



Law Society
of Scotland

Consultation Response

Mandatory retirement age for judicial office holders

October 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Ministry of Justice consultation: *Consultation on the mandatory retirement age for judicial office holders*.¹ We have the following comments to put forward for consideration.

General Comments

We note that the scope of this consultation² does not include judicial offices devolved to Wales, Northern Ireland or Scotland. However, we note that certain judicial office holders in Scotland do fall within the scope of this consultation, including Employment Tribunal judges and non-legal members. We also note that judicial offices of relevance to all areas of the UK, specifically the Justices of the Supreme Court of the United Kingdom, are within the scope of this consultation. Additionally, changes made to terms of judicial office elsewhere in the UK may ultimately influence the ways in which judicial offices are recruited and retained in Scotland. We note, for instance, the consultation on mandatory retirement age in Northern Ireland, opened on 14 October.³ Remuneration is an area where there is coordination already, with the benchmarking of judicial offices in Scotland benchmarked against those in England and Wales for the purposes of the Senior Salary Review Board. Our comments below are made on this basis.

We also note the impact of Covid-19 on the recruitment and retention of judicial office. Significant backlogs have been caused by the inability to progress many cases through the lockdown period and this may continue for a period of several years. Though we have responded to the proposals in the consultation on their own merits, changes around retirement age may offer additional flexibility in meeting the challenges of resolving these backlogs.

¹ https://consult.justice.gov.uk/digital-communications/judicial-mandatory-retirement-age/supporting_documents/judicialmandatoryretirementageconsultation.pdf

² *Ibid*, para 56-58 and Annex A

³ <https://www.justice-ni.gov.uk/consultations/mandatory-retirement-age-devolved-judicial-office-holders>

Consultation Questions

Q1A. Do you think that judicial office holders would choose to stay in office until the age of 72 if the MRA was raised to 72? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

Yes. Anecdotally, we are aware of both salaried and fee-paid judicial officeholders appointed to both courts and tribunals in Scotland who have sought and been granted extensions until the age of 72, or who would have continued to sit until the age of 72, had they been permitted to do so.

Q1B. Do you think that judicial office holders would choose to stay in office until the age of 75 if the MRA was raised to 75? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

This is a more difficult question to answer as there does not appear to be any arrangement currently in place which permits judicial officeholders to remain in office until age of 75. We anticipate some salaried and fee-paid judicial officeholders sitting in both courts and tribunals would consider sitting until the age of 75. This may be particularly attractive to fee-paid judicial officeholders, as they have the ability to regulate the amount of sitting that they undertake, and to salaried judicial officeholders who work fractionally.

Q2A. Do you think that raising the MRA to 72 would change the behaviour of judicial office holders who choose to retire before the age of 70? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

We can see no particular reason why raising the mandatory retirement age to 72 would impact upon the behaviour of those who choose to retire before the age of 70.

Q2B. Do you think that raising the MRA to 75 would change the behaviour of judicial office holders who choose to retire before the age of 70? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

We can see no particular reason why raising the mandatory retirement age to 75 would impact upon the behaviour of those who choose to retire before the age of 70.

Q3A. Do you think raising the MRA to 72 would have an adverse impact on the diversity of the judiciary? If yes, do you think this impact is significant enough to prevent a change to the MRA? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

As new appointees to judicial office are, on average, more diverse than older incumbents,⁴ it is inevitable that raising the MRA to 72 will have an adverse impact on the diversity of the judiciary. However, the extent of the adverse impact will depend upon a number of factors: Firstly, the profile of existing judicial officeholders within a particular jurisdiction. In the employment tribunals in Scotland, around half of salaried judges have been female for some time.⁵ Secondly, whether there is a growth in the overall number of judicial officeholders as a result of new appointments. Thirdly, the proportion of judicial officeholders who continue to sit until the MRA and the profile of those who do so. Fourthly, whether those who continue to work until the MRA are fee paid or, if salaried, whether they are working full-time or fractionally.

Q3B. Do you think raising the MRA to 75 would have an adverse impact on the diversity of the judiciary? If yes, do you think this impact is significant enough to prevent a change to the MRA? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

Raising the MRA to 75 will undoubtedly have a more significant impact on diversity, if those who continue in post are predominantly white male salaried judges.

⁴ https://consult.justice.gov.uk/digital-communications/judicial-mandatory-retirement-age/supporting_documents/judicialmandatoryretirementageconsultation.pdf at para 75

⁵ Diversity of the judiciary: 2020 statistics: <https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2020-statistics>

Q4A. Do you think that judicial office holders with specific protected characteristics are more likely to stay in office until the age of 72 if the MRA was raised to 72? Please state which office holders you think are more likely to stay in office in your answer and give your reasons.

This is a very difficult question to answer, as deciding when to retire will depend upon a range of personal factors such as family circumstances, caring responsibilities and financial security. We anticipate that the proportion of judicial officeholders who meet the statutory definition of disability within the Equality Act 2010 choosing to work beyond 70 is likely to be lower than judicial office holders generally, as those health conditions may make working beyond 70 more difficult for them. However, it is very difficult to draw very clear conclusions, given the range of conditions that are likely to exist. For female judicial officeholders who have taken time out to care for children and whose career developments and earnings have been adversely impacted, we consider the option to continue to work beyond 70 may be attractive, as their financial positions will be less secure.

