

Burglary: s 419; Entering: s 421

Legislation

418 Definitions

- (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.
- (2) 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) A person who obtains entrance into a dwelling or premises by means of any threat or artifice used for that purpose, or by collusion with any person in the dwelling or premises, or who enters any chimney or other aperture of the dwelling or premises permanently left open for any necessary purpose, but not intended to be ordinarily used as a means of entrance, is deemed to have broken and entered the dwelling or premises.
- (4) In this chapter—

premises includes—

 - (a) a building or structure and a part of a building or structure other than a dwelling; and
 - (b) a tent, caravan, or vehicle; and
 - (c) any similar place.

419 Burglary

- (1) Any person who enters or is in the dwelling of another with intent to commit an indictable offence in the dwelling commits a crime.

Maximum penalty—14 years imprisonment.
- (2) If the offender enters the dwelling by means of any break, he or she is liable to imprisonment for life.
- (3) If—
 - (a) the offence is committed in the night; or
 - (b) the offender—

- (i) uses or threatens to use actual violence; or
- (ii) is or pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance; or
- (iii) is in company with 1 or more persons; or
- (iv) damages, or threatens or attempts to damage, any property;

the offender is liable to imprisonment for life.

- (4) Any person who enters or is in the dwelling of another and commits an indictable offence in the dwelling commits a crime.

Maximum penalty—imprisonment for life.

- (5) The *Penalties and Sentences Act 1992*, section 161Q also states a circumstance of aggravation for an offence against this section.
- (6) An indictment charging an offence against this section with the circumstance of aggravation stated in the *Penalties and Sentences Act 1992*, section 161Q may not be presented without the consent of a Crown Law Officer.

421 Entering or being in premises and committing indictable offences

- (1) Any person who enters or is in any premises with intent to commit an indictable offence in the premises commits a crime.

Maximum penalty—10 years imprisonment.

- (2) Any person who enters or is in any premises and commits an indictable offence in the premises commits a crime.

Maximum penalty—14 years imprisonment.

- (3) If the offender gains entry to the premises by any break and commits an indictable offence in the premises, he or she is liable to imprisonment for life.

Commentary

Meaning of 'entering'

A person is said to 'enter' a dwelling as soon as any part of the person's body or any part of any instrument used by the person is in the dwelling: s 418(2).

Meaning of 'dwelling' and 'premises'

A 'dwelling' includes any building or structure which is being kept by the owner or occupier for the residence of himself or herself or his or her family: s 1. 'Premises'

includes a building or structure or part thereof, a tent, caravan, vehicle or similar place: s 418(4). It is a narrower definition than that contained in s 1, and does not include the land or water on which a building or other structure is situated: *R v Smith* [\[2009\] 1 Qd R 239](#).

Intent to commit an indictable offence

For notes on intention, see **No 59 – Intention**.

The prosecution need not plead the specific indictable offence or offences: *Borland* (1907) 10 GLR 241.

Aggravation

There are additional circumstances of aggravation in s 419(2) and (3).

Break

A person can break a dwelling or premises by unlocking, pulling, pushing, lifting or any means whatever any door, window, shutter, cellar, flap or other thing that is intended to close an opening to the dwelling or premises or open giving passage from one part of the dwelling or premises to another. See definition in s 418(1). In *R v Gibb* [\[2018\] QCA 120](#) at [92]-[96] the further opening of an already partly opened garage door did not constitute a 'breaking'.

Meaning of 'night'

An offence is committed in the night if it is committed between 9 pm and 6 am: s 1 *Criminal Code*.

Actual violence

Actual violence means no more than physical force which is real and not merely threatened or contemplated: *R v De Simoni* [\(1981\) 147 CLR 383](#).

Armed

To be armed with a weapon means that the defendant must be in possession of a weapon and the weapon must be available for immediate use as a weapon: *Miller v Hrvojevic* [\[1972\] VR 305](#).

In company

Being 'in company' with 1 or more persons requires proof that the defendant and one or more other person or persons be physically present for the common purpose of entering the dwelling or premises: *R v Brougham* [\(1986\) 43 SASR 187](#); *R v Leoni* [\[1999\] NSWCCA 14](#).

Damages property

It is an aggravating circumstance if the defendant damages or threatens to damage any property.

The offence is a prescribed offence under s 161Q *Penalties and Sentences Act 1992* so a serious organised crime circumstance of aggravation is applicable.

Suggested Direction

The prosecution must prove that:

1. **The defendant entered the dwelling [or, for offence under s 421, premises] of [the complainant];**
2. **At the time the defendant entered the dwelling house he/she intended to commit an indictable offence, namely [name indictable offence].**

[The named offence] is an indictable offence.

Direct on any relevant circumstances of aggravation:

1. **Break.**

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 an opening in a dwelling or premises, or an opening giving passage from one part of the dwelling or premises to another, is said to break the dwelling or premises.

2. **“In the night” means between 9 pm and 6 am.**
3. **“Uses or threatens to use actual violence”.**

Actual violence means no more than physical force which is real and not merely threatened or contemplated.

4. **Armed.**

To be armed with a weapon means that the defendant must be in possession of a weapon and the weapon must be available for immediate use as a weapon.

5. **“In company”.**

Being ‘in company’ requires proof that the defendant and one or more other person or persons be physically present for the common purpose of entering the dwelling or premises.

6. **“Damages, or threatens or attempts to damage, any property”.**

[Where a circumstance of aggravation is charged under s 161Q of the *Penalties and Sentences Act 1992* (serious organised crime circumstance of aggravation), see Part 9D, Division 1 of the *Penalties and Sentences Act 1992* for relevant definitions.]