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# *Ethical business conduct*
# The holy grail?

*A PwC briefing with David Green CB QC and Lord Gold*

*Thursday 6 March 2014*

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**Event host**

***Will Kenyon***
Partner, PwC Investigations and Anti-Bribery Compliance

**Speakers**

***David Green CB QC***
Director of the Serious Fraud Office

***Lord Gold***
Compliance Monitor and Corporate Advisor

***Tracey Groves***
Partner, PwC Business Ethics and Integrity Risk

# Foreword

*Andrew Gordon*

Forensics Services Leader, PwC UK

Recent months have seen a series of controversies focused on perceived lapses in behavioural ethics by businesses in a wide range of industries. Combined with anxiety driven by economic uncertainty, these events have attracted scrutiny of the integrity of corporate behaviour – whether from Boards, customers, suppliers, employees, investors, regulators, government, the media, or the public at large.

The message is loud and clear: the world is changing, and with that change the expectations of a wide diversity of stakeholders have shifted. The resulting scepticism – even cynicism – over the intentions and conduct of business has driven a deepening breakdown of trust between business and society.

Against this background, the route to renewed trust is for business to be seen to be 'doing the right thing', for the right reasons. This is easy to say. But what does it mean in practice? How can a business deliver a commitment to doing the right thing across its entire operations, not just in the UK but in all countries and diverse cultures worldwide? And in an era when the integrity of business conduct is more important and visible than ever, is good business ethics the 'holy grail' that will provide deliverance?

To help businesses in their quest for answers to these questions and more, PwC convened a high profile presenter-led briefing at its More London offices in early March 2013. At the event, an audience of around 120 senior executives and decision-makers heard presentations and participated in Q&A sessions with the three panellists, each of whom has their own perspective on the importance of business ethics.

This paper summarises the themes that emerged from the presentations and discussions. Please note that we have attributed comments to the members of the speaker panel under explicit approval of their direct quotes, but that all contributions from the floor are quoted without attribution under the Chatham House Rule.

We hope that you find this paper a valuable and thought-provoking contribution to the increasingly hot and challenging debate on business ethics, rebuilding trust and the power of 'doing the right thing'.

"Corporate integrity and ethics have never been under such scrutiny – tax, the environment, anti-bribery, supply chain, remuneration, business behaviour, and more – allied to the overplayed and unfair perception that business is not to be trusted. There's widespread cynicism about the intentions and conduct of business. Rebuilding trust requires businesses to do the right things for the right reasons."

**Will Kenyon, PwC**

# Deferred prosecution agreements

## DPAs: a useful addition to the prosecutor's toolkit...

The seminar hosted by PwC on '*Ethical Business Conduct – the holy grail?*' was one of the first public speaking engagement undertaken by David Green, the Director of the SFO, since Deferred Prosecution Agreements (DPAs) first became available to UK prosecutors on 24 February. The event also followed hard on the heels of publication by the SFO and the Director of Public Prosecutions of a joint code of practice on the use of DPAs on February 14.

Accordingly, SFO Director David Green spent some time explaining the thinking and processes behind DPAs. By way of definition, a DPA is an agreement reached under judicial supervision between the prosecutor and an organisation. The agreement allows a prosecution to be suspended for a defined period, provided the organisation meets certain specified conditions. DPAs in the UK only apply to organisations in cases of economic crime, and not individuals.

## ...and a potentially valuable option for businesses

Describing UK DPAs as 'a very useful addition to the Prosecutor's toolkit,' Mr Green highlighted in particular the differences between the UK's approach to DPAs and that taken in the US, and the benefits that UK DPAs can bring to companies seeking to address wrongdoing they have uncovered in their operations. He also stressed the benefits of self-reporting to the SFO – a route that has been used by several companies in recent years – and explained the opportunity that the introduction of DPAs presents to a UK company that is minded to self-report.

In his presentation, Mr Green went on to list several reasons why a company should seek and enter into a DPA:

- It avoids a prosecution and the stigma of a possible conviction.
- While a statement of facts must be agreed, a formal admission of guilt is not required.
- It can be conducted in private until the final declaration.
- It speeds up the investigative process and saves on the costs and paralysis involved in a full criminal investigation.
- It permits at least some influence and control by the corporate – certainly more than that presented by a full criminal investigation.
- It provides closure and certainty.
- It may avoid disqualification from tendering for EU public contracts following a conviction.

