

113a. Engaging in Penile Intercourse with Child: s 215

(Offences charged after 1 August 2023)

113a.1 Legislation

[Last reviewed: December 2024]

Criminal Code

[Section 215](#) – Engaging in penile intercourse with child under 16

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

[Section 229](#) – Knowledge of age immaterial

[Section 745](#) – Application of former s 215

[Section 756](#) – Offences charged before or after the commencement of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*

113a.2 Commentary

[Last reviewed: December 2024]

Note that 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. See **Chapter 113 – Carnal Knowledge: (former) s 215** for the former provision.

The defendant must have:

- (1) Engaged or attempted to engage in penile intercourse with the complainant;
- (2) Which was unlawful;
- (3) In circumstances where the complainant was under the age of 16.

Consent to the act of penile intercourse by the complainant is irrelevant.

The term ‘penile intercourse’ is defined at s 6(1) of the *Criminal Code* as including penetration of the vagina, vulva or anus. Other relevant definitions for this offence are at s 1 (‘Crown Law Officer’ and ‘person with an impairment of the mind’) and s 4 (‘attempt’) of the *Criminal Code*.

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 also the reasoning for analogous provisions in *R v Addley* [2019] 2 Qd R 46, following *R v Shetty* [2005] 2 Qd R 540, [13]-[14].

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.

Although circumstances of aggravation are provided for the defendant being the guardian of the child and where the child is in the care of the defendant for the time being by s 215(4), there is no circumstance of aggravation if the child is the lineal descendant of the defendant (presumably as that conduct would amount to incest).

Where the complainant suffers an impairment of the mind and is under 16 years, it is open to the prosecution to present a charge under either this section or s 216(1). Where the offence is charged as, or the defendant is convicted of attempting to engage in penile intercourse with a child under 16, under s 215 the maximum penalty will be 14 years by operation of s 536(2) of the *Criminal Code*. However, the maximum penalty if charged under s 216(1) will be life imprisonment by the operation of s 216(3)(b).

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.

113a.3 Suggested Direction

[Last reviewed: December 2024]

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

With regard to the act of penetration:

- (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 following text 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 be added): The argument for the defendant is that what was done [(or, where appropriate), was 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.

- 2. That the act of penile intercourse [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].**

The issue of consent to penile intercourse by a complainant under 16 is irrelevant.

(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 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 because of [his/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 the defendant's care at the time of the alleged engaging in penile intercourse [or attempting to engage in penile intercourse], that is, the defendant 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.

(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**
 - i. results in – 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].