

# **Judicial Mandatory Retirement Age**

## **Equality Impact Assessment Results**

**March 2021**



**Scottish Government**  
Riaghaltas na h-Alba  
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## EQUALITY IMPACT ASSESSMENT - RESULTS

<b>Title of Policy</b>	Judicial Mandatory Retirement Age
<b>Summary of aims and desired outcomes of Policy</b>	<p>The policy aim of judicial mandatory retirement age (MRA) is to have a judiciary that is capable of meeting the needs of the justice system, allows for opportunities for participation in judicial office, retains public confidence and is representative of the Scottish public. The MRA is currently set at 70.</p> <p>This EQIA considers the impact of raising the MRA for all Scottish courts and tribunals judiciary.</p>
<b>Directorate: Division: team</b>	Justice Directorate, Civil Law and Legal System Division, Courts and Tribunals Unit.

### Executive summary

The current mandatory retirement age (MRA) for most judicial office holders is 70. The MRA for courts and tribunals judiciary is set out in s.26 and Schedule 5 of the Judicial Pensions and Retirement Act (JUPRA) 1993.

The purpose of this EQIA is to consider the impact of raising the MRA for all courts and tribunals judiciary.

The people primarily affected by any change to MRA will be judicial office holders. The policy may also affect those who are considering or are in the process of applying to judicial office.

For those who interact with the judiciary in courts and tribunals, an increased MRA may mean that they are more likely to have their cases considered by a judicial office holder who is older. This may be reflective of society as Scotland has an aging population with both an increase in life expectancy and the proportion of the population which is over 65, however it may also be a cause for concern if the public view the judiciary as an aged workforce.

If the MRA is raised, it will have the main effect of enabling the average age of the judiciary in Scotland to increase. It will allow judicial office holders (all court judiciary and tribunal members whose MRA are within the Scottish Parliament's legislative competence) to work for longer and retire later, should they want to do so. This would benefit judicial office holders in that they would be able to continue to work for longer, mitigating against mandatory retirement at the age of 70.

For those who are considering applying to judicial office, an increased MRA may in the shorter term reduce opportunities for new applicants as turnover of opportunities to apply for judicial office arising from vacancies could slow. However, an increased MRA may attract older applicants as it would allow them to remain in office for a longer period. It may also lead to greater gender diversity as those who have taken mid-career breaks may be more likely to apply at a later stage in their career if they can remain in office for longer.

## **Background**

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 in 1993, average life expectancy has increased and many people want to and expect to continue working for longer than in previous decades. In Scotland, life expectancy in 1993 was 71.40 for men and 76.96 for women. In 2019, it was 77.24 for men and 81.24 for women.

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.

## **The Scope of the EQIA**

During the EQIA process, the potential impact on each of the protected characteristics was considered.

Our assessment identified that the policy change was likely to have a direct impact on judicial office holders with protected characteristics - age, sex, and race.

Disability, gender reassignment, sexual orientation, religion or belief, maternity and pregnancy, and marriage and civil partnership do not have a direct bearing on the proposal to change the MRA. We did not encounter evidence that judicial office holders in any of these groups would be disproportionately adversely affected by proposal to raise the MRA.

## Key Findings

### Age

The MRA policy affects judicial office holders by setting a fixed retirement age. Any person who reaches this age must retire from full-time service. A higher MRA allows judicial office holders to work for longer. This would mitigate against the potential discriminatory impact of having an MRA, by enabling judicial office holders who wish to do so, to stay in their roles for longer than they may currently do so.

The [Scottish Tribunals Annual Report](#) for 2019/2020 shows that, at 31 March 2020, 37% of first-tier tribunal members were aged 50-59 and 29% were aged 60 and over.

The [Judicial Attitudes Survey 2020](#) provides demographic analysis of current salaried judiciary. The response rate for the survey was 82%.

The survey showed that there are only small proportions of salaried judges (court judiciary) under 50 years of age in most judicial posts.

- Summary sheriffs have the highest representation of younger judges, with the single largest group (39%) under 50.
- Two thirds of senators (66%) are 60 and older, with almost a third 50-59 (30%).
- Almost half (47%) of all sheriffs are between 60-65 years of age, with over a third (34%) aged 50-59.

Applicants are appointed to salaried judicial posts only after a substantial time in legal practice, and therefore it is to be expected that judicial office holders will take up appointments later in their careers. A higher MRA would provide more opportunities for all potential candidates to achieve the experience required to allow them to apply to judicial office.

This is particularly the case for older applicants, as a higher MRA will both increase opportunities for them to apply and lengthen their possible time in service. This may encourage more older candidates to apply who would otherwise be disincentivised by the limited time in office. However, at least in the short term, it is likely to reduce opportunities for younger candidates to apply for judicial offices, as recruitment opportunities are largely driven by retirements.

According to data from the Judicial Office for Scotland, during the last eleven years the average age at which the salaried court judiciary have retired is 66, which is below the current MRA. 16.2% of salaried court judiciary remained in post until their MRA.