"Prior to DPAs, we could prosecute or not prosecute a company, or maybe launch an action for civil recovery. If convicted, a company could be fined or wound up. That might well involve severe collateral damage to those (like employees, shareholders or pensioners) who had no part in the criminality prosecuted…DPAs provide an alternative response to some corporate criminality, a response which avoids that collateral damage. The route to a DPA should also be cheaper, quicker and more certain for all parties."

**David Green, SFO**

# *The top ten key themes emerging on ethical business conduct*

## *1. Prevention is better than cure: companies must measure their integrity risk and get their own house in order – do not wait until it is too late*

Throughout the briefing, a recurrent theme was the scale and severity of the risks – financial, reputational, legal, personal – that ethical failings present to businesses and their stakeholders. Businesses are now operating in an environment where behaviour that is perceived as unfair or reprehensible can generate a storm of public criticism, even if the company has behaved within the applicable laws or regulations.

However, the upside of this scrutiny is that embedding ethical conduct and creating a culture in which employees do the right thing will also be noticed, and will be a critical factor in enabling an organisation to build trust, win business and drive sustainable growth. An increasing number of companies are aware of these shifts in the business environment, leading to a growing recognition that there is no excuse for unethical behaviour.

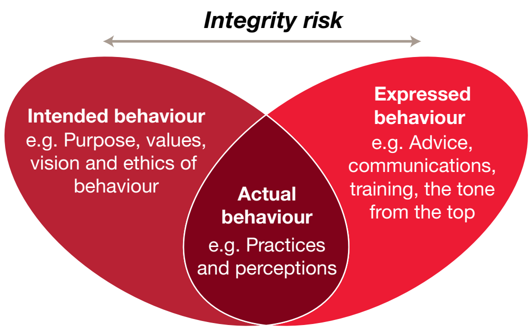
With this in mind, a top-line message that came across clearly during the presentations and audience questions was that companies should not wait for a problem to emerge before starting their journey to an ethical culture. Instead, they should move to measure and identify where the gaps are between the behaviour they intend their people to exhibit, and the behaviour they are actually getting from them – and then take steps to close those gaps. PwC calls such an initiative an 'Ethics and Integrity Risk Assessment' (see information panel). This provides companies with evidence-based insight and visibility of where they are potentially most vulnerable to unethical business conduct and its inevitable consequences – and then to take the necessary action, before it's too late.

### *PwC Ethics and Integrity Risk Assessment: Mind the Gap*

The simple definition of 'integrity' is 'whole' and 'undivided'. In a business context, this means demonstrating the same behaviour in the workplace as elsewhere, based on a set of universal values. It follows that 'integrity risk' is the risk that employees are not 'doing the right thing – even when no-one is looking'. This is a behavioural risk, and can be expressed in terms of three types of behaviour:

- **Intended behaviour** – The behaviour that management are seeking and expecting through their actions and the systems and controls they put in place.
- **Expressed behaviour** – Visible statements made publicly or internally about the behaviour management wish to see and expect to have in place.
- **Actual behaviour** – The behaviour demonstrated by employees and leaders.

When these behaviours are not aligned, organisations face a higher risk of unethical business decisions, regulatory scrutiny, violation of legal requirements and significant reputational damage. To help measure and manage these risks, an Ethics and Integrity Risk Assessment is a crucial tool to identify and quantify these gaps on a tangible basis.



## *2. It's a journey, not a single step: embedding integrity and ethics takes time, effort and long-term commitment*

To drive new behaviour and build trust, an ethical culture must be embedded at all levels, led by explicit behaviour and constant reinforcement from the top of the organisation. This demands much more than simply publishing a code of conduct and running online training programmes in the hope of inculcating the behaviours it calls for.

Instead, if everyday behaviours are really to change, all the relevant elements that encourage and/or motivate people to act in certain ways must be aligned and coordinated – including incentives, training, communications, disciplinary processes and performance evaluation.

This takes time: as one speaker highlighted, a company embarking on an ethical behavioural change programme in a large organisation should think in terms of a timeframe of no less than three years before the changes become apparent.

A further message was that when it comes to shaping behaviour, an organisation's culture will always win out over explicit rules. A participant from the floor voiced the view that the only sure way to shift behaviour to an ethical basis is to change the behavioural norms and what's deemed to be 'culturally acceptable'.

