



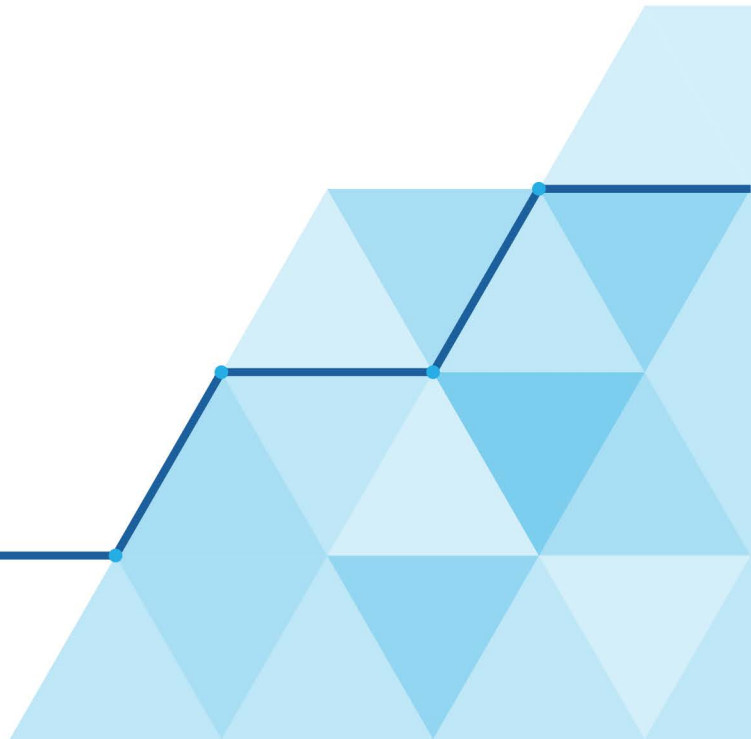
Ministry  
of Justice

# Retained EU Case Law

**Consultation on the departure from  
retained EU case law by UK courts  
and tribunals**

This consultation begins on 2 July 2020

This consultation ends on 13 August 2020





Ministry  
of Justice

## **Retained EU Case Law**

Consultation on the departure from retained EU case law  
by UK courts and tribunals

**A consultation produced by the Ministry of Justice. It is also available at  
<https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals>**

# About this consultation

**To:**

- The President of the Supreme Court
- The Lord Chief Justice of England and Wales
- The Lord President of the Court of Session
- The Lord Chief Justice of Northern Ireland
- The Senior President of Tribunals
- President of Scottish Tribunals
- President of Welsh Tribunals
- Judge Advocate General
- Scottish Government
- Northern Ireland Executive
- Welsh Assembly
- The Lord Advocate
- Attorney General for Northern Ireland
- Public Prosecution Service Northern Ireland
- International Law Committee
- The Law Society
- The Law Society of Northern Ireland
- The Law Society of Scotland
- City of London Law Society
- The Bar Council
- The Bar of Northern Ireland
- Faculty of Advocates
- Chartered Institute of Legal Executives
- Employment Lawyers Association
- Insolvency Lawyers Association
- Law Centre, Northern Ireland
- Director of Service Prosecutions
- British Chamber of Commerce
- Scottish Chamber of Commerce
- Northern Ireland Chamber of Commerce
- Confederation of British Industry
- Confederation of British Industry Scotland
- Confederation of British Industry Northern Ireland
- Institute of Directors
- Institute of Directors Scotland
- Institute of Directors Northern Ireland
- Federation of Small Business
- Federation of Small Business Scotland

Federation of Small Business Northern Ireland  
Trade Union Congress  
Scottish Trade Union Congress  
Irish Congress of Trade Unions  
The Environment Agency  
Scottish Environment Protection Agency  
Environment Agency Northern Ireland  
Natural England  
Food Standards Agency  
Food Standards, Scotland  
Food Standards Agency Northern Ireland  
Rural Payments Agency  
Marine Maritime Organisation  
Marine Scotland  
Health and Safety Executive  
Health and Safety Executive Northern Ireland  
Northern Ireland Human Rights Commission  
Equality Commission for Northern Ireland

**Duration:**

6 Weeks

From 2 July 2020 to 13 August 2020

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by 13 August 2020.

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# Introduction

The European Union (Withdrawal) Act 2018 (“the 2018 Act”), as amended by the European Union (Withdrawal Agreement) Act 2020 (“the 2020 Act”) sets the legal framework following our departure from the EU and after the end of the Transition Period on 31 December 2020.

The aim of this legislation 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.

This paper seeks 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.

This power will enable the Government to balance the need for legal certainty with the need for the law to continue to evolve and reflect changing needs of the UK following our departure from the EU.

This consultation has been sent 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 enforcement agencies, asking for their views on the exercise of the power to make these regulations.

## Relevant Legislation

Section 6 of the 2018 Act provides for a Minister of the Crown to make regulations for certain courts or tribunals not to be bound by retained EU case law. It was amended by section 26(1) of the 2020 Act to introduce new ministerial powers to set out further courts and tribunals which may depart from 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).<sup>1</sup> This power 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. Courts and tribunals could not depart from retained EU case law in these circumstances.

As set out above, the Minister, by such regulations, may:

- designate additional courts or tribunals as “*relevant courts*” 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.

Before making these regulations, a Minister of the Crown must consult:

- The President of the UK Supreme Court;
- The Lord Chief Justice of England and Wales;
- The Lord President of the Court of Session for Scotland;
- The Lord Chief Justice of Northern Ireland;
- The Senior President of Tribunals; and
- such other persons as the Minister of the Crown considers appropriate.

It is important to ensure consistency and legal certainty of retained EU law as it applies in the UK as far as it is possible and practicable to do so while at the same time allowing sufficient opportunity for those seeking to challenge retained EU case law the opportunity to do so within a reasonable time, given we have left the EU. As these regulations will apply across the UK, we consider it appropriate to consult the Devolved Administrations of Scotland, Northern Ireland, and Wales as well as the Lord Advocate, President of Scottish Tribunals, President of Welsh Tribunals, the Attorney General for Northern Ireland, and the Public Prosecution Service of Northern Ireland.

