

## Grooming children under 16 years or parent or carer of: section 218B of the *Criminal Code*

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### Legislation

#### 218B Grooming child under 16 years or parent or carer of child under 16 years

- (1) In this section—
- (a) a reference to a **child**, in relation to an adult engaging in conduct in relation to a child, is a reference to—
    - (i) a person under 16 years; or
    - (ii) a person the adult believes is under 16 years, whether the person is a real person or a fictitious person who is represented to the adult as a real person under 16 years; and
  - (b) a reference to a **child**, in relation to an adult engaging in conduct in relation to another person who has care of a child, is a reference to—
    - (i) a person under 16 years; or
    - (ii) a person the adult believes is under 16 years; and
  - (c) a reference to a **person who has care of a child**, in relation to an adult engaging in conduct in relation to another person who has care of a child, includes a reference to a person whom the adult believes is a person who has care of a child.
- (2) An adult who engages in conduct in relation to a child, or a person who has care of a child, with intent to—
- (a) facilitate the procurement of the child to engage in a sexual act, either in Queensland or elsewhere; or
  - (b) expose, without legitimate reason, the child to any indecent matter, either in Queensland or elsewhere;  
commits a crime.
- Note—*  
See section 1 for the definition *indecent matter*.  
Maximum penalty—5 years imprisonment.
- (3) The adult is liable to 10 years imprisonment if the child is—
- (a) a person under 12 years; or
  - (b) a person, including a fictitious person, the adult believes is under 12 years.

- (4) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for an offence against this section.
- (5) 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.
- (6) For subsection (2)(a), a child engages in a sexual act if the child—
  - (a) allows a sexual act to be done to the child; or
  - (b) does a sexual act to the child’s own body or the body of another person; or
  - (c) otherwise engages in an act of an indecent nature.
- (7) Subsection (6) is not limited to sexual intercourse or acts involving physical contact.
- (8) For subsection (2)(a)—
  - (a) it is not necessary to prove that the adult intended to facilitate the procurement of the child to engage in any particular sexual act; and
  - (b) it does not matter that, by reason of circumstances not known to the adult, it is impossible in fact for the child to engage in the sexual act; and
  - (c) it does not matter when the adult intended the child would be procured to engage in a sexual act.
- (9) Evidence that the child was represented to the adult as being under 16 years, or under 12 years, as the case may be, is, in the absence of evidence to the contrary, proof that the adult believed the child was under that age.
- (10) It is a defence to a charge under this section to prove the adult believed on reasonable grounds that the child was at least 16 years.
- (11) For an offence defined in subsection (2) alleged to have been committed with the circumstance of aggravation mentioned in subsection (3), it is a defence to the circumstance of aggravation to prove that the adult believed on reasonable grounds that the child was at least 12 years.
- (12) In this section—

***person who has care of a child*** includes a parent, foster-parent, step-parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child.

**procure** means knowingly entice or recruit for the purposes of sexual exploitation.

## Commentary

Relevant definitions for this offence are at section 1 (“child”, “indecent material”), section 218B(6) and (7) (“child engages in a sexual act”), section 218B(1) (“child”, “person who has care of a child”) and section 218B(12) (“person who has care of a child” and “procure”) of the Criminal Code.

Where more detailed directions are required as to the meaning of “procure” in the circumstances of a trial, see the observations in *R v Bartkowski* [2021] QCA 1, [23]-[26], [42], [44]-[47], [59] which considered an identical definition of the term found in section 218A. Specifically the Court found there was no warrant for constraining the type of conduct that qualifies as “procuring”, given the purpose of the provision in section 218A. The Court thereby distinguished the observations of Cullinane J in *R v F; ex parte Attorney-General (Qld)* [2004] 1 Qd R 162 concerning the meaning of the word in the context of the kidnapping offence at section 354.

The phrase “legitimate reason” is derived from the *Protection of Children Act 1978* (UK). Lord Scarman said during the debate on the Act; “This phrase really embraces a question of fact on which courts and juries are well able to reach a sensible decision in determining the meaning.”

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 218B(5), “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 218B(9) for a facilitation of proof provision concerning the defendant’s belief as to the age of a child. The concept of “belief” was explained by the High Court in *George v Rockett* (1990) 170 CLR 104, 116.

