



# DATA AND RISK MANAGEMENT

IN-HOUSE COUNSEL AND RISK MANAGEMENT: AN OPPORTUNITY PRESENTS  
THE COSTS OF LOSING CUSTOMER DATA  
THE ASCENT OF MILLENNIAL IN-HOUSE COUNSEL

# Your global in-house community



ACC is a global legal association that promotes the common professional and business interests of in-house counsel who work for corporations, associations, and other organisations through information, education, networking, and advocacy.

**We are:**

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75 countries

10,000 organisations

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60 chapters

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- Represent in-house lawyers as full and equal members of the legal profession
- Foster excellence among in-house practitioners, helping them represent their clients effectively and deliver services efficiently
- Advance the highest ethical standards governing the practice of law in a corporate setting
- Promote diversity and inclusiveness within ACC and the in-house community as a whole
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- Foster a sense of collegiality to facilitate networking and interaction among in-house counsel and foster professionalism, openness, and candour among members

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# PRESIDENT'S REPORT



**Karen Grumley**  
National President

To embolden change, boards and executive around Australia and globally are putting innovation, technology, disruption and diversity forward as critical to every strategic decision they make. A similar outlook applies to all that we do as in-house counsel. We operate in an ever-changing business and economic landscape and today, more than ever, we must think beyond tomorrow to stay competitive and shape our future within the in-house industry.

Saint Jerome, a Christian theologian born in 347 AD, put it aptly when he said "Good, better, best. Never let it rest. 'Til your good is better and your better is best". Innovation, engagement, and leading practices have an ever-increasing influence on the way we fulfil our roles, and the focus of many in-house teams today is that of continuous improvement and transformation.

In furtherance of this objective, this issue of the Australian Corporate Lawyer explores a range of pertinent themes. Risk management and culture; using analytics in your legal department and the inclusion of millennials, and diversity of thought in build influential and entrepreneurial in-house teams – how do you make your better, the best?


I'm also delighted to announce the ACC In-House Certification Program is coming to Sydney from 5-8 August. This four-day program draws on the collective knowledge and experience of ACC's global membership and the program's 25 curriculum hours targets three competency areas: Stakeholder Relations, Department Management, and Legal Services. Most significantly, not only do delegates benefit from a program focused on professional excellence and translating legal knowledge into business solutions, but we can also learn useful global best practices from each other. I'm looking

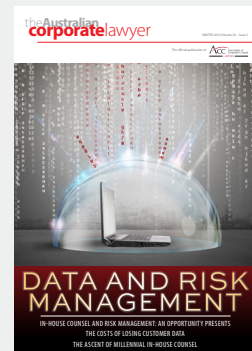
forward to participating and hope to see many of you there too. Places are strictly limited, so contact [aumembership@acc.com](mailto:aumembership@acc.com) for more details.

The 25th In-House Legal National Conference in Adelaide from 13-15 November represents Australia's largest gathering of in-house counsel. We aim to reveal how you can inspire change in your team and your organisation.

The Annual Meeting represents a unique opportunity for you to take a leading role in your career development and discuss changes to our profession, best practices on how to adapt, and meet with hundreds of your peers during two and a half days of intensive programming focused on Innovation and Engagement. This year we will motivate you to understand the latest technology and what impact it has on in-house counsel. Visit the ACC Australia website for further details and keep an eye out for the release of the full event program. I look forward to another exceptional conference and networking with my peers to explore new ideas on how I can be better every day, in every way.

In the meantime, keep an eye on the ACC Australia newsletter for details of upcoming CPD events and workshops in your area. As well as providing first class professional development opportunities, these provide yet another invaluable opportunity to connect with your in-house colleagues and grow your professional network.

Finally, we love being social at ACC Australia - so subscribe to, like and share our social media channels. Show us and others what good, better, best looks like and remember it is branding, not bragging! 



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# LEGAL VOICES



**Sayuri Grady**

Having worked in a range of Australian Government Departments and Agencies since 2006, Sayuri is currently General Counsel at the Australian Public Service Commission, a government policy agency committed to positioning the Australian Public Service workforce for the future. Sayuri is passionate about contributing to the legal community and currently volunteers with Legal Aid ACT.

The views expressed in this article are her own and not representative of Government or Agency views or policy in any way.

Sayuri is a current ACC Australia Board member.

## ETHICAL BEHAVIOUR, ORGANISATIONAL CULTURE AND GOVERNANCE AS IT AFFECTS THE IN-HOUSE LAWYER

Each month ACC Australia invites our in-house industry leaders to share their experiences and perspectives on areas of importance to the Australian in-house community.

There is a carefully designed framework for Australian Government employees which encourages ethical behaviour and decision-making. This framework exists for the primary purpose of preserving the integrity and apolitical nature of the Australian Public Service (APS). It includes the APS Values, Code of Conduct and the Employment Principles, as well as accountability legislation like the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

The Values state that the APS is impartial, committed to service, accountable, respectful and ethical. The Code of Conduct requires APS employees, among other things, to act with care and diligence, honestly and with integrity, to comply with Australian laws and reasonable directions, to maintain confidentiality and avoid conflicts of interest, and act in a way that upholds the APS Values and Employment Principles. The spirit and language of the Code are not dissimilar to the duties of directors under the *Corporations Act 2001*. Breaches of the Code can result in varying sanctions for APS employees. The Employment Principles, a relatively recent addition to the *Public Service Act 1999*, establishes that the APS is a career-based service that makes fair employment decisions, requires effective performance, and provides a flexible, safe and rewarding workplace, free from discrimination that recognises and fosters diversity.

The PGPA Act governs the duties of officials and 'accountable authorities', most commonly public servants and Secretaries of Departments, respectively. Duties of officials are in almost identical terms of the duties of corporation directors (good faith, honesty, care and diligence, use of information and disclosure of interests), but broadly applies to persons who are officers, employees or members of the relevant entity.

No doubt, employees of the APS occupy a position of trust, being part of a broader representative and responsible government tasked with carrying out executive functions. These frameworks act as a check and balance on APS behaviour and are well-embedded and understood by APS employees.

While no such comprehensive framework exists for the private sector, community standards are now evolving to the point where it is expected that corporations behave in an ethical manner, and in many circumstances those expectations extend to behaviours reflecting more than what the

law requires. Some sectors have adopted their own codes of conduct – for example, the Australian Banking Association's *Banking Code of Conduct* – and many more are in development, like the Mandatory Dairy Code of Conduct requiring farmers and processors to deal with each other in good faith.

Recent legislation has targeted unethical conduct to the point of making it unlawful to essentially 'turn a blind eye' to practices occurring at arms' length in a business context. The Commonwealth's *Modern Slavery Act 2018* requires certain large businesses to publicly report on their actions to address modern slavery risks in their operations and supply chains. No longer can a business claim they have not made enquiries, or considered behaviour occurring a few steps away from their immediate operations, that puts individuals at risk. The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2018* broadens existing protections and remedies for corporate and financial sector whistleblowers, and creates a protection regime for disclosures by individuals regarding breaches of tax law or related misconduct.

It is interesting to observe the rhetoric emerging as a result of the Financial Services Royal Commission around the theme of the General Counsel and other key executives as the 'moral compass' of the organisation, or, to borrow an oft-quoted Australian Institute of Company Director's phrase, 'to set the tone at the top'.

The Commission's final report observed that there were six principles for proper institutional behaviour, which were shown to be inconsistently applied in the industry and, at times, breached. These were:

- Obey the law;
- Do not mislead or deceive;
- Act fairly;
- Provide services that are fit for purpose;
- Deliver services with reasonable care and skill; and
- When acting for another, act in the best interests of that other.

These behaviours alone do not result in consistent application.

They must be supported by the proper systems, processes and policies – in essence, governance of the organisation. The board must receive the right information. There should be clear expectations and accountabilities within the organisation. Written policies must do more than just pay lip service to ways of doing things.

## LEGAL VOICES

In addition, the organisation must support a culture that walks the talk and reflects these behaviours, assumptions and unwritten rules at all levels. The environment must be conducive to a shared system of norms that are demonstrated in employee attitudes and overall mindset.

Some questions you can ask yourself to appreciate your organisation's ethical climate might include:

- How does your organisation talk about integrity, ethics and culture?
- Are there systems, policies, codes, or training that embed ethical behaviour?
- Do your leaders model ethical behaviour and encourage discussion about it?
- Is it okay to talk about ethics? What do people do when no one is watching?
- Does your organisation evaluate culture? Does your board discuss culture? What does the board's interaction with management say about your organisational culture?

I would suggest that while senior leaders obviously have a critical role to play, any employee can act as an agent of change for the better. As in-house counsel, we are uniquely positioned to lead by positive example and act as model ethical legal advisors with integrity and trust.

The imperative to do so is not only to comply with the law and community expectations. Good governance is fundamental to the sustainability of

organisations of all sizes. A positive culture results in relationships of mutual trust and honesty where constructive debate produces more robust decision-making. High levels of perceived integrity are positively correlated with increased profits and attracting and maintaining staff.

The ripple effect of small acts cannot be underestimated.

Think for example of the junior lawyer, who escalates issues relating to a client persistently seeking advice around the fringes of the law rather than working with in-house counsel to take into account legal risk at the early stage of matters. The supervising lawyer is required to consider whether a particular business unit's course of conduct indicates a broader problem.

What about the team leader lawyer, in a medium-sized practice, who reinforces ethical acts by hearing team members when they have frank discussions around potentially unethical practices observed in the business?

These are just small examples of lawyers who play an important role in promoting a positive culture of ethical behaviour. They often start with just one question, one conversation, one day at a time.

As lawyers, we sometimes forget that we have a wonderful network of fellow practitioners whom we can draw on for support. This is based on a fundamental

pillar of the legal profession: collegiality. This notion runs deep, even to the language solicitors use in court, referring to each other as 'my learned friend' (although the writer acknowledges this term of endearment is not always used in this context!).

Throughout my career, I have well appreciated the counsel of my legal colleagues time and time again. I would not have survived some of the philosophical challenges I have faced as an in-house lawyer without being able to debrief with my trusted associates.

I encourage lawyers to think about who can be 'their friend', or who they can be a friend to, in the legal profession, so they can be a sounding board and support network for what is often a high-pressure environment full of grey areas.

And don't forget you can head on down to your next ACC Australia networking event and have a chat to your fellow in-house colleagues – it is more than likely they have faced a similar challenge to the one before you today. [a](#)

**ACC Australia's Peer Referral program connects members with senior in-house counsel on a confidential basis to discuss issues of ethics and legal professional privilege. Contact ACC Australia for more information.**





# ACC IN-HOUSE COUNSEL CERTIFICATION PROGRAM

August 5-8 || Sydney, Australia



## Helping Corporate Lawyers Around the World Be Effective, Recognised, and Successful

Finally, there is an intensive program designed specifically to help in-house counsel become proficient in the essential skills identified as critical to an in-house legal career—and a certification that recognises those who have mastered the requisites. This unique program will help you position yourself—and members of your team—as indispensable to the corporate client and raise the stature of your law department overall.

Each participant will not only personally benefit from the training, but their law department and employer will benefit from having an in-house lawyer that returns with global best practices in providing effective and efficient legal counsel.

### About the Program

The ACC In-house Counsel Certification Program covers the core competencies that are applied by corporate counsel professionals. Certification is not tied to any specific country's laws but draws from the experience of ACC's global membership to identify what is essential to the successful in-house practice.

The program's 25-hour curriculum targets three competency areas: **Stakeholder Relationships**, **Law Department Management**, and **Legal Services**. Training and certification exams are conducted in English.

### About the Designation

Participants earn the In-house Counsel Certification (ICC) upon completing the requirements of the ACC In-house Counsel Certification Program, specifically, the 25-hour training and assessment. This elite global credential indicates that its holder possesses the competence, skills, and acumen to complement a high-performing organisation.

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Yen Lee Sim

*As Senior Legal Counsel, East Asia & Japan at Schneider Electric since 2015, Yen Lee has been directly involved in Schneider Electric's recent growth and acquisition activities across Asia. She completed her Bachelor of Laws at the University of London and recently completed a Master's degree in Law with a Distinction in International Business Trade Law.*

# A DAY IN THE LIFE

## YEN LEE SIM

Senior Legal Counsel, Schneider Electric  
Kuala Lumpur, Malaysia



**6:30 am** Wake up to prepare coffee and a sandwich for my husband.

**7:00 am** Do my routine facial, dress, and make-up before heading into the office.

**7:30 am** Stuck in traffic for 45 minutes while on the way to the office. I listen to my favourite songs by Michael Learns to Rock to cheer me up and pass the time.

**9:00 am** My mailbox has several urgent emails that require responses. While I provide my feedback, I munch on my cream puff, which is today's breakfast. Print out the documents that require thorough review.

**9:30 am** Leave the office with our team to visit a customer to negotiate the closing of a supply and install contract.

**10:00 am** Before walking into the building, our internal team does a quick alignment before the meeting to make sure we are on the same page.

**10:15 am** The customer's procurement team, legal counsel, project managers, and members of the tendering department greet us in the conference room and the meeting begins.

**1:00 pm** The negotiation ends with a handshake and signature, concluding the deal. What a satisfying moment for the parties to see the deal is finally closed and sealed! During the negotiation, I saw a few text messages and missed calls, mostly about chasers on outstanding matters or some other urgent request. I respond accordingly.





**1:30 pm** Grab a tuna sandwich as a quick lunch while rushing back to the office for another meeting.

**2:00 pm** Catch up with the tendering managers for each business units. We check the tender status and outstanding matters to be closed by legal. When in doubt, I seek more clarification to close the gaps. I check through the documents one last time before submitting them to the customer's tender secretary.

**3:30 pm** Finally, after a day of meetings, I am back to my working office room to check and respond to my emails. I review contracts to provide legal comments and recommendations on mitigation plans.

**4:30 pm** Quick catch up with the VP of business on gift and hospitality compliance requirements regarding corporate sponsorship of an event in Kuala Lumpur, Malaysia.

**5:00 pm** Conference call with the Taiwan management team to revise the Delegation of Authority chart to improve the internal process and possibly empower local employees to have more discretion in performing their daily work.

**6:30 pm** Log in to the system to approve the document that's required for company chop.

**7:00 pm** My day in the office is over. Leave for a quiet dinner with my husband without our phones beside us. Life can be so peaceful for a moment without technology.

**9:00 pm** Arrive home and promptly check text messages and browse through some legal updates and emails.

**10:30 pm** Do a 30-minute indoor cycle to build up a good sweat before winding down for the night.

**11:30 pm** My daily facial routine is the final task before I prepare for sleep. Thank God for such a fruitful day and hope that tomorrow will be even better. 🍷

# LEGAL LEADERSHIP



**Whitnie Wiley**

*A former Advisor and Senior Legislative Advocate at the Association of California Water Agencies, Whitney is the founder and owner of Shifting into Action, a coaching and consulting firm for aspiring entrepreneurs and clients in the midst of career transition.*

## LEADING THROUGH CRISIS

There are few of us who will get through this life without encountering a crisis or two along the way. The same is likely true in our careers. Whether there is trouble on the corporate level or within our internal departments, there will come a time when we will be tested.

The good news is that while the details of the challenge may change, the basic processes of managing and surviving, or better yet thriving through the crisis remain essentially the same. So, the fact that we've endured one crisis makes us better prepared to endure the subsequent ones.

Being a leader is about what we do on a daily basis. However, the world tends to judge us on how we manage and lead through a crisis. So now, while things are calm, is the time to develop the skills and mindset you'll need to not just lead during the next crisis, but to do so masterfully.

Here are 10 steps that should be a part of every crisis management process.

Manage the crisis

1. **Get the facts** — You would think this is a no-brainer. However, more often than you'd think, decisions are made without knowing the facts on the ground. Without a clear understanding of what is happening, actions might end up being counterproductive.
2. **Accept reality** — Nothing is worse than pretending the crisis isn't happening. Because those around you can see the truth, it is vital to accept the truth of the moment and then deal with it. When we accept reality, it allows us to get perspective and realise that as bad as things may seem, they could always be worse. If we face the fact that litigation is on the table, we can take a step back and see that means we still have a path forward.
3. **Assume responsibility and control** — In every situation (especially stressful ones), your troops are looking for someone to take responsibility and control. In a crisis, the person who doesn't look to scapegoat others is the one who has the ability to instill confidence in those looking for assurance that everything will be alright.
4. **Communicate constantly and consistently** — One of the best ways to ensure trust from those whom we lead is to communicate with them honestly and in a timely manner. We don't have to communicate what we don't know, but also acknowledging that we don't have all the answers right now goes a long way toward maintaining trust. People want to know what's going on and they are looking to their leaders for answers. Therefore, provide them with what you know.

5. **Trust your ability** — Just as we want those we lead to trust us; we have to trust ourselves. By being as prepared as possible or drawing upon our previous successes, we should be able to trust in our own abilities to face a current or future crisis.
6. **Make a plan** — One of the best ways to deal with crises, challenges, or obstacles is to have a plan. Knowing we have a roadmap provides us with confidence and it takes a lot of the guess work out of what to do next. As part of the plan it is necessary to identify any constraints that we face. Then we have to be willing to unleash our creativity and be flexible as we maneuver to the end goal. While we have a plan, we cannot be afraid to deviate from it if it's not helping us get to the desired outcome. Being decisive is good for our self-confidence and shows leadership to others. And where possible and necessary, the plan should include opportunities to delegate actions and decisions to others, so that leaders can focus on the big picture.

