

EXPLANATORY MEMORANDUM TO
THE INQUIRIES AND CORONERS (AMENDMENT) (EU EXIT) REGULATIONS
2018

[2018] No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Act.
- 1.2 This memorandum contains information for the Committees on the UK's exit from the European Union (EU).

2. Purpose of the instrument

- 2.1 This instrument amends references to “obligations” and “enforceable obligations” under EU law in the Inquiries Act 2005 and the Coroners and Justice Act 2009, and amends references to “community obligations” in the Coroners Act (Northern Ireland) 1959, to ensure reference is now made to “retained EU obligations” and to “retained enforceable EU obligations” following the United Kingdom's withdrawal from the European Union. It also amends s43 of the Inquiries Act 2005 to provide a definition of ‘retained enforceable EU obligation’ for the purposes of this SI with reference to the European Union (Withdrawal) Act 2018.
- 2.2 In the Inquiries Act 2005 the amendments relate to powers restricting public access to proceedings, producing evidence and publishing the inquiry report. In the Coroners and Justice Act 2009 and the Coroners Act (Northern Ireland) 1959 the amendment relates to coroners' powers to require the production of evidence or documents.
- 2.3 Explanations
 - *What did any relevant EU law do before exit day?* Before exit day a person could rely on an EU obligation or an enforceable EU obligation under the sections listed below. In relation to the Inquiries Act 2005, there are four relevant sections:
 - Section 19, which gives a minister or an inquiry chair powers to restrict public access to an inquiry's proceedings. One of these powers is where a restriction is required by an enforceable EU obligation. Other reasons to restrict attendance include that the Minister or chairman considers it to be conducive to the inquiry fulfilling its terms of reference or it is necessary in the public interest.
 - Section 22, which says that a person cannot be required to produce evidence to an inquiry if it would be incompatible with an EU obligation. Other reasons include that the evidence or document could not be required in civil court proceedings or it is in the public interest not to produce it.
 - Section 25, where the person whose duty it is to arrange for the publication of a report – such as a minister publishing the Inquiry Report – may withhold material in the report from publication where this is required by an enforceable

EU obligation. Other reasons include that it would not be in the public interest to publish the material.

- It also amends section 43(1) (interpretation) to define “retained enforceable EU obligation” as “an obligation (as modified from time to time) which forms part of retained EU law by virtue of section 3 or 4 of the European Union (Withdrawal) Act 2018;”.

In relation to the Coroners and Justice Act 2009, there is one relevant Schedule:

- Schedule 5, which gives a coroner the power to require the production of evidence or documents, and provides that a person may not be required to give, produce or provide any evidence or document if the requirement would be incompatible with an EU obligation. Other reasons include that it could not be required in civil court proceedings or it is in the public interest not to produce evidence.

In relation to the Coroners Act (Northern Ireland) 1959, there is one relevant provision:

- Section 17B(2)(b). Section 17A gives a coroner the power to require the production of evidence or documents, section 17B contains further provisions including restrictions on the power of a coroner providing, in section 17B(2)(b), that a person cannot be required to give or produce any evidence or document if to do so would be incompatible with a Community obligation. Other reasons in section 17B include that it could not be required in civil court proceedings or it is in the public interest not to produce evidence.

We believe that the ability to rely on an EU obligation or enforceable EU obligation in relation to the above is not used in practice, rather inquiries and inquests use the other reasons within the sections for when evidence could be restricted, for example when public access is restricted or when certain materials are withheld from publication, such as on reasons of national security.

Why is it being changed?

The references to EU obligations and enforceable EU obligations need to be amended to ensure retained EU law continues to apply to these Acts once the UK leaves the EU. If the references to EU obligations and enforceable EU obligations are not amended then the relevant provisions will no longer operate correctly because those terms will no longer have a clear meaning. The terms need to be amended to refer to the new terminology relating to retained EU law to be introduced by the European Union (Withdrawal) Act 2018.

What will it now do?

Where the UK decides to keep an EU obligation or enforceable EU obligation as retained EU law on exiting the EU, a person could rely on those obligations under the sections/Schedules above.

3. Matters of special interest to Parliament

Matters of special interest to the Committees on the UK's exit from the European Union

- 3.1 None.
- 3.2 This instrument is being laid in draft for sifting under the European Union (Withdrawal) Act 2018 by the ESIC and SLSC.

