



MURRAY TORCETTI LAWYERS

RIGHT LAWYER / RIGHT NOW

CRIMINAL LAW CASE ASSESSMENT

ELEMENT SHEET

Element sheets are one tool the Criminal Defence Team at Murray Torcetti Lawyers can use to test the charge against our clients. We break down the 'elements' of the offence and examine the evidence the police may and your instructions to test the strength of the charge. The "elements" are the puzzle pieces of a charge. If all elements can be proven beyond reasonable doubt and no defences are raised successfully at a trial, you could be found guilty of the charge.

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THE ELEMENTS - Choking, suffocation or strangulation in a domestic setting

NO.	Element	Notes on the Element	Comment / Evidence / Instructions
1	A person.	See the <i>Acts Interpretation Act</i> “Meaning of commonly used words and expressions” – person includes an individual and a corporation.	
2	Unlawfully	Unlawful means not justified authorised or excused by law.	
3	Chokes, suffocates or strangles another person	<p>The act of choking requires that the defendant hinders or restricts the breathing of the complainant. The act of choking does not require proof that breathing was completely stopped. The act of choking requires some detrimental effect on the breathing of the complainant. See <i>R v HBZ</i> [2020] QCA 73 the Court of Appeal said:</p> <p>“[57] ... In order to achieve the purpose of the introduction of this offence, ‘chokes’ must be construed as the act of the perpetrator that hinders or restricts the breathing of the victim and does not require proof that breathing was completely stopped, although the hindering or restriction of the breathing would encompass the stopping of the breathing. The act of choking will not be proved, unless there is some detrimental effect on the breathing of the victim, because otherwise it would not constitute the act of choking. ...</p> <p>[58] ... There is no choking, if the perpetrator merely puts his or her hands to the neck of the victim. In order to amount to choking, there must be some pressure that results at least in the restriction of the victim’s breathing. ...”</p>	
4A	The person is in a domestic relationship with the other person	Defined in the code as the same meaning as what is in the <i>Domestic and Family Violence Protection Act 2012</i> at s 13.	

		<p>“Meaning of relevant relationship: A relevant relationship is— (a) an intimate personal relationship; or (b) a family relationship; or (c) an informal care relationship.”</p> <p>Noting sections 14 and 15 elaborate on the above.</p>	
<i>Prosecution to prove beyond reasonable doubt either element 4A or 4B</i>			
4B	<p>The choking, suffocation or strangulation is associated domestic violence under the Domestic and Family Violence Protection Act 2012</p>	<p>See s 9 of the <i>Domestic and Family Violence Protection Act 2012</i></p> <p>“ Meaning of associated domestic violence Associated domestic violence means behaviour mentioned in section 8(1) by a respondent towards— (a) a child of an aggrieved; or (b) a child who usually lives with an aggrieved; or (c) a relative of an aggrieved; or (d) an associate of an aggrieved.”</p>	

Charge: Choking, suffocation or strangulation in a domestic setting

Source: Section 315A of the Criminal Code

Election: Indictment to the District Court

Penalty: 7 Years Imprisonment

A serious charge with serious consequences.

Being charged with Choking is a serious, the consequences for pleading guilty or going to trial and losing are severe. The charge has been written to capture acts of domestic violence, which by its nature often means there are no 3rd party or independent witnesses to the alleged incident, the strength of the charge will likely be dependent on the credit of the complainant and any medical evidence that supports the complainant's version.

Case law is still developing, when first introduced, a custodial sentence (with actual time) was all but certain, then the meaning of "choking" was limited but subsequently widened by the court's interpretation of the legislation. There has also been recent authority to suggest a term of imprisonment is not the only sentence open to sentencing judge.

"Assault" is not an element of the charge; this is to remove the defence of provocation. However, other defences can still be explored.

Jurisdiction – Where will this charge be heard?

All charges in Queensland start in the Magistrates Court in the geographical location the offences is alleged to have occurred. Some charges must go the District and Supreme Courts (for example, a charge of Murder will go to trial in the Supreme Court but will start in the Magistrates Court). Some charges like public nuisance must stay in the Magistrates Court. Sometimes either the defence or prosecution can choose where the charges are heard.

Choking, suffocation or strangulation in a domestic setting must be sent to the District Court.

What materials are expected to be disclosed by the prosecution and might be examined to determine the strength of the charge?

- Medical evidence of any injury to the neck area that may either support or be inconsistent with the complainant's version.
- The complainant's statement.
- Any other witnesses to the incident.
- Your recollection of the events.

What are some of the ways the lawyers can resist (fight) the charge? of Choking, suffocation, or strangulation in a domestic setting?

When the lawyers first see the police materials, what are the first and most frequent options to test the strength of the charge the lawyer might consider?

Compulsion – Duress s 31(1)(c) Criminal Code

In certain circumstances the law offers a defence if we are compelled to act to resist the violence of others. The Queensland Criminal Code calls this 'compulsion' and says, for present purposes, that a person is not criminally responsible for an act if that person does the act because it is reasonably necessary to resist a threat of actual and unlawful violence to themselves or property.

Like all defences. The law of defences is nuanced. Your lawyer will need to review the facts, law and your instructions to determine if the defence is open to you and form a strategy to wield the defence in a way that best works in your unique case.

