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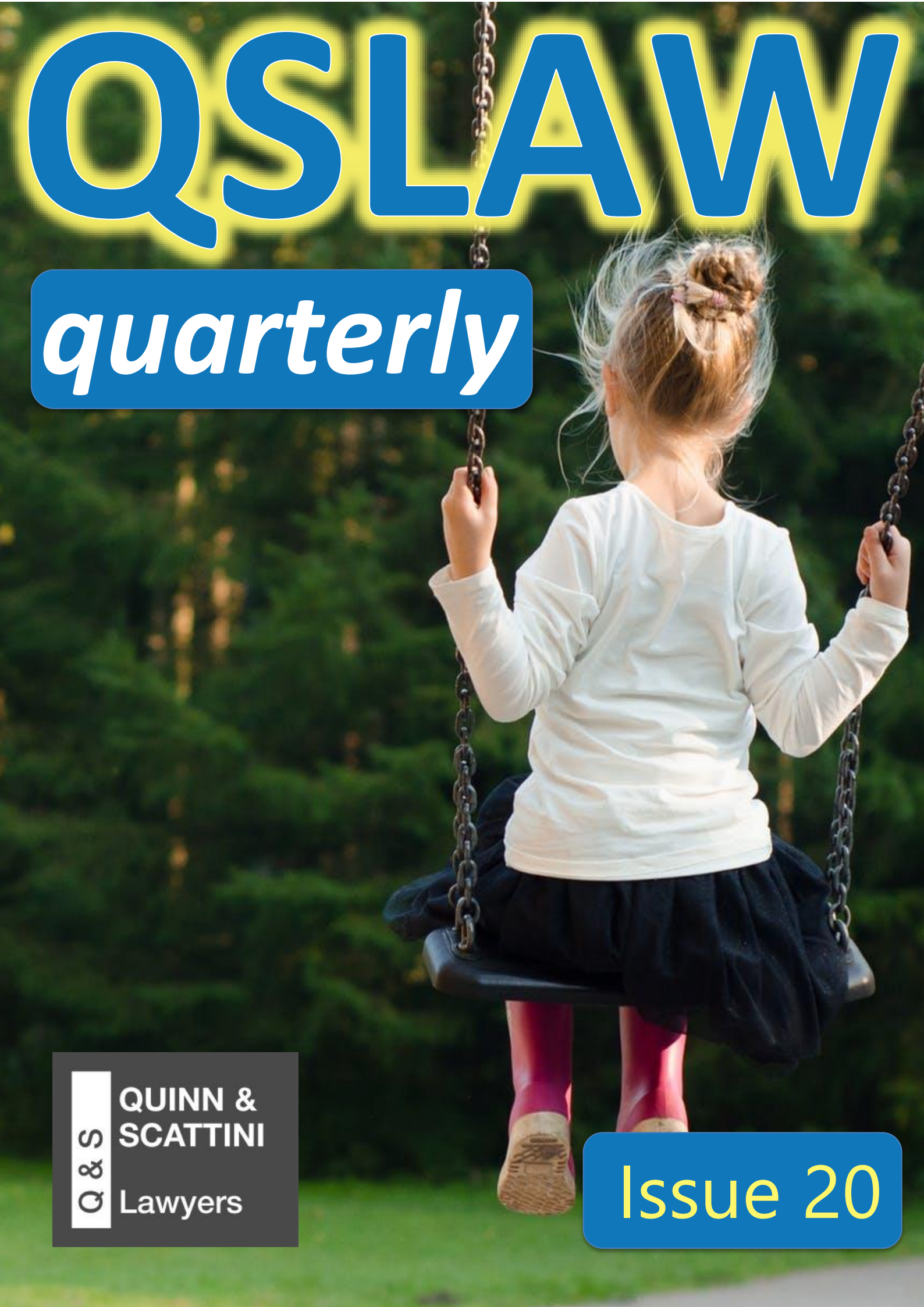

Q&S QUINN & SCATTINI Lawyers

Issue 20

Can I Change Final Family Law Court Orders?

Family & De Facto Law Team

When people form a relationship, they engage in activities as partners which can include; having children, living together, pooling incomes, buying and selling property and getting married.

