

113. Carnal Knowledge: s 215 (Offences charged prior to 1 August 2023)

113.1 Legislation

[Last reviewed: December 2024]

Criminal Code

[Repealed] [Section 215](#) - Carnal knowledge with or of children under 16

[Repealed] [Section 6](#) - Carnal knowledge

[Section 229](#) - Knowledge of age immaterial

[Section 745](#) - Application of former s 215

[Section 756](#) - Offences charged before or after the commencement of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*

113.2 Commentary

[Last reviewed: December 2024]

Note that the *Domestic and Family Violence Protection (Combating Coercive Control and Other Legislation Amendment Act) 2023* (Qld) amended s 215 of the *Criminal Code* to describe the offence as engaging in penile intercourse with a child. The Amendment Act commenced on 1 August 2023. The transitional provision in s 756 of the *Criminal Code* states that the former provisions continue to apply where the person is charged before the commencement date. See **Chapter 113a – Engaging in Penile Intercourse with Child** for the new provision.

The defendant must have:

- (1) Had or attempted to have carnal knowledge with or of the complainant;
- (2) Which was unlawful;
- (3) In circumstances where the complainant was under the age of 16.

Consent to the carnal knowledge by the complainant is irrelevant.

Before it was amended by the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* (Qld), the term ‘carnal knowledge’ was defined by s 6(2) of the *Criminal Code* as including anal intercourse. Section 6(1) further specified that ‘[i]f carnal knowledge is used in defining an offence,

the offence, so far as regards that element of it, is complete on penetration to any extent’.

Other relevant definitions for this offence are at s 1 ‘Crown Law Officer’ and ‘person with an impairment of the mind’ and s 4, ‘attempt’ of the *Criminal Code*.

See s 215(5) for a defence available to a person charged with this offence where the child is 12 years or older. The onus of proving the defence is on the defendant, on the balance of probabilities. By the operation of s 229, a defendant cannot raise an excuse concerning the age of the complainant based on the operation of s 24, which would leave the onus of proof on the prosecution. See also the reasoning for analogous provisions in *R v Addley* [2019] 2 Qd R 46, following *R v Shetty* [2005] 2 Qd R 540, [13]-[14].

See s 215(5A) for a defence to a circumstance of aggravation that the child had an impairment of the mind under s 215(4A). The onus of proving the defence is on the defendant, on the balance of probabilities.

Although circumstances of aggravation are provided for the defendant being the guardian of the child and where the child is in the care of the defendant for the time being by s 215(4), there is no circumstance of aggravation if the child is the lineal descendant of the defendant (presumably as that conduct would amount to incest).

Where the complainant suffers an impairment of the mind and is under 16 years, it is open to the prosecution to present a charge under either this section or s 216. Where the offence is charged as, or the defendant is convicted of attempted carnal knowledge, under s 215 the maximum penalty will be 14 years by operation of s 536(2). However, the maximum penalty if charged under s 216 will be life imprisonment by the operation of s 216(3)(b).

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.

113.3 Suggested Direction

[Last reviewed: December 2024]

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

- 1. That the defendant had carnal knowledge with or of the complainant.**

Carnal knowledge means the insertion of the defendant’s penis into the [vagina/vulva/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;**
- d) whether or not ejaculation occurred is irrelevant; and**
- e) whether or not the complainant consented to the act of penetration is irrelevant.**

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

(Where attempted carnal knowledge has been charged, also see chapter 71 - Attempts).

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, the defendant 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.

- 2. That the complainant was under 16 [(or as the case may be) under 12 years].**

[If necessary, outline here the evidence relevant to proof of this element].

- 3. That the 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 a person under the age of 16 years 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 negated by the prosecution, or outline any defence under s 215(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 s 215(4)).

- 4. 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

(or, as the case may be)

5. That the complainant was under the defendant's care for the time being.

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(Where a circumstance of aggravation is charged under s 215(4A)).

6. 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 in dispute].