

Equality Statement

Reviewing the Judicial Mandatory Retirement Age

1. This Equality Statement (ES) documents the assessment undertaken by the Ministry of Justice (MoJ) of the identified equality impacts of a change to the mandatory retirement age (MRA) for judicial office holders for which the Lord Chancellor is responsible. The MRA is set out in s.26 and Schedule 5 of the Judicial Pensions and Retirement Act (JUPRA) 1993 (for courts and tribunals judiciary¹), s.13 of the Courts Act 2003 (magistrates in England and Wales) and Coroners and Justice Act 2009 (coroners in England and Wales). This assessment has been undertaken to enable Ministers to fulfil the requirements placed on them by the Public Sector Equality Duty (PSED), in accordance with section 149 of the Equality Act 2010. This statement accompanies the public consultation documentation.
2. We have sought, whenever possible, to use available evidence to assess the equality impacts. For matters where we believe we may lack relevant evidence, we have either included relevant public consultation questions to collect evidence, or we have specified the limits of the data currently collected. We will reassess the equality impacts if the consultation provides significant new evidence.

1. Background

3. The MRA is currently set at 70 by JUPRA 1993 for most judicial office holders across England and Wales, Scotland and Northern Ireland. The scope of this consultation is limited to judicial offices for which the Lord Chancellor holds the responsibility for setting the terms and conditions. The governments of Scotland, Northern Ireland, and Wales may wish to hold their own consultations for devolved judicial offices. For magistrates sitting in England and Wales, the MRA of 70 is set by the Courts Act 2003. Coroners appointed after the Coroners and Justice Act 2009 came into force (in July 2013, 'new terms') also have an MRA of 70, aligned to that of the wider judiciary.
4. There is a strong justification for having an MRA for judicial office holders, in contrast to other professions. A set MRA protects judicial independence by reducing the need for individual assessments of health or capacity. In addition, it balances the need for a judicial office holder (JOH) to continue in office for a reasonable time against the need to create opportunities for new judicial careers. Finally, it is believed to maintain public confidence in the capacity of the judiciary to deliver justice. The Government considers that these rationales remain strong and it is therefore not consulting on removing the MRA for judicial office holders.
5. There are nonetheless recent changes that warrant scrutiny and have led us to explore whether the MRA should be raised. They are summarised below.

2. Policy and rationale

6. Several elements have changed since the MRA was set for paid judiciary at 70 in JUPRA in 1993. First, life expectancy has increased since 1993. The Office for National

¹ Including courts judiciary in England and Wales and Northern Ireland, as well as coroners in Northern Ireland.

Statistics (ONS) 2019 life expectancy report shows that life expectancy increased by 5.8 years for men and 4.1 years for women since 1993 (and increases for men and women will continue albeit at a slower rate).² An MRA increase would acknowledge that JOHs live longer and can offer their expertise for a longer period of time.

7. Second, the review of MRA needs to be considered in the wider context of the Lord Chancellor's constitutional duty to provide resources for the efficient and effective support of courts and tribunals. This duty includes consideration of policies that might affect the recruitment and retention of JOHs. Whilst we continue to consider there are strong objective justifications for having an MRA – such as guaranteeing that new generations have access to judicial office and minimising the need for assessments of capacity – an increased MRA could improve the recruitment and retention of JOHs.
8. Some commentators, including judges, have argued that raising the MRA might increase the attractiveness of the judiciary to new applicants, especially to applicants for senior judicial offices who might still have a reasonable length of time to sit and “be on the Bench long enough to have a chance of further promotion”.³ Similarly, the Bar Council have argued that raising the MRA may enable those who have taken career breaks or have been working less than full time the opportunity to prepare for salaried judicial office. We could not find evidence to show an MRA increase would improve recruitment, but we believe there is merit in exploring this rationale. The consultation includes questions to collect a broad range of views on whether this is a reasonable assumption.
9. More importantly, an increased MRA would allow the existing judiciary to retire later which is a key benefit in a context of resourcing pressures. The resourcing picture has changed significantly compared to 1993 for courts in England and Wales and the Unified Tribunals. This is reflected in the scale of judicial recruitment undertaken by the Judicial Appointments Commission, which before 2017 was on average making approximately 500 recommendations per year, and it has been increasing to approximately 1,000 recommendations in recent years, to cope with additional requirements. While the size of the programme is expected to decrease slightly from 2021/22 (as the recruitment backlog has been tackled), sustained levels of recruitment will be required to cope with demand across all jurisdictions and to replace departures.
10. In this context of increased recruitment needs, there have been recruitment shortfalls at High Court, Circuit Bench and latterly District Bench exercises. There are also significant recruitment challenges at magistrate level. We do not have evidence of a similar issue for coroners, as recruitment is undertaken by individual local authorities, but the Local Government Association indicated there are less pressing recruitment pressures for coroners. Recruitment remains a key measure in ensuring the judiciary has sufficient resource to deal with caseloads, and it has been an important driver of increase in judicial diversity.
11. Some arguments made in the past against an increased MRA were that a higher MRA might increase the risk that judges lack the capacity to properly deal with cases, which could in turn lead to decreasing public confidence in them. We have considered whether a higher MRA might result in greater numbers of JOHs unable to sit due to ill-health, including issues of mental capacity, despite the consideration of any reasonable adjustments for disability. MoJ does not hold sickness data for the judiciary, but a preliminary analysis by the Judicial Office indicates that a smaller proportion of judges aged 65+ have taken sick leave, compared to judges aged 45-64, in the past three years (2016-19). This is consistent with national-level data provided by ONS, which shows that

² ONS “Past and projected data from the period and cohort life tables, 2018-based, UK: 1981 to 2068”, December 2019

³ Turenne and Bell (for SSRB) “The Attractiveness of Judicial Appointments in the United Kingdom”, January 2018; Morison and Dickson (for NIJAC) “Barriers to High Court Appointments in Northern Ireland”, June 2019.