"Embedding ethics is about cultural acceptability at all levels. As a colleague once said to me: 'You can't write everything down. You don't tell people not to pee in the plant-pots – but they don't do it anyway because it's culturally unacceptable.' By making doing the wrong thing culturally unacceptable you help to embed the right behaviour."

**Audience member**

## *3. Tone and authenticity from the top are key*

Comments from the speakers and the audience pointed to unanimous agreement on the view that the behaviour of leaders in any organisation fundamentally shapes how people behave at all levels. If those at the top do one thing and say another, or what they say does not feel authentic to their employees, then the culture will never change to a more ethical basis.

By way of illustration, one participant recounted the experience of talking to a salesperson who had been told by their line manager to focus less on selling and more on building customer relationships. However the salesperson knew that 'deep down' their manager really wanted them to keep on selling, so they ignored the directive.

As such instances underline, business leaders can't just talk ethics. They have to live them. What they say and do has to be aligned, authentic and clearly reflective of a deeper personal belief system. Alongside setting a positive example, coming down hard on wrongdoing is key, even – or perhaps especially – at senior levels.

"Suppose a large corporate was profiting from a particular course of conduct by some of its middle-ranking employees. Suppose that the people at Board level knew all about it, and the corporate was benefitting from it. In that case, why shouldn't the corporate be subject to criminal prosecution? Why should it be allowed to sail serenely on?"

**David Green, SFO**

"Disciplinary processes are very important. If someone senior in the organisation falls on his or her sword, because something has gone wrong, that sends a very powerful message."

**Lord Gold**

## *4. Beware of the 'muddle in the middle'*

When leaders launch programmes to try and embed ethical cultural change, they often find that progress can be blocked or stalled at the middle management level. This layer of people are ambitious and results-focused, and are often seeking to make their way up the organisation by following the behavioural norms and incentives that applied when they joined. This can turn them into a 'black hole' for ethical initiatives and resistors to genuine cultural change. This problem can be especially pronounced for an international company with operations in different cultures, where different ethical and behavioural norms may apply.

This issue around middle management is evidenced by research. A survey of UK business leaders and managers by the Institute of Leadership and Management (ILM) and Business in the Community (BITC) found that lower level/first line managers were the least likely to refer to their organisation's values statement when making decisions – at 65% of managers compared to 84% of directors. However, many managers also highlighted pressure to do what they felt was the 'wrong thing': 63% said they had been asked to act counter to their own ethical code at some point in their career.

Communication around values needs to be clear and direct – ideally face-to-face – or the messages can get blurred as they are passed down the hierarchy. Even if the messages from the top are being transmitted in good faith and with the best of intentions, there's always a question over how middle management will interpret them if there are too many layers in between. Clear and simple ideas can get lost in translation – and people at the bottom may hear a different message from middle management from what they actually were told by the top.

Breaking through the resistance to behavioural change in the middle management requires constant reinforcement of the right values and conduct from senior levels, and appropriate incentives, disciplinary actions, training and communication. It is also vital that middle management know they can use whistleblowing processes if and when they see bad behaviour, and will not suffer personally for doing so. Again, there are problems to be addressed at this level: the ILM/BITC study quoted above found that 28% management respondents were either certain, or concerned, that they would be negatively affected if they were to report an ethical breach at their workplace.

"Messages should be kept simple. If a message is cascaded down through an organisation and at each level a manager adds something to it, there is a risk that the original message will become obscured and it's meaning lost."

**Lord Gold**

"I'm always interested in whether a business has a genuine ethics-based compliance programme. If there's no such programme in place it can be hugely significant."

**David Green SFO**

## 5. *Make the organisation's purpose and values explicit – and use these to create and calibrate a 'moral compass' applicable everywhere in the world*

People must be encouraged to 'do the right thing'. But, far from being absolute and consistent in every situation, what the right thing is depends on the context in which a decision is being made.

So, to drive positive change, leadership first needs to crystallise and articulate the core purpose and values of the organisation. Then it should apply these to equip, enable and empower the workforce with an ethical decision-making framework, or 'moral compass', that embodies the values, and guides people towards the right thing in any situation, in any part of the world.

While it is leadership who set the 'true north' of the compass – the tone and direction – it is the employees themselves who then use it to navigate the moral maze of decision-making in today's fast-changing world. This can be especially important for an international company that may be operating in territories where some accepted local 'norms' of business behaviour might count as corruption or bribery under UK law.

