Ministry
of Justice

Government response to consultation

Response to the consultation on the departure from retained EU case law by UK courts and tribunals

October 2020

CP 303

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Response to the consultation on the departure from retained EU case law by UK courts and tribunals

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

October 2020

CP 303

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Introduction and contact details

This document is the post-consultation Government response to the consultation paper on the departure from retained EU case law by UK courts and tribunals.

It will cover:

- the background to the consultation;
- a summary of the responses to the consultation;
- a detailed response to the specific questions asked in the consultation;
- the next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Joanne Davies** at the address below:

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This report is also available at https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals

Alternative format versions of this publication can be requested from the Judicial Policy Team by emailing Judicial_Policy_Correspondence@justice.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Executive Summary

Our departure from the EU and the forthcoming end of the Transition Period in December 2020 brings a fundamental change for us all. The Government has, through legislation, made provisions to bring the law from the EU that we have chosen to retain into our law so that our law remains clear and certain.

Of course, our law does not just comprise statute, it is also built, under our common law system, from case law-judgments of the courts over time. During our membership of the EU, much of that case law has evolved from judgments of the Court of Justice of the European Union.

From January 2021, our courts, rather than the Court of Justice of the European Union will, rightly, be the final arbiter of the laws that govern our lives.[1] However, in order to promote legal clarity and certainty in our law following our departure from the EU, Parliament, through the EU (Withdrawal) Act 2018 ("the 2018 Act") has provided that the EU law we

[1] Subject to the terms of the Withdrawal Agreement and Northern Ireland Protocol

have chosen to retain is to be interpreted in line with the principles laid down by, and decisions of, the Court of Justice of the European Union, as modified by UK law from time to time, subject to certain exceptions ("retained EU case law").

In making this provision, it was also recognised that the way the law is interpreted by our courts and tribunals does not remain static over time. Our departure from the EU has naturally brought with it a change to the context in which the law is considered; and we would want our courts to be able to reflect that in their decisions where appropriate. Without the ability to depart from retained EU case law, there is a risk that the EU law which has been retained in UK law remains tied to an interpretation from the Court of Justice of the European Union that is arguably no longer appropriate in the UK.

It is for this reason that the 2018 Act vested in the UK Supreme Court and High Court of Justiciary in Scotland (in specified cases) the power to depart from retained EU case law, applying their own tests for deciding whether to depart from their own case law when doing so. Parliament also decided, in amending the 2018 Act in the EU (Withdrawal Agreement) Act

2020 (“the 2020 Act”), that the list of courts which may depart from retained EU case law could be extended further, following consultation.

The Government is grateful for the considered responses it has have received to the consultation on the exercise of this power on the questions of: which courts ought to be able to depart from retained EU case law and the extent to which the court is not bound by retained EU case law; the test that they should apply when deciding whether to depart from retained EU case law; the operation of precedent in these circumstances, and the considerations that the courts, including the UK Supreme Court and High Court of Justiciary in Scotland, ought to take into account in coming to such decisions.

The Government notes the caution expressed about the potential impact that a decision to depart from retained EU case law might have on confidence in, and certainty of, the law; but in doing so, notes also that it was the question of whether more courts ought to be able to depart from retained EU case law, rather than the existence of the ability to depart from retained EU case law itself, that was the subject of

this consultation – the latter point having already been determined by Parliament.

Having considered the consultation responses fully, the Government is satisfied that it is appropriate to introduce Regulations to extend the power to depart from retained EU case law to the Court of Appeal in England and Wales; the Court of Appeal of Northern Ireland; the High Court of Justiciary in Scotland when sitting as a court of appeal in relation to a compatibility issue or a devolution issue; the Inner House of the Court of Session; the Lands Valuation Appeal Court and the Registration Appeal Court. Extending the power to this limited list of additional courts will help achieve our aim of enabling retained EU case law to evolve more quickly than otherwise might have been achieved. Such a step would help mitigate the operational impacts on the UK Supreme Court and High Court of Justiciary in Scotland which would arise if the power were reserved solely to those courts; and there will be benefits to the UK Supreme Court in being assisted by a prior judicial dialogue on these complex issues from the Court of Appeal or the relevant appellate court in Scotland or Northern Ireland.

By restricting this power to the highest appeal courts, we will also minimise the risk, identified in the consultation responses, of adverse impacts which may arise out of any legal uncertainty resulting from additional litigation being brought, and the risk of divergence of approach between courts across the UK.

On the question of the test to be applied by these courts, our proposal for a single test – that adopted by the UK Supreme Court in deciding whether to depart from its own case law – was supported by a majority of consultation responses. As that test has already once been approved by Parliament in the 2018 Act as the appropriate test for the UK Supreme Court, the Government is confident that this is the appropriate approach, and that in setting the same test for the additional courts to apply, we will promote consistency of approach between the courts to whom this power will be extended. Given the nature of that test, the Government is not minded to specify any additional factors for the courts to consider.

Finally, a number of questions relating to the precedent value of certain decisions were asked in the consultation – our detailed responses to those are set

out in detail within this document, but, in summary, the Government will not be making changes in that space.

Background

The consultation paper '*Consultation on departure from retained EU case law by UK courts and tribunals*' was published on 2 July 2020. It invited comments on whether the power to depart from retained EU case law should be extended to additional courts and tribunals across the UK at the end of the Transition Period.

The European Union (Withdrawal) Act 2018 ("the 2018 Act") as amended by the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act") set out the legal framework following our departure from the EU after the end of the Transition Period on 31 December 2020 in exercise of the power provided by section 6 of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020).

The aim of the 2018 Act, as well as other things, is to provide legal clarity and certainty in our law following our departure from the EU. It sets out which elements of EU law are retained in UK law, and how retained EU law is to be interpreted, including the extent to

which the case law of the Court of Justice of the European Union is retained and should be followed by UK courts and tribunals.

Relevant legislation

Pursuant to section 6 of the 2018 Act (as amended), UK courts and tribunals cease to be bound by principles laid down by the Court of Justice of the European Union, or any decisions made by that court, after the end of the Transition Period (11pm on 31 December 2020), subject to the provisions of the Withdrawal Agreement. However, it further provides that retained EU law, as far as that law is unmodified on or after the end of the Transition Period, and as far as is relevant to it, is to be interpreted in line with retained case law.

Retained case law comprises retained domestic case law and retained EU case law. Retained domestic case law means the principles and decisions laid down by UK courts and tribunals before the end of the Transition Period in relation to EU law which is retained under the 2018 Act (subject to certain exceptions). This includes such case law as modified by UK law after the end of the Transition Period.

Retained EU case law means the principles and decisions laid down by the Court of Justice of the European Union, in relation to EU law which is retained under the 2018 Act (subject to certain exceptions), which were applicable on or before the end of the Transition Period, as modified in UK law. Only the UK Supreme Court or the High Court of Justiciary (as the final criminal court of appeal in Scotland in circumstances where there is no route of appeal to the UK Supreme Court) have the power to depart from retained EU case law (under section 6(4) of the 2018 Act), and in so doing would apply the rules they respectively exercise in departing from their own previous case law.

The consultation

Our departure from the EU and the end of the Transition Period brings a fundamental change to the context within which retained EU law and retained EU case law is to be considered. The Government recognises the need to provide legal clarity and certainty following this fundamental change, but also that our courts should not continue to be bound to retained EU case law where it is not right to do so.

It is in this new context that retained EU law and retained EU case law are to be considered in the future. In the same way that courts and tribunals can currently depart from their own case law (subject to the doctrine of precedent), UK courts and tribunals need to be able to depart from the body of retained EU case law in similar circumstances.

The 2018 Act already vests this power in the UK Supreme Court and High Court of Justiciary (as the final criminal court of appeal in Scotland in cases where there is not a route of further appeal to the UK Supreme Court). In considering whether to extend the power to other courts and tribunals, as provided for by section 6 of the 2018 Act, the Government has carefully considered the desirability of additional courts and tribunals being able to depart from retained EU case law, to allow for appropriate and timely development of retained EU law. Extending the power to depart from retained EU case law to additional courts and tribunals would provide greater scope for the interpretation of retained EU law to evolve to recognise the UK's changing status.

Section 6 of the 2018 Act, as amended by section 26(1) of the 2020 Act, provides for a Minister of the

Crown to make Regulations for courts or tribunals other than the UK Supreme Court and the High Court of Justiciary in Scotland (in its capacity as a final court of appeal) not to be bound by retained EU case law.

