IN-HOUSE TOM

a target operating model for the law

department, law firm & C-Suite relationship

Ciarán Fenton

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INTRODUCTION

Definition of terms

In-house

In-house lawyers are employed by businesses and not-for-profit organisations, as opposed to being employed by “out-of-house” law firms.

No other function in an organisation uses this in/out nomenclature.

For example, accountants don’t call themselves “in-house accountants” nor do they refer to accounting firms “as-out-of-house” either.

I will explain in the book how this curiosity has evolved, how the uncut umbilical cord connecting “in and out of house” has developed, who’s the “mother” and what could happen next.

TOM

A target operating model is a blueprint for an organisation linking three components:

- a market (client) need

- strategic resources

- strategic processes to apply the resources to meet that need

New

The current IN-HOUSE TOM isn't working well enough for all stakeholders for reasons I will explain in detail but the headlines are:

- Society is poorly served because in-house lawyers can't/don't act independently as required by regulation which is also so light touch as to be hands-off
- Business is poorly served because in-house lawyers can't/don't report directly to their boards which is their client under law but to the CEO, or worse, to the CFO who is their "boss". This means that instead of "telling" the business what it needs in relation to its strategy, it must "ask". This flies in the face of the asymmetrical knowledge nature of the relationship
- Lawyers are poorly served because they are not trained to lead in commercial contexts in law school nor in their legal training in law firms; they are frequently subjected to ethical pressure by "the business" and are constantly having to justify their existence evidenced by their regular conferences debating "how to have a seat at the table". No other function, apart from HR, is stuck in this organisational hamster wheel.

This book is about how lawyers in-house and out working with the "C-Suite" can come together to sort this mess out for the good of society, business and lawyers.

It's time to change the status quo.

It's time for a new IN-HOUSE TOM.

Ciarán Fenton

April, 2020

Section 1.1

What is an IN-HOUSE TOM?

What is a target operating model?

A target operating model (TOM) links needs, resources and processes to create a model to execute a commercial organisation's strategy to achieve its purpose.

An IN-HOUSE TOM links the legal counsel and process needs of the organisation with the resources and processes of the legal department to create a model to meet those needs to execute a commercial organisation's strategy to achieve its purpose.

So far, so simple.

How does a TOM relate to Legal?

The problem is that each of the terms in the definition is currently unclear, subject to debate and questioning within each organisation:

- What is the purpose of any commercial organisation?
- What is the purpose of your organisation?
- What is your organisation's strategy?
- What are the legal counsel and process needs of your organisation?
- Who decides?
- What is the purpose of any law department?
- What should the strategy of any law department be?
- What are its strategic resources?

- What are its strategic processes to apply the resources to achieve the needs?

Here's one set of answers, based on my 15 years' experience working with law departments, which some readers may recognise:

- The purpose of any commercial organisation is to make money for its shareholders
- The purpose of our organisation is to make loads of money
- Our organisation's strategy is (say) growth through aggressive global acquisition
- Our organisation needs Legal to anticipate risks and sort legal process, fast and cheaply
- Our CEO decides, everything.
- The purpose of any law department is to help make loads of money for the organisation without anyone going to jail
- The strategic resources are very bright lawyers
- The strategic processes can be boiled down to "the diving catch" by lawyers to get stuff done because "that's what we're trained to do"

Is this familiar?

The future

The purpose of your organisation drives its strategy which, in turn, drives how Legal responds in target operating model terms to enable that strategy.

In many organisations that response is driven by a wish to please the CEO and "the business".

What if?

- what if the legal profession were to help shape the purpose of any commercial organisation post-Global Financial Crash (2008) and post Covid-19 (2020)?
- what if the law department told, not asked, the CEO what legal counsel and processes the business needed to achieve its strategy?
- what if law departments were run like internal break-even businesses with the appropriate target operating models?

I believe that if these three "what ifs" happened then society, business and lawyers would be better served.

This book sets out how.

Section 1.2

Cinderellas of the boardroom & denial

The first problem with the current in-house target operating model is that:

- the “C-Suite” frequently treats in-house lawyers as “Cinderellas” of the boardroom
- lawyers are in denial about this
- worse, one points this out at one’s peril

After a speech on the oppression of in-house lawyers which I gave at an in-house conference, one lawyer, carefully and in commendably restrained language, gave me written feedback:

“On oppression, it may be that [your] lead language causes a reaction that limits the ability of the audience to give the remainder of the message due consideration…the language of oppression is reserved for slavery and other elements of serious abuse of human rights. This is not something that most lawyers would identify with applying to them and so an instant barrier can come up…Most lawyers would also likely see themselves as individuals within a privileged elite rather than an oppressed body… these absolutes work well with business people who operate in short-hand, for the detail-orientated lawyer they are a point to take exception to…”

That was polite and very helpful.

But I have received aggressive, if passive, feedback which reassures me that I'm onto something important.

Both responses leave me with a problem which I hope to resolve while writing this book: how can you help someone who doesn't feel they need help?

It's not about lawyers

My immediate answer is that this debate is not about lawyers but about the society they serve.

The reason there is no "disruption" in legal services is that lawyers are debating with themselves as if the issue is about them and not clients, business and society.

Society is unhappy with the legal profession and, ultimately, that's where the market need in the target operating model lies.

Once society at large "cottons on" to the fact that the practice of commercial law is in many respects, if not all, a "stitch-up" it will start calling for change.

Once society starts calling for change, seriously, things will change. And it will be that and no words of mine that will incentivise lawyers to change their behaviour.

The #MeToo movement

The #MeToo movement is an example of society saying "enough is enough". And Harvey Weinstein is in an orange jumpsuit today. That outcome was as

unthinkable five years ago as the notion that lawyers could transform – in its full sense – business, society and their own sense of career fulfilment.

Meanwhile, I hope to help prepare lawyers for this inevitable outcome. All I ask is that you keep your jury out on my suggestions, analysis and new target operating model construction until the end of the book.

This Section

This Section will focus on the evolution of the role of in-house counsel and the evidence which supports my "Cinderella" assertion.

To be fair to Cinders, when told to scrub the kitchen floor by the Ugly Sisters she didn't say "Oh ok, do you want me to do the stairs as well?".

Cinderella wasn't invited to The Ball (the boardroom) but she did get there, admittedly through processes not set out in any recognisable conduct manual or workflow, and a handsome Prince did save her from her lot.

Who is "the Prince" here?

Spoiler alert: the "C-Suite" is the Prince.

Why?

Because, as we say in Ireland, the C-Suite knows "on what side its bread is buttered".

If law firms and law departments came together with the C-Suite in response to society's tumbrils rolling towards them, as surely they are, everything is possible.

Section 1.3

In-house independence is a contradiction in terms

The second reason, of seven, as to why the current target operating model is not working is because in-house lawyers, by definition, cannot "act independently" as required by the regulator and as needed by society.

The term "in-house" contains the clue to the conflict.

The independence regulation is unenforceable because through custom and practice a myth is comfortably perpetuated by business, by the profession and by the regulator that in-house and out-of-house lawyers are "the same" and that there is no difference between them in their obligation and reasonable ability to act independently.

Everyone knows this isn't true.

Everyone is let off the hook because the onus in the regulations is on the individual lawyer to raise concerns. But turkeys don't vote for Christmas, generally speaking, so concerns are raised by them only in extremis, a poor basis for any workable model.

This untruth, that dare not speak its name, causes three serious systemic problems concerning the current in-house target operating model:

- "the business" suffers because it needs its in-house lawyers to be independent – some would say only when it suits – and so the woolliness in their status creates a serious conduct risk for the business
- society suffers because the deception hoodwinks it into thinking that it has "cops on the inside" when it doesn't
- in-house lawyers suffer because they are neither wholly independent nor wholly dependent; neither fish nor fowl, hence their Cinderellaesque status (see Section 1.2).

Legal academics acknowledge the evidence for this inherent flaw in the system:

Richard Moorhead, Steven Vaughan and Cristina Godinho helpfully and clearly set out the tortuous situation in ***"In-House Lawyers' Ethics – Institutional, Legal Risk and the Tournament of Influence*** (Bloomsbury, 2019; pages 90-91) "…lawyer independence comprises at least four facets: first, being prepared to say 'No' to a client; second, an acceptance that independence may, in some situations, mean taking decisions that have negative financial consequences for the solicitor; third, a need for a solicitor to avoid becoming overly reliant or close to any given client; and finally, a recognition that, in litigation, individual lawyers are professionally responsible for their handling of cases (ie they cannot simply rely on acting in accordance with the client's instructions to justify questionable tactics). **On the third point, it might be said that having but one employer, this aspect cannot apply to the in-house community. [my Bold]** However, an alternative is to see this as putting an obligation on in-house lawyers to manage more carefully for independence given the risks of having a single employer/client: to ensure they do not forget or avoid their professional obligations. This is consistent with the SRA's recognition that the clients of

large law firms pose specific risks to independence, such that they, 'must resist client pressure which may adversely compromise their professional independence'. Only belatedly does the SRA add, though that, 'Maintaining independence is also relevant to inhouse lawyers, who may come under pressure from their employers."

A Curious Martian – a rhetorical device I frequently use in speeches and writing on this subject – with instant access to terabytes of data, were they to land on Earth, might ask the regulator, business and society that permits it, in respect of the above extract:

- is it reasonable to expect earthling inhousers to say "no" to their bosses on all appropriate occasions when those bosses carry out their annual reviews, rank them, control their promotion, pay and bonuses? *&%?*!!! – Martian for WTF?
- isn't the biggest "negative financial consequence" for any earthling in-house solicitor in taking a decision, er, is to lose their jobs, complete with elegantly written NDAs?
- how can earthling solicitors, in-house and out, have the same independence obligations if they are required "to avoid becoming overly reliant or overly close to any given client"? Aren't earthling employment contracts, cleverly crafted by other earthling lawyers, as close as earthlings can get to anyone in a work environment?
- if "on the third point it might be said that this aspect cannot apply to the in-house community" why then does the earthling regulator insist that there is no difference between in-house and out-of-house earthling lawyers if it "must be said"?