See sections 218B(10) and (11) 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. For observations on the limited operation of these defences in light of the onus on the prosecution to prove elements of the offence see *R v Addley* [2018] QCA 125, following *R v Shetty* [2005] 2 Qd. R. 540, [13]-[14].

See sections 228G for the power to order forfeiture of items. 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, including section 218B. It applies whether the defendant has been convicted or not and is not limited to material amounting to CEM. It applies to anything used to commit the offence, 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 the defendant is an adult.**

**An adult is a person of or above the age of 18 years.**

[Either direct that the element is not in issue or, if it is, set out the relevant evidence.]

[Where the charge alleges conduct in relation to a child]

**2. That the defendant engaged in conduct in relation to a child.**

**First, you must determine what conduct you are satisfied that the defendant did do. That is, how he or she did in fact conduct himself or herself.**

**[Outline what is particularised as the relevant conduct]**

**If you are not satisfied that the defendant did any or all of the conduct as alleged by the prosecution, then he or she must be found not guilty of the charge.**

**If you are satisfied that the defendant did conduct himself or herself as particularised by the prosecution in some respect, then you must determine if that conduct he or she did do was done in relation to a child. The term “in relation to” does not have any special legal meaning, it is a term of ordinary English usage.**

**However, the term “child” does have a special meaning. For the purposes of this trial, a child is either:**

- a) someone actually under 16 years (or 12 years as the case may be); or**
- b) someone whom the defendant believed was under 16 years (or 12 years as the case may be), whether a real person or a fictitious person who was represented to the defendant as a real person under 16 years (or 12 years as the case may be).**

**[If appropriate] Proof that the child was under 16 years (or under 12 years as the case may be) is straightforward and requires no explanation.**

[Set out the evidence relevant to proof of the actual age of the child or, if not in issue, direct that this aspect of the element of the charge is not in issue and should be taken as having been proved.]

[If appropriate] **The prosecution must prove that the defendant actually believed that the person was under 16 years (or under 12 years as the case may be), as opposed to merely suspecting that was the case. A belief is an inclination of the mind towards accepting a proposition, such as the age of the person involved. In determining this issue you should look at all facts and circumstances, including things said and done by the defendant as well as things said and done to or in his presence. It is for you to decide whether, in all of the circumstances, the prosecution have proven that the defendant held that belief.**

[Amend as appropriate to the facts in the trial] **Evidence that the child was represented to the defendant as being under 16 years (or under 12 years, as the case may be) is, in the absence of evidence to the contrary, proof that the defendant believed the child was under that age. Where the child is a fictitious person, or a real person over 16 years, evidence to the contrary includes evidence that the defendant did not believe the representation that the person was under 16 years; or the defendant had no belief either way whether the person was under or over 16 years. It is for you to assess the credibility of any explanation the defendant has given as to not believing the representation, and for you to decide whether the prosecution have disproved that explanation beyond reasonable doubt. The offence has not been committed unless the defendant is proved to have intended to facilitate the procurement of a person the defendant believed to be under 16 years (or 12 years as the case may be) to engage in a sexual act (or expose a person he believed to be under 16 years (or under 12 years as the case may be) to any indecent matter).**

[Here set out the evidence relevant to the issue.]

[Or, where the charge alleges conduct in relation to a person who has care of a child]

**First, you must determine what conduct you are satisfied that the defendant did do. That is, how he or she did in fact conduct himself or herself.**

[Outline what is particularised as the relevant conduct]

**If you are not satisfied that the defendant did any or all of the conduct as alleged by the prosecution, then he or she must be found not guilty of the charge.**

**If you are satisfied that the defendant did conduct himself or herself as particularised by the prosecution in some respect, then**

**you must determine if that conduct he or she did do was done in relation to a person who has care of a child, or who the defendant believes has care of a child. The term “in relation to” does not have any special legal meaning, it is a term of ordinary English usage.**

**A person has a child under his or her care if he or she had assumed the responsibility of looking after the child at the time. A person who has care of a child includes, but is not limited to, a parent, foster-parent, step-parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child. The prosecution does not have to prove that he or she was the only person looking after, or who had care of the child at the relevant time.**

**The term “child” does have a special meaning for the purposes of this trial. A child is either:**

- a) someone actually under 16 years (or 12 years as the case may be); or**
- b) someone whom the defendant believed was under 16 years (or 12 years as the case may be), whether a real person or a fictitious person who was represented to the defendant as a real person under 16 years (or 12 years as the case may be).**

