

Advising the Board on **Reputation Management Risk**

Reports looking at the full range of commercial risk



Risk, Resilience
and Reputation

Directors' risk report

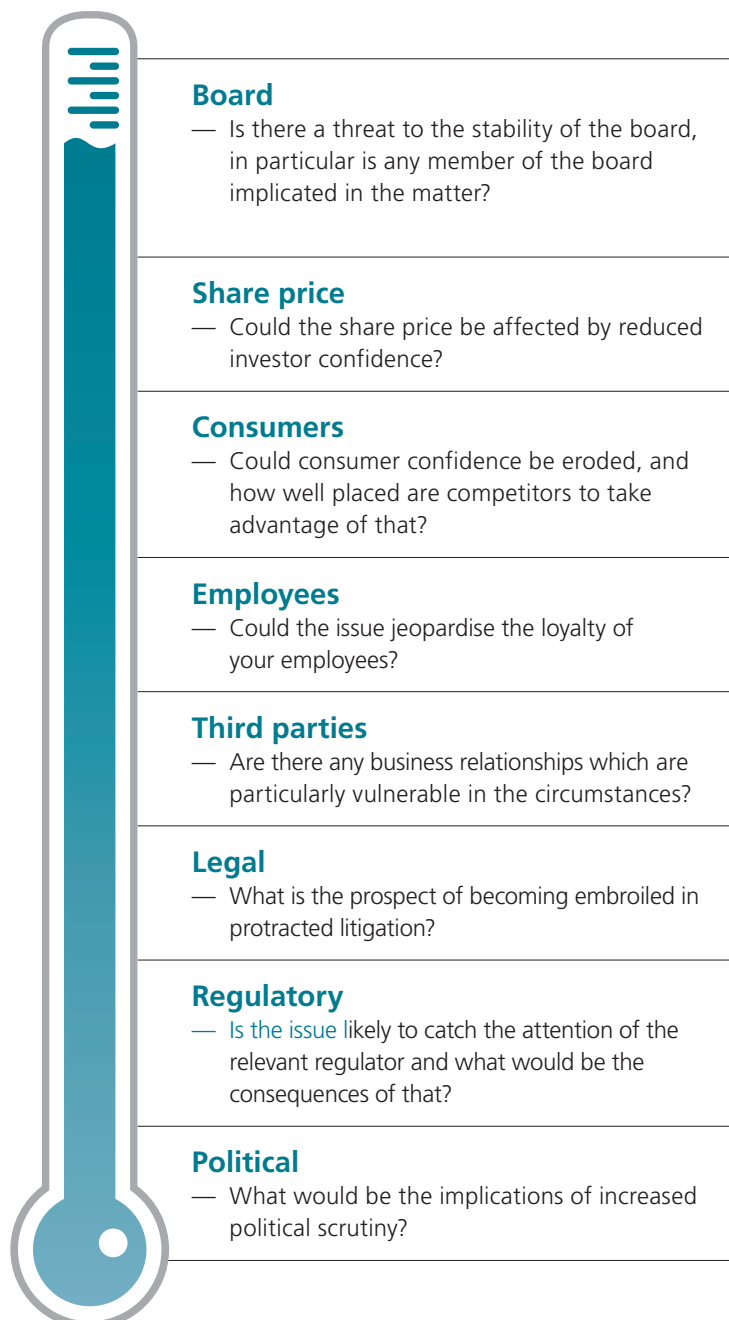
The modern world provides a particularly challenging landscape for boards and directors to navigate as regards the protection of corporate and professional reputations. Firstly, the rise of electronic communication has meant that damaging false allegations and sensitive confidential information can be transmitted – and can gain traction – with frightening rapidity.

Secondly, there has been a marked rise in recent years both within the public at large, and especially within the media, of suspicion and hostility towards commerce and business, which means that adverse allegations are more readily accepted and can cause great damage.

A reputation crisis can – and often does – spring from nowhere. The challenge for directors facing a reputation crisis is how to respond strategically to achieve the best possible outcome. This requires considerable skill and judgement.

