

Incest – s 222 of the *Criminal Code*

Legislation

222 Incest

- (1) Any person who—
- (a) engages in penile intercourse with the person's offspring or other lineal descendant, or sibling, parent, grandparent, uncle, aunt, nephew or niece; and
 - (b) knows that the other person bears that relationship to him or her, or some relationship of that type to him or her;
- commits a crime.

Maximum penalty—imprisonment for life.

- (2) Any person who attempts to commit the crime of incest is liable to imprisonment for 10 years.
- (3) It is immaterial that the act or attempted act of penile intercourse happened with the consent of either person.
- (4) It is a defence to a charge under this section to prove that the accused person was, at the time when the act or attempted act of penile intercourse happened, acting under the coercion of the other person.
- (5) A reference in this section to an offspring or other lineal descendant, or a sibling or a parent includes a relationship of that type that is a half, adoptive or step relationship.
- (5A) For sub-s 5, a reference to an adoptive relationship includes a relationship of that type that came into existence as a result of the making of an adoption order under the *Adoption Act 2009* regardless of whether the order has been discharged.
- (6) For sub-s (5), a reference to a step relationship includes a relationship corresponding to a step relationship arising because of cohabitation in a de facto relationship or because of a foster relationship or a legal arrangement.
- (7) Also, for sub-s (5), a reference to a step relationship does not include a step relationship that first arose after the relevant persons became adults.

- (7A) Also, if a parentage order is made under the *Surrogacy Act 2010*, a reference in this section to an offspring or other lineal descendant, or a sibling or a parent includes a relationship of that type that—
- (a) existed before the making of the order; or
 - (b) came into existence as a result of the making of the order regardless of whether the order has been discharged.
- (7B) Also, if a cultural recognition order is made under the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020*, a reference in this section to an offspring or other lineal descendant, or a sibling or a parent includes a relationship of that type that—
- (a) existed before the making of the order; or
 - (b) came into existence as a result of the making of the order regardless of whether the order has been discharged.
- (8) This section does not apply to penile intercourse between persons who are—
- (a) lawfully married; or
 - (b) if both persons are adults—entitled to be lawfully married.

Commentary

Relevant definitions for this offence are at s 1 (“adult”) and s 6 (“penile intercourse”) of the Criminal Code, and at s 32DA (“de facto partner”) of the *Acts Interpretation Act 1954*.

The s 6 definition of “penile intercourse”, inserted in substitution of “carnal knowledge” by s 9 *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* with effect from 1 August 2023, includes penile penetration of the anus, as did the former definition of “carnal knowledge”, which was amended to include anal intercourse (initially referred to as sodomy) with effect from 3 December 2004 by the Schedule to *Justice and Other Legislation Amendment Act 2004*. Because the physical acts contemplated by either label remain the same and because trial judges’ directions should direct what the relevant act is, the below suggested direction adopts the more recent label of “penile intercourse” **without reminding judges that the theoretically correct label for pre-1 August 2023 offending is “carnal knowledge”**.

Section 222 was amended to refer to orders under the *Adoption Act 2009*, *Surrogacy Act 2010* and *Meriba Omasker Kaziw Kazipa (Torres Strait Traditional Child Rearing Practice) Act 2020* and the effect of those orders were introduced into the provision by *Meriba Omasker Kaziw Kazipa (Torres Strait Traditional Child Rearing Practice) Act*

2020, s 127, effective from 1 July 2021. There is no transitional provision concerning those amendments and so they would seem to be operative only from that time.

Where the prosecution relies upon the alternative within s 222(1)(b), namely a knowledge of “some relationship of that type”, it will be necessary to explain that element by reference to the facts alleged in the prosecution case. The expression “some relationship of that type” in s 222(1)(b) appears to be related to the expression “a relationship of that type” in s 222(5). For example, where the complainant is the step-daughter of the defendant, the jury might be instructed that it must be proved that there was that relationship and that the defendant knew that there was a relationship of the type of father and daughter.

See s 636 for a facilitation of proof provision as to the blood relationship between the defendant and complainant, where that is alleged, and the presumption of knowledge of that relationship by the defendant. The occasion for resort to this provision will be limited by the state of the evidence and recognition that the occasion for a reversed onus defence is limited by the need for the prosecution to prove its case in the first place, by parity of reasoning from *R v Addley* [2018] QCA 125, following *R v Shetty* [2005] 2 Qd R 540, [13]-[14] dealing with the reversed onus defence provision in s 218A. However, the occasion may still arise for resort to the presumption, particularly where there is no direct evidence of the defendant’s knowledge of the relationship, but there is evidence that the blood relationship is reputed to exist.

