

ALLEN & OVERY

A view on culture from... *the UK*

HAVE YOU SEEN A CHANGE IN THE WAY CLIENTS ARE APPROACHING CULTURAL ISSUES WITHIN THEIR ORGANISATION? IF SO, WHAT ARE THEY DOING?

In the last couple of years there has been (and continues to be) an increasing and proactive focus on culture. Companies have specific teams focussed on ensuring they have the right culture for their organisations, and to drive forward initiatives to promote good behaviour and diversity. Boards are taking an active interest, having recognised that management are the culture carriers of the organisation.

This is in stark contrast to the previous situation, in which culture only got raised when something went wrong, in which case it was “fixed” and everyone moved on without focusing on whether there were underlying issues that needed to be addressed - the band-aid has now well and truly been pulled off and longer-term solutions are being put in place. These include:

- more practical, case-study based (often mandatory) diversity and respect at work training;
- incorporating diversity targets into performance reviews particularly for senior management and even ensuring it feeds into compensation decisions;
- taking positive action to support under-represented groups during recruitment and promotion decisions; and
- having employee-support groups to drive awareness for different diversity issues.

“Mental health is a really good example – a few years ago this was barely discussed and certainly it was far from common for organisations to have any specific mental health initiatives in place. Now, most organisations will be doing something to support employee mental health wellbeing and those who are not will be coming under pressure to do so or risk losing their talented people to those companies that do recognise the importance of this issue.”

Sarah Henchoz



HAVE YOU SEEN AN INCREASE IN ANY PARTICULAR CULTURAL ISSUES? EG HARASSMENT, WHISTLEBLOWING, MENTAL HEALTH ISSUES

It's fair to say that there's been an explosion of culture-related matters. In this environment of increased transparency and accountability, speaking up is on the rise. The fear of retaliation however remains, which shows that there is still some way to go to ensure an organisation is really practising what it preaches. That said, there is a real "enough is enough" mentality now when it comes to serious cultural issues. In the UK we are seeing this in the areas of harassment and regulatory impropriety, but I think bullying will be the next area where the lid will be lifted on some really poor behaviours. This will be a difficult area for employers to address as it is subjective (one person's robust management will be another's bullying). There will of course be some very clear examples but no doubt many shades of grey. Navigating this to the benefit of both parties, in order to ensure people can continue to work effectively in a professional environment, will be key, and managers will need to be accepting of the fact that some employees may need to be managed in a different way to others to get the best from them.

ARE ANY PARTICULAR SECTORS MORE AFFECTED THAN OTHERS?

This is one issue which permeates across industries - no organisation is immune. The key is having visible initiatives that the organisation is committed to and ensuring these are genuinely being adhered to across the organisation. Progress and results need to be measured and assessed for their effectiveness. Often we see senior management commit publicly but then find that those below them are not living by the standards being set. The other area is to ensure there are clear processes in place to deal with concerns that are raised. Sometimes a written/prescribed process won't be the right approach - flexibility, proportionality and a practical yet human touch is essential.

For those organisations operating under a regulatory lens there will be increased scrutiny of what the firm is doing to address culture issues and how the firm responds to non-financial conduct in particular. The FCA, for example, is being very vocal about what it expects from firms, what and when it expects issues to be reported to them, and how wrongdoers should be dealt with. The implications are serious - it's moved on from purely financial repercussions - reputations (both of the company and the individuals who behave badly) are on the line.

WHAT WOULD YOU SAY HAS BEEN THE BIGGEST DRIVER FOR CHANGE/ HAD THE MOST IMPACT ON CULTURE IN RECENT YEARS?

Whilst we've had legislation in place in the UK to address diversity for over 40 years, the biggest instigator of change in my view has been #MeToo - the support and extent of this movement (and others like it) has done more to raise awareness, by encouraging speaking up and holding organisations to account, than any legislation or case law.



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HAVE YOU SEEN ANY PARTICULARLY INNOVATIVE WAYS CLIENTS HAVE BEEN ADDRESSING CULTURAL ISSUES WHETHER TO PROACTIVELY IMPROVE CULTURE OR TO ADDRESS SITUATIONS OF POOR CULTURAL BEHAVIOUR?

Some organisations are taking a pretty strong (and brave) approach of naming and shaming people who have left for poor behaviour. This is not just in employee references, which are essentially private, but also more publicly by sending communications around the relevant team or business area to call out what has happened. The obvious plus-side of this is that employees will be able to see how seriously the issue is taken, which will help to encourage others to come forward in the future. The downside of course is the risk of a privacy-related claim from the departing employee. To mitigate against this, other organisations are producing anonymised stats of the number of people who have left in a 12-month period for poor conduct, so again they can show, against the number of complaints made, the strength of action taken. We have also seen companies require individuals who have been found to have acted badly to publicly apologise to those affected and to also commit to address their behaviour going forward. Of course the nature of the remedial action must fit the seriousness of the conduct, but having an element of public reporting is certainly helpful in showing the organisation's commitment to improving workplace behaviour.

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WHAT TRICKY ISSUES HAVE ARISEN IN YOUR JURISDICTION RELATING TO CULTURE?

Most allegations of poor conduct are tricky, either due to the sensitivity of the issue, the potential lack of evidence and therefore the need to assess one person's word against another, or the subjective nature of allegations such as bullying. Where allegations relate to historic conduct this can often be difficult to address as recollections may have faded and evidence may be even harder to obtain. There may also be a lot of speculation about someone's conduct but limited “hard” evidence. A sufficient amount of credible speculation may still be enough to take formal disciplinary action, but care needs to be taken that companies do not jump to conclusions without carefully assessing all the information available prior to reaching any decision.

Where the allegation involves an issue which may also amount to a criminal offence, there is the additional complication of different burdens of proof. In order for a criminal prosecution to be successful, the allegation must be proven beyond reasonable doubt, whereas in the employment context, the threshold is the balance of probabilities. Disciplinary managers are therefore often left making a finding which could have serious implications for the individual, where a criminal prosecution of the same behaviour may not be successful.

WHAT WOULD BE YOUR TOP 5 TIPS FOR CLIENTS FACED WITH A COMPLAINT OF POOR CULTURAL BEHAVIOUR?

1 Live and breathe your cultural values across the whole organisation

Middle management in particular need to be engaged.

2 Be prepared to try things and admit where more can be done

Genuine attempts to do the right thing can make a big difference even if those things ultimately are not successful in bringing about the required level of change. .

3 Don't just follow a strict process

Be human, as these types of issue aren't always ones where normal process helps – think about how you would like to be treated if you had raised such a concern and, similarly, if you had had a concern raised about you.

4 Manage expectations from the start

and remember that it won't always be easy to give everyone what they want, be realistic but ensure you are listening to what is being reported and react to it where you can, and explain why when you can't.

5 Don't let investigations become unwieldy

A proportionate and reasonable approach is required. Trying to do something more may well impact timing and/or cause greater stress to those involved. For investigators, time passes quickly but for those subject to investigation or those who have spoken up, a week without any update could seem like forever.