



BIRMINGHAM LAW SOCIETY
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**Response to Ministry of Justice Consultation on Judicial
Mandatory Retirement Age**

October 2020

This response has been prepared by the Employment Law Committee of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members. The response represents the collective view of its members who are specialist lawyers practising in all aspects of the employment law and from all branches of the legal profession.

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
- Given the increases in life expectancy since 1993 (increase by 5.8 years for men and 4.1 years for women) there is likely to be an increase, to some degree (may or may not be commensurate), in the desire to retire later; particularly given that many will wish to retire on the maximum pension possible, and some may need extra years (depending on start date).

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.

- Yes
- Given the increases in life expectancy since 1993 (increase by 5.8 years for men and 4.1 years for women) there is likely to be an increase, to some degree (may or may not be commensurate), in the desire to retire later; particularly given that many will wish to retire on the maximum pension possible, and some may need extra years (depending on start date).

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.

- No
- Those who would have chosen to retire before the current MRA are unlikely to alter their choice if the MRA is increased.

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.

- No
- Those who would have chosen to retire before the current MRA are unlikely to alter their choice if the MRA is increased.

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.

- Yes
- It is relatively obvious that with greater equality of opportunity, there has been an increased level of representation in the judiciary in recent years, by comparison with the cohort approaching retirement age now. The data bears that out. Therefore, to increase the MRA, and decrease the need for recruitment accordingly, will have an adverse impact on the diversity of the judiciary. As a result, this consultation entails a cost/benefit analysis. The benefit is in terms of the estimated savings (as detailed in the Impact Assessment), perhaps combined with the fact that increasing the number of quality applicants/increasing recruitment might require increasing the attractiveness, to potential applicants, of the remuneration package (a hidden cost, not discussed in the materials, that could be very significant). As to analysing the ‘cost’ (the adverse impact on diversity): the modelling in the equality statement, that seeks to quantify that adverse effect, is not easily open to testing by consultees. If the modelling is correct, it does suggest that the actual level of impact (by an increase of the MRA to 72) would not be significant. However, that modelling must be based on current data, and the impact may be greater depending upon the trends (which cannot be accurately predicted) in the coming years. Therefore, it would perhaps be sensible to tread with caution in this area, which may make a rise to 72 preferable to the greater rise to 75.

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.

- Yes
- For the reasons detailed above in answer to Q3A, there is a risk that ‘cost’ in terms of adverse impact on diversity is higher than predicted and the importance of this social aim is such that it would be safer to tread with caution and increase to 72 rather than 75.

Q4A. Do you think that judicial office holders with specific protected characteristics¹⁹ 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.

- Yes
- Assuming that this question is about the attitudes of judicial holders (and not about the impact of the proposals on judicial diversity due to reduced recruitment): the answer to this is yes, for the same reasons given in answer to question 1A. The data does not provide an evidential basis for suggesting that JOHs with any of the specified protected characteristics (with the possible exception of disability) are likely to view the desirability of staying in office any differently to JOHs that are without such protected characteristics.

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.

- Yes
- Assuming that this question is about the attitudes of judicial holders (and not about the impact of the proposals on judicial diversity due to reduced recruitment): the answer to this is yes for the same reasons given in answer to question 1A. The data does not provide an evidential basis for suggesting that JOHs with any of the specified protected characteristics (with the possible exception of disability) are likely to view the desirability of staying in office any differently to JOHs that are without such protected characteristics.

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.

- Yes
- We agree that a longer potential judicial career does give rise to a greater opportunity for advancement. We also agree that it makes greater allowance for those potential applicants who have taken career breaks or worked part-time, with a commensurate adverse impact on pre-appointment experience. Furthermore: one of the reasons for difficulties with recruitment in recent years has been the failure to increase remuneration packages. Potential applicants often face a reduction in earnings should they take office, and this is frequently at a time of life when costs/outgoings are particularly high. One of the aspects of the remuneration package that is relatively attractive is the judicial pension. Therefore, potential applicants are often balancing an immediate loss of income against a future benefit on retirement. Increasing the MRA by two years will allow potential applicants to defer applications (albeit only slightly) whilst maintaining the prospect of holding office for a sufficient length of time thereafter to qualify for the maximum pension benefit.

