

**Involving a child in making child exploitation material:
section 228A of the *Criminal Code*
(commencement date: 4 April 2005)**

Legislation

228A Involving child in making child exploitation material

- (1) A person who involves a child in the making of child exploitation material commits a crime.

Maximum penalty—

- (a) if the offender uses a hidden network or an anonymising service in committing the offence—25 years imprisonment; or
- (b) otherwise—20 years imprisonment.
- (2) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for an offence against this section.
- (3) 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.
- (4) In this section—
- involves*** a child in the making of child exploitation material includes—
- (a) in any way concerns a child in the making of child exploitation material; and
- (b) attempts to involve a child in the making of child exploitation material.

Commentary

There are no known appellate decisions as to the scope of this provision.

In a given factual scenario, the same conduct may amount to an offence under sections 228A and 228B, in which case either provision may be relied on by the prosecution. When regard is had to other related legislative provisions, it can be seen that the focus of this provision is on prohibiting and punishing the involvement of a child in the making of CEM, as opposed to the making or distribution of the material which may occur after the involvement of the child, and which is the focus of sections 228B and 228C. The creation of the specific offence at section 228A obviates the need for the prosecution to rely on the party provisions in a scenario where the defendant has involved the child in the making of CEM but has not had direct involvement in the actual making of it.

Relevant definitions for this offence are at sections 207A (“child exploitation material”, “material”, “anonymising service”, “hidden network” and “network”) and 228A(4) (“involves a child in the making of child exploitation material”) of the Criminal Code and (“child”) Schedule 1 *Acts Interpretation Act 1954*.

See the commentary to section 228D for reference to authorities on the scope and nature of “child exploitation material”.

The definition of “involve” in the specimen direction has been taken from the Oxford English Dictionary Online <https://www-oed-com.ezproxy.sclqld.org.au/view/Entry/99206?redirectedFrom=involve#eid>.

Section 161Q of the *Penalties and Sentences Act 1992* states a circumstance of aggravation for an offence against this section. Reference should be made to Part 9D, Division 1 of the *Penalties and Sentences Act 1992* where that circumstance of aggravation is charged for definitions and the elements of the circumstance of aggravation. For the purposes of section 228A(3), “Crown Law officer” is defined at section 1 of the Criminal Code as meaning the Attorney-General or the director of public prosecutions.

See section 228E 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.

See section 228H for an exculpatory provision applying to certain conduct involving CEM by a law enforcement officer.

See section 228F for the requirement for the exclusion of non-essential persons from the courtroom when material alleged to be CEM is on display.

See section 228G for the power to order the forfeiture of CEM. Notably this power is wide-ranging and exists where the defendant has been prosecuted for an offence against the CEM provisions, as well as some other offences in Chapter 22, applies whether the defendant has been convicted or not, is not limited to material amounting to CEM but also to anything used to commit the offence and applies whether the thing to be forfeited has been seized or is in its owner’s possession.

Suggested Direction

In order for the prosecution to prove this offence, it must prove each of the following matters beyond reasonable doubt:

1. That there was a child; and

A child is a person under the age of 18 years.

[If in issue, set out the evidence as to the age of the child, or indicate there is no issue about this element.]

2. That the defendant involved that child in the making of child exploitation material.

“Child exploitation material” is defined as meaning: [amend as appropriate to the factual allegations in the trial]

“material that, in a way likely to cause offence to a reasonable adult, describes or depicts a person, or a representation of a person, who is, or apparently is, a child under 16 years—

- (a) in a sexual context, including for example, engaging in a sexual activity; or**
- (b) in an offensive or demeaning context; or**
- (c) being subjected to abuse, cruelty or torture.”**

A person may be described, depicted or represented, without the whole of the person being described, depicted or represented. It is sufficient if there is a description, depiction or representation of part of a human body.

[Outline the evidence as to what is said to be the CEM and, if in contest, the opposing arguments as to why it is or is not CEM.]

To make child exploitation material means to create it, or to do something towards creating it.

[In an appropriate case] **“Material” includes anything that contains data from which text, images or sound can be generated, so child exploitation material may be made even though it is not immediately able to be seen or heard in a form from which it can be concluded that it is child exploitation material.**

The phrase “involving a child in the making of child exploitation material” is broadly defined as including, but not being limited to:

- “(a) in any way concerning a child in the making of child exploitation material; and**

(b) attempting to involve a child in the making of child exploitation material”.

