



Law Society
of Scotland

The Law Society Scotland

Consultation by the Ministry of Justice on the
Departure from Retained EU case law by UK Courts
and Tribunals

July 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law sub-committee, Criminal Law and Civil Justice Committees welcome the opportunity to consider and respond to the Ministry of Justice consultation on the *Departure from Retained EU case law by UK Court and Tribunals*. The sub-committee has the following comments to put forward for consideration.

General Comments

Introduction

We considered the European Union (Withdrawal Agreement) Bill in late 2019/early 2020 during its Parliamentary passage. We raised concerns at that time about ensuring certainty and predictability in the status of retained EU case law.

Departures from existing EU case law were envisaged to be limited in the Department for Exiting the European Union White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*, which stated, "we propose that the Bill will provide that historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court. It is very rare for the Supreme Court to depart from one of its own decisions or that of its predecessor, the House of Lords... We would expect the Supreme Court to take a similar, sparing approach to departing from CJEU case law."

Our view expressed in relation to the Bill was that a wider range of courts or tribunals being able to depart from precedent may see a proliferation of decisions around the status of retained EU case law (and, potentially an increase in upward appeals where a higher court could reaffirm the original interpretation and reasoning of CJEU case law).

We also stated that such a provision could result in divergence of approach within and between the jurisdictions of the UK on matters of law where a common approach is essential, both for legal certainty and the proper operation of that law. Decision on the interpretation of retained EU law should be taken at the highest level, as originally envisaged by the European Union (Withdrawal) Act 2018 (EUWA).

We note that the Government are consulting on two policy options which will meet 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. Accordingly, we have the following responses to make to the questions posed in the consultation.

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.

We do not agree 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. We reaffirm the point of view we expressed during the passage of the European Union (Withdrawal Agreement) Act 2020 that a wider range of courts or tribunals being able to depart from precedent may see a proliferation of decisions around the status of retained EU case law (and, potentially an increase in upward appeals where a higher court could reaffirm the original interpretation and reasoning of CJEU case law).

We also reaffirm our view that such a provision could result in divergence of approach within and between the jurisdictions of the UK on matters of law where a common approach is essential, both for legal certainty and the proper operation of that law. We also confirm our view that a decision on the interpretation of retained EU law should be taken at the highest level, as originally envisaged by the EUWA.

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**

It is assumed that the courts and tribunals referred to in a and b of this question are those identified in Q4 and Q5 below.

The greater the number of courts or tribunals which are allowed to depart from retained EU law, the greater the risk of uncertainty in the law, of divergent approaches between different courts and jurisdictions and of a greater number of appeals which would slow up the administration of justice.

It is not thought that there would be much greater risk of uncertainty if the power to depart from retained EU case law was extended to the courts in Scotland covered by a. of this question (or Option 1 in Consultation Paper), namely to

- the Inner House of the Court of Session and

- the High Court of Justiciary when sitting as a Court of Appeal in relation to a compatibility issue or a devolution issue (that is, in all cases and not just in those cases where there was no right of appeal to the Supreme Court).

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.

For the reasons mentioned above, it is thought that Option 1 in the Consultation Paper would achieve the best balance between providing flexibility and minimising legal uncertainty.

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.

So far as Scotland is concerned, it is considered that courts referred to in iv and v of the Question specify the intended courts.

Instead of iv, it might have been possible to refer simply to a court consisting of two or more judges of the High Court of Justiciary but the existing wording corresponds better to the wording contained in section 6(5B)(a) EUWA.

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.

So far as Scotland is concerned, it is considered that the courts referred to in ii,iii and iv specify the intended courts.

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.

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.

We do not agree that 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. Such a proposal would restructure the doctrine of precedent irrespective of which Option was pursued. This would result in confusion and a lack of clarity in the law and limit the ability of solicitors to be able to clearly advise their clients about the law.

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.

In relation to the Scottish courts, the usual operation of precedent should apply.

