



Queensland

# **Criminal Code (Child Pornography and Abuse) Amendment Act 2005**

**Act No. 9 of 2005**





## Queensland

# Criminal Code (Child Pornography and Abuse) Amendment Act 2005

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# **Criminal Code (Child Pornography and Abuse) Amendment Act 2005**

## **Act No. 9 of 2005**

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**An Act to amend the Criminal Code, and for other purposes  
[Assented to 18 March 2005]**

**The Parliament of Queensland enacts—**

**Part 1 Preliminary**

**1 Short title**

This Act may be cited as the *Criminal Code (Child Pornography and Abuse) Amendment Act 2005*.

**2 Commencement**

This Act commences on a day to be fixed by proclamation.

**Part 2 Criminal Code amended**

**3 Code amended in pt**

This part amends the Criminal Code.

**4 Amendment of s 1 (Definitions)**

Section 1—

*insert—*

*‘child exploitation material*, for chapter 22, see section 207A.

*classification officer*, for chapter 22, see section 207A.

*classified*, for chapter 22, see section 207A.

*computer game*, for chapter 22, see section 207A.

*film*, for chapter 22, see section 207A.

*material*, for chapter 22, see section 207A.

*publication*, for chapter 22, see section 207A.

*someone*, for chapter 22, see section 207A.’

## 5 Insertion of new s 207A

Chapter 22, before section 208—

*insert—*

### ‘207A Definitions for this chapter

‘In this chapter—

***child exploitation material*** means material that, in a way likely to cause offence to a reasonable adult, describes or depicts someone 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.

***classification officer*** means—

- (a) the computer games classification officer under the *Classification of Computer Games and Images Act 1995*; or
- (b) the films classification officer under the *Classification of Films Act 1991*; or
- (c) the publications classification officer under the *Classification of Publications Act 1991*.

***classified—***

- (a) for a computer game—see the *Classification of Computer Games and Images Act 1995*; or
- (b) for a film—see the *Classification of Films Act 1991*; or
- (c) for a publication—see the *Classification of Publications Act 1991*.

***computer game*** see the *Classification of Computer Games and Images Act 1995*.

***film*** see the *Classification of Films Act 1991*.

***material*** includes anything that contains data from which text, images or sound can be generated.

**publication** see the *Classification of Publications Act 1991*.

**someone**, in the context of a description or depiction, includes the body parts of someone, including for example, someone's breast or genitalia.'

## **6 Insertion of new ss 228A–228H**

After section 228—

*insert—*

### **'228A Involving child in making child exploitation material**

'(1) A person who involves a child in the making of child exploitation material commits a crime.

Maximum penalty—10 years imprisonment.

'(2) In this section—

**involves** a child in the making of child exploitation material includes—

- (a) in any way concerns a child in the making of child exploitation material; and
- (b) attempts to involve a child in the making of child exploitation material.

### **'228B Making child exploitation material**

'(1) A person who makes child exploitation material commits a crime.

Maximum penalty—10 years imprisonment.

'(2) In this section—

**make** child exploitation material includes—

- (a) produce child exploitation material; and
- (b) attempt to make child exploitation material.



### **‘228C Distributing child exploitation material**

‘(1) A person who distributes child exploitation material commits a crime.

Maximum penalty—10 years imprisonment.

‘(2) In this section—

*distribute* child exploitation material includes—

- (a) communicate, exhibit, send, supply or transmit child exploitation material to someone, whether to a particular person or not; and
- (b) make child exploitation material available for access by someone, whether by a particular person or not; and
- (c) enter into an agreement or arrangement to do something in paragraph (a) or (b); and
- (d) attempt to distribute child exploitation material.

### **‘228D Possessing child exploitation material**

‘A person who knowingly possesses child exploitation material commits a crime.

Maximum penalty—5 years imprisonment.

### **‘228E Defences for ss 228A–228D**

‘(1) Subsections (2), (3) and (5) prescribe defences available to a person charged with an offence against section 228A, 228B, 228C or 228D.

‘(2) It is a defence for the person to prove that—

- (a) the person engaged in the conduct that is alleged to constitute the offence for a genuine artistic, educational, legal, medical, scientific or public benefit purpose; and
- (b) the person’s conduct was, in the circumstances, reasonable for that purpose.

