



**CONSULTATION RESPONSE BY UKELA (UK ENVIRONMENTAL LAW ASSOCIATION)
TO THE MINISTRY OF JUSTICE CONSULTATION PAPER ON THE DEPARTURE FROM
RETAINED EU CASE LAW BY UK COURTS AND TRIBUNALS**

UKELA (UK Environmental Law Association) comprises approximately 1,400 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment. It has been exploring what EU exit means for environmental law since 2016 and published a series of briefing papers and reports on the topic. Details of the briefings, reports and submissions are provided in the Annex.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared primarily by the Environmental Litigation Working Party but with input from UKELA's Governance and Devolution Group (GDG) which includes representatives from all its working parties. In essence, these submissions do not necessarily and are not intended to represent the views and opinions of all UKELA members but have been drawn together from a range of its members.

UKELA considers that the level of environmental protection, and the ability of citizens to participate in environmental decision-making and to take action in the courts where necessary, must not be diminished by any future changes to domestic legislation. The development of a post-Brexit framework of environmental legislation presents a unique and critically important opportunity for the UK Government and devolved administrations to explore ways of improving and strengthening environmental regulation. We reply below to the consultation document asking for views about expanding the range of courts and tribunals that will have the power to depart from retained EU case law from the Supreme Court to:

- a) the Court of Appeal and equivalent level courts in the devolved administrations;
- b) the High Court and equivalent level courts and tribunals in the devolved administrations; or
- c) all 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.

1. No. UKELA considers that the power to depart from retained EU case law should not be extended to courts or tribunals beyond the Supreme Court. We consider that to do so risks undermining the consistent interpretation of retained EU law which the European Union (Withdrawal) Act 2018 (as amended) (EUWA 2018) aims to ensure: see e.g. s. 6(3), EUWA 2018. Indeed, we understood that the government's rationale for transposing EU law into domestic law with effect from 'exit day' or, as it is now, the Implementation Period (IP) completion day on 31 December 2020 is to ensure continuity and provide certainty to businesses, individuals and public bodies. Hence, s.6(3) of EUWA 2018 is to ensure that domestic judicial treatment of retained EU law is to be determined in accordance with the retained case law and general principles of EU law. Those provisions help ensure the objectives of continuity and legal certainty.
2. Under the current legislative provisions, from IP completion day onwards, retained EU law will fall to be interpreted by the courts in accordance with retained EU case law, save that the Supreme Court shall not be bound by it, and may therefore depart from it, in accordance with its own rules on departing from its previous decisions. Those rules are contained in the House of Lords Practice Statement 1966 and permit the Supreme Court to depart from its own previous decisions '*where it is right to do so.*' In practice, the Supreme Court seldom departs from its own decisions (and nor indeed, did its predecessor, the House of Lords). It is also worth bearing in mind that the Practice Statement preceded the UK's entry into the European Communities and was not devised with the circumstances of EU entry, membership or exit in mind.
3. In interpreting retained EU case law in a post-Brexit environment, the task of the courts will be to judge the extent to which retained EU case law is compatible with the UK's emerging legislative framework which in some areas is likely to (based on the government's legislative intentions) involve 'departure' or "divergence' from existing EU law. Under the present arrangements, the Supreme Court may decide that it is right to depart from retained EU case law in a particular case which will have the effect of changing domestic law given the precedent-setting effect of the Supreme Court's judgments. If in certain circumstances some principles of retained EU case law are to be departed from UKELA considers that the Supreme Court is the

appropriate court to exercise that power and it would not be appropriate to permit a wide range of lower courts and tribunals to undertake that task given the potential for a patchwork of inconsistent decisions across multiple areas of domestic law which has been affected by EU law.

