

Abuse (attempted or actual penile intercourse) of persons with an impairment of the mind: section 216(1)

Offences charged after 1 August 2023

Note: This direction is concerned only with charges under section 216(1) of the Code. For charges under section 216(2), see Direction No 119C.

The former section 216(1) continues to apply to a defendant charged before 1 August 2023: see Direction No 119B.

Legislation

216 Abuse of persons with an impairment of the mind

- (1) Any person who engages or attempts to engage in unlawful penile intercourse with a person with an impairment of the mind is, subject to subsection (3)(a) and (b), guilty of a crime, and is liable to imprisonment for 14 years.
- (2) ...
- (3) If the person with an impairment of the mind is not the lineal descendant of the offender but the offender is the guardian of that person or, for the time being, has that person under the offender's care, the offender is guilty of a crime, and is liable—
 - (a) in the case of the offence of engaging in unlawful penile intercourse—to imprisonment for life; or
 - (b) in the case of an attempt to engage in unlawful penile intercourse—to imprisonment for life; or
 - (c) ...
- (3A) ...
- (4) It is a defence to a charge of an offence defined in this section to prove—
 - (a) that the accused person believed on reasonable grounds that the person was not a person with an impairment of the mind; or
 - (b) that the doing of the act or the making of the omission which, in either case, constitutes the offence did not in the circumstances

constitute sexual exploitation of the person with an impairment of the mind.

(5) ...

756 Offences charged before or after the commencement

- (1) Despite the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*, the former provisions continue to apply in relation to a person charged with an offence before the commencement.
- (2) The new provisions apply in relation to a person charged with an offence after the commencement, whether the charge is for an offence committed before or after the commencement.
- (3) In this section—

former provisions means the provisions of this Code as in force from time to time before the commencement.

new provisions means the provisions of this Code as in force from the commencement.

Commentary

The *Domestic and Family Violence Protection (Combating Coercive Control and Other Legislation Amendment Act) 2023* amended s 216(1) of the *Criminal Code* (having or attempting to have unlawful carnal knowledge with or of a person with an impairment of the mind) to describe the offence as engaging or attempting to engage in unlawful penile intercourse with a person with an impairment of the mind.

The Amendment Act commenced on 1 August 2023. The transitional provision in s 756 *Criminal Code* states that the former provisions continue to apply where the person is charged before the commencement date. The new provisions apply where the person is charged after the commencement date, whether the charge is for an offence committed before or after the commencement.

The meaning of engage in penile intercourse is set out in s 6:

6 Meaning of engage in penile intercourse

- (1) **Penile intercourse** is the penetration, to any extent, of the vagina, vulva or anus of a person by the penis of another person.
- (2) A person **engages** in penile intercourse with another person if—
 - (a) the person penetrates, to any extent, the vagina, vulva or anus of another person with the person's penis; or

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- (b) the person’s vagina, vulva or anus is penetrated, to any extent, by the penis of another person.

Other relevant definitions for this offence are contained in s 1 (“penis”), (“person with an impairment of the mind”) and s 4 (“attempts to commit offences”).

The definition of attempts to commit offences in s 4 *Criminal Code* applies to the offence of attempting to engage in unlawful penile intercourse with a person with an impairment of the mind: see *R v O’Neill* [1996] 2 Qd R 326.

See s 216(4)(a) for a defence available to a person charged with this offence where the accused person believed on reasonable grounds that the complainant was not a person with an impairment of the mind.

See s 216(4)(b) for a defence available to a person charged with this offence where the doing of the act or the making of the omission which, in either case, constitutes the offence did not in the circumstances constitute sexual exploitation of the person with an impairment of the mind.

The onus of proving these defences is on the defendant, on the balance of probabilities.

As to the meaning of “sexual exploitation” in s 216(4)(b), in *R v Little* (2013) 231 A Crim R 145; [\[2013\] QCA 233](#), [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.

Suggested Direction

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:**

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.]