sickness absence rates for workers aged 65+ have been consistently lower than those aged 50-64 since 1993.⁴

12. On the question of whether a higher age might negatively affect the public confidence in the capacity and health of the judiciary, we are not currently aware of any evidence that an MRA increase to 72 or 75 would likely 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.⁵
13. In the context of the significant changes mentioned above, we are consulting on whether an increase of the MRA to 72 or 75 would help address the current recruitment and retention challenges, whilst considering the potential equalities impacts on JOHs with protected characteristics, as defined by the Equality Act 2010.
14. This review of the current MRA has also been endorsed by the Lords' Constitution Committee,⁶ the Senior Salaries Review Body,⁷ and the House of Commons Justice Select Committee.⁸ In addition, the Magistrates Association and the Magistrates Leadership Executive have formulated proposals for extending magistrates' tenure beyond 70 on a business-needs basis.
15. We consider that a change to the MRA that applies consistently to *all* JOHs, rather than to a specific cohort of judges (for example, senior judges), is most appropriate. Given the strong links between a set MRA and considerations of judicial independence, the Government believes parity in treatment across all judicial offices is particularly important, unless there are strong justifications for differentiation. A consistent approach also minimises the risk of unlawful discrimination claims.
16. We similarly think a change in MRA for magistrates is most appropriate to maintain alignment with the wider judiciary for the same reason, although given the more significant retention impacts, there are merits to also including consideration of case-by-case extensions for magistrates in this consultation. As explained in the consultation, MRA has been imposed much more recently for coroners (since July 2013), and therefore a substantive number of coroners have retained their pre-2013 lack of MRA. A change in MRA would only affect coroners who already have an MRA set at 70 ('new terms' coroners). A more specific assessment, based on the available evidence, of this change in light of each limb of the PSED in relation to the protected characteristics is detailed in the sections below.

3. Equality Analysis – framework and data sources

17. Section 149 of the Equality Act 2010 ('the Act') and the Equality Act 2010 (Specific Duties) Regulations 2011 require public authorities, in the exercise of their functions, to have due regard to the need to:
 - a. Eliminate discrimination, harassment and victimisation and any other conduct that is prohibited by or under the Act.

⁴ ONS "Sickness absence in the UK labour market – 2018 data", November 2019

⁵ Ipsos MORI Veracity Index 2019, November 2019

⁶ House of Lords Constitution Committee, "Judicial Appointments: Follow Up", November 2017

⁷ Review Body on Senior Salaries, "Supplement to the Fortieth Annual Report on Senior Salaries 2018", October 2018

⁸ House of Commons Justice Select Committee, "The Role of the Magistracy: Follow Up", June 2019

- b. Advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it.
 - c. Foster good relations between people who share a relevant protected characteristic and those who do not share it.
18. There are nine protected characteristics that fall within the Act: sex, race, disability, age, sexual orientation, religion and belief, gender reassignment, marriage & civil partnership, pregnancy & maternity. The characteristics of marriage and civil partnership are relevant only when considering the first limb of the duty.
19. We have endeavoured, insofar as possible, to review the available evidence across all nine protected characteristics. Data on JOHs from England and Wales courts and Unified Tribunals is held by the Judicial Office (JO), whilst data on new appointments is held by the Judicial Appointments Commission (JAC). Data on current JOHs from Northern Ireland for which the Lord Chancellor is responsible is held by the office of Lord Chief Justice (Northern Ireland), and for new appointments by the Northern Ireland Judicial Appointments Commission (NIJAC). The data provided by Northern Ireland is summarised in section 5.4.
20. We undertook our assessment on three protected characteristics – sex, race and age – as these are the protected characteristics most consistently recorded in both Judicial Appointments Commission (JAC) recruitment data and Judicial Office eHR database, which contains all current judicial office holders. We were not able to conduct analysis on the remaining six protected characteristics for the following reasons:
- a. **Disability** – this is recorded and reported by the JAC. However, until recently, the JO only collected this information on a non-mandatory basis by self-declaration. It is not currently possible to differentiate between those without a disability and those who chose not to respond to the disability question. JO are changing the way they collect diversity information to help resolve this issue. This will allow JOHs to self-record / update their diversity information.
 - b. **Gender reassignment** – no data was available at the time of our assessment. The JAC have recently revised their candidate equalities monitoring form to collect information, but data will not be reported until 2021 at the earliest. The JO will include this as a field for JOHs to self-record during the current reporting year.
 - c. **Marriage and civil partnership** – no data was available at the time of our assessment. The JAC do not record this information. The JO will include this as a field for JOHs to self-record during the current reporting year.
 - d. **Pregnancy and maternity** – no data was available at the time of our assessment. The JAC and JO do not record this information through their diversity monitoring forms.
 - e. **Religion or belief** – no data was available at the time of our assessment. The JAC record and report this information at an aggregate level (i.e. for all exercises during a financial year). The JO will include this as a field for JOHs to self-record during the current reporting year.
 - f. **Sexual orientation** – the JAC record and report this information at an aggregate level (i.e. for all exercises during a financial year). The JO will include this as a field for JOHs to self-record during the current reporting year.
21. Whilst there are improvements in the recording of protected characteristics in JO and JAC databases, the new data will not be aggregated soon enough to inform this consultation.

22. In addition to the Public Sector Equality Duty, the Lord Chancellor and the Lord Chief Justice have a statutory responsibility to encourage judicial diversity. We have therefore paid particular attention to assessing whether a change to the MRA could affect the diversity of the judiciary, compared to maintaining the MRA unchanged. A summary of our assessment can be found in section 4.2 below, where it shows a change to the MRA would not be incompatible with the statutory responsibility, as it does not reverse current efforts in improving judicial diversity.
23. Equalities data is unfortunately much more limited for coroners, partly due to the lack of centralised data. The Chief Coroner's Office has provided data on male / female ratio and age for 'new terms' coroners and recent appointments, but data on all other characteristics is missing. For the purposes of this assessment, we considered it disproportionate to request data from individual local authorities. The Chief Coroner's Office intends to undertake a Coroners' Attitude Survey which may be used to collect data on protected characteristics for future analysis.