This power is only relevant to the interpretation of retained EU law. It will not affect the interpretation of law which is not retained EU law. For example, section 7A of the 2018 Act gives effect to the rights and obligations under the Withdrawal Agreement and Northern Ireland Protocol. These rights must be interpreted in line with the terms of the Withdrawal Agreement (including, where relevant, the jurisprudence of the Court of Justice of the European Union).[2] The power in section 6 does not affect this obligation. Further, any UK legislation, (including domestic law which forms part of retained EU law), which gives effect to the requirements of the Withdrawal Agreement, must be interpreted in accordance with the Withdrawal Agreement. Following the end of the Transition Period, courts and tribunals could not depart from retained EU case law in these circumstances.

[2] See section 6(6A) and 7C of the 2018 Act.

The consultation sought views on the use of the power contained within section 6(5A) of the 2018 Act, (as amended by the 2020 Act), which enables the Government to:

- designate additional courts or tribunals with the power to depart from retained EU case law;
- specify "the extent to which, or circumstances in which," the court or tribunal "is not to be bound by retained EU case law";
- set out the test which a relevant court or tribunal "*must apply*" in deciding whether to depart from any retained EU case law;
- specify considerations which "*are to be relevant*" to the court or tribunal in coming to such decisions.
- specify considerations which "*are to be relevant"* to the UK Supreme Court or the High Court of Justiciary in Scotland in coming to such decisions.

In considering whether, and if so, how, to exercise the Regulation making power, to extend the power to depart from retained EU case law to additional lower courts and tribunals, the Government considered the impact of the options on:

- the development of case law in the UK after the end of the Transition Period;

- clarity of and certainty of the law in the UK;
- the administration of justice and the operational impacts on courts and tribunals in the different UK legal jurisdictions; and
- our obligations under the Public-Sector Equality Duty:
    - having due regard to –
        - the need to eliminate unlawful discrimination, harassment, and victimisation and any other conduct prohibited by the Equality Act 2010;
        - advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
        - foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Based on a preliminary assessment against the above criteria, we identified and consulted on two policy options which we considered are capable of giving effect to the policy aims of enabling more courts to depart from retained EU case law, whilst at the same

time maintaining legal certainty across the UK. The options were to:

1. Extend the power to depart from retained EU case law to the Court of Appeal of England and Wales and its closest equivalents in other UK jurisdictions; or
2. Extend the power to depart from retained EU case law, in addition to the Court of Appeal and equivalent courts across the UK, to the High Court of Justice of England and Wales and its closest equivalents in the other UK jurisdictions.

The consultation (across 11 questions) invited views on:

1. Whether the power to depart from retained EU case law should be extended to additional courts;
2. Whether to prescribe a test to be applied, and if so what test;
3. What considerations should be relevant to the test for the UK Supreme Court, High Court of Justiciary in Scotland and any additional courts on whom this power is conferred;
4. The application of the doctrine of precedent to decisions relating to departure from retained EU case law; and

5. An assessment of the impacts and equality impacts, including on different levels of courts and tribunals.

The consultation was sent to the statutory judicial consultees (the President of the UK Supreme Court, the Lord Chief Justice (England and Wales), the Senior President of Tribunals, the Lord Chief Justice (Northern Ireland) and the Lord President of the Court of Session) as well as to members of the judiciary in the different UK legal systems, the Scottish Government, the Northern Ireland Executive, the Welsh Assembly and representative bodies from the legal sector, businesses, and regulatory bodies, asking for their views on the exercise of the power to make these Regulations.

The six-week consultation period closed on 13 August 2020 and this document summarises the responses, including how the consultation process influenced the final decision based on the proposals consulted upon and outlines the next steps the Government will take.

The consultation was not accompanied by an Impact Assessment or an Equality Impact Assessment. The views of consultees on any impacts were invited, to enable account to be taken of evidence provided by

stakeholders during the consultation period. An Impact Assessment has been published alongside this response document and a statement regarding the equalities impact is set out below.

Summary of responses

We received a total number of 75 responses to the consultation paper. All percentages regarding responses are calculated out of the total number of respondents (75), regardless of whether they commented on the question.

To aid our analysis of the responses, we have broken the responses down into 12 categories of respondent: The number of responses in each category is listed in the table below.

Description	Number of Responses	% of total
Statutory judicial consultees	4	5%
Parliamentary committees	1	1%
Judiciary	3	4%
Devolved Administrations and AGO NI	3	4%
Legal Services Sector	30	40%

Description	Number of Responses	% of total
Legal Academics	4	5%
Businesses and other organisations	12	16%
Trade Unions	3	4%
Regulatory Bodies	2	3%
Human Rights Organisations	4	5%
Members of the Public	9	12%
Total	**75**	**100%**

Within these responses we have noted that:

- The Lord Chief Justice England and Wales and the Senior President of Tribunals submitted a joint response;
- The Justice Select Committee submitted a response; and
- Legal academics have responded in their personal capacity not on behalf of their academic organisation.

Responses to specific questions

WHETHER TO MAKE REGULATIONS AND IF SO TO WHICH COURTS SHOULD THE POWER TO DEPART FROM RETAINED EU CASE LAW BE EXTENDED?

Questions 1–3 in the consultation document invited views from respondents on whether the power to depart from retained EU case law should be extended to additional courts and tribunals.

Question 1: Do you consider that the power to depart from retained EU case law should be extended to other courts and tribunals beyond the UK Supreme Court and High Court of Justiciary? Please give reasons for your answer.

Yes	20	27%
No	42	56%
But if Government making Regulations, Option 1	18 out of 42	43% (of all noes)

But if Government making Regulations, Option 2	0	0% (of all noes)
No comment on extension of the power	11	15%
Unclear	2	3%

Question 2: What do you consider would be the impacts of extending the power to depart from retained EU case law in each of the options below? Please give reasons for your answer.

a) **The Court of Appeal and equivalent level courts;**
b) **The High Court and equivalent level courts and tribunals;**
c) **All courts and tribunals.**

Not everyone responded to this question and the key themes of those who did have been grouped together below.

The following tables identify the positive and negative impacts identified in consultation responses of the option to extend the power to depart from retained EU case law to the Court of Appeal level.

Positive impacts		
Strikes the right balance between legal certainty and evolution of law	7	9%
Alleviates pressure on the UK Supreme Court	6	8%
Provides flexibility in the law	6	8%
More scope for reconsideration by domestic judges	5	7%
Maintains necessary degree of predictability in the law / decisions binding on the courts beneath them / provides greatest certainty	4	5%
Prior judicial consideration of the case for departure	3	4%
Reduces the risk of divergence	2	3%
Reduced costs for parties	2	3%
Complexities associated with such issues best suited to appellate courts / appropriate expertise in dealing with such issues	2	3%
Avoids an unmanageable spike in litigation / negative impacts on efficiency and access to justice	2	3%

Negative impacts		
Introduces an element of uncertainty into UK law / undermines doctrine of precedent / lack of cohesion in the development of law	28	37%
Increase in early cases will lead to overall increase to judicial / court workloads	18	24%
Inappropriate to make this constitutional change through statutory instrument / political issue for Parliament not the courts / inconsistent with policy in 2018	12	16%
Do not have UK Supreme Court's cross-jurisdictional powers	7	9%
Uncertainty undermines the UK's international reputation for dispute resolution	3	4%
Undermine Aarhus convention rights/ Withdrawal Agreement obligations / International conventions	2	3%
Undermine on-going negotiations with the EU	1	1%

The following tables identify the positive and negative impacts identified in consultation responses of the option to extend the power to depart from retained EU case law to both the High Court level and all courts and tribunals. The majority of those who responded noted that the impacts in c) above are similar to b), but to a greater extent. For this reason, those two options have been merged into one table.

