

Judicial Mandatory Retirement Age: report on the consultation on the mandatory retirement age for judicial office holders

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Executive Summary

This paper provides a report of the responses received to the Scottish Government consultation on Judicial Mandatory Retirement Age. The consultation welcomed views on the mandatory retirement age (MRA) for devolved judicial office holders (JOHs) in Scotland whose MRA falls within the legislative competence of the Scottish Parliament. The consultation received 71 completed responses. We received a joint response from the Lord President of the Court of Session and the Lord Justice Clerk, and a response from the Chamber Presidents of the devolved Scottish Tribunals and the Presidents of Scottish tribunal jurisdictions. Seven responses were received from judicial and legal organisations or representative bodies on behalf of their members. 11 individual respondents noted that they were JOHs.

There was strong support for the proposal to raise the MRA, with the majority of respondents (73.2%) in favour of raising. Of those who were in favour of raising, the majority (75%) were in favour of 75 instead of 72. The most common reason given for supporting a raise in MRA was that it would help to retain skills and experience within the judiciary.

The majority of respondents (68.1%) also felt that increasing the MRA would not negatively impact their confidence in the judiciary. Again, the retention of skills and experience of older JOHs was a significant factor for maintained confidence.

The majority of respondents (59.4%) were in favour of maintaining parity with the UK, should the MRA be raised for reserved judicial offices. The most common reason for preferring to maintain parity was to ensure equity for JOHs in Scotland with those in the rest of the UK.

When considering the possible impact of a higher MRA on recruitment and retention of JOHs, the largest group of respondents (40.9%) felt that a higher MRA would encourage JOHs who would currently retire before the age of 70 to remain in post. However, a substantial number (24.2%) felt that decisions about the age at which to retire are often based on personal circumstances, which would vary considerably between individuals and which would not necessarily be influenced by a change in the MRA.

The majority of people (50.7%) felt that increasing the MRA would attract more people to apply for judicial office. Respondents noted that a higher MRA would encourage older candidates to apply, as they would have a longer time to serve before mandatory retirement. Of those that did not agree that increasing the MRA would attract more applicants (37.7%), half noted that decisions to apply to judicial office are not influenced by retirement age and a change to the MRA would have no impact on applications.

When considering the impact of raising the MRA on the diversity of the judiciary, 33.3% felt that it would have an adverse impact while 49.3% said that it would not have an adverse impact. 41.2% of respondents felt that a higher MRA would not attract more diverse candidates to apply for judicial office while 30.9% felt that it would. Respondents who felt that a higher MRA would negatively impact the

diversity of judiciary noted concerns around older JOHs preventing the recruitment of younger, more diverse candidates and slowing the pace of change. However, respondents who did not think that it would have a negative impact noted that a higher MRA may improve gender and age diversity. Several respondents felt that a higher MRA may attract more applicants who have taken longer to build up the experience required for judicial office due to caring responsibilities, career breaks, or facing barriers to career progression.

There was strong support (75.4%) to allow extensions of appointment past the MRA for applicable offices, as currently provided for in s.26(5) and (6) of the Judicial Pensions and Retirement Act 1993, be maintained if the MRA is increased to 72. There was also strong support (76.9%) for JOHs being able to sit beyond the age of 75 in exceptional circumstances. Some examples of justifiable circumstances were to allow for the closing of cases, or to provide expertise for a particular case.

Introduction

1. The current mandatory retirement age for most JOHs is 70, and derives from UK primary legislation enacted 27 years ago; the Judicial Pensions and Retirement Act 1993. This introduced the MRA of 70 for most JOHs and non-legal members throughout the UK
2. The Ministry of Justice issued a consultation, which closed on 16 October 2020, inviting views on proposals to raise the mandatory retirement age (MRA) for JOHs in England and Wales and reserved judicial offices. The consultation document can be found at <https://consult.justice.gov.uk/digital-communications/judicial-mandatory-retirement-age/>.
3. The purpose of the Ministry of Justice's consultation was to consider if an MRA of 70 continues to achieve the objective of balancing the requirement for sufficient judicial expertise to meet the demands on courts and tribunals whilst safeguarding improvement in judicial diversity and protecting the independence of and confidence in our judiciary. The consultation was part of the UK Government's response to improving judicial recruitment and retention, and sought views on raising the MRA to 72 or to 75 for judicial offices that fall within the competence of the UK Parliament.
4. As the Ministry of Justice's consultation covered only those judicial offices whose MRA falls within the competence of the UK Parliament, the Scottish Government decided to issue a separate consultation to collect views, and additional evidence, on the MRA for devolved judicial offices in Scotland.
5. The Northern Ireland Executive and Welsh Government have also consulted on proposals to increase the MRA to 72 or 75 for JOHs for whom the MRA is devolved within their jurisdictions.
6. The Scottish Government consultation covered only devolved judicial offices whose MRA falls within the competence of the Scottish Parliament. These offices are:
 - Lord President of the Court of Session
 - Lord Justice Clerk
 - Judge of the Court of Session (Senators)
 - Temporary Judge of the Court of Session
 - Sheriff Principal, Sheriff or Summary Sheriff
 - Temporary Sheriff Principal
 - Part-time Sheriff
 - Part-time Summary Sheriff

