Abuse of persons with an impairment of mind: section 216(2)

NOTE THAT THIS DIRECTION IS CONCERNED ONLY WITH CHARGES PURSUANT TO S. 216(2). FOR CHARGES PURSUANT TO S. 216(1) SEE DIRECTION # 119

Legislation

216 Abuse of persons with an impairment of the mind

(1) Any person who has or attempts to have unlawful carnal knowledge with or of 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) Any person who –

(a) unlawfully and indecently deals with a person with an impairment of the mind; or

(b) unlawfully procures a person with an impairment of the mind to commit an indecent act; or

(c) unlawfully permits himself or herself to be indecently dealt with by a person with an impairment of the mind; or

(d) wilfully and unlawfully exposes a person with an impairment of the mind to an indecent act by the offender or any other person; or

(e) without legitimate reason, wilfully exposes a person with an impairment of the mind to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter; or

(f) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a person with an impairment of the mind;

is, subject to subsections (3)(c) and (3A), guilty of a crime, and is liable to imprisonment for 10 years.

(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 having unlawful carnal knowledge - to imprisonment for life; or

(b) in the case of an attempt to have unlawful carnal knowledge - to imprisonment for life; or

(c) in the case of an offence defined in subsection (2)—to imprisonment for 14 years.

(3A) In the case of an offence defined in subsection (2), if the person with an impairment of the mind is, to the knowledge of the offender, the offender's lineal descendant, the offender is guilty of a crime, and is liable to imprisonment for 14 years.

(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) In this section—

deals with includes doing any act that, if done without consent, would constitute an assault.

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 (“person with an impairment of the mind”) and s. 216(5) (“deals with”) of the Criminal Code. 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. 216.

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 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.

The sample direction as to the meaning of the term "deals with" has been taken from *R v S* [1996] 1 Qd R 559.

The sample 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 first sample directions concerning "indecency" 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 "indecency" 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 sample 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 "*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 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.

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).

Suggested Direction

(Circumstances of aggravation that may be applied to each subsection of the offence provision)

[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 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]

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 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 or 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.

(WHERE THE DEFENDANT IS CHARGED UNDER S. 216(2)(a))

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 dealt with the complainant;

This second element comprises two components, the concept of "deals with" and the conduct of the defendant.

The term "deals with" is capable of wide application and means "to have to do with", "to act towards" or "to treat". It includes, but is not limited, to a touching of the complainant, as well as an application of force of any kind, directly or indirectly, to the complainant. It is irrelevant whether the complainant consented to being dealt with or not, and so consent does not affect in any way the consideration of this element.

You may have noticed that the charge is referred to as Indecent Treatment of the complainant. A dealing with the complainant and a treatment of the complainant are interchangeable terms.

If you are satisfied that the complainant was dealt with, the second aspect of this element that must also be proven beyond reasonable doubt is that it was the defendant who dealt with the complainant.

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

3. That the dealing with the complainant 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 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 complainant 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.

[If appropriate] 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 touching 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 conduct.

4. That the dealing with the complainant was unlawful.

The fourth element is concerned with proof of unlawfulness. The act of indecently dealing 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 negatived 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] 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 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 appropriate, refer to the start of the suggested directions for sample directions on any charged circumstance of aggravation]

(WHERE THE DEFENDANT IS CHARGED UNDER S. 216(2)(b))

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 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 or her own volition, that is to persuade the complainant to do the thing that he or she did. It is irrelevant whether the complainant consented to doing the act which he or 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] 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.

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.

[Outline here any authorisation, justification or excuse raised on the evidence and which must be negatived 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] 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.

[Where appropriate, refer to the start of the suggested directions for sample directions on any charged circumstance of aggravation]

(WHERE THE DEFENDANT IS CHARGED UNDER S. 216(2)(c))

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 permitted himself or 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] 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 negatived 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.

[Where appropriate, refer to the start of the suggested directions for sample directions on any charged circumstance of aggravation]

(WHERE THE DEFENDANT IS CHARGED UNDER S. 216(2)(d))

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 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 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]

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 negatived 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.

[Where appropriate, refer to the start of the suggested directions for sample directions on any charged circumstance of aggravation]

(WHERE THE DEFENDANT IS CHARGED UNDER S. 216(2)(e))

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 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.

3. **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]

4. **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.

[Where appropriate, refer to the start of the suggested directions for sample directions on any charged circumstance of aggravation]

(WHERE THE DEFENDANT IS CHARGED UNDER S. 216(2)(f))

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 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 as the case may be, visual image) of the complainant was indecent.**

   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.

4. That the defendant had no legitimate reason to take the photograph (or as the case may be, 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 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.

[Where appropriate, refer to the start of the suggested directions for sample directions on any charged circumstance of aggravation]