

## 118. Possessing child exploitation material: s 228D of the *Criminal Code*

(commencement date: 4 April 2005)

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### 118.1 Legislation

[Last reviewed: October 2024]

[Section 228D](#) – Possessing child exploitation material.

[Section 207A](#) – Definitions for Chapter 22.

[Section 228E](#) – Defences for ss 228A-228DC.

[Section 228F](#) – Excluding non-essential persons from court when child exploitation material displayed.

[Section 228G](#) – Forfeiture of child exploitation material etc.

[Section 228H](#) – Possession etc of child exploitation material by law enforcement officer.

### 118.2 Commentary

[Last reviewed: October 2024]

The defendant must have:

- (1) Possessed child exploitation material; and
- (2) Knowingly possessed the material.

See *R v Campbell* [2009] QCA 128, [57], [58], [61] and [63] for observations about the concept of possession in the context of this offence, and at [51], [54] and [60]-[63] for the importance of precisely identifying what it is that the defendant is said to have possessed.

The term ‘knowingly possesses’ means that the defendant must have actual knowledge of the material that is child exploitation material. Guilty knowledge of possession of the subject material is an element of the offence – see *R v Campbell* [2009] QCA 128, [55]-[57], endorsing observations in *R v Shew* [1998] QCA 333, [18] made in respect of earlier legislation. Proof may be achieved through reliance on circumstantial evidence and inference.

The determination of whether material satisfies the definition of child exploitation material is not necessarily confined to an examination of the material itself to the exclusion of contextual features – see *R v SDI* [2019] QCA 135, [55]. A piece of

literature that describes a fictional person is capable of being child exploitation material – *R v Campbell* [2009] QCA 128, [46].

The Court of Appeal in *R v SDI* [2019] QCA 135, [49] considered that in the particular circumstances of that case it was not necessary for the trial judge to elaborate or explain the meaning of the terms ‘offensive’ or ‘demeaning’ in the definition of ‘child exploitation material’ because the material there being considered clearly satisfied another aspect of the definition. By parity of reasoning, it may be necessary in other cases.

Relevant definitions for this offence are at s 1 (‘possession’) and s 207A (‘child exploitation material’, ‘material’, ‘anonymising service’, ‘distribute’, ‘hidden network’ and ‘network’) of the *Criminal Code*.

See s 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 s 228H for an exculpatory provision applying to certain conduct involving child exploitation material by a law enforcement officer.

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

See s 228G for the power to order the forfeiture of child exploitation material. Notably this power is wide-ranging and exists where the defendant has been prosecuted for an offence against the child exploitation material provisions, as well as some other offences in Chapter 22 of the *Criminal Code*, applies whether the defendant has been convicted or not, is not limited to material amounting to child exploitation material 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.

NOTE: Where a circumstance of aggravation is charged under s 161Q of the *Penalties and Sentences Act 1992* (Qld), see Part 9D, Division 1 of the *Act* for relevant definitions.

### **118.3 Suggested Direction**

[Last reviewed: October 2024]

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

**1. That the defendant possessed material;**

**The first element focusses on the meaning of the term ‘possession’.  
That term has the same meaning as it has in ordinary English usage.**

**It includes having the material possession or custody, or under control.**

**(In an appropriate case, the following paragraph may be added): For the purposes of this trial the term also includes, but is not limited to, having under control in any place whatever, whether for the use or benefit of the defendant or of another person, even though another person has the actual possession or custody of the thing in question. That is, a person may be in possession of material by exercising control over the item even though he or she is not in actual physical possession of the material.**

**(Where joint possession is not alleged): In order to prove that the defendant had the material in [his/her] possession, the prosecution must prove that others were or could be excluded from control of the material.**

**(Otherwise, where joint possession is alleged): The prosecution case is that the defendant jointly possessed the material with another or others. In order to prove this element of possession, the prosecution need not prove that the defendant had a major or dominant role in the possession, custody or control of the child exploitation material. It will be sufficient if the prosecution proves that the defendant had a real or substantial ability to exercise possession or custody of, or control over the child exploitation material even though another or others also had that ability. 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.**

**[Outline here the evidence relevant to the issue of ‘possession’ of the child exploitation material].**

## **2. That the material was child exploitation material; and**

**The second element requires proof that the material the defendant possessed was ‘child exploitation material’. That term 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 an appropriate case the following paragraph may be added): **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.**

(In an appropriate case the following paragraph may be added): **'Material' includes anything that contains data from which text, images or sound can be generated, so child exploitation material may be possessed 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.**

**You must objectively assess the material and decide whether the material satisfies that definition. In performing that task you are entitled to have regard to contextual features, such as [refer here to relevant contextual features] in determining if the material is in fact child exploitation material.**

[Here summarise the evidence as to what is said to be the child exploitation material and, if in contest, the opposing arguments as to why it is or is not child exploitation material].

**3. That the defendant knowingly possessed the child exploitation material.**

**The third element is that the defendant 'knowingly possessed' the child exploitation material. The prosecution must prove that the defendant knew that [he/she] had child exploitation material in [his/her] possession.**

(In an appropriate case, the following may be added): **Proof of knowledge that the defendant possessed some form of media, such as a disc, USB, hard drive, or the like is not sufficient unless it is also proven that the defendant knew that the media contained child exploitation material.**

(Where a circumstance of aggravation under s 228D(1)(a) is charged, the following text under (4) or (5) below should be added)

**4. 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/her] commission of the offence.**

**(Or, as the case may be):**

- 5. 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/her] commission of the offence.**

(Where a circumstance of aggravation under s 161Q of the *Penalties and Sentences Act 1992* is charged, the following text under (6) should be added):

**6. 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 defendant—**

- (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.**