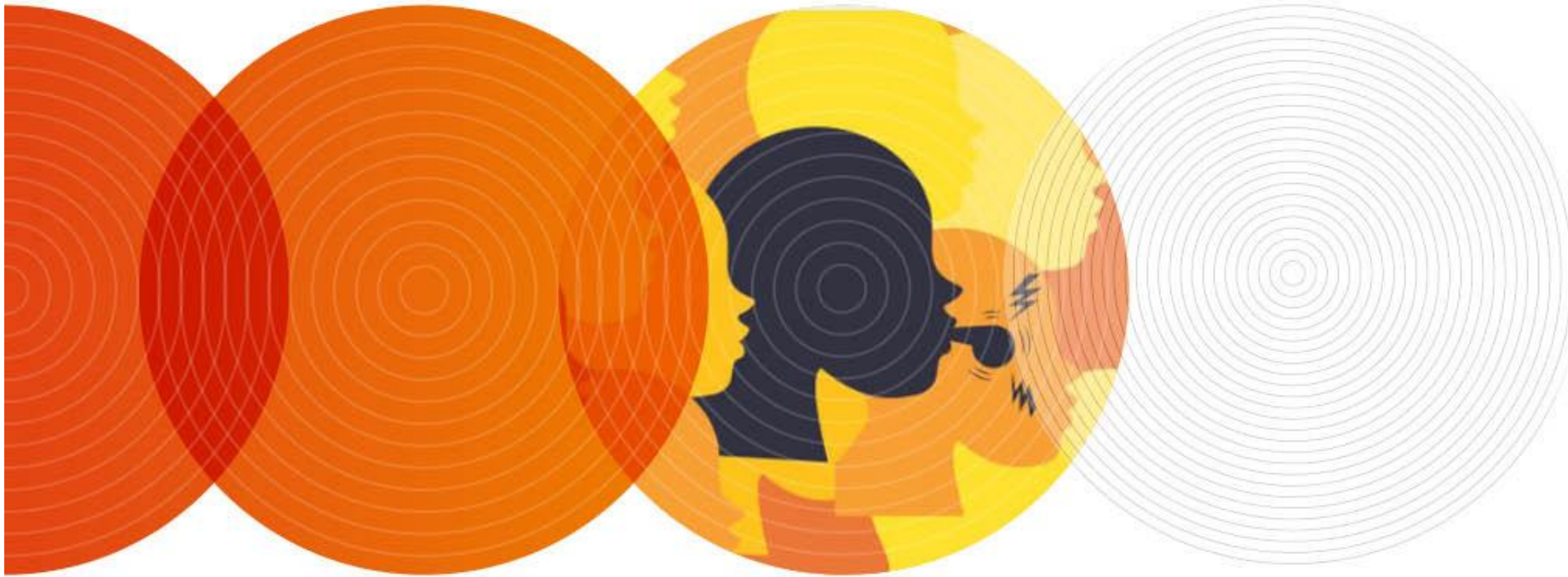

Whistleblowing: The evolving role of in-house counsel and importance of corporate culture in getting the response right.

Wednesday, 25 November 2020



In association with



Introduction

- This seminar will explore:
- The legislative framework of the Irish whistleblowing regime together with EU Directive 2019/1937
- How to best place an organisation in handling a whistleblowing event appropriately and the importance of generating the right corporate culture
- The evolving role of the GC who moves centre stage when a whistleblowing event occurs and the myriad of issues both internal and external they must consider
- The balancing act a GC must maintain between retaining independence and managing the needs of the business

The Current Legislative Framework

The Protected Disclosures Act 2014 (the “PDA”)

Currently the PDA extends its protections to “*workers*” which includes an employee, consultant, agency worker, a person undergoing experience or training, a civil servant, a member of the Garda Síochána and a member of the Defence Forces or Reserve Defence Forces.

A worker is said to make a protected disclosure if they disclose “*relevant information*”. According the section 5(2) if the 2014 Act, information is relevant if it comes to the worker’s attention in connection with their employment and the worker reasonably believes that it demonstrates “*wrongdoing*”.

- Wrongdoing is widely defined under sections 5(3) – 5(5) of the 2014 Act and includes:
 - the commission of criminal offences;
 - failing to comply with legal obligations;
 - endangering the health and safety of individuals;
 - damaging the environment;
 - perpetrating a miscarriage of justice, misusing public funds;
 - oppressive, discriminatory, grossly negligent or grossly mismanaged acts or omissions by a public body; and
 - the concealment or destruction of information about any of the above wrongdoing.
- In order for an act or omission to be considered “wrongdoing” for the purposes of the 2014 Act, the worker’s employer must have been the perpetrator.
- The test is more arduous should a report be made to a competent authority or to the press.

The Central Bank (Supervision and Enforcement) Act 2013

- Unlike the 2014 Act, the protections outlined in the 2013 are not limited to “workers”. Section 38 of the 2013 Act states that *“where a person makes, in good faith, whether in writing or otherwise, a disclosure to an appropriate person (the CBOI or an employee/authorised officer of the CBOI) and the person making the disclosure has reasonable grounds for believing that the disclosure will show one or more of the following:*
- *(a) that an offence under any provision of financial services legislation may have been or may be being committed;*
- *(b) that a prescribed contravention may have been or may be being committed;*
- *(c) that any other provision of financial services legislation may have been or may be being contravened;*
- *(d) that evidence of any matter which comes within paragraph (a), (b) or (c) has been, is being or is likely to be deliberately concealed or destroyed,*
- *the disclosure shall be a protected disclosure for the purposes of this Part.”*
- Both the protections and remedies available to employees under the 2013 Act are essentially identical to those outlined under the 2014 Act. Namely, an employer is prohibited from penalising an employee who makes a protected disclosure within the meaning of the 2013 Act. The definition of “penalisation” is outlined under section 37 of the 2013 Act and mirrors the definition outlined under the 2014 Act.
- However, while there are a number of similarities between the two Acts, they are not identical. For example, in a marked departure from the 2014 Act, an employer is guilty of a criminal offence if it penalises an employee for making a protected disclosure under the 2013 Act.

