

Response to consultation paper on retained EU case law

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This response to Ministry of Justice, *Retain EU Case Law: Consultation on the Departure from Retained EU Case Law by UK Courts and Tribunals* (July 2020) has been prepared by members of the Centre for Public Law and the Centre for European Legal Studies in the Faculty of Law, University of Cambridge, after discussion at a webinar on 16th July 2020 organized by the Centres. We have benefited from the contributions of participants in the webinar, but this response represents the personal views of the authors.

In section A, we make some general observations about the constitutional and legal framework into which any change of the sort envisaged by the Consultation Paper would have to fit. In section B, we answer specific questions raised in the Consultation Paper. In section C, we summarise the matters which, in our view, need to be taken into account before a change of the kind envisaged in the Consultation Paper could be introduced successfully.

SECTION A GENERAL CONSTITUTIONAL AND LEGAL FRAMEWORK

We consider that giving the judiciary a power to change “the law” as it has previously been authoritatively established is problematic, for four reasons.

First, it would expressly confer on courts a legislative function. In common-law systems, courts inevitably create new law, usually through a gradual process of interpretation and re-interpretation of earlier judicial decisions and by extending previously settled rules and principles by analogy to new situations. Sometimes, to enhance the coherence of the law, earlier judgments (even of the highest courts) can be reconsidered by those courts and departed from on limited grounds. That power is exercisable mainly by the highest courts, and is very cautiously used. It is not usually politically controversial, although there has been criticism, by legal scholars, politicians and judges themselves, of some judgments that are said to be insufficiently grounded in previously authoritative precedents and principles.

The Consultation Paper envisages conferring a qualitatively different law-creating power on judges, and extending it well beyond the highest courts. The proposal is to allow the Court of Appeal and the High Court in England and Wales and Northern

Ireland, the Inner House and Outer House of the Court of Session in Scotland, and potentially a wider range of courts and tribunals, to change ‘the law’ as it has up to now been authoritatively established. If the criterion for allowing departure by the Supreme Court from its own, or the House of Lords’, earlier decisions is extended to other courts in respect of retained EU case-law – i.e. that the court considers it ‘right’ to do so – the move would make the courts’ legislative function very broad, going beyond reinterpretation of earlier case-law. Inviting courts to exercise such a function would be a constitutionally innovative step, placing on judges a new responsibility going beyond anything that judges, Parliament or Government have previously contemplated as part of the judicial role. If one views such an invitation from the perspective of the division of powers between Westminster and the devolved legislatures of Scotland, Wales and Northern Ireland, it can be seen to give rise to a further constitutional anomaly: the devolved legislatures are not given power to amend retained EU law or (which is another side of the same coin) to authorise departure from retained EU case-law, so it would seem odd to confer such a legislative power on judges who lack democratic accountability.

For reasons explained below, in practice it seems to us that judges would be unlikely to exercise the power save where retained EU case-law seems to be inconsistent with legal principle, so the judges’ legislative power would not operate in as revolutionary a constitutional manner as the Consultation Paper appears to contemplate. Nevertheless, we emphasise that the proposed power would be inconsistent with the separation of powers, in that it invites judges to exercise a nakedly legislative function, unless the criteria for exercising it are tightly confined by reference to legal principles rather than social or economic policy. If the power remains confined to the highest courts, it is likely to be used consistently and sparingly. If extended more broadly without strict criteria, it is more likely to be used inconsistently and inappropriately.

Secondly, giving the judiciary power to change ‘the law’ without such restrictive criteria would often require judges to decide issues of social and economic policy in respect of which they have limited information available, very limited resources for obtaining relevant information, and in most cases limited expertise. They would have to rely on the parties, presenting their own cases in their own interests, to provide evidence for judges to use in assessing the public interest. This would be a hit-and-miss way of legislating. Lawyers might even feel obliged to ask courts to embark on law-revision on economic and social grounds for fear that they might be liable to their clients in negligence if they fail to do so.

Thirdly, there is no system for ensuring that those matters which require legislation in the public interest become a subject of litigation, or for prioritising cases. What issues get litigated is largely a matter of chance, depending on who has funding and who is prepared to risk their money in pursuing what would, in challenging retained EU case-law, inevitably be very chancy litigation. Litigation is not a good way of achieving systematic law reform.¹ The risk of unintended or unwanted consequences is considerable, and increases as the variety of courts with power to legislate is extended.

