

# Modern Lawyer

Ideas for Legal Leaders

Editor: Catherine McGregor

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*The show must go on:  
creativity and thinking  
differently in law*

*The pandemic's psychological  
price*

*Failure camp – the importance  
of psychological safety for  
lawyers*

The background of the lower half of the cover is an abstract composition of 3D cubes and rectangular blocks in various shades of grey, blue, and green. One central cube is brightly lit from within, casting a warm yellow glow. The overall effect is a sense of depth and modern architectural design.

# The Future of Law

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# **Inherent tension in-house: defusing the law department time bomb at a time of pandemic**

**Ciarán Fenton**

There is, according to the evidence, a correlation between serious corporate risk events which affect society and the inherent tension in the relationship between in-house lawyers, required to serve the regulatory societal objectives of the 2007 Legal Services Act, and their business employers who pay and direct them. Is this a systemic weakness? Does it constitute a significant risk time bomb for society? Will the corporate stress caused by the pandemic exacerbate the inherent tension? The purpose of this article is to explore these risks and to suggest ways of mitigating them.

## Introduction

I stumbled into the world of in-house lawyers many years ago when, as a leadership consultant, I helped a general counsel to find a new role as a lawyer-leader, as I like to call them. It was his last role, and he was looking ahead to his post-corporate portfolio career. He asked me to research legal education, an area he was interested in pursuing. He felt that lawyers were underprepared for business life. That piece of research led me to a world of which I was unaware, to people I would otherwise never have met and, ultimately, to work engagements with hundreds of lawyers, teams and boards in-house and out, across the world as well as unanticipated speaking and writing opportunities. This is one of those writing opportunities. I was not new to the legal world. I majored in law in my business degree and in my corporate career, I spent much of my time working on deals with lawyers. I also ran divisional businesses for large organisations and have extensive experience as a non-lawyer (sic) working with CEOs, CXOs, NEDs, boards and teams.

## Legal Services Act 2007

Of the eight regulatory objectives defined in the Legal Services Act 2007,<sup>1</sup> from which in-house lawyers (IHLs) derive their authority, the first of these – public interest – is the focus of this article. IHLs have a long track record of preventative counselling which protects the business and society. Those practising in heavily regulated industries like drugs, food and banking have a tougher role than unregulated sectors. Even in non-regulated businesses, there are requirements that mitigate risks, all of which IHLs track. Their hard work and successes are frequently undercelebrated, underfunded and underappreciated partly because they provide credence services<sup>2</sup> and partly because they are not trained in the art and science of internal communications nor see value in hiring those that do. The problem is not what IHLs are doing well or that most are highly ethical – these points are not controversial – it's whether or not, over time, the inherent tension in the relationship between IHLs and their employers has adversely impacted the public interest regulatory objective of the 2007 Act to such an extent that it's only a matter of time

before a front-page risk event implicating IHLs directly occurs and of such magnitude that the public and their public representatives clamour for something to be done about in-house lawyers thereby catching modern legal practice on the back foot, as it were. Does the evidence support the existence of this time bomb and is it more likely to explode in the context of a pandemic, at which time the inherent tension<sup>3</sup> may be exacerbated?

## Leveson and other stories

Ask a lawyer to cite a case involving an in-house lawyer, and they will invariably refer to the *Brett* case which emerged from the Leveson Inquiry in 2011.

The Leveson Inquiry was a judicial public inquiry into the culture, practices and ethics of the British press following the News International phone-hacking scandal, chaired by Lord Justice Leveson, who was appointed in July 2011.

Alastair Brett was formerly legal manager at Times Newspapers Ltd. The Leveson inquiry considered Mr Brett's actions in connection with a 2009 story in *The Times* which revealed the author of an anonymous blog entitled 'Nightjack', chronicling the life of a police officer.