- is there not something inherently contradictory in the use of the term "employer/client"? how can earthling lawyers have clients who are also their employers and "manage more carefully for independence given the risks of having" such a combination?
- do the authors imply by the words "given the risks of having" that it's a case of "caveat emptor" for those lawyers who choose that role when in fact the profession actively promotes in-house as a career path?
- is there not a significant difference between the independence risks faced by earthling law firms and in-house lawyers because of the difference in, er, dependence?
- why does the SRA say in-house lawyers "may come under pressure" when they must know that they do so because everyone knows it. My computer banks tell me, for example, that Professor Moorhead and others wrote a Moral Compass Survey in 2016 that confirmed that earthling in-house lawyers experience significant ethical pressure and frequently "elevated" ethical pressure?
- why did the SRA add it "belatedly"? Does this mean that "in-house" is a regulatory afterthought?
- in earthling terms, what does the word "elevated" mean and what might "elevated pressure" mean for the earthling in-house lawyer and how might the fear of it compromise their independence?
- and finally, isn't the current earthling in-house target operating model and culture designed precisely to encourage them to "forget" their obligations to become "business people first, lawyers second…commercial…and, er, 'pragmatic'?.

No other member of the “C-Suite” – CEO, CFO, CMO, CRO, CTO or HRD – has to suffer this systemic undermining.

Yet the C-Suite is the GC’s “client” and they usually “report” either to the CEO or CFO.

No wonder the Martian is confused.

Section 1.4

Ethical pressure, chilling fear & breath-taking acquiescence

The third, of seven weaknesses, in the current in-house target operating model is the vulnerability of in-house lawyers to ethical pressure, the fear that this generates and, for me at least as a "non-lawyer", the breathtaking acquiescence with which this beating is absorbed by the profession.

"Ethical pressure" and "chilling fear" are not my words.

In "Mapping the Moral Compass" report published by the UCL Centre for Ethics and Law in 2016 as part of its Ethical Leadership for In-House Layers Initiative the headline findings included:

- 10–15% experienced elevated ethical pressure;
- 30–40% sometimes experienced ethical pressure;

The authors note that "…a number of our interviewees suffered exposure to what the following interviewee termed the "shouty man syndrome". IHL24 wraps up, rather nicely, the desire to be seen to be adding value, to not being a deal blocker, as a "helpful' part of the team:

The problem we face is what I call the "shouty man syndrome", which it doesn't matter how much we agree this is the right way to go, if you've got a client, an internal stakeholder, shouting at you to get something done because it's urgent and you just don't understand why legal is being so difficult? You end up

defaulting to all too often being helpful even though long-term that's the wrong answer. [IHL24]" (In-House Lawyers' Ethics Ibid page 67)
Professor Stephen Mayson, in his Interim Independent Legal Services Regulation Review Report (2019) deals with in-house lawyers in Section 5.8 on page 70.

The section is notable as much for its implicit commentary on the current context in which in-house counsel operate as it is for its specific proposals and questions regarding changes in regulations.

"These are not simply private or commercial matters. As we have seen recently, corporate failures can lead to consumer and societal detriment, and in-house lawyers have to be able to sound alarm bells without the chilling effect of potential reprisal. The public interest in effective and fearless legal representation is engaged in much the same way as it is with private practice."
That said, I required neither the Moral Compass Report nor Professor Mason's Interim Report to convince me of the vulnerability of in-house lawyers.

In my leadership consulting practice in which I have worked with hundreds of house lawyers over 15 years I witnessed corporate brutality mercilessly dealt out to in-house lawyers at close quarters.

Not that I did't witness, or experience, corporate brutality meted out to "non-lawyers" in my 15 or so years in corporate roles. I did.

The difference is that society has come to expect, at times, appalling behaviour towards "non-lawyers" by bosses with low EQ but it does not expect, nor is it

fully aware, that Officers of the Court are routinely “bludgeoned” by the C-Suite. Bludgeoned is my word.

None of this is a surprise and I suspect, at this stage, many in-house readers will be sniffling a yawn. Heard it all before, mate. Plus ça change, as the say on the in-house conference circuit.

It’s this breathtaking acquiescence by the profession that I hope will cause some a-typical in-house lawyers, with higher than normal EQ, to pause and apply their razor sharp intellects and high IQ to the implications of this acquiescence.

Typical lawyers, bless them, will continue to think that just because the water around them doesn’t appear to have changed temperature, much, that it will never boil.

But the societal waters are warming around them and one day lawyers will wake up because, and just as Mr Weinstein has landed in jail because people came together to say “enough it enough”, a high profile business bully will “go down” for “doing in” a GC.

When it happens, remember where you heard it first.

Section 1.5

Litigators at heart, omertàesque silence & no #lawyersbacks

The fourth, of seven weaknesses, of the current in-house target operating model, is that in-house lawyers are litigators by training and therefore by instinct. This skill is mostly useless in dealing with the business of law.

They also maintain as, one in-house lawyer put it, an almost omertàesque silence about what is "going on" in business. This undermines their current target operating model, business and society.

The profession is systemically adversarial. There is no culture of "having each other's backs" in a career sense, trained as they are as lone wolves in law firms where dog eats dog in the service of the billable hour which remains, despite all the huffing and puffing about "disruption", the God/Goddess of the legal sector.

When I say they, I mean all but the most a-typical lawyers. This is an important caveat as it's only a-typical lawyers who can save the profession from its impending nemesis.

The problem with their litigator-as-a-default training is that they see everything as an opportunity to win arguments so that when they need to sell messages, which is what the business of law is about, they're lost.

To be fair to their trainers, most lawyers are brilliant not only at ensuring that they win, but that the other side loses, badly. Winning arguments has become part of their identity. Without an adversary, they lose confidence.

This weakness is ruthlessly exploited by “the business” which understands selling.

Equally and as damaging, in-house lawyers view “the business”, albeit unconsciously, as an adversary. This is a massively self-defeating strategy and cripples their current operating model.

Their “omertàesque” silence on what is “going on” in business is a major undermining problem because “the business” knows that it has Legal in a headlock, knows it will not squeal to the outside except in extremis and so “the business” keeps on tightening its lock. Why wouldn’t it?

Some in “the business”, I’m sure, may view some in-house lawyers as people who otherwise would have to “cut it” on the billable hour treadmill in law firms, have sold their souls for a good salary, five weeks holidays, a bonus/potential LTIPs and, if they behave, some power over other lawyers.

I generalise and exaggerate, but only a little.

But by far the biggest flaw in their current TOM is their refusal/inability to back each other publicly.

This refusal is understandable. Why would any in-house lawyer stick their neck out in what only the most myopic amongst them know is one of the few

remaining unreconstructed sectors in business and which has managed an ongoing Big Bang bypass despite rumours to the contrary?

And those that do stick their neck out get them chopped off not just by the business, but by their fellows.

And woe betides anyone who calls out this societal deception playing out in plain sight.

When, in 2016, UCL published its Moral Compass Survey (ibid) there was a furious reaction not from "the business" who are blissfully unaware of the problem because lawyers talk only amongst themselves about their problems but from miffed inhousers at the language used by the authors in describing them.

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

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

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

A recent piece of research from University College London on in-house lawyers, Mapping the Moral Compass, has caused a stir in the legal community. It identifies four main ethical groups of in-house lawyers: the capitulators, the

coasters, the comfortably numb and the champions. Perhaps unsurprisingly, some general counsel have taken exception to these characterisations.
Rhymer does a good line in understatement.

While I have experienced some hostility towards me and my views, generally speaking, I receive huge support, privately of course, even by those in-house lawyers who disagree with some of my views.

Their pain is painful to witness.

In 2019 I ran a six-month trial which I called #lawyersbacks. I chaired a fortnightly anonymous conference call for lawyers who could speak openly, safely and with other lawyers about their experiences under pressure.

The calls were heartbreaking to hear mainly because some lawyers were gobsmacked that their experiences were shared by others and that mutual support was possible in what is often a “macho” environment where being the brightest is what counts and emotions eschewed. The loneliness came over like a scream though no lawyer would ever reveal this publicly.

In this regard – a reminder of the three key elements of any target operating model: needs, strategic resources, processes.

Lawyers are the main strategic resource in the current in-house target operating model.

Given the evidence above, how could the current IN-HOUSE TOM possibly be “fit for purpose”. How?

Section 1.6

Legal business leadership is not billable by the hour; ergo it's not rated & not taught at law school

The fifth, of seven weaknesses, in the current in-house target operating model is that since law firms, in which crucible most in-house lawyers thinking was forged, cannot bill leadership and the art and science of business by the hour it follows that lawyers – apart from the most "a-typical" (ibid) – do not rate or value business leadership and consequently law schools don't teach it. In the UK, it's not even a module for the new SQE.

Since business leadership is a key strategic resource in any business target operating model – and law departments are internal businesses – it follows that the current in-house target operating model cannot be strong if this key strategic resource is not rated, valued and understood.

Although I have worked with in-house leaders and teams for over 15 years, it took me some time to figure out that antipathy towards business leadership and knowledge was at the heart of the dysfunction in the function.

Lawyers are invariably bright. Often stunningly bright. But their high IQ frequently cloaks mind-blowing gaps in knowledge and awareness.

A few experiences convinced me that the legal emperors had few business or leadership clothes:

- One senior GC, when I suggested to him that “Legal should be run as a business, not like one”, replied: “Frankly I think that’s too simplistic”. I took that to mean that Legal was “above” business.
- One law firm equity partner of not insubstantial fee-earning numbers, when I extolled the value of marketing as an art and science, snorted “What’s all this fuss about marketing, eh? All one needs is a hefty wodge of tickets to Wimbledon!” [Full disclosure: slight, but only slight, literary license used in this story]
- When facilitating a lawyers’ business board meeting, it became clear to me that no one, but no one, around the table, understood the difference between a strategy and a plan, nor cared less. It was as shocking as it was dangerous.

I believe this weakness is the most difficult of all seven to fix because it’s so embedded in the lawyers’ culture.

Culture is a function of a host of factors which bolster identity. There’s no doubt, in my mind at least, that lawyers’ identities are in no way connected to their prowess as business leaders.

This is problematic because law departments need strong business leaders, especially the larger ones, not strong lawyers. And since organisations tend to promote the best lawyers and not the best leaders to GC roles, the problem becomes almost intractable.

Almost. As I will set out later, the problem is remedial, but first we need to confront how bad it is now.

There are vast volumes of academic material available to support this assertion. I particularly like this excerpt from **Legal 500 GC Magazine Winter/Spring 2020 Edition** sent to me, very helpfully, by a GC client:

"If asked to describe the 'typical' lawyer, the person on the street might have a few ideas. Popular culture is strewn with stereotypes of lawyers, some admirable, many not. But is it possible to truly make generalisations about the typical personality traits a lawyer might have?