Employees should not be left to navigate this path alone and unaided: in many cases the 'right thing' will be to start by seeking guidance and escalate dilemmas up the hierarchy. This option can be supported by placing ethical 'advisors' or 'officers' across the business – meaning people at all levels have ready access to a sounding-board they know and trust. One further suggestion is that companies might take a leaf out of the prosecuting authorities' book, and appoint their own internal 'monitor' to scrutinise their ethics on a continuing basis and suggest improvements.

"There's no single right thing to do. It's relative and situational. Social values and perspectives are constantly shifting over time, meaning the yardstick that society and the media apply to organisational behaviour is also changing, as part of that journey. As a result, any definition of 'doing the right thing' cannot be set in stone, but will always be relative to the time and context in which it's created and applied. What was right yesterday may not be right today."

**Tracey Groves, PwC**

## 6. Keep messages simple and emphasise values over rules

Values are universal, rules aren't. To put it another way, values apply everywhere in the world, even across very different local cultures – meaning they trump rules that are often narrowly focused on specific situations. However, to have real power, values need to be clear, simple and reflective of humanity.

This brings major implications for companies seeking to progress along their ethical journey. People not only need to know what their organisation's values are, and to be able to articulate them simply in plain language; they also need to understand and share them at an emotional level, so that they can be lived every day as part of their own personal belief system.

In contrast, rules are rational rather than emotional, meaning they can end up being counter-productive. Far from inculcating ethical behaviour and decision-making, too many rules can obscure what's right, and create a box-ticking approach where people simply cover their own backs without thinking through the rights and wrongs of a decision for themselves.

"I've had people sidle up to me and say: 'What you prosecutors don't understand is that we have to bribe to get these orders – and if we didn't, someone else would.' But I'm in law enforcement. And the UK Bribery Act says you can't bribe. That's the law."

**David Green, SFO**

## 7. Target the critical decision-making moments that matter – and measure the results

The litmus test of any ethical culture is what happens at the key moments and decision-points when people face a stark binary choice between doing the right thing or not.

Every situation is different and in reality there are trade offs to be made. So it's impossible to have specific rules of conduct covering every one. However, if the moral compass is working it will guide people the right way, including sharing dilemmas and seeking advice from peers and managers.

By identifying and focusing on these moments that matter, companies can equip and prepare their people more fully for the challenge of doing the right thing. For example, real-world ethical dilemmas from within the business – whether or not the right decision was taken – can be used in ethical education programmes. In this context face to face training is generally far more powerful than online, since it allows people to debate interactively, raise challenges and engage with each other on an emotional level.

To assess progress in improving their decisions at the moments that matter, companies should apply observational, subjective and objective measures to what happens at these points. These measurements should look not just at outcomes, but also the processes that led to those outcomes – such as whether people consulted or collaborated to reach a decision, or questioned the right course of action and the consequences.

"Have you identified what are the critical decision-making moments when your people have a choice that could go either way? What could you give them at those moments to help them do the right thing?… Companies should create an ethical decision-making framework to support those critical decision-making moments that matter and enable a consistent approach to doing the right thing."

**Tracey Groves, PwC**

## *8. Base regulatory compliance on ethics – not the other way round*

Doing the right thing means going above and beyond rules-based compliance. In fact, ethical behaviour should be the basis of – and route to – regulatory compliance, or the result will be a rules-based and box-ticking approach to ethics that will ultimately fail to provide a moral compass to the workforce or embed a pervasive culture of doing the right thing.

If things do go wrong in the business, and laws or regulations are suspected to have been breached, then it is almost inevitable that ethical values will have been breached as well. If such an eventuality arises, investigators and prosecutors will see the presence of an existing ethics-based compliance programme as evidence that the business is serious about putting its house in order, and indeed has already taken steps to do so.

Similarly, the Internal Audit function should be encouraged to look beyond its traditional remit, and consider issues of ethical behaviour and conduct by assessing the effectiveness of behaviour-based controls. Moving beyond process and systems-based controls will support the organisation's commitment to monitoring business conduct on an ethical basis.

"Pride in your organisation is the best compliance tool you will ever have. If your people feel good about the organisation and proud of its ethical culture, then they won't do bad things – or stand by and see bad things being done in the business. Pride turns everyone into a compliance officer."

**Audience member**

"How about creating a system of incentives where your workforce is incentivised to sell, and include a category of award where someone is rewarded for turning down a sale for good ethical reasons?"