See s 222(4) for a defence of coercion available to a person charged with this offence. The onus of proving the defence is on the defendant on the balance of probabilities.

The suggestion direction on the meaning of the word “coercion” draws both on the dictionary definition of the word from the Oxford English Dictionary online and, in so far as that definition refers to compulsion, aspects of the suggested direction on s 31(1)(d) of the Criminal Code.

See s 222(8) for an exclusionary provision applying where both persons are married or, if both adults, are entitled to be married. Section 222(8) was amended by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013*, assent 29 April 2013 to confine the exclusion to adults who are lawfully entitled to be married. “Adult” is defined at s 1 *Criminal Code*. As to when people are lawfully married and adults are entitled to be lawfully married, see ss 11 - 23B of the *Marriage Act 1961 (Cth)*. See also *R v Rose* [2010] 1 Qd R 87 for the meaning of the phrase “entitled to be lawfully married”.

There is no suggested direction concerning s 222(8) as it is considered that the fact of lawful marriage or entitlement to lawful marriage will always be a matter of law, and hence not a matter for the jury’s deliberations.

Suggested Direction

The offence of incest is committed if a person engages in penile intercourse with the person's offspring or other lineal descendant, or sibling, parent, grandparent, uncle, aunt, nephew, or niece and knows that the other person bears that relationship to him or her, or some relationship of that type to him or her.

In order for the prosecution to prove this offence, it must prove each of the following three elements or ingredients beyond reasonable doubt:

1. That the defendant engaged in penile intercourse with the complainant.

Penile intercourse is the penetration, to any extent, of the vagina, vulva or anus of a person by the penis of another person.

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

[Refer to evidence in issue relevant to this element, or if not in issue direct the jury to that effect and that they should take this element as having been proven.]

[Where the defendant has been charged with attempted incest pursuant to s 222(2):

1. That the defendant attempted to engage in penile intercourse with the complainant.

Because an attempt is alleged the prosecution need not prove that penile intercourse occurred. It must however prove beyond reasonable doubt that the defendant attempted to engage in penile intercourse with the complainant. For that reason, it is relevant to know what penile intercourse is [here read the above meaning of penile intercourse and engaging in 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 penile intercourse, the defendant must have been acting with the purpose of having 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 engage in 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 have penile intercourse, so that when the defendant was doing those things, he was not then in the process of trying to engage in penile penetration. 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 there was a relationship between the defendant and the complainant of the type which is alleged, namely (offspring or other lineal descendant, or sibling, parent, grandparent, uncle, aunt, nephew or niece, as the case may be).**

[If the nature of the relationship is in issue] **The prosecution contends that the relationship between the defendant and complainant is (an offspring or other lineal descendant, or a sibling or a parent)**

[If appropriate, include the following paragraphs in this section, as amended to reflect the particularised relationship] **A reference to (an offspring or other**

lineal descendant, or a sibling or a parent) includes a relationship that is a half relationship.

A reference to (an offspring or other lineal descendant, or a sibling or a parent) includes a step relationship, provided the step relationship arose prior to the defendant and complainant each becoming adults, that is prior to each of them reaching the age of 18 years. It also includes a relationship that is corresponding to a step relationship because of cohabitation in a de facto relationship or because of a foster relationship or a legal arrangement. [Refer, if necessary, to the definition of “de facto partner” at s 32DA of the *Acts Interpretation Act 1954*.]

In this trial you have heard evidence (or there is a formal admission) that an order was made under the *Adoption Act 2009*. A reference to (an offspring or other lineal descendant, or a sibling or a parent) also includes an adoptive relationship, including where that adoptive relationship came about as a result of an order under the *Adoption Act 2009*, regardless of whether the order has been discharged.

In this trial you have heard evidence (or there is a formal admission) that a parentage order was made under the *Surrogacy Act 2010*. A reference to (an offspring, other lineal descendant, or a sibling or a parent) also includes a relationship of that type that existed before the making of the order, or that came into existence as a result of the making of the order regardless of whether the order has been discharged.

In this trial you have heard evidence (or there is a formal admission) that an order was made under the *Meriba Omasker Kaziw Kazipa (Torres Strait Traditional Child Rearing Practice) Act 2020*. A reference to (an offspring, other lineal descendant, or a sibling or a parent) also includes a relationship of that type that existed before the making of the order, or that came into existence as a result of the making of the order regardless of whether the order has been discharged.

[Refer to the evidence relevant to proof of this element if in issue, or if not direct that the element is not in issue and that the jury should find it proven.]

