

PUBLIC CONSULTATION - CITIZENS' ASSEMBLY ON GENDER EQUALITY 2020

QUESTIONNAIRE

CA30177

Name: Irish Women Lawyers Association

Theme 1: Gender norms and stereotypes

Gender norms and stereotypes as barriers to gender equality

Fixed ideas about what women and men should do in the home or at work are learned by girls and boys in early childhood and throughout their lives. These ideas or gender stereotypes affect their choices in school and as they enter careers and contribute to a lack of progress toward equality between women and men. This limits not only the jobs that women and men consider or are available to them, but also can exclude women and men from social roles and tasks.

- Please outline what you see as the key barriers/ obstacles and challenges to gender equality under this theme in law, policy and practice.

Please see attached Submission on proposed Repeal of Article 41.2 of the Constitution, which Article, in the view of IWLA, reinforces on a legal footing the gender norms and stereotypes that act as barriers to gender equality.

- Please identify the steps to be taken to address the issues raised and who should address them (e.g. the state, private sector, education system etc.)

Set out in in attached submission. IWLA proposes that Article 41.2 be repealed.

Theme 2: Work: Occupational segregation by gender, gender discrimination and the gender pay gap

Women and men are often concentrated into different kinds of jobs and within the same occupations, women are often in work that is less well paid and has less opportunities for career advancement. Women often work in areas where they can work part-time so as to fit in with their caring responsibilities. While many men work in low paid jobs, many professions dominated by women are also low paid, and professions that have become female-dominated have become lower paid. This worsens the gender pay gap (the average difference between the wages of women and men who are working).

- Please outline what you see as the key barriers/ obstacles and challenges to gender equality under this theme in law, policy and practice.

Please see attached 2 submissions on this theme:

- (i) Proposed legislative changes in compliance with EU law to introduce positive action measures to address gender inequality in employment and occupation.
- (ii) Measures to address the gender pay gap in the legal sectors

- Please identify the steps to be taken to address the issues raised and who should address them (e.g. the state, private sector, education system etc.)

Theme 3. Care, paid and unpaid, as a social and family responsibility

Care -- the social responsibility of care and women and men's co responsibility for care, especially within the family

Women remain disproportionately responsible for unpaid care and often work in poorly paid care work. For working parents or lone parents, balancing paid work with parenting and or caring for older and dependent adults presents significant challenges. Women are most disadvantaged by these challenges, yet men also suffer from lack of opportunities to share parenting and caring roles. Despite recent legislation and policy initiatives to support early years parental care, inequalities in the distribution of unpaid care continue between women and men. The cost of childcare has been identified as a particular barrier to work for women alongside responsibilities of caring for older relatives and dependent adults.

- Please outline what you see as the key barriers/ obstacles and challenges to gender equality under this theme in law, policy and practice.

As a member of the National Women's Council of Ireland, IWLA supports the position advanced by NWCi on this theme. We make no further submission.

- Please identify the steps to be taken to address the issues raised and who should address theme (e.g. the state, private sector, education system etc.)

See above.

Theme 4: Women's access to, and representation in, public life and decision making

Ensure women's participation and representation in decision-making and leadership in the workplace, political and public life

Women are systematically underrepresented in leadership in economic and political decision-making. Despite the introduction of a candidate gender quota (through the system of party funding) for national political office, and initiatives to support women’s access to corporate decision-making roles, men continue to dominate leadership positions. There are also issues to be considered around how media represents women and men.

- Please outline what you see as the key barriers/ obstacles and challenges to gender equality under this theme in law, policy and practice.

Please see attached Submission at Theme 2 which also addresses these issues, in particular as regards legislating on a broader basis for positive action to address gender inequality.

- Please identify the steps to be taken to address the issues raised and who should address them (e.g. the state, private sector, education system etc.)

As above.

5. Where does gender inequality impact most?

To conclude we would be interested in your response to the following question: In which area do you think gender inequality matters most?

Please rank the following in order of importance, 1 being the most important:

- Paid work __ 1 __
- Home & family life __ 2 __
- Education -----
- Politics and public life -----
- Media -----
- Caring for others __ 3 __
- Other – please elaborate -----

- Please outline the reasons for your answer below:

- Please include any further comments or observations you may have here.

IWLA's position is fully set out in the attached submissions.

If there is any supplementary information or documents that you would like to submit as part of your consultation, please send this to info@citizensassembly.ie, with 'Public Consultation Supplementary Information' in the subject line, along with your name to allow us to correctly match any documents with your submission.

Theme 1. Gender Norms and Stereotypes

Submission: Repeal Article 41.2 of the Constitution

Submission on behalf of the Irish Women Lawyers Association to the Citizens' Assembly on gender equality

Introduction

The Irish Women Lawyers Association was founded in 2002 and advocates for women in law in Ireland and for changes to the law for women. We aim to speak out publicly on behalf of our members and Irish women generally. We seek to promote educational awareness both in law and in areas that interact with or impact upon the law. From this background, in 2018 the Irish Women Lawyers Association commissioned research on Article 41.2 – to understand its origins, its impact (if any) and to examine the options currently being considered regarding the future of the Article.

IWLA Proposal:

IWLA proposes that Article 41.2 is repealed.