The following exchange took place at the hearing:

*Mr Alastair Brett*

*If I'm approached by somebody for legal advice, and I was, I think I would regard that as covered by legal professional privilege.*

*Lord Justice Leveson*

*I'll have to think about that.*

*Mr Alastair Brett*

*It raises all sorts of interesting questions about in-house lawyers.*

*Lord Justice Leveson*

*Indeed.<sup>4</sup>*

In analysing the implications of these exchanges and the outcome of the Inquiry and subsequent Solicitor's Disciplinary Tribunal, Richard Moorhead, Steven Vaughan and Cristina Godinho observe in *In-House Lawyer's Ethics*<sup>5</sup>:

*If we look at in-house conduct in terms of risk, the decision not to impose some form of entity regulation on legal teams does not make much sense either. Weigh the harms caused by SCB's wire-stripping, or Rolls-Royce's corruption, against the more standard fare of SRA enforcement (solicitors taking client money, misleading the court), and we are hard pushed to see that in-house practice is low risk.*

### ***A recent piece of research from University College London on in-house lawyers, Mapping the Moral Compass, has caused a stir in the legal community.***

Successive governments did not introduce any form of entity regulation on legal teams in the United Kingdom after the *Brett* case or indeed after the many scandals involving in-house lawyers some of which are set out in the introduction to *In-House Lawyer's Ethics* (pp3–4) and, in respect of which the list according to the authors, “suggests that the in-house role is an ethically compromised endeavour”. Their list includes:

- General Motors: ignition-switch scandal;
- Enron: accounting transactions issue;
- Arthur Andersen: document retention policies;
- Apple: stock options backdating;
- Energy Solutions: employee witness bonuses;
- Siemens: business consulting agreements;
- Government examples include advice given in the United States and the United Kingdom on Iraq War matters.

Do the *Brett* case and this list merely prove that some IHLs struggle with the inherent tension or are they symptomatic of a deeper malaise within the structure of law departments? The UCL Moral

Compass Report 2016 helps us answer this question, at least in part.

### **The Moral Compass Report**

The *Mapping the Moral Compass*<sup>6</sup> report was published by the UCL Centre for Ethics and Law as part of its Ethical Leadership for In-House Lawyers Initiative in 2016. The headline findings included:

- 10–15% (of the in-house lawyers surveyed) experienced elevated ethical pressure;
- 30–40% sometimes experienced ethical pressure;
- 36% agreed that loopholes in the law should be identified that benefit the business;
- 9% indicated saying “no” to the organisation was to be avoided, even when there is no legally acceptable alternative to suggest;
- 65% reported that achieving what their organisation wants has to be their main priority; and
- 7% never discussed professional ethics issues with colleagues internally or externally, formally or informally.

The authors of the survey found that there were four categories of in-house lawyer:

- the capitulators;
- the coasters;
- the comfortably numb; and
- the champions.

The report had a mixed reaction. Rhymer Rigby wrote in the *Financial Times* at the time of publication:

*A recent piece of research from University College London on in-house lawyers, Mapping the Moral Compass, has caused a stir in the legal community. It identifies four main ethical groups of in-house lawyers: the capitulators, the coasters, the comfortably numb and the champions. Perhaps unsurprisingly, some general counsel have taken exception to these characterisations.*

Unsurprising indeed. GCs assume that their integrity is being impugned when challenged on the moral compass issue. Seeing the problem through their lens, they feel understandably outraged at the

suggestion that, as one GC put it, all IHLs leave “their morality at the door when going in-house”. But no one is suggesting all do, but that some do and indeed did, according to the evidence. While different personality types manage morality differently, as the percentages in the Moral Compass survey demonstrate, GCs cannot deny (and don’t to me) that many decide or are convinced by the business environment in which they operate that they must dilute or play down their status as regulated professional officers of the court to a greater or lesser extent. How often do we hear lawyers at in-house conferences insist that “I’m a business person first, lawyer second”?

The first time I heard a GC use that phrase was at an in-house conference, within months that GC’s organisation was at the centre of a front-page corporate scandal. I suspect that, at that moment, no one cared how good a business person they were but how good a lawyer they were in helping their client – the organisation – survive the crisis. I also suspect that that organisation was quick to take advantage of privileged conversations with that GC, a privilege granted by society, not to all function heads in the business.

