



JUDICIAL EXECUTIVE  
BOARD

# Guidance to the judiciary on engagement with the Executive

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## Summary

- A. This Guidance is primarily addressed to the judiciary; however, it is hoped that it will also serve as a useful point of reference for the Executive.<sup>1</sup> It aims to assist individual judges and the judiciary as an institution when considering whether, and how, to engage with the Executive, particularly in relation to matters of policy and legislation.
- B. For the purposes of this Guidance, references to judges and the judiciary means all holders of judicial office – courts and tribunals judiciary; coroners; recorders, deputies, tribunals members and magistrates in their judicial capacity – and should be construed accordingly. It also applies to judicial associations.
- C. The need to preserve judicial independence necessarily limits judicial engagement with the Executive. Specifically, constitutional conventions preclude or restrict judicial comment on: the merits of legal cases or decisions; the merits of public figures or appointments; the merits of policy or the merits, meaning or likely effect of prospective legislation; or, policy proposals subject to consultation when a formal response by senior leadership judges is intended.
- D. Engagement, however, is permissible and if permissible will be in the public interest. This is most likely to arise in the context of comment on proposed policy or legislation. In these cases, judicial comment can be permissible in relation to i) technical or procedural aspects of policy or legislation that may affect the operation of courts and tribunals or the administration of justice; and, ii) measures affecting the independence of the judiciary or the rule of law. Whilst the judiciary will strive to assist the Executive, there will necessarily be areas on which they cannot properly comment.
- E. Given its constitutional significance in terms of judicial independence, a judge considering engagement with the Executive (by invitation or by election) should notify and liaise with the Private Office of the Lord Chief Justice and inform their relevant senior leadership judge. A judge should only proceed once the consent of the Lord Chief Justice, via his office, has been granted.

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<sup>1</sup> References to the Executive and the Legislature are in general terms so as to include, for example, the devolved administrations.

## Engagement and comment – the conventions<sup>2</sup>

1. The Lord Chief Justice and the Senior President of Tribunals have express statutory duties to represent the views of the judiciary and tribunals members to the Lord Chancellor and the Executive generally.<sup>3</sup> Otherwise, the need to protect judicial independence necessarily limits judicial engagement with the Executive and longstanding constitutional conventions curtail judicial comment on a variety of matters.
2. Engagement is most likely to arise in the context of judicial comment on the development of policy, in response to government consultations, or on the drafting of primary and secondary legislation. Here, the conventions limiting such comment operate to prevent the impartiality of a judge or the judiciary being called into question if a court or tribunal is asked to apply, interpret, or set aside such measures.
3. There are two qualifications to this convention. These qualifications arise where proposed measures directly affect the operation of the courts or the administration of justice:
  - a. First, it is permissible for the judiciary to comment on the technical and procedural aspects of policy and legislation when the aim is not to influence policy or pass judgement on the merits of proposals or the effects of legislation.
  - b. Secondly, it is permissible for the judiciary to comment on the merits of policy or legislation that affects the independence of the judiciary or the rule of law.
4. Engagement between the judiciary and the Executive can be beneficial to both branches of the State, whilst permissible comment on proposed policy and legislation can be in both the interests of the public and the administration of justice. However, it is crucial that the constitutional conventions are adhered to. Identifying the constitutionally appropriate boundaries or “red lines” will need to be carefully considered by the Lord Chief Justice and senior leadership judges before agreeing to engagement. Whilst the judiciary will strive to assist the Executive, there will nonetheless be some areas where they simply cannot comment.

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<sup>2</sup> See the Judicial Executive Board’s *Guidance to Judges on Appearances before Select Committees* for more information: [https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/select\\_committee\\_guidance.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/select_committee_guidance.pdf).

<sup>3</sup> See section 7(2)(a) of the Constitutional Reform Act 2005 (c.4) and paragraph 14 of Schedule 1 to the Tribunals, Courts and Enforcement Act 2007 (c.15) respectively.

## **Why engage**

5. Engagement can be beneficial to the judiciary, the Executive, and, ultimately, the public. Judges in senior leadership positions may need to consider additional training requirements (where a proposal for a new statutory provision or procedure would require familiarisation) and whether a proposal would have an impact on deployment and recruitment; procedural rules may also need to be updated.
  
6. A policy or draft measure may have a precise legal meaning or practical consequences unknown or unforeseen by officials or drafters. Judicial input, based on day-to-day experience, can help produce legislation that is technically accurate and workable in practice. Moreover, the judiciary can often offer insight into resource implications, which in certain cases may be significant. Separately, the courts and tribunals often need adequate lead time for changes because staff might require training and IT systems may need to be adapted.

## **Who should engage**

7. There are three levels of engagement:
  - a. the individual judge;
  - b. individual judges with responsibility for leading on a particular issue or in a particular legal area;
  - c. the judiciary as an institution, with individual judges (or judicial bodies or occasionally judicial associations) acting in a representative capacity.
  
8. It is generally inappropriate for an individual judge to engage with the Executive. The appropriateness of engagement and any “red lines” that would curtail comment will not always be clear to individual judges or the Executive.

