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The *Queensland Law Handbook* is a comprehensive plain-English legal resource designed to help you deal with your legal problems.

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COMMUNITY LEGAL CENTRE

# Introduction to Criminal Law

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# INTRODUCTION

A criminal offence is conduct that breaches the criminal law and is described in the *Criminal Code Act 1899* (Qld) (Criminal Code) of Queensland as ‘an act or omission which renders the person doing the act or making the omission liable to punishment’ (s 2 Criminal Code).

All offences against the law of Queensland are criminal offences, except those specifically designated as regulatory offences (s 3 Criminal Code). This means that even very minor offences (e.g. public nuisance) are classed as criminal offences.

The main Queensland criminal statute is the Criminal Code. There are, however, many other Queensland Acts that contain criminal offences.

By contrast, a civil wrong is improper conduct committed against another person or corporate entity. The improper conduct does not, however, breach the criminal law. Examples of civil wrongs include proceedings in defamation, tort or breach of contract.

## CRIMES VERSUS CIVIL WRONGS

### Crimes

A crime is conduct that breaches the criminal law. A person committed the offence of stealing, for example, when they take money from a bag without permission (s 398 Criminal Code). Police investigate the crime and may lay charges against the suspect. Once charged, the police and/or the Office of the Director of Public Prosecutions then prosecute the person in court.

A person who is found guilty or pleads guilty to a criminal offence is punished. The level of punishment is decided by the presiding judge or magistrate, within the legislative bounds set by the state. Punishment includes penalties such as:

- imprisonment
- probation
- community service
- fines

### Private criminal prosecutions

A private citizen may commence criminal proceedings against an alleged offender. This is an extremely rare procedure.

## Offences by children

Offenders aged under 18 years are dealt with pursuant to the *Youth Justice Act 1992* (Qld). For further discussion about criminal law and children see the chapter on Children and the Criminal Law.

## Civil wrongs

By contrast, when a person commits a civil wrong, the police are not usually involved in the investigation of the conduct, and the person is not prosecuted by the state.

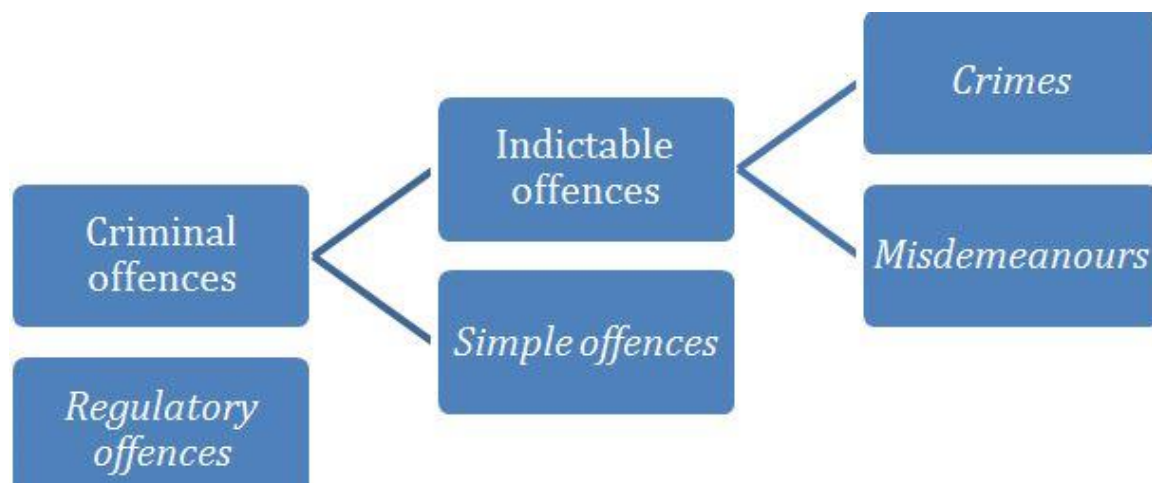
The person who alleges that the wrongful conduct has occurred institutes private proceedings against the wrongdoer in court. Generally, the remedy for a civil wrong is a court order requiring the wrongdoer to pay damages (money), although other remedies may be available.

## TYPES OF CRIMINAL OFFENCES

Section 3 of the Criminal Code divides offences into:

- crimes
- misdemeanours
- simple offences
- regulatory offences.

