

## 128. Damaging Evidence with Intent: s 129

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### 128.1 Legislation

[Last reviewed: January 2025]

*Criminal Code*

[Section 129](#) - Damaging evidence with intent

### 128.2 Commentary

[Last reviewed: January 2025]

The Defendant must have:

- (1) Damaged a thing;
- (2) Knowing that the thing is or may be needed in evidence in a judicial proceeding;
- (3) With intent to stop it being used in evidence.

*Meaning of 'judicial proceeding'*

Judicial proceeding includes any proceeding before any court, tribunal or person, in which evidence may be taken on oath (*Criminal Code*, s 119).

*Meaning of 'knowing that something is or may be needed in evidence'*

In this context, knowing means believing. It is sufficient to prove that the Defendant believed that there is a realistic possibility the relevant thing might be required in evidence in a possible future proceeding. That is, there does not have to be a proceeding on foot at the time (*R v Ensbey* [2005] 1 Qd R 159, [15], [16] (Davies JA), [48] (Jerrard JA)).

*Meaning of 'damage'*

Damage has its natural and ordinary meaning, 'injury or harm that impairs value or usefulness' (*Prime Infrastructure (DBCT) Management Pty Ltd v Vero Insurance Limited* [2005] QCA 369, [31]). This definition is enlarged as relevant and appropriate by the definition of 'damage, in relation to a document', in s 1 of the *Criminal Code*.

In *R v Zischke* [1983] 1 Qd R 240, a case concerning s 469 of the *Criminal Code*, it was held at 246 that a thing may be said to be 'damaged' even though the injury to the thing is not permanent but is remediable; a thing is damaged if it is rendered imperfect or inoperative.

Damage may be caused by either physical harm to the relevant thing (rendering it imperfect), or interference with the functionality of the relevant thing (rendering it inoperative, or unable to be used for its ordinary functions), even if that is for a period

of time, while the imperfection or inoperability is being eliminated (*Hammond v The Queen* (2013) 85 NSWLR 313, [42]-[69], and in particular [50] and [69]).

### *Intention*

The Defendant must have damaged the thing with the intent to stop the thing being used in evidence. See the direction on intention at **Chapter 59 – Intention**.

## **128.3 Suggested Direction**

[Last reviewed: January 2025]

**The prosecution must prove that the Defendant:**

1. **Knew that the [relevant thing] may be needed in evidence in a judicial proceeding:**
  - (a) **‘judicial proceeding’ includes any proceeding before any court, tribunal or person, in which evidence may be taken on oath;**
  - (b) **in this context, ‘knowing’ means ‘believing’; and**
  - (c) **it is sufficient to prove that the Defendant believed that the [relevant thing] might be required [that is, there is a realistic possibility] in evidence in a possible future proceeding [that is, there does not have to be a proceeding in existence at the time];**
2. **Damaged the [relevant thing]:**
  - (a) **the word ‘damage’ bears its natural and ordinary meaning, namely, ‘injury or harm that impairs value or usefulness’;**
  - (b) **a thing may be said to be damaged even though the injury to the thing is not permanent but is remediable; a thing is damaged if it is rendered imperfect or inoperative;**
  - (c) **damage may be caused by either physical harm to the relevant thing [rendering it imperfect], or interference with the functionality of the relevant thing [rendering it inoperative, or unable to be used for its ordinary functions], even if that is for a period of time, while the imperfection or inoperability is being eliminated.**
3. **Did so with the intention of stopping the [relevant thing] being used in evidence.**