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
- We agree that a longer potential judicial career does give rise to a greater opportunity for advancement. We also agree that it makes greater allowance for those potential applicants who have taken career breaks or worked part-time, with a commensurate adverse impact on pre-appointment experience. Furthermore: one of the reasons for difficulties with recruitment in recent years has been the failure to increase remuneration packages. Potential applicants often face a reduction in earnings should they take office, often at a time of life when costs/outgoings are particularly high. One of the aspects of the remuneration package that is relatively attractive is the judicial pension. Therefore, potential applicants are often balancing an immediate loss of income against a future benefit on retirement. Increasing the MRA by two years will allow potential applicants to defer applications (albeit only slightly) whilst

maintaining the prospect of holding office for a sufficient length of time thereafter to qualify for the maximum pension benefit.

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.

- Yes
- The answer ‘yes’ above is qualified in that it relates to some protected characteristics rather than others (or at least is more applicable to some). There are likely to be a greater number of women who have taken career breaks due to childbirth/childcare than men; and, accordingly, the extension of the MRA *may* make judicial appointment more accessible and attractive, thereby increasing the representation of women in judicial office. To the extent that this is so (which is hard to predict or evidence), this may offset some of the adverse impact on diversity that raising the MRA will have. A similar rationale may exist for those with a disability. We are unsure that an increase in MRA of itself will attract a greater diversity of applicants with other protected characteristics.

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.

- Yes
- The answer ‘yes’ above is qualified in that it relates to some protected characteristics rather than others (or at least is more applicable to some). There are likely to be a greater number of women who have taken career breaks due to childbirth/childcare than men; and, accordingly, the extension of the MRA *may* make judicial appointment more accessible and attractive, thereby increasing the representation of women in judicial office. To the extent that this is so (which is hard to predict or evidence), this may offset some of the adverse impact on diversity that raising the MRA will have. A similar rationale may exist for those with a disability. We are unsure that an increase in MRA of itself will attract a greater diversity of applicants with other protected characteristics.

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.

- Yes
- We consider that there is a risk in this regard, which is another reason that a more tentative increase (to 72) would be preferable to a greater increase (to 75). Whilst the Ipsos Veracity Index 2019 suggests that public trust in the judiciary remains high, and stable despite variations in the MRA; there is no data/survey, it seems, that specifically addresses the extent to which public confidence/trust is adversely affected by a greater number of JOHs of 70 plus years of age. Rightly or wrongly, it is expected that the general perception (perception by the legal profession may well be different, albeit this will still vary from person to person) will be that, with advancing

years into what would previously have been considered to be retirement age, there will be a reduction in capacity, health and general ability.

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.

- Yes
- We consider that there is a risk in this regard, which is another reason that a more tentative increase (to 72) would be preferable to a greater increase (to 75). Whilst the Ipsos Veracity Index 2019 suggests that public trust in the judiciary remains high, and stable despite variations in the MRA; there is no data/survey, it seems, that specifically addresses the extent to which public confidence/trust is adversely affected by a greater number of JOHs of 70 plus years of age. Rightly or wrongly, it is expected that the general perception (perception by the legal profession may well be different, albeit this will still vary from person to person) will be that, with advancing years into what would previously have been considered to be retirement age, there will be a reduction in capacity, health and general ability.

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

- Yes
- For the reasons given in the consultation, there is benefit to consistency including a reduced risk of legal challenge and no sufficient justification for a difference in treatment across the roles.

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

- Yes
- For the reasons given in the consultation, there is benefit to consistency including a reduced risk of legal challenge and no sufficient justification for a difference in treatment across the roles.

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

- No comment

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

- Yes
- The costs savings and increased attractiveness of judicial office that are likely to result, combined with the fact that an increase is justified by increases in life expectancy, suggest that this is a beneficial step, in principle.

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?

- 72
- There is clearly some adverse impact in terms of judicial diversity, the extent of which is hard to quantify. There is also likely to be some disproportionate impact in terms of certain protected characteristics. Less hard to evidence: we consider that there is likely to be some reduction in public confidence by way of an increased MRA. Accordingly, a more modest increase would be prudent.

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
- Allowing for such facility in exceptional circumstances is helpful, despite the concern in relation to judicial independence that exists in relation to decision as to which judges should be extended. However, maintenance of this facility is likely to be necessary whilst there does not appear to be a prospect of increased remuneration (such that there may will continue to be recruitment difficulties) and is more justifiable if the MRA is increased to 72 rather than 75, as we would propose.

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?

- No
- The need for this facility is reduced if the MRA is increased to 72, and is outweighed by the concern in relation to judicial independence that exists in relation to decisions as to which judges should be extended.

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.

- Don't know
- We do not feel qualified/sufficiently appraised to respond on this issue.

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.

- Yes
- Consistency is helpful and, for the same reasons as given in relation to judges, the facility to extend may be necessary if the MRA is increased to 72 rather than 75.

16 October 2020

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President

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