

EXPLANATORY MEMORANDUM TO

THE CIVIL PARTNERSHIP AND MARRIAGE (SAME SEX COUPLES)
(JURISDICTION AND JUDGMENTS) (AMENDMENT ETC.) (EU EXIT)
REGULATIONS 2019

2019 No. 495

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Act.

2. Purpose of the instrument

- 2.1 This instrument is made under the European Union (Withdrawal) Act 2018 (the Withdrawal Act) to remedy deficiencies in EU-derived domestic legislation which is retained EU law within the meaning of that Act. It amends rules on jurisdiction and repeals rules on recognition for the divorce of same sex couples and the dissolution of civil partnerships to correspond to the changes being made in relation to opposite sex married couples by the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019. This instrument also amends the powers to make regulations relating to jurisdiction and recognition to enable the use of the powers after UK exit.

Explanations

What did any relevant EU law do before exit day?

- 2.2 In accordance with Government policy and to ensure equal treatment, the Civil Partnership Act 2004 (CPA) and the Domicile and Matrimonial Proceedings Act 1973 (DMPA) gave the Lord Chancellor the power to make regulations for civil partnership dissolution and for same sex divorce respectively corresponding to the jurisdiction and recognition rules for opposite sex divorce in the law of the European Union Council Regulation 2201/2003 (Brussels IIa). Using those powers, the Lord Chancellor made Regulations under the CPA for jurisdiction and recognition rules for dissolution and annulment of civil partnerships and legal separation of civil partners (civil partnership proceedings) for England and Wales and on behalf of the Department of Justice for Northern Ireland in the Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005 (SI 2005/3334) (the 2005 Regulations). The Lord Chancellor made Regulations under the DMPA for jurisdiction and recognition rules for same sex divorce, annulment and judicial separation (divorce etc proceedings) in England and Wales in the Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014 (SI 2014/543) (the 2014 Regulations).

Why is it being changed?

- 2.3 In the event of no deal, Brussels IIa is revoked by the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 which also set out rules of jurisdiction for opposite sex divorce etc proceedings so that they operate independently of EU legislation. The 2005 and 2014 Regulations are being amended to ensure, post exit, that the jurisdiction rules for civil partnership and same sex divorce etc proceedings and the position on recognition continue to correspond with

the rules applying to opposite sex divorce etc proceedings. The provisions relating to the recognition and refusal of recognition of judgments by a court of a Member State are being repealed and the substantive recognition provisions in the CPA (and supplementary provision made under it) and in the Family Law Act 1986 (for divorce) will apply to all cases. The powers to make Regulations in the CPA and the DMPA relating to jurisdiction and recognition are being changed to ensure the powers can be used in the future when the UK ceases to be a Member State. An amendment is needed to the CPA to remove reference to the 2004 Regulations in the provisions on recognition of overseas civil partnership dissolution, annulment or separation.

What will it now do?

- 2.4 The amendment of the jurisdiction rules for civil partnership proceedings in England and Wales and Northern Ireland and same sex divorce etc. proceedings in England and Wales makes them consistent with the (post exit) jurisdiction rules for opposite sex divorce etc. proceedings and with the approach taken on recognition of opposite sex divorce orders. The amendment of powers in the CPA and the DMPA enables their future use after exit.

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 varies between provisions.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is to England and Wales and Northern Ireland, subject to Regulation 5(5) extending to Northern Ireland only and Regulations 3, 5(4) and 6 extending to England and Wales only. Regulation 4(2)(c) also extends to Scotland.
- 4.2 The territorial application of this instrument is England and Wales and Northern Ireland.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Civil Partnership and Marriage (Same Sex Couples) (Jurisdiction and Judgments) (Amendment etc.) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The 2005 and 2014 Regulations broadly reflect the relevant jurisdiction and recognition provisions in Brussels IIa and are “retained EU law” for the purposes of the Act. The Brussels IIa jurisdiction and recognition provisions are being replaced so that they work after UK exit; this instrument makes amendments to keep the 2005 and 2014 Regulations working after UK exit too.

- 6.2 Section 8(1) of the Withdrawal Act empowers a Minister of the Crown to make regulations to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency arising from the withdrawal of the UK from the EU. Regulations made under section 8(1) may make any provision that could be made by an Act of Parliament, including repeal of relevant retained EU law.

7. Policy background

What is being done and why?