When these relationships go sour and there is a need to separate, the *Family Law Act 1975*[1] (**the Act**) can be of assistance. The Act provides direction and regulation for parties as to how to achieve a resolution beyond the conflict that can follow a separation. Often, this resolution is the making of court orders, whether it be by consent or determined by the court.

Once final orders have been made they are intended by the court to be final, and to bring an end to all and any litigation.

Often, after orders have been made, people question "*How can I change these orders?*"

Where the change to an order is by consent, this change can be effected by drafting consent orders which are then lodged with the Family Court[2]. Once lodged, the Family Court then makes those changes into a new order without the need for the parties to attend court.

When seeking to change final orders there may be a dispute between the parties. The first, and sometimes only, answer to the question "*Can I change my final orders?*" has to be; "*Has there been a significant change in circumstances*?"

One other important factor to be aware of is that there are no generic rights when applying for an order to be changed, varied or set aside in proceedings under the Act. Each application to change a final order is different. It is up to the court to exercise its discretion upon consideration of all the evidence on a case by case basis.

Parenting Orders

To be successful in making an application for a change in final parenting orders, as always, the best interests of the child is paramount to all considerations.

Therefore, the first step should be to try and make that change by consent, through mediation or other alternate dispute resolution process.

If change cannot be achieved by consent, to be successful in an application for a change to final parenting orders, a party must have evidence of extraordinary circumstances or special or significantly changed circumstances that result in the existing orders being unworkable and unrealistic.

Children are not static. Changes do occur. But not all changes require a change to parenting orders.

A common phrase found in parenting orders is "*such further or alternate…as agreed between the parties*". This gives the parties to the order the power and flexibility to alter the arrangements as they see fit, as long as it

is in the best interests of the child. This can be done informally from time to time, or on a more formal basis through the use of a written parenting plan.

When talking about changes to parenting orders, lawyers and courts will refer to a case called *Rice and Asplund*[3] wherein it is stated that "*…a court should not lightly entertain an application to reverse an earlier…order.*" That there should be "*circumstances which require the court to consider afresh how the welfare of the child should be best served.*[4]"

The court adopts the view that if it were to allow orders to be varied simply because a child is growing up, the court would be inviting endless litigation. This is because change itself is an ever-present factor in life. The purpose of the rule in *Rice and Asplund* is to protect children from being exposed to ongoing litigation and endless uncertainty about their future.

There is no checkbox list of circumstances that give rise to being successful in an application for a change to final orders, but some examples are:

- relocation,
- change in the partnership or other living arrangements of a party,
- orders no longer reflecting the actual arrangements,
- abuse or family violence,
- changes in the health of a party or a child, and
- contravention of orders.

It's important to remember that what might constitute a *significant change in circumstances* will depend upon the facts of each case.

Property Orders

The questions we encounter regarding final property orders are usually not so much how to change them, but how to enforce. Nevertheless, wanting to change final orders and asking "*how*" is a question that can arise.

There are very limited circumstances in which the court will approve a change to final property orders. This is due to the fact that orders are intended to in be full and final settlement of parties' rights and entitlements to, what was a joint property pool.

It is important to note that the last step the court takes when making final property orders is considering whether they are 'just and equitable under all the circumstances'.

Further, claiming lack of knowledge of rights won't give rise to a special circumstance due to the fact that parties to property proceedings are deemed to know what their rights and entitlements are because they have to attest, at some point, that they have read and considered sections 72 and 79 and subsection 75(2) together with Part VIII of the Act[5].

The limited circumstances that can give rise to a successful application to vary or set aside or change final property orders include:

i. There has been such a significant change in circumstances since the making of the order that it is impossible to enact the terms,
ii. A miscarriage of justice by way of fraud, duress, suppression of evidence or other such circumstances, or
iii. There has been a default in the enactment of the terms of an order by one or more of the parties.

Even if such a circumstance arises, it is important to be aware that there must be sufficient evidence to present to the court so that it is able to determine if it should exercise its discretion and change the orders.