Positive impacts		
Greater access to justice / enhances the administration of justice	3	4%
Faster pace of divergence	2	3%
Appropriate level of court to decide such issues	1	1%

Negative impacts		
Considerable degree of legal uncertainty – inconsistency / arbitrariness	50	66%
Increase in case volumes and applications to appeal / speculative litigation / pressure on the courts in scope	29	39%

Negative impacts		
Greater risk of divergence across jurisdictions in the UK	17	23%
Increased incentive to parties to re-litigate	13	17%
Increased costs and delays	11	15%
First instance courts do not have experience of departing from precedent / inappropriate for a single judge to make such decisions / insufficient expertise	8	11%
Undermines the UK's strong international reputation as a dispute resolution centre	7	9%
Approach is inconsistent with the hierarchy within the court's structure / doctrine of precedent	6	8%
Inconsistency across the UK encourages "forum shopping"	4	5%
Prejudice UK's negotiating position during on-going negotiations	4	5%
Pressure on the judiciary to depart	3	4%
Undermine Aarhus convention rights / Withdrawal Agreement obligations / International conventions	2	3%

Negative impacts		
Legal uncertainty will last longer where parties do not appeal decisions to a senior court	2	3%
Loses the balance between the policy objectives	1	1%

Question 3: Which option do you consider achieves the best balance of enabling timely departure from retained EU case law whilst maintaining legal certainty across the UK? Please give reasons for your answer.

None	42	56% of which:
But if Government making Regulations, Option 1	18 (out of 42)	43%
But if Government making Regulations, Option 2	0 (out of 42)	0%
Option 1	24	32%
Option 2	2	3%

Referral mechanism (1st preference)	1	1%
Referral mechanism (alternative preference)	1	1%
Did not comment	5	7%

Whether to make Regulations

56% of respondents were not in favour of the power to depart from retained EU case law being extended beyond the UK Supreme Court and the High Court of Justiciary in Scotland. Those opposed included a large proportion of the legal services sector, legal academics, trade unions and businesses who responded to the consultation.

Respondents cited a range of reasons in support of not making Regulations, but the predominant reason given was the risk to legal certainty if this power were to be extended beyond the UK Supreme Court and High Court of Justiciary in Scotland. They considered that the impact of such legal uncertainty would result in:

- the re-litigation of well-established legal principles;
- a divergence in legal approaches across the UK on similar issues; and

- an incoherent legal framework with adverse impacts in key areas such as tax, employment, environment and equalities.

They concluded that the cumulative effect of this uncertainty would negatively impact businesses and the UK's international reputation as a reputable forum in which to settle disputes.

Many of those who did not support the extension of the power expressed concern about the principle of reliance on the courts to consider diverging from retained EU case law – arguing that this is a matter for Parliament to legislate upon.

Option 1

32% of all respondents supported extending the power to depart from retained EU case law to the Court of Appeal level. This figure increases to 56% when including those respondents whose primary preference was for no Regulations to be made but considered the Court of Appeal level to be the preferable approach if Regulations were to be made nevertheless. Of these, there was a strong consensus that the impacts arising out of this option were the most manageable and caused the least risk of negative impacts such as legal uncertainty. The

statutory judicial consultees, other judicial respondents and the Devolved Administrations expressed a preference for this option.

There was some recognition amongst the responses of the benefits of extending the power to depart to the Court of Appeal level, particularly in respect of alleviating undue pressure on the UK Supreme Court. The benefits of judicial dialogue of prior consideration of the issues prior to determination by the UK Supreme Court were also highlighted.

Responses also noted the benefits of more senior judges in the Court of Appeal, as opposed to the High Court level considering such cases, noting the particular complexities of issues surrounding retained EU case law and the Northern Ireland Protocol. It was also noted that there is greater reporting of decisions at the Court of Appeal level in comparison to the High Court level, which would help promote clarity.

Two of the statutory judicial consultees expressly referenced the benefits to the UK Supreme Court with the Lord President noting that Option 1:

> *"would relieve the UK Supreme Court of the burden of dealing with challenges from the four jurisdictions, whilst permitting it to gain the benefit of experienced*

appellate courts in distilling and filtering questions of law. It protects legal certainty."

Option 2

Only two respondents (3%) supported Option 2. Many responses demonstrated a strong objection to Option 2 on the basis that it would cause significant legal uncertainty, chaos and confusion within the courts, and result in an unmanageable increase in demand as litigants seek to re-litigate settled points of law in a bid to seek a more favourable outcome, with some respondents expressing concern about the ability of some to access justice.

This included concerns about the increased risk of "*forum shopping*" between UK jurisdictions which would increase the risk of divergence and exacerbate legal uncertainty. There were arguments that such issues are not suited for consideration by a single judge and best placed before a panel of judges given the complexities involved in any decision to depart from retained EU case law.

Overall, respondents urged caution from the Government in making a final decision on whether to exercise the power in section 6 of the 2018 Act to avoid unintended consequences arising from any

decision to extend the power to depart from retained EU case law to a large number of additional courts and tribunals. Respondents were, broadly speaking, more accepting about the ability to manage impacts at Court of Appeal level than at High Court level.

Approach

The basis of this consultation centred on the question of whether more courts and tribunals ought to be able to depart from retained EU case law. Parliament has already considered and answered the question about whether the ability for a court to depart from retained EU case law should exist. By passing the 2018 and 2020 Acts respectively, Parliament has made it clear that it is necessary and appropriate to allow some courts to depart from retained EU case law and has already agreed that the UK Supreme Court and High Court of Justiciary in Scotland at a minimum should be able to do so.

The Government notes the need for caution expressed amongst respondents about the potential impacts that litigation seeking to persuade courts to depart from retained EU case law might have on confidence in, and certainty of, the law. It recognises that this risk needs to be balanced against the risk

that under the status quo, cases in which it might be wished to argue for departure from retained EU case law may take too long to be considered resulting in "fossilisation" of our law, and the risk that our law does not evolve to reflect the UK's changed status following its departure from the EU.

While the Government recognises that a majority of respondents did not support the extension of the ability to depart from retained EU case law to more courts and tribunals, it also notes that some of that objection was focussed on an objection in principle to the courts being able to reach such a decision at all – a principle that was not subject to this consultation.

The Government has also considered that a number of respondents, and particularly the statutory consultees, identified positive benefits from the extension of this power, in particular for the UK Supreme Court in terms of its ability to hear such cases in a more timely manner, and the assistance that prior consideration of departure from retained EU case law at the Court of Appeal level would provide.

The Government agrees that extending the power to additional courts will alleviate the pressures on the UK Supreme Court. The President of the UK Supreme

Court acknowledges that "*a proportion of the cases…would still be likely to come to the UKSC on appeal, but the number would be likely to be much lower than if the UKSC were the only avenue available*." The Government is particularly mindful of the impact on case volumes and timeliness in the UK Supreme Court who will have to balance these new additional cases alongside the existing work before the Court. The UK Supreme Court has 12 justices who, in addition to sitting in the UK Supreme Court also sit in the Judicial Committee of the Privy Council. We consider that, if the power were not extended to additional courts, the UK Supreme Court could become a bottleneck to the timely resolution of such cases due to an increase in demand. This delay in the resolution of cases could in itself result in legal uncertainty as parties to the proceedings, and those with an interest in those proceedings, have to wait longer for a final decision that would provide a certain way forward.

The Government finds these arguments particularly persuasive, both in terms of their source, and in the context of the overarching policy aim of enabling the courts to consider these questions in a timely manner.

The Government therefore intends to exercise the power to enable more courts to depart from retained EU case law.

On the question of which courts should be able to depart from retained EU case law, the Government has noted the strong preference for Option 1 over Option 2 in the consultation responses.

It notes that more positive benefits, particularly operational benefits given the limited capacity of the UK Supreme Court, were identified with Option 1. In particular, the strongly held view that reserving the power to this level of appellate courts will provide less legal uncertainty than would be the case if the power were to be extended more widely, as there would be a lower risk of divergence in the application of retained EU case law, and the law would become settled more quickly, is persuasive. The Government agrees that extending the power more widely to High Court level would significantly increase legal uncertainty and divergence in decision making which could encourage parties to engage in "*forum shopping*" to find the jurisdiction most likely to result in a favourable outcome.

For Option 2, the main benefit identified was that this level of court would provide greater access to justice as parties are more easily able to access a lower court and few parties can afford to appeal decisions to the Court of Appeal. In contrast, the Government considers that the greater possibility associated with this option of creating significant volumes of litigation risks undermining access to justice if litigants are faced with conflicting rulings and limited resource to appeal to a higher court to a more certain outcome in a particular jurisdiction.

While it is arguable that the policy aim of enabling decisions on whether to depart from retained EU case law to be made in a more timely manner could be better achieved by Option 2, the Government considers that the risks identified outweigh this.

