

EXPLANATORY MEMORANDUM TO
THE EQUALITY (AMENDMENT AND REVOCATION) (EU EXIT) REGULATIONS
2019

2019 No. 305

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Government Equalities Office and is laid before Parliament by Act.

2. Purpose of the instrument

- 2.1 This statutory instrument amends references to the European Union, its laws and institutions in a range of legislation relating to equalities. These references will become redundant when the United Kingdom leaves the European Union on 29 March 2019 and therefore this instrument is required to ensure that the relevant domestic legislation remains clear, workable and fit for purpose after this date. This instrument also revokes two pieces of redundant retained direct EU legislation, so that they no longer have effect domestically after EU exit.

Explanations

What did any relevant EU law do before exit day?

- 2.2 In Parts 2 and 3 the relevant EU law covers references to (a) enforceable EU rights (b) new obligations implemented under the European Communities Act 1972 (c) references to EU law, the European Economic Area (EEA) and specific EU directives and (d) harmonisation provisions. Before exit day, these references allowed domestic legislation to keep pace with developing EU law, refer to specific provisions of EU law or give effect to EU rights domestically. In Part 4, the relevant EU law established the European Institute for Gender Equality (EIGE) and in so doing, made the UK, as an EU Member State, automatically a participant. The other piece of relevant EU law established the European Year of Equal Opportunities for All in 2007 (EYEOA), in which again the UK automatically participated.

Why is it being changed?

- 2.3 After EU exit, the references will become deficient and are therefore being amended in Parts 2 and 3: (a) in order correctly to reflect rights which form part of retained EU law; (b) because the UK will no longer be required to keep pace with EU law (c) in order to reflect the removal of the supremacy of EU law; and (d) because there will be no need to ensure consistency with EU law. All relevant EU law on equalities has been incorporated into domestic law and will be retained under the EU (Withdrawal) Act 2018. Therefore, removing these references will not alter the present effect of EU law domestically in the field of equalities, which the Government is committed to retaining under the principle of “non-regression”. In Part 4, the UK’s participation in the EIGE will cease on the date of our departure from the EU, and this needs to be reflected in an amendment to retained direct EU law in this area. Likewise, while EU Decision 771/2006, which established the EYEOA of 2007 is still in force, it has no practical application to the UK after exit day and will be revoked.

What will it now do?

- 2.4 The policy intention is that the provisions that this instrument amends will continue to operate as before.
- 2.5 In the case of the repeal of sections 203 and 204 of the Equality Act 2010, these measures were designed to enable domestic law to be harmonised with any new EU obligations (to be implemented using section 2(2) of the European Communities Act 1972) that arose. These are therefore being removed entirely and not replaced with equivalent provisions.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument varies. Regulations 1, 2, 3, 8 and 9 apply to the United Kingdom, regulations 4 to 6 apply to Great Britain and regulation 7 applies to Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Secretary of State for International Development and Minister for Women and Equalities has made the following statement regarding Human Rights:

“In my view the provisions of the Equality (Amendment and Revocation) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This statutory instrument is made in consequence of the United Kingdom’s exit from the European Union. In common with hundreds of other pieces of primary legislation, the Equality Act 2010, along with other primary and secondary legislation that are broadly concerned with equalities, contains a number of references to the European Union, its laws and institutions. These entries, were they to remain post-EU exit, would create deficiencies in domestic law, which would cease to operate appropriately. Accordingly, this instrument either amends or revokes these references, to ensure the statute book continues to function correctly.
- 6.2 The amendments are technical in nature and maintain the status quo for equality protections in the post EU exit domestic legislative framework. This approach is consistent with the Government’s pledge that there will be no reduction in protections in domestic equality legislation as we leave the European Union.
- 6.3 The legislation being amended is: the Civil Partnership Act 2004 (‘CPA’), which governs civil partnerships; the Gender Recognition Act 2004 (‘GRA’), which permits recognition of an acquired gender; the Equality Act 2006, which establishes the

Equality and Human Rights Commission and sets out its governance arrangements and powers and the Equality Act 2010, which is the main piece of anti-discrimination legislation in Great Britain ('the 2006 Act', 'the 2010 Act' and together, 'the Equality Acts'). Also being amended are the Equality Act 2010 (Amendment) Regulations 2012, which implement the ruling of the Court of Justice of the European Union that sex should not be used as a risk factor in determining individuals' insurance premiums and benefits. The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2012 is the equivalent legislation in Northern Ireland and is also being amended.

