



## **EQUALITY COMMISSION FOR NORTHERN IRELAND**

### **Policy for the Provision of Legal Advice And Assistance for complaints relating to Article 2(1) of the Ireland/Northern Ireland Protocol**

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## **Policy for the Provision of Legal Advice And Assistance for complaints relating to Article 2(1) of the Ireland/Northern Ireland Protocol**

### **1. Legislative Framework**

- 1.1 Under Article 2(1) of the Ireland/Northern Ireland Protocol (‘the ‘Protocol’)<sup>1</sup> to the Withdrawal Agreement reached with the EU in October 2019, the UK Government committed to ensuring that the protections currently in place in Northern Ireland for the rights, safeguards and equality of opportunity provisions set out in the chapter of the same name in the Belfast (Good Friday) Agreement are not reduced as the UK leaves the EU.
- 1.2 It also committed to ensuring that some of Northern Ireland’s equality laws will keep pace with any future changes to certain EU equality laws. These EU equality laws are set out in Annex 1 to the Protocol<sup>2</sup>.
- 1.3 A person has the right to bring legal action, by way of judicial review, before the courts if they consider that there has been a breach of the UK Government’s commitment under Article 2(1) of the Protocol.
- 1.4 To ensure that the UK Government meets this commitment, a ‘dedicated mechanism’ has been created comprising of the Equality Commission for Northern Ireland and the Northern Ireland Human Rights Commission (‘NI Human Rights Commission’).
- 1.5 Further to provisions in the European Union (Withdrawal Agreement) Act 2020, which amended the Northern Ireland Act 1998, the Equality Commission, from 1 January 2021, has been granted litigation powers to enforce Article 2(1) of the Protocol.
- 1.6 These litigation powers include a power for the Equality Commission to provide advice and assistance to a person in legal proceedings, or proposed legal proceedings, in respect of an alleged breach or potential future breach of Article 2 (1) of the

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<sup>1</sup> [Ireland/Northern Ireland Protocol to the EU/UK New Withdrawal Agreement](#), agreed at negotiator level between the UK and EU, published 19 October 2019.

<sup>2</sup> All of the EU equality Directives listed in Annex 1 to the Protocol have been brought into force in Northern Ireland law and are designed to promote equal treatment and tackle discrimination on the following protected grounds :Gender; Racial or Ethnic Origin; Religion or belief; Disability; Age; and Sexual Orientation.

Protocol. (Section 78 D (1) & (2) of the Northern Ireland Act 1998, as amended by Schedule 3 of the European Union (Withdrawal Agreement) Act 2020)<sup>3</sup>.

## **2. Information and Guidance**

Information and guidance on a person's right to take legal action in relation to an alleged breach (or potential future breach) of Article 2(1) of the Protocol may be obtained from staff within the Commission's Dedicated Mechanism Unit. This will include information and guidance on the types of assistance which the Commission may be able to provide, as well as general information and guidance on the protections provided by Article 2(1) of the Protocol.

## **3. Authorisation of Assistance**

As permitted by Schedule 8, Paragraph 8(1)(a) of the Northern Ireland Act 1998 the power to decide upon the grant of assistance has been delegated by the Commission to a Committee or Committees formed for that purpose. These Committees are known as Legal Funding Committees and will be made up of Commissioners of the Equality Commission.

## **4. Assistance**

- 4.1 The Commission may grant any application for assistance received from a person who is an actual or prospective complainant in relation to proceedings arising from an alleged breach (or potential future breach) of Article 2 of the Protocol.<sup>4</sup>
- 4.2 The Commission can only grant assistance if the application comes within the statutory grounds specified in section 78 D(2) of the Northern Ireland Act 1998, as amended. This provides that the Equality Commission may grant an application for assistance, so far as it relates to the alleged breach (or potential future breach) of Article 2(1) of the Protocol on any of the following grounds:

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<sup>3</sup> See [Schedule 3](#) of European Union (Withdrawal Agreement) Act 2020, sections 78A to 78E. These provisions came into force at the end of the Brexit transition period on 31 December 2020.

<https://www.legislation.gov.uk/ukxi/2020/1622/contents/made#printOptions>

<sup>4</sup> A "person" includes a body of persons corporate or unincorporated as defined in Schedule 1 of the Interpretation Act 1978

- (a) that the case raises a question of principle;
- (b) that it would be unreasonable to expect a person to deal with the case without assistance because of its complexity, or because of the person's position in relation to another person involved, or for some other reason;
- (c) that there are other special circumstances which make it appropriate for the Commission to provide assistance.

