

# Guide to appropriate management systems

Practice Support

**March 2017**

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# 1. Introduction

## 1.1 Appropriate management systems & the ‘10 commandments’

The *Legal Profession Act 2007* (‘the Act’) requires legal practitioner directors of incorporated legal practices (ILPs) and legal practitioner partners of multi-disciplinary partnerships (MDPs) to ensure that “appropriate management systems” are implemented and maintained to ensure that provision of legal services complies with the requirements of the Act.

While the Act does not define ‘appropriate management systems’, Queensland has chosen to remain consistent with the approach of New South Wales, where ‘ten commandments’ have been developed outlining the areas that practitioners will have to demonstrate compliance in order to meet the legislative requirements in relation to ‘appropriate management systems’.

The list below outlines the 10 areas for which appropriate management systems need to be implemented and maintained in order to comply with the Act.

1. **negligence** (providing for competent work practices)
2. **communication** (providing for effective, timely and courteous communication)
3. **delay** (providing for timely review, delivery and follow up of legal services)
4. **liens/file transfers** (providing for timely resolution of document/file transfers)
5. **cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer, along with appropriate billing practices during the retainer)
6. **conflict of interests** (providing for timely identification and resolution of conflicts of interests, including when acting for both parties or acting against former clients, as well as potential conflicts between the duty to serve the best interest of the client and the solicitor’s own interests)
7. **records management** (minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving and providing for compliance with requirements regarding registers of files, safe custody and financial interests)
8. **undertakings/orders** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities)
9. **supervision of practice and staff** (providing for compliance with statutory obligations covering practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services)
10. **trust account regulation** (providing for compliance with the *Trust Accounts Act 1973 (Qld)* and chapter 3, part 3.3, division 2 of the Act and proper accounting procedures).

## 1.2 ‘Risk-based’ regulation

Historically the majority of legal regulation was concerned with ‘outputs’, ‘results’ and the effects of various actions. Examples of output/result regulations include:

- practitioners must serve their clients competently and diligently
- practitioners must maintain the confidentiality of their clients’ affairs.

Much of this regulation can be described as ‘ethics-based’ regulation, derived from concepts about integrity, independence, professionalism or solicitors’ duties to clients, to the courts, to other practitioners, and to third parties.

An understanding of the underlying causes of claims and complaints, however, indicates that service failings or low professional standards are rarely the result of poor ethical awareness, wilful misconduct or inadequate regulation. Instead, they are primarily the result of failings in administration, communication and management, and specifically the absence of a systematic approach to management. The requirement for appropriate management systems therefore endorses the concept that, in modern legal practice, business management is as central to the proper delivery of services to clients as technical competence.

The requirement for appropriate management systems is therefore as concerned with management inputs, and asks practices to address **how they seek to ensure** that standards are maintained. In this respect, appropriate management arrangements might seek to address, for example:

- how the practice seeks to ensure that clients are served competently and diligently
- how the practice seeks to ensure that the confidentiality of clients' affairs are maintained.

The '10 commandments' have been developed, through reference to claims and complaints data, as the main areas of management that need to be addressed in order to ensure that standards are maintained. In this way, such regulation can be seen to be more influenced by the discipline of risk management than by concepts of professional ethics.

### 1.3 Claims and complaints

The regulation on appropriate management systems seeks to raise professional standards by directly addressing the management failings and oversights that have been shown through analysis to contribute directly to claims, complaints and service failings.

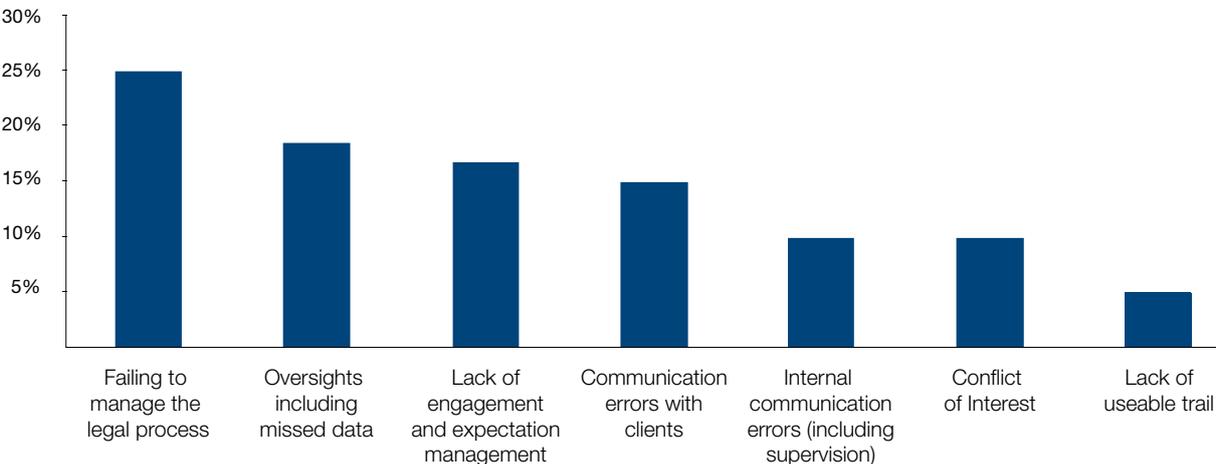
The Queensland Legal Services Commission, in its annual report for 2014-2015, recorded its complaints by nature of matter:

Complaints by nature of matter	14-15	%	13-14
quality of service	126	32.47	167
ethical matters	104	26.80	143
costs	69	17.78	96
communication	24	6.19	60
compliance	28	7.22	26
trust funds	15	3.87	21
documents	9	2.32	10
personal conduct	8	2.06	5
PIPA	1	0.26	5
all other 'natures of matter' combined	4	1.03	8
<b>Total</b>	<b>388</b>		<b>541</b>

### Claims and professional negligence

The drivers of claims again overlap directly with the requirement for appropriate management systems and the 10 commandments. In Queensland, Lexon Insurance has identified the underlying causes of claims as follows:

#### Underlying cause of claim



## 1.4 Practice management and quality management

### Practice management

The term 'practice management' is generally used in private practice firms to describe the process of managing the delivery of the legal services for which they are responsible. There are many elements to legal practice management including file management, supervision, financial management, knowledge management, client care and communication, IT, marketing, HR, and compliance. The profile and importance of all these elements has grown significantly in the past 25 years as law firms have undergone, to varying degrees, the transition from professionalism to commercialism.

Specifically, the last 25 years can be seen to have had the following effect on the discipline of practice management:

- an increasingly litigious society, and the end of deference for professionals, leading to an increase in negligence claims and complaints, and a resulting increased focus on risk management
- rising client expectations requiring a more focussed approach to client care, client communications and service delivery
- increased competition leading to a greater focus on efficiency, profitability, marketing service delivery and competitive advantage
- increasing adoption of the business and management techniques common in the commercial world
- the recognition and acceptance of non-lawyer managers and the growth of a legal practice management 'industry', including books, conferences, consultants, courses and recruitment.

There remain large differences in the way firms approach practice management. Some, for example have a partner or partners in the key management role(s) while others employ specialist managers. Some keep investment in practice management (IT, marketing, risk management) to a minimum to keep overheads low, while others invest heavily in practice management resources to free-up fee-earning time and boost profitability.

The introduction of ILPs and MDPs gives firms more options and opportunities in both these areas (as discussed later in this guide), however the introduction of requirements in relation to appropriate management systems will also mean that firms will have to approach practice management in a much more structured and systematic way than they might have done in the past.

### Quality management/quality assurance

Over the past 25 years, as claims and complaints against lawyers have risen dramatically, and questions of competence and reputation have been raised, both solicitors and their regulatory bodies – across numerous jurisdictions – have come to increasingly accept that failures in management, administration and service delivery, rather than any lack of legal knowledge, tend to lead to most client concerns, particularly in the areas of casework and communication with clients.

In recognition of this, legal practices and their regulators have looked to quality assurance systems to provide a framework to help practices take preventative action and put systems and procedures in place that help to minimise mistakes.

