

## **Carnal knowledge of persons with an impairment of the mind: section 216(1)**

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**NOTE THAT THIS DIRECTION IS CONCERNED ONLY WITH CHARGES PURSUANT TO SECTION 216(1). FOR CHARGES PURSUANT TO SECTION 216(2) SEE DIRECTION #146**

### **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.

### Commentary

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

See section 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.

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 section 208(1)(c). That occurred by way of specific exclusion in the definition of “carnal knowledge” at section 216(5). The current position was effected by the *Health and Other Legislation Amendment Act 2016*.

### 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 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 genitalia (or anus, as the case may be) of the complainant;**

- 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 attempted carnal knowledge has been charged]

**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 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 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 have carnal knowledge. 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 carnal knowledge, so that when the defendant was doing those things, he 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 of (or attempting to have carnal knowledge 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 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 having carnal knowledge (or attempting to have carnal knowledge), 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.**