

Issues to Consider When Establishing an In-House Legal Function

February 2025

Copyright © by the Law Society of Western Australia

Table of Contents

Preface from the In-House/ Government Lawyers Committee.....	3
1. Introduction.....	4
2. Factors to Consider.....	4
2.1. Expectations.....	4
2.2. Structure.....	5
2.3. Sound Governance.....	6
2.4. Ethics and Independence	7
2.5. Legal Professional Privilege.....	7
2.6. Marketing the Legal Department.....	8
2.7. Insurance.....	9
3. Conclusion	9
Annexure 1	10

Preface from the In-House/ Government Lawyers Committee

The In-house/Government Lawyers Committee aims to promote and support the specific needs of in-house and government lawyers in Western Australia. It particularly seeks to promote increased understanding in the wider profession of the in-house sector, which constitutes over 30% of the national legal profession.

The In-house/ Government Lawyers Committee is pleased to have produced this Resource to assist legal practitioners and organisations identify the issues for consideration when establishing an In-house legal function.

This Resource is designed to stimulate analysis and exploration, not to provide legal advice.

In-House/ Government Lawyers Committee, 2025

1. Introduction

There is a growing global trend towards businesses establishing their own in-house legal team. The in-house counsel has the scope to develop a more intimate knowledge of the industry and thereby the context for providing improved legal services to the organisation, such as:

- risk mitigation;
- improved corporate governance;
- reduced overall or better deployed legal spend;
- crisis prevention and management; and
- increased speed and productivity.

“The practical idea of the modern general counsel is a lawyer-statesperson who is an outstanding technical expert, a wise counsellor and an effective leader, and who has a major role assisting the corporation achieve the ... fusion of high performance with high integrity and sound risk management.”¹

2. Factors to Consider

There are several factors to consider when establishing an in-house legal department, including:

- managing the expectations of the executive team;
- structuring the legal team to suit the size and structure of the organisation;
- sound governance principles;
- ethics and independence;
- preservation of legal professional privilege;
- marketing the legal department; and
- insurance.

2.1. Expectations

Aside from general expectations of value, productivity, efficiency and proactive, strategic advice, there are often company-specific expectations. These might include the level of independence in-house counsel will have, the type of matters the legal department will deal with, the mix of specialist and generalist practitioners, and whether in-house counsel is expected to manage strategic planning for the organisation as well as transactional legal responsibilities.² To most effectively serve the company, the legal team must understand the professional goals of their corporate clients.

When establishing an in-house legal function, general counsel will likely face some client misperceptions about the roles and scope of in-house lawyers. Company employees may not understand that the legal department represents the organisation — it is not able to provide personal legal advice for staff members.

The executive team may need to be informed that the legal practitioner's first duty is to the court, and that there will be no 'bending of the rules' to accommodate unethical conduct.³ There is often also the misperception that the general counsel does not need to be consulted about any matter that is not wholly and strictly legal: that they might create extra hurdles in getting a deal finalised.

¹ Heineman, B. Jr., *The Inside Counsel Revolution*, Harvard Law School Forum, 2016: <https://corpgov.law.harvard.edu/2016/03/29/the-inside-counsel-revolution>

² Association of Corporate Counsel, *Establishing the In-House Law Department: A Guide for an Organization's First General Counsel*, 2012: http://www.acc.com/cs_upload/vl/membersonly/InfoPAK/1313060_1.pdf

³ Bühr, D., & Wohlmann, H., *Top five governance principles for the corporate legal function*, Ethic Intelligence, 2013: <http://www.ethic-intelligence.com/experts/318-is-there-a-need-for-good-governance-in-the-corporate-legal-function>

Defining expectations, explaining limitations and establishing procedures should be carried out as soon as possible after forming the in-house legal department. It is important that the general counsel addresses management's expectations and corrects misperceptions at the outset to avoid confusion and future conflict, and to build confidence in the legal team.⁴

2.2. Structure

Setting up an organisation's legal function from scratch will include determining the centralisation and hierarchy, coordinating outside counsel, employing administrative support staff, implementing technology, and addressing any related logistical issues. It will require an understanding of the company's industry, market and strategy.⁵

The legal team may be centralised as a separate department, embedded within the various departments of the business or separate divisions, or a hybrid model depending on the needs and activities of the organisation, and can evolve over time to suit particular projects. A benefit of a centralised function is that it may allow the legal team to develop areas of specialisation, but it may result in reduced commercial visibility.⁶ A decentralised legal department may enable team members to develop a deeper understanding of the needs and priorities of the particular business in which they are embedded but may result in less cross-team collaboration.