4. Direct discrimination

24. Imposing a mandatory retirement age is *prima facie* direct **age** discrimination – that is, direct discrimination on the basis of the protected characteristic of age. Under the Equality Act 2010, discrimination is not unlawful if it constitutes a proportionate means of achieving a legitimate aim.⁹
25. Having a set mandatory retirement age fulfils the legitimate aims of promoting and preserving judicial independence by avoiding the need to make individual decisions of suitability in every case; preserving the dignity of the judiciary by avoiding the need for individual assessments of health and capacity; and of maintaining public confidence in the capacity and health of the judiciary. These justifications were successfully defended in *White v MoJ*,¹⁰ and we believe they remain legitimate. We do not therefore intend to remove the MRA, but to determine whether a new, increased, level, is proportionate, in light of new realities.
26. We have considered whether the proposal to set the MRA at 72 or 75 is proportionate in relation to the following two aims, which we consider legitimate:
 - a. **Workforce¹¹ planning**: ensuring there is an appropriate number of JOHs at the necessary levels of seniority to meet the needs of various jurisdictions and enabling reasonable accurate forecasts of future need;
 - b. **Inter-generational fairness**: ensuring that experienced JOHs can continue in office for a reasonable time, given recent increases in life expectancy, while ensuring a balance of opportunity between generations and accounting for effects on judicial diversity.
27. At this stage, we consider that setting the MRA at either 72 or 75 would be a proportionate means of achieving these legitimate aims, for the reasons set out below. We look forward for evidence during consultation on which MRA would be most appropriate in striking the right balance.

⁹ Equality Act 2010, s. 13(2)

¹⁰ *Mr G B N White v Ministry of Justice*, Case No. 2201298/2013, Employment Tribunal, 20 Nov 2014

¹¹ "Workforce planning" is the technical term used in age discrimination legislation and caselaw to refer to the accepted justifications for having a certain set retirement age. Judicial office holders are not employees and do not constitute a workforce in the common sense, but we have employed this term here to make a clear link to the relevant justifications in previous caselaw.

4.1. Workforce planning: ensuring appropriate numbers of JOHs

28. As explained in Section 2 above, the Government considers an increase to the MRA will effectively further the legitimate aim of ensuring there is a sufficient number of JOHs to cope with the current and future jurisdictional caseload. This aim is aligned with the constitutional duty of the Lord Chancellor to ensure provision of resources for the efficient and effective support of the courts for which he is responsible.¹²
29. Since 2006, recruitment for most judges in England and Wales has been undertaken by the JAC. Annual recruitment was at average of 400-500 recommendations,¹³ but this increased to about 700 in 2017/18 and in excess of 1,000 since 2018/19, reflecting both the pattern of limited recruitment undertaken between 2014 and 2017 and an increase in demand on our courts and tribunals. Future forecasts indicate that there will be continued substantive recruitment required in the next few years.
30. A recent picture has emerged of recruitment shortfalls, i.e. fewer candidates are recommended for appointment compared to the business need. This has been seen for many types of office: High Court Judge (since 2015), Circuit Judge (since 2016), First Tier Tribunal (in 2017), and District Judge (from 2017). There have also been significant challenges in recruiting sufficient magistrates. In this context, a higher MRA would contribute to the legitimate aim of ensuring appropriate levels of judicial resource, by retaining more existing judicial office holders.
31. Since 2013 for coroners and 2003 for magistrates, there has been alignment of their MRA with other JOHs, reflecting the integrated nature of our judiciary. Therefore, the consultation on the judicial MRA will include coroners and magistrates.
32. The Government has undertaken analysis to determine which MRA level is the most proportionate measure to meet this legitimate aim (the 'retention analysis'). As explained in the consultation document, we have considered 72 and 75 as the most appropriate options to evaluate. In this retention analysis, we accounted for the JOHs approaching retirement and quantified how much additional resource they would constitute if we increased the MRA to 72 or 75.
33. In our modelling, we took into account current retirement data, which shows that a majority of judges retire before their MRA. Our assessment is that an increase in MRA would result in a very small proportion of judicial office holders remaining until the higher MRA (the 'best estimate' scenarios) by assuming future retirement behaviour will be similar to current behaviour – although future changes in remuneration or working conditions could change these behaviours. We also looked at the extreme scenario where all JOHs would decide to stay up to the new MRA (summarised in the Impact Assessment).
34. Given future forecasts of judicial recruitment, combined with this preliminary assessment of retention impacts, we anticipate that an increase in MRA to either 72 or 75 would be a proportionate change, with a change to 75 yielding higher retention impacts than 72. Our assessment is that:
- a. For MRA 72: 3% of the current judicial complement would remain in office on average every year (the equivalent of 245 JOHs), which is the equivalent of 31% of the forecasted annual recruitment programme.¹⁴ For magistrates, an increase

¹² Constitutional Reform Act 2005, s. 17

¹³ With the notable exception of 2006/07 when 1,000 JOHs were recruited. This could be due to a recruitment backlog from the pre-JAC years.

¹⁴ Assuming the JAC programme would have a size of 800 appointments per year, based on our current forecasts for beyond 2021/22 (it would represent 24% of the current JAC programme of 1,000 vacancies). If caseload requirements decrease in the future, the retention impact would be even more significant compared to the recruitment programme.

to 72 is expected to retain 7% of the current complement (1,056 magistrates) yearly.

