

Judicial Mandatory Retirement Age

Consultation on the mandatory retirement age for judicial office holders

November 2020

Introduction

This consultation welcomes views on the mandatory retirement age (MRA) for devolved judicial office holders in Scotland whose MRA falls within the legislative competence of the Scottish Parliament.

The consultation asks if the MRA for Scottish judicial offices should be raised, and if so, whether this should be to 72 or 75, and whether the MRA for Scottish judicial offices should maintain parity with the MRA for judicial office holders in the rest of the UK. The consultation also invites views on a proposal that would allow judicial appointments to be extended beyond the MRA, as is currently possible for some offices when it is in the public interest.

Why we are consulting

The Ministry of Justice has issued a consultation, which closed on 16 October, inviting views on proposals to raise the mandatory retirement age (MRA) for judicial office holders to either 72 or 75 years of age.

The consultation document can be found at <https://consult.justice.gov.uk/digital-communications/judicial-mandatory-retirement-age/>

The retirement age for most judicial office holders is 70 and derives from primary legislation enacted 27 years ago. The purpose of the Ministry of Justice's consultation is 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 Ministry of Justice's consultation covers those judicial offices whose MRA falls within the sole legislative competence of the UK Parliament. It does not include devolved judicial offices and it is for the governments in each of the devolved administrations to consider whether to raise the MRA for their respective devolved judicial office holders.

In Scotland, these offices are:

- Lord President of the Court of Session
- Lord Justice Clerk
- Judge of the Court of Session
- 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

The Welsh Government and Northern Ireland Executive have each issued consultations on raising the MRA for the judicial offices within their devolved competence.

Responding to this Consultation

We are inviting responses to this consultation by 14 December 2020.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space: <http://consult.gov.scot>. Access and respond to this consultation online at <https://consult.gov.scot/justice/judicial-mandatory-retirement-age>

You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 14 December 2020.

If you are unable to respond using our consultation hub, please send your views and comments either by email to JudicialMRAconsultation@gov.scot or by posting a paper copy to:

Judicial Mandatory Retirement Age Consultation
Courts and Tribunals Unit
Scottish Government
GW-15 St Andrew's House,
Regent Road,
Edinburgh,
EH1 3DG

If responding by post or email, please complete the Respondent Information Form included at the end of this document and return along with your response.

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included at the end of this document.

To find out how we handle your personal data, please see our privacy policy:
<https://www.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot> If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or to JudicialMRAconsultation@gov.scot

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online at <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Overview of the MRA for judicial office holders in Scotland

A mandatory retirement age for judges of the Court of Session and above was first introduced by the Judicial Pensions Act 1959, which set a retirement age of 75. Prior to this, judges could continue in office for as long as they wished. For sheriffs principal and sheriffs a retirement age of 72 was introduced in the Sheriffs' Pensions (Scotland) Act 1961. Prior to this, sheriffs could also continue in office for as long as they wished.

The Judicial Pensions and Retirement Act 1993 ("JUPRA") introduced a standard judicial retirement age of 70 for all judicial offices listed in schedule 5, which includes the majority of the UK judiciary. The provisions, which brought greater consistency to the judicial retirement system, only applied to judges' appointments made after the relevant provisions were commenced on 31 March 1995. Some judges appointed to judicial office prior to 31 March 1995 retained their previous (usually higher) retirement date. A MRA of 70 was set in 2003 for magistrates and in 2013 for coroners in England and Wales, which has aligned their MRA with that of the wider judiciary. A MRA of 70 has been applied to judicial offices introduced in Scotland subsequent to 1995, such as summary sheriffs and part-time sheriffs.

The policy objectives for having an MRA for the judiciary are that it:

1. promotes and preserves judicial independence by avoiding individual decisions in each case (albeit with limited provision for extension);
2. preserves judicial dignity by avoiding the need for individual health and capacity assessments;
3. maintains public confidence in the capacity and health of the judiciary;
4. supports workforce planning and allows for greater career progression/ diversity;
5. shares opportunity between the generations by balancing the need for experienced judges to continue in office for a reasonable time against career progression opportunities for newer appointees (and thereby also promoting diversity in the judiciary).

Since the MRA was set, average life expectancy has increased and many people want to and expect to continue working for longer than in previous decades.

A number of factors are relevant in the consideration of the most appropriate MRA for judicial office holders. Chief among these are how to ensure effective resourcing of courts, tribunals and other judicial functions; the need to promote opportunity and diversity through a steady turnover of retirements to allow for new appointments; and ensuring judicial independence and public confidence in the judiciary is protected.

As part of the response to improve recruitment and retention in the judiciary, the Ministry of Justice is considering raising the MRA to 72 or to 75 for judicial offices that fall within the competence of the UK Parliament. It is also considering bringing forward legislation to

provide for magistrates' appointments to be extended beyond the MRA when there is a public interest, or business need, in line with existing powers that allow for judges' appointments to be extended.

The purpose of this consultation is to collect views, and additional evidence, on whether the MRA for judicial offices which are within the Scottish Parliament's legislative competence should be raised to either 72 or 75, or whether it should be maintained at 70.

In the event that the UK Government decides to increase the MRA for judicial office holders, this consultation also asks whether, for the purpose of parity for judicial office holders across the UK, the MRA for devolved Scottish judicial offices should be increased in line with their counterparts.

We also seek views on whether the policy to allow a judicial office holder's appointment to be extended past mandatory retirement age should be retained if the MRA is increased. Currently under section 26(5) of JUPRA, the Scottish Ministers may extend the appointment of a judge below Court of Session level, following their compulsory retirement date, for a period of up to one year if they consider it desirable in the public interest. That appointment can then be extended each year by virtue of section 26(6), for a further one-year period up to the point at which the judge turns 75, subject to the same requirement. The power to extend does not apply to the Senior Judiciary (Senators of the Court of Session and above). Under s.20E of the Judiciary and Courts (Scotland) Act 2008 a qualifying former judge can be appointed by the Lord President, where he/she consider doing so to be expedient as a temporary measure, to act as a judge of the Court of Session, up to the age of 75. For tribunal members, Chamber Presidents may request extensions, following which the President of the Scottish tribunals can make a recommendation to Ministers.

Call for Evidence

Questions about the MRA

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
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?
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.
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.

5. Do you think that judicial office holders with protected characteristics under the Equality Act 2010¹ 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.
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.
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.
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.

Extension past MRA

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?
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?
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.

Questions about parity with UK for judicial offices

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

¹ The protected characteristics under the Equality Act 2010, as set out in section 4, are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation.



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RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the

future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No



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