

Chapter 5
Specific offences
under the Criminal Code
more commonly
dealt with and defences

Chapter 5—Specific offences under the Criminal Code more commonly dealt with and defences

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A. Assaults

5-1 Definition of assault

Under s 245(1) of the *Criminal Code Act 1899* (Qld), '[a] person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an assault'.

The term 'applies force includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort' (s 245(2)).

The word 'assault' has been held to have a very wide definition. If a person presents an unloaded gun or imitation firearm at another person, this could be held to be an assault. However, words not accompanied by some bodily act or gesture indicating an intention to assault would not be held as assault.

5-2 Assault is an offence

Under s 246:

- (1) 'An assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law.
- (2) The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person'.

Normally, consent is relevant (e.g. a boxing match) but not where the consent is obtained by fraud or the complainant is not legally allowed to consent (e.g. in certain sexual offences where age is relevant).

5-3 Common assault

'Any person who unlawfully assaults another is guilty of a misdemeanour, and is liable, if no greater punishment is provided, to imprisonment for 3 years' (s 335).

5-4 Aggravated assault

While there is no specific offence of aggravated assault, the Criminal Code has previously provided, in certain circumstances of aggravation, increased penalties on summary conviction for assault. The penalty for common assault was increased from one to three years' imprisonment from 1 July 1997. This gives the court greater scope for variation in sentencing, depending on the nature of the assault and any alleged circumstances of aggravation.

Circumstances of aggravation have previously included where the:

- assault was of a sexual nature
- person assaulted was a child under 16
- person assaulted was a female
- person assaulted was a male child under the age of 14 years.

5-5 Assault occasioning bodily harm

Under s 339:

- (1) 'Any person who unlawfully assaults another and thereby does the other person bodily harm is guilty of a crime, and is liable to imprisonment for 7 years.
- (3) If the offender does bodily harm, and is or pretends to be armed with any dangerous or offensive weapon or instrument or is in company with 1 or more other person or persons, the offender is liable to imprisonment for 10 years'.

'Bodily harm' is defined as 'any bodily injury which interferes with health or comfort' (s 1).

The sensation of pain without 'bodily injury' is not sufficient to constitute bodily harm (see *R v Scatchard* (1987) 27 A Crim R 136). However, if the bodily injury results in:

- (a) 'the loss of a distinct part or organ of the body; or
- (b) serious disfigurement; or
- (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available', it comes under the definition of 'grievous bodily harm' (s 1).

5-6 Serious assaults

Section 340 of the Criminal Code provides examples of assaults that are deemed to be serious assaults. These include when a person:

- a. assaults...with intent to commit a crime, or with intent to resist or prevent the lawful arrest or detention of himself or herself or of any other person; or
- b. assaults, resists or wilfully obstructs a police officer while acting in the execution of the officer's duty, or any person acting in aid of a police officer while so acting; or
- c. unlawfully assaults any person while the person is performing a duty imposed on the person by law; or
- d. assaults any person because the person has performed a duty imposed on the person by law; or...
- g. unlawfully assaults any person who is 60 years or more; or
- h. unlawfully assaults any person who relies on a guide, hearing or assistance dog, wheelchair or other remedial device' (s 340).

If convicted of a serious assault, an offender is liable to seven years' imprisonment. A charge of serious assault must be dealt with summarily if the prosecutor elects (s 552A(a)).

5-7 Defences to assault

The defences most frequently relied on are provocation and self-defence. These are discussed further below.

5-8 Provocation defined

Section 268 defines ‘provocation’ as ‘any wrongful act or insult of such a nature as to be likely, when done to an ordinary person’ or to people in a special relationship to the person (see s 268(1) for the relationships covered by the definition), ‘to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered’ (s 268). ‘A lawful act is not provocation to any person for an assault’ (s 268(3)).

5-9 Defence of provocation

Under s 269, ‘[a] person is not criminally responsible for an assault committed’ in response to such provocation if:

- the person is deprived of self-control
- ‘the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm’
- the person acts upon the provocation ‘on the sudden and before there is time for the person’s passion to cool’ (s 269).

5-10 Provocation is a defence only if assault is element of offence

Provocation can be raised as a defence only if assault is an element of the original offence (*Kapronovski v R* (1973) 133 CLR 209; [\[1973\] HCA 35](#)). Therefore, this may apply in relation to offences of assault, common assault or assault occasioning bodily harm, but not to unlawful wounding or unlawful grievous bodily harm, as assault is not specifically an element of those offences.

