

Important opportunity to comment on case law precedent

The UK government is considering extending this power to depart from retained EU case law to additional lower courts and tribunals, namely the Court of Appeal in England and Wales and the High Court of Justice in England and Wales and their equivalents.

📅 07 August 2020

From 31 December 2020, the amended European Union (Withdrawal) Act 2018 vests the power to depart from retained EU case law in the Supreme Court and the High Court of Justiciary (where there is no leave of appeal to the UK Supreme Court). The UK government is considering extending this power to depart from retained EU case law to additional lower courts and tribunals, namely the Court of Appeal in England and Wales and the High Court of Justice in England and Wales and their equivalents.

The consultation on this proposal began on 2 July 2020 and closes on 13 August 2020. Browne Jacobson LLP will be submitting a response to the consultation.

As a firm, we do not support extending the power to depart from retained EU case law to other courts and tribunals beyond the UK Supreme Court and the High Court of the Justiciary. Our view is that extending the power to depart to lower courts would be likely to cause great legal uncertainty, and potentially divergence between the UK legal jurisdictions. Uncertainty would weaken the UK's reputation as a strong legal centre because it would present a difficulty in advising about the prospects of success of cases. Any extension of the power to depart would also be likely to cause a dramatic increase in re-litigation of previously closed issues, which would in turn increase costs for litigants, particularly in areas of law such as intellectual property, environment and planning and procurement.

Our stance is that if the law is to be changed, it should primarily be changed through the legislature. To leave the decisions on when to depart from European case law entirely to the judiciary is arguably a dereliction of the government's duty to legislate. In our view, retaining the right to depart from EU case law to the Supreme Court and the High Court of Justiciary constitutes a satisfactory compromise between legal certainty and UK sovereignty following the end of the transition period. It would also allow any such departure to take place in a controlled and consistent manner.

We would urge our clients, and colleagues within the wider legal profession to comment upon the proposals. If you would like to input into our final response, please ensure any comments are sent to charlotte.butler@brownejacobson.com by midday on 12 August 2020.

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