3. That the defendant knew that there was that relationship, or a relationship of that type.

[Where the prosecution relies upon the alternative within s 222(1)(b), namely a knowledge of “some relationship of that type”, it will be necessary to explain that element by reference to the facts alleged in the prosecution case. The expression “some relationship of that type” in s 222(1)(b) appears to be related to the expression “a relationship of that type” in s 222(5). For example, where the complainant is the step-daughter of the defendant, the jury might be instructed

that it must be proved that there was that relationship and that the defendant knew that there was a relationship of the type of father and daughter.]

[Where the charge alleges knowledge of the particularised relationship only] **The prosecution has alleged that the defendant knew that the stated relationship existed (or that a relationship of that type existed, as the case may be). In order to prove this element, the prosecution must prove that the defendant actually knew the relationship existed (or a relationship of that type existed, as the case may be) as opposed to merely believing or suspecting that to be the case.**

[If appropriate, explain what is meant by “a relationship of that type” by reference to the evidence in the trial.]

[Outline the evidence relevant to the issue of knowledge of relationship.]

[If a blood relationship is alleged, and the direction is appropriate in the circumstances] **However, the allegation here is of a blood relationship between the defendant and the complaint, namely that of (father and daughter, or as the case may be). I direct you that blood relationship is sufficiently proved by proof that the relationship is reputed to exist and it is not necessary, regardless of whether any marriage that the blood relationship relies upon was lawful or not and that the defendant is, until the contrary is proved, presumed to know at the time the penile intercourse (or attempted penile intercourse, as the case may be) is alleged to have been committed of the blood relationship.**

Unlike the elements of the offence, it is for the defendant to prove that he did not in fact have this knowledge. However, the standard of proof imposed on the defendant is less onerous than that imposed on the prosecution to prove the elements of the offence. The prosecution must prove the elements beyond reasonable doubt, whereas the defendant need prove this issue to the lesser standard, being on the balance of probabilities, that is, he or she need only prove this matter to be more likely than not.

If the defendant proves on the balance of probabilities that he or she did not know that the stated relationship existed, that will mean that the prosecution has failed to prove beyond reasonable doubt that state of knowledge required to prove the charge. In that instance he or she must be acquitted; that is found not guilty of the charge.

If defence of coercion arises

It is a defence for the defendant to prove on the balance of probabilities that, at the time the act of penile intercourse (or attempted penile

intercourse, as the case may be) happened, the defendant was acting under the coercion of another person.

The term “coercion” does not have a special legal meaning. It is a word of ordinary English usage, and usually means the act of constraining, restraining or compulsion or the application of force to control the action of a voluntary agent.

For present purposes, the defendant is not criminally responsible for having penile intercourse (or attempting to have penile intercourse, as the case may be) if he or she did that in order to save themselves or their property (or the person or property of another, as the case may be) from serious harm or detriment threatened by some person in a position to carry out the threat; and, when the defendant did that, he or she reasonably believes that he or she is otherwise unable to escape (or that the other person was unable to escape, as the case may be) the carrying out of the threat and, engaging in penile intercourse (or attempting to engage in penile intercourse, as the case may be) was reasonably proportionate to the threatened harm or detriment.

[Discuss evidence material to coercion.]

In this case, you must consider whether:

- 1. a threat was made of serious harm or detriment to the defendant’s person or property (or the person or property of another, as the case may be). “Detriment” is a common English word meaning injury or damage); and**
- 2. the person making the threat was in a position to carry it out; and**
- 3. the defendant reasonably believed he or she was unable to escape the carrying out of the threat (or that the other person was unable to escape the carrying out of the threat other than by engaging in penile intercourse (or attempting to engage in penile intercourse, as the case may be); and**
- 4. the engaging in penile intercourse (or attempting to engage in penile intercourse, as the case may be) was reasonably proportionate to the harm or detriment threatened.**

[Set out the evidence relevant to the issue of a belief being held at the time of the charged conduct, and the reasonable grounds, or otherwise, for that belief.]

Unlike the elements of the offence, it is for the defendant to prove that this defence applies. However, the standard of proof imposed on the defendant is less onerous than that imposed on the prosecution to prove the elements of the offence. The prosecution must prove the elements beyond

reasonable doubt, whereas the defendant need prove this defence to the lesser standard, being on the balance of probabilities, that is, he or she need only prove this matter to be more likely or than not the case.

If the defendant proves on the balance of probabilities that he or she was acting under the coercion of another person, that is a complete defence to the charge and he or she must be acquitted; that is found not guilty.