RISK MANAGEMENT IN A PERSONAL INJURY PRACTICE

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Introduction

As legal practitioners, we are required to comply with and discharge many professional and ethical duties, obligations, rules and standards. Our conduct in Queensland is governed by the *Legal Profession Act 2007 (Qld)* ("**LPA**") and, in addition to the LPA, the Australian Solicitor Conduct Rules ("**ASCR**") provide a framework of rules with which we must comply, all in conjunction with the common law and equity.[1]

As legal practitioners we must be, and remain, *fit and proper* people to hold a practising certificate.[2] In addition to this, we must ensure that we have (and maintain) adequate skills and knowledge in the field of personal injury law and litigation, which spans many pieces of legislation and regulations, along with voluminous case law. The reality of private practice is that we must also work within the context of individual KPIs (including daily time recording and/or yearly budgets) and contribute to overall business development. And let's not forget, that at the very centre of all of these expectations and requirements, is our dealing, day-in and day-out with many people, from all walks of life, with physical and psychological impairments and restrictions who look to us to guide them through a foreign legal process during one of the most difficult times of their respective lives.

When we consider the role, responsibilities and pressures of a personal injury lawyer within the above context, we can see the reality of the environment within which a personal injury practice operates; an environment fraught with risks.

The purpose of this paper is to identify some of the key risks that arise specifically within the context of a personal injury practice, being a practice that generally requires practitioners to carry large volumes of similar files at any one time. That said, the risk areas that are the focus of this paper can cross over into practice generally. It is intended that readers are provided with practical guidance on identifying those risks and managing them. It is not intended to be an exhaustive guide to risk management in these areas, but a supplement to the many resources and tools that are widely available in this space. This paper does not consider the general business risk and compliance issues arising from areas such as taxation and superannuation laws, workplace health and safety, employment laws or consumer laws.

Readers are encouraged to approach risk management in a personal injury practice as a holistic model that is best achieved when all firm employees are engaged in it, not just legal practitioners. All roles in a personal injury practice give rise to some level of risk that needs to be identified and managed. Importantly, each team member needs to be aware of, and understand, the risks that arise from their own roles and how that interplays with the work and risks being handled by their wider team.

For example, staff responsible for opening mail are dealing with confidential and (often) time sensitive information and data, receptionists and secretaries are usually the first point of contact for enquiries and responsible for (accurately) capturing contact data for the purpose of conflict checking, and paralegals and legal secretaries have a lot of contact with clients

[1] Queensland Law Society, Stafford Shepherd, Senior Ethics Solicitor, http://www.qls.com.au/Knowledge_centre/Ethics/ASCR_2012, accessed 10 March 2019.
[2] *Legal Profession Act 2007*, s 21(1)(b).

and can be pressured by clients to provide legal advice (as opposed to legal information)[3] when lawyers are unavailable to take calls. These are all risks that arise before even considering the risks that are associated with the actual of practice of law.

It is only when a firm adequately and consistently communicates, manages and monitors the risks for which each and every team member is accountable, that optimal risk management can be achieved.

Legal practitioners who hold management and director positions within their personal injury practice may well find that, by approaching risk management in this holistic way, staff and practitioners at all levels become more engaged and risk management improves.

What is risk management?

Risk management in the context of a personal injury practice comprises the following:

1. **Identification**, measuring and recording of the risks associated with the practice of personal injury law, both general to practice and specific to the respective law firm;
2. **Development** of risk management strategies, protocols, policies, processes, procedures etc.;
3. **Implementation** of the risk management strategies, including training and education;
4. **Auditing** of compliance with the firm's adopted risk management strategies;
5. **Review and improvement** (where necessary) of the risk management strategies.

To ensure optimal effectiveness of the risk management structures[4] being adopted by your personal injury practice, the following should be considered for inclusion in the overall framework:

- clear accountabilities for the management of risk and compliance – in particular, responsibility at senior management level;
- risk management and compliance framework for all parts of the practice;
- integration of the risk management processes into everything the firm does;
- accessibility - central repository of information, process and policy documents readily available to practitioners and other staff members;
- regular compliance monitoring (audits);
- systems to respond to non-compliances;
- training and education, including updates / refreshers;
- clear and consistent communication of risk management and compliance matters.

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[3] In my opinion, personal injury claims are underestimated for their complexity and I believe this stems from various factors, but mostly from the very process driven nature of the pre-litigation claims process. There is a lot of focus on the milestones. When an area of the law is underestimated in this way, combined with personal injury practitioners being time poor to speak with clients each and every time they call, a lot of pressure can be placed on secretaries and paralegals who feel they *need* to answer client questions for advice. If this is happening in your practice, be mindful of the extent that advice is being given by non-practitioners. It's not ideal, but to the extent it happens, there needs to be thorough file noting by the secretary / paralegal and timely review and consideration of it by the legal practitioner to ensure any inaccuracies or ambiguities are clarified with the client without delay.

[4] "Structures" includes, but is not necessarily limited to policy, process, procedure, precedents and tools, monitoring, training etc.

Additional risk management obligations – Incorporated Legal Practices ("ILP") and Multi-Disciplinary Partnerships ("MDP")

The LPA places an obligation on legal practitioner directors of ILPs and legal practitioner partners of MDPs to ensure that "appropriate management systems" are implemented and maintained to ensure that compliance with the LPA is achieved when providing legal services.[5] This is additional to the usual duties and obligations they hold as legal practitioners.

As at 30 June 2018, ILPs represented 53.97% of all law firms operating in Queensland and the number of ILPs continues to increase.[6] Accordingly, there are an increasing number of legal practitioners who bear this additional obligation to ensure their practices have "appropriate management systems".

Unfortunately, the LPA does not actually define "appropriate management systems", but the Queensland Law Society does provide some helpful guidance on how an appropriate system could be achieved. The following is set out in the QLSs current *Guide to appropriate management systems*:[7]

> *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)*

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[5] *Legal Profession Act 2007*, s 117(2) & (3).
[6] Queensland Law Society, *Guide to appropriate management systems – 1.1 Appropriate management systems and the 10 commandments* (March 2017: Version 1.1), p 7.
[7] Queensland Law Society, *Guide to appropriate management systems – 1.1 Appropriate management systems and the 10 commandments* (March 2017: Version 1.1), p 4.

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)*.

The 10 commandments provide a great base to work from in terms of ensuring that a personal injury practice is addressing these key areas in its management system.