Focus on the future

7. **See opportunity** — When viewed optimistically, a crisis is an opportunity. The goal shouldn't be to take advantage of people or situations, but provide a chance to change the status quo for the better.
8. **Practice self-care** — We should never forget that whatever is going on will, at some point, come to an end. Because that is the case, we should not spend time beating ourselves up because we encountered a crisis. We have to make sure we take care of ourselves, so that we can move on when the storm subsides.
9. **Move forward confidently** — If we gain nothing else from our times of crisis, we should walk away more confident than when the crisis began. One of our goals should be to learn through the process and accept that we are resilient and capable of navigating a multitude of issues.

Prevent future crises

10. **Think ahead and develop a contingency plan** — Finally, where possible, a crisis should not be the result of a failure of imagination. We are in positions of leadership for a reason, one of which is to anticipate storms and have a plan of action to deal with them.

By taking steps before something happens, we can hopefully minimise the number of times we find ourselves in crisis. But as it will inevitably happen, we can rest assured that with proper planning and a well-thought-out process, we can get through anything that comes our way. <sup>1</sup>





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# IN-HOUSE COUNSEL AND RISK MANAGEMENT: AN OPPORTUNITY PRESENTS

The noticeable refocussing of attention by boards and regulators on the non-financial risks organisations take, including operational and conduct risk, has created opportunities for in-house counsel to refresh our value proposition to employers. However, have we truly seized these opportunities for what they are, and, if we have, are we ready to take them on and deliver on expectations? I'm hopeful the observations I share here help to answer these questions and provoke thought on career path and professional development options.

My interest in the future of the legal profession – specifically, the future role of the in-house counsel – has been enlivened in the last year because of two things in particular: the release of APRA's *Prudential Inquiry into the Commonwealth Bank of Australia* in April 2018; and the very public flagellation of the financial services sector during the *Hayne Royal Commission*. In the former, amongst its various findings, the prudential regulator described CBA's insufficient focus on, and oversight of, the management of non-financial risks. During the latter, we repeatedly heard of the alleged failure of organisations to not only do what was legally required, but also to do 'what ought to be done' in relation to customer interests. There was critique in each, directly or indirectly, of the role risk culture played in the shaping of decisions made in these organisations. There were a range of observations and findings in relation to the performance of senior management, boards, risk management personnel and in-house counsel, as well as in relation to their collective accountability failures in maintaining high standards of governance and risk management. When it came to the demonstration of corporate values and culture, it was truly an *annus horribilis*.

What followed was extensive commentary and expert advice on actions organisations should take to either address or avoid these shortcomings. There also continues to be a great focus on the skills, experience, knowledge and capability that boards need – when looked at through the recently polished lens of non-financial risk – in order to discharge their duties. There are also questions asked as to whether risk management frameworks continue to be fit for purpose in light of recent events. And there are now a vast range of legal and consulting firms providing organisations with their own strategic and tactical roadmaps to improve risk management, risk culture and the promotion of ethical conduct.

## In-house counsel capability, skills and knowledge gap

Although all of the above are necessary and welcome consequences of the refocussing of risk management in organisations, it seems to me that the skills, experience, knowledge and capability of an intrinsic component of the machinery of risk management have been overlooked in the discourse, namely that of the in-house counsel. By "risk management" I mean the discipline of risk management and not the narrower "legal risk management" for which modern legal professionals are experts. While boards, management, regulators and, indeed, in-house counsels may implicitly expect internal legal teams to play an integral role

in risk management, I query whether there is any consideration of whether legal teams are sufficiently equipped to meet those expectations.

My own observations point to the answer being 'no'.

Firstly, I am concerned that there may be a general lack of awareness of the much closer connection between the effective implementation, operationalisation and maintenance of an organisation's risk management framework and the work that in-house counsel do day-to-day. The days of the legal and the risk management functions of an organisation operating in siloes are over – or they should be. In this regard, I think it is no longer sufficient for in-house counsel to only have a 'general understanding' of risk management – irrespective of whether they see themselves taking on the accountabilities of a Chief Risk Officer. Although this fact may be most noticeable to those who work in financial and other high-trust service sectors, it is only a matter of time before it is seen more broadly across others.

Secondly, although it is common for the risk function to ultimately report to the General Counsel or another senior legal professional in the organisation, it is hard to identify any systemised skills or qualification refresh for in-house counsel – particularly for the less experienced of us – that responds to current risk management demands. It seems strange for there to be somewhat of a disconnect between certain career paths for in-house counsel and what the profession deems necessary to effectively prepare lawyers for such careers.

## Susskind's future for legal services and the "hole in the wall"

In my mind, this state of affairs, whether by oversight or other reasons, not only does a disservice to the organisations that employ us, but also to ourselves by narrowing down our potential career path options. I also believe this gap between client expectations and lawyers' capabilities will become more evident when the legal services demanded by organisations change over time.

To better frame that last statement, I turn to the observations of Professor Richard Susskind OBE FRSE, author, adviser, speaker and futurist. Susskind has spent the best part of the last three decades theorising about the long-term future of the legal profession and promulgating the need for lawyers to anticipate a shift in the legal paradigm – predicting fundamental changes in the law and legal services.



In his book, *Tomorrow's Lawyers: An Introduction to Your Future (2nd Edition)*, Susskind paints a picture of a future legal services landscape that is starkly different from what it is now. Susskind also recounts the story of a leading power tool company and its training course for new executives. The training entailed the executives being asked to not see what the company sells as the power drill (for which they are a household name), but rather the sale of new and innovative ways in which to make a hole in the wall – the hole being what their customers actually want. This, Susskind submits, is an apt analogy for how legal services of the future should be viewed: the value and benefit that lawyers bring to their clients to address the latter's wants. Put in another way, the question is "What is the lawyer's 'hole in the wall'?"

This question was one I, too, had been pondering, although admittedly with neither Susskind's prescience nor perspective. Reflecting also on the experiences of 2018 and the greater role in-house counsellors are being asked to play in response, it is apparent to me that Susskind's analogy was apposite, a prediction already is borne out. However, borrowing from Susskind, it appears that many in-house counsellors still see themselves as selling power drills rather than understanding that their clients only truly want an efficient and effective way of making a hole in the wall.

### What needs to change?

It is demonstrably the case that in-house counsel will play an increasingly important role in risk management within organisations. What is not as clear is how the profession intends to bridge the gaps between its existing skills, experience, knowledge and capability and what is actually required. My personal experience and observations are that attempts to bridge these gaps are often only made when in-house counsel find themselves leading risk teams. The discussions between an in-house lawyer and their manager are unlikely to cover the discipline of risk management and its role in the lawyer's professional development until such time risk management is an accountability for the role. This is hardly surprising as legal and risk functions working in tandem is a relatively recent phenomenon. However, in my view, to continue to neglect the interconnectedness of the two functions and the need to build the relevant skills, experience, knowledge and capability of our lawyers earlier – before they find themselves accountable for risk management – is a mistake.

Here are three suggestions for how I think these gaps could be bridged sooner rather than later:

1. **Offer in-house counsel, in particular those less experienced, the opportunity to complete an appropriate and accredited risk management course. Understanding the theory and becoming familiar with risk management methodology and its lexicon are fundamental requirements for appreciating the risk management remit. In this regard, risk management and governance bodies offer good programs with flexible study options.**
2. **Secondments are a fantastic way to gain experience and skills in an area of practice to which one has not previously been exposed. It may be that structured and meaningful secondments are offered to in-house counsel within the risk management function. The practical immersion in the application of risk management methodology can help to 'connect**

**the dots' on how the theory works in practice – whether or not in conjunction with completing a formal risk management course. A reverse secondment into a 'friendly' consulting firm offering risk management services is another option. These could operate just like reverse secondments in law firms do.**

3. **Undergraduate and postgraduate legal courses offered to law students and in-house practitioners (as applicable) should include elective or optional risk management course work. In addition to helping lawyers develop complementary knowledge, the inclusion of such courses signals that there are alternative and emerging career paths for in-house counsel.**

Apart from the additional career opportunities that formal or structured risk management studies or experiences offer, they are also likely to help in-house counsel make better judgments on the legal risks they advise on, even if their careers run the traditional course. For example, in drafting a provision of a contract, risk-informed judgment can be applied to ensure that the provision deals with no less and no more than what is required to mitigate or avoid a particular risk. Whether it is good enough for the risk to be merely mitigated as opposed to being avoided is also a judgment call that benefits from the discipline. Importantly, if the provision describes a control for a business risk, the lawyer's understanding of that control and how it is to be applied and monitored in practice may mean the terms of that provision reflect practical considerations and are not merely theoretical.

### Conclusion

Risk management will be more than an adjunct to in-house counsel accountabilities in the future. In fact, risk management that is broader than legal risk management is already a necessary discipline for the effective discharge of many emerging demands for internal legal teams; it is just that these demands have not been identified clearly enough in such terms. The readiness of in-house counsel to fully capitalise on the opportunity depends on how clearly the opportunity is seen, acknowledging that merely relying on the 'transferable skills' of lawyers is no longer sufficient. In relation to the latter, formal or structured skills and knowledge uplift are required. <sup>a</sup>

#### Dave Van Sanden



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# WHY DIVERSITY AND INCLUSION WILL ADVANCE YOUR BUSINESS – AND YOUR CAREER

I am a 63-year-old, white male and a long-time champion of diversity. As General Counsel of four major corporations, I have helped 15 in-house counsel move up to become General Counsel in their own right. Currently, I head up technology and administration for MassMutual, a Fortune 100 company. Later this year, I plan to retire, after 45 years of work. I have had a wonderful life, career, marriage, and family. I may be among the luckiest people in this world! So why am I so committed to diversity and inclusion?

**M**y personal success is closely correlated with advancing diversity and inclusion and surrounding myself with a diverse team. In the past, I have thought: why share my competitive advantage? But by championing the value of diverse and inclusive teams, I have been able to attract and lead talented individuals who have contributed to my companies' – and my personal – success. If you truly aspire to be a leader, you need to make developing a diverse and inclusive culture as important as any other operational and leadership action you take to drive performance.

"Diverse and inclusive" mean different things to different people. While "diversity" reflects the racial, ethnic and different makeup of the team, "inclusion" is the "active, intentional, and ongoing engagement with diversity in the organisation."<sup>1</sup> Building a culture of diversity and inclusion in your legal team is critical because it will improve your team's results. First, you will attract superior talent. Second, it will facilitate the provision of unique insights to better understand the needs of your diverse customers. Third, it will create better strategies and solutions for questions and issues your team will need to address. Fourth, it will help establish an environment of innovation and creativity. Fifth, it will assist in developing an atmosphere of learning and continuous improvement. All of this will work together to increase productivity and deliver exceptional performance.

## It's all about talent and teams

My guiding principle is: "It is all about talent and teams – diverse and inclusive teams." Any leader or legal team is only as strong as the overall team. To identify and attract the very best talent, you need to be able to choose from the most expansive population pool. The broadest talent group possible should yearn to join your team and your organisation. This talent pool is rapidly changing. Around the year 2042, the white majority in the United States will become the minority;<sup>2</sup> never to be reversed. Currently, 56 percent of enrollees and graduates at American colleges are women.<sup>3</sup> Women comprised 51 percent of the law students in the 2018 class.<sup>4</sup> Women now represent 28 percent of General Counsel. Minorities are close to 11 percent of Fortune 500 GCs.<sup>5</sup> In both categories, there has been an increase on the percentages of past years.<sup>6</sup>

For years, many lawyers have recruited and hired people just like themselves. On one hand, that is not irrational. We tend to like people who are like ourselves. And there is no doubt that it is generally "easier" to work with someone who has a similar education, background, experiences and family as you. Not only are there these commonalities, but many are reticent to interact with others who are different from them on the fear they may do or say something wrong, and offend them, or even create legal liability. Recently, I found

myself in India and asking one of the people there who worked with my team whether they found it offensive if I asked questions about their family. But just because it may be harder to work with people who are different, and you may make mistakes, the payoff significantly outweighs any such difficulties.

Some individuals view a focus on diversity to be a zero-sum game or think that the desire to create a diverse team that appreciates, accommodates, and is respectful of differences is a form of "cultural Marxism." Thus, when a diverse lawyer is hired or promoted, and a straight, white man is not, that man may feel he has lost. And some argue that even though they are better qualified, a diverse lawyer was hired for a choice position, or advanced over them. In such circumstances, it can be helpful to meet with these individuals to reassure them that their contributions are valued, and that there are opportunities for all. If appropriate, describe the criteria you used to make your decision. Emphasise that having a diverse and inclusive team improves results and thereby creates additional benefits for all of us. Just being part of such a team will improve your results and, therefore, increase your own potential and opportunities — this has certainly happened to me.

## The demographic tsunami is upon us

Prepare now for the fast-paced wave of demographic change. No legal team can limit itself to less than half of the talent pool. That means reaching out to women and other diverse individuals is a necessity, including women returning to the workforce after raising children. To attract the best talent, an organisation needs to publicly display that it values all people and their views. It has to be clear that a diverse array of individuals can and have become successful because of their talent and their work. Your commitment to diversity will seem hollow if all the leaders look and act the same. Thus, not only must the team be diverse, but its leaders must also understand and represent those they are leading, and *proof of "making it"* benefits the current team and potential new recruits. Simplistically, a candidate should think: "*If I can see it, I can be it.*"

Recruiting a very talented woman or person of colour has, in the past, been for many a challenge. Overcoming this challenge is all about the expectations for all those within your legal group. We do not delegate hiring to the company human resources recruiting team, but it is each of our responsibility at every level in the organisation. We need to get out and meet diverse talent, before we are even looking, whether through boards, at events, or on panels, or through mentoring, internships, or writing for publications. By sharing what we have done, are doing, and plan to do with respect to diversity and inclusion, I know we have tipped the scales in our favour.

Just as the demographics of the talent pool are changing, they are also changing for attracting customers. Customers and suppliers of almost all businesses are also global; what the population looks like in our domestic market certainly does not reflect the world's population. Effective and successful interactions with suppliers and customers require a team of individuals who not only reflect these constituents, but also understand their needs and how they can be met. Diversity brings an organisation "cultural intelligence," which is necessary in our global economy.

## Perceptions matter

In today's economy, companies must consider and respond to customers' perceptions of them. Competitive alternatives exist for almost all products and services. Customers trust businesses with entities whose workforce, marketing, and messaging reflect their individual preferences. Incorporating diversity in all aspects of an organisation sends a message that you value differences and, therefore, value diverse customers.

Some argue that legal teams solely interact with internal clients and, therefore, do not need to reflect the population as a whole. This assertion is simply not true. For example, having a team member who understands cultural differences will greatly assist in negotiating legal issues from different nationalities and cultures. Coaching one another on how to best interact and communicate with different populations adds value to the business. As we work on legal issues with customers, regulators, legislators, and administrators, we often retain outside counsel who are appropriate for, and reflect, those stakeholder groups. The same rationale and benefits apply to a diverse in-house team. Our internal clients are not a homogeneous group either. Successful companies are embracing the notion that company employees, including senior management, should reflect the overall population. In short, the corporate enterprise demands diversity.

## Inclusion is an essential part of the equation

A full range of diversity is necessary, but not sufficient, to improve results. An inclusive environment, where different perspectives are truly encouraged, listened to, and valued is the second part. Diversity is the noun and inclusion is the verb – and you need both. Companies can create diverse teams just for numbers or window-dressing. But because the team is not prepared for, and does not value and listen to, the different individuals and perspectives being offered, they fail to "mine" the inherent value of a diverse group. It is not what members of senior management say about diversity and inclusion, but rather what they *do* that matters. *The requirement is to "live it" and so that its values become a natural part of the corporate culture.*

If a group is diverse by gender, colour, ethnicity, and other factors, that typically means it possesses ideological diversity. However, when advancing diversity of approach and thought, we cannot limit ourselves to the historical "protected classes." It is critical to include the infinite range and combination of individual and unique characteristics and experiences that lead us to approach challenges differently and to identify varying solutions. There's a saying that if a diverse team is in a room, and the lights go off, what remains are those different backgrounds and experiences that make for alternative perspectives on issues. It doesn't matter what the people look like.

## "Group think" is dangerous

Diversity and inclusion bring equilibrium to any team. The more alternatives that exist to solve a particular problem, the greater the potential for a better decision. I remember at U S WEST we wanted to expand our telecommunications business beyond traditional wired telecommunications services to one using cable properties. At that time, the Cable Cross Ownership Act did not allow us to be in the cable business. I could have worked with just our legislative group to try to figure out how to change the law, but we put together a diverse team, including those with litigation and constitutional law expertise, and brainstormed ideas to get around this. The team concluded it made sense to sue the federal government on the basis that such a limitation infringed on our right of free speech – and we won! Thus, another benefit of a broad range

of ideas is counterbalancing "group think." *A clubby group may be more cautious about calling out what is wrong or crosses the line, or what is even illegal.* How many times have we heard we should do something because "everybody does it," only to be surprised when there is a problem and, on further inspection, not "everybody" is doing it. Understanding, evaluating, and vetting different approaches sharpens a team's thinking. This allows team members to identify and raise issues early, correct them, and reduce errors later in the process.