The legal profession is a key stakeholder in the operation of the justice system, who have the relevant expertise and operational knowledge on whether any policies are viable in practice. We therefore also consider it appropriate to consult the legal services sector,

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<sup>1</sup> See section 7C and 6(6A) of the 2018 Act.

namely, the International Law Committee, the Law Society, the City of London Law Society, the Law Society of Northern Ireland, the Law Society of Scotland, the Bar Council, the Bar of Northern Ireland, the Faculty of Advocates, the Chartered Institution of Legal Executives, the Employment Lawyers Association, the Insolvency Lawyers Association and the Law Centre Northern Ireland.

Finally, these proposals will have a direct impact on the Service Justice System, businesses and some enforcement bodies where the subject matter area is largely developed by EU law. For this reason, we consider it appropriate to consult the Judge Advocate General, Director of Service Prosecutions, British Chamber of Commerce, Scottish Chamber of Commerce, Northern Ireland Chamber of Commerce, Confederation of British Industry, Confederation of British Industry Scotland, Confederation of British Industry Northern Ireland, Institute of Directors, Institute of Directors Scotland, Institute of Directors Northern Ireland, Federation of Small Business, Federation of Small Business Scotland, Federation of Small Business Northern Ireland, Trade Union Congress, Scottish Trade Union Congress, Irish Congress of Trade Unions, the Environment Agency, the Environment Agency Northern Ireland, Scottish Environment Protection Agency, Natural England, Food Standards Agency, Food Standards Scotland, Food Standards Agency Northern Ireland, Rural Payments Agency, Marine Maritime Organisation, Marine Scotland, Health and Safety Executive, Health and Safety Executive Northern Ireland, Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland to ensure the full impact of these proposals is identified and taken into consideration before a final decision is made.

We have drawn up questions at the end of our assessment of the proposals and we would be grateful if you can respond to all of them.

## **Next Steps and Timing**

This consultation will be open for six (6) weeks to provide an opportunity for all those likely to be affected to comment on our proposals. We are satisfied this is a sufficient consultation period as we are targeting interested partners and stakeholders to ensure they have the opportunity to comment on these proposals.

This consultation is also published online 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>. We welcome the views of other interested persons on these proposals.

Once the consultation has closed, we will consider all the views and proposals of respondents and will issue a response. Any regulations, if made, following this consultation, will be made via the affirmative resolution procedure. The power to bring



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such regulations expires on 31 December 2020, so any regulations must be made before that date.

## Issues to be considered

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). 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 of 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 jurisdiction to depart from retained EU case law, and in so doing would apply the rules they respectively exercise in departing from their own previous case law.

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, we are considering the impact of an option 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;
    - advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
    - foster or encourage good relationships 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 have identified two policy options which we consider 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 are:

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

The Government welcomes consultees' views on the proposals and their impacts to inform the final decision.

## Development of UK case law

The Government recognises that the 2018 Act, as amended by the 2020 Act, envisaged the need for UK courts and tribunals to be able to depart from retained EU case law. This reflects the fact that the way the law is interpreted by our courts and tribunals does not remain static over time – case law evolves, and our understanding of the law evolves with it. Our departure from the EU and the end of the Transition Period in December brings a fundamental change to the context within which retained EU law and retained EU case law is to be considered. In the same way that courts and tribunals can currently depart from their own case law, UK courts and tribunals need to be able to depart from the body of retained EU case law in similar circumstances.

The 2018 Act vests that power in the UK Supreme Court and High Court of Justiciary<sup>2</sup> (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, the Government has also considered the desirability that courts and tribunals, other than the UK Supreme Court and High Court of Justiciary, should be able to depart from retained EU case law, to allow for the more rapid 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 case law to evolve to recognise the UK's changing status. There is a risk that, if only the UK Supreme Court or the High Court of Justiciary retain this power, cases may take longer to consider and the law becomes "*fossilised*", given the more limited capacity of these courts. This point was raised by some parliamentarians in debate during the passage of the 2018 and 2020 Acts.

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<sup>2</sup> Throughout this document we have referred to the "High Court of the Justiciary" meaning the "High Court of the Justiciary in Scotland".

There is a counter risk that extending the power to depart from retained EU case law to more courts and tribunals could ultimately increase the number of cases brought to the UK Supreme Court. However, we believe that, in the majority of cases, it is likely that the UK Supreme Court would be greatly assisted if there is a prior judgment of the Court of Appeal or Inner House of the Court of Session (irrespective of whether or not a lower court or tribunal has made a prior decision) on the issue to be determined. Whilst there could be a further appeal to the UK Supreme Court, the test for permission to appeal to the UK Supreme Court is restrictive and may therefore ultimately reduce the number of cases needing to be determined by the UK Supreme Court.

There is a secondary risk with option 2 that there will be a greater increase in the volume of cases to the Court of Appeal or Inner House of the Court of Session than with option 1. The test to be applied by the Court of Appeal in considering whether to grant permission to appeal from the High Court is less restrictive than the test to be applied by the UK Supreme Court in considering whether to grant permission to appeal from a decision of the Court of Appeal. We believe that the Court of Appeal or Inner House of the Court of Session, similar to the UK Supreme Court, would be assisted by a prior determination of the issue at the High Court and Outer House of the Court of Session level, and that the volume of cases is capable of being managed within existing capacity. We would, however, welcome consultees' views on this assessment of the impact on case volumes.

There are some narrow circumstances in which it is possible for appeals from the High Court to “leapfrog” to the UK Supreme Court. *Leapfrog appeals* have a high bar in that they must raise a point of law of general public importance. As the Court of Appeal, in addition to the High Court, will also have the power to depart from retained EU case law under option 2, we believe that this will mitigate any increase in the number of *leapfrog appeals*. We would, however, welcome consultees' views on this assessment.

