

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

Legislation

228D Possessing child exploitation material

- (1) A person who knowingly possesses child exploitation material commits a crime.

Maximum penalty—

- (a) if the offender uses a hidden network or an anonymising service in committing the offence—20 years imprisonment; or
- (b) otherwise—14 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.

Commentary

See *R v Campbell* [2009] QCA 128 at [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 section 1 (“possession”) and section 207A (“child exploitation material”, “material”, “anonymising service”, “distribute”, “hidden network” and “network”) of the Criminal Code.

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 228D(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 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] 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 or her possession, the prosecution must prove that others were or could be excluded from control of the material.

[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] 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] “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 CEM and, if in contest, the opposing arguments as to why it is or is not CEM.]

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 had child exploitation material in his possession.

[In an appropriate case] 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 section 228D(1)(a) is charged]

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 or 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 or her commission of the offence.

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

- 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 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.]