## **5. Discretionary factors to consider in deciding whether to grant assistance**

- 5.1 In exercising its discretion to grant assistance the Commission will have regard to its obligations under the Human Rights Act 1998 and the European Convention on Human Rights. Each application will be considered individually. In reaching its decision whether it is thought appropriate to grant assistance the Legal Funding Committee will assess whether the application meets one or more of the statutory grounds.
- 5.2 In addition to the statutory grounds the Commission will have regard to and assess the strength of the following discretionary criteria and any other relevant factors.

Each are weighted equally. The Commission will assess *the extent* to which each of the factors apply to each application for assistance. The Legal Funding Committee, in assessing each application, will *score the extent* to which the factor applies to the particular application on a scale of 1 to 5 where a score of 1 means that the factor applies to a very limited extent and a score of 5 means that the factor applies to a very significant extent.

- a) **Strategic objectives** - the extent to which the case will assist the Commission to deliver on its objectives, as set out in its Business Plan and Corporate Plan in place at the time, relating to the delivery of its responsibilities as part of the Dedicated Mechanism;
- b) **Impact and ripple effect** - the extent to which a successful outcome in the case is likely to have a positive effect beyond

the person's circumstances, in terms of raising awareness of the legal rights and protections provided by Article 2(1) of the Protocol having potential to bring about changes in practices and procedures, legislation, or otherwise;

- c) **Legal uncertainty** - the extent to which the matter may raise an issue of legal uncertainty, or allow for a challenge of untested areas of law relevant to Article 2(1) of the Protocol and/or the remit of the Commission as part of the Dedicated Mechanism;
- d) **Merits of the case** - the extent to which there are reasonable grounds for believing that a breach or potential future breach of Article 2(1) of the Protocol has occurred or may occur as alleged, or that there are reasonable prospects of success, depending upon the stage to which proceedings have progressed;
- e) **Cost – benefit** - the extent to which the likely cost of assistance is justified in pursuit of the statutory objectives of the Commission;
- f) **Alternative Enforcement Powers** – the extent to which it is, or might be, more appropriate for the matter to be addressed using an alternative enforcement power/s or other power/s of the Commission relating to Article 2(1) of the Protocol.
- g) **Remit of NI Human Rights Commission** – the extent to which it is, or might be more, appropriate for the matter to be considered or dealt with by the NI Human Rights Commission.
- h) **Assistance provided by NI Human Rights Commission** – where the person making the application has received assistance from the NI Human Rights Commission, the extent of assistance granted by the NI Human Rights Commission.
- i) **Any other factor** the Commission considers relevant, including the extent to which the Commission has supported same or similar cases. This means that the Commission

*may* support cases where the issue has been the subject of persistent complaints to the Commission; or alternatively past support for the issue may mean that the cost of supporting another similar application is not justified

6. Whilst retaining discretion, assistance will not normally be granted by Legal Funding Committees in the following circumstances:
  - a. **Non-compliance with statutory time limits** – a case that appears to have not been lodged with the relevant court and the time limit for lodgement has expired; or a case has been lodged late and outside of the deadline for the relevant proceedings, will not be assisted unless a court has ruled (or is likely to rule) that it is just and equitable for that case to be heard;
  - b. **Non-cooperation** - where a person fails to co-operate with the staff of the Commission in relation to an application for assistance, (including unreasonable conduct towards staff of the Commission or in relation to the Commission itself) assistance will not normally be granted, or will be withdrawn. The Commission will bear in mind its obligations as an employer and as a service provider and will make necessary adjustments to service provision to ensure that there are no barriers that may impede any person's cooperation with the Commission.

## **7. Exercise of powers separately or jointly with the NI Human Rights Commission.**

- 7.1 As set out above, the Commission and the NI Human Rights Commission can exercise their enforcement powers, including assisting a person to bring legal proceedings, separately or jointly.
- 7.2 Prior to the Commission considering an application for assistance, a person applying for assistance should inform the Equality Commission as to whether or not they have, or intend to, prior to the Commission's consideration of the application, sought the assistance of the NI Human Rights Commission, in relation to the matter which is the subject of the application for assistance.

