

## Damaging Evidence with Intent: s 129

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### Legislation

#### 129 Damaging evidence with intent

A person who, knowing something is or may be needed in evidence in a judicial proceeding, damages it with intent to stop it being used in evidence commits a misdemeanour.

Maximum penalty—7 years imprisonment.

### Commentary

#### *Meaning of 'judicial proceeding'*

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

#### *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 at [15] and [16] per Davies JA and at [48] per 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 at [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*.

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: *R v Zischke* [1983] 1 Qd R 240 at 246D.

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 at [42]-[69], 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 **No 59 – Intention**.

## **Suggested Direction**

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

- 1. knowing 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 on foot 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. with the intention of stopping the [relevant thing] being used in evidence.**