## Clarity of and certainty in the law

The Government recognises the need to provide legal clarity and certainty in our law, following our departure from the EU and the end of the Transition Period. That was one of the overarching policy aims of the Government through the 2018 and 2020 Acts. However, the Government also considers that it is important that UK courts and tribunals are not bound to retained EU case law for longer than is appropriate and in the interests of the UK and that potential litigants have sufficient ability to seek a change to retained EU case law where it adversely affects them.

The Government is mindful that during the passage of the 2020 Act, a number of concerns were raised in Parliament and elsewhere, that extending the power to depart from retained EU case law to a large number of courts and tribunals would bring with it a risk of creating considerable legal uncertainty. This was couched in terms of a risk of creating a “free for

*all* where there would be a large financial incentive to re-litigate potentially controversial areas covered by retained EU case law e.g. in areas such as Value Added Tax (VAT) scope or paid leave entitlement. Re-litigation to a significant degree would not only cause uncertainty in the law, until the point is finally decided by the UK Supreme Court, but, it is argued, will also undermine the reputation of the UK as an attractive place to do business and a preferred destination for the settlement of disputes.

Depending on how courts and tribunals approach this re-litigation, the pace of divergence could be very rapid or minimal. If every court and tribunal can depart from retained EU case law, the uncertainty created could be significant. That uncertainty would, ultimately, be capable of being resolved, as decisions are challenged via appeal through to the higher courts, but it will take considerable time for that position of legal certainty to be reached.

### **Consistency of Approach**

Subject to the provisions of the 2018 Act, retained EU case law will have to be followed by all UK courts and tribunals at the end of the Transition Period, except the UK Supreme Court and High Court of Justiciary. The UK Supreme Court sets precedent for the lower courts and tribunals in Northern Ireland, England and Wales and Scotland (other than where the High Court of Justiciary has jurisdiction). The High Court of Justiciary sets precedent for the lower courts in criminal matters in Scotland when sitting as an appellate court, normally with a bench of three or more judges. Should those courts<sup>3</sup> decide to depart from retained EU case law in any given case, that decision creates principles which lower courts and tribunals are in turn bound to follow in relevant cases. This therefore provides clarity and certainty in the law across the separate jurisdictions of England and Wales, Scotland and Northern Ireland.

Divergence from retained EU case law is important to ensure the law remains flexible and appropriate to the UK's situation following its departure from the EU. However, the lower the level of court and tribunal at which the power to depart from retained EU case law is set, the greater the risk that we will see divergence in approach between the jurisdictions in the UK arising out of more re-litigation in the lower courts and tribunals. This might therefore mean that judgments are issued by other courts and tribunals in and across different jurisdictions of the UK, which may be divergent in terms of their approach to the question of whether, and if so how, to depart from retained EU case law. Again, this risks undermining certainty in the law and may encourage "*forum shopping*" by parties to bring litigation in the jurisdiction that they believe will lead to the most favourable outcome. Whilst such divergence is ultimately capable of being resolved by appeal, ultimately to the UK Supreme Court or High Court of Justiciary, this will take time to work through the system. We welcome consultees' views on the impacts on courts and tribunals, particularly

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<sup>3</sup> UK Supreme Court and High Court of Justiciary.

in the event of increased cases in which arguments about the appropriate jurisdiction may emerge across the UK legal systems.

### **Precedent value of judgments**

In order to minimise the risk of legal uncertainty, including from divergence, the question of the precedent value of a court or tribunal's judgment is also an important consideration in this context. If the power is exercised in a way that preserves the precedent value of judgments from relevant courts and tribunals, a decision to depart from retained EU case law or not by those courts and tribunals would then set precedent for lower courts and tribunals, which would help to mitigate the risks set out above.

The precedent value of judgments of the courts<sup>4</sup> we have considered is set out below.

### **Court of Appeal of England and Wales and equivalent levels**

Across the UK, the courts below are the closest equivalents to the Court of Appeal of England and Wales:

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

### ***England and Wales***

Judgments of the Court of Appeal of England and Wales will set precedent for courts and tribunals below it in England and Wales, and will be influential in other parts of the UK. Where there is divergence in approach between Court of Appeal decisions in different jurisdictions of the UK, these can move more rapidly for consideration, where appropriate, by the UK Supreme Court.

The Court Martial Appeal Court<sup>5</sup> performs, broadly, the same function in the Service Justice System<sup>6</sup> as the Court of Appeal in England and Wales does for criminal appeals. Judgments of this court are binding on the courts beneath it and appeals from this court lie to the UK Supreme Court.

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<sup>4</sup> We have identified courts in scope of each of the options on which the Government is consulting but welcome views from consultees on whether there are other courts and tribunals that should be in scope of either option.

<sup>5</sup> The Court Martial Appeal Court hears appeals from the Court Martial, the court which has jurisdiction to try any service offence; broadly offences against service discipline or criminal conduct committed by service personnel in the Royal Navy, the Army and the Royal Air Force, or civilians subject to service discipline.

<sup>6</sup> The Service Justice System is the mechanism for dealing with offences against service discipline/criminal conduct for the UK armed forces; policy responsibility for the system lies with the Ministry of Defence.

## **Scotland**

### *Civil Cases in Scotland*

#### The Inner House of the Court of Session

The Inner House of the Court of Session hears appeals from the Outer House of the Court of Session, as well as a variety of appeals from lower courts, the Upper Tribunal and certain professional bodies, including the Law Society of Scotland. Although primarily an appeal court, the Inner House of the Court of Session can also hear certain petitions at first instance.

The Inner House of the Court of Session can be bound by its own earlier decisions if the decision is issued by a bench of greater number. If an earlier decision of a Division of the Inner House of the Court of Session is to be reviewed, a larger bench will normally be set down to do so.

Decisions of the Inner House of the Court of Session are binding on judges in the Outer House of the Court of Session and on sheriffs and appeal sheriffs in the Sheriff Court and Sheriff Appeal Court.

