

**Making child exploitation material - section 228B
of the *Criminal Code*
(commencement date: 4 April 2005)**

Legislation

228B Making child exploitation material

- (1) A person who makes 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—
- make** child exploitation material includes—
- (a) produce child exploitation material; and
 - (b) attempt to make child exploitation material.

Commentary

See the commentary to section 228A concerning the distinction between section 228A and this provision.

Relevant definitions for this offence are at sections 207A (“child exploitation material”, “material”, “anonymising service”, “hidden network” and “network”) and 228B(4) (“make child exploitation material”) of the *Criminal Code*.

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

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 228B(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 child exploitation material; and

“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.”**

In order for a person to be described, depicted or represented, it is not necessary that the whole of the person be described, depicted or represented. It is sufficient if there is a description, depiction or representation of part of a human body.

[Consider here summarising 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.]

2. That the defendant made that child exploitation material.

The phrase “made child exploitation material” has the same meaning as it has in ordinary English usage, except that our law has extended its usual meaning for the purposes of this charge to include, but not be limited to, producing child exploitation material and also attempting to make child exploitation material.

[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.

[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]

[In an appropriate case] The prosecution need not prove that the defendant was the sole maker or that he had a major role in the making of the child exploitation material. It will sufficient if the prosecution proves that the defendant had a real or substantial role to play in making the child exploitation material, as that term is defined. This is not a philosophical question, nor one determined by assigning mathematical probabilities. It 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 228B(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.]