Mandatory Reporting Obligations - Section 19 of the Criminal Justice Act 2011

- Section 19 provides that a “person” (which includes a corporate body) is guilty of an offence if he or she withholds information which may be of material assistance in the prevention, apprehension, prosecution or conviction of any other person for certain prescribed “relevant offences”
- This section applies to a whole range of offences including company law offences, money laundering and terrorism, competition law and more recently, cyber-crime and hacking.
- A person to whom section 19 applies is obliged to make a disclosure to an An Garda Síochána and the maximum penalty that can be imposed for failing to do so is an unlimited fine and imprisonment for up to 5 years or both.
- If his/her employer has failed to adhere to its mandatory reporting obligations, a worker may disclose this fact and avail of the protections outlined under the 2014 Act (or the 2013 Act if the relevant offence relates to the provision of financial services). If such a disclosure is made, the worker’s employer will be prohibited from penalising him/her provided the relevant criteria have been satisfied.

Recent Irish Cases

- *Tibor Baranya v Rosderra Irish Meats Group Limited* [2020] IEHC 56
- *John Clarke v CGI Food Services* [2020] IEHC 368

EU “Whistleblower’s” Directive (EU) 2019/1937

- The Directive must be transposed into national law by 17 December 2021.
- It aims to set a common minimum standard across EU Member States for the protection of persons who report information about threats or harm to the public interest and breaches of EU law obtained in the context of their work-related activities.
- It is the first EU law to provide protection to whistleblowers across the EU, covering 12 policy fields, adopting a wide definition of who can be a whistleblower, and including both the public and private sector.
- The protections outlined under the Directive only apply to disclosures of wrongdoing which relate to EU law across the 12 policy fields.

Whistleblower's Directive : Key differences to the Protected Disclosures Act 2014 (PDA)

- **Extension to Private Sector** – It will now be mandatory for private sector organisations to have whistleblowing policies and procedures in place where there are more than 50 employees (and no minimum number of employees in some areas such as financial services)
- **Extension of “Reporting Persons” definition** – this will become much broader and will include temporary workers, volunteers, unpaid interns, shareholders, suppliers, legal as well as natural persons and will also protect those persons around a whistleblower against retaliation.
- **Extension of “Relevant Wrongdoings”** – The Directive expands the ambit of relevant wrongdoings by encompassing breaches of financial services, products and markets, and prevention of money-laundering and terrorist financing, corporate tax laws, food, product and transport safety, animal health, protection and welfare, environmental protection, public procurement, data protection, consumer protection, radiation, nuclear safety and public health and breaches affecting the financial interests of the European Union and the single market.

Directive – Key differences to the PDA continued

- **Extension of definition of Penalisation:** The Directive specifically provides that the following acts can constitute penalisation: withholding of training, negative performance assessment or employment references, ostracism, failure to convert a temporary employment contract into a permanent one, where the worker had legitimate expectations that they would be offered permanent employment, failure to renew or early termination of the temporary employment contract, harm to a person's reputation, particularly in social media, or financial loss, including loss of business and loss of income, blacklisting, early termination or cancellation of a contract for goods and services, cancellation of a licence or permit and or psychiatric or medical referral.
- **Introduction of Strict Timeframes:** the complaint must be acknowledged within 7 days and there must be follow up within a 3 month period, with a limited option to extend to 6 months.
- **Extension of Protection** – The Directive provides for the extension of the protection against penalisation and retaliation to people who make information available in the public domain.
- **Limits to Liability of Reporting Persons** – The Directive provides for the removal of liability for a reporting person where they make a disclosure which gives rise to a number of possible issues including defamation, copyright breach, breach of secrecy or data protection rules or disclosure of trade secrets, where the reporting person has “*reasonable grounds*” to believe the disclosure is necessary to reveal the breach.
- **Legal Aid-** competent authority must provide legal aid to whistleblowers.

PDA – When are disclosures protected?

Disclosure to employer (internal reporting channel)	Disclosure to a prescribed person/competent authority (external reporting channel)	Public Disclosure
<ul style="list-style-type: none"> Reasonable belief that the information discloses wrongdoing 	<ul style="list-style-type: none"> Reasonable belief that the relevant wrongdoing is within the remit of the prescribed person Information disclosed must be substantially true 	<ul style="list-style-type: none"> Information disclosed must be substantially true Disclosure cannot be for personal gain Public disclosure is reasonable in all the circumstances <p>And one of below:</p> <ul style="list-style-type: none"> reasonable belief he/she will be penalised if disclosure is made to an employer, Prescribed Person Reasonable belief that evidence will be concealed or destroyed if the worker makes the disclosure directly to his/her employer. Wrongdoing is of an exceptionally serious nature etc.

Directive – When are disclosures protected?

Disclosure to employer (internal reporting channel)	Disclosure to a prescribed person/competent authority (external reporting channel)	Public Disclosure
<ul style="list-style-type: none"> Reasonable belief that the information disclosed was true at the time of reporting <p>Note: Member states must encourage workers to use internal reporting channels in the first instance</p>	<ul style="list-style-type: none"> Reasonable belief that the information disclosed was true at the time of reporting The reporting person has first reported through internal channels or internal channels are unavailable or inadequate 	<ul style="list-style-type: none"> Reasonable belief that the information disclosed was true at the time of reporting Must have first reported internally and externally, or directly externally but no appropriate action was taken in response to the report within the timeframe referred to under the Directive (ordinarily 3 months) or Must have reasonable grounds to believe the breach may constitute an imminent or manifest danger to the public interest; or (ii) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed



Julie Fenton

Head of Forensic & Integrity Services Ireland
EY



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What are we seeing now - increasing incidents and drivers of risk

External

Malware-laden emails/social media purportedly from government and health organisations

Supply chains under pressure and you or your suppliers dealing with unknown parties