*Example of something made for a ‘public benefit’—*

A current affairs television program showing children being tortured during a civil war.

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- ‘(3) It is a defence for the person to prove that, at the time of the alleged offence—
- (a) a classification exemption had been given to an entity for the material that is alleged to be child exploitation material; and
  - (b) the person engaged in the conduct that is alleged to constitute the offence—
    - (i) for a purpose for which the exemption was given; and
    - (ii) in a way that is consistent with the exemption, including any conditions imposed on the exemption.

*Example—*

A Brisbane medical school is given an exemption under the *Classification of Computer Games and Images Act 1995*, section 59, to allow the medical school to possess computer images of tortured children, and to distribute the images to its medical students. The exemption is subject to a condition that the medical students are not allowed to distribute the images to anyone, including to themselves at another computer. Amy, a medical student, sends a copy of the images to her home computer and also to her brother Bob’s computer. Neither Amy nor Bob could claim a defence under subsection (3), because their possession of the images is not consistent with the exemption.

- ‘(4) Whether conduct was engaged in for a purpose mentioned in subsection (2)(a) or (3)(b)(i) is a question of fact.
- ‘(5) It is a defence for the person to prove that the material alleged to be child exploitation material is—
- (a) a computer game that, under the *Classification (Publications, Films and Computer Games) Act 1995* (Cwlth), is a film classified R or X; or
  - (b) a computer game, film or publication that is classified as something other than RC.
- ‘(6) For subsection (5), the material may have been classified before, or may be classified after, the offence is alleged to have been committed.

- ‘(7) A certificate that states any of the following facts is evidence of that fact—
- (a) whether a stated computer game, film or publication has been classified;
  - (b) if a stated computer game, film or publication has been classified—the classification given to the computer game, film or publication.

- ‘(8) In this section—

**certificate** means—

- (a) a certificate under the *Classification (Publications, Films and Computer Games) Act 1995* (Cwlth), section 87; or
- (b) a certificate signed, or purporting to be signed, by—
  - (i) for a computer game—the computer games classification officer under the *Classification of Computer Games and Images Act 1995*; or
  - (ii) for a publication—the publications classification officer under the *Classification of Publications Act 1991*.

**classification exemption** means an exemption given under—

- (a) for a computer game—the *Classification of Computer Games and Images Act 1995*, section 59; or
- (b) for a publication—the *Classification of Publications Act 1991*, section 37.

## ‘228F Excluding non-essential persons from court when child exploitation material displayed

- ‘(1) When material alleged to be child exploitation material is on display in a courtroom, the court must exclude from the courtroom anyone who is not an essential person.
- ‘(2) An **essential person** is—
- (a) a party, or a person representing a party, to the proceeding; or

- (b) a Crown Law officer or a person authorised by a Crown Law officer; or
  - (c) the prosecutor; or
  - (d) a witness giving evidence; or
  - (e) a person who a witness is entitled to have present in court under the *Evidence Act 1977*, section 21A(2)(d) or 21AV or the *Criminal Law (Sexual Offences) Act 1978*, section 5(1)(f); or
  - (f) a person whose presence is, in the court's opinion, necessary or desirable for the proper conduct of the proceeding; or
  - (g) a person who applies to the court to be present and whose presence, in the court's opinion—
    - (i) would serve a proper interest of the person; and
    - (ii) would not be prejudicial to the interests of any child described or depicted in the child exploitation material, whether or not any child can be identified from the child exploitation material.
- ‘(3) When forming an opinion under subsection (2)(f) or (g), the court must consider the public benefit of limiting the number of people with access to child exploitation material.

### **‘228G Forfeiture of child exploitation material etc.**

- ‘(1) This section applies if a person is prosecuted for an offence against—
  - (a) section 210(1)(f);<sup>1</sup> or
  - (b) section 228A, 228B, 228C or 228D.
- ‘(2) Whether or not the person is convicted of the offence, the court may order the photograph, visual image, or material that is the subject of the offence be forfeited to the State.

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<sup>1</sup> Section 210 (Indecent treatment of children under 16)

- ‘(3) If the person is convicted of the offence, the court may also order that anything used to commit the offence be forfeited to the State.

*Example of a thing used to commit the offence—*

A computer, camera or sound recording device.

