



Ministry
of Justice

Retained EU Case Law

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

Consultation Questions

Please submit responses marked for the attention of Joanne Thambyrajah by email to 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.

No. As noted by the House of Lords Constitution Committee in their report in January, if the power to depart from retained EU case law is granted to lower courts, there could be significant divergence in how and when that power is used. This may lead to more cases going before the various appeal courts and ultimately in cases going to the Supreme Court of the United Kingdom and the High Court of Justiciary in Scotland. Primary consideration needs to be given to maintaining legal certainty and avoiding differentiation, where possible, between the various legal jurisdictions within the UK.

As part of the rationale for introducing the 2018 Withdrawal Act the Government made the case that while significant elements of EU law were retained within UK law that it was necessary to have a common understanding of how it applied. It therefore designated that only the Supreme Court could decide if there was to be a departure from existing case law. The Withdrawal Act also stipulated that retained EU law would remain in force until either the Westminster Parliament or Government Ministers, under new powers within the Act decided to change or remove those laws. The clear purpose as stated at the time was to provide as much legal certainty as possible as we moved out of the EU. The proposals contained within this consultation document effectively undermine that principle of legal certainty by opening up potentially divergent and contradictory mechanisms for deviating from retained EU law.

The Supreme Court is best placed to navigate the uncertainty of leaving the EU and thus ensure clarity and consistency in the law and evenness of application. The Supreme Court is the only court within our legal system with a UK wide remit and UK wide expertise. It is important that any court vested with powers to deviate from EU law has the relevant expertise, experience and holistic approach that will be required to adjudicate on matters that will cross the boundaries between political, constitutional and international factors at play in any decision to depart from retained law.

The power to depart from retained EU law should not be extended to any courts lower than the UK Supreme Court and the Scottish High Court of Justiciary.

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.**

As noted above, we feel that extending the power to depart from retained EU case law risks clarity and consistency in the law and unevenness of application. The Supreme Court is formed of the most senior judges in the UK who are experienced in considering departing from precedent and issues of far reaching significance. Lower courts are not as well equipped to undertake this role.

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.

Retaining this power with the Supreme Court. In order to preserve legal certainty such decisions should be left to the most senior judges in the UK to decide. Having a wide range of courts empowered to depart from EU case law has the potential to increase court caseloads as judgments involving departures will almost certainly be contested on appeal.

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.

We do not agree that additional courts should be granted this power.

- 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 of Scotland 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.

No. We do not agree that additional courts should be granted this power.

- 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.**

No. We do not agree that additional courts should be granted this power.

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.

No. Allowing lower courts to depart from domestic case law would further jeopardise legal certainty.

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.

Yes. While we do not agree that this power should be extended to other courts, if this was to happen it would clearly undermine the power of the most senior courts in the UK if lower courts are subsequently able to make decisions contrary to their prior interpretations; undermining the well-established operation of precedent would further risk legal uncertainty and general confusion across legal jurisdictions.

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.

We do not agree that additional courts should be granted this power.

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.

The UK government's commitment 'to ensuring that no diminution of rights is caused by its departure from the EU, including in the area of protection against forms of discrimination enshrined in EU law' is legally binding and reflected in Article 2 ('Rights of individuals') of the Ireland/Northern Ireland Protocol to the Withdrawal Agreement.

As the Ireland/Northern Ireland Protocol is not adequately referenced in the consultation document, it is unclear how the Protocol may intersect with the departure from EU case law, particularly if the potential to do so is granted to lower courts in Northern Ireland. This uncertainty raises concerns about the prospect of undermining the Protocol and the rights, safeguards or equality of opportunity as set out in the Belfast/Good Friday Agreement and referenced in Article 2 of the Protocol.

The commitment noted in Article 2 of the Protocol equates to a commitment to maintain particular protections of EU law in Northern Ireland and to continue to interpret the law within the framework of EU law. This commitment subsequently places Northern Ireland in a different position from the rest of the UK in terms of the ongoing application of both EU Law and relevance of EU case law. We

question how this sits with the potential divergence from EU case law and whether departing from EU case law may equate to the diminution of these rights and protections, ultimately leading to a roll back in human rights and equality. We also remain concerned by the possibility that judges in different UK jurisdictions may choose to diverge from retained human rights and equality law thereby causing confusion and legal uncertainty and therefore this potential divergence should be minimised.

- 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.**
 - 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.**

We believe that it is impossible to predict what impact the proposed changes may have on the volume of cases or the type of litigation across the justice system. Though it is clearly a possibility that the proposed changes will lead to an increased number of cases in lower courts which may seek to challenge the UK's linkage with retained EU case law. That in turn would be likely to lead to an increase in appeals processes and cases that would proceed upwards through the court system and eventually to the Supreme Court itself. This would have the negative impact of creating uncertainty at a lower court level and across jurisdictions but also placing an increased burden on the Supreme Court itself.

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

Justice is a devolved matter and we have concerns about the extent of the UK government's pre-consultation with the devolved governments in this matter. The limited time frame of the consultation period and being conducted over the summer months will have a detrimental impact on the scope and effectiveness of this consultation exercise. We would therefore recommend that the consultation period be extended until at least the 24th September 2020 to provide a more effective twelve-week consultation period.

The consultation documents states that the Government is considering the impact of these proposals on categories covered by the Equality Act 2010, but that legislation does not extend to Northern Ireland. It would be essential that the Government conduct an equality impact assessment under Section 75 of the Northern Ireland Act 1998 to full ascertain the equality impacts in Northern Ireland of the current proposals.

While the NI Protocol as contained in the Withdrawal Agreement and legalised domestically in the Withdrawal Act 2020 does ensure that the principle of non-diminution will be applied to areas of EU law that fall within the scope of the chapter on 'Rights, Safeguards and Equality of Opportunity in the Belfast/Good Friday Agreement, there remains a risk that there may be areas of EU law relevant to the protection of human rights and equality that the UK Government does not interpret as falling within the scope of that section of the protocol. To that end we remain concerned about the potential divergence between what might be designated as 'protected' under the non-diminution principle and what may fall outside that protection in the view of the UK Government. Accordingly, in the context of this consultation, retaining the power to deviate from retained EU law within the highest court of the UK judicial system ensures a significant degree of insulation from potential judgements of lower courts that have neither the scope or experience to be able to progress such important decisions.

The Consultation document clearly states that courts and tribunals could not depart from retained EU case law in circumstances where they were considering domestic laws that gave effect to the requirements of the Withdrawal Agreement, but there is limited information regarding the manner in which such protections will interact or be further protected from the proposal that lower courts or tribunals could depart from retained EU law. Again, this potentially creates legal uncertainty around the operation of the Withdrawal Agreement and the Protocol.

We believe that the significant risks of too many courts being granted the powers under consideration outweigh any potential benefits and therefore we would recommend limiting the power to the very highest senior courts - the Supreme Court of the United Kingdom and the High Court of Justiciary in Scotland.

Thank you for participating in this consultation.

About you

Please use this section to tell us about yourself

Full name	Jacqueline Monahan, PhD
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	Human Rights Officer
Date	13 August 2020
Company name/organisation (if applicable):	Human Rights Consortium
Address	Community House 6A Albert Street
	Belfast, Co Antrim, Northern Ireland
Postcode	BT12 4HQ
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.

The Human Rights Consortium is a broad alliance of civil society

organisations from across all communities, sectors and areas of Northern Ireland who

work together to help develop a human rights based society.