We have also considered that we are in an unprecedented and novel situation as no Member State has ever left the EU before. The issues around retained EU law and the departure from retained EU case law is therefore a complex area of law and the Government is mindful of the inevitable risk of divergence between the UK jurisdictions. The impacts of this potential divergence are mitigated by restricting

the power to the Court of Appeal level because it would bind itself and courts below as well as judgments of this level of court being persuasive across the UK's three legal systems.

We have noted points made in the consultation responses that such matters may be better considered by a panel of judges at Court of Appeal level who will collectively consider the issues to reach a conclusion, rather than a single judge of first instance at High Court level and agree that consideration at the appellate level is preferable.

The Government has therefore concluded that the power to depart from retained EU law should be extended as per Option 1 in the consultation – namely the Court of Appeal and equivalent courts across the UK.

COURTS WITHIN SCOPE OF OPTION 1 AND OPTION 2

Questions 4–6 in the consultation invited views on which courts fall in scope within each of the two options on which the consultation was based.

Question 4: If the power to depart from retained EU case law is extended to the Court of Appeal and its equivalents, do you agree that the list below specifies the full range of courts in scope?

i. **The Court of Appeal of England and Wales;**
ii. **The Court Martial Appeal Court;**
iii. **The Court of Appeal of Northern Ireland;**
iv. **The High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue or a devolution issue; and**
v. **The Inner House of the Court of Session in Scotland.**

Please give reasons for your answer.

Yes	34	45%
No	2	3%
Did not comment	37	49%
Unclear	2	3%

Question 5: If the power to depart from retained EU case law is extended to the High Court and its equivalents, do you agree that the list below specifies the full range of courts in scope?

i. **The High Court of England and Wales;**

ii. The Outer House of the Court of Session in Scotland;
iii. The Sheriff Appeal Court in Scotland;
iv. The High Court of Justiciary sitting as first instance; and
v. The High Court in Northern Ireland.
Please give reasons for your answer.

Yes	20	27%
No	17	23%
Did not comment	34	45%
Unclear	4	5%

Question 6: In respect of either option, are there other courts or tribunals to which the power to depart from retained EU case law should be extended? If yes, in what circumstances should this occur?
Please give reasons for your answer.

Yes	10	13%
No	35	47%
Did not comment	28	37%
Unclear	2	3%

Of those who answered yes:

For Option 1:

- Election Petition Court (Scotland);
- Registration Appeal Court (Scotland);
- Land Valuation Appeal Court (Scotland).

For Option 2:

- Upper Tribunal;
- Competition Appeal Tribunal;
- Employment Appeal Tribunal;
- Construction and Technology Court;
- Intellectual Property Enterprise Court;
- Scottish Land Court (Scotland);
- Sheriff Court (Scotland)
- Appointed Person.

Court of Appeal level

The majority of respondents who answered this question agreed that the list of courts specified in question 4 captures the full range of courts at Court of Appeal level.

In determining “equivalent courts across the UK”, the Government considers that the principal question is whether the decisions of a particular court are binding on the courts beneath them and other courts at the

same level unless the relevant test in place to depart from their case law applies. Using this definition, the Government is satisfied that the courts listed above, appropriately fall in scope of an extension of the power to depart from retained EU law at Court of Appeal level.

However, we note that the Lord President commented that "*This list does not include all other final courts of appeal in Scotland. Examples include the Lands Valuation Appeal Court, the Registration Appeal Court and the Election Petition Court.*" This was supported by a response from a member of the judiciary.

In the period between 01 January 2017 and 19 August 2020, data from the Scottish Courts and Tribunals Service records 8 land valuation appeals and 0 election or registration appeals. Despite the small volume of cases before these courts, the Government notes that the Lands Valuation Appeal Court and Registration Appeal Court are specialist courts in their respective jurisdictions and are listed separately from the Court of Session of Scotland in Section 2 (6) of the Judiciary and Courts (Scotland) Act 2008. These courts are final appeal courts in Scotland who, broadly speaking, sit at the same level as the Inner House of

the Court of Session in Scotland. There is no automatic route of appeal to the UK Supreme Court.

The Government therefore considers that the Lands Valuation Appeal Court and the Registration Appeal Court in Scotland should be added to the list of courts considered to be an "equivalent" to the Court of Appeal of England and Wales.

High Court level

In comments underpinning the responses received, the Lord President noted that "*there is no logical reason for excluding others such as the Scottish Land Court, the Upper Tribunal, the Competition Appeal Tribunal and the Employment Appeal tribunal.*"

This was supported by a response from a member of the judiciary who also questioned the omission of the Scottish Land Court from this list. A member of the public responded: "*in my view, there is no principled reason for the Outer House of the Court of Session to be on this list but for the Sheriff Court not to be*." Another response questioned why the Sheriff Appeal Court was on the list as it was argued that this court is not an equivalent to the High Court.

There was a further response suggesting that the construction and technology court (and other similar courts) should be included within the scope of this option. This was argued on the basis that the specialist nature of some jurisdictions, for example environmental law, which requires a panel of specialist judges to consider the issues with at least one panel member with appropriate expertise in the matters in dispute in the proceedings. They argued that in the event of Option 2, there should be more specialist panel courts set up to deal with these types of issues and these courts should then fall in scope as an equivalent of the High Court.

A final court suggested by a single respondent was the inclusion of the Intellectual Property Enterprise Court which sits within the Chancery Division of the High Court.

One respondent argued that all statutory tribunals should be in scope whilst another respondent suggested industrial tribunals should be in scope.

One member of the public argued that every court and tribunal other than the magistrates' court should be in scope of Option 2.

The Government notes these responses. However, the Government has not formed any conclusions on this point as it is the Government's intention only to extend the power to depart from retained EU case law to the Court of Appeal level.

OPERATION OF PRECEDENT

Questions 7 and 8 invited views on the operation of the doctrine of precedent on decisions relating to the departure from retained EU case law.

Question 7: Do you consider that the courts and tribunals to which the power to depart from retained EU case law is extended should be permitted to depart from retained domestic case law relating to retained EU case law? If yes, in what circumstances should this occur? Please give reasons for your answer.

Yes	12	16%
No	31	41%
Did not comment	21	28%
Unclear	11	15%

A majority of those who responded did not consider that that the courts and tribunals to which the power to depart from retained EU case law is extended should be permitted to depart from retained domestic case law relating to retained EU case law.

A number argued that the existing rules of the doctrine of precedent should always apply. It was argued that if it becomes easy for lower courts to depart from the reasoning of senior courts, then legal certainty and predictability will be in jeopardy which could have unintended consequences to business and the public.

The Law Society considered that "*this would risk creating conflicting precedents within the judicial system and considerable legal uncertainty*."

The Bar Council noted the complexity of the question: *"A lower court invited to consider departure from a CJEU principle laid down in a particular way may well find – indeed will frequently find – that the principle has been applied or extended in subsequent decisions of UK courts whose decisions are binding on it. In such a case, departing from the CJEU precedent is pointless unless the lower court has power to depart from the domestic precedent as well – but a power to depart from precedents set by high*

courts (or, in the case of the Court of Appeal, its own past judgments) would be a major disruption of the system of precedent on which legal certainty depends in a common-law system."

Some argued that once the power to depart from retained EU case law has been extended to additional courts and tribunals, it must be logical that they are also able to depart from retained domestic case law which relates to retained EU case law. A member of the judiciary noted that "*domestic case law cannot be easily separated from underlying EU case law. If one type of case law can be re-opened, both should be reopened, subject only to the appropriate test.*" This was supported by Birmingham Law Society and Browne Jackson LLP who considered the distinction between retained EU case law and retained domestic case law relating to retained EU case law to be artificial.

Having considered the points raised, the Government is mindful that a majority of those who answered the question did not support a change, and of the risk of creating legal uncertainty, and has **concluded that it is not desirable for courts with the power to depart from retained EU law to be able also to**

depart from retained domestic case law and that development of such law should be governed by the existing rules of precedent.

Question 8: Do you agree that the relevant courts and tribunals to which the power is extended should be bound by decisions of the UK Supreme Court, High Court of Justiciary and Court of Appeal and its equivalents across the UK where it has already considered the question of whether to depart from retained EU case law after the end of the Transition Period, in the normal operation of precedent? Please give reasons for your answer.

Yes	51	68%
No	0	0%
Did not comment	24	32%

Of those who answered this question, all agreed that there was no justifiable reason to depart from the normal operation of the doctrine of precedent. They suggested that to do otherwise, would significantly undermine legal certainty, heighten the risk of inconsistencies, cause uncertainty in the development of the law and unnecessarily risk divergence.

