

## Legislation

### 210 Indecent treatment of children under 16

- (1) Any person who—
  - (a) ...
  - (b) ...
  - (c) unlawfully permits himself or herself to be indecently dealt with by a child under the age of 16 years; or
  - (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 (“Crown Law Officer”, “person with an impairment of the mind”) and s. 210(6) (“deals with”) of the *Criminal Code*. 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 first sample directions concerning “indecenty” will usually be sufficient for this offence, however in *R v Jones* (2011) 209 A Crim R 379; [2011] QCA 19, [32], a Sexual Assault case, it was held that “*The quality of “indecenty” 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.*” Where the evidence raises that issue, the second part of the sample direction may be appropriate.

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 permitted himself or herself to be dealt with by the complainant;**

**This element comprises two components; the concepts of “permitted” and that of “dealt with”.**

**“Permitted” simply means allowed, and so what must be proven is that the defendant allowed himself or herself to be dealt with by the complainant.**

**The terms “dealt with” and “deals with” are capable of wide application and mean “to have to do with”, “to act towards” or “to treat”. In the context of this offence, it includes, but is not limited, to a touching of the defendant by the complainant, as well as an application of force of any kind, directly or indirectly, to the defendant by the complainant.**

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

**2. That the permitted dealing 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 relationship between the two parties, the ages of both the complainant and the defendant, (if appropriate, the place on the body where the defendant was touched), 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 touching (or as the case may be, dealing).**

**[If appropriate] In looking at all factors, including those I have just mentioned, you must consider if the touching (or as the case may be, dealing) had a sexual connotation. I direct you that it is only if you accept beyond reasonable doubt that there was a sexual connotation to the touching (or as the case may be, dealing), that is that the charged touching (or as the case may be, dealing) was motivated by a desire held by the defendant to gain some form of sexual experience, pleasure or satisfaction that you would find that the conduct was indecent. What the complainant thought of the conduct is not to the point, it is the motive or reason for the defendant permitting himself/herself to be touched (or as the case may be, dealt with) in the manner that he/she did, as you find it to be, which is important is deciding if there was a sexual connotation to the conduct.**

**3. That permitting the indecent dealing by the complainant was unlawful.**

**The third element is concerned with proof of unlawfulness. Permitting indecent dealing by a child under 16 years of age is unlawful unless**

**authorised, justified or excused by law, or is the subject of a specific legal defence.**

[Here outline 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] 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.]**