Yes, according to psychologist (and former trial lawyer) Dr Larry Richard. After ten unhappy years in practice, Richard followed his heart into psychology. But far from leaving the law behind, he remains fascinated by it – or by one aspect, at least.

'Having put in all that time and grown up with my colleagues in law school and practice, I said "I'm going to study us and find out what makes lawyers tick",' he explains.

At his Pennsylvania-based consulting firm, LawyerBrain, Richard applies neuroscience, social psychology, positive psychology, leadership science, and a variety of other social science disciplines to lawyer performance.

'Lawyers are the most atypical occupation on the planet. We are more different from the general public than any other occupation since data has been published. We are the original outliers,' he says.

Among 21 traits measured on a standard personality profile, Richard's research shows that lawyers' average scores for seven of these are dramatically atypical compared to the general public (it's considered unusual for even one trait to be

atypical in most occupations). According to his research, lawyers score highest on scepticism, as well as on need for autonomy, urgency (read impatience) and ability for abstract reasoning. So far, so predictable, perhaps. But he also found that lawyers score low on sociability, psychological resilience, and cognitive empathy.

Richard argues that scepticism is particularly encouraged at law schools, which, he says, attract candidates already predisposed to this trait and then train them to be even more so.

'The training that we have as lawyers trains us to look for the negative. We are trained to look for problems, what could go wrong, what is wrong, what's not ok – we ignore the 95% that's working. Whenever anyone else makes an assertion, we're trained to always question the underpinnings of what they've said: never accept, never give the benefit of the doubt, always challenge. We're trained to be vigilant about hidden motives, what do you really mean by that, what's your agenda – it's that kind of hidden, almost paranoid mindset. All of these things make someone a very competent lawyer, because the better you can do these things, the more you're going to protect your client from a host of unseen potential problems,' he explains.

'But there is a price to pay and here's the built-in tension. All the other roles that we ask lawyers to play these days require just the opposite, because almost all the other roles are founded on relationships.'

In Richard's view, supervision, mentoring, managing, leading, being collegial, innovative – all important roles for lawyers as they climb the career ladder, particularly in-house – could be made more challenging by legal training."

Convinced?

Section 1.7

More for less, ten things for seven dollars & the diving catch

The sixth, of seven weaknesses, in the current in-house target operating model is that in-house lawyers have, over recent years, created a culture in which they acquiesce with doing “more for less”, delivering ten legal counsel and process “things” for seven dollars when ten “things” cost ten dollars and, to the point of self harm to themselves and their teams, will rarely say “No”, if ever, to a request from “the business”.

The point of a target operating model is to model realism. The current in-house model is neither realistic nor sustainable.

The lawyers’ “cilice”: More for Less

Try as I might – and I have tried to listen very carefully to in-house lawyers at many conferences – I fail to understand why they signed up for the “more for less” lunacy. No argument advanced makes sense to me.

Why would any function agree to do more for less as if they had been doing less for more all along?

Why do in-house lawyers not seek to find, as other functions do, reasonable efficiencies and savings without converting this mundane budgeting process into a dramatic masochistic and competitive task as if their existential identity relied on it?

What's with the whiff of burning martyr that comes off their worthy conference sessions as if to say "Hey, let's see if can do even more for even less. Wouldn't that be great!". Bring on the cilice.

I exaggerate. But only a little.

Part of the reason for this madness is that frequently, in my experience working with in-house teams, they haven't a clue how to manage legal costs to the extent sometimes of not even knowing how much they spend annually and, in one case, how many people worked in their Legal department.

So when "the business" says "we need to spend less money on Legal" in-house lawyers panic and turn the problem in on themselves rather than presenting options back to "the business".

Ten things for seven dollars

Let's say a business needs ten things in terms of legal counsel and process. Let's also say that ten things cost ten dollars, but the business says to the law department "you can only have seven dollars".

Currently the law department is, frequently, doing ten things for seven dollars despite the fact it told the business that ten things costs ten dollars and it wasn't lying.

Once, when I set this out this dysfunctional behaviour in a speech at an in-house legal conference a few lawyers in the audience became very "cross". One said, and I paraphrase: "One does what one has to do. That's how we're trained".

One doesn't. One chooses to do so. And the fact that "one does" is a massive own-goal which, to mix metaphors, places lawyers and legal teams between a rock and a very hard place indeed.

The diving catch

Professional cricket players are paid to hurt themselves in performing their awesome diving catches.

In-house lawyers are paid nowhere near enough for the pain they and their teams endure in the ensuing chaos created by their failure to insist on an Adult-Adult relationship with "the business". Legal risks multiply and society suffers, as ever, through major "risks events".

As far back as January 2013, Paul Gilbert CEO LBC Wise Counsel, wrote:

"In-house lawyers still deliver prodigious amounts of work and are full of admirable people doing great things, but far too much time is spent wallowing in the equivalent glory of a "diving one-handed catch"; and far too little time is devoted to thoughtful "fielder placement" that would result in systematic, risk sensitive prioritisation, demand reduction and better knowledge management."

Plus ça change.

I will set out in later Sections how they might change these habits.

Meanwhile, if you are an in-house lawyer try – instead of bristling at the above – reflecting on it its potential benefits to you, even if you don't necessarily agree with it.

Section 1.8

Mind the gaps between law firms, law departments and the "C-Suite"

The last, of seven weaknesses, in the current in-house target operating model are the communication gaps between law firms, law departments and the "C-Suite".

Three TOMs

A law department's target operating model is to meet the legal counsel and process needs of "the business" using the law department's strategic resources by applying the law department's strategic processes. (IN-HOUSE TOM)

A commercial law firm's (or practice) target operating model is to meet the law department's out-of-house needs using the law firm's strategic resources by applying the law firm's strategic processes. (LAW FIRM TOM)

A "C-Suite's" target operating model is to meet the needs of its customers using the strategic resources of the business by applying the strategic processes of the business. (C-SUITE TOM)

One of the "C-Suite's" strategic resources is its relationship with its law department.

One of a law department's strategic resources is its out-of-house relationships.

One of a law firm's strategic resources is its in-house relationship.

All three TOMs are, therefore, interdependent on the quality of the relationships between them. If these relationships are dysfunctional then all three suffer potential existential risks.

Three dysfunctional relationships

The relationship between the law department and the "C-Suite" is dysfunctional for the reasons set out earlier:

SECTION 1.2 Cinderellas of the boardroom & denial

SECTION 1.3 In-house independence is a contradiction in terms

SECTION 1.4 Ethical pressure, chilling fear & breathtaking acquiescence

SECTION 1.5 Litigators at heart, omertàesque silence & no #lawyersbacks

SECTION 1.6 Legal business leadership is not billable by the hour; ergo it's not rated & not taught at law school

SECTION 1.7 More for less, ten things for seven dollars & the diving catch

The relationship between the law firm and the law department is dysfunctional for three reasons

- Law departments won't let law firms near the "C-Suite"
- Law firms don't/can't help law departments fix their relationship with the "C-Suite"; they ignore the implications to all three TOMs of the dangerously uncut "umbilical cord" between law firms and law departments, illustrated by the in-out-of-house nomenclature, not present in any other function in "the business".

- The “C-Suite” is blissfully unaware of all the nuances of this situation and the resulting ticking time bomb under its TOM.

There’s no “elephant in the room” because there’s no room

Apart from in-house conference organisers asking token CEOs “to tell us what the business needs from Legal” in-house lawyers never get together in any meaningful way and in large numbers with the “C-Suite” at conferences or in debate on, or offline.

Ditto law firms and law departments.

Ditto law firms, law departments and the “C-Suite”.

There’s no “elephant in the room” because there’s no room in which these three interdependent groups meet, ever.

There can be only one reason why this unhealthy and dangerous stasis persists: money.

Until now, making money trumped any reasonable argument about any problem in business/society.

That’s about to change. All the signs are that the sleeping giant that is society is about to wake up and make very loud and angry demands of business in how it is serving society’s needs.

Tumbrils will roll in the direction of the “C-Suite”.

That’s where the money is.

Law firm's and law departments should get into a room with the C-Suite before it's too late.

By "too late" I mean too late for lawyers – in-house and out – to prevent society over reacting and taking draconian action against them.

In Section 2 I will set out a new target operating model for law departments which I hope will address this danger.

It's time to close the gaps. And time's running out.

Richard Susskind and Daniel Susskind wrote in *The Future of the Professions* (Oxford University Press, 2015) that "the traditional professions will be dismantled, leaving most (but not all) professionals to be replaced by less expert people and high-performing systems".
I disagree and five years on there's no sign of their prediction coming to pass.

The opposite I believe will happen.

Philip Wood QC former head of Allen & Overy Global Law Intelligence Unit, visiting professor and author of *The Fall of the Priests and the Rise of the Lawyers* wrote in *Modern Legal Practice* (January 2018) wrote:
"If we were speaking from the point of view of common sense, we could say…that we on the planet have a duty to survive and…we need moral rules, and that legal systems are by far the biggest, the oldest and the most efficient code of morality that we have. This is notwithstanding all of their faults…Yet my experience is that large numbers of people do not go along with these propositions and greet them with incredulity…"

Incredible as it may seem lawyers, as Officers of the Court, are the closest we now have to reliable moral protectors of society.

If you are expecting them to be “dismantled” any time soon, I wouldn’t hold your breath.

Society won’t allow it.

Section 2.1

Step 1 – Agree the current purpose, strategy and behaviour (PSB) of "the business"

In Section 1, I set out the weaknesses of the current in-house target operating model of law departments as I have witnessed them.

In this Section 2, I will set out seven steps to building a new in-house target operating model which can be customised to specific needs.

In Section 3, I will review the macro-context in which law departments will operate their models and how to maximise the efficiency of those models in that changing context. Section 3 will also include a review of the evolution of law departments so that the book attempts to answer three questions:

- where are we now, and why?
- where are we going?
- how will we get there?

In this section while I will use "you" as if talking to a GC or Head of Legal or sole in-house lawyer, my remarks are also directed at, and should hopefully be of interest to, law firm managing partners and the "C-Suite".

I will use the words "Legal" and "law department" interchangeably. I will refer to all organisations as "the business" because that's the term I hear most used even if the organisation is not-for-profit.