- b. For MRA 75: 5% of the current judicial complement would remain in office on average every year (the equivalent of 399 JOHs), which is the equivalent of 50% of the forecasted annual recruitment programme.¹⁵ For magistrates, an increase to 75 is expected to retain 15% of the current complement (2,122 magistrates) yearly.

- 35. The retention impact can vary by type of office – this is due to the age profile of different types of office. In courts, a higher proportion of High Court, Deputy High Court, Deputy District Judges and Deputy District Judges (Magistrates Courts) might be retained, whilst retention impacts might be smaller for District Judges and Circuit Judges. In tribunals, non-legal and medical members might have higher retention rates than tribunal judges. The numbers for Court of Appeal and Supreme Court judges are too small to warrant a reliable analysis.
- 36. We do not hold the same level of data for coroners and the figures involved are significantly smaller.¹⁶ Data from the Chief Coroner's Office (CCO) suggests there are currently 386 coroners appointed after July 2013 ('new terms') who would be affected by an MRA change, and another 284 coroners who do not have a set MRA ('old terms'). There are currently 62 'new terms' coroners aged 60+ who would reach MRA in the next decade (9% of all 'new terms' coroners), and would therefore benefit from the new MRA. We do not know the age distribution of those approaching retirement, but an average annual retention impact would not be higher than 1% compared to the overall headcount. The numbers are very small and need to be interpreted with caution. A summary of available data can be found in Annex D.

4.2. Turnover and diversity: enabling experienced JOHs to continue in their role for a reasonable time, whilst maintaining opportunities for new JOHs and promoting judicial diversity

- 37. One of the aims of this policy is that experienced JOHs should be able to continue in their roles for a reasonable time, whilst allowing sufficient opportunities for younger generations to take up judicial appointments. This is particularly important in the context of Lord Chancellor's duty to encourage judicial diversity, as it is believed that a decrease in turnover would negatively affect the future diversity of the judiciary.
- 38. To evaluate how an MRA increase might change the turnover of JOHs with protected characteristics (and therefore affect overall diversity), we compared the diversity makeup of judicial office holders (JOHs) approaching retirement (aged 65+) with the one of newly-appointed JOHs (recruited by the JAC within the last 4 years). Based on JAC diversity statistics from 2015 to 2019, 54% of recommended candidates had at least one under-represented characteristic (female or BAME), compared to only 34% of retiring judges. This suggests that new appointments are generally more diverse in terms of race and sex than judicial office holders approaching retirement.
- 39. Looking at the overall results above is not sufficient to give a measure of the annual turnover or of actual diversity impacts. This is because not all judges will choose to stay, and retirements will be phased across several years. The size of turnover compared to the entire complement also needs to be considered. We therefore conducted more detailed modelling of turnover and diversity impacts, based on the yearly rates of

¹⁵ Assuming the JAC programme would have a size of 800 appointments per year, based on our current forecasts for 2021/22 (or 40% of the current JAC programme of 1,000 vacancies). If caseload requirements decrease in the future, the retention impact would be even more significant compared to the recruitment programme.

¹⁶ There are only 3 substantive coroners and 13 salaried judges who also hold appointments as coroners in Northern Ireland. Given the very small numbers involved, no analysis can be meaningfully done.

departures, by taking into account the overall size of the judiciary. Our turnover and diversity analysis concluded that:

- a. An increase of MRA to 72 could see up to 3% of the current paid judiciary and 7% of current magistracy retained every year. An MRA increase of 72 would have a small impact on diversity (i.e. the proportion of the judiciary that are female, BAME or both): the overall judiciary is forecast to be 1-2% less diverse relative to keeping the existing MRA in the short term, and could be less diverse by 1% in the medium term. Some larger categories of JOHs (e.g. Recorders, DDJs, DDJ(MC)s, tribunal non-legal members) will be the more likely affected, due to their cohort size, age profile and difference between retiring judges and new appointments. The effects of MRA would mean judicial diversity efforts would be slowed down, but not reversed.
- b. An increase of MRA to 75 could see a slower turnover compared to 72; it is estimated 5% of the paid judiciary and 15% of the magistracy could decide to stay on the bench every year. This would have a more significant impact on overall judicial diversity – the overall judiciary is forecast to be 2% less diverse relative to keeping the existing MRA in the short term, and could be less diverse by 1-3% in the medium term.

40. We conclude from Sections 4.1 and 4.2 that an increase in MRA to 72 or 75 would have only a marginal impact in delaying the recruitment of new JOHs (judges and magistrates), given that the proportion of JOHs expected to remain longer is small compared to the overall judicial complement. This slower turnover would also lead to a marginal slowing down of the likely improvements in diversity, rather than a decrease of diversity, although this effect will be larger for 75 compared to 72. This effect is further detailed in section 5 below. We therefore consider that an increase of MRA to 72 or 75 constitutes a proportionate means of achieving the legitimate aim of enabling experienced judges to continue in their role, whilst balancing their interests against the desire of new generations to accede to judicial roles. Annex A presents the current age breakdown of the current complement and of new entrants for all jurisdictions affected.

41. We are unable to make similar assessments of turnover and impact on diversity on ‘new terms’ coroners, as the numbers involved are significantly smaller. Annual turnover of ‘new terms’ coroners is likely to be very small (up to 1%), due to their age profile. The Chief Coroner’s Office has advised that diversity is not such a key concern for coroners as it is for judges, although efforts are made during recruitment to account for diversity of candidates.

4.3. Direct discrimination in relation to other protected characteristics

42. We do not have any evidence that a change in mandatory retirement age would constitute direct discrimination on protected characteristics other than age. The new mandatory retirement age will apply across all judicial office holders equally, with no JOH with other protected characteristics being treated less favourably by the proposals compared to those JOHs who do not share the protected characteristic.

