

Episode 65

Close enough to catch it? Better oversight, fewer surprises

Intro
This is Risk on Air by Lawcover. In today's episode, we discuss supervision in legal practice for better oversight and fewer surprises.

Julian: Welcome to Risk on Air. I'm Julian Morrow and today we are talking about supervision in legal practice. How close is close enough to talk us through this topic. I'm very pleased to welcome Dr Felicity Bell, who's the Deputy Director of the Centre for the Future of the Legal Profession at the University of New South Wales Law and Justice.

Welcome, Felicity.

Felicity: Thank you, Julian.

Julian: It's great to have you and interesting to see also that your centre has produced a report on making supervision work for everyone. So this is a pretty timely discussion.

Felicity: Yeah, that report came out of a think tank that we held and we choose our think tank topics based on what we see as being topical and important for the profession at that moment.

Julian: Yeah, the report describes supervision as a foundational part of legal practice, but also an area where there is a profession wide gap, which we might have a discussion about. But first, one of the things at the heart of the challenge of supervision is what's described in the report as the supervision squeeze.

What's the supervision squeeze?

Felicity: Yeah, so we coined that term to capture the idea that other work that lawyers do, of which there is a lot can squeeze out time for supervision. So it's that idea that lawyers are already doing so much, particularly in a smaller practice where they also have a sort of management role, business development role, carrying their own files, etc. Supervision can really get squeezed out of the picture sometimes.

Julian: Because lawyers are always busy and matters always have pressing timelines. It's a really tough challenge. And I think generally managing people is one of the hardest things to do in any walk of life.

Felicity: Absolutely. It's really true. And lawyers, like most professionals, you tend to move up the hierarchy by being a technical expert rather than having amazing people management skills. And those aren't always prioritised or taught, or you're not always given training in those skills.

Julian: That was very diplomatically put, Felicity. But it's an interesting point, like where and how do lawyers actually learn how to supervise?

Felicity: What people often default to is the type of supervision that they received when they were a junior lawyer. And the stories that I've heard went in one of two ways. It was either extremely micromanaged, where they felt that they couldn't really grow and develop because they had a supervisor who was so intensely overseeing them and their work, or the laissez-faire, here's your files, there's your client, off you go. And neither of those are great. So, I think when it comes to being a supervisor yourself, there's a sort of vacuum there in terms of no one has necessarily modelled great supervision for me.

Julian: That's one of the things that seem to come out in the report, that profession-wide gap is the fact that there's not really much training in how to supervise it. The profession generally and individual practices would probably benefit from a bit of actual focus on the subject.

Felicity: Yeah, I think so. And the other thing that really did come through strongly was that people felt that supervision isn't really recognised or rewarded in a lot of organisations. So there was a sense that this isn't necessarily an easy thing to do or to do well, and we really need to champion the idea that this is a skill that is valuable and important and encouraged and should be rewarded.

Julian: Another observation, which I thought was really instructive, that supervision is often made up of small but consequential interactions. And the report says individually they might seem routine, but collectively they shape trust, confidence, learning and risk. I wonder what your reflections are on the mix of formal and informal aspects that can go into quality supervision.

Felicity: I guess when we tried to conceptualise supervision, we saw it as quite a complex task, or a task that's got to achieve a lot of different things. So risk management, developing a new person, teaching and learning, but also those interpersonal aspects like giving great feedback. So in some ways, our way of trying to get people to think about it in a way that seemed more manageable was like, well, let's think about all those small moments that make up supervision rather than thinking of it as this huge, massive responsibility for basically creating a new professional. And I think it was also in the context of limited time. Everybody is very time poor. You can't get away from it. So how do we make a really effective use of time? What are the moments that are really significant and how can we make sure that those moments are going to add up to a positive overall?

Julian: And one of the moments that might not jump to mind immediately is not actually when you're working on a matter, but when you start the job at induction, how can induction shape the, if you like, the culture of supervision in a law practice.