- 6.4 The legislation being revoked is: Regulation (EC) 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality; and Decision 771/2006EC of the European Parliament and of the Council of 17 May 2006 establishing the EYEOA (2007) – towards a just society.
- 6.5 The 2010 Act consolidated and strengthened existing equalities protections in Great Britain. The 2010 Act did not itself implement EU Directives for the first time but it replaced earlier legislation, which had implemented them. The implementing provisions remain primary legislation, in accordance with Government commitments.
- 6.6 It should be noted that further amendments with similar purpose will be made to the GRA, the CPA, the 2010 Act and related legislation and equivalent legislation in Northern Ireland in separate instruments led by other Government Departments. For example, the European Parliamentary Elections Etc. (Repeal, Revocation, Amendment and Saving Provisions) (United Kingdom and Gibraltar) (EU Exit) Regulations 2018 repeal two redundant references in the 2010 Act.

7. **Policy background**

What is being done and why?

- 7.1 On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until 29 March 2019, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation.
- 7.2 The changes are consequential to the UK's departure from the EU and ensure that the legislation continues to operate properly after EU exit. In the case of the changes to the CPA and the GRA (regulations 2 and 3) the amendments simply reflect that the relevant provisions are now subject to a retained EU right – the position after EU Exit - rather than an enforceable EU right. Couples arriving in the UK after EU Exit day will still benefit from these retained EU rights.
- 7.3 The amendments to the 2006 Act (regulation 4) are intended to ensure that the Equality and Human Rights Commission can continue to provide individuals with legal assistance on the same basis as the status quo, in relation to legal matters relating to retained EU law.
- 7.4 The amendments to the 2010 Act are designed to: replace references to an EU Directive (regulation 5(2)); omit references to section 2(2) of the European Communities Act 1972 (ECA) (regulations 5(3), 5(7) and 5(8)); delete powers to amend the Equality Acts to ensure consistency across the legislation where changes

required by EU law would otherwise result in inconsistent provision (regulations 5(4), 5(5) and 5(6)); and omit references to the EEA (regulation 5(9)).

- 7.5 The Equality Act 2010 (Amendment) Regulations 2012 contain review requirements that reference an EU Directive and requirements to have regard to the implementation approach of other Member States. The amendments at regulation 6 remove these references, but do not affect the requirement on HM Treasury to review the Regulations' operation at regular intervals. Similar changes are being effected for the equivalent Northern Ireland legislation, through regulation 7, which amends the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2012.
- 7.6 This instrument applies to equal opportunities, which is a transferred matter for Northern Ireland under the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day less than one year away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.
- 7.7 Regulations 8 and 9 revoke two measures of retained direct EU legislation. In the case of EU regulation 1922/2006, the EIGE's functions relate primarily to dissemination and mainstreaming of EU policies on gender within EU Member States, which will no longer apply to the UK after departure from the European Union. EU Decision 771/2006 no longer has any practical application and is therefore redundant.
8. **European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**
- 8.1 This instrument is being made using the power in section 8(1) of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act, the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.
9. **Consolidation**
- 9.1 The Department does not intend to consolidate the relevant legislation at this time.
10. **Consultation outcome**
- 10.1 As there is no policy change, no public consultation has been required. The purpose of the instrument is solely to enable the current legislative and policy framework to remain unchanged by the withdrawal of the United Kingdom from the European Union.
- 10.2 The Scottish, Welsh and Northern Ireland devolved administrations have been consulted about these proposed amendments, as has the Equality and Human Rights Commission on those changes relating to the Equality Act 2006. There has been no other consultation.

11. **Guidance**

11.1 Since the changes in this instrument are technical in nature and do not impact on the legal obligations or entitlements arising from the amended legislation, no guidance is required.

12. **Impact**

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because there is no, or no significant, impact on business and no requirement for business to familiarise with these changes.

13. **Regulating small business**

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. **Monitoring & review**

14.1 The approach to monitoring this legislation is for each lead Department to consider. The Government Equalities Office intends to review the operation of the amended provisions on an ongoing basis.

14.2 As this instrument is being made under the European Union (Withdrawal) Act 2018, no review clause is required.

15. **Contact**

15.1 Matthew King at the Government Equalities Office. Telephone: 0207 340 7314 or email: Matthew.king@geo.gov.uk can be contacted with any queries regarding the instrument.

