

197. Commonwealth Code – Proof of Physical and Mental Elements of an Offence

197.1 Legislation

[Last reviewed: March 2025]

Criminal Code (Cth)

[Part 2.2](#) – The elements of an offence

197.2 Commentary

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Codified principles of criminal responsibility

Chapter 2 of the *Criminal Code*, enacted by the Criminal Code Act 1995 (Cth), codifies the general principles of criminal responsibility with respect to offences against the laws of the Commonwealth. Provision is made for the progressive application of the provisions of Ch 2 to Commonwealth offences, though these provisions have applied to all Commonwealth offences since 15 December 2001, pursuant to s 2.2.

The general principles of criminal responsibility in the *Criminal Code* do not adopt the common law concepts of *actus reus* and *mens rea*. Instead, the *Criminal Code* defines criminal responsibility in terms of proof of the physical elements and fault elements of an offence: s 3.1. Liability for the commission of an offence is dependent upon proof of each physical element of the offence together with proof of the fault element that is applicable to each physical element: s 3.2.

This Benchbook Chapter provides brief commentary on the conceptual vocabulary of criminal responsibility in the *Criminal Code*, together with suggested directions on the fault elements in the *Code*. Further commentary may be found in Part 2.2 of [The Commonwealth Criminal Code: Guide for Practitioners](#).

Physical elements

The physical elements of an offence may be conduct, a result of conduct, or a circumstance in which conduct, or a result of conduct, occurs: s 4.1. ‘Conduct’ means an act, an omission to perform an act, or a state of affairs. ‘Engage in conduct’ means to do an act or omit to perform an act. Conduct must be voluntary: s 4.2.

An offence may comprise more than one physical element and different fault elements may apply to each physical element: s 3.1. The law that creates an offence may, however, provide that there is no fault element for one or more of the physical elements of the offence: s 3.1(2).

Fault elements

Under the *Criminal Code* the fault elements of an offence may be ‘intention’, ‘knowledge’, ‘recklessness’ or ‘negligence’, pursuant to s 5.1 (though this does not prevent a law from specifying additional fault elements for the physical elements of a given offence). These concepts are defined in 5.2 through 5.5.

With regard to intent, it is appropriate for a judge in directing a jury on proof of intention under the *Criminal Code* to provide assistance as to how (in the absence of admission) the prosecution may establish intention by inferential reasoning in the same way as intention may be proved at common law. Knowledge or belief is often relevant to intention (*R v Tang* [\(2008\) 237 CLR 1](#), [47]; [82 ALJR 1334](#), 1348).

Where the law creating an offence does not specify a fault element for a physical element, the *Criminal Code* makes provision for a fault element by default: s 5.6. Thus where no fault element is specified for a physical element that consists only of conduct, intention applies as the fault element for that physical element: s 5.6(1). Where no fault element is specified for a physical element that consists of a circumstance or a result, recklessness applies as the fault element: s 5.6(2) (see also *Crowther v Sala* [\[2008\] 1 Qd R 127](#)).

197.1 Suggested Directions

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Intention

Intention is an element of the offence.

(Where conduct is the physical element): **A person has intention with respect to the conduct of [insert details] if the person means to engage in that conduct.**

(Where a circumstance is the physical element): **A person has intention with respect to the circumstance of [insert details] if the person believes that it exists or will exist.**

(Where a result is the physical element): **A person has intention with respect to the result that [insert details] if the person means to bring it about or is aware that it will occur in the ordinary course of events.**

Intention is a state of mind. In ascertaining the Defendant’s intention, you are drawing an inference from facts which you find established by the evidence concerning the Defendant’s state of mind. The prosecution invites you to draw an inference as to the Defendant’s state of mind from certain facts. You are entitled to infer such intent as is put to you by the prosecution if, after

considering all the evidence, you are satisfied beyond reasonable doubt that it is the only reasonable inference open on that evidence.

Knowledge

A person has knowledge of a circumstance or a result if [he/she] is aware that it exists or will exist in the ordinary course of events.

Recklessness

(Where a circumstance is the physical element): A person is reckless with respect to a circumstance if the person is aware of a substantial risk that the circumstance exists or will exist and, having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(Where a result is the physical element): A person is reckless with respect to a result if the person is aware of a substantial risk that the result will occur and, having regard to the circumstances known to [him/her], it is unjustifiable to take the risk.

The question of whether taking a risk is unjustifiable is one of fact.

Recklessness can be established by proving intention, knowledge or recklessness.

Negligence

A person is negligent with respect to a physical element of an offence if [his/her] conduct involves:

- 1. such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and**
 - 2. such a high risk that the physical element exists or will exist;**
- that the conduct merits criminal punishment for the offence.**