- 7.1 The Government made the policy decision when legislating for civil partnership and same sex marriage to ensure the jurisdiction and recognition rules for civil partnership and same sex divorce etc proceedings corresponded as closely as possible to the rules that apply to opposite sex divorce etc proceedings under Brussels IIa and section 5 of the DMPA.
- 7.2 In the event of the UK's no deal exit from the EU, the Brussels IIa Regulation is being revoked and replaced by jurisdiction provisions in domestic legislation for opposite sex divorce etc and by provisions which will apply the existing recognition rules to all cases including EU cases. The new rules for opposite sex divorce etc proceedings largely reflect the Brussels IIa rules and also include sole domicile as an alternative jurisdictional rule together with other drafting changes needed because of UK exit.
- 7.3 This instrument amends the 2005 and 2014 Regulations to ensure, post exit, that the jurisdiction rules for civil partnership proceedings in England and Wales and Northern Ireland and same sex divorce etc proceedings in England and Wales correspond to the jurisdiction rules for opposite sex divorce etc proceedings and the approach taken to recognition.
- 7.4 This instrument also amends powers in the CPA and the DMPA to enable them to operate effectively in future when the UK leaves the EU.
- 7.5 Transitional and saving provisions provide that the amendments made by this instrument do not apply in relation to proceedings issued before exit day.
- 7.6 This instrument applies to private international law which is a transferred matter for Northern Ireland under section 4(1) of 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 four months 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.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument is being made using the powers in section 8 of the Withdrawal Act and paragraph 21 of Schedule 7 to the Act 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 There are no plans to consolidate the relevant legislation.

10. Consultation outcome

10.1 This instrument has not been the subject of formal consultation.

10.2 The Government's no deal policy for same sex divorce and civil partnership dissolution was outlined in its Civil Judicial Cooperation Technical Notice that was published on 13 September 2018: (<https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brex-it-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brex-it-deal>). No queries or concerns have been raised with the Government by family stakeholders or practitioners.

10.3 The devolved administrations have been consulted about this instrument.

11. Guidance

11.1 The Government has no plans to issue guidance on this instrument.

12. Impact

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

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

12.3 A full impact assessment of the effect that this instrument will have on the costs of business, the voluntary sector and the public sector is available from the Ministry of Justice, 102 Petty France, London, SW1H 9AJ and is published alongside the instrument on <https://legislation.gov.uk>. In summary, this instrument makes changes to the jurisdiction and recognition rules for same sex divorce etc and civil partnership proceedings so that they continue to reflect what exists for opposite sex divorce etc after UK exit. The impact on business, charities or voluntary bodies (being those that advise, represent and support individuals and families engaged in cross-border family law matters) of this instrument will, on balance, be positive.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), transitional provisions ensure that the amendments made by this instrument do not apply in relation to proceedings issued before exit day.

14. Monitoring & review

14.1 As this instrument is made under the EU (Withdrawal) Act 2018, no review clause is required.

15. Contact

- 15.1 Miss G Bailey at the Ministry of Justice Telephone: + 44 (0)20 3334 3200 or email: gay.bailey@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Kristen Tiley, Deputy Director for Europe Division, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Lucy Frazer QC MP at the Ministry of Justice 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 sections 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/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 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 sections 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 sections 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 sections 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 sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 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, Schedule 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 Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Civil Partnership and Marriage (Same Sex Couples) (Jurisdiction and Judgments) (Amendment etc.) (EU Exit) Regulations 2019 does no more than is appropriate”.

- 1.2 This is the case because the instrument remedies EU exit related deficiencies in retained EU law by amending the jurisdiction and recognition rules for civil partnership proceedings in England and Wales and Northern Ireland and same sex divorce etc proceedings in England and Wales to ensure, post exit, these rules continue to correspond to the rules for opposite sex divorce etc proceedings and amends the power for making jurisdiction rules to ensure this can be used in future when the UK ceases to be an EU Member State.

2. Good reasons

- 2.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

- 2.2 These are that this instrument will ensure that, post exit, the jurisdiction and recognition rules for civil partnership proceedings in England and Wales and Northern Ireland and same sex divorce etc proceedings in England and Wales continue to correspond with the rules for opposite sex divorce etc proceedings thereby ensuring equality of treatment between opposite sex and same sex couples in this regard.

3. Equalities

- 3.1 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement(s):

“The instrument does not 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.

- 3.2 The Parliamentary Under Secretary of State for Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to this instrument, I, Lucy Frazer, 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. This Act does not extend to Northern

Ireland, but as the Civil Partnership and Marriage (Same Sex Couples) (Jurisdiction and Judgments) (Amendment etc.) (EU Exit) Regulations 2019 extend to Northern Ireland, I have given equivalent due regard to the need to eliminate discrimination, harassment and victimisation in relation to Northern Ireland.”

4. Explanations

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