

Defences in relation to sexual offences which relate to a specific age or person with impairment of the mind

Legislation

Chapter 22 *Criminal Code* contains offences against morality, including offences against children such as the indecent treatment of children under 16 (s 210) and repeated sexual conduct with a child (s 229B).

Section 229 provides:

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.

The following offences provide that it is a defence for the defendant to prove that he/she believed, on reasonable grounds, that the child was of or above the age of 16 years. The references below are to the sub-section providing the defence.

210(5)	Indecent treatment of children under 16
213(4)	Owner etc. permitting abuse of children on premises
215(5)	Engaging in penile intercourse with child under 16
218A(9) & (9A)	Using internet etc. to procure children under 16
218B(10) & (11)	Grooming child under 16 years or parent or carer of child under 16 years
219(4)	Taking child for immoral purposes
229B(5)	Repeated sexual conduct with a child

An example of the defence may be found in s 210(5):

210 Indecent treatment of children under 16

...

- (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.

The Chapter also contains offences relating to persons with an impairment of the mind. The following provisions are relevant:

- 210(5A) Indecent treatment of children under 16
- 215(5A) Engaging in penile intercourse with child under 16
- 216(4) Abuse of persons with an impairment of the mind

An example of the defence in relation to alleged offences against persons of unsound mind may be found in s 216(4):

216 Abuse of persons with an impairment of the mind

...

- (4) It is a defence to a charge of an offence defined in this section to prove—
 - (a) that the accused person believed on reasonable grounds that the person was not a person with an impairment of the mind; or
 - (b) that 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.

Commentary

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

As to the meaning of “sexual exploitation”, in *R v Little* [\(2013\) 231 A Crim R 145](#); [2013] QCA 233, [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.

The defences require consideration of the defendant’s actual state of belief which must be based on reasonable grounds.

See also commentary on matters relevant to a defendant’s belief at No 80.3-80.4 (Mistake of fact in sexual offences).

Suggested Directions

A. Where the offence is alleged to have been committed against a child

It is a defence to prove that the defendant believed, on reasonable grounds, that the child was of or above the age of 16 years.

The defendant has the onus of proving the defence on the balance of probabilities.

The issue is the defendant's actual belief as to the complainant's age, which must be based on reasonable grounds.

[Consider whether it is necessary to direct the jury on any particular circumstances relevant to the defendant and outline the relevant characteristics]

[Outline the evidence and competing arguments]

B. When the offence is alleged to have been committed against a person with an impairment of the mind

It is a defence to prove that:

(a) the defendant believed on reasonable grounds that the complainant was not a person with an impairment of the mind; or

(b) that the doing of the act which constitutes the alleged offence did not in the circumstances constitute sexual exploitation of the complainant.

A dictionary definition of "exploitation" is "selfish utilisation". Sexual exploitation means taking advantage of the complainant in a sexual way. Your assessment of whether the defendant has established that the alleged act did not, in the circumstances, constitute sexual exploitation of the complainant involves an assessment of the nature of the relationship between the complainant and the defendant; the defendant's understanding, appreciation, and knowledge of the relationship; and whether he/she abused that relationship for his/her own sexual gratification.

The defendant has the onus of proving the defence on the balance of probabilities.

The issue is the defendant's actual belief which must be based on reasonable grounds.

[Consider whether it is necessary to direct the jury on any particular circumstances relevant to the defendant and outline the relevant characteristics]

[Outline the evidence and competing arguments]