

## 71. Attempts: s 4

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### 71.1 Legislation

[Last reviewed: October 2024]

*Criminal Code*

[Section 4](#) – Attempts to commit offences

[Section 535](#) – Attempt to commit indictable offences

### 71.2 Commentary

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*Section 4 applies to attempts to commit ‘an offence’*

Section 4 defines attempts to commit offences. Section 535 applies generally to make it a crime to attempt to commit a crime. Some specific provisions of the *Criminal Code* also make it an offence to commit particular offences, e.g. s 306 ‘Attempt to murder’ (see **Chapter 186 – Attempt to Murder**) and s 350 ‘Attempt to commit rape’.

The definition in s 4 applies to all provisions of the *Criminal Code*, which make it an offence to attempt to do something which is itself an offence. For example, the definition applies to s 306, by which a person who attempts unlawfully to kill another is guilty of a crime, because, per s 300, it is a crime to kill another unlawfully: *R v O’Neill* [1996] 2 Qd R 326 at 432 per Dowsett J (Pincus JA agreeing at 422).

The position is different in respect of provisions of the *Criminal Code* under which it is an offence to attempt to bring about a result which is not, in terms, an offence. An example is s 317 of the *Criminal Code*, considered in *R v Leavitt* [1985] 1 Qd R 343 (discussed in **Chapter 186 – Attempt to Murder**). Another example is s 140 ‘Attempting to pervert the course of justice’.

*Elements: s 4(1)*

Section 4(1) contains the main definition of an attempt, and the remaining sub-sections contain qualifications of variable relevance depending on the circumstances of the case.

In *Barbeler v The Queen* [1977] Qd R 80, 82-83, it was explained that s 4(1) requires proof of three elements, namely:

- (1) the defendant intended to commit the offence;
- (2) the defendant put that intention into execution by means adapted to fulfilling it;  
and
- (3) the defendant manifested that intention by some overt act.

The below suggested direction, and the elements table at Appendix A, adds a preliminary element to those three, namely:

- that the acts allegedly committed by the defendant in allegedly attempting the offence were in fact committed and the defendant was responsible for committing them.

The addition is suggested because elements (2) and (3) per *Barbeler* require the occurrence of physical acts with qualities connected to the defendant's intention referred to in element (1). Yet, regardless of those qualities and that intention, the prosecution must fail at the threshold if it cannot prove those physical acts were committed and that the defendant is responsible for committing them: *R v Ridgeway* [2020] QCA 38, [74]. There may be an issue as to whether an act occurred, or whether it was the defendant who committed it, or, if the defendant did commit the act, whether the defendant is excused from criminal responsibility for committing the act by reason of a defence. Such issues are conveniently addressed by the suggested preliminary element.

There must be an actual intent to commit the offence. Knowledge or foresight of a result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the *Criminal Code*: *Zaburoni v The Queen* (2016) 256 CLR 482, 490; [2016] HCA 12, [14]. Where the defendant knows that a particular result of the defendant's conduct is certain, an inference that the defendant intended that result may be compelling; but that is a matter for the jury who should not be directed in those terms, but instead told that they must be satisfied that the defendant intended to produce the particular result: *Zaburoni* at 490 [15]. Intention and motive are different things in this context: *Zaburoni* at 490 [16].

Intention is usually a matter of inference and therefore usually requires a circumstantial evidence direction (see **Chapter 48 – Circumstantial Evidence**). Whether the defendant had a motive (see **Chapter 49 – Motive**) or was intoxicated (see **Chapter 84 – Intentional Intoxication**) may also be relevant to considering whether the inference of intention should be drawn.

The defendant must begin to put the intention into execution by means adapted to its fulfilment. This distinguishes mere preparation to commit an offence from an attempt to commit it: *R v De Silva* (2007) 176 A Crim R 238, 247; [2007] QCA 301, where Jerrard JA additionally observed it is not necessary to establish that the last act possible was done before the completed offence would occur.

An attempt is complete if there is a step towards the commission of the specific crime, and that step could not reasonably be regarded as having any other purpose than the commission of that specific crime: *R v Williams* [1965] Qd R 86, 100 (Stable J, with whom Wanstall J agreed).

It may sometimes occur that the means by which the defendant put the intention into execution, per element (2) above, are the same as the overt act relied upon as outwardly manifesting the intention, per element (3) above. Even in those cases both elements warrant discrete explanation because they have a different focus.

Given proof of an overt act is an element the jury should be instructed to be unanimous as to which overt act they are satisfied of: *R v Lake* [\[2007\] QCA 209](#), [67].

*It is unnecessary to prove the offence being attempted was not completed.*

In *Barbeler*, the lead judgment of Douglas J, at 83, explained the words near the conclusion of s 4(1), ‘but does not fulfill the person’s intention to such an extent as to commit the offence’, do not require proof the offence was not committed. The effect of his Honour’s reasoning is that those words merely qualify the three elements in a contextual sense. Were it otherwise, his Honour explained, the absurd result would be in cases of doubt as to whether the substantive offence was completed or only attempted then the defendant could not be convicted either of the offence or the attempt to commit it.