Consultees identified a problem of divergence across the jurisdictions of the UK if the doctrine of precedent were to be revised, which would increase the risk of divergence. An example was proffered by the President of the UK Supreme Court of what it would look like at the Court of Appeal level: "*If the Court of Appeal of England and Wales chose to depart from a UKSC decision relating to retained EU case law, that decision to depart would only have effect in England and Wales. The original UKSC decision would continue to be binding in Scotland and Northern Ireland, to the extent that it is applicable in those jurisdictions, unless and until the equivalent courts (i.e. the Inner House of the Court of Session and the Court of Appeal in Northern Ireland) also chose to depart from it.*"

Approach

The Government has carefully considered whether these Regulations should enable courts to depart from the normal of operation of precedent to allow for more flexible divergence from decisions of the Court of Justice of the European Union. The Government is persuaded by the strength of the consultation responses that modifying the concept of precedent

would cause unnecessary legal uncertainty and confusion.

For these reasons, the Government has concluded that the well-established and well-understood doctrine of precedent does not require any modification.

THE TEST TO BE APPLIED

Questions 9 and 10 invited views on what test should be applied in considering whether to depart from retained EU case law and whether any considerations were required within that test.

Question 9: Do you agree:

a) **that the test that should be applied by additional courts or tribunals should be the test used by the UK Supreme Court in deciding whether to depart from its own case law?**
b) **that this test is capable of being easily understood and applied across the jurisdictions by reference to the relevant case law?**

Please give reasons for your answers. If you do not agree, what alternative test do you consider

should be applied? Please give reasons for your answer.

Question 9a

Yes	41	55%
No	22	29%
Did not comment	12	16%

Question 9b

Yes Yes, but test should be further enhanced	29 **8 (out of 29)**	39% **28% (of 29)**
No	20	27%
Did not comment	26	35%

Test to be applied

A majority of respondents (55%) agreed that the test that should be applied by additional courts or tribunals should be the UK Supreme Court test in deciding whether to depart from its own case law, although 29% disagreed.

39% of all respondents also agreed that this test is capable of being easily understood and applied

across the jurisdictions by reference to the relevant case law.

The President of the UK Supreme Court notes that "*the test is well-established and that there is considerable judicial guidance on its application*". The Lord Chief Justice of Northern Ireland also believes that "*this test is capable of being easily understood and applied across the jurisdictions by reference to the relevant case law*". This was supported by many practitioners, including the Bar Council who noted that "*We see no need to modify the established Supreme Court test, which is flexible enough to take full account of those considerations (and other relevant ones, such as the need to avoid, so far as possible, sudden and retrospective changes in the settled law, and the need to avoid accusations of the judiciary pre-empting decisions of the legislature)*".

The Administrative Law Bar Association disagreed with applying the UK Supreme Court test on the basis that the test is insufficiently clear to be capable of easy application. They considered that "*a higher merits threshold should be set, requiring the Court of Appeal or High Court to be satisfied that existing CJEU* [sic] *was no longer appropriate for general*

application in all areas of retained EU case law". This was supported by the Association of Personal Injury Lawyers who considered that "*It is right that each individual court should apply its own test when considering if it should allow an appeal. Applying a different test to that already established within the courts own jurisdiction will create uncertainty, allowing for different cases being appealed depending on the issues to be considered.*" The Bar European Group and Chancery Bar Association both disagreed that the UK Supreme Court test was sufficient clear and well understood to be capable of meaningfully interpreted by courts beneath the UK Supreme Court. Clifford Chance LLP considered that the test applied by the lower courts should be stricter than that applied by the UK Supreme Court.

Approach

We have carefully considered and balanced the views expressed. The Government notes that there is a majority in favour of adopting the test which the UK Supreme Court would apply in deciding whether to depart from its own case law, as being the appropriate test that is capable of being easily understood and applied without any further guidance.

The Government disagrees with the view expressed by some consultees that there should be a higher standard or stricter test for the courts to whom the power to depart from retained EU law is extended, as the introduction of a new test would exacerbate legal uncertainty whilst the interpretation and application of this test is settled, and in some cases, appealed and established within UK law. It considers that using a different test at Court of Appeal level risks uncertainty as to which test should be applied when a matter is appealed to the UK Supreme Court.

Applying the same test as that used by the UK Supreme Court will help to promote consistency and certainty so far as it is possible to achieve this. We believe that there is merit in the same test being applied by the courts to whom the power to depart from retained EU law is extended, as in the event of a further appeal to the UK Supreme Court, it is open to that court to provide further guidance on the application of the test, if necessary, which will then be binding on the Court of Appeal level courts across the UK. We further note that there is a wealth of case law underpinning the UK Supreme Court's test which has evolved over time to ensure courts take into account changing circumstances and modern policies.

The Government has therefore concluded that additional courts should apply the same test as will be used by the UK Supreme Court in deciding whether to depart from retained EU case law.

Question 10: Are there any factors which you consider should be included in a list of considerations for the UK Supreme Court, High Court of Justiciary and other courts and tribunals to whom the power is extended to take into account when deciding whether to depart from retained EU case law? Please give reasons for your answer.

Yes	10	13%
No	40	53%
Did not comment	25	33%

List of considerations

A majority of responses (53%) did not consider that there should be a list of considerations for courts to take into account when deciding whether to depart from retained EU case law.

Only 13% of respondents indicated that there were factors that they thought ought to be included in any test. These include:

- whether the legislature has already attempted to remedy deficiencies in the application of EU law in this area;
- whether a departure from retained EU case law would preserve or undermine legal certainty and clarity;
- whether a departure from retained EU case law would undermine existing and settled English legal case law principles;
- whether the EU law in question is the subject of imminent legislative change;
- principles of public policy applicable in the UK;
- the impact of departure from retained EU case law on the substantive field in question;
- the extent to which departure from retained EU case law impacts upon the protection of fundamental rights;
- the extent to which departure from retained EU case law would violate domestic principles of statutory interpretation;
- the impact to which departure from retained EU case law may affect UK–EU trade and business;

- whether it is in the interests of justice to depart from retained EU case law;
- the length of time for which the precedent has existed and the extent to which it will be applied to future cases.

The majority of respondents however considered that a further list of considerations (either for the UK Supreme Court, the High Court of Justiciary in Scotland or additional courts and tribunals) was not necessary. They noted that the House of Lords' Practice Statement has been in operation since 1966 and evolved over time to reflect changing circumstances. There is a wealth of case law undermining the interpretation of the UK Supreme Court's test and there was concern that seeking to either codify the test in some way or specifying any considerations would result in a rigid and inflexible approach that risks undermining the aim for timely evolution of UK law. There was also concern that specifying an alternative test or list of factors may exacerbate legal uncertainty as there would be arguments over the interpretation of the factors which may take time to resolve on appeal.

Approach

The Government has carefully considered whether it is appropriate to specify on the face of the Regulations any considerations which are relevant to the courts and tribunals in deciding whether to depart from retained EU case law. We have particularly noted that the test contained in the House of Lords' Practice Statement has been in place since 1966 and has over the years been underpinned by significant judicial guidance on its application. As the President of the UK Supreme Court comments: "*Whilst placing due weight on the need for certainty in the common law, the test provides the appropriate degree of flexibility.*" The Practice Statement has been in operation since 1966 without any statutory alteration which has enabled it to develop over time to remain fit for purpose.

The Government has concluded that seeking to codify the wealth of case law on this point would be unhelpful and counter-productive to the aim of maintaining legal certainty as the precise meaning and application of the factors would require judicial resolution, most likely through an appeal to the UK Supreme Court in due course. We consider that the UK Supreme Court's test is underpinned by a wealth

of settled case law which recognises the fluid nature of factors which may be relevant in any given case and the changing nature of public policy considerations over time.

It is for these reasons that the Government will not be including a list of considerations for courts to take into account in deciding whether to depart from retained EU case law in the Regulations.

ASSESSMENT OF IMPACTS

Question 11 invited views from respondents on the impacts of the two options on the administration of justice and the operation of courts and tribunals.

Question 11a: Do you consider that the changes proposed would be likely to impact on the volume of litigation started in UK courts and tribunals? Please specify where, in your view, this would occur and why?

