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Submission by Council of The Bar of
Ireland and the Employment Bar
Association to the Citizens' Assembly
on Gender Equality

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Introduction

Elimination of the gender pay gap and other forms of gender inequality in Ireland will require a fundamental shift in the workplace culture and in society generally. However, according to the World Economic Forum's "The Global Gender Gap Report 2020", at the current rate of progress, gender parity will not be attained for 99.5 years, meaning none of us will see gender parity in our lifetime.¹ It is clear therefore that a radical change in approach is needed if we are to eliminate gender inequality in the foreseeable future.

Legislation and Government policies can greatly assist with tackling these issues. The benefits of doing so will not only increase wealth for individual women and their households but will accrue to the Irish economy and to Irish society generally.

Why we need to fix this problem

The Bar of Ireland and the Employment Bar Association welcome the opportunity to make this submission on gender equality to the Citizens' Assembly. The Bar of Ireland is the representative body of approximately 2,170 barristers who are members of the Law Library and practising as independent sole practitioners at the independent referral bar. The Employment Bar Association is an association of Senior and Junior Counsel who are members of The Bar of Ireland and who specialise in employment, equality and labour law. We are acutely aware of the legal landscape facing women and men, employers and employees in Ireland and the potential benefits to all if gender equality can be achieved.

According to Eurostat, the average gender pay gap in Ireland is 14.4%, despite the fact that equal pay legislation has been in force for decades.² This results in the even more worrying gender pension gap of 27.6%.³ Furthermore, women remain far under-represented at the top of corporate positions in Ireland, for example, women hold just 19.1% of directorships in Irish listed companies.⁴

¹World Economic Forum "The Gender Gap Report 2020": <https://www.weforum.org/reports/gender-gap-2020-report-100-years-pay-equality>

² Gender pay gap difference between average gross hourly earnings of male paid employees and of female paid employees as a percentage of average gross hourly earnings of male paid employees; 2017 data: https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics

³ "Closing the Gender Pay Gap" (2020) <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200207-1> (Irish data available through link under infographic).

⁴ Balance for Better Business, Second Report, November 2019. <https://betterbalance.ie/wp-content/uploads/2020/01/B4BB-Second-Report-2019-Single-Pages.pdf>

Ireland ranked 17th of the EU-28 countries in 2019 for representation of women on the board of large publicly listed companies.⁵

The gap between women and men is evident worldwide. It derives from outright discrimination and a complex web of factors that influence and constrain the options open to women, with parenthood being the moment that the gap widens when mothers take a wage penalty while fathers enjoy a premium.⁶

Therefore, tackling the gender pay gap should be one of a range of measures which the State should undertake to facilitate increased female participation in the labour force and reduce the ‘motherhood penalty’ which affects all working mothers.^{7,8}

If this is done effectively, the evidence is that,

“Improving female participation in work across the OECD could boost OECD GDP by US\$6 trillion, while closing the gender pay gap could boost GDP by US\$2 trillion.”⁹

Equal opportunities for men and women are not a luxury, and when societies are more equal the benefit accrues to individuals, families and the economy generally.¹⁰

The factors creating the gender pay gap

Work done by women is not valued as highly as that done by men. This is backed up by the results of a study¹¹ on US census data from 1950 to 2000 which showed that when women enter fields in greater numbers than men, pay decreases.

⁵ *Ibid.*

⁶ As per the submission by economist Laura Tyson to the World Economic Forum in 2019: <https://www.weforum.org/agenda/2019/03/an-economist-explains-why-women-get-paid-less/>

⁷ Balance for Better Business, Second Report, November 2019. <https://betterbalance.ie/wp-content/uploads/2020/01/B4BB-Second-Report-2019-Single-Pages.pdf> : Significant challenges remain in maintaining harmony between caring responsibilities and employment, particularly in relation to the costs of childcare. These issues impact on women’s career development and management at earlier stages which can ultimately limit overall achievement.

⁸ While EU Directive 2019/1158 on Work Life Balance is to be welcomed it does not go far enough and radical changes are required.

⁹ PCW Women in Work Index, p.2: <https://www.pwc.co.uk/economic-services/WIWI/pwc-women-in-work-2019-final-web.pdf>

¹⁰ <https://eige.europa.eu/gender-mainstreaming/policy-areas/economic-and-financial-affairs/economic-benefits-gender-equality/activity-pay>

¹¹ Asaf Levanon, Paula England and Paul Allison “Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950-2000 US Census Data” *Oxford Journal Social Forces* Vol 88 Issue 2 <https://academic.oup.com/sf/article/88/2/865/2235342>

“In one deft data moment the idea that women deserve (and effectively opt for) lower pay because they ‘choose’ less lucrative jobs that suit them better was turned on its head. The pay in nursing and teaching isn’t low in comparison to other sectors by accident or because women are better at ‘caring’ roles; the wages are lousy because these jobs are dominated by women, whose work is undervalued.”¹²

Also the majority of part-time workers are women; arguably this is as a result of the disproportionate share of childcare and household responsibilities shouldered by women.