The original quality system with international recognition from the business community is ISO9001, and this has been used as a starting point, or key influence, for the few legal industry-specific schemes that have been developed in recent years:

- Quality Practice Standard (QPS): Western Australia
- Quality in Law (QL) – Law Society of New South Wales/College of Law
- Law 9000 – Law Society of New South Wales/College of Law/SAI
- Lexcel – Law Society of England & Wales
- various other schemes linked to legal aid or public sector procurement.

As with ISO9001, these quality assurance schemes are non-prescriptive, meaning that although a standard will define 'what' requirements have to be met, it is up to the firm to develop their own arrangements for 'how' to meet them. In this way, as with the appropriate management systems requirements, quality assurance standards are not an exercise in imposing set bureaucratic structures, but are instead a means of providing firms with a framework to develop their own processes and procedures. This fact is discussed further in the next section on the implementation of appropriate management systems.

## Quality assurance & risk management

One of the features of the development of legal practice management quality assurance schemes is the increased focus on risk management as the schemes have developed.

Although ISO9001 (which the schemes discussed were largely based on) is an effective system for improving service and eliminating many basic service failings, it does not claim to be a comprehensive risk management system and, in particular, is a less than ideal framework for addressing risk in the legal practice context of avoiding claims and complaints. For this reason, legal quality assurance schemes did not adopt risk management requirements as quickly or comprehensively as they might have done.

Legal risk management was in its infancy in the early 1990's when Lexcel, QPS and QL/Law9000 were initially developed, and as such the schemes have been revised to include more requirements in recent years. These revisions have been largely driven by insurers, regulators and analysis of claims/complaints data to ensure that different risks are addressed through new management or administrative requirements.

The '10 commandments' that form the basis of the ILP & MDP appropriate management systems requirements can therefore be seen to overlap to a significant extent with the requirements that form the basis of current legal practice management quality standards.

The table below shows a comparison of the 'ten commandments' requirements and the requirements of legal practice management quality assurance standards:

	10 Commandments	Law9000 (New South Wales)	Lexcel (England & Wales)	QPS (WA)
<b>Negligence, risk &amp; claims</b>	Yes	Yes	Yes	In part
<b>Communication</b>	Yes	Yes	Yes	Yes
<b>Delay</b>	Yes	Yes	Yes	Yes
<b>Liens &amp; file transfers</b>	Yes	Yes	Yes	In part
<b>Costs disclosure</b>	Yes	Yes	Yes	Yes
<b>Conflicts of interest</b>	Yes	Yes	Yes	Yes
<b>Records management</b>	Yes	Yes	Yes	Yes
<b>Undertakings</b>	Yes	Yes	Yes	No
<b>Supervision</b>	Yes	Yes	Yes	Yes
<b>Trust accounts</b>	Yes	Yes	Yes	In part
<b>HR</b>	No	Yes	Yes	Yes
<b>Financial management</b>	No	Yes	Yes	Yes
<b>Knowledge management</b>	No	Yes	Yes	Yes

Practices which are accredited under a recognised quality assurance standard should therefore find it simple to satisfy the Legal Services Commission as to their compliance with the appropriate management systems requirements. In NSW, this has been formally acknowledged and Steve Mark, the former NSW Legal Services Commissioner has stated that accreditation under Law9000 will be accepted as demonstrating full compliance with the requirements.

In Queensland, although several Brisbane firms are accredited under Law9000, there is currently no legal practice management quality standard that is considered relevant to, and actively marketed to, the bulk of practices in Queensland.

Queensland firms should consider seeking and using the advice and guidance that has been developed by such standards as they seek to implement their own management systems and meet the requirements of the ILP/MDP legislation. Similarly, the experience of other firms in implementing quality standards and/or cohesive practice management systems can also help to inform Queensland practitioners as to the broad range of benefits – beyond mere compliance – that are achievable through effective implementation.

## 1.5 Effectiveness and benefits of management systems

The instinctive response of many practitioners when they hear of new regulations or practice requirements is to despair at any new addition to what many see as an already over-regulated profession.

The experience of firms who have implemented such management systems, either voluntarily or otherwise, has however been very positive, and the firms to benefit most have been the ones who have seen management systems as an opportunity to raise standards, improve service and increase efficiency and profitability, rather than as a constraint or burden to be circumvented.

The potential benefits to legal practices of appropriate management systems include:

- fewer claims and complaints
- favourable premiums from insurers
- improved client satisfaction leading to more referrals of work and higher rates of client retention
- improved efficiency in fee-earning, leading to a reduction in discounting, less writing-off of work-in-progress, and subsequent higher profitability
- improved management efficiency
- greater success in tenders, pitches and panel reviews (especially for public sector) as clients
- potential clients are made aware of practice efficiency
- higher morale and staff retention
- better supervision leading to the potential for profitable high gearing
- faster development of associates and assistants
- improved marketability of practice for potential sale of practice
- simpler demonstration of compliance with regulatory or statutory requirements.

These benefits will be experienced by different practices to different degrees. Much will depend on the differing attitudes during implementation and also the degree to which firms invest in their implementation. ‘You get out what you put in’ would be true of investment in management systems and the practice that has no other objective than to meet the minimum regulatory requirements is unlikely to benefit in other ways such as client retention, increased efficiency or quicker development of associates.

## 1.6 Management systems and opportunities from ILP/MDP legislation

Incorporation provides practices with opportunities in relation to compliance with the appropriate management systems requirements and other practice management initiatives. The ILP/MDP legislation goes a long way to removing some of the main barriers that practices face in implementing effective management systems and structures, namely:

- a lack of skills, time or enthusiasm for management issues amongst partners
- a lack of options and flexibility for motivating, retaining and remunerating specialist non-lawyer managers
- a flat partnership decision-making structure which complicates the discussion and implementation of management initiatives
- problems in raising the investment required for effective practice management.

The first advantage of ILP/MDP status is that it allows a clearer distinction between ownership, fee-earning and the management activities of the practice. Incorporation status means that, of the lawyers who were partners in the previous partnership, only those who specifically want to, and who the practice agrees should, will either become directors or will retain management duties. This means that management can be left to those with management skills (whether directors, shareholders or employees), while lawyers can focus on providing legal services. This should result in both more effective management, and more effective fee-earning.

This opportunity is likely to raise the profile and importance of non-lawyer managers as their responsibility increases. In the past, many law firms have struggled to recruit and retain managers at the required level because of restrictions on offering equity to non-lawyers. The ILP/MDP legislation removes this barrier, and gives the practice not only the option of offering equity to non-lawyer managers but also more flexibility in motivating and retaining all staff through remuneration. As such ILP/MDP status is likely to assist in breaking down the ‘fee-earner divide’ that can often both de-motivate and limit the influence of non-lawyers in any practice.

Another advantage in relation to practice management is the opportunity to establish a more corporate, streamlined decision making structure. With the separation between management and ownership comes greater flexibility to implement arrangements that are designed to efficiently meet the practice's objectives rather than a 'flat' decision making structure that is designed to accommodate the views of all dissenting partners. This will inevitably facilitate superior management as the CEO and management team will be answerable only to the board of directors and will not be impeded by individual partners.

Another key opportunity is that ILP/MDP status offers more flexibility to practices in raising and retaining investment capital allowing for investment in new staff, training, external resources, knowledge management resources or new IT systems.

## 1.7 Management systems

The term management systems is meant to be interpreted broadly, and certainly is not meant to be confused with or limited to 'IT systems', although IT programs or software could of course form part of a practice's arrangements.

Management systems should encompass all arrangements, procedures, processes and methods of organization put in place to achieve the desired outcome, and might or might not include some of the following:

- management or administrative checklists
- defined policies
- defined processes or procedures
- plans
- IT programs or software
- defined targets or objectives
- training programs
- structures
- meetings
- forms
- any other systems or arrangements that help ensure defined standards are maintained.

## 1.8 'Appropriate'

There are no simple or universal 'right' management systems for any given practice, and what is considered appropriate for one practice might not be considered appropriate for another. Similarly, there is no requirement that management systems take a particular form; the design and form of management systems is a matter for the practice.

Factors to be taken into account by a practice in determining the appropriateness of any set of arrangements should include the size and complexity of the practice, the number, experience and qualifications of staff, and the nature of the work undertaken.