Summary

At the bottom of Family Law Court Property Orders there is usually a notation:

> *That it is the intention of the parties that these Orders be in full and final settlement of their respective claims against the other for property settlement and/or spousal maintenance pursuant to Part VIII of the Family Law Act 1975.*[6]

Full and final means that the parties to the orders intend them to sever the financial relationship between them and not have to return to the adversary that is Family Law litigation.

In children's matters the objective should be to settle, or to have ordered, suitable arrangements that are the least likely to lead to future litigation. As His Honour Chief Justice, as he was then, Evatt commented, the courts won't *lightly entertain an application to reverse an earlier… order*[7].

At Quinn & Scattini Lawyers we have a team of experienced Family Lawyers who can assist you to negotiate and reach agreement in relation to parenting and property matters and formalise those agreements in such a way that you will never need to ask "*How do I change these final orders?*."

However, if you do find yourself in a situation where you need to have that question answered, our expert family lawyers can meet with you for an initial consultation to discuss the issues and guide you in the right direction.

If there is a case in which consent is part of the proposed change, we can step you through the entire process of applying to change by filing a consent application with the court.

Alternatively, if no agreement can be reached between you and the other party as to the change/s, we can assist you by filing, for and on your behalf, an Initiating application with the court and provide expert representation throughout the process.

[1]or the *Family Court Act 1997 (WA)*

[2]Consent Order Applications can only be lodged with the Family Court

[3]*In the Marriage of Rice and Asplund* (1979) FLC 90-725; (1978) 6 FamLR 570

[4]At p 7

[5]or the equivalent sections of the *Family Court Act 1997 (WA)*

[6]or the *Family Court Act 1997 (WA)*

[7]ibid

To Guarantee or not to Guarantee

Business & Property Team

With financial institutions tightening up their lending requirements in recent years, it has become increasingly common for lenders to require additional security as part of their lending criteria. One form of additional security can come in the form of a personal guarantee.

Before agreeing to become a guarantor for another person, it should be understood what this entails and the risks that come with it.

What is a Guarantee?

A guarantee is essentially a promise made by one party (called the guarantor) to another party (the lender) that the borrower will perform his/her obligations in accordance with the terms of the loan agreement and if the borrower defaults then the guarantor will perform the borrower's obligations. Normally this relates to payment of monies owed but can extend to other obligations.

Personal guarantees have two parts. The first is the promise to pay. The second is an agreement to indemnify the lender against any costs, expenses and losses suffered or incurred by the lender.

What does being a Guarantor on a Loan Mean?

Being a guarantor involves helping someone else get credit, such as a loan or mortgage. By acting as a guarantor, the guarantor 'guarantees' someone else's loan or mortgage by promising to repay the debt if the borrower is unable or unwilling to do so. You should be wary of providing a personal guarantee. At the very least, you should only agree to be a guarantor for someone you know well. Often, parents will act as the guarantors for their children to help them take the first step onto the property ladder.

How much is Being Guaranteed?

It is important to check how much the guarantor is guaranteeing. Some guarantees limit the principal sum whereas other guarantees will be unlimited. In either case, the lender will be able to pursue the guarantor for interest and costs on top of the principal sum.

What Happens if a Guarantor Refuses or Unable to Pay?

The nature of a guarantee dictates that if the borrowers become unable to repay their loan, the responsibility falls on the guarantor to pay the full amount, plus interest and other fees associated with the guarantee such as legal costs. If a guarantor is unable or refuses to pay the lender, the guarantor may be in breach of the guarantee agreement. A breach of guarantee agreement entitles the lender to pursue legal action against the guarantor, and the lender may seek to enforce its guarantee against the assets of the guarantor. This could include the family home.

Can a Guarantor be removed from a Loan?

A person who agrees to guarantee a loan can, by written notice to the lender, withdraw from the agreement at any time prior to the provision of credit to the borrower. The guarantor can generally seek to withdraw from the guarantee after the credit has been provided to the borrower but the guarantor will still be liable for the debt outstanding at that time.

What Happens After Guarantor Pays the Debt?

If the borrower defaults under the loan and the guarantor pays off the amount owing in full then the guarantor is entitled to pursue the borrower for the monies that the guarantor has paid. Whether the borrower has any money to pay the guarantor is another issue.

Do You Really Want to do this?

