

Terms of Reference

Project Name

EU developments in Equality and Human Rights: Impact of Brexit on the divergence of rights and best practice on the island of Ireland.

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 expert legal briefing paper that analyses 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.

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 new 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.

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 online) 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 costing for the provision of the expert paper; and a separate costing for a presentation of key findings at a public seminar/event to convey and build awareness of the paper's findings, should the Commissions decide to proceed with this optional public seminar/event element. Should the Commissions decide to proceed with this public seminar/event, the Commissions will cover the costs of the publication of the expert paper, if published, and the costs of organising the event.

It is hoped that the research project will commence by mid-October 2021.

Context / Background

Article 2(1) of the Protocol commits the UK Government to ensuring there is no diminution of rights, safeguards and equality of opportunity, as set out in the Chapter of the same title in the Belfast/Good Friday Agreement, as a result of the UK leaving the EU, including the rights set out in the six EU equality Directives in Annex 1 to the Protocol ('Annex 1 Directives')¹. 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 Annex 1 Directives²³.

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 new functions on the Commissions, which commenced on 1 January 2021⁴. These functions are to monitor, advise, report on, promote, and enforce the implementation 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 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 Protocol⁵. Section 7A of the EU (Withdrawal) Act 2018 ensures that all rights, powers and remedies available under Article 2 of the Protocol are also binding on the UK Parliament and Government. The Article 2 commitment in the Protocol is therefore now part of UK law.

Divergence of rights and EU best practice.

While the UK Government's commitment under Article 2 in relation to keeping pace with any EU changes that amend or update the Annex 1 Directives could result in a strengthening of equality protections in Northern Ireland in certain equality areas, importantly, the Article 2 commitment has its limitations, in that the 'keeping pace' commitment only applies to the Annex 1 Directives.

Therefore, should the EU introduce a subsequent EU Directive on equality and/or human rights that does not amend or replace the Annex 1 Directives after the end of the transition period, this could result in stronger equality and human rights for people in Ireland compared to people in NI⁶. There is thus the risk of increasing 'divergence' of equality and human rights on the island of Ireland as a result of Brexit.

¹ HM Government (2019), [New Protocol on Ireland/Northern Ireland and Political Declaration](#).

² 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?](#)

³ See ECNI and NIHRC (2021), [A Short Guide, Equality and Human Rights after Brexit](#).

⁴ Sections 74(7) and 78A-78E, Northern Ireland Act 1998.

⁵ [European Union \(Withdrawal Agreement\) Act 2020](#).

⁶ For example, the EU has already published a [Proposal](#) for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, 4 March 2021. In addition, it has introduced [a DIRECTIVE \(EU\) 2019/1158 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU](#), which entered into force on 1 August 2019 and has to be implemented into the national legislation of Member States on or before the 2 August 2022. This Directive was not transposed into UK law prior to the end of the Brexit transition period.

It will be noted that, in some areas, such as outlawing discrimination on the grounds of age discrimination as regards older people, in terms of access to goods and services, including public services, there is already stronger protection against discrimination in both Ireland and Great Britain than in NI. The Article 2 commitment does not commit the UK Government to introducing changes in this area in Northern Ireland, even if such changes are covered by a future EU Directive.

Further, the European Commission has taken forward a range of good practice policy developments/initiatives that relate to equality and human rights⁷. After the end of the Brexit transition period, such good practice policy developments/initiatives will no longer be promoted and supported by the Commission in the UK.

It will also be noted that whilst the UK Government is of the view that the Article 2 commitment does not require North-South equivalence of rights and equality protections, it has made clear that future developments in best practices in the area of human rights and equalities in the rest of the UK, the EU and the rest of the world will be taken into consideration as the Article 2 commitment is implemented⁸.

PROJECT SCOPE / REQUIREMENTS

Aim (Overall the project will achieve:)

Produce an expert paper which analyses 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 (Completion of this project will result in:)

The expert paper must include the following:

Divergence: Equality and Human Rights Protections

EU Law:

1. Provide a brief overview of the key differences between equality and human rights in NI and Ireland.
2. Identify 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 Dec 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.
3. In relation to each piece of EU law identified, the report should:

⁷ See for example, EC(2020), [LGBTIQ Equality Strategy 2020-2025](#)

⁸ 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? Paras 7 and 23.](#)

- 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.

CJEU case law

4. Provide a brief overview of any differences between how the jurisprudence of the CJEU on equality and human rights related matters will be taken into account or complied with by the respective courts in NI and Ireland post the end of the Brexit transition period.
5. Identify the range of the most recent reports from the European Commission to the European Parliament and Council in relation to each of the Annex 1 Directives, and identify any case law of the CJEU that relates to each of these Directives that is not listed in these reports. The details and implications, including potential implications, of this CJEU case law on equality and human rights in NI should be set out. For example, if the most recent European Commission report on a particular Annex 1 Directive was published several years ago, the contractor is asked to identify any case law of the CJEU that relates to that Directive since the publication of that report.
6. Identify 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 after the end of the Brexit transition period. The details and implications, including potential implications, of this CJEU case law on equality and human rights in NI should be set out. 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 identified. 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.

Divergence: EU Best practice

7. Identify the range of EU good practice policy developments/initiatives that relate to equality and human rights, including in relation to the matters covered by the Annex 1 Directives, which the EU is taking forward, or will progress, on or after the end of the Brexit transition period. 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.
8. Assess how EU good practice policy developments / initiatives have positively impacted on equality and human rights in Northern Ireland and Ireland up to the end of the Brexit transition period. Following the end of the Brexit transition period⁹, assess the implications for divergence on the island of Ireland given the EU's human rights and equality policy priorities going forward.

⁹ when such EU good practice policy developments/initiatives will no longer be promoted and supported by the European Commission in the UK

EU sources of information

9. Identify the range of key EU sources of information that will assist the Commissions with its role in tracking and monitoring EU developments, including proposed and actual EU legislation and CJEU decisions, relating to equality and human rights in Northern Ireland, including, but not limited to, developments relating to the Annex 1 Directives.

SUPPLEMENTARY INFORMATION

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

Scope

Inclusions

As above.

Exclusions

None

Suggestions regarding Methodology

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.*

- Comprehensive desk based analysis of relevant materials/literature, including EU law (actual and proposed), CJEU case law, EU best practice, academic reports, and EU sources of information 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.
- The contractor may wish to give consideration to including in the methodology engagement with a small number of key organisations/ individuals.

Contractor Expertise / Experience

In addition to any other element they feel relevant, prospective contractors should demonstrate their relevant expertise/experience regarding:

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.

PROJECT DELIVERABLES

What Deliverables are required? What must they contain?

The following documents must individually and collectively meet the required standards for acceptance¹⁰ by the Commission.

Deliverable	Content
Project Initiation Document	<p>The document will incorporate details on the scope of the study, roles and responsibilities, assumptions, risks, deliverables, reporting and timing.</p> <p>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.</p>
Interim Progress Report	An update on progress and early findings shall be with the Commission by 6 December 2021.
Draft Final Report(s) and Final Report	<p>The Draft Final and Final Report should deliver on the aim and objectives of the project as specified above and contain an executive summary.</p> <p>A draft paper shall be with the Commission by 10 January 2022.</p> <p>Following any refinements (further to feedback from the Commission) a final paper shall be with the Commission by 14 February 2022.</p>

Proposed Budget

	Amount
The budget for this project, including the provision of an expert paper and the optional public presentation element, should not exceed this value.	£30K (including any VAT)

¹⁰ Information on Quality / Acceptance standards are available separately from the Commission