Fraudsters posing as suppliers asking client staff to change bank account details

Companies offering access to funding and grants for an upfront fee

Internal

Less scrutiny and oversight on employee actions with remote working arrangements

Pressure on staff to report positive results and maintain BAU services may result in anti-fraud, compliance and cybersecurity taking a back seat

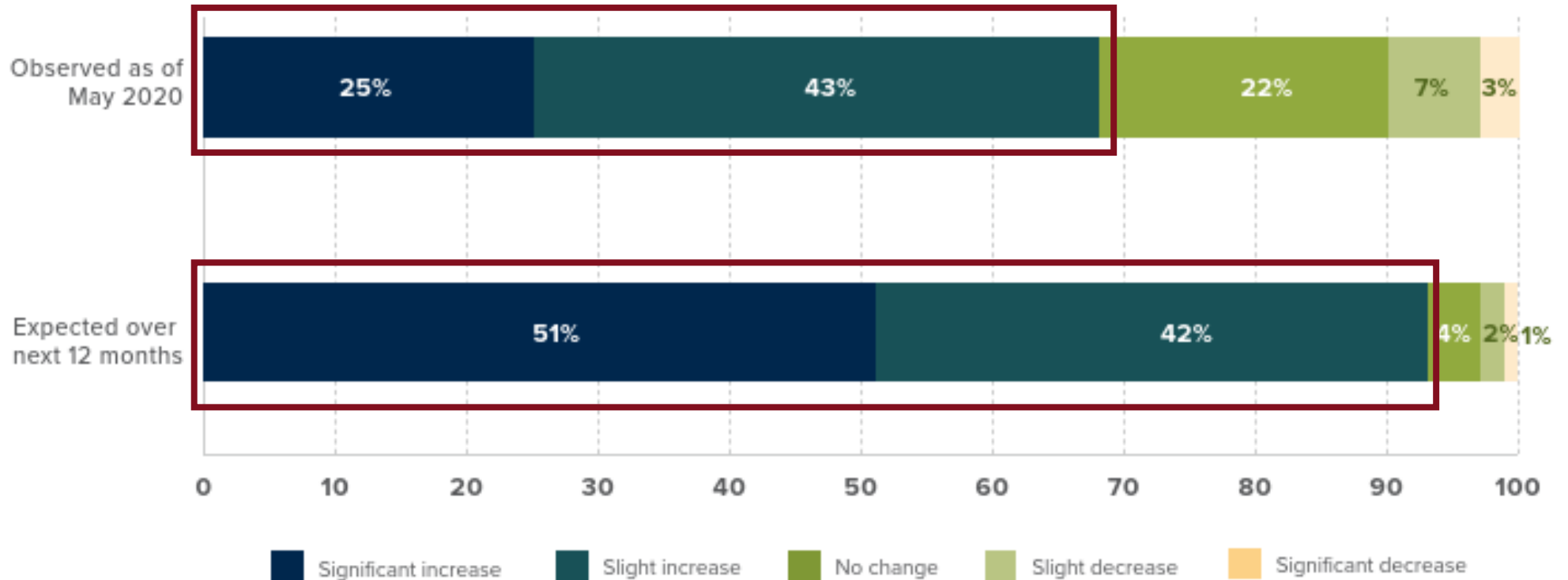
Uncertainty caused by COVID-19 may cause employees to be less vigilant

Enterprise-wide controls to prevent and detect fraud may not be designed to operate in near-100% virtual environment

New ACFE Report: we anticipate a change in the overall level of Fraud

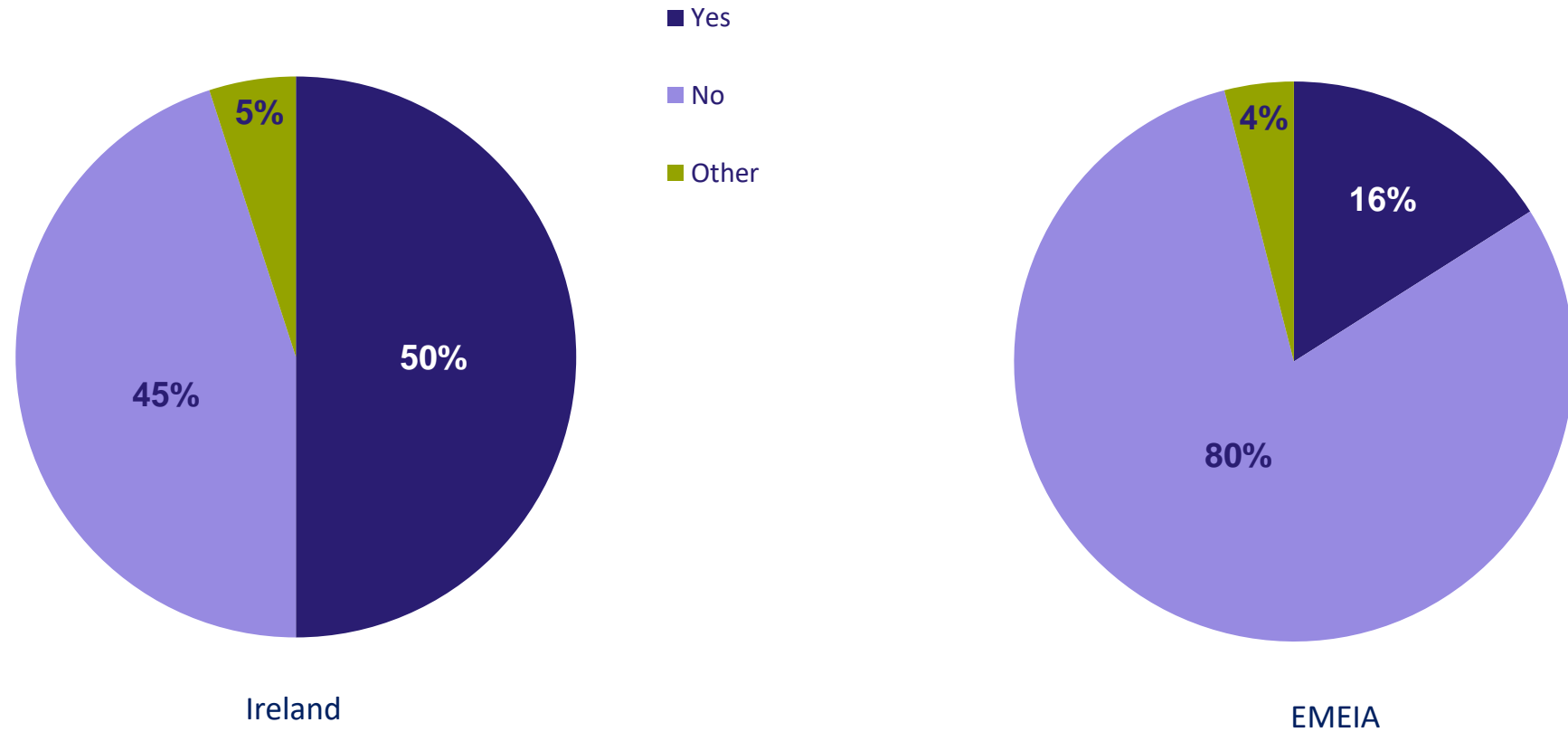
FRAUD IN THE WAKE OF COVID-19: BENCHMARKING REPORT

