'under care' has been drawn from *R v FAK* (2016) 263 A Crim R 322; [2016] QCA 306, [71]-[78].

The sample direction concerning guardianship is drawn from *R v G* (1997) 91 A Crim R 590, 599.

Pursuant to s 210(4B), a circumstance of aggravation under s 161Q of the *Penalties and Sentences Act 1992* (Qld) applies. See Part 9D, Division 1 of the *Penalties and Sentences Act 1992* (Qld) for relevant definitions.

151.3 Suggested Direction

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In order for the prosecution to prove this offence, it must prove each of the following matters beyond reasonable doubt:

1. **That there was an indecent object** [or indecent film, videotape, audiotape, picture, photograph or printed or written material].

[Outline here the particularised indecent object or indecent film, videotape, audiotape, picture, photograph or printed or written material]

It is a matter for you to determine if that object [or indecent film, videotape, audiotape, picture, photograph or printed or written material] **is indecent. ‘Indecent’ bears its ordinary everyday meaning; that is, what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.**

2. **That the defendant wilfully exposed the complainant to that indecent object** [or indecent film, videotape, audiotape, picture, photograph or printed or written material].

The word ‘wilfully’ means that the defendant deliberately or intentionally exposed the complainant to the indecent object [or indecent film, videotape, audiotape, picture, photograph or printed or written material] [or, as the case may be, that the defendant deliberately did an act, aware at the time that the result charged (i.e. that the complainant would be exposed to the indecent object (or as the case may be, indecent film, videotape, audiotape, picture, photograph or printed or written material) was a likely consequence of the doing of the act and yet recklessly proceeded regardless of that risk].

‘Exposed’ is an ordinary English word and means ‘showed’.

(Or, if appropriate): ‘Exposed’ usually means ‘showed’, but here the allegation is that the exposure was not visual but through another means (e.g. sound). In this case, ‘exposed’ means that the defendant in (the particularised manner) made the complainant aware of the act.

[Outline here the evidence relevant to proof of this element].

3. **That the defendant had no legitimate reason to expose the complainant to the object** [or film, videotape, audiotape, picture, photograph or printed or written material].

It is a matter for you to decide whether there was a legitimate reason for the defendant to have wilfully exposed the complainant to that indecent object [or film, videotape, audiotape, picture, photograph or printed or written material].

[Outline here what, if any, legitimate reason is raised by the evidence].

The law leaves it to the good sense of juries as representatives of the community to decide whether the defendant acted without legitimate reason.

Remember that the defendant does not have to prove that [he/she] had a legitimate reason. The onus of proof rests on the prosecution to prove beyond reasonable doubt that the defendant did not have a legitimate reason.

(If appropriate): In this trial there is no legitimate reason raised on the evidence and you will find this element to have been proven.

- 4. That the complainant was under 16 [or as the case may be, under 12] years.**

[If necessary, outline here the evidence relevant to proof of this element].

(Where a circumstance of aggravation is charged under s 210(4)):

- 5. That the defendant was at the time the guardian of the complainant.**

The prosecution must prove that the defendant was the complainant's guardian in that [he/she] had a duty by law to protect the complainant. That is, that the defendant was required to protect the complainant's property or rights in circumstances in which the complainant was not capable of managing [his/her] affairs, as opposed to voluntarily taking on any such responsibility.

(Or, as the case may be):

- 6. That the complainant was under the defendant's care for the time being.**

The prosecution must prove that the defendant had the complainant under [his/her] care at the time of the charged conduct, that is, [he/she] had assumed the responsibility of looking after the complainant at the time. The prosecution does not have to prove that [he/she] was the only person looking after the complainant at the relevant time.

(Or, as the case may be):

7. That the complainant was the defendant's lineal descendant.

The prosecution has to prove that the complainant was a direct descendent of the defendant.

(As appropriate): A complainant is the direct descendant of [his/her] biological parents and biological grandparents, etc but is not the direct descendant of, for example, any step-parents, step-grandparents, aunts, uncles or cousins.

(Where a circumstance of aggravation is charged under s. 210(4A)):

8. That the complainant was a person with an impairment of the mind at the relevant time;

The phrase 'a person with an impairment of the mind' means a person with a disability that -

- a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and**
- b) results in –**
 - (i) a substantial reduction of the person's capacity for communication, social interaction or learning; and**
 - (ii) the person needing support.**

[Outline here the evidence relevant to proof of this element, if it is in dispute].