15.2 Charles M Ramsden at the Government Equalities Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rt. Hon. Penny Mordaunt MP, Minister for Women and Equalities, can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

| Statement | Where the requirement sits | To whom it applies | What it requires |
|-------------------|---|---|--|
| Sifting | Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7 | Ministers of the Crown exercising clauses 8(1), 9 and 23(1) to make a Negative SI | Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/ESIC |
| Appropriateness | Sub-paragraph (2) of paragraph 28, Schedule 7 | Ministers of the Crown exercising clauses 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 | A statement that the SI does no more than is appropriate. |
| Good Reasons | Sub-paragraph (3) of paragraph 28, Schedule 7 | Ministers of the Crown exercising clauses 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 | Explain the good reasons for making the instrument and that what is being done is a reasonable course of action. |
| Equalities | Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7 | Ministers of the Crown exercising clauses 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 | Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010. |
| Explanations | Sub-paragraph (6) of paragraph 28, Schedule 7 | Ministers of the Crown exercising clauses 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs | Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law. |
| Criminal offences | Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7 | Ministers of the Crown exercising clauses 8(1), 9, and 23(1) or jointly exercising | Set out the 'good reasons' for creating a criminal offence, and the penalty attached. |

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| | | powers in Schedule 2 to create a criminal offence | |
| Sub-delegation | Paragraph 30, Schedule 7 | Ministers of the Crown exercising clauses 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument. | State why it is appropriate to create such a sub-delegated power. |
| Urgency | Paragraph 34, Schedule 7 | Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Sch 7. | Statement of the reasons for the Minister's opinion that the SI is urgent. |
| Explanations where amending regulations under 2(2) ECA 1972 | Paragraph 13, Schedule 8 | Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA | Statement explaining the good reasons for modifying the instrument made under s.2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law. |
| Scrutiny statement where amending regulations under 2(2) ECA 1972 | Paragraph 16, Schedule 8 | Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s.2(2) ECA | Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid. |

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Secretary of State for International Development and Minister for Women and Equalities, the Rt. Hon. Penny Mordaunt MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

1.2 “In my view the Equality (Amendment and Revocation) (EU Exit) Regulations 2019 do no more than is appropriate”. As explained in paragraphs 2.1 and 6.1 of the memorandum, this is the case because these technical amendments are necessary to secure the proper ongoing operation of equalities legislation in the United Kingdom. They simply remove or replace references to the European Union, its laws and institutions, or legislation that is only relevant to the UK’s EU membership. The intention and effect is to provide legal certainty and clarity, which is not affected by the outcome of negotiations on the future of UK-EU relations. This is consistent with Government policy in this area, which was endorsed by Parliament during passage of the European Union (Withdrawal) Act.

2. Good reasons

2.1 The Secretary of State for International Development and Minister for Women and Equalities, the Rt. Hon. Penny Mordaunt MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

2.2 “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”. As explained in paragraph 2.2 of the memorandum, without these amendments the relevant legislation would become deficient and not fully fit for purpose. Some of the legislation would become moribund and it is good practice to repeal such legislation.

3. Equalities

3.1 The Secretary of State for International Development and Minister for Women and Equalities, the Rt.Hon. Penny Mordaunt MP has made the following statement: “The draft instrument does amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts. The effect of these amendments, repeals and revocations is as follows:

3.2 Regulation 2 amends the Gender Recognition Act 2004 so that domestic rules on the recognition of the gender of a person from overseas are subject to any right, which forms part of retained EU law, rather than an enforceable EU right. This does not change the effect of the provision, although the position would alter were rights under retained EU law (in particular rights under section 4 of the EU (Withdrawal) Act 2018) to evolve after the UK’s exit.

3.3 Regulation 3 amends the Civil Partnership Act 2004, such that recognition of same-sex relationships effected overseas, where one of the parties has been granted legal recognition of their gender change under the law of an EU country, can be treated as a civil partnership in the UK, without the need first to obtain a full gender recognition

certificate under the Gender Recognition Act 2004. The amendment means that individuals will now benefit from a right which forms part of retained EU law rather than an enforceable EU right. The effect of this is neutral although the position would alter were rights under retained EU law (in particular rights under section 4 of the EU (Withdrawal) Act 2018) to evolve after the UK's exit.