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Previous recession in Ireland – experience of fraud

Q: Has your organisation experienced a significant fraud in the last two years?

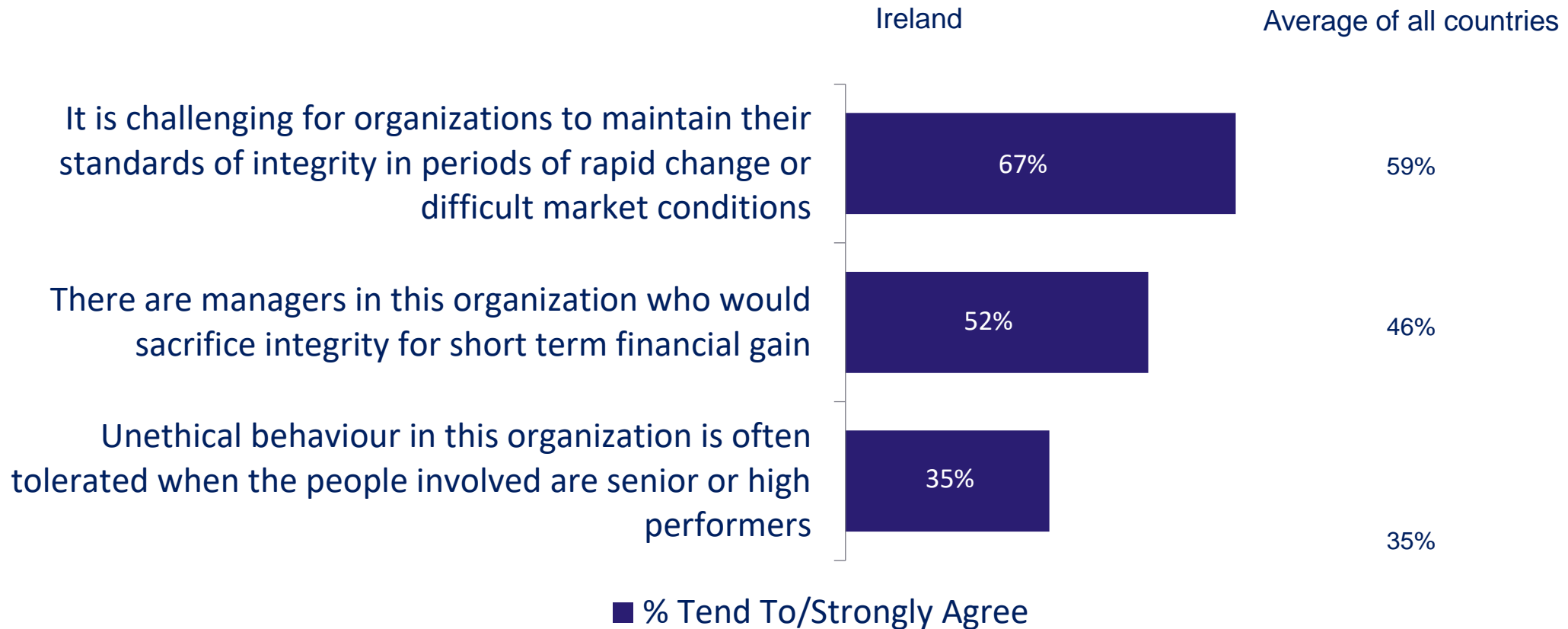


Results from: EY EMEIA Fraud Survey 2010

A blurred office scene with a person's silhouette in the foreground and other people in the background. A green horizontal bar is overlaid on the image, containing text.