A 'matrix legal function' has practitioners embedded within company departments as well as a centralised legal team, which allows for deeper specialisation while maintaining commercial visibility.⁷ This is particularly effective for larger and global organisations: a central department in the company's head office to oversee and coordinate the legal function, and practitioners in each of the organisation's national and/or international offices who have a deeper understanding of that country's legal system.

A decision will have to be made about the structure, which in turn will depend on the seniority of the lawyers who make up the team. A flat hierarchy may be more suitable for companies employing senior lawyers, whilst a structured and layered hierarchy may better suit companies where there is a mix of junior and senior lawyers to ensure adequate supervision, mentorship and learning.⁸ The size of the legal team will of course depend on the range of expertise required, the volume of work and work flows based on the services scoped with the Executive Leadership team and, of course, on the available budget. The effective performance of the legal department requires adequate internal authority and appropriate resources, always seeking to balance capacity and capability.

The executive's attitude to risk, and the risk inherent in the industry, can also influence the structure of the in-house legal function. In a highly regulated and high potential risk sector such as energy, the company may choose to have a centralised legal team, closely aligned with the leadership and public relations departments.

The structure of the legal department should reflect the essential reporting relationships within the business: to whom does the general counsel report, and who reports to the general counsel?

"The general counsel's reporting relationship is important because it indicates to other company employees and outside counsel the relative importance and accountability of the law department ... Having the general counsel directly report to the top corporate officer ... gives the general counsel more authority to audit and become involved with aspects of the

⁴ Association of Corporate Counsel, *Establishing the In-House Law Department: A Guide for an Organization's First General Counsel*, 2012: http://www.acc.com/cs_upload/vl/membersonly/InfoPAK/1313060_1.pdf

⁵ *Ibid*

⁶ DLA Piper, *A Guide for General Counsel: Structuring Your Legal Team*, 2014:

<https://www.dlapiper.com/en/uk/insights/publications/2015/01/a-guide-for-general-counsel>

⁷ *Ibid*

⁸ Association of Corporate Counsel, *Establishing the In-House Law Department: A Guide for an Organization's First General Counsel*, 2012: http://www.acc.com/cs_upload/vl/membersonly/InfoPAK/1313060_1.pdf

company's business planning [which] allows the general counsel to better anticipate and prevent legal issues.”⁹

Aside from other lawyers, paralegals and administrative staff in the legal department, it may also be helpful for other departments within the company to report to the general counsel regularly, keeping them apprised of any actions which may involve legal liability. This can help prevent situations such as manager-level employees contracting with external vendors without realising the legal implications of those agreements.¹⁰

When structuring an in-house legal department, another key consideration is the engagement of external counsel: determining which matters require the services of a specialist practitioner and therefore cannot be handled internally; drafting an outside counsel retention agreement; and supervising and evaluating outside counsel.¹¹ Over time, this process can help with staffing decisions too — if a particular area of law regularly requires the services of outside counsel, it may be worth hiring additional in-house counsel in this area.

2.3. Sound Governance

The principles of best practice corporate legal and compliance management require good governance, effective risk management and strict compliance with the law. In their article for Ethic Intelligence, Daniel Bühr and Herbert Wohlmann outline five governance principles of the corporate legal function:

1st Governance Principle – Board Role and its Relation to the Legal Function

The board of directors supervises the effectiveness of the legal function and takes action, if necessary. Non-executive board members who are lawyers do not interfere with operational legal management of the company.

2nd Governance Principle – The Place at the Table

General Counsel at Group, Division and Country level are, as a rule, a member of the respective management committee. They are systematically involved in important decision taking processes; they co-decide and bear full responsibility.

3rd Governance Principle – Independence of the Legal Function

The General Counsel is a business partner and a guardian to the company. They report to the CEO and – in matters of strategic importance – to the chairperson of the board of directors. The chairperson of the board approves their appointment and termination.

4th Governance Principle – Appropriate Resources of the Legal Function

The General Counsel and the legal department have appropriate authority and resources to fulfil the assigned tasks.