Although, as discussed above, the requirements for appropriate management systems focus to a great extent on inputs rather than outputs, the effectiveness of any management systems will be a significant factor in assessing whether they are 'appropriate'. Any evidence of, or mechanisms for review of, the effectiveness of your management systems will support any case that your arrangements are appropriate.

Although practices should aim to implement systems that are demonstrably compliant, this doesn't necessarily mean that all systems have to be documented: processes that are clearly observable, or that can be demonstrated or justified in other ways should be considered equally compliant as long as a lack of documentation does not hinder their effectiveness.

The word 'appropriate' also implies some ethical considerations. A time recording system which acted to inflate bills unfairly, for example, would not be considered appropriate.

## 1.9 The process of developing and implementing management systems

The process of developing and implementing appropriate management systems can be a very demanding, but also a very rewarding experience. As mentioned in the previous module, the value of the process can depend to a great extent on the attitude of those involved, and the extent to which they adopt either:

- a minimalist 'tick-box' approach with the simple aim of meeting minimum regulatory requirements or
- a more ambitious broad-ranging approach, aiming to use the development or enhancement of management systems as a catalyst for a wide range of practice initiatives and objectives.

Given that one of the primary benefits of incorporation is the flexibility it gives practices in relation to practice management, the adoption of a minimalist approach is likely to be a lost opportunity. This section therefore outlines the main steps and issues arising from the process.

## Assess current position

The initial step in implementing appropriate management systems is to confirm where you are starting from:

- what systems or arrangements do you already have in place?
- to what extent do your current arrangements ensure compliance with legal regulation?
- do you have an office procedures manual? Induction training? Other training?
- are they effective? Could they be improved?
- do people consistently follow these arrangements?
- who is responsible for any management systems?
- are there any obvious gaps?

The answers to the above questions should help in general terms. In relation to the specific regulatory requirements and the '10 commandments', it will also be worthwhile to undertake an initial analysis of your current compliance with the '10 commandments'. An ILP self-assessment audit form is available on the Legal Services Commission website.

## Agree your objectives

One primary objective is to meet not only the specific requirements of appropriate management systems, but also to design your management arrangements so as to ensure compliance with any related or complementary regulatory requirements in the areas addressed by the '10 commandments'. In this respect, members should refer to the *Australian Solicitors Conduct Rules 2012* ('ASCR') and the Act.

As discussed earlier, however, approaching the task of implementing appropriate management systems as merely a bureaucratic exercise in regulatory compliance will often be a lost opportunity. Practices should instead agree amongst themselves what their own objectives are for any management systems that are developed. In addition to meeting both new and existing regulatory requirements, practice objectives might include:

- improved client satisfaction leading to more referrals and better client retention
- fewer claims and complaints
- increasing fee-earning potential by relieving fee-earners of management duties
- increased management efficiency
- increasing fee-earning efficiency.

Focusing on objectives such as these will increase support and enthusiasm from fee-earners for any management changes and help to ensure any implementation of new systems is successful. Without this focus on additional objectives, practices are likely to encounter resistance to change to a much greater extent, which is likely to affect the success of any arrangements.

Once you have defined your basic objectives, make them **SMART**:

**S**pecific – Objectives should specify what they want to achieve.

**M**easurable – You should be able to measure whether you are meeting the objectives or not.

**A**chievable – Are the objectives you set achievable and attainable?

**R**ealistic – Can you realistically achieve the objectives with the resources you have?

**T**ime – When do you want to achieve the set objectives?

**SMART** objectives will force you to be realistic about what you can hope to achieve, in a specified time, and with specified resources. It will also give you a clear framework, provide discipline, and help you to explain the process to colleagues.

## Resources & support

Without support, the task of attempting to implement new management systems in your practice could be a thankless and frustrating one. It is therefore important to try and maximize any support that might be available to you from both inside and outside your practice.

Gaining support from colleagues is key. This is best done by communicating clearly both:

- the anticipated benefits of any new arrangements for your practice in general and
- the specific benefit of any proposed arrangements.

This will help to minimise resistance to proposals that might at first seem bureaucratic, restrictive or unappealing. Gaining this support will often mean starting from the top, and management initiatives are rarely effective if they do not have the support of the senior or managing partner (CEO/director for ILPs). In addition to tacit acceptance of any proposals, you are also likely to need your colleagues to invest some time in the project which will require providing a good estimate on their likely personal time costs.

External support will be available from the Queensland Law Society through guidance, events and other initiatives.

## Designing arrangements

All practices are different and each will have its own most effective arrangements, which might or might not resemble typical 'best-practice' suggestions. Because of differing cultures, work practices etc. some arrangements will work better in some practices than in others, and it can often take time and a number of refinements before practices find the arrangement that best suits them. In this respect, implementing appropriate management systems is a continuous journey rather than a one-off event.

In designing arrangements it is always important to consider the impact any arrangement will have on fee-earning time and the possibility of negative perceptions of bureaucracy. If any arrangement carries too high a cost in terms of lost fee-earning time or bureaucracy, it will not be followed and will not be effective. It is therefore vital to listen to the concerns of colleagues in the design stage of developing appropriate management systems: it is no use designing a foolproof, intellectually unimpeachable process if it is too time-consuming and no-one follows it. Sometimes the whole design process can be very positive – with new arrangements leading to time savings because old arrangements have not been considered for so long.

## Implementing arrangements

Once you have designed any new management arrangements, they need to be implemented, and again, this is an ongoing process rather than a one-off event. The 4 key elements of implementation are:

- integration – into existing or other processes, procedures, IT systems
- reference materials: a manual/checklists/intranet/policy booklet/IT
- training: of all fee-earners on the arrangements
- testing:
  - review
  - audits?
  - are people following the arrangements?
  - are the arrangements effective and efficient?
  - continually analyze any data provided by the system.
  - could the arrangements be improved?
  - are new or different arrangements needed?

## 2. The 10 commandments

The 10 areas (known as the 10 commandments) to be addressed to demonstrate compliance with the legislation are:

1. **negligence** (providing for competent work practices)
2. **communication** (providing for effective, timely and courteous communication)
3. **delay** (providing for timely review, delivery and follow up of legal services)
4. **liens/file transfers** (providing for timely resolution of document/file transfers)
5. **cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer, along with appropriate billing practices during the retainer)
6. **conflict of interests** (providing for timely identification and resolution of conflicts of interests including when acting for both parties or acting against previous clients, as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions etc)
7. **records management** (minimising the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests)
8. **undertakings/orders etc** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the LSC and courts)
9. **supervision of practice and staff** (providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services)
10. **trust account regulations** (providing for compliance with the *Trusts Accounts Act 1973* (Qld) and chapter 3, part 3.3, division 2 of the LPA and proper accounting procedures).

In the sections below, these requirements are discussed in more detail. This discussion **should not be considered as providing definitive guidance** on the compliance of different arrangements but instead should merely provide practices with advice and direction.

Included in each section are suggestions for typical systems or arrangements that might be considered compliant. **All examples provided are suggestions only** because ILPs and MDPs will vary in terms of size, work practices and nature of operations, so no 'one size fits all'. Practices are not expected to implement all the arrangements listed in the following pages, but are encouraged to consider the highlighted issues in the development of management systems appropriate to their own practice.

In its efforts to concentrate on the 'inputs' of management arrangements rather than the 'outputs' identified in complementary legal regulation, this section does not include details of other regulatory requirements specific to the issues identified. Practices are, however, encouraged to keep up to date with and make reference to, such regulatory requirements to ensure that any management systems they implement are consistent and compliant.

### 2.1 Negligence

**"providing for competent work practices".**

The first of the 10 commandments essentially asks firms to implement a risk management system for their practice and is aimed at ensuring negligence is addressed in the practice's overall management framework.