### *Criminal Cases in Scotland*

#### The High Court of Justiciary as an appellate court

The High Court of Justiciary is Scotland's supreme criminal court. When sitting as an appeal court, the High Court normally consists of two judges when hearing an appeal against sentence, and at least three when hearing an appeal against conviction or any other appeal. More judges may sit when the court is dealing with particularly complex cases, or where important matters of law are to be considered. Appeals are heard from the High Court; from more serious (solemn) sheriff court cases and from cases referred by the Scottish Criminal Cases Review Commission. Additionally, the Lord Advocate may refer to the High Court of Justiciary, a point of law which arises in the course of a case for an Opinion.

Decisions of the High Court of Justiciary with a bench of a greater number are treated as binding. The court will also regard itself as bound by a previous decision of a bench of equal number.

Decisions of the High Court of Justiciary can be binding on sheriffs in criminal trials.

## **Northern Ireland**

The Northern Ireland Court of Appeal deals with appeals in civil cases from the High Court and with appeals in criminal cases from the Crown Court. It also hears appeals on points of law from the county courts and the magistrates' courts. Judgments of the Court of Appeal in Northern Ireland will be binding on the courts below it. Great respect is accorded by the courts in Northern Ireland to the decisions of the Court of Appeal in England and Wales, especially where the law is the same, although these decisions are not technically binding.

## High Court of Justice of England and Wales and equivalent levels

In Scotland and Northern Ireland, we consider that the courts below are the closest equivalents to the High Court of England and Wales:

- Outer House of the Court of Session in Scotland;
- The Sheriff Appeal Court in Scotland;
- The High Court of Justiciary sitting at first instance; and
- The High Court of Northern Ireland.

Judgments of the High Court of England and Wales, and equivalent courts in Scotland and Northern Ireland, only have precedent value in their respective jurisdictions, and then to varying degrees.

### ***England and Wales***

Within England and Wales, High Court judgments will set precedent for lower courts, but do so in a much more limited way for tribunals. For example, High Court judgments will, in some cases, bind First-Tier tribunals, but do not bind the Upper Tribunal.<sup>7</sup>

When sitting as a court of first instance, England and Wales High Court judgments may be persuasive but are not binding in other England and Wales High Court cases. When the High Court is sitting as the Divisional Court (that is, hearing appeals from the Magistrates' Court, Crown Court or County Court), it will be bound by its own decisions, except in exceptional circumstances where it is satisfied that the earlier decision was reached *per incuriam* (by error of the court); for example, because it failed to take account of a binding authority. This means that we could see a divergence of approach in High Court judgments which could only be resolved in due course by appeal to a higher court.

### Tribunals

The Upper Tribunal will be binding on the First-Tier tribunal. The Employment Appeal Tribunal will bind the Employment Tribunal. Appeals from the Upper Tribunal and Employment Appeal Tribunal are heard by the Court of Appeal. The UK-wide jurisdiction of reserved tribunals will see that precedent applies in those tribunals throughout the UK.

### ***Scotland***

#### *Civil Cases in Scotland*

#### Outer House of the Court of Session

The Court of Session sits in Parliament House, Edinburgh, and is presided over by the Lord President, Scotland's most senior judge. The Outer House of the Court of Session is a court of first instance. Decisions of the Outer House of the Court of Session may be appealed to the Inner House of the Court of Session.

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<sup>7</sup> *Gilchrist v HMRC [2014] UKUT 169 (TCC)*.



A judge in the Outer House of the Court of Session is not bound by previous decisions of other judges of the Outer House of the Court of Session. Such prior decisions will often be followed and, where a decision is not to be followed, reasons will normally be given. Although highly persuasive, a decision of a judge in the Outer House of the Court of Session is not binding on sheriffs or the Sheriff Appeal Court.

### The Sheriff Appeal Court

A decision of a Sheriff in civil proceedings may be appealed to the Sheriff Appeal Court. Decisions of the Sheriff Appeal Court may be appealed to the Inner House of the Court of Session.

A decision of the Sheriff Appeal Court on the interpretation or application of the law is binding in proceedings before a sheriff anywhere in Scotland; in proceedings before a justice of the peace anywhere in Scotland; in proceedings before the Sheriff Appeal Court, except in a case where the court hearing the proceedings is constituted by a greater number of Appeal Sheriffs than those constituting the court which made the decision.

### *Criminal Cases in Scotland*

#### The Sheriff Appeal Court

The Courts Reform (Scotland) Act 2014 transferred all the powers and jurisdiction of the High Court of Justiciary so far as relating to appeals from courts of summary criminal jurisdiction to the Sheriff Appeal Court. An appeal on a point of law may be taken to the High Court of Justiciary against any decision of the Sheriff Appeal Court in criminal proceedings, but only with the permission of the High Court of Justiciary. For the purposes of considering and deciding an appeal, three of the judges of the High Court of Justiciary are to constitute a quorum of the court.

The binding nature of Sheriff Appeal Court decisions, as set out in section 48(1) of the 2014 Act referred to above, applies also to criminal matters. Accordingly, decisions of the Sheriff Appeal Court in criminal matters are binding on sheriffs, justices of the peace or itself (unless there is a larger bench hearing the appeal).

#### The High Court of Justiciary sitting at first instance

In addition to its appellate function, the High Court of Justiciary is also a court of first instance in relation to certain serious criminal offences. A single judge hears cases with a jury of 15 people. Decisions of a single judge do not bind other judges sitting alone though they may in some cases bind a sheriff.<sup>8</sup>

### Tribunals

There are some tribunals in Scotland where the subject matter of the proceedings is reserved and heard within the tribunals structure of England and Wales, for example

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<sup>8</sup> See *Jessop v Stevenson* 1987 SCCR 655.

Social Security and Child Support. Devolved tribunals in Scotland<sup>9</sup> operate in a similar structure to England and Wales. In that there is a First-Tier tribunal for Scotland and Upper Tribunal for Scotland.<sup>10</sup> Like England and Wales, decisions of the Upper Tribunal are binding on the First-Tier tribunal. Appeals from the Upper Tribunal are heard by the Inner Court of Session.