Many people feel pressured into signing a guarantee for a number of reasons. In some cases people enter into guarantees to preserve a relationship with a family member. In other cases, a spouse feels he or she has no choice because the family is dependent on the income generated by the business requiring the loan.

Giving a personal guarantee is a serious undertaking. A guarantor's personal assets are at risk in the event of default. Lenders do pursue guarantors. Think carefully before agreeing to be a guarantor and ensure that independent legal advice is sought.

The information given this in this article is general in nature and is not to be relied upon in entering into a guarantee. Specific legal advice must be taken before entering into a personal guarantee.

Misconduct by Attorneys

Wills & Estates Team

Most of us have heard stories about attorneys who have taken funds or gained some advantage from an elderly person who gave them their Enduring Power of Attorney (**EPA**). The attorney is usually a child or a trusted friend of the elderly person. Elder abuse is receiving a lot of coverage in the media these days. Sometimes the transgression seems innocent. Many transgressions occur as a result of the attorneys' ignorance of their responsibilities. The law in relation to attorneys' conduct is complex. Let's take a typical scenario which is loosely based on a real case.

Case Example

The father appointed his son as his attorney. The father was about to move into a nursing home because he had been diagnosed with Alzheimer's disease and he had become quite forgetful. The son as attorney for his father sold his father's holiday house at Caloundra to his daughter for $25,000 less than its market value. The house was dilapidated and could not be rented out. The attorney's sister found out and alerted the Office of the Public Guardian (**the OPG**). The OPG has wide investigative powers and often calls attorneys to account for their actions. Court action was taken against the attorney to recover the $25,000 loss that the father had suffered. The son had not intended to deceive his father; he thought he was doing the right thing. In fact, the son had:

- noted that the EPA said the attorney could not purchase the principal's property unless he paid market value,
- obtained a valuation of the property for $75,000, and
- asked his financial planner whether he could sell the property to his daughter.

The case went to trial. After considering the evidence about the value of the house, the judge found that the true value of the house was $100,000. The son argued that the reduced value of $75,000 was because it would have cost about $25,000 to bring the house to a 'saleable condition'. He said that he therefore sold the property to his daughter for that value. The son also argued that he had saved his father $2,500 in real estate agent's commission by selling the house to his daughter.

The judge ordered the son to pay the $25,000 difference between the realistic valuation of the house at $100,000 and the price the house was sold to his daughter.

Lessons

What could the attorney have done to save the discomfort of the OPG investigation and the court case that followed?

A 'conflict transaction' is any transaction an attorney enters into on behalf of his principal in which the attorney, a relation, a business associate or close friend of the

attorney stands to benefit from the transaction.

Where the principal has the mental capacity to agree to the conflict transaction, it is always a good idea to have a written agreement signed by the principal in the presence of an independent witness. A written agreement that sets out the exact terms of the transaction, and is signed by the principal and witnessed by an independent witness, will protect the attorney. The independent witness will be able to vouch that the principal understood the transaction and that there was no pressure from the attorney to agree to it. The agreement should be made before the transaction is conducted.

However, there is currently legislation before parliament that will enable a principal to retrospectively agree to a conflict transaction, provided the principal has the mental capacity to do so. Keep an eye out for this change and ask your lawyer if you find yourself in this situation.

The difficulty arises where there is some doubt about the principal's mental capacity to agree to the transaction. If the attorney suspects that the principal does not have the mental capacity to agree to a transaction, the attorney can (and should) apply to the Queensland Civil and Administrative Tribunal (**QCAT**) for its approval of the transaction. QCAT is a tribunal that deals with issues involving people with impaired mental capacity. It operates on an informal basis, compared to the courts. It will examine the proposed transaction and, if it is in order, give its approval. QCAT may also add some conditions that it will require to be met. In the above case example, if the attorney had obtained the approval of QCAT he would have been saved the uncomfortable investigation and the court case that followed.

If you have any questions about your obligations as an attorney, one of our lawyers can assist you.

Have You Been Defamed By A Keyboard Warrior Or An Online Troll? What You Need To Know!

Roly O'Regan
Senior Associate
Commercial Litigation

Did you know almost eight in ten people in Australia have an active social media account?

