

Engaging in penile intercourse with child: s 215

(Offences charged after 1 August 2023)

Note that the former provision continues to apply where the person was charged before 1 August 2023: see Benchbook Direction No. 113.

Legislation

215 Engaging in penile intercourse with child under 16

- (1) Any person who engages or attempts to engage in unlawful penile intercourse with a child under the age of 16 years is guilty of an indictable offence.
- (2) If the child is of or above the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for 14 years.
- (3) If the child is under the age of 12 years, the offender is guilty of a crime, and is liable to imprisonment for life or, in the case of an attempt to engage in unlawful penile intercourse, to imprisonment for 14 years.
- (4) If the child is not the lineal descendant of the offender but the offender is the child's guardian or, for the time being, has the child under the offender's care, the offender is guilty of a crime, and is liable to imprisonment for life or, in the case of an attempt to engage in unlawful penile intercourse, to imprisonment for 14 years.
- (4A) If the child is a person with an impairment of the mind, the offender is guilty of a crime, and is liable to imprisonment for life.
- (4B) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for an offence against this section.
- (4C) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.
- (5) If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years.
- (5A) If the offence is alleged to have been committed with the circumstance of aggravation mentioned in subsection (4A), it is a defence to the circumstance of aggravation to prove that the accused person believed

on reasonable grounds that the child was not a person with an impairment of the mind.

Note—

See section 745 in relation to the application of this section as in force from time to time before the commencement of the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989*, section 14.

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.

745 Application of former s 215

- (1) Former section 215 is taken always to have applied as if the limitation provision of the section were not, and had never been, in force.
- (2) To remove any doubt, it is declared that any immunity from prosecution acquired because of the limitation provision of former section 215 is abolished.
- (3) However, subsections (1) and (2) do not apply in relation to the limitation provision of former section 215 to the extent it applied, from time to time before the commencement of the 1976 amendment, to a prosecution for an offence in relation to a girl of 16 years.
- (4) In this section—

1976 amendment means the *Criminal Code Amendment Act 1976*, section 19.

1989 amendment means the *Criminal Code, Evidence Act and Other Acts Amendment Act 1989*, section 14.

former section 215 means section 215 as in force from time to time before the commencement of the 1989 amendment.

limitation provision, of former section 215, means the provision of former section 215 that limited the period within which a prosecution for either of the offences firstly defined in the section must be begun.

756 Offences charged before or after the commencement

- (1) Despite the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*, the former provisions continue to apply in relation to a person charged with an offence before the commencement.
- (2) The new provisions apply in relation to a person charged with an offence after the commencement, whether the charge is for an offence committed before or after the commencement.
- (3) In this section—

former provisions means the provisions of this Code as in force from time to time before the commencement.

new provisions means the provisions of this Code as in force from the commencement.

Commentary

The *Domestic and Family Violence Protection (Combating Coercive Control and Other Legislation Amendment Act) 2023* amended s 215 of the *Criminal Code* (carnal knowledge with or of children under 16) 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 *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.

The meaning of engage in penile intercourse is set out in s 6:

6 Meaning of engage in penile intercourse

- (1) **Penile intercourse** is the penetration, to any extent, of the vagina, vulva or anus of a person by the penis of another person.
- (2) 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.

Other relevant definitions for this offence are contained in s 1 (“penis”), (“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 child: see *R v O’Neill* [\[1996\] 2 Qd R 326](#).

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

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.

Suggested Direction

The prosecution must prove that the defendant engaged or attempted to engage in unlawful penile intercourse with the complainant, a child under 16 years.

There are therefore three elements that the prosecution must prove beyond reasonable doubt:

- 1. 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.

- (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.

[Where it is alleged that the defendant attempted to engage in penile intercourse with the child]

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 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 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 engage in penile intercourse, so that when the defendant was doing those things, he 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.

The defendant's vagina/vulva/anus (as the case may be) was penetrated to any extent by the penis of the complainant (or attempted to do so).

- 2. That the act (or attempt to have penile intercourse) was unlawful, which means not authorised, justified or excuse by law.**

- 3. That the complainant was under 16 years (or as the case may be, under 12 years).**

[Where a circumstance of aggravation is charged under s 215(4)]

- 4. That the defendant was the complainant's guardian at the time.**

The prosecution must prove that the defendant had the right or duty of protecting 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 because of her age or other disability.

or

- 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 engaging in penile intercourse (or attempting to engage in penile intercourse), 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.

[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 it is in dispute.]

[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.]