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.**

4. UKELA considers that the most likely impact of extending the power to depart from retained EU case law beyond the Supreme Court will be increased litigation and increased uncertainty in the application and compliance with the law. This will be prompted by the opportunity for potential litigants to see a court shifting an approach to a particular decision, policy or approach without that approach going through appropriate democratic procedures. We are of the view that the courts are likely to take a cautious approach following general constitutional principles that it is for Parliament to change the law, nevertheless that may not prevent attempts to seek judicial departures from a particular approach.
5. The above view applies to scenarios in (a), (b) and (c). We do recognise that litigation may be a less likely option if it were scenario (a) alone but potential litigants may take the view that having a right of appeal to the Court of Appeal may be sufficiently worth the litigation risk. However, even with scenario (a) the current general principle is that the Court of Appeal is generally bound by its own decisions although we recognise that there are exceptions to this.¹
6. The concerns in respect of options of (b) and (c) could also place undue pressure on individual, single judges to have to consider quite complex areas of EU law, where such matters are difficult enough for a panel of judges to collectively consider at e.g. at an appellate level or where Parliament may well carry out an inquiry through select

¹ See e.g. *Young v Bristol Aeroplane Co. Ltd* [1944] KB 718 CA

committees into particular areas. In our view, the courts and tribunal system is not really structured, designed or intended to consider or decide departures from the current law on a regular basis. Most often, courts and tribunals of first instance are making findings of fact or determining specific issues on the basis of existing law.

7. UKELA further notes that the House of Lords Constitution Committee was very concerned about the implications of the power in section 6(5A) of the 2018 Act which was introduced by the 2020 Act, finding that:

“We do not believe it is appropriate for courts other than the Supreme Court and the Scottish High Court of Justiciary to have power to depart from the interpretations of EU case law. Allowing lower courts to reinterpret EU case law risks causing significant legal uncertainty that would be damaging to individuals and companies. It would also increase court workloads as judgments involving departures are contested on appeal.”²

8. On the other hand, UKELA also recognises the potential deficiencies of a system in which only the Supreme Court may depart from retained EU case law. By limiting the power to depart to the Supreme Court, the cost to litigants is likely to be increased and there will inevitably be delays in the administration of justice as cases work their way through the appellate system. It would be contrary to the objective of access to justice and especially environmental justice for litigants to have to take cases up to the Supreme Court in order to resolve questions of departing from retained EU case law which lower courts or tribunals would not be empowered to depart from (at least under the current arrangements).
9. By way of example, issues relating to the interpretation of retained EU case law principles (particularly in the context of prospective new domestic legislation which may involve ‘divergence’ or ‘departure’ from EU standards) may arise during the course of proceedings in the lower courts or Tribunal which require determination. Presently (during the ‘implementation period’), the article 267 preliminary reference mechanism operates to give courts and tribunals the power to refer a question relating to the interpretation of EU law to the Court of Justice. The article 267 procedure will not be replicated in domestic law following the end of the ‘implementation period’. Under the current arrangements under section 6(3) of the 2018 Act, the lower court or tribunal would be bound to follow retained EU case law

² <https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/5/5.pdf>

and the Supreme Court would only get to rule on the underlying question of retained EU case law if the case was appealed through the system to it. This would not serve access to justice or the efficient administration of cases.

10. In order to avoid some concerns that could present themselves post IP completion day, UKELA invites the government to consider whether courts and tribunals could be empowered to refer questions relating to the interpretation of retained EU case law to the Supreme Court which would give a ruling akin to the preliminary ruling given by the Court of Justice European Union currently available under Article 267 of the Treaty of the Functioning of the EU. This could improve access to justice and remove the risk that cases would take longer to consider and that the law may become, in the government's words at page 7 of the consultation document, 'fossilised'. The replacement of the existing Article 267 reference arrangements would ensure that a single body was tasked with interpreting and developing retained EU case law post-Brexit in a consistent manner. It would also avoid the risk that a plethora of courts and tribunals with the power to depart from retained EU case law would exercise that power and, albeit not by design, give rise to a patchwork approach across the multiple sectors of our legal system touched by EU law³.
11. There will need to be consideration as to whether a reference to the Supreme Court or some other comparable judicial panel e.g. the Privy Council would involve amendments to primary legislation. For instance, the Supreme Court exists by virtue of s. 23 of the Constitutional Reform Act 2005 and s. 40 of that Act explains its jurisdiction and while s. 40(5) appears to provide quite a wide power to determine "... *any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment*" it would seem that its current functions are generally limited to appeals from the higher appellate courts in England and Wales, Scotland and Northern Ireland, save for a specific function in consideration matters of devolution.
12. UKELA acknowledges that the government may regard it as a welcome development for the courts to be able to deal with what it may regard as 'unnecessary red tape' however, UKELA's view is that it is not the role of the court to be carrying on a quasi-legislative/administrative function and that if the government wishes to diverge from retained EU law in a particular sector or sphere, it (rather than the courts) should take