- Justice of the Peace
 - Chairman or other member of the Scottish Land Court
 - Ordinary or legal member of the Scottish Tribunals
 - Members of the Lands Tribunal for Scotland
 - President and Members of the Pensions Appeal Tribunal
7. An overview of the MRA for devolved judicial offices in Scotland can be found in the Scottish Government [consultation paper](#).

The consultation

8. The online public consultation began on 2 November 2020 and remained open for six weeks. The consultation closed on 14 December 2020. The consultation also invited responses by post and email.
9. The consultation asked respondents for their thoughts on issues surrounding the MRA. The questions covered:
- Whether the MRA for Scottish judicial offices should be raised, and if so, whether this should be to 72 or 75, and what impact this may have on the diversity of the judiciary
 - Whether the MRA for Scottish judicial offices should maintain parity with the MRA for JOHs in the rest of the UK
 - Whether judicial appointments should be extended beyond the MRA, as is currently possible for some offices when it is in the public interest

Overview of responses

10. We received 71 completed responses.
11. The majority of respondents were from individuals, 11 of whom stated in their responses that they were JOHs.
12. We received a joint response from the Lord President of the Court of Session and the Lord Justice Clerk, and a response from the Chamber Presidents of the devolved Scottish Tribunals and the Presidents of Scottish tribunal jurisdictions.
13. We also received responses from judicial associations and key stakeholders on behalf of their members:
- Senators of the College of Justice, Court of Session (not including the Lord President and the Lord Justice Clerk)
 - Part-time Sheriffs' Association

- Association of Commercial Attorneys
- Scottish Justices Association (Justices of the Peace)
- Society of Solicitor Advocates
- Sheriffs' Association
- Law Society of Scotland

Table 1: Respondent profile	
Individual responses who identified as JOHs	11
Individuals	51
Judicial leadership, judicial associations and stakeholders	9
Total	71

14. Not every respondent answered every question. Therefore, analysis for each question is based on those who answered each question.

Questions about raising the MRA

15. The majority of consultation responses were in favour of raising the MRA.

Q1. Do you think that the Mandatory Retirement Age for devolved JOHs should be increased?		
Yes / Agree	52	73.2%
No / Disagree	15	21.1%
Other	3	4.2%
No view	1	1.4%
Total	71	

16. Of those who were in favour of raising the MRA, the most common reason given (19 respondents) was that the increase would help to retain the skills, experience or expertise which JOHs had built up during their careers. One individual said, 'I do think the mandatory retirement age for devolved office holders should be increased. If office holders remain keen and committed to the service then the accumulated wisdom of years' experience will continue to be of public service.'

17. The second most common reason (7 responses) was changes to life expectancy, which mean that 70 is no longer considered old and people expect to be able to work for longer if they wish.

18. Of those who were in favour of raising, other reasons given included:

- An increased MRA may encourage applicants who may be nearing the current MRA of 70 to apply
- An increased MRA would widen the pool of persons who can apply for judicial office
- Longer service would allow for better pensions, which may in turn improve recruitment
- Increased MRA could address resourcing problems when they arise
- Equality of MRA across all judicial offices

- A regular appraisal system would ensure that all those in judicial roles are capable

19. Of those who were not in favour, reasons given included:

- risks around reduced capacity of older JOHs who would be able to remain in post for longer
- preventing recruitment of new cohorts by allowing older JOHs to remain in post
- a negative public image of an older judiciary which does not reflect the population

20. The Lord President and the Lord Justice Clerk considered that the risk of undermining public confidence in the judiciary arising from concerns with the physical and intellectual fitness of some JOHs outweighs possible retention benefits.