2. That the defendant engaged (or attempted to engage) in unlawful penile intercourse with the complainant.

The prosecution must prove that there was an act of physical penetration (or an attempted act of physical penetration).

Penile intercourse is the penetration, to any extent, of the vagina/vulva/anus (as the case may be) of another person.

A person engages in penile intercourse with another person if:

(a) The person penetrates to any extent, the vagina/vulva/anus (as the case may be) of another person with the person's penis.

This means that the defendant penetrated (or attempted to penetrate) to any extent, the vagina/vulva/anus (as the case may be) of the complainant with his penis.

or

(b) The person's vagina/vulva/anus (as the case may be) is penetrated, to any extent, by the penis of another person.

This means that the defendant's vagina/vulva/anus (as the case may be) was penetrated, to any extent, by the complainant's penis.

- Penetration to the slightest degree is sufficient;**
- The offence is complete the moment that penetration is achieved;**
- There is no requirement for proof that penetration was effected for any particular period of time;**
- Whether or not ejaculation occurred is irrelevant; and**
- Whether or not the complainant consented to the act of penetration is irrelevant.**

[Where it is alleged that the defendant *attempted* to engage in penile intercourse with the complainant]

The defendant is charged with attempting to engage in unlawful penile intercourse. I will now explain to you what the law means by an “attempt” in this context.

For someone to attempt to commit a particular offence, that person must intend to commit that offence. So, in this case, for the defendant to have attempted to engage in unlawful penile intercourse, the defendant must have been acting with the purpose of engaging in penile intercourse. Someone who attempts to bring about a certain result must be meaning to do so at the time of engaging in the conduct which is the subject of the charge. This intention on the part of the defendant must be proved by the prosecution, beyond reasonable doubt.

You have to consider what the defendant did, when, it is alleged, he was attempting to have penile intercourse. A mere intention to commit an offence does not matter, if the defendant had not started to put his intention into effect, by conduct, i.e. some act or acts by the defendant which were directed to achieving his or her purpose. Further, the defendant’s conduct must have been something which, if anyone had been watching it, would have made the defendant’s purpose clear. The prosecution must prove, beyond reasonable doubt, that there was something done by the defendant which was conduct of the kind which I have just described.

Therefore you have to consider the evidence of what the defendant was doing when, the prosecution argues, he was attempting to engage in penile intercourse. You must be satisfied, beyond reasonable doubt, that he was doing what the prosecution alleges he was doing. You have to consider whether, by that conduct, the defendant had begun to put his intention into effect, and whether the conduct would make it clear to someone watching it that the defendant had the purpose which the prosecution alleges.

It is unnecessary for the prosecution to prove that the defendant did everything which he could have done to bring about the intended result.

[Describe the competing arguments, by reference to those elements of an “attempt”.]

[Where appropriate, this might be added] **The argument for the defendant is that what was done [alleged to have been done] was, at the most, merely preparation ahead of any attempt to engage in penile intercourse, so that when the defendant was doing those things, he was not then in the process of trying to engage in penile intercourse. The law recognises that merely doing something to prepare for the commission of an offence, is not of itself an attempt to commit the offence. It is for you to assess whether you**

are satisfied, beyond reasonable doubt, that the defendant's acts went beyond mere preparation.

3. That the penile intercourse (or attempted penile intercourse) was unlawful.

This element is concerned with proof of unlawfulness. The act of engaging in penile intercourse (or attempting to engage in penile intercourse) with 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 section 216(4) the onus of which lies on the defendant to prove on the balance of probabilities. See Direction No 65 for defences in relation to sexual offences alleged to have been committed against a person with an impairment of the mind.]

[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.

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

4. 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 in the sense that he was required to protect her property or rights in circumstances in which the complainant was not capable of managing her affairs, as opposed to voluntarily taking on any such responsibility.

[or, as the case may be]

5. 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 alleged penile intercourse (or attempting to engage in penile intercourse), that is, he had assumed the responsibility of looking after the complainant at the time. The prosecution does not have to prove that he was the only person looking after the complainant at the relevant time.

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

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