Section 4(2) was not discussed in *Barbeler*, but supports the conclusion reached there because it provides it is ‘immaterial ... whether the offender does all that is necessary ... for completing the commission of the offence’.

#### *Other immaterial considerations*

It is also immaterial whether:

- completion was prevented by circumstances independent of the defendant’s will (s 4(2)); or
- the defendant desists of the defendant’s own motion from further prosecuting the defendant’s intention (s 4(2)); or
- by reason of circumstances unknown to the defendant it was impossible to commit the offence (s 4(3)).

#### *Defences*

The general interaction of defences with the elements of an attempt has not received material appellate consideration. Approaches to that interaction will invariably depend on the circumstances of the case. However, cases such as *R v David* [\[2006\] QCA 206](#), [42]-[43] and *R v Huni* [\[2014\] QCA 324](#), [62]-[63] and [71] contain observations implicitly suggesting the following approach is apt:

Where a defence might operate to make a person ‘not criminally responsible’ for an ‘act’ relied upon in proof of the alleged attempt, for example an unwilling act per s 23(1)(a), then it ought be considered as part of the preliminary question of whether the Defendant is responsible for committing the acts relied upon as

constituting the Defendant's alleged attempt to commit the offence. In contrast, where a defence might operate to make such an act 'lawful', e.g. a defensive act per s 271, and thus preclude proof of an element of unlawfulness in the offence allegedly being attempted, then it ought be considered in assessing whether the element of intention has been proved. That is because it informs the assessment of whether what the Defendant was intending to commit would have constituted an offence.

That approach has been adopted by the authors in the direction suggested for attempts to commit offences.

### 71.3 Suggested Direction

[Last reviewed: October 2024]

**Our law provides that attempting to commit an offence is itself an offence. The defendant is charged with attempting to commit the offence of [describe the relevant offence, i.e. the offence nominated in the charge].**

**For you to determine whether the defendant attempted to commit that offence you need to know what would have constituted the commission of that offence and what an attempt is.**

**What is [insert relevant offence]? [Here proceed to explain the relevant offence, specifying what conduct and/or result, if proved, would have constituted proof of the completed relevant offence by the defendant].**

**What is an attempt? Our law provides: when a person, intending to commit an offence, begins to put the person's intention into execution by means adapted to its fulfilment, and manifests the person's intention by some overt act, but does not fulfil the person's intention to such an extent as to commit the offence, the person is said to attempt to commit the offence.**

**That description gives rise to three elements which must be proved beyond reasonable doubt to prove an attempt to commit the offence of [insert relevant offence]. [If using an elements table: they are set out as elements (1), (2) and (3) in the elements table I have given you].**

**They are:**

- (1) the defendant intended to commit the offence of [insert relevant offence];**
- (2) the defendant began to put that intention into execution by means adapted to fulfilling it; and**
- (3) the defendant manifested that intention by some overt act.**

**You will appreciate that element (1), intention, relates to the defendant's state of mind. In contrast, elements (2) and (3) require the occurrence of physical acts with particular qualities connected to the defendant's intention. Before they could even potentially have such a connection it is essential, as a preliminary requirement, that those physical acts were in fact committed and that the defendant was responsible for committing them.**

**The prosecution alleges for element 2 that the [act/s] of the defendant which began to put the defendant's intention into execution [was/were]: [insert the act or acts alleged by the prosecution re element 3]. Further, the prosecution alleges for element 3 that the overt act of the defendant which manifested the defendant's intention was: [insert the act alleged by the prosecution re element 4 (in some cases it might be the same act as in element 3)].**

**It is therefore a preliminary element of the charge that the acts alleged for elements 2 and 3 were committed and that the defendant was responsible for committing them. [If using the elements table: this is the preliminary element mentioned in the elements table.]**

**[Here identify what, if any, issues the jury must resolve as to whether the alleged acts were in fact committed and whether the defendant was responsible for committing them. Where it is open for the jury to conclude the defendant committed an alleged act in a physical sense but there is an issue as to whether the defendant is responsible for committing the act because of the potential operation of a defence excusing criminal responsibility for the act, direct the jury as to the potential operation of the defence].**

**If you are not satisfied that the acts allegedly committed by the defendant in allegedly attempting the offence were in fact committed and the defendant was responsible for committing them then you would find the defendant not guilty. If you are so satisfied it remains to consider the three constituent elements of an attempt.**

**Element 1, intention, requires that the defendant intended to commit the offence of [insert relevant offence]. No lesser or other intention will suffice.**

**'Intention' carries its ordinary meaning. The defendant would have intended to commit the offence if that is what the defendant meant to do.**

**That offence would have been committed here if [here identify the constituent elements of what had to occur for the relevant offence to have been committed].**

**(Where a critical alleged act of the defendant may be rendered lawful by the potential operation of a defence and thus preclude proof of an element of unlawfulness in the offence allegedly attempted, the following text may be added) It is essential that what the defendant intended to commit would have been an offence. What the defendant intended to commit would not have been an offence if the allegedly unlawful act of the defendant giving rise to such an offence would have been**

**excused as lawful by the operation of a defence which the prosecution could not exclude. In the present case...** [here identify and explain the nature of the defence relied upon and the issues of fact to be determined by the jury in determining whether the allegedly intended offence would not have been an offence because of the operation of the defence].

