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LEGAL PRACTICE



# The criminal defence of provocation in Queensland

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Provocation is a legal concept that recognises that sometimes people react in the heat of the moment to serious insults or wrongful acts like assaults and other offences of violence. In Queensland, provocation can be a complete defence to assault and a partial defence to murder.

## Provocation as a complete defence to assault

Assault is the use of force against another person without their consent. It is unlawful, unless "authorised, justified, or excused" by law. Provocation is one such legal excuse.

Queensland is one of only two Australian states (alongside Western Australia) where provocation is a complete defence to assault (sections 268 and 269 of the *Criminal Code*). If successful, it means a person is acquitted of the charge.

A defence of provocation to assault requires:

- a wrongful act or insult by the victim, serious enough to cause an ordinary person to lose self-control and assault the victim;
- the defendant must actually have lost self-control and acted "on the sudden, before there was time for their passion to cool";
- the force used must not be out of proportion to the provocation, and must not be intended or likely to cause death or grievous bodily harm.

This is assessed by the "ordinary person" test. The "ordinary person" test is objective: would an ordinary person, in the defendant's position, have lost self-control? The law expects everyone to meet the same standard, regardless of personal traits.

Importantly, the defence only applies to offences of which assault is an element. Provocation **does not apply** to offences like wounding, grievous bodily harm, or choking in a domestic setting, because those matters don't include a legal element of assault.

# Provocation as a partial defence to murder

Provocation is not a complete defence to murder - it is a partial defence (section 304 of the *Criminal Code*). If a person is convicted of murder, the penalty is mandatory life imprisonment. If provocation is accepted, a person is convicted of manslaughter, and the court has discretion in sentencing.

Provocation to murder requires:

- the defendant was provoked by the victim to such an extent that they lost self-control and acted "in the heat of passion";
- the conduct must be serious enough to cause an ordinary person to lose self-control;
- the killing must occur before there is time for the person's passion to cool.

## Important limitations of provocation as a partial defence

### The partial defence cannot be relied upon (other than in exceptional circumstances) where the reaction is based on:

- words alone (of the victim);
- anything done by the deceased to end or change a domestic relationship;
- an unwanted sexual advance.

# How do courts decide provocation?

In deciding provocation cases, courts must consider:

- the gravity of the provocation to the particular defendant (including their relationship to the victim, and any history between them);
- whether the defendant acted suddenly, before their passion cooled;
- whether the response was proportionate;
- whether the conduct would have caused an ordinary person to lose self-control.

# High Court case review – defence of provocation

The High Court has considered provocation in several cases.

In the 2020 case of *Peniamina v The Queen* (2020) 271 CLR 56, the appellant, *Peniamina*, was charged with the murder of his wife. He pleaded not guilty to murder, but guilty to manslaughter on the basis of provocation under section 304 of the *Criminal*

*Code (Qld)*.

The central issue was whether the jury had been properly directed on the law of provocation. Specifically, the case examined the interpretation of section 304(3)(c), which excludes provocation as a defence if the provocative conduct involved a domestic relationship and the accused killed the person in response to that conduct.

The High Court considered whether the operation of section 304(3)(c) should be confined to the specific conduct identified by the accused as causing the loss of self-control, or whether the jury could consider other conduct as well.

Ultimately, the High Court dismissed the appeal, upholding the conviction for murder. The Court found that the jury had not been misdirected and that the statutory exclusion of provocation applied in this case.

# Queensland review of criminal defences

In November 2023, the Queensland Government asked the Queensland Law Reform Commission to examine and make recommendations about particular defences in the *Criminal Code*, including provocation.

On 20 February 2025, the QLRC released a consultation paper. The final report with recommendations and draft legislation will be given to the Queensland Government by 1 December 2025.

# Get help from a criminal lawyer

Provocation is a complex and evolving area of Queensland criminal law. It recognises that people sometimes react in the heat of the moment, but sets strict limits to protect the community. If you're facing charges for assault or murder, and believe provocation may apply, it is vital to get expert legal advice from an experienced criminal lawyer.

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