Current trends from the Legal Services Commission ("LSC") Annual Report 2017-18

The conduct of legal practitioners in Queensland is supervised by the QLS and the LSC. If a client is dissatisfied with the legal services provided to them during the course of their personal injury claim, a complaint can be made to the LSC, which will either be summarily dismissed or investigated (and potentially litigated). The following summaries and trend commentary from the most recent LSC Annual Report can help to provide some context as to how inadequate risk management can translate into LSC engagement and the areas that are most commonly the subject of LSC complaints:[8]

> *This year the key statistics for the Commission are generally on par with 2017 but show some trending variances. This year, there were 262 solicitors subject to investigation compared to 353 the year before. Most complaints did, as usual, centre around quality of service, costs and the general ethical conduct of practitioners. In the categories of complaints received, family law, conveyancing, deceased estates, litigation, personal injury, criminal and commercial law constituted the major areas of the law. In addition the Commission dealt with over 2840 general enquiries. In matters commenced by way of "own motion" or described as investigation matters under the Legal Profession Act 2007 (LPA), personal injuries and WorkCover litigation once more featured prominently on 19 matters which represented 26.39% of all matters, generally relating to concerns under the Personal Injuries Proceedings Act 2002 (PIPA). Trust Account breaches also featured prominently on 12 matters or 16.67% of all matters.*
>
> …
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> *During the course of this year, the Commission has also assisted complainants to obtain refunds or waiver of legal costs of approximately $69,482.00 which is not an insignificant achievement for the year. We have secured apologies from lawyers in response to 39 complaints. We have secured undertakings from lawyers to improve their management systems; 9 undertakings have been given to be supervised or mentored or to undertake training; and 18 undertakings given from principals of law firms to amend their personal injury advertising to become compliant under the PIPA. It is disappointing however, whilst discussing statistics, to note that around 23% of all enquiries received in the 2017-18 year related to costs issues and, once again, most concerned on-going costs disclosure during the course of a complainant's matter. Approximately 23% of all written complaints and investigation matters are costs related. In all, this resulted in 46% of matters we dealt with being related to costs issues*.

Breakdown of relevant statistics from the LSC Annual Report 2017-18

The following tables are extracted from the LSC Annual Report and provide greater context to the summarised outcomes and trends set out above.[9]

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[8] Legal Services Commission, *Annual Report 2017-2018*, pp 5 and 7.
[9] Legal Services Commission, *Annual Report 2017-2018*, pp 31-3.

4.3.4 Complaints by area of law

	17-18	%	16-17	15-16
family law	75	23.44	86	81
litigation	42	13.13	43	55
deceased estates or trusts	40	12.50	48	49
conveyancing	32	10.00	37	61
personal injuries /WorkCover litigation	26	8.13	42	19
criminal law	22	6.88	33	15
commercial /company law	17	5.31	27	39
conduct not in the practice of law	12	3.75	10	6
property law	9	2.81	22	16
administrative law	4	1.25	3	3
building /construction law	4	1.25	2	6
leases /mortgages	3	0.94	7	6
immigration	3	0.94	4	3
industrial law	2	0.63	2	2
trust account breaches	2	0.63	1	3
bankruptcy and insolvency	-	-	3	3
all other 'areas of law' combined	27	23.44	47	51
Total	**320**		**417**	**418**

4.3.5 Complaints by nature of matter

	17-18	%	16-17	15-16
quality of service	93	29.06	152	143
ethical matters	78	24.38	75	90
Costs	64	20.00	79	85
Compliance	34	10.63	30	31
Communication	27	8.44	42	37
Trust funds	8	2.50	17	15
Documents	8	2.50	8	10
Personal conduct	3	0.94	8	6
PIPA	3	0.94	3	-
All other 'natures of matter' combined	2	0.63	3	1
Total	**320**		**417**	**418**

4.3.8 Investigation matters by area of law

	17-18	%	16-17	15-16
personal injuries /WorkCover litigation	19	26.39	33	25
conduct not in the practice of law	15	20.83	6	8
trust account breaches	12	16.67	18	12
criminal law	7	9.72	4	-
deceased estates or trusts	5	6.94	2	7
family law	4	5.56	6	2
litigation	2	2.78	5	2
administrative law	1	1.39	1	1
bankruptcy and insolvency	-	-	2	6
conveyancing	-	-	1	2
building/construction law	-	-	1	-
commercial /company law	-	-	-	3
all other 'areas of law' combined	7	9.72	9	13
total	**72**		**88**	**81**

5.7 Solicitors subject to investigation by law firm size[10]

PC Holders	2017-18	%	2016-17	2015-16
1	73	34.43	90	93
2-3	61	28.77	74	75
4-6	40	18.87	50	47
7-12	17	8.02	34	23
13-24	8	3.77	17	24
25-50	9	3.30	5	5
51-100	3	1.42	3	7
101-200	3	1.42	2	5
Total	**212**	**100**	**275**	**279**

The above statistics relating to "solicitors subject to investigation by law firm size" shows that small law firms[11] by far represent the highest number of complaints that progress to investigation, with between 55.66% and 59.43%. Sole practitioner law firms account for 34.43% and large law firms[12] between 6.14% and 9.91%. There were no prosecutions

[10] Legal Services Commission, *Annual Report 2017-2018*, pp 37-8.
[11] Law firms with less than 20 practising certificate holders.
[12] Law firms with 20 or more practising certificate holders.

flowing from these investigations specifically in relation to personal injury litigation and WorkCover. [13]

These statistics will be influenced by various factors, with risk management likely being a key influencer. This appears to be supported by the LSCs statement that a number of lawyers were required to provide undertakings to improve their management systems. It would be interesting to know how many of those undertakings were required from personal injury lawyers specifically and, further, what challenges and hurdles the practitioner (and their firm more widely) attributed to the break down or inadequacies in their risk management structures. It is often the case that learning from mistakes (whether our own or those of others) is the best way to learn.

What is "best practice"

From both a business and legal perspective, a personal injury practice should be aiming to institute "best practice" in their risk management system. But what is "best practice"?

According to the LSC, "best practice":[14]

> *…is adopting work or business practices tailored to your organisation to achieve quality services for your clients. All lawyers should review their business, legal and administration practices on a regular basis to ensure currency, compliance and client satisfaction. Processes need to be tailored to the way you like working, to your clients' needs and to suit your staff and culture. Strive for best practices that will suit your needs.*

Whilst all personal injury practices will have varying degrees of commonality, each will also have its own specific values and objectives. This should be kept by in mind by practitioners when developing and re-evaluating their risk management systems.

Once you have your risk management system and protocols up an running, it is important to ensure that the system is effective and being complied with. Therefore, to ensure best practice, your risk management system must include regular auditing.[15] For practitioners, this usually involves the auditing of files.