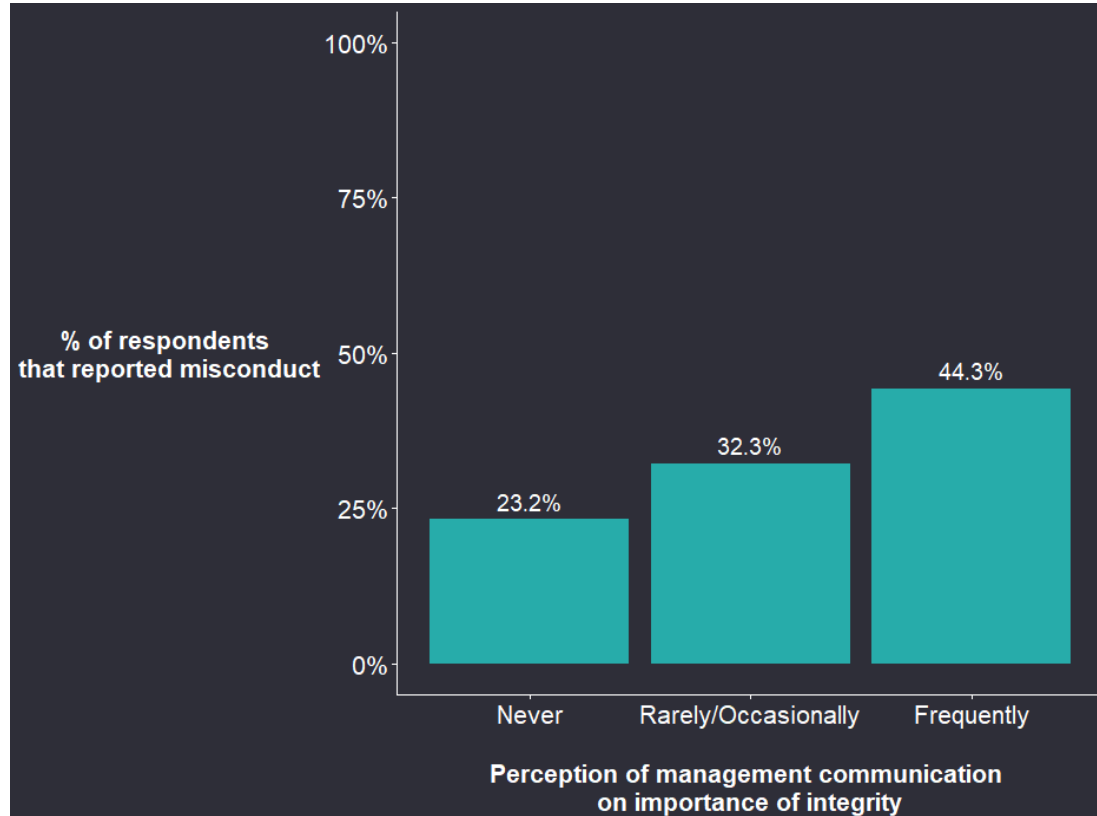
40% of all fraud and corruption cases are discovered by whistleblowers - only **19%** by internal audits

Are you comfortable people will speak up?



Does communication on important of integrity matter?

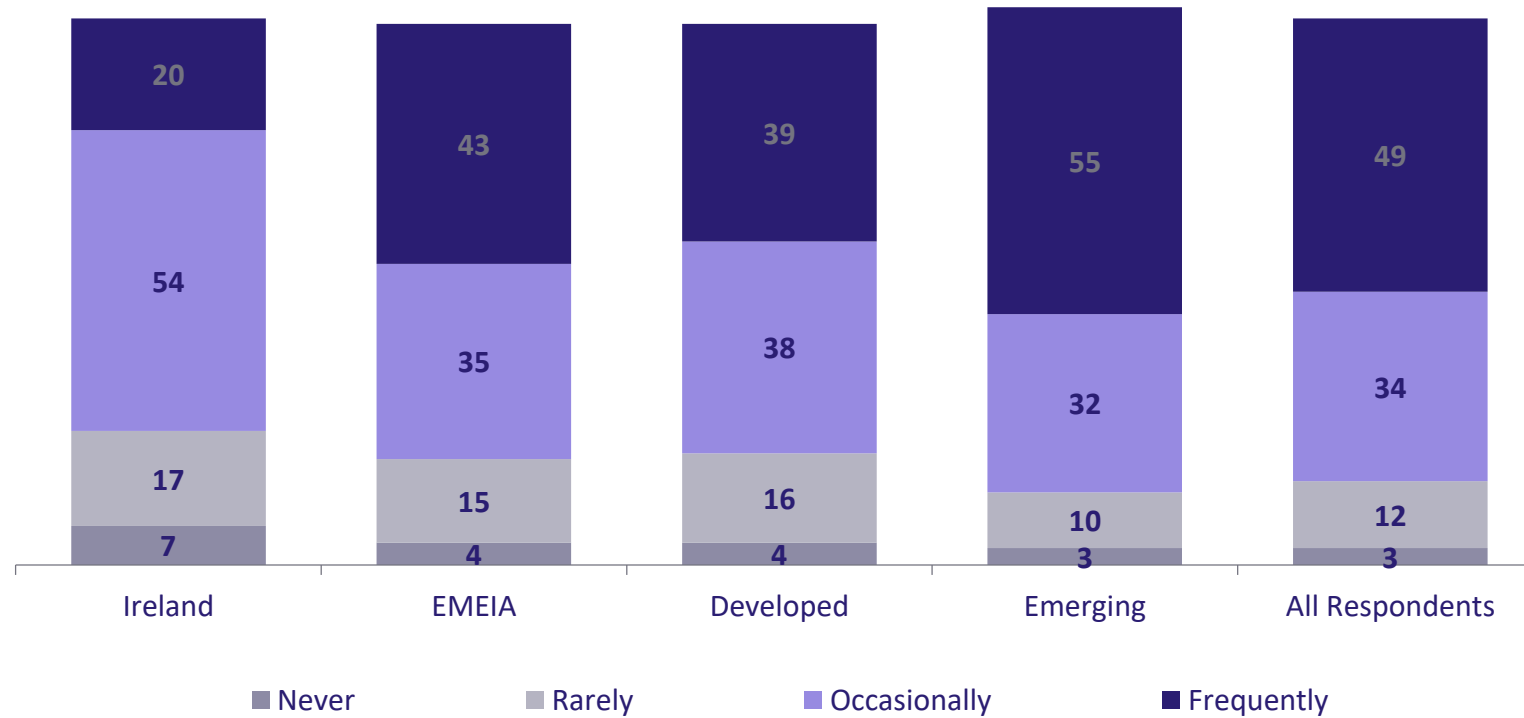
Tone and action from the top matters immensely



All Respondents (2948)

- Question x-axis: In the last two years, how often have you heard management communicate about the importance of behaving with integrity?
- Question y-axis: Have you personally ever reported issues of misconduct, for example to management or to a whistleblowing hotline?