21. Six respondents to this question noted their view that MRA should be abolished entirely.

22. Of the 52 respondents who had answered Question 1 stating that they were in favour of raising the MRA, the majority were also in favour of raising it to 75.

Q2. Do you think the Mandatory Retirement Age should be raised to 72 or 75? Why do you think this age is the most appropriate?		
Raise to 75	39	75%
Raise to 72	11	21.2%
Other	2	3.8%

23. Of those who said 75, the reasons given were similar to those given in response to Question 1. Seven respondents noted that increased life expectancy means that people expect to be able to work for longer, and a further six respondents said they were in favour of 75 to retain JOHs' skills and experience.

24. Other reasons given for preferring 75 included:

- Equalise MRA for all judicial offices
- Maximum increase
- An appraisal system would mitigate any risks of higher MRA
- 75 would allow the justice system to benefit for the longest period
- 75 is appropriate if the JOH remains capable
- 72 is too little change
- Flexibility for JOHs
- If there has to be an MRA, it should be as high as possible
- 75 would better reflect the community
- 75 would allow tribunal members 10 years' service after leaving other employment

25. Of the respondents who preferred 72, five said that 72 would achieve the best balance. One individual responded: '72 strikes the correct balance between retaining experience and allowing "fresh talent" to come forward.'

26. Of the respondents who preferred 72, other reasons given included:
- 72 has less risk than 75
 - 72 is a good point for a review to assess JOHs' suitability for continuation
 - 72 is a sensible starting point for a change to the MRA, with commitment to further review
27. In the 'Other' responses, one person noted their view that MRA should be abolished while another respondent described their own positive experiences as a JOH who worked past the age of 70.
28. Of the legal and judicial organisations who submitted responses on behalf of their members, the majority were in favour of raising the MRA, however the organisations were divided on whether this should be to 72 or 75; see Table 2 below.
29. Of the salaried judiciary organisations, the Sheriffs' Association offered no view on whether the MRA should be raised while the Senators thought it should. Both agreed on 72 as the most appropriate age, as did the collective response from the Tribunal Presidents.
30. Of legal representative bodies, the Law Society of Scotland and Society of Solicitor Advocates thought 72 was the more appropriate of the two age options.
31. Part-Time Sheriffs', Scottish Justices and Commercial Attorneys Associations all preferred 75. The Scottish Justices Association noted that 'the view of the majority of Justices of the Peace is that the increase should be to 75 rather than 72 and a significant number suggested that there be no MRA.'
32. Present legislation provides for all judiciary (including Justices of the Peace) to continue on a fee paid basis (part time) up to 75.

Table 2: Judicial Leadership, Judicial Associations and Stakeholder Responses to Consultation Questions 1 and 2

Respondent	Raise MRA?	72 or 75?
Lord President of the Court of Session and Lord Justice Clerk	No	72, if raised
The Chamber Presidents of the devolved Scottish Tribunals and the Presidents of Scottish tribunal jurisdictions	Yes	72
Senators of the College of Justice, Court of Session	Yes	72
Sheriffs' Association	No View	72, if raised
Part-time Sheriffs' Association	Yes	75
Scottish Justices Association (Justices of the Peace)	Yes	75, with support for no MRA
Society of Solicitor Advocates	Yes	72
Law Society of Scotland	Yes	72

Association of Commercial Attorneys	Yes	75
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Questions about recruitment and retention

33. Questions 3 and 6 asked how changes to the MRA may impact recruitment and retention of JOHs.

34. Question 3 asked if an increased in the MRA to either 72 or 75 would result in JOHs who currently retire before the age of 70 remaining in office for longer. The most common response was to agree, however a significant number also disagreed.

Q3. Do you think that raising the Mandatory Retirement Age to either 72 or 75 would result in JOHs who currently retire before the age of 70 remaining in office for longer?		
Yes / Agree	27	40.9%
No / Disagree	22	33.3%
Other	7	10.6%
Not sure / Don't know	11	16.7%
Total	66	

35. Five respondents said that they felt JOHs would remain due to a sense of purpose and opportunity to contribute to the community. Three respondents said that personal circumstances would strongly influence when to retire rather than the MRA.

