PROMOTING WORKPLACE CULTURE: AN IN-HOUSE LAWYER'S SOLUTION

Ryan Solomons

Ryan Solomons is Special Counsel & Head of the Employment group at Bespoke. He is recognised as an expert in employment law and is involved in all aspects of workplace relations law, including workplace investigations and regularly advises organisations in relation to termination of employment matters, unfair dismissals and adverse action claims, discrimination and sexual harassment claims, and workplace relations policy development and training. Bespoke (www.bespokelaw.com) is a pioneer of NewLaw and revolutionises the traditional legal market by combining in-house and private practice principles to provide fixed price, cost effective and high quality commercial legal solutions.

A cultural shift

Organisations are beginning to recognise the strong correlation between positive workplace cultures and business productivity, employee engagement and health of employees. With this backdrop, we are witnessing a noticeable shift in the role of in-house lawyers. Not only are they advisers of legal risk, but influencers of positive corporate governance and workplace culture.

Indeed, in-house lawyers have increasingly been called upon by organisations to proactively contribute to the development of positive workplace cultures given the impact it has on its ongoing success.

What is workplace culture?

Workplace culture is the unique character and personality of an organisation. It can be described as the shared values, beliefs, behaviours, traditions, assumptions and norms that are prevalent in the workplace.[1] An organisation's workplace culture defines the form and manner in which work is performed and shapes the way management, employees, contractors, suppliers and customers interact in the workplace.

Workplace culture is influenced by various factors, including the nature of the business and its management style and the demographic makeup of the workforce. Workplace culture evolves over time, particularly, where there is staff turnover. Given the dynamic nature of workplaces, organisations are required to constantly promote and reinforce positive workplace values. Let's examine how important a positive workplace culture is and what role in-house lawyers play in that process.

Positive workplace cultures – make or break

Workplace culture can 'make or break' an organisation. Australian and overseas studies[2] have suggested that organisations with strong values based cultures consistently outperform those with poor ones.

It is no surprise that the Federal Parliamentary inquiry[3] into workplace bullying determined that supportive workplace cultures have been associated with productivity gains, greater staff retention, higher levels of job satisfaction, lower levels of stress and less conflict between work and family responsibilities.

In contrast the inquiry found that toxic workplace culture:

- can have a devastating impact on the health and wellbeing of workers;
- is characterised by high staff turnover and low staff morale; and
- results in high levels of informal grievance and complaints, inconsistent application of policies and rules, poor performance and victimisation of those who protest.

The Federal Parliamentary report and recent court decisions have revealed organisations that have poor workplace cultures are more likely to create an environment where workplace bullying, harassment and intimidation flourish. Interestingly, the Federal Government responded to the report by introducing an anti-bullying regime in the Fair Work Act 2009 (Cth)[4].

Further, organisations that do not have an in-house legal function (or do not use specialist employment lawyers) are less likely to adopt risk mitigation strategies to eliminate inappropriate workplace behaviours. The need for organisations to engage in-house or external employment lawyers to develop positive workplace cultures and values has never been greater.

Recent court decisions are a wake up call for organisations

The cases of Kate Mathews v Winslow Constructors (Vic) Pty Ltd[5] and Tolan v WD Gelle Insurance and Finance Brokers Pty Ltd[6] highlight the impact a toxic working environment can have on an employee's health and the damage it can do to an organisation's profitability and reputation. This is particularly so where the organisation fails to prevent bullying and harassment in the workplace.

In the first case, Mathews was awarded $1.3 million in damages. The Supreme Court determined the employer was negligent in not providing a safe working environment by failing to prevent her from being subjected to ongoing sexual harassment and bullying by co-workers. In the second case, Tolan was awarded damages of $733,723 for psychological injuries after the District Court found the employer breached its duty of care by failing to act on complaints of sexual harassment, bullying and intimidation in the workplace.

More recently, a Victorian employer was convicted and fined for breaches of the Occupational Health and Safety Act 2004 (Vic) for actively engaging in the bullying of an apprentice.[7] It is uncommon for WorkSafe Victoria to prosecute an employer for workplace bullying as the aggrieved employee can seek remedies under the new anti-bullying regime in the Fair Work Act 2009 (Cth). Nevertheless, this case illustrates that by providing safe systems of work and identifying and eliminating hazards in the workplace, an organisation is making a positive contribution to its workplace culture and values.