9. Another important aspect of engagement is that it is undertaken by an appropriate member of the judiciary, which the Lord Chief Justice and other senior leadership judges are best placed to assess. There are obvious benefits to a judge with particular responsibility or expertise leading on any linked engagement. If the matter in question concerns judicial independence, it should only be for the Lord Chief Justice or other senior leadership judges to engage.
10. Overall, given the constitutional significance of engagement in terms of judicial independence, the Lord Chief Justice and senior leadership judges should be involved. Such involvement will avoid improper entry by the judiciary into the political arena (and any consequent damage to judicial independence) as it will often be a matter of judgement as to whether and how to engage.
11. A judge who wishes to engage with the Executive in relation to any given matter - or those who are approached by a government department directly - should notify and liaise with the Private Office of the Lord Chief Justice and inform their relevant senior leadership judge. The Executive is encouraged to liaise with the Private Office of the Lord Chief Justice rather than approaching judges directly.<sup>4</sup>
12. In either case, a judge should only proceed to engage once the consent of the Lord Chief Justice has been granted. This approach is not intended to compromise the independence of individual judges, but instead to safeguard judicial independence and provide experienced support for judges; it also provides centralised record-keeping and administrative convenience.

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<sup>4</sup> You can contact the Private Office of the Lord Chief Justice via [LCJ.office@judiciary.gsi.gov.uk](mailto:LCJ.office@judiciary.gsi.gov.uk)

## When to engage

13. There are generally four stages when it could be appropriate for the judiciary to consider engagement in relation to policy or legislation:
- a. Policy formulation;
  - b. consultation;
  - c. drafting of primary and secondary legislation, and consideration of changes during the legislative process; and,
  - d. other scrutiny by the Legislature.<sup>5</sup>
14. The stages may overlap, and engagement should be considered as a dialogue. Early engagement is preferable as it may be easier for the judiciary to comment in broad terms before proposals are fixed or become too politicised. Early engagement will also assist in identifying the areas or topics where the judiciary can and cannot provide assistance.
15. Engagement will often be informal or at official level, especially at the stage of policy formulation. Even so, the constitutional proprieties should still be observed. Formal consultation may demand a representative or institutional response by, for instance, a Head of Division or the Judicial Executive Board. As noted at C. above, individual judges or judicial associations should not respond to consultations until an institutional response, if so intended, has been submitted. Such institutional responses can relay consensus or give a range of differing views, with an assessment of their respective merits. This is likely to be of greater assistance to the Executive, as opposed to receiving multiple responses containing divergent views.
16. In terms of legislation, the sharing of early drafts by departmental officials will allow issues to be identified, raised and discussed at the outset, rather than when proposals are before the Legislature or are being implemented. Those drafting legislation may also wish to engage with the judiciary.

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<sup>5</sup>Members of the judiciary are increasingly invited to appear before Parliamentary Committees. If a judge is invited, the *Guidance to Judges on Appearances before Select Committees* should be consulted; see footnote 2.

## Categories where engagement may be appropriate

17. Categories of proposed laws or policy in respect of which it may be appropriate for the judiciary to engage with the Executive include, but are not limited to, those:

- amending or codifying the common law, or laws introducing a statutory compensation scheme based on existing principles of civil liability and damages;
- affecting the jurisdiction and powers of courts and tribunals, such as the introduction of a new ground of appeal, criminal offence or sentencing provision;
- affecting the judicial function, such as legislation mandating particular procedures e.g. hearings without notice, in private, or directing particular modes of taking evidence;
- affecting the distinctive character of the judiciary, such as conferring non-judicial dispute resolution powers on them; and,
- relating to the abolition of existing courts and tribunals, or the creation of new ones, or the closure or opening of courts or tribunals buildings.<sup>6</sup>

## Examples of effective engagement

18. The examples provided below are intended to give a practical insight into when engagement between the judiciary and the Executive has been appropriate and effective:

### Consultation on policy (fees)

The justice system is partly funded by the State, one of its core constitutional duties, from general taxation and partly by those who use it in the form of fees. The judiciary has submitted responses to Government consultations about fee increases due to the impact on the administration of and access to justice. Such responses have been submitted by the Judicial Executive Board on behalf of the judiciary.

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<sup>6</sup> This list is based on the *Guidelines for Communications and Relationships between the Judicial Branch of Government and the Legislative and Executive Branches* adopted by the Council of Chief Justices of Australia and New Zealand, 23 April 2014. See: <http://www.jca.asn.au/wp-content/uploads/2013/10/Guidelines-Judicial-Legislative-Executive-Government.pdf>.



### Consultation on draft legislation (criminal sentencing practice)

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) introduced changes to the way in which judges were required to credit time spent in prison awaiting trial against a sentence of imprisonment. The judiciary was consulted on the proposed changes by the Ministry of Justice prior to the enactment of LASPO, unlike when the previous regime was introduced. The new scheme has been implemented effectively. This demonstrates that engagement at the right time is of the greatest value.

### Passage of a Bill (tribunals and judicial deployment)

Schedule 8 to the Consumer Rights Act 2015 introduces significant changes to the jurisdiction of the Competition Appeal Tribunal, a specialist tribunal hearing private competition claims from all parts of the United Kingdom. Following discussions with the judiciary, a Government amendment was tabled during the final stages of the Bill to ensure that judges with sufficient expertise would be able to sit on the Tribunal.

### Implementation (public family law)

As part of the reforms to the family justice system, effected by the Children and Families Act 2014, early engagement with the President of the Family Division was hugely beneficial. He was able to work closely with members of the Family Justice Board to prepare for the introduction of the changes. The President of the Family Division helped design new forms and templates for local authority social workers for presentation of evidence.