

Using the Internet to Procure Children under 16 s 218A

(Offence introduced by the *Sexual Offences (Protection of Children) Act 2003*.
Commencement date 1 May 2003.

1. **The defendant is charged with committing the crime of using electronic communication contrary to the provisions of s 218A of the Criminal Code.**
2. **That section makes it an offence for an adult to use electronic communication with intent to procure a person who is in fact under the age of 16 years (or 12 years, as the case may be) or who the adult believes is under the age of 16 years (or 12 years, as the case may be) to engage in a sexual act, either in Queensland or elsewhere.¹**
3. **To prove that charge the prosecutor must prove**
 - (a) **The defendant was an adult at the time of the offence;**
 - (b) **The defendant used electronic communication;**
 - (c) **In doing so, the defendant had the intent to procure a person to engage in a sexual act, either in Queensland or elsewhere.**
 - (d) **The person was aged under 16 years (or 12 years, as the case may be) or the defendant then believed that the person was aged under 16 years (or 12 years, as the case may be).**
4. **In a little more detail, that the defendant was an adult at the time of the offence. An adult is a person of or above the age of 18 years.²**
5. **The defendant used electronic communication. Electronic communication means email, internet chat rooms, SMS messages, real time audio/video or other similar communication. The prosecution must prove it was the defendant who used that communication.**
6. **In using that electronic communication, the defendant had the intent to procure a person to engage in a sexual act. To procure means knowingly to**

¹ *R v Shetty* [2005] 2 Qd R 540 at [18].

² See s 1 of the Criminal Code.

entice or persuade a person to engage in a sexual act. To procure a sexual act may mean that the person allows a sexual act to be done to the person's body, or that person does a sexual act to the person's own body or the body of another person or engages in an act of an indecent nature.

The sexual act sought to be procured may be in Queensland or elsewhere. The prosecution does not have to prove that the sexual act the defendant intended to procure was sexual intercourse or acts involving physical contact or any particular sexual act. It is not necessary for the prosecution to prove that the defendant intended to procure the person to engage in any particular sexual act.

The word "*indecent*" bears its ordinary everyday meaning, that 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.

It does not matter that, by reason of circumstances not known to the defendant it was impossible in fact for the person to engage in the sexual act intended to be procured.

7. The person intended to be procured was aged under 16 years (or 12 years, as the case may be) or the defendant then believed that the person was aged under 16 years (or 12 years, as the case may be).

It does not matter that the child is a fictitious person represented to the defendant to be a real person, provided the prosecution prove beyond reasonable doubt that the defendant believed that the person being communicated with was a real person under the age of 16(or 12 years, as the case may be).

Evidence that the person was represented to the defendant as being under the age of 16 (or 12 years, as the case may be) is, in the absence of evidence to the contrary, proof that the defendant believed the person was under that age.

[Where the child is a fictitious person, or a real person over 16] **evidence to the contrary includes evidence that the defendant did not believe the representation that the person was under 16. This could include evidence such as, that despite the representation, the defendant had no belief either way whether the person was under or over 16. It is for you the jury to assess the credibility of any explanation raised by the defendant as to his lack of belief as to the representation and for you to decide whether the prosecution has disproved that explanation beyond reasonable doubt.**

Belief is concerned with the state of mind of the defendant at the time of the communication and involves drawing an inference as to his state of mind, in the same way as drawing an inference as to his intention.

(See the general direction on intention on page 56.1).

No offence against this provision is committed unless the defendant is proved to have intended to procure a person the defendant believed to be under 16 (or 12 years, as the case may be) to engage in a sexual act.

- 8. Evidence that the person was represented to the defendant as being under the age of 16 (or 12, as the case may be) is, in the absence of evidence to the contrary, proof that the defendant believed the person was under that age. [Where the child is a fictitious person, or a real person over 16] evidence to the contrary includes evidence that the defendant did not believe the representation that the person was under 16; this could include evidence such as, that despite the representation, the defendant had no belief either way whether the person was under or over 16. It is for you the jury to assess the credibility of any explanation the defendant has given as to his lack of belief as to the representation, and for you to decide whether the prosecution have disproved that explanation beyond reasonable doubt. No offence against s 218A is committed unless the defendant is proved to have intended to procure a person the defendant believed to be under 16 (or 12, as the case may be) to engage in a sexual act.**

9. [When a child is under 16 years (or 12, as the case may be)] **it is a defence for the defendant to prove on the balance of probabilities that the defendant believed on reasonable grounds the person was at least 16** (or 12, as a defence to the circumstance of aggravation in subsection (2)(a)(i)).³
10. **Direct on any circumstances of aggravation.**^{4 5}

³ These directions in 7 and 8 derive from the decision in *R v Shetty* [\[2005\] 2 Qd R 540](#); the Benchbook Committee considers the words in plain type within the square brackets are supported by that decision.

⁴ Section 218A(2). It is a circumstance of aggravation if the person was under 12 years or the defendant believed the person was under 12 years or the offence involved the adult intentionally meeting the person or going to a place with the intention of meeting the person. The offence is a prescribed offence under s 161Q *Penalties and Sentences Act 1992* so a serious organised crime circumstance of aggravation is applicable.

⁵ See s 228G for the power to order the forfeiture of child exploitation material.