**[If appropriate] Proof that the child was under 16 years (or under 12 years as the case may be) is straightforward and requires no explanation.**

**[Set out the evidence relevant to proof of the actual age of the child or, if not in issue, direct that this aspect of the element of the charge is not in issue and should be taken as having been proved.]**

**[If appropriate] The prosecution must prove that the defendant actually believed that the person was under 16 years (or under 12 years as the case may be), as opposed to merely suspecting that was the case. A belief is an inclination of the mind towards accepting a proposition, such as the age of the person involved. In determining this issue you should look at all facts and circumstances, including things said and done by the defendant as well as things said and done to or in his presence. It is for you to decide whether, in all of the circumstances, the prosecution have proven that the defendant held that belief.**

**[Amend as appropriate to the facts in the trial] Evidence that the child was represented to the defendant as being under 16 years (or under 12 years, as the case may be) is, in the absence of evidence to the contrary, proof that the defendant believed the child was under that age. Where the child is a fictitious person, or a real person over 16 years, evidence to the contrary includes evidence**

that the defendant did not believe the representation that the person was under 16 years; or the defendant had no belief either way whether the person was under or over 16 years. It is for you to assess the credibility of any explanation the defendant has given as to not believing the representation, and for you to decide whether the prosecution have disproved that explanation beyond reasonable doubt. The offence has not been committed unless the defendant is proved to have intended to facilitate the procurement of a person the defendant believed to be under 16 years (or 12 years as the case may be) to engage in a sexual act (or expose a person he believed to be under 16 years (or under 12 years as the case may be) to any indecent matter).

[Here set out the evidence relevant to the issue.]

3. **That the defendant engaged in that conduct with intent to:** [amend as appropriate to the issues in the trial]
- (a) **facilitate the procurement of the child (as defined) to engage in a sexual act either in Queensland or elsewhere; or**

There are a number of components to this element, all of which must be proven beyond reasonable doubt by the prosecution.

First, the prosecution must show that the defendant acted with a specific intent, namely the intent to facilitate the procurement of the child (as defined) to engage in a sexual act either in Queensland or elsewhere. It does not matter where it was intended that that the sexual act would be engaged in, but the specific intent must be proven.

Intention may be inferred or deduced from the circumstances which you find proven in the evidence, including things said and done by him or her before, at the time of, or after he did the specific act or acts with which he has been charged. And, of course, whatever a person has said about his or her intention may be looked at for the purpose of deciding what that intention was at the relevant time.

Secondly the intention must be to facilitate the procuring of the child to engage in a sexual act. I will direct you shortly about what “sexual act” means.

For the purposes of this element the word “procure” has a specific meaning, namely to knowingly entice or recruit for the purposes of sexual exploitation.

**A proven intention to procure a child to engage in a sexual act will satisfy this aspect of the element, but the prohibited intent is wider than only that. This aspect of the element is also proven where the proven intent is to facilitate the procuring of the child, that is to permit it or make it able to happen.**

**The prosecution do not need prove that the defendant intended to facilitate the procurement of the child to engage in any particular sexual act. An intent to facilitate the procurement of the child to engage in a sexual act of any type is sufficient.**

**Further, it does not matter when the defendant intended the child would be procured to engage in a sexual act. What is required is proof that he held the prohibited intention when he undertook the conduct in relation to the child that is the subject of the charge.**

**[If appropriate] Also, it does not matter that, by reason of circumstances not known to the defendant, it is impossible for the child to engage in a sexual act.**

**[Outline here what the particularised intent is, and the evidence relevant to the issue.]**

**Thirdly, the intent must relate to the child engaging in a sexual act, which term is widely defined for the purposes of this trial. A person engages in a sexual act if the person —**

- (i) allows a sexual act to be done to the person's body; or**
- (ii) does a sexual act to the person's own body or the body of another person; or**
- (iii) otherwise engages in an act of an indecent nature.**

**The sexual acts and act of an indecent nature that I have just referred to are not limited to acts of sexual intercourse or acts involving physical contact.**

**An act will be a sexual act if it has a sexual connotation or aspect to it.**

**In order to decide whether an act is of an indecent nature, you must determine what is indecent. 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 light of time, place and circumstance.**



- (b) expose, without legitimate reason, the child to indecent matter, either in Queensland or elsewhere.**