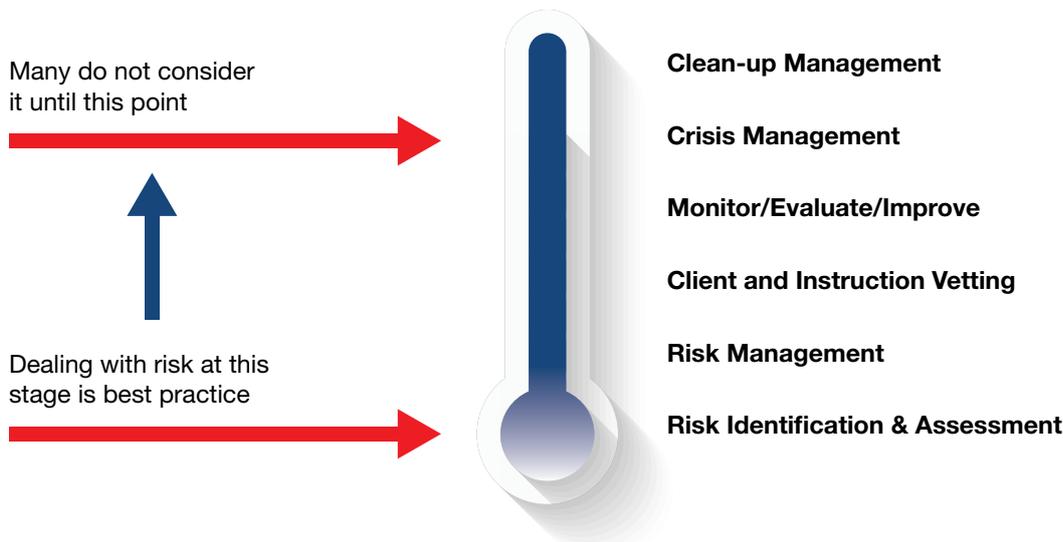
In seeking to meet this requirement, practices are encouraged to refer to one of the growing number of available resources in relation to risk management:

- Lexon Insurance & [lexoninsurance.com.au](http://lexoninsurance.com.au)
- QLS Compulsory CPD seminars & related notes
- QLS Practice Management Course
- Proctor & QLS website
- AS4360 Australian Standard on Risk Management.

The advice from these sources is consistent in suggesting a systematic, preventative approach to risk management, based on the process of risk identification, risk assessment, risk management and monitoring, evaluation and improvement as outlined in AS4360.

In many instances, the first time practitioners consider risk management is when a claim is made. Effectively this is crisis management or indeed “clean-up management” or dealing with the aftermath of a claim. An effective risk management program is implemented well before these stages are encountered.

## Risk



It is important to ensure that this process is continuous. Establishing a risk management plan which is not regularly reviewed ignores the fact that the legal environment is constantly changing and that a legal practice may also be changing both in the services offered and the way those services are provided.

This model, and common risk management arrangements, are discussed in more detail in the notes to the QLS CLE seminar on risk management, attached in the appendices to this module.

Although data on the common categories and causes of claims is available from Lexon Insurance and other sources, practices should aim to identify those risks that are specific to their own practices, and then implement arrangements that both address these risks and are appropriate for their own practice. Implementing ‘generic’ risk management arrangements will be of only minimal use if they do not directly relate to the risks that any practice faces.

## Engagement processes

It is not rare, when a claim or complaint has been settled, for a solicitor to say something like “I knew I should have never accepted that case/client”. Alarm bells often ring during the engagement process, but are ignored by fee-earners, as if a firm has no choice in the acceptance of instructions. There is of course a choice, and firms can benefit from investing in effective engagement arrangements, in order to limit risk.

The key is to ensure that fee-earners are always asking themselves, “Should I be accepting this instruction, from this client, at this time?”

To avoid claims arising from accepting areas outside your competence, the first, simple step is to document and distribute to all fee-earners clear guidelines on what work the practice will and will not undertake. This might then be developed into a more sophisticated ‘risk template’ that identifies risk, not only in relation to the generic types of work a practice will undertake, but also risk factors within normally accepted work. Each instruction should then be compared to the template and fee-earners should think again about accepting any instructions that carry a high element of risk. The important factor is that risk is not accepted through ignorance, and that where an element of risk is accepted, the practice is confident that it has the arrangements in place to manage that risk.

In addition to instructions being inherently risky, many clients are inherently risky. Problem clients can often be identified by a number of factors such as unrealistic expectations or multiple previous solicitors. Clients can also bring with them the risk of a conflict of interest, carry reputation risk if controversial, and bring other problems. As with instructions, it is good practice for fee-earners to be informed of the range of client-related risks and be given guidelines on how to address them.

The other major element in the acceptance of instructions is time. Even where the instruction and the client present no identifiable risk, a practice must consider the time it will take to complete any new work, the client's expectations re time, and the firm's capacity to accept and complete the work within agreed time limits. This can particularly be an issue for sole practitioners who have fewer resources to manage in the first place but also for larger firms where a team or practice area are already flat out on one or more projects and do not have the capacity to take on new work at a particular time. Whilst resources can be stretched within certain limits, it must be remembered that stress is a major cause of risk and claims and that resources cannot be stretched too far or too thinly.

## Key principles of risk management

Practices might also benefit from the table below that outlines the key principles of legal risk management.

Principle/Arrangement	Note
<b>Responsibility at senior management level</b>	To ensure arrangements are implemented and adhered to and to take high-level decisions on risk as required.
<b>A framework for managing risk across all parts of the business</b>	'Joined up' risk management. Risks can rarely be isolated and are often transferred between fee-earning departments or from support departments to fee-earning departments.
<b>Accountability in each practice area and support functions such as accounts, IT and Human Resources</b>	If accountability for risk management is not defined, responsibility will not be accepted and arrangements will break down.
<b>Integration of the risk management processes into everything the firm does</b>	A culture – not an event – so although you appoint a senior person to be in overall charge of risk management, everyone knows that it is their responsibility too.
<b>A risk evaluation process</b>	To identify high risk clients and/or instructions, so work can either be declined or the risk managed.
<b>Regular reviews and audits</b>	Regularly review the effectiveness of all arrangements and audit compliance with your own arrangements. An external review is preferable but an internal audit can also be useful.
<b>Business continuity planning</b>	To provide for the minimum interruption to client business in the event of temporary emergencies or unexpected events.

Amended from: "A Practical Guide to Minimising Risk": Frank Maher/Law Society of England & Wales

## Negligence: suggestions for systems or arrangements that might be considered compliant:

- Lexon's Enhanced Management Review Program can reduce the risk of a claim against legal practices while also reducing the 2015/2016 annual insurance base levy by 15%
- the development of this program, available to all Lexon's insured legal practices (including sole practitioners), follows claims analysis that found excessive workloads or human issues were often contributing factors where there was a failure to adhere to practice systems and checklists
- Lexon also found that firms with an excellent claims history generally had regular file review processes in place to ensure the firm's systems were followed
- these reviews have been proven to be effective in assisting in claim prevention as they enable the early identification of the possible effects of excessive workloads, human factors, mere oversights and staff who are taking on work outside of their area of expertise
- details of the EMR program are available on the Lexon website [lexoninsurance.com.au](http://lexoninsurance.com.au).
- a designated single risk manager with ultimate responsibility for making high-level decisions on risk
- confirmation of matters in which the practice will accept instructions and also of those areas where the practice will not accept instructions
- written records of attendance at CLE (CPD) programs concerning not only relevant practice areas but also practice management, staff management and risk management
- agreed lists of generic risks associated with all practice areas in which the practice accepts instructions
- arrangements for managing high risk or demanding matters

- processes for the risk assessment of all new clients and instructions prior to accepting instructions
- continued risk assessment of all matters throughout the matter and when closing the file
- processes to ensure the use of relevant and up to date precedents
- defined arrangements for legal research and knowledge management
- regular review of the performance of the practice and the effectiveness of all management arrangements.
- arrangements to identify and record details of all claims, complaints and ‘near-misses’
- arrangements to ensure all claims, complaints, ‘near misses’ or other failings are investigated to identify the root cause of any failings and corrective actions are implemented as required
- procedural checklists for any high volume or formulaic work.

## 2.2 Communication

***“providing for effective, timely and courteous communication”.***

Both in Queensland and across numerous other jurisdictions, communications failings are consistently found to be a major cause of both claims and complaints against solicitors.