36. Further reasons given for thinking that an increased MRA would result in JOHs remaining in office longer included:

- The skills and experience will be of benefit to younger judiciary
- Those who enjoy the job would want to remain in post
- Those who are assessed as competent would wish to stay in post
- Differences between individuals would mean that some would chose to remain
- Flexibility for recruitment
- It would encourage people to remain in post rather than leaving to start another career
- Life expectancy has changed so people expect to be able to work past 70
- JOHs would remain in post as they would not have to leave at 70

37. Of those who did not think that raising the MRA would result in JOHs remaining in office, the most common response (16 responses) was that JOHs' decisions about the age at which to retire are often based on personal circumstances, which would vary considerably between individuals and which would not necessarily be influenced by a change in the MRA.

38. Further reasons given included:

- Raised MRA would not help retain JOHs in their roles

- Pension considerations, such as the 20-year cap on judicial pensions in JUPRA
- Some roles, such as Justice of the Peace, are voluntary

39. Of the 'Other' responses, six responded that it is difficult to know if individuals would remain in office as decisions about retirement are often based on personal circumstances.

40. The largest group of respondents felt that raising the MRA would attract more people to apply to judicial office.

Q6. Do you think that increasing the Mandatory Retirement Age to 72 or 75 would attract more people to apply to judicial office?		
Yes / Agree	35	50.7%
No / Disagree	26	37.7%
Other	4	5.8%
Not sure / Don't know	4	5.8%
Total	69	

41. Of those who thought that increasing the MRA would attract more applicants, the most common response (17 responses) was that a higher MRA would increase applications from older age groups or candidates over the age of 60, as they would have a longer time to serve.

42. The Senators of the College of Justice said that, 'Yes. A longer opportunity to sit on the bench may be likely to attract well-qualified candidates at a later stage in their careers. It would allow them more time to hone their judicial skills, and to have a greater chance of promotion.'

43. Other reasons for thinking that a higher MRA would increase the number of applications to judicial offices included:

- As there is no MRA for solicitors or advocates, the judicial MRA can be off-putting to applicants from those professions
- Limitations on service may currently be discouraging to new applicants
- Potential for longer service, promotion, long-term security and/or better pension may be attractive to older applicants
- Increased MRA may encourage more disabled people to apply for lay member roles in tribunals
- Increased opportunity to use skills and expertise for longer
- Some JOHs will want to reduce their hours while continuing in office
- Some potential applicants may wish to wait until their family is older before applying
- A higher MRA may not influence younger candidates' decision to apply, but may be a factor with older candidates

44. Of the 52 respondents who felt that the MRA should be raised (Question 1), the majority (33) also felt that it would attract more people to apply to judicial office.

45. Of respondents who did not agree that raising the MRA would attract more people to apply for judicial office, 13 respondents felt that retirement age is not a strong factor of consideration when individuals decide to apply for judicial office, and therefore raising the MRA would not have an impact on applications.
46. Other reasons for not thinking that raising the MRA would attract more people to apply for judicial office, included:
- A raised MRA may deter or be a disincentive to new applicants if they felt they were expected to work to 75
 - MRA is likely to be a consideration for older applicants or existing office holders only, and will have limited impact on younger applicants.
47. The Sheriffs' Association responded: 'No. It may change the age profile of applicants but we doubt if it would alter the overall number of applications made.'
48. The Scottish Justices Association stated that: 'The majority of Justices of the Peace felt that this would not have any significant bearing on an individual's decision whether to apply for a Justice of the Peace position or not. The retirement age is not an issue which most Justices of the Peace consider when considering whether to apply. Some Justices of the Peace felt it may be attractive to some, in that they would bring greater experience to their judgments. In the other hand some Justices of the Peace felt that it may deter some applicants who may feel that they would be expected to serve until 75, after many years in full time employment.'

Questions about diversity

49. Questions 4, 5 and 7 asked about the possible impact of raising the MRA on the diversity of the judiciary in Scotland.
50. The largest group of respondents did not think that raising the MRA to 72 or 75 would have an adverse impact on the diversity of the judiciary.

Q4 'Do you think raising the Mandatory Retirement Age 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 Mandatory Retirement Age?'		
Yes / Agree	23	33.3%
No / Disagree	34	49.3%
Other	9	13.0%
Not sure / Don't know	3	4.3%
Total	69	

51. Four respondents felt that raising the MRA would have an adverse impact on the diversity of the judiciary because older JOHs would remain in post and prevent the appointment of new candidates. The Sheriffs' Association said, 'Yes. On the assumption that such a change would lead to fewer sheriffs retiring at 70 than at present, then an inevitable consequence would be that there would be fewer 'young' judges. Given that at present the majority of 'older judges' are less diverse than their younger colleagues, there would be a likely impact on diversity of the judiciary.'