**There are a number of components to this element, all of which must be proven beyond reasonable doubt by the prosecution.**

**First, the prosecution must show that the defendant acted with a specific intent, namely the intent to expose, without legitimate reason, the child to indecent matter either in Queensland or elsewhere. It does not matter where it was intended that the exposure to indecent matter would occur, but that specific intent must be proven.**

**Intention may be inferred or deduced from the circumstances which you find proven in the evidence, including things said and done by him or her before, at the time of, or after he did the specific act or acts with which he has been charged. And, of course, whatever a person has said about his or her intention may be looked at for the purpose of deciding what that intention was at the relevant time.**

**Secondly the prosecution must show an intention that the child be exposed to the indecent matter. “Expose” means show or in some other way make the child aware of the indecent material.**

**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 light of time, place and circumstance. “Indecent matter” includes, but is not limited to, indecent film, videotape, audiotape, picture, photograph or printed or written matter. It is any matter or material that you as a jury consider to be indecent.**

**Thirdly, it must be shown that the defendant acted with that intent without legitimate reason. The law leaves it to the good sense of the jury as representatives of the community to decide whether the defendant acted without legitimate reason. The onus of proof is on the prosecution to prove beyond reasonable doubt that the defendant did not have a legitimate reason. There is no onus on the defendant to prove he did have a legitimate reason.**

**[If appropriate] A legitimate reason could include for the benefit of the child’s sexual education, but it is a matter for**

**you to decide if that is a legitimate reason or not in all of the circumstances.**

4. [Where appropriate, given the limited operation of the defences at sections 218B(10) and (11) in light of the prosecution's onus and standard of proof of the earlier elements] **Where the child is actually under 16 years (or 12 years, 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 years (or 12 years, as the case may be).**

**The standard of proof imposed on the defendant is less onerous than that imposed on the prosecution to prove the elements of the offence. The prosecution must prove the elements beyond reasonable doubt, whereas the defendant need prove this defence to the lesser standard, being on the balance of probabilities, that is, he or she need only prove this matter to be more likely or than not the case.**

**A defendant's belief is reasonable, when it is one held by the defendant, in his particular circumstances, on reasonable grounds. Any intoxication, as you may find there to be on the part of the defendant, is not relevant to an assessment of whether the belief was held on reasonable grounds. Self-induced intoxication cannot turn what would otherwise be an unreasonable belief into a reasonable one. Whether the belief is reasonable requires an objective assessment by you.**

**It also must have been a belief that was actually held at the time of penetration. It cannot be an afterthought or a later rationalization of conduct.**

[Set out the evidence relevant to the issue of a belief being held at the time of the charged conduct, and the reasonable grounds, or otherwise, for that belief.]

**If the defendant proves on the balance of probabilities that he or she believed on reasonable grounds that the child was at least 16 years old, that is a complete defence to the charge and he or she must be acquitted; that is found not guilty.**

[If appropriate] **If the defendant proves on the balance of probabilities that he or she believed on reasonable grounds that the child was at least 12 years old but not that the child was at least 16 years, that is a defence to the circumstance of aggravation charged in the indictment, but not a complete defence to the charge and, if all other elements have been proven by the prosecution, he or she must be found not guilty of the aggravated form of the offence but guilty of the non-aggravated form of it.**

5. [Where a circumstance of aggravation is charged under section 218B(3)]

**The prosecution have charged the defendant with a circumstance of aggravation that the child was under 12 years (or that the defendant believed that the child was under 12 years, as the case may be). It must prove that allegation (or those allegations) beyond reasonable doubt.**

**I have earlier directed you on the issues in proof of the age alleged by the prosecution, and they apply in consideration of the proof of this circumstance of aggravation.**

**If the prosecution fails to prove that the child was under 12 years (or that the defendant believed the child was under 12 years, as the case may be) but does prove that the child was under 16 years (or that the defendant believed that the child was under 16 years, as the case may be), if all other elements have been proven by the prosecution, he or she must be found not guilty of the aggravated form of the offence but guilty of the non-aggravated form of it.**

**[If appropriate] I have already directed you as to the consequences of a similar finding based on the defendant's reliance on the defence which must be proven by him or her on the balance of probabilities.**

6. [Or, where a circumstance of aggravation is charged pursuant to section 218B(4)]

**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.]