Although solicitors would normally claim to be good communicators, many would often struggle to justify this claim or to outline how they manage communications from their practice. Effective client communication and client care is based around a number of overlapping principles:

<b>Focus on the client’s service requirements, not just the legal product</b>	<p>What does the client need?</p> <p>Speed? Reassurance? Value? Communication? Candid advice? Sensitivity? Respect? Efficiency? Regular updates? Involvement?</p> <p>Contrary to popular belief, clients do not buy your time and expertise, they buy a service. As a result, they do not just need technical skills, they also need the communication that can bring good feelings, positive experiences and confidence.</p>
<b>Manage expectations</b>	<p>Identify, understand and manage any client expectations. Many solicitors fail to manage client expectations because they either mismanage the communication process or are not sensitive to possible client concerns.</p>
<b>Keep the client involved and in control</b>	<p>One of the main concerns when clients retain lawyers is they feel they have lost control and have ‘handed over’ all responsibility to the lawyer. Fee-earners should, therefore, ensure they keep the client regularly informed on the progress of the matter, any changes to cost estimates, and any changes to timescales. Even if the matter hasn’t progressed, or if there are no changes to initial estimates, it is good practice to stay in touch with the client just to reassure them that everything is on track.</p>
<b>Make every client feel they are your most important client</b>	<p>Many clients will leave a firm, not because of any problems with the quality of legal work but because a perception has arisen that they are not a particularly valued client. Often this is a misperception and the lawyer can be working very hard on their case with considerable success. If the client is not advised of progress or is not included, a perception of neglect can still occur.</p>

A large number of law firms would claim to do some or all of the above but again, many would struggle to tell you how. It is not enough for a law practice to claim to subscribe to these as principles; management arrangements are needed to ensure these principles are embedded in all activities. An effective client communication strategy should therefore involve a mixture of the following:

<b>Policies, processes, procedures &amp; checklists to facilitate good communications</b>	<p>Client needs should form the basis of all systems and procedures and must also be perceived as credible by those operating them. Examples include procedures for first interviews, client agreements, updates, complaints handling etc.</p>
<b>Culture</b>	<p>A supportive culture that gives the fee-earner the time and support they need to communicate effectively.</p>

<b>Individual communication skills</b>	Ensuring individual fee-earners and other practice staff have the required skills and expertise in relation to client communication. Not everyone is a natural communicator.
<b>A philosophy of continuous improvement, using client feedback</b>	Client feedback and complaints information, as well as your own observations, should give you the information to identify strengths and weaknesses in your service and communication and to continuously improve.

### **Communication: Suggestions for systems or arrangements that might be considered compliant:**

Procedures to ensure that client agreements are issued and agreed for every matter, including a description of the steps involved in any matter, the best information available on likely timescales, the best information available on likely costs, the staff involved in the matter and who to contact if there are any problems. These could include:

- a formal complaints handling system
- annual or ongoing survey of client satisfaction
- agreed policies or checklists for client interviews, client communication, client care, cost and matter updates
- the development of client communication and service objectives and targets, such as answering phones within 5 rings, returning calls within 24 hours
- training on client care and client communication
- arrangements to ensure cost and matter updates are provided at agreed or appropriate intervals
- arrangements to ensure clients are advised promptly of any change in the people acting on their case
- file audits.

## **2.3 Delay**

### ***“providing for timely review, delivery and follow-up of legal services”.***

One of the major reasons for both professional negligence claims and client dissatisfaction is that solicitors fail to observe time limits, whether they be in relation to court dates, Statute of Limitation dates, or in simple communication with clients.

Some of the actions which are affected by a failure to meet a deadline are:

- appeal precluded due to the expiry of the time limit
- pleading not filed, amended or answered within the prescribed time limit
- expiry of the Statute of Limitations
- case-flow intervention if a request for trial date has not been filed within 180 days of the filing of the notice of intention to defend which may lead to the matter being deemed resolved
- failure to respond to a rule 444 letter within the prescribed time
- dismissal granted/leave refused because of a failure to prosecute
- notice not given when such notice is a precondition to the recovery of damages
- failure to observe time in a contract when time is of the essence.

To these can be added numerous other time limits related to client care, such as deadlines for updating the client on the matter or on costs. Practices should consider defining for themselves what should be considered as a ‘key date’.

There can be several reasons why time limits are not observed: poor definition of the retainer, lack of knowledge of the law, inadequate investigations of the facts etc. The primary reason according to claims analysis, however, is that the practice concerned does not have an **adequate reminder or diary system**.

Other jurisdictions adopt more stringent rules than those which prevail in Queensland. Most American and Canadian Bar Associations or Law Societies provide that it is professional misconduct for a firm not to have and use a diary system. There are many types of reminder systems, the most common of which are in use in legal practice include:

- diary (both manual and computerised)
- specific data base of key dates
- duplicate manual diaries.

Every system has its limits. A chain is only as good as its weakest link. For example, it is no use rigorously entering dates in the diary if the diary is not reviewed daily, particularly if someone is away ill. There needs to be some system of flagging non-performance of key steps. This need for automation precludes reliance on manual diaries, notes and files.

The days of relying solely on manual records are passed. The complexities of modern legal practice and the number of matters that may be current at any time mean that manual reminder systems are anachronistic and dangerous.

An electronic diary should be accessible to all solicitors and secretaries. Modern control systems can require solicitors to check a step as done and if not done by a designated date the failure to check the step can automatically trigger an email to the partner or secretary. These electronic systems flagging non-performance of critical steps to third parties are designed to ensure key actions are all performed on time. Electronic diaries, automated bring-ups and dedicated databases for tracking key dates are now commonplace. Microsoft Outlook has a very useful bring-up system which can be linked to the diary. The ready availability of these electronic practice support systems means there is no reason why practitioners need remain in the dark ages so far as practice and file management are concerned.

Whilst important, however, electronic diary systems are not foolproof and your practice should ensure there are manual back-up key date diaries, accessible to all, that can be used in the event of any IT system failure.

In addition to diaries and reminder systems, file inactivity checks can be useful to ensure that client dissatisfaction and possible claims arising from delay do not occur. Typical arrangements might include the fee-earner doing a weekly or monthly check that all files are being appropriately progressed. Alternatively, depending on the sophistication of your practice's time recording arrangements, it might be possible to do a central check of all matters and, for example, highlight matters that have had no time recorded on them for a period of time.

Obviously, it is important to examine your office procedures with respect to time limits and follow up action:

- do you have an organised system of recording and filing all deadlines automatically?
- could some deadlines slip through the system – for example, a deadline discussed on the telephone, arising at a conference?
- assuming your deadline is recorded, how are you reminded of deadlines? i.e. are you given sufficient time to take action on the deadline or does a crisis erupt?
- does your system involve automatic checking that the follow-up reminder has in fact been acted upon?
- do you always use your follow-up system?
- what would happen if both you and your secretary or other members of your team were absent from the office on the same day?

## Too busy?

Often of course, the cause of delay is neither a lack of awareness of key dates nor any oversight of required action on any file: it is simply that the fee-earner is too busy and cannot do all the work required of him.

If this is a common occurrence, practices should consider implementing arrangements to measure and then control the amount of work each fee-earner has.

## Delay: Suggestions for systems or arrangements that might be considered compliant:

- all key dates to be recorded on file
- all key dates to be recorded in fee-earner diary
- all key dates to be recorded in a back-up, centrally available diary
- regular inactivity checks, either by individual fee-earners, central system or both
- procedures to ensure a re-allocation of matters and responsibilities in the absence of any fee-earner
- systems for ensuring that any matter plan is adhered to and that files contain all appropriate notes, time records or other relevant documentation
- file contains a complete record of all aspects of the matter including letters, notes, invoices, notes of telephone calls
- procedures for locating files and documents;
- ensure regular updates on matter, costs and timescales by diarising the need for updates in the same way as for key dates
- ensure regular billing by diarising the need for interim billing in the same way as for key dates
- business continuity plan – IT
- business continuity plan – general

- engagement policies that consider time requirement and available resources
- delegation procedures that consider fee-earner workload
- measure and control the workload of all fee-earners
- discussion of workload during supervision meetings.

## 2.4 Liens/file transfers

***“providing for timely resolution of document/file transfers”.***

See section 2.7 on records management, and 2.5 on termination of retainer.