5-11 Questions of fact for court

‘Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self control, and whether any force used is or is not disproportionate to the provocation, are questions of fact’ (s 269(2)). Where provocation is open on the evidence, the onus is on the prosecution to disprove provocation beyond a reasonable doubt (*Stingel v R* (1990) 171 CLR 312; [\[1990\] HCA 61](#)).

5-12 Self-defence against unprovoked assault

‘When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm’ (s 271(1)).

If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm’ (s 271(2)).

5-13 Self-defence against provoked assault

Self-defence can be available when, after ‘a person has unlawfully assaulted another or has provoked an assault from another, and that other assaults the person with such violence as to cause reasonable apprehension of death or grievous bodily harm, and to induce the person to believe, on reasonable grounds, that it is necessary for the person’s preservation from death or grievous bodily harm to use force in self-defence...although such force may cause death or grievous bodily harm’ (s 272(1)).

This protection does not apply if ‘the person using force which causes death or grievous bodily harm first begun the assault with intent to kill or to do grievous bodily harm to some person’ (s 272).

5-14 Aiding in self-defence

‘In any case in which it is lawful for any person to use force...for the purpose of defending himself or herself against an assault, it is lawful for any other person acting in good faith in the first person’s aid to use a like degree of force for the purpose of defending the first person’ (s 273). It is a question of fact for the court and, where the question of self-defence arises, the prosecution must negative self-defence beyond a reasonable doubt.

B. Sexual offences

5-15 Sexual offences that may be dealt with summarily

In some circumstances, several sexual offences can be dealt with summarily if the defendant elects this option. Section s 552B(1) sets out these offences.

5-16 Offences where absence of consent is not an element

For offences under ss 210 (‘Indecent treatment of children under 16’) and 215 (‘Carnal knowledge with or of children under 16’), the prosecution does not have to establish the absence of consent. The acts constituting these offences become unlawful because the child is under the age of 16. However, the question of consent may be relevant on sentencing, depending on the complainant’s age and maturity.

5-17 Offences where absence of consent is an element

For certain offences, such as rape, the absence of consent is clearly an element. If a defence is raised on the basis that either the complainant consented or the accused had an honest and reasonable but mistaken belief about consent, the Crown must negative consent beyond reasonable doubt.

5-18 Sexual offences that must proceed on indictment

Most sexual offences under the Criminal Code are contained in ss 208–229B and 347–352. Except for the offences referred to in 5-15, these offences must proceed on indictment. Sections 208–229B deal with offences against morality, including sodomy, indecent treatment of children under 16, carnal knowledge with or of children under 16, procurement of sexual acts, incest, child exploitation material offences and sexual relationships with a child. Sections 347–352 deal with rape, attempts to commit rape, assault with intent to commit rape and sexual assaults.

5-19 Mistaken belief about age of complainant

When dealing with any offence under Chapter 22 (ss 208–229B) of the Criminal Code, you should be aware of s 229, which states that, ‘[e]xcept as otherwise expressly stated, it is immaterial, in the case of any [offence in Chapter 22]

committed with respect to a person under a specified age, that the accused person did not know that the person was under that age, or believed that the person was not under that age'. Some sections allow for a specific defence regarding mistaken belief about age.

Under ss 210 ('Indecent treatment of children under 16') and 215 ('Carnal knowledge with or of children under 16'), an accused person can raise a defence if the child is above the age of 12 and they can prove that they reasonably believed that the child was of or above the age of 16. The onus of proof is reversed in this case—the defence must not only raise a defence but also establish the defence on the balance of probabilities. If the child is under the age of 12, there seems to be no defence, and belief about the child's age is irrelevant and immaterial.

C. Offences of dishonesty

5-20 Offences more commonly encountered

The dishonesty offences you are more likely to encounter as a duty lawyer include stealing, receiving, breaking and entering, burglary and fraud.

5-21 Stealing defined

Under s 391:

- '(1) A person who fraudulently takes anything capable of being stolen, or fraudulently converts to the person's own use or to the use of any other person anything capable of being stolen, is said to steal that thing.
- (2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if the person does so with any of the following intents, that is to say—
- (a) an intent to permanently deprive the owner of the thing of it;
 - (b) an intent to permanently deprive any person who has any special property in the thing of such property;
 - (c) an intent to use the thing as a pledge or security;
 - (d) and intent to part with it on a condition as to its return which the person taking it or converting it may be unable to perform;
 - (e) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
 - (f) in the case of money—an intent to use it at the will of the person who takes or converts it, although the person may intend to afterwards repay the amount to the owner'.

See s 391(2) for the definition of 'stealing'.

5-22 Things capable of being stolen

'Anything that is the property of any person is capable of being stolen if it is moveable or capable of being made moveable, even if it is made moveable in order to steal it' (s 390).