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)

- 3.3 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.
- 3.4 We consider the negative resolution procedure is appropriate as the changes it makes are technical to fix defects in these three Acts following withdrawal of the United Kingdom from the EU. It does not make substantive policy changes. The choice of procedure has been guided by the power to make regulations in section 43 of the Coroners and Justice Act 2009, the power in section 41 of the Inquiries Act 2005 and the power in section 36A of the Coroners Act (Northern Ireland) 1959 to make rules, all of which are subject to the negative resolution procedure.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales, Scotland and Northern Ireland.
- 4.2 The territorial application of this instrument is the United Kingdom (in respect of the Regulation amending the Inquiries Act 2005), England and Wales (in respect of the Regulation amending the Coroners and Justice Act 2009) and Northern Ireland (in respect of the Regulation amending the Coroners Act (Northern Ireland) 1959).

5. European Convention on Human Rights

- 5.1 Lucy Frazer QC MP has made the following statement regarding Human Rights:
“In my view the provisions of The Inquiries and Coroners (Amendment) (EU Exit) Regulations 2018 are compatible with the Convention rights.”

6. Legislative Context

Inquiries Act 2005

- 6.1 The Inquiries Act 2005 established a statutory framework for the conduct of public inquiries in the UK. From time to time events occur which are of such concern that it is in the public interest to establish an inquiry to examine what happened and make recommendations, with a view to ensuring that lessons are learned to prevent recurrence and to restore public confidence.
- 6.2 Whilst most inquiries are established under the Inquiries Act 2005, Ministers are not bound to use it. They may rely instead on specific legislation or establish non-statutory inquiries or a Royal Commission. There have been a number of non-statutory inquiries established since the Act came into force, for example the Chilcot Inquiry. Section 15 provides a means for a non-statutory inquiry to be converted into a statutory inquiry.

- 6.3 The 2005 Act extends to the whole of the UK, and governs the establishment of inquiries by UK Ministers, as well as Ministers of the devolved administrations (s1). S33 makes provision for inquiries involving more than one administration.
- 6.4 The Act makes provision for the establishment and constitution of an inquiry (ss.1-14), conversion of non-statutory inquiries into inquiries under the Act (ss.15-16), inquiry proceedings (ss.17-23), inquiry reports (ss.24-26), inquiries in the devolved administrations (ss.27-31), inquiries for which more than one Minister is responsible (ss.31-34), and supplementary provision (ss.35-51).
- 6.5 Section 19 provides that restrictions may be imposed on attendance at an inquiry, or particular parts of an inquiry, or disclosure of any evidence. Section 22 provides for evidence not to be disclosed in certain circumstances. Section 25 provides for the publication of the Report and makes provision on withholding material from publication.
- 6.6 The Inquiry Rules 2006 deal with matters of evidence and procedure and apply to inquiries established under the 2005 Act by UK Ministers. The Inquiries (Scotland) Rules 2007 apply to inquiries established under the 2005 Act by Scottish Ministers. Northern Ireland and Wales have not so far made Rules for inquiries established under the 2005 Act by Welsh Ministers.
- 6.7 Twenty three inquiries have been established under the 2005 Act, some of which were established under other legislation but were subsequently converted into 2005 Act inquiries. The most recent 2005 Act Inquiries are the Grenfell Tower Inquiry (established 14 June 2017) and the Infected Blood Inquiry (established 8 February 2018).

Coroners and Justice Act 2009

- 6.8 Part 1 of the Coroners and Justice Act 2009 provides for the duties and powers of coroners in England and Wales. Coroners have a duty to investigate deaths in certain circumstances, such as where the death is violent or unnatural. Section 1(1) of the CJA places a duty on a senior coroner who is made aware that the body of a deceased person is within that coroner's area to conduct, as soon as practicable, an investigation into the person's death if one of the triggers in section 1(2) for an investigation applies. The triggers in section 1 are that the coroner has reason to suspect that:
 - (a) the deceased died a violent or unnatural death;
 - (b) the cause of death is unknown; or
 - (c) the deceased died while in custody or otherwise in state detention.
- 6.9 Under section 5(1) of the CJA the purpose of a coroner's investigation is to determine:
 - (a) who the deceased was;
 - (b) how, when and where the deceased came by his or her death; and
 - (c) the particulars (if any) required by the Births and Deaths Registration Act 1953 to be registered concerning the death.
- 6.10 Under section 5(2), where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998 (c. 42)), the purpose in paragraph (b) above is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.

