

Taking an indecent photograph etc of a child under 16 s 210(1)(f)

The prosecution must prove that:

1. The defendant took an indecent photograph or recorded, by means of any device, any indecent visual image of a child.

“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.¹

2. The complainant was under 16 years at the time.²
3. The defendant had no legitimate reason for taking the photograph or image. The law leaves it to the good sense of the jury as representatives of the community whether the defendant acted without legitimate reason.³

The onus of proof is on the prosecution. The defendant does not have to satisfy the jury that he or she had a legitimate reason. The prosecution has to satisfy the jury beyond a reasonable doubt that the defendant had no legitimate reason.

4. Refer to any circumstances of aggravation.⁴

¹ *R v Dunn* [1973] 2 NZLR 481.

² If the offence is alleged to have been committed in respect of a child of or above 12 years, it is a defence to prove that the defendant believed, on reasonable grounds, that the child was of or above 16 years(s 210(5)). See also s229 which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

³ The phrase “legitimate reason” is derived from the *Protection of Children Act 1978* (UK). Lord Scarman said during the debate on the Act: “This phrase really embraces a question of fact on which courts and juries are well able to reach a sensible decision in determining the meaning.”

⁴ Section 210(3),(4) and (4A). See also *Circumstances of Aggravation in Sexual Offences* (100.1). The offence is a prescribed offence under s 161Q *Penalties and Sentences Act 1992* so a serious organised crime circumstance of aggravation is applicable.