The relationship between these different categories of offences is illustrated in the diagram below:



All offences are either criminal offences or regulatory offences.

Criminal offences may then be indictable or simple. Indictable offences are either crimes or misdemeanours.

Indictable offences cannot be dealt with summarily (i.e. in the Magistrates Court, a court of summary jurisdiction) unless expressly stated. Simple and regulatory offences can be dealt with summarily.

## Indictable offences: crimes and misdemeanours

An indictable offence must be prosecuted on an indictment (a written charge by a person authorised to prosecute criminal offences) before a judge and jury in the District or Supreme Court. In certain circumstances, a charge on indictment may be prosecuted before a judge alone, without a jury (ch 62 div 9A Criminal Code).

In certain situations, an indictable offence may be dealt with summarily in the Magistrates Court (ch 58A Criminal Code).

## Simple offences

A simple offence (also known as a summary offence) is a less serious offence. Examples of simple offences include being a public nuisance or trespass.

If a criminal offence is not otherwise designated (e.g. as a misdemeanour or crime), it is automatically a simple offence.

In most cases, there is a time limit of one year from the time the matter of complaint arose within which a complaint must be made and for police to obtain evidence and commence proceedings for simple offences (s 52 *Justices Act 1886* (Qld)).

Simple offences are usually heard in the Magistrates Court.

## Regulatory offences

Regulatory offences are set out in the *Regulatory Offences Act 1985* (Qld) and include acts such as:

- stealing goods valued at \$150 or less from a shop
- leaving a hotel or restaurant without payment of a bill for goods or services valued at \$150
- damaging property valued at \$250 or less.

Regulatory offences must be finalised in the Magistrates Court and all offences carry fines as the maximum penalty according to the Act.

# GENERAL PRINCIPLES OF CRIMINAL LAW

## Innocent until proven guilty

A core principle of the Australian criminal justice system is that a person is presumed to be innocent unless proven guilty of the offence beyond a reasonable

doubt. An accused person must be acquitted of an offence if there is any reasonable doubt about their guilt in the mind of the jury (or judge or magistrate).

The prosecution have the burden of proof. This means that an accused person does not prove they are innocent of the crime. Rather, the prosecution must prove the person is guilty beyond a reasonable doubt.

There are some limited exceptions to the rule that the prosecution must prove the case against a person (see s 129 *Drugs Misuse Act 1986* (Qld)).

## The right to remain silent

The right to remain silent is another important principle of the Australian criminal justice system.

A person is not required to answer any questions that are put to them by a police officer, regardless of whether they have been arrested or not.

The major exception is that a person should provide their name and address if asked by police; not doing so may constitute an offence.

It is important that a person who has been arrested understands that, beyond providing their name and address, they have the right to refuse to answer all questions or participate in an interview.

Anything a person says to police, whether in a formal interview or not, may be used in evidence against that person at their trial. Making ill-considered, hasty or careless statements to police in the heat of the moment, during an interview or when questioned at the scene and without legal advice can cause great harm to a person and their legal position.

The fact that a person has relied on their right to silence cannot be used against them at their trial. This means that a prosecutor cannot point to a person's silence as evidence of their guilt in any way.

In court, a defendant is not obliged to give sworn evidence in their own defence.

There are some circumstances when a person may be required to give evidence which may implicate them. One example is at a coronial inquest or at crime commission hearings.

## Double jeopardy

Section 16 of the Criminal Code states that a person cannot be tried twice for the same offence. There are certain limited exceptions to this rule, such as 'fresh and compelling evidence' for a charge of murder.

## ACCESSORIES AND PARTIES TO CRIMES

Accessories and parties to crimes are people who did not directly commit the offence but were indirectly involved in the crime at some point. For example, a person who drives a getaway car after a robbery may be a party to the offence of robbery.

Section 7 of the Criminal Code states that it is an offence to:

- aid
- abet
- counsel and/or procure another person to commit a crime.

It is also an offence to be an accessory after the fact (i.e. to receive or assist another person after an offence has been committed). For example, a person who assists a murderer to hide a body may be charged as a party to the offence of murder.

Any person who aids in a crime (counselling or procuring the crime) can be punished in the same way as the person who actually committed the crime.

