

Terms of Reference

Project Name

European Union Developments in Equality and Human Rights: The Impact of Brexit on the Divergence of Rights and Best Practice on the Island of Ireland: Update Paper

Overview of the Request

Summary

The Equality Commission for Northern Ireland ('the Commission'), in conjunction with the NI Human Rights Commission (NIHRC) and the Irish Human Rights and Equality Commission (IHREC), wishes to appoint a contractor to produce an a mapping exercise and expert legal briefing paper which will serve to update our previous research which analysed the impact, and/or potential impact, of Brexit as regards the divergence of equality and human rights protections and EU best practice on the island of Ireland¹.

This work is commissioned further to the Equality Commission's role, with the NIHRC, to monitor and enforce the UK Government's commitment in Article 2(1) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement ('the Protocol') to no diminution of certain equality and human rights. It aims to support the work of the two Commissions, together with the Irish Human Rights and Equality Commission (IHREC), to provide oversight of, and reporting on, rights and equalities issues falling within the scope of the commitment under Article 2 that have an island of Ireland dimension.

This expert paper will inform the work of the Commissions, including assisting the Commission and the NIHRC in carrying out their powers and duties including:

- monitoring how the UK Government's commitment under Article 2 is implemented;
- reporting on its implementation to the Secretary of State for Northern Ireland and The Executive Office; and
- advising the Secretary of State and the Northern Ireland Executive of legislative and other measures that must be taken to implement the commitment.

¹ Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland, (2022 - unpublished).

The Commissions may, on receipt of the expert paper, decide to publish all or part of the paper as appropriate.

In addition, the Commissions are considering holding a public seminar/event (potentially hybrid event) to take place after acceptance of the expert paper (date of seminar/event to be agreed) aimed at creating a platform to convey and build awareness of the paper's findings.

The contractor is asked to provide a fixed costing (inclusive of VAT) and proposed timeline of research activities, including the production of the final report. The contractor is asked to provide a **separate costing** (inclusive of VAT) for a presentation of key findings at a public seminar (potentially online) to convey and build awareness and advocacy should the Commission decide to proceed with this optional public seminar element.²

The maximum budget available for this project, including the presentation at the seminar (if it proceeds) is in the range of £20K to £25K (inclusive of VAT). It is anticipated that the project will commence in April 2023 and complete in late February 2024.

Context / Background

Article 2 of the Protocol and Dedicated Mechanism

Article 2(1) of the Protocol commits the UK Government to ensuring there is no diminution of the rights, safeguards and equality of opportunity provisions, set out in the relevant Chapter in the Belfast/Good Friday Agreement, as a result of the UK leaving the EU³. The Government has also committed to keeping pace with any future changes after 1 January 2021 made by the EU that amend or update the six EU equality Directives in Annex 1 to the Protocol ('Annex 1 Directives').^{4 5}

The Equality Commission, with the NIHRC, is empowered to oversee this commitment as part of the dedicated mechanism framework established under Article 2 of the Protocol. The Northern Ireland Act 1998 has been amended to confer functions on the Commissions, which commenced on 1 January 2021⁶. These functions are to monitor, advise, report on, promote, and enforce the implementation

² ECNI will pay reasonable costs for venue hire and catering. The costing for the presentation here relates to the time and other costs for the researcher/s to make the presentation at such an event, if applicable.

³ HM Government (2019), [New Protocol on Ireland/Northern Ireland and Political Declaration](#).

⁴ See Northern Ireland Office (2020) [UK Government commitment to "no diminution of rights, safeguards and equality of opportunity" in Northern Ireland: What does it mean and how will it be implemented?](#)

⁵ See ECNI and NIHRC (2021), [A Short Guide, Equality and Human Rights after Brexit](#).

⁶ Sections 74(7) and 78A-78E, Northern Ireland Act 1998.

of Article 2(1) of the Protocol. As set out above, the Equality Commission and the NIHRC work with IHREC to provide oversight of, and reporting on, rights and equalities issues falling within the scope of the commitment that have an island of Ireland dimension.