### ***Northern Ireland***

The High Court in Northern Ireland hears complex or important civil and family cases, judicial reviews and appeals from county courts. It also includes the Divisional Court of Northern Ireland which hears judicial review in criminal cases and will often, but not always, comprise of judges from the Northern Ireland Court of Appeal or a combination of High Court and Court of Appeal judges. The Divisional Court also operates as the appeal court from the Crown Court in extradition matters. Appeal from the Divisional Court in these instances lies to the UK Supreme Court, for example under Section 32 of the Extradition Act 2003.

High Court precedent operates in Northern Ireland in a similar way to England and Wales. Tribunals in Northern Ireland are established under various statutes with a number of separate routes for appeals against tribunal decisions, so it will depend on the particular governing legislation whether High Court decisions are binding. Where the subject matter is excepted, such as immigration, then tribunals are heard within the UK-wide structure of the First-Tier tribunals and Upper Tribunals.

### **Courts below the High Court of Justice of England and Wales and equivalent levels**

Across the UK jurisdictions, decisions by courts and tribunals at this level are not binding<sup>11</sup> on other courts.

### **The test to be applied and factors to be considered in any decision by a court or tribunal to depart from retained EU case law**

The test and factors to be taken into account by any court or tribunal which may depart from retained EU case law is also relevant to the question of the clarity of the law and certainty of approach. Different tests apply (i) across the UK; and (ii) between different levels of court when deciding whether to depart from its own case law. This could drive disparate considerations and judgments. They could also create uncertainty as to what test should be applied by the appeal court when considering an appeal on whether or not the decision to depart from retained EU case law was correct.

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<sup>9</sup> Tribunals (Scotland) Act 2014.

<sup>10</sup> There are Scottish Tribunals that deal with devolved issues and have specific Scottish jurisdiction and structures (e.g. Mental Health Tribunal for Scotland) and there are Scottish Tribunals that deal with reserved issues but have specific Scottish jurisdiction (e.g. tribunal that deals with war pensions). In both these instances the Tribunal is supported by the Scottish Courts and Tribunals Service.

<sup>11</sup> In Scotland, some decisions at this level are binding and this is discussed in more detail above.

Some of the issues in relation to the risk of uncertainty in the law and the risk of divergence, and even those relating to the precedent value of decisions could be mitigated through the description of the test to be applied and the factors to be considered.

We are equally mindful of the need for any test not to fetter judicial discretion and of the complexity of seeking to codify a comprehensive range of factors which may be relevant in a very wide range of litigation.

## **Impact on the administration of justice and the operation of UK courts and tribunals**

Taking into account the factors set out above in relation to the question of certainty in the law, the Government considers that there is a risk that extending the power to a wide range of courts and tribunals could drive re-litigation and impact upon the volume, and complexity of the cases being considered. Uncertainty in the law also runs the risk of causing damage to the UK's reputation as a destination in which to settle disputes. The Government therefore does not consider extending this power to all courts and tribunals as a viable solution to implementing the aims of enabling departure from retained EU case law where it is no longer in the interests of the UK, whilst at the same time maintaining legal certainty, and the UK's international reputation as an attractive forum in which to do business and settle disputes.

At this time, it is not possible to undertake a full economic assessment as it is difficult to assess the nature of the impacts as it is dependent on the nature of cases brought and how the courts and tribunals will rule on such issues in the future. Such decisions will depend on the facts of individual cases at the time the decision is made, and it is not possible (or appropriate) to predict how, and in what circumstances, the courts and tribunals may wish to exercise this power.

It has been suggested that there may be particular subject matters (e.g. tax) where re-litigation is more likely. To date, we have not been able to obtain evidence about any potential impacts on businesses over and above a general assumption that legal uncertainty would be unwelcome.

Given this uncertainty, an impact assessment has not been produced at this stage, however responses from consultees will assist in gathering information about any impact on business, the administration of justice, the rest of the public sector and wider society. The Ministry of Justice will then be enabled to take a more detailed view on the assessment of impacts and any required scrutiny for the post consultation stage as appropriate.

## **Equality Impacts**

We are considering the impacts of any change on those with particular protected characteristics under the Equalities Act 2010, namely:

- Age;
- Disability;
- Gender reassignment;
- Marriage and civil partnership;
- Pregnancy and maternity;
- Race;
- Religion or belief;
- Sex; and
- Sexual Orientation

We welcome views from consultees on the equality impacts of the proposed changes.

# Our preliminary views

## Whether to extend the power to depart from retained EU case law

There is a balance to be struck between the policy aim of encouraging timely departure from retained EU case law, where appropriate, and the negative impacts of driving re-litigation, and therefore case volumes, creating legal uncertainty and reducing confidence in the UK as a forum in which to settle legal disputes.

On balance, having taken into account the factors outlined in the sections above, the Government considers that it is desirable to extend the power to depart from retained EU case law to additional courts and tribunals, to allow for the departure from retained EU law, to reflect the changing circumstances which our departure from the EU brings. However, we are mindful of the significant risks of creating legal uncertainty and driving considerable volumes of re-litigation, if the power to depart was extended to a large number of courts. We have also taken into account the considerations in relation to the risk of divergence across the UK. We are therefore proposing that the ability to depart from retained EU case law should be limited to more senior courts.

## Which courts or tribunals should have the power to depart from retained EU case law

We have concluded that there are the two primary options that would be arguably capable of achieving a balance, between the benefits of extending the number of courts and tribunals with the power to depart from retained EU case law, whilst mitigating the risks to legal clarity and certainty. It is these two options on which the Government is now consulting.

**Option 1** is to extend the ability to depart from retained EU case law to the Court of Appeal in England and Wales, and equivalent courts in the other UK jurisdictions, namely the:

- i. Court of Appeal of England and Wales;
- ii. Court Martial Appeal Court;
- iii. 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.