The following tips and recommendations may assist a personal injury practice to implement an effective auditing system:

- understand the difference between a qualitative file audit that is undertaken by a supervising partner and a procedural audit, which audits the file against the risk management protocols and checklists.[16] Both have a role to play in effective risk management;
- set a frequency of audits that best suits the level of experience of practitioners;

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[13] Legal Services Commission, *Annual Report 2017-2018*, pp 34-5.
[14] Legal Services Commission, *Fact Sheet 9 – Avoiding Complaints*, https://www.lsc.qld.gov.au/__data/assets/pdf_file/0006/97755/FACT-SHEET-9-Avoiding-Complaints.pdf, accessed on 9 March 2019.
[15] Queensland Law Society, *Guide to appropriate management systems – 1.1 Appropriate management systems and the 10 commandments* (March 2017: Version 1.1), p 21.
[16] Queensland Law Society, *Guide to appropriate management systems – 1.1 Appropriate management systems and the 10 commandments* (March 2017: Version 1.1), p 21.

- determine the number of files to be audited on each occasion and how those files are to be selected;
- clearly define who will be responsible for undertaking the audit;
- adopt a process for dealing with non-compliance, for example:
    - timeframes for rectification;
    - assessment of the non-compliance to determine appropriate steps to avoid repetition of the breach, which may include changing the risk management approach, re-educating staff etc;
    - determination of whether insurance or client notifications are triggered;
    - how to best learn from the non-compliance.
- consider whether file audit outcomes should form part of a legal practitioners KPIs.

Considering risks specific to a personal injury practice

There are many factors associated with the practice of personal injury law that create risk – too many to cover in a single paper. Accordingly, five key factors have been identified and the risks most commonly associated with those areas will be discussed in more detailed.

Those factors are:

1. Managing large numbers of similar files;
2. Managing critical time limits;
3. Managing client expectations as to costs;
4. Dealing with conflicts of interest between multiple files; and
5. Data management and cyber security.

1. Managing large numbers of similar files

It is commonly understood amongst personal injury practitioners that those working exclusively (or predominantly) in this area carry a large volume of cases. This is driven by several factors, but mainly the long-tail nature of the claims and the speculative basis of the Costs Agreements.

The management of high-volume file loads is itself a breeding ground for risks. Whilst it might be assumed that similarities between those files is an advantage to effective risk management, that is not the case. Managing large numbers of similar files creates risks in the following areas:

a. Pigeon-holing similar claims – making assumptions and missing crucial details;
b. File and records management;
c. Excessive workloads – impacts on practitioner wellbeing.

Pigeon-holding similar claims – making assumptions and missing crucial details

No two claims are ever the same and no two clients are ever the same. That said, when running many claims that are *similar*, over the years, a practitioner will generally hear instructions about many *similar* mechanisms of injury and *similar* injuries and effects. They

can also run multiple claims against the same or similar respondents, particularly in the workers' compensation space. This can create an environment where a practitioner begins to pigeon-hole *similar* claims (as though they are in fact the *same*) and make assumptions about certain facts and circumstances without adequately investigating the claim.

Unfortunately, a single assumption can infect the entirety of the case and, in some circumstances, significantly impact the prospects or outcome. For example:

- pigeon-holding a matter can cause tunnel-vision and result in missing crucial facts that may identify additional respondents or causes of action, which can significantly change views on prospects of success;
- forming a view on a type or effect of injury and not paying enough attention to the finer detail in medical reports and changes in condition over the course of the claim (for example, missing the signs of a potential acquired brain injury)

In order to address the risk of a practitioner becoming complacent and pigeon-holing claims, and to ensure that a proper forensic investigation of the facts and circumstances of each matter is obtained and considered, firms should consider the following:

- Whether the process from initial enquiry to case selection includes adequate safeguards. For example, see the comprehensive list of initial instructions recommended by Lexon Insurance in its *Initial Interview Checklist* – does your firm have a similar guide for practitioners for initial consultations? Is there a review and sign-off of a legal practitioner's recommendations for an initial enquiry?
- Are practitioners adequately documenting their review and consideration of instructions and evidence received during the life of a claim? For example, when medical records or other large files are received, are practitioners required to expressly file note whether to content of records changes their view in any way or requires the taking of further instructions or gathering of further evidence? Or are practitioners simply recording their perusal time and not really turning their mind to these factors?

The most practical and effective measures to put in place to guard against the risk of practitioners pigeon-holing claims are peer or management reviews on claim recommendations, qualitative file audits by senior practitioners and precedent checklists / procedures that direct practitioners to all relevant matters at the initial consultation stage.

File and records management

Most personal injury practices have a combination of electronic and paper-based files. There are some more advanced practices that operate a paperless office, and still some that are at the opposite end of the scale with only hard copy files (although there should be relatively few with no electronic system). Whichever category your personal injury practice falls within, adequate file management is a challenge due in large part to the number of files being carried.

For practices that operate with physical files, they will generally be dealing with the following factors that amplify the challenges of adequate file and document management:

- many physical files that look the same (same coloured file, same font size and colour);
- inaccurate labelling of files, such as the total number of volumes to a file at any given time;
- some clients having multiple files;
- large volumes of documents coming into the firm on a continuous basis from various sources (clients, doctors, insurers etc.); and
- the above file related documents themselves can look very similar.

The most obvious risks arising from the above include the following, but this is not an exhaustive list of the risks:

- filing of documents on the wrong file;
- filing incomplete documents;
- failing to consistently ensure that documents are stored in both electronic and hardcopy form in those practices operating both file types;
- recording of data on the wrong file;
- not being able to accurately determine the location of all files at any given time, for example, where physical files may have been removed from the office;
- loss of data and documents, and potential confidentiality and privacy breaches, due to the above;
- missing complete volumes of documents due to incorrect file volume labels;
- increased and unreasonable costs on account of disorganised files;
- failing to adequately manage legal issues due to the combining of multiple client claims within the same file or the recording of information on the wrong file where multiple client files exist.

There are some basic ways that the above risks can be reduced or completely avoided. The following suggestions are provided by QLS as systems or arrangements that might be considered compliant with the "appropriate management systems" requirements and which relate specifically to file and record management:[17]

- procedures for opening and closing files;
- procedures for maintaining files, for example:
    - keeping documents in a logical sequence – consider a file structure protocol;
    - separate files – if a client has more than one legal claim/issue, create a separate file for each one;
    - keep correspondence separate and strictly in chronological order;
    - filing of draft version documents to trace history and maximise cost assessments
- procedures for physically moving and transferring files, including a log or register of any files being removed from the office;
- file summary sheet on all files designed to act as both a procedural checklist and as an aid when reviewing and/or transferring files;

[17] Queensland Law Society, *Guide to appropriate management systems – 1.1 Appropriate management systems and the 10 commandments* (March 2017: Version 1.1), p 22.

- procedures for filing all relevant incoming and outgoing communication, including where correspondence should be kept that requires actioning but that has not yet been actioned;
- clear labelling and/or the use of registers for any documents or objects that are kept separate from the primary file(s). Complete files should be easily and quickly accessible;
- systems for the listing of all open, closed and archived matters;
- procedures for managing document history including the saving and clear labelling of current and past drafts of any documentation;
- procedures to determine who has access to secure files, documents etc;
- 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;
- file management protocols and training to ensure consistency and to facilitate effective handover of files;
- regular file audits that include file and document management checks;
- procedures to ensure the client is advised about arrangements for storage and retrieval of papers and other documents or items.