52. The view of the Lord President and the Lord Justice Clerk was that a higher MRA which retains a greater number of existing JOHs could limit the opportunities for younger and more diverse new appointments.
53. Other reasons for thinking that the MRA would have an adverse impact on diversity included:
- Current profile of judiciary will be prolonged due to slower turnover
 - Younger people should be more represented, and younger recruits should be encouraged to improve diversity
 - Negative impacts on diversity would be lessened by raising MRA to 72 instead of 75
54. Of the 15 respondents who were against raising the MRA in Question 1, the majority (12) also thought that raising the MRA would have a negative impact on diversity.
55. The Chamber Presidents, the Senators of the College of Justice and the Law Society of Scotland were all in favour of raising the MRA but each noted that it may have an adverse impact on diversity as younger JOHs tend to be more diverse. However, the Chamber Presidents noted that 'the adverse impact on diversity would be restricted with an increase of two years on the MRA rather than an increase of five years to 75.'
56. For the respondents who did not think that raising the MRA would have a negative impact on diversity, 9 respondents said that an increased MRA may improve diversity amongst JOHs due to increased age diversity and gender diversity.
57. Five respondents noted that a higher MRA may be beneficial for the gender diversity of the judiciary, as women may take longer to gain the experience needed to apply to judicial roles due to career breaks or caring responsibilities. An increased MRA would allow time for a longer period of service and may encourage women to apply to judicial posts. One individual said, 'I do not think raising the mandatory retirement age would have an adverse impact on the diversity of the judiciary. If anything, it may improve its gender diversity, as knowing that there was a longer period available to be in the role may encourage women (who often take on the burden of caring duties within families, and therefore have delayed progression in their careers) to apply for judicial posts.'
58. Another five respondents stated their view that efforts to improve diversity should be focused on recruitment of candidates rather than those at the point of mandatory retirement.
59. Other reasons for thinking that increasing the MRA would not have an adverse impact on diversity included:
- Increased MRA would have little overall effect on diversity of the judiciary
 - The importance of retaining skills and experience
 - Increased MRA may increase the number of the judiciary who have disabilities

- Increased MRA would have a positive impact as the judiciary would better reflect the community
- Impact on diversity not significant enough to keep MRA at 70.

60. Of the 52 respondents who agreed that the MRA should be raised in Question 1, the majority of these respondents (33) did not think that raising the MRA would have a negative impact.

61. For the 'Other' responses, three noted that it is likely to have both positive and negative impacts on the diversity of the judiciary. The Part-Time Sheriffs' Association responded: 'Any observation in response to this question would be pure speculation. We do however note the need to take positive steps to promote the diversity of the judiciary.'

62. Question 7 asked if raising the MRA to 72 or 75 is likely to attract a more diverse range of applicants for judicial office. The largest group of respondents did not think that this would be the case.

Q7 Do you think raising the Mandatory Retirement Age to 72 or 75 is likely to attract a more diverse range of applicants for judicial office?		
Yes	21	30.9%
No	28	41.2%
Other	6	8.8%
Not sure / Don't know	13	19.1%
Total	68	

63. 13 respondents said that they did not know or were unsure whether raising the MRA would attract a more diverse range of applicants.

64. Of those who did not think that raising the MRA would attract a more diverse range of applicants, 10 respondents did not think that MRA would have an impact or make any difference to individuals' decisions to make an application. One individual responded: 'No, I do not think that MRA has any bearing on whether or not someone applies for a judicial office.'

65. Other reasons for thinking that raising the MRA would not attract a more diverse range of applicants to judicial office were:

- The decision to apply for judicial office is driven by personal interest which is unlikely to be influenced by MRA
- A higher MRA may deter new applicants
- MRA has no impact on diversity of applicants

66. The Sheriffs' Association replied: 'No. We are not aware of any reliable evidence that raising the MRA to 72 or 75 would be likely to have an effect on the diversity of applications.'

67. For those who felt that raising the MRA would attract a more diverse range of applicants to judicial office, four respondents said that raising the MRA would attract more older candidates while three other respondents said that a higher MRA would attract candidates who wanted to apply later in their careers. One

individual said, ‘Yes. It takes a while to gain the experience necessary for judicial appointment. It is common knowledge that certain groups with protected characteristics either come later to the law, or take career breaks which delay their progress in the law. Raising the MRA to 75 would make judicial appointment more attractive to all groups.’