Yes	32	43%
No	7	9%
Unsure	4	5%

Possibly	11	15%
Did not comment	21	28%

Question 11b: Do you consider that the changes proposed would be likely to impact on the type of litigation started in UK courts and tribunals? Please specify where, in your view, this would occur and why?

Yes	30	40%
No	7	9%
Unsure	4	5%
Possibly	6	8%
Did not comment	28	37%

Question 11c: Do you consider that the changes proposed would be likely to have more of an impact on particular parts of the justice system, or its users? Please specify where this might occur and why?

Yes	30	40%
No	8	11%
Unsure	6	8%

Did not comment	31	41%

Question 11d: Do you consider that the changes proposed would have more of an impact on individuals with particular protected characteristics under the Equalities Act 2010? Please specify where this might occur and why?

Yes	15	20%
No	7	9%
Unsure	2	3%
Possibly	12	16%
Did not comment	39	52%

It has been widely suggested that with any extension of the power to additional courts and tribunals, there is consequently greater the potential for increased volumes in litigation. The wider the scope of the extension, the greater the impacts will be. Herbert Smith Freehills LLP considered that "*The further the power is extended the greater the potential there is for an increased volume of litigation as it gives rise to new arguments that litigants can seek to deploy. Having the power at Court of Appeal level and above*

per Option 1 potentially offers a deterrent against vexatious/unmeritorious litigation at High Court/tribunal level." This was supported by the Chancery Bar Association.

However, it should be noted that in response to question 2, respondents also noted a number of positive benefits by restricting the power to Court of Appeal level, specifically managing operational demand in the UK Supreme Court as well as the benefits of judicial dialogue.

Respondents found it difficult to provide a clear assessment of the types of litigation that might be impacted in UK courts and tribunals. It was assumed in most responses that the greatest impacts would be in those areas which are heavily reliant on EU law, for example where there have been numerous EU Directives and Regulations. A number of responses cited areas of law which could be impacted such as: environmental law, employment law, competition, trade disputes and manufacturing. However, most respondents felt that it was always difficult to predict litigant behaviour. A large number of responses considered that there will be an increase in litigation due to increased opportunities to access the lower

courts if the power is extended to additional courts below the UK Supreme Court level. Whilst any increase will inevitably result in additional pressure on the courts, if there were to be a significant spike in the number of cases, this would result in significant pressure across the whole justice system as it strives to deal with existing cases and this new additional workload. However, beyond describing these impacts in general terms, the responses were speculative and difficult to quantify in any reliable detail.

Equalities impacts

21 respondents considered that there would be an equalities impact arising out of the options on which the Government consulted. Respondents could not predict exactly where and how any impacts might arise. Respondents considered that there were general areas of law that might be impacted e.g. employment, which in turn may risk individuals with particular protected characteristics under the Equalities Act 2010 being more affected. Examples given included those affected by the law in relation to paternity leave or part time workers (who may be more likely to have protected characteristics).

Other areas identified by respondents in this question included women and those from minority ethnic backgrounds in the areas of employment and human rights. Respondents were concerned that decisions to depart from retained EU case law may cause confusion about the legal duties owed to people with a protected characteristic particularly as the number of cases in which EU case law and legislation has influenced the development of protected characteristics under the Equalities Act 2010 is unknown.

Two respondents considered that there would be no direct impact specifically on equalities.

Consultees agreed that there would be an increase in litigation due to increased opportunities to litigate if the power is extended to additional courts below the UK Supreme Court level. This would put pressure across the whole administrative justice system. However, as stated above, this remains speculative and difficult to specify although the following areas have been mentioned; increased routes of appeal which will add pressure to appellate courts, tribunals which often deal with cases heavily dependent on retained EU

case law like environmental law, employment law, competition, trade disputes and manufacturing.

The Government has considered these arguments in full in the impact assessment and its assessment of equalities impacts in relation to this policy. In doing so, it has also reflected that that UK is committed to high standards and has led the way in areas such as workers' rights and environmental protection and has no intention to weaken these following our departure from the EU.

Question 12 invited any other comments from respondents.

Question 12: Do you have any other comments that you wish us to consider in respect of this consultation?

The majority of consultees (43 respondents) did not have any additional comments beyond those discussed above.

A small number of respondents raised the following points which we have addressed in turn below:

- Inclusion of the Judicial Committee of the Privy Council to alleviate burden on the UK Supreme Court;
- The impact of the Northern Ireland Protocol;
- Transitional provisions;
- The impact of any Regulations on the UK's on-going negotiations with the EU;
- Retrospectivity;
- A referral / leapfrog mechanism on a question of departing from retained EU case law; and
- The ability to refer a question on retained EU law to the courts with the power to depart from retained EU case law.

Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council is the court of final appeal for the UK overseas territories, Crown dependencies and serves those Commonwealth countries that have retained the appeal to Her Majesty in Council. The rationale behind this proposal is unclear as the Judicial Committee of the Privy Council consists of the same justices who sit in the UK Supreme Court. Conferring such powers on the Judicial Committee of the Privy Council does not therefore generate any additional capacity to deal with

the anticipated increase in volumes that will be faced by the UK Supreme Court if the power to depart from retained EU case law is not extended to additional courts and tribunals. The Government is not satisfied that there is any cogent rationale for moving work of the UK Supreme Court to the Judicial Committee of the Privy Council.

Northern Ireland Protocol

As mentioned above, the power is only relevant to the interpretation of retained EU law, it will not affect the interpretation of law which is not retained EU law. This includes EU law that the Protocol gives effect to in Northern Ireland on a provisional basis and subject to consent. Whilst there is a risk for some divergence due to the operation of the Protocol, the Government is satisfied that such divergence is mitigated by extending the power to Court of Appeal level to ensure such issues are considered by senior appellate courts whose decisions are binding on the courts below them.

Transitional provisions

The Government has carefully considered the necessity for transitional provisions in relation to these Regulations. There will clearly be a number of cases

in progress at the end of the Transition Period. Section 6 of the 2018 Act does not provide for any transitional provisions in relation to the UK Supreme Court. It is therefore possible for parties in live litigation to raise such issues in proceedings before the UK Supreme Court from the time this power comes into effect. We see no justification for adopting a different approach to additional courts and tribunals. In our view, it is more beneficial for such issues to be raised more quickly and determined by the courts.

Impact on negotiations

Some consultees raised concern that extending the power too widely too quickly would have an impact on the UK's on-going negotiations with the EU and the UK's application (and compliance if successful) to join the Lugano Convention. The Government considers that this is a weak and speculative link. The UK's negotiations with the EU are completely independent of any decision made by the courts to depart from retained EU case law. In any event, the power to depart from retained EU case law only takes effect at the end of the Transition Period by which point any negotiations would have concluded, and the courts will be mindful of any obligations to which the UK is

required to comply with as part of the decision-making process.

Retrospectivity

A small number of responses raised concerns about the effect of a decision to depart from retained EU case law on acts and omissions which occurred before the end of the Transition Period. We do not expect that a decision to depart from retained EU case law would have such retrospective effect. For example, the test applied by the UK Supreme Court in deciding to depart from its own case law explicitly mitigates this concern. The wording of the 1966 Practice Statement itself provides that *"In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law."* and the UK Supreme Court has previously been reluctant to interfere with the legitimate expectations of those who have placed reliance on a previous decision.

Referrals and "leapfrog"

There were two responses which proposed an alternative model to that proposed by the

Government. This was a referral system from a lower court to the UK Supreme Court in considering a question of whether to depart from retained EU case law. Such an approach would require primary legislation as the power to make these Regulations does not include the power to implement such an approach. Even if the vires existed, the Government does not agree that this is a suitable alternative as it does not address the issue about increased demand on the UK Supreme Court. Referrals from a lower court will still require input and consideration from the UK Supreme Court prior to the conclusion of the proceedings and would be in addition to any increased appeals to that court as a result of this power. This would inevitably cause delays in the determination of both appeals and referrals on the issue of departure from retained EU case law which in turn would exacerbate legal uncertainty. For these reasons, the Government rejects this alternative model as it is not operationally viable.