Background - A legal perspective

- Article 41.2 has been little used by litigants over the decades and no substantive rights have been held to exist as a result of it. It has been referred to in only 25 reported cases in its 82-year history – often in only an incidental manner.¹
- The Article has been cited in four cases involving discrimination on the grounds of gender. In two cases involving deserted fathers, the Article was used to justify gender discrimination in favour of women. In two other cases, unsuccessful attempts were made to rely on Article 41.2 to justify gender discrimination against women.
- Undoubtedly the seminal case involving Article 41.2 was that of **BL v. ML [1992] 2 IR 77**. In this case among the reliefs sought, the Plaintiff was seeking a declaration that she had a beneficial interest in the matrimonial property in circumstances where she had not made a contribution in money or money's worth to the purchase price of the property. The marriage

¹ Dr Liam Thornton of the School of Law, UCD has listed only 25 cases in its 82-year history in which Article 41.2 has been mentioned before the Courts (as at July 2018).

had broken down and the couple were separating. The Plaintiff was a housewife who looked after the home and children and provided occasional assistance to her husband. In the High Court Barr J held that Article 41.2 conferred a property right on a woman ‘through the assessment of her work in the home’² though this right only extended to the family dwelling and its contents – and not to any other property of her husband. The defendant appealed the judgment to the Supreme Court and a five judge Supreme Court unanimously overturned the decision of the High Court.

- Given the outcome of the case there is no reason to believe that a litigant could rely on the Article in the future.

The Proposals

The IWLA has examined all the proposals which have been made regarding the future of the Article including the most recent proposals made by the Oireachtas Joint Committee on Justice and Equality in the latter half of 2018. Having considered those proposals the IWLA would support and advocate for the view expressed by a number of parties who appeared before that Committee, including that of the then Minister for Justice and Equality, that the Article should be repealed simpliciter. Ms Catherine McGuinness, President of the IWLA, in her submission to the Committee submitted that ‘deleting it simpliciter would be the legally cleanest way of proceeding’.³

It is acknowledged that other views were expressed by the IHREC and the NWCI that some recognition of carers should be addressed in an amended Article 41.2. When these or other proposals are in a more certain form the IWLA would be keen to provide legal advice concerning any possible amendments, in order to ensure that any legislative changes are both legally valid and effective in providing the protection and recognition sought for carers. It is the position of IWLA that given that Article 41.2 has been ineffective in its stated protection of women/mothers, then there is little point in an amendment which would provide ineffective protection to a wider or alternative group.

² *BL v. ML* [1992] 2 IR 77, at 100.

³ Houses of the Oireachtas Joint Committee on Justice and Equality, *Report on pre-legislative scrutiny of the General Scheme of the 38th Amendment of the Constitution (Role of Women) Bill* (Oireachtas, December 2018). Available at: <https://www.oireachtas.ie/en/publications/?committee%5B0%5D=%2Fen%2Fcommittees%2F32%2Fjustice-and-equality%2F&topic%5B0%5D=reports>. Accessed 19th December 2018, at 28.

The Joint Oireachtas Committee commented that ‘there was universal consensus amongst both witnesses and members of the Committee that Article 41.2 of the Constitution as currently drafted is sexist and paternalistic and has no place in the Ireland of the 21st century’.⁴ The IWLA concurs with this viewpoint.

What next?

The IWLA has provided information to our members through the commissioned research, a podcast on Article 41.2 and an information evening held in November 2019. It is our intention to host further events nationwide.

The IWLA is delighted that the Citizens’ Assembly has been tasked with considering gender equality in Ireland. We submit that the debate regarding Article 41.2 is highly important in the context of gender equality as it sets out a specific place for women in Irish society and singles them out in describing such a role. Further we contend that the Article is not reflective of women’s lived lives and that the best interests of society are ensured by women’s full and effective participation.

The IWLA believes that any debate regarding the Article should ideally take place in two stages:

1. First a decision should be made regarding whether or not to repeal the Article. The IWLA would support the repeal of the Article.
2. Then, if a decision is been made to repeal the Article a separate and different debate can be had regarding whether or not to replace the Article.

The IWLA looks forward to being an active participant in supporting positive change and providing legal advice as required.

**Irish Women Lawyers Association
6 March 2020.**

⁴ *Ibid*, at 38.

Theme 2: Work: gender discrimination and occupational segregation by gender and the gender pay gap

and

Theme 4: Women's access to, and representation in, public life and decision making.

Submissions:

1. Positive action measures
2. Gender Pay Gap in the legal sector

Irish Women Lawyers Association

Positive Action and Gender Equality Law

IWLA Proposal:-

The state should utilise the legal mechanisms available to it under Irish and EU law to legislate for the widespread and practical application of positive action measures to address gender inequality.

Evidence shows how gender diversity in the workplace improves the bottom line in business. Clients want diversity⁵. Diversity adds more creativity and flexibility. Diverse viewpoints encourage debate and challenge set ideas in the workplace. It is about recognising the marketability of diversity. While the evidence is clear that there is insufficient gender diversity at senior levels in the Irish legal sector⁶, there are measures which the state can take to encourage and achieve true gender diversity in work and occupation, while also protecting employers who wish to address the issue without exposure to a risk that they discriminate unlawfully under employment equality law.

Ireland has yet to fully embrace European Equality Law to ensure equal gender representation in the workplace.

