

## **Unlawfully procuring a child under 16 years to commit an indecent act: s 210(1)(b)**

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### **Legislation**

#### **210 Indecent treatment of children under 16**

- (1) Any person who—
- (a) ...
  - (b) unlawfully procures a child under the age of 16 years to commit an indecent act; or
  - (c) ...
  - (d) ...
  - (e) ...
  - (f) ...
- 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 20 years.
- (4) If the child is, to the knowledge of the offender, his or her lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his or her care, the offender is guilty of a crime, and is liable to imprisonment for 20 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 20 years.
- (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.
- (6) In this section—
- deals with* includes doing any act which, if done without consent, would constitute an assault as defined in this Code.

## **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

Relevant definitions for this offence are at s. 1 of the Criminal Code (“Crown Law Officer”, “person with an impairment of the mind”). Note that 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 s. 210.

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.

See ss. 210(5) & (5A) for defences available to a person charged with this offence. The onus of proving the defence is on the defendant on the balance of probabilities. Note however that the defence at s. 210(5A) provides a defence to liability on the circumstance of aggravation only.

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 as to the meaning of the term “procures” has been taken from *R v F; ex parte Attorney-General (Qld)* [2004] 1 Qd R 162, [33]-[34] which was concerned with the meaning of the term for the purposes of s. 7(1)(d) of the *Criminal Code*. There seems to be no reason why the word would have a different meaning for the purposes of this provision. See also the observations in *R v Georgiou* (2002) 132 A Crim R 150; [2002] QCA 206, [79].

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.

## **Suggested Directions**

**In order for the prosecution to prove this offence, it must prove each of the following matters beyond reasonable doubt:**

- 1. That the defendant procured the complainant to commit an act;**

**This element comprises two components, the concept of “procuring” and the conduct of the defendant.**

**The term “procured” is an ordinary English word, and not a term of art. It means to bring about or to persuade someone to do something. Procuring can be regarded as bringing about a course of conduct which the complainant would not have embarked on of his or her own volition, that is to persuade the complainant to do the thing that he or she did. It is irrelevant whether the complainant consented to doing the act which he or she did, and so consent does not affect in any way the consideration of this element.**

**If you are satisfied that the complainant was procured to do the particularised act, the second aspect of this element that must also be proven beyond reasonable doubt is that it was the defendant who procured the complainant to do the act. That is, it must have been some conduct on the defendant’s part which caused the complainant to do the act which is relied on by the prosecution to prove the charge.**

**[Where appropriate] In order to prove that that the defendant’s conduct caused the complainant to do the act, the prosecution need not prove that the defendant’s conduct was the sole cause of the act being done, or that it had a major role in causing it to be done. It will be sufficient if the prosecution proves that the defendant’s conduct had a real or substantial role to play in bringing about the act by the complainant. This is not a philosophical question, nor one determined by assigning mathematical probabilities. It is a question to be determined by you applying your common sense to the facts as you find them, appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal trial.**

**[Outline here the evidence relevant to proof of both aspects of this element.]**

**2. That the procured act was indecent.**

**The word “indecent” bears its ordinary everyday meaning, it is what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstance.**

**You should look at things like the nature of the act which was procured, the context in which the procuring occurred, the relationship between the two parties, the ages of both the complainant and the defendant and the nature of any interaction between them, including what if anything was said between them at the time leading up to, during and immediately after the procuring of the act.**

**3. That the procuring of the act was unlawful.**

**The third element is concerned with proof of unlawfulness. Procuring a child under 16 years of age to commit an indecent act is unlawful unless authorised, justified or excused by law, or is the subject of a specific legal defence.**

[Outline here any authorisation, justification or excuse raised on the evidence and which must be negated by the prosecution, or outline any defence under s. 216(4) the onus of which lies on the defendant to prove on the balance of probabilities.]

**[If appropriate] I remind you that the concept of consent is irrelevant to proof of this charge, and so even if you thought the complainant might have consented to doing the act, that does not provide any authorisation, justification or excuse to the conduct, and neither does it provide any form of the defence to the charge.**

**[If appropriate] In this trial there is no authorisation, justification, excuse or defence raised on the evidence and you will find this element to have been proven.**

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

[If necessary, outline here the evidence relevant to proof of this element.]

[Where a circumstance of aggravation is charged under s. 210(4)]

**5. That the defendant was at the time the guardian of the complainant.**

**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.**

[or, as the case may be]

**6. 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 charged conduct, that is, 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.**

[or, as the case may be]

**7. That the complainant was the defendant’s 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 a circumstance of aggravation is charged under s. 210(4A)]

**8. 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. 210(4B)]

9. [Where a circumstance of aggravation is charged under s. 161Q of the Penalties and Sentences Act 1992, see Part 9D, Division 1 of the Penalties and Sentences Act 1992 for relevant definitions.]