

Organisational name: CLUBS AUSTRALIA INDUSTRIAL

Model Work Health and Safety Code of Practice Preventing and Responding to Workplace Bullying - Public Comment Response Form

Code or Guide

See Page 2 of the draft model Code of Practice

Comments:

Clubs Australia Industrial (CAI) supports the introduction of practical guidelines for employers and employees, designed for the primary purpose of preventing and responding to incidents of bullying and harassment in the workplace. CAI believes that this can be achieved through the implementation of a Guide rather than with a Code of Practice.

CAI considers that creating a Code does not further enhance the aims of educating and guiding employees and employers, but simply adds another regulatory burden on employers in an area which is already the subject of change, recognition and creating additional protections for those subject to bullying, under the *Fair Work Amendment Bill 2013*. Unlike many other areas of work, health and safety, the concept of what constitutes bullying is not easily defined and to some extent also has a subjective element. To create a Code in an area which is so often shaded with grey, creates an unreasonable obligation for duty holders to satisfy and for which they will almost certainly be held accountable in litigation proceedings, even if the specific circumstances did not warrant compliance with every aspect of the Code.

As at the date of this submission, there are a number of forms of legal action and regulatory bodies that have jurisdiction to address workplace bullying and harassment. These include unfair dismissal; unlawful dismissal; adverse action; discrimination claims; workers compensation; civil claims for breach of contract in addition to the prosecutorial style powers of the Fair Work Ombudsman and Safe Work Australia. This does not include the pending anti-bullying laws under the *Fair Work Amendment Bill*. Adding a Code to the list of mandatory compliance regimes is considered by CAI to be unnecessarily burdensome on employers.

CAI submits that the same level of guidance can be provided to an employer via the mechanism of a Guide, which if the individual case demands, still has the ability to be tendered in court proceedings.

Model Code of Practice – Preventing and Responding to Workplace Bullying

Chapter 1: Introduction

Comments:

Section 1.1, page 6: CAI submit that the definition of workplace bullying found in the Code is useful for a number of reasons, including that it is consistent with the definition provided in the *Fair Work Amendment Bill* and also provides additional guidance by defining the terms

“repeated behaviour”. The attempt to create some context around what constitutes “unreasonable behaviour” in an objective manner, may be helpful for employers to better understand this concept.

Section 1.2, page 7: Whilst it may be viewed as a relief to employers that there is an attempt to exclude from the definition of bullying, “reasonable management action taken in a reasonable way”, CAI are concerned that cases of “unreasonable management action” will be automatically presumed to be acts of bullying. Whilst there is a valuable aspect of the draft Code which specifically deals with “low level workplace conflict” (page 8) and the fact that it generally does not constitute bullying, it is important to ensure that by attempting to exclude reasonable management action from the definition of bullying, we do not create the unintended consequence where any perceived “unreasonable” management action is presumed to be bullying. This will be extremely prejudicial to employers, especially in the event that the draft Code retains the status of a Code and therefore subject to the further scrutiny of the Courts. It must be recognised in the guidelines that there may be instances where cases of “unreasonable management action” will not amount to bullying conduct. CAI is of the view that there is some degree of uncertainty about this and that it would best to provide some clarity in the guidelines, rather than leave the matter to be tested by the Courts.

Chapter 2: Preventing workplace bullying

Comments:
CAI is generally supportive of the preventative measures suggested in Chapter 2 of the draft Code.

Chapter 3: Responding to Workplace bullying

Comments:
CAI is generally supportive of the response measures suggested in Chapter 3 of the draft Code.

Chapter 4: Investigations

Comments:
CAI is generally supportive of the investigative procedures recommended in Chapter 4 of the draft Code.

General Comments

CAI recognises the need to prevent and appropriately respond to workplace bullying, both in the interests of ensuring individual’s health and well-being and reducing the considerable costs that these types of cases can have on workplaces.

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Notwithstanding this, CAI are of the view that whilst it is important to educate and guide employers and employees about workplace bullying, that legislation, multiple compliance/regulatory requirements and the number of existing legal avenues for employees to utilise for dealing with such claims (as noted above under the sub-heading “Code or Guide”), will not in themselves be enough to combat this problem in workplaces and may even prove counter-productive.

As we have alluded to in our introductory comments, there are inherent uncertainties in workplace bullying, which makes it distinct from other traditional, more black and white areas of health and safety at work. Workplace bullying is an interpersonal issue that can be affected by a host of factors, including personalities of employees, the culture and norms of an individual workplace and management style. These factors vary from business to business and what may be considered ‘bullying’ at one workplace will not be viewed that way in others.

With these matters in mind, CAI is of the view that adopting a top-heavy legislative matrix of rules, regulations and codes is not the most effective way forward. If the Code is indeed primarily an educative tool, (and its content suggests that it is) then it must be given the status of a Guide. If employers feel it is simply another stick to be used in litigation against them, this could lead to greater caution and less open recruitment in workplaces and Clubs would be no exception. CAI believes that it is not in the industry’s interests to have Clubs employ people all of the same demographic, cultural background, same gender, same religious beliefs, in order to ensure ‘safe’ employees are hired, that are either unlikely to be bullies or be bullied.

There can be little doubt that in workplaces where communication is fair and open, where people show one another respect, policies are complied with and senior management are properly trained and supportive of their staff, that the incidence of bullying is going to be significantly lower. Accordingly, it is a multi-faceted approach that is the solution to this problem. The government has a role in making the resources available to assist workplaces move in the right direction and legislation is important to ensure that the problem of bullying is understood to be a serious one. However, CAI considers the most significant impact for the desired behavioural change lies at the heart of the workplace and therefore caution must be had to the over-regulation of this area, by turning a useful educative tool such as the draft Code, into a weapon which is negatively viewed by employers.

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Workers Guide

A Workers Guide to Managing Workplace Bullying

Comments:

CAI considers that the Worker's Guide is a comprehensive, useful and easy to understand tool that will assist employees to understand what may constitute bullying as distinct from other types of conduct in the workplace, which commonly may be confused as bullying. Employee obligations and practical strategies are well articulated in this document in the event they find themselves in a situation where they either feel they are being bullied, or being accused of having engaged in bullying conduct.

CAI submits that consideration be given to converting/modifying this Workers Guide to forms that will be accessible to the hearing or sight impaired, the disabled or for non-English speaking employees. It is the vulnerable workforce who are at greater risk of workplace entitlements being denied and who are also most likely to lack the capacity, means or understanding to secure them.