Article 157(4) of the Treaty on the Functioning of the European Union allows Member States to implement legislation for positive action in the workplace. It is described as follows:

'With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.'

This is also supported by Article 3 of the Gender Recast Directive 2006/54, which states as follows:

⁵ 2018 Queen Mary Study shows that clients want diverse arbitrators, [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF)

⁶ See attached Submission on Gender Pay Gap

'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty [now Article 157(4) TFEU] with a view to ensuring full equality in practice between men and women in working life.'

In Greece, positive action is required pursuant to the Constitution, in all areas (Article 116(2) of the Greek Constitution). Many countries have yet to adopt positive action measures and they are not often seen as a priority by the legislature or by employers. In countries where positive action measures do exist, they appear more frequently in the public sector where it is encouraged to take positive action measures. Obligations for positive measures in the private sector exists in few countries, such as in Finland where they have “equality plans”.⁷

The Employment Equality Acts in Ireland⁸ have a particularly broad definition of discrimination. Positive action measures for gender are set out in Section 24 of the Employment Equality Act 1998, which states as follows:

“24. Positive action on equal opportunities

[(1) This Act is without prejudice to any measures—

(a) maintained or adopted with a view to ensuring full equality in practice between men

and women in their employments, and

(b) providing for specific advantages so as—

(i) to make it easier for an under-represented sex to pursue a vocational activity, or

(ii) to prevent or compensate for disadvantages in professional careers.]”

There is conflicting case law in the CJEU where Member States have implemented positive action measures and in some cases these have been found to be discriminatory. As it currently stands, there is the potential that employers who wish to address gender equality and embrace diversity in their workplaces will find themselves in breach of the Employment Equality Acts e.g. where women candidates are preferred over male candidates in order to address gender imbalance. This is ground that needs to be tread upon carefully to ensure compliance with the law.

⁷ European Network of Legal Experts in Gender Equality and Non-Discrimination, Gender Equality Law in Europe, How are EU Rules Transposed into National Law in 2016? p13.

⁸ Employment Equality Acts Ireland 1998 -2015

Under the Employment Equality Acts, direct discrimination is not open to defence. There is only opportunity for defence in the case of indirect discrimination. This is why employers may be exposed to risk, if they seek to address gender equality.

Self – Employed Workers

From the perspective of women lawyers, many women are self-employed as barristers or partners in law firms. They also experience gender inequality in the workplace. Positive action measures which could be taken, in compliance with EU law, would have the potential to extend not only to employees but also to the self-employed.

Article 4 (1) of the Self-Employed Workers Directive 2010/41/EU sets out the Material Scope of the Directive which provides that,

‘The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the public or private sectors, either directly or indirectly, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.’

Article 5 of the Directive refers to positive action and states as follows:

“Member States may maintain or adopt measures within the meaning of Article 157(4) of the Treaty on the Functioning of the European Union with a view to ensuring full equality in practice between men and women in working life, for instance aimed at promoting entrepreneurship initiatives among women.”⁹

Section 2(b)(i), of The Employment Equality Act 1998 seeks to include self-employed persons under the Act and states that:-

“contract of employment” means,

(b) any other contract whereby—

(i) an individual agrees with another person personally to execute any work or service for that person,”

This provision is particularly important to self-employed barristers where there is a disproportionate number of women who are at a disadvantage in their receipt of work in all areas and levels of legal practice, (with the exception of Family Law), but in

⁹ Article 5 of Parliament and Council Directive 2010/41/EU on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity and Repealing Council Directive 86/613/Eec (Consolidated).

particular; at the Superior Court level and in the areas of commercial and criminal defence law.¹⁰ This is a provision which could help to starkly change that landscape if utilised in an efficient manner. This could be addressed in more detail in our domestic legislation to encourage more solicitors' firms, the State and Direct Professional Access clients to brief women barristers or at the very least to adopt measures to ensure that their briefing policies are gender balanced.

Both the Directives and the Employment Equality Act, make it clear that included in the definition of "*discrimination*" is "*an instruction to discriminate*". It is therefore an offence under Employment Equality law to direct someone else to discriminate on the grounds of gender against an employee. In those circumstances consumers of legal services need to be informed that it is unlawful to request legal representation based only on gender as to do so could give rise to unlawful discrimination.

Non-discrimination and Partnerships.

Many of the members of IWLA are partners in law firms or are employed by law firms which are partnerships. Provisions are detailed in relation to the non-discrimination of persons working in partnerships in Section 44 of the Equality Act 2010¹¹. It includes detail of non-discrimination when appointing a partner to the firm. Section 45 of the Act¹² deals with non-discrimination in Limited Liability Partnerships. Section 47 specifically deals with discrimination against barristers including in the arrangements for deciding whom to offer a pupillage or tenancy in chambers¹³. This is very detailed legislation specific to non-discrimination against workers in the area of law which would be very welcome in this jurisdiction. The glass ceiling, and perhaps even the glass cliff, is something which very much still applies in solicitors' firms in Ireland today and legislation of this kind could add more transparency to the selection of individuals being elevated to partner, and particularly managing partner. In relation to barristers, legislation of this sort would add some accountability to how barristers select pupils – particularly in those areas of expertise which are very imbalanced in terms of gender e.g. commercial law.

UK Perspective

In considering how the very limited provisions on positive action in the Employment Equality Act could be expanded on, we have considered the position in the UK.