Building positive workplace cultures

Studies of workplace culture[8] have concluded that unplanned workplace cultures are less likely to result in strong values-based cultures. If an organisation does not take proactive steps to develop its own workplace values and culture, it is inevitable that its culture and values will evolve over time based on the behaviour (good or bad) of its managers and employees. If bullying, harassment and other inappropriate workplace behaviours have been tolerated by management and in-house lawyers, then a toxic workplace culture can emerge.

Managers, in-house lawyers and employees have a shared obligation to create and maintain a positive workplace environment and promote workplace values. However, reshaping workplace culture and eliminating bullying and inappropriate workplace behaviours requires the full and transparent support of management and its in-house lawyers. An Australian Human Resources Institute online survey of human resources professionals concluded that communication and strong, visible support from an organisation's leadership team is crucial in driving cultural change across an organisation. [9]

However, the Federal Parliamentary inquiry and recent court decisions identified that many organisations and managers lack the skills, experience and resources to promote a healthy workplace culture, including those relating to addressing bullying or harassment. Further, organisations struggle to navigate and manage a regime of complex and overlapping Commonwealth, State and Territory statutes and common law principles in respect of workplace health and safety.

In-house counsel have a critical role

The Federal Parliamentary inquiry clearly illustrated that organisations require assistance to address workplace bullying and to build strong workplace values. It also recommended that the Federal government introduce initiatives to overcome workplace bullying.

It is evident from the report that in-house lawyers can play an integral role in building and reinforcing positive workplace and valued-based cultures. By virtue of their role involving the mitigation of legal risk and conflict resolution, in-house lawyers possess the skills and knowledge to influence workplace culture.

Top 10 steps for in-house lawyers

In-house lawyers can be a key constituent is shaping workplace culture. In this respect, here are top 10 steps that in-house lawyers can proactively take to influence workplace culture:

1. work with the organisation to implement comprehensive workplace relations policies, including bullying and sexual harassment policies.
2. undertake regular audits of workplace policies to ensure they are:
    *   up to date; and
    *   compliant with recent changes in workplace laws.
3. provide staff with ongoing training and guidance in respect of workplace policies.
4. assist managers and team leaders to regularly and effectively communicate workplace policies to employees, including any changes to current workplace policies. Importantly, new employees should be provided with training in workplace policies so they understand the organisation's values and the expected standard of behaviour.
5. educate staff to identify and eliminate bullying, harassment or discrimination and provide training to managers in complaint handling procedures, privacy and conflict resolution.
6. assist managers and team leaders to ensure that:
    *   workplace policies are followed and consistently applied; and
    *   complaints are promptly addressed. Importantly, the consistent application of workplace policies can put an organisation in a better position when defending work related claims.
7. undertake prompt and fair workplace investigations to prevent work related claims.
8. take measures to prevent victimisation of employees who participate in workplace investigations or disciplinary actions.
9. take prompt action against any employee (regardless of seniority) who has engaged in inappropriate behaviour in breach of workplace policies.
10. act as role models by exhibiting positive workplace behaviours and values.

Take away tip – prevention is better than cure

Organisations with positive workplace cultures will outperform organisations with poor workplace cultures. They will also mitigate the risk (and associated litigation costs) of being held vicariously liable for the wrong doing of its employees by putting the onus back on employees to conduct themselves in an appropriate manner.

Early and proactive intervention is critical in developing a healthy workplace culture. In-house lawyers have the right mix of risk mitigation skills and business acumen to make an important contribution to organisation's positive workplace culture.

Footnotes

1 Workplace Culture Improvements: A Review of the Literature. A report for the Workforce Planning and Development Branch of the NSW Ministry of Health, June 2014.

2 Employee Engagement Report by Towers Watson-ISR, 2006 – a global, 12 month study of engagement levels and performance of 664,000 employees from 50 countries.

3 Workplace Bullying We just want it to stop, House of Representatives Standing Committee on Education and Employment, October 2012.

4 Fair Work Amendment Act 2013 (Cth).

5 Kate Mathews v Winslow Constructors (Vic) Pty Ltd [2015] VSC 728.

6 Tolan v WD Gelle Insurance and Finance Brokers Pty Ltd [2014] NSWDC 185

7 WorkSafe Victoria News, 6 June 2016 (http://www.worksafenews.com.au/news/item/502-geelong-builder-fined-$12,500-for-bullying-teen-apprentice.html)

8 Employee Engagement Report by Towers Watson-ISR, 2006 – a global, 12 month study of engagement levels and performance of 664,000 employees from 50 countries.

9 How important is workplace cultural change and how do you about driving it? Australian Human Resources Institute survey of professionals from the AHRI LinkedIn group, March 2014.