**Audience member**

## 9. *If the worst happens – investigate, self-report to the authorities, and 'co-operate, co-operate, co-operate'*

A key attribute of an ethical behavioural culture is a readiness to admit errors and instances of wrongdoing, and move to confront, tackle and correct them rather than sweeping them under the carpet. Investigation should be swift and as comprehensive as possible – and action to address ethical breaches should be visible and applied at all levels, with seniority being no protection. The old quip of 'assistant heads will role for this!' has masked an uncomfortable and widely-observed truth in many organisations.

When wrongdoing is detected at any level, the route of self-reporting to the authorities – now potentially combined with the new tool for UK businesses and prosecutors of deferred prosecution agreements (as explained earlier) – presents a potential way to sustain the business and co-operate with the authorities to reach a settlement that may limit collateral damage to innocent parties.

To be clear, DPAs are not a matter of choice for the corporate. They can only be offered by the prosecutor and are subject to approval by a judge in open court. A corporate can choose not to enter into a DPA.

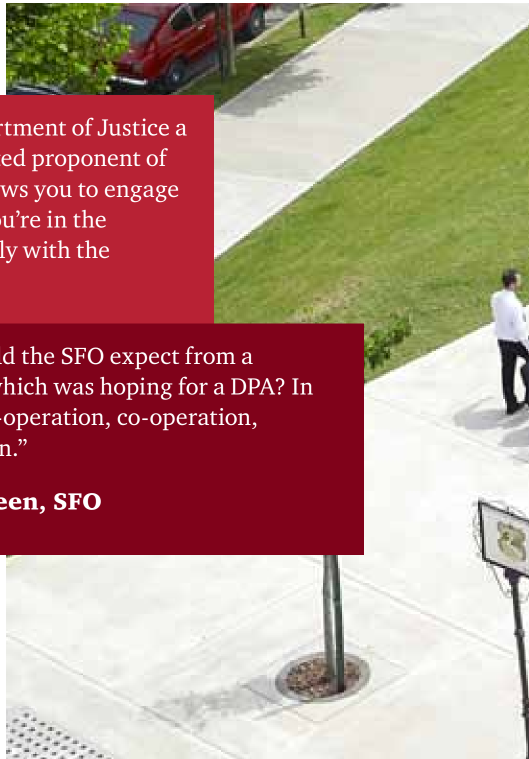
However, in the long run, self-reporting and a DPA is likely to prove the most beneficial route for all stakeholders: if the business really is committed to ethical behaviour, then prosecutors will see this in management's tone and actions, and take this into account. This underlines the importance for companies of having an authentic and credible story to tell, and hard evidence of an existing commitment to 'doing the right thing'. Clearly, where there is a need to self-report in multiple jurisdictions, this becomes more complex. Authorities such as the SFO are asking corporates to trust them and their overseas counterparts to co-operate so as to mitigate the risk of double or multiple jeopardy. Only experience will tell how effectively this works in practice.

"My company self-reported to the US Department of Justice a few years ago. As a result I'm a whole-hearted proponent of self-reporting: it gives you control, and allows you to engage properly with your customers about why you're in the headlines. And it helps you engage positively with the enforcement authorities."

**Audience member**

"What would the SFO expect from a corporate which was hoping for a DPA? In essence: co-operation, co-operation, co-operation."