**Option 2** is, in addition to the Court of Appeal and equivalent courts, to extend the ability 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. In addition to the courts in option 1, this would include:

- i. The High Court of England and Wales;
- ii. Outer House of the Court of Session in Scotland;
- iii. The Sheriff Appeal Court in Scotland;
- iv. The High Court of Justiciary sitting at first instance; and
- v. The High Court in Northern Ireland.

In deciding the level of court at which the power to depart from retained EU case law is set, there may be instances where other courts and tribunals could be considered the “*equivalent*” for those courts listed above. With option 1, the Court of Appeal, and its closest equivalents, deal with appeals from both courts and tribunals with any onward appeal to the UK Supreme Court.

Both options raise questions about whether other courts and tribunals should be in scope of these proposals. For example, in some instances, appeals from the High Court can “*leapfrog*” from the High Court to the UK Supreme Court. Similarly, in the tribunals structure, appeals from the First-Tier Tribunal and Employment Tribunal are heard by the Upper Tribunal and Employment Appeal Tribunal respectively prior to any determination by the Court of Appeal. On the courts side, challenge to decisions of the Crown Court dealing with cases on indictment will be heard by the Court of Appeal, not the High Court. The Court Martial has similar powers and procedures to the Crown Court. Appeal is to the Court Martial Appeal Court; just as appeal from the Crown Court is (generally) to the Court of Appeal.

It is debatable whether additional courts and tribunals across the UK, and possibly others not mentioned above, should be included in scope of either option, but particularly option 2, and have the power to depart from retained EU case law which would then be binding on the courts and tribunals lower to them. We welcome consultees’ views on which courts or tribunals should be in scope of either of these options.

Option 2 would potentially see more cases of this type being heard and more quickly. This has the advantage, now that we have left the EU, of enabling more people to argue to challenge retained EU case law which adversely affects them. We are interested to receive views on whether this outweighs, or is outweighed by, the greater risk of divergence between cases within and across UK jurisdictions, and therefore uncertainty in the law. This might arise in part, due to the more limited extent in which this tier of court sets precedent for themselves (although the High Court generally follows decisions of another High Court), and the courts and tribunals below them and influence other courts and tribunals in the same tier within their own, and across UK jurisdictions. It might therefore take longer for any new case law to become settled under this option. Although

the risk of divergence is not completely eliminated by option 1, it does mean that any variance will be resolved more quickly, through the route of appeal directly to the UK Supreme Court.

We welcome consultees' views on which option would in practice achieve the balance of enabling timely departure from retained EU law, whilst at the same time maintaining legal certainty in the law across the UK.

## **The extent to which, or circumstances in which, a relevant court or tribunal is not to be bound by retained EU case law**

After 31 December 2020, retained EU case law will have the same binding, or precedent, status in domestic courts and tribunals as existing decisions of the UK Supreme Court and High Court of Justiciary in relation to any question as to the validity, meaning or effect of any retained EU law. UK courts and tribunals may also have regard to decisions of the Court of Justice of the European Union taken after the UK's departure from the EU, where they are relevant to any matter the court or tribunal is considering.

Unlike other courts and tribunals, the UK Supreme Court and the High Court of Justiciary (where there is no further route of appeal to the UK Supreme Court) are not bound by retained EU case law after 31 December 2020.

Given the precedent setting power of the UK Supreme Court, it is considered that courts and tribunals with the power to depart from retained EU case law in option 1, should be bound by the decisions of the UK Supreme Court where it has considered the question of whether to depart from retained EU case law. In the case of option 2, we also consider that the High Court, and its equivalents across the UK, should be bound by decisions of the Court of Appeal, including its equivalents across the UK, or the High Court of Justiciary, as they normally would be.

Currently, the jurisprudence of the Court of Justice of the European Union forms part of the UK legal system through two channels:

- i. it is directly applicable, and
- ii. it is applied through decisions of UK courts, either because
  - a. they have made a reference to the Court of Justice of the European Union on a point of law and that has formed part of the ultimate judgment of the domestic court; or,
  - b. they have applied a previous judgment of the Court of Justice of the European Union.

As detailed above, from the end of the Transition Period, retained EU law, as far as that law is unmodified on or after the end of the Transition Period, and so far as relevant to it, is to be interpreted in line with retained case law, comprising of retained EU case law and

retained domestic case law.<sup>12</sup> Decisions of the Court of Justice of the European Union, as far as they form part of UK law through channel (i) above before the end of the Transition Period, would become retained EU case law and, as far as they form part of UK law, through channel (ii) above, would become retained domestic case law.

We are considering the extent to which the relevant courts or tribunals should be permitted to depart from retained domestic case law which relates to retained EU case law in circumstances where they would not otherwise be able to (as permitted by 6(5B)(b) and (c) of the 2018 Act). Retained domestic case law relating to retained EU case law could be, for example, a domestic judgment given before the end of the Transition Period applying a ruling of the Court of Justice of the European Union.

We would welcome your views as to whether relevant courts or tribunals, under either option, should be permitted to depart from such judgments from courts superior to them, and under what circumstances.

## **Whether to include a test**

The Government is mindful of the importance of clarity in any legislation it may bring forward, and in particular, in relation to the test to be applied by the courts and tribunals when considering whether to depart from retained EU case law.

Our starting point is that it is desirable, as far as possible, for the same test to be applied by the relevant courts and tribunals to which this power is extended, in order to provide clarity to the courts and tribunals on the test which should be applied, and to promote as far as possible consistency of approach and legal certainty across the different jurisdictions of the UK.

Moreover, if no test is provided, this would create uncertainty as to which test should be used by:

- a) the courts and tribunals when considering whether to depart from retained EU case law; and,
- b) in option 1, by the UK Supreme Court; or in option 2, by the Court of Appeal including its equivalents across the UK, and the UK Supreme Court and High Court of Justiciary, when considering an appeal of a decision on the question of whether to depart from retained EU case law.

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<sup>12</sup> Subject to certain exceptions under Section 5 of and Schedule 1 to the 2018 Act.