There are a range of legal options which may have a role to play in any such response. This does not necessarily mean a legal claim or Court proceedings, although in some cases that may be appropriate. Often it means the deft use of legal arguments to push back on objectionable reporting and misinformation. Understanding these options is crucial to an effective response.

Key risks thermometer





Life cycle of reputation crisis



Issue –

Media query pre-publication, comment on social media, etc.



Escalation –

How do you ensure issues are raised at the right level? What is a standard media enquiry / social media criticism and what needs C-suite input?



Initial response –

Be wary of an immediate denial that has to be quickly retracted. Consider a statement confirming you are investigating instead. In parallel, do you need lawyers to engage with the journalist/ publication, for example, to push for more time to respond?



Fact-finding –

How can your IT and document management systems facilitate this? Be careful of assuming allegations are false because they are new. Consider an independent internal or external team to conduct the investigations.



Decision making –

Establish clear reporting lines, stakeholder involvement and decision making processes. Do you need external assistance with PR, legal, investigations, etc.? Consider whether privilege should apply to documents produced in the course of investigations and decision making.



Communication –

Who will be the company's spokesperson? Do they need to be independent of the issue? Consider communications to employees and business partners as well as external communications to the press and through social media.



Coordination –

A reputation crisis may touch on any aspect of the business: operational, legal and communications. Being fully joined up is vital. Moreover, someone needs to ensure that all necessary steps are taken and there is a consistency of approach and message. For example, are all proper steps being taken to ensure that potentially harmful documents are not being unnecessarily created (or that any such documents are protected by legal privilege)? Are all necessary reports and notifications being made: from RNSs to the market, notifications to insurers, reports to regulators, etc. Are you liaising with all key stakeholders?



Mitigation –

If the issue is real and ongoing, act fast to stop it. Consider the potential consequences: civil liability, criminal liability, reputational damage, or disclosure of embarrassing information. Consider agreements on confidentiality and compensation schemes, and think about whether any regulatory reports or public apologies should be made.



Follow-up –

Prepare for complaints and claims following on from the initial issue, and consider action / claims against parties responsible for the incident. Consider how best to insure against future reputational risk. Do new practices or procedures need to be put in place to avoid the issue happening again? Is there a role for an investigation / audit to establish the facts and start to repair the damage?

Expert perspective



Charles Andsell
Managing Partner, Newgate Communications

PR perspective

In complex, high-stakes issues, managing communications can further complicate fraught situations. Misinformation and confusion, diverse stakeholders and a fragmented media create a challenging and fluid environment.

Why communication matters

While many organisations may have strong business continuity or disaster recovery protocols, many may not have fully considered how they will deal with communications in times of crisis.

In our experience, organisations tend to focus on the operational and financial aspects of issues, rather than reputation. Research shows that reputational impacts can persist for long after operational or financial issues are resolved.

Robust preparation is key

The key to successful crisis communication management is preparation, leadership and teamwork. This is critical in a digital age, where stories break on social media and travel around the world in minutes.

Organisations should invest in preparation: identify the risks and create a process/team/response to those risks.

These can be documented in practical crisis manuals and scenario “playbooks”.

Companies should train teams – and their leaders – in these processes through crisis simulations. While most scenarios can be modelled, the actual communications responses will depend on the specifics of a given issue. Teams need to be flexible and responsive and have the right training and skill sets.

A holistic legal / reputational strategy

Creating a cohesive legal / reputational strategy is increasingly key to successfully managing an issue.

All communications should carefully consider any legal strategy – ensuring that they align with (and don’t prejudice) any legal approaches.

Simultaneously, legal strategies should be devised while ensuring that a company’s reputation and stakeholder relationships are considered and protected.

The capability to “flex” a diverse toolbox of complementary legal and communications strategies can allow organisations to rapidly solve issues.



Legal options for reputation management

There are a variety of legal claims available to help protect an individual and / or a corporate’s reputation and information. The key tools available to directors where there is a threat to publish or actual publication of false allegations and / or sensitive information are:

Defamation

Defamation is the traditional tool for protecting reputation.

