



Law Society
of Scotland

Consultation Response

Judicial mandatory retirement age

December 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 Equalities Law sub-committee welcomes the opportunity to consider and respond to the Scottish Government consultation: *Judicial mandatory retirement age*.¹ The sub-committee has the following comments to put forward for consideration.

General Comments

We have previously responded² to the Ministry of Justice consultation: *Mandatory retirement age for judicial office holders*.³ We recognise that this is an area where co-ordination is necessary to retain parity for judicial office holders across England, Wales, Scotland and Northern Ireland. 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.

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.

Whilst we welcome the opportunity to comment on the mandatory retirement age (MRA) for devolved office holders, we note that increasing the MRA is only one way of ensuring the skills, experience, diversity and capacity of the judiciary as a whole. It is important that wider work continues to ensure a judiciary that effectively administers justice and commands public confidence.

1 <https://www.gov.scot/publications/judicial-mandatory-retirement-age-consultation-mandatory-retirement-age-judicial-office-holders/pages/1/>

2 <https://www.lawscot.org.uk/media/369666/20-10-16-emp-judicial-mandatory-retirement-age.pdf>

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

Consultation Questions

1. Do you think that the MRA for devolved judicial office holders should be increased? Please give your reasons. You may wish to reference a specific judicial office holder type – e.g. Sheriff or Summary Sheriff

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. Raising the MRA may also have a positive medium to long-term impact on judicial diversity, as more women and people from minority ethnic communities may see the judiciary as a viable career option and more Sheriffs and Sheriffs-Principal may apply for Senatorial posts.

2. 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 a greater short-term 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.

3. Do you think that raising the MRA to either 72 or 75 would result in judicial office holders who currently retire before the age of 70 remaining in office for longer? Please give your reasons.

We can see no particular reason why raising the mandatory retirement age to 72 or 75 would impact upon the behaviour of those who currently choose to retire before the age of 70. We would anticipate that raising the MRA may lead some devolved judicial officeholders who would have stepped down on reaching 70 to consider sitting until they reach the new MRA.

4. Do you think raising the MRA to 72 or 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.

Promoting diversity in the judiciary is one of the policy objectives for the MRA.⁴ In England and Wales, new appointees to judicial office are, on average, more diverse than older incumbents.⁵ Raising the MRA to 72 or 75 may therefore have an adverse impact on the diversity of the judiciary in the short term. 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. 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. Raising the MRA to 75 may have a more significant adverse impact on diversity than raising the MRA to 72. However, the potential adverse short-term impact of raising the MRA must be balanced against the potential benefits noted above. There may be other, more proportionate, means of promoting the diversity of the judiciary whilst also raising the MRA. We have previously suggested reforms which would increase the diversity of the Shrieval and particularly Senatorial bench and would urge these are revisited.⁶ Most obviously, the prohibition on Tribunal Judges not being able to apply for Senatorial positions is something that could be changed relatively easily and would lead to a more diverse pool of applicants.

5. Do you think that judicial office holders with protected characteristics under the Equality Act 2010 would be more likely to stay in office if the MRA was raised to 72 or 75? Please state which office holders you think would be 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. The same may also be true for judicial officeholders from minority ethnic communities, who may have faced barriers to carer progression earlier in their careers.

⁴ Consultation document, at "Overview of the MRA for judicial officer holders in Scotland", <https://www.gov.scot/publications/judicial-mandatory-retirement-age-consultation-mandatory-retirement-age-judicial-office-holders/pages/1/>.

⁵ https://consult.justice.gov.uk/digital-communications/judicial-mandatory-retirement-age/supporting_documents/judicialmandatoryretirementageconsultation.pdf at para 75

⁶ Law Society of Scotland, "Merit and Diversity: Compatible Aspirations in Judicial Appointment? The Law Society of Scotland's Response" November 2015, available at: <https://www.lawscot.org.uk/media/1564/council-paper-jabs-report-final-post-jabs.pdf>

6. Do you think that increasing the MRA to 72 or 75 would attract more people to apply to judicial office? Please give your reasons.

Increasing the MRA 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.

7. Do you think raising the MRA to 72 or 75 is likely to attract a more diverse range of applicants for judicial office? Please give your reasons.

Increasing the MRA 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. Applicants from minority ethnic communities who may have encountered barriers to career progression at earlier stages of their careers may also be more likely to apply. It is therefore likely that raising the MRA would provide opportunities for a more diverse group of applicants for judicial office.

8. Would raising the MRA to 72 or 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.

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. Improved transparency and diversity in the judicial appointment process, alongside reforms suggested above, could assist in mitigating these risks and ensuring public confidence in the judiciary.

9. Should the policy of allowing extensions of appointment past the MRA for applicable offices, as currently provided for in s.26(5) and (6) of JUPRA, be maintained if the MRA is increased to 72?

Yes. 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.

10. Are there any circumstances where it may be justifiable 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.

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

Yes. We consider that there should be parity across devolved judicial appointments.

12. In the event that the MRA for reserved judicial offices is raised to either 72 or 75, do you think that the MRA for devolved Scottish judicial offices should be raised to maintain parity with the rest of the UK? Please give your reasons.

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 may 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. There is a risk that if the position in Scotland were seen to be less advantageous than the position in the rest of the UK, those eligible for appointment in other UK jurisdictions may choose appointment in those jurisdictions over appointment in Scotland.

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

We have no further comments.

For further information, please contact:

Jennifer Paton
External Relations
Law Society of Scotland
DD: 0131 476 8136
JenniferPaton@lawscot.org.uk