## The test to be applied

The UK Supreme Court and High Court of Justiciary are required under s6(5) of the 2018 Act to apply the “*same test as [they] would apply in deciding whether to depart from [their] own case law*” in deciding whether to depart from retained EU case law.

The UK Supreme Court test in deciding whether to depart from its own case law is set out in the House of Lords Practice Statement of 26 July 1966,<sup>13</sup> namely “*whether it appears right to do so*”. There are a range of relevant considerations sitting beneath that which have been developed in a significant body of case law. The power is discretionary and will turn on the facts of each individual case. There is no settled jurisprudence relating to the exact circumstances when the UK Supreme Court will exercise this power. Indeed, dicta have discouraged the use of any rigid formula, however, it is generally accepted that the power will only be used sparingly. Examples of when it has been used include where a previous decision does not reflect modern public policy<sup>14</sup> or where a previous decision causes uncertainty.<sup>15</sup>

The position is similar in respect of the High Court of Justiciary in deciding whether to depart from its own case law. It may do so when the interests of justice require it. Decisions made by larger benches, and in particular where a case has been considered by the whole court, are considered to be of greater authority. It is the practice to convene a larger court when a point of importance or difficulty falls to be decided, and the question of whether a whole court decision can be reversed by a subsequent court remains open. There is no set test that must be met to overturn an earlier decision, but earlier cases can be reconsidered where there are doubts as to whether the legal principles relied on remain sound, or where the court considers that an earlier case was wrongly decided.

We have looked to the existing tests used across the UK jurisdictions at Court of Appeal and High Court and equivalent levels when deciding to depart from their own case law. Each appeal court in each jurisdiction has a different approach.

In England and Wales, the Court of Appeal may only depart from its own case law in very limited circumstances: (i) where two Court of Appeal decisions conflict; (ii) if the decision, although not expressly overruled, conflicts with a decision of the UK Supreme Court; and (iii) if the earlier decision was given *per incuriam* (for example, where a statute or a rule having statutory effect which would have affected the decision was not brought to the

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<sup>13</sup> [1966] 1 WLR 1234. This has been confirmed to apply to the Supreme Court in subsequent case law (*Austin v Mayor and Burgess of the Borough of Southwark* [2010] UKSC 28) and in the current UKSC practice direction (<https://www.supremecourt.uk/docs/practice-direction-03.pdf>).

<sup>14</sup> See *Miliangos v George Frank (Textiles) Limited* [1976] A.C. 443, although see *Hall v Simon*, [2002] 1 A.C. 615, which suggests that changes in public perception alone would not be sufficient to warrant a departure, and that there must be other significant changes in circumstance.

<sup>15</sup> See *Murphy v Brentwood* [1991] 1 A.C. 398.

attention of the earlier court).<sup>16</sup> This is more restrictive than the test applied by the UK Supreme Court in deciding whether to depart from its own case law.

In Scotland, decisions of the High Court of Justiciary with a bench of a greater number are treated as binding. The court will also regard itself as bound by a previous decision of a bench of equal number.

The Inner House of the Court of Session can be bound by its own earlier decisions if the decision is issued by a bench of greater number. If an earlier decision of a Division of the Inner House of the Court of Session is to be reviewed, a larger bench will normally be set down to do so. Decisions of the Inner House of the Court of Session are binding on judges in the Outer House of the Court of Session. Decisions of the Inner House of the Court of Session are also binding on sheriffs and Appeal Sheriffs in the Sheriff Appeal Court.

In Northern Ireland, a similar position applies as in England and Wales. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the UK Supreme Court, the Court of Appeal must follow its previous decision and leave the UK Supreme Court to rectify the mistake.<sup>17</sup>

The picture at High Court level is even more complex.

In England and Wales, the High Court, when hearing actions at first instance, is not bound by other first instance decisions, although these judgments may be persuasive. When acting as a Divisional Court, (hearing an appeal), the High Court may depart from earlier decisions of the High Court when it considers that the earlier decision was reached in error by the court (*per incuriam*).

Similar considerations apply in Northern Ireland but different considerations apply in Scotland when deciding whether to depart from its own case law as set out above.

The final route of appeal for all of the additional courts to whom the power to depart from retained EU case law would be extended under these proposals is the UK Supreme Court.

In light of its objective to have a single test to provide clarity and promote consistency of approach, the Government is of the view that the additional courts and tribunals who are able to depart from retained EU case law should not each rely on their own test of whether to depart from their own case law.

Considering our stated objective to achieve consistency of approach as far as possible, we have therefore looked to the test already specified in the 2018 Act to be used by the UK Supreme Court in deciding whether to depart from its own case law which we have described above. Specifying a test other than that which the UK Supreme Court uses, (for

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<sup>16</sup> *Young v Bristol Aeroplane Co Ltd* [1944] K.B 716.

<sup>17</sup> See *Breslin & others v McKenna & others* (ruling no 9) [hearsay evidence] [2008] NIQB.

example, each court or tribunal applying their own test), may risk uncertainty as to which test should be applied when it is considering an appeal about a decision to depart from retained EU case law.

We therefore consider that extending the test applied by the UK Supreme Court when considering whether to depart from its own case law to the relevant courts and tribunals would achieve our objective of promoting consistency of approach and minimising the risk of divergence across the different jurisdictions of the UK.

We have considered whether we ought to seek to codify this test in full on the face of any regulations, but our initial view is that this would be unnecessary and runs the risk itself of imparting a degree of unwanted inflexibility into the application of that test, which has itself evolved over time. In our view, this test is capable of being easily understood and applied across the jurisdictions by reference to the relevant case law.

The Government's preferred view is, therefore, that any regulations would state that the test to be applied by any additional court or tribunal is the test applied by the UK Supreme Court in deciding whether to depart from its own case law. For the avoidance of doubt, the High Court of Justiciary, as the final criminal court of appeal in circumstances where there is no route of appeal to the UK Supreme Court, will continue to apply its own test.<sup>18</sup> We welcome consultees' views on the test to be applied by courts below the High Court of Justiciary for whom it is the final court of appeal.