The commitment under Protocol Article 2(1) is binding on the UK Government and Parliament and the Northern Ireland Executive and the Assembly, as a matter of international law. Further, the EU (Withdrawal Agreement) Act 2020 amended the Northern Ireland Act 1998 to ensure that the NI Assembly and Executive are prohibited from making primary or secondary legislation that is incompatible with Article 2(1) of the Protocol.⁷ Section 7A of the EU (Withdrawal) Act 2018 ensures that all rights, powers and remedies available under Protocol Article 2 are also binding on the UK Parliament and Government. The Protocol Article 2 commitment is therefore now part of UK law.

The text of the Belfast (Good Friday) Agreement requires “at least an equivalent level of protection of human rights” in Ireland as in NI.⁸ In its Explainer on Protocol Article 2, the UK Government sets out its view that the 1998 Agreement does not require North-South equivalence of rights and equality protections.⁹ However, in the context of the Protocol Article 2 commitment, it also highlighted that “best practices in the area of human rights and equalities in the rest of the UK, the EU and rest of the world will be taken into consideration as the commitment is implemented”.¹⁰ The Commissions consider that long-term North-South equivalence is important to ensure there is no diminution of rights in Northern Ireland and to ensure that human rights and equality protections are subject to continual improvement.

Whilst the Protocol requires that NI equality law keeps pace with any EU changes to the Annex 1 equality directives which enhance protections, there is the potential for equality and human rights on the island of Ireland to diverge after the end of the Brexit transition period.

In November 2021 the Equality Commission for Northern Ireland ('the Commission'), in conjunction with the NI Human Rights Commission (NIHRC) and the Irish Human Rights and Equality Commission (IHREC) commissioned an expert paper on *“European Union Developments in Equality and Human Rights: the impact of Brexit on the divergence of rights and best practice on the island of Ireland”*. The aim of the

⁷ [European Union \(Withdrawal Agreement\) Act 2020](#).

⁸ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity – Human Rights; the Agreement states, “the Irish Government will also take steps to further strengthen the protection of rights in its jurisdiction ... The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”.

⁹ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 9.

¹⁰ Ibid, at para 7.

research was to analyse the impact, and/or potential impact, of Brexit as regards the divergence of equality and human rights protections in relation to EU law, Court of Justice of the EU (CJEU) case law, EU best practice and to identify EU sources of information which will assist the Commissions with their role in tracking and monitoring EU developments. The analysis was based on an extensive mapping exercise in relation to EU law and policy. These exercises cover EU measures that were enacted or proposed between December 2020 and mid-January 2022 that could have implications for Northern Ireland law given the Article 2 commitment and developments in CJEU case law relevant to these commitment in the same period.

The research highlighted where divergences between Ireland and Northern Ireland loom or already exist in both devolved and reserved or excepted areas.¹¹ This includes the areas of work-life balance; age discrimination in access to goods, facilities and services; pay transparency reporting, and citizen's rights. It also highlights potential divergences in areas such as voting rights and trafficking following the introduction of the Elections Act 2022 and Nationality and Borders Act 2022 respectively by the UK Government. The report highlighted that there are already a number of proposed EU laws, and/or EU laws which were not transposed into Northern Ireland law prior to the end of the Brexit transition period, that have the potential to strengthen equality and human rights. Such EU laws, if introduced, will need to be implemented in law in Ireland, but the UK Government will not, under the terms of the Protocol, be required to 'keep pace' with them in terms of implementing them into Northern Ireland law. Such EU laws include, for example, the Work Life Balance Directive,¹² the European Accessibility Act,¹³ and proposed legislation aiming to improve the gender balance among non-executive directors of listed companies.¹⁴

The research also highlighted a range of recent European Court of Justice (CJEU) decisions which continue to have implications for Northern Ireland, such as in relation to disability discrimination and discrimination on the grounds of religious belief.¹⁵

The research represents a snapshot of divergence of rights as at January 2022. The research outlines that the complexity of the legal landscape for equality and human

¹¹ Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland, (2022 - unpublished).