For this reason women are also more likely to have more limited employment options, which also impacts on the remuneration they are likely to receive.

The actions that need to be taken

Pay

- Implement pay transparency in all organisations, either full transparency or as salary scales or pay grades.¹³ Full transparency would mean that everyone’s salary would be known within each organisation. An alternative would be for organisations to implement salary scales (similar to the public service).
- Implement transparency on how companies make compensation decisions.
- A ban on individual salary negotiations¹⁴; this is one solution which has been implemented in a number of US organisations¹⁵.
- Companies should be encouraged to actively close the gender pay gap at remuneration reviews¹⁶ as some companies in Australia have done.

Recruitment / Internal promotions

- Gender quotas at all levels of an organisation, to be introduced on an incremental basis.¹⁷

¹² Catherine Fox, *Stop Fixing Women: Why Building Fairer Workplaces is Everyone’s Business* (New South Books, 2017) p. 77

¹³ <https://www.forbes.com/sites/kimelsesser/2015/11/19/two-solutions-for-the-gender-pay-gap-that-can-be-implemented-today/#3ad10e732d35>

¹⁴ <https://www.theguardian.com/commentisfree/2017/aug/02/ban-individual-salary-negotiations-gender-pay-equality>

¹⁵ <https://www.shrm.org/hr-today/news/hr-magazine/pages/0915-salary-negotiation-bans.aspx>

¹⁶ Ibid; p86

¹⁷ The Organisation for Economic Co-Operation and Development (OECD) recommends gender quotas: <http://www.oecd.org/social/quotas-gender-equality.htm>; France reports success with gender quotas according to an Irish Times report of 1 February 2020: <https://www.irishtimes.com/business/economy/france-shows-gender-quotas-work-in-business-while-targets-do-not-1.4157942?mode=amp>

- Gender blind paper-sift stage for interview (i.e. CVs anonymised to eliminate unconscious bias prior to interview stage), both for new hires and for internal promotions.¹⁸
- Internal promotions to be advertised and a transparent recruitment process followed.
- Recruitment consultants to be obliged to provide a gender-balanced shortlist for interviews.
- Ensure that employees who are on maternity or parental leave are aware of their rights and don't miss out on pay reviews or promotion opportunities.¹⁹

Changes in the workplace

- A right to properly paid maternity leave; Ireland performs badly on paid maternity (and paternity) leave in comparison with other countries;²⁰
- A right to properly paid compulsory paternity leave on a use-it-or-lose-it basis for 3-6 months after the mother's maternity leave has ended²¹;
- The cost of paying for maternity and paternity leave to be borne by the State in order to avoid disincentivising the employment of prospective parents;
- A right to share maternity leave and benefits between parents.²²
- Organisations should ensure that performance is assessed and rewarded in a way that ensures that women are not unfairly penalised by supposedly gender-neutral performance targets that disadvantage female ways of working (e.g. promotions only open to full time employees);
- Gender targets should be embedded in manager key performance indicators (KPIs).²³

Care²⁴

- Men and women need *equal* opportunity for access to and involvement in care work;²⁵

¹⁸ Gender blind recruitment works: <https://gap.hks.harvard.edu/orchestrating-impartiality-impact-%E2%80%9Cblind%E2%80%9D-auditions-female-musicians>

¹⁹ While this is already a legal requirement under the Employment Equality Act 1998, it should be enforced not only by individuals making complaints under the Act but also by means of annual inspection/report.

²⁰ See the UNICEF report on family friendly policies from June 2019: <https://www.unicef.org/press-releases/sweden-norway-iceland-and-estonia-rank-highest-family-friendly-policies-oecd-and-eu>

²¹ Rebecca Asher, *Shattered: Modern Motherhood and the Illusion of Equality* (Vintage, 2012). This approach has worked in Canada: <https://www.theguardian.com/world/2018/jun/15/the-daddy-quota-how-quebec-got-men-to-take-parental-leave#maincontent> and in Spain: <https://www.independent.co.uk/voices/parental-leave-dads-paternity-children-work-a8950331.html>

²² This will be of particular benefit where the mother is self employed and the father is employed. See the Shared Maternity Leave and Benefit Bill, initiated on 12 July 2018 by the Opposition but not progressed beyond the Dail second stage and lapsing on the dissolution of the Dail on 14 January 2020.