Felicity: I think that induction is so important because it is where expectations get set and managing expectations is kind of the number one thing that if you get that right, it's going to be much smoother. So, I think mismatched expectations and miscommunication more generally is kind of a large part of problematic supervision. So, it's that idea that at the beginning you're setting expectations for how your supervisee will behave, but you're also setting their expectations on what you're going to do for them, how the relationship is going to work. And the idea is that you really want to instil in them a sense that they can trust you, that you have their best interests at heart, that you're working towards this shared goal, which is them becoming a fully-fledged legal professional who no longer has to be supervised. If we get the expectations right and set the scene for how this is all going to work, it's going to save us heaps of time and problems down the track.

Julian: So that's one place of starting. The other place of starting, I suppose, is at the beginning of a matter when delegation of work occurs. What emerged from the discussion with the profession about what's needed at an initial briefing?

Felicity: Particularly the first tasks that you said are important because they have to be the right level for the person. So you don't want to give them something that is too challenging where they lose confidence. You maybe don't want to err on the side of too easy, but in some ways too easy is probably better than too hard. But you really want to be clear about, and this goes for all tasks, but I think in the early tasks it's even more important, what exactly they're being asked to do and why. So we have very limited research on supervision, but some research that we do have suggests that not just for supervised lawyers, but really for junior lawyers more generally, they need the context of the matter. They need to understand where the bit of work that they're doing fits into the bigger picture, because that helps them understand why it's important, why it matters, and it gives them a sense that it's meaningful and that they're contributing something to a kind of bigger picture, even if what they're doing doesn't seem exciting or important or worthwhile. So it's trying to give that motivation to do the task well.

Even though this seems like a very boring routine task, it is actually important because it feeds into this bigger aspect. And I think the other thing that you want to do in that task setting is give them absolutely as much help as you can. And it's really a time saving thing. You don't want them going off and spending two days doing research because they've misunderstood what they were being asked to do. You already had a precedent for that, or you already had the key case there. So it's not treating it like this is a test, let's see if you can pass. It's actually giving them as much as you possibly can to help them succeed.

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Julian: One thing that I think almost all lawyers have heard, even in the era of open plan, is my door is always open. How useful a comment is that? I suppose it's better than saying my door's always closed.

Felicity: Yeah, it's better than saying I'm not here or don't bother me. But look, the fact is your door isn't always open. And so I think an open-door policy was a favoured method of supervision for a really long time. That's the type of supervision that I had to an extent when I was a junior lawyer. And I guess from my own experience, I can say it can be very difficult to go through that door.

Julian: An open door can still be an intimidating entrance.

Felicity: That's right. So I think particularly at the start, this is really putting too much of an onus on the supervisee to work out at what point they should go through that door, what kind of things do they need to escalate to you, what kind of feedback can they trouble you for. And you run the risk that they just won't do that. They'll see it as the door's open but only for really, really important urgent things and I need to try and figure this out for myself first. And that's not necessarily what you want. And I think it's just that power differential, the differential in usually in age, but certainly in experience that means they're going to be reluctant to be the instigator of conversations. So, I really think it's the responsibility, at least at the beginning of the supervisor, to set times for discussion of things.

Julian: So, the onus is not fully on.

Felicity: No, I don't think so. Because I think as a supervisor, this is risky. You're going to miss too much. It isn't setting a great tone either to kind of put it all back onto them. So yeah, I think that setting regular times to talk, if that's what works for you, where you have a spare few minutes that you can slot something in to have those conversations quickly and as close to the thing that you're discussing as possible, is better than maybe going, we have a fortnightly meeting, let's just push everything to that 45 minutes or whatever it is.

Julian: Felicity, I wonder if you could speak a little bit about what is arguably the central challenge of supervision, which is striking a balance between how much you oversee with the risk that you might end up basically doing it yourself versus how much freedom is too much freedom?

Felicity: Yeah, it's a really good question and it's a tricky one. I think the first thing is that however you begin, you are expecting at the end of whatever time period it is, it might be a year, it might be two years, but you're expecting that at some end point, you are not going to need to manage the supervisee as intensively or review their work as intensively as you do at the start. I do think that as lawyers we can be quite risk averse and we can be quite perfectionist and that's understandable. We're concerned about standards for our clients and things like that. So, I'd say there are probably lots of people who tend towards the more micromanage type overseeing.