Step 1 Organisational purpose, strategy & behaviour (Organisational PSB)

The first, of seven steps, in building a new target operating model for your law department is to agree a shared language regarding the current purpose, strategy and plan of "the business".

I say "current" because that purpose can change quickly.

Legal and "the business" could resolve many of the tensions which arise between them if they suffered the pain of agreeing a shared language on the current purpose (P), strategy (S) and behaviour (B) of "the business".

In my leadership model I call this "Organisational PSB".

Case Study 1 (facts altered for illustration purposes)

Once, I worked with the law department of a global business services business. I advised the GC to have several conversations with the CEO starting with getting clarity on the current Organisational PSB.

The CEO was only too happy to talk on this subject. Let's say the answer was, roughly, and changing some details:

- *"we want to be ranked at least X in Y listing within Z years and we will achieve this by global acquisitions"*

For our purposes here let's assume the PSB analysis of the CEOs statement is:

- Purpose: maximise financial ranking
- Strategy: by global acquisitions
- Behaviour: a business target operating model to achieve the above

Usually, a GC would not have to have a conversation with the CEO to establish the objectives and strategy of “the business” as these would be well known and contained in every “deck” in “the business”.

The purpose of the conversation is to agree a shared language which goes beyond the platitudes of mission statements, captures underlying personal motivation of board members and, especially, surfaces differences of opinion which will be exposed during crises and “risk events”.

Questions the GC should ask

- Does every member, without exception, of the board (your client) agree with the CEOs PSB statement?
- If not, what are the differences/nuances of opinion on the board regarding the CEOs PSB?
- To what extent is the Board’s PSB driven by the CEO’s personality and therefore to what extent might it change were the CEO to leave?

Personal purpose, strategy and behaviour (Personal PSB) of board members

When I start to work with a GC almost invariably the first issue raised is the personality of the CEO and then of the other board members.

The PSB of any business is driven by the Personal PSBs of the strongest members of its board.

It follows that any law department target operating model must take into account the personalities on their client board.

Imaginary draft GC email to the Chair of Board

Somehow, the GC must find a way to have an agreed Organisation PSB statement, including the nuances which may affect it, in writing from the Board from which foundation the GC can start to build their legal department target operating model.

Using the Case Study example above, and following 1-1 conversations with every board member the GC might write something along the lines of the following imaginary email to the Chair of Board as follows:

Dear Chair,

Following my recent 1-1 conversations with board members I'm writing to clarify my understanding of the board's purpose, strategy and target operating model so that I can develop the target operating model of the legal department to maximise the chances of the Board – my client – achieving the outcomes it desires.

I understand that the Board has agreed that's its main purpose is to achieve a financial ranking of X within Y years through a strategy of global acquisitions and that it is developing a target operating model to deliver on that strategy.

While there is broad agreement on the Board as to the above I understand that there are some differences of opinion as to how this may be achieved in implementation.

Some board members have expressed concerns about the ESG implications of the strategy.

Others feel that while financial ranking is important the current excellent global reputation of the brand should not be sacrificed in the service rankings.

Finally, I understand that there are some concerns as to the realism of the timeframe – Z years seem tight to some on the Board.

Please can you confirm if the above is an accurate reading of the nuances of the current position of the Board so that I can reflect it in my planning for the legal department?

Y*ours etc.*

The GC

Possible reactions to this draft email

- This is absolutely crazy – could never happen in our organisation
- I don't even report to the Chair
- I don't have access to board members
- The CEO would never let me write that email
- I report to the CFO – so forget it!
- Compliance might be able to have this conversation but but not Legal – we don't have that status
- No problem, this is possible in our organisation; happens already

Is it possible in your organisation?

If not, it doesn't mean it can't be possible and the next six steps will set out how.

Meanwhile I have written extensively on **Personal and Organisational PSB** here, particularly in **Blog 40**:

Small Change: how small changes in behaviour have a big impact on how we work lead or follow.

Section 2.2

Step 2 – Decide, don't ask, what "the business" needs from Legal

The second, of seven steps, in building a new in-house target operating model is to decide, within the law department and with advice from outside it, what "the business" needs to achieve its purpose, strategy and behaviour plan (PSB).

The question "what does the CEO need from legal" should be banned, never asked and most certainly never but never be a topic at an in-house legal conference ever, like ever, again.

It's tantamount to me rocking up to my GP (family doctor) and saying, nay, shouting:

"Hi Doc, Listen Up Sunshine! Let me tell you what you are going to do about my health problems, ok? OK? O-K?!!"

I exaggerate, but only a little.

The business doesn't know what it needs in terms of legal counsel and process to achieve its PSB. If it did, it wouldn't need lawyers.

You, lawyers, do know, or at least you should.

But the law department can't tell anyone anything in "the business" unless and until it has absolute clarity on the PSB of "the business" as set out in Step 1.

This necessarily means understanding, at a detailed level, the target operating model of “the business”.

It also means that Legal has to confront “the beam” in its own eye before banging on, as it frequently does, about the “mote” in the eye of “the business”.

The “beam” in Legal’s eye is a failure to know, understand and value Business 101.

By Business 101 I mean all the art and science of business as developed over many years, especially over the last 70 years. Read the books – especially the text-books – and try not to be intellectually snooty about them:

- Porter
- Kotler
- Drucker
- Goleman
- Handy
- Collins
- Christensen, to mention just seven.

Read the academic papers on target operating models. There are many different frameworks for these. I prefer the simple three-part structure: need/resources/processes, but there are others. Take your pick, but stick to one.

Next, you need the current SWOT for “the business”. Hopefully, your Board prepares a SWOT at least quarterly. If it doesn’t, it should. You might suggest it.

The Current SWOT of your business will cover the current strengths, weaknesses, opportunities and threats of/to “the business”.

The Current SWOT is a gift to Legal because of its value in helping Legal update its Legal Risk Register.

It is also a key document in helping Legal frame a draft answer to the question: How can we, Legal, help “the business” implement its PSB via its target operating model?

Let’s say you decide that “the business” needs ten “essential things” in terms of legal counsel and process to achieve it PSB, say, like:

- Conduct: risk management of behaviour over time
- Contracting: templates, workflows, blah, blah
- Governance: codes etc.
- Compliance (part of Legal or not?; if not, how to engage)
- GDPR & IT security etc.
- CSR & ESG
- Regulatory affairs, to mention just seven I hear about in my work.

Whatever the list in your case, a simple question:

Could you stand up in front of your Board and justify the link between each item in your list of “ten essential things” and the Board’s desired outcomes like a barrister/attorney might in a court of law and win your case beyond reasonable doubt?

If not, why not?

SECTION 2.3

Step 3 Set up a Legal Operating Board to run Legal as a business, not like one

The third, of seven steps, in building a new in-house target operating model is to set up a Legal Operating Board (LegalOpsBoard) to run Legal as an internal breakeven business.

Whether your total annual legal spend, including external law firm fees, is in the hundreds of millions or thousands – it doesn't matter.

Law departments are regulated internal businesses – law firms if you like – providing legal services to "the business".

Just because regulators use a "light touch" – a euphemism, I know – with legal departments, which are no different to Alternative Business Systems (ABS) yet require no license – doesn't mean that society does not expect legal departments to be run properly.

All the art and science of business applies to Legal.

Conversely if Legal does not apply well established business principles, especially in dealing with "the business" which at least tries to do so, it struggles.

Several years ago I facilitated a pilot Legal Operations Board at a global brand. Initially the GC was skeptical but is now a fan of the process. Since then I have used the same process with my GC clients. It works.

Why an "operating board"?

- a "board" makes decisions
- an operating board runs the day-to-day operations of a business
- Legal needs an operating board

Who should sit on the board?

- The GC acting as a CEO
    - Set legal skills to one side; not required
    - This role is about leadership
    - Creating an environment in which people thrive
    - Growing the Legal function
    - Pleasing all stakeholders – "the business", employees, the regulator, society
- Someone from Finance (or external) acting as the CFO
    - A senior qualified accountant
    - Responsible for all the "numbers" in Legal
    - Signs off all budgets and management accountants
    - Presents monthly variance analysis report
- Someone acting as COO; could be a lawyer, or the GC, double-hatting
    - Responsible for keeping Legal's promise to "the business"
    - Operations expert
    - Knows how to get stuff done
- Practice area lawyers reporting to the COO

    - These act as mini-COOs in their practice area
- Someone from Marketing (or external) to act as CMO or Head of Internal Communications
    - A communications professional (never say comms.)
    - Responsible for articulating Legal's value to "the business"
    - Responsible for coordinating monthly "storytelling" – big wins, big learning, BAU stuff – "we did hundreds of blue things this month"
- Someone from IT (or external) acting as CTO
    - Responsible for enabling Legal strategy through technology
    - Senior IT professional
    - NB Let them do their job
- Someone from HR (or external) acting as HRD and/or a Chief of Staff
    - People, people
    - Supporting the GC to help people thrive
    - "Transactional" HR
- A lawyer acting as GC to the Operating Board
    - A lawyer to ensure that the Legal Operating Board remains legal
    - A Devil's Advocate for decisions
    - Sounding board

What should the Legal Operating Board do?

- Draft a Legal Department Three Year Business Plan, using a zero budget starting point and which incorporates a target operating model, congruent with "the business" purpose, strategy and behaviour plan (PSB)
- Secure sign off from "the business" on the generic purpose, strategy, and behaviour plan (PSB) of any Legal department

- “Sell”the draft Business Plan to “the business” and the Board
- Sign off the final draft ensuring it promises “only seven thing for seven dollars, and not ten things for seven dollars”
- Secure written “protection” for Legal on “the three things” not paid for in the Business Plan
- Empower the Legal Operating Board to deliver the Business Plan
- Deliver only seven things excellently and hyper-communicate up, down and across “the business”

Questions?: please write to me at cfenton@ciaranfenton.com

SECTION 2.4

Step 4 Sell to your Board the purpose of Legal; be ready to walk away en masse & don't bluff

The fourth, and toughest of the seven steps, in building a new target operating model for your law department is to sell to your board the necessary reframing of the purpose of Legal, ever before you present your Legal Business Plan – incorporating your new TOM – and that you are ready to walk away en masse if they don't buy it, and you are not bluffing.