Consider the file and document management systems currently in place within your practice and whether there are any areas where improvements could be made.

High or Excessive workloads – practitioner wellbeing

Personal injury lawyering is a high pressure and (in most cases) a high workload practice area. Individual practitioner workloads can be difficult to manage, especially in circumstances where a practitioner is hesitant to raise workload issues with their superior for fear of being perceived as weak or a poor performer; there can be a tendency to assume that if no issues are being raised then a practitioner must be coping.

But let's face it, a lot of lawyers have personality traits associated with high performance, perfectionism and competitiveness that do not encourage self-reporting of excessive workload demands and pressure. For those lawyers who do not necessarily share in those personality traits, simply being in an environment with those practitioners can encourage them to overextend themselves in an effort to "keep up" (or at least give that perception).

A national survey of nearly 1000 Australian legal practitioners conducted in 2012-13 examined the working conditions, work experience, and health and wellbeing of solicitors and barristers who practise in a variety of settings.[18] A lack of control over workload combined with excessive workplace pressures were some of the key work-related factors which were significantly linked with poorer mental health outcomes. These outcomes can have negative effects on work performance, job satisfaction, absenteeism and staff turnover.

[18] Chan, Janet; Poynton, Suzanne; Bruce, Jasmine, *"Lawyering Stress and Work Culture: An Australian Study"* [2014] UNSWLawJl 39; (2014) 37(3) UNSW Law Journal 1062.

Some of the standout statistics were as follows:[19]

- 69% of respondents agreed that they had constant time pressure due to a heavy workload;
- 77% of respondents agreed they experienced many interruptions and disturbances while performing their job; and
- 71% of respondents agreed that their job had become more demanding over the past few years.

Over the last 10 to 15 years, there has certainly been an increased focus on, and improved awareness of, stress, mental health issues and general wellbeing of legal practitioners. Many firms now boast health and wellness initiatives such as corporate gym memberships, health and wellness budgets for teams/departments and general health check-ups for their employees. There are even education sessions focused on mindfulness. Whilst these are all excellent initiatives, they are mostly focused on addressing symptoms of stress and building resilience, as opposed to providing primary prevention strategies to address the causes of mental health and wellbeing decline[20] such as excessive workload.

Primary intervention strategies are "[p]roactive initiatives intended to eliminate or reduce job stressors in the organisation or work environment (e.g. reducing job demands)".[21] There are many ways in which a personal injury practice firm can seek to eliminate or reduce excessive workload demands for its practitioners, including but not limited to:

a. Looking beyond file numbers as a measure of workload and capacity;
b. Ensuring adequate support;
c. Monitoring non-file commitments and workloads; and
d. Monitoring remote access work outside of usual work hours.

High file numbers, inadequate support, over commitment to non-file areas and taking work home via remote access each contribute to excessive workloads. Unfortunately, all four are common in a personal injury practice and, collectively, give rise to a not insignificant risk of excessive workload and decline in practitioner mental health and well-being. It is therefore important that law firms have adequate policy and procedure in place to identify, monitor, assess and respond to these factors, which (if left unchecked) can have very negative effects on the individual and the wider practice.

Each of the above four factors is briefly discussed below.

a. Look beyond file numbers

Determining appropriateness of workload simply by reference to the number of files a personal injury lawyer has carriage of is not, in my opinion, adequate. There are many

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[19] Chan, Janet; Poynton, Suzanne; Bruce, Jasmine, *"Lawyering Stress and Work Culture: An Australian Study"* [2014] UNSWLawJl 39; (2014) 37(3) UNSW Law Journal 1062.

[20] Marianna Papadakis, *Lawyers have lowest health and wellbeing of all professionals, study finds*, Australian Financial Review, published online 20 November 2015, https://www.afr.com/leadership/lawyers-have-lowest-health-and-wellbeing-of-all-professionals-study-finds-20151118-gl1h72

[21] Poynton, S. et. al., *Assessing the effectiveness of wellbeing initiatives for lawyers and support staff*, UNSW Law Journal, Vol 41(2), 584, 592.

factors relevant to the files that comprise the overall file load number that must be considered if a managing partner or solicitor is to properly determine workload. This includes, but is not necessarily limited to:

- What types of files comprise a practitioner's caseload? 60 motor vehicle accident cases where liability is admitted will create a lower workload than 60 cases crossing over public liability and work injuries where both liability and quantum is in dispute. The workload may be even higher where cases involve multiple respondents and/or other claim complexities and time limit pressures.
- Are all cases within the practitioner's skill/experience/competency or should they be transferred elsewhere? This is relevant for every matter that is opened, but is especially important to keep in mind when a lawyer is taking over an entire caseload of another lawyer.
- What stage are the files at and are there any events or milestones coming up that will significantly increase the practitioner's workload? Does the practitioner have multiple conferences or mediations scheduled in a short space of time? Do they have any matters listed for trial? These factors can cause intense periods of stress and pressure. Forward planning and adequate management of those periods can help ensure that, when the period passes, the practitioner is not left with a mountain of backlog and newly urgent issues (which increase the likelihood of risks eventuating).
- What proportion of the files involves psychological/psychiatric injury and/or horrific incidents? Should consideration be given to distributing some of those files to mitigate risk of vicarious trauma?

b. Ensuring adequate support

Legal practitioner workload can be significantly impacted, for better or worse, depending on the competency of support staff. Consideration needs to be given to the following factors to ensure the right people are in the rights jobs:

- does each legal practitioner have access to adequate secretarial and administrative support for the purpose of delegating work?
- Are the supporting team members adequately skilled and experienced or is inadequate support creating additional work for practitioners?
- What processes are in place to ensure the right people are in the right positions and that performance is regularly monitored? For example, are legal practitioners being involved in feedback and discussions regarding the suitability and adequacy of support staff?

c. Monitoring non-file commitments and workloads

It is a reality of modern private practice that business development forms part of a personal injury lawyer's role. In addition, there are an abundance of committees, groups, events and continuing education opportunities that present themselves to practitioners are every stage of their career. These components of modern-day practice alone can equate to many hours of commitment and work in addition to the case work a practitioner must complete.

Managing practitioners are not always aware of the level of involvement of their individual team members and how it may be impacting upon their ability to complete their file work, this is especially so in firms where daily time recording is not the norm.

This is not to say that involvement in non-file commitments and group should not be encouraged or supported. Involvement in these areas can have its own benefits and assist practitioners to obtain increased enjoyment and fulfilment in their career. However, non-file commitments should not be prioritised over primary workloads where the backlog of work increases the risks that a personal injury practice is exposed to. Legal practitioners should be encouraged to have full and frank discussions with their managers with regards to conflicts or issues arising from over-commitment to non-file related areas. Consideration should be had to including such discussions in reviews and dedicated "catch-ups".

d. Monitoring remote access

Many legal practitioners remotely access their emails – they have them right there on their smartphone – available to them 24/7. Even with the best of intentions to restrict the amount of time spent on work emails outside of the office (and in personal time), this can be difficult to achieve.