## ATTEMPTED CRIMES

When a person tries to commit an offence but does not complete it, they may be charged with attempting to commit that offence. Before a person can be guilty of attempting to commit an offence, the prosecution must prove that they:

- intended to commit the offence
- commenced executing that intention into action and
- performed some overt act by which that intention was manifested (s 4 Criminal Code).

In most cases, the maximum punishment for an attempt to commit an offence is half of the maximum punishment for actually committing the offence (ss 536, 538 Criminal Code).

## DEFENCES AGAINST CRIMINAL CHARGES

The prosecution must prove on evidence that a person committed an offence. A person may defend a criminal charge by relying on a defence (or combination thereof). A defence (if successful) may either:

- reduce the offence charged to a lesser offence
- provide a complete defence to the charge, which results in the person being acquitted of the offence.

## Provocation

Provocation (ss 268–269 Criminal Code) is any wrongful act or insult of such a nature as to be likely to deprive an ordinary person of the power of self-control and to induce them to assault that person. The response must be sudden (i.e. done in the heat of the moment) and proportional to the provocation.

Provocation may be raised where the provocative act was directed at a person other than the defendant (e.g. a child or other family member).

Sections 268 and 269 of the Criminal Code provide a complete defence to an offence containing assault as an element. This includes:

- common assault
- assault occasioning bodily harm
- serious assault.

However, it does not include an offence such as wounding, grievous bodily harm and choking, suffocation or strangulation in a domestic setting. It also does not apply to unlawful homicide. A separate partial defence to murder for killing on provocation is in s 304 of the Criminal Code.

Provocation provides a partial defence to murder. This means that in certain circumstances, the charge is reduced from murder to manslaughter if it occurred ‘in the heat of passion caused by sudden provocation and before there is time for the person’s passion to cool’.

One effect of this reduction is that a person convicted of manslaughter can receive any sentence determined by the judge whereas a person convicted of murder must receive a mandatory sentence of life imprisonment.

### **Killing for preservation in an abusive domestic relationship**

There is a specific partial defence to murder where the accused is a victim of domestic violence. The defence acts to reduce murder to manslaughter if:

- the deceased has committed domestic violence during the relationship
- the accused believed their actions were necessary for their preservation from death or grievous bodily harm and
- this belief is reasonable.

## Self-defence

### **Self-defence to unprovoked assault**

Section 271 of the Criminal Code makes it legal for a person to use such force as is reasonably necessary to defend them against an unprovoked assault. The force

used must not be intended or likely to cause death or grievous bodily harm, and must be proportionate.

If the person being assaulted reasonably fears that their attacker may cause death or grievous bodily harm, that person can use necessary force to defend themselves (or the person being attacked) even if the force causes the death of, or grievous bodily harm to, the attacker.

### **Self-defence to provoked assault**

If a person assaults someone or provokes an assault, s 272 of the Criminal Code makes it legal for that person to then use reasonable force (even if it results in death or grievous bodily harm) to protect themselves if the other person responded with such violence that the person who provoked the assault reasonably fears they may suffer death or grievous bodily harm.

The defence is not available when the person:

- who first assaults or provokes an assault does so with intent to kill or do grievous bodily harm
- uses the force which causes death or grievous bodily harm before the necessity to do so arose.

The person who uses the force must attempt to remove themselves from the conflict or retreat as far as practicable.

### **Acting in aid of others**

In any circumstances to which self-defence may apply, it may also be lawful for a person acting in good faith to use a similar degree of force for the purpose of defending another person (s 273 Criminal Code).

### **Defence of moveable property**

Sections 274 and 275 of the Criminal Code allow a person to use reasonably necessary force to defend the possession of moveable property, provided that the person does not do grievous bodily harm to the other person.

### **Defence of premises against trespassers**

Sections 277 and 278 of the Criminal Code allow a person in possession of any land structure, vessel or place or who is entitled to control or management of the place to use such force as is reasonably necessary to prevent trespassers, or to remove disorderly persons, so long as the force used does not amount to grievous bodily harm.

Section 267 of the Criminal Code also provides that a person in possession of a dwelling is entitled to use force to prevent or repel another person from



unlawfully entering or remaining in the dwelling, if that person believes that force is necessary and the person entering intends to commit an indictable offence in the dwelling.