The UK goes much further to recognise positive action by including detailed measures in the Equality Act 2010 to allow for positive action in the workplace. In Part 2, Chapter 1, Section 4 of the Act, the "protected characteristics" are set out. Sex is identified as

¹⁰ <https://www.irishtimes.com/news/crime-and-law/women-in-law-still-face-a-fight-for-gender-equality-1.3371389>

¹¹ <http://www.legislation.gov.uk/ukpga/2010/15/section/44>

¹² <http://www.legislation.gov.uk/ukpga/2010/15/section/45>

¹³ <http://www.legislation.gov.uk/ukpga/2010/15/section/47>

a “protected characteristic”. Positive action is addressed in Chapter 2 at Section 158¹⁴ (General) and Section 159¹⁵ (Recruitment and Promotion). These sections allow for what is possible to the extent permitted by European law.

General Positive Action¹⁶

General Positive Action would apply in an example where an employer identifies that they have fewer female managers compared to male managers. To try to overcome this perceived gender disadvantage, it may be proportionate to introduce a mentoring system for women or targeted networking opportunities for female staff. Proportionality is key when taking positive action. Employers need to first consider, before taking positive action, whether there are alternative measures available which would carry less risk of preferential treatment. A situation could arise in a workplace where, rather than paying for women employees to attend management training courses, the employer could, reserve spaces for women to attend.¹⁷

Positive Action in Recruitment and Promotion¹⁸

Certain difficulties can arise when utilising positive action in recruitment and promotion in practice. This section is intended, within the confines of European law, to allow the maximum extent of flexibility to address disadvantage and under-representation where candidates are as good as each other¹⁹. Positive Action in Recruitment and Promotion will apply where an employer reasonably considers that:-

“(a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or

(b) participation in an activity by persons who share a protected characteristic is disproportionately low.”²⁰

It would be permitted for an employer to treat a person with a protected characteristic more favourably at the recruitment²¹ or promotion stage, by enabling or encouraging persons to overcome or minimise that disadvantage, or to participate in that activity, if it reasonably believes that the representation of employees with the same protected characteristic is disproportionately low in their workplace.²²

¹⁴ <http://www.legislation.gov.uk/ukpga/2010/15/section/158>

¹⁵ <http://www.legislation.gov.uk/ukpga/2010/15/section/159>

¹⁶ This section of the Act does not apply to Gender Representation on Public Boards (Scotland) Act 2018 as per section 11 of that Act.

¹⁷ <https://diversityq.com/positive-action-to-promote-equality-in-the-workplace-1006298/>

¹⁸ This section of the Act does not apply to Gender Representation on Public Boards (Scotland) Act 2018 as per section 11 of that Act.

¹⁹ Equality Act 2010 Explanatory Notes, section 159, (520).

²⁰ Section 159 (1) (a) and (b) of the Equality Act 2010, UK.

²¹ The section defines recruitment broadly to include offers of partnership in a solicitors’ firm or barristers’ pupillage, or tenancy in barristers’ chambers.

²² See Explanatory notes on section 158 and 159 for more detail of Positive Action in the UK, <http://www.legislation.gov.uk/ukpga/2010/15/notes/division/3/11/2?view=plain>

This would only be permitted in the following circumstances:-

- (a) where the woman candidate is equally as qualified as the male candidate to be recruited or promoted²³.
- (b) the employer does not have a “blanket” policy of treating women more favourably in connection with recruitment or promotion than men, and
- (c) taking the action in question is a proportionate means of achieving the aim²⁴.

There are certain difficulties in practice in achieving this balance and the case of *Furlong v Police Constable 2017/18* highlights this. In this case a recruitment policy designed by the employer to increase diversity was found to be discriminatory. The scoring method applied in the process of recruitment was artificial. A greater number of candidates were considered to be as qualified as each other even where their skill sets were very different. Under the Act, the candidates were not deemed to be of “equal merit”.

It is clear that it is open to the state under EU law to implement positive measures in the employment context to address gender inequality and it is submitted by IWLA that such measures are needed as a matter of urgency. Such measures are required not only to address gender inequality from the perspective of individual workers but also to protect those employers who wish to take positive steps to do so but may not be protected in law in doing so. These are issues which are very pertinent to members of IWLA but in fact apply throughout working life in Ireland, to persons outside the legal sector.

Work Life Balance for Parents and Carers (Directive 2019/1158/EU)

Parental leave is taken much more frequently by women than by men. This social expectation, together with the lack of childcare facilities available, results in women often being forced to leave work.

Welcome legislation in this jurisdiction has increased the amount of parental leave that a person can take. This is reflected in the Parental Leave (Amendment) Act 2019. The amount of parental leave has increased from 18 weeks to 26 weeks with this increase is being phased in over a 2-year period. Part of this leave can be shared between both parents in certain circumstances. The Parent's Leave and Benefit Act 2019 also allows

²³ In this case the positive action would operate to permit the employer to select the woman candidate when all other factors are equal.

²⁴ In this case, addressing the gender imbalance, by increasing the number of female employees in the employer's workforce.

a parent two weeks leave. This legislation is beneficial to mothers in that it allows their partners to also take some time off. The sharing of leave between parents is particularly beneficial in addressing the social expectation that only women are the ones who wish to take such time to care for their children. This limits the impact on a woman's career, by sharing that impact with her partner, while still ensuring that children have the benefit of time with their parents. These are measures which could be further expanded on.