²³ Catherine Fox, *Stop Fixing Women: Why Building Fairer Workplaces is Everyone's Business* (New South Books, 2017)

²⁴ With some amendments and additions, these proposals are taken from Claire O'Hagan, *Complex Inequalities and Working Mothers* (Cork University Press, 2015). Ms O'Hagan is Research Fellow working on gender equality at the University of Limerick.

²⁵ <https://www.irishtimes.com/news/social-affairs/irish-spend-over-30-hours-a-week-doing-unpaid-care-housework-1.3951214?mode=amp>

- The state should provide universal accessible and affordable childcare and, as an alternative option for families, tax credits for care in the home.²⁶ It is to be noted that tax credits are available for elder care but not for child care.²⁷
- Schools should provide after-school care and activities. This would have the additional benefit of providing all children with equal opportunities to pursue activities which are currently often reserved to more affluent socio-economic groups;
- Shorten the working week, as has been done in Denmark²⁸.
- A right to properly paid maternity leave; Ireland performs badly on paid maternity (and paternity) leave in comparison with other countries;²⁹
- A right to properly paid compulsory paternity leave on a use-it-or-lose-it basis for 3-6 months after the mother's maternity leave has ended³⁰;
- The cost of paying for maternity and paternity leave to be borne by the State in order to avoid disincentivising the employment of prospective parents;
- A right to share maternity leave and benefits between parents.³¹

Legislation / public policy

- There should be compulsory publication of the gender pay gap for companies with over 50 employees, similar to the new requirement in the UK,³² however Ireland should adopt a statutory enforcement mechanism with financial penalties for failure to comply. The Gender Pay Gap Information Bill, introduced by the Government on 4 April 2019 was not progressed beyond the Dail third stage on 13 May 2019 and lapsed with the dissolution of the Dail on 14 January 2020. It is to be noted that this Bill did not include any financial penalty for employers in breach of its provisions.

²⁶ <https://www.irishtimes.com/business/economy/high-childcare-costs-keeping-women-out-of-workplace-study-1.3617000?mode=amp>

²⁷ <https://www.revenue.ie/en/personal-tax-credits-reliefs-and-exemptions/health-and-age/dependent-relative-tax-credit/index.aspx> Note that these are available even if the person for whom care is provided is not incapacitated, depending on the relationship between the person receiving care and the person providing care.

²⁸ Ibid, p.184

²⁹ See the UNICEF report on family friendly policies from June 2019: <https://www.unicef.org/press-releases/sweden-norway-iceland-and-estonia-rank-highest-family-friendly-policies-oecd-and-eu>

³⁰ Rebecca Asher, *Shattered: Modern Motherhood and the Illusion of Equality* (Vintage, 2012). This approach has worked in Canada: <https://www.theguardian.com/world/2018/jun/15/the-daddy-quota-how-quebec-got-men-to-take-parental-leave#maincontent> and in Spain: <https://www.independent.co.uk/voices/parental-leave-dads-paternity-children-work-a8950331.html>

³¹ This will be of particular benefit where the mother is self employed and the father is employed. See the Shared Maternity Leave and Benefit Bill, initiated on 12 July 2018 by the Opposition but not progressed beyond the Dail second stage and lapsing on the dissolution of the Dail on 14 January 2020.

³² The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017

- Publication of the gender pay gap is of itself insufficient to effect change.³³ Companies should also be obliged to report on their policies on this topic; this should include the information required in Directive 2014/95/EU on this topic, i.e.
 - A description of their policies;
 - Any due diligence processes implemented in pursuance of the policy;
 - A description of the outcome of the policy;
 - If they have no policy on closing the gender pay gap, they must provide a clear and reasoned explanation for not doing so.

- The Employment Equality Act 1998 applies not only to employees but also to persons contracted personally to execute any work or service.³⁴ Measures designed to tackle the gender pay gap should similarly extend beyond employees to persons contracted personally to execute any work or service. This means that sole practitioners - such as accountants, barristers and IT professionals - will benefit from the measures. This in turn will mean a greater benefit to society. This will also prevent any attempts to avoid such measures by engaging 'independent contractors' rather than 'employees'.

- The Council of The Bar of Ireland ("the Council") is currently engaging in efforts to promote equality of opportunity for barristers, who as members of the Law Library are independent sole practitioners. Taking the lead from its counterparts in Australia (National Model Gender Equitable Briefing Policy)³⁵ and New Zealand (Gender Equitable Engagement and Instruction Policy)³⁶, the Council is committed to taking measures which address the under-representation of women in certain areas of practice through the introduction of an equitable briefing policy.

