

13 September 2019

Mr John Farrell
Law Council of Australia
Senior Policy Lawyer
Policy Division

Via email: john.farrell@lawcouncil.asn.au

Dear Mr Farrell,

Consultation on a Modern Award for Early Career Lawyers in Private Practice

The Law Institute of Victoria (**LIV**) thanks you for the opportunity to contribute to the discussion regarding a Modern Award for Early Career Lawyers in Private Practice, and inform the Law Council of Australia's (**LCA**) policy position on this matter. This submission has been prepared by members of the LIV Young Lawyers (**LIV YL**) Section. As the peak body for Victorian early career lawyers we represent over 9,000 law students, law graduates, lawyers in their first five years of practice, and lawyers under the age of 36, and we consider the issue of a modern award particularly relevant to our members. In addition, feedback was sought from the LIV's Workplace Relations Section, who support the position outlined in this paper. In relation to the discussion paper, the LIV YL offer the following comments and suggestions for consideration following consultation with LIV YL members.

This submission adopts the expression used in the Discussion Paper.

1. Overall position

The LIV YL commends the LCA's discussion regarding expanding the existing modern award to cover early lawyers in private practice, and alternatives, including the establishment of a minimum wage. The LIV YL considers there is significant merit for the expansion of the modern award to cover early lawyers in private practice, and for the Law Council of Australia to adopt such a policy.

2. Defining the issue

Consistent with our member's views, the LIV YL has proceeded on the basis that, for the purposes of an expanded modern award, "early lawyers" should be taken to mean solicitors in the first five years of practice post-admission, regardless of age – these solicitors might also be appropriately described as "new lawyers".

The LIV YL considers this cohort is comparatively more vulnerable to financial exploitation, mental health crises, wage theft, and has reduced negotiating power, compared with their peers with more post-admission experience, and therefore would disproportionately benefit from the protections a modern award could provide.

3. Underpinning rationale

As noted in the Discussion Paper, issues of underpayment and exploitation among early career lawyers are widely felt.¹ The LIV YL disagrees with the contention that the attributes of early lawyers entering the profession provide a sufficient bulwark against such exploitation.² This is particularly so in circumstances where;

1. There is an exponential increase in the number of law graduates;
 - The number of law graduates and admitted solicitors greatly outnumber available positions in the legal profession. For example, 240 lawyers were admitted in Victoria in a single day of admissions sittings in August this year.
 - Anecdotally, the experience of LIV YL members in those circumstances is that many will eagerly take whatever entry level positions available, notwithstanding the value they generate for their employers.
2. Negotiating skills of early lawyers are underdeveloped;
 - Notwithstanding the education and negotiation skills required to become an admitted solicitor, the notion that solicitors do not constitute a vulnerable group³ should be rejected. Newly admitted lawyers do not possess the same negotiating skills as their senior counterparts, and in many cases are unfamiliar with the general operation of a professional working environment.
 - The argument that new lawyers are able to fend for themselves ignores the realities of entry-level legal practice (where entry-level lawyers are simply not equipped or in a bargaining position to argue remuneration and working conditions with partners and human resources staff);
3. There is minimal transparency;
 - There is minimal transparency regarding wages paid by private practice employers. Early lawyers are regularly subject to 'gag-clauses' which preclude them discussing their wages.⁴ This issue does not arise for public sector or government lawyers, whose rates of pay are the

1 Discussion Paper, 4.

2 Discussion Paper, 10 [31].

3 Discussion Paper, 10 [31].

4 ACT Young Lawyers and Women Lawyers Association of the ACT, 2017-18 Lawyers Pay and Conditions Survey (Findings Report, 31 May 2018), 18.

- outcome of a different negotiating process, such as an enterprise bargaining agreement.⁵
4. Early lawyers are less familiar with their rights and entitlements;
 - Early lawyers are not as familiar with their rights and entitlements as those who have worked in the profession for longer periods of time. This is an extension of point 2 above, in that it should not be assumed that simply because a person is a solicitor that the person is a capable and informed negotiator.
 5. There is significant bullying, discrimination and harassment.
 - The NARS Bullying, Discrimination and Harassment Survey results are concerning and demonstrate the importance of wage and working conditions to the retention solicitors, both in their workplaces and to the profession in general. This is increasingly important as it relates to more vulnerable new solicitors.⁶

The expansion of the modern award to create a minimum salary would provide an additional safeguard against discrimination based on gender or other protected personal attributes.

We consider these comments are equally applicable to later lawyers who may be joining the legal profession as part of a second career, in circumstances where their previous career experience is not recognised within the strict constraints of post-admission experience generally used to assess experience and remuneration.

4. Mitigating negative repercussions

The LIV YL considers the argument that the potential inclusion of lawyers in private practice in the Legal Services Award would increase costs and have a negative impact on access to justice should be viewed with caution, given the nature of (and costs already associated with) private practice, the prevalence of pro bono work undertaken by lawyers in modern legal practice, and the fact that graduates are often more highly paid than newly admitted peers.⁷ Nonetheless, as noted in the Discussion Paper, the introduction of a modern award is complicated by existing variance in wages between the size of private practice employers and their location in Australia, including a disparity between small, medium and large organisations, and capital cities in each State and Territory and between metropolitan, suburban and Regional Remote and Rural (RRR) areas. We proceed on the basis that, all things being equal, this discrepancy is a result of market forces that reflect basic supply and demand chains within each area that will continue into the foreseeable future, although may be affected by a range of factors and evolve over time.