This outcome has been substantiated by studies, using mock juries, which conclude that a diverse decision-making group outperforms homogeneous groups.<sup>7</sup> And they will consider more information, more carefully deliberate and make fewer errors. Diversity encourages those homogenous group members to also raise more facts and make fewer errors. This effect is particularly telling when working on complex issues.<sup>8</sup> Given the complex and multi-faceted legal challenges facing enterprises, it is logical to conclude that diversity of thought will be of particular value in solving such problems. "[P]eople work harder in diverse environments both cognitively and socially. They may not like it, but the hard work can lead to better outcomes," writes Katherine Phillips in her 2014 *Scientific American* article, "How Diversity Makes Us Smarter."<sup>9</sup>

An organisation that demonstrates its commitment to accepting and respecting individual differences will also be receptive to ideological differences. Creativity and innovation are natural products of such an environment. Individuals will feel more comfortable both expressing their own ideas and challenging institutional assumptions and the ideas of others because the organisation has established a safe culture where all are encouraged to try new things. (I would rather have 10 ideas, with only two good ones, than none at all.) I remember when we decided to join the Massachusetts Attorney General in litigating that the Defense of Marriage Act ("DOMA") was unconstitutional. We brainstormed, with several of our gay team members, on ways we could show how the then-current law forced us to discriminate against our gay employees – inconsistent with our corporate non-discrimination policies. I believe adding these specific facts and arguments to the amicus brief added value to the litigation and appeal, which was ultimately successful. Steve Jobs recognised the value of diverse input to innovation when he "connected the humanities to the sciences, creativity to technology, arts to engineering ... at almost every product launch Jobs ended with a slide that showed a sign at the intersection of liberal arts and technology streets."<sup>10</sup>

If an individual walks into a meeting with strangers who look like cardboard cutouts of each other, and they have concluded that the correct solution to a problem is X, it is simply hard to suggest alternative Y. However, if one walks into a room where diverse groups of individuals are working in an environment where unique "against the grain" thoughts are accepted and encouraged, it is much easier to propose and debate alternative Y. A CEO whom I worked for often said, "*When smart people ask dumb questions — listen.*" *You need to create an environment where smart people are comfortable asking those "dumb" questions.* Moreover, if the participants are diverse and the organisation supports differences and inclusion, it is likely that good constructive questions will be raised – which leads to more thorough discussions and better solutions. "The mere fact that an individual is different from most people around him promotes more open and divergent, perhaps even rebellious thinking in that person."<sup>11</sup> "Simply adding social diversity to a group makes people believe that differences of perspective might exist among them and that belief makes people change their behavior."<sup>12</sup> Liberating people from conventional thinking, and inspiring individuals to move out of their silos and collaborate (potentially even cross-functionally), enhances innovation. "[F]or groups that value innovation and new ideas, diversity helps."<sup>13</sup>

Whenever I need to develop a unique legal strategy, confront and provide a solution to a challenge or respond to an adverse result, I do not close my door and start working. My first step is to pull together a team of smart, creative people. For example, recently I was making tough decisions on how to structure my new technology team to best support our business objectives, and I knew I could not do this on my own. Therefore, I surrounded myself with individuals that were viewed and respected as having creative ideas, careful thinking and good judgment. And these



individuals were not people who were all at the higher echelons of our corporate hierarchy. The group has to be diverse to ensure that many potential solutions are raised and all the possible downsides are identified and addressed. When making a key decision, an individual with good judgment timely considers alternatives, weighs the value of the range of facts presented, and considers the impact on various stakeholders, as well as the risks, cost and likelihood of successful implementation of the proposed solution. A diverse and inclusive team will bring valuable input to each of these components, enhancing and refining both the decision-making process and the decision itself.

For better or worse, we generally live our lives in a homogeneous world. As a result, we all carry certain stereotypes and biases.<sup>14</sup> We should not necessarily be self-critical that we have such natural biases or stereotypical views. Without them, our minds would not be able to create “shortcuts” to allow us to react to the almost infinite amount of perceptions we form on any given day. And the individuals we generally love and trust most are our families. Likewise, most employees spend most of their non-working time in their family environment. Generally, the family unit is *de facto* very homogeneous. We tend to be like our parents and our kids tend to be like us – biology and/or parenting works that way. In addition, we are likely to be more comfortable around people who are like us. Not all, but most people’s friends tend to be like them.

We need to be aware of not only our potential “negative” biases, but also of our “positive” biases. When we are working on a great project, are we actively ensuring we don’t assign it to someone we know, or like, and might enjoy working with, but to people based on their abilities? I am a true believer in a performance-driven and reward culture. But, *remember, results are the combination of ability and opportunity – we need to ensure we do not allow our biases to determine to whom we give opportunities.* Otherwise, only a limited group will have the chance to achieve those visible great performances.

By understanding and discussing our natural biases, we have an increased opportunity to counteract them and allow them to have a reduced influence on our decisions.<sup>15</sup> This self-awareness can have a significant impact on our choices around the key employment decisions including hiring, promotions, compensation, team composition and the retention of external counsel. When we discuss these choices, I include my entire (diverse) leadership team. Through transparency and discussion, we aim to better recognise and avoid our biases and reach better outcomes. I simply could not do this alone.

The workplace is different from our predominately homogeneous homes and families. At work, we are engaged in solving issues side-by-side with individuals of different genders, races, religions, and cultures – who come from disparate geographic and socioeconomic backgrounds, and who have different political and ideological leanings. This diversity allows us to interact with and learn about and from individuals who may be very different from ourselves. The optimal outcome is the creation of a learning environment that leads to the organisation always looking at what is different, what is new, and what can be improved. Every month I send out a message to my team covering the significant religious and ethnic holidays of that month – their history, meaning, and how they are celebrated. It is a great way to share with one another our differences and has been a continuous learning experience for the team – and for me. I had not heard of “Three Kings Day” and got huge kudos for sending out notes explaining what Eid is and wishing our team a great Eid al-Fitr.

At different times, we all play diverse roles: individual contributor, follower, and leader. In addition, someone may be at times a manager who fills out appraisals, makes compensation decisions, etc. An individual’s unique perspectives and experiences provide opportunities for them to play certain roles and be leaders with respect to those roles. Therefore, creating a diverse team and drawing upon the value of inclusion creates leadership opportunities for many. Within our law department, we have a diversity committee. No surprise, it is made up of both diverse and non-diverse members from all levels in our department, including our non-lawyer staff. All of these individuals had an opportunity to work together with me and our leadership team. As a result, we could learn about them, interact with

them, and see how they come up with creative ideas and implement them. In addition, for all of our interview panels, we require the interviewers to be diverse (both in gender and colour). As a result, during the hiring process, I had the opportunity to interact with many people who are different from me and learn about how they would make judgments around the selection of talent – probably the most important decisions we make. By the way, if talent and teams are so important, every General Counsel needs to send the message and interview every in-house lawyer hired and always ask about the diverse slate and diverse interviewers.

## The importance of leadership – not slogans or posters

If we think about our careers, we all know how much more we enjoyed working for a leader who we respected and who cared about our work, our futures, and us. People generally do not leave jobs, but leave bosses. The 2010 Corporate Counsel Women of Color survey shows that “being valued” is the greatest driver of job satisfaction for in-house counsel women of colour.<sup>16</sup> In addition, studies support the proposition that diversity effectiveness improves business results by increasing employee retention, facilitating collaboration, and inspiring employees to work slightly harder.<sup>17</sup> Moreover, if we think about how much more productive we were when we were valued by our leaders and had high job satisfaction, it is startling. We are energised to come to work early, go the extra mile on a project or spend our free time thinking about how to achieve better results.

An environment and culture that promotes diversity and inclusion are ones where people bring their full selves to a diverse-friendly environment. This means that diverse people feel they are welcome and can “show up” to their jobs in full, without holding anything back. They trust they will not have to deal with the pain and discomfort of an unwelcoming environment and they can instead focus on adding value. The best, and a sad, example of this was my good friend Dan Brandhorst. Dan was a partner at PwC and helped me through many tough projects. And was there to support me and comfort me during some of the challenging times in my career. Unfortunately, he apparently felt that he could not share his personal life with his colleagues or me. And I did not know he was gay – until Dan, his partner, and son were all killed in the second plane to hit the Trade Center. I felt sick that he believed he had to hide this from all of us — and *I vowed that I would not work in such a world that doesn’t allow individuals to share their differences.* Thank you, Dan!

Employees do not come to work wanting to be failures. They come to work wanting to be valued and to add value. Engaged employees have been shown to increase average revenue growth by 11 percent over the industry average.<sup>18</sup> If the environment encourages this attitude, productivity will soar. Conversely, if one is suppressing something – an experience, a thought, a suggestion – because they feel it will be unwelcome, it is natural that such suppression will also invade and erode their ideas, creativity, and productivity.

## The results will come

All of the previous factors work together to increase productivity and produce better results. Therefore, it is not surprising that companies with the highest percentage of women on their executive committees significantly outperform male-only teams in both returns on equity and average Earnings Before Interest and Taxes margin.<sup>19</sup> A 2001 survey also found that Fortune 500 firms with more female executives outperformed their industry medians by 34 percent in terms of profit as a percent of revenues, and by 69 percent in terms of profit as a percent of stockholder’s equity.<sup>20</sup> In addition, 72 percent of respondents to a 2010 McKinsey survey believed there is a direct connection between a company’s gender diversity and financial success.<sup>21</sup> Finally, “highly diverse law firms generate greater revenue and turn higher profits than their peers, even after controlling for hours, location and firm size . . . The evidence suggests that diversity is both a cause and effect of good business.”<sup>22</sup>

## Diversity and inclusion encompasses, but has moved beyond, civil rights

For a long time, diversity has been championed in the name of equality and called the “right thing to do” from legal, moral, and religious perspectives. In my younger years, we called it “civil rights.” This certainly remains true



today. Yet, law departments that want to drive superior performance will recognise the affirmative business value of diversity and inclusion. They will move beyond satisfying the minimum standard of what is legally required and will attract and develop a very talented, diverse team, to establish a culture that is inclusive of all views and perspectives. Such an environment will allow every individual to create value, and bring his or her greatest gifts to the organisation. The outcome will be more creative and proactive legal approaches and better decision-making that will generate superior results in addressing complex legal challenges and customer needs.

### Straight white males can't just be supporters – they need to own it

As advancing diversity and inclusion is so important, it cannot be assigned to others to accomplish. Nonetheless, generally, the straight, white male, like me, has not always been involved in this issue for two major reasons: First, it is viewed as “not my issue” – it is one for diverse individuals to work on and address. And, second, many think that a focus on diversity and inclusion does not benefit the straight, white legal manager. As a result, we often feel we do not have the “psychological standing” to actively advance and support this imperative.<sup>23</sup>

The factors outlined above should make it clear why diversity and inclusion benefit all of us. So, it is just as important to the members of the majority as to the others. We need to be clear this is a non-delegable issue. It is important too and owned by all of us. And it cannot be assigned to diverse individuals or employee resource groups. It can't be treated as a “feel-good” extracurricular exercise, but must be pursued like other significant business objectives – purposefully and with a sense of urgency.

We should always select and promote the best person for any position. Therefore, if we want to have the strongest team, and get the best results, we need to take active, significant steps to attract a diverse pool of candidates and ensure equal opportunities in recruitment, (involving a diverse slate and diverse interviewers), career development, and promotion. If we are selecting the best person, they will be valued, and become an active supporter of diversity and inclusion. And if one is such a supporter, he or she will work hard to ensure a diverse team is created. Part of this effort is to work very hard to compensate for, and reduce, our unconscious biases in all significant employment decisions.

### The conclusion is simple

The conclusion to this article is simple to write. Advancing diversity and inclusion is important to your business and to your personal success. The net result benefits us all – our society, our shareholders, the business we work for, and ourselves. It has worked extremely well for me. I “may” not be the luckiest person in the world – I am! <sup>24</sup>

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ACC Australia is committed to promoting a diverse and inclusive in-house profession and encourages its members to do the same. ACC Australia is proud to present the ACC Australia Diversity & Inclusion Charter. This Charter is provided to enable in-house legal leaders to declare their support and commitment for creating an inclusive legal profession as well as supporting diversity and inclusion initiatives within their legal departments.

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#### Mark Roellig



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# HOW TO USE RISK ASSESSMENTS TO SHIFT CULTURE

Risk - isn't that something that puts all your defences up, that you need to fight against? Isn't it the experience of General Counsel/legal counsel that protecting against risk entails a constant struggle against management? Isn't it usually the lawyer against the business, trying to reign them in and stop them doing anything that will push the business off the rails?

**W**hat a struggle. It's the pitting of valuable resources (personnel) against each other that, in a healthy business, should really be working together. So how do we change this paradigm? It requires a cultural shift.

To take an example, I entered my current General Counsel role in 2014. The organisation was going through a huge cultural and transformational shift. After having worked in two other heavily regulated industries in in-house roles and in two top tier firms, the organisation offered me the challenge to help with the transformation before them, and I accepted it.

The business brought me on to assist with an organisation-wide shift. Many things had to change in the transition from the 'old' to the 'new'. Systems, people, business approaches all underwent significant change. Many legal factors emerged in this change – as is always the case with a large-scale corporate transformation.

The key factor in this organisation-wide transformation was seeing myself as an advisor to and partner of the directors and business. In other words, I was not a block; I was a strategic advisor, who understood their perspective, what they were trying to achieve, and could help map out an approach that would not only mitigate risk but would make both commercial and legal sense. In short, my job – as is the case in this modern legal world for a General Counsel – was to be more than a lawyer.

A good lawyer knows the law well and can apply their technical prowess with ease and streamlining, generating proficient, on point advice, and can back it up. In this day and age, everyone at the General Counsel level is expected to be able to operate as a 'good lawyer'. In fact, that is a given – and the General Counsel should be doing it with their eyes closed. A General Counsel, in today's world, calls for much more than a 'good lawyer'. A really great lawyer knows their business (the client), they know what's important to the business, they know its strategic direction and why it's there, and they can see the risks along the way. They have a depth of understanding of the regulatory environment – *not* so they can tick boxes, but so their knowledge of the detail can inform a macro, bird's eye view of how the business can best move from its current position to where it needs to go.

A really great lawyer, in today's world, is very business savvy and has experience in spotting and responding to risk. In fact, they are so adept at doing this they can spot risk well before it actually arises. For instance, a business may be planning to enter a new market, or to instigate a new campaign, and the General Counsel may foresee particular elements that need to be satisfied to 'close off all holes' before the business can commence. In a way, the General Counsel is like the watcher of the outer perimeter of the business, aware, in a general sense at least, of everything inside and outside and ensuring nothing extraneous and unwanted 'gets in'. In other words, seeing it as one's job to 'let nothing in'. This is essentially about risk.

In this way, you could see the General Counsel as acting a bit like a barometer. He/she does not get in the way of the business – they are one of the business' greatest allies, friends and advisors. They deeply understand and appreciate what the business is wanting to do, and what is important

to the business, its directors and shareholders, and combined with their knowledge of the law and the particular regulatory/business environment the business operates in, they can be like a powerful lighthouse, scanning with its beaming light across the vast oceans, far and wide, and 'spotting' any blip in the sea that could potentially cause an 'impact'.

It takes a while to build that level of experience to be able to foresee things in advance and to be right there on the front foot, supporting the business and its leaders at every step.

While you may be hired to be a General Counsel or similar position, you end up stepping into a key, if not pivotal, part of the entire business, because of the breadth and depth of your vision, and your very real, practical and industry-focused view you bring to running the business.

Can you imagine the value to a business of having a lawyer onsite, like that? If you think that would be valued by CEOs and directors, then you are right. In fact, it's a complete understatement.

If I was running a company, small or large, I'd want a super well-informed, passionate and business savvy lawyer by my side to keep a hawk's eye on all developments and advise me of what looks like smooth sailing, what poses potential problems but can be addressed with some tweaks here and there, and what should be avoided. All of this can be presented in a way that works to the people you work with.

***If the lawyer sees themselves as a bridge between law and business, more of a strategic counsel than a doomsday sayer or the holder of the legal 'yes' or 'no', then they can start to work with the business to help steer it to where it needs to go.***

This is very important, and is a shift away from where legal departments have tended to go in the past. *There should never be an ivory tower in the legal department.* General Counsel and their teams are there to provide support. If they are seen as the bringer of the dreaded "No", then your advice will be avoided. After all, who wants to hear a repeated "No"?

Bear in mind, though, that as a wise, seasoned General Counsel or lawyer, you are there to bring the truth of the matter, as it is. You are not a doormat – you are a wise reflection of the truth. However, the *manner* in which you do this is *supportive*, and as part of an equal, whole team. Lawyers could do very well to drop a few tonnes of arrogance, in my view.

As you are not a doomsday sayer, then if you say 'No', your colleagues know it is for a reason. And a damn good reason. When you give advice, it comes from the business' perspective, knowing what will get it to where it wants to go, and what will not.

To be able to do this, you need to have a very solid understanding of risk. Unfortunately, this is not something that can be learnt from a book. It is something that comes with experience, through exposure to different scenarios and, above all, tuning into those you work with. In fact, more than anything else, understanding risk is all about appreciating and understanding people.



