

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%.[[1]](#footnote-1) 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.[[2]](#footnote-2)

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.[[3]](#footnote-3) At that stage the research clearly indicated a gender pay gap in 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.[[4]](#footnote-4)
* 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.[[5]](#footnote-5)
* 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.[[6]](#footnote-6)
* 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.
* 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 development[[7]](#footnote-7), 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.

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.
4. **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.

1. **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.**
1. **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?*”[[8]](#footnote-8)

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.

#

## 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.

1. 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.
2. 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.
1. 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%. [↑](#footnote-ref-1)
2. Irish Times. 20 January 2014. Elizabeth Fitzgerald. “Barrister Fee records reveal scale of gender inequality” [↑](#footnote-ref-2)
3. Gender Injustice. Feminising the Legal Profession. Ivana Bacik, Cathryn Costallo and Eileen Drew. Trinity College Dublin Law School. 2003 [↑](#footnote-ref-3)
4. 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. [↑](#footnote-ref-4)
5. 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. [↑](#footnote-ref-5)
6. 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. [↑](#footnote-ref-6)
7. 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. [↑](#footnote-ref-7)
8. Irish Times. 20 January 2014. Elizabeth Fitzgerald. “Barrister Fee records reveal scale of gender inequality” [↑](#footnote-ref-8)