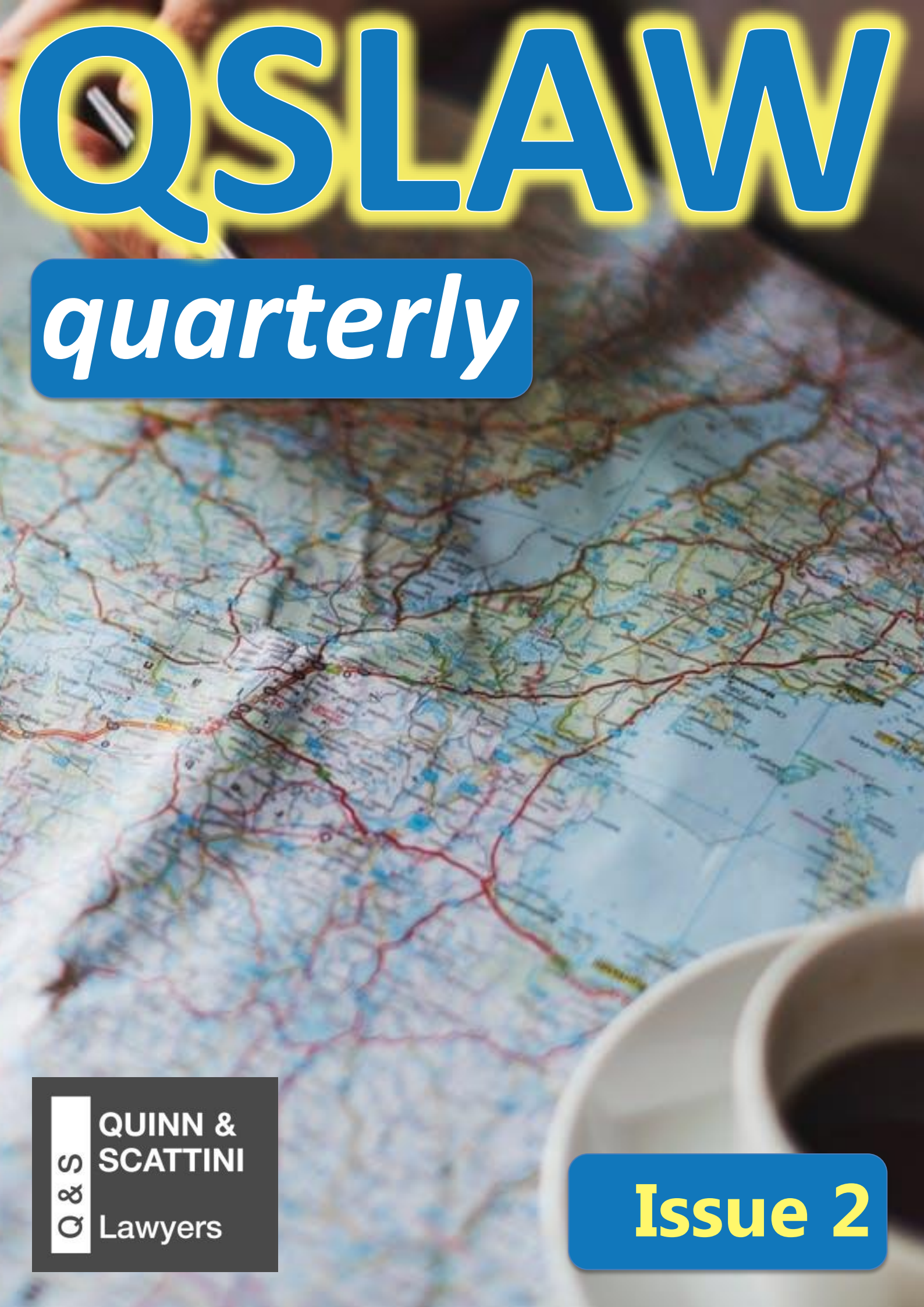

# QSLAW

## quarterly

Q&S QUINN & SCATTINI Lawyers

Issue 2

# Relocating With Your Child – What's It All Mean?

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**Family Law**

Separation is always a difficult time.

It is compounded when one parent unilaterally decides to move away, or expresses a desire to move away, against the remaining parents' wishes. Neither party has an automatic 'right' to move away and potentially compromise the child's relationship with the other parent.

## The Law

In family law, it is always about what is in the best interests of the child and the child's rights, not that of the parent. There is also no automatic 'right' to 50/50 shared care – rather a presumption of equal shared parental responsibility is the starting point and from there, the judges are required to consider whether an equal shared care arrangement is appropriate. Ordinarily, before any application concerning children comes before the Court, the parties have had to attend mediation pursuant to section 60I of the *Family Law Act 1975* (**the Act**).