6.11 An inquest must be held as part of all investigations, subject to section 4(3)(a). Section 4(3)(a) provides that a coroner may discontinue an investigation without holding an inquest if the cause of death is revealed by a post-mortem examination and the death was not violent, unnatural or in custody or otherwise in state detention. Section 10 sets out the determinations and findings to be made at the inquest and they cover the same matters as the purposes of the investigation under section 5.

6.12 Schedule 5 provides further powers including powers relating to the production of evidence and circumstances when it may not need to be disclosed.

There is further detail on coroners' powers in the Coroners (Investigations) Regulations 2013 (SI 2013/1629) (made under section 43 of the CJA). There are also the Coroners (Inquests) Rules 2013 (SI 2013/1616) (made under section 45 of the CJA

The Coroners Act (Northern Ireland) 1959

6.13 The Coroners Act (Northern Ireland) 1959 sets out the law in Northern Ireland in relation to Coroners' appointment and powers.

6.14 Amendments to the Coroners Act (Northern Ireland) 1959 were introduced by section 49 of the Coroners and Justice Act 2009. Section 49(2) of the Coroners and Justice Act 2009 introduced Schedule 11, which substituted for section 17 of the Coroners Act (Northern Ireland) 1959 new sections 17A to 17C to make provision concerning witnesses, evidence and related offences in relation to inquests in Northern Ireland. The amendments brought Northern Ireland in line with the reformed system in England and Wales as the provisions in sections 17A-C are broadly equivalent to those contained in Schedule 5 to the Coroners and Justice Act 2009.

7. Policy background

What is being done and why?

7.1 Whilst this SI ensures that people can rely on retained and enforceable EU obligations, in theory the ability to rely on these is wide and would cover any aspect of EU law. We would expect that an obligation would be used in circumstances around data protection or subject specific areas. For example, the UK Air Accidents Investigation Branch (AAIB) operates under EU Regulations on the investigation and prevention of accidents and incidents in civil aviation. Evidence from the AAIB may be used as part of the coroner's inquest or in a public inquiry. It is not the purpose of this SI to decide whether or not the policy under this EU Regulation, or any other Regulations, should continue post-exit from the EU. Rather the policy is that if the provisions in such Regulations are retained post-exit, then they should continue to be used to not provide evidence etc in accordance with the Acts. Where the UK decides to keep an EU obligation or enforceable EU obligation as retained EU law on exiting the EU, that obligation should still be able to be relied on in the Inquiries Act 2005, the Coroners and Justice Act 2009 and the Coroners Act (Northern Ireland) 1959.

7.2 However, we believe that the ability to rely on an EU obligation or enforceable EU obligation in relation to the above provisions is not used in practice. Our discussions with operational colleagues have not brought up any circumstances in which either has been used. In practice, we believe inquiries and inquests use the other reasons within the sections for evidence/documents being restricted, public access restricted or material withheld from publication, such as on reasons of national security. These

reasons are unaffected by the changes the SI makes. Inquiries and inquests can still operate as they do currently under these sections. For example, at an inquiry or an inquest restricted evidence can be given and an inquiry can withhold material from publication in the report on grounds of national security.

- 7.3 If the references to EU obligations and enforceable EU obligations are not amended then the relevant provisions will no longer operate correctly because those terms will no longer have a clear meaning. The terms need to be amended to refer to the new terminology relating to retained EU law to be introduced by the European Union (Withdrawal) Act 2018.
- 7.4 This instrument applies to functions of the Department of Justice and the Advocate General for Northern Ireland in the Coroners Act (Northern Ireland) 1959 and transferred matters for Northern Ireland under Article 12, Schedule 14 and Article 15(1) Schedule 17 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I No.976/2010). 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.

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

- 8.1 This instrument is being made using the power in section 8 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 EU. 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 These regulations amend primary legislation and are not being consolidated. In due course changes will appear on the legislation.gov.uk website.

10. Consultation outcome

- 10.1 A public consultation was not undertaken for these changes which are minimal and technical. This instrument corrects what will be defects in the three Acts to ensure retained EU law continues to apply in these Acts following withdrawal of the United Kingdom from the EU. We discussed the proposed changes with operational colleagues in inquests and inquiries, and those in Government responsible for sponsorship of inquiries, to ask whether an EU obligation or enforceable EU obligation has ever been used in the circumstances set out in the Acts. They were not

aware of examples of these being used. There are no substantive policy changes and we are confident that the Acts can continue to operate effectively once these changes are made. Therefore we consider this SI will not attract the interest of key stakeholders. However, once the SI is laid, we will notify all relevant parties across Government, the Chief Coroner's office and the Chairs of current inquiries under the Inquiries Act 2005. At the same time, Northern Ireland colleagues will engage with stakeholders in Northern Ireland.