The LIV YL suggests that if the modern award is expanded to include early lawyers in private practice,

⁵ Ibid.

⁶ See, for example, Discussion Paper, 22 [88] and [89].

⁷ Discussion Paper [35].

the award take into consideration anticipated concerns from industry that employers in RRR areas and smaller private practices may have greater difficulty paying a minimum salary covered by an expanded award, and anticipated concerns from practitioners that they may be discriminated against by being paid less than their metropolitan and larger counterparts.

The LIV YL acknowledges that flexibility in the modern award by setting different rates for different areas and sizes of employers could mitigate detrimental financial effects to smaller employers within the legal profession, and those that operate in locations with smaller client bases and profitability. The LIV YL also acknowledges that tailoring of the modern award minimum wages to account for these discrepancies could stimulate work in less-populous areas, as employers would shift their resources to areas with lower operating costs, and among smaller private practices, which would also benefit from reduced operating costs.

However, the LIV YL is concerned that setting different amounts for different employers with regard to a modern award could entrench discrimination and be exploited by employers to pay lawyers a lower amount by shifting operations to RRR areas or structuring their organisations to remain ‘small’ or ‘medium’ size employers. Further, we consider that setting different amounts within the award based on size and location would be unprecedented and spurn unnecessary complexity in the terms of the award.

On balance, the LIV YL considers that the modern award salary reflect years of post-admission experience but *not* otherwise vary based on location or size of organisation, and be set at an amount that reflects minimum amounts that can be sustained in all jurisdictions in Australia. We note that this would not preclude larger or metropolitan private practices, among others, paying above the modern award rate, although it could lead to a ‘race to the bottom’ whereby they justify lower salaries on the basis that they are meeting the modern award minimum salary rates.

The LIV YL notes the concerns raised in paragraphs 115-119 about access to justice. However, given many private practices have established pro bono practices which provide value to their businesses despite their cost, we query whether this is truly an issue in determining fair remuneration and working conditions. We also query whether this discussion is the appropriate vehicle for addressing issues of access to justice, with the LCA examining that issue separately.⁸

With regard to whether the introduction of such an award is incompatible with the nature of legal

⁸ <https://www.lawcouncil.asn.au/justice-project/access-to-justice>.

practice and irregular hours with short-term and sudden deadlines, summarised at paragraph 31 of the Discussion Paper, the LIV YL considers that the introduction of such an award is not incompatible with those demands and legal practice is comparable in many ways to professional occupations as set out at paragraphs 106-112 of the Discussion Paper. Further, lawyers in government and the public sector are already covered by awards.

5. Consideration of alternatives

The LIV YL considers the expansion of the existing modern award would be preferable when compared to not changing the existing regime, establishing of a minimum wage, or the creation of a new, separate modern award specifically for early lawyers in private practice.

Maintaining the Status Quo

With regard to maintaining the status quo, the LIV YL disagrees with the notion that cultural change in this area within legal employers is best addressed through methods other than mandatory conditions. Leaving large and/or medium private practices to self-regulate generally has not been a success.⁹ While a portion of private practices are able to successfully self-regulate to greater or lesser degree, this does not always offer a safeguard for all early lawyers in private practice.¹⁰ Further, the difference between graduate and new lawyer salaries in favour of new graduates is compelling evidence against the exclusion of lawyers in private practice from the award system on the basis that graduate coverage sets a minimum wage by proxy.

Creation of a minimum wage

The LIV YL considers the creation of minimum wage alone is unlikely to address the systemic issues identified in the discussion paper for the reasons outlined therein.

Creating a new, separate modern award

The LIV YL considers the creation of a new, separate modern award would be unnecessarily bureaucratic and likely garner greater opposition than simply expanding the existing award, in circumstances where the inclusion of early lawyers in private practice was initially considered for inclusion in the modern award when it was created.

6. Related issues

The LIV YL invites the Law Council of Australia to consider any expansion of the existing modern award alongside its existing and future policy positions on working conditions. The LIV YL considers such consideration is essential, especially where some private practices based on billable time and work

⁹ See, for example, in a different but similar context, the comments of Wayne Byres, Chairman, at the 2019 Banking and Finance Oath Conference, Sydney, 8 August 2019: <https://www.apra.gov.au/media-centre/speeches/self-regulation-dead>.

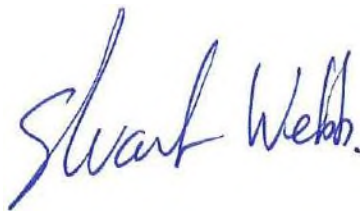
¹⁰ See, for example, the incidents discussed at <https://www.theguardian.com/law/2018/dec/03/young-lawyers-push-back-against-culture-of-overwork-in-top-law-firms>.

deadlines have led to complaints to WorkSafe as well as an adverse impact on the mental health of early lawyers. The LIV YL considers this is one area where the introduction of a modern award covering newly admitted lawyers might have the most benefit, if it is tied to greater clarification surrounding the definition of reasonable working conditions.

If the LCA would like to discuss any of the points raised in the submission, please do not hesitate to contact me or Rose Inglis, LIV Young Lawyers Manager, at younglaw@liv.asn.au.

We look forward to engaging further with the discussion paper and the development of the Law Council of Australia's policy on this important issue in due course.

Yours sincerely,



Stuart Webb
President