

## 119. Abuse (attempted or actual penile intercourse) of persons with an impairment of the mind: s 216(1) - Offences charged after 1 August 2023

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### 119.1 Legislation

[Last reviewed: October 2024]

*Criminal Code*

[Section 216](#) - Abuse of persons with an impairment of the mind

[Section 756](#) - Offences charged before or after the commencement

[Section 6](#) - Meaning of engage in penile intercourse

### 119.2 Commentary

[Last reviewed: October 2024]

**Note:** This direction is only concerned with charges under s 216(1) of the *Criminal Code*. For charges 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 former s 216(1) continues to apply to a defendant charged before 1 August 2023: see **Chapter 119A – Carnal knowledge of persons with an impairment of the mind: section 216(1) - Offences committed before 1 August 2023**.

The *Domestic and Family Violence Protection (Combating Coercive Control and Other Legislation Amendment Act) 2023* (Qld) amended s 216(1) of the *Criminal Code* (having or attempting to have unlawful carnal knowledge with or of a person with an impairment of the mind) to describe the offence as engaging or attempting to engage in unlawful penile intercourse with a person with an impairment of the mind.

The Amendment Act commenced on 1 August 2023. The transitional provision in s 756 *Criminal Code* states that the former provisions continue to apply where the person is charged before the commencement date. The new provisions apply where the person is charged after the commencement date, whether the charge is for an offence committed before or after the commencement.

To be guilty of the offence under s 216(1), the defendant must have:

- (1) engaged or attempted to engage in unlawful penile intercourse;
- (2) with a complainant with an impairment of the mind.

The meaning of engage in penile intercourse is set out in s 6. Other relevant definitions for this offence are contained in s 1 ('penis' and 'person with an impairment of the mind') and s 4 ('attempts to commit offences').

The definition of attempts to commit offences in s 4 *Criminal Code* applies to the offence of attempting to engage in unlawful penile intercourse with a person with an impairment of the mind: see *R v O'Neill* [1996] 2 Qd R 326, 432.

See s 216(4)(a) for a defence available to a person charged with this offence where the accused person believed on reasonable grounds that the complainant was not a person with an impairment of the mind.

See s 216(4)(b) for a defence available to a person charged with this offence where 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.

The onus of proving these defences is on the defendant, on the balance of probabilities.

As to the meaning of 'sexual exploitation' in s 216(4)(b), in *R v Little* (2013) 231 A Crim R 145; [2013] QCA 223, [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.

### 119.3 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) 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 engaged (or attempted to engage) in unlawful penile intercourse with the complainant.**

**The prosecution must prove that there was an act of physical penetration (or an attempted act of physical penetration).**

**Penile intercourse is the penetration, to any extent, of the [vagina/vulva/anus (as the case may be)] of another person.**

**A person engages in penile intercourse with another person if:**

- (a) The person penetrates to any extent, the [vagina/vulva/anus (as the case may be)] of another person with the person's penis.**

**This means that the defendant penetrated (or attempted to penetrate) to any extent, the [vagina/vulva/anus (as the case may be)] of the complainant with his penis.**

**or**

- (b) The person's [vagina/vulva/anus (as the case may be)] is penetrated, to any extent, by the penis of another person.**

**This means that the defendant's [vagina/vulva/anus (as the case may be)] was penetrated, to any extent, by the complainant's penis.**

- Penetration to the slightest degree is sufficient;**
- The offence is complete the moment that penetration is achieved;**
- There is no requirement for proof that penetration was effected for any particular period of time;**
- Whether or not ejaculation occurred is irrelevant; and**
- Whether or not the complainant consented to the act of penetration is irrelevant.**

*(Where it is alleged that the defendant attempted to engage in penile intercourse with the complainant, the following may be added):*

**The defendant is charged with attempting to engage in unlawful 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 unlawful penile intercourse, the defendant must have been acting with the purpose of engaging in 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/she] was attempting to have penile intercourse. 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 engage in penile intercourse. 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 also 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 engage in penile intercourse, so that when the defendant was doing those things, [he/she] was not then in the process of trying to engage in penile intercourse. The 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 penile intercourse (or attempted penile intercourse) was unlawful.**

**This element is concerned with proof of unlawfulness. The act of engaging in penile intercourse [or attempting to engage in penile intercourse (as the case may be)] 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 negated 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 (See **Chapter 65 – Defences in relation to sexual offences which relate to a specific age or person with impairment of the mind**)].

**(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 216(3), add the following under (4) or (5) below).

**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 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)

**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 penile intercourse [or attempting to engage in penile intercourse], that is, [he/she] had assumed the responsibility of looking after the complainant at the time. The prosecution does not have to prove that the defendant was the only person looking after the complainant at the relevant time.**