¹² Directive 2019/1158/EU 'Directive of the European Parliament and Council on work-life balance for parents and carers', 20 June 2019.

¹³ Directive 2019/882/EU, 'Directive of the European Parliament and Council on the accessibility requirements for products and services', 17 April 2019.

¹⁴ EU Commission, Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures.

¹⁵ Sarah Craig, Anurag Deb, Eleni Frantziou, Alexander Horne, Colin Murray, Clare Rice and Jane Rooney, European Union developments in Equality and Human Rights: The Impact of Brexit on the divergence of rights and best practice on the island of Ireland, (2022 - unpublished).

rights in Northern Ireland post-Brexit means that there is a real potential for domestic developments to fail to keep pace with EU law developments, particularly in relation to areas under development that are likely to fall within the scope of Article 2 in the future.

The ‘keeping pace’ obligation which arises in the context of the Annex 1 equality directives therefore requires ongoing monitoring of the development and interpretation of EU law to ensure that any amendment to, or replacement of, an Annex 1 equality directive by the EU on or after 1 January 2021, which enhances rights and protections, is reflected in NI law. In line with Article 13 of the Protocol, the Annex 1 equality directives will continue to be informed by future CJEU rulings and, to the extent that such rulings evolve general principles of EU law, the EU Charter of Fundamental Rights and the relevant EU Treaty provisions, these will continue to have relevance in NI.¹⁶

To assist in the process of monitoring developments in EU law and future CJEU rulings, this project will seek to update our previous research which analysed the impact, and/or potential impact, of Brexit as regards the divergence of equality and human rights protections and EU best practice on the island of Ireland up until January 2022.

Project Scope / Requirements

Aim

Produce a mapping exercise and expert paper which will serve to update our previous research which analysed the impact, and/or potential impact, of Brexit as regards the divergence of equality and human rights protections and EU best practice on the island of Ireland.

Objectives

Key objectives are to produce a mapping exercise and expert paper that:

Divergence: Equality and Human Rights Protections

EU Law:

1. Provide an update on any developments in terms of key differences between equality and human rights in NI and Ireland since January 2022, including, in respect of NI, in areas of law and policy that are reserved or excepted as well as those which are transferred (devolved).

¹⁶ Article 13(2) and 13(3), Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement. See also Re SPUC Pro-Life Limited [2022] NIQB 9, at para 93

2. Update and identify developments since January 2022 relating to proposed and/or actual EU law (Directives and Regulations), that relates to equality and human rights, which did not apply in NI domestic law before the end of the Brexit transition period (31 December 2021), and which:
 - could potentially amend and/or update an Annex 1 Directive;
 - does not amend and/or update an Annex 1 Directive; namely, to identify EU law relating to equality and human rights which would have applied to NI had the UK remained in the EU.

In relation to each piece of EU law identified, the report should:

- outline the scope and nature of the EU law identified, and analyse the impact, or potential impact, on equality and human rights in NI had that EU law applied in NI domestic law before the end of the Brexit transition period;
- assess the degree to which, if any, the equality and human rights protections set out in the proposed /actual EU law have already been, or are being, implemented in Great Britain and Ireland;
- highlight the timeframes for the implementation/transposition of the EU law into the domestic law of EU Member States including Ireland;
- make clear the extent to the EU law relates to devolved and/or non-devolved matters that impact on equality and human rights in NI.

CJEU case law

3. Provide an update, analysis and implications in terms of domestic legislative developments, if any, since January 2022 relating to how the jurisprudence of the CJEU on equality and human rights related matters is to be, or will be, taken into account or complied with by the respective courts in NI post the end of the Brexit transition period. For example, this would include any developments (or proposed developments) under the Protocol Bill and the implications of such developments.
4. Identify and provide an update on case law of the CJEU that relates to each of the Protocol Annex 1 Directives delivered since January 2022. The details and implications, including potential implications, of this CJEU case law on equality and human rights, including on equality and human rights law, in NI should be set out.
5. Identify and provide an update on case law of the CJEU that relates to equality and human rights but which does not relate to any of the Annex 1 Directives and which has been delivered by the CJEU since January 2022. The details and implications, including potential implications, of this CJEU case law on equality and human rights in NI should be set out.

