

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

148.1 Legislation

[Last reviewed: November 2024]

Criminal Code

[Section 210\(1\)\(b\)](#) – Indecent treatment of children under 16

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

[Section 636](#) – Evidence of blood relationship

148.2 Commentary

[Last reviewed: November 2024]

The defendant must have:

- (1) Unlawfully procured;
- (2) A child under the age of 16;
- (3) To commit an indecent act.

Relevant definitions for this offence are at s 1 of the *Criminal Code* ('Crown Law Officer' and 'person with an impairment of the mind'). Note that the extended definitions of 'lineal descendant' at s 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 s 210(5) and subs (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](#), [71]-[78].

The sample direction concerning guardianship is drawn from *R v G* [\(1997\) 91 A Crim R 590](#), 599.

Pursuant to s 210(4B), a circumstance of aggravation under s 161Q of the *Penalties and Sentences Act 1992* (Qld) applies. See Part 9D, Division 1 of the *Penalties and Sentences Act 1992* (Qld) for relevant definitions.

148.3 Suggested Direction

[Last reviewed: November 2024]

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/her] own volition, that is to persuade the complainant to do the thing that [he/she] did. It is irrelevant whether the complainant consented to doing the act which [he/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, add the following): In order to prove 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, add the following): 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, add the following): **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 the defendant 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/her] 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, add the following): **A complainant is the direct descendant of [his/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].