

## 152. Taking indecent photograph of a child under 16 years: s 210(1)(f)

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### 152.1 Legislation

[Last reviewed: January 2025]

[Section 1](#) – Definitions

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

[Section 225](#) – Repealed.

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

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

### 152.2 Commentary

[Last reviewed: January 2025]

The Defendant must have:

- (1) Taken an indecent photograph or recorded an indecent visual image with any device;
- (2) Of a child under the age of 16;
- (3) 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.

The concept of 'legitimate reason' in s 210(1)(e) and (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 'This 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 photograph was taken of the Complainant in the belief that the Complainant was of or above the age of 16 years and would not have otherwise been taken, 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.

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.

### 152.3 Suggested Direction

[Last reviewed: January 2025]

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

1. **That the Defendant took a photograph [or recorded by means of any device a visual image] of the Complainant.**  
[Outline here the evidence relevant to proof of this element, including the particularised conduct].
2. **That the photograph [or visual image] of the Complainant was indecent.**

**It is a matter for you to determine if that photograph [or visual image] 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.**

- 3. That the Defendant had no legitimate reason to take the photograph [or visual image] of the Complainant.**

**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 photograph [or visual image].**

**[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].