The implications of the CJEU case law in terms of both devolved matters and non- devolved matters that impact on equality and human rights in NI should

be clearly specified. For example, the contractor is asked to make clear whether or not, as a result of the CJEU case law, NI law and/or policy requires to be, or should be as a matter of good practice, amended/ updated, and by whom (NI Executive/ UK Government), and whether the matter relates to a devolved or non -devolved matter. The degree to which, if any, this CJEU case law has impacted, or will impact, on equality and human rights in Ireland should also be briefly identified. For example, if Ireland has, since January 2022, amended its equality and human rights laws or policy, or intends to amend its laws or policy, as a result of this CJEU case law this should be highlighted.

The CJEU case law identified should be broken down by CJEU judgments and should flag up any cases where there is divergence between the decision of the CJEU and the opinion of the Attorney General (AG). It should be noted that the contractor is not required to carry out an analysis of any divergence identified (between the CJEU and AG opinions).

Further, in carrying out the analysis of CJEU case law since January 2022, the contractor should highlight CJEU decisions where the CJEU considered that the Charter of Fundamental Rights had particular significance or ‘added value’ in terms of the protection of the equality or human rights under consideration.

In carry out the analysis further to part 5 above (namely, CJEU case law relating to non- Annex 1Directives), the contractor is asked to consider CJEU case law relating to the EU law identified by the Commissions as following within the scope of Protocol Article 2. This part of the research should focus on identifying significant decisions relating to key EU measures contained in the table of EU law identified in the joint ECNI/NIHRC *Working paper on the scope of Protocol Article 2*. The successful contractor and the Commissions will agree at the outset of the project what EU measures in the Working Paper are considered ‘key’.¹⁷

Divergence: EU Best practice

6. Identify and update the range of EU good practice policy developments/initiatives that relate to equality and human rights since January 2022, including in relation to the matters covered by the Annex 1 Directives, which the EU is taking forward, or will progress. This should include the identification of EU initiatives that encourage or support the Governments of Member States to progress equality or human rights, and/or support civil society organisations in their work to progress equality or human rights.

¹⁷ [Publication - NIHRC and ECNI Working Paper: The Scope of Article 2\(1\) of the Ireland/Northern Ireland Protocol | Northern Ireland Human Rights Commission](#)

7. Assess the implications for divergence on the island of Ireland given the EU's human rights and equality policy priorities and good practice initiatives going forward since January 2022. This should include, but not be limited to, for example, the implications in terms of the UK no longer being required to follow EU initiatives relating collection of equality and human rights data in NI as a result of the UK leaving the EU.

Conclusions and Recommendations

8. Draw conclusions and, where needed, make recommendations, including for Government, aligned to the findings of the expert paper carried out across the above three key areas, which are aimed at avoiding a divergence of equality and human rights on the island of Ireland.

Optionally, at the Commission's discretion:

- present key findings at a public seminar (potentially online) to build awareness of, and/or build support for, the key findings and conclusions / recommendations highlighted in the report.

Supplementary Information

The following supplementary information is intended to assist potential contractors in the tendering process.

Scope

Inclusions

In addition to the above matters, the report should take into account, and set out, any relevant implications as regards the divergence of equality and human rights on the island of Ireland, including in relation to proposed and/or actual EU law, the application of CJEU case law, and the Charter of Fundamental Rights, arising out of developments relating to the Windsor Framework¹⁸ published in February 2023.

Exclusions

In general, the report should aim to update, rather than replicate, the material, including in terms of its findings and/or conclusions / recommendations, set out in the expert paper on "*European Union Developments in Equality and Human Rights: the impact of Brexit on the divergence of rights and best practice on the island of Ireland*", published in January 2022. However, the report, where appropriate, may wish to reference and/or build on the findings and/or conclusions / recommendations of this research. The report should also not replicate other ongoing or completed research commissioned by the Commissions; for example, NIHRC ongoing research on

¹⁸ [The Windsor Framework - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

Protocol Article 2¹⁹. We will ensure that the researchers are kept appraised of related projects and will facilitate collaboration where possible.