5. Indirect discrimination

43. We have assessed whether an MRA increase would indirectly discriminate against judicial office holders who share a relevant protected characteristic (sex or race).

5.1. Sex

44. A higher MRA would apply to all existing and future judicial office holders (JOHs) at the time of it coming into force. It will be for each JOH to decide whether they wish to remain in office until their MRA.
45. We have made a preliminary evaluation of whether an MRA increase might create sex-based indirect discrimination. To do so, we compared the male / female profile of JOHs approaching retirement with the JOHs that have been recently recruited by JAC. We have applied the same methodology described in section 4.2 above (relating to yearly turnover).
46. Based on JAC diversity statistics from 2015 to 2019, 46% of applicants recommended for appointment by the JAC were women compared to 27% of JOHs (other than magistrates and coroners) who are approaching retirement (aged 65+). Similarly, 58% of new magistrates were women, compared to 50% magistrates approaching retirement. This might suggest that an increase in MRA could retain a bigger proportion of men. We have no evidence to believe that either men or women are more likely to wish to remain in office. We reviewed ONS national-level data but were unable to find data on female / male statistics of workers above 70 to see whether males or females are more likely to continue working. We are seeking evidence on this point from the consultation.
47. This effect can vary across judicial offices. Annex B shows the proportion of JOHs approaching retirement who are women, the proportion of newly-appointed JOHs who are women, and the difference factor, which shows the magnitude of difference.
48. This would suggest that District Judges (Magistrates' Courts), Deputy District Judges (Magistrates' Courts), Recorders and Employment Tribunal Fee Paid Judges might be most affected, i.e. a change in MRA would more likely retain men in those posts, but that generally effects on male / female ratio are mixed depending on judicial office.
49. Nonetheless, we believe this snapshot assessment does not accurately reflect the fact that (1) only a small proportion of JOHs will take advantage of the new raised MRA; (2) the departures will take place successively, year by year, as JOHs reach 70+. It also does not take into account the size of the current cohorts, and the small difference new appointments contribute annually to increased gender diversity.
50. We have therefore modelled the potential year-by-year additional retention rate of retiring JOHs, and assessed the difference they might make to the male / female ratio of the overall judiciary. In doing so, we took into account current retirement patterns (accounting for the fact that a small proportion of JOHs stay until they reach MRA), current diversity efforts, and the age profile of current JOHs (with protected characteristics and without). We did not consider it proportionate to conduct any analysis on the effects of a change in MRA to the proportion of JOHs sitting in extensions or retirement, as they constitute an exceptional category (although we present some statistics in section 5.3).
51. Our main conclusion was that, compared to the option of not changing the MRA:
 - a. an increase in MRA to 72 would result in a 1%-1.4% annual decrease of women JOHs in the short term (within the first year of implementation), and of 0.7%-1.1% in the medium-long term (within 10 years of implementation). This effect would be slightly higher for MRA 75, resulting in a 1.5%-2.1% annual decrease of women JOHs in the short term, and 1.2-2.8% in the medium-long term.
 - b. there will be little impact on the proportion of the magistrates who are women (a maximum of 0.5% fewer women could be retained) for an increase of MRA to 72, given the small differences between new appointments and retirees. This effect would be slightly higher for an MRA of 75 (a maximum of 1.3% fewer women magistrates), but still marginal. Recent magistrate appointments have been 58%

women, so in effect this change would contribute to a balancing the male / female ratio on the magistrate bench.

52. We believe that the overall impact is marginal and would not be likely to constitute a particular disadvantage on the basis of sex. These minimal impacts are justified as a proportionate means of achieving the legitimate aims set out above. We will monitor the impacts of a raised MRA on female retention by monitoring the male / female ratio of JOHs who stay beyond 70.
53. Available data on male / female ratio from CCO suggests 'new terms' coroners who will be approaching retirement in the next decade are only slightly less gender diverse than recent appointments (35% vs 49% women), which suggests an increase in MRA would affect diversity. That said, these effects are probably negligible, due to the very small number of yearly retirements, compared to the overall complement. We are unable to quantify impacts for MRA 72 compared to MRA 75 due to the very small numbers involved, but we estimate impacts would be higher for MRA 75. A summary of data is available in Annex D.

5.2. Race

54. An increased MRA would be available to all existing and future judicial office holders (JOHs) at the time of the implementation of the policy, irrespective of their race. It will be for each JOH power to decide whether they wish to remain in office until their new MRA or leave the judiciary sooner.
55. We have made a preliminary evaluation of whether an MRA increase might create race-based indirect discrimination. We used the same methodology as for male / female ratio – comparing the race of JOHs approaching retirement with newly-appointed JOHs.
56. Based on JAC diversity statistics from 2015 to 2019, around 13% of applicants recommended for appointment by the JAC were BAME compared to 9% of JOHs who are approaching retirement. Similarly, 11% of new magistrates are BAME compared to 5% of magistrates approaching retirement. This might suggest that an increase in MRA could disproportionately retain non-BAME JOHs on the bench. We have no evidence to believe that either BAME or non-BAME JOHs are more likely to wish to stay. We reviewed ONS national-level data but were unable to find statistics on the race of workers above 70 to see whether some groups are more likely to continue working. We welcome any evidence on this point in the consultation.
57. This effect can vary across judicial offices. Annex C shows the proportion of JOHs approaching retirement who are BAME, the proportion of newly-appointed JOHs who are BAME, and the difference factor, which shows how big the difference is between the former and the latter. The annex suggests that for all offices below High Court, the JOHs approaching retirement tend to be less racially diverse than the most recent JAC appointments. Racial diversity at the Court of Appeal and the High Court level is too small to have any impact.
58. Just like for male and female ratio, we believe that this snapshot does not truly capture the impacts on racial diversity, because it does not account (1) for the fact that only some JOHs approaching MRA will stay in office past 70; (2) that the effect of departures will be staggered over the years, and (3) that the effect of the turnover is limited compared to the diversity of the overall judicial complement.
59. We have therefore applied the same methodology as for male to female ratio to assess the overall racial diversity impacts over time, forecasting departures based on current patterns and accounting for the overall size of the cohorts. Our main conclusion was that, compared to the option of not changing the MRA:

- a. there is little impact of an MRA of 72 on the proportion of paid JOHs who are BAME (0.1-0.2% fewer BAME office holders in the short term, and 0.2-0.3% fewer in the medium-long term) given the small differences between new appointments and retirees; for MRA 75, the effect remains almost null, with 0.3-0.4% fewer BAME office holders in the short term, and 0.3%-0.6% fewer BAME office holders in the long term.
 - b. similarly, there is little impact on the proportion of magistrates who are BAME (a maximum of 0.3% fewer BAME) for MRA 72, given the size of the cohort. For MRA 75, the impacts could be more significant (a maximum of 1% fewer BAME), given a lot of retiring magistrates are expected to wish to remain based on current retirement patterns.
60. We believe that the overall impact is marginal and is not likely to result in any particular disadvantage on the basis of race, for both options, although the impact might be almost nil for MRA 72. The minimal impacts are justified as a proportionate means of achieving the legitimate aims set out in sections 4.1 and 4.2 above. We will continue to monitor the impacts of a raised MRA on BAME retention on the bench post-implementation, by gathering data on the race of JOHs who stay beyond 70.
61. There is no centralised data on the race of coroners or other protected characteristics. We are therefore unable to make any assessments of impacts at this stage. We hope the Coroners' Attitude Survey will provide the necessary data for future assessments.

5.3. Effect on extensions of judicial appointments

62. As explained in the main consultation document, an MRA increase would impact the business need argument for the extension of judges' appointments past MRA and of judges sitting in retirement.¹⁷ Generally, we expect that there would be a reduced business need for judges to sit in retirement past MRA or to have their appointments extended beyond the MRA, as judicial resource overall will be increased by JOHs who stay in office longer.
63. At 1 October 2018¹⁸ there were 367 JOHs aged 70-75 whose appointments had been extended past MRA, and 80% of them were male (and 90% non-BAME). In addition, 191 JOHs were sitting in retirement, and over 90% male (and over 90% non-BAME).
64. Approval to extend a judges' appointment is dependent on evidence of a clear business need, for example to maintain geographical, jurisdictional or specialist cover until a new judge can be recruited. We have no evidence that the criteria for approving extensions results in direct or indirect discrimination against judges with protected characteristics.

5.4. Effect on judicial offices in Northern Ireland

65. Given the Lord Chancellor also has a responsibility for setting the terms and conditions for most judicial office holders in Northern Ireland, we have approached the office of the Lord Chief Justice of Northern Ireland for any evidence that might inform our assessment of a change in MRA on JOHs with protected characteristics in excepted Northern Ireland offices.

¹⁷ Provisions to extend appointments past MRA are contained in s.26(5)/(6) JUPRA 1993. In summary, the appropriate person (usually the LCJ for judges in E&W) may, with the Lord Chancellor's concurrence, extend a judge's appointment following their compulsory retirement date for a period of one year if he considers it desirable in the public interest. That appointment can then be extended each year for a further one-year period up to the point at which the relevant judge turns 75. The power to approve some salaried judicial office holders to retire at MRA or retire early and sit as a fee-paid judge in retirement is contained in a variety of instruments pertaining to different judicial offices.

¹⁸ At the time of our analysis, the most recent available dataset from Judicial Office was from 1 Oct 2018. We have assessed, but consider that the more recent JOH headcount data would not have any significant impact on our analysis, given the small degree of turnover of JOHs in a year compared to the overall complement.

66. The Lord Chief Justice for Northern Ireland’s Office (OLCJ) has provided the following breakdown of male to female ratio for JOHs for which the Lord Chancellor is responsible:

Table 1: Difference between retiring JOHs and newly-appointed JOHs (sex) (Northern Ireland)

Total in post	New appointments (past 5 years)	New female appointments	% New Female	JOHs aged 65+	Female Aged 65+	% Female Aged 65+	Difference factor
120	45	10	22%	36	4	11%	11%

67. The data suggests a lower proportion of women are approaching retirement, compared to newly-appointed JOHs. As before, we have no evidence that increasing MRA would particularly disadvantage women. We welcome further evidence on differential motivations in the consultation.

68. Regarding race, OLCJ indicated that 100% of excepted NI judiciary are white. This seems to be lower than the judicial applicant pool (1.2% courts)¹⁹, which might suggest increasing MRA might decrease turnover and therefore slow down an increase in racial diversity, but the numbers are too small to warrant reliable conclusions.

6. Harassment and victimisation

69. Harassment under the Act includes unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating the victim’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

70. We do not consider there would be a risk of harassment or victimisation as a result of the revised policy.

7. Advancing equality of opportunity

71. We have considered how these proposals might impact on the advancement of equality of opportunity. The revised MRA would be available to all current and future judicial office holders, irrespective of their protected characteristics. We therefore do not think a change in MRA would negatively affect the equality of opportunity. It will, however, be likely to increase participation in public life for JOHs between the ages of 70-71 (for MRA 72) and 70-74 (for MRA 75). A greater participation in public life would be expected for MRA 75.

72. In addition, it has been argued that an increased MRA would attract more candidates who are usually ineligible after 65 as they cannot offer sufficient years of service. A recent qualitative study has supported this argument,²⁰ but previous quantitative surveys of barriers to judicial appointment do not indicate MRA as a significant barrier, compared to other incentives such as remuneration or working conditions.²¹ We seek further evidence on this point in the consultation.

