



Defences to criminal charges

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When charged with a [criminal offence](#), it is the accused's right to defend the charges in court. There are a number of defences available for criminal charges. This article briefly considers some of the more common defences which may be available in criminal matters in Queensland.

Prosecution must prove beyond reasonable doubt

It is a cornerstone of criminal law that the prosecution must prove all elements of a criminal allegation, and the accused need not prove their innocence. This is where the common phrase, 'innocent until proven guilty' is often referenced.

It follows that if a jury (or magistrate) is not convinced the prosecution has established the accused's guilt to the high standard of 'beyond reasonable doubt', the court is obliged to find the accused not guilty.

As a result, the best 'defence' to a criminal charge is often not a defence at all. Rather, it involves calling upon the prosecution to prove their case against the accused and then demonstrating to the jury or magistrate how the prosecution has failed to show that the accused is guilty of the alleged crime.

Honest claim of right defence in criminal law

For an offence relating to property (eg. stealing or wilful damage), an accused is not criminally responsible if they acted under an honest claim of right and without intention to defraud.

This defence may arise when a person removes or destroys some item of property on the understanding that it was their own property.

The defence can also apply where a person is acting as 'agent' for the owner of the property. For example, Person A asks Person B to pick up their car from the mechanic after a service. An error is made, and Person B mistakenly drives off in Person C's car, believing it was Person A's vehicle. So long as Person B was not acting dishonestly at the time if they were charged with stealing the car, they would have a defence of honest claim of right.

Unwilled acts (automatism)

A person is not criminally responsible for an act or omission that occurs independently of the person's will.

This defence sometimes arises where a person is sleep-walking or otherwise unable to control their actions (such as due to a medical episode). Generally, it is necessary to obtain expert evidence to support such a defence.

Applying the criminal defence of 'accident'

A person is not criminally responsible for 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.

The test when considering this defence to a criminal charge involves considering whether an ordinary person in the position of the accused would have foreseen the consequence as a possible outcome from their act or omission.

Mistake of fact criminal defence

This defence applies where a person does an act under an honest and reasonable but mistaken factual belief. For example, a person who has reasonable grounds to believe they are about to be attacked may be justified in defending themselves (eg. punching another other person), even where the other person was not actually intending to attack them.

Where the defence applies, the person is not criminally responsible for their conduct to any greater extent than if the real state of things had been such as the person believed to exist.

In recent times there has been public debate about the application of this defence on the issue of consent in sexual matters You can read more about it in this article: ['Consent & mistake of fact in Queensland'](#).

Mistake of fact often also arises in conjunction with other defences, for example, self-defence or provocation.

Extraordinary emergency defence to criminal charges

A person is generally not criminally responsible for an act or omission done in the midst of an extraordinary emergency.

Queensland's Criminal Code provides no real guidance as to what constitutes an extraordinary emergency so as to not limit the circumstances where the defence can apply. By way of example though, the defence would likely exclude responsibility for driving offences that occurred in the rush of transporting a critically injured family member to hospital.

The elements of the defence are:

- there were circumstances of sudden or extreme emergency;
- the accused's act or omission occurred under those circumstances; and
- those circumstances were such that an ordinary person could not reasonably be expected to act otherwise.

Again, the defence can operate in conjunction with the defence of mistake of fact.

The criminal defence of insanity or unsound mind

Every person is presumed to be of sound mind – that is, sane – until the contrary is proved.

In order for the criminal defence of insanity to arise, the accused must have been subject to a mental disease (or natural mental infirmity) which took away their ability to:

- understand what they were doing;
- control their actions; or
- know they ought not to do the relevant act or make the omission.

In order to raise this defence, the accused will usually need to rely upon medical evidence. Insanity is one of the rare defences that must be proved by the defence rather than its application being disproved by the prosecution.

The defence is generally excluded from application where the accused has to any extent, intentionally caused themselves to become intoxicated by alcohol or drugs.

With serious charges, the question of insanity may be an issue for a jury to decide, but more often, with such matters, the issue is determined through the Mental Health Court. You can read more about this court proceedings in our article, ["How does the Mental Health Court in Queensland work?"](#)

In Magistrates Court matters the issue is generally determined by the presiding magistrate.

The defence of compulsion in criminal matters

This defence applies if a person is compelled to act to resist the violence of others. An accused is not criminally responsible for an act they did that was reasonably necessary to resist a threat of actual and unlawful violence to themselves or another person in their presence.

By way of example, if a person was told that they would be severely harmed unless they helped rob a bank, then this defence may arise.

The defence will apply where:

- there is actual violence threatened to the accused (or another person in the accused's presence);
- the violence which is threatened was unlawful; and
- the act done by the accused was reasonably necessary in order to resist the threatened violence.

