



Response from the Faculty of Advocates
to the
Consultation on the departure from retained EU case law
by UK courts and tribunals

The Faculty of Advocates, as the independent referral bar in Scotland, is pleased to offer the following comments in response to the Ministry of Justice consultation on the departure from retained EU case law by UK courts and tribunals.

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.

Yes. The Faculty favours the extension of the power to depart from retained EU case law to the Court of Appeal of England and Wales and equivalent courts in the other UK jurisdictions, as identified in ‘Option 1’ (consultation, p 17). In broad terms, this would be consistent with the common law method, which generally reserves power to depart from established authority to the superior courts. Whilst we do not accept the suggestion that the law may become ‘fossilised’ (p 7) if the power were not so extended (there being no obvious incentive for widespread re-litigation, as to which see our answer to Q3 below), we do not support the extension of the power to any lower courts. In particular, therefore, we would not support the extension of the power to the Outer House of the Court of Session, the Sheriff Appeal Court or the High Court of Justiciary sitting at first instance, in Scotland. We consider that any such extension would create a significant risk of uncertainty as to the extent of divergence from retained EU case law across the UK, without apparent legal justification (as to which, see our answers to Qs 2 and 3 below).

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 explained in our answer to Q1 above, the Faculty does not support the extension of the power to other courts and tribunals beyond those specified in option (a). The reasons are explained in our previous answer: in short, any such extension is likely to lead to an undesirable level of uncertainty in the law. The risk of uncertainty, and therefore the negative impact of any extension of the power, merely increases with the range of courts and tribunals identified in options (b) and (c) identified above. Moreover, the Faculty has not identified any potential countervailing benefits to the proper development of the law or functioning of the legal system, which might mitigate such risks of uncertainty.

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.

The Faculty notes that ‘encouraging timely departure from retained EU case law, where appropriate’ is expressly identified as a policy aim of the UK Government (p 17). To that extent, the appropriate ‘balance’ to be struck between that policy aim and the wider interests of legal certainty must be identified by the Government itself. This is made abundantly clear by the statement that the Government 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’ (p 8, emphasis added). The extent to which it may be in the interests of the UK to remain bound by retained EU case law (or, indeed, whether divergence from retained EU case law is ‘*appropriate to the UK’s situation* following its departure from the EU’: p 9, emphasis added) is quintessentially a political question, upon which UK courts and tribunals are unable to adjudicate. Nor would it be appropriate for them to attempt to do so. The courts are familiar with determining when it may be appropriate, in a

general sense, to develop the law by modifying or departing from a previous line of authority, but that is usually on the basis of some wider development in the law or generally accepted social conditions. Any suggestion that ‘the interests of the UK’ may be an appropriate threshold test for the courts to depart from case law (of any kind) is wholly misconceived.

For similar reasons, the Faculty does not consider that it would be appropriate to offer its views on the essentially political question of what the ‘best balance’ might be between ‘enabling timely departure from retained EU case law’ (whatever that may mean exactly) and maintaining legal certainty across the UK. The Faculty seeks, as a matter of general principle, to maintain legal certainty in terms of the approach favoured in its answer to Q1 above.

We would observe, however, that to suggest that potential litigants may have the ability to change retained EU case law that adversely affects them (p 8) is misleading. It is difficult to see what justification there could be for a court or tribunal – as a matter of legal principle rather than political policy – to depart from retained EU case law, solely on the basis that the dispute fell to be determined after the UK’s departure from the EU and the end of the Transition Period. There is no imperative that the whole body of retained EU case law must be revisited after 31 December 2020, save to the extent that there may be political will to enact supervening domestic legislation. Even to that extent, such legislation would not ordinarily be expected to have retrospective effect or to disturb the outcome of settled cases. The implicit assumption of a general entitlement to re-litigate (contrary to the general principles of legal certainty and finality of judgments) is, therefore, misplaced.

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.