Fourthly, before deciding whether to depart from retained EU case-law, it would be necessary to determine what retained EU law currently requires in the light of the

¹ See, e.g., Sir Richard Buxton, ‘How the common law gets made: *Hedley Byrne* and other cautionary tales’ (2009) 125 *L.Q.R.* 60-78.

retained EU case-law. This is not always straightforward. Case-law is a complex form of ‘law’. The system of precedent within the hierarchy of courts has been developed to allow a reasonable degree of consistency in judicial decision-making while keeping open opportunities for higher courts to correct flaws in lower courts’ case-law and in certain situations to revisit their own case-law. First-instance decisions, usually made by single judges, do not usually ‘bind’ other judges, but judges sitting at the same level in the structure of courts habitually follow each other’s decisions unless they seem clearly wrong, both for the sake of consistency and predictability and on account of mutual respect.

The contribution made by judicial decisions to ‘the law’ is made up of several strands. Outcomes of individual cases are authoritative as between parties to the cases, but the wider “binding” effect of a judicial decision relates to the considerations taken into account in the reasoning advanced by the judges in arguing towards and justifying the outcomes. These typically take the form of reflections on the applicability, scope and mode of implementation of statutory provisions, general principles of law, and judges’ reasoning in earlier case-law. ‘The law’ for the time being is to be found in the most authoritative judicial reflections on those matters as applicable to the subject in question.

Principles of precedent are guides to the level of authority of earlier judicial reflections emanating from a particular court or tribunal relative to the authority of the court or tribunal deciding the present case. We say, for example, that the reasoning, or what appears to be the majority’s reasoning, in a Supreme Court decision “binds” all lower courts and tribunals. That does not, however, tell us what the relevant “binding” principle or rule is. There may be considerable disagreement as to what principle or rule the earlier judgment authoritatively laid down. For example, in *Sevilleja v. Marex Financial Ltd*² the Supreme Court considered the scope of a rule denying recovery by a shareholder in a company of “reflective loss”, stemming from a judgment of the House of Lords in *Johnson v. Gore Wood & Co.*³ The majority of the Supreme Court in *Sevilleja* interpreted the rule as expounded by the majority in *Johnson* as being a rule of the law of damages, which they regarded as wrong, so they departed from it. Three dissenting Justices in *Sevilleja*, by contrast, interpreted *Johnson* as having laid down a rule of company law, and being acceptable. The outcome was the same, but the Justices disagreed as to whether it was necessary to depart from a previous House of Lords decision in order to reach it.

This shows that, before one can decide whether to consider departing from a judgment of the CJEU, it is necessary to interpret that judgment to see what is ‘the law’ that can be derived authoritatively from it. The form in which judgments of the CJEU are sometimes delivered may make it difficult to interpret them, and leave considerable scope for creativity without a need to consider departing from them, for two main reasons. First, they are in the form of a single judgment that may represent a compromise between differing views of the various judges. Secondly, the form of the judgment, being closer to the civil-law tradition than to the common-law tradition, may make it difficult for common lawyers to identify authoritative statements of rule or principle going beyond the facts of the particular case. For example, in the HS2 case, *R. (Buckinghamshire*

² [2020] UKSC 31.

³ [2002] 2 A.C. 1, HL.

County Council) v. Secretary of State for Transport,⁴ the Supreme Court found it difficult to interpret some of the Court of Justice's judgments construing provisions of Parliament and Council Directive 2001/42/EC and Parliament and Council Directive 2011/92/EU concerning how strategic environmental assessments and environmental impact assessments were to be made when the body authorising a major infrastructure project was a national legislature. They found ways to reach what they thought was clearly the intention of the European legislation, but also thought that one of the European judgments would have been clearly wrong had the Supreme Court not been able to interpret it in the way they did.⁵ After Implementation Period completion day, the Supreme Court would still have to go through the difficult process of interpreting the European case-law before deciding whether it was desirable to depart from it.

The Consultation Paper recognizes the risk of increased legal uncertainty if more courts are permitted to depart from retained EU case-law. This is correct. The risk is greatest, for England and Wales, if the power is extended to judges of the High Court, as (unlike the Court of Appeal) the High Court is not bound by its own decisions. Uncertainty would be somewhat reduced by a system for fast-tracking an appeal to the Supreme Court at public expense (as it would not be reasonable to expect parties to expend their own money on an appeal which might not do them any good).

For these reasons of general legal policy and constitutional propriety, we consider that any extension of the Supreme Court's current power to depart from retained EU case-law should be confined closely. More detailed reasons are given below, in relation to the specific consultation questions.

