



MURRAY TORCETTI
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E L E M E N T
S H E E T

s 419 Criminal Code
Burglary

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.

Murray Torcetti Lawyers
4/13 King Street Caboolture
PH: 07 5414 4209
www.murraytorcetti.com.au

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THE ELEMENTS – Burglary

NO.	Element	Notes on the Element	Comment / Evidence / Instructions
<i>Simple Offence – 14 Years imprisonment</i>			
1	The defendant	Natural person – Can the prosecution prove it was the defendant?	
2	Enters – or is in	ss418 Definitions - 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	The dwelling of another	Dwelling encompasses a structure connected to the building used as the residence.	
5	With the intent to commit	Only need to connect the fact of entry coinciding with the mental element of intent to commit an indictable offence, <i>R v Rigney</i> [1996] 1 Qd R 551.	
6	An indictable offence	See the facts to work back to determine the indictable offence alleged.	
<i>Above Simple offence + A circumstances of aggravation – Life</i>			
(2)	By break	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.	
(3)(a)	At night	S 1 definitions: "Night" is defined as any time between 9pm and 6am.	
3(b)(i)	Uses or threatens to use actual violence	Same test is used for the charge of robbery, the least amount of violence is sufficient for the charge to be made out.	
3(b)(ii)	Is or pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance	Anything capable of being used for offensive purposes even though it is also capable of being used for innocent purposes. – context is the issue.	
3(b)(iii)	Is in company with 1 or more persons	With others, look to facts to see where it is alleged the intention was.	
3(b)(iv)	Damages, or threatens or attempts to damage, any property		
(4)	Commits an indictable offence	Check facts and work backwards.	

- Beware of the indictable offence alleged to have been committed, the offence will dictate which jurisdiction the charge is heard in.

Charge: Burglary

Source: s 419 Criminal Code QLD

Election: Depends on the "indictable offence"

Penalty: 14 years for the simple offence / Life Imprisonment if there is a circumstance of aggravation

Charges of Burglary, often considered as a "Home invasion" is a serious criminal offence with significant consequences.

Sentencing statistics in September 2022 showed across 279 cases, 75% of people who were sentenced for a charge of Burglary received a period of imprisonment. A careful assessment of the facts, law and your instructions are needed to reduce risks and ensure you are aware of the risks and benefits of all options available to you.

What are some of the ways the lawyers can resist (fight) the charge of burglary?

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?

- Forensics that connect you to the dwelling at the time of the alleged offence. Often it may be DNA or fingerprints that link a defendant to the scene of the crime. Where the property is considered "moveable property" the defence can argue the item does not place you at the location, only that you have touched property at some time that has been found at the location.
- Any CCTV of the incident, private homes may have CCTV and often commercial locations have cameras in and around the area.
- Any additional witness statement of people who saw the incident

Defences to consider

All the defences are complicated in how the tests operate, how they have been applied, what needs to be raised and the various factual issues about force and proportion. Your lawyer will work out with you which defences may apply, to what extent and your prospects of successfully establishing them. Below are a few examples but are not an exhaustive list or in-depth discussion on how they operate.

Weakness of the "element" of the charge

Can the elements of the charges be proved "beyond reasonable doubt?". In the case of Burglary, a close examination of the "indictable offence" is undertaken. If there is a defence to the indictable offence the charge of burglary has deficits the defence can leverage.

Identity of the defendant:

This not a "defence" as the law applies see it, but an approach the defence might take in preventing the prosecution from proving the 1st element above to the standard of beyond reasonable doubt.

Can the Prosecution prove it was you? In some cases, the identity of the person who did the assault causing the bodily harm might not be readily identified. An example would be if there the assault occurred in a dark part of town, the complainant was near sighted and drunk and only a poor description of the defendant was given.

Intoxication

Section 28 of the Criminal Code provides a defence. As the charge requires an "intent", intoxication may offer a defence to the charge if there is insufficient evidence the intention was formed as considered. The defence is not a straightforward as it may seem at requires the facts and evidence to be closely examined to determine if it applies.

Emergency

The QLD District and Supreme Courts Criminal Law Bench Books summarize the defence as:

Extraordinary Emergency, s 25 A person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise.

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. Defences are and can be tricky to navigate and may raise issues of evidence.

Duress

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.

Honest claim of right to the property

The Criminal Code defence may apply to this as a person is not criminally responsible, for an offence relating to property, if what he did with respect to the property was done in the exercise of an honest claim of right and without intention to defraud.

Can the charge be 'Case Conferenced'?

What is Case Conferencing?

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.

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.

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.

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.

Case Conferencing – Charges

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

Burglary may resolve on a plea to lesser charges such as trespass or entering a premises and committing an indictable offence which carries lesser maximum penalties.

What you can do to mitigate penalty 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.

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.