If a practitioner is not able to adequately self-monitor their out-of-hours access to work related emails, this can have significant effects on the practitioner's well-being.

Does a legal practitioner really need to have access to their emails outside of the work environment? If they do, is this for legitimate reasons, such as their role taking them out of the office and on a regular basis? Or is their need for remote access a sign that they are not managing their workload during work hours and reasonable overtime hours?

Remote email access should not be freely and unconditionally given simply because it can. Leaving aside issues of data and cyber security (discussed further below), a practitioner's failure or inability to "disconnect" from file work can negatively impact their wellbeing. Consideration should be given to implementing a policy that requires management approval to remote access and other factors such as monitoring of the hours of use and early identification of patterns or trends of use that exceeds reasonable overtime hours.

Managing critical time limits

We have said it on countless occasions – strict time limits apply to personal injury claims. This is not intended to be a discussion on what those time limits are or how to calculate them – that is a substantive law issue and outside the scope of this paper. Suffice to say, there are various critical time limits that arise throughout the life of a personal injury claim and a personal injury practice should ensure that it has clearly identified the types of time limits that are considered to be "critical" and that therefore need to be proactively monitored.

According to the QLS, "[o]ne of the major reasons for both professional negligence claims and client dissatisfaction is that solicitors fail to observe time limits".[22] The failure to protect

[22] Queensland Law Society, *Guide to appropriate management systems – 1.1 Appropriate management systems and the 10 commandments* (March 2017: Version 1.1), p 16.

critical time limits is generally caused by delay in the provision of legal services, but can also be caused by lack of legal knowledge and inadequate investigation or identification of material facts (see for e.g. the earlier discussion on the risk of pigeon-holing claims).

If you hold a practicing certificate, failing to protect a time limit on account of delay or lack of knowledge will be a breach of, at least, rules 4.1.3 and 4.1.5 of the Australian Solicitor Conduct Rules. Separate to any disciplinary action taken against you, the affected client may sue the firm for professional negligence.

It is therefore integral that, as part of any risk management framework implemented by a personal injury practice, issues such as *delay* and competency are addressed. As stated earlier, *delay* and *negligence* both fall under the 10 commandments that should be addressed to ensure an adequate management system. Those issues are not dealt with in detail in this paper.

According to claims analysis, the primary reason for a personal injury practice failing to protect a time limit is because the practice does not have an adequate reminder or diary system.[23] This is interesting because, in the context of risk management systems and processes, a diary or reminder systems appears (on its face) to be one of the simpler structures to create and implement.

The types of time limit reminder systems that I have come across in practice include:

- a centralised data base of dates that is regularly monitored and accessible at any time by any person, including a process whereby practitioners are reminded of upcoming time limits and required to confirm the steps being taken to protect them;
- computerised diaries;
- manual recording of time limits on file checklists secured to the front of all files; and
- capturing of time limits in outlook in the calendar of the practitioner with carriage of the matter and their assistant.

These systems have varying degrees of effectiveness. In my experience, the most effective system was the combination of a centralised database and proactive reminders. Any system that relies upon practitioners to capture and monitor their own time limits with no oversight or backup is not an appropriate system.

The QLS *Guide to appropriate management systems* provides helpful guidance on the limitations and benefits of different types of reminder systems. The following extracts are particularly helpful for personal injury practitioners and should be considered when developing, or re-assessing, the time limit reminder systems you currently have in place:[24]

> *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.*

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[23] Queensland Law Society, *Guide to appropriate management systems – 1.1 Appropriate management systems and the 10 commandments* (March 2017: Version 1.1), p 16.
[24] Queensland Law Society, *Guide to appropriate management systems – 1.1 Appropriate management systems and the 10 commandments* (March 2017: Version 1.1), p 17.

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.

Managing client expectations as to costs

Cost disclosure requirements and adequate management systems for no-win no-fee agreements

Division 3 of Part 3.4 of the LPA prescribes various costs disclosures that must be made by a law practice to achieve compliance with the LPA. The LPA imposes obligations as to initial disclosure pursuant to ss 308, 309(1) (legal costs of another law practice), 312 (settlement of a litigious matter) and 313. This includes, amongst other things, as estimate of the legal costs associated with the scope of legal services to be provided under the Costs Agreement.

There is then a continuing obligation to disclose under s 315. Section 315 provides:

> *A law practice must, in writing, disclose to a client any substantial change to anything included in a disclosure already made under this division as soon as is reasonably practicable after the law practice becomes aware of that change.*

Costs disclosure obligations continue throughout the life of a file to the extent required by s 315.[25] The most likely matter requiring reappraisal and further disclosure is the estimate of professional costs.

If any disclosure initially provided under sections 308, 309 or 312 has been the subject of substantial change, the obligation to provide ongoing disclosure under section 315 will be triggered. For example, an additional respondent is identified during the early stages of the claim and the respondent needs to be joined, which will increase costs over the life of the claim.

There are implications relating to payment of costs that flow from a failure to comply with the obligation of ongoing costs disclosure. In addition, a breach of the section 315 obligation of

[25] Queensland Law Society Ethics Centre, Guidance Statement No. 2 Ongoing Costs Disclosure: 1.3 Status of this Guidance Statement, 5 May 2015, p 2.

ongoing disclosure may constitute a breach of a practitioner's ethical duty to act in the best interests of a client, along with a breach of rule 4.1.1 of the ASCR which incorporates that same obligation.[26]

In terms of compliance with the ongoing obligation of costs disclosure under the LPA, the QLS has issued *Guidance Statement No. 2 – Ongoing Costs Disclosure (Published 5 May 2015 (revised 25 July 2017).* Whilst the Guidance Statement does not have any legislative or statutory effect, it is endorsed by the LSC as representing a "good standard of practice".[27] Practitioners are encouraged to familiarise themselves with the Guidance Statement. For the purpose of this paper, the following extracts from page 3 of the statement *What is the issue?* are particularly helpful:

> *The meaning of the word "substantial" in s 315 has not been the subject of any judicial consideration. However, the ordinary meaning of the word suggests that a change which is essential, material or important will trigger the obligation to make disclosure of it. It is important to bear in mind that it is a substantial change to something which has been the subject of disclosure under ss 308, 309 or 312 which triggers the obligation under s 315.*
>
> *In practice, it will almost always be a substantial change to:*
>
> a. *the estimate or range of estimates of total legal costs and the explanation of the major variables affecting that (s 308(1)(c));*
> b. *(in a litigious matter) the range of costs that may be recovered if the client is successful or which the client may be ordered to pay if unsuccessful (ss 308(1)(f) and 308(4));*
> c. *the likely costs of a barrister retained in relation to the matter, to the extent that the barrister makes a further disclosure (s 309); and*
> d. *the estimate of legal costs payable by the client if a litigious matter is settled (s 312),*
>
> *that triggers the obligation to make further disclosure under s 315.*
>
> *Difficulties often arise in "no win no fee" matters or matters where the law practice agrees to defer rendering any invoices for legal costs until the conclusion of the matter (not uncommon in family law property and maintenance matters). In those circumstances, the law practice may not be able to readily compare the amount of the legal costs actually billed to the client with the estimate given when initial disclosure was made. Practitioners should be astute to have in place a system or other means by which work in progress is periodically reviewed against the initial disclosure and where it appears that the legal costs which will be invoiced at the conclusion of the matter or upon a successful outcome in a "no win no fee" matter are likely to substantially exceed those the subject of the initial disclosure, ongoing costs disclosure pursuant to s 315 must be made. Most modern legal costs software permits a practitioner to record the estimate made at the commencement of the matter and to set a "WIP alert" or "WIP alarm" when work in progress recorded on the system exceeds or approaches the initial estimate.*
>
> *It is recommended that practitioners ensure that the file, costs agreement and estimates provided are reviewed upon:*

[26] Queensland Law Society Ethics Centre, Guidance Statement No. 2 Ongoing Costs Disclosure: 1.3 Status of this Guidance Statement, 5 May 2015, p 1.
[27] Queensland Law Society Ethics Centre, Guidance Statement No. 2 Ongoing Costs Disclosure: 1.3 Status of this Guidance Statement, 5 May 2015, p 2.

a. *a matter reaching a milestone in its progress (e.g. completion of disclosure in a litigious matter, the completion of due diligence); and/or*
b. *a substantial change in the facts or instructions; and/or*
c. *an invoice being rendered.*

An estimate may then be made of the costs anticipated to complete the matter, which can be compared with the estimate made when initial disclosure was provided. Any substantial change will require further disclosure under s 315.

Given the consequences of a failure to make disclosure required by s 315, it is suggested that prudence – and good practice in any event – requires that practitioners err on the side of caution; if in doubt, make the further disclosure.

Compliance with the relevant costs disclosure obligations not only helps to ensure compliance with the ASCR and a practitioner's ethical duties, but also assists in managing a client's expectations as to the costs of their personal injury claim. That said, it is not simply enough to have provided cost estimates in writing and practitioners need to ensure that the initial costs disclosure and any updates are understood. Effective communication is therefore key to managing costs expectations!

Understanding and managing client expectations generally

In order to adequately manage client expectations in relation to costs, a personal injury practice must understand how expectations are formed and can be managed.

The formulation of expectations is a psychological process.[28] Given this, the management of client expectations requires legal practitioners to apply more than just management system process and procedure to ensure that expectations are adequately managed. Consideration must be had to each individual client, their personal circumstances and experiences and the legal practitioner's observations and assessment of each client that will naturally arise from their interactions with them.

In an online article published by the Australasian Legal Practice Management Association in 2013, written by Vue Consulting[29] and titled *Client Engagement vs Client Expectations*,[30] they set out *5 Tips to Management of Client Expectations*. The tips provide a helpful starting point for managing client expectations from a risk management perspective, as processes and procedures could be developed with a focus on achieving these outcomes:

1. **Stop making assumptions!** – while clients have a core of similar expectations, every client is different and has different experiences shaping their expectations
2. **Put it in writing (and following up verbally)[31]!** – Humans are visual creatures. Give clients something in writing which they can discuss with you and give the

[28] George Katona, *How Expectations Are Really Formed*, Challenge, Vol. 23, No. 5 (November/December 1980), p 32.
[29] Vue Consulting is a client referral training consultancy firm.
[30] Australasian Legal Practice Management Association, *Client Engagement vs Client Expectations*, published online 20 August 2013, http://www.alpma.com.au/a-survival-guide-for-legal-practice-managers/client-engagement-vs-client-expectations accessed 10 March 2019.
[31] This is my own addition to Vue Consulting's 5 Tips.

client the option of meeting with you to discuss costs if they have any questions or concerns.

3. **Don't let clients be passive! –** Don't just present clients with the cost figures and leave it at that. A client who is passive and not speaking isn't necessarily agreeing or understanding. Ask the client direct questions and satisfy yourself that they have given a considered response. Have you really adjusted the client's expectations (especially in respect of a s 315 LPA adjustment) or are they just nodding?
4. **Document key expectations! –** This is already a requirement in respect of personal injury claim costs, which must be advised and updated in writing.
5. **Check in periodically!** – don't wait until the last minute to address costs disclosure. A good example is the compulsory conference costs statement. Whilst the costs set out in the statement should not exceed prior disclosures, clients are often "surprised" by the amount of costs appearing in that costs statement. Send the costs statement as early as possible, follow tips 1 to 3 above so that you are aware of any expectation issues as soon as possible. Your practice may even consider including cost updates in the written general claim and milestone updates to clients. Not only will this help in managing client expectations, but it would also provide an additional layer of risk management in terms of s 315 LPA compliance.

The LSC has also published several Fact Sheets for both practitioner and client benefit, including in respect of client communication. According to the LSC, they often receive complaints from clients whose costs expectations have not been met.[32] And as set out earlier in the LSC Annual Report commentary, 46% of matters dealt with in the 2017 – 2018 financial year related to costs. The LSC sees the client agreement as providing a *basis* for communication but agree with my above sentiments that it "[s]hould never be relied upon as the only or main means of communication. There needs to be regular communication at appropriate intervals"[33] and practitioners must understand their clients' expectations in order to adequately manage them.

Dealing with conflicts of interest between multiple files

The foundations of the conflict of interest are the fiduciary duties of loyalty, confidentiality and not to put your own (or anyone else's) interests before those of your client.[34]

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[32] Legal Services Commission, *Fact Sheet 7 – Communicating with your client*, http://www.lsc.qld.gov.au/_data/assets/pdf_file/0008/598832/FACT-SHEET-7-Communicating-with-your-client-March-2019.pdf accessed 9 March 2019, p 1.
[33] Legal Services Commission, *Fact Sheet 7 – Communicating with your client*, http://www.lsc.qld.gov.au/_data/assets/pdf_file/0008/598832/FACT-SHEET-7-Communicating-with-your-client-March-2019.pdf accessed 9 March 2019, p 2.
[34] J Pakula, Ethics Solicitor, Law Society of NSW, "Conflict of interest – Practical Aspects", https://www.lawsociety.com.au/sites/default/files/2018-03/conflict%20of%20interest%20-%20practical%20aspects.pdf accessed 11 March 2019.