Suggestions Regarding Methodology²⁰

- Comprehensive desk-based mapping analysis of relevant materials/literature, including EU law (actual and proposed), CJEU case law, and EU best practice, that will assist the dedicated mechanism with its role in tracking and monitoring EU developments, etc.
- Development of a matrix / grid / table for the presentation of data highlighting key findings as outlined in the project's objectives, in an accessible format.
- Deliver the report in a format which is accessible, according to disability access standards and the Commission's accessibility guidelines, for website publication.

The appointed contractor will be responsible for securing all consent and approvals as required for any subsequent publication and dissemination of the report by the Equality Commission.

Contractor Expertise / Experience

In addition to any other element they feel relevant, prospective contractors should demonstrate their relevant expertise/experience²¹ regarding the following.

The contractor must demonstrate, with evidence, that they have expert knowledge and understanding of:

- EU law and case law and its application in NI, Ireland, and Great Britain and/or EU policy. Expert knowledge and understanding of EU law and case law and EU policy in the context of equality and human rights, although not essential, is preferred.
- Human rights and equality law in NI or GB or Ireland.
- Possess good analytical skills and the ability to write about complex ideas and present key findings in an engaging and lay accessible format.

¹⁹ Including planned research in relation to the Interaction between the EU Charter of Fundamental Rights and Article 2 of the Ireland/Northern Ireland Protocol and planned research on the Impact of the UK's withdrawal from the EU on Human Rights and the Environment in NI. For further details of NIHRC research on Protocol Article 2 see [Human rights after Brexit | Northern Ireland Human Rights Commission \(nihrc.org\)](#)

²⁰ In proposing a methodology, the contractor is asked to consider the following. The project is not limited to any examples set out in this section and the contractor should only include those elements which they feel have merit and relevance to their proposed approach.

²¹ See the accompanying "Response to Tender Guidelines" for further information.

Project Deliverables

The following documents must individually and collectively meet the required standards for acceptance²² by the Commission.

Project Initiation Document

The document will incorporate details on the scope of the study, roles and responsibilities, assumptions, risks, deliverables, reporting and timing. Draft PID should be submitted by 1 May 2023 and final agreed PID should be submitted by 15 May 2023. Contractors should note that any work to be undertaken is subject to contract and budget confirmation by the Commission.

The contractor shall provide the draft document in advance and meet with the Commission's Advisory Group to agree same prior to the commencement of the project.

Interim Report

An Interim Report shall be with the Commission by 31 August 2023.

The interim report shall comprise two main parts:

- a summary of activities undertaken and outstanding; and
- an annotated draft final report structure (chapter headings and key arguments / findings) capable of delivering the aim and objectives of the project and supplemented with project background and preliminary findings.

Draft Final Report(s) and Final Report

The **Draft final report(s)** and **final report** should deliver on the aim and objectives of the project as specified. The reports should reflect the following generic format: executive summary, background, aims & objectives, methodology, findings, discussion, conclusions and recommendations. The report should include a matrix / grid / table for the presentation of data highlighting key findings as outlined in the project's objectives

Draft final report shall be with the Commission by 27 November 2023.

Following feedback from the Commission, a **final report** (containing an executive summary) shall be with the Commission by 23 February 2024.

Optional Presentation

The Commission is considering holding a seminar following the completion of this research (date to be agreed) to set out key findings in an accessible way to build awareness and advocacy. In the event that this seminar proceeds, the Commission

²² Information on Quality / Acceptance standards are available separately from the Commission

will cover the cost of venue hire, catering etc, and the contractor's fee should relate only to a presentation fee, and, where relevant, travel expenses.

Proposed Budget

The budget for this project is in the range of £20K to £25K (including VAT and expenses, and presentation fee).