SECTION B THE SPECIFIC CONSULTATION QUESTIONS

Q. 1 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 consider that, for the reasons outlined in Section A, there are strong arguments for confining the power to depart from retained EU case-law to the Supreme Court and High Court of Justiciary. If, however, contrary to our view, it were to be extended to other courts, we think that it should be confined to the Court of Appeal (of both England and Wales and Northern Ireland), the Court Martial Appeal Court, and the Inner House of the Court of Session. This would reduce uncertainty, as the Court of Appeal is normally bound by its own previous decisions, which also bind the High Court; while the Inner House of the Court of Session normally follows its own previous decisions unless a larger panel of judges sits in the later case.

We do not consider that the power should be conferred on judges of the High Court in England, Wales or Northern Ireland or the Outer House of the Court of Session in Scotland. Decisions made by judges of those Courts do not bind other judges sitting of similar status, although a spirit of collegiality and concern for consistency usually leads High Court judges to follow the decisions of other High Court judges unless they consider

⁴ [2014] UKSC 3, [2014] 1 W.L.R. 324, SC.

⁵ See particularly paragraph [159] *et seq.* (Lord Neuberger and Lord Mance, with whom all five other members of the Court agreed).

them to be clearly erroneous. In addition, first-instance judges (unlike appellate judges) usually sit alone, and, while they are highly responsible, do not have the moderating influence of having to cooperate with other judges in decision-making.

Non-binding decisions to depart from retained EU case-law would inevitably lead to uncertainty. If they were to be permitted, we think that it would be important to have a method for ensuring that the matter would be decided authoritatively as soon as possible by the Supreme Court or High Court of Justiciary. Two procedures at least would be possible: (a) a procedure for a lower court, when invited to depart from retained EU case-law, to refer the matter to the Supreme Court for an opinion which it would then have to apply when deciding the substance of the action; (b) expedited appeals to the Supreme Court against decisions of lower courts. In either case, the risk of being subjected to an order for costs in front of the Supreme Court would be likely to be a significant disincentive to litigants to pursue the matter. If the system were to work effectively, there would need to be a public fund to support litigants taking part in references or appeals to the Supreme Court in order that public-interest questions relating to retained EU case-law could be properly litigated.

The capacity of the Supreme Court to determine cases is limited by their resources. If there were to be more than a very few cases of this kind each year, it might be necessary, in order to avoid excessive delays to other litigants, to increase the membership of the Court, or to establish a special body to determine preliminary references from lower courts. It has recently been suggested that the Judicial Committee of the Privy Council might be an appropriate body, but we note that the judges of the Judicial Committee are largely the same as those who sit in the Supreme Court, so it might not greatly ease the pressure on case-load.⁶

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

The Court of Appeal and equivalent level courts

The High Court and equivalent level courts and tribunals

All courts and tribunals

Our comments in section A and in response to Q. 1, above, cover this question. In short, we expect that (a) legal uncertainty would increase, with the risk being greatest where decisions are made by courts whose decisions are not binding on other courts, (b) there would be an increased burden on the Supreme Court, and (c) it would be necessary to introduce new procedures and increased public funding for litigants and funding and human resources for the Supreme Court to allow the Supreme Court to deal with an increased case-load speedily without inflicting long delays on other litigants.

In addition, it is likely that the power to depart from retained EU case-law would increase the length and complexity, and therefore the cost, of litigation in courts and tribunals, as it would be incumbent on litigants' legal representatives to advance an

⁶ Kate Ollerenshaw, 'Retained EU Case Law: a fourth option', U.K. Const. L. Blog (27th July 2020) (available at <https://ukconstitutionallaw.org/>).

argument for departing from retained EU case-law whenever it seems to be in the client's interest to do so, unless the client otherwise instructs.

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.

In view of the unpredictability of litigation, in relation both to who brings cases before the courts and to whether or when particular issues arise for decision, the best balance would be maintained by using legislation, either primary or subordinate, to make changes that are thought to be in the public interest rather than leaving it to the roulette of litigation. We have developed this argument in Section A, above, but make a few additional comments here.

If one desires timely and consistent decisions about when the law in the UK should depart from that laid down by the CJEU, litigation can only be at best a marginal, back-up method of legal change. Litigation depends on there being parties on each side able and willing to pursue it, and (unless the Government were to fund a test-case strategy, which would give rise to its own difficulties of cost and management) there can be no guarantee that useful cases would be brought or that socially useful departures from retained EU case-law would be made even if the litigation were started and successfully pursued to a conclusion.