- **Please identify the steps to be taken to address the issues raised and who should address them (e.g. the state, private sector, education system etc.)**

State

The State has the opportunity under EU law to legislate for positive action measures to address gender inequality in a much more expansive and effective manner than it has done to date. This is an opportunity which should be taken without delay. Such positive action measures could apply to workers irrespective of whether they are employed as employees or in a different capacity. It is the gender inequality across society which needs to be addressed and there is no point in limiting any such measures to a defined group of workers. There is no requirement to do so either, in light of the scope of the Employment Equality Act as it currently stands. The State should provide more support for family care to remove the gender stereotype of women in the role of carer.

State Best Practice Measures

When allocating state funding or tenders a gender balanced commitment must be demonstrated by a successful party. This is more than requiring a party to commit to non-discrimination but in fact should commit to gender balance, which balance should be demonstrated.

Example in the legal sectors could be as follows:-

- Legal aid could be assigned on a gender equal basis in prosecution and defence work in criminal law. In high profile trials where all counsel are male, this gives the impression to the public that only men are capable of working on the big cases. This is a perception which negatively affects women.
- A law firm tendering for legal services to a public body should confirm that their when nominating personnel to provide the services in question this is done on a gender balanced basis at all levels – partner, associate and when instructing counsel.

Private sector

What employers can do:

The Equality and Human Rights Commission in the UK published a report in April 2016 to the Consultation: Women in executive management inquiry²⁵ which recommends the following action for employers:-

- i) Incorporate objective, formal recruitment practices that direct focus on ability rather than networks;
- ii) Implement blind recruitment (for example remove names or gender from job applications);
- iii) Provide training to interviewers on unconscious bias and promoting diversity;
- iv) Encourage women to apply for particular positions by way of outreach;
- v) Utilise targets to provide focus on resolving gender imbalance; and
- vi) Avoid adopting recruitment policies that favour candidates sharing a protected characteristic, where possible.
- vii) Any recruitment policy implemented should only be temporary otherwise it will run the risk of being disproportionate.
- viii) When using positive action in the recruitment process, the scoring system identifying 'equal merit' should be robust.

There are currently risks involved when positive action is taken by an employer. It is important to note that the risk of employers passing over talented candidates based on unconscious gender perceptions is much greater. There is a lot more work to be done before gender balance in the workforce is achieved. Irish businesses should promote women in the workplace using positive action as appropriate, to achieve a more balance workplace environment.

Barristers

It needs to be addressed that when solicitors, the State and clients continue to brief the same male barristers, junior and senior, that they may in fact be passing over real talent by not briefing women for the job. Rather than jumping to hire the top male barristers, it is women barristers that could be considered for a case. More women barristers, both junior and senior counsel, could be added to solicitors, the State's and insurance panels, as it is mostly men that dominate these internal panels.

More outreach is required to encourage women to devil in commercial and criminal law.

²⁵ <https://www.equalityhumanrights.com/en/legal-responses/consultation-responses/response-equality-and-human-rights-commission-consultation>

Arbitration

A Pledge²⁶ has been taken globally in international arbitration that the international arbitral institutions will have at least 20% women arbitrators on their list of recommended arbitrators when providing a list to a client. This is something we could pledge to do here in Ireland when recommending a mediator or arbitrator domestically to widen awareness of the pool of available talent.

Work Life Balance Directive

This Directive provides an opportunity for change for employers to set more flexible working policies for their employees. The chance to share parental leave between parents would mean that not all caring obligations are directed towards woman. The State could support family care more which would help to remove the gender stereotype.

The Rooney Rule

The Rooney Rule refers to a recruitment strategy when hiring for head coaching vacancies in football. A team must interview at least one minority candidate. This has led to more hiring of minorities, over 20% overall. This is a strategy that businesses in Ireland could adopt to strive to achieve gender balance in the workforce.

The “Mansfield Rule”²⁷ is a global initiative that certifies that law firms consider at least 30% diverse lawyers for all governance and leadership roles. This initiative could be adopted by law firms in Ireland.

Men as agents of change

The vast majority of leadership positions are occupied by men. They could be called the ‘gatekeepers’ to the positions of power. One of the driving forces for change is the engagement of male senior leaders in the worlds of legal, corporate and politics. They can make a point of encouraging and promoting women in the workforce. The first woman Examiner was appointed in Ireland in June 2019, just one day after comments were made by Mr Justice Haughton of the Commercial Court that no woman had ever been appointed an Examiner in Ireland since the law was passed in 1990.²⁸

²⁶ <http://www.arbitrationpledge.com/>

²⁷ <https://www.diversitylab.com/pilot-projects/mansfield-rule-legal-department-edition/>

²⁸ <https://www.irishtimes.com/business/retail-and-services/court-appoints-first-woman-examiner-to-restaurant-business-1.3972285>

Submission on Gender Pay Gap

The attached submission on the Gender Pay Gap was made by IWLA in the context of the Public Consultation Process on measures to address the Gender Pay Gap. IWLA relies on this submission in respect of the issues raised under Theme 2 for consideration by the Citizens Assembly.