### **Liens/file transfers: suggestions for systems or arrangements that might be considered compliant:**

- procedures to ensure timely preparation of bills of costs when a file transfer is requested
- procedures for release of documents to clients
- file management protocols to ensure consistency and to facilitate effective handover of files
- file summary sheet on all files, designed to act as both procedural checklist and as an aid when transferring files.

## 2.5 Cost disclosure, billing practices and termination of retainer

***“providing for shared understanding and appropriate documentation on commencement and termination of retainer covering cost disclosure, along with appropriate billing practices during the retainer”.***

Solicitors are often uncomfortable with discussions on pricing and billing and this can lead to failures in communication and client dissatisfaction. Many solicitors think they handle costs reasonably well but costs remain one of the key areas of dissatisfaction for the clients of solicitors.

Clients are usually highly aware that ‘the meter’s running all the time’ but will resent having to raise the subject of costs themselves. Solicitors should aim to address the issue of charges before the client and continue providing costs information throughout the case.

Below are some of the key issues to consider in relation to costs information:

<b>Accuracy</b>	An estimate of costs is of little use to the client and could be counter-productive, if such estimates do not accurately reflect the final bill. Too often, solicitors do not invest sufficient time and care to ensure an estimate is well considered and accurate because the billable hour system ensured they will be paid for their work. Any resulting difference between an initial estimate and the final bill can subsequently lead to tensions and client dissatisfaction.
<b>Communication</b>	Understanding your clients’ needs and preferences applies equally to the pricing of services. Wherever possible, try to discuss their preferences on the structuring of fees, so you are then able to come up with an offer or solution that is attractive to them.
<b>Reliability</b>	Agree when you are going to bill your client – and stick to that agreement as much as possible.
<b>Overheads &amp; Disbursements</b>	Clients dislike unexpected extras or overheads in a bill. State clearly at the outset what expenses and disbursements will be included in the final bill and try to limit these as much as possible. If you are going to charge the client for travel, photocopying and refreshments/subsistence, these amounts should be reasonable and made clear at the outset. The Legal Services Commissioner has published his guidelines for charging outlays and disbursements. This should be read by all partners/principals and is available at <a href="http://lsc.qld.gov.au">lsc.qld.gov.au</a>
<b>Transparency</b>	Another major concern of clients is to know exactly what they are getting for their money. For this reason, it will often help not only to explain in detail the work you will undertake but also to offer a full printout of work done and hours spent on the matter by all fee-earners involved. Some firms even offer the chance for clients to inspect their time recording or billing systems.

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**Regular cost updates**

Once fees have been quoted, it is vital to keep the client informed about the progress of costs against the estimates and to issue interim bills and interim estimates whenever possible including an explanation of the additional costs. It is much better to do this than to wait until the end of the matter and shock the client with a bill well above the initial estimate. Section 315 of the Act imposes an ongoing obligation to disclose any substantial change to any previous disclosure as soon as reasonably practicable.

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## Termination of retainer

It is essential that matters are closed effectively. Clients appreciate swift closure on matters, which is often at odds with some solicitors' perfectionist instincts to hang on to a file 'just in case' an outstanding issue arises. If, however, firms do not take sufficient care in the closing of files, they run the risk of ruining any client satisfaction or goodwill that might have been developed up to that point if something goes wrong.

Some firms adopt the more cautious approach of refusing to act where interests are opposed (eg vendor and purchaser), while others will do so with varying degrees of controls or safeguards (eg approval of a senior partner, client consent, Chinese walls). Still other firms leave the decision entirely to individual solicitors (principals or employed solicitors) and hence have no way of monitoring their exposure. The lack of involvement of senior or 'neutral' partners and managers in any conflicts discussions can be seen as a common reason for claims or complaints arising re conflicts of interest.

As regards emerging conflicts of interest, one problem seems to be that solicitors fail either to recognise conflict issues as they emerge during the life-cycle of a matter or do not realise that the interests of parties have diverged to the point of an actual conflict of interest. Another problem is solicitors who recognise a conflict of interest has emerged but are unrealistically optimistic that the problem will resolve itself without the need to send the parties away or that the parties will not use the emergence of the conflict against the solicitor at some later date.

It is important not to confuse "conflict" in the sense of "dispute" with "conflict of interest" in the legal sense. A serious conflict of interest can exist even though the parties are not in dispute with each other and both desire the solicitor to keep acting.

Barriers to the effective management of conflicts within firms therefore include:

- inability to spot potential conflicts or to assess the likelihood of conflicts of interest developing in different situations
- the personal ambitions and competitive nature of partners
- commercial imperatives and fee-earning targets that act as a strong disincentive to decline any work
- uncertainty or lack of confidence on the part of partners as to best practice on the termination of retainers and the management of both commercial and ethical concerns in such situations.

Practices should aim to break down these barriers through education, training, cultural initiatives and the implementation of defined processes and procedures in relation to conflicts checking.

## 2.6 Conflicts of interest

***"providing for timely identification and resolution of conflicts of interests".***

Suggestions for systems or arrangements that might be considered compliant:

- refer to Rules 10 and 11 of the ASCR. If in doubt call the **QLS Ethics Centre** on **07 3842 5843** or email **ethics@qls.com.au**
- defining examples of conflicts of interest for your practice
- guidance to fee-earners on identifying and handling conflicts of interest including the circumstances in which you will cease to act and those circumstances when a conflict of interest might be managed
- identifying instances where conflicts have emerged and developing strategies for managing these
- taking of instructions to include identification of related entities that might lead to any conflict of interest. This might include asking the client whether they are aware of any potential conflict of interest
- procedures or systems for conflict checking (possibly including the use of a conflicts database) prior to the acceptance of all instructions
- established processes and procedures for senior-level decision-making on the acceptability of any identified conflicts of interests

- established processes and procedures for managing conflicts of interests when these have been identified but accepted. Typical arrangements might include gaining the informed consent of clients and implementing ‘Chinese wall’ arrangements
- established processes and procedures for declining work or ending retainers when it has been agreed that conflicts of interest cannot be managed effectively.

## 2.7 Records management

***“minimizing the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving etc and providing for compliance with requirements regarding registers of files, safe custody, financial interests”***

### Document management arrangements

The main issues in relation to document and file management are summarized below:

<b>Traceability</b>	Can all documents, files, deeds, wills or any other items relating to a matter be traced quickly and easily? The simplest way of ensuring traceability is to keep documents on file wherever possible. Beyond this, practices should consider labelling, computer coding systems, registers and other methods to ensure all documents can be traced as required.  When a file is contained in a number of folders/lever arch files, there should be some method by which they can be shown to belong to the same matter.
<b>Taking documents out of the office</b>	Do you have guidelines for taking files out of the office? Do you keep a register logging what files are taking out, by whom, and when they are returned?
<b>Confidentiality</b>	Are you at risk of compromising the confidentiality of any client files or documents? Confidentiality can be an issue whether files are held on computers or are ‘hard copy’, and wherever documents can be viewed or accessed, whether this be in or out of office hours, in the office or on a train, or in public or private places.
<b>Security</b>	Are you confident that the integrity and security of all files and documents, whether these be hard copy or held as computer data are being safeguarded.
<b>IT data and documents</b>	Files or documents held on IT systems or servers are constantly at risk of server crashes, viruses or other problems. Practices should ensure files are backed-up on a regular basis and invest in the protection of IT systems and data.
<b>Archiving and storage</b>	Has your practice implemented standards and arrangements for the safe storage and archiving of all documents? Do your arrangements facilitate swift retrieval of all documents when required? Clients should always be made aware of the details and any cost implications of archiving arrangements.
<b>Return of client documents</b>	Do you have arrangements to ensure the return of all client documents at the termination of any matter? <b>Guidance Statement No. 6 – Form of Delivery for Client Documents</b> provides a suggested clause for inclusion in client/costs agreements.

### File management arrangements

Could a file be picked up or a matter progressed competently by someone else in your absence? That should be one of the primary aims when implementing file and records management arrangements. In the risk management context, another question would be: is there a usable trail to prove what advice was given or how the matter was progressed?

If you can confidently answer yes to both questions, it is likely that you have already implemented some good file and records management arrangements. Professional indemnity insurers, however, wish they had a dollar for every time a solicitor who is being sued says “I’m sorry about the lack of documentation in the file. My files are not all like this.”