## Honest claim of right

Ignorance of the law is not a defence. For property offences, however, it is a defence to show that the person broke the law by acting in the exercise of an honest claim of right and without any intention to defraud (s 22 Criminal Code).

For example, a person charged with stealing as a result of writing company cheques payable to themselves, cashing those cheques and keeping the money may say they have a claim of right if:

- as an employee of the company, they were authorised to write company cheques
- the money was taken as a result of underpayment of wages owed by the company to them
- they took the money honestly believing it was for wage payments.

If the claim of right defence is successful, the person would be not guilty of stealing. The claim of right must be honest although not necessarily a reasonable one.

## Accidental acts

Section 23 of the Criminal Code applies to all persons charged with any criminal offence against the statute law of Queensland, and it provides that a person is not criminally responsible for an 'event' that occurs independently of the exercise of the person's will or by accident.

Currently, the law requires that the 'event' was a consequence that was not intended or foreseen by the defendant, and that an ordinary person in the defendant's position would not have reasonably foreseen.

However, (s 23(1A) Criminal Code) provides that a person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a physical defect, weakness or abnormality, even though the offender does not intend or reasonably foresee the death or grievous bodily harm.

## Mistake of fact

A person is not criminally responsible if they did something based upon an honest and reasonable mistake of fact (s 24 Criminal Code). For instance, a person charged with rape may raise as their defence the fact that they had an honest but mistaken belief that the victim consented to sexual intercourse.

It is important to note that a mistaken belief by an accused person must be a positive belief and not mere ignorance.

## **Sudden or extraordinary emergency**

A person is not criminally responsible for an act or omission done under a sudden or extraordinary emergency that an ordinary person, possessing ordinary powers of self-control, could not reasonably be expected to act otherwise (s 25 Criminal Code).

## **Insanity**

Every person is presumed to be sane until the contrary is proven. This means that a defendant must show on the balance of probabilities they were suffering from a mental disease or impairment that prevented them from understanding or controlling their actions. A person is insane and not criminally responsible if they are deprived of one or more of the following capacities:

- understand what they are doing
- control their actions
- know that they ought not to be doing it.

In Queensland, the Mental Health Court generally determines whether a person was of unsound mind at the time of the offence or if they are fit for trial and what action should be taken from that finding.

## **Alibi**

A defendant may rely on alibi evidence to show that they were not at the relevant location at the time of the offence. Alibi evidence can be given by the accused and by other witnesses.

Section 590A of the Criminal Code states that on an indictable offence a defendant must lodge a Notice of Alibi with the Director of Public Prosecutions within 14 days of the date the person is committed for trial. This enables the prosecution to investigate the alibi before trial.

## **Automatism**

This defence applies when the accused acted without conscious will due to some external cause at the time of committing the offence (s 23 Criminal Code). Examples can include an epileptic fit, concussion or sleep walking.

## Intoxication

Voluntary intoxication is not a defence and nor can it be taken into account as a mitigating feature on sentence. Section 28 (Criminal Code) makes involuntary intoxication a defence in very limited circumstances.

Section 28(3) (Criminal Code) provides that intentional intoxication should be considered in determining whether intention exists in relation to offences that require an intention to cause a specific result. Murder is the most important of the few offences that contain an element of intention.

## Diminished responsibility

Diminished responsibility is a partial defence in that it reduces murder to manslaughter if at the time of the act or omission which caused death, the person is in such a state of abnormality of mind as to substantially impair their capacity to understand what they are doing, to control their actions and/or to know that they ought not to be doing it (s 304A Criminal Code). Evidence of the abnormality of the mind is often complex, and comes from a skilled expert witness.

## CORONIAL INQUESTS

Under the *Coroners Act 2003* (Qld), coroners are responsible for investigating reportable deaths that occur in Queensland.

The investigation determines the identity of the deceased person, how they died and the place, date and medical cause of the death.

Inquests are not held for every death, however, for certain deaths (e.g. deaths in custody) an inquest is required. The focus is on determining what happened, not attributing blame, and making recommendations to prevent similar deaths in future.

Read more about the role of the Coroners Court and Inquests in our Coronal Matters chapter.

# LEGAL NOTICES

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