

Guidance Statement No. 16 – Supervision (Published 18 March 2019)

1. Introduction

1.1. Who should read this Guidance Statement?

This Guidance Statement is for solicitors and law practices.

1.2. What is the issue?

The purpose of this Guidance Statement is to outline what is considered to be ‘reasonable supervision’ under the *Australian Solicitors Conduct Rules 2012* (‘ASCR’) and the common law.

This Guidance Statement is *not* generally concerned with the ‘supervised legal practice’ requirements applying to practitioners with restricted practising certificates, although some of the topics addressed do refer to practitioners in this category.

1.3. Status of this Guidance Statement

This Guidance Statement is issued by the Queensland Law Society (‘QLS’) Ethics and Practice Centre for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of this Guidance Statement it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct.

This Guidance Statement represents a standard of good practice and is endorsed by the QLS Ethics Committee.

2. Ethical principles

ASCR

Rule 37 provides:

37. Supervision of legal services

- 37.1 A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.

This Rule imposes a professional obligation not only upon the principals of a legal practice but also on the solicitor within that legal practice who has designated responsibility for a matter.

3. What is ‘reasonable supervision’?

3.1. The basics

What constitutes reasonable supervision depends upon the particular facts of each situation – the matter itself, the ability and experience of the supervised solicitor and the type and complexity of the work involved.

The following is unlikely to constitute reasonable supervision:

- to simply leave the person who is being supervised to his or her own devices;
- to not have in place a system or practice involving the regular review of the matters¹ conducted by the person being supervised. Solely relying on that person to bring any difficulties to the attention of their supervisor is not sufficient – the supervising solicitor must be proactive in their supervision;
- to delegate the entire conduct of the matter; or
- simply tell the person being supervised that you have an ‘open door policy’ if they have any queries.

A failure to take proactive steps to check and supervise could result in disciplinary charges being levied against the supervisor.²

3.2. Too many staff to supervise?

Care should be taken when solicitors take on the supervision of too many staff, even where they have devolved this supervision to other senior solicitors who report to them. A supervisor needs to be in a position where they can direct, provide oversight, have the ability to give instructions, assign tasks, override and intervene when necessary.

3.3. Remote supervision

Where the solicitor with primary responsibility for supervision is not based in the same physical location as the person being supervised, remote supervision is possible.

Available technology has the capacity to facilitate such regular and direct supervision of remote practitioners. Similar considerations apply to lawyers working full-time or part-time from home or those who are assigned to a satellite office.

However, care should be taken in this situation to establish proper systems for supervision. These systems will depend on the nature of the practice, the type of work and the experience of the practitioner to be supervised. Ideally such systems would involve some form of regular face-to-face in person contact as well.

¹ For those who are insured with Lexon, also see the EMR Program (if you have opted in): https://www.lexoninsurance.com.au/Managing_your_risk/EMR_Program.

² *Council of the Queensland Law Society Inc v Cummings* [2004] QCA 138; *Legal Services Commissioner v Gould* [2016] QCAT 533.

3.4. Client secondments

The secondment of solicitors to client organisations is now a well-established practice which can be beneficial to both the client, the firm and the individual solicitor. However, these arrangements can take many forms.

The terms of the client secondment will determine whether a solicitor on secondment is providing advice on behalf of their firm or is instead being provided to work solely under the client's supervision.

The former requires careful attention as to the proper supervisory arrangements, especially in the case of less experienced practitioners who will be working on-site with clients who are likely to expect the seconded solicitor to provide advice on the spot, rather than through the normal supervisory channels which exist in law firms.

The latter arrangement, where the solicitor is entirely under supervision of the client, even if it does not involve the provision of legal services by the solicitor's firm, may give rise to other regulatory issues for the law firm, the solicitor and the client.³

The above considerations are particularly relevant to firms which operate on a 'secondment-only' basis. These firms must still maintain proper supervisory arrangements where legal services are being provided, even if the employees on secondment are experienced. The principal / employee ratio within the firm will be a relevant consideration here in determining whether the supervision arrangements are appropriate.

Whether a secondment is full-time or part-time will also be relevant to whether proper supervision is achievable. Considerations such as whether the secondee is part of an in-house legal team, as opposed to working by themselves at the client's premises, will also be relevant.

In general, a solicitor who holds a restricted practising certificate should not be regarded as a suitable candidate for a client secondment, unless they are accompanied on that secondment by a competent unrestricted practising certificate holder from the seconding firm who has, as at least part of their duty, the supervision of the restricted practitioner.

Supervision of a restricted practising certificate holder on secondment by a member of the client's legal team also has the potential to give rise to conflicts of interest for both parties and should be avoided for that reason as well.