If litigation is to be used as a method of law reform it must be recognised that it is suboptimal as compared to legislation, not least because of the resulting uncertainty. Uncertainty would stem from (a) the range of courts and individual judges making decisions about whether to follow retained EU case-law within each of the UK's jurisdictions, (b) the fact that judgments delivered in each jurisdiction do not bind courts in the other jurisdictions, and (c) the fact that it is not always simple to interpret and apply judgments in later cases. (The Supreme Court's judgments are probably in practice, if not in theory, an exception to (b)). Uncertainty flowing from (a) and (b), but not (c), could be minimised by allow the Court of Appeal and Inner House of the Court of Session not to be bound by decisions of the CJEU, but not the High Court or Outer House of the Court of Session.

If litigation is to be used, however, the best balance would, in our view, be struck by continuing to confine the power to depart from retained EU case-law to the highest courts (Supreme Court of the UK, and High Court of Justiciary for criminal matters in Scotland).

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?

Court of Appeal of England and Wales;

Court Martial Appeal Court;

Court of Appeal of Northern Ireland;

The High Court of Justiciary when sitting as a court of appeal in relation to a compatibility issue or a devolution issue; and

The Inner House of the Court of Session in Scotland.

Please give reasons for your answer.

This seems to be correct.

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?

The High Court of England and Wales

Outer House of the Court of Session in Scotland;

The Sheriff Appeal Court of Scotland in Scotland;

The High Court of Justiciary sitting at first instance; and

The High Court in Northern Ireland.

Please give reasons for your answer.

There is a question as to whether the Upper Tribunal should be regarded as a equivalent of the High Court etc., considering that appeals from the Upper Tribunal lie only to the Court of Appeal. Applications for judicial review of non-appealable decisions of the Upper Tribunal may be made to the High Court or the Outer House of the Court of Session, but the application will be allowed only in very limited circumstances: see *R. (Cart) v. Upper Tribunal (Public Law Project intervening)*⁷ and *Eba v. Advocate General for Scotland (Public Law Project intervening)*.⁸

The same might apply to other tribunals presided over by a High Court judge from which appeals lie to the Court of Appeal.

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.

We make two points here. *First*, there is already provision for departure from retained EU case-law by any court or tribunal, or the Competition and Markets Authority and anyone acting on its behalf, in relation to certain aspects of competition law: Competition Act 1998, section 60A(7), as inserted by the Competition (Amendments etc.) (EU Exit) Regulations 2019, reg. 23. There is a danger that the power to depart might become an irregular patchwork, with some tribunals having the power in all cases and others having the power in relation to only some matters. The more complicated and less principled the

⁷ [2011] UKSC 28, [2012] 1 A.C. 663, S.C.

⁸ [2011] UKSC 29, [2012] 1 A.C. 710, S.C.

distribution of the power becomes, the greater the risk of confusion, uncertainty, and tribunals making decisions that they have no power to make.

Secondly, as noted in our response to Q. 5 above, there are tribunals which, for most purposes, have similar functions and equivalent status to those of the High Court. The Upper Tribunal is just one example. If the power to depart were to be extended down as far as the High Court, it would be difficult to make a principled argument for not allowing those tribunals, too, to exercise it. This would, however, greatly expand the opportunity for uncertainty and for conflicting decisions being made in different jurisdictions and tribunals or courts, so it would be necessary to ensure that there were procedures for getting such cases speedily to the Supreme Court by way of reference or appeal, and for resourcing those references or appeals so that the best decisions may be made in the public interest.

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 consider that, to avoid confusion in the law, normal principles of precedent should continue to apply to judgments of courts in the UK relating to retained EU law. It would be unnecessarily disruptive to allow lower courts and tribunals to depart from judgments of higher courts and tribunals merely because they think that it is right to do so. This applies to retained EU law as it does to other areas of 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.

To avoid confusion in the law, it would be important for the principles of precedent to continue to operate in relation to retained EU law as it does in relation to other areas of law.

Q9: Do you agree:

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?

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 Supreme Court will only rarely depart from its previous decisions, or decisions of the House of Lords. (Departure from decisions of the House of Lords is more frequent than

departure from decisions of the Supreme Court, although this could simply be because the number of decisions of the House of Lords far exceeds the number of decisions of the Supreme Court so far.) The question, as the Consultation Paper states, is ‘whether it appears right to do so’. This, however, is not a test. It is merely a minimum condition for departing from an earlier decision. No court or tribunal would depart from a previous decision of a higher court if it did not feel that it was right to do so. A test would tell us what criteria would be applied when deciding whether it appears right to depart from earlier case-law, bearing in mind the demands of consistency and certainty which form one element of the rule of law. The House of Lords and the Supreme Court have carefully avoided laying down such a test.