Below are some of the main issues to consider in relation to file management:

<b>Logical sequence</b>	Do all files contain documents in logical sequence so that the solicitor and others who may wish to see the file do not have to waste time sorting through the documentation? Are files themselves stored in a logical sequence?
<b>Separate files</b>	Ensuring each matter has a file of its own not only makes for greater efficiency but also ensures that all work that should be billed is billed. The temptation to file an unrelated letter on a continuing file for a client, where the letter involves short advice should be avoided, as it invariably leads to confusion. If a letter relates to more than one file, the copy should be placed on the related file as “information only” to avoid the possibility that the client is charged twice for the letter.
<b>Separate Correspondence</b>	Regardless of the structure that the solicitor decides upon, it is a good idea to keep correspondence in a separate section in the file. This section should be kept in strict chronological sequence. It should contain all letters received and sent, all emails, faxes, and memoranda of attendances. It is sometimes difficult to organise letters in chronological sequence. There is no problem if the letter is dictated and typed immediately upon receipt of inward correspondence. However, where there is a delay, if the inward correspondence is filed, there is a danger that it will be forgotten about. Keeping it loose in the files invites the letter to be lost. It is best to keep all unanswered letters pinned securely to the outside of the file or in a special filing ledger.
<b>File Notes</b>	Are adequate notes taken of all conversations (particularly instructions) and conferences with clients? Are important conversations subsequently confirmed in correspondence with the client? The tests of a good file note are whether the note is accurate, comprehensive and whether someone else is able to read and act on the note.
<b>Draft History</b>	Are various drafts or versions of documents that evidence the history of the matter clearly referenced and retained at least until the conclusion of the matter?
<b>Email and voice communications</b>	Voicemail, emails and electronic diaries raise issues regarding record keeping. For example, in relation to voicemail messages do you just listen, make a file note or transcribe word for word? Should email be treated like correspondence and a copy of everything printed out and retained on file? Given the volume of attachments that now accompany emails prudent practice would suggest you retain a copy on file of all emails sent and received on a matter.

One of the best ways to ensure efficient and risk-free file management is to undertake regular file audits. Whilst partners might undertake qualitative file audits as part of the supervision process, reality dictates that they cannot look at all files on a regular basis.

Procedural file audits, however, involve checking individual files against previously defined checklists or protocols. Systems like this can act as a supervisory prompt to ensure that the fee-earner covers all the necessary steps listed in the checklist/protocol. This can work in two ways:

- the fee earner is required to complete a checklist, provide information on a file summary form or enter information on an IT-based case management system as a check to ensure all appropriate steps have been taken
- files are audited, either in the form of a peer review by a fee-earning colleague or by a support manager to ensure all necessary steps have been taken. Peer reviews can often be popular amongst legal teams because the auditor/reviewer can also learn from the process by recognising improvements or alternatives in a colleague's case management.

For file reviews to be effective, firms have to set target requirements for the number of files to be reviewed, by whom and how frequently. This frequency will depend to a great extent on the nature of the work and the experience of people involved.

## **Records management: suggestions for systems or arrangements that might be considered compliant:**

- procedures for linking files, documents, especially in relation to the use of IT or computer systems
- a log or register of any files that are removed from the office
- clear labelling and/or use of registers for any documents or objects that are kept separate from the primary file(s)
- systems for the listing of all open and closed matters
- procedures for ensuring the confidentiality of all files
- procedures for managing document history including the saving and clear labeling of current and past drafts of any documentation
- file register, safe custody register
- policies and procedures relating to the storage, archiving and destroying of files
- procedures to ensure the client is advised about arrangements for storage and retrieval of papers and other documents or items
- procedures to safeguard the security of all files, documents, records and other items, both in the manual sense and when data is stored on IT systems
- established procedures for opening, maintaining, moving, reviewing and closing files
- diary system for key dates, accessible to all
- procedures to determine who has access to secure files, documents etc
- file management protocols and training to ensure consistency and to facilitate effective handover of files
- file summary sheet on all files designed to act as both procedural checklist and as an aid when transferring files
- regular file audits
- procedures for filing all relevant incoming and outgoing communications.

## **2.8 Undertakings**

***“providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the LSC and courts.”***

Given that breaches of undertakings remain a principal area of professional negligence claims, procedures to manage the giving and performing of undertakings should be important to all practices.

In developing arrangements for the management of undertakings, practices should remember that:

- an undertaking might not always be described as such
- an undertaking will be binding on the principals even if they did not know or sanction it.

Recommendations in relation to the content of undertakings are that they should not relate to matters outside the control of the firm and must in all cases be phrased in such a way so as to avoid any confusion as to their scope. Oral undertakings should always be confirmed in writing.

## **Undertakings: suggestions for systems or arrangements that might be considered compliant:**

- review Rule 6 of the ASCR
- identify the common or likely undertakings for your practice and develop different procedures or safeguards as required
- development of either guidance or an office policy on undertakings (e.g. what kinds of undertakings the firm will and won't give and expectations regarding consultation with or approval by principals) and ensure staff know and follow the policy
- designate who may and who may not give what undertakings for the firm
- keep register/record of undertakings including authorisation, discharge and dates
- highlight all undertakings prominently in any file, perhaps on a file summary sheet
- ensure timely and full responses are given to notices, orders and rulings
- arrangements for the actioning of undertakings in the event of temporary absence of the main fee-earner
- arrangements to check that undertakings have been discharged as part of any file closure procedure
- training for all staff on management of undertakings.

## 2.9 Supervision of practice & staff

***“providing for compliance with statutory obligations covering licence and practising certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal and non-legal staff involved in the delivery of legal services”.***

Partners have a number of responsibilities in addition to their fee-earning duties but managing their teams and supervising their staff is one of the most significant. In the context of risk, supervision specifically involves the pro-active oversight of not only the legal content of any matter but also file management and client communication.

**Structure:** Practices should have a clear supervisory structure so it is clear who is responsible for supervising which files and which fee-earners. If there is no clear supervisory structure, responsibility can disappear and work will go unsupervised.

Open-door policies are most effective when there is no hesitation on the part of the fee-earner to ask for assistance. The supervisor’s attitude and personal communication skills are key to managing this and the supervisor should endeavour to not only avoid showing frustration at any interruptions to their own casework but also endeavour to cultivate a supportive ‘no-blame culture’ amongst their team.

**Reactive supervision:** One of the key elements of supervision is availability. Fee-earners need to know that help is available as and when needed. For this reason, many principals, practices or departments operate an ‘open-door’ policy, when the supervisor will make himself/herself available to offer assistance to fee-earners as required. In recognition of the fact that this might not always be practical, due to the timetable or workload of the supervisor, this ‘open-door’ policy is often modified so that it operates only at certain times. The important thing is that fee-earners do have access to supervision on a regular basis.

**Risk based pro-active supervision:** Open-door policies are important but they are rarely fully effective on their own. Pro-active supervision includes regular meetings between principals and staff, reviewing current matters on a rolling basis.

The frequency of supervised meetings or level of supervision will vary according to the experience of the fee-earner and the nature of the work but supervisors should aim to approach such meetings with an awareness of the possible risks associated with specific types of work. This will help to identify or anticipate any problems and ensure that risks or failings are avoided.

**File-reviews/file audit:** File reviews are key to the supervision function and this is usually done during regular meetings between the supervisor and fee-earners.

Although a principal or senior fee-earner will in most cases be required to supervise the quality of the legal and technical work of fee-earners, administrative or file-management supervision can often be delegated, relieving time pressure on the supervisor. The extent to which this is possible will depend to a great degree on the nature of the work and is more relevant to highly commoditised work than to high value sophisticated legal work.

Procedural supervision involves checking individual files against previously defined checklists or protocols. Systems like this can act as a supervisory prompt to ensure that the fee-earner covers all the necessary steps listed in the checklist/protocol. This can work in two ways:

- the fee earner is required to complete a checklist, provide information on a file summary form or enter information on an IT-based case management system as a check to ensure all appropriate steps have been taken
- files are audited, either in the form of a peer review by a fee-earning colleague or by a support manager, to ensure all necessary steps have been taken. Peer reviews can often be popular amongst legal teams because the auditor/reviewer can also learn from the process by recognising improvements or alternatives in a colleague’s case management.