A personal injury practice, and its respective legal practitioners, should not act for a client where there is a conflict of interests (or a perception of a conflict). To do so would be in breach of the ASCR and, likely, one or more of the above fiduciary duties.

In the practice of law generally, there are three primary areas where a practitioner or practice may come across a conflict:

1. Acting for one client against a former client;
2. Acting for one or more individual clients with different interests;
3. Business or personal conflicts (e.g. acting for an individual against a person or organisation who is a source of referrals for the practice or acting for family members).

The relevant area of conflict for the purpose of this paper is *acting for one or more individual clients with different interests*. Specifically, this refers to accidents or incidents wherein multiple individuals are injured and wish to pursue a claim.

The following factual scenarios represent circumstances under which a conflict can arise between the interests of two (or more) injured persons in the same claim:[35]

1. **Motor vehicle accident (MVA):** a parent (driver) and minor child (passenger) are injured in a MVA and both schedule a consultation to speak with a practitioner in the firm. The MVA involved three vehicles in what would be described as a concertina accident. Their vehicle was rear-ended, however, at the time of initial consultation it is not clear whether the parent driver (1) collided with the car in front first and was *then* rear-ended, or (2) was rear-ended by the last car which *then* caused them to collide with the car in front. Given the uncertainty with liability, it is possible the parent driver may bear some liability for the accident. Accordingly, the minor child would need to pursue a claim against the parent and the other driver. There is a conflict of interest between the parent and the minor child and the personal injury practice cannot act for both. There is also the issue of the minor child having to find a different litigation guardian for the claim.

2. **MVA:** a motorcycle driver and pillion passenger are both injured in a multi-vehicle accident. The circumstances of the accident related to the vehicles merging into one lane. Arguably, both drivers are at-fault and so the pillion passenger would need to pursue a claim against both drivers. There is a conflict and you cannot act.

3. **Work injury:** two underground mine workers are injured in the course of their employment. One of the workers is the supervisor. They both seek to be engaged to purse a damages claim. The workers were injured during a rock collapse whilst they were performing rock-bolting. The alleged negligence is that the mining company used the incorrect type (size too small) and system (incorrect spacing) of rock-bolts and this caused the collapse. However, the mining company argues that the injured supervisor is also to blame because he acted contrary to previous training, instructions and specific warnings, which included not using the smaller bolt size. Accordingly, the worker will need to advance his claim on alternative grounds of negligence, that is, the negligence of the employer mining company or the employer's vicarious liability for the negligence of the supervisor. There is a conflict and you cannot act.

[35] I would like to acknowledge Mr Dominic Murphy, Barrister, 31 West Chambers, for his input on these factual scenarios.

4. **Public liability:** two proud homeowners were hosting a dinner party on the deck of their newly constructed home. Six people suffered personal injury when the deck collapsed, including the two homeowners. All six injured parties seek to engage the practice in a claim against the builder and/or architect for faulty design of the deck. The builder and/or architect respond to the claim by arguing that the homeowners contributed to the deck collapse, for example by loading the deck with heavy items after the building was certified, to a point that exceed the loading capacity of the design. The guests will need to add the homeowners to the claim. There is a conflict and you can no longer act for the homeowners.

Rule 11.1 of the ASCR states, "[A] solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule". Exceptions are based upon informed consent[36] and, in some circumstances, the use of information barriers.[37] Even in the event of informed consent, practitioners should think carefully about whether it is worth continuing to act. Actual or potential conflicts, which appear management at first blush, could be ticking time bombs.

In the above scenarios, the conflict (or potential conflict) may have been discernible at the point of initial enquiry. It may not have become apparent until the claim was commenced and responded to. In the former scenario, the personal injury practice should not act for all parties. In the latter, it will be necessary to advise all clients of the emergence of the conflict and take appropriate steps to terminate the retainer of the relevant party/parties.

It is not the case that a personal injury practice cannot act for multiple parties injured in the same accident on *every* occasion. But the possibility of a conflict in those circumstances must be at the forefront of mind when taking initial instructions. How is your personal injury practice managing the risk of a practitioner not picking up on an actual or potential conflict? Is there record of the practitioner having considered the possibility and conflict, as well as record of re-considering conflicts when the claim is responded to or further respondents are joined to a claim? Practical measures such as precedent initial instruction checklists and supervising partner approval of client selection can be easily implemented to help address this issue. Review of the status of conflicts could also be added to the recurring file audit that should be a staple of any risk management system.

Again, QLS Ethics Centre provides practitioners with resources and guidance on identifying and dealing with actual and potential conflicts. The *Conflict resolution steps checklist*[38] is a particularly handy tool that could easily be integrated into a practice's risk management system.

Consideration should also be had of ASCR rule 25.1 regarding conferring with more than one lay witness (including a party or client) at the same time. Compliance with rule 25.1 needs to happen from the very first consultation so that there cannot be any questions about the integrity of evidence. Even in the event of a parent / minor MVA (scenario #1 above), if the parent was the driver of the vehicle, the parent should be advised to bring another adult to

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[36] *Australian Solicitor Conduct Rules 2012*, 11.3.2, 11.4.1 and 11.5.
[37] *Australian Solicitor Conduct Rules 2012*, 11.4.2.
[3838] Available online at http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Conflicts_concerning_former_clients/Conflict_resolution_steps_checklist accessed 11 March 2019.

the consultation to sit in with the minor. But be sure to provide the parent with an explanation as to why that is necessary and do so in a way that does not suggest you are accusing them of causing injury to their child. That is not likely to be received well.

Data management and cyber security

A personal injury practice is continuously obtaining, creating and accessing data relating to their clients and their respective matters. The volume of data is immense and can take many forms, such as verbal instructions recorded in a file note, emails, general file notes, documents, advices and data captured in computers and legal management software.

Firms must always keep in mind the obligation of confidentiality they have to their clients.[39] The obligation is nearly absolute as there are only limited exceptions.[40] In addition to this, practices need to ensure compliance with privacy laws.[41]

Given the obligations with respect to confidentiality and privacy, along with the increased use of technology, the management and protection of data is a key risk area. The information and data held by a law firm is at risk of both *internal data loss* and *external data loss*. This paper discusses these particular risk sources in further details.

Internal data loss

The people, technology and work practices of a personal injury practice at any given time can be the source of internal data loss. This includes, without limitation, loss caused by:

- incorrect filing of documents (refer above to risks associated with managing large volumes of similar files);
- technology break down;
- inadequate file noting of instructions;
- employees taking data home (e.g. emailing documents to personal email to work on them at home, taking physical files home);
- departing employees taking documents;
- inadvertent disclosure.