The purpose of an equitable briefing policy is to encourage those who brief the Bar to make a conscious effort to look beyond their usual pool of barristers and to assist in the equitable distribution of briefing to male and female counsel, in all areas of practice. Equitable briefing practices optimise opportunities for the practice development of all counsel and maximise choice for legal practitioners and their clients by promoting the full use of the Independent Referral Bar. In short, an equitable briefing policy asks that all reasonable endeavours are made to increase the number of women briefed in practice areas where women are not briefed, or are infrequently briefed, in order to ensure fair promotion of women generally

³³ On 23 April 2019 the Financial Times reported that "The UK's gender pay gap has barely budged in the year since the government imposed new disclosure rules, raising questions over whether its strategy of naming and shaming employers makes them improve their gender pay balanced." <https://ig.ft.com/gender-pay-gap-UK-2019/>

³⁴ The Employment Equality Act 1998, section 2 as amended defines 'contract of employment' to include a contract personally to execute any work or service, thereby bringing sole practitioners who are not employees within the ambit of the Act.

³⁵ https://www.lawcouncil.asn.au/files/pdf/policy-guideline/National_Model_Gender_Equitable_Briefing_Policy_updatedversion.pdf

³⁶ https://www.nzbar.org.nz/sites/default/files/uploaded-content/field_f_content_file/gender_equitable_engagement_and_instruction_policy_dec_2017.pdf

and to address historic inequality. Briefing entities are therefore encouraged to give genuine consideration to the skills and competency of counsel, regardless of gender, and should avoid inappropriate assumptions about the capacities and aptitude of female and male counsel. Where there is equally capable male and female counsel available, arbitrary and prejudicial factors should not operate to exclude the engagement of female counsel.

Measures to evaluate the impact of the policies introduced in Australia and New Zealand require briefing entities who have adopted the policy to submit to the relevant bar association, each year, a confidential report with an outline of their briefing practices and the measures they have taken to implement the policy. Briefing firms are therefore required to develop the capacity to collect data and to report upon that data so as to identify the nature of engagement with counsel. The confidential report is expected to address separately the figures for male and female barristers in respect of, inter alia, the monetary value of briefs and the pay rates. The obligation to submit an annual report will thus assist the briefing entity in assessing its success or otherwise in the implementation of the policy and to initiate steps, where necessary, to widen the pool of barristers it briefs to include barristers of all genders in line with the recommended targets of the policy. It will also work to expose any discrepancies in pay rates according to gender and enforce the principle of equal pay for like work.

The adoption of a similar policy in Ireland would greatly enhance and reflect community expectations of fairness in all aspects of the administration of justice. Given that State bodies are the largest single consumer of legal services, the State can play a significant role in taking the lead and establishing best practice in terms of fair and equitable engagement of counsel and to set a standard which is hoped private firms would seek to emulate. The Council is currently seeking the cooperation of some of the largest briefing authorities in the State, such as the Office of the Director of Public Prosecutions, the Legal Aid Board, the State Claims Agency, the Chief State Solicitors Office and the Office of the Attorney General, in ensuring equal participation of both genders in the provision of legal services, and thereby ensuring a profession which is much more representative of the composition of the community it serves.

Additional enforcement measures

As an additional enforcement mechanism for the above policies, companies that contract with the State or that are in receipt of State funding should be obliged to submit to a pay audit to ensure that they are complying with their equal pay obligations.

In the US, federal contractors (i.e. any company in receipt of federal funds) is required to allow the US Department of Labor (DoL) to inspect and copy records and information about its compliance with equal opportunity laws. This has led to the DoL suing Google for compensation data³⁷, the data that it has uncovered has revealed “systemic compensation disparities against women”³⁸.

³⁷ <https://www.dol.gov/newsroom/releases/ofccp/ofccp20170104>

³⁸ <https://www.theguardian.com/technology/2017/apr/07/google-pay-disparities-women-labor-department-lawsuit>

As a further measure, companies that contract with the State or that are in receipt of State funding should be subject to an 'equality holdback', whereby a proportion of fees is contingent on improvements in the gender pay gap.³⁹

This sort of enforcement is likely to be much more effective than the UK solution of requiring companies to self-report their gender pay gap data, as this relies on no more than 'naming and shaming' of companies with a poor record on gender pay gaps.

Conclusion

Far reaching changes are required if women in Ireland are to be permitted to realise their full potential in the world of work. However, if these changes are made, the resultant benefits will accrue not only to women and their families but to the Irish economy and to Irish society as a whole.

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³⁹ A similar measure has been adopted by Hewlett Packard in the United States:
https://www.abajournal.com/news/article/hp_general_counsel_tells_law_firms_to_meet_diversity_mandate_or_forfeit_up

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