Legislation

210 Indecent treatment of children under 16

(1) Any person who—

(a) …

(b) …

(c) …

(d) …

(e) without legitimate reason, wilfully exposes a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter; or

(f) …

is guilty of an indictable offence.

(2) If the child is of or above the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 14 years.

(3) If the child is under the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 20 years.

(4) If the child is, to the knowledge of the offender, his or her lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his or her care, the offender is guilty of a crime, and is liable to imprisonment for 20 years.

(4A) If the child is a person with an impairment of the mind, the offender is guilty of a crime, and is liable to imprisonment for 20 years.

(4B) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for an offence against this section.

(4C) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

(5) If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years.

(5A) If the offence is alleged to have been committed with the circumstance of aggravation mentioned in subsection (4A), it is a defence to the circumstance of aggravation to prove that the accused person believed on reasonable grounds that the child was not a person with an impairment of the mind.

(6) In this section—

deals with includes doing any act which, if done without consent, would constitute an assault as defined in this Code.

229 Knowledge of age immaterial

Except as otherwise expressly stated, it is immaterial, in the case of any of the offences defined in this chapter committed with respect to a person under a specified age, that the accused person did not know that the person was under that age, or believed that the person was not under that age.

636 Evidence of blood relationship

(1) In this section—

blood relationship means the blood relationship existing between a person charged with a prescribed offence and the person in respect of whom or, as the case may be, with whom a prescribed offence is alleged to have been committed.

prescribed offence means an offence—

(a) defined in section 222; or

(b) defined in section 210 or 216(2) where it is alleged as a circumstance of aggravation that the offence was committed in respect of a child under the age of 16 years who is the lineal descendant of the person charged.

(2) On the trial of a person charged with a prescribed offence—

(a) blood relationship is sufficiently proved by proof that the relationship is reputed to exist and it is not necessary to prove that the person charged or the person in respect of whom or with whom the prescribed offence is alleged to have been committed or any person (living or dead) upon whom the blood relationship depends was born in lawful wedlock; and

(b) the person charged is, until the contrary is proved, presumed to have had knowledge at the time the prescribed offence is alleged to have been committed of the blood relationship.

Commentary

Relevant definitions for this offence are at s. 1 of the Criminal Code ("Crown Law Officer", "person with an impairment of the mind"). Note that the extended definitions of "lineal descendant" at ss. 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.

See ss. 210(5) & (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) & (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 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.

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 "*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) & (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, esp at [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.

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

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

Suggested Directions

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 as the case may be, indecent film, videotape, audiotape, picture, photograph or printed or written material).**

   [Outline here the particularised indecent object (or as the case may be, indecent film, videotape, audiotape, picture, photograph or printed or written material)]

   It is a matter for you to determine if that object (or as the case may be, 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 as the case may be, 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 as the

case may be, 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 ward 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 as the case may be, 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 as the case may be, indecent 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 prove that he/she had a legitimate reason. The onus of proof rests on the prosecution to prove beyond reasonable doubt that 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 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 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 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 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.]

[Where a circumstance of aggravation is charged under s. 210(4B)]

9. [*Where a circumstance of aggravation is charged under s. 161Q of the Penalties and Sentences Act 1992, see Part 9D, Division 1 of the Penalties and Sentences Act 1992 for relevant definitions.*]