For file reviews to be effective, firms have to set target requirements for the number of files to be reviewed, by whom and how frequently. This frequency will depend to a great extent on the nature of the work and the experience of people involved.

**Key checks:** Although in an ideal world all files would be checked, in reality this will not be practical. For this reason, a practice should consider introducing central checks to either assist in the selection of files to be reviewed or to complement the file review process. A practice’s ability to make these checks might depend to a significant extent on the sophistication of any internal systems or databases but where possible should be highly informative.

Check	Notes
<b>Inactivity checks</b>	<p>Check for open files that have not had any time recorded against them for a significant period of time (depending on the work type).</p> <ul style="list-style-type: none"> <li>• Are there any outstanding or imminent actions?</li> <li>• Is the inactivity justified?</li> <li>• Does the fee-earner have a mental block on the file?</li> </ul>
<b>Significant unbilled work in progress</b>	<p>Check for files where a significant amount of time has been recorded but not billed when would normally be expected.</p> <ul style="list-style-type: none"> <li>• Is the fee-earner reluctant to bill the client?</li> <li>• Are there problems with the file that the fee-earner has not raised?</li> <li>• Has the client been informed of the running costs?</li> <li>• Will the recorded time be recoverable?</li> </ul>
<b>Workload and recorded hours checks</b>	<p>Check the workload and working hours of all fee-earners.</p> <ul style="list-style-type: none"> <li>• Are all workloads manageable?</li> <li>• Who is under pressure?</li> <li>• Do the hours billed tally with expected workload?</li> <li>• Is anyone dishonestly adding time to client files?</li> <li>• Is anyone taking shortcuts? Do recorded hours and hours-in-office tally?</li> </ul>
<b>Unpaid bills</b>	<p>Check whether bills are being paid.</p> <ul style="list-style-type: none"> <li>• Are any fee-earners having problems recovering fees?</li> <li>• Are the fees in dispute?</li> <li>• Are clients being given accurate costs information?</li> </ul>
<b>Principal input</b>	<p>Check files for the proportion of principal time to fee-earner time.</p> <ul style="list-style-type: none"> <li>• Are any fee-earners over-reliant on supervision?</li> <li>• Are any fee-earner under-reliant on supervision?</li> <li>• Are any fee-earners hiding files from supervision because of embarrassment over problems within the files?</li> <li>• Are supervisors as accessible as required?</li> <li>• Are principals over-supervising?</li> </ul>
<b>Written-off time</b>	<p>Check how much time is being written-off.</p> <ul style="list-style-type: none"> <li>• Is too much time being written off?</li> <li>• Why is so much time being written off?</li> <li>• Are fees too high?</li> <li>• Is the work profitable?</li> <li>• Do the fee-earners have sufficient skills?</li> <li>• Does supervision need to be increased?</li> </ul>

When supervision identifies any problems or failings, it is important that a practice gets to the root cause of any problems so that things can be changed to ensure the same problem does not happen again.

**Supervision skills and training:** During their career, most people will have encountered a sufficiently broad range of bosses to know that some managers/supervisors are better than others. Although some people are fortunate enough to be natural leaders or supervisors, the majority of people will need to work at improving their skills in relation to supervision. This is as true for lawyers as it is for anyone because of the vital role that supervision plays within legal practice.

In addition to learning the many structural or systematic elements of supervision, partners and supervisors should benefit from a wide range of skills training including: communication skills, giving and receiving feedback, team management, leadership, motivation, appraisal skills, interviewing skills, effective delegation, chairing meetings and conflict management.

**Team meetings:** Team meetings are a very effective way to complement one-to-one supervision because:

- they advance a sense of teamwork
- it involves everyone in decision making, thus increasing the chances of support
- they allow for open discussion of issues thus facilitating creativity and swifter resolution of problems
- issues can be addressed in an objective universal way, limiting personal sensitivity
- messages can be communicated to everyone at the same time thus increasing consistency and avoiding duplication.

Meetings are most effective when they are held regularly, have a set structure and a standing agenda. They should not, however, be used as a substitute for one-to-one supervision.

**Principal supervision:** Partners/principals need supervision as much as other fee-earners. In fact, according to statistics within the Legal Services Commission Annual Report 2014-2015, solicitors in their fifties or solicitors with more than 25 years experience are significantly more likely to be the subject of a complaint (either a conduct matter or a consumer dispute) than less experienced solicitors.

There a number of suggested reasons for this:

- experience leads to confidence which, in some instances, might lead to arrogance, a lack of diligence or disregard for established practices
- senior solicitors have different attitudes to compliance, regulation and risk management as a result of starting their careers in less regimented times
- principals do not have access to the same level of support and guidance as junior fee-earners
- principals manage client relationships and therefore take responsibility for their team's mistakes.

Whatever the reason, the evidence suggests that practices should not consider principals as being 'above supervision' and should consider ways to effectively supervise them. This poses a problem for the majority of practices because a principal will be the most experienced person within his area of law within the practice and will remain, to a significant extent, self-supervising. This does not, however, limit the scope of the practice to implement procedural supervision arrangements or to supervise the principal in his management or client care activities through peer review.

### **Supervision: suggestions for systems or arrangements that might be considered compliant:**

- consider your obligations under Rule 37 of the ASCR
- recruitment process to include all relevant checks, possibly including checks on all practising certificates, references, disciplinary records, claims records
- defined induction arrangement for both new staff and those transferring between departments
- supervision training for all supervisors
- guidance to supervisors on common risks or supervision issues
- job descriptions for all staff
- regular appraisals of all staff, including all principals
- regular team/practice meetings
- defined delegation processes that take into account both relevant expertise and workload
- procedures for opening and checking of all relevant communications
- named supervisor in each area of work
- timetabled supervision/review meetings for all staff with their supervisor(s)
- arrangements for regular file reviews covering both substantive legal content and procedural file management
- central accounts/time recording system checks on file and fee-earning re WIP, billing and extent of supervision
- arrangements for the recruitment, induction and supervision of locums or any temporary fee-earners
- defined reporting arrangements throughout the practice
- annual review of all practice information and management arrangements to identify areas for improvement.

## 2.10 Trust account regulations

***“providing for compliance with the Trust Accounts Act 1973 (Qld) and chapter 3, part 3.3, division 2 of the LPA and proper accounting procedures.”***

Trust accounting is a simple form of bookkeeping used exclusively for trust transactions. It is the recording by a trustee (the practitioner) of the receipt and payment of other people's money, with all transactions being recorded in individual trust ledger accounts maintained for the person from or on whose behalf the money was received.

Regardless of whether a manual, machine or computer system is used, arrangements must be developed and implemented in relation to the use and management of the following trust account records:

- trust account receipts
- register of receipt forms
- bank deposit books
- cheque butts and paid cheques
- trust account cash books
- financial institution statements
- trust journal
- trust ledger
- trust account reconciliations
- investment ledger
- reconciliations of investment ledger
- transaction files
- trust account authorities
- investment authorities
- mortgage register.

Trust moneys are defined in the Trust Accounts Act as “moneys received for or on behalf of any other person by the trustee in the course of or in connection with the practise of the person's profession or the carrying on of the person's business”.

Difficulties will sometimes be experienced in determining whether or not money received is trust money. In these circumstances it is better to err on the side of caution and treat the money as trust money but practices should consider defining what should be recognised as trust money.

For more information on trust accounting, practitioners are encouraged to refer to the trust accounting resources on the QLS website [qls.com.au](http://qls.com.au), or to contact Bill Hourigan of the QLS Trust Accounts/Audit department on **07 3842 5845**.

### **Trust accounts: suggestions for systems or arrangements that might be considered compliant:**

- a suitable accounting software package with appropriate written delegations and procedures for the handling of trust monies, especially the issuing of trust account cheques
- accounting records are compliant, accurate, up to date and regularly monitored
- training for all staff – including both fee-earners and support staff on trust accounting procedures and the ramifications of mistakes or oversights
- defined procedures in relation to the receipting of cheques, the use of accounts ledgers, completing deposit slips, banking requirements etc.
- procedures in relation to anti-money laundering legislation.