## At the very essence of all law is people

If you make your job primarily about people, then the way you communicate, what you see as important, and your willingness to support and guide the way forward, will be driven by your connection with and knowledge of the people who make up the business. What is needed for them? What is needed for the customers/clients of the business? What systems are needed to support the people in the business?

Lawyers very much deal with risk. However, risk is not just about filling out a risk analysis table or matrix and making sure it all turns green. A lawyer who operates at a *function-only* level in this day and age will not get very far. We need to be adding far more value than mere function.

By way of explanation, function-only means doing the minimum; satisfying all the requirements on your task list – but as a matter of functioning, i.e. 'It's done'. But what about the way in which it was done, and an inquiry – naturally realised when one connects to the purpose of what one is doing – into whether more or something different is needed.

***Underneath any risk strategy should be the goal of providing true service. Not risk management to tick boxes, nor risk management to get away with as much as possible. After all, if the focus of the business is on providing a service or product to people, then wouldn't risk management be about ensuring that nothing gets in the way of making that product or service all it needs to be?***

The General Counsel has the opportunity to work very closely with the board and executive management, so much so that they *together* steer the business.

The General Counsel can only achieve that if they are seen as a trusted, committed part of the business and not as a roadblock.

Do you find yourself saying no all the time and fighting for what you know is right? If yes, then a cultural shift is needed.

So how do you go about achieving that cultural shift?

First, you need to stop fighting, and support the business leaders in developing their view of risk, including legal risk. Grow your perception of your role as being bigger than the upholder of the black letter law. The role of an in-house legal team is bigger than that.

The key to all of this is quality. Yes, quality.

A General Counsel can educate the business that full compliance, with no compromise, and fully seeing and addressing legal risk, is about achieving a high-quality product. After all, you wouldn't expect to run a business and not lodge a tax return – like it or lump it, it's what you have to do.

But embrace it as a fact that legal risk must be addressed and you can actually use it as a lever from which you can exponentially grow the quality of the business and the united commitment of the team.

***If you can help the business see that quality is important – in fact, it is everything – they will start to see that full compliance and risk management are a competitive advantage.***

That is the cultural shift that has occurred in my workplace over the last five years.

Evolve College has achieved this across its entire operation, by realising as a company-wide exercise that regulatory compliance and legal risk are part of the mechanics of the business – non-negotiable and simply essential to the bottom line. The Evolve team prides itself on its quality of service and has come to understand that true quality cannot be attained if a business is just scraping through (as most are) and feeling like they are always chasing the 8 ball.

If the team commits to quality, then regulatory compliance and legal risk management simply become part of the necessities of doing business and, when done truly well, are an enormous asset to the business.

Hence, for Evolve College, achieving the highest possible compliance rating by the auditor in its industry and receiving a fully green light audit report on a full organisational audit are competitive advantages.

This cultural shift was spawned by legal. And such is the value of what is presented here that no major decision in the business would be made without legal. That is not a mandate – it just is.

Legal is not a block, nor it is working against the growth of the business. Legal is a strategic advisor and equally committed partner in the business and its development.

***Together, the growth of the business must be premised on its true purpose – providing quality service to people.***

When that is embraced as a truth and not just words, regulatory compliance and legal risk management become a simple necessity – a natural consequence of wanting to run an operation that represents quality in-truth.

The business operates to higher standards than minimum compliance or 'avoiding risk'. It operates to the standard of providing a very, very high-quality product or service to its customers. From there, meeting the regulatory requirements or identifying and managing legal risk are just obvious and part of what needs to be done.

The fight dissolves, the GC joins as an equal member at the executive and board tables, and together the team walks as one, unified by their common purpose: quality service.

And this represents an enormous competitive advantage for the business as a whole. **a**

### Serryn O'Regan



*Through her role as Executive Manager Governance and General Counsel at Evolve College, a national Registered Training Organisation, Serryn draws on her 25 years' corporate experience, including working at two top tier law firms in Australia. She is also the former Worldwide Director of a prominent charity in the USA, where she forged and managed relationships with the United Nations as well as coordinating 10,000 member groups in 190 countries.*

Serryn was a finalist for the 2018 Corporate Counsel of the Year award.

# INSIDER DATA BREACHES

It's coming from inside: How to educate your organisation on insider threats. The occurrence of insider data breaches has been on the rise in recent years, and company executives are devoting significant resources to addressing these threats. But how should in-house counsel best champion this effort and educate the organisation?

In recent years, navigating the threat of a data breach has been high on the priority list for in-house counsel. In early 2018, in-house counsel were finalising and rolling out Data Breach Response Plans for their organisations, in readiness for the commencement of the Notifiable Data Breaches Scheme in February 2018. Soon after, in May 2018, the EU General Data Protection Regulation came into effect, which required Australian in-house counsel to assess their application and reach. For APRA-regulated entities, information security is a particular focus amongst in-house counsel and their boards, with the commencement of Prudential Standard CPS234 in July 2019.

Being prepared to respond adequately and efficiently to a data breach is essential, but, as we all know, prevention is better than cure. Knowing that a significant part of the threat comes from those inside the organisation itself means that you should be able to implement effective strategies to control and minimise that threat. In-house counsel have a valuable role to play in educating the organisation and supporting the executive team's efforts to address insider threats. What will work best for your organisation will depend on its size and culture, its type of business and regulatory environment, as well as the sophistication of its IT systems and other available resources.

Your starting point is to know your data. Make sure you are familiar with what type of data your organisation collects and holds. Understand the higher risk areas – do you collect sensitive information? How is it stored? Work with your IT/information management to do an audit on the type of data you collect and hold. You or your organisation may have already carried out this type of exercise when reviewing your cyber-security risks and insurance, or when preparing your Data Breach Response Plan.

Next, you need to understand where the threats of data breach lie, and why. Who are the potential culprits in your workplace when it comes to data breaches? Many insider breaches are inadvertent – that means it's likely that staff at all levels of your workforce are possible culprits and potential threats to your data security. Think about your staff and your type of industry. It's easy to conjure up scenarios that could arise:

## THE EMPLOYEE WITH POOR CORPORATE HYGIENE.

**They leave documents in a taxi or lose their laptop at the airport. They don't install upgrades on their computer and open the door to viruses. They don't use a secure server connection or company equipment when they're travelling for work or working from home. Poor hygiene can exacerbate the effects of a data breach.**

## THE OVERLY HELPFUL EMPLOYEE WHO SHARES TOO MUCH INFORMATION.

**They're the ones who'll happily answer that work phone call on the train and loudly discuss customer information. They'll divulge sensitive information thinking they're being 'helpful', but need to be more careful about the consequences.**

## THE EMPLOYEE WHO FEELS APPREHENSIVE ABOUT SEEKING HELP.

**They won't tell anyone they've caused a data breach. They ignore it or try to cover it up and the damage gets worse.**

## THE EMPLOYEE WHO ACTS MALICIOUSLY.

**They've had a falling out with a close work friend, so they access and misuse that person's data. Or they might feel aggrieved with the organisation about work conditions or a performance review with a manager and they want to damage the organisation by disclosing confidential information.**

## THE EMPLOYEE WHO IS NOT ENGAGED IN THEIR JOB, OR THE EMPLOYEE WHO TRIES HARD TO PERFORM WELL, BUT TRAINING SESSIONS AND PROTOCOLS JUST DON'T STICK.

**These employees inadvertently cause data breaches by sending emails to the wrong person, attaching the wrong document, not understanding what types of data can be shared with others, getting mixed up when using online team chats, not carefully disposing of confidential information, and even forgetting to use the mute button on conference calls.**

**THE HIGHLY COMPETENT STAR EMPLOYEE WITH A BUSY WORKLOAD WHO, IN A MOMENTARY LAPSE, IS DECEIVED BY A SCAM AND DISCLOSES SENSITIVE INFORMATION TO A FRAUDSTER.**

**They were too tired and stressed-out to recognise the warning signs of a scam.**

Once you've identified the sources of potential breaches, you're in a position to work out the best way that you, as in-house counsel, can assist to minimise the insider risk in your organisation and get all employees to improve their data safety. Here are some suggestions:

- **Support efforts to improve the culture of the organisation.** Culture is an important barometer of a company's risk profile. You can champion the board's and your executive team's initiatives to make staff feel valued, and you should build a work environment that fosters compliance, accountability and transparency by keeping the board and executive team up to date with legal and regulatory developments. These steps will help to remove the seeds and patterns of behaviour that can create both inadvertent and malicious insider breaches. Review your Code of Conduct and the policies that back it up to get your staff to improve their habits.
- **Do what you can to make it easy for staff to comply with corporate policies and procedures.** Are the policies easy to read, up to date, fit for purpose and accessible to staff? Help your staff to improve their corporate hygiene, for example by making sure they've been trained about the IT policy before they travel for work, or work offsite.
- **Conduct tailored, regular training sessions for staff.** Training on privacy and data breaches should be tailored to your organisation. Don't talk about 'data' as an abstract concept – give actual examples of the type of information your organisation collects and handles. This will help employees to know exactly what types of 'data' you're talking about and what effect a data breach might have. Some employees don't readily engage with training sessions and the training message doesn't sink in. For those employees, try conducting a mock data breach with their involvement, to demonstrate what to do if there is a breach. This will make your message more memorable. Make sure your training is carried out regularly and is up to date with the latest developments.
- **Review the profile of the in-house legal team.** Is the legal team approachable and accessible? Nurture and encourage a culture where staff feel comfortable to admit to errors to their manager or to in-house counsel, and where staff understand that it is better to speak up if they become aware of a breach rather than hide it.
- **Be familiar with your own Data Breach Response Plan so that you can act quickly and calmly if an event occurs, and guide your staff and executive team.** Learn from any data incidents that happen in your organisation. Conduct a post-breach assessment and review your policies to ensure scenarios don't get repeated.
- **Become friends with the IT department.** In-house counsel should make it a priority to understand the technology and its application in your organisation as deeply as possible. This will give you the best chance to identify risk areas and vulnerabilities, to understand the way in which inadvertent breaches might occur, to ask the right questions, and to understand whether IT solutions to mitigate data breach risks will be effective. Check in with your IT team regularly to learn about their project plans and the developments they're working on. See yourself as a partner to the IT team when major new applications and systems are being introduced and tested for vulnerability and resilience, so that you can assess the legal implications and risks of new ways of storing information.
- **Be aware that IT tools can provide a safety net for your employees.** A secure, controlled IT system with defined operator access controls and a good document management system are essential safeguards against inadvertent breaches as well as limiting the opportunity for disgruntled employees to deliberately cause damage. Use your influence to ensure that high-risk data is stored securely, that the tasks carried out by employees are appropriate to their role, and that user access rights to data are appropriate to prevent unauthorised employees inadvertently or otherwise accessing sensitive data.
- **Check whether your work health and safety practices could be contributing to the risk of insider breaches to data security.** If you're diligent, valued employees start to pose a threat to data security because of stress and overwork, it may be that work health and safety initiatives and improvements can assist to neutralise the problem and improve employee wellbeing. You should remind the executive team and board to take steps to comply with their health and safety obligations.
- **Use your influence to ensure your organisation's contracting practices do not increase the risk of data breaches.** Educate your staff to recognise when a non-disclosure agreement is needed. This will minimise the risk of information being shared without any protections in place when they are engaging researchers and suppliers, or discussing projects with potential contractors. Also, stay alert to the potential for data breaches when your organisation is devising new marketing plans and strategies, or new ways of distributing information to shareholders and other stakeholders.
- **Know when a Privacy Impact Assessment is needed and what is required for a major new project or product.** The new project might change the type of information you collect or the way it will be stored and handled. Assess the mapping of information flows and recommend measures to minimise the risk to privacy and the threat of an inadvertent or intentional insider data breach.
- **Work with your Human Resources team to ensure that the organisation's employment strategies and practices support a data safe environment.** For example, inductions of new staff should cover responsible data handling, and what to do in the event of a data breach. Assess your recruitment strategies to guard against bringing on board a person who may engage in misconduct. Ensure police checks and reference checks are conducted and employment contracts and associated policies address data handling and consequences of breach. Don't forget that your Human Resources exit procedures are also a line of defence against threats to data security. If a disgruntled employee is terminated, their access to the office premises and to the IT systems should be promptly revoked.

## Conclusion

In-house counsel can play a valuable role in assisting an organisation with lowering its risk profile for insider data breaches. The best starting point for educating your organisation is by educating yourself: learn about the organisation's data and technology. One thing for certain in this data-driven era is that you will have the support of your executive team in devising effective strategies to lower the risk of insider breaches. <sup>a</sup>

### Elizabeth Fox



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# THE BOTTOM LINE: WHY ANALYTICS ARE THE ANSWER TO GENERAL COUNSELS COST CONTROL PROBLEMS

The role of in-house counsel around the world, and particularly in Asia, is becoming more and more difficult with each passing year. Technology is constantly evolving, while data volumes are increasing, and data sources are becoming more complex with cross-border cloud-based platforms and the prevalence of mobile devices in the everyday corporate environment. The legal department is forced to take on more responsibility, tasked with complying with changing data privacy regulations and new cybersecurity laws and overseeing corporate governance. These issues are squeezing the resources of the General Counsels (GC's) office, and demanding that the legal department do more with less.

**R**egulators and whistleblowers have heightened scrutiny of corporations across the continent, requiring legal teams to conduct a much higher volume of investigations than in previous years. In its 2016–2017 operational review, the Securities and Futures Commission issued 81 disciplinary actions (among the more than 400 cases initiated) and US\$93 million worth of fines. This was a substantial increase from the previous year, which reported 35 disciplinary actions and US\$87.1 million in fines. Many multinational corporations in Asia have become accustomed to dealing with US and EU regulators, but now they are facing greater oversight by authorities across Asia with escalated penalties for non-compliance.

Data privacy and data protection regulations like the General Data Protection Regulation (GDPR) and myriad Asian cybersecurity laws have introduced further complexity to the equation. While many GCs previously relied on support teams in the US or UK to do much of the heavy lifting, they are now limited in how data can be transferred across borders and they must implement local teams that can do the work quickly and efficiently in-country.

With the strain on internal resources most GCs in Asia face today, many continue to heavily lean on outside counsel to conduct their investigations work. Outsourcing is likely to be expensive and may take control away from the legal department, but with some understanding of analytics technology, GCs can influence process efficiencies and better contain costs.

## Analytics on the Rise

Fortunately, there are solutions for GCs and their teams to work smarter and reduce the time and costs needed to complete investigations. Advanced data analytics, technology-assisted reviews (TARs) and predictive coding have gained a significant amount of traction in the US and are also seeing increasing adoption in Asia Pacific and Europe. These technologies, and support from outside partners experienced in their application, are replacing or augmenting manual review workflows and keyword-focussed linear approaches to improve eDiscovery processes for investigations and litigation. In an ALM survey of more than 300 litigators, trial lawyers and librarians at Am Law 200 firms, nearly one-third of respondents reported that analytics are “invaluable” to them. Furthermore, 92 percent said analytics are “very or somewhat important” for cost savings.

Predictive coding can automate many of the time-intensive manual processes involved with keyword search, filtering and data sampling

to prioritise likely responsive documents and remove non-responsive documents from the dataset. Some firms have taken this a step further and used predictive coding to replace much of the first-pass review that was previously done by armies of lawyers examining each individual document. Visual analytics tools can help teams quickly understand key facts, uncover document themes and build a strong case strategy, even before the review begins and without the benefit of clear allegations. Through a visual approach, reviewers can narrow the focus to pertinent documents and dig deeper into the concepts of greatest importance to a matter. Similar documents can be clustered together based on common core concepts across a dataset, and then connected to other clusters to enable lawyers to review large datasets more efficiently.

Brian Burke, a partner at Shearman & Sterling, is one lawyer embracing new technology. He said, “Linear reviews used to be the default for us in the past but now it’s the other way around. These days we usually recommend predictive coding and other technology-assisted tools as the starting point. It’s not just about saving time and money – which is always good – the substantive results when using analytics are usually better in terms of getting your hands on the most relevant documents.”

Still, many lawyers may feel reluctant to embrace these options or worry that the technology won’t provide results that are as accurate as that of a manual review. In reality, analytics tools are not a black box, and can be used in a practical way. The defensibility of data analytics has been validated extensively in numerous jurisdictions (e.g. *McConnell Dowell Constructors Pty. v. Santam, Ltd.* in Australia and *Pyrrho Investments Limited v MWB Property* in the U.K). In some matters, the court has insisted upon their use (such as *Winfield v. City of New York*).

Below are a handful of examples in which analytics can help GC contain investigation budgets and add predictability to their projects.

- **Early Case Assessment:** Analytics are very powerful in conducting early case assessments and allowing the GC to quickly find information that can verify the validity of pending allegations, and shed light on the strength of a case’s arguments. This can all be done before the corporation commits to the weighty cost of engaging in a large scale

review effort or launching a full investigation. Subsequently, analytics can also make a big impact once a matter kicks off and counsel is developing keyword search terms, by helping discern and validate keywords. This allows legal teams to expand keywords as needed, uncover facts faster, set better case strategies and coordinate resourcing for efficient case management.


