



**Judicial Mandatory Retirement Age
Consultation on the mandatory retirement age for
judicial office holders**

JUSTICE consultation response

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1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. Established in 1957, our vision is of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law.
2. This briefing responds to the Ministry of Justice's consultation on whether to raise the mandatory retirement age ("MRA") for judicial office holders and, if so, to what age (the "Consultation").
3. JUSTICE has long worked on the effective operation of the judiciary, publishing key reports in 1972 and 1992. The latter of these reports proposed a body very similar to what became the Judicial Appointment Commission. In 2017, we published a report looking specifically at the lack of diversity in the judiciary and making recommendations for ways to improve it. Most recently, in January 2020, we published an update to our 2017 report; this assessed the progress that had been made since 2017, outlined areas that remain of critical concern and made further recommendations for improving judicial diversity.
4. We are therefore particularly concerned about the potential impacts of increasing the MRA on the diversity of the judiciary. We have therefore limited our response to this issue, which will be relevant to questions 3A, 3B, 4A, 4B, 6A, 6B.
5. We are pleased that the Consultation recognises the need to promote opportunity and diversity through the steady flow of new appointees. And that promotion of judicial diversity is one of the stated objectives for setting the MRA.
6. We also recognise the issues with recruitment shortfalls, particularly for the High Court, Circuit and District benches as well as magistrates. However, we are concerned that raising the mandatory retirement age will have an adverse impact on the diversity of the judiciary for the following reasons.
7. As recognised in the Consultation document and equality statement, raising the MRA is likely to have an impact on judicial diversity because new appointees to judicial office tend to be more diverse than older incumbents. If the MRA is raised this will result in some incumbents remaining in post longer, resulting in fewer opportunities for the appointment of new, and likely more diverse, judges. It was for this reason that JUSTICE supported the

2016 proposal in the 'Modernising Judicial Terms and Conditions' consultation for single non-renewable fixed term appointments to Recorder and Deputy High Court Judge.¹

8. We note that the Consultation emphasises the fact that the impact of raising the MRA on judicial diversity is on diversity growth. Despite some improvements in recent years, progress in improving judicial diversity has been slow and the UK's judiciary remains un-diverse. This cannot continue; a diverse judiciary is crucial as a matter of legitimacy, quality and fairness. Therefore, in our view, any measure that adversely impacts on diversity growth is a significant issue.
9. The equality statement states that a very small proportion of judicial office holders would remain until the higher MRA, assuming future retirement behaviour will mirror current behaviour. However, it is also acknowledged that future changes to remuneration or working conditions could change these behaviours. We note that there is a current consultation on changes to the judicial pension scheme which, if implemented, may well make it more attractive for judicial office holders to remain in post for longer.² This would increase the adverse impact on diversity as the older, less diverse judges remain in their positions for longer.
10. The focus of JUSTICE's work on judicial diversity has been in respect of the senior judiciary, where the lack of diversity is most acute. We are therefore particularly concerned that the impact on diversity will likely be felt most acutely in respect of Recorders – a key feeder role for the senior judiciary; six per cent of Recorders aged 65 and above are women compared with 42 per cent of recent recruits.³
11. We note that in relation to ethnicity the Ministry of Justice's analysis shows that there will be minimal impact on diversity.⁴ This is because of the shockingly low proportion of both older judicial office holders and recent recruits who are non-white. In fact, in respect of Deputy High Court Judges, the office holders aged 65 or above are more diverse than the recent recruits.

¹ JUSTICE, *Modernising Judicial Terms and Conditions*, JUSTICE consultation response (November 2016) available at <https://justice.org.uk/wp-content/uploads/2016/11/JUSTICE-Modernising-Judicial-Terms-and-Conditions-29-Nov-16-final.pdf>

² Para 52 of the Consultation states, "If the MRA for judges were to be increased, judges would increase the net value of their pension if they remained in service until reaching the new, higher MRA. This is because scheme members would gain from the effect of extra accrual and, under the reformed scheme, judges would not be impacted by the service cap or lifetime tax allowance if they were to work to the increased MRA."

³ Equality Statement, Annex B: Female proportion of retiring JOHs and new entrants.

⁴ Equality Statement, Annex C: Breakdown of race of retiring JOHs and new entrants.

12. However, comparing the diversity of older judicial office holders with recent recruits alone does not provide the whole picture in respect of judicial diversity. The modelling done by the Ministry of Justice assumes that the diversity of new appointments remains static.⁵ However, it looks at the impact on judicial diversity in the medium-long term, which is considered to be within 10 years of implementation. Given that the Judicial Appointments Commission, senior judiciary and legal profession have all expressed their commitment to a diverse judiciary, we would hope that the diversity of new appointees drastically improves from that of recent recruits. If it does, then the impact on judicial diversity would be greater.
13. In our 2017 report *Increasing Judicial Diversity*,⁶ three of our key recommendations were:
- a. the introduction of targets with ‘teeth’ i.e. targets for selection bodies, with the ‘teeth’ being obligations to comply and/or explain, reporting on progress to the Justice Select Committee;
 - b. the creation of “appointable pools” i.e. talent pools of people who are deemed to have met the very high standard of appointability for the relevant post. When judicial vacancies arose, candidates would be selected from the pool, taking into account institutional needs, including that of greater diversity - meaning that diverse candidates would be given priority appointments; and
 - c. creating an upward judicial career path.

An increase in the MRA would make these recommendations harder to implement and less effective methods of increasing judicial diversity, as judges staying longer in post would mean fewer recruitment opportunities and a slower path to more senior posts.

14. We acknowledge that in theory the MRA could have a positive impact on diversity by providing greater opportunity for those who have taken longer to gain the experience necessary for judicial office, for example, because they took a career break, worked part time or faced structural barriers to career progression in private practice. However, in practice, our analysis of judicial appointments to the Circuit bench and High Court bench, released in February 2020, reveals that in recent years women have been appointed to these courts more swiftly and with less experience than male counterparts. Whilst more evidence is needed to fully understand this potential impact on diversity, our analysis

⁵ Consultation, para 77.

⁶ JUSTICE, *Increasing Judicial Diversity* (April 2017), available at <https://justice.org.uk/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>.

suggests that, at least in respect of gender, this benefit is unlikely to materialise in practice and that raising the MRA will have an overall negative impact on judicial diversity.

15. In light of the above, we recommend that current MRA is retained. In the event that it is agreed to raise the MRA, given that an MRA of 75 would be substantially worse for judicial diversity, we would urge that it only be increased to 72.

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