- ‘(4) Subsections (2) and (3) apply whether the thing to be forfeited has been seized or is in its owner’s possession.
- ‘(5) The court may also make any order that it considers appropriate to enforce the forfeiture.
- ‘(6) This section does not limit the court’s powers under the *Penalties and Sentences Act 1992*, the *Criminal Proceeds Confiscation Act 2002* or another law.
- ‘(7) When forfeited to the State, the thing becomes the State’s property and may be dealt with as directed by the chief executive.

**‘228H Possession etc. of child exploitation material by law enforcement officer**

- ‘(1) A person is not criminally responsible for an offence against section 228B, 228C or 228D if—
- (a) the person is, at the time of the offence, a classification officer or law enforcement officer acting in the course of the person’s duties; and
- (b) the person’s conduct is reasonable in the circumstances for the performance of the duties.

*Examples of conduct that may be reasonable for the performance of a law enforcement officer’s duties—*

- 1 Copying child exploitation material for the purposes of preparing a brief for police prosecutors
- 2 Supplying child exploitation material to a classification officer for classification or to the Office of the Director of Public Prosecutions for use during the prosecution of a person for an offence
- 3 Keeping child exploitation material obtained during an investigation for legitimate intelligence purposes

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‘(2) However, subsection (1) does not apply to the extent that the person’s conduct consists of—

- (a) engaging in an activity as part of an investigation of chapter 5 criminal activity; or
- (b) engaging in conduct that is directed to obtaining evidence of the commission of an offence against a particular person.<sup>2</sup>

‘(3) In this section—

*chapter 5 criminal activity* has the meaning given by the *Police Powers and Responsibilities Act 2000*.

*law enforcement agency* means—

- (a) the Queensland Police Service; or
- (b) the Office of the Director of Public Prosecutions; or
- (c) the Crime and Misconduct Commission; or
- (d) any other entity of—
  - (i) another State; or
  - (ii) the Commonwealth; or
  - (iii) another country;

that performs a similar function to an entity in paragraphs (a) to (c).

*law enforcement officer* means—

- (a) a member or officer of a law enforcement agency, including a person appearing for the director under the *Director of Public Prosecutions Act 1984*, section 10(4); or
- (b) a person who is authorised, in writing, by the commissioner of the police service, or the chairperson of the Crime and Misconduct Commission, to help a member or officer of a law enforcement agency; or

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<sup>2</sup> See the *Police Powers and Responsibilities Act 2000*, chapter 5, which provides for the approval of, and protection from liability of persons involved in, controlled operations and controlled activities.

- (c) a person who belongs to a class of persons that is authorised, in writing, by the commissioner of the police service, or the chairperson of the Crime and Misconduct Commission, to help a member or officer of a law enforcement agency.’.

**7 Amendment of s 590AF (Meaning of *sensitive evidence*)**

Section 590AF—

*insert—*

- ‘(2) Child exploitation material under chapter 22, or material alleged to be child exploitation material, is *sensitive evidence*.’.

**Part 3 Child Protection (Offender Reporting) Act 2004 amended**

**8 Act amended in pt**

This part amends the *Child Protection (Offender Reporting) Act 2004*.

**9 Amendment of sch 2 (Class 2 offences)**

Schedule 2, item 1(a)—

*insert—*

- section 228A (Involving child in making child exploitation material)
- section 228B (Making child exploitation material)
- section 228C (Distributing child exploitation material)
- section 228D (Possessing child exploitation material)’.

## **Part 4****Commission for Children and Young People and Child Guardian Act 2000 amended**

### **10 Act amended in pt**

*This part amends the Commission for Children and Young People and Child Guardian Act 2000.*

### **11 Amendment of s 99E (What is an excluding offence)**

Section 99E—

*insert—*

‘(c) an offence against the Criminal Code, section 228A, 228B, 228C or 228D.<sup>3</sup>’.

### **12 Amendment of sch 2 (Current serious offences)**

Schedule 2, item 4—

*insert—*

‘228A Involving child in making child exploitation material

228B Making child exploitation material

<sup>3</sup> Criminal Code, section 228A (Involving child in making child exploitation material), 228B (Making child exploitation material), 228C (Distributing child exploitation material) or 228D (Possessing child exploitation material)



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- 228C     Distributing child  
          exploitation  
          material
- 228D     Possessing child  
          exploitation  
          material'.