3.5. Incorporated Legal Practices ('ILPs')

Legal Practitioner Directors of ILPs have imposed upon them a statutory duty⁴ to be responsible for the management of legal services provided by the ILP and to ensure that appropriate management systems⁵ are implemented and kept.

³ These issues may include whether the *Labour Hire Licensing Act 2017* (Qld) applies, whether the solicitor on secondment holds the appropriate practising certificate and whether the secondee may be entitled to any employment benefits from the client organisation.

⁴ *Legal Profession Act 2007* (Qld) s 117 ('LPA').

⁵ 'Appropriate management systems', *Legal Services Commission* (Web Page, 11 November 2011) <<https://www.lsc.qld.gov.au/compliance/incorporated-legal-practices/appropriate-management-systems>>.

This includes the duty of reasonable supervision. Legal Practitioner Directors must take all reasonable action⁶ to ensure a breach of the professional obligations of an Australian Legal Practitioner does not happen.

3.6. In-house & government

The appropriate level of supervision within an in-house legal team (including within a government legal department) will in part depend on the respective roles and responsibilities of the lawyers involved within the organisation in question, including their position descriptions, internal policies and lawful employer directions.

Practitioners in these roles may also need to consult position descriptions and internal policies to help them ascertain whether they are engaging in legal practice.⁷

3.7. Supervised principals

A practitioner who holds a restricted principal practising certificate may practise as a partner of a law firm, as one of at least two directors of an incorporated legal practice or as one of at least two legal practitioner partners of a Multi-disciplinary Practice ('MDP'), provided that they do so under the supervision of a person holding an unrestricted principal practising certificate.⁸ They may not practise as a sole practitioner, nor can they supervise an office of a law practice.

3.8. Contractors

A contractor must hold an unrestricted employee certificate as an 'employee'⁹ of the law practice, be insured under the professional indemnity policy of the law practice and be properly supervised. The contractor must not provide legal services to anyone other than that law practice's clients, through that law practice.¹⁰ The services or labour provided by the contractor to the law practice must not be capable of being characterised as unsupervised legal services.

Where the contractor is not going to be supervised, the relationship is that of one law practice retaining another law practice, similar to the engagement of a barrister by a solicitor. The solicitor in this situation must hold an unrestricted principal practising certificate and establish their own firm or practice. The Act provides how costs are to be disclosed to clients in this situation.¹¹

The Society is aware of solicitors holding restricted practising certificates being asked to enter into contracts for services instead of employment agreements to complete their required period of supervised legal practice. They are asked to obtain an ABN, to operate as a contractor to the law practice (rather than an employee) and are paid a lump sum for

⁶ LPA (n 4) s 117(4).

⁷ See also Queensland Law Society, *Guidance Statement No. 15 – In-house counsel - practising certificates* (4 October 2018).

⁸ QLS Ethics Centre, 'Practising certificate and regulatory guidance', *Queensland Law Society* (Web Page) <http://www.qls.com.au/For_the_profession/Practice_support/Direct_support/Practising_certificate_and_regulatory_guidance>.

⁹ LPA (n 4) sch 2 defines 'employee' to include both 'a contract of service or contract for services'.

¹⁰ Except, for example, where they are also a contractor to, or employee of, another practice where similar arrangements are in place.

¹¹ LPA s 309.

salary, tax and superannuation on the expectation that they will make their own arrangements in these respects.

Apart from the workplace relations and taxation issues associated with such arrangements, a practitioner holding a restricted practising certificate is not entitled to engage in unsupervised legal practice, which may well be the effect of such an arrangement.¹² Even where that is not the case, such arrangements are unlikely to allow for the proper supervision of the holder of such a certificate and are therefore to be approached with caution.

4. More Information

Solicitors are also referred to the Queensland Law Society, *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners*, Queensland Law Society (2014).

For further assistance, including difficulties you may be experiencing as either a supervisor or as a practitioner who is being supervised, please contact an Ethics Solicitor in the QLS Ethics and Practice Centre on **07 3842 5843** or ethics@qls.com.au or a QLS Senior Counsellor.¹³

¹² QLS Ethics Centre, 'Should restricted practitioners be engaged as contractors?', *Queensland Law Society* (Web Page, 19 June 2017) <http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Supervision_of_legal_services/Should_restricted_practitioners_be_engaged_as_contractors>.

¹³ 'QLS Senior Counsellors', *Queensland Law Society* (Web Page) <http://www.qls.com.au/Becoming_a_member/Member_benefits/Professional_benefits/QLS_Senior_Counsellors>.