## **The considerations which are to be relevant to courts and tribunals in departing from retained EU case law**

We have considered whether we would wish to specify on the face of regulations any considerations which are relevant to the courts and tribunals in deciding whether to depart from retained EU case law.

We are not minded to specify any such considerations to be taken into account by the UK Supreme Court, the High Court of Justiciary or the relevant additional courts and tribunals in light of our proposal that the test that should be applied is that used by the UK Supreme Court in deciding whether to depart from its own case law. In our view, this 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. Our view is, therefore, that it would be unhelpful to seek to

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<sup>18</sup> As mentioned above, decisions of the High Court of Justiciary with a bench of a greater number are normally treated as binding and the court will normally regard itself as bound by a previous decision of a bench of equal number.

produce an exhaustive list of relevant considerations on the face of the regulations; however, we welcome consultees' views on this approach.

## Conclusion

In summary the Government is proposing to make regulations pursuant to section 6 (5A) of the 2018 Act which will extend the power to depart from retained EU case law to additional courts and tribunals. In making these regulations, the Government's intention is to allow the courts and tribunals the flexibility to depart from retained EU case law, in a timely way following our departure from the EU, whilst at the same time balancing this with the need to maintain legal certainty and clarity across the UK. The Government believes that there are two options which meets these aims on which the Government is now consulting:

**Option 1:** Extending the power to depart from retained EU case law to the:

- i. Court of Appeal of England and Wales;
- ii. Court Martial Appeal Court;
- iii. Court of Appeal of Northern Ireland;
- iv. 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.

**Option 2:** Extending the power to depart from retained EU case law to the:

- i. Court of Appeal of England and Wales;
- ii. Court Martial Appeal Court;
- iii. Court of Appeal of Northern Ireland;
- iv. High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue or a devolution issue;
- v. The Inner House of the Court of Session in Scotland;
- vi. The High Court of England and Wales
- vii. Outer House of the Court of Session in Scotland;
- viii. The Sheriff Appeal Court in Scotland;
- ix. The High Court of Justiciary sitting at first instance; and
- x. The High Court in Northern Ireland.

We welcome your views on whether there should be any other courts or tribunals within scope of either of these two options.

In exercising the power to enable additional courts and tribunals to depart from retained EU case law, our preferred approach is that these courts will not be bound to the extent that the retained EU case law is unmodified by the UK Supreme Court. We welcome your views as to the extent to which these courts should be bound by retained domestic case law which relates to retained EU case law.

## **Retained EU Case Law**

Consultation on the departure from retained EU case law by UK courts and tribunals

In extending the power to depart from retained EU case law to these additional courts, we propose that these courts should apply the same test as that applied by the UK Supreme Court in deciding whether to depart from its own case law. We do not intend to specify a list of considerations that all courts and tribunals with the power to depart from retained EU case law should take into account when making such determinations. Again, we welcome your views on the Government's preferred approach.

We believe that this approach achieves the Government's policy objectives of encouraging timely departure from retained EU case law, where appropriate, whilst at the same time mitigating the risk of adverse impact on the operation of the administration of justice, and legal uncertainty. We believe that these options will maintain the UK's international reputation as a forum in which to settle disputes.

We welcome consultees' views on the practical, operational and equalities impacts of the two options to enable an informed decision to be made at the end of the consultation period.

# Consultation Questions

Please submit responses marked for the attention of Joanne Thambyrajah by email to [Judicial\\_Policy\\_Correspondence@Justice.gov.uk](mailto:Judicial_Policy_Correspondence@Justice.gov.uk)

- Q1: 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.**
- Q2: 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.
- Q3: 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.**
- Q4: 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. Court of Appeal of England and Wales;
  - ii. Court Martial Appeal Court;
  - iii. 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.**
- Q5: If the power to depart from retained EU case law is to be extended to the High Court and its equivalents, do you agree that the list of courts below captures the full range of courts in scope?**
- i. The High Court of England and Wales
  - ii. Outer House of the Court of Session in Scotland;
  - iii. The Sheriff Appeal Court in Scotland;
  - iv. The High Court of Justiciary sitting at first instance; and
  - v. The High Court in Northern Ireland.

**Please give reasons for your answer.**

- Q6:** 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.
- Q7:** 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.
- Q8:** 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.
- Q9:** 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.
- Q10:** 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.
- Q11:** As part of this consultation process, we would also like to know your views on how these proposals are likely to impact the administration of justice and in particular the operation of our courts and tribunals.
- a. 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?
  - b. 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?
  - c. 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.

**Retained EU Case Law**

Consultation on the departure from retained EU case law by UK courts and tribunals

- d. 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.**

**Q12: Do you have any other comments that you wish us to consider in respect of this consultation.**

**Thank you for participating in this consultation.**



## Contact details / how to respond

Please send your response by email to:

**Joanne Thambyrajah**

**Email:** [Judicial\\_Policy\\_Correspondence@Justice.gov.uk](mailto:Judicial_Policy_Correspondence@Justice.gov.uk)

**☎ Phone:** 020 3334 3181

**Mobile:** 07870 983128

### Complaints or comments

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

### Publication of response

A paper summarising the responses to this consultation will be shared with all the consultees.

### Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

# About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## **Confidentiality**

By responding to this consultation, you acknowledge that your response, along with your name/corporate identity, may be subject to information regimes (these are primarily the Freedom of information Act 2000(FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

The Government considers it important in the interests of transparency that the public can see who has responded to Government consultations and what their views are. Further, the Ministry of Justice may choose not to remove your name/details from your response at a later date, for example, if you change your mind or seek to be ‘forgotten’ under data protection legislation, if the Ministry of Justice considers that it remains in the public interest for those details to be publicly available. If you do not wish your name/corporate identity to be made public in this way then you are advised to provide a response in an anonymous fashion (for example ‘local business owner’, ‘member of public’). Alternatively, you may choose not to respond.



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