5th Governance Principle – Remuneration

The salary of employees who are exercising control functions (e.g., employees in the legal, compliance, internal audit, regulatory and risk management functions) should be commensurate with their responsibilities and qualifications and on par with other senior executives of the company. Their compensation should correspond to an increased fixed salary or to an

⁹ Association of Corporate Counsel, *Establishing the In-House Law Department: A Guide for an Organization's First General Counsel*, 2012 http://www.acc.com/cs_upload/vl/membersonly/InfoPAK/1313060_1.pdf

¹⁰ *Ibid*

¹¹ *Ibid*

adequate base salary and a bonus which is not tied to the financial results of the company.¹²

In-house lawyers should strongly influence good governance and compliance in their organisation, as well as broader risk-management concerns. They can act as both facilitators for their client's objectives and as guardians of their client's long-term interests.¹³

2.4. Ethics and Independence

The role of the modern General Counsel goes well beyond law. It includes business initiatives, ethics, public policy, enterprise risk and crisis management among others. Keeping the separation between the roles of business advisor and legal advisor and maintaining their own independence (their first duty being as an officer of the court) is a challenge faced by in-house counsel on a daily basis.

“We must be loyal to our employer while providing independent, impartial and professional advice. We must act in the best interests of our client while maintaining our independence as lawyers and comply with our ethical duties to the law, the court and the client.”¹⁴

As such, in-house lawyers should have structures and systems in place to support their professional independence, including their ability to give frank and fearless advice.¹⁵

One of the difficulties for many in-house lawyers is that they may be seen as having one client, and they may be an employee of that client. It is therefore necessary to clearly explain their ethical and professional obligations under the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* to colleagues who are not lawyers: namely that the same rules apply to the in-house lawyer as to all other lawyers. This includes the requirement to hold a current practising certificate.

For reasons of independence, it is unwise to attach the remuneration of the in-house counsel to the financial success or otherwise of the company.

“Ideally, in-house counsel should be compensated by an increased fixed salary. The internal remuneration and promotion process should not in fact stimulate or reward legal leniency.”¹⁶

2.5. Legal Professional Privilege

The preservation of legal professional privilege can be greatly complicated by the dual roles of lawyer-business manager that in-house counsel are often expected to play. In-house counsel cannot assume that by virtue of their being a lawyer, legal professional privilege will automatically be upheld. There are numerous cases to the contrary.

“When a General Counsel gives legal advice to a client, the communications enjoy the protection of the attorney-client

¹² Bühr, D., & Wohlmann, H., *Top five governance principles for the corporate legal function*, Ethic Intelligence, 2013: <http://www.ethic-intelligence.com/experts/318-is-there-a-need-for-good-governance-in-the-corporate-legal-function>

¹³ Heineman, B. Jr., *The Inside Counsel Revolution*, Harvard Law School Forum, 2016: <https://corpgov.law.harvard.edu/2016/03/29/the-inside-counsel-revolution>

¹⁴ Hass, P., LexisNexis Butterworths: *Inhouse counsel: Ethics— not ‘a place in England’*, July 2005

¹⁵ Report of the Royal Commission into the Robodebt Scheme, 7 July 2023: [Report | Royal Commission into the Robodebt Scheme](#)

¹⁶ Bühr, D., & Wohlmann, H., *Top five governance principles for the corporate legal function*, Ethic Intelligence, 2013: <http://www.ethic-intelligence.com/experts/318-is-there-a-need-for-good-governance-in-the-corporate-legal-function>

privilege, however if they step into the role of management and offer business advice on a question, they forfeit that protection.”¹⁷

The protection of legal professional privilege will only apply if in-house counsel is providing legal advice as a legal adviser, not if they are speaking in any other role. The Association for Corporate Counsel (ACC) recommends including special sessions on legal professional privilege to ensure that all staff understand that privilege only applies if certain conditions are met, and that this includes the confidentiality of documents and files.¹⁸ In this regard, organisations will need appropriate document management and file management systems, with limited access, and high levels of cybersecurity.

2.6. Marketing the Legal Department

In an organisation which has not previously had in-house counsel, it is important to promote the services provided by the legal department and educate management and staff about when legal advice should be sought and how to prepare for the consultation.¹⁹ In marketing the legal department and showing sensitivity to business and cost considerations, in-house counsel can address many of the misperceptions mentioned above in Expectations, and create the image of in-house counsel being part of the business team. It can also help increase the commercial visibility of the legal department within the business, and ensure that legal is recognised as an integral part of any decision-making process:

“One fail-safe way to assist in gaining corporate support is to be visible. Walk around the organisation and schedule meetings in other people’s offices. Explain what you do and how you do it. Ask about their general concerns. I have a quarterly program I call the ‘travelling roadshow’ where I make rolling appointments with heads of business units as well as the chief executive officer and deputy chief executive officer. I spend 45-60 minutes talking about our service, their experience of that service in the last period, and any problems they may be anticipating in the next quarter. It also gives them an opportunity to get to know you, which makes the tough call in the midst of a crisis much easier.”²⁰