And pigs will fly, I hear readers say, because:

- we don't, really, report to the Board even if we are supposed to
- we report to the CEO, if we're lucky
- and they have us over a barrel through our employment contracts, annual reviews, bonuses, share schemes and LTIPs etc.
- we can't "walk" en masse because we have nowhere to go
- our places would be filled in an instant by compliant lawyers
- in any event lawyers don't do anything "en masse" – that's a joke
- we don't have each others' backs, when it comes to the wire, that's how we're trained

I have heard all these arguments many times from lawyers and lawyers are very skilled and persuasive in argument.

But not in selling.

If they understood Selling 101 they might feel differently.

Selling 101

- There's no sale without pain, explicit or implicit
- The pain of "the business" is legal risk and uncompetitive process
- Legal must demonstrate, not assert, its ability to deal with the pain
- It the must understand "the business" perception of the gap between its need and Legal's pitch
- Then Legal must close the gap or walk away

The PSB of Legal

The generic purpose (P) of any legal department is to enable better decisions by their Board, and everyone who reports to it, in terms of legal counsel and process.

The generic strategy (S) of any legal department should be to act as an independent internal business; walk with a big stick and use it occasionally.

The generic behaviour (B) of any legal department should be to deliver ten things for ten dollars excellently or seven for seven but never ten for seven.

Walk away; don't bluff

If Legal sells properly then "the business" will buy because it needs legal. If Legal fails to sell properly it has only itself to blame. But if "the business" is too stupid to buy what it needs, and the Regulator won't back Legal as it currently is failing to do, then Legal must walk away en masse, without bluffing.

To where?

That's a good question and reminds me of a valuable lesson I learned from a learned boss when I was a young and inexperienced managing director of a business which was part of a group. We had a key supplier who supplied a business critical bespoke service and was asking for more money that we could afford. We were "over a barrel" because we were deeply embedded in that supplier's internal value chain. They knew it.

My boss, the group CEO, told me a) to find an alternative provider within budget and b) plan for the disruption of a move and c) tell our current supplier that if they didn't agree to our price we would definitely move.

I did. They didn't. We moved. The move was less painful than we thought. The supplier suffered a major "risk event", to put it mildly.

So, where would a law department move to en masse, if it had to?

To a law firm.

An innovative law firm.

Why?

Because that's Step 5: Sack your Panel and joint venture with innovative law firms from the start; make them part of your team.

Find law firms that will have your back.

Further snorts of derision, I hear.

What would make any law firm do that?

Society will.

Lawyers won't change. Society will. Then they will demand change. Lawyers will have no choice.

Society's change is happening much sooner than lawyers think.

It's the boiling frog syndrome.

SECTION 2.5

Step 5 Invest cash in innovative providers to help close the C-Suite gap & end the in/out myth

The fifth, of seven steps, in building a new in-house target operating model is to fix what's broken with "out-of-house" by abolishing the vanity of "panels", investing cash in long-term relationships with innovative suppliers of legal counsel and process, allowing them access to your C-Suite so that they can help you close the yawning "gap with Legal" and in doing so end the myth that in-house and out are in any way different save that in-house should be "in the room" by right.

Bjarne Tellmann quotes Sun Tzu in his book "Building an Outstanding Legal Team" (Globe Law & Business 2017 p.155): "If you do not seek out allies and helpers, then you will be isolated and weak."

He's right and, although I don't agree with all of his views on out of house relationships, he makes a crucial point that "it [outside spend] is likely to comprise the largest component of you legal spend".

Why then do law departments not exploit, positively, this awesome buying power on "eat all you can for a fiver" joint venture deals over three to five years instead of over-priced "à la carte" legal menus offered by panels?

Law firms' business models are constructed and thrive, at least financially, on the current dysfunctional relationship between in-house, law firms and the C-Suite.

As one equity partner explained to me: "…we advise businesses how to get from A to B. This involves counsel and process. We undercharge for counsel and overcharge for process. But it nets out ok in the end…"

It may "net out ok" for some law firms, but business and therefore society is underserved.

The cure is painful and demands courage but would put law departments in the driving seat of "legal disruption" with innovative providers up front with them:

- abandon panels: time-wasting, expensive, vanity beauty contests
- invest cash in innovative providers: help them fund their target operating models over several years so they can de-risk yours
- be confident enough to allow them access to your C-Suite: they can help you develop and sell in your Legal Business Plan
- make them part of your team; invite them to your operating board meetings
- help them build businesses which have good people but not reliant on any personalities
- have the courage to avoid the "none got fired for instructing a "Magic Circle" law firm hamster wheel by helping your joint venture suppliers invest in talented lawyers as good as the best

- end the “magic circle” myth once and for all; it isn’t magic

The magic circle myth perpetuates the in/out myth which is that there is an unbreakable caste system in law: in-housers are perceived by some as a tad intellectually inferior to law firm lawyers; that they have taken “the corporate shilling” and pay law firm’s exorbitant bills only because their in-house relationships with the C-Suite are so dysfunctional they dare not as they need substantial air-cover.

This merry-go-around serves no-one. Not even the big law firms who know that their models are disintegrating because their billable hour cultures are not sustainable.

Soon the matter will be taken out of their hands as society wakes up to the over-priced mess that is the legal services sector which still allows corporations to go under while employing law departments the size of law firms and with no ABS obligations and “light touch” regulation and who were not “in the room when that decision was made” but, strangely, were in the room when that “legal privilege moment” was urgently required. Officer of the Court one moment, “blocker”, the next.

The water is getting warmer around the frog.

Clever law firms and providers should “get in there now” and help sort out this mess before the “revolution”.

Clever law departments should invite them in.

SECTION 2.6

Step 6 Negotiate a business plan which meets business needs but honours Legal's purpose

I'm writing a book with the working title: ***IN-HOUSE TOM: a new model for the law department, law firm & C-Suite relationship*** – initially as a series of blogs.

You can follow the full index of the blogs as they build here: IN-HOUSE TOM: INDEX

IN-HOUSE TOM: SECTION 2.6 Step 6 Negotiate a business plan which meets business needs but honours Legal's purpose

The sixth, of seven steps, in building a new in-house target operating model is to negotiate a breakeven law department business plan which meets reasonable business needs but at the same time must honour the purpose of any law department which is to enable better decisions using excellent legal counsel and process.

By "negotiate" I mean to negotiate a deal with the Board where you agree to deliver "seven things for seven dollars not ten things for seven dollars." (Ibid).

This requires selling skills, covered earlier, and negotiating skills ensuring the business feels that this approach is in its long term interests.

By "business plan" I mean a plan which allows you to run Legal as a business, not like one, over the next three to five years.

You can use any business plan template.

I have developed this one tailored for legal departments:

Legal Department Business Plan Executive Summary Template (and notes)

1. **Definitions [To Be Agreed with "the business"]**
    1. "Legal" The legal department…
    2. "The business" The Board…[not the CEO]
    3. "The needs of the business" : See Appendix A
    4. "The budget": See Appendix B
    5. "Foresight" [Not a crystal ball…]
    6. "Legal counsel": legal advice
    7. "Legal process": all processes which have a legal component
    8. "Lawyer-Leaders"
        1. Lawyers who lead teams and need to develop appropriate leadership skills
    9. "Exclusions" Appendix C
        1. The list of services that the business needs but which cannot be funded within the budget therefore not part of this plan.
2. **The Purpose of Legal (Why)**
    1. *"A vibrant, independent legal profession is an essential element of any democratic society committed to the rule of law… lawyers also owe overriding specific duties to the court and to society, duties…which may require lawyers to act to their own detriment, and to that of their clients."* Lord Neuberger
    2. *"The lawyer has a duty to the court which is paramount.…He owes allegiance to a higher cause. It is the cause of truth and justice.… He*

must disregard the specific instructions of his client if they conflict with his duty to the court" Lord Denning Rondel v Worsley 1967

3. Work with the business to foresee risks
4. Provide excellent legal counsel and process
5. To develop in-house lawyers and lawyer-leaders

3. **Legal Strategy to achieve this purpose (How)**
    1. The primary strategy to achieve its purpose will be to focus on communicating how scarce resources are being exploited to foresee top end emerging risks and to provide essential counsel and process
4. **Legal Behaviour (Approach)**
    1. Operating as an independent breakeven business
    2. Emphasis on maxmising personal and team performance and fulfilment
    3. Best practice in internal marketing and operational management of scarce resources
5. **The Agreed Needs of "the business"**
    1. Foresight
    2. Visible/vanguard
    3. Engaged in the business
    4. Excellent legal counsel
    5. Excellent legal process
    6. Value for money
    7. Within budget
    8. See Appendix D
6. **The opportunity**

1. To demonstrate that “foresight” can be delivered to and with the business
2. To have a new conversation with the business which matches needs to resources
3. To create an environment in which lawyers and non-lawyers can thrive

7. **Internal Marketing Plan**
    1. Internal marketing, not just communications, is a key component of Legal strategy. All Legal Operating Board Members need to understand what Internal Marketing is and how it is works in practice. The Plan will follow standard marketing principles i.e. ‘The 4 Ps”:
        1. Product (Service)
            - Foresight
            - Counsel
            - Process
        2. Price
            - The Budget
        3. Place (Delivery)
            - 1-1
            - 1- many
            - In writing
        4. Promotion (internal marketing)
            - Legal “brand”: Professional, High quality
            - Reliable: forward looking, risk managers etc.
            - Seminars led by Legal team members

- Relationship marketing – stories

8. **Operations Plan**
    1. Business need
    2. People
    3. Resources
    4. IT Plan
    5. Finance Plan
    6. Behaviour Plan
    7. Cost
9. **People Plan**
    1. Legal Operating Board
        1. GC as “CEO”
        2. CFO from Finance Department or external
        3. COO
            1. Practice Heads
        4. CTO from IT Department or external
        5. CMO from Marketing Department or external
        6. HR
        7. GC to Operating Board
    2. Risk Committee
    3. People Committee
    4. The Organisation Chart is set out in Appendix E
    5. Legal Operating Board will set out, in conjunction with HR, its own People Policy particularly in relation to the creation of a culture of excellence for lawyers and those who support lawyers

6. A separate Policy document will be agreed by Legal in respect of external counsel and in particular the use of “new law” providers.