There are a few exceptions to mediation and urgency is one of those. Mediation is an opportunity for each parent to outline what arrangements they propose for the children to spend time with the other parent. Sometimes agreement is reached, sometimes not. Relocation, or moving from the area where a parent has lived, is still not an automatic right even at this time.

## Unilateral Relocation

If one parent simply up and moves a distance away with the child, and especially if they decide to move a distance that will make the existing order difficult to observe or established arrangements thwarted, e.g. by moving hundreds of kilometres away or to the other side of Brisbane where there has been an equal shared care arrangement and the move would make the ongoing equal shared care arrangement impossible to observe, the remaining parent can file an application in the Federal Circuit Court of Australia for the child to be returned pending resolution of all parenting matters. There are no guarantees in this jurisdiction and there are many variations of situations. Each case is unique. The comments here are general.

It is helpful if there is already an order in place setting out what time each parent is to spend with the child. If those orders are established and have been observed, and most importantly action is taken quickly to start court proceedings, the prospects of succeeding in the application are increased.

If an order hasn't been obtained, it is necessary to seek orders for the care of the child as well as the order that the child be returned to the location from where they were removed.

When making the application, the remaining parent will also need to file an affidavit which sets out the background of the matter and provide the court with details as to why, on their case, the court should order the return of the child.

The applicant will need to consider things such as:

- the arrangements which were in place before the removal occurred;
- activities that the child was involved in through school;
- activities that the remaining parent and child did, the schooling for the child;
- extra-curricular activities;
- relationships with half- and other siblings;
- logistics arising from the move;
- notification received regarding the move; and
- the dynamics of the relationship between the parents e.g. domestic violence/civil relationship.

The affidavit material needs to demonstrate the involvement of the remaining parent in the child's life and how the change of arrangements will affect the significant time that the remaining parent and child have been spending together.

It is very unusual for a court to consider an application like this without the parent who is left being served with the application and affidavit and having an opportunity to respond and thereby state their case or their story.

**Request to Move**

Where a party decides that they wish to move to a different area, they should first seek the agreement of the remaining parent and try to negotiate an arrangement that supports the child spending significant and substantial time with each parent. If they cannot agree, then an application will need to be made to the Federal Circuit Court to enable the parent to move with the child.

**In family law, it is always about what is in the best interests of the child and the child's rights, not that of the parent.**

As with the unilateral move, an affidavit needs to be filed. It should detail the story of the party wishing to move and why they are moving. Details such as how the parent will support the child's relationship with the remaining parent, the school the child will be attending, residential arrangements, connection to the new location, job prospects and family or other support are just some of the considerations that the court looks at. Whilst not a direct factor, a relevant factor in all matters is the payment of child support whilst the involvement of the remaining parent in the child's life to date is a significant point for the court to look at.

Each party has an opportunity to put forward their case.

### What Steps Does the Court Take to Work Out the Cases?

As mentioned above, the court commences its review from a position of equal shared parental responsibility. If there is no reason to question why both parents should not be responsible for the long term decisions concerning the child, in consultation, then it will move to the next stage and that is to consider whether equal shared time with each parent is appropriate in the given case.

Equal time must be in the child's best interests and reasonably practicable – how far apart parties live, capacity of the parents to implement the care arrangement, capacity to resolve differences, and such factors as the court considers relevant. Allegations of domestic violence are also relevant.

If it is decided that there should be sole parental responsibility, that does not mean that one parent gets to move away with the child nor stop the consideration of whether significant and substantial time for the child with the parent is appropriate, and how to support that. Even where there is an order for equal shared parental responsibility, it may not be appropriate for equal shared care to occur so the court will consider significant and substantial time for the child with the parents.

The court always works to determine what arrangement is going to be in the best interests of the child. To do this the court takes into account section 60CC of the Act.

The first two considerations are:

- the benefit to the child of having a meaningful relationship with both of the child's parents; and
- the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

After coming to a conclusion about these aspects, the court must then consider:

- views expressed by the child;
- the nature of the child's relationship with each parent and other persons important to the child;
- the extent to which each parent has taken, or failed to take, responsibility for participation in decisions about the long-term care of the child, spending time with the child and communicating with the child;
- how the parent has met their responsibility to maintain the child;
- the likely effect of the change on the child including the impact of separation from a parent;
- the practical difficulty of the proposed arrangement including the expense involved;
- capacity of the parent and others involved in the child's life to provide for the child's needs, including intellectual and emotional;
- maturity of the child and the parents and any other characteristics that the court considers relevant;

- whether the child has Aboriginal or Torres Strait Islander heritage;
- the attitude demonstrated by each parent to the responsibilities of parenthood;
- family violence;
- if there is a family violence order, the nature of the order, circumstances of its making, evidence for the order, findings made and other relevant matters as determined by the court from the evidence provided;
- arrangements which would least likely lead to the institution of further proceedings; and
- any other fact or circumstances the court considers relevant when considering the case before it.

