

## 149. Permitting indecent dealing by a child under 16 years: s 210(1)(c)

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### 149.1 Legislation

[Last reviewed: January 2025]

*Criminal Code*

[Section 24](#) – Mistake of fact

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

[Section 216](#) – Abuse of persons with an impairments of the mind

[Section 222](#) – Incest

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

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

### 149.2 Commentary

[Last reviewed: January 2025]

The Defendant must have:

- (1) Unlawfully;
- (2) Permitted himself or herself to be indecently dealt with;
- (3) By a Child under the age of 16.

Relevant definitions for this offence are at s 1 ('Crown Law Officer' and '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 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.

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. Note, however, *R v McGrady* [2020] QCA 192, [46]-[47], where Fraser JA observed that whether or not touching was motivated by sexual interest is not an element of s 210:

*A direction that such a motivation was required was necessary in R v Jones only because the issue at trial in that case was whether the conduct of the defendant, a paramedic, of deliberately touching the complainant's breasts whilst attaching electrodes required for an ECG examination was indecent because it was motivated by sexual gratification, or whether it was instead not indecent because it occurred in the course of a legitimate medical examination.*

'Deals with' is defined under s 210(6) to include 'doing any act which, if done without consent, would constitute an assault as defined in this Code'.

See s 210(5) and ss (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 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.

### 149.3 Suggested Direction

[Last reviewed: January 2025]

**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/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/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’ 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, add the following): In looking at all the 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 in 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/she] 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): **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].**