- **Regulatory Matters:** Reviews for regulatory investigations are high-pressure, high-stakes and typically run on very tight timelines. As they often involve massive volumes of data, predictive coding is a very effective method to understand the scope of data that should be ultimately reviewed and produced. Advanced analytics tools allow counsel to get to the important data as quickly as possible, and more efficiently than when using search terms or other low-level tools.

Even in situations where regulators are asking for an extensive production of all potentially relevant information, analytics can speed up review times. Often these matters can take six months or longer to complete, with hundreds of hours billed by outside review teams. With analytics, this timeline can be significantly reduced, with many matters resolved in just two months. Finding the important documents earlier on in the process and obtaining a clear picture of the entire dataset puts the GC in a stronger position to negotiate parameters with the regulator and reduce overall costs.

- **Reducing Manual Review:** Analytics can be applied to narrow the pool of what truly matters to a case. Using analytics to group similar documents together and cross-referencing those groups against search terms and other criteria can help define document correlation with responsiveness. Organising the documents in similar groups provides context for reviewers to understand how the documents relate to each other and allows routing of comparable documents – some of which may require specialised reviewers – to the appropriate teams.
- **Post-Production Work:** These technologies can also be extremely useful beyond the initial review, offering new ways to handle third-party productions and trial preparation. Predictive coding and other analytics tools allow counsel to overlay known facts onto an incoming production set and quickly find the opposing side's key documents in context, offering insight into a case's strengths and weaknesses. Quickly identifying key facts to assist with preparing for depositions or support court presentations can make a significant difference in the cost and success of a matter.
- **Identifying Sensitive Information:** When transferring data across borders for regulatory response or litigation, counsel needs to understand the privacy and security implications of that information. Analytics workflows can help the legal team identify any variety of sensitive data to proactively and reactively (as in the case of a breach) mitigate exposure.

FTI Technology recently concluded one investigation for a multinational company seeking to learn more about the allegations made by a whistleblower. The whistleblower's claims were profound but narrow; the client wanted to know if they were accurate and if there were additional issues that the whistleblower didn't bring to their attention. Moreover, the client needed to determine if the claims were true in several different parts of the world. The project spanned millions of documents in multiple languages, requiring multilingual attorneys and investigators skilled in applying analytics technology to accelerate

workflows. Using predictive coding and other analytic tools, our team introduced a workflow that cost 50 percent less than what the client initially budgeted, and in the end helped the client understand the facts of the matter more than a month ahead of schedule, enabling them to proactively take action.

As counsel begins to consider the use of eDiscovery analytics to reduce costs, they should evaluate ways to use technology to do the heavy lifting, as well as relying on third-party experts to help guide how and when they are used. Outside counsel should also be encouraged to embrace these analytic tools, as they will speed up processes and reduce the time lawyers spend manually reviewing documents. Teams willing to embrace new approaches enabled by technology will become increasingly comfortable with using these tools. Over time, counsel can establish standardised workflows, which will further streamline processes for high-volume caseloads, allowing legal teams to better meet expectations and do more with less. 

#### Sandeep Jadav



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#### Peter Glanville



*Specialising in assisting clients and their advisors with contentious matters, Peter has over 18 years' experience in assisting clients in responding to matters including allegations of fraud, bribery & corruption and misconduct. He also assists clients in assessing internal controls and compliance programs and assists in remediating deficiencies identified.*

#### Karen Chon



*As the head of business development for the Technology practice of FTI Consulting in Asia, Karen has over 7 years of experience in the legal industry assisting law firms and corporations with complex disputes and investigations. She helps clients solve data related (e-discovery) challenges and deliver tangible business benefits that reduce risk, control costs and help clients achieve the best outcome for their matters.*

*The views expressed herein are those of the author(s) and not necessarily the views of FTI Consulting, Inc., its management, its subsidiaries, its affiliates, or its other professionals.*

# THE COSTS OF LOSING CUSTOMER DATA

The 2017 data breach of US credit reporting agency Equifax exposed the personal information, including names, birthdays and social security numbers, of nearly 150 million Americans. The information obtained could be used to steal an identity, having a lasting impact on the lives of those affected. The breach has been reported to have cost Equifax between US\$400m and US\$600m, with the cost potentially increasing as ongoing disputes are resolved.

In 2018, Marriott discovered that, when they acquired Starwood, they also acquired an advanced persistent threat actor that reportedly stole data from 500 million customers over a four-year period, including names, contact information, passport numbers and other personal information.

Here in Australia, there have been numerous events too, including the 2017 breach of nearly 50,000 Australians' information from a private contractor that worked with federal government departments and several ASX-listed corporations.

Incidents like the above can have significant impacts on a business' reputation and financial performance, however, the extent that Australian entities will be fiscally penalised in the event of a breach is not yet known. In February 2018, the Notifiable Data Breaches Scheme (the Scheme) was enacted in Australia, which puts in place an expectation that organisations are responsible for how they handle our data, and creates a system of trust and transparency that should something go wrong, we have a way of knowing about it and the potential harm that may be caused.

*Failure to comply with the Scheme can result in penalties of up to \$1.8 million for organisations, and \$360,000 for individuals.*

As these penalties show, this is an issue that senior executives and risk committees must take seriously. However, it can be difficult to know where to start. Understanding the issue in more detail can be helpful in putting things into perspective.

## The data explosion

As businesses move into the information age, the quantity and types of data they are collecting have grown. The opportunities this data and the overlying analytics provide are myriad, and the benefits can be seen in everything from better recommendations on Netflix, to more personalised offers from our favourite stores. It allows businesses to make more informed decisions and offer improvements to their products and services. With the increase in size and spread of our data comes increased risk that a breach could occur. This extends far beyond a straightforward customer contact database or the payment records that typically come to mind when we think about customer data. Consider the following examples:

- your workplace uses an external facing email address to communicate with customers;
- you have digital product development teams using services like Amazon Web Services (AWS) to develop a new customer product or marketing tool; or
- your customers fill out application forms which are stored electronically on your servers.

In each of the above scenarios, the risk of a data breach involving customer information is high. For example:

- Customer facing email accounts are often used to send identification and other supporting documents such as for the 100-point checks,

and information in these accounts is very rarely deleted due to the use of cloud email environments like O365 and the removal of the requirement to purge data to fit within mailbox size limits.

- Product development teams could be using customer data to build new marketing tools leveraging powerful cloud-based servers. Failure to properly secure your cloud services or de-identify your customer data can lead to unauthorised access and theft.
- Application forms are highly likely to contain personal information and, since they are usually handwritten forms that have been scanned in, they pose unique challenges when it comes to identifying and quantifying the information they contain.

With more data, and data-sprawl, comes increased risk to your organisation and an increased chance that a data breach may occur.

## What exactly is a data breach?

Simply put, a data breach occurs when personal information that an entity holds is subject to unauthorised access or disclosure, or it is lost. You do not need to be the victim of a sophisticated hack that results in a loss of data; you could simply have an employee send an email to the wrong address, or lose an unencrypted USB device with sensitive personal information on it.

### TIP 1: DEVELOP A DATA BREACH RESPONSE PLAN BEFORE YOU NEED ONE

**Each entity must develop their own procedures for assessing any suspected data breach, so the Office of the Australian Information Commissioner (OAIC) and impacted individuals can be notified. The purpose of a data breach plan is to outline your strategy for containing, assessing and managing the incident from start to finish. Your plan should set out roles and responsibilities for managing a data breach and also describe the steps your organisation will take should a data breach occur.**

**The OAIC website (<https://www.oaic.gov.au>) has useful guidance on developing a plan.**

## What to do if you have a breach

In the event of a data breach, it is important that in-house and external counsel are notified as part of the response plan. It is easy for the technical experts to be solely focussed on containing a breach that they may lose sight of the obligations entities have under the Scheme. This is where it is important that counsel maintains oversight of the process that assesses the data breached and importantly determines if a data breach is a notifiable event.



Per the OAC, your assessment of a data breach should consider:

- if there has been any Personally Identifiable Information (PII) involved in the breach;
- the circumstances of the breach, including causes and the extent. These factors will help you understand the potential impact; and
- the nature of the harm to affected individuals and if remedial action can reduce this harm.

Importantly, you must take all reasonable steps to complete the assessment within 30 calendar days after your organisation becomes aware of the grounds (or information) that caused it to suspect an eligible data breach.

## What is PII?

Personally Identifiable Information, known as PII, is a broad term for any details that can be used to distinguish or trace an individual's identity. Names, birthdays, addresses, biometrics such as fingerprints, and driver's licences are all prime examples of PII. As noted above, much of this information is valuable to businesses – both for the business itself and its customers. Many organisations, such as banks and AUSTRAC reporting entities, are even required to collect and store this kind of data to prevent potential money laundering.

If your business deals with individuals, then you are probably holding some form of PII.

### TIP 2: KNOW YOUR RISK – IDENTIFY AND CLASSIFY YOUR DATA

**Undertaking a project to identify and classify the data your organisation holds is a significant first step in understanding the risk. Work through each of your key business processes to identify the points where data is collected, stored or transferred between systems. Review these data points and determine if they contain PII or not, and create a register with classifications as to the type of PII. These registers are useful for assessing risks and building controls, and are a useful tool for assessing a data breach at the time of an event.**

## The complexities of a notifiable event

On face value, it may seem reasonably straightforward to inform customers should a notifiable breach occur, and, in some circumstances, it is. Consider the scenario where an Excel file containing customer contact details is sent to the wrong person. In this situation, the following is true:

- you know exactly what data was subject to the breach;
- the data is structured in a table, making the assessment straightforward; and
- knowing the individuals impacted allows you to easily look up their contact details for the purpose of notifying them.

Executing your response plan in the above situation would be reasonably straightforward, and completing the assessment within 30 calendar days is quite feasible.

However, most situations are not this straightforward, and identifying the people potentially impacted and notifying them has unique challenges. Now, consider the following, more complicated scenario:

- your IT experts identified that someone has accessed a corporate email account and likely downloaded the entire mailbox;
- the email was used by customers to send in scanned copies of identification and other 100-point-check documents that contain a large amount of personal information; and
- there are thousands of emails and attachments to review for PII.

In this scenario, you still have 30 days to complete your assessment, however, now the process of identifying and assessing the data breach

has become a lot more complex. How will you analyse the thousands of emails and create a detailed list of potentially impacted individuals? In these complex situations, you require the assistance of Cyber Information Risk and Analytics specialists to manage the response and analyse the data.

- **Cyber Information Risk** specialists are able to capture forensic copies of data and event logs in a forensically sound manner to preserve the integrity of the information. They are experienced in managing the end-to-end process of responding to a data breach and can perform a post-incident review with your team to make sure the organisation is able to learn from the incident and adjust accordingly.
- **Data Analytics** specialists can use analytical techniques to help identify the different types of PII and link them to individuals using text analytics and pattern matching. Identifying the individuals in unstructured data such as emails is a complex task. By using Named Entity Recognition and similar entity extraction processes, they are able to automatically scan through vast amounts of unstructured data and identify the names of the individuals potentially impacted.

### TIP 3: TEST YOUR PLAN WITH A DESKTOP EXERCISE

**If you have developed a plan, outlined the roles and responsibilities and created a data register, then why not test it? Enacting a desktop exercise with the relevant people where a data breach is staged and the plan is worked through is a useful way for your people to become familiar with the process and creates a safe environment in which to do so.**

It is impossible to say that a data breach can be completely avoided. However, ensuring you are proactive in identifying and classifying the data your business needs to hold and developing a detailed response plan is the next best thing. In the event you do have a data breach, you will be prepared, know which actions to take and will have met your obligations. By demonstrating that your organisation is compliant with the Scheme and takes data privacy seriously, you will be able to maintain the trust of the Commissioner and public in your organisation. <sup>①</sup>

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# THE ASCENT OF MILLENNIAL IN-HOUSE COUNSEL

Millennials have started to enter the corporate in-house world, and their numbers are rapidly growing. For some older in-house counsel, who have never experienced working with millennials and who may have only heard rumours about their bad work habits and sense of entitlement, the arrival of millennial in-house counsel may seem like an end to everything they know and value. This article will set your mind at ease.

**W**ith millennials' arrival, today's corporate legal departments can often find they have four generations of lawyers working together. To say that these four generations are quite different would be a gross understatement — they think and operate differently, and are driven and motivated by different values. And that's not necessarily a bad thing. Legal departments can, in fact, benefit from this generational diversity.

## Meet the four generations

The traditionalists, born before 1946, lived through the Great Depression, World War II, and the Korean War. They are typically very loyal to their employers, have a great work ethic, are most comfortable with formalities in the workplace, on the telephone, and on the page, and are eager to mentor younger lawyers and to leave a meaningful legacy.

The baby boomers, born between approximately 1946 and 1964, lived through the Cold War and grew up during the inception of the Civil Rights Movement. They value loyalty, authority in the workplace, hard work, including long hours, and are often motivated by financial success. As they age, the baby boomers are choosing to postpone retirement, even as they seek out a greater work-life balance.

The Generation Xers, born between approximately 1965 and 1980, were raised in families with two working parents, witnessed the rise of divorce rates, and as a result were often left to their own devices. These experiences shaped them to be independent, rely-only-on-themselves, entrepreneurial individuals who are not huge fans of teamwork. They do not typically have the same institutional loyalty as generations before them, and do not have the same respect for rules and authority. Generation Xers are not usually motivated by money and instead value professional development and work-life balance.

The millennials, born between approximately 1980 and 2000, grew up witnessing the rise of terrorism and school shootings, and were sheltered by "helicopter" parents who praised their children for meaningless accomplishments (think participation trophies). Their childhood days were meticulously planned out by their parents with playdates and extracurricular (mostly team) activities. They also grew up immersed in technology. In fact, many of them can barely remember the world without cell phones, text messaging, the Internet, or social media. So, who did these "sheltered" children of younger baby boomers and older Generation Xers grow up to be?

The number of millennials in the workforce is growing rapidly with no slowdown in sight. Overall, the millennials comprise

over 20 percent of the legal workforce.<sup>1</sup> The oldest millennials graduated from law school around 2004–05. By now, many who joined law firms have reached the partnership ranks. An increasing number of them, however — having spent several years billing long hours as outside counsel — are making the transition to corporate in-house positions. The new in-house millennials are more mature and responsible as they become parents. They are moving to the corporate world for a reason. And that reason is that the corporate world is where they want to be — mainly because it aligns with their value framework.

That was exactly Meyling Ortiz's reason for leaving a law firm she loved for an opportunity to go in-house with Toyota Motor North America. She left private practice the very year she was up for shareholder. "Yes, part of it was wanting to spend more time with my daughter, Olivia, who was only a few months old when I returned from maternity leave, but it was also the drive to want to be a part of something bigger than myself — beyond billing."

## PERCEPTION ADJUSTMENT

Many of you may have your own ideas of what millennials are like. Thomson Reuters surveyed 150 corporate attorneys in 2018 to learn about their perceptions of millennials.

### Their findings included:

- **74** percent of their respondents said they thought that millennials would bring about advancements in technology in their legal departments faster than previous generations.
- **70** percent of their respondents believed that millennials wanted to be involved in decision-making processes.
- **76** percent of baby boomer and Generation Xer respondents believed millennials would stay in their current jobs for less than five years, while only 38 percent of millennial responders agreed with that statement.

## HERE IS WHAT YOU NEED TO KNOW. GENERALLY, MILLENNIALS ....

- ✓ Are casual in the workplace and dislike formalities, yet are deeply serious and passionate about the work;
- ✓ Value challenging and meaningful work over financial rewards;
- ✓ Want to impact decision-making processes;
- ✓ Desire instant, continuous, and preferably informal feedback;
- ✓ Want to be heard and valued;
- ✓ Are vocal about what they want;
- ✓ Refuse to work for an employer whose values do not align with their own;
- ✓ Value and understand the importance of diversity and inclusion in the workplace;
- ✓ Will not compromise their work-life balance, wellness, and time with their family and friends;
- ✓ Value continuous professional development;
- ✓ Want to work where they can be their authentic selves;
- ✓ Will seek out opportunities for advancement sooner than other generations;
- ✓ Respect older generations and want to learn from them;
- ✓ Are more than willing to share their technological knowledge with others in the workplace;
- ✓ Are comfortable with change; and
- ✓ Will be loyal to the employer that checks most of their must-have items.

### What are the unique aspects of millennial counsel? And why should you welcome them to the table?

Yes, millennial counsel are very different from lawyers of other generations, but many of those differences are actually good. Let me elaborate.

- **Millennials are tech-savvy.** Not only can they help you figure out the peculiarities of the latest version of your matter management software, but they can also help you select the best technology for your department as your tech needs evolve.
- **Millennials are innovation geeks.** Millennials enjoy and crave change, and thus love innovation. They understand and want to support your business clients who are pushing for more innovation. Capitalise on that! Millennials speak the innovation language and can quickly become your most forward-thinking clients' trusted advisors. Facilitate these partnerships and then watch the "magic" happen.
- **Millennials challenge the status quo.** They are less likely than older generations to accept that things should be done the way they have always been done; and while this may appear to be disrespectful to authority or tradition, it is really about efficiency and innovation. Millennials challenge others to think about more efficient and cost-effective and less time- and resource-consuming ways to get to the finish line.
- **Millennials can better relate to your younger business clients.** Business people sometimes forego consulting their in-house counsel because they feel intimidated by lawyers.