Sometimes, it is a very finely balanced decision as to whether a parent should stay or be allowed to go, where they have made the application before moving, or ordered to return or remain pending proper resolution of the application. The legislative pathway as set out in the Act must be followed by the court.

Advisers working in this area also need to discuss these aspects with clients so their minds are being turned to the evidence required to prepare and present their case.

## In Summary

No parent has an automatic right to change the arrangements for the care of a child. Each parent has shared parental responsibility, even if no order exists to confirm this. The removal of a child to another location falls within parental responsibility. Because of the nature of parental responsibility, notification and discussion needs to take place. If agreement is not reached, the child should not be removed. It is imperative that the child's interests are placed ahead of those of the parents.

The courts take very seriously the role of making a decision about the care arrangements for a child. It is involved because their parents cannot come to an agreement. Sometimes, the court may appoint a family consultant or report writer to help ascertain information about the parties, to observe interactions and make recommendations for the support of the child's relationship with a parent and whether the move is in the child's best interests. The court is guided by these recommendations.

Sometimes, obtaining such a report before starting court proceedings can be of substantial benefit to guide discussions and negotiations about the best way to support a proposed move, or occasionally a change of primary care provider. Nothing is certain in this sphere and it is always case by case and it has to be as each case has a different set of facts from the one before or after it.

The one consistent factor through all children's matters, though, is that the child's best interests are the paramount consideration.

# Man Dies Moments before Signing His Last Will – Can It Be Proved Valid?

**Wills & Estates Team**

Picture this: a man is dying in hospital and suddenly decides to change his will. A lawyer is called to attend the hospital to take instructions for the man's will. The man, close to the end of his life, labouring to breathe, just barely able to summon enough energy to speak, gives his final will instructions.

The lawyer records the conversation on his dictaphone and writes down the instructions in a blank will form he brought with him. But the patient is too weak to sign the will form and lapses into a coma not long after giving his will instructions.

Can the instructions recorded on the lawyer's dictaphone and the unsigned will form be admitted to probate as the man's will?

For a will to be valid it must be:

- intended by the will-maker to be his last will; and
- signed by the will-maker in front of two independent witnesses.

Before 2006, if a will did not meet these requirements it could not usually be admitted to probate. However, the law has changed since then.

This article explores the elements required to successfully make an application to admit to probate a will that does not meet the usual formal requirements.

There are three elements about which the court must be satisfied to admit to probate a will that does not meet the usual formal requirements for a will.

There must be a 'document'. This is broadly defined to include "any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced…". In Mellino v Wnuk the court admitted to probate a DVD left by the deceased containing his will instructions. In Re Yu the deceased left his will instructions on his iPhone.

The document must contain the testamentary intentions of the deceased person. The testator must have formed the final and conclusive intention that that particular document contained his/her last testamentary wishes.

The third element is the element to which the courts have found necessary to devote most attention. The evidence must satisfy the court that the deceased intended the document to be his will.

The above elements were considered carefully by the Supreme Court of Victoria in Fast v Rockman. The following conclusions can be drawn from that case:

- the document must exist at the date of death;
- the evidence the court will consider is broad, encompassing:

    - the form of the document,
    - the contents of the document; and
    - the circumstances in which the document came into being.
- it must be demonstrated that the deceased by his/her words and/or actions intended that particular document to be his/her will;
- there is no hard and fast rule that the particular document propounded must have been produced by, read to, or written by the testator. However, the courts are more ready to find the requisite intention where the document is written by, bears the signature of, or has some mark by the deceased indicating his intention to adopt the document as his own;
- it is relevant to enquire whether the testator was aware of the formalities required to make a valid will. The court drew a distinction between cases where this fact was an element in the court's deliberations and those cases where the testator lacked the knowledge of formal requirements, observing that the testator's awareness of the formalities to make a will may have a bearing on the court's assessment of the testator's intention. If the document does not meet the formal requirements of the testator and the testator was aware of them, to court is more reticent to find the document is the testator's will, and
- there must a direct connection (a causal connection) between the testator's testamentary intention and the creation of the document.