Q4B. Do you think that judicial office holders with specific protected characteristics are more likely to stay in office until the age of 75 if the MRA was raised to 75? Please state which office holders you think are more likely to stay in office in your answer and give your reasons.

See answer to Q4A.

Q5A. Do you think that increasing the MRA to 72 would attract more people to apply to judicial office? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

Increasing the MRA to 72 would almost certainly encourage potential applicants from older age groups to apply, as they would have more time to spend in post. It is not clear to us that one particular group of judicial officeholders is more likely to apply, if the MRA is increased, than others as it will depend upon their individual circumstances.

Q5B. Do you think that increasing the MRA to 75 would attract more people to apply to judicial office? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

Yes. See answer to Q5A.

Q6A. Do you think that increasing the MRA to 72 is likely to attract more diverse applicants for judicial office? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

Increasing the MRA to 72 would almost certainly encourage potential applicants from older age groups to apply, as they would have more time to spend in post. It may also encourage applications from female applicants who have taken time out of practice for child care and who may not have felt they had sufficient experience to apply at an earlier stage.

Q6B. Do you think that increasing the MRA to 75 is likely to attract more diverse applicants for judicial office? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

The full list of protected characteristics as stated in the Equality Act 2010 are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Given our earlier comments about career interruptions and / or access to a more diverse group of people, including older applicants, it is likely that extending the MRA would provide opportunities for a more diverse group of applicants for judicial office.

Q7A. Would raising the MRA to 72 cause you to have less confidence in the judiciary? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

Within popular culture, there still exists a stereotypical view of judges as elderly males disconnected from real life. Increasing the retirement age may reinforce that stereotype. However, provided those appointed to judicial office reflect the diversity of the communities in which people live, and women and minority groups are properly represented, there is a much lower risk of this.

Q7B. Would raising the MRA to 75 cause you to have less confidence in the judiciary? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. judges, magistrates or coroners.

Please see answer to Q7A.

Q8. Do you agree that the MRA for magistrates should continue to be aligned with that of judges? Please give your reasons.

We are not aware of any reason why the MRA should be fixed at different ages for different judicial officeholders.

Q9. Do you agree that the MRA for coroners should continue to be aligned with that of judges? Please give your reasons.

Please see answer to Q8.

Q10. Please provide any comments you have on retaining parity of MRA for judicial office holders across England, Wales, Scotland and Northern Ireland.

We believe it is important to retain parity of MRA for judicial office holders across England, Wales, Scotland and Northern Ireland. Some judicial officeholders in Scotland are appointed to judicial posts that exist only in Scotland. Those appointed to tribunals hold appointments that entitle them to sit in England, Wales, Scotland and Northern Ireland. We can see no good reason why the MRA for these judicial officeholders should not be the same.

Q11. Do you agree that the MRA for judicial office holders should be increased? Please give your reasons.

Yes. As life expectancy increases, many people will wish to work for longer. Judicial officeholders will have developed skills and gained substantial experience during their working lives. It will be of benefit to the system if those skills and experience are not lost at a point in time when the judicial officeholder is still capable of carrying out the role effectively. There is a particularly strong argument for allowing judicial officeholders to continue to work in those jurisdictions where there are problems of recruitment and retention.

Q12. If so, do you think the MRA should be raised to 72 or 75? Why do you think this age is the most appropriate?

Given the potential for a significant increase in the MRA having an adverse impact on diversity, and the possibility of allowing extensions of appointment past the MRA, we favour the MRA being raised to 72, but this age being kept under review. We consider it would be appropriate to look again at the MRA in 5 years' time.

Q13. Should the policy of allowing extensions of appointment past the MRA, as per JUPRA s.26(5) and 26(6) be maintained if the MRA is increased to 72?

Yes. As we favour an increase in the MRA to 72, this provides some additional flexibility, particularly in those jurisdictions where there are recruitment and retention problems, or where someone's skills are likely to be of considerable benefit.

Q14. Are there any circumstances where it may be justified for a judge to sit, exceptionally beyond the age of 75 for a short period?

Yes. We consider that there is an argument for some discretion to exist within the system to allow judicial officeholders continue to sit beyond 75, if there are very good reasons for the judicial officeholder to do so. It could well be of benefit to the system if a judicial officeholder who has been involved in long-running litigation is allowed to continue his or her involvement in order to bring matters to a conclusion or where there is substantial pressure on the system because of increased workloads.

Q15. Should the power for judicial appointments to be extended be available to any other judicial offices in England & Wales, not currently covered by JUPRA s.26(5) and 26(6)? Please give your reasons.

As this question relates to only England and Wales, we do not consider it appropriate that we comment.

Q16. Do you think that magistrates' appointments should be eligible for extensions past the MRA if in the public interest in line with judges? Please give your reasons.

As this question relates to only England and Wales, we do not consider it appropriate that we comment.

For further information, please contact:

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