³ On this point see e.g. K. Ollerenshaw, 'Retained EU Case Law: A Fourth Option', U.K. Const. L. Blog (27th July 2020) (available at <https://ukconstitutionallaw.org/>).

the lead by introducing primary or secondary legislation so that the courts have a clear legislative framework in which to operate in the post-Brexit landscape.

13. In summary, the impact and effect of extending the power to depart from retained EU case law is likely to result in uncertainty, inconsistency, increased litigation and is, in our view, unnecessary.

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.

14. For the reasons given above UKELA does not consider that the options in scenarios (a) to (c) provides the opportunity of timely departure while maintaining legal certainty. Even if scenario (a) was a preferred option and that the Court of Appeal and equivalent level courts in the devolved administrations had the power to depart from retained EU case law, this is still likely to involve legal uncertainty and inconsistency whereby, for instance, there could be differences in approach in the application of retained EU law between the Court of Appeal of Northern Ireland, the Inner House of the Court of Session in Scotland and the Court of Appeal in England and Wales.
15. UKELA is concerned that the general objective and purpose of the EUWA 2018 risks being undermined by powers introduced by amendments to the Act which were made by the European Union (Withdrawal Act) 2020 (EUWA 2020), including in particular s. 6(5A). UKELA notes with concern that the Ministry of Justice consultation paper appears to be predicated on the basis that ‘timely departure’ from retained EU case law should be ‘encouraged’ in a generalised or blanket manner as if this were an accepted end in itself.
16. To be clear, UKELA would emphasise that if it is in fact the case it does not agree that the Government should seek to pursue a ‘timely departure’ from retained EU case law in the environmental field as a policy objective and it was not UKELA’s understanding hitherto that that was, in fact, the Government’s aim. To the contrary, the Government’s objective should be to retain and build upon existing EU law and the case law which underpins it in order to support the wider ambition for a ‘green

recovery' and to improve environmental protection as reflected, e.g. in the Government's "*A Green Future: Our 25 Year Plan to Improve the Environment*". Put more succinctly, if retained EU law is effective in achieving the Government's environmental policy aims then there is no need for 'timely departure' simply for the sake of it; if by contrast what is being considered is a particular proposal to improve environmental law or build upon existing EU law, then this would not necessarily require a departure from EU law but involve development and progression of the law by means of legislative change.

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.

17. Yes, we agree. The list appears to specify the full range of courts in scope.

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.

18. No. UKELA considers that the Scottish Land Court has functions that are at a comparable level with the Outer House of the Court of Session in Scotland but are distinct⁴.

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.

19. UKELA does not consider that the power to depart from retained EU case law should be extended beyond the Supreme Court and so finds it difficult to suggest other courts or tribunals which should be empowered to do so. It appears that option (c) is non-exhaustive in any event.

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.

20. UKELA considers that the power to depart from retained domestic case law relating to retained EU case law should be limited to circumstances where the Court has power to depart in any event⁵. This we envisage would arise as a consequence of existing practice apply by the Supreme Court set out in the House of Lords Practice Statement 1966 and in the limited exceptions of departure within the Court of Appeal in England and Wales and any associated permitted rights in Scotland and Northern Ireland.