10. **Target Operating Model**
    1. Taken together, the sections above constitute the Legal Target Operating Model (TOM), which is about how, ideally, the law department would like to operate. The components of the TOM are needs, strategic resources and strategic processes:
    2. Need: The agreed needs of the business
    3. Strategic Resources: People, External relationships, Knowledge
    4. Strategic Processes: Operating Board, Risk Committee, People Committee, Workflows, etc
11. **Financ**e
    1. Detailed Budget: See Appendix
    2. Financial Reporting processes
    3. Monthly management accounting reports with variance analysis and narrative to be presented to the Legal Operating Board
12. **SWOT & Mitigation**
    1. Strengths:
    2. Weaknesses:
    3. Opportunity:
    4. Threat:
        1. Mitigation
            0. A
            1. B
            2. C

Busieness Plan Steps

- Debate and agree Draft 1 at Legal Operating Board meetings
- Full Legal Operating Board to present Draft 1 to the business
- Debate
- Review and agree Draft 2 at Legal Operating Board Meetings
- Re-present Draft 2 to the business
- Repeat as required
- SIGN OFF
- DELIVER

SECTION 2.7

Step 7 Defy law school training; use the F-word; accept the GC as CEO of Legal

The seventh, of seven steps, in building a new in-house target operating model is for in-house lawyers to defy their law school training when it comes to leadership processes because law schools don't value leadership only because law firms don't value them because they can't bill them by the hour; for in-house lawyers-as-leaders to use the F-word – Feeling – much more frequently that the T-word – Thinking, because legal training eschews feelings which may work in the practice of black letter law but is disastrous when lawyers have to lead, as so many of them do and, finally and crucially, by ensuring that fellow in-house lawyers accept that one of their number – the GC – is in fact the CEO of Legal, whether they like it or not, and the GC must lead and they must submit to leadership. It's an action, not a thought.

Leadership is a strategic process

Every target operating model consists of three minimum components:

- needs
- strategic resources
- strategic processes

Leadership is a strategic process. Without it the strategic resources cannnot be applied to meet the needs of "the business".

The leadership skills of the GC and other in-house lawyers-as-leaders are strategic resources. If these are weak then they cannot meet needs of "the business" effectively.

All leaders do three things; so must lawyers-as-leaders

- **Create an environment in which the people they lead thrive**
    - Lawyers-as-leaders struggle with this. They are litigators trained not only to win, but to ensure that the other guy loses, bigly. The notion that they might *help someone else win* does not compute. It's counter intuitive. That's why GCs must pay more attention than they think to leadership development – their own, particularly.
- **Grow and develop whatever they lead**
    - GCs must grow and develop the legal department as a business because money is involved. One GC I worked with felt this characterisation of Legal-as-a-Business was "far too simplistic". I understand this view and its etymology. Legal training promotes brilliance in legal practice to a God-like status whereby lawyers vie with other to be the "brightest in the room". Small wonder therefore that they find themselves so frequently left outside "the room" in "the business". In-house lawyers would help themselves more if they tried to be less snooty about the art and science of business and leadership and more aware that it's hard work leading well and is a skill to be cherished, not ignored.
- **Please stakeholders – all of them, not some**
    - In-house lawyers-as-leaders must please

- The Court: they are Officers of the Court although I find that many don't like to be reminded of this inconvenient truth. It sits uneasily with the nonsensical "pragmatic business partner" trope encouraged in recent years at in-house conferences. You'll never hear a CEO facing the possibility of being fitted for an orange jumpsuit talk about lawyers-as-business-partners. They'll be desperate for that "privileged" conversation, which privilege (sic) is granted to in-house lawyers by the Court.
- The Board: the Board, not the CEO, is their client. The board also pays the law department's bills.
- Society: people died in trenches to allow lawyers to practice in a free democracy. Society expects lawyers to bear society in mind when advising "the business". This expectation will intensify as businesses realise that ESG – environment, society and governance decision-making – is here to stay. It's not a fad.
- "Direct Reports" – Lawyers-who-lead have a duty to the people they lead. It's a duty, not an option.
- Other functions: people who work in other functions in "the business" look up to Legal to model behaviour: "If Legal isn't worried, why should I"?
- Regulators – Legal and other regulators are key stakeholders. It's unfortunate, however, that legal regulators fail to help in-house lawyers with their "independence" challenges more than they do.

The GC is the CEO of Legal

Sadly, all but the most a-typical of in-house lawyers and fortunately there are a few of those, struggle with the notion that one of their number must lead them.

Being led doesn't sit easily with these heroic soloists.

What if GCs and lawyers-as-leaders were to take Charlie Munger's famous advice:

"Never, ever think about something else when you should be thinking about the power of incentives".

So what's the incentive for in-house lawyers to change their behaviour when they have resolutely failed to "disrupt" anything in the last five years and they show no signs of doing so now?

I recall giving a speech to an in-house legal conference many years ago setting out the arguments in this book. There were about 180 in-house lawyers in the room. Less than ten showed any active interest. I think I said: you are all here on expenses, with your five weeks holidays, pensions and LTIPs. Why should you care? Where's your pain? Why don't we stop the session and go and drink pints? They laughed.

I don't/didn't blame them.

There's only one incentive that will move lawyers to action: that's peer pressure.

When a-typcial lawyers-as-leaders connect with the "boiling frog" reality of legal services they will act. Their peers will respond. They're not stupid. They're "bright", remember.

What will make a-typcial lawyers act?

Society.

“Changes in the macro-environment” is the “in” phrase.

That’s what the next section of this book, Section 3, is about:

Why the legal frog should jump out of the warming waters, before it’s too late.

Disrupt on their terms rather than be disrupted on the terms of others.

Either way, just like the parent who says to a child at bedtime: “Would you like the blue teddy or the brown teddy?” [But you’re going to bed] – society will, unless lawyers act, tell which lawyers which teddy they will have, like it or not.

Allowing the water to boil isn’t “bright”, is it?

SECTION 3.1

Trend 1 #ESG: Lawyers will be required to enable the relaunch of capitalism, whether they like it or not

In Section 1, I set out the weaknesses in the current in-house target operating model and in Section 2, the steps to building a new one.

In Section 3, I will set out seven trends which form the context in which in-house lawyers will operate. These make a new model not only unavoidable but also achievable.

The first is the unstoppable trend towards the relaunch of capitalism via a focus on environment, society and governance (ESG) in investment decision-making. This is now a multi-trillion dollar business.

Skeptics point to inconsistent metrics, shallow motivations, and no fundamental change in company law on stakeholder holder value despite movements in that direction.

But Covid19 has squashed any remaining doubts that Milton Friedman's manifesto for the primacy of shareholder value will be consigned to history, despite the protests of the right that state interventions are "temporary and not socialism".

They miss the point. The loudest noises for a relaunch in capitalism are coming, not from traditional socialists, but from capitalists red in tooth and claw: Larry Fink, The Financial Times, and the 181 CEOs of The Business Roundtable to mention just three.

Society has had enough of trickle-down economics, stagnant wages, high dividends and unjust executive pay.

Until now some ESG rhetoric has been a fig leaf for making more money by by having a “purpose” other than making more money. That goose is truly cooked by Covid19 because it assumes that business will do this voluntarily. Pigs will fly.

Society will bring a big stick to business and will use it in anger, because it is furious and. sooner or later, history tells us that if society “gets mad” and decides to change its mandate it will be sudden and brutal.

It’s mandate to business will change. I call the new mandate ESGP: you must make as much profit as you can (P) because if you don’t we won’t be able to fund hospitals, schools and the police nor will we be able to entice people to risk their capital but you must do so but only after you pay a significant cash contribution to protecting environment, society and the cost of running a business ethically (ESG).

That means business will make less money. That means growth forecasts will have to take account of ESG costs. That means the stock markets will have to reset their expectations on ROI.

Ergo, board decision-making processes will change beyond belief. Since the board is the law department's client, it follows that the role and purpose of the law department in enabling better ESGP decision-making will become of paramount importance to the organisation because one of biggest ESG risks for business is "conduct risk" which is defined as behaviour over time and the business will need their law department and their external law firm advisers to advise carefully on how to mitigate conduct risk and on internal legal process which can also lead to conduct risk.

If a GC wants to concentrate the minds of their client Board they might ask the following questions:

- Do you want to be on the front pages for damaging the environment?
- Or for a #MeToo incident, flagrant unequal pay or tax dodging (which could have paid for ventilators)?
- Or for serious unethical behaviour?
- Or any of the above which break laws and could land you in jail?
- Or perhaps someone you know died of Covid-19 and you now believe in ESGP or you have changed your mind for another reason?
- Or perhaps you genuinely feel that while you want to make money you also want to contribute to society or at least not damage it?
- Will you now, please, get out of our way and let the law department do its job which is to enable better ESGP decisions?

How far fetched or far off do you honestly feel that line of questioning is?

SECTION 3.2

Trend 2 Law firm hubris: no incentives to change; gleeful at the disruption desert but "airline-type" big bang looms

The second, of seven trends, against which backdrop the current in-house, law firm and C-Suite relationship languishes is the increasing and understandable hubris in law firms who have no incentives to change their broken models, are gleeful that, while AI may be an oasis in a desert of legal services disruption, "New Law" hasn't "caught on", is frequently viewed as an LLP respray and in any event the "billable hour" is alive and ticking in most firms, save for a few "outliers".

But hubris, which in Greek tragedy meant excessive pride and defiance towards the gods leading to nemesis, in law firm terms means a defiance towards the "god" of society which is telling the legal sector that it is unhappy. Very unhappy. An while unhappy markets can sustain for long periods – sometimes very long periods – sooner or later trends collide to enable one or more players to say "enough is enough".

This happened in the airline sector. Once upon a time flying was for a certain class of person, was massively overpriced and the service provided inconsistent across the range of that service category's benefits.

Southwest Airlines, Easy Jet and Ryanair put an end to all of that. Their stories are now part of business disruption folklore. But before they did what they did the market was incredibly unhappy but resigned to the status quo.

The legal services market is in the same position now save for one factor: the disruption required in the airline industry was about services whereas the disruption required in the legal sector is not about services but about lawyers and their behaviour.

Legal services doesn't need disruption. Lawyers do.

Broadly speaking legal services are fine and will improve when they become more customer focused and enabled by technology. That's not difficult. Time, money and innovation will sort that.

Disruption of lawyers will take longer.

But a combination of one courageous law firm, one a-typical law department and one innovative ESG focused CEO/C-Suite could bring the entire commercial law edifice tumbling to the ground.

The managing partner of a law firm which has reached a "glass ceiling" and is currently failing to break into "the next level" of corporate clients might lead the revolution or maybe a managing partner of a "top firm" who fears such an outcome might do so too.