In the last two years, how often have you heard management communicate about the importance of behaving with integrity?



Base: Ireland (54*); EMEIA (1639); Developed (1218); Emerging (1730); All Respondents (2948)

All above figures are %

So where does this leave us?

A European audience was asked:

“What do you think of when you hear the term Whistleblower?”



Analysis show that the average whistleblower is

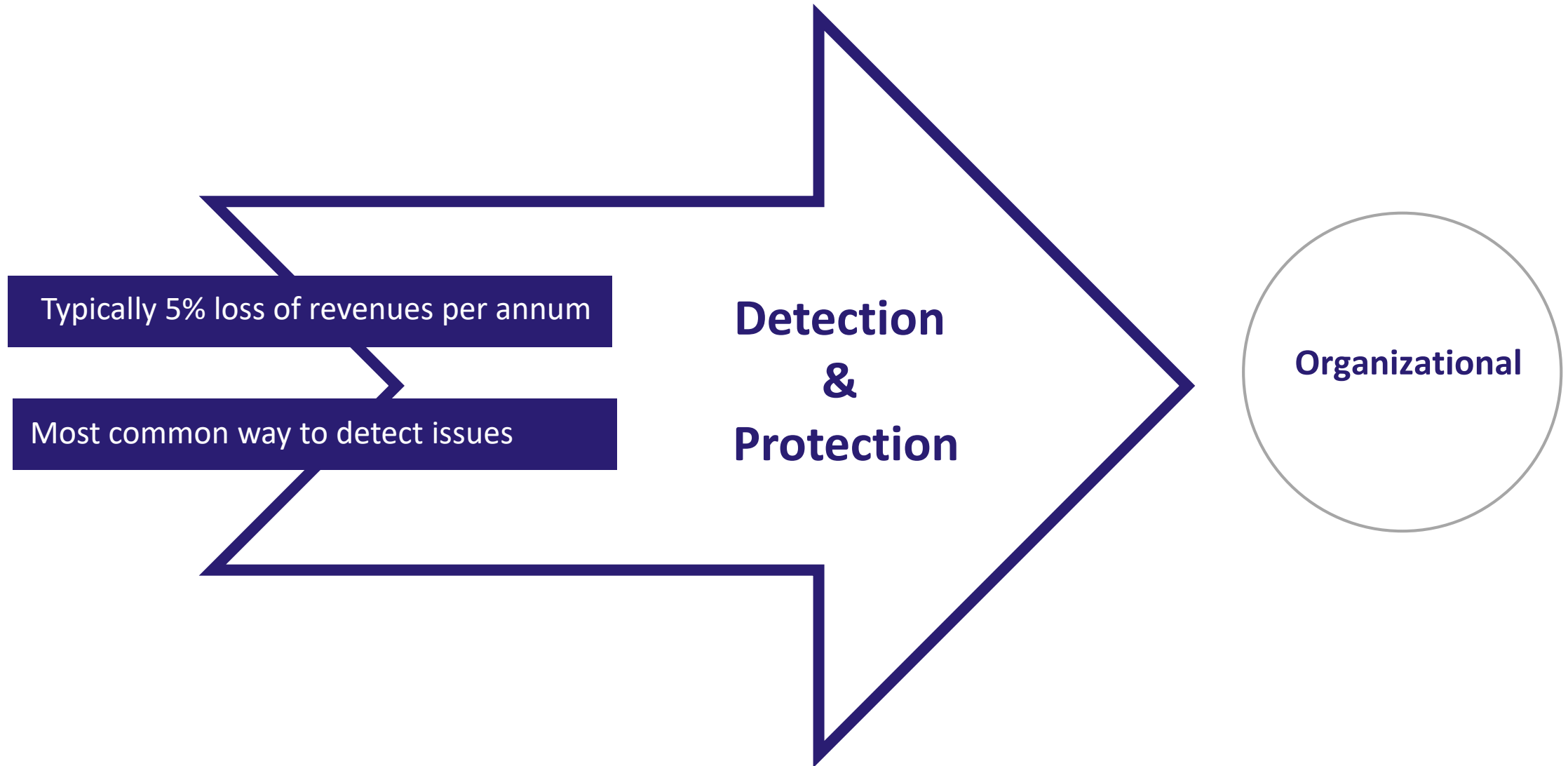
- is a top performer
- is paid above average
- Is often in a management position
- tries to solve the problem
- attempts to raise the problem internally at least three times before turning to law enforcement or the press

Speaking up can come at a price

- Being ostracized by colleagues, society, friends and family
- Complete career stop
- Exhausting for all parties
- Traumatizing



