

125. Circumstances of Aggravation in Sexual Offences

125.1 Legislation

[Last reviewed: October 2024]

Criminal Code

[Section 1](#) - Definition of 'impairment of the mind'

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

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

125.2 Commentary

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There are numerous sexual offence provisions that include circumstances of aggravation. It is impractical to include each of those offence provisions under the Legislation heading of this Chapter. The purpose of this Chapter is to bring together the sample directions for some of the more commonly charged circumstances of aggravation in sexual offences in isolation from the other elements of those offences. Regard should be had to the Chapters dealing with the particular offence provision under consideration.

The extended definitions of 'lineal descendant' at ss 222(5), (7A) and (7B) of the *Criminal Code* apply only to the offence of incest, and therefore do not apply to any other sexual offences.

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.

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* for offences in Chapter 22 of the *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](#), especially at [71]-[78].

The sample direction concerning "guardianship" is drawn from *R v G* [\(1997\) 91 A Crim R 590](#), 599; *Gummow v R* [\[1997\] Library 970147](#).

125.3 Suggested Directions

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'Under care':

The prosecution must prove that the defendant had the complainant under [his/her] care at the time of the charged conduct, that is, that [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.

'Under the age of 12':

This is not disputed. You should treat this as proven.

(Or, where relevant): The uncontested evidence from the child's mother [or from the birth certificate – exhibit --] is that the child was born on [date] so at all material times [he/she] would have been under 12.

'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 or 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 the circumstance of aggravation requires proof that the defendant knew that the complainant was his/her lineal descendant, the following may be added):

The prosecution must also prove that the defendant knew that the complainant was [his/her] lineal descendant. It must prove that the defendant knew that the relationship between the two of them existed. It need not prove that the defendant knew that the existence of that relationship meant that the complainant was [his/her] lineal descendant, only that the relationship existed.

[If the issue is in dispute, outline here the evidence showing knowledge of the relationship between the two].

'Guardianship':

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.

'A Person with an Impairment of the Mind':

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].

(Where the circumstance of aggravation requires proof that the defendant knew that the complainant had an impairment of the mind, the following may be added):
The prosecution must also prove that the defendant knew that the complainant had an impairment of the mind. It must prove that the defendant knew that the complainant's mind was impaired in the sense that condition has just been described.

[If the issue is in dispute, outline here the evidence showing knowledge of the complainant's impairment of the mind].

'Serious Organised Crime':

Some sexual offences are prescribed offences under s 161Q of the *Penalties and Sentences Act 1992*, so a serious organised crime circumstance of aggravation is applicable.