5-23 Intention

You need to obtain clear instructions regarding intention. Often, people wish to plead guilty to finalise the matter quickly but their instructions do not indicate an intention to permanently deprive. For example, a person who, through an oversight, failed to pay for an item upon leaving a shop may still feel that they have done something wrong and wish to plead guilty. Obviously, this person would not be guilty of any offence under the Criminal Code, though, arguably, they could be guilty of an offence under s 5 of the [Regulatory Offences Act 1985](#) (Qld), if so charged.

5-24 Bona fide claim of right

While ignorance of the law does not usually afford any excuse ‘unless knowledge of the law by the offender is expressly declared to be an element of the offence...a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done...in the exercise of an honest claim of right and without intention to defraud’ (s 22). When this defence is raised on the evidence, the prosecution must negative it beyond reasonable doubt. The defendant does not have the onus of proof. This section has had very wide application. The usual application has been where a person has done some act relating to property, while honestly but mistakenly believing that they own it.

5-25 Mistake of fact

‘A person who does or omits to do any act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist’ (s 24(1)). When this defence is raised on the evidence, the prosecution has the onus of proof to exclude it beyond reasonable doubt.

5-26 Abandoned property

The Criminal Code specifically provides for situations where property ‘has been lost by the owner and found by the person who converts it...[T]he conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes, on reasonable grounds, that the owner can not be discovered’ (s 391(5)).

The prosecution has the onus of negating the application of s 391(5). If this question arises, it must prove on the evidence that the defendant either knew at the relevant time where the owner was or did not believe on reasonable grounds that the owner was undiscoverable (*Dolby v Stanta* [1996] 1 Qd R 138; [\[1995\] QCA 434](#)).

5-27 Receiving stolen property

‘A person who receives tainted property, and has reason to believe it is tainted property, commits a crime’ (s 433). To constitute receiving, ‘it is sufficient to show that the accused person has, either alone or jointly with some other person, had the thing in his or her possession, or has aided in concealing it or disposing of it’ (s 433(2)).

The Criminal Code provides far more substantial penalties for receiving than stealing. A person who steals (if no other punishment is provided) is subject to a maximum of five years’ jail, while a person convicted of receiving stolen property can be subject to a maximum of seven or fourteen years’ jail (s 433).

5-28 Mental element—receiving

The defendant must have the mental element of the offence, namely the guilty knowledge, at the time of receiving and not acquire it subsequently (*R v Patterson* [1906] QWN 32). Proof of possession is essential, while mere knowledge is insufficient (*R v Watson* [1916] 2 KB 385).

5-29 Breaking and entering offences

Sections 419 and 421 set out the various offences of breaking and entering. The penalties vary from 10 years’ jail to life. Section 419 relates to entering or breaking and entering dwellings, while s 421 relates to entering or breaking and entering premises. A ‘dwelling’ can include a caravan or motel unit.

5-30 Mental element

The mental element in all offences of breaking and entering is an intention to commit an indictable offence. A person who breaks into a house intending to steal or assault someone clearly does so with the intention of committing an indictable offence.

However, a person who breaks into a house merely to retrieve their own property would not be guilty of the offence of breaking, entering and stealing, or breaking and entering with the intention of committing an indictable offence. However, they could be guilty of an offence under s 48A of the [Invasion of Privacy Act 1971](#) (Qld).

You should take care when obtaining full instructions about the mental element of the offence, particularly when a summary plea of guilty is being considered. Sometimes charges are laid when there is no evidence of the mental element.

5-31 Breaking and entering defined

Under s 418:

- ‘(1) A person who breaks any part, whether external or internal, of a dwelling or any premises, or opens, by unlocking, pulling, pushing, lifting, or any other means whatever, any door, window, shutter, cellar, flap or other thing intended to close or cover an opening in a dwelling or any premises, or an opening giving passage from one part of a dwelling or any premises to another, is said to break the dwelling or premises.
- (2) A person is said to enter a dwelling or premises as soon as any part of the person’s body or any part of any instrument used by the person is within the dwelling or premises.
- (3) A person who obtains entrance into a dwelling or premises by means of any threat or artifice used for that purpose, or by collusion with any person in the dwelling or premises, or who enters any chimney or other aperture of the of the dwelling or premises permanently left open for any necessary purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the dwelling or premises’.

5-32 Premises defined

In relation to burglary, housebreaking and other similar offences contained in Chapter 39 of the Criminal Code, the term ‘premises’ includes a building or structure, or part thereof, other than a dwelling, and also a tent, caravan, vehicle and any similar place (s 418(4)).