11. Guidance

- 11.1 No guidance will be provided on the amendments made by these regulations. In relation to the Inquiries Act 2005, the Cabinet Office provides guidance on inquiries to government departments and inquiries on setting up and running an inquiry, which includes guidance on taking and hearing evidence and publishing the inquiry report. The Inquiries Act 2005 is also supported by the Inquiry Rules 2006 which provide procedures to follow on, among other things, disclosure of potentially restricted evidence.
- 11.2 In relation to the changes to the Coroners and Justice Act 2009, the Chief Coroner has provided a Guide to the Coroners and Justice Act 2009 which includes taking and hearing evidence and disclosure. The Act is also supported by the Coroners (Investigations) Regulations 2013 which contain provisions on the disclosure and provision of information.
- 11.3 No guidance will be provided on the amendments made by these regulations to the Coroners Act (Northern Ireland) 1959. In relation to the Coroners Service in Northern Ireland guidance is provided on <https://www.justice-ni.gov.uk/articles/coroners-service-northern-ireland>. The Act is supported by the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 (S.R. & O. 199/1963).

12. Impact

- 12.1 A full impact assessment has not been published for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

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 of this legislation is that it will not be monitored as the change is technical and minimal.
- 14.2 As this instrument is made under the European Union Withdrawal Act 2018, no review clause is required.

15. Contact

- 15.1 Michelle English at the Ministry of Justice Telephone: 020 3334 5610 or email: Michelle.English3@justice.gov.uk can be contacted with any queries regarding the elements of the instrument related the Coroners and Justice Act 2009 and the Inquiries Act 2005. For matters related to the Coroners (Northern Ireland) Act 1959 contact Janine McGahan at the Department of Justice: email: janine.mcgahan@justice-ni.x.gsi.gov.uk

- 15.2 Richard Mason 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 A

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/ESIC
Appropriateness	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 23(1) or jointly exercising	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		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, 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. Sifting statement(s)

- 1.1 The Parliamentary Under Secretary of State at the Ministry of Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 1.2 “In my view the Inquiries and Coroners (Amendment) (EU Exit) Regulations 2018 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)”. This is the case because the SI only makes minor, technical changes in order to ensure that retained EU law continues to apply in the three Acts following withdrawal of the United Kingdom from the EU. In practice, we believe that there have not been any occasions to date in which ‘EU obligations’ or ‘enforceable EU obligations’ have been cited as a reason for acting on the relevant exceptions in any of the Acts, rather the other reasons within the Acts are used for when evidence could be restricted, public access restricted or material withheld from publication, such as on reasons of national security. These reasons are unaffected by the changes the SI makes and so inquiries and inquests can still operate as they do currently.

2. Appropriateness statement

- 2.1 The Parliamentary Under Secretary of State at the Ministry of Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 2.2 “In my view the Inquiries and Coroners (Amendment) (EU Exit) Regulations 2018 does no more than is appropriate”. This is the case because the technical SI corrects deficiencies to ensure retained EU law continues to apply in these Acts following withdrawal of the United Kingdom from the EU. It does not make any policy change.

3. Good reasons

- 3.1 The Parliamentary Under Secretary of State at the Ministry of Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 3.2 “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”. These are: they will correct deficiencies to ensure retained EU law continues to apply to these Acts following withdrawal of the United Kingdom from the EU and they bring clarity and accuracy to ensure the Acts operate correctly post exit.

4. Equalities

- 4.1 The Parliamentary Under Secretary of State at the Ministry of Justice, Lucy Frazer QC MP, has made the following statement(s) “The draft 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.

- 4.2 The Parliamentary Under Secretary of State at the Ministry of Justice, Lucy Frazer QC MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- 4.3 “In relation to the draft instrument, I, Parliamentary Under Secretary of State at the Ministry of Justice, Lucy Frazer QC 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.”.
- 4.4 There is no disproportionate impact on any of the protected characteristics from these changes. The changes are intended to make the Inquiries Act 2005, the Coroners and Justice Act 2008 and the Coroners Act (Northern Ireland) 1959 operate correctly after the UK leaves the EU and will apply equally to all inquiries and inquests, and all individuals whether or not there are protected characteristics.

5. Explanations

- 5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.