Such intimidation is even more prevalent when business clients are much younger than the in-house counsel. With your client base becoming younger and more millennials moving into leadership positions in business, your millennial counsel can help your legal department better relate to those younger clients.

- **Millennials can help "modernise" your outside counsel.** Millennial in-house counsel expect their outside counsel to be technologically savvy and to have the best tools to do the job. Plus, they are vocal about their expectations. This will push your outside firms to invest in new technology and stay on top of leading trends in the legal industry (think data mining, chatbots, and other uses for Artificial Intelligence).
- **Millennials can be the best brand marketers for your organisation and legal department.** They are into social media and community involvement. As a result, they can be very "visible". Millennials can be excellent promoters of their employers' brands. And they can be the promoters of your legal groups as well! Is your legal department doing noteworthy pro bono work? If so, you better believe that your millennial counsel is highlighting your group's efforts on professional social media channels. You get the point. Get your millennials to respect your brand, and they will sing praises to it everywhere they go — literally and virtually.

### How to retain millennial counsel

Now that you've hopefully come around to being excited about having millennials on your legal team, how do you retain them and grow their loyalty to your organisation?

- **Become more transparent about the goals of your legal department.** Millennials have a need to understand the big picture. What is the main function of the legal department? What role does your legal team play in the overall organisation? How do you interact with your corporate clients? Answer these questions clearly and frequently reemphasise the mission and goals of your department.
- **Explain how the millennial counsel's work fits into the big picture.** Millennials value meaningful work and have an innate desire to know that what they do on a daily basis or their part of the project contributes to the greater goal of your department. Explain the "why" behind their work and how it contributes to the big picture.
- **Speak openly about the pathway to leadership.** Yes, millennials are less patient than older generations, especially when it comes to professional advancement. That being said, they are willing to wait and work toward a goal if they clearly understand the path to a leadership position. Be transparent about how many years this path may take, what steps would need to be taken, and what development would be required to get there. Stay silent on this topic and watch your millennial counsel jump ship to a different employer.
- **Walk the walk when it comes to diversity.** Diversity matters to millennials. Millennial in-house counsel are more diverse than those from previous generations, and they want to see their employers adopt diversity and inclusion as one of their core values. According to the 2016 survey conducted by the Institute for Public Relations in collaboration with the engagement firm Weber Shandwick,<sup>2</sup> nearly half of millennial respondents indicated they value diversity and inclusion in work environments. Set diversity and inclusion as one of your department's strategic goals — not just for in-house counsel and leadership, but also for outside counsel and vendors you work with. Millennials will generally be more loyal to employers if they see professionals of their gender and/or ethnicity in leadership positions.



- **Let your millennial counsel spread their wings.** Millennials want to be significant contributors. Encourage them to speak up with their ideas and to challenge the status quo; they may very well surprise you with innovative proposals and approaches. But don't just stop there. Let them lead a project or oversee a deal. Do not assume that the millennials' younger age equates to a lack of ability or confidence. Millennials are more than ready and eager to be the lead on anything, given an opportunity. Empowering the millennials will inspire them to grow exponentially and to contribute to your organisation in innovative ways.
- **Provide your millennial counsel opportunities to shine in front of your key corporate clients.** Next time you need to train your executives or garner their buy-in, allow your millennial to take the lead. Give millennials opportunities for internal exposure, and you will very likely be pleasantly surprised by their level of professionalism and impact. Such opportunities for exposure will not only boost their confidence, but will also help them develop relationships with some of your most important corporate clients and start earning their trust and respect.
- **Allow them flexibility in how they work.** Let's be honest — one of the main reasons the millennial lawyers are attracted to corporate in-house positions is their inherent desire to have a better work-life balance and not have to bill hours. And that means having some flexibility in how they structure their days. They are professionals, after all. So, treat them that way. Requiring them to be at their desks all day for the sole purpose of facetime will not make them be better at their work or produce better deliverables. On the contrary, it will dampen their creativity and suppress their innovative juices. Millennials need to be inspired, and some flexibility — in how to work, where to work, and when to work — helps achieve just that.
- **Offer them mobility within your organisation.** Mobility does not always have to be upward. Your millennial counsel would likely appreciate the opportunity to rotate to a different group in your legal department. Yes, this may create some extra work, but the benefits both to the millennial and the department would in the long run greatly outweigh any inconvenience. In our fast-paced business environment, don't you want your in-house counsel to be flexible and easily adaptable to any condition? Nothing creates such qualities better than rotational opportunities. Plus, I cannot overstate the importance of building relationships across functions within your department. Better yet, create opportunities for your millennial counsel to rotate out of your legal department and into a business function. This rotation does not need to be long-term; a simple opportunity to work on a short-term project outside of their usual area, and outside their comfort zone, will boost their morale and make them more committed to the mission and goals of your organisation.
- **Give them better technology.** It's certainly not a secret that millennials are spoiled when it comes to technology. They grew up immersed in it and are often the first ones to try the newest technology releases — whether it's the latest smartphone, app, or electronic note-taking device. Many millennials geek out on the newest technological stuff. Try not to disappoint them. Give them the technological tools — devices, software, virtual meeting capabilities — that will make them feel proud and excited to be a part of your organisation. Keeping up with technology comes with a hefty price tag, but it is definitely a worthwhile investment.
- **Support your millennial counsel's eagerness to do pro bono and community service work.** For millennials, being responsible community members means giving back to the communities where they live and work. Financial gifts are not enough. Millennials want to give their time,

their expertise, and their passion for the causes they find important. Do you have a pro bono program within your legal department or a volunteer program within the company? Plug your millennial counsel in! If there is no formal program in place, encourage your millennials to get involved with pro bono projects on their own and allow them time during the work day to do that. Your local ACC chapter offers a great variety of pro bono opportunities that they would be easily able to jump into. In addition, many millennials choose to join boards of directors of various non-profit organisations. Support those efforts, as the relationships they establish and the experiences they gain through these engagements will not only develop them into greater leaders of tomorrow, but will also benefit your organisation.

- **Show them you respect and value them, their full identities, and their families.** Are your legal department members comfortable in displaying their family photos and openly talking about the challenges of raising kids? Are they bringing their same-gender partners to the department-sponsored events? Be the employer that respects and values everyone. Millennials, with their desire to easily transition from work to personal life and back, do not want to have to be "different people" in separate, but sometimes overlapping, spheres of their lives. In addition, the rise of social media has allowed everyone to be more transparent about who they are and how they live, so you will attract and retain more millennials if you welcome them as they are.

### How to develop millennial counsel

Of course, like any other generation, millennials come with their own shortcomings. Consider these ways to help them overcome their challenges.

First, while baby boomers typically have excellent people and client relationship skills, millennials are visibly lacking in that department. Need to send a winning text? Your millennial has got you covered. But business often involves face-to-face client interaction. There, millennials need some help. Coach them on effective traditional people and relationship skills. Allow them to shadow you when you meet with your business clients and encourage them to have more in-person meetings with their own clients.

Perhaps because millennials spend most of their time communicating via electronic means, they often lack emotional intelligence — the ability to identify and manage their own emotions, as well as to identify and influence the emotions of other people. The more time they spend having in-person interactions with others, the better they will become at skills involving emotional intelligence. Michelle Brookshire, Deputy General Counsel at Sky Chefs, Inc., knows the value of in-person interactions and encourages other millennials to seek out opportunities to connect with clients one-on-one. "As millennials, because we are adept with electronic communications, that is usually our default means of communication. However, one of the wonderful things of working at a corporate headquarters is that you may be able to walk down the hall and have one-on-one interactions with your clients. You don't have to rely on electronic communication to get the job done! Looking for those opportunities is important not only for sharpening emotional intelligence, but for being an effective business partner."

In the meantime, you may want to consider educating your group on how to build their interpersonal skills and how to become better communicators and negotiators.

## RESOURCES FOR MILLENNIALS (AND OTHERS) ON HOW TO BECOME BETTER COMMUNICATORS

There are numerous tools out there to help members of your legal department improve their communication skills.

### READ

- *Beyond Smart: Lawyering with Emotional Intelligence*, by Ronda Muir, is a comprehensive guide explaining the essence of emotional intelligence and its significance in the practice of law, and providing practical tips on how to raise your own emotional intelligence.
- *Crucial Conversations: Tools for Talking When Stakes Are High*, by Kerry Patterson, Joseph Grenny, Ron McMillan and Al Switzler, offers the reader tools to manage high-stakes conversations, including how to be persuasive and in control of one's emotions.
- *The Definitive Book of Body Language*, by Barbara and Allan Pease, provides insight on how to read others' non-verbal cues and how others may be reading you.

### TAKE A PERSONALITY TEST

One of the main keys to becoming a better communicator is understanding your own personality and communication style. While personality tests are not perfect, they can help you understand yourself better – everything from what makes you tick to how you interact with others. Check out the Myers-Briggs Type Indicator® (MBTI®) assessment for starters ([https://www.mbtionline.com/?utm\\_source=MBF&utm\\_medium=link&utm\\_campaign=online](https://www.mbtionline.com/?utm_source=MBF&utm_medium=link&utm_campaign=online)).

### PARTICIPATE IN A WORKSHOP ON PROFESSIONAL COMMUNICATION

You likely have star communicators in your legal group or among your executives. Invite them to do a workshop on ways to be more effective communicators with an interactive element to give your millennials an opportunity to put their newly acquired knowledge to practice.

### TAKE NEGOTIATION TRAINING

Don't stop at helping your millennials become better communicators. Give them the tools to become more confident and skilful negotiators as well, and you'll reap great benefits! With many courses to choose from, consider KARRASS that offers seminars around the country, as well as customised in-house programs ([www.karrass.com](http://www.karrass.com)).

Throughout their careers, millennials expect and need clear schedules and firm deadlines. Growing up, millennials' lives were carefully curated by their parents and caregivers. As a result, they grew up into professionals who need a bit more direction than previous generations. How can you help? Set the project schedule and deadlines early on, check in periodically to chat about progress and challenges, and offer project management education if needed. Dena DeNooyer Stroh, a Generation Xer and General Counsel of the North Texas Tollway Authority, loves the enthusiasm and creativity that millennials bring to projects and finds that she can "help harness their energy by offering deadlines and structure."

## Educating others about millennials

Now that you know how to keep your millennial counsel happy and loyal to your organisation, as well as how to help develop them, here are some ideas on how to assist other generations to better connect with millennials.


First, host a lunch-and-learn with your senior leaders to discuss challenges and opportunities of working with millennials. Millennials are inevitably joining and rising in the workforce, so counsel from other generations need to learn how to build relationships with them. Listen to, and acknowledge, the older lawyers' concerns about the clash of generations, and follow up with any younger lawyers who might be struggling to fit into your company's legal culture.

As part of this effort, encourage formal or informal mentoring outside of established hierarchical relationships. Millennials want to learn from other generations, and other generations can benefit from interacting with millennials. It's truly a win-win proposition.

To further these relationships, talk to your department leaders about sponsoring millennials. While the goal of both mentors and sponsors is to support you in achieving your legal and business aims, the mentors' main role is to be an advisor, while sponsors are your advocates who promote you and help you become more visible in your organisation or in the community. Urge your leadership to take a step beyond mentorship and to consider being a sponsor and a champion for your millennial counsel. This will help foster relationships among your team of different generations. At the same time, it will make millennials more connected with your organisation.

As part of these relationships, encourage your traditionalists and baby boomers to pass on their insight, expertise, and historic organisational knowledge to your millennial counsel. Older generations tend to "hoard" their professional knowledge and are often reluctant to share it with younger generations, presumably in fear of being replaced. However, older lawyers — as leaders of your legal department — need to realise that timely knowledge transfer to younger team members is essential to ensure the long-term success of your organisation. The quicker this realisation sets in, the easier it will be to maintain your business clients' trust in your legal department.

Finally, start getting serious about succession planning for your legal group. According to a 2017 Thomson Reuters survey,<sup>3</sup> only 26 percent of the legal departments surveyed had a succession plan in place. Yet succession planning is not just for law firms. Being prepared for the future is essential to maintain continuity in the world of disruptions and unpredictability. Millennials can be groomed and prepared to take the reins when their time comes.

The bottom line: millennials have arrived in your legal departments, and it's time to take them seriously. It's also important to make them welcome and to help them succeed as an integral part of your team. After all, they are your future legal leaders. 

### Footnotes

1. Christopher Imperiale, *Attracting and Retaining the Millennial Lawyer*, Law 360, January 19, 2017, [www.law360.com/articles/882564/attracting-and-retaining-the-millennial-lawyer](http://www.law360.com/articles/882564/attracting-and-retaining-the-millennial-lawyer).
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# THE SECRETS OF CREATING A MORE INFLUENTIAL LEGAL TEAM

Do you want to be at the heart of decision-making in your business? Do you want to have greater autonomy over your own work and for your team? Do you want to be seen more positively within your organisation? Why increasing your influence isn't just beneficial, it's essential.

**W**ho wouldn't want to be more influential? The benefits are numerous—from improved job satisfaction to faster career progression, to increased departmental budgets. The influence of in-house counsel has certainly expanded in recent years.

However, what might be less obvious is the fast approaching danger of losing this forward momentum and the chance for your team to take charge as influential players in the game.

## Securing Your Share of Limited Resources

Whatever you are trying to accomplish in an organisation, you need resources. This might be budget, skills, senior time and involvement, or the many other types of business support. In every organisation all resources are limited. Put simply, the less influence you have in the business and on the bottom line, the fewer resources available to you.

## Staff Retention is Essential

Staff retention is an issue for all aspects of business. You need good budgets for recruiting and rewarding staff. You also need interesting work and sought-after opportunities for career progression. Daniel Pink, the author of *Drive*, identified three motivators of white-collar workers:

1. **Mastery:** Developing and using skills
2. **Autonomy:** Being in control of how you work
3. **Purpose:** Knowing the purpose of the organisation and team you belong to, your place within it and being recognised for the difference you make towards that purpose.

If we cannot deliver at a high level on mastery, autonomy and purpose, then we risk losing good staff. The cost of losing staff is far greater than the cost of recruiting a replacement.

If you want your mission to benefit from the individuals in your team, you need to ensure you are empowering these team members. People go to work for the camaraderie too. One Gallup study shows that good work friendships boost employee satisfaction by 50% (Gallup (2017) *State of the American Workplace* <https://news.gallup.com/reports/178514/state-american-workplace.aspx>). But people move on from 'nice teams' which don't challenge themselves or each other. The Law Society of NSW warns that the first sign it is time to move on is the feeling of being unchallenged and disillusioned (Allman <https://www.lawsociety.com.au/resources/resources/career-hub/it-time-leave-your-job>).

The retention of good staff is imperative for high-end professional services companies. Everyone wants the high fliers. But high fliers know their worth. They know their worth financially AND in terms of their career development. High fliers don't stay where they don't have enough opportunities for growth. Replacing good staff takes time and further investment, as does the bedding-in process and training in the way your company works.

## Josh Bershin of *Bershin by Deloitte* Finds Costs of Replacing Employees Include:

- Cost of onboarding, including training and management time.
- The cost of hiring a new employee, including advertising, interviewing, screening and hiring.
- Lost productivity—a new employee can take up to two years to reach the productivity of an existing team member.
- Lost engagement—other employees who see high staff turnover tend to disengage and lose productivity.
- Customer service and errors—new employees often take longer and are less adept at solving problems.
- Training cost—over two to three years, a business likely invests 10 to 20 per cent of an employee's salary or more in training.

In 2012, The Centre for American Progress published the study *There are Significant Business Costs to Replacing Employees*. Researchers Boushey and Glynn showed that the costs of replacing professional employees ranged from 30% of their annual salary up to 213% for C-suite level. So even for professionals earning \$150K per annum, that could be a cost to the bottom line of \$75K.

So, how does increasing influence affect retention? It is a chance to achieve more and deliver a stronger result. It is a chance to have greater status in the company and put yourself in the path of upcoming opportunities.

The more influential we are, the greater the opportunity we have to make the difference we took our jobs to make.

## Why increasing influence is even more essential today

### Step Up or Step Out

The nature of in-house counsel and the legal profession is changing. Much has been written about the role of technology and the implications for the number and types of jobs in the profession.

A Deloitte study in 2016 predicted a loss of 100,000 jobs in in-house counsel in the next 20 years in the UK. That's 39% of existing jobs. The tipping point, it said, was 2020, by which time the profession needed to ensure it had prepared for the oncoming changes. In fact, it claimed that 30,000 jobs (not included in the above figure) had already been lost due to technology.



However, all is not lost because this is not destruction, merely evolution, and as with all environmental crises, those who evolve will thrive. The report stated that as of 2016, 80,000 new jobs had been created in in-house counsel in the UK. The change is, however, that these jobs are at a higher level than those lost.

As we have seen throughout the world of work, it is the repetitive, simple jobs which technology replaces first. Those which require higher-order cognitive skills and creative solutions are the most robust. Creativity may indeed be the final bastion to be overcome by technology.

### Weakening Hierarchies

While the legal profession is traditional, even within its walls the changes to the ways companies work are being felt.