THE IRISH WOMEN LAWYERS ASSOCIATION

SUBMISSION ON MEASURES TO
TACKLE THE GENDER PAY GAP

The Irish Women Lawyers Association has amongst its members women employed in the legal professions, as solicitors, barristers, academics and also includes law students and trainees. The three pillars of the Irish Women Lawyers Association are:

1. Networking

- Providing a professional and social network for women lawyers in Ireland.
- Maintaining a forum for the exchange of ideas amongst such women
- Creating and enhancing awareness of women's contribution to the practice and development of the law

2 Advocacy & Advancement

- To encourage and assist the entry of women into the legal profession and their advancement
- To represent, advocate for and promote the interests of Irish women
- To promote career opportunities for women within the legal profession and the exploration of alternative work options

3 Education

- To enhance the legal knowledge and skills of women lawyers in Ireland by providing continuing legal education seminars consistent with IWLA objectives
- Promoting educational awareness both in the law and in areas that interact with or impacts upon the law
- To affiliate with academic institutions and with other third parties with similar objectives.

INTRODUCTION

The Irish Women Lawyers Association (“IWLA”) welcomes the opportunity to engage in this public consultation process offering a perspective pertaining to the gender pay gap within the legal sector on behalf of its members. In particular we seek to offer suggestions as to the questions posed in the consultation invitation, namely:

- the factors creating the gender pay gap within the legal sector;
- the actions that need to be taken; and
- whether the IWLA can contribute to implementing these actions.

Executive Summary

The IWLA submits that there are unique characteristics which apply to the engagement of lawyers which should be considered in any reporting obligations on the gender pay gap which are introduced. In particular the IWLA submits that the scope of any reporting requirements should be sufficiently broad to encompass barristers and self-employed solicitors.

Failing to do so would remove a large cohort of workers from the context within which this important issue is considered. The impact of this would result in a lost opportunity to properly consider the underlying reasons for the gender pay gap in the sector. The opportunity to properly address those issues will also be lost.

The IWLA therefore makes proposals in this submission such that the definition of “worker” which is adopted for the purposes of reporting obligations on the gender pay gap, reflects the definition in the Employment Equality Act, 1998 (as amended). This would result in barristers and self-employed solicitors and other self-employed workers in the legal sector being included in any reporting requirements.

The IWLA submits that the state should adopt voluntary best practice reporting measures to address the gender pay gap.

Further the IWLA submits that the reporting mechanism which is introduced should be one which produces meaningful results from which the reasons for a gender pay gap can be properly identified with a view that positive steps can be taken to address those underlying issues.

Gender pay gap within the legal sector

The IWLA is aware that there is a gender pay gap in the sectors in which its members work:

- academic institutions
- law firms
- self-employed barristers, both junior and senior counsel
- in-house legal positions

There are substantially less women senior counsel than male, less female junior and senior counsel practicing in Commercial law, fewer women partners in legal firms, fewer equity partner women solicitors and fewer women judges.

While it is very difficult to ascertain the precise extent of the gender pay gap in the legal sector, having regard to the large number of self-employed workers (barristers and partners in law firms), it is still apparent that a gender pay gap exists.

This has been estimated as being in the region of 20%.²⁹ As regards barristers, it is currently very difficult to be specific as to a gender pay gap in this profession, given that barristers are self-employed. However, having regard to an analysis carried out in 2014, in respect of fees paid by the Office of the Attorney General to barristers engaged on behalf of the state, a very concerning picture emerged as to gender inequality in respect of fees, including that female senior counsel who work for the state are getting paid less for each brief than men.³⁰

Further evidence is apparent when one considers the gender breakdown in respect of criminal legal aid fees paid by the state in 2016 to barristers, wherein the top 12 junior counsel in that year were men and only one woman made up the top 20 senior counsel fee earners.

Important research was carried out in 2003 which considered many of the issues relevant to the gender pay gap in the legal sector.³¹ At that stage the research clearly indicated a gender pay gap in

²⁹ In its report *Gender Pay Gap Ireland 2016*, Morgan McKinley, in collaboration with Emolument.com estimated that the gender pay gap in the law sector was 20%.

³⁰ Irish Times. 20 January 2014. Elizabeth Fitzgerald. "Barrister Fee records reveal scale of gender inequality"

³¹ Gender Injustice. *Feminising the Legal Profession*. Ivana Bacik, Cathryn Costallo and Eileen Drew. Trinity College Dublin Law School. 2003

respect of the legal sector in both the private and public sectors. The IWLA is currently undertaking research to update the findings made in 2003 and to consider whether the situation has changed.

Factors creating the gender pay gap within legal sectors

While there are many factors which give rise to this situation the following are likely contributing factors:

Barristers:

- Barristers receive their work from solicitors. Sometimes the solicitors are directed in their briefing policy by their client and otherwise the solicitor has autonomy over who they choose to brief. Unconscious bias can result in solicitors' briefing policy being informed by stereotype impressions as to gender preference, suitability or ability for different work areas. For example, there can be a perception that female barristers are more suitable for family law matters, litigation relating to children, medical negligence cases relating to gynaecological health or personal injuries cases involving female plaintiffs with scar injuries. In matters of criminal law, female barristers may be more likely to be briefed in rape cases and male barristers in murder cases.³²
- Commercial practices at the bar remain predominantly male practices with the resultant higher earning potential associated with a practice of this nature. This is exacerbated by the existence of a natural male network within the sector which has the effect of making it more difficult for women barristers to infiltrate. In other words, it becomes more challenging for women lawyers to achieve the experience and the profile necessary to encourage commercial law firms to instruct them in such cases.
- On occasion the bias may be conscious or unconscious but may not be bias on the part of the instructing solicitor but that of the engaging client. However, where the bias is that of a client, it may well be passed on in the briefing policy of the firm.³³

³² The Gender Injustice Report (2003) identified an over-representation of female lawyers in family law and an over-representation of male lawyers in commercial, competition, EU and criminal law.