There were a small number of respondents who noted the benefits of expanding the existing ability to “leapfrog appeal” from the High Court to the UK Supreme Court which would enable cases to be dealt with more quickly as it eliminates the need for prior

consideration by the Court of Appeal. As with a referral mechanism, this approach does not address the issues about increased demand on the UK Supreme Court and the consequential impacts of such delays on legal certainty. This also has the disadvantage of removing judicial dialogue between two senior appellate courts on the issue, which the President of the UK Supreme Court has noted is a benefit in dealing with cases involving complex issues, such as whether to depart from retained EU case law. For these reasons, the Government reject an expansion of the existing “leapfrog” appeal model, leaving it to the courts to determine in what circumstances such a “leapfrog” is appropriate and necessary to the issues in the case.

Impact Assessment, Equalities and Welsh Language

Impact Assessment

Extending the power to depart from retained EU case law to additional courts and tribunals would provide greater scope for the interpretation of case law to evolve to recognise the UK's changing status. As part of this response, the Ministry of Justice has undertaken an impact assessment of the options on which the consultation was based. The impact assessment is based on three options:

1. **Option 0: Under this option, the Government will not exercise the power to make Regulations to enable additional courts and tribunals to depart from retained EU case law. This means that from 11pm on 31 December, only the UK Supreme Court and the High Court of Justiciary in Scotland (when acting as a final court of appeal) will have the power to depart from retained EU case law.**
2. **Option 1: Make Regulations to extend the power to depart from retained EU case law to**

the Court of Appeal of England and Wales and its closest equivalents in other UK jurisdictions.

3. **<u>Option 2</u>: Make Regulations to extend the power to depart from retained EU case law to the High Court of Justice of England and Wales and its closest equivalents in the other UK jurisdictions**

Although we hold data on case volumes, we do not routinely collate data on the number of cases which either involve an aspect of EU law or involve a reliance on EU case law within the proceedings. We invited views from consultees on any impacts which have been summarised above. There is consensus that it will be difficult to meaningfully assess the impacts of this change without a clear baseline to begin with.

We have concluded that the impacts on an increase in case volumes as a result of this power being conferred on additional courts is manageable at Court of Appeal level. In reaching this conclusion, we have particularly noted the views of the President of the UK Supreme Court and the Lord Chief Justice, England and Wales, both of whom outline the operational

benefits of extending the power to this level of court. There is a small risk of an increased financial costs to individuals, businesses and organisations, but the extent of these costs will be dependent on both litigant behaviour, in whether such proceedings are brought, as well as judicial behaviour in exercising the power to depart from retained EU case law. Based on a qualitative assessment, we believe that any financial impact that may materialise, although undesirable, is manageable at Court of Appeal level.

The Impact Assessment is published alongside this response and can be accessed through the following link: https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals.

Equalities

The Ministry of Justice, as a public authority, is required by the Equality Act 2010 to have ‘due regard’ to the aims of the public-sector equality duty when making decisions and when setting policies. As part of this response, the Ministry of Justice has undertaken an Equalities Impact Assessment assessing the equality impacts that arise when expanding the power

to depart from retained EU case law beyond the UK Supreme Court and High Court of Justiciary in Scotland to additional courts and tribunals.

The Government sought views from consultees as part of assessing the equality impacts of the proposals on which we consulted. Although some responses outlined the impacts on equality, the responses themselves and the data we hold is insufficient to draw reliable conclusions. It will be necessary to monitor this policy post-consultation to fully assess the equalities impacts.

This policy confers a power on the courts to depart from retained EU case law when they consider it appropriate to do so. This policy does not prevent individuals from applying to the courts seeking such decisions; nor are the courts mandated to make a decision departing from retained EU case law. We are therefore satisfied that there is no direct discrimination to anyone with a protected characteristic as the courts remain accessible to everyone and this policy does not interfere with, or undermine, access to justice.

Any risk of indirect discrimination will be heavily dependent on the nature of the litigation brought and the scope of the decision.

Welsh Language Impact Test

The Government's policy in this area does not change any operational processes within the court's system generally, or Wales specifically. The legislation confers a power on the courts to depart from retained EU case law, but this power will be exercised within the legal process in the course of any litigation on this point. HMCTS have arrangements in place to enable Welsh speakers to access the courts and effectively partake in court proceedings and this policy does not change those arrangements in any way.

We have not received any consultation responses from Welsh stakeholders outside of the Welsh Assembly specifically and, of the consultation responses received, there are no particular issues or considerations for Wales or Welsh-speakers that require the Government to respond further.

This response document will be translated into Welsh and made available online at https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals

Conclusion and next steps

The Government is grateful to all those who took the time to respond to the consultation on the departure from retained EU case law by UK courts and tribunals.

Having considered all the responses carefully, the Government has concluded that it is appropriate to exercise the power given under section 6 of the European Union (Withdrawal) Act 2018 to extend the power to depart from retained EU case law to additional courts and tribunals. The extension of this power will be restricted to the Court of Appeal (or equivalent) level. The full list of courts in scope are the:

- Court of Appeal of England and Wales;
- Court Martial Appeal Court;
- Court of Appeal of Northern Ireland;
- High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue or a devolution issue;
- Inner House of the Court of Session in Scotland;
- Lands Valuation Appeal Court in Scotland; and
- Registration Appeal Court in Scotland.

The Government considers that extending the power at this level will strike the appropriate balance between the need for legal certainty and for timely departure from retained EU law. In making such decisions, these courts will apply the same test which would be used by the UK Supreme Court in deciding whether to depart from its own case law, namely whether it is right to do so, and the doctrine of precedent will continue to apply in the usual way.

The Government is today (15 October 2020) laying in Parliament a Statutory Instrument that will make Regulations to give effect to the Government's policy on the departure from retained EU law by UK courts and tribunals. This will be considered and debated by Parliament in the coming months, and, if approved by both Houses, will come into effect at the end of the Transition Period.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

Annex A – List of respondents

Statutory Consultees (4)

- President of the UK Supreme Court
- Lord Chief Justice and Senior President of Tribunals (joint response)
- Lord Chief Justice, Northern Ireland
- Lord President of the Court of Session

Parliament (1)

- Justice Select Committee

Judiciary (3)

- Industrial Tribunal and Fair Employment Tribunal
- Lord Advocate
- Sheriff George Jamieson

Devolved Administrations (3)

- Attorney General, Northern Ireland
- Humza Yousaf, BPA / MSP, Cabinet Secretary for Justice, Scottish Government
- The Right Honourable Mark Drakeford MS, First Minister of Wales, Welsh Assembly

Legal Services (30)

- Administrative Law Bar Association

- Allen & Overy LLP
- Association of Personal Injury Lawyers
- Bar European Group
- Bird and Bird LLP
- Birmingham Law Society
- Browne Jackson LLP
- Chancery Bar Association
- Chartered Institute of Patent Attorneys and Chartered Institute of Trade Mark Attorneys
- City of London Law Society
- Clifford Chance LLP
- Commercial Barristers of England and Wales
- Deloitte LLP
- Employment Lawyers Association
- Faculty of Advocates
- Financial Markets Law Committee
- Freshfields Bruckhaus Deringer LLP
- Herbert Smith Freehills LLP
- International Family Law Group LLP
- International Law Committee
- Linklaters LLP
- Liverpool Law Society
- Public Law Project
- The Bar Council

- The Bar of Northern Ireland
- The Law Society
- The Law Society Scotland
- Thomas de la Mare QC and Bingham Centre for the Rule of Law
- Thompsons Solicitors LLP
- UK Environmental Law Association

Legal Academics (4)

- Centre for Public Law and Centre for European Legal Studies, Faculty of Law, University of Cambridge
- School of Law, University of Aberdeen
- School of Law, University of Essex
- The Law School, University of Edinburgh

Businesses and other Organisations (12)

- Chartered Institute of Taxation
- Chartered Institute of Wastes Management
- City remembrancer
- Forum of Private Business
- Friends of the Earth
- GC100
- Greener UK and Wildlife and Countryside Link
- Health and Safety Executive

- International Association for the Protection of Intellectual Property
- Natural England
- TheCityUK
- UK BioIndustry Association

Trade Unions (3)

- Fire Brigades Union
- Trade Union Congress
- Unison

Regulatory Bodies (2)

- Civil Aviation Authority
- Environment Agency

Human Rights Organisations (4)

- Equality and Human Rights Commission
- Equally Ours
- Human Rights Consortium Northern Ireland
- Northern Ireland Human Rights Commission

Members of the Public (9)

- Joseph Ashford
- Chris Blagg
- Peter Browning
- Kieran Buxton

- Michael Hall
- Clare Payne
- John Searby
- Paul Stockton
- James Tumbridge

Annex B – Consultation responses: Summary

Statutory Judicial Consultees

Section 6(5C) of the European Union (Withdrawal) Act 2018 requires a Minister of the Crown to consult the President of the UK Supreme Court, the Lord Chief Justice of England and Wales, the Lord Chief Justice of Northern Ireland, the Lord President of the Court of Session and the Senior President of Tribunals (as well as any other person considered appropriate) before the Regulations can be made.

