

119B. Abuse (indecent dealing, exposure to indecent acts, taking indecent photographs etc) of persons with an impairment of mind

119B.1 Legislation

[Last reviewed: October 2024]

Criminal Code

[Section 216](#) - Abuse of persons with an impairment of the mind

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

119B.2 Commentary

[Last reviewed: October 2024]

Note: This direction is concerned with charges of s 216(2) offences only. For charges of s 216(1) offences, see **Chapter 119 – Abuse (attempted or actual penile intercourse) of persons with an impairment of the mind: s 216(1)** (for offences charged after 1 August 2023) and **Chapter 119A – Carnal knowledge of persons with an impairment of the mind: section 216(1)** (for offences charged before 1 August 2023).

Section 216(2)(a)-(f) sets out numerous offences against persons with an impairment of the mind. This Chapter contains suggested directions for each of these offences.

Relevant definitions for the offences in s 216(2) are at s 1 ('person with an impairment of the mind') and s 216(5) ('deals with') of the *Criminal Code*. Note, however, 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 216.

Section 216(5) defines 'deals with' in this section as doing any act which, if done without consent, would constitute an assault as defined by the *Code*. It is ordinarily unnecessary to inform the jury of this definition, as the issue is usually the truth and reliability of the complainant person. The expression 'deals with' is capable of wide application, see *R v S* [1996] 1 Qd R 559. The suggested direction as to the meaning of the term 'deals with' has been taken from *R v S* [1996] 1 Qd R 559.

The suggested direction as to the meaning of the term 'procures' has been taken from *R v F; ex parte Attorney-General (Qld)* [2004] 1 Qd R 162, [33]-[34] which was concerned with the meaning of the term for the purposes of s 7(1)(d) of the *Criminal Code*. There seems to be no reason why the word would have a different meaning for the purposes of this provision. See also the observations in *R v Georgiou* (2002) 132 A Crim R 150; [2002] QCA 206, [79].

The use of terms such as 'moral turpitude' and an 'offence against morality' as used by members of the Court of Criminal Appeal in *R v Bryant* [\[1984\] 2 Qd R 545](#), are not essential to the meaning of 'indecenty': see *R v Schneiders* [\[2007\] QCA 210](#).

The first suggested directions concerning 'indecenty' will often be sufficient, however in *R v Jones* (2011) [209 A Crim R 379](#); [\[2011\] QCA 19](#), [32] it was held that

The quality of 'indecenty' is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision.

Where the evidence raises that issue, the second part of the sample direction may be appropriate.

The suggested direction on the term 'wilfully' for the purposes of ss 216(2)(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 216(2)(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 it to those matters, or to direct in those terms where they are raised.

An issue arises as to the interaction between the element of 'without legitimate reason' having to be proven by the prosecution and the reversal of the onus for the purposes of proof of defences raised by s 216(4) where there is overlap between the two requirements. For example, where the defence case is that an indecent photograph was taken of an adult with an impairment of the mind because the defendant believed the complainant was not impaired (or perhaps did not know that he or she was impaired), 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 that the photograph was taken without legitimate reason rather than the defence having to prove the defence on the balance of probabilities.

See s 216(4) 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. See however the observations below concerning the applicability of the defences to ss 216(2)(e) & (f) where the prosecution must prove a lack of legitimate reason.

As to the meaning of 'sexual exploitation' in s 216(4)(b), in *R v Little* (2013) 231 A Crim R 145; [\[2013\] QCA 223](#), [26] it was observed that the phrase takes its ordinary English meaning, and a dictionary definition that 'exploitation' is 'selfish utilisation' was referred to with approval. In *R v Libke* [\[2006\] QCA 242](#), [100] a direction that sexual exploitation means taking advantage of the complainant in a sexual way was said to be accurate.

While the facilitation of proof provision at s 636 of the *Criminal Code* purports to apply to s 216(2) it in fact cannot. That is because s 636 requires that the charge under s 216(2) contain a circumstance of aggravation that the complainant is under 16 years and there is no such available circumstance of aggravation provided for s 216(2).

119B.3 Suggested Directions

[Last reviewed: October 2024]

(Note: These suggested directions deal first with the substantive offences created by section 216(2), and then with the circumstances of aggravation. Directions for each subsection are on separate pages for clarity).

Section 216(2)(a) – indecent dealing

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

- 1. That the complainant was a person with an impairment of the mind at the relevant time.**

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].

- 2. That the defendant dealt with the complainant.**

The terms ‘dealt with’ and ‘deals with’ are capable of wide application and mean ‘to have to do with’, ‘to act towards’ or ‘to treat’.

In the context of this offence, it includes, but is not limited to, a touching of the defendant by the complainant, as well as an application of force of any kind, directly or indirectly, to the defendant by the complainant.

The touching does not have to be a touching of the person by the defendant’s hand – it can be a touching of the person by any part of the defendant’s body.

3. That the dealing was indecent.

The word ‘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.