A GC who combines a brilliant legal mind, with proven leadership skills and exceptionally high emotional intelligence might one day be the "Herb Kelleher"

of commercial law's Big Bang or maybe, a "respected GC" with the smarts to read the runes and the relationships and convening power to facilitate change might do so too.

Or perhaps a young well educated, rounded, well adjusted, emotionally intelligent CEO of a "something-tech" successful and trendy business who cares about ESG as much as money might lead this or maybe a crusty old CEO who sees the tumbrils coming down the track decides to act and help lawyers help themselves.

Or maybe all three, all six or a combination. Who knows.

Either way and whoever does it, as sure as water flows downhill, this will happen.

Covid-19 will accelerate it.

SECTION 3.3

Trend 3 #Legaltech "disruption" hopes fading; "Ryanair" moment rising; state intervention hovering; purpose of law needs fixing, first

The third, of seven trends, against which backdrop the current in-house target operating model struggles, is that the hopes that technology would somehow change the behaviour of lawyers leading to a "transformation" or "disruption" in legal services are fading; that this creates an opportunity for one or more parties to do what, for example, Ryanair did i.e. to see technology as an enabler, not as a driver, of change and that this might also be a good opportunity for the state to intervene and "encourage" accelerated change – after-all, lawyers are Officers of the Court and, ultimately, servants of the state – an inconvenient truth perhaps, but a truth n'er the less.

This is no surprise to "non-lawyers" who wonder what lawyers are doing noodling about "#legaltech" when their very purpose in society is unclear? Fix your "why", and your "how", including your "tech" revolution, will follow. Ask Simon Sinek for help.

"WHEN AI AND THE INTERNET MEET THE PROFESSIONS…

…This book sets out two futures for the professions. Both rest on technology. One is reassuringly familiar. It is a more efficient version version of what we have today. The second is transformational – a gradual replacement of

professionals by increasingly capable systems" (Back cover of ***The Future of the Professions: how technology will transform the work of human experts*** by Richard Susskind and Daniel Susskind, Oxford University 2015) The Susskinds must feel disappointed.

As must those who endorsed in the book: Lord Thomas, Daniel Finkelstein, Ian Goldin, Philip Evans, Hugh Verrier, Anthony Seldon, Nicholas LaRusso, Conrad Young, and Richard Sexton.

The Susskinds and their endorsers are bright, experienced and thoughtful people. How could they have got this so wrong? Have they got they got it wrong? Is it too early to say?

Well, so far no transformation. We'd know.

Is it likely soon based on current efforts? Don't hold your breath.

Here's what might break the logjam:

- One ABS licensee led by a "non-lawyer", or an a-typical lawyer, with deep pockets could "do a Ryanair" which used technology (online booking) to disrupt the no frills airline market
- The state could intervene and insist that the profession wake up and smell the digits
- One innovative GC + one inspirational Managing Partner + an onside C-Suite including, er, a CTO might one day get in a room with a flip-chart and some post-it notes and sort this out.

Have you ever seen GCs, Managing Partners and CXOs including, er, CTOs get together regularly in large numbers at conferences? If you have, please DM.

The Susskinds weren't wrong. They just missed a step:

Humans, not technology, will transform the work of human experts and then they will use technology to enable that transformation.

But the first step is to clarify the purpose "of the work of human experts".

That's up for grabs, "big time", in respect of lawyers.

I'd love to read a book by the Susskinds on that topic including their take on society's shift towards ESG investing, which in my view, will be the key "disrupting" factor in the legal sector.

SECTION 3.4

Trend 4 Regulation: pressure for change is growing, albeit slowly

The fourth, of seven trends, against which backdrop the current in-house target operating model struggles is the growing pressure, albeit slow, to enforce current regulation in respect of in-house lawyers and to strengthen it in order to protect society which includes businesses and lawyers.

In the UK lawyers are subject to the same regulations, whether they practice in-house or out.

One of these is the principle of "independence" . Lawyers are expected to act in an independent manner with respect to their clients.

As set out at length earlier (see Index) this is almost impossible for in-house lawyers.
Everyone knows it.

Many years ago when I started to look into this matter first I posted a blog on the subject on social media. The responses implied that the regulations are not "really enforced" in-house. I was shocked.

Recently I asked the Regulator the same question who replied that it's up to the in-house lawyer to "report" issues and to act independently.

I asked the Regulator had they ever carried out a Thematic Risk Assessment on the independence risks in-house since they are required under their Enforcement Strategy to assess "serious risks" to society. There is ample academic research and case law evidence to suggest there is a serious risk. They said "no" but I could request one. I did. Nothing has happened, yet.

I conclude that as a "non-lawyer" member of society I hold little sway in these matters.

But what surprises me is the fact that lawyers and academics who raise these issues are also, largely, ignored – so far.

For example, Professor Stephen Mayson published his Legal Services Regulation Interim Report in 2020. He deals with in-house lawyers in Section 5.8 on page 70. The section is notable as much for its implicit commentary on the current context in which in-house counsel operate as it is for its specific proposals and questions regarding changes in regulations.

In the second paragraph he states:

"Analysis of the legal services market shows that a significant and increasing volume of lawyers (about 20%) and legal services are now in in-house settings. There is little doubt that a tension is inherent in this relationship when the client for legal services is also the adviser's employer, and the usual notion of 'independent' legal advice is often stretched."

This paragraph raises several questions in the mind of, say, a curious Martian were they to land on Earth today and read the report:

- If there is “little doubt that a tension is inherent in this relationship” why has this tension not been addressed before now?
- If the “usual notion of ‘independent’ legal advice is often stretched, why has this “stretching ” not been investigated more frequently heretofore?
- Since the “little doubt” of which he writes is supported by ample anecdotal and written evidence of which most interested parties are aware, not least the UCL Moral Compass Survey 2016 which detailed the extent to which in-house counsel experience ethical pressure, why have boards of directors and regulators not done anything about it?

He goes on to say:

“Equally, those advisers who are professionally qualified would typically prefer to maintain their professional independence, ethics and standards and not bow to any organisational or commercial pressures to modify their advice to make it more palatable to their internal clients. In these circumstances, it is arguable that those with professional obligations might benefit from further regulatory support (see also the discussion of ‘inverse vulnerability’ in paragraph Version: IR Final2 71 4.5.3). This could strengthen their position when dealing with internal clients, and provide an independent benchmark or standard against which to justify their professional advice. In principle, they should not be at risk of dismissal or disadvantage simply for observing their professional obligations.”

The Martian might, therefore, reasonably ask:

- Are in-house lawyers currently at risk of dismissal or disadvantage simply for observing their professional obligations, yes or no?
- If no, what’s the problem?
- If yes, why have they not by now received “further regulatory support”?

Professor Mayson moves on to governance:

"Further, effective corporate governance should ensure that in-house lawyers are able to function effectively and are supported in doing so. This might entail express conditions in their employment contract, and a direct reporting line to the Board (or to the chairman or a senior independent non-executive director)."
He references in the footnotes a paper for discussion about best practice: "In-house lawyers and non-executive directors" by Professor Richard Moorhead and others.

The Martian, equipped as they are with instant access to all data on the subject, might ask:

- Why do their current contracts not include "conditions", given the acknowledged "vulnerability"?
- Since currently, in-house lawyer's client is already "the board" why has no-one challenged the widespread practice of GCs reporting to CEOs and even CFOs who have unlimited power over their salaries, titles, and performance reviews?
- And in respect of the latter and in reference to "independence" above why are they allowed to take advantage of LTIPs and Bonus schemes?

It is the final paragraph in 5.8.1 that is most shocking and might take our learned Martian by surprise:

"These are not simply private or commercial matters. As we have seen recently, corporate failures can lead to consumer and societal detriment, and in-house lawyers ***have to be able to sound alarm bells without the chilling effect of***

***potential reprisal**. The public interest in effective and fearless legal representation is engaged in much the same way as it is with private practice."*

The Martian might be forgiven for asking in respect of recent corporate failures:

- Did some in-house lawyers not "sound alarm bells" because of "the chilling effect of potential reprisals"? And in what instances? Do we know?
- Did some in-house lawyers sound the alarm bells and in fact experienced the chilling effect of reprisals? And in what cases? Do we know?
- Since "the public interest in effective and fearless legal representation is engaged in much the same way as it is with private practice" why in respect of recent corporate failures was the public interest not protected?

The report goes on to examine the merits of separate registration and other remedies.

I would encourage boards, GCs, regulators, Larry Fink and the 181 signatories of The Business Roundtable and anyone else interested in ESG to pause at the end of Section 5.8.1 and ask the question that the Martian might, again reasonably, ask:

- While we may need to wait for a final report to propose new regulations, it's clear that the public interest remains unprotected today; surely that can't wait? What are boards, GCs and the profession/regulator going to do about it?

The sentence in the report which stands out for me and should haunt us all is:

"*As we have seen recently, corporate failures can lead to consumer and societal detriment, and in-house lawyers* ***have to be able to sound alarm bells without the chilling effect of potential reprisal***."

How, against this background, is it possible for any law department to run anything approaching a workable target operating model?

How?

SECTION 3.5

Trend 5 The "turf war" between Compliance and Legal is escalating, especially in rapid growth businesses

I'm writing a book with the working title: ***IN-HOUSE TOM: a new model for the law department, law firm & C-Suite relationship*** – initially as a series of blogs.

You can follow the full index of the blogs as they build here: IN-HOUSE TOM: INDEX

IN-HOUSE TOM: SECTION 3.5 Trend 5 The "turf war" between Compliance and Legal is escalating, especially in rapid growth businesses, where these are separate

The fifth, of seven trends, against which background in-house counsel must run their target operating models is the escalating turf wars between the Compliance function and Legal function where these are separate.

Over many years I have witnessed in my work with in-house teams avoidable problems caused by this separation, particularly in rapid growth contexts where revenue pressures can create a culture "to keep Legal out of Compliance".

According to an article, ***The compliance function at an inflection point*** published by McKinsey in January 2019 (Insights) "…The 2008 financial crisis brought compliance into sharp focus. At financial institutions worldwide,

failures related to compliance led to fines and losses topping $300 billion in the ensuing years—damage approaching the proportions of crisis-induced credit losses. Compliance woes have not gone away since: recent McKinsey research indicates that most senior managers feel more comfortable with their credit-risk management than with their control of compliance risk. The reason for the discomfort is the inchoate state of compliance standards. Best practices for compliance risk are still emerging, few agree on the most effective organizational approach, and business ownership of compliance risk is weak." The article's reference to the lack of agreement "on the most effective organisational approach" is the heart of the matter.