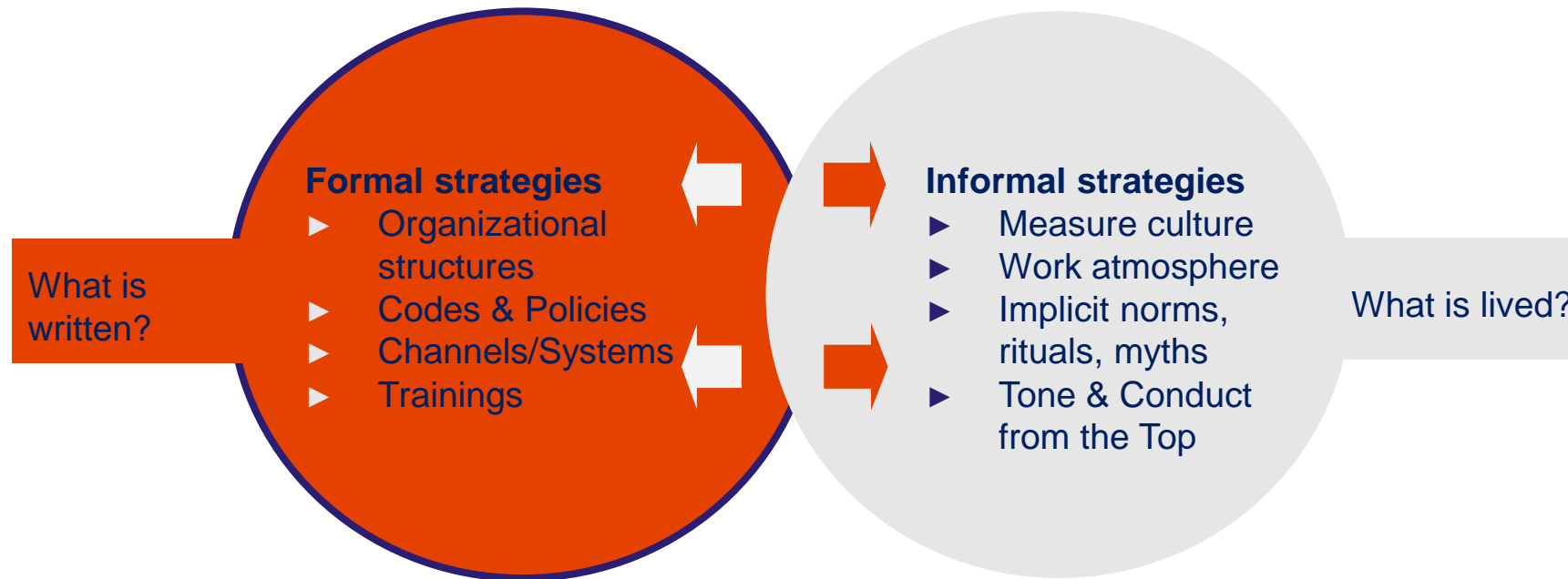
So what can we do



Always remember what those who speak up **care about**:



We need to normalize the process





Eleanor Daly
General Counsel
Fexco Group



The Three “C”s approach to Whistleblowing Policies

Clarity

- Whistleblowing policies and systems should be clear, unequivocal and easy to understand. You should have a clear and communicated stance on non-retaliation and confidentiality.

Communication

- Use as many internal marketing tools and techniques as you have at your disposal to communicate about the policy. It is important to focus not just on the how to the policy works, but also why it is important.

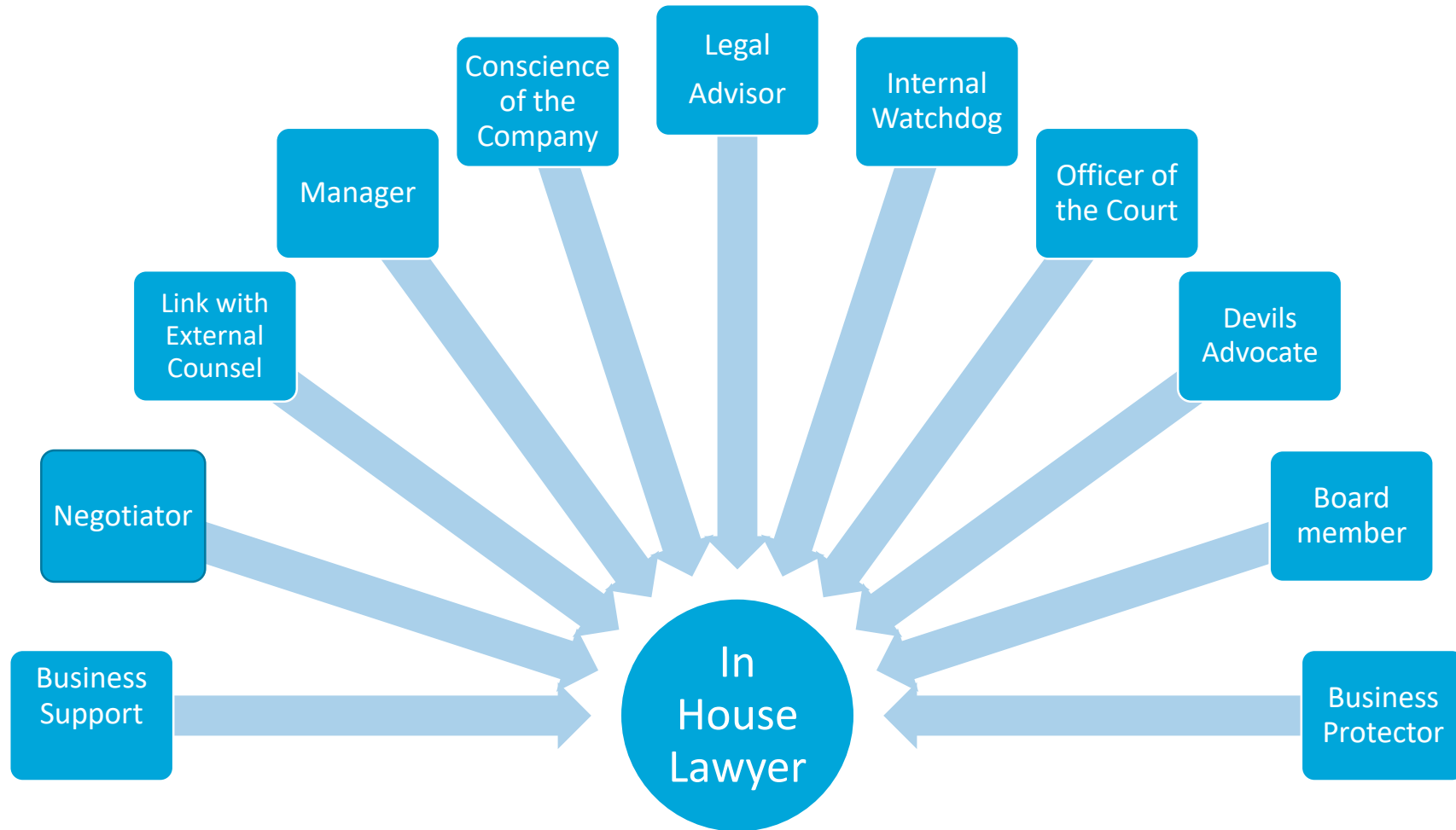
Culture

- Take steps to build an organisational ethical culture that supports speaking up. Understand any current barriers. Engage the visible and vocal support of leadership and middle management. Publicise positive outcomes. Build coherence between what is said and how things are done