It is available to individuals and corporates where false allegations are made that cause or are likely to cause serious harm to reputation. The “serious harm” threshold was introduced in England and Wales by the Defamation Act 2013 and, in the case of companies, requires that the publication has caused or is likely to cause “serious financial loss”. This threshold for companies has not been tested properly before the Courts (as parties are choosing to resolve their disputes instead).

When contemplating a complaint or claim, it is important to consider whether the author or publisher will be confident that they have a defence in relation to the publication. This informs the strength of any complaint and identifies pressure points. These defences include:

Truth – this can apply where some of the publication is inaccurate, so long as the respondent can prove the allegations are substantially true. Save for in specific circumstances, it is not enough simply to have copied them from someone else or that someone else wrote them.

Honest opinion – a statement of opinion honestly held based on true facts.

Publication on a matter of public interest – particularly with traditional media this provides a good platform before publication to push for the allegations to be put to you properly, for you to be given an opportunity to respond and for your side of the story to be included in any publication.

Privilege – there is statutory protection for the publication of copies / summaries and / or extracts of certain reports, such as proceedings before Parliament and Court.

Operators of websites – if the content is not their own and they follow a set procedure.

Full blown defamation claims are now unusual and interim injunctions to stop publication before trial are extremely rare. But defamation continues to be a very useful tool to push back pre or post publication where key allegations are false.

Confidentiality

Information may be confidential because it has the “necessary quality of confidence” or because it has been agreed by contract that it should be treated as confidential. If such information is passed on in circumstances that impose an obligation of confidence, you may be able to obtain at short notice an injunction to prevent or stop it being misused. This can be critical to protect your business, your employees or your customers. Moreover, such an injunction may be effective not just against the party or parties known to have the information in question but also any person who it subsequently becomes apparent has come into possession of the information.

Confidentiality will be balanced against the public interest in disclosure.

Privacy and misuse of private information

Living individuals have a right to privacy under common law and Article 8 of the European Convention of Human Rights. This protection does not extend to corporates but may extend to officers and employees of corporates. However, the right to privacy of the individual must be



Internet cases

These days, often reputation issues arise online, typically with an anonymous user disseminating highly damaging and false allegations about a corporate, its officers or its employees – or sometimes revealing sensitive confidential or private information. These cases require a bespoke approach.

One important step may be to track down and identify the perpetrator. Often there will be strong suspicions as to who this may be, but this falls short of adequate evidence to take any action. However, there are a range of means of seeking to identify a perpetrator online, for example with well-established methods of seeking

balanced against the public interest in publication. The balance may well tip in favour of publication where the subject matter can be said to relate to an individual's performance of or suitability for their job, particularly for large or public companies.

The risk of information spreading on social media means privacy injunctions in particular need to be used with caution.

Data protection

Data protection is a relative newcomer to the reputation management field (despite data protection law being in place since 1984). It can be a useful tool to manage how others use information about employees and officers of a corporate (as only living individuals have data subject rights).

Individuals have the right to be informed about the collection and use of their data, to be given access to that data and to the rectification of inaccurate data. Importantly in the reputation management field, individuals have the right to request the erasure of their personal data entirely. This is why search engine results pages often now state that some results may have been removed under data protection law.

There is a broad exemption from data protection obligations for processing for journalistic purposes. Journalism is interpreted widely and so can include, for example, personal blogs. However, the exemption is not absolute and there may be scope to challenge the use of personal data by traditional or new media if the publisher has not properly considered whether it is in the public interest and whether it would be incompatible with the journalistic purpose to comply with data protection obligations.

Other tools

Other legal tools may be relevant, such as intellectual property infringement or protection from harassment. There may also be a regulatory angle to consider, such as Ofcom, IPSO or the ICO, although you will relinquish control once any complaint is made to a regulator.

There are also specific orders which can be obtained from the court in internet cases requiring the person to stop the activity even if he or she cannot be identified.

These orders can be extremely powerful and can even include a requirement that the person come forward and identify himself or herself.