³³ In the event that the basis for the client's preference is discriminatory, this may constitute a "direction to discriminate" to the instructing solicitor, which is prohibited as unlawful discrimination under both Irish and European equality legislation. However this is not something which can currently be readily identified.

- Solicitors on occasion may also consider that it is more important to brief male barristers, being the “breadwinners” in their households and on occasion consider that female barristers are practicing for reasons other than financial necessity.
- From the perspective of barristers, a risk of losing ones’ practice if a female barrister takes time out for maternity purposes discourages some women from taking time off work. This can have serious health and safety implications for these workers which can make their career at the bar unsustainable in the long term.
- Many women barristers who have busy practices and busy family lives do not have the time available to professionally network to further develop their practices, nor to engage in other professional activities which could assist them in becoming senior counsel at a later stage.
- Male barristers may have more time available in the evenings to work than their female colleagues who have families. This results in male barristers being in a position to be more productive with the resultant higher earnings from their higher productivity.
- There are substantially fewer female senior counsel than male, which has the knock-on effect of a more pronounced gender pay gap at senior levels in the profession.
- When all other factors have been taken into account, discrimination on the grounds of gender remains a possible factor.

Solicitors

- Similar unconscious bias can pertain to female solicitors who are subjected to stereotyping as regards the work they undertake. The bias can arise from the client or it can arise within particular practices.
- This manifests itself in female solicitors perhaps being considered more suitable for family type law versus criminal or commercial law.³⁴
- Women solicitors can be perceived as being potentially less available to provide the level of productivity required in the long hours culture in many firms.
- This can arise in the context of women lawyers who have children or are perceived as likely to have children.
- A culture of long working hours driven by billable hours practices in law firms, can become unfeasible for some women in the context of family commitments, either in respect of young children or caring responsibilities for elderly persons, or for other personal reasons.

³⁴ The Gender Injustice Report (2003) identified an over-representation of female lawyers in family law and an over-representation of male lawyers in commercial, competition, EU and criminal law.

- This can result in a lower number of woman lawyers being willing or available to progress to senior ranks within their practices.
- Discrimination on the grounds of gender can also be a possible factor.

Actions that need to be taken

The IWLA submits that, many measures could be taken relating to increasing awareness at educational level and professional level, providing training and mentoring for women lawyers to encourage their professional development³⁵, and further efforts to support women in relation to needs which they and their families may have as regards childcare or elder care, together with family appropriate working hours. These points have been well articulated to date by many contributors to this and other consultation processes in relation to gender pay equality. The IWLA supports calls for further action in respect of these measures.

Proposals

In addition, the IWLA, in suggesting action that should be taken, for the purposes of this submission, seeks to focus on the unique factors which pertain to the legal sector, as outlined in the Introduction above.

The IWLA is of the view that comprehensive reporting of matters relating to the gender pay gap in the legal sector will assist the understanding of the factors giving rise to such a pay gap. Understanding those factors will better enable the sector to address the underlying causes for such a gap, and hence can contribute positively to the reduction of the pay gap and the elimination of inequality within the legal sector. The reporting mechanism which is adopted should be one which can produce valuable information which can be used to achieve positive results. An inadequate and incomplete reporting structure of a limited cohort of workers would possibly produce information which will not provide the same opportunities for redressing the gender pay gap which exists.

³⁵ Mentoring could be implemented through mentoring programmes using/supporting the model recently adopted by The Law Society of Ireland and Bar of Ireland in collaboration with IWLA: The Law & Women (L&W) Mentoring Programme.

From the perspective of the Irish Women Lawyers Association, there are 3 specific actions which should be adopted when considering any requirement to report on a gender pay gap:

1. The scope of any reporting requirements should encompass workers who meet the definition in the Employment Equality Act and not be limited to employees.
2. Government departments and state bodies should report on the gender pay gap in respect of all persons who provide personal service, irrespective of whether those persons are employees.
3. The reporting mechanism which is adopted should be one from which meaningful results can be identified.

1. Employment status

Employees are workers who are engaged pursuant to a contract of employment, being a contract of service.

Barristers are predominantly self-employed. While barristers provide personal service to a solicitor who engages them on behalf of a client, they are not employees. Solicitors, legal secretaries, legal administrators, and legal academics may also be engaged pursuant to contracts which are not contracts of employment. Partners in law firms are not employees.

Any measures to report on the gender pay gap in respect of employees only, will result in a large cohort of workers in the legal sector remaining outside any such reporting. This is a sector in which there is large female worker representation, and any under-reporting in this sector must be avoided.