5-33 Fraud

Under s 408C:

- ‘(1) A person who dishonestly—
- (a) applies to his or her own use or to the use of any person—
 - (i) property belonging to another; or
 - (ii) property belonging to the person, or which is in the person’s possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or
 - (b) obtains property from any person; or
 - (c) induces any person to deliver property to any person; or
 - (d) gains a benefit or advantage, pecuniary or otherwise, for any person; or
 - (e) causes a detriment, pecuniary or otherwise, to any person; or
 - (f) induces any person to do any act which the person is lawfully entitled to abstain from doing; or
 - (g) induces any person to abstain from doing any act which that person is lawfully entitled to do; or
 - (h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;
- commits the crime of fraud’ (s 408C(1)).

'Property' includes 'credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit, and releases of obligations (s 408C(3))', as well as:

- (a) every thing animate or inanimate that is capable of being the subject of ownership; and
- (b) money; and
- (c) electrical or other energy, gas and water; and
- (d) a plant; and
- (e) an animal [defined in s 1]; and
- (f) a thing produced by an animal [defined in s 1]; and
- (g) any other property real or personal, legal or equitable, including things in action and other intangible property' (s 1).

The sole basis for criminality is proof of dishonesty. The question of intention is paramount, so you should question the defendant at length about whether any fraudulent intention existed, particularly if the defendant's instructions are to plead guilty summarily.

5-34 Passing valueless cheques

The offence of passing valueless cheques is contained in s 427A. Under s 427A(2), it is a defence that the accused person reasonably believed that the cheque would be paid in full on presentation and had no intention to defraud. The accused person must establish the defence on the balance of probabilities (*R v Carr-Briant* [1943] KB 607).

5-35 Computer hacking and misuse

Under s 408E:

- '(1) A person who uses a restricted computer without the consent of the computer's controller commits an offence'. This offence must be dealt with summarily and carries a maximum penalty of two years' imprisonment.
- (2) If the person causes or intends to cause detriment or damage, or gains or intends to gain a benefit, the person commits a crime and is liable to imprisonment for 5 years.
- (3) If the person causes a detriment or damage or obtains a benefit for any person to the value of more than \$5000, or intends to commit an indictable offence, the person commits a crime and is liable to imprisonment for 10 years.
- (4) It is a defence to a charge under this section to prove that the use of the restricted computer was authorised, justified or excused by law'.

D. Property damage

5-36 Wilful and unlawful damage

It is an offence for any person to wilfully and unlawfully destroy or damage any property (s 469). The maximum penalty is five years' jail. There is no longer any distinction between whether the offence is committed during the day or night, but this may be reflected in any penalty imposed.

5-37 'Wilfully' defined

It has been held that the Crown does not need to prove beyond reasonable doubt, as an element of the offence, an intention to destroy or damage the actual property that was destroyed or damaged. The Crown must merely prove that the accused person either:

- actually intended to do the particular kind of harm that they did
- deliberately did an act (i.e. a willed act), aware at the time that the resulting charge was a likely consequence of the act and that they recklessly did the act regardless of the risk (*R v Lockwood; ex parte Attorney-General* [1981] Qd R 209).

For example, if a person throws a bottle at another person, intending to injure them, but misses and shatters a window, they could be successfully prosecuted under this section even though they had no intention of breaking the window at any stage.

5-38 Unauthorised damage to property under Regulatory Offences Act

A similar offence of unauthorised damage to property where the loss caused is \$250 or less may be brought under s 7 of the Regulatory Offences Act. If the charge is brought under the Regulatory Offences Act, the matter must be dealt with summarily.

If the charge you are considering as duty lawyer would, upon conviction, breach a suspended sentence and is charged as wilful damage under the Criminal Code but the value of the loss is \$250 or less, you should consider seeking that the charge be substituted with the Regulatory Offences Act ‘unauthorised damage to property’ charge (where the maximum penalty is a fine and not an imprisonment term).

E. Defences generally

5-39 Defences available under Chapter 5 of the Criminal Code

Unless specifically excluded by the particular statute, the defences available under Chapter 5 of the Criminal Code apply to all statute law in Queensland (s 36). The most common defences are:

- bona fide claim of right (s 22)
- acts that occur ‘independently of the exercise of a person’s will’ (s 23(1)(a)) or by ‘an event that the person does not intend or foresee as a possible consequence and an ordinary person would not reasonably foresee as a possible consequence’ (s 23(1)(b)). However, if an event occurs by an event that the person does not intend or foresee as a possible consequence (and an ordinary person would not reasonable foresee as a possible consequence), ‘the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness or abnormality’ (s 23(1A))
- mistake of fact (s 24)
- insanity (s 27)
- intoxication (s 28).

You should be familiar with the various defences under Chapter 5 of the Criminal Code.