You should look at things like the nature of the act, the context in which it occurred, the relationship between the two parties, the ages of both the complainant and the defendant, and the nature of any interaction between them, including what if anything was said between them at the time leading up to, during and immediately after the dealing.

(If appropriate, add the following) In looking at all factors, including those I have just mentioned, you must consider if the dealing had a sexual connotation. I direct you that it is only if you accept beyond reasonable doubt that there was a sexual connotation to the dealing, that is that the charged dealing was motivated by a desire held by the defendant to gain some form of sexual experience, pleasure or satisfaction that you would find that the conduct was indecent. What the complainant thought of the conduct is not to the point, it is the motive or reason for the defendant dealing with the complainant in the manner that [he/she] did, as you find it to be, which is important is deciding if there was a sexual connotation to the dealing.

4. That the dealing was unlawful.

Unlawful means not justified, authorised or excused by law.

[Refer to any issue raised on the evidence.]

(If appropriate, add the following) I remind you that the concept of consent is irrelevant to proof of this charge, and so even if you thought the complainant might have consented to what occurred, that does not provide any authorisation, justification or excuse to the conduct, and neither does it provide any form of the defence to the charge.

(If relevant) It is a defence to this offence for the defendant to prove on the balance of probabilities –

- **that the defendant believed, on reasonable grounds, that the person was not ‘a person with an impairment of the mind’; or**
 - **that the act that was the offence did not, in the circumstances, constitute sexual exploitation of the ‘person with an impairment of the mind’.**
- 5. (Where a circumstance of aggravation is charged under ss 216(3) or (3A), go to the circumstances of aggravation at the end of this Chapter).**

Section 216(2)(b) – procures

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

- 1. That the complainant was a person with an impairment of the mind at the relevant time.**

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].

- 2. That the defendant procured the complainant to commit an act.**

This second element comprises two components, the concept of 'procuring' and the conduct of the defendant.

The term 'procured' is an ordinary English word, and not a term of art. It means to bring about or to persuade someone to do something. Procuring can be regarded as bringing about a course of conduct which the complainant would not have embarked on of [his/her] own volition, that is to persuade the complainant to do the thing that [he/she] did. It is irrelevant whether the complainant consented to doing the act which [he/she] did, and so consent does not affect in any way the consideration of this element.

If you are satisfied that the complainant was procured to do an act, the second aspect of this element that must also be proven beyond reasonable doubt is that it was the defendant who procured the complainant to do the act. That is, it must have been some conduct on the defendant's part which caused the complainant to do the act which is relied on by the prosecution to prove the charge.

(Where appropriate, add the following) In order to prove that that the defendant's conduct caused the complainant to do the act, the prosecution need not prove that the defendant's conduct was the sole cause of the act being done, or that it had a major role in causing it to be done. It will be sufficient if the prosecution proves that the defendant's conduct had a real or substantial role to play in bringing about the act by the complainant. This is not a philosophical question, nor one determined by assigning

mathematical probabilities. It is a question to be determined by you applying your common sense to the facts as you find them, appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal trial.

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

3. That the procured act was indecent.

The word ‘indecent’ bears its ordinary everyday meaning, it 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 circumstance.

You should look at things like the nature of the act which was procured, the context in which the procuring occurred, the relationship between the two parties, the ages of both the complainant and the defendant and the nature of any interaction between them, including what if anything was said between them at the time leading up to, during and immediately after the procuring of the act.

(If appropriate, add the following) In looking at all factors, including those I have just mentioned, you must consider if the procuring had a sexual connotation. I direct you that it is only if you accept beyond reasonable doubt that there was a sexual connotation to the procuring, that is that the charged procuring was motivated by a desire held by the defendant to gain some form of sexual experience, pleasure or satisfaction that you would find that the conduct was indecent. What the complainant thought of the conduct is not to the point, it is the motive or reason for the procuring which in important is deciding if there was a sexual connotation to the conduct.

4. That the procuring of the act was unlawful.

The fourth element is concerned with proof of unlawfulness. Procuring a person with an impairment of the mind to commit an indecent act is unlawful unless authorised, justified, or excused by law, or is the subject of a specific legal defence.

(If appropriate) I remind you that the concept of consent is irrelevant to proof of this charge, and so even if you thought the complainant might have consented to doing the act, that does not provide any authorisation, justification, or excuse to the conduct, and neither does it provide any form of the defence to the charge.

(If appropriate) In this trial there is no authorisation, justification, excuse or defence raised on the evidence and you will find this element to have been proven.

or

[Outline here any authorisation, justification or excuse raised on the evidence and which must be negated by the prosecution or outline any defence under s. 216(4) the onus of which lies on the defendant to prove on the balance of probabilities.]

5. (Where a circumstance of aggravation is charged under ss 216(3) or (3A), go to the circumstances of aggravation at the end of this Chapter).

Section 216(2)(c) – permitting self to be indecently dealt with

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

- 1. That the complainant was a person with an impairment of the mind at the relevant time.**

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].