- 3.4 Regulation 4 amends section 28 of the Equality Act 2006, which sets out the circumstances in which the Equality and Human Rights Commission (EHRC) may provide legal assistance to individuals bringing cases of alleged discrimination and other unlawful conduct under the Equality Acts. The purpose and effect of this amendment is to maintain the current scope of the EHRC's power to provide legal assistance, so far as it may be relevant after exit.
- 3.5 Regulation 5(2) amends section 140AA of the Equality Act 2010 to remove and replace, with domestic law equivalents, references to the Alternative Dispute Resolution process, which provides consumers and service providers with alternative means of settling disputes, without recourse to the courts. This amendment, which specifically relates to the extension of time limits in such disputes, is neutral in its effect.
- 3.6 Regulation 5(3) amends section 162 of the Equality Act 2010, which enables the Secretary of State to extend the application of provisions on taxis to franchises. It specifically removes a provision that enabled the Secretary of State to exercise (under section 2(2) of the European Communities Act 1972) powers conferred on the Scottish Ministers to implement an EU obligation. This qualification to devolution is no longer required from EU exit date.
- 3.7 Regulations 5(4) and 5(5) remove sections 203, 204 and Schedule 24 from the Equality Act 2010. These provisions have never been used, but were designed to enable the Secretary of State to harmonise relevant provisions in the Equality Act 2010, where implementation of an EU obligation would otherwise have resulted in inconsistencies in approach, so undermining one of the key tenets of the Equality Act. These provisions are moribund from EU Exit date; their removal has no effect. Consequential to these amendments, Regulation 5(6) removes from Section 208 the requirement that an order under the harmonisation powers is to be subject to the affirmative procedure.
- 3.8 Regulation 5(7) modifies the age and nationality discrimination exception in relation to the provision of services and the exercise of public functions. Currently, the exception in Paragraph 15A of Schedule 3 to the Equality Act 2010 allows the Home Office to operate in a way that may, ordinarily, be considered race or age discrimination – for example, when deciding which foreign nationals to admit to the United Kingdom. Such action is permissible if required under immigration and related legislation or under EU law, including law transposed domestically through section 2(2) of the European Communities Act 1972. Regulation 5(7) continues to allow this, except that the section 2(2) references have been removed and retained EU law is now the criterion that sits alongside domestic legislation.
- 3.9 Regulation 5(8) removes references to section 2(2) of the European Communities Act 1972 from the exception from application of the Public Sector Equality Duty that applies in relation to immigration activities and requirements. This is replaced by a reference to retained EU law.

- 3.10 Regulation 5(9) amends Schedule 23 to the Equality Act 2010. This provision currently contains an exemption which allows a training provider to provide training to a person who is not ordinarily resident in the European Economic Area (EEA) where the training provider thinks that the training recipient does not intend to exercise the skills obtained in this country. The amendment recognises that the UK will not form part of the EEA after exit day and so ensures that this exception now applies to any country outside Great Britain.
- 3.11 The Equality Act 2010 (Amendment) Regulations 2012 introduced a gender-neutral pricing requirement on insurance companies, so implemented the European Court of Justice’s “Test Achats” judgement of March 2011, which banned insurance companies from charging premiums and paying benefits based on the sex of the person being insured. Regulation 6 maintains the effect of the regulations but removes references to the Directive on which the Court opined. Regulation 6 also removes requirements that during its review of the regulations, the HM Treasury must have regard to how other Member States are approaching their reviews.
- 3.12 Regulation 7 makes similar amendments to The Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2012, in which the Test Achats judgment had been implemented.
- 3.13 Regulation 8 revokes the EU Regulation which established the European Institute for Gender Equality (EIGE). The UK’s participation of EIGE will cease on the date of our departure from the EU and it would therefore be redundant to retain this measure as part of our domestic law.
- 3.14 Regulation 9 revokes the European Year of Equal Opportunities for All 2007, a now historic event originally promulgated through Council Decision 771/2006. Retaining this domestically would serve no purpose.
- 3.15 The Secretary of State for International Development and Minister for Women and Equalities, the Rt. Hon, Penny Mordaunt MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
“In relation to the draft instrument, I, Rt.Hon. Penny Mordaunt MP have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010. I have given equivalent due regard to the need to eliminate discrimination, harassment and victimisation in relation to Northern Ireland.”
- 3.16 The approach we have taken when making preparations for the drafting of this instrument is to ensure that it fits with the Government’s commitment that there will be no regression in equalities as we leave the European Union. The technical nature of the changes, as described above, means that there is no adverse impact on our overarching commitment to eliminating discrimination, harassment and victimisation.

4. Explanations

- 4.1 The explanations statement has been made in paragraph 2 of the main body of this Explanatory Memorandum.