The popularity and accessibility of social media has advantages but there are also disadvantages. One disadvantage is the increase in 'keyboard warriors' and 'online trolls'. Keyboard warriors are known to behave aggressively and unreasonably online, but unsurprisingly in 'real life' they do not behave in that way.

Internet trolls conduct themselves in a similar manner, but are known to target newsgroups, forums, chat rooms and blogs and do so to evoke an emotional reaction which can constitute defamation.

Whether it be published on Facebook, Instagram, Snapchat, Twitter, Pinterest or LinkedIn, all social media organisations (and newspaper outlets and radio stations) have policies and procedures in place to counter this online behaviour. The issue with these policies is you see what has been published before you can take appropriate action. Or in some instances, you are unaware about the posts until long after being published in cyber space when the damage to your personal or professional reputation has already occurred.

So what can you do if you have been targeted by a keyboard warrior or internet troll?

Have I Been Defamed?

Firstly, you need to determine whether the publication is defamatory or not. Defamation is defined as "*false and derogatory statements about another person published in the press, electronic media or by word of mouth, without any justification recognised by law*". The legislation concerning defamation in Queensland is found in the *Defamation Act 2005*.

Obtaining Evidence Of The Imputations

Secondly, you need to obtain evidence of the defamatory content to initiate a case of defamation. Ideally, as much information as possible should be recorded. Whether this record be in the form of handwritten notes (including date, time, location and content of discussion, for verbal defamation), or screenshots taken from the relevant online sources evidencing the defamatory content concerning you.

Once you have the relevant evidence of the defamatory conduct, whether it be published on social media, radio or television, or in the newspaper, the next

step is to seek legal advice from an experienced defamation lawyer who will provide you with the right advice and legal options to ascertain whether the publication is defamatory and what remedies are available to you.

Are There Any Defences Available For The Defamatory Publication?

It must be noted, however, that although the publication may be defamatory to you, the *Defamation Act 2005* (Qld) and the common law include a number of defences including these:

- Justification,
- contextual truth,
- absolute privilege,
- public documents,
- fair report of proceedings of public concern,
- qualified privilege,
- honest opinion, and
- innocent dissemination

Therefore, it is important to obtain advice before any correspondence is sent to the publisher of the defamatory material as a defence may well be available.

A Recent Example

Although this case concerned defamatory material published on the radio, the same legal principles apply to defamatory posts published on social media.

Recently, the well-known broadcaster, Mr Alan Jones, along with radio stations 2GB and 4BC, defamed the highly successful Wagner family in a series of radio broadcasts where it was published that the Wagner family were responsible for the deaths of 12 people, including two children, in the 2011 Grantham floods when a quarry wall owned by the family collapsed. Justice Flanagan of the Supreme Court of Queensland found that the allegations were defamatory and ordered that Mr Jones and 2GB and 4BC pay the family $3.75 million in damages. (See *Wagner and Others v Harbour Radio Pty Ltd and Others* [2018] QSC 201).

Why Do I Need A Lawyer To Assist Me?

Defamation is a serious matter and can have a disastrous impact on your personal and professional reputation. Defamation matters can be complex and you need an expert lawyer on your side to effectively navigate the legislation and put forward your best possible case so you obtain the right outcome, whether it be having the content permanently removed or receiving compensation for having your reputation injured.

How Long Does A Defamation Case Take?

Defamation cases may take some time to resolve. However, it is normal practice to firstly send the defamer a letter or 'concerns notice' inviting them to make amends before any court proceedings are commenced.

Need To Protect Your Reputation?

Feel free to contact our experienced defamation lawyers on 3222 8222, or email mail@qslaw.com.au, or visit http://www.qslaw.com.au and submit an online enquiry.

Migration – Frequently Asked Questions

Migration Law Team

Why Migrate To Queensland?

There are many benefits of migrating to Queensland to work, such as equal opportunity within the workplace, work entitlements and safe working conditions; and not to mention the weather!

Why Is It Important To Use A Registered Migration Agent?

Australian immigration law can be complex and fluid. There is a lot of red tape that needs to be attended to when making the move to Australia. In order to avoid difficulties and delays with your visa application, you need to ensure all your documents are accurate. It is at this stage you need an experienced migration lawyer on your side.