- 2. That the defendant permitted [himself/herself] to be dealt with by the complainant.**

This second element comprises two components; the concepts of 'permitted' and that of 'dealt with'.

'Permitted' simply means allowed, and so what must be proven is that the defendant allowed himself or herself to be dealt with by the complainant.

The terms 'dealt with' and 'deals with' are capable of wide application and mean 'to have to do with', 'to act towards' or 'to treat'. In the context of this offence, it includes, but is not limited to, a touching of the defendant by the complainant, as well as an application of force of any kind, directly or indirectly, to the defendant by the complainant.

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

- 3. That the permitted act was indecent.**

The word 'indecent' bears its ordinary everyday meaning, it 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 circumstance.

You should look at things like the relationship between the two parties, the ages of both the complainant and the defendant, the place on the body where the defendant was touched, the nature of any interaction between them, including what if anything was said between them at the time leading

up to, during and immediately after the touching (or as the case may be, dealing).

(If appropriate, add the following) In looking at all factors, including those I have just mentioned, you must consider if the touching had a sexual connotation. I direct you that it is only if you accept beyond reasonable doubt that there was a sexual connotation to the touching, that is that the charged touching was motivated by a desire held by the defendant to gain some form of sexual experience, pleasure, or satisfaction that you would find that the conduct was indecent. What the complainant thought of the conduct is not to the point, it is the motive or reason for the defendant permitting [himself/herself] to be touched (or as the case may be, dealt with) in the manner that [he/she] did, as you find it to be, which is important is deciding if there was a sexual connotation to the conduct.

- 4. That permitting the indecent dealing by the complainant was unlawful.**

The fourth element is concerned with proof of unlawfulness. Permitting indecent dealing by a person with an impairment of the mind is unlawful unless authorised, justified, or excused by law, or is the subject of a specific legal defence.

[Here outline any authorisation, justification or excuse raised on the evidence and which must be negated by the prosecution or outline any defence under s. 216(4) the onus of which lies on the defendant to prove on the balance of probabilities].

(If appropriate) In this trial there is no authorisation, justification, excuse or defence raised on the evidence and you will find this element to have been proven.

- 5. (Where a circumstance of aggravation is charged under ss 216(3) or (3A), go to the circumstances of aggravation at the end of this Chapter).**

Section 216(2)(d) – wilful exposure

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

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

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.]

2. That there was an indecent act by the defendant.

[Outline here the particularised indecent act by the defendant].

It is a matter for you to determine if that act 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 wilfully exposed the complainant to that indecent act.

The word 'wilfully' means that the defendant deliberately or intentionally exposed the complainant to the indecent act (or, as the case may be, that the defendant deliberately did the indecent act, aware at the time that the result charged (i.e. exposing the complainant to that act) was a likely consequence of the doing of the indecent act and yet recklessly proceeded regardless of that risk).

'Exposed' is an ordinary English word and means 'showed'.

(Or, if appropriate, substitute with the following) 'Exposed' usually means 'showed', but here the allegation is that the exposure was not visual but through another means [refer to that 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].

4. That wilfully exposing the complainant to that indecent act was unlawful.

The fourth element is concerned with proof of unlawfulness. Wilfully exposing a person with an impairment of the mind to an indecent act is unlawful unless authorised, justified, or excused by law, or is the subject of a specific legal defence.

[Here outline any authorisation, justification or excuse raised on the evidence and which must be negated by the prosecution; or outline any defence under s. 216(4) the onus of which lies on the defendant to prove on the balance of probabilities].

(If appropriate) In this trial there is no authorisation, justification, excuse or defence raised on the evidence and you will find this element to have been proven.

5. (Where a circumstance of aggravation is charged under ss 216(3) or (3A), go to the circumstances of aggravation at the end of this Chapter).

Section 216(2)(e) – exposure to indecent object

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

- 1. That the complainant was a person with an impairment of the mind at the relevant time.**

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].

- 2. 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, 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.

- 3. That the defendant wilfully exposed the complainant to that indecent [object, 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, 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, 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, substitute with the following) **'Exposed' usually means 'showed', but here the allegation is that the exposure was not visual but through another means [refer to that 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].

4. **That the defendant had no legitimate reason to expose the complainant to the [object, 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, 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.

5. (Where a circumstance of aggravation is charged under ss 216(3) or (3A), go to the circumstances of aggravation at the end of this Chapter).

Section 216(2)(f) – taking indecent photographs/images

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

- 1. That the complainant was a person with an impairment of the mind at the relevant time.**

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.]

- 2. That the defendant took a photograph (or as the case may be, 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].

- 3. 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.

- 4. 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 indecent [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 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.

- 5.** (Where a circumstance of aggravation is charged under ss 216(3) or (3A), go to the circumstances of aggravation at the end of this Chapter).

Aggravations

(Where a circumstance of aggravation is charged under s 216(3)):

1. **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)

2. **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.

(Where a circumstance of aggravation is charged under s 216(3A)):

3. **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 lineal descendant of, for example, any step-parents, step-grandparents, aunts, uncles or cousins.