The IWLA submits that this should be addressed by ensuring that the scope of any reporting requirements should not be limited to persons who are employees. In that regard, we propose the following:

- **The scope of any measures to address the gender pay gap, including any reporting mechanisms and requirements which are implemented, should apply to workers as defined by the Employment Equality Act, 1998. This would therefore include persons engaged under a contract “whereby he or she agrees with another person personally to execute any work”.**

The IWLA submits that it is appropriate that any measures which are introduced are extended to workers, as defined by Employment Equality legislation. This is the practice which has been adopted in the UK where the definition in the Equality Act, 2010 is used for gender pay reporting purposes. Not only would this have the effect of including within any such process workers who are engaged to provide personal service but it would be appropriate that there be a consistent approach to equality measures and anti-discrimination measures on a general basis.

It should be noted that it is not just the legal sector which is populated by workers, who are not employees. Modern employment practices throughout the Irish economy are such that many workers are not deemed to be employed under contracts of employment. Atypical contracts are common which are devoid of the legal concept of mutuality of obligation, which has the effect of depriving the workers under such contracts of establishing that they are employees, notwithstanding that in many other respects workers are de facto employees and in particular are providing personal service. Such contracts include zero hour contracts, "if and when" contracts and other contracts of personal service, but without the express obligation on the worker to accept all work offered to the worker. If a traditional definition of employee is used, a huge cohort of workers, and in particular female workers, would be excluded.

In circumstances where the Irish Women Lawyers Association is of the view, that a gender pay gap exists within the legal sector, any limitation in the scope of the measures adopted which would exclude these persons would serve to perpetuate such a gap and would result in a missed opportunity to address this issue. It would leave entirely unaddressed a large cohort of female workers who are already earning less than their male counterparts.

2. Public Sector Measures

The Irish state is the largest single consumer of legal services. In that context, it is reasonable that any gender pay gap which exists as between lawyers engaged by the state is identified. If identified, it should be addressed. In that context, irrespective of any measures which are ultimately imposed on private sector employers, the IWLA submits that all government departments and state bodies, and any bodies which discharge pay to persons they engage to provide personal service, from public funds, should adopt a voluntary best practice model as regards gender pay gap reporting. This would include the Attorney General, The Chief State Solicitor, The HSE, The DPP and any other state bodies who use or fund the engagement of persons to provide legal services. The IWLA therefore proposes that the state adopt:

- **Voluntary gender pay gap reporting of all legal services procured by means of public funds.**
- **Law firms who provide legal services to the state should in any procurement or tendering competition or process for the provision of such services, report the gender pay gap in their firm, to include counsel fees and partner income.**

3. Reporting Mechanism

The Australian model for reporting on the gender pay gap considers the like-for-like remuneration of standardised occupational categories.

The model adopted in the UK is based on a calculation which applies to all persons working for a particular employer, including the most senior management. There is no room within the model for a calculation which compares persons with the same or similar jobs or working hours. Given the principle of equal pay for equal work, the IWLA submits that a model which does not report on “like for like” work would not conform with this principle.

The IWLA submits further that a model of this nature will not produce results which will readily assist a willing employer to identify the underlying reasons for a gender pay gap and to eliminate discrimination where it exists.

- **The IWLA submits that a reporting model should be adopted which produces meaningful results from which positive measures to address the gender pay gap can be developed. The IWLA submits that the Australian model is more appropriate as a guide for an Irish reporting model than the model adopted in the UK.**

This is particularly appropriate in the context of legal fees, where a like for like comparison is essential to properly identify the gender pay gap. Pursuant to a Freedom of Information request on the part of the Irish Times in 2014, an analysis of fees paid to barristers engaged by the Attorney General in the period from 2002 to 2012 was carried out. While the average payment to female senior counsel grew from 47 per cent of the average payment received by male senior counsel in 2002 to 97 per cent of the average payment received by male senior counsel in 2012, the average payment per brief as a

different measure provided “*startling results*” with the average payment per brief for female senior counsel just 88 per cent of that of male senior counsel, although this was a significant improvement from 58 per cent in 2002. According to the Irish Times, these figures indicated that female senior counsels were “*taking more briefs and getting paid less for each brief*”. The question was posed “*Are male senior counsels getting more complicated and time-consuming work or are they charging more for equal services?*”³⁶

The IWLA submits that gender pay gap reporting will identify questions such as this and will enable such questions to be answered.

Comparing pay at associate or junior level in law firms may produce a very different picture than when pay at senior and partner level is compared.

Again, the IWLA submits that the “equal pay for equal work” principle ought to be reflected in the reporting model which is adopted.

Whether the IWLA can contribute to implementing these actions.

The IWLA is committed to working with its members in advocating for measures to reduce the gender pay gap in the legal sector.

³⁶ Irish Times. 20 January 2014. Elizabeth Fitzgerald. “Barrister Fee records reveal scale of gender inequality”

Conclusions

1. The Irish Women Lawyers Association strongly recommends that a large cohort of Irish women lawyers are not excluded from the current discussion on gender pay equality by limiting the scope of any measures that are adopted by ensuring that they are extended to:-
 - barristers,
 - partners in law firms,
 - all lawyers, administrators, academics and others within the legal sector engaged on atypical contracts.

2. Best practice voluntary reporting measures should be adopted in respect of the engagement of persons who provide personal service, for the state or where funded by the state.

3. Having regard to the principle of equal pay for equal work, any reporting mechanisms which are adopted should result in a comparison of “like with like” situations in order that meaningful information can be obtained and analysed as to where a gender pay gaps exist and the reasons for same.