The Faculty generally agrees that the specified list represents the full range of courts broadly within the scope of the Court of Appeal of England and Wales and its equivalents throughout the UK. It is sufficient to observe in this regard that they represent the ‘more senior courts’ (consultation, p 17) whose judgments are therefore considered to be of particular legal significance, whether as strict (binding) precedent or merely persuasive (non-binding) authority between the different jurisdictions of the UK.

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.

On the view which we are taking, Q5 does not arise. But, if the power to depart were to be extended to the courts listed in paragraphs (i) and (v), we would agree that it should also be extended to the courts listed in (ii), (iii) and (iv).

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. Please see our answer to Qs 1 and 2.

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. The Faculty considers that the power of the courts to depart from retained domestic case law ought to be defined according to the same test as would apply in deciding whether to depart from its own case law in respect of any other matter. There would appear to be no legal justification (if, indeed, there ever could be in terms consistent with the separation of powers) for the Executive to seek to interfere with the operation of one of the cardinal features of the common law – namely the operation of the doctrine of *stare decisis* or the system of binding precedent that operates amongst the courts. The Faculty considers that section 6(5A) of the 2018 Act is properly confined to the circumstances in which the courts may be entitled to depart from retained EU case law, as a consequence of the UK’s withdrawal from the EU. Any such regulations do not carry the same risk of interference with the operation of the domestic courts, retained EU case law emanating instead from the Court of Justice of the EU.

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, if by ‘the normal operation of precedent’ it is meant that there will be no difference in the operation of precedent amongst the courts operating across the UK irrespective of whether the judgment in question concerns whether to depart from retained EU case law or otherwise. Thus, for example, the Inner House of the Court of Session would be no more bound by a judgment of the Court of Appeal of England and Wales in any question of whether to depart from retained EU case law than it would be by any other judgment of that court. We do not consider there to be any legal justification for the Executive to seek to fetter the powers of the courts *inter se* (which would amount to interference with the common law doctrine of *stare decisis*, as to which, see our answer to Q7 above) beyond merely providing for the extent to which the courts may be entitled to depart from retained EU case law.

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.

In response to part (a), the Faculty considers that it would be preferable for the courts to continue to apply the same test as would apply in deciding whether to depart from its own case law. That is to say, the Inner House of the Court of Session would continue to apply the same test as it would apply in deciding whether to depart from its own case law in respect of any other matter. The test proposed already appears, of course, in s. 6(5) of the 2018 Act in respect of the UK Supreme Court and High Court of Justiciary. To impose the test used by the UK Supreme Court upon any other courts by way of regulations made in terms of s. 6(5A) would be inconsistent with this provision, as well as unduly interfering with the operation of the common law doctrine of *stare decisis* (as to which, see our answers to Qs 7 and 8 above).

In response to part (b), we agree that the test is capable of being easily understood. Nonetheless, its application across other courts would be unusual and unnecessary in a system of precedent that is already well able to ensure cross-jurisdictional consistency where appropriate in matters of law with UK- or GB-wide effect. There is no reason to suspect that the courts would not be capable of adopting the same approach to ensuring cross-jurisdictional consistency in respect of departure from retained EU case law without the need to innovate on existing common law doctrine.

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. The Faculty considers that it would be highly undesirable for there to be any further tests or factors prescribed. As the consultation notes, there is a risk of inflexibility and a potentially greater risk of uncertainty. That is not to say that the courts would not benefit from greater clarity on the extent to which retained EU case law *must* be departed from – rather than the manner by which the courts ought to arrive at such decisions for themselves. Leaving aside the general principles set down in s. 6(1) – (3) of the 2018 Act, which make appropriate

provision in the latter regard, it may be expected to be of some assistance to the courts to the extent that retained EU case law may come to be superseded by specific domestic legislation in due course. That, however, would properly be a matter for Parliament, and ought not to be conflated with the proper extent to which the Executive ought to control the development of the common law in the intervening period.

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.***

The Faculty has no comments to make in response to this question, save to emphasise our observations in answer to Q3 to the effect that we do not consider any general entitlement to re-litigate to arise.

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

No.

12 August 2020