¹⁹ NIJAC Equality Monitoring Report 2018, “Applicant Pool for Schemes: Ethnicity”, p. 11

²⁰ Turenne and Bell (for SSRB) “The Attractiveness of Judicial Appointments in the United Kingdom”, January 2018.

²¹ Accent (for Judicial Appointments Commission) “Barriers to Application to Judicial Appointment”, July 2013; Morison and Dickson (for NIJAC) “Barriers to High Court Appointments in Northern Ireland”, June 2019.

8. Eliminating unlawful discrimination in relation to disability and duty to make reasonable adjustments

73. We do not have any evidence to assess whether these changes to MRA are likely to indirectly discriminate against people with disabilities, due to limits in data set out in section 3 above. The judiciary are changing the way disability data of existing JOHs is recorded to help more accurate future analysis. In any event, HMCTS will ensure that JOH with disabilities continue to receive reasonable adjustments in line with the 'Reasonable Adjustments for Disabled Judicial Office Holders' policy.

9. Fostering good relations

74. We do not consider that these proposals will actively foster good relations between those who share a protected characteristic and those who do not. However, we have had regard to the need to foster good relations when formulating these proposals so that the proposals are not incompatible with this aim.

75. We believe that raising the mandatory retirement age for all current and future JOHs, irrespective of their protected characteristics, would respect the fostering good relations principle, as it would not create differences in treatment between different JOH types.

76. We are consulting on changes to MRA for magistrates and coroners at the same time as the rest of the judiciary to enable them to maintain alignment.

77. We will continue to update this equality statement in the light of any new evidence of impact in accordance with the ongoing nature of our responsibilities under the PSED.

10. Annex A: Age breakdown of current complement and new entrants

10.1. England and Wales

78. This section presents the most recent data available on the protected characteristic of age. For England and Wales, the most recent Judicial Diversity Statistics 2019 (published in July 2019) provide an age breakdown (by band) for all current judicial office holders. This is presented below.

Table 2: Age breakdown for current JOHs and new entrants (courts)²²

JOH Type	Age (current complement)				Age (new entrants)			
	Under 40	40- 49	50- 59	60 and over	Under 40	40- 49	50- 59	60 and over
Heads of Division	-	-	-	5	-	-	-	1
Court of Appeal Judges ³	-	-	3	36	-	-	2	4
High Court Judges ⁴	-	3	46	48	-	1	8	2
Deputy High Court Judges ⁵	-	16	42	29	1	10	11	1
Judge Advocates, Deputy Judge Advocates	-	-	1	5	-	-	-	-
Masters, Registrars, Costs Judges ⁶	-	3	11	13	-	2	2	-
Deputy Masters, Deputy Registrars, Deputy Costs Judges ⁶	-	3	10	14	-	-	-	-
Circuit Judges ⁷	3	78	250	339	4	22	20	5
Recorders	25	173	287	388	33	70	17	2
District Judges (County Courts)	6	90	183	145	9	32	29	1
Deputy District Judges (County Courts)	93	221	193	241	142	121	26	2
District Judges (Magistrates' Courts)	4	21	43	59	-	1	3	-
Deputy District Judges (Magistrates' Courts)	6	15	20	39	-	-	-	-
Total	137	623	1,089	1,361	189	259	118	18

79. A significant % of new courts entrants are aged 40-49 (44%), and offices below the High Court have a high proportion of younger entrants (e.g. 49% of DDJs are under 40), while unsurprisingly, given the need for greater legal experience, more senior offices attract older entrants (e.g. 91% of High Court Judges are aged 50+). Perhaps not surprisingly, 95% of leavers are aged 60+.²³ 52% of magistrates are aged 60+.

²² Source: Judicial Diversity Statistics 2019, tables 1.1 (current complement) and 4.1. (new entrants).

²³ We have not reproduced the leavers tables, but they can be found in the Judicial Diversity Statistics 2019, table 7.1.

Table 3: Age breakdown for current magistrates²⁴

Magistrates	Total in post	Age				
		18-29	30-39	40-49	50-59	60 and over
England and Wales total	14,348	123	609	1,604	4,569	7,443

80. In tribunals, 42% of judges and 58% of non-legal members are aged 60+. In contrast, 46% of new judicial entrants are aged under 40.

Table 4: Age breakdown for current JOHs and new entrants (tribunals)²⁵

JOH type	Total in post	Age (current complement)				Age (new entrants)			
		Under 40	40-49	50-59	60 and over	Under 40	40-49	50-59	60 and over
Judges									
Presidents, Chamber Presidents, Deputy and Vice Presidents	14	-	-	6	8	-	-	2	1
Upper Tribunal Judge	54	1	11	18	24	-	-	-	-
Deputy Upper Tribunal Judge	26	1	6	4	15	2	1	-	-
Tribunal Judge	1,430	113	301	416	600	132	107	38	2
Regional, Deputy Regional Tribunal Judge	30	-	1	12	17	-	-	3	-
Circuit Judge ⁵	2	-	-	2	-	-	-	1	-
Employment Judge	288	2	63	118	105	-	-	2	-
Regional Employment Judge	10	-	2	1	7	-	1	-	-
Total Judges	1,854	117	384	577	776	134	109	46	3
Non-Legal Members									
Tribunal Member	3,121	100	353	843	1,825	29	53	97	20
Total Judges and Non-Legal Members	4,975	217	737	1,420	2,601	163	162	143	23

81. In addition, at 1 October 2018 there were 367 JOHs in office aged 70-75, with approximately one third aged 71 and another third aged 72. In addition, 191 JOHs are sitting in retirement, with just over half aged 70+.

10.2. Northern Ireland

82. Northern Ireland indicated that the average age for current JOHs aged 65+ is 67 for women and 69 for men, and the current average age for office holders recruited in the past five years is 56 for women and 62 for men. The JOHs aged 65+ represent 30% of the current complement.