**I suspect that, at that moment, no one cared how good a business person they were but how good a lawyer they were in helping their client – the organisation – survive the crisis.**

If you Google the words “business-person-first-lawyer-second” most of the initial hits are from law firms. They have no current incentive to encourage GCs to be “lawyers first and business people second” because that would risk cutting the umbilical cord that connects law firms to GCs: most GCs come from law firms; are protected by them in tough times; and the cord helps maintain the fiction that solicitors in

and out of house are the same. Why else has the term ‘in-house’ sustained? No other function in business is defined in terms of its relationship with out of house. In-house CFOs don’t exist. Law firms have no incentive therefore, at present, to rock the boat. Hence their muted response to Section 4.12 of the Independent Review of Legal Services Regulation (IRLSR). By muted I mean, in some cases, no response at all, and from a legal services business perspective, who would blame them? Perhaps this reflects the fragility of their business model. One GC said to me: “... outside counsel tend to be more conservative in their opinions than in-house lawyers because they have to be or risk being sued”. Equally, IHLs risk being bullied if they are too conservative, according to the evidence. Society doesn’t get a look in.

### **Section 4.12 of the IRLSR**

The Centre for Ethics and Law, University College London, published a report on 11 June 2020 written by Professor Stephen Mayson with the title: “Reforming Legal Services – Regulation Beyond the Echo Chambers – Final Report of the Independent Review of Legal Services Regulation”.

Section 4.12 relates to “Corporate legal departments and in-house lawyers” and in respect of which he makes a recommendation, Recommendation 20, as follows:

*An in-house legal department should be capable, for regulatory purposes, of being registered as a distinct business unit, so that the department’s delivery of legal services would be subject to the same regulatory obligations as any other registered provider. Individuals within such a registered in-house unit should also be registered personally if they carry on activities for which before-the-event authorisation or personal accreditation would otherwise be required.*

Professor Mayson sets out his reasons for this Recommendation as follows:

*There is little doubt that a tension is inherent in this relationship when the client for legal services is also the adviser’s employer. The usual expectation of ‘independent’ legal advice is often stretched ... arguable that those with professional obligations might benefit from further regulatory support ...*

*In principle, they should not be at risk of dismissal or disadvantage simply for observing their professional obligations ... This might entail express conditions in their employment contract, and a direct reporting line to the Board ... As we have seen in recent years, corporate failures can lead to consumer and societal detriment. In-house lawyers have to be able to sound alarm bells without the chilling effect of potential reprisal.*

The words “chilling effect of potential reprisal” are indeed chilling when you consider the impact of corporate failures on society and which failures, more often than not, hit the more vulnerable parts of society.

So why did Section 4.12 not receive more attention from lawyers, business and regulators given the gravity of its conclusion in terms of societal risk? I guess that most in-house lawyers don’t see the problem as a problem of their making or one which they can solve and also because their solo training doesn’t encourage them to think in those terms. Law firms have no incentive to comment as set out above. Businesses, based on my work mediating between Legal and the business is unaware of the time bomb, would struggle with GCs not reporting to CEOs, and just don’t get the risk; regulators, understandably from their perspective, don’t want to take on the poisoned chalice of fixing a problem that successive governments have failed to identify let alone address. They may argue that successive governments ignore the societal objectives of Section 1 of the 2007 Legal Services Act as they do in the spirit of Section 172 of the Companies Act. Who wants to take on big business?

## Time of pandemic

But if organisations care only for their business’ profitability in the short term, they will find that Covid-19 has created an environment in which they will be out of step with the public mood especially if they took advantage of Covid-19 public financing. Society will expect in-house lawyers to get in step with this mood or else lawyers may find society will take legal services regulation out of their hands and in a manner which may make the second state of affairs worse than the first.