As many judicial office holders already retire before the current MRA of 70, there would continue to be opportunities for new or younger candidates to apply while still increasing opportunities for older candidates should they wish to apply at a later point in their careers.

The higher the MRA, the higher the risk of diminished capacity as [data on the incidence of dementia in the UK population](#) shows that this increases with age. Between 65-69 this is 1.6%, between 70-74 it is 3% and between 75-79 it is 6%. Preserving the dignity of the judiciary by avoiding the need for individual assessment of health and capacity goes inseparably with the requirement for judicial independence. In Scotland, a judge may only be removed for 'inability, neglect of duty or misbehaviour.' As such, an MRA also ensures that the risk of diminishing capacity of individual members of the judiciary which could require individual assessments are avoided. While an increase in MRA does not appear that it would significantly impact on this, a much higher MRA (eg, 80), is likely to risk introducing the need for assessments of individuals' capacity.

The risk of judges remaining in office with diminished capacity could lead to lower public confidence in the judiciary. We are not currently aware of any evidence that an MRA increase would affect public confidence in the capacity of the judiciary. There are no public opinion surveys that evaluate perceptions of judicial capacity. According to the most recent [Ipsos Mori Veracity Index 2019](#), public trust in the judiciary remains very high (81%) and it has remained at stable levels since the Index was created in 1983, despite variations in MRA. This is a UK-wide survey.

The [Judicial Attitudes Survey 2020](#) identified concern amongst current judiciary about the loss of experienced judges. A higher MRA would retain skilled and experienced judges for longer, which in turn may address potential concerns about public confidence in an older judiciary and concerns from the judiciary about loss of experienced judges.

## Sex

The [Scottish Tribunals Annual Report](#) for 2019/2020 shows that, at 31 March 2020, 57% of first-tier tribunal members were female and 43% were male.

The [Judicial Attitudes Survey 2020](#) showed that female judges (26.5%) are under-represented in the salaried judiciary in relation to their representation in the Scottish population (51.5%)

Improving the gender diversity of the judiciary can only currently be achieved at entry point through new appointments. Recruitment statistics from the Judicial Appointments Board for Scotland (JABS) show that recruitment of women to judicial office lags behind that of men. A higher MRA would, in the short term, slow down the turnover of the judiciary, which reduces opportunities for women to apply for judicial roles.

However, a higher MRA would provide increased opportunities for women who may take a longer career path to the judiciary due to career breaks or caring responsibilities. The [Law Society of Scotland's Profile of the Profession Survey 2018](#) showed that the most frequent reason identified for why comparatively few women reach senior positions was that it is difficult to reach senior levels and have a family. Therefore, a higher MRA may provide increased opportunities for women by allowing a longer period to get the experience needed to apply for judicial office and a longer period of service before mandatory retirement.

## Race

Figures for ethnicity are not held for Scottish Tribunal members.

The [2020 Judicial Attitudes Survey](#) reported that ‘non-White judges comprised 2% of the salaried [court] judiciary that self-identified their ethnicity.’ This is below the Scottish population level, where in 2018, ‘96% of the Scottish population self-identified as White and 4% self-identified as non-White ethnicities.’

The [Law Society of Scotland’s Profile of the Profession Survey 2018](#) noted that ‘there is a perception that comparatively few BAME solicitors make partner or take up judicial appointments.’ Respondents to the survey most frequently felt that comparatively few BAME solicitors reach senior positions because of unconscious bias. The second most frequent answer was that ‘traditional networks and routes to promotion can exclude BAME solicitors.’

Increasing the racial diversity of the judiciary can only currently be achieved at entry point through new appointments. A higher MRA, in the short term, slows down the turnover of the judiciary, which reduces the opportunity for minority ethnic candidates to apply for judicial roles.

However, this may be offset by the fact that increased MRA would provide increased opportunities for individuals who may take a longer career path to the judiciary due to facing barriers to career progression.

The Ministry of Justice are raising the MRA for reserved judicial offices. A similar raise in Scotland ensures that judicial office holders in Scotland are treated comparably to judicial office holders in other nations in the UK, and all judicial office holders are treated equally with regards to MRA regardless of their domicile or nationality.

## **Recommendations and Conclusion**

Raising the MRA would mitigate against the potential discriminatory impact of having an MRA.

While raising the MRA may reduce opportunities for new candidates to apply for judicial office in the shorter term, what is not so clear is the overall impact on other protected characteristics. As the average age of retirement for salaried judicial office holders is 66, assuming that that trend will continue, opportunities for new candidates to apply would continue. An increased MRA may allow people from underrepresented groups sufficient time to gain the experience needed to apply for judicial office, including later in life and to serve for longer once in post.

The EQIA has helped to ensure that the policy meets its aims of having a judiciary that is capable of meeting the needs of the courts, has public confidence and is representative of the Scottish public.



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Any enquiries regarding this publication should be sent to us at  
The Scottish Government  
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ISBN: 978-1-80004-866-9 (web only)

Published by The Scottish Government, March 2021

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS846067 (03/21)