And I think in some ways the best starting point is to reflect on yourself at the beginning and think about which way you might lean. If you know that you have a tendency towards supervising maybe a bit too closely, then there's stuff that you might need to work on in order to give a little bit more space.

I think that one of the really important things that we talked about in the think tank was finding the right tasks, we call them stretch tasks, which are going to be just that little bit more challenging than the person has done before. So you always want to be giving them just a little bit more freedom or a little bit more room to sort it out by themselves or do it on their own. It can be hard. The memory from when I was an article clerk, which shows you how long ago it was, a partner asked me, it wasn't a partner I usually worked for, but he asked me to come and be on this phone call with a client who was being kind of difficult, like pushing back on the advice, not happy. And very early on in the conversation, the partner just threw up his hands and didn't leave the room, but basically walked off to the corner, just like, I can't deal with this person anymore. And it kind of just fell to me to take over the conversation and sort of finish it and I remember being absolutely taken aback. I did feel kind of chucked in the deep end, just like, oh, here, you take over, and with no warning that was going to happen. But actually, it was a great experience for me because I realised, oh I can do this. it was a stretch task. I'm not sure if it was planned.

Julian: Clearly not planned.

Felicity: Obviously that partner had decided at some point that I can trust Felicity to do this. She's not going to start making up the wrong advice or getting a shouting match with this client or anything like that. And it turned out that they were right and I could manage that, which then increased my confidence. So I think it's about recognising your own tendencies and thinking about how you might modify them if you need to.

Maybe you think you're doing a great balance of support versus oversight already. It's thinking about how to, I guess the educational term that we use is scaffold somebody's learning. So how to give them supports where they need it but also let them do a certain amount of working it out on their own. And it's also recognising that it isn't going to be this way forever. Ideally, if you do it, everything's going well, then in six months' time, hopefully you don't actually need to review every single line of the work that they did in the same way.

Julian: Let's go back to that moment of self-reflection that you were referring to. As you said, it is possible that every person self-reflecting will go, oh no, I'm actually just getting the balance perfectly right. But if they get to the next phase of self-reflection, sort of identify what might be some signs in the way you do things that are an indication of the fact that you are, on the one hand, too involved or maybe on the other, too distant.

Felicity: I think that if you're really open to hearing feedback, you can find this out.

If you're not sure, then the best thing to do is ask people that you trust to give you an honest answer and say to them, I won't be offended if you tell me that I am, but do you think that I check people's work too closely? Do you think that I should let so and so do something on their own? And if they say to you, no, I think everything's totally fine, they need that support, then okay. If they come back to you and say, well, actually, now that you mention it, you probably could back off a little bit on this or that, then hopefully you have some insight there.

Julian: A lot of this discussion about supervision can sound as though it's assuming the format of a medium to large-size firm where there are quite a few layers of seniority amongst the lawyers, maybe formal mentoring programs, plenty of people to ask, that sort of thing. Of course, that's not the reality for many practices. The principal might have a small setup where they're very busy and they've got to supervise staff, carry on files, manage clients and run the business as well. What does good supervision look like in a practice where people and time are really limited?

Felicity: It's a really great question and this did come out quite a bit in the think tank too. I think it's also important to remember that there can be a lot of benefits to a small practice. I know this is easy for me to say, but just by dint of being small, it is much easier to have relationships with people so it's much easier for everybody to know each other and each other's work habits and things like that quite well. So you're not routinely working with people where you're not really familiar with their style. You also have the benefit that communication is simpler and easier because there's not as many layers and people that things need to get to. I think if you have a small team, it is quite beneficial to have regular team meetings. You might need to have additional supervisory type meetings too. But I think bringing as many people as your firm has together, even just very briefly, is very helpful. And you really need to have, I think, very clear understanding about how things should be escalated and what things should be escalated.

So, it's quite likely that supervised lawyers in a smaller practice will have more freedom early on or more independence or they'll be doing more work on their own rather than as part of a larger team, for example. In which case I think you really need to make the most of sharing as much knowledge as possible with them ahead of time in relation to existing matters, in relation to past matters that might be similar, but also making sure that they understand, happy for you to do X, Y, Z up to here. But if this happens or if you get to this point or this thing, that's when I need to know about it. So it's setting those expectations. I think you can manage this and this and this on your own. However, there might be a point where you don't feel comfortable if that's when you need to come and get me.