Meanwhile many in-house lawyers see the writing on the wall but are not sure what to do about it in the short term. Below I set out seven steps they might consider. But first, they may wish to reflect on three current trends which may incentivise them to take action:

- The environment, society and governance (ESG) movement is here to stay. Lawyers in-house and out will be required by their clients to support ESG and to enable the relaunch of capitalism,<sup>7</sup> especially in the light of Covid-19 financing to high-profile companies – see list.<sup>8</sup>
- The poor mental health and wellbeing of lawyers<sup>9</sup> are receiving more considered attention and, in the light of the success of the #MeToo movement, there is a trend towards confronting the status quo. A growing minority of lawyers are starting, counter-intuitively, to have each other’s backs. Were a number of these to break ranks, ignore their NDAs and come out – that would be as some characterise it, a game-changer.
- The business model of legal services is coming under increasing scrutiny as consumers – retail and business – are waking up to its flaws.

When I confront lawyers – in-house and out – with the risks their counter-arguments include:

- I don’t see the problem. My boss is great, and I don’t encounter major ethical issues.
- Ethics are not the sole responsibility of lawyers. That’s the role of compliance.
- Who’s to say a significant risk event can be traced to IHLs? There are lots of factors.

Surprisingly, none is willing to address the specific charge that IHLs are to a greater or lesser extent dependent on their employers and therefore cannot always act independently as required by the regulator, nor is there a consensus on the specific points of the IRLSR Report Section 4.12. Surprising because one would have expected lawyers to be swayed by evidence and they’re not. I can only assume that they feel it’s a problem not of their making and one they feel they cannot fix.

I disagree with this assessment. It is of their making since few would doubt that Section 4.12 of

## A seven-step in-house TOM to help defuse the time bomb

- **Step 1 – Agree a shared language on the current purpose, strategy and behaviour (PSB) of the business.** One GC told me that many lawyers don't know how to contribute to the broader strategic planning process and therefore don't spend time on it, in which case they should have the humility to ask, just as the business should ask them about the legal process.
- **Step 2 – Decide, don't ask, what the business needs from Legal.** Decide, within the law department and with advice from outside it, what the business needs in terms of legal counsel and process to achieve its purpose, strategy and behaviour plan (PSB). The business doesn't know what it needs. If it did, it wouldn't need lawyers. Lawyers do know or at least should know.
- **Step 3 – Set up a Legal Operating Board to run Legal as a business, not like one.** Set up a Legal Operating Board consisting of lawyers and non-lawyers (sic) from Finance, IT and Internal Communications to run Legal as an internal breakeven business. All the art and science of business applies to Legal. Conversely, if Legal does not apply well-established business principles it will struggle to convince the business that it can deliver the essential 'ten things for ten dollars'.
- **Step 4 – Take responsibility for selling the purpose of Legal to your board.** I hear from GCs that the business is not interested in Legal until there's a problem. Therefore, they must sell the purpose of Legal to their board, even before they present their Legal Business Plan. The generic purpose (P) of any legal department is to enable better decisions by their board in terms of legal counsel and process that benefits the business and society under the objectives set out in the 2007 Act from which law departments derive their authority. The generic strategy (S) of any legal department should be to act as an independent internal business. The generic behaviour (B) of any legal department should be to deliver 'ten things for ten dollars' excellently or seven for seven, but never ten for seven.
- **Step 5 – Invest in innovative law firms.** Invest in long-term relationships with innovative law firms, allowing them access to the C-suite so that they can help close the gap with Legal. The problem is, as one equity partner explained to me: "... we advise businesses how to get from A to B. This involves counsel and process. We undercharge for counsel and overcharge for process. But it nets out ok in the end ...". It may "net out ok" for some law firms, but society is underserved, and soon it will clamour for change.
- **Step 6 – Negotiate a business plan which meets business needs but honours Legal's purpose.** By 'negotiate' I mean to negotiate a deal with the board where Legal agrees to deliver 'seven things for seven dollars not ten things for seven dollars'. This requires selling skills and negotiating skills, ensuring the business feels that this approach is in its long-term interests. By 'business plan' I mean a plan which allows you to run Legal as a business, not like one, over the next three to five years.
- **Step 7 – Accept that the GC is the CEO of Legal.** The final step is for in-house lawyers to defy their law school training when it comes to leadership. Law schools don't value leadership because law firms can't bill leadership by the hour. In-house lawyers must accept that one of their number – the GC – is the CEO of Legal who must value the purpose of lawyers as leaders:
  - to create an environment in which the people in the law department thrive;
  - to develop the legal department in every respect; and
  - to serve all stakeholders: people, the business and society.