- 7.3 In the event that a person has sought the assistance of the NI Human Rights Commission, the person should inform the Commission of the outcome of their application of assistance to the NI Human Rights Commission, prior to the Commission's consideration of the person's application.
- 7.4 The Commission may grant an application for assistance received from a person who is an actual or prospective complainant in relation to proceedings arising from an alleged breach (or potential future breach) of Article 2 of the Protocol, and decide to exercise its enforcement powers in relation to the matter which is the subject of the grant of assistance, jointly with the NI Human Rights Commission. This will be dependent on the NI Human Rights Commission approving the decision to act jointly with the Commission in relation to the matter that is the subject of the grant of assistance.
- 7.5 It will be a matter for the Commission to decide whether or not it is appropriate to exercise its powers separately or jointly with the NI Human Rights Commission in relation to the matter which is the subject of the application for assistance.

## **8. Grant of Assistance**

- 8.1 A decision by a Committee granting assistance constitutes authority to provide all those forms of assistance specified in Section 78D(3) of the Northern Ireland Act 1998, as amended. In particular, where an application for assistance has been granted the Commission may:
- provide, or arrange for the provision of, legal advice
  - arrange for the provision of legal representation
  - provide any other assistance which it thinks appropriate.
- 8.2 The person granted assistance and/or their representative will be notified in writing, subject to their acceptance of the Conditions of Offer.

## **9. Refusal of Assistance**

- 9.1 Where a person's application for assistance is refused or discontinued on review, the person will be notified and given

written reasons for the decision. The person will also be advised that they retain the right to pursue the matter independently of the Equality Commission through the court process.

## **10. Review of Decision to Offer Assistance**

A Legal Funding Committee may at any stage review the decision to offer assistance; in particular a case will be reviewed when sufficient evidence is available to indicate whether or not the case enjoys a reasonable prospect of success; where information becomes available that impacts on the statutory grounds or discretionary factors; and/or when the case has been listed for hearing. A review of assistance may result in assistance being continued or discontinued.

## **11. Reconsideration of decision to refuse or withdraw assistance**

A decision of a Legal Funding Committee not to grant assistance in the first instance; **or** to withdraw from an assisted case may be reconsidered. A person may request a reconsideration if they have new or additional information that they think is relevant to their case and/or if they wish a Legal Funding Committee to consider views on the application of the criteria for the grant of assistance, to the case. Any information received with a request for a re-consideration, will be considered by a Legal Funding Committee. The Committee will consider the relevance of the information presented to criteria for the grant of assistance. The Committee will retain its discretion to assist cases. The Committee may either uphold or overturn the original decision to refuse/withdraw assistance.

## **12. Representation**

Where assistance is granted pursuant to the provisions of paragraph 8 above to include legal representation before a Court,



such representation may be provided by staff of the Commission, an appointed external solicitor or, as appropriate, by Counsel.

### **13. Assistance in Related Proceedings/Appeals to Higher Court**

The grant of assistance covers assistance to the conclusion of proceedings, subject to review as set out above. However, where a decision of a Court is to be challenged by way of an appeal to a higher court, a fresh application for assistance must be submitted to the Committee.

### **14. Conditions of Offer to Complainants**

This policy should be read in conjunction with the conditions of offer furnished to Applicants and, as appropriate, outside legal representatives. Acceptance of an offer of assistance is acceptance of the Terms of Engagement under the Law Society Communications Regulation for the Equality Commission to act for an individual in legal proceedings.

### **15. Publicity**

The Commission will normally publicise decisions and settlements secured under its auspices with the aim of promoting understanding and awareness of Article 2(1) of the Protocol, including amongst the general public. This includes promoting understanding and awareness of a person's right to take legal proceedings, in certain circumstances, in relation to an alleged breach or future potential breach of Article 2.

### **16. Variation of Policy**

The Commission may at any time and at its discretion, revise, vary or amend this policy. The policy will be reviewed every three years in line with the time frame for each new Corporate Plan of the Equality Commission. This review will consider any changes made to the Policy for the Provision of Legal Advice and Assistance to Individuals.

The Commission will, as a service provider, comply with its statutory duty to make reasonable adjustments to this policy and its

procedures and practices implementing this policy if any of these make it impossible or unreasonably difficult to make use of the Commission's service.

**Equality Commission**  
**January 2023**