The word “involve” does not have a specific legal meaning. It is a word of ordinary English usage. When used in the sense of getting someone else involved in something, it means to include that person in that thing’s operation.

Before you can conclude that the defendant involved the child in the making of child exploitation material, you must be satisfied that the defendant knew that child exploitation material would be made involving the child. The prosecution need not prove that the defendant knew the precise type of child exploitation material that would be made, but it must prove that the defendant knew that child exploitation material of some type, as defined, would be made involving the child. A mere suspicion or belief that material of that nature would be made is not sufficient to prove guilt. The prosecution must prove the defendant *knew* that material of that nature would be made.

[In an appropriate case] The prosecution need not prove that the defendant was the sole or major cause of involving the child in the making of child exploitation material. It will be sufficient if the prosecution proves that the defendant had a real or substantial role to play in involving the child in the making of child exploitation material, as that term is defined. This 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.

[Where a circumstance of aggravation under section 228A(1)(a) is charged]

3. The defendant used a hidden network in committing the offence.

In order to prove this circumstance of aggravation, the prosecution must prove each of the following matters beyond reasonable doubt:

(1) That the defendant used a hidden network; and

For the purposes of this trial, the term “hidden network” means: [refer only to features of the definition relevant to the factual allegations in the trial]

a network of computers or other devices (whether or not part of the internet) that has, or uses, digital, physical or other measures to do, or that are designed to do, any of the following –

- (a) restrict access to the network;**
- (b) make the network undiscoverable when searched for in a way that is generally used to search for networks, including, for example, by using an internet search engine;**
- (c) hide the identity or location of persons who administer, access or use the network;**
- (d) hide information stored on the network;**
- (e) hide communication, including the exchange of information, between—**
 - (i) the network and a person who administers, accesses or uses the network; or**
 - (ii) 2 or more persons who administer, access or use the network;**
- (f) hide the location of the network.**

[Refer here to features of the evidence that are alleged to support the allegation, and any contrary features of evidence if the issue is in dispute]

- (2) That the defendant used it at any time during the course of committing the offence.**

The prosecution need not prove that the network was used throughout the commission of the offence. It need only prove that the network was used by the defendant at some point in time as part of his or her commission of the offence.

[or, as the case may be]

- 4. The defendant used an anonymising service in committing the offence.**

In order to prove this circumstance of aggravation, the prosecution must prove each of the following matters beyond reasonable doubt:

- (1) That the defendant used an anonymising service; and**

For the purposes of this trial, the term “anonymising service” means: [refer only to features of the definition relevant to the factual allegations in the trial]

a device or other thing, or a physical, digital or other measure, used to hide—

(a) the identity or location of a person who administers, accesses or uses a network, computer or other device; or

(b) information stored on a network, computer or other device; or

- (c) communication, including the exchange of information, between 2 or more persons using a network, computer or other device; or**
- (d) the location of a network, computer or other device.**

[Refer here to features of the evidence that are alleged to support the allegation, and any contrary features of evidence if the issue is in dispute]

- (2) That the defendant used it at any time during the course of committing the offence.**

The prosecution need not prove that the anonymising service was used throughout the commission of the offence. It need only prove that it was used by the defendant at some point in time as part of his or her commission of the offence.

[Where a circumstance of aggravation under section 161Q of the *Penalties and Sentences Act 1992* is charged]

- 5. In order to prove this circumstance of aggravation, the prosecution must prove beyond reasonable doubt:**

That, at the time the offence was committed, or at any time during the course of the commission of the offence, the offender—

- (a) was a participant in a criminal organisation; and**
- (b) knew, or ought reasonably to have known, the offence was being committed—**
 - (i) at the direction of a criminal organisation or a participant in a criminal organisation; or**
 - (ii) in association with 1 or more persons who were, at the time the offence was committed, or at any time during the course**

of the commission of the offence, participants in a criminal organisation; or

(iii) for the benefit of a criminal organisation.

[NOTE: where a circumstance of aggravation is charged under section 161Q of the *Penalties and Sentences Act 1992*, see Part 9D, Division 1 of the *Penalties and Sentences Act 1992* for relevant definitions.]