

**The European Union (Withdrawal Agreement) Bill**  
**Briefing on allowing lower courts to depart from CJEU case law**  
**(clause 26(1)(b-d))**  
**PLP and ClientEarth Joint Briefing**  
**8 January 2020**

## Introduction

1. This is a joint briefing by the Public Law Project ('PLP') and ClientEarth concerning clause 26(1)(b-d) of the European Union (Withdrawal Agreement) Bill ('WAB').<sup>1</sup>
2. This briefing addresses the new provisions in clause 26(1) WAB which were added in the December WAB and therefore differ from the October WAB on which PLP has previously [briefed](#). This briefing explains how clause 26(1) functions against the background of the EU Withdrawal Act 2018 ('EUWA') and outlines concerns about the changes.
3. We support Amendment 49<sup>2</sup> which would delete these provisions from the WAB and promote legal certainty.

## What does clause 26(1)(b-d) of the WAB do?

4. EUWA provides that most EU law in effect in the UK at the end of the implementation period<sup>3</sup>, is incorporated into domestic law after exit as "retained EU law". Section 6(3) of EUWA provides that in interpreting this body of retained EU law, any decisions made by the European Union Court of Justice ('CJEU') before the end of the implementation period<sup>4</sup> are binding on all UK courts, save for the Supreme Court and the High Court of Justiciary (s6(4) EUWA). The Supreme Court and the High Court of Justiciary may only depart from CJEU decisions in the circumstances in which they would depart from their own earlier decisions (s6(5) EUWA)<sup>5</sup>. Any decisions made by the CJEU after IP implementation day can be taken into account when relevant, but are not binding (s6(2)).
5. Clause 26(1)(b-d) of the WAB amends s. 6 EUWA to create a power for ministers to make regulations to allow specified lower courts and tribunals to depart from any retained EU case law made before exit day. Clause 26(1)(d) would allow a minister to lay down the test which a lower court or tribunal must apply in deciding whether to depart from any retained EU case law, and to specify considerations which are relevant to the application of that test.

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<sup>1</sup> For more information on PLP's Brexit work, see: <https://publiclawproject.org.uk/what-we-do/current-projects-andactivities/brexit/>; for more information on ClientEarth's Brexit work, see: <https://www.clientearth.org/>.

<sup>2</sup> House of Commons, Committee of the Whole House, [Amendments to the WAB](#), Wednesday 8 January 2020, page 11, amendment 49.

<sup>3</sup> Sections 2-6. Currently these provide for this to happen on exit day but if the WAB is passed, other provisions will amend EUWA to provide for this to happen at the end of the implementation or transition period.

<sup>4</sup> See note 2 above.

<sup>5</sup> Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

## Concerns about clause 26

6. The Government made a deliberate policy decision in introducing EUWA, as outlined in the White Paper "*Legislating for the United Kingdom's withdrawal from the European Union*" that in order to minimise disruption for the public, all EU law which applied in the UK before exit day, would continue to apply after exit day unless and until modified by Parliament, or by Ministers under the delegated powers conferred under EUWA.<sup>6</sup> Post exit day the UK would therefore be free to depart from EU law as much as it wished, but this policy was intended to ensure continuity and legal certainty for businesses and individuals during the process of withdrawal.
7. At the same time as ending the CJEU's jurisdiction over the UK going forward (by s.6(1)), the Government also recognised that "for as long as EU-derived law remains on the UK statute book, it is essential that there is a common understanding of what that law means".<sup>7</sup> That is why EUWA provided for retained EU law to be interpreted in accordance with pre-exit case law, save where the UK's highest courts decided that it was appropriate to depart from that caselaw. As the White Paper expressly acknowledged, "This approach maximises legal certainty at the point of departure".
8. This common-sense policy position rightly puts the authority and responsibility for departing from EU case law with Parliament. This approach means legislation – which is subject to proper scrutiny – produces a single source of legal authority. This approach is undermined by clause 26 as currently drafted. People and businesses have ordered their lives and affairs around sometimes long operating CJEU case law, with no expectation these laws could suddenly change. As the White Paper explained, CJEU case law governs important matters such as the calculation of holiday pay entitlements for UK workers and what is subject to VAT in the UK.<sup>8</sup> Exposing these long-established rules to unanticipated changes by the lower courts creates much uncertainty for people and businesses.
9. Further, if lower courts are not bound by existing CJEU case law this risks a proliferation of different decisions on the same legal point from lower courts, which are not necessarily binding on other courts and tribunals. This would further undermine legal certainty. Not all lower courts and tribunals' decisions are reported, which makes it harder for individuals and businesses to establish what the law is.
10. For these reasons we support amendment 49 which would remove these provisions from the Bill. Absent these provisions, businesses and individuals will have greater certainty and be able to organise their affairs in the knowledge that EU law, as interpreted by the CJEU before the end of the implementation period, will continue to apply. This law will apply unless and until amended by Parliament through primary legislation or by Ministers through existing delegated powers or departed from by the Supreme Court in accordance with the well-established test for departing from an earlier precedent.

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<sup>6</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) Cm 9446, 30.03.2017, paragraph 2.14-2.11 ('the White Paper').

<sup>7</sup> The [White Paper](#), paragraph 2.14.

<sup>8</sup> The [White Paper](#), paragraph 2.15.