Julian: And you're talking there in terms of the sorts of issues that might arise in the ordinary course.

I suppose a more challenging version of that is if something goes wrong, how do you determine what the threshold is for making sure a supervisor is told if an error's occurred, to what extent should lawyers be taking that on themselves to fix or escalating?

Felicity: I think it does depend on the nature of the error. I would say in most cases, the principal or the supervisor really wants to know about that, really needs to know.

Julian: There's a bit of protection there for the junior lawyer if the supervisor does know as well.

Felicity: Absolutely. I mean, I think the worst case scenario is an error that cannot actually be easily corrected or that is really significant that the person doesn't find out about. You know, there are disciplinary cases where that unfortunately has happened. That is the basis for a lot of disciplinary matters is that things spiral, someone makes an error, they try to cover it up or they try to fix it, doesn't work and so on and it tends to get worse from there. So I think as a supervisor, yes, you can say if any of these things happen, come to me. If you are worried that something might be wrong, but you could have done something wrong, if there's something that doesn't make sense, I really want to know about that. Going back to the open-door policy, you don't want to make that conversation a really, really hard one for people to have. You want them to be able to raise it as early as possible. And it might be that you can just go, yep, don't worry about it. It's not important. It doesn't matter.

Julian: Well, because there's two things there, aren't there? One is how they feel about communicating that there is an issue or a problem, but then controlling to the extent that you can, how you react when it actually happens is another challenge.

Felicity: Yeah, like I guess we talk about giving feedback that is immediate or as contemporaneous as possible, but the exception to that is where you're really, really annoyed or upset or disappointed or unhappy with whatever has transpired. If you're feeling very, very emotional about it, whatever that emotion might be, then definitely don't give the immediate feedback. It is better to wait and reflect on it. If something goes wrong, you really want people to be disclosing to you. If they're absolutely terrified of you, that increases the risk that they won't tell you and instead they'll try and fix it or hide it themselves, which is never going to lead to a happy ending.

Julian: So, Felicity, we've talked about the briefing and delegation, the start of a matter being a critical point for supervision. If something goes wrong, also clearly a really important moment in terms of risk management and mitigation. In the rest of the life of a matter, what are significant moments to be aware of in terms of the possibility of quality supervision or the risks associated with poor supervision?

Felicity: Some of the other ones that we discussed at the think tank were this idea of checking in quite early in a piece of work, assuming that this is something that's reasonably substantial, I guess, like you're not bugging someone 10 minutes after you've given them the task.

Julian: Do a good delegation, but then build in a check so that things don't veer off course a long way without being caught.

Felicity: Yeah, it's that idea that a stitch in time. Find out if things are on track, they seem to be approaching it the way that you expected or wanted them to, that's great. If they seem to have veered off into something else, then you can get it back on track before they spend too much time going down that wrong path. And then other moments we talked about were before something significant happens. So, if there's something that has to be filed, if there's a deadline, if there's a meeting, whatever it is that it's leading towards, check in before that moment, and I guess obviously, but when something changes, when there's new information, whatever it might be, maybe that's the time to go just checking that you're aware of this change or this new information. Do you have an idea of how you're going to approach that similar to the earlier check-in. And I think the other part that is less significant but can really round off the learning is this idea of a debrief. I don't think we're great at doing that, partly because we're so sick of a matter or we've just had enough of it or we want to break from it or we feel like it's been so much work that we just don't want to talk about it or think about it anymore. And so we tend to push it aside or delay it, but actually having a debrief is very useful potentially. It's where you can work out what did we learn, what could we do better. So it's great to have that, build in the time to have that as well. And maybe it could also be to celebrate it. Like we did this really well, let's give ourselves some credit. Supervisor, you did a great job.

Julian: A fruitful supervision relationship is a quite intimate personal dynamic and not all workplace relationships gel that well. I was interested in one of the observations in the report saying that ideally good supervision systems should include alternative pathways and alternatives for support, but also for escalation. That struck me as really interesting. I wonder if you could speak a little to that.