The document propounded must be supported by evidence that the testator (by his words or acts) had every intention, without equivocation, to adopt or authenticate the document prior to death. That is, that the testator intended the creation of the document 'to be the legally operative act which disposes of the deceased's property upon their death'.

The same statutory provision can be used to admit to probate a copy of an original will that has been lost. Provided the court is satisfied that the original will was merely mislaid and not destroyed by the will-maker for the purpose of revoking the will, the court will admit the copy will to probate.

Although the analysis of the dispensatory provision is interesting, these applications are expensive. The cost of the application is paid from the deceased's estate and far exceeds the cost of seeing a lawyer to have a properly drafted and validly executed will.

# One Punch Laws – Tough on Crime and Tough on Rights

**Criminal Law Team**

On 26 August 2014, the *Safe Night Out Legislation Amendment Bill 2014* (**the Bill**) was passed by the Queensland Parliament which is part of the Queensland Government's 'Safe Night Out' strategy, with the objective to reduce alcohol and drug-related violence in Queensland's nightlife.

The Queensland State Government has stated that the Bill will achieve these policy objectives by 'increasing penalties and police powers, strengthening liquor licencing compliance measures and creating stronger local management of entertainment precincts'.

In addition to a number of other varied methods, the Bill aims to achieve this purpose by implementing the following:

- amending the Queensland Criminal Code to create a new offence of 'unlawful striking causing death'; and
- introducing 'sober safe centres' in the Brisbane CBD.

It is not disputed that the proposed aim of the Bill to 'make Queensland's nightlife safer for all through the reduction of alcohol and drug-related violence'[1] is commendable.

This article explores the impact of the legislative amendments, particularly the negative impact on the rights and freedoms of the Queensland public.

**Unlawful Striking Causing Death**

The Bill creates a new offence under section 302A of the Queensland Criminal Code of 'unlawful striking causing death' which purports to 'fill the gap' between manslaughter and an assault which results in the death of a person.

The Explanatory Notes for the Bill states that this proposed 'gap' is the difficulty of securing a conviction for murder where the prosecution cannot prove that the offender intended to kill the victim, and the difficulty in securing a conviction for manslaughter in cases where it can be argued that death of the victim was not intended or foreseen by the offender[2].

The Bill therefore addresses this 'gap' in the new created offence of "unlawful striking causing death" by only requiring the prosecution to prove that the defendant unlawfully struck another person to the head or neck, and that caused the death of that other person.

The new section to the Criminal Code has a deeply problematic impact.

Firstly, the offence of 'unlawful striking causing death' is adequately covered by the current offence of manslaughter, which covers the same conduct and also carries with it a maximum penalty of life

imprisonment. In truth, there is no 'gap' to fill and the new offence of 'unlawful striking causing death' is redundant. Furthermore, the new offence of 'unlawful striking causing death' removes a defendant's ability to argue that the consequence of a strike is unintentional, and further removes their lawful right to use such force as is reasonably necessary to prevent repetition of an act or insult that amounts to provocation if that force is not intended and not likely to cause death or grievous bodily harm.

In their review of the proposed bill, the Queensland Law Society provided the following illustration to highlight the serious miscarriages that might occur under this provision.

*"A woman may receive repeated verbal insults and/or unwanted attention from a man in a bar. The woman may react by slapping that man in order to prevent repetition of the insult. Not expecting the slap, the man may fall backward, hit his head on a hard surface and die. Under the (previous) law, the woman might argue that she did not intend that her slap cause the death of the man. Under section 302A, the woman would not be able to rely on the defence of accident, may be found guilty of the offence of unlawful striking causing death and may face life imprisonment."*

In our respectful view, this would be an unjust outcome[3].

The new offence also carries mandatory sentencing in its penalty provision. This offence carries with it a maximum penalty of life imprisonment, and further states that if a term of imprisonment is imposed for this offence, the court must make an order that the defendant not be released from prison until they have served either 15 years in prison or 80 percent of the term of imprisonment for the offence (whichever is the lesser amount of time). This should be contrasted with the offence of manslaughter, which carries a maximum penalty of life imprisonment, but leaves the decision solely in the hands of the courts as to the sentence to impose in each particular case.

The Queensland Law Society further expressed concerns that mandatory sentencing under this new offence provision reduces the rights and liberties of Queensland individuals and mirrors the comments of the former Sentencing Advisory Council in stating that it "also risks having a disproportionate impact on vulnerable offenders, including Aboriginal and Torres Strait Islander offenders and offenders with a mental illness or intellectual impairment"[4].