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.

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 tests currently applied by those and other courts in deciding whether to depart from their own case law are described in pages 21-23 of the Consultation Paper. They are all differently expressed.

The circumstances in which the Inner House will decide whether to depart from its case law are quite limited. The Consultation Paper says

“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.”

The Scottish Courts and Tribunals website states that:

The Inner House is divided into two permanent divisions. The First Division is chaired by the [Lord President](#), while the Second Division is chaired by the [Lord Justice Clerk](#). These two judges have a wide range of responsibilities and, when neither is available to sit in court, an Extra Division is set up and chaired by the next most senior judge. The decisions made by all three of these divisions have the same authority. Cases in the Inner House normally have three judges sitting on the bench (apart from administrative and procedural hearings which can be heard by a single judge). Each judge has an equal vote in a decision with no casting vote by the Chair. If a case is particularly important, or raises a significant legal point, a bench of five judges or more can sit.

However, this paragraph does not describe the test which the Inner House will apply to depart from its previous case law. In the case of Morgan Guaranty Trust Company of New York Pursuers (Reclaimers) against Lothian Regional Council Defenders (Respondents) 1995 S.C.L.R. 225 the court used the test that the earlier case was ‘wrongly decided’.

The Consultation Paper recommends that, to promote consistency of approach and to avoid divergences, the test used by the Supreme Court should be one used by all the courts in Option 1. According to the Consultation Paper –

“ 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 1966,13 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...”

There are clearly advantages in setting out one test. In principle the test applied by the Supreme Court may seem innocuous enough but to apply that test might carry with it all the case law where it has been applied which may not be appropriate in the case of:

- the Inner House of the Court of Session and

- the High Court of Justiciary when sitting as a Court of Appeal in relation to a compatibility issue or a devolution issue (that is, in all cases and not just in those cases where there was no right of appeal to the Supreme Court)

Because it may involve interfering with the existing jurisprudence of those Scottish courts as to when they depart from their 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 for departing from its own case law in accordance with section 6(5) of the 2018 Act.)

We therefore suggest

- that the test in those cases mentioned in the previous paragraph should be the test as is applied by the Inner House.
- that the test to be applied by the High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue or devolution issue should be the same as that applied by the High Court in section 6(5) EUWA, that is the same test as it would apply in deciding whether to depart from its own case law

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.

No for the reasons mentioned in paragraph 23 of the Consultation Paper.

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?**

There is a possibility that if lower courts have the power to depart there will be an increase in litigation by litigants who seek to overturn previous decisions. There may also be an increase in appeals as litigants seek further clarity.

- 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?**

Clearly the changes could impact on any aspect of retained EU case law. However, statistics from the 2019 Report of the Court of Justice of the EU indicate that most cases (adjusted for Retained EU law) arise in areas such as competition and state aid, intellectual and industrial property, environment and consumer protection. There might also be an increase in Employment law cases.

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.

The types of cases referred to above suggest that businesses and SMEs might be more affected than individuals. However, this is a matter of speculation. Embarking on litigation is a matter where many factors come together, and it is a matter for those who require to enforce obligations or vindicate rights as to whether they will do so. There might also be greater need for legal aid which will highlight the access to justice issues such a change might precipitate.

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 do not have sufficient empirical evidence to respond to this question.

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

If it had been within the vires of section 6(5A), it would have been suggested that consideration should have been given to enabling other courts and tribunals to make a reference of the question whether there should be a departure from retained EU Law to the Inner House of the Court of Session or to the High Court of Justiciary when sitting as a Court of Appeal. This would be similar to the provisions in Schedule 6 to the Scotland Act 1998. However, we doubt whether the powers in section 6(5A) EUWA would permit this.



For further information, please contact:

Michael P Clancy

Director Law Reform

Law Society of Scotland

DD: 0131 476 8163

michaelclancy@lawscot.org.uk