⁴ See e.g. *Jardine v Murray* 2012 SC 185, in which Lord Malcolm stated at §80 that "... unlike the Land Court, the Court of Session is not an expert tribunal in respect of the matters under consideration, and so should be careful to avoid trespassing on the Land Court's jurisdiction".

⁵ This is, of course, not to be confused with being able to distinguish prior decisions.

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.

21. Yes, the reasons for this are provided in answer to Q7 above.

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.

22. UKELA disagrees with the principle of extending the power to depart from retained EU law beyond the Supreme Court for the reasons given in answer to Q1 and Q2. However, a power to depart from retained EU case law that was different from and based on a different test from the Supreme Court's existing power to depart is likely to lead to considerable unnecessary uncertainty and inconsistency in an already complex legal justice system for reasons discussed above.

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.

23. The appropriate starting point and factors to take into account would be for the Supreme Court to apply the principles in the House of Lords Practice Statement 1966. This should not be applied beyond the Supreme Court for the reasons already given.

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?

24. As explained above, we consider that extending the power to depart from retained EU law beyond the Supreme Court would increase the volume of litigation started in the UK courts and for the reasons provided above. This is likely to occur in both public and private disputes. Put simply, if more courts and tribunals have the power to depart from retained EU case law, the greater the opportunity there will be for potential litigants to seek to change retained EU case law.
25. There is also a risk that, if empowered to do so, the legal systems in different parts of the UK may approach the departure from retained EU case law in different ways, potentially resulting in a divergence *between* jurisdictions within the UK. Even the possibility of such divergence will increase uncertainty since when a court in one jurisdiction decides to depart from retained EU case law it will not be known whether other jurisdictions will follow suit. Especially in the smaller jurisdictions it may take a long time before litigation arises that offers a suitable opportunity to resolve this.

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?

26. There is likely to be an increase in judicial review and other public law proceedings. There may also likely to be an increase in litigation in private disputes where the application of EU law came into consideration. This may be e.g. where EU legislation had direct effect such as Regulations.

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.

27. Yes, there is likely to be an increase in judicial review and other public law proceedings.

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.

28. This is likely where EU case law and legislation has influenced the development of protected characteristics under the Equalities Act 2010.

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

29. No.

UKELA
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Contact:
Dr Paul Stookes
UKELA Working Party Advisor

paul@ukela.org

UK Environmental Law Association: better law for the environment
Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX **www.ukela.org**

Annex

UKELA EU Exit Reports

- Brexit and Environmental Law: Exit from the Euratom Treaty and its Environmental Implications (July 2017)
- Brexit and Environmental Law: Enforcement and Political Accountability Issues (July 2017)
- Brexit and Environmental Law: Brexit, Henry VIII Clauses and Environmental Law (July 2017)
- Brexit and Environmental Law: the UK and International Environmental Law after Brexit (September 2017)
- Wales, Brexit and Environmental Law (October 2017)
- Brexit and Environmental Law: The UK and European Co-Operation Bodies (January 2018)
- Brexit and Environmental Law: Environmental Standard Setting outside the EU (February 2018)
- UKELA's response to the consultation paper published by Defra: *Environmental Principles and Governance after the United Kingdom leaves the European Union: Consultation on environmental principles and accountability for the environment* (July 2018)
- UKELA Submission to Inquiries by the Environmental Audit Committee and the Select Committee on Environment, Food and Rural Affairs for Pre-Legislative Scrutiny of the Draft Environment (Principles and Governance) Bill (January 2019)
- UKELA's Scottish Working Party response to the consultation paper published by the Scottish Government: Consultation on environmental principles and governance in Scotland (May 2019)
- UKELA's Wales Working Party Response to the Welsh Government Consultation on Environmental Principles and Governance in Wales Post European Union Exit (May 2019)

These are available at: <https://www.ukela.org/brexitactivity>.