**Intention may be inferred or deduced from the circumstances in which the defendant acted and from the defendant's conduct before, at the time of and after the defendant's actions. Of course, whatever the defendant has said about the defendant's intention may also be considered for the purposes of deciding whether the defendant held the requisite intention at the time the defendant acted as alleged.**

[Here explain, if relevant, how the defendant's motive or lack of motive or the defendant's intoxication may be circumstances relevant to inferring what if any intention ought to be inferred – adopting directions in **Chapter 49 – Motive** or **Chapter 84 – Intentional Intoxication** as appropriate. Also, identify any factual issues the jury need to resolve in determining the presence of motive or intoxication].

**While you can have regard to earlier or later events in considering whether the intention to commit the offence existed, the time at which the defendant must be proved to have held the intention is the time at which the defendant committed the acts the prosecution alleges were committed in attempting to commit the offence.**

**In considering whether the defendant held the intention to commit the offence, you will be drawing inferences from evidence of the surrounding circumstances, which you find established by the evidence concerning the defendant's state of mind. For you to infer the defendant held the intention to commit the offence it is necessary not only that the evidence rationally sustains that inference but that it is the only rational inference. That is, that the evidence excludes beyond reasonable doubt any rational inference consistent with innocence, such as that the defendant held no particular intention at all or that the defendant held some lesser or different intention than an intention to commit the offence.**

[Here identify any potential rival innocent inferences as to intention. More generally, also identify any factual issues arising from circumstances before, during or after the event which the jury need to consider or resolve of relevance to the element of intention].

**For the element of intention to be proved, you must be satisfied beyond reasonable doubt that, at the time the defendant engaged in the conduct which the prosecution alleges was an attempt to commit the offence, the defendant held the intention to commit the offence. If you are not so satisfied, you would find the defendant not guilty. If you are so satisfied, it remains to consider the remaining elements.**

**Element 2 requires that the defendant began to put the intention to commit the offence into execution by means adapted to fulfilling it.**

**A mere intention to commit the offence is not enough. Nor is it enough that the defendant's actions were merely preparatory to beginning to implement the defendant's intention. This element requires the defendant committed an [act or acts] which actually began to put that intention into effect and [was/were] directed to achieving the defendant's purpose. While it is necessary to prove the defendant actually took a step towards committing the offence, not just preparing to commit it, it is unnecessary to prove that the defendant did everything which the defendant could have done to commit the offence.**

**[Here identify the act or acts relied upon by the prosecution as constituting the means by which the defendant allegedly began to implement the intention. More generally, also identify any factual issues the jury need to consider or resolve in respect of this element].**

**(Where appropriate, the following additional paragraph on preparation might be added): The argument for the defendant is that what was [done/alleged to have been done] was, at the most, merely preparation ahead of any attempt to [state the result], so that when the defendant was doing those things, [he/she] was not then in the process of trying to [state the result]. Our law recognises that merely doing something to prepare for the commission of an offence, is not of itself an attempt to commit the offence. It is for you to assess whether you are satisfied, beyond reasonable doubt, that the defendant's acts went beyond mere preparation.**

**For element 2 to be proved you must be satisfied beyond reasonable doubt that the defendant began to put the intention to commit the offence into execution by means adapted to fulfilling it. If you are not so satisfied, you would find the defendant not guilty. If you are so satisfied, it remains to consider the remaining element.**

**Element 3 requires that the defendant manifested the intention to commit the offence by some overt act. The prosecution has to prove at least one overt act beyond reasonable doubt and you must be in unanimous agreement as to which overt act has been so proved.**

**The overt act alleged by the prosecution is [insert the overt act alleged].**

**An overt act is an act of the defendant which, if anyone had seen it, would have made the defendant's purpose clear. It must have been an act of such a nature as to make it apparent to a hypothetical observer that the defendant had the intention to commit the offence.**

**[Here identify any factual issues the jury need to consider or resolve in respect of this element.]**

**For element 3 to be proved you must be satisfied beyond reasonable doubt that the defendant manifested the intention to commit the offence by some overt act. If you are not so satisfied, you would find the defendant not guilty. If you are so satisfied and, provided you are likewise satisfied in respect of all the other elements, you would find the defendant guilty.**



## 71.4 Appendix A

[Last reviewed: October 2024]

**R v .....**

**Elements of attempted .....**

	To prove the charge of attempted ..... the prosecution must prove the preliminary element and all of elements (1), (2) and (3) beyond reasonable doubt:
Preliminary element	The acts alleged to have been committed by the Defendant in attempting the offence (i.e. the acts relied on for elements (2) and (3)) were in fact committed and the Defendant was responsible for committing them.
Element (1)	The Defendant intended to commit the offence of .....
Element (2)	The Defendant began to put that intention into execution by means adapted to fulfilling it.
Element (3)	The Defendant manifested that intention by some overt act.