Felicity: Yeah, so I think it is recognising that, as you say, people don't necessarily gel with one another. And one of the difficulties that people discussed in the think tank was if you are receiving very poor supervision or you feel that you're receiving very poor supervision or you just don't get along with your supervisor, whatever it might be, you can feel quite stuck. If you're in a large organisation, yes, there's a possibility to sort of move within that organisation. If you're in a smaller practice, you might be left with, well, do I leave and run the risk that I won't find another place to finish my supervised legal practice? Or do I stay in a situation? Anything from it's not great to there are workplace issues which are very, very negative like bullying or harassment or something like that.

This discussion was about what are some ways that people can build in, as you say, alternative pathways where instead of everything being dependent on my relationship with this one person, who has a lot of control and power about what my work experience is like, can they be given other options, at least a different person within the organisation to talk to or to get support or even help from.

Bearing in mind we had a think tank full of people who are really passionate about supervision and think it's really important, which it is. It was in the context of people saying, we are asking supervisors to do a lot. This role covers a lot of things. It's not necessarily meant to be or designed to be like a mentoring or supportive type role. It might be, but maybe it's also beneficial to have another person who is more occupying that mentor type role, who might be giving more of the interpersonal support, whereas the supervisor is more focused on work and professional development, etc.

Julian: Felicity, I'd like to ask you about supervision in the context of some really profound changes that have come to all workplaces, including lawyers. The first one is working remotely. How does that change the challenges of supervision?

Felicity: Yeah, working remotely is a great example and it's become really, really common now. So I think there is an expectation among a lot of lawyers who are being supervised that they will be working remotely for some portion of their week. Supervising lawyers might also have the expectation that they will also be remote for some portion of time too. So not everyone's necessarily anticipating a sort of five days in the office altogether as they might have in the past.

The difficulties that it presents, I think, are around those communication and time aspects that we talked about earlier, but they just sort of amp it up. If it's hard to go through an open door, it's very hard to call someone on Teams if you need advice, particularly if you haven't actually been face-to-face with them all that much or you don't see them all that often. There's also the aspect that it is just harder to oversee people's work. One lawyer I spoke to gave this example where she was talking about during the COVID pandemic when everybody in their office was working remotely. And she said, In the past, we could hear if someone was getting really heated in a discussion on the phone with a client or something, we could kind of hear that or see that or get a sense of that. But if they're at home alone having that conversation, it's much more difficult to be able to see things like is this person not doing their job as well as they could be or are they struggling for some reason. It's just harder to keep that oversight of people. And then it's also in terms of people's work product, just more difficult to see what they're doing. And you have great examples of this from the AI misuse cases where the person was working remotely using AI and obviously there was no one really overseeing or checking their work particularly thoroughly.

Julian: Although it's interesting that you say in the report that the real risk is not so much just being remote but having passive or under-designed supervision. That's the risk and that can happen anywhere.

Felicity: That is very true. And I think one message that came out of the think tank was really supervision generally just needs to be more intentional. There just needs to be a little bit more thought about how exactly is this person being supervised? Is that supervision achieving what it needs to? And part of that was that if people are working remotely, you have to be even more intentional. So you really have to plan things out. Let's have a meeting at this time on this day where we discuss these things.

Because you can't wait until you catch someone in the corridor and go, oh, actually. So there just needs to be more planning, more foresight into artificially if you like, but somehow creating a space for those moments if you're online and not face-to-face.

Julian: And actually, that case brings together the two work transformations that I was talking about because it's working remotely, but of course the other and the one that's on everyone's mind these days is AI. How does AI change the challenges of supervision and what particular risks does it come with?

Felicity: I actually really like the AI misuse cases as examples of supervision moments, if you like, partly because they give us a really interesting window into sort of not great supervision, whereas normally the disciplinary cases are the sort of extremely poor supervision is what we tend to see. So it's interesting to get these cases, there's only a couple of them, but where AI misuse is exposed, just not great supervision. So I think there's a couple of different risks. Certainly the extreme one is the one where AI leads to someone making a really bad mistake, putting fabricated material before a court. I think there are risks to learning and development for juniors, which people are relatively aware of but not necessarily sure how to tackle. And there's real risks, I think, for supervisors of not having oversight or understanding of how supervisees are using AI. And that's risky for both of those reasons. So there's a risk they might use it and make a mistake that isn't picked up and there's a risk that they're using it and they're just not learning stuff that they should be learning. So it's sort of that masking effect where using AI can make people seem more competent and capable than they actually are. And then you learn the hard way that they're not actually as confident and capable as they appeared.