The Lord Chief Justice and Senior President of Tribunals made no observations on whether the power should be extended, however, the remaining three senior judges all supported an extension of the power to depart from retained EU case law to additional courts. All five senior judges expressed a preference for Option 1 applying the same test as that used by the UK Supreme Court. Although they acknowledged that any extension of the power introduces legal uncertainty, they considered Option 1

strikes the balance between predictability and certainty in the law and operational capacity.

The President of the UK Supreme Court noted that extending the power to depart from retained EU case law to Court of Appeal level could help relieve pressure on the UK Supreme Court and that it would be of assistance to the court to have the Court of Appeal's considerations in cases which reached them. He also noted that the legal uncertainty with Option 2 is exacerbated by the different provisions for the reporting of judgments across different levels of court.

The Lord Chief Justice and Senior President of Tribunals noted that Option 1 provides more scope for reconsideration of retained EU case law but would be "*unlikely to create an unmanageable spike in litigation*".

The Lord Chief Justice of Northern Ireland raised particular concerns about the impact of Option 2 in relation to the operation of the Northern Ireland Protocol and the significant risk of divergence and uncertainty he considered this would cause not only within Northern Ireland but also across the UK. He noted that because, under the Northern Ireland Protocol to the Withdrawal Agreement a large amount

of EU law continues to be directly applicable after the Transition Period, there is already "*a real prospect of divergence between EU law that is directly applicable in Northern Ireland and any retained EU case law (which may be departed from)*". In his view, this complexity supports the power being restricted to Court of Appeal level to mitigate the risks of divergence (as far as reasonably practicable in the circumstances), particularly in light of the fact that an incorrect legal interpretation by a lower court could result in a failure by the UK to comply with its international obligations under the Withdrawal Agreement. On balance he concluded that the undesirable consequences are outweighed by the practical benefits in extending this power to the Court of Appeal level.

The Lord President supported Option 1 on the basis that it "*would relieve the UK Supreme Court of the burden of dealing with challenges from the four jurisdictions, whilst permitting it to gain the benefit of experienced appellate courts in distilling and filtering questions of law. It protects legal certainty.*"

All were in agreement that precedent should continue to operate in the usual manner (with decisions of

higher courts binding those below) to mitigate as far as possible the legal uncertainty that would otherwise arise. These judges also did not consider it necessary to specify additional considerations to the UK Supreme Court's own test on departing from its own case law as the test is well established and underpinned by a wealth of case law which is provides sufficient guidance on the application of the test. The President of the UK Supreme Court commented that any attempt to develop "*a list of factors specific enough to be of guidance to the courts*" would be very challenging and require consultation with a number of stakeholders.

Justice Select Committee

The Justice Select Committee supported Option 1, applying the same test as that used by the UK Supreme Court. They were concerned that if Option 2 were to be pursued "*this could result in a considerable degree of legal uncertainty and potential divergence across jurisdictions in the UK*" which would be "*damaging to individuals and companies.*" They further suggested that the test to be applied is more suitable for an appellate court as it is too vague for first instance courts. They would, however, support an

alternative approach of allowing the High Court and its equivalents to refer a question on whether to depart from retained EU case law directly to the UK Supreme Court which, although requiring primary legislation, they considered to be a more appropriate approach on matters of this nature.

Judiciary

The three responses were supportive of the changes proposed. They unanimously supported Option 1 because of adverse operational impacts in retaining the power to depart with the UK Supreme Court and the High Court of Justiciary in Scotland which would result in an unacceptable backlog of appeals: particularly in the area of employment law where significant areas, such as working time and discrimination, are affected by EU case law.

Devolved Administrations

Responses were received from the Scottish Government and Welsh Assembly. Although no response was received from the Northern Ireland Executive, a response was submitted by the Attorney General of Northern Ireland. They were all supportive

of Option 1 applying the same test as that used by the UK Supreme Court. They were all also in agreement that precedent should continue to operate in the usual manner to preserve legal certainty.

Legal Services Sector

There was strong support for not making any Regulations at all and maintaining the current position with this power only being vested in the UK Supreme Court and the High Court of Justiciary in Scotland from the end of the Transition Period. Many respondents argued that, as a matter of principle, it is for Parliament not the courts to set the framework on the departure from retained EU law. It should, however, be noted that the consultation did not seek views on whether courts should be able to depart – Parliament has already determined that they should be – but which additional courts, if any, should be able to exercise this power.

Many of those who did not support an extension of the power to depart from retained EU case law, considered that Option 1 would be the preferable alternative against Option 2. Any extension to the Court of Appeal level was regarded as a manageable

"*compromise*". In such circumstances, the majority considered that precedent should continue to operate in the usual manner and the test to be applied should be the same as that applied by the UK Supreme Court.

Legal Academics

Most were against any exercise of the power to make Regulations, but, similar to the legal services sector, Option 1 was seen as a suitable compromise. Concerns centred around the blurring of constitutional principles in the UK as the power was conferring courts and tribunals with a legislative function, something which should always be for Parliament to do. However, in considering these concerns it is important to note that the consultation did not seek views on whether courts should be able to depart from retained EU case law – Parliament has already determined that they should be – but which additional courts, if any, should be able to exercise this power. There were also questions around whether the courts (regardless of seniority) had the relevant expertise to make such decisions. They also noted that a wide expansion of this power would pose significant challenges to legal certainty.

Businesses and Other Organisations

The business community came out strongly against any changes to the status quo and strongly objected to making these Regulations. The concerns around extending this power to additional courts and tribunals centred on the increased risk of legal uncertainty, the risk of divergence in similar decisions across the UK and the consequential risk this poses to the UK's reputation as a reputable forum in which to settle international disputes. There was consensus that the lower the level of court to which the power to depart was extended, the greater the risk and effects of these impacts in practice.

Trade Unions

The trade unions did not support any changes to the existing position as set out in the European Union (Withdrawal) Act 2018 (that is, the power to depart from retained EU case law lying only with the UK Supreme Court and the High Court of Justiciary in Scotland) and were concerned about the impact of such changes on employment law and workers' rights that have been long-settled and the risk of legal uncertainty if these settled legal points were to be re-

litigated. They strongly opposed any approach which would undermine the doctrine of precedent which would cause significant uncertainty and disruption to both employers and employees and were clear that the Government should not make the Regulations for these reasons. They also noted that this is a departure from the White Paper position in which decisions of the Court of Justice of the European Union, prior to the UK's departure from the EU, would be treated as equivalent to decisions of the UK Supreme Court.

Regulatory Bodies

The responses did not specify a clear preference for an option but raised points which should be considered in making a decision. They noted the risk of rising case volumes the wider the scope of the power, as well as cost implications due to increased caseloads, volumes and complexity of litigation and the associated resource implications, capacity and capability of lower courts and tribunals. They also questioned whether the Government intended to introduce transitional provisions in making the Regulations, so such issues were only considered for

cases commenced after the end of the Transition Period.

Human Rights Organisations

The responses received from this sector did not support any extension of the power beyond the UK Supreme Court and the High Court of Justiciary in Scotland (when acting as a final court of appeal). The organisations cited the risk to legal certainty if lower courts were to exercise the power. The Northern Ireland Human Rights Commission and Human Rights Consortium, Northern Ireland argued that there is an obligation under the Protocol to continue to apply EU law in certain areas and this may lead to unintended divergence between Northern Ireland and the rest of the jurisdictions in the UK. Therefore, decisions of such magnitude should be left to the most senior judges in the UK, namely the UK Supreme Court.

Members of the Public

These responses were largely mixed and diverse and varied significantly in the amount of detail provided in the response. Some who supported extending the power to depart from retained EU case law beyond

the UK Supreme Court (and High Court of Justiciary where it is the final court of appeal in Scotland) did not provide any reasoning in support. Whilst the majority preference was for Option 1, they highlighted the risk to the principle of precedent and the burden on lower courts and tribunals to consider changing case law from the Court of Justice of the European Union.

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