The arrival of Gen X in the workplace heralded a change in thinking which has gained momentum over the last 30 years. More than ever, people work for themselves. That is to say, they are responsible for their own career development and are more ready to create their own career solutions. Gen Z, the youngest in our workforce today, have been taught resourcefulness and pragmatism in delivering their work. They respect hierarchies, but look all around for solutions. They pick up what they need and put it down when they no longer need it. Solutions can be temporary, so long as they do a good job while they are needed.

This style of work is encouraged by agile work practices. Diverse functions and disciplines come together to deliver projects and then disband. Authority and autonomy are bestowed upon the teams. There is a move away from hierarchical 'waterfall' decision-making, which slows down the company's progress and competitiveness.

In this new, flexible world, people choose who they work with. The overarching preference is for those who are clever and skilled, who are also helpful in pushing towards the end goal. Collaboration is essential. Our senior professionals of the future need be well versed in empowering others, effective communication and trust. If you want to be on the team, you need to demonstrate usefulness.

People prefer to work with those who help them achieve their goals. If you want to be picked for the team, you need to develop

relationships with others which show them how you can empower them. Naturally, your strength is in your knowledge and use of the law. However, your usefulness to them is in how you can wield this super-power to help them. Influence is all about them, not about you.

So in this new world of weakened hierarchies, you need to demonstrate your usefulness in order to be picked to work on high-profile projects. Hierarchy will not be enough. You need to demonstrate that you are on their side.

### Business is people

When we think of business, we tend to think of financial planning, profit and loss, products and services. But when you think back to what made something happen in your business, and perhaps when a great idea wasn't executed, what was the cause of that?

The answer is probably people. Business isn't money. Business is people. Given this fact, it's astonishing that we are not taught more about how people work, what makes people work well together, how to work with someone to get the best out of them, how to create environments when ideas thrive through empowerment, and what motivates people and what hinders them.

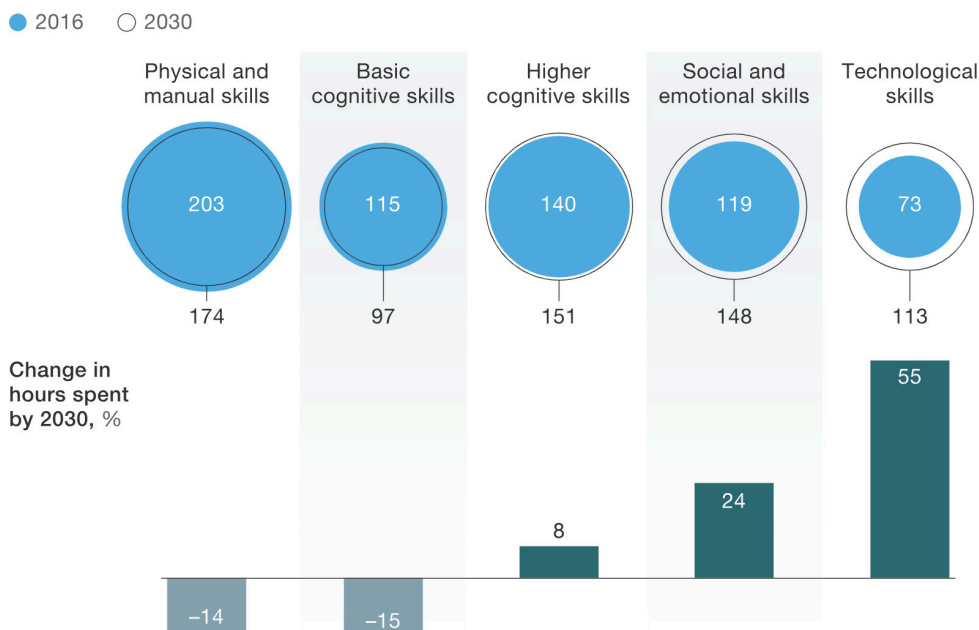
People to business are what water is to fish. Essential for life but often invisible. Yes, our knowledge and skills are essential. But they don't make or break our projects. Budgets can curb our behaviours, but it's people who set those budgets.

Consider: there are two levers to pull to ensure you get the opportunities you deserve. One is your expertise, the other is your skill with people.

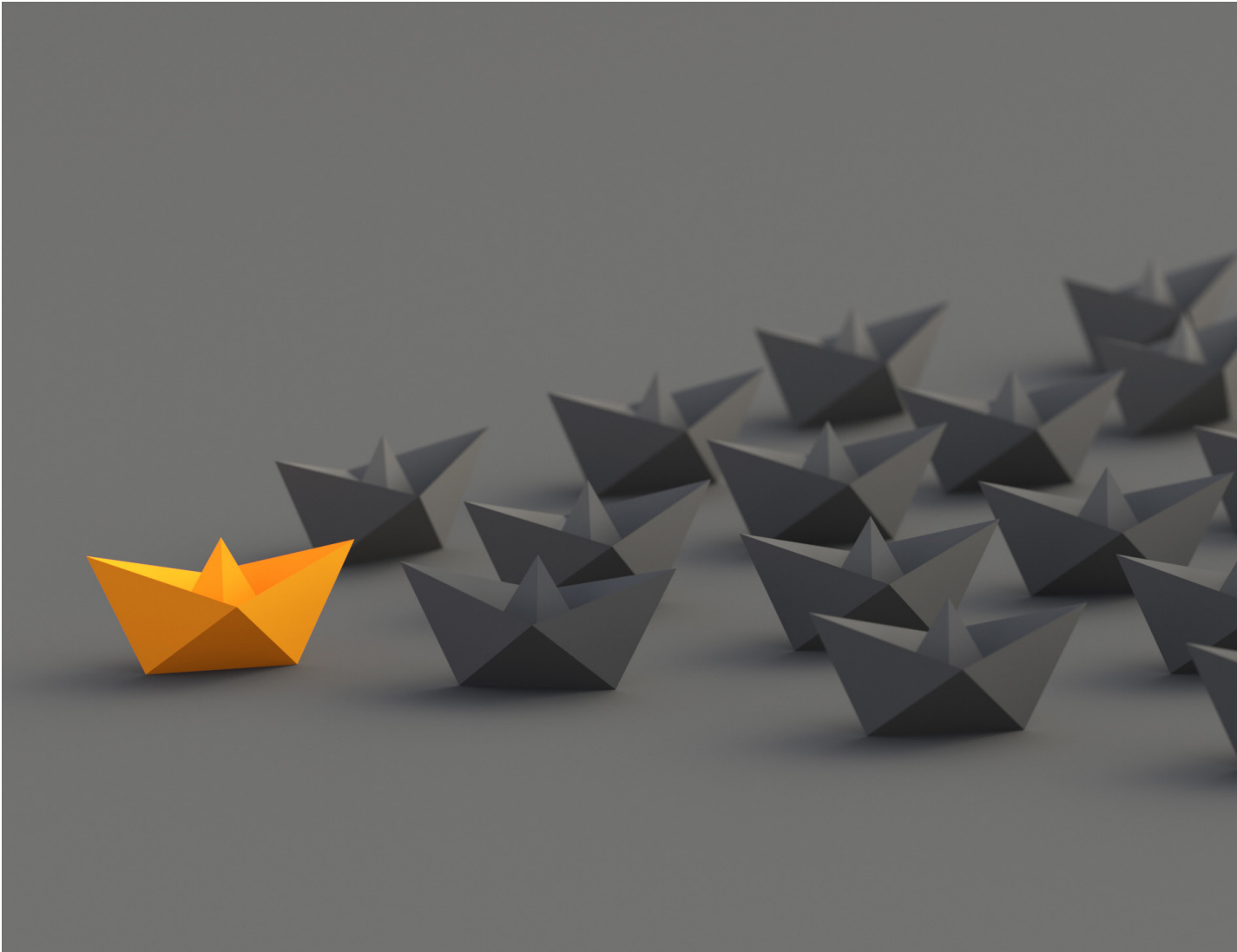
It is essential that you develop your people skills to get what you want from your work. The most effective people skill you can develop is empowering others.

A study by McKinsey (below) shows how people skills will become ever-more important (for all the reasons stated above). Higher cognitive skills are going to be more important too—but apart from technology skills it is people skills that will get stuff done in the new world of work.

Total hours worked in Europe and United States, 2016 vs 2030 estimate, billion



Source: McKinsey Global Institute Workforce Skills Model; McKinsey Global Institute analysis



How influential do your stakeholders think your team is?

The way to judge this is not to ask yourself how influential you think you are, but how influential you think your stakeholders think you are. This will probably vary by stakeholder, but nonetheless, it is a good guide.

The lower the level of influence, the less budget, the fewer career opportunities, the less job satisfaction and the weaker the staff retention.

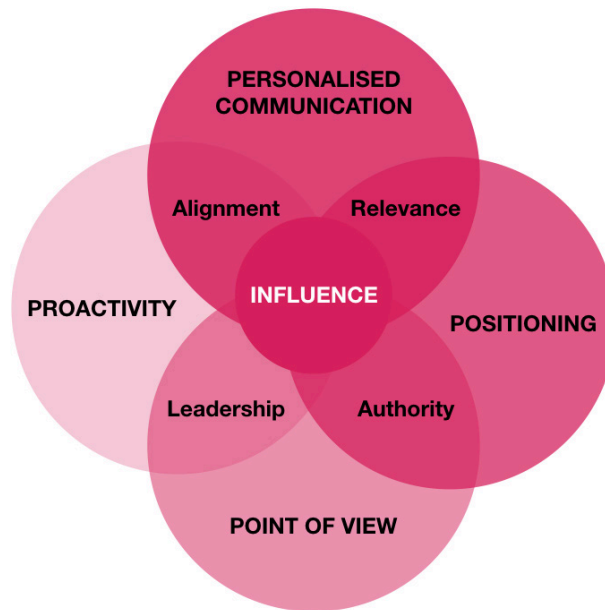
HOW FAR UP THE INFLUENCE TABLE DO YOUR STAKEHOLDERS THINK YOUR DEPARTMENT IS?

	How Your Stakeholders Would Describe Your Department	What They Think You Provide	Effect on Motivation, Performance and Business Success
LEVEL 5	Core Influencer	Direction and Strategy	x10
LEVEL 4	Key team member	Wisdom	x5
LEVEL 3	Team member	Knowledge	Neutral
LEVEL 2	Support	Information	x-5
LEVEL 1	Resource	Data	x-10

Essential part of strategic team decision-making from the beginning. Strong business relationships. High levels of autonomy, mastery and purpose. High profile in the company, good job satisfaction.

Passive, reactive. No relationship with stakeholders. Little to no value added. Not part of the decision-making team. Low budget for staff, low levels of autonomy.

## THE FOUR ESSENTIALS FOR INCREASING THE INFLUENCE OF IN-HOUSE COUNSEL: THE INFLUENCE MODEL



### 1. POSITIONING

**PROBLEM:** We'd like to provide business solutions but we're mainly asked to check out the legality of plans others have made.

This is your chance to decide how you're used and model it for the business. What is your purpose? Are you protecting, enabling, empowering, driving, identifying opportunity ...? What will be the parameters within which you work? How can you show others how to work with you?

### 3. PROACTIVITY

**PROBLEM:** I'm not invited in at the beginning so don't get the whole picture.

If you want a seat at the decision-making table you want to be seen to add value, not just be a requirement. This means being across the game sooner. This requires taking time to find out what's going on and how you can help.

### 2. POINT OF VIEW

**PROBLEM:** We'd like to provide business solutions but we are not used to going that far. We need to develop a point of view.

This is your chance to stretch your thinking. It's essential that counsel now go beyond the 'facts' to create informed solutions. Do you have enough knowledge about the business and its place in the industry to be confident in your view?

### 4. PERSONALISED COMMUNICATION

**PROBLEM:** We get frustrated sometimes as we are brought in as the black hat; our relationship with the others in the project team could be better.

Professor Amy Cuddy says that before we can impress people, first we must be trusted. This means showing others that you will empower them. To do this, you need to tune in to what they want and how they like to work.

### The challenge

Increasing your influence is the way forward for In-House Counsel. It's step up or step out. This evolution will require courage. There is no 'set and forget' or 'business as usual' in today's world of work. This change is essential, but it will bring with it a better world of opportunity, achievement and professional growth for all who make the leap.

Take a deep breath and grasp it with both hands! 

### Sara Garcia



*An expert in human behaviour, Sara works with ambitious teams to increase their effectiveness and authority within their organisations. Through her work, she helps people work together to achieve intended outcomes. She continues to volunteer as serve as a Mentor with **Youth Off the Streets** in Sydney and her book 'Ambitious Team's will be released later this year.*



# THE TRUE COST OF MISCONDUCT IN THE WORKPLACE, AND WHAT CORPORATE COUNSEL CAN DO ABOUT IT

Bullying, discrimination, fraud and integrity breaches have no place in the modern Australian workplace. These illegal behaviours damage individuals and also damage the company by pulling teams off track, distracting high performers, creating unnecessary rifts and damaging productivity.

**Y**et bad behaviour is all too common. In 2016 research by Dr Lindsay McMillan, 14% of workers described their workplace environment as 'toxic', and 20% had experienced major problems in communication with a co-worker or boss. A massive 50% of Australian workers have experienced one or more serious incidents of conflict or other negative conduct at work.

Not only the individual targets of bullying and harassment suffer: toxic workers have a damaging ripple effect on their co-workers. In a 2015 Harvard Business School report, Michael Housman and Dylan Minor claim that having a toxic employee on the payroll costs the average business an additional USD \$15,169 per year, primarily due to the loss of valued team members who can no longer tolerate the negative atmosphere that the toxic employee creates.

Even modest levels of toxic behaviour can result in major costs and lost opportunities to the employer's organisation, including loss of customers, decreased employee morale, increased turnover and loss of legitimacy amongst external stakeholders (Housman and Minor, 2015). A Safe Work Australia report in 2012 suggested that employers could ease \$720 million of the financial burden on the Australian economy if they actively mitigated job strain and bullying in the workplace.

Further, legal costs and reputational damage to the company can be huge. The royal commissions into institutional responses to child sex abuse, misconduct in the banking and finance industry, and aged care (due to report in April 2020) are high-profile examples. So too are cases of 'rogue' traders, sleazy politicians and CEOs, and various cases described by anti-corruption agencies.

The good news? Minimising and addressing bad behaviour in the workplace can generate huge savings for employers, and there are clear actions that corporate counsel can take to support the company's efforts.

## 1. Handle complaints legally and ethically

Complaints about sexual harassment, bullying, discrimination and fraud are often swept under the carpet, silenced or shut down. This happens all too frequently, from the moment the complainant first raises concerns.

Corporate counsel who are involved in the handling of complaints, or advise on the handling by human resources, compliance or other managers, should be particularly aware of:

- The increasing legal obligations on employers to provide procedural fairness to complainants and respondents;

- The high standard of internal investigation that is required of employers—see, for example, *Gera v Commonwealth Bank of Australia Ltd* [2010] FMCA 205;
- Unfair dismissal considerations—see, for example, *Dent v Halliburton Australia Pty Ltd* [2014] FWA 5692;
- The risk of adverse action—see, for example, *Bartolo v Dousta Galla Aged Services Ltd* [2015] (No. 2) FCCA 345;
- The Fair Work Commission's approach in stop bullying orders—see, for example, *Susan Purcell v Mary Farah and Mercy Education Ltd* [2016] FWC 2308; and
- Additional statutory provisions that apply in the public sector.

Of course, case law and legislation prescribe the minimum standard. The values and ethics of the organisation, industrial relations constraints and particular circumstances of the case might require:

- Specific timeframes being met;
- Additional support being offered to both parties;
- Particular preservation of confidentiality; and
- Careful handling of mental health and other wellbeing issues, among other considerations.

## 2. Review the data

Bad behaviour in the workplace is often hidden from view. The many accounts that emerged in the recent #metoo movement showed that sophisticated bullies and sexual harassers often work behind the scenes, targeting an individual when no one else is present to witness their misconduct. However, the consequences of a workplace culture that allows sexist, racist or aggressive conduct are harder to hide.

Employers can review the data they hold on employee engagement, complaints and departures. Look for patterns and signs of distraction, disengagement and distress of employees. Turnover statistics, absenteeism rates and exit interviews are particularly revealing, as well as longitudinal analysis of employee engagement surveys if you run them annually. Put together the data with your own knowledge of cultural issues and anecdotal evidence of certain managers' styles—what is the data telling you? Are there 'hotspots' of dissatisfaction? Are risks to the company heightened in certain teams or division?

## 3. Train front line managers

The research and statistics—as well as the reputational train wrecks of recent royal commissions—prove that good workplace conduct is a legitimate focus for employers. There is a clear business case for addressing bad behaviour early and fearlessly. Employers should develop skills in managers to help them identify the early signs of

unethical conduct and manage disciplinary issues. They must build accountability in staff to do something about bad behaviour when they become aware of it.

Staff should be trained in having difficult conversations, how to be an 'active bystander' and how to intervene when they observe unethical behaviour, and the basics of adverse action, discrimination and bullying. Corporate counsel can assist by delivering training on managers' legal obligations, including personal liability under the Fair Work Act, anti-discrimination laws, occupational health and safety legislation, and the Corporations Act.