²⁴ Source: Judicial Diversity Statistics 2019, table 3.

²⁵ Source: Judicial Diversity Statistics 2019, tables 2.3 (current complement) and 4.4. (new entrants).

11. Annex B: Female proportion of retiring JOHs and new entrants

JOH Type	Number of JOHs in post ²⁶	JOH % women 65 and above	Recent recruits ²⁷ % women	Difference Factor
Courts				
Court of Appeal	51	10%	21%	11%
High Court Judges	98	11%	37%	26%
Deputy High Court Judge	165	9%	34%	25%
Circuit Judges	642	14%	38%	23%
Recorders	1,108	6%	42%	36%
District Judges (County Courts)	421	17%	51%	33%
Deputy District Judges (County Courts)	609	17%	44%	27%
District Judges (Magistrates' Courts)	131	14%	48%	34%
Deputy District Judges (Magistrates' Courts)	106	14%	53%	39%
<i>High Court and above</i>	<i>314</i>	<i>10%</i>	<i>33%</i>	<i>23%</i>
<i>All court judges</i>	<i>3,331</i>	<i>12%</i>	<i>42%</i>	<i>31%</i>
Tribunals				
Upper Tribunal Salaried	55	20%	No JAC data available	
Upper Tribunal Fee-paid	122	37%	No JAC data available	
First-tier Tribunal Salaried	249	33%	61%	27%
First-tier Tribunal Fee-paid	1,162	28%	46%	17%
Employment Tribunal Salaried	106	31%	44%	13%
Employment Tribunal Fee-paid	183	11%	44%	33%
FtT - Non-legal member	1,575	36%	60%	24%
Employment Tribunal - Non-legal member	736	42%	No JAC data available	
<i>All tribunal judges²⁸</i>	<i>1,700</i>	<i>27%</i>	<i>48%</i>	<i>20%</i>
<i>All tribunal members (including non-legal)</i>	<i>3,275</i>	<i>32%</i>	<i>54%</i>	<i>22%</i>
Total: courts and tribunals	6,606	22%	48%	26%
Magistrates	14,218	50%	58%	8%

²⁶ At the time of our analysis, the most recent available dataset from Judicial Office was from 1 Oct 2018. We have assessed, but consider that the more recent JOH headcount data would not have any significant impact on our analysis, given the small degree of turnover of JOHs in a year compared to the overall complement. In contrast, diversity of new appointments could be more affected by large recruitment – we therefore updated the JAC recruitment figures to account for recent large exercises.

²⁷ recent recruit % based on JAC data (last 4 years where available), except for magistrates where figure is based on recent entrants

²⁸ only those roles for which JAC data is available are included in the totals

12. Annex C: Breakdown of race of retiring JOHs and new entrants

JOH Type	Number of JOHs in post	JOH % BAME 65 and above	Recent recruits ²⁹ % BAME	Difference Factor
Courts				
Court of Appeal	51	0%	0%	0%
High Court Judges	98	3%	3%	0%
Deputy High Court Judge	165	17%	11%	-5%
Circuit Judges	642	1%	5%	4%
Recorders	1,108	4%	7%	3%
District Judges (County Courts)	421	5%	8%	3%
Deputy District Judges (County Courts)	609	3%	12%	8%
District Judges (Magistrates' Courts)	131	0%	14%	14%
Deputy District Judges (Magistrates' Courts)	106	0%	6%	6%
<i>High Court and above</i>	314	10%	7%	-3%
<i>All court judges</i>	3,331	4%	8%	4%
Tribunals				
Upper Tribunal Salaried	55	22%	No JAC data available	
Upper Tribunal Fee-paid	122	19%	No JAC data available	
First-tier Tribunal Salaried	249	10%	11%	1%
First-tier Tribunal Fee-paid	1,162	4%	12%	8%
Employment Tribunal Salaried	106	0%	11%	11%
Employment Tribunal Fee-paid	183	0%	11%	11%
FtT - Non-legal member	1,575	18%	24%	6%
Employment Tribunal - Non-legal member	736	7%	No JAC data available	
<i>All tribunal judges¹</i>	1,700	4%	12%	8%
<i>All tribunal members (including non-legal)¹</i>	3,275	11%	18%	7%
Total: courts and tribunals³⁰	6,606	7%	13%	6%
Magistrates	14,218	5%	11%	5%

²⁹ recent recruit % based on JAC data (last 4 years where available), except for magistrates where figure is based on recent entrants

³⁰ only those roles for which data is available are included in the totals

13. Annex D: Coroners data³¹

13.1. Breakdown of coroners by type of post and terms of service (including MRA) as at May 2020

	'New terms' coroners	'Old terms' coroners	Total coroners by type	Recent 'new terms' appointments (2017-2020)	Recent retirements (2017-2020)
Senior coroners	21	56	77	9	11 (0% new terms)
Area coroners	26	5	31	10	no data
Assistant coroners	339	223	562	213	no data
Total coroners by terms	386	284	670	232	no data

13.2. Breakdown of coroners by male / female ratio and terms of service (including MRA) as at May 2020

	New terms	Old terms	Diversity difference
Female	189	77	
Female %	49%	27%	22%
Male	197	207	
Male %	51%	73%	-22%
Total	386	284	

13.3. All 'new terms' coroners, new appointments and 'new terms' coroners approaching retirement (aged 60-67), by male / female ratio, as at May 2020

	All 'new terms' coroners	% female	New appointments (2017-2020)	% female	'New terms' coroners approaching retirement (aged 60-67)	% female	Diversity difference between new appointments and future retirements
Senior coroner	26	23%	8	25%	2	50%	-25%
Area coroner	27	30%	10	40%	3	33%	7%
Assistant coroner	333	53%	216	50%	57	35%	15%
Total coroners	386	49%	234	49%	62	35%	13%

³¹ Data provided by the Chief Coroners' Office