

119A. Carnal knowledge of persons with an impairment of the mind: section 216(1) - Offences committed before 1 August 2023

119A.1 Legislation

[Last reviewed: October 2024]

Criminal Code

[Section 216](#) - Abuse of persons with an impairment of the mind (version current immediately before 1 August 2023)

[Section 6](#) - Carnal Knowledge (version current immediately before 1 August 2023)

119A.2 Commentary

[Last reviewed: October 2024]

Note: This direction is concerned with defendants charged with a s 216(1) offence before 1 August 2023. For defendants charged with a s 216(1) offence after 1 August 2023, see **Chapter 119 – Abuse (attempted or actual penile intercourse) of persons with an impairment of the mind: s 216(1)**. For defendants charged with offences under s 216(2), see **Chapter 119B – Abuse (indecent dealing, exposure to indecent acts, taking indecent photographs etc) of persons with an impairment of mind**.

The defendant must have:

- (1) had or attempted to have unlawful carnal knowledge;
- (2) with or of a complainant with an impairment of the mind.

Relevant definitions for this offence are at s 1 ('person with an impairment of the mind'), s 4 ('attempt') and s 6 ('carnal knowledge') of the *Criminal Code*.

Prior to 23 September 2016, this offence did not proscribe carnal knowledge by anal intercourse (then referred to as sodomy) of or with a person with a mental impairment; that was then proscribed by s 208(1)(c). That occurred by way of specific exclusion in the definition of 'carnal knowledge' at section 216(5) as effected by the *Health and other Legislation Amendment Act 2016* (Qld).

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.

For further commentary on the application of s 4 to s 216(1) and subs (4) defences, see **Chapter 119 – Abuse (attempted or actual penile intercourse) of persons with an impairment of the mind: s 216(1)**.

119A.3 Suggested Direction

[Last reviewed: October 2024]

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 had carnal knowledge [or attempted to have carnal knowledge] of the complainant:**

This second element refers to the concept of ‘carnal knowledge’. Carnal knowledge means the penetration by the defendant’s penis into the vulva, vagina or anus (as the case may be) of the complainant;

or

The penetration by the complainant’s penis into the vulva, vagina or anus (as the case may be) of the defendant.

(a) penetration to the slightest degree is sufficient;

(b) the offence is complete the moment that penetration is achieved;

(c) there is no requirement for proof that penetration was effected for any particular period of time; and

(d) whether or not ejaculation occurred is irrelevant.

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

(Where it is alleged that the defendant *attempted* to have carnal knowledge with or of the complainant, the following may be added):

The defendant is charged with attempting to have unlawful carnal knowledge. 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 have unlawful carnal knowledge, the defendant must have been acting with the purpose of having carnal knowledge. 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/she] was attempting to have carnal knowledge. A mere intention to commit an offence does not matter, if the defendant had not started to put [his/her] intention into effect, by conduct, i.e. some act or acts by the defendant which were directed to achieving [his/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/she] was attempting to have carnal knowledge. You must be satisfied, beyond reasonable doubt, that [he/she] was doing what the prosecution alleges [he/she] was doing. You have to consider whether, by that conduct, the defendant had begun to put [his/her] 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/she] 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 have carnal knowledge, so that when

the defendant was doing those things, [he/she] was not then in the process of trying to have carnal knowledge. Our 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 having of carnal knowledge [or the attempt to have carnal knowledge] was unlawful:**

The third element is concerned with proof of unlawfulness. The act of having carnal knowledge with or of [or attempting to have carnal knowledge with or of] 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(5) 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.

(Where a circumstance of aggravation is charged under section 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/she] had a duty by law to protect the complainant in the sense that [he/she] was required to protect [his/her] 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)

- 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/her] care at the time of the alleged having carnal knowledge [or attempting to have carnal knowledge], 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.