To illustrate the difficulty of understanding and articulating factors that dispose the United Kingdom’s highest courts to depart from their previous decisions, and using those factors to formulate a test, one may take the examples given in the Consultation Paper to support the Consultation Paper’s articulation of circumstances in which the power has been used. *Miliangos v. George Frank (Textiles) Ltd*⁹ was not a case in which a previous decision ‘does not reflect modern public policy’ (Consultation Paper, p. 21). It was a case in which a decision of the House of Lords fifteen years earlier was departed from because procedural obstacles to awarding damages expressed in a foreign currency, identified at the time of the earlier case, had been overcome in the interim, the idea of giving effect to orders for payment of compensation in a foreign currency had come to be accepted in international commercial practice, in the High Court of England and Wales, and in arbitrations, and serious currency fluctuations and devaluation of the pound sterling in the 1960s and early 1970s would have left foreign plaintiffs inadequately compensated if required to accept judgment in pounds sterling assessed as at the date of breach of contract or commission of a tort. The judgment in *Miliangos* applied to cases where the proper law of the contract or tort was the law of the place whose currency was to be used, and the plaintiff was based in that place. The change was based on the need to give fair compensation for losses unlawfully caused, where there was no longer any insuperable procedural obstacle to doing so.

In *Murphy v. Brentwood*,¹⁰ a seven-judge Appellate Committee of the House of Lords departed from a decision made 13 years earlier by a five-judge Committee in *Anns v. Merton LBC*,¹¹ where it had been held that a local authority exercising statutory functions in relation to building control was not liable to compensate an owner or occupier of an apartment in a block of flats for losses sustained on account of physical damage suffered as a result of the block having been built with inadequate foundations. To achieve this, the Committee had moved away from the idea that negligence liability should be extended only gradually and incrementally, and had imposed a very broad basis for liability subject to a number of limiting factors. This itself been an innovative decision, imposing on local authorities a liability in negligence to which they had not previously thought they were subject in the performance of their statutory regulatory functions. But it was not a decision which, as the Consultation Paper suggests, had caused ‘uncertainty’ (p. 21), although many lawyers thought it had been wrongly decided. The problems were, first, that it imposed a very large financial burden on local authorities

⁹ [1976] A.C. 443, HL.

¹⁰ [1991] 1 A.C. 398, HL.

¹¹ [1978] A.C. 728, HL.

in respect of problems which they could not be said to have ‘caused’; secondly, that on more careful analysis the reasoning supporting the decision could be seen to have been simply defective; and, thirdly, that, if there would be social benefit in making local authorities liable, Parliament should decide on both need for and scope of a new duty on local authorities – judges should not legislate.

The highly indeterminate character of the ‘appears to be right’ formulation causes some uncertainty, but is not a major problem when the power to depart from previous decisions is known to be sparingly exercised and is confined to a single court with relatively few judges who always sit in panels of several judges. It seems to us to be a recipe for confusion if applied by a very much larger group of judges, many of whom would normally sit alone. If the power is to be extended, we consider that clearer criteria should be laid down by legislation, at any rate for the High Court, although we are not able to suggest what those criteria should be.

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

We agree that a list (perhaps not an exclusive one) of relevant considerations would be a better way of helping to structure the use of the power to depart than attempting to lay down a test. Possible considerations include the following.

As retained EU case-law is concerned with the interpretation and application of retained EU law, any decision departing from the EU case-law must be an interpretation, or giving effect, of the retained EU law, and be loyal to the language and structure of that law. Courts should not feel that they have been invited to rewrite the retained EU law on which the case-law was based. That would be a legislative function, not a judicial one.

If administrative, legislative and regulatory structures in the UK have been developed to give effect to the retained EU case-law, judges should be slow to depart from the case-law where that would require new administrative, legislative or regulatory structures to be instituted to replace those already in place.

If people have acted on the understanding that they have vested rights, or a settled expectation that the retained EU case-law applies to their affairs, and would suffer disadvantage if a court were to depart from it, courts should generally leave it to the legislature to amend the law rather than themselves deprive people of vested rights or settled expectations. This consideration should apply more strongly in relation to substantive rights and liberties than in relation to procedural matters.