The political angle

There is an increased politicisation of corporate issues, fuelled by intensifying media interest in the way companies are run, and a heightened public desire for corporates to be seen to be held to account. Parliamentary select committees and public inquiries, while comprising part of the political, and not legal, process, often touch on corporate issues and can add fuel to the media coverage of a business crisis, enhancing public exposure just at the time when companies are seeking to limit the damage to their reputation.

Select committees

Parliamentary select committees are intended to examine and assist with the work of government departments, and yet regularly include within the scope of their investigations the private sector. They are particularly difficult to deal with in light of their information and evidence gathering powers. Failure to comply with a request for documents or to appear as a witness may result in the sanction of contempt of Parliament. No one has recently been convicted of such an offence, so the exact nature of such a sanction is unclear. The potentially more important sanction is that of public censure. This means that requests from parliamentary select committees are regularly complied with – but at what cost to a company's reputation?

Select committees are generally conducted in public and may ask any question or make any allegation covered by absolute parliamentary privilege.

Public inquiries

Public inquiries have no power to determine criminal or civil liability and any recommendations made are not legally binding. Despite this, public inquiries have assumed a quasi-judicial role, analysing large quantities of evidence, establishing facts and pronouncing views

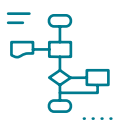
on culpability and accountability. They are also increasingly broadcast, save for limited issues that are dealt with in private. In certain circumstances, witnesses can be compelled to give evidence under oath and the inquiry can require persons and entities to disclose documents and other information.

That public inquiries are not legally binding does not, of course, affect the potential impact such an inquiry might have on a company's reputation in the event it suffers adverse publicity as a result.

To afford yourself more input into the process of an inquiry, you may seek to have the company recognised as a 'core participant' or 'interested party'. However, this would also raise your company's profile in the context of the inquiry, which may not necessarily be desirable.

What can you do to prepare?

While you can never fully prepare for the unexpected, having the necessary procedures in place and advisory team on standby can minimise the reputational risk and help maintain the corporate narrative. In particular, by contrast to giving evidence in legal proceedings in the UK, it is permitted to be prepared to give evidence to Select Committees or Public Inquiries and to run mock sessions in advance.



Preparing for the worst

Steps you can take to ensure your company has the policies and procedures in place to deal as effectively as possible with a reputational crisis:

Prepare crisis response protocols

— Ensure that your company has a clear understanding of what types of issues require escalation and establish clear reporting lines, stakeholder involvement and decision making processes.

War games / role plays to identify weaknesses

— Test protocols regularly and in different ways, to ensure that your company takes steps to understand where it is most vulnerable.

Insurance

- Consider if the risks which your company identifies are insurable and the value that insurance may provide.

Audit of 3rd party contracts / contractors

- Ensure that those with whom you contract are not operating in a manner inconsistent with your company's culture and values.

Identify key internal and external stakeholders

- Ensure that your company's employees know who they need to contact quickly to deal with an escalating issue. Too often those best placed to deal with the issue, whether they are lawyers, PR firms, or senior managers, receive the information at too late a stage.

Establish lines of communication

- Ensure that the board knows who its spokesperson will be and how its message will be communicated internally to employees and business partners, and externally to the press and on social media.

Prepare for investigation of facts

- Ensure that your IT and document management systems are equipped to undertake searches of documents quickly. Consider which independent external team you may turn to in order to undertake or lead an investigation.

Summary: practical risk management for directors

The board has an important role to play in managing reputation both in advance of and during a reputational crisis. The following three overarching principles are helpful to keep in mind when preparing for and dealing with reputational issues:



Be prepared

Understand who your key stakeholders are and exactly how you will take decisions as an issue arises and develops.



Act fast

In a modern environment, it is crucial to act quickly as information is now spread faster than ever.



Be clear on objectives

Your best case-scenario and a distinction between key priorities and "nice to haves" should be kept at the forefront of your mind as an issue arises and develops. This can help to ensure that you achieve a sensible, realistic, and positive outcome in difficult circumstances.

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