68. Other reasons for thinking that raising the MRA would attract a more diverse range of applicants to judicial office were:
- Increased MRA would offer longer term security
 - Judicial workplace may be more suitable for those who are unable to continue in more physical occupations
 - Raising the MRA would attract applicants from diverse backgrounds
69. The Law Society of Scotland responded that, ‘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.’
70. The Senators of the College of Justice replied: ‘Some well-qualified lawyers may have chosen to take a career break for caring and other responsibilities, including those relating to children. They may see the increase in the MRA as beneficial to their careers, especially if the option of part-time working is available.’
71. Question 5 asked if JOHs 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. An equal number of respondents agreed and disagreed.

Q5 Do you think that JOHs with protected characteristics under the Equality Act 2010 would be more likely to stay in office if the Mandatory Retirement Age was raised to 72 or 75?		
Yes / Agree	19	30.6%
No / Disagree	19	30.6%
Other	11	17.7%
Not sure / Don't know	13	21.0%
Total	62	

72. 13 respondents did not know or were not sure whether JOHs with protected characteristics would be more likely to stay in office if the MRA was raised.
73. Of those who agreed that an increased MRA would encourage JOHs with protected characteristics to stay in office, four noted that personal reasons would have an impact on individuals’ decisions.
74. Other reasons for thinking that an increased MRA would encourage JOHs with protected characteristics to stay in office included:

- increased opportunities for those with protected characteristics (including age and disability)
- a higher MRA would allow for career breaks for caring responsibilities
- some JOHs with protected characteristics may feel they have had to fight for their position
- changes to state pensions and life expectancy mean that people expect to work longer
- some JOHs are still capable and want to remain in post
- protected characteristics would have no impact on this

75. Of those who thought that an increased MRA would not encourage JOHs with protected characteristics to stay in office, eleven respondents felt that an increase in MRA would have no or limited impact on individuals with protected characteristics' decision to stay in office. Three other respondents noted that personal circumstances are the key factor to decisions about retirement.

76. Of the 'Other' responses, five said that personal circumstances are the key considerations of when individuals choose to retire.

77. The Law Society of Scotland noted that: '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 JOHs who meet the statutory definition of disability within the Equality Act 2010 choosing to work beyond 70 is likely to be lower than JOHs 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 career progression earlier in their careers.'

78. Three of the 'Other' responses reiterated their view that there should not be an MRA.

Questions about confidence in the judiciary

79. Question 8 asked if an increase in MRA would impact confidence in the judiciary. The majority of respondents did not think that raising the MRA would cause them to have less confidence in the judiciary.

Q8. Would raising the Mandatory Retirement Age to 72 or 75 cause you to have less confidence in the judiciary?'		
Yes / Agree	13	18.8%
No / Disagree	47	68.1%
Other	9	13.0%
Total responses	69	

80. Of the 52 respondents who were in support of raising the MRA (Question 1), the majority (44) also felt that it would not impact their confidence in the judiciary.
81. The most common reason given for maintained confidence in the judiciary was that skills would be retained and older JOHs would be able to use the experience they had obtained during their careers (15 responses). One person said, 'No, on the contrary, the increase in experience is to be welcomed.'
82. Nine respondents suggested that a mandatory appraisal or monitoring system would provide a safeguard against any risks of decreasing capacity amongst older JOHs if MRA was to be raised. This was also a consistent theme across responses to other questions.
83. Other reasons given for maintained confidence in the judiciary in event of the MRA being raised included:
- Loss of confidence based on age is discriminatory
 - JOHs can be trusted to step down if they are no longer able to do the job
 - Older people are just as capable
 - 75 is not considered old due to increases in life expectancy
 - A higher MRA would have no impact on confidence in the judiciary
 - 75 may cause concerns, but 72 would not
 - There is little difference between confidence in an MRA set at 70, 72 or 75.
84. Of the respondents who said that raising the MRA would reduce their confidence in the judiciary, reasons given included:
- Public image of an older judiciary may negatively impact public confidence
 - Risk of loss of JOH's capacity
 - Physical and mental deterioration that occurs as people get older
 - Potential for JOHs who are less capable to remain in office for longer
 - Less opportunity for new entrants
 - Need for an appraisal system to ensure competency
85. One individual responded: 'I am inclined to say that it would slightly reduce my confidence in the judiciary because it means that incompetent judges would remain in office for longer. I think there are better methods of vastly improving public confidence in the judiciary rather than tinkering with MRA.'
86. Every respondent who said that raising the MRA would impact on their confidence in the judiciary, was also opposed to raising the MRA (Question 1).
87. Two of the 'Other' responses discussed the risks around raising the MRA, while a further two responses discussed how these risks might be mitigated against. The Law Society of Scotland responded: '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.’