**David Green, SFO**

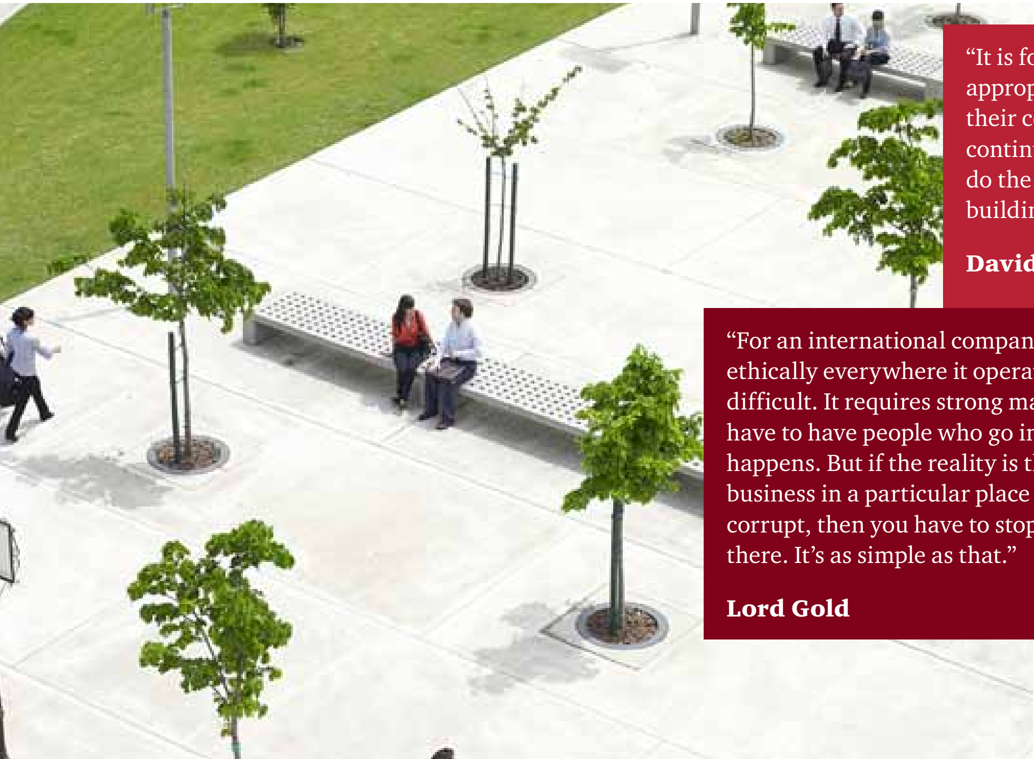


## *10. Much of this comes down to trust – both internal and external*

At its root, business ethics and compliance is arguably built on a single issue: whether a business and its people can be trusted by external parties – and can also trust each other – to do the right thing.

In other words, external trust and internal trust mirror each other – and each reinforces the other. Building trust within a business through an ethical culture also builds value in the marketplace through higher sales, revenue growth and greater sustainability. And the value of being trustworthy comes even more strongly to the fore if things go wrong, and the company decides to self-report and pursue a DPA.

During the event, PwC's Tracey Groves asked: "If the level of external trust between a business and society is very low, how can it expect the internal trust between its employees and own leadership to be any different?" The consensus among the speakers and audience was clear: it can't.



"It is for business and senior managers to decide appropriate standards of ethics and integrity in their commercial activities… But the SFO will continue to engage with companies who want to do the right thing, and we are very interested in building trust."

**David Green, SFO**

"For an international company to do business ethically everywhere it operates can be extremely difficult. It requires strong management. You have to have people who go in and make sure it happens. But if the reality is that you can't do business in a particular place without being corrupt, then you have to stop doing business there. It's as simple as that."

**Lord Gold**

# Conclusion

Building trust through an ethical culture of 'doing the right thing' isn't a nice-to-have. It's a prerequisite for leading a sustainable, successful and competitive business.

In an era when ethical and behavioural risks are increasingly critical and potentially catastrophic for any business, an organisation that fails to demonstrate and embed ethical behaviour in everything it does is putting its very future in danger.

So: does your organisation already have a shared ethical culture based on trust and belief in shared values – one in which wrongdoing is not just against the rules, but culturally unacceptable? If the answer's no, it's time to start the journey. If the answer yes, it's time to keep pressing ahead: when it comes to doing the right thing, no business can afford to be complacent or slacken its efforts. Every day brings more moments that matter – each one testing out the organisation's ethical culture in a new way and context.

While changing culture may sound like a 'soft' activity, it's actually anything but. Hard measurement is key – as are tracking progress over time and cracking down on wrongdoing. Given the exposure and impact of 'not doing the right thing', why would any organisation not want to perform an ethics and integrity risk assessment on a regular basis – as it would with any other important risk to its business?