Practical measures can be implemented to limit the loss of data caused by the above and the following table provides details of some common examples:

Risk	Risk Management Measure
Incorrect filing	• electronic copy of all incoming documents and correspondence prior to being reviewed / filed • file structure protocols for physical files • practitioner notation of correct file number on documents for clients with multiple files

[39] This obligation arises at common law (it is implied in all retainers), in equity and under Rule 9 of the Australian Solicitors Conduct Rules 2012 (ASCR)
[40] See Rule 9.2 ASCR – consent etc.
[41] *Privacy Act 1988 (Cth)*.

	• periodic file audit
Technology breakdown	• established process to respond to technology breakdown • back-up of files (whether separate electronic back-up or physical files)
Inadequate file noting	• Education and training on the expectations of detailed file noting • period file audit – including auditing of WIP entries against file notes (e.g. a 10 unit time recording for a telephone attendance on a client should correspond to an file note that is representative of such a lengthy discussion – "Phone attendance on client" and nothing else would be a major red flag)
Employees taking data home to work on documents	• Employment contract terms • Policies • Port blockers
Departing employees taking documents[42]	• Employment contract terms • Policies • Port blockers • Surveillance of computer systems
Inadvertent disclosure, e.g. holding documents/files in public where names and information is clearly visible, talking about a matter in public in a manner that might identify the client or other party	• Identification of the ways in which information can be inadvertently disclosed and internal training/education to ensure awareness;[43] • Provision of various sized bags and suitcases for transporting files and documents

External data loss[44]

Personal injury practices are constantly gathering enormous amounts of private data. At the same time, the rates of data theft are increasing and practices are exposed to the very real risk of external data loss, specifically through cyber attack.

While it used to be the case that data breaches would require removal or copying of physical files, most personal injury practices today are operating electronic files. Accordingly, practices today that are unprepared and operating inadequate risk management systems are at serious risk of external data loss, including the potential of having the entirety of their electronic files hijacked within a matter of minutes.

Internally, a personal injury practice can mitigate the risks of data breaches by ensuring that their data storage systems are secure. Some firms utilise on premise data storage and some

[42] Malcolm Burrows, Legal Practitioner Director, Dundas Lawyers, *Legal issues for data loss*, published online 15 November 2016, https://www.dundaslawyers.com.au/legal-issues-for-data-loss/ accessed 12 March 2019.
[43] See for e.g. QLS Ethics Centre Note *Loose Lops Sink Ships*, authored by Stafford Shepherd, Senior Ethics Solicitor.
[44] I would like to acknowledge the input of Mathew Taylor, Managing Director, Shift Computer Solutions, to the discussion on "external data loss". I had the opportunity to sit down with Mathew and discuss risks and risk management in the technology space on 11 March 2019.

utilise cloud services. The security pros and cons of both systems should be discussed with your IT advisor, not just the operational advantages, to ensure you are making fully informed decisions that provide the best security for your practice's data storage and protection.

In regard to cloud services, practices should also ensure that IT providers have set the practice up with best practice security policies. Cloud services such as Office 365, for example, provide strong second factor authentication as well as mobile device management ensuring email data is not compromised by the use of smart phones.

With the wide deployment of laptops, practices should also ensure that laptops are encrypted, and that users are trained to ensure the laptop is switched off when not in use. Laptop loss is a significant way data is stolen and lost. An unsecured laptop out in public makes for an easy target.

In terms of cyber attacks generally, the following table sets out some possible risk management measures to be considered; however, technology and cyber-security are highly specialised areas and practices should be seeking the advice and guidance of appropriately trained and educated IT and security advisors. The suggestions set out below are sourced primarily from Lexon Insurance.

Risk	Risk Management Measure
Cyber attacks[45]	• seek professional advice from your IT advisor and engage their assistance for both development, implementation, monitoring and review; • ensure email accounts are secure (and stay secure) • warning to staff of risks of cyber attacks and what to look out for • implement systems and security settings aimed at making it difficult for malware, such as configuring web-browsers and applications for security, running reputable and up-to-date Anti-Virus that is configured for regular self-updating and system monitoring, [46] • make it harder for attackers to operate your system remotely, for example, ensure Remote Desktop Protocol is turned off, identify and actively control the devices that can access your system remotely, establish multi-factor authentication for all users using remote access solutions, ensure firewalls are correctly configured • ensure traceability of hacker access and attempts of access and have in place firm process and policy for dealing with an attempted or successful hack. Traceability may be achieved by enabling event logging on your

[45] Suggestions have been taken directly from the Lexon Insurance *A Lexon Lastcheck: Cyber Security – IT Systems*, for use from November 2018, accessed 10 March 2019.
[46] Malware is software that is specifically designed to disrupt, damage, or gain unauthorised access to a computer system.

	system or network, alerts to notify you of unusual activity and automatic system lock-out in the event of too many failed log-in attempts • have a cyber attack first response procedure so you know what to do immediately when notified of an attack – the QLS has published a "First Response checklist for law firms subjected to a cyber incident"[47] that is a good place to start! • manage user ability to install new software – set user and account privileges to a level consistent with the degree of risk identified

A big piece of the risk management puzzle is high quality ongoing security awareness training. Most people, lawyers included, are just not aware of how sophisticated criminal attacks are, and the only good defence against them is education. IT providers can supply this training including testing to see which users are still susceptible to these kinds of attacks so that knowledge gaps can be plugged with further training and system gaps can be plugged with adequate fixes.

Personal injury practices should also consider the security of their clients' systems and recommend similar actions be taken, as breaches may occur on the client side, with whom the firm has communicated electronically. For example, how many of your clients are emailing you from multiple accounts (personal, work, spouse etc). Are they doing this from home, their mobile device, public computers, on unsecured Wi-Fi connections?

Concluding thoughts

Risk management in a personal injury practice is no small task, but it is integral to ensuring the provision of adequate legal services, satisfied clients and compliance with the many rules, duties and obligations that come with being a personal injury lawyer. Risk management systems and protocols should be intimately intertwined with the business and day-to-day practices of a personal injury practice at all levels and across all departments.

All staff, whether they hold a practicing certificate or not, have a role to play in effective risk management. Their engagement in that process and their compliance ability is underpinned by training, education and consistent communication and messaging from management and those who hold key risk management accountabilities.

Whether you are new to personal injury practice, in the early stages of starting your own firm or have been 'in the game' for a number of years, we all face similar challenges. It is also in our collective interests that our personal injury law colleagues are adequately managing risks within their own practices because the profession as a whole tends to be tarred with the same brush when things go wrong.

47 http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Cyber_security/First_response_checklist_for_law_firms_subjected_to_a_cyber_incident

If you are struggling within your practice to adequately manage risks or simply looking for ways to re-invigorate and improve your current systems, starting a dialogue with other practitioners in the industry can be a great way to expand your knowledge. Your own teams can be a great source of feedback and ideas for your specific practice and there is also an abundance of freely available tools and resources to assist you.

So don’t let poor risk management in your personal injury practice be the cause of sleepless nights – as set out at the start of the paper, we’ve already got enough to worry about!