Another tool for marketing the legal department and establishing open communication is to prepare and distribute a written policy on legal department procedures, which is especially useful for larger or global companies. The policy should include how and when to contact the legal department, with full contact details for all in-house counsel members. It should also cover basic advice on when the client can enter into agreements on behalf of the company and when they can contact outside counsel.²¹

Hosting regular training sessions and seminars is recommended by the Association of Corporate Counsel, to keep clients abreast of key legal issues and to promote a strong, supportive and approachable legal department. These can range from informal lunchtime talks to compulsory training sessions. Conducting periodic client surveys can assist the legal department in determining areas of greatest need: another marketing strategy is to send out a summary of the proposed improvements in-house counsel intends to pursue based on the feedback received from the surveys. According to the Association of Corporate Counsel, three of the most common areas to impact on client satisfaction are: be timely; be clear; and be practical. Publicly thanking

¹⁷ Association of Corporate Counsel, *Establishing the In-House Law Department: A Guide for an Organization's First General Counsel*, 2012 http://www.acc.com/cs_upload/vl/membersonly/InfoPAK/1313060_1.pdf

¹⁸ The Law Society of Western Australia, *In-house Council Guidelines: Legal professional privilege for in-house and government lawyers* (2018)

¹⁹ Association of Corporate Counsel, *Establishing the In-House Law Department: A Guide for an Organization's First General Counsel*, 2012: http://www.acc.com/cs_upload/vl/membersonly/InfoPAK/1313060_1.pdf

²⁰ Hass, P., LexisNexis Butterworths: *Inhouse counsel: The care and feeding of the legal department*, February 2006.

²¹ Association of Corporate Counsel, *Establishing the In-House Law Department: A Guide for an Organization's First General Counsel*, 2012: http://www.acc.com/cs_upload/vl/membersonly/InfoPAK/1313060_1.pdf

clients for consulting the in-house legal team and following procedures will help to build further trust and collaboration.²²

2.7. Insurance

As in-house lawyers may not be able to access the schemes made available to private lawyers through Law Societies,²³ careful thought must be given, and arrangements made, to ensure in-house teams are appropriately insured. Considerations might include whether a company has an umbrella policy that covers advice given by employees generally and which may be broad enough to cover the in-house team, or whether additional cover may be needed if the in-house team gives pro-bono advice.

3. Conclusion

It is critical that legal practitioners conduct themselves with integrity, objectivity and independence. In-house lawyers that consciously establish and practice these principles within their legal team will create significant benefits for an organisation – from improved governance to risk mitigation, and the ability to efficiently and ethically consider and act on opportunities for the business.

²² *Ibid*

²³ In WA, for example, see <https://lawsocietywa.asn.au/law-mutual/insurance/>; https://lawsocietywa.asn.au/wp-content/uploads/2024/04/2023-24-Professional-Standards-Scheme-FAQ_2024-29-Scheme-Information-Sheet.pdf

Annexure 1

First-Year Priorities for Establishing an In-House Legal Department

Extracted from the Association of Corporate Counsel's InfoPAK: *Establishing the In-House Law Department: A Guide for an Organization's First General Counsel*, 2012

First Quarter	Meet senior clients and evaluate their legal needs and expectations	Start tracking ongoing and new legal matters	Sign up for industry periodicals, join trade groups, and actively network with colleagues in the industry	Talk to outside counsel the company has worked with in the past	Review existing client contracts (both external and internal agreements)	Evaluate and develop the new legal department's administrative and technological infrastructure (e.g., a contract database)
Second Quarter	Establish key policies and common work processes (e.g., code of ethics, contract review policy, records retention policy)	Continue developing key client relationships and meeting more internal clients	Meet in-house colleagues from key industry competitors	Begin gathering law department spending data	Become more involved with corporate governance issues and develop board of director policies as needed	
Third Quarter	Present company management with summary of legal activities thus far	Benchmark the legal department's performance against data for other legal departments	Manage client expectations for the role of the legal department	Meet as many non-management employees in each business unit as possible	Roll out additional internal policies (e.g., social media and technology policies)	Develop and distribute an outside counsel management policy
Fourth Quarter	Develop a written law department mission statement	Start distributing FAQs and legal guides for clients (preferably via an intranet system)	Develop employee training and compliance programmes	Consider purchasing budget and matter management software	Conduct a client satisfaction survey for the law department	Evaluate the law department's first year performance and integrate feedback to develop a plan to improve during the next year