Julian: So the AI is making it harder to spot the risks in the work.

Felicity: Yeah, I think to a degree it is. Partly because lawyers have had for a long time, you know, one of the benchmarks or criterion that's used to assess people's capability is their skills in written work or in communication skills. And so I think there is that default for a lot of lawyers, which is if someone writes very fluently and well, they must know what they're talking about and it must be correct. And of course, with AI, that's just not true because everybody can use it to produce material that's very fluently written. So I don't think it necessarily has to be to make everything more difficult for supervisors, but I do think, and this came through in the think tank report too, that you do need to, at the same time that you're setting expectations about work more broadly, you need to be very clear on what the policy is at your organisation with AI use. You definitely don't want people using it in a way that's not approved or that's not appropriate. Obviously you have work that needs to get done, but you do want tasks that are going to help the person learn. And so some of that might be, maybe you should do this without AI at least once to help with that learning part before you turn to just get AI to replicate what we already have here and then make some minor changes. It's a challenging one for supervisors though.

Julian: So just finally, Felicity, for the supervising solicitor, busy with all sorts of things, maybe someone in the small practice, what are three things that they could change tomorrow that would make supervision better without necessarily adding a dreaded layer of process into things?

Felicity: I mean, there's a lot of things, but the three that I think are probably most immediate and useful, hopefully. The first one is when you're setting someone a task, focus on spending a few minutes giving them that framing of the task's importance or place in the overall scheme of work and also giving as much guidance as you can when you're first setting a task. So I think a lot of time is wasted, not necessarily your time, but the supervisee's time. And a lot of stress is caused needlessly if that person has to spend a whole chunk of time trying to figure out what exactly you want, because you haven't been as clear or you haven't directed them to sources that are available to help them. And I guess along with that, being super clear about what your expectations are for work.

And part of that's also setting timelines, being really direct about timeframes and when you need stuff done by and how long you think it should take. You can always say to them, it might take you longer and that's fine. You might use AI and do it in 30 seconds, that's fine, but this is what I think realistically the time that you should spend on it is. The second one is trying to prioritise giving your supervisee a diversity of experience.

So I think it's always trying to remember that things which seem really boring or mundane to you or which you've done a zillion times might be new for them, probably are new for them. And there might be stuff that they can learn from it. Even if it's a quick phone call to the client where you just drop them in it and they have to suddenly take over. If you're going to involve them in things like that, give them a role. So get them to take notes. Don't have them just sitting there. wondering why they're there, give them something to do in the meeting or in the exercise. You might not need them to take notes, but it gives them something to do and they will think about it and focus on it differently if they're taking notes than if they're just sitting around. The third thing is I think try and get them to reflect on their own development. That sounds like a really heavy task but it can actually be quite simple. So it might just be having a checklist of things that you expect them to be able to do or it might be a list of goals or anything like that where you can say. Where do you think that you want more experience? Where do you think you need more support to do some of these things?

There was some research done by the Victorian Legal Services Board and Commissioner and it was a small survey and it wasn't random so we can't place heaps and heaps of weight on it but it was interesting that a very large proportion, so over 50% of the supervisees who completed that survey said They didn't really know what the purpose of supervised legal practice was. They didn't really know what they were supposed to be achieving through doing it. They didn't really understand it at the beginning. And fortunately, the number who did feel they had a good understanding about its purpose increased.

However, it does show that for a lot of people potentially, they don't really see the broader goals that they're working towards. And if you don't see the purpose of it, then it's hard to understand why it matters that you do certain things or don't do them. So I think trying to encourage that ability to self-reflect and seeing this as a journey that has an end point and a goal.

Julian: Dr Felicity Bell, thank you very much for joining us on Risk on Air.

Felicity: Thanks so much for having me.

Outro

Thanks for listening to Risk on Air by Lawcover. And to stay up to date, join us for the next episode on current risks in legal practice.