A number of factors are identified by section 60A(7) of the Competition Act 1998, not yet in force but prospectively inserted by regulation 23 of The Competition (Amendment etc.) (EU Exit) Regulations 2019, S.I. 2019 No. 93, for the purpose of competition law. Some of these might, *mutatis mutandis*, be relevant more generally: (a) differences between the provisions of this Part under consideration and the corresponding provisions of EU law as those provisions of EU law had effect immediately before exit day; (b) differences between markets in the United Kingdom and markets in the European Union; (c) developments in forms of economic activity since the time when the principle or

decision was laid down or made; (d) generally accepted principles of competition analysis or the generally accepted application of such principles; (e) a principle laid down, or decision made, by the European Court on or after completion day; and (f) the particular circumstances under consideration.

Whatever considerations are specified, there is a concern that the test may become a means of ‘backward reasoning’, justifying a decision made on other grounds to depart (or not to depart) from retained EU case-law, rather than being a formative part of the decision-making process. But this can happen with any rule, principle or list of relevant factors.

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.

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?

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?

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.

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 knowledge or expertise to predict the effect on the volume of litigation started in the United Kingdom or on the type of litigation started. It could be that most cases in which a party asks the court to depart from retained EU case-law would have been brought anyway, and that an argument for departing from the EU case-law would be an additional string to a litigant’s bow. It seems likely that one part of the justice system likely to generate a particularly significant number of such arguments is that dealing with employment law, which is also an area particularly likely to have an impact on people with protected characteristics under the Equalities Act 2010.

Where departing from retained EU case-law becomes an issue, it will have the potential to lengthen and complicate the litigation, increasing expense and delaying a resolution of the case. This is a particular problem in the field of employment law, where delays in hearing cases before Employment Tribunals are already significant (and those Tribunals, when first set up, were intended to provide quick and straightforward access to justice).

If a system permits conflicting decisions to be made in different jurisdictions of the United Kingdom, or by different judges or tribunals in the same jurisdiction, it will of course greatly increase uncertainty. The very potential for such conflicts will also

increase uncertainty. Whether it is likely to encourage or discourage litigation is unclear; wealthier litigants or those with most to gain may wish to take risks to exploit uncertainty in the hope of strengthening their own position, either in the course of litigation or in negotiations with other parties. But other people may be more risk-averse.

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

See section C, below.

SECTION C ADDITIONAL AND CONCLUDING COMMENTS

We are concerned that any extension to the power to depart from retained EU case-law would give rise to increased legal uncertainty. If such steps were to be taken, measures would need to be taken to allow uncertainty to be minimised and resolved quickly by the Supreme Court or an equivalent body, perhaps the Judicial Committee of the Privy Council, by way of expedited appeals and/or a preliminary reference system.

If judges were to be invited to change retained EU law on the basis of their assessments of social or economic factors, rather than because the case-law is clearly wrong, it would place judges in the position of acting as legislators. Accepting that this is a proper role for the judiciary would be innovative and might have wider implications for the separation of powers.

Litigation is an inherently unsatisfactory system for achieving timely law reform. It is beset by unpredictability, fluke and happenstance. Will anyone have the desire or resources to litigate a particular issue? Will the other party have the resources or desire to contest it? Will a case arise in which a point which one wants to have decided is presented on the facts as found by the court or tribunal? Will the judges who decide the point have the necessary expertise (especially if they are expected to take account of economic or social factors)? Will anyone like the outcome? Legislation would be far more systematic, quicker, more reliable, and more democratic.

The costliness of most litigation is a disincentive to people to raise complex and sometimes hypothetical issues before courts. A system of law reform that significantly depends on litigation to achieve its goals is likely to give excessive influence, if not power, to people with an axe to grind and access to a great deal of money to pursue it. This would limit the range of matters that would come before courts for consideration, and, unless funding and other resources are provided for litigants, likely to diminish the quality of the arguments put to courts. It could also tip the direction of legal change in favour of those with the means and desire to pursue a particular goal, who might bombard the courts with litigation in the hope of finding one judge or tribunal willing to decide the matter in their favour whether or not it is in the public interest.

In view of all this, we consider that the power to depart from retained EU case-law should be closely confined, and ideally limited to the courts currently permitted to exercise it.

Proper resources, financial and human, should be made available to the Supreme Court and to any other court or tribunal to allow it to deal with additional burdens, in terms of

the length and complexity of some litigation and the need for speedy resolution of uncertainty at a high level in the courts system, which are likely to flow from the need to consider exercising the power.

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