the Mayson Report would become law tomorrow if enough high-profile lawyers in-house and out lobbied for it. As one GC put it to me: “Bluntly, there needs to be greater leadership from the very best in-house legal leaders/influencers, and ultimately government regulation which effectively codifies the purpose of an in-house team.” They don’t because they, as yet, see no incentive in doing so. The public interest argument does not move them because they don’t see law-making as their role or responsibility and law firms, on whom IHLs rely heavily, fear what might happen to their substantial commercial fee income if the status quo were to be challenged.

In respect of regulation, one GC said:

*Regulators, I suspect, rather than seeing the risk and not wanting to address it, simply haven’t yet clocked the link between public interest and corporate failure. They see consumers as the biggest area of risk and focus there. In house lawyers can look after themselves and resign if needed – no big deal.*

I find this puzzling – if the regulator doesn’t see the link it means it is wilfully ignoring the first regulatory objective of the 2007 Act. Why would it do that unless it doesn’t believe that society is serious about taking on poor business behaviour and therefore ignores that objective? Another GC quipped: “If we can’t get people to address climate change, what chance legal supervision!”

But self-interest may incentivise IHLs to take at least some steps to mitigate the risks they face in

what none refute is a rapidly changing environment. Over the last five years, I have piloted a seven-step in-house target operating model (in-house TOM) in several organisations in the United Kingdom and in the United States. My intention is that these might become the framework for self-regulation – a sort of ‘Mayson S4.12 Pilot’.

These are actions, not intellectual endeavours nor, as one lawyer suggested to me, “Socratic processes”. One GC said to me that my suggestion of running legal as a business is “too simplistic”. I disagree. These principles are simple, not simplistic, and while the journey is not without challenges, can IHLs afford to do nothing? Another GC answers this question:

*Unfortunately for many, that statement will elicit the answer ‘yes, I can afford to do nothing’. As such ‘failing conventionally’ doesn’t look like too bad an option, especially if it is slowly, rather than risk doing something and being wrong.*

If that GC is correct and I am wrong, then the status quo will survive. But if I am right and there are several front-page risk events directly linked to IHLs and society demands, as part of the ESG movement emboldened by the pandemic, that the societal first objective of the 2007 Act is observed, then the time bomb will explode under IHLs and modern legal practice, as it stands, will not be prepared.

If I were an IHL at the start of, or in mid-career, I’d care about that risk.



Ciarán Fenton is a leadership consultant to CEOs, boards and teams focused on facilitating behaviour change over time in the service of a shared purpose. He has extensive experience working with lawyers-as-leaders, in-house and out.

1 Legal Services Act 2007 Section 1.

2 Francisco Cabrillio and Sean Fitzpatrick, *The Economics of Courts and Litigation* (Edward Elgar, 2008), p159.

3 Stephen Mayson, *Independent Review of Legal Services Regulation* (UCL, 2020), Section 4.12.

4 <https://leveson.sayit.mysociety.org/hearing-15-march-2012/mr-alastair-brett#s55267>.

5 Richard Moorhead, Steven Vaughan and Cristina Godinho, *In-House Lawyer’s Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Hart Publishing, 2019), p228.

6 Richard Moorhead, Cristina Godinho, Steven Vaughan, Paul Gilbert and Stephen Mayson, *Mapping the Moral*

*Compass: The Relationships between In-House Lawyers’ Role, Professional Orientations, Team Cultures, Organisational Pressures, Ethical Infrastructure and Ethical Inclination* (2 June 2016). Available at SSRN: <https://ssrn.com/abstract=2784758> or <http://dx.doi.org/10.2139/ssrn.2784758>.

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