Self-Defence – Section 271(1) of the Criminal Code

Like many other defences in criminal law the defence of self-defence is complicated and more nuanced than "they hit me first". The defence has limitations on the force used in different circumstances. Your lawyer will need to review the facts, law and your instructions to determine if the defence is open to you and form a strategy to wield the defence in a way that best works in your unique case.

The Prosecution cannot prove one or more of the above elements of the offence

Can the charge be 'Case Conferenced'?

For criminal charges in Queensland, your defence lawyer will review your charges, the possible evidence and your instructions to start negotiating the charges. The aim of case conferencing for defence lawyers is to place you in the most favourable position by resisting charges and facts that are not supported by evidence, law or contrary to your instructions.

What is Case Conferencing?

Case Conferencing – Disclosure

At the start of your case, you are provided the police version of the facts but not the evidence relied upon. Your lawyer will seek the disclosure of materials to clarify the facts further or determine the strength of the case against you.

Example: After an incident at the local pub, you have been charged with assault occasioning bodily harm. The police facts note the incident was recorded on CCTV and have sought the CCTV be disclosed to see if the footage supports the police version (or have left out important facts supporting your version) and medical records.

Case Conferencing – Facts

You might wish to plead guilty to the offences, but the police materials are different to your version of the events. Defence lawyers propose amendments, additions or removal of facts so the matters do not need to go to hearing. From a defence perspective, the purpose of conferencing on the facts is to remove irrelevant information or facts that may result in a higher sentence.

Example: CCTV records you striking a person several times. The police facts state it was "5 punches", but the footage is unclear. Through case conferencing the facts were amended to "struck the victim a number of times" or "the complainant was struck twice".

Case Conferencing – The Law

If the charges are not supported by the evidence the prosecution has, the lawyers suggest the charge be withdrawn or reduced to a lesser offence. If the law provides a mitigation or defence to your charges, your lawyer will conference with the prosecution to seek the charge be withdrawn.

Example: You have been charged with assault occasioning bodily harm, however the medical evidence does not support the charge. As a result of conferencing, the charge was amended to the less serious charge of common assault.

Case Conferencing – Charges

Charges are not set in stone after the police issue with the notice to appear or you are released on bail. Often the police will "over charge" and though the process of case conferencing more appropriate charges are agreed to.

Example: The charge of Choking, suffocation or strangulation in a domestic setting does not require the element of assault to be proven. However, in some cases a charge of common assault or even assault occasioning bodily harm might be a preferable charge. Wherever possible, your Murray Torcetti Lawyers will be negotiating with the prosecution for a lesser charge if you instruct us to take that approach.

What you can do to mitigate (lessen) the sentence if you are pleading guilty

Sometimes the decision to plead guilty is made for several reasons beyond actual guilt of the charge. It might be because the evidence is overwhelming, the risk of a trial is not worth the time and funds required or because pleading guilty is the fastest option. After consulting with the lawyer, if a plea is identified and we are instructed to list the matter for sentence there are numerous things you can do to assist the court to see beyond the charges and demonstrate remorse.

Attend Counselling

If you are going to enter a plea of guilty to the charge, attendance at a counselling program will assist the court to see you have a better understanding of your behaviour and demonstrated a willingness to change so it does not happen again.

Your Murray Torcetti Lawyer can suggest local programs you can take part in.

Demonstrate Employment

Demonstrating employment through a letter of employment assists the court to see you are productive and able to maintain responsibilities whilst being a member of the community. The letter could address your responsibilities, how long you have been employed and your attitude towards work.

Your Murray Torcetti Lawyer will review the letter of employment ahead of court to ensure all important points are addressed in the letter.

Letters of Reference

Character references assist the court by showing you have other parts to your character. You are more than a moment in time as read out by the prosecutor. You may be an active member of the community, provide support to a person in need or be able to demonstrate this was out of character.

Before the court date your Murray Torcetti Lawyer will review the references to ensure the letters achieve what is intended by the people who have taken the time and effort to assist you at your sentencing date.

Letters of Remorse

Remorse can be seen as a deep regret and repentance for a wrong committed. Letters of remorse can be tendered to the court at your sentencing to show the court you have insight into your behaviour and its impact on others.

Depending on the unique facts of your situation, your Murray Torcetti Lawyer will direct you if the insights are better as a letter to the court or another party as it would be inappropriate to provide an any correspondence in some instances.

Offer compensation / Restitution

Before making any offers of compensation or restitution it is important to make you have been given legal advice. You may be admitting guilt where you have a defence. Or, if not done correctly you may be seen to be attempting to 'buy your way out of trouble' which will not go down well for you in court. However, genuine offers of compensation are one way to demonstrate genuine remorse for your behaviour to both the complainant and the courts.

Case law

At the date of sentencing, both the Prosecution and Defence lawyers will offer to the court cases to support the sentence they are arguing is most appropriate. Your Murray Torcetti lawyers and counsel will be reviewing cases that are like your situation where the lowest possible sentence was imposed and seek to persuade the court why the defence cases are more appropriate than the prosecution cases.

This is not legal advice. It boils down to: If you need legal advice see a lawyer. Dr Google isn't going to prescribe you meds if you are sick, Google LLB isn't going to give you advice or information specific to your situation. While care and attention to the above has been taken, it is never going to be accurate enough for your situation to be relied upon for legal advice and should be taken as general information only. If you need legal assistance. See a lawyer. We are lawyers, you can absolutely call us on 07 5414 4209. Criminal law is what we do.