Questions about extensions past the MRA

88. Questions 9, 10 and 11 asked for views on extensions to judicial appointments in different circumstances.

89. The majority of respondents were in favour of the policy of allowing extensions of appointment past the MRA for applicable offices being maintained if the Mandatory Retirement Age is increased to 72.

Q9. Should the policy of allowing extensions of appointment past the Mandatory Retirement Age for applicable offices, as currently provided for in s.26(5) and (6) of the Judicial Pensions and Retirement Act 1993, be maintained if the Mandatory Retirement Age is increased to 72?		
Yes / Agree	49	75.4%
No / Disagree	6	9.2%
Other	4	6.2%
Not sure / don't know	6	9.2%
Total	65	

90. For those who were in favour, seven respondents noted that this would provide flexibility of resource to assist the running of the judicial system. One individual said, ‘I believe it would be useful to retain this up to the age of 75, to assist with local unexpected shortages of JOHs. It takes many months to complete the selection process and so the ability to have extensions would be a useful option to retain.’

91. Five respondents said that extensions should be allowed due to the continuing ability and capacity of JOHs after the age of 72. Four respondents said that they would support extensions, but that their preference was for the MRA to be raised to 75.

92. Other reasons for supporting extensions included:

- This would provide a short-term option in extenuating circumstances
- Acceptable in specific circumstances
- For use of retired JOHs in part-time roles
- Extensions should be allowed if the JOH wishes to work on
- This would provide a middle ground between raising MRA to 72 or 75

93. The Part-Time Sheriffs’ Association, the Scottish Justices Association, the Chamber Presidents, the Sheriffs’ Association and the Senators of the College of Justice were in favour of allowing extensions past the MRA. The Law Society of Scotland was also in favour of allowing extensions past the MRA: ‘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.’

94. Of those who said 'No' or disagreed, the two respondents who provided a reason both referred back to their previous arguments: one was opposed to raising the MRA and the other felt that the MRA should be 75 for all offices.
95. The majority of respondents felt that there were circumstances where it may be justifiable for a judge to sit, exceptionally, beyond the age of 75 for a short period.

Q.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 / Agree	50	76.9%
No / Disagree	8	12.3%
Other	4	6.2%
Not sure / don't know	3	4.6%
Total	65	

96. Of those said No or did not agree, reasons included the risk that the JOH would not be fully capable to fulfil the role, even if for a short time, and the need to ensure consistency for all JOHs.
97. Of those who said Yes or agreed, 13 respondents said that closing or completing cases would be an acceptable circumstance for JOHs to sit beyond the age of 75. 12 respondents said that an extension would be justifiable if there were resourcing pressures or a shortage of JOHs.
98. Seven respondents said that an extension would be justifiable if the JOH had specific skills or expertise that would assist in a particular case.
99. Other reasons for supporting extensions included:
- In exceptional circumstances
 - Extension would need to be dependent on continued capacity of JOH
 - Extension could be dependent on appraisal
100. The majority of respondents were in favour of the power for judicial appointments to be extended being available to any other judicial offices in Scotland, not currently covered by s.26(5) and (6) of the Judicial Pensions and Retirement Act 1993.

Q11 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 the Judicial Pensions and Retirement Act 1993? Please give your reasons.		
Yes / Agree	28	38.0%
No / Disagree	10	14.1%
Other	2	4.2%
Not sure / don't know	18	25.4%
Total	58	

101. A quarter of respondents to this question did not know or were unsure. These respondents noted that they did not have an opinion or a view on this question.

102. Of those who were not in favour, three noted that they were not aware of any other offices which should be covered by this provision. One individual said no, as the provisions should be kept simple. The other respondents did not provide a reason.

103. Of those who were in favour, 19 respondents said that the provision should cover all offices, to ensure equity of treatment and to avoid discrimination between JOHs.