#### 4. Discourage toxic behaviour

The next step for employers is to ensure that the workplace culture actively discourages toxic behaviour. Think about the various signals that employees receive about ethics in your organisation. These include strong statements in employment policies and internal communications that bad behaviour will not be tolerated, and organisational responses to incidents that prove this to be true.

If there is a disconnect between the operational reality and the ethical principles and values that the organisation says it believes in, the employer should take steps to address that. Ensure that values such as respect, equity and accountability are truly front and centre in the organisation's decisions and actions.

Address behaviour that's 'toxic at the top' because, as we all know, the conduct of leaders and managers sets the ethical tone for the rest of the business. Are they walking the talk? Does the CEO need to have a quiet word with one of their direct reports? Could a coach help to build self-awareness and self-control in a 'rockstar' executive who misbehaves?

#### 5. Build channels of reporting

The groundswell of #metoo complaints—including naming and shaming harassers on social media—increased the recognition that complainants should be supported to speak out. Many Australian companies quickly reviewed their own performance in handling complaints and concerns, given the reputational damage and legal risks that are created by harbouring unethical employees.

Griffith University's *Whistle While You Work* project showed that a significant majority—81.6%—of employees who reported cases of unethical behaviour in their workplaces faced repercussions for speaking up; 42% felt mistreated because of their complaint. In light of these statistics, the importance of good communication channels can't be overstated—concerns and complaints should be brought to light promptly and without fear of retribution. These channels include regular employee surveys which address culture, values and risk-taking (as well as engagement), and trusted senior managers.

Does your organisation hold forums in which employees are encouraged to express their views constructively? Are staff told of the actions that the company has taken in response to feedback and complaints? If you were an employee who wanted to raise a genuine concern about the conduct of a senior manager, and do so anonymously, how easy would this be?

In-house counsel should be aware of the upcoming changes to whistleblower protection requirements, passed recently in the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*. These reforms will be covered in detail in the Australian Corporate Lawyer magazine in [June].

#### CASE STUDY: COMMISSION AT ANY COST

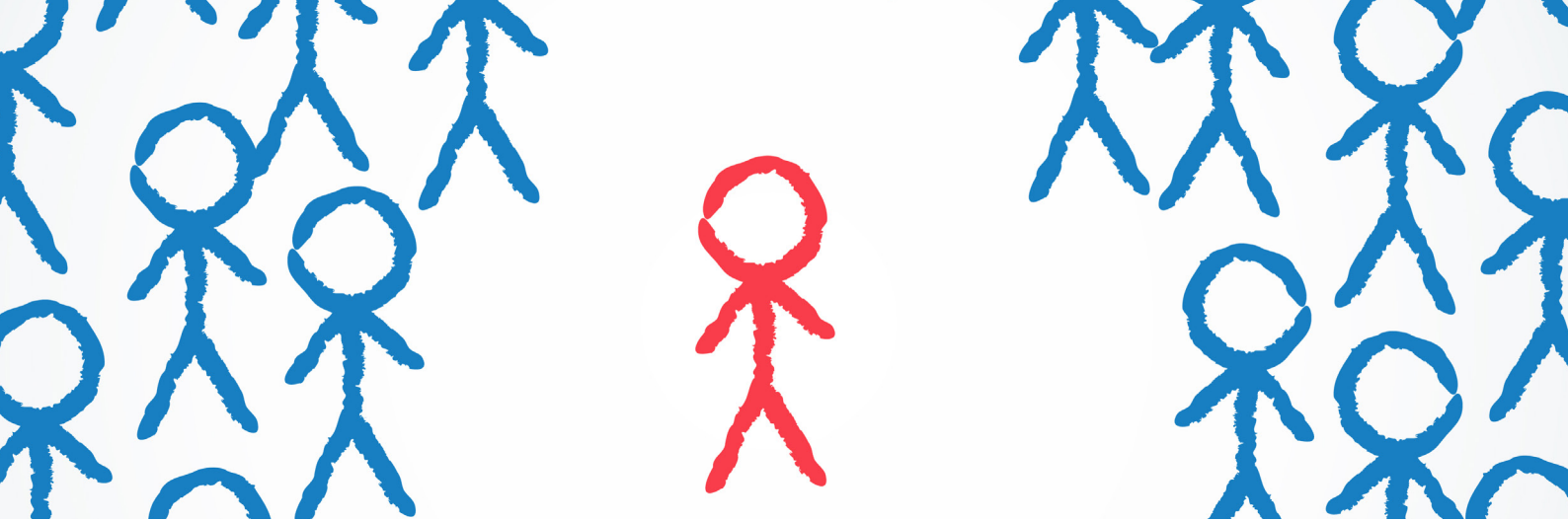
Jeff and Yee-Fui are sales agents in a real estate agency. Jeff is charismatic and well-connected; he uses his charm to build relationships with high-end clients. Yee-Fui speaks Mandarin fluently and focuses on the overseas investor market, which is lucrative.

Every member of the sales team is paid almost completely on commission. If they make no sales, the agents earn very little income. This means that the team competes ferociously. They keep separate Customer Relationship Management data—which is kept secret even from the Sales Director Chun-he—and they do not share the leads and information that they are supposed to share in team meetings. They are more focused on beating each other than building the business, and fail to take proper notice of the other real estate businesses that are moving into the territory.

With loose management and a 'flexible' approach to compliance, regulatory breaches start to creep in. Jeff convinces the Sales Director to backdate a document, which leads the Compliance Officer to resign out of fear for his own reputation and personal liability. Meanwhile, Yee-Fui is accused of 'stealing' two buyers who telephoned the agency to speak with Jeff but then struck up a conversation with Yee-Fui in Mandarin. Arguments ensue about who is entitled to what percentage of the commission on some big sales and the sales agents start querying their contractual entitlements.

Jeff is desperate to earn sufficient commission to cover his mortgage that month, and is also in danger of losing his job due to low sales figures. In an effort to attract more buyers, he subverts the advertising guidelines, which were never strictly enforced. This results in damage to the brand, according to one of the directors, and the in-house counsel is increasingly worried about honesty in advertising and other regulatory issues.

Factions form, broadly along racial lines. The agency's market share starts to trend in the wrong direction. Meanwhile, staff describe the workplace culture as "toxic", "tense" and "divided". They all accuse each other of cut-throat conduct and say that the others need to "get on the same page", but no one seems to take individual responsibility for changing their own behaviour. The in-house counsel, who is now acting as Compliance Officer, is increasingly overworked. She is expected by the agency's owners to sign off personally on various regulatory compliance documents, but she seriously doubts that they reflect the reality.



## CASE STUDY: ACTING UP ON THE FACTORY FLOOR

Night Shift Manager, Peter, has been at the manufacturing company Acme Industries for 8 years now. It's pretty cruisy for him, as the team all seems to be going fine. Although there has been a bit of pushback towards management, the team meets its targets much of the time.

Peter is keeping his eye out for alternative roles, as there isn't much chance of progressing at Acme, and he's a bit bored.

The crew mostly keep to themselves. On a few nights they have taken long breaks, and all seven left the site on break at the same time, which they are not technically supposed to do. Peter asked Edo about it once, but then he felt a bit silly for raising it with the blokes—after all, everyone knows that night shift can have a rotten effect on your family life and it's important to offer flexibility.

One night they get back at 1 am and are pretty trashed. Peter says to Iosefa, "Come on mate, don't you think you've had one too many?" but Iosefa just laughs and heads back to the plant. "Just give it a while before you drive the forklift," says Peter, laughing somewhat nervously.

The next day, Peter checks the swipe card records and they falsely indicate that only two staff left together, which means that they are swiping each other in and out to cheat the shift rules for working hours. Peter could say something, but he wants to be one of the boys.

## 6. Work strategically to remove toxic employees from the workplace

Sometimes a manager will inherit someone with poor ethics, dysfunctional behaviours or a 'high conflict personality'. At other times, an otherwise pleasant employee may let their personal troubles adversely affect their professionalism. Removing this person from the workplace, temporarily or permanently—

particularly if they are sophisticated and strategic in the ways they exert power and cause harm to others—can be incredibly difficult and risky.

Avoiding or removing a toxic worker from your workplace delivers twice the benefit of adding a 'superstar' (Housman and Minor, 2015), so can your organisation afford to ignore the risk of toxic conduct in the workplace?

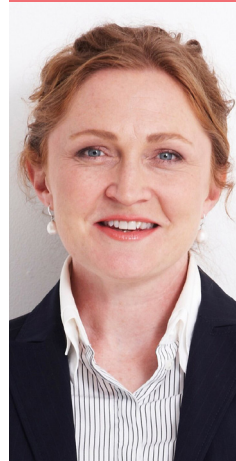
In-house counsel can support the business to manage the risks caused by the toxic personality through:

- Ensuring that the standards of conduct and performance that apply to employees are clear and contractually enforceable;
- Interpreting industrial relations instruments, contractual provisions (including probation periods), policies and procedures;
- Conducting a formal investigation of alleged misconduct, or engaging an experienced external investigator;
- Instructing forensic accountants and IT experts, under privilege, to audit the employee's computer use, access to buildings and facilities, or financial transactions;
- Assessing apparent breaches of OHS, discrimination and corruption laws; and
- Representing the employer in any unfair dismissal or other litigation that may follow.

Keep in mind that, by the time they are involved in the organisational responses to a toxic personality, the managers who are close to the situation are often burned out and impatient for an outcome. Managers often lack understanding of the realities of legal disputes, and most human beings are conflict avoidant! Part of our job is to guide managers through the risks and complexities.

Give managers confidence that confronting the toxic personality—though it is difficult—is the right thing for the organisation and for all of its employees. By doing so, with skill and patience, the employer is demonstrating integrity, following their own processes, minimising legal risk, and protecting the health, safety and productivity of the whole team. <sup>a</sup>

### Rose Bryant-Smith



*As co-founder and Managing Director of Worklogic, Rose works with employers to prevent and minimise the impact of illegal and inappropriate conduct in the workplace. Rose is co-author of **Fix Your Team** (Wiley) and **Workplace Investigations** (CCH Wolters Kluwer). She is a former workplace relations lawyer and Human Rights Law Fellow at Mercy Global Action at the United Nations.*

**For more information visit:**  
[www.worklogic.com.au](http://www.worklogic.com.au)



# LEGAL WELLNESS



**Greg de Moore**

*An Associate Professor of Psychiatry based at Sydney's Westmead Hospital, Greg works as a clinician, teacher and researcher in the fields of neuropsychiatry, general hospital psychiatry, deliberate self-harm and the history of medicine. As the Director of Psychiatry Training across western Sydney, he oversees the psychiatric education of young doctors as they work towards becoming psychiatrists.*

*Greg has been on the board of Minds Count since 2016. Minds Count is a charitable organisation dedicated to raising awareness of mental health issues within the legal profession.*

**For more information visit:**  
<https://mindscount.org/>

## ASKING FOR HELP

One day, late last year, I received a phone call. It was a call I had not anticipated.

A close work colleague had taken his life.

Workmates soon gathered, picked over our colleague's last few days, and wondered why. The person we all thought we knew was unrecognisable in this act. We wanted to go back and ask questions of him. To scrape away the exterior. Trying to figure it all out. Had we noted anything amiss? Nothing. Nothing to arouse suspicion.

Two weeks later, I was called down to the emergency department to see a patient.

As a psychiatrist I see people in a low state, a vulnerable state. Typically, when I walk down to the emergency department there might be half a dozen people waiting to see me. On this day there was just one:

James was 38-year-old lawyer in a mid-tier law firm in the CBD. His parents stood next to his bed. James was working 14-hour days; his supervisor was 'a bastard'. Over the last three weeks James had stopped eating well. At night he woke and was gripped by a fear of facing the next day. Sometimes he'd lie in bed for hours with little energy.

The tipping point for his misery was an obsession over something that seemed relatively trivial: e-mails.

'I made three mistakes at work. I made a grammatical error in one e-mail; I did not answer another e-mail; and was too curt in my answer to a third.' He was ruminating over and over about these perceived errors. Before long, his mind seized up, and stopped working. To James it all looked bleak. He capsize all about him. And even when he didn't make errors, he thought he had.

He was isolated at work. The bridges between people that should operate were not there. While on his regular bus trip to work he contemplated ways of harming himself. When he arrived at work, within minutes he found himself in the toilet, crying. Huge convulsive sobs. Self-control, something he prided, was lost. His phone was handy. Instead of harming himself he rang his parents.

James had a diagnosis of 'major depression'. We suggested a few treatments including medication. He balked: 'They'll know at work.' This was his greatest fear. That his work colleagues would

know, somehow, that he was under psychiatric care. That he would lose respect and the chance for promotion. Stigma dies hard.

He did start medication and was seen weekly. Friends and colleagues rallied. Companions kept watch. Some walked with him, others stayed with him. A work colleague cooked for him. Another rang each day. From a man who had no bridges to the people around him, now he was surrounded by bridges. The ruminations that tore into his sleep, softened. Antidepressant medication helped but so did everything else.

Four weeks later James was a changed man. Replenished, he was almost unrecognisable as he sprang into my office.

What makes one person reach out for help, like James, but another not? If we had an aperture into the human mind, we might know the answer. But usually we are left guessing. Recognising symptoms like depression and having some insight into how they are affecting us are obviously important in getting care.

I am often asked when should someone seek help. How low does someone have to be to see a GP, a counsellor, a psychiatrist. Sometimes the answer is easy. If you feel that you are suffering, and wonder if you might need to see someone, the chances are that you do. At least to have an assessment. What is vital, though, is to appreciate that in the early twenty-first century we have a range of excellent treatments for many psychiatric disorders. Some involve medication; many do not. Understanding that effective help is available is one reason for reaching out.

Low mood and feelings of anxiety are the commonest, but not the only reasons, for seeking help from a professional. We all know what it is like to be disappointed, down for a few days. But the kind of depression James had was longer lasting, and profoundly affected his life. It took a crisis, and supportive parents, for him to navigate his way through. The support and understanding of his friends and work colleagues was critical in reconnecting James to the world.

Whatever the nature of the problem, or its severity, a critical point is reached when a person feels that they have no further options, that hope is lost. Building a bridge to that person, whether at work or at home, offers them a chance. And even if you don't think you know what you're doing (and most of us feel we don't), the simple act of reaching out and building a bridge with another person is probably the most important thing you'll do to help them. Just in case they want to take that step. **a**



# ACC GLOBAL UPDATE

## ACC Supports Legal Privilege Before High Court

The Association of Corporate Counsel (ACC) and ACC Australia, a chapter representing more than 4,000 in-house lawyers, have requested to file an *amicus curiae* brief in *Glencore International AG vs Commissioner of Taxation of the Commonwealth of Australia*. This case before the High Court of Australia concerns documents obtained in the 2017 Paradise Papers leak.

In late March, ACC sought leave to appear as an *amicus curiae* to support plaintiff Glencore International's claims of privilege, as well as to address the broader international implications of the Court's eventual decision.

Glencore International has asked the High Court to compel the Commissioner of Taxation of the Commonwealth of Australia to return documents that Glencore asserts were obtained illegally and should have been protected by legal professional privilege.

ACC asserts that the privilege holder has a right to restrain third parties' use of privileged documents, and that this right is not waived by Australian tax law.

The written submissions further point out that

the Court's decision has key implications for law worldwide; the privilege in question stems from communications with a Bermudan law firm. Furthermore, the decision could put Australia on the map as "a desirable place for hackers to leak stolen privileged documents" in the event that the Court does not restrain third parties' access to privileged materials.

"Given the increasing number of cyberattacks on law firms, it is essential that the Court recognise that legal professional privilege still applies in this case," said Tanya Khan, ACC Vice President and Managing Director, Australia and Asia Pacific. "Allowing the government or any other third party to retain and use privileged documents in this manner undermines client candour and entirely thwarts the purpose of legal professional privilege."

To read the ACC and ACC Australia affidavit and written submissions, please visit <https://www2.acc.com/advocacy/upload/2019-03-22-Filed-Affidavit-of-J-Priestley.pdf>.

## ACC Announces Inaugural Australian Class of Global In-House Counsel Certification Program


The ACC In-house Counsel Certification Program is coming to Australia. With support from The College

of Law, the course will be held from August 5-8 in Sydney.

The intensive certification programme is designed to help lawyers master the skills critical to an in-house career. The programme is run by the ACC Credentialing Institute and is the first of its kind for any legal association.

The programme creates a standard of best practices for in-house lawyers working worldwide. To date, approximately 100 in-house counsel have graduated from three past Dubai-based classes of the ACC In-house Counsel Certification Program, including in-house lawyers from 52 companies and more than 20 countries.

"We've long wished to host a certification program in Australia," said Karen Grumley, ACC Australia National President and Head of Legal—Coal at Pacific National. "The certification programme in Sydney will give Australasian lawyers the opportunity to position themselves—and members of their team—as indispensable to the corporate client and raise the stature of their in-house legal teams overall."

For more information on the ACC Credentialing Institute, visit [www.acc.com/certification](http://www.acc.com/certification) or contact [certification@acc.com](mailto:certification@acc.com). 



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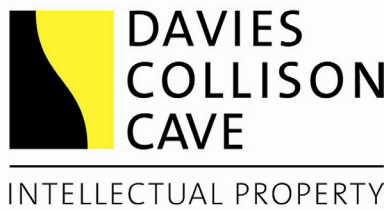
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