

IN-HOUSE LAWYERS – RESPONDING TO THE COVID-19 CRISIS

DON'T WASTE A GOOD CRISIS, GOES THE SAYING. IN THE CONTEXT OF COVID-19, THIS MAY SEEM HARSH, BUT AT ITS ROOT THERE IS AN INESCAPABLE TRUTH. THE CRISES WE FACE, WHETHER LOCALISED OR GLOBAL, WILL ENGULF US NO MATTER WHAT WE DO. IF WE SUFFER WITHOUT LEARNING, WE LOSE DOUBLY.

The crucible of crisis forces change upon us. Some of it will be lasting and beneficial. There is a genuine social, business and political imperative to draw on our recent experiences, to learn what lessons we can, to become better than we were.

The best time to learn those lessons is in the immediate aftermath, when our memories are fresh and the experience is raw. Business will not become resilient unless it takes time, now, to embed new behaviours and processes.

We are not out of the woods yet, but this is a worthwhile exercise as one begins to emerge from any crisis. Given current circumstances, it may prove critical if – as many predict – there are further surges or spikes in the COVID-19 pandemic.

The following guide should help you, whether as a senior in-house lawyer or otherwise, to navigate the uncertain waters that lie ahead.

HOW TO PLAN BEFORE A CRISIS (OR BEFORE ANY RESURGENCE OF COVID-19)

Given that we can be fairly certain all organisations will experience further impacts (whether direct or indirect) due to COVID-19, you should ensure that you have a robust plan that will enable you to respond to, and mitigate the negative effects of, that disruption.

Keystone has previously published a guide which provides an overview of a good crisis management plan. It looks at the components of the plan, the structure of a crisis management team and the lawyer's role in all of this. The guide also explains why planning is important, and why you must be ready to adapt and improvise as circumstances change.

You can access the guide [here](#).

WHAT TO PLAN FOR IN THE MIDDLE OF A CRISIS (HOW DO YOU RETURN TO BUSINESS AS NORMAL?)

When faced with an existing crisis, one of the hardest things is to raise one's eyes to the horizon and think about the future. But failing to plan, failing to think about next steps, will only extend the duration, or magnify the impact, of the current adversity.

Over the past few months, a number of clients have asked what they should focus on as the crisis unfolds, and how they might work towards a gradual exit from lockdown.

One needs to reflect soberly on what has happened so far. Be honest about what you would do differently next time, and identify areas where you were under-prepared.

You should undertake this work in addition to any efforts towards reinvigorating your client and customer relationships, and re-engaging with your workforce, supply chain and other key stakeholders.

Lawyers are (or should be) practised at anticipating what comes next. So, deploy those skills to help your business colleagues plan for the future, as well as manage the present. In planning for an uncertain future, you need to create an adaptive and flexible framework – a crisis management plan is not a 'to do' list to be slavishly followed, but a sort of algorithm that gives you a basis from which to manage, with confidence, the unpredictable evolution of circumstances. So, while a great deal cannot be pinned down, you need to think about a number of questions – including the following:

- How has COVID-19 affected your client / customer base?
- What will the new competitor landscape look like?
- What new opportunities may emerge? Will they be local, national, or international? Will you need new resources, a different structure, or a new way of operating to seize those opportunities?
- What 'temporary' adaptations have you made to your old operating model that present an ongoing opportunity in the new environment?
- How have your workforce's needs changed? Will remote working become more accepted or expected? What infrastructure, IT, information security considerations arise? Do you need to provide counselling or other emotional support? How quickly can / should you scale back up? How will you communicate, and manage, expectations? How do you maintain cohesion and collegiality in a dispersed workforce?

- How robust is your supply chain? Think about the shift from “just in time” to “just in case”. Will the legal or regulatory landscape change after COVID-19?
- Will corporate policies or contract templates need to be updated for the “new normal”?

WHAT TO DO

Your business should already have established a Crisis Management Team (CMT). It should be populated with diverse perspectives and skills. As GC / senior in-house counsel, you must be on it. Bring in external expertise where required. Keep a record of information and decisions: what was known? when? where? what decisions were taken, and by whom?

An effective CMT will have assessed the state of play at the start of the crisis (and will continue to re-assess it on an ongoing basis). It should seek, now, to anticipate what may come next. Relevant considerations include the following.

- **Time frames:** How long do you think the chilling effects of COVID-19 will last?
- **Reach:** To what extent will COVID-19 continue to impact your business directly and indirectly (i.e. through its effect on your clients, customers and suppliers)?
- **Financial:** How will revenues, costs and financial obligations (of all descriptions – have you looked at your banking covenants?) be affected?
- **Reputational:** What drives value for your business? Staff / client / customer loyalty? Brand / public profile / market activity?
- **Legal:** How will you continue to meet your contractual, compliance and regulatory obligations? What if you cannot? How do you create room to manoeuvre?
- **Channels:** Do you fully understand the channels through which your business will experience any adverse impact?
- **Options:** How can you create breathing space? How can you plug the gaps?

When the business is taking decisions around mitigation and risk management, you have a role in ensuring that the legal, regulatory, compliance and policy

implications of any piece of information are absorbed. The consequent decisions of the CMT need to be informed, even if they are not always directed, by that insight.

HOW TO BEHAVE

In a crisis of this scale, it is not just a question of what you do. Perhaps just as important is how you do it.

By contrast with any localised or business-specific crisis, COVID-19 is a global pandemic that has adversely impacted almost every aspect of commerce and society. It requires, therefore, a categorically different response. Everyone going through COVID-19 experiences the crisis on both a personal and a professional level. They worry about the health and wellbeing of themselves, and their family and friends, not just safeguarding their job or business. You may need to identify problems, and think about solutions, quite differently from your normal approach.

Your legal expertise will play an important role, of course, but try not to define yourself narrowly as a lawyer. Business decisions have legal implications. And legal advice has commercial repercussions. Put on your business hat and, also, just be a human being. Let empathy, ethics and common sense guide you as much as the law.

You need to think both strategically and tactically. That means identifying your ultimate objectives and planning how to achieve those (strategy) and, also, determining what steps, at a more operational level, will maximise the chances of your organisation achieving those objectives (tactics).

Take a risk-based approach. Make sure you focus on risk within the context of the threat that this crisis poses to business and society; do not be unduly drawn into minutiae.

Understand that risk is a spectrum, not a binary state. Things are not either a threat or harmless. Risk is a function of impact and probability. You need to examine both in order to determine the intensity of focus you and your organisation must bring to each issue that arises. You also need to be able to prioritise – to differentiate between what can be done, what needs to be done,

and what is outside your immediate ability to control or influence.

Wherever possible, as with any crisis, you need data in order to take sensible, informed and timely decisions. But do not become a slave to detail. You must be comfortable taking decisions (or, in the case of a lawyer, advising your executive team, board or the CMT) on the basis of partial information. Can you work with ambiguity? You will need to. It goes against the grain for many lawyers, but you must control the urge to know and contain every dimension of a situation.

In the case of COVID-19, it is also recommended that you bring into your analysis the question of sustainability in the context of the broader economic environment. Yes, you must take smart, business-savvy decisions (and we all understand our professional and contractual obligations to employer and client) but there is more at stake. This is not to advocate that you should take your eye off the legal, compliance or regulatory ball. But try to act, and advise, holistically and in a joined-up way. Try to understand and give due weight to the wider commercial, reputational, ethical and social impacts of any business decisions you may advise on.

FOR FURTHER INFORMATION



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