

## Indecent Dealing with a child under 16 s 210(1)(a)

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The prosecution must prove that:

1. The defendant dealt with the complainant.<sup>1</sup>

The term “deals with” includes a touching of the child.

It does not have to be a touching of the child by the defendant’s hand – it can be a touching of the child by any part of the defendant’s body.

2. The dealing was indecent. The word “indecent” bears its ordinary everyday meaning, that is what the community regards as indecent.<sup>2</sup> It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.<sup>3</sup>

3. The dealing was unlawful.

Unlawful means not justified authorised or excused by law.<sup>4</sup>

4. The complainant was under 16 years.<sup>5</sup>

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<sup>1</sup> Section 210(6) *Criminal Code* defines “deals with” in this section as doing any act which, if done without consent, would constitute an assault as defined by the *Code*. It is ordinarily unnecessary to inform the jury of this definition, as the issue is usually the truth and reliability of the complainant child. The expression “deals with” is capable of wide application and includes a situation in which a person at his own request has a complainant touch and suck his penis: *R v S* [1996] 1 Qd R 559. However now see s 210(1) (c).

<sup>2</sup> The use of terms such as “moral turpitude” and an “offence against morality” as used by members of the Court of Criminal Appeal in *R v Bryant* [1984] 2 Qd R 545, are not essential to the meaning of “indecent”. See *R v Schneiders* [2007] QCA 210. See also *Attorney-General v Huber* (1971) 2 SASR 142.

<sup>3</sup> *R v Dunn* [1973] 2 NZLR 481. In *R v Jones* (2011) 209 A Crim R 379; [2011] QCA 19 (“*Jones*”) the Court of Appeal held that in a case involving an ambulance officer found guilty of indecent assault while performing an ECG the trial judge erred in directing the jury that the appellant’s motive was not relevant to whether the act was indecent. White JA said at [32] “The quality of ‘indecent’ is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision.” See also *R v Rae* [2009] 2 Qd R 463, where it was held that a direction that the acts had to be accompanied by an intention to gain sexual gratification was not required in that particular case. In *R v McCallum* [2013] QCA 254 it was held that the decision in *Jones* did not require that a direction on the motive of the accused be given in every case where indecency is an element of the offence (at [31] - [40]).

<sup>4</sup> Refer to any relevant issue raised on the evidence.

<sup>5</sup> Refer to relevant evidence e.g. birth certificate. If the offence is alleged to have been committed in respect of a child of or above 12 years, it is a defence to prove that the defendant believed, on reasonable grounds, that the child was of or above 16 years (s 210(5) *Criminal Code*). See also s 229 *Criminal Code* which provides that, except as otherwise stated, it is immaterial that the defendant did not know the person was under the specified age or believed that the person was not under that age.

5. Refer to any circumstance of aggravation:<sup>6</sup>
- (a) The complainant was under the age of 12 years; or
  - (b) The complainant was, to the knowledge of the defendant, his or her lineal descendant;<sup>7</sup> or
  - (c) The defendant was the guardian of the child or, for the time being, had the child under his or her care;<sup>8</sup> or
  - (d) The child was a person with an impairment of the mind.<sup>9</sup>

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<sup>6</sup> See Benchbook Direction No 125 Circumstances of Aggravation in Sexual Offences. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act 1992* so a serious organised crime circumstance of aggravation is applicable.

<sup>7</sup> Lineal means being in the direct line of descent from an ancestor.

<sup>8</sup> “Under his or her care” is an ordinary English expression. It means at the time alleged the defendant was responsible for the control and supervision of the child. It does not require any formal legal process to have occurred such as an order for custody. In determining that the jury should take into account such things as the age of the child, how the child came to be with the defendant and why the child was with the defendant. See *R v FAK* [2016] QCA 306.

<sup>9</sup> The circumstance of aggravation was introduced by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013*, assent 29 April 2013. “A person with an impairment of the mind” is defined in Section 1 *Criminal Code*. It is a defence to the circumstance of aggravation to prove the defendant believed on reasonable grounds that the child was not a person with an impairment of the mind (s 210(5A)).