104. Other reasons given included:

- To address operational requirements
- To maintain parity with the rest of the UK
- If the office holder is suitably qualified and experienced

105. Some offices which were given as examples included:

- All tribunals, quangos, and health boards
- Justices of the Peace and other unpaid positions
- Lay member positions and medical member positions

Questions about parity with the rest of the UK

106. Questions 12 and 13 invited views on maintaining parity of MRA between Scotland and the rest of the UK.

107. The majority of respondents were in favour of maintaining parity with the rest of the UK.

Q.12 In the event that the Mandatory Retirement Age for reserved judicial offices is raised to either 72 or 75, do you think that the Mandatory Retirement Age for devolved Scottish judicial offices should be raised to maintain parity with the rest of the UK?		
Yes	38	59.4%
No	15	23.4%
Other	7	10.9%
Not sure / don't know	4	6.3%
Total	64	

108. For those who did not think that parity should be maintained, five responses felt that Scotland should be considered separately from the rest of the UK as the legal systems are separate. One person said, 'There is no particular reason why any MRA for Scottish judicial offices should be the same as in England or any other separate jurisdiction.'

109. Other reasons given for not wanting to maintain parity included:

- Decision should be made based on Scotland's best interests only
- Different circumstances in England and Wales with respect to recruitment
- Parity is not essential
- This is a devolved matter and therefore does not need to be the same

110. The Scottish Justices Association responded that the majority of Justices of the Peace felt that the decision on the MRA could be taken independently of the rest of the UK, as there is a separate Scottish judicial system.
111. For those who did think that parity should be maintained, the most common reason (14 responses) was to ensure equity for JOHs in Scotland with those in the rest of the UK. One individual said, 'Yes I feel Scottish judicial holders should not be disadvantaged.'
112. Other reasons for preferring to maintain parity included:
- Judicial salaries and pensions are reserved
 - To maintain current parity
 - Consistency across the UK
 - To avoid confusion
 - To avoid creating divisions where they do not currently exist
 - To ensure holding judicial offices in each jurisdiction is equally attractive
113. Of the 52 respondents who were in favour of raising the MRA (Question 1), the majority (34) were also in favour of maintaining parity with the rest of the UK.
114. The Part-Time Sheriffs' Association, the Sheriffs' Association, the Senators of the College of Justice and the Chamber Presidents were all in favour of maintaining parity.
115. The Sheriffs' Association responded: 'Yes. Sheriffs and Circuit Judges in England and Wales have parity on their terms of appointment, including remuneration and pensions. As there is a relationship between those terms, perhaps especially pension entitlement, then it would be appropriate to maintain that parity on all terms, including MRA. If the MRA were to be raised for judges of the UK Supreme Court, judges in the other UK jurisdictions, and judges of UK Tribunals (including those based in Scotland), it should not remain at 70 for sheriffs and other Scottish salaried JOHs.'
116. The Association of Commercial Attorneys and the Law Society of Scotland were both in favour of maintaining parity. The Law Society noted that: 'We believe it is important to retain parity of MRA for JOHs across England, Wales, Scotland and Northern Ireland. Some JOHs 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 JOHs 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.'
117. In the 'Other' responses, four respondents reiterated their views on whether the MRA should be raised.
118. Question 13 asked for any further views on parity with the rest of the UK. There were 28 responses to this question.

119. The Lord President and the Lord Justice Clerk noted in their responses that there may be demographic differences between the judiciary in Scotland and in England & Wales which should be taken into account when determining the appropriate MRA for each legal jurisdiction.
120. 14 responses were in favour of parity. Three respondents noted that UK-wide parity ensures equity for JOHs. Two respondents felt that parity of MRA would avoid confusion and provide clarity for JOHs and the public.
121. The Senators of the College of Justice noted that different MRAs would impact pensions for JOHs in Scotland: 'If the MRA for Scottish judges remains 70 but the MRA for other judges is raised, Scottish judges will not have the same opportunity as their counterparts to accrue pension benefits after 70 as a way of compensating for some of the disadvantages of the reformed pension scheme.'
122. Other reasons given in favour of parity were:
- There is an expectation of uniformity of approach to judicial appointment and retirement across the UK.
 - Parity for Scottish JOHs in salary and pensions
 - There are similar circumstances across UK so difference in MRA does not make sense
 - Parity would be expected by overall population
 - Parity with UK would provide peer support
 - Some jurisdictions cover the whole UK
 - There should be a UK-wide approach to MRA
123. Seven responses were not in favour of parity. Reasons were:
- Each jurisdiction should do what is right for them
 - Scottish JOHs do not practice in UK courts, so parity is not relevant.
 - Terms of appointment of judiciary in other jurisdictions is not a concern
 - Justice is a devolved matter
 - There is no need for parity
 - Parity is irrelevant
124. Of the remaining responses, two were against raising the MRA. One individual noted that age is a protected characteristic, and another noted that age is less important than competence.



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