Domestic discipline defence to criminal charges

The domestic discipline defence applies where a parent, teacher, or someone in a similar position uses force:

- by way of correction, discipline, management or control of a child; and
- the force used was not unreasonable.

To negate the application of the defence, the prosecution must prove, beyond reasonable doubt, that:

- the person was not disciplining the child; or, alternatively
- that the force used was not reasonable in the circumstances.

Self-defence

Self-defence applies where a person uses force which was reasonably necessary to defend themselves (or some other person) from an assault.

The level of force used must be reasonable in the circumstances, and the level of threat posed by the other person (ie. the original attacker) will influence the reasonableness of the force used in defence. For example, if a person defending themselves is concerned only that they may be shoved by their attacker, then they would not be justified in using force, which is likely to result in death or serious injury to the original attacker.

The application of this defence may also turn upon whether the accused has provoked the attacker (ie. the person the accused is then seeking to defend themselves from).

The defence of self-defence may operate in conjunction with the separate defence of mistake of fact.

Provocation in defence of an assault

A person is not criminally responsible for assaulting another person if the person who was assaulted provoked the assault. That is, where the accused was operating in response to a wrongful act or insult of such a nature as to be likely to deprive an ordinary person of the power of self-control, the defence of provocation in defence of assault may apply.

In order for this defence to apply, these elements must be present:

- The person is deprived of the power of self-control by the wrongful act or insult;
- That person acts suddenly before there is time for the person's "passion to cool"; and
- The force used is not disproportionate to the provocation and is not intended or likely to cause death or grievous bodily harm.

In these circumstances, the defence operates as a complete defence. This means that the accused is not criminally responsible for an assault they are alleged to have committed.

Provocation in defence of murder

Separately to provocation in an assault matter, provocation may reduce a [charge of murder to manslaughter](#). This is important because sentences imposed for manslaughter are generally significantly less than the mandatory sentence of life imprisonment imposed for murder.

To raise the defence of provocation, the accused must prove that it is more probable than not that:

- there was provocation by the deceased towards the accused;
- the accused was actually provoked by the deceased; and
- the accused was operating whilst still provoked when they did the act which killed the deceased.

Prior to 30 March 2017, this defence could be argued to apply in circumstances of 'unwanted sexual advance' (which has at times been referred to as the 'gay panic defence'). You can read more about that legislative change in the Queensland Government media release, ['Palaszczuk Government ends "gay panic" defence'](#). :

Criminal defence of diminished responsibility

The defence of diminished responsibility also reduces an offence of murder to manslaughter rather than absolving criminal responsibility entirely. For it to apply, the accused (the defence) must prove that:

- at the time of the killing, the accused was in a state of abnormality of the mind; **and**
- that state of abnormality impaired the accused's capacity to understand what they were doing, control their actions, or know that they ought not do that act or make that omission; **and**

- the impairment was substantial.

Substantial impairment means that the conclusion has to be drawn that the mental impairment was the 'real cause' of the accused's conduct. The accused need not show it was the sole cause, but it must be more than a trivial cause which had no real or appreciable difference upon the accused's ability to control themselves.

The onus of proof with criminal defences

For the majority of criminal defences, where there is some evidence suggesting the defence is open for the accused to be found guilty, the prosecution must disprove that the defence was applicable in the circumstances to the high standard of beyond reasonable doubt. This is referred to as the onus of proof.

This is a very important consideration in criminal litigation. It can often be determinative of guilt or innocence in a given matter.

As detailed in some of the defences referenced above, there are some exceptions to this, including, for example, the defence of insanity. In that instance, the accused (the defence team) must prove the application of that defence.

Raising your defence to criminal charges

Defences give rise to complicated issues in criminal litigation.

One reason is that certain defences are available for some charges and not others. For example, the defence of provocation is available in response to charges of common assault and assault occasioning bodily harm but not with the more serious charge of causing [grievous bodily harm](#).

The significance of this is further emphasised by the fact that some injuries (for example, a broken eye socket) may amount to either 'bodily harm' or the more serious charge of 'grievous bodily harm', depending on the severity of the fracture. Further, different medical experts may disagree upon that very conclusion.

There are others issues which an accused might feel justifies their alleged conduct, but as a matter of law, does not give rise to a defence. This includes voluntary intoxication, being unaware or mistaken about the law, and (for some charges) a lack of criminal intent.

Get help from a criminal lawyer

If you or a loved one are charged with an offence, or if police wish to speak with you about any such allegation, you should engage an experienced criminal lawyer for advice and representation.

Callan Lloyd is a Director of Gilshenan &Luton and a Queensland Law Society accredited specialist in criminal law. Callan is also the current chair of the Queensland Law Society's accredited specialist advisory committee for criminal law. He has been recognised by Doyle's Guide as a leading Queensland criminal defence lawyer.

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