IS YOUR FIRM PRIVACY COMPLIANT?

By Simone Herbert-Lowe

Solicitors have always been custodians of confidential information. Our obligations to maintain the confidentiality of information received during the solicitor/client relationship arise through the common law, contract and equity. More recently, privacy legislation has put additional obligations upon many organisations that hold sensitive personal information. These obligations are not limited to clients and may extend to personal information held about any individuals. While there has always been a need for solicitors to keep information confidential, there is now increased awareness of the need to prevent or respond to data breaches in a world where digital communications are the norm and technology amplifies the risk of information being illegally accessed or unwittingly disclosed to a wider audience.

How do data breaches occur?
Data breaches can occur in many different ways. Examples provided by the Office of the Australian Information Commissioner (OAIC) include lost or stolen laptops, removable storage devices, hard disk drives and other digital media containing personal information due to technology illegally accessed or unwittingly disclosed.

What can you do to protect your practice?
Your firm’s risk for a data breach depends on which of the following categories your law practice falls into: old or new firms, small or large practices, in excess of $3 million or not.

For old or new firms
In this category, any practice is required to comply with the Privacy Act. Note that the privacy obligations are in addition to any professional and ethical obligations.

For smaller practices
This category includes all businesses and not-for-profit organisations. The extra obligations required for you to comply are:
• New privacy legislation due to commence in early 2018 will require the mandatory reporting of certain data breaches for organisations which are required to comply with the Privacy Act.
• Be aware that the new legislation could apply to your firm and to your clients.

For larger practices
This category includes larger practices with annual turnover in excess of $3 million will be subject to the legislation.

Legislation because:
• New privacy legislation due to commence in early 2018 will require the mandatory reporting of certain data breaches for organisations which are required to comply with the Privacy Act.

Risk for solicitors
Direct risks for law practices
Regardless of size, all law practices are required to comply with the new privacy legislation because:
• larger practices with annual turnover in excess of $3 million will be subject to the legislation.
• many practices hold TFNs and are subject to the legislation for the purposes of those records; and
• many solicitors hold health records (for example lawyers who act in personal injury litigation or those who hold medical certificates in relation to individuals’ legal capacity for the purposes of powers of attorney).

If your law practice falls into any of these categories it will be required to comply with the new privacy regime and you should prepare for its introduction in early 2018.

Assessing whether your firm’s privacy protections are adequate
Breaches of privacy occur through both failures in technology and negligent actions by individuals. Workplace culture is an important predictor of an organisation’s vulnerability to data breaches (Daily Willis RevView, Willis Towers Watson, 16 March 2017). When assessing the likelihood of privacy breaches, consider the potential consequences of privacy breaches and whether it is appropriate for all employees to have access to sensitive personal information.

Implement appropriate training to emphasize the importance of protecting private information, particularly for new employees.

In terms of technology, ensure that software is up to date, and consider engaging a cyber security expert to assist you if required.

The OAIC has recommended that organisations consider implementing privacy enhancing technologies to secure personal information through encryption, access control, copy protection and intrusion detection.

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