The newly created offence violates the fundamental constitutional principle of the separation of powers, which is the cornerstone of fair government. The courts were historically established to provide checks and balances to government power, to ensure that power is not abused. This is achieved by examining individual circumstances of parties and dealing with defendants on a case-by-case basis. The new offence of unlawful striking causing death takes the power away from the courts to decide the appropriate sentence for an individual offender and puts that power into the hands of the government.

This is a gross abuse of power and reduces Queensland Courts to little more than a

'rubber stamping' process in the event that the police exercise their discretion to charge a person with this offence.

**Sober Safe Centres**

The Bill further amends the *Police Powers and Responsibilities Act 2000* ("**the Act**") by introducing 'Sober Safe Centres' on a 12 month trial, which will be located inside the designated precincts in the Brisbane CBD[5].

These amendments give the police the power to detain and transport any person they feel is intoxicated to the point where they are being a nuisance or could harm themselves or another person, to a Sober Safe Centre. Persons can be held in these centres for up to eight hours, without being charged, and are further liable to pay a 'cost recovery charge', which is increased every time the person is admitted to a centre.

It is further concerning that section 390C(2) of the amended Act authorises police watch-houses being used as 'sober safe centres', and authorises watch-house managers to act as centre managers for these 'sober safe centres', effectively ensuring that time in these 'sober safe centres' is little different than standard time in police custody.

The Explanatory Notes to the Bill state that "*people who intoxicate themselves to the point where they are reckless in their behaviour should not have the benefit of the cost of their health and well-being paid for by the community*"[6].

It is highly concerning that the Bill gives the police the subjective power to decide whether or not they are intoxicated for the purposes of detaining them without charge or arrest and further billing them for the 'privilege' of being detained.

Under this legislation, the police do not have to rely on a breath or blood alcohol test to determine whether or not a person is intoxicated and it is possible and even likely that persons who are not intoxicated could be unjustly detained under these provisions. This could include vulnerable persons who suffer from mental illness, old age or other health or personal difficulties.

In conclusion, the introduction of the Bill has a serious and significant impact on the operation of criminal law and police powers in Queensland.

In all cases involving allegations of assault or public violence, it is important that legal advice is obtained very quickly. If you or someone you know has had the unfortunate experience of being charged or detained after a night out, our Criminal Law Team would be happy to provide assistance.

If you would like to obtain legal assistance you can contact us on 1800 999 529.

[1] Explanatory Notes, page 1
[2] Explanatory Notes, page 4
[3] Safe Night Out Legislation Amendment Bill 2014, Letter of Ian Brown, Queensland Law Society to Research Director, Legal Affairs and Community Safety Committee, 4 July 2014, page 4
[4] Queensland Law Society, Letter to Legal Affairs and Community Safety Committee regarding Safe Night Out Legislation Amendment Bill 2014, 4 July 2014, page 5; Sentencing Advisory Council, Minimum standard non-parole periods final report, September 2011, page 20
[5] Police Powers and Responsibilities Act 2000, Part 5, Division 2
[6] Explanatory Notes, page 7

# Landlords Beware – Blinds and Curtain Cords Can Kill

**Business & Property Team**

Loose blinds, curtain cords and chains (particularly those with loops) have been the subject of extensive investigations, inquiries and consultations with industry associations, companies, people and health and advocacy groups in recent years, conducted by the Australian Competition and Consumer Commission (**ACCC**) due to the number of deaths it has caused amongst young children.

As a result, the Federal Minister for Small Business has introduced further safety requirements under the Competition and Consumer (Corded Internal Window Coverings) Safety Standard 2014 (**the new safety standards**) for the installation of corded internal window coverings in domestic dwellings (which does not include caravans, boats and mobile homes) in a way which will avoid the production of dangerous loops and lengths of cord which are a demonstrated threat to life in young children.

The new safety standards were introduced on 20 March 2014 but will not commence until 1 January 2015.

The purpose of the new safety standards is to ensure that corded internal window coverings installed in domestic dwellings are installed in accordance with the safety instructions and any safety devices required under the safety standards found in the Trade Practices (Consumer Product Safety Standard – Corded Internal Window Coverings) Regulations 2010 (**existing safety standards**).

In particular the installation requirements under the new safety standards will require that:

A corded internal window covering must be installed:

- in such a way that a loose cord cannot form a loop 220 mm or longer at less than 1,600 mm above floor level; and
- using any components specified in the installation instructions as necessary to meet requirements for cord safety.

The person who installed the internal window covering must attach a label containing the name and contact details of the person or company that carried out the installation and to ensure that such label remains attached to the cord.

Both landlords and persons engaged in the supply or installation of corded internal window coverings should make sure they fully understand the requirements imposed by the new safety standards in order to ensure compliance.

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