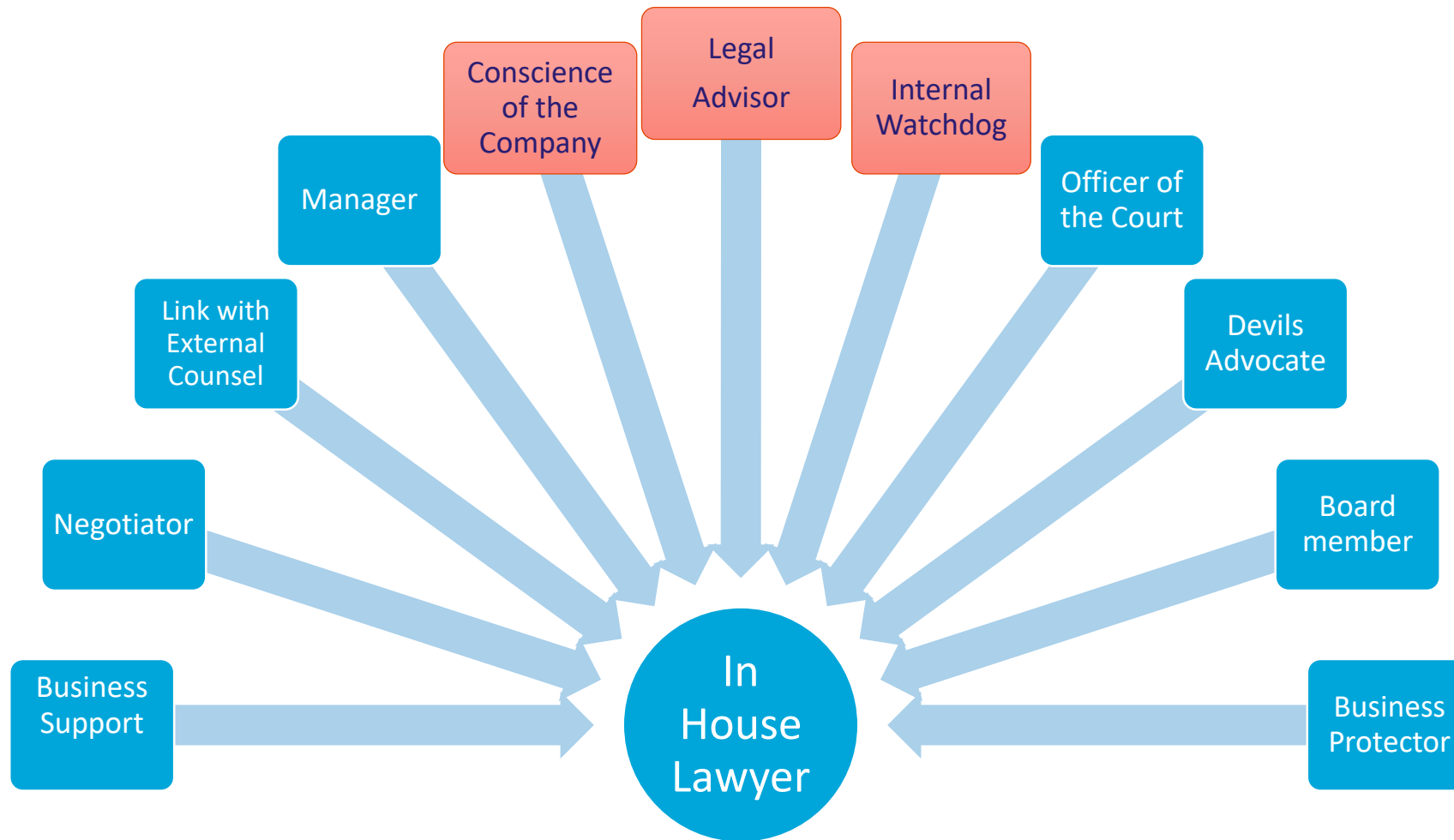
What is your role in a Whistleblowing event?

- Are you a person who someone would feel comfortable to approach with an issue?
- Are you a person named in your Whistleblowing Policy as such?
- Does the Whistleblowing Policy call out the role of the Legal Department in any whistleblowing investigation?

The Varied Role of an In-House Counsel



The Varied Role of In House Counsel



Professional Independence



"I'm afraid the building next door might be undermining your foundations."

The Whistleblowing Policy has been invoked... What next?

- What does the policy require the organization to do?
- Who is on the team to deal with the issue?
- Who co-ordinates the organization's response ?
- Is an investigation required?
- Should Legal take responsibility for any such investigation?

Other key Issues to Consider – Stakeholders

- Who is your client?
- Do you need to inform your board?
- If you are regulated, does your regulator need to be informed?
- Do you need to report under Section 19 of the Criminal Justice Act 2011?
- If this is a fraud against your client, do you intend to make a criminal prosecution?

Other key Issues to Consider – The Whistleblower

- Are the rights of the whistleblower being protected?
 - In respect of his/her protected disclosure?
 - As an employee? Has the employer adopted fair procedures?
- Are you the whistleblower? What are the implications for an in-house lawyer when they become a whistleblower?

Conflicting Rights and Interests



Some further reading

- *Guide for Solicitors Employed in the Corporate and Public Sectors*, Law Society of Ireland, May 2018
- ***Blowing the Whistle*, Commerce & Industry Group, The Law Society (UK), April 2007**
- *Reconciling the Irreconcilable?* Commerce & Industry Group, The Law Society (UK), March 2005
- *A Fine Line*, Commerce & Industry Group, The Law Society (UK), May 2006
- *Corporate Lawyers and Corporate Governance*, Joan Loughrey Cambridge University Press, 2011

Questions?