What Does A Registered Migration Agent Do?

A Registered Migration Agent is acknowledged by the Migration Institute of Australia as having a high level of technical expertise surrounding immigration laws. Quinn & Scattini's expert migration lawyers, Roly O'Regan and Jaci Soles, are also Registered Migration Agents and have the experience required to effectively assist you with the visa application process.

We will guide you through each stage of the immigration law process including obtaining a detailed understanding of your personal circumstances, completing an assessment of your eligibility and preparing, reviewing and submitting all necessary applications.

If necessary, we can also arrange to have any documentation translated into English by certified National Accreditation Authority for Translators and Interpreters, assist with skills assessment requirements and arrange certification of documents.

What Are Some Of The Reasons My Visa Could Be Refused?

There are numerous reasons why the Department of Home Affairs may reject your visa application. This may be due to not complying with visa conditions, failing to meet character requirements or providing the incorrect information.

Can The Migration Agent Guarantee That Your Visa Will Be Approved?

At Quinn & Scattini Lawyers, we follow the necessary procedures to ensure that your visa application has the best chance of success. However, please keep in mind that no Migration Agent can guarantee that a visa application will be approved.

Traffic Law – Drink Driving – Frequently Asked Questions

Traffic Law Team

Do I Need A Lawyer To Represent Me If I Have Been Charged With A Traffic Offence?

Some people believe that lawyers are a waste of money and feel they can represent themselves. However, being disqualified from driving can cause significant concern for most people, especially for those who need their license for work. We have experienced traffic lawyers who can appear for you in court on a daily basis and know the importance of staying up-to-date with the law.

We can ensure your case is put forward to the court and make the most appropriate submission possible to make sure you get the best possible outcome.

Having us assist you will ease the stress that can be associated with appearing in court as our traffic lawyers speak in plain English and respond in a timely manner.

What Is The Law Regarding Drink Driving?

The law in Queensland states that a person in charge of a motor vehicle who has a blood alcohol concentration (**BAC**) level in excess of the prescribed limit, or who is adversely affected by alcohol, commits a drink driving offence.

What Happens If I Do Not Complete A Breath Test For Police?

You may also be charged with a drink driving offence if you refuse to provide a specimen of breath, blood or saliva as directed by police.

Can I Drive If I Have Been Caught Drink Driving?

If you have been caught drink driving, your licence will be automatically suspended for a minimum of 24 hours. In no circumstances are you permitted to drive any vehicle during this period. Be cautious. Some drink driving charges will result in your licence being suspended, up until your court date.

Are There Any Possible Defences To Drink Driving?

There are really only three possible defences to a drink driving charge. It is extremely uncommon to see any of these defences being used to counter drink driving charges. Potential defences include:

- you were not driving, or in charge of the vehicle, at the time,
- the police instrument recording your reading was not operating correctly, and
- you did provide a specimen or breath or blood (if charged with failure to provide).

What Is A Driver Education Program?

If you have been charged with drink driving, it may be beneficial for you to attend a drink driving program or attitudinal driving workshop.

These programs include the Queensland Traffic Offenders Program (**QTOP**), the SAVE – Traffic Offender Intervention Program and Under The Limit (**UTL**). The QTOP and SAVE programs aims to increase your understanding of your social responsibility overall. The UTL program focusses on drink driving prevention and rehabilitation.

What Should I Bring With Me When Meeting A Lawyer For A Drink Driving Charge?

It will be beneficial if you bring the following documents with you:

- a copy of the Police QP9 Report,
- a copy of your traffic history, from the Department of Transport and Main Roads, and
- your current criminal record, from your local police station.

If you do not have the above, we can assist you in obtaining these documents.

What Does A Lawyer Do For You If You Have Been Charged With Drink Driving?

Our drink driving lawyers can:

- expertly navigate traffic law complexities,
- advise you on potential penalties,
- identify any mitigating factors that will assist your defence to get you the best possible result,
- ensure all required documentation is prepared in a timely manner,
- provide extensive support in the lead up to court appearances,
- respond to your questions in a timely manner,
- advise you of the likelihood of succeeding in your application for a work licence, and
- provide reliable and professional representation in all court proceedings.

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