

# Circumstances of Aggravation in Sexual Offences

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## Legislation

### *Criminal Code Act 1899*

#### 1 Definition of “impairment of the mind”

***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.

#### 229 Knowledge of age immaterial

Except as otherwise expressly stated, it is immaterial, in the case of any of the offences defined in this chapter committed with respect to a person under a specified age, that the accused person did not know that the person was under that age, or believed that the person was not under that age.

#### 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

There are numerous sexual offence provisions that include circumstances of aggravation. It is impractical to include each of those offence provisions under the Legislation heading of this Chapter. The purpose of this Chapter is to bring together the sample directions for some of the more commonly charged circumstances of aggravation in sexual offences in isolation from the other elements of those offences. Regard should be had to the Chapters dealing with the particular offence provision under consideration.

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 any other sexual offences.

The facilitation of proof provision at s. 636 of the *Criminal Code* applies to facilitate proof that a complainant is the lineal descendent of the defendant.

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 of the *Criminal Code*, which would have left the onus of proof on the prosecution.

The sample direction concerning “under care” has been drawn from *R v FAK* (2016) 263 A Crim R 322; [\[2016\] QCA 306](#), esp at [71]-[78].

The sample direction concerning “guardianship” is drawn from *R v G* ([1997](#)) 91 A Crim R 590, 599.

## Sample Directions

### “Under care”:

**The prosecution must prove that the defendant had the complainant under his care at the time of the charged conduct, that is, that 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.**

### “Under the age of 12”:

**This is not disputed. You should treat this as proven.**

**OR: The uncontested evidence from the child’s mother [or from the birth certificate – exhibit -- ] is that the child was born on [date] so at all material times he/she would have been under 12.**

**“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 descendant of, for example, any step-parents, step-grandparents, aunts, uncles or cousins.**

[Where the circumstance of aggravation requires proof that the defendant knew that the complainant was his/her lineal descendant] **The prosecution must also prove that the defendant knew that the complainant was his/her lineal descendant. It must prove that the defendant knew that the relationship between the two of them existed. It need not prove that the defendant knew that the existence of that relationship meant that the complainant was his/her lineal descendant, only that the relationship existed.**

[If the issue is in dispute, outline here the evidence showing knowledge of the relationship between the two.]

**“Guardianship”:**

**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.**

**“A Person with an Impairment of the Mind”:**

**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.]

[Where the circumstance of aggravation requires proof that the defendant knew that the complainant had an impairment of the mind] **The prosecution must also prove that the defendant knew that the complainant had an impairment of the mind. It must prove that the defendant knew that the complainant’s mind was impaired in the sense that condition has just been described.**

[If the issue is in dispute, outline here the evidence showing knowledge of the complainant’s impairment of the mind.]

**“Serious Organised Crime”:**

**Some sexual offences are prescribed offences under s 161Q of the *Penalties and Sentences Act 1992* so a serious organised crime circumstance of aggravation is applicable.**