

### Legislation

#### 245 Definition of assault

- (1) A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an **assault**.
- (2) In this section—

**applies force** includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort.

#### 246 Assaults unlawful

- (1) An assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law.
- (2) The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.

#### 335 Common assault

- (1) Any person who unlawfully assaults another is guilty of a misdemeanour, and is liable, if no greater punishment is provided, to imprisonment for 3 years.
- (2) The Penalties and Sentences Act 1992, section 108B states a circumstance of aggravation for an offence against this section.

### Commentary

An assault is unlawful unless it is authorised, justified or excused by law. See Benchbook Chapters on Criminal Responsibility – e.g. **No 91 – Provocation**, **No 94 – Self-defence**.

An assault can involve either an actual physical application of force or a threatened or attempted application of force.

#### *Physical application of force*

There are three elements of assault by a physical application of force:

1. The striking, touching, moving of, or application of force of any kind to the person of another;
2. Either directly or indirectly;
3. Without the other person's consent or with consent, if the consent is obtained by fraud.

### Consent

Consent may be tacit or implied: *Horan v Ferguson* [1995] 2 Qd R 490. Force applied with the consent of the other person will be unlawful if the consent is obtained by fraud. See also *R v Gee* [2016] 2 Qd R 602, dealing with an assault on an infant.

### *Threats or attempts to apply force*

Any person who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another is said to assault that person under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect that person's purpose: s 245(1).

There are four elements of assault by a threatened or attempted application of force:

1. By any bodily act or gesture;
2. Attempting or threatening to apply force of any kind to the person of another;
3. Without the person's consent;
4. In circumstances where the person making the attempt or threat has, actually or apparently, a present ability to effect that purpose.

### Bodily act or gesture

Words alone cannot amount to an assault. There must be some bodily act or gesture associated with words indicating an intention of assaulting. See *R v Agius* [2015] QCA 277 for a discussion as to whether there is a relevant bodily act or gesture.

The commentary in Carter's *Criminal Law of Qld* for ss 335-340 includes helpful summaries of the elements of this and other assault-related offences.

### *Multiple charges*

It may be proper to lay one charge, notwithstanding that a series of assaults is relied upon by the prosecution: see *R v Morrow* [1991] 2 Qd R 309 and *R v Chen* [1997] QCA 355 where the court said, at 4-6:

*There are no doubt cases in which, notwithstanding that offences could be charged separately, it is nevertheless permissible and even appropriate to prefer only one charge. One obvious class of such cases is that where the offence may be constituted by continuing conduct. But also where one act constitutes a number of offences (stealing a number of articles at one time) or where there are a number of similar acts, each constituting a separate*

*offence, but in a short space of time — a flurry of blows, whether with or without a weapon, or a succession of shots — there is, in most cases, little practical advantage in separating them and no loss of fairness to an accused in failing to do so ... Courts have never managed to produce a technical verbal formula of precise application which constitutes an easy guide in cases such as this and the question will always be one of fact and degree for decision in each case.*

See also *R v Fowler* [2022] QCA 265; *R v Aplin* [2012] QCA 258 for an illustration of a case where the indictment was held to be duplicitous because a series of incidents should have been separately charged.

### **Suggested Directions**

It will often be sufficient to pose the following questions, depending on the issues in the case:

1. **Did the defendant punch** [or specify the act alleged by the prosecution, being an act within the definition found in s 245A]?
2. **Was that act done without A's consent?**
3. **Was that act unlawful? Unlawful means not authorised, justified or excused by law.** [See s 246]

In a case where it is alleged the defendant applied force indirectly to the complainant, the following questions might be put to the jury, depending on the issues in the case:

1. **Did the defendant ...** [specify the act alleged by the prosecution]?
2. **Did the defendant thereby apply force indirectly to A?**
3. **Was that done without A's consent?**
4. **Was that unlawful? Unlawful means not authorised, justified or excused by law.** [See s 246]

In a case where it is alleged the defendant assaulted the complainant by threatening to apply force, the following questions might be put to the jury, depending on the issues in the case:

1. **Did the defendant ...** [specify the act alleged by the prosecution]?
2. **Did the defendant thereby threaten to ...** [describe the threatened means of applying force to the complainant]?

3. **Did the defendant at that time have, or apparently have, the ability to...**  
[again, describe the threatened means of applying force to the complainant]?
4. **Was that done without A's consent?**
5. **Was that unlawful? Unlawful means not authorised, justified or excused by law. [See s 246]**

Relevant evidence and/or admissions should be identified for each question posed for the jury. It will often be convenient to provide a short summary of the arguments of the parties in relation to each question.