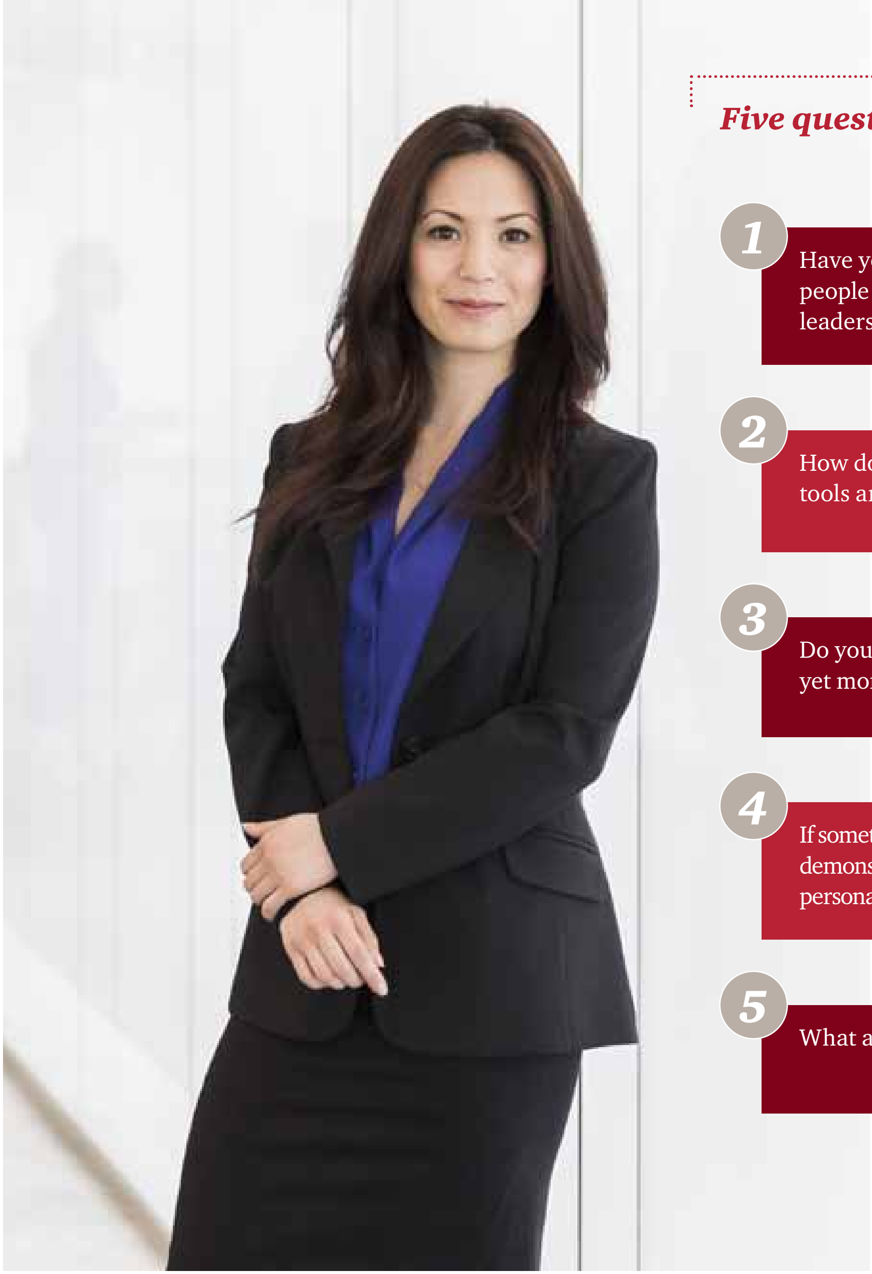
To get back to exam question, 'Is ethical business conduct the holy grail?' Our shared conclusion at this event was 'yes, it is'. But it won't happen just by paying lip service to a rules-based business ethics programme. To navigate the journey to doing the right thing and to make ethical decisions, companies need to measure the right things (through tools like ethics and integrity risk assessments and behaviour-based controls) and equip their people to identify the right thing for themselves (through an ethical decision-making framework or moral compass). To drive change, an organisation's ethical values have to be made an integral part of every employee's everyday reality and their personal belief system. And that's just the start.

"Embedding ethical conduct is about building trust at all levels of the organisation and in all its relationships. This takes time and can be painful. It's not a quick fix you can do overnight. It's about building confidence among people at all levels that it's OK to question, to challenge and to say 'no!'"

**Tracey Groves, PwC**

"Doing the right thing comes down to values. Values are universal but rules are not. If an organisation's values are based around transparency, honesty and ethical behaviour, it has a much better chance of getting things right."

**Lord Gold**



## *Five questions to take away*

1. Have you defined what is 'doing the right thing' for your people – and does that include everyone, including leadership?

2. How do you know your people are doing it, and what tools are you equipping them with?

3. Do you trust them to get on with it, or do you revert to yet more rules and regulations?

4. If something were to go wrong, what evidence do you have to demonstrate to a third party of your organisational and personal commitment to doing the right thing?

5. What are you going to do as a result of this briefing?

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