

Retained EU Case Law

Consultation Response

Introduction

1. The Bar Council is the regulatory and representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar welcomes the opportunity to comment on the Ministry of Justice's consultation paper on Retained EU Case Law. We note that it identifies two policy options aimed at enabling more courts to depart from retained EU case law, namely extending the power to the Court of Appeal of England and Wales and its closest equivalents or, in addition to this, also extending the power to the High Court of Justice of England and Wales and its closest equivalents in other UK jurisdictions. Our submission covers the consultation questions contained in the document.

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.

3. No – the Bar takes the view that the power to depart from retained EU case law should not be extended to other courts and tribunals beyond the UK Supreme Court and High Court of Justiciary. We do not agree with the paper's assessment that it would be desirable for courts and tribunals, other than the UK Supreme Court and High Court of Justiciary, to be able to depart from retained EU case law in an effort to allow for the more rapid development of retained EU law. The paper provides no evidence to support the suggestion that the failure to extend this power to other courts will result in cases taking longer to consider or the law becoming "*fossilised*" following the UK's departure from the EU.

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.

Retained EU Case Law

Consultation Response

4. The Bar does not believe that option a, b or c should be pursued given that allowing such a wide range of courts and tribunals the power to depart from retained EU case law will mean a greater the risk that there will be a divergence in approach between the jurisdictions in the UK arising out of more re-litigation in the lower courts and tribunals. This could result in various judgments being issued by courts and tribunals across different jurisdictions of the UK which could be conflicting in terms of their approach to the interpretation of whether, or indeed how, to depart from retained EU case law. The Bar takes the view that these three options only risk undermining certainty in the law and could potentially cause delays as any divergence is likely to result in an appeal ultimately to the UK Supreme Court or High Court of Justiciary.

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.

5. The Bar acknowledges that the UK Government is attempting to balance the need for legal certainty with the desire to allow the law to evolve and reflect the needs of the UK following the departure from the EU. The Bar considers that options a, b and c will all jeopardise the aim of legal certainty with the associated risk that the UK will cease to be the forum of choice for litigants. Therefore we do not believe that the UK should pursue any of these options and that the power to depart from retained EU case law should reside only with the Supreme Court and High Court of Justiciary.
6. In considering the specific context of Northern Ireland, we would further point to the Protocol on Ireland/Northern Ireland between the UK and EU published in October 2019 and Article 12(4) which confirms that the “Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect”. In addition, the Protocol makes clear that there are only two means to terminate the CJEU’s jurisdiction. Firstly, the NI Assembly refusing to consent to the ongoing operation of the Protocol through a simple majority in accordance with Article 18 or secondly through a future relations agreement coming into force which supersedes the Protocol. This could explicitly seek to supersede the jurisdiction of the CJEU as mandated through Article 13(8).
7. Consequently, we would query the rationale for affording any of the lower courts power to depart from retained EU caselaw, particularly when the CJEU retains its Treaty jurisdiction in respect of the application of EU law in Northern Ireland.

Retained EU Case Law

Consultation Response

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.

8. As detailed above, the Bar does not believe that the power to depart from retained EU case law should be extended to the Court of Appeal and the equivalent level courts listed in question 4.

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.

9. As detailed above, the Bar does not believe that the power to depart from retained EU case law should be extended to the High Court and the equivalent level courts listed in question 5.

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.

10. There are no other courts or tribunals beyond this which the power to depart from retained EU case law should be extended.

Retained EU Case Law

Consultation Response

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.

11. No – the Bar considers that this would only create further unnecessary confusion across a range of courts with the potential for an adverse impact on the administration of justice.

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.

12. The Bar does not agree that the power to depart from retained EU case law should be extended. However, if it is to be extended then we consider that the operation of precedent judgments must be maintained in order to minimise the risk of any legal uncertainty. Given the precedent setting power of the UK Supreme Court, the Court of Appeal should be bound by the decisions of the UKSC under the first policy option where it has considered the question of whether to depart from retained EU case law. Meanwhile it would also be necessary for the High Court, and its equivalents across the UK, to 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 as part of the second policy option.

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.

13. The Bar does not agree that the power to depart from retained EU case law should be extended. We are also concerned by the suggestion that the UK Supreme Court's test should be used by a range of courts in deciding whether to depart

Retained EU Case Law

Consultation Response

from retained EU case law. This test is set out in the House of Lords Practice Statement of 26 July 1966, namely “whether it appears right to do so”. The power is discretionary, sparingly used and turns on the facts of an individual case with a range of relevant considerations sitting beneath the test which have developed in a significant body of case law. However, the tests used across the UK jurisdictions at Court of Appeal, High Court and equivalent levels in terms of deciding to depart from their own case law differ again depending on the jurisdiction and court, as highlighted from page 21 of the consultation paper onwards. Consequently, there is the risk that this will add further confusion and uncertainty across the different jurisdictions.

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.

14. No comments.

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.

15. The Bar notes that the consultation paper states that an impact assessment has not taken place. We appreciate that it is difficult to predict the outcomes to some degree as it is dependent on the nature of cases brought and how the courts will rule on these issues in the future. However, given the risk that these proposed policy changes will cause legal uncertainty in some cases, it is disappointing that the paper makes no attempt to outline the predicted potential impact which makes it difficult to accurately attempt to answer the component parts of question 11. The suggestion that it is sufficient at this stage to simply use

Retained EU Case Law

Consultation Response

“responses from consultees... in gathering information about any impact on business, the administration of justice, the rest of the public sector and wider society” before the MOJ takes a more detailed view at a later stage appears to situate the responsibility for identifying and assessing the impact with respondents.

16. In broad terms across the UK, we consider that both policy options identified by the MOJ will likely drive re-litigation and impact upon the volume and the complexity of cases being considered by the courts. It also seems very possible that any decisions made by the High Court or Court of Appeal in departing from retained EU case law would be appealed to the Supreme Court, potentially by way of a leapfrog appeal from the High Court if on an important point of law, and therefore we do not agree that pursuing option 2 will mitigate any increase in the number of leapfrog appeals. In addition, we must also conclude that these policy proposals will have little practical relevance in Northern Ireland and many only serve to cause confusion given the Protocol on Ireland/Northern Ireland between the UK and EU and the continuing importance of the Court of Justice of the European Union in this jurisdiction.