This is a serious matter and the problem is not new or unknown to all concerned.

The problem is further complicated by the fact that, apart from issues around compliance by organisations with laws generally referenced above, there are serious and unresolved matters regarding compliance by in-house solicitors with their regulator.

Moorhead, Vaughan and Godhino wrote in ***In-House Lawyer's Ethics – Institutional Logics, Legal Risk and the Tournament of Influence*** (Hart Publishing 2019 p.226) "…Entity regulation is applicable only to law firms, Alternative Business Structures…and those working inside the law firms…Even where a business might employ more than 1,000 in-housers, each solicitor in that team is regulated as an individual and there is no entity-based regulation…What this means is that in-house teams are not required to have the same systems and processes in place as a law firm or ABSs for managing

compliance and reporting breaches: in particular they will not have a mandated COLP [Compliance Officer for Legal Practice]…ethical challenges pose risks that organisations are poorly placed to deal with, where the organisations themselves are the source of that ethical risk…it is probably most accurate to say that the distinctively different approach to in-house practice in the current Code is as much historical accident as it is a clearly thought-through policy position".

And so the origins of the current compliance mess – and it is a mess – is a function of confusion.

Confusion because, as McKinsey points out in its article "the more recent view of compliance as a risk rather than a legal obligation…business ownership of compliance is still lacking".

Confusion leads to matters missed because in-house lawyers who feel they should be "across compliance" are sometimes shut out of compliance issues as none of their business.

Moorhead et al sum it up well:

"Weigh the harms caused by SCB's wire-stripping, or Rolls-Royce's corruption, against the more standard fare of SRA enforcement (solicitors taking client money, misleading the court), and we are hard pushed to see that in-house practice is low risk."

Weigh the harms, indeed.

I suspect that in the aftermath of COVID-19, during which decisions were taken which may later prove to be questionable but were not questioned.

Society will be less forgiving after COVID-19 of in-house lawyers and their regulators than they were after the 2008 Crash.

“Where were the lawyers and their regulators?” will be a question asked much more stridently and insistently.

“Where?”.

SECTION 3.6

Trend 6 The well-being of lawyers remains a low priority; society pays a high price

The sixth, of seven trends, against which background in-house counsel must run their target operating models is the fact that the well-being of lawyers, in-house and out, remains a low priority and society – which includes the legal profession, business and "the public" – continues to a pay a very high price indeed.

Paul Gilbert, CEO LBC Wise Counsel wrote in ***A report on the well-being of in-house lawyers*** (LBC Wise Counsel July 2015 p.3) "The 'Crisis of well-being" article that I wrote in March 2014 and is republished in this report, had a very significant response…[that] spurred LBC Wise Counsel to conduct a survey…[which shows] a shocking picture…If these were physical injuries caused by machines in factories the businesses concerned would be shut down and directors prosecuted…It is unacceptable to inflict such harm and inexcusable to let it continue…Before it gets any worse worse we must act and act now".
I have witnessed little evidence of sustainable action.

Horacio Bernardes Neto, President, International Bar Association wrote in ***Us Too? Bullying and Sexual Harassment in the Legal Profession*** (IBA May 2019) "…bullying and sexual harassment are widespread in legal workplaces. Some of us have experienced it ourselves. Many of us have witnessed it. Others

have heard about it from colleagues. However, the plural of anecdote is not data. For the first time at a global level, this research provides quantitative confirmation that bullying and sexual harassment are endemic in the legal profession."

The #MeToo campaign is making progress because people are working together for a shared purpose but the system which underpins the behaviour has changed not a jot, barring a few isolated exceptions.

One of the most revealing analyses of this stasis was provided by Professor Laura Empson, Director of the Centre for Professional Service Firms at Cass Business School, London, and a Senior Research Fellow at Harvard Law School's Center on the Legal Profession in her ***BBC Radio 4 documentary*** (September 2018), available on BBC iPlayer.

Professor Empson told us nothing new and everything new.

We knew that the stress levels in professional services – and in legal services in particular – are unsustainable. I have seen it at close quarters over 15 years working with lawyers as leaders. Professor Empson's stories and interviews are genuinely shocking, but won't surprise any listener who knows that world.

What was new about Professor Empson's programme was that she has moved the debate on, significantly, by tapping into the growing tolerance in the world of work for people making themselves vulnerable.

Moreover, what was riveting about this programme is that she – a former investment banker and strategy consultant turned academic – is a self-confessed "insecure overachiever" and speaks openly about her struggle.

And she manages to persuade “big names” in professional services to speak openly, frankly, and movingly about their experiences.

One story stands out: the managing partner who changed his shirt five times and pill-popped headache tablets all day due to the stress of an annual partners conference, who knew that he was perceived as cool but was dying inside.

Professor Empson’s engagement with vulnerability – her own and others – is new and part of a growing trend.

Several years ago, Richard Given – a client GC in the UK with extensive team leadership experience – gave me a copy of Brené Brown’s *Daring Greatly*, a book which explains how the courage to be vulnerable works and dispels the myth that it’s a weakness and her Ted Talk is, rightly, in the Top Ten. In the spirit of the book, Richard spoke openly and refreshingly to everyone about his own tendency to overachieve.

Stephen Fry, Alasdair Campbell, and Ed Balls – all high profile figures in the UK – dared to speak openly about their issues. Paul Gilbert, a former GC and leader of UK’s foremost leadership programme for in-house counsel, has written for many years about the problem of stress in the profession and, movingly, about his own experiences.

The courage of Prof Empson and these people to speak out does us all an excellent service. It has an impact much more significant than perhaps some realise. It gives others permission to do so too. I now speak openly to my clients about my own experiences, and they theirs. Our shared work is enriched.

The arguments from interviewees in the programme who argued against vulnerability were as chilling as they were predictable: “if-you-can’t-hack-it-get-out…and “slavery was abolished…no one is forcing you to do it….and clients expect it…”

The problem with these arguments is that although factually they assume that everyone will persist with what Yuval Noah Harari calls in *Sapiens* the current “shared fiction” of the purpose of work in general, and the purpose of professional services in particular. Once we decide to change our shared purpose, all bets are off for the manipulators of “insecure overachievers”. However, it hasn’t yet happened. And that explains, in part, the mystery of mostly zero disruption in legal services. There won’t be any substantive disruption in legal services, apart from technology-enabled change, unless and until more lawyers accept that vulnerability isn’t a weakness.

One step that might help this process, not addressed in Professor Empson’s programme but hopefully in a sequel, is an examination of what in their formative years has led to them becoming “insecure overachievers”.

This one aspect of the program left me a little troubled. I’m uncomfortable with the coining of another new label – “insecure overachiever” – which some lawyers will use to self-flagellate and others as another secret elite badge of honour. I don’t believe this issue can be addressed without looking at the full arc of one’s life.

Professor Empson’s says in her closing words that although the feelings may diminish they “never go away…make your peace with them…recognise that you

can be manipulated…channel it for you and not against you…your deepest fears may drive your wildest dreams."

I don't see it this way. For me, It's not about making peace with the feelings or channelling them. It's about making peace with their origin. Understanding what drove early overachieving decisions in your life and making a new decision. William Glasser calls this *Decision and ReDecison*.
Professor Empson asks frequently in the programme – "who's to blame?"

"Who?", indeed. A great question.

SECTION 3.7

Trend 7 #lawyersbacks: a growing minority of lawyers are starting to, counter-intuitively, “have each others backs”

I’m writing a book with the working title: ***IN-HOUSE TOM: a new model for the law department, law firm & C-Suite relationship*** – initially as a series of blogs.

You can follow the full index of the blogs as they build here: IN-HOUSE TOM: INDEX

IIN-HOUSE TOM: SECTION 3.7 Trend 7 #lawyersbacks: a growing minority of lawyers are starting to, counter-intuitively, “have each others backs”

The seventh, of seven trends, against which background in-house counsel must run their target operating models is that slowly and with maddening caution a growing minority of lawyers are starting to challenge the status quo and “have each others backs”.

The status quo, which I set out in detail earlier, can be summarised as the dysfunctional behaviour which most lawyers and non-lawyers acknowledge is prevalent in the relationship between law departments, law firm and the C-Suite.

While I say “most”, based on my anecdotal experiences over 15 years, I acknowledge that not all lawyers agree, are more than happy with the status

quo and indeed a few have exhibited, what might be called in the animal kingdom, hostile noises towards me and others on these issues.

Those at the top of the profession, in-house and out, have no incentive to rock the boat. Why would they?

Even for those of their number who challenge the status quo the response can be negative. For example there was a furious response from some GCs when the UCL Centre for Ethics and Law in 2016 published its Mapping the Moral Compass Report in 2016 in which set out four categories of in-house lawyer:

- the capitulators
- the coasters
- the comfortably numb
- the champions

That list chimes with my experience of working with hundreds of in-house lawyers over many years.

“The Coasters”, the report said “…was the largest group by some distance…They had moderately low levels of perceptual moral attentiveness but moderately high reflective moral attentiveness…we speculate that this group is not yet being tested or testing itself in ethical terms”.

I see a correlation between in-house “Coasters” behaviour in relation to in-house ethics and their attitude to the ethics of the current house status-quo: they’re keeping their heads down.

But over recent years I have noticed three developments which suggest that there's a growing minority getting ready to be ready to be ready (sic) to speak out:

- The success of the #MeToo movement is encouraging more lawyers to believe that deeply embedded behaviour can be challenged successfully
- More lawyers are becoming more and more comfortable airing their views about the dysfunctionality of the profession on social media
- In-house lawyers who have been brutalised by "the business" are more willing to speak up, and help each other – at least in private. The recent outing of NDAs as instruments of mental torture has helped. In 2019 I ran a six month trial, which I called #lawyersbacks, to create a safe place for lawyers, in-house and out, to talk about their shocking experiences. The trial proved that a) there is a need for such support b) the support needed doesn't exist currently c) the problems are systemic.

This delicate growth – against all their adversarial legal training instincts – of the value of helping each other, with the help of one or two high profile high EQ law firms and ESG-oriented C-Suites, will be the key to "disruption"in the legal profession, worldwide.

Once the numbers reach its tipping point – change, which has been gradual, will be sudden.

Watch this space.