



JUDICIAL EXECUTIVE
BOARD

Guidance to Judges on Appearances before Select Committees

The Judicial Executive Board

October
2012

Judicial comment - the conventions

1. For the most part parliamentary business, including the business of select committees, is conducted without the involvement of the judiciary, and without the appearances of judges before them. Such appearances should be regarded as exceptional. Indeed, until the last quarter of the twentieth century there were virtually no appearances by judges before parliamentary committees.
2. If a judge is asked to appear before a select committee, the request will be administered by the Private Office of the Lord Chief Justice. The process for receiving and responding to committee requests is considered in more detail in paragraphs 20 - 26 below.
3. On being asked to give evidence to a parliamentary committee, longstanding constitutional conventions (and, in the case of IV, desirable practice) are likely to prevent judges from commenting on the following matters:

- I. The merits of individual cases, whether or not the judge giving evidence has adjudicated on that case, and whether these are pending, ongoing, or have concluded (but see paragraph 7 below);
- II. The personalities or merits of serving judges, politicians, or other public figures, or more generally on the quality of appointments;
- III. The merits, meaning or likely effect of provisions in any Bill or other prospective legislation and the merits of government policy (but see paragraphs 12 - 13);
- IV. Issues which are subject to government consultation on which the judiciary intend to make a formal institutional response, but have not yet done so (but see paragraphs 16 - 17).

Explanation and exceptions

I: The merits of individual cases

4. The convention against speaking about the merits of individual cases is long standing. The House of Lords Constitution Committee referred to it when it stated “under no circumstances must committees ask judges to comment on the pros and cons of individual judgments”¹. Lord Woolf CJ speaking in the House of Lords referred to “the very important convention that judges do not discuss individual cases”². The convention promotes the dignity of the judicial office, the finality of judgments, and, most importantly, the independence of the judiciary.

1. 6th Report of Session 2006-07 on relations between the executive, the judiciary and parliament, at para 126.

2. Lords Hansard 21 May 2003 Column 882

www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030521/text/30521-07.htm

5. This convention bears consideration alongside the parliamentary sub judge resolution³, which applies to members of committees, and which bars any mention of cases in which court proceedings are active (as defined by the two Houses).
6. The convention is reflected in the Guide to Judicial Conduct which provides at paragraph 8.1.1 that “a judge should refrain from answering any criticism of a judgment or decision, whether from the bench or otherwise”⁴.
7. An exception to the convention is that it is generally not inappropriate for a judge to refer to concluded cases as examples of practice when discussing or explaining general principles of law or practice.

II: The personalities or merits of serving judges, politicians, or other public figures, or more generally on the quality of appointments

8. The convention against speaking about the personalities or merits of public figures or the quality of appointments reflects the need to uphold the dignity and status of the judicial office. It is reflected in the Guide to Judicial Conduct at paragraph 4.2, which provides that a judge should seek to be courteous and should respect the dignity of all, and at paragraph 5.1(6), which provides that a judge in exercising his right to freedom of expression shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.
9. The convention may operate differently with respect to the Lord Chief Justice and Heads of Division, who, by virtue of their particular functions, leadership responsibilities, and representative roles⁵, may have cause to comment on, for instance, the quality of judicial appointments.

III: The merits, meaning or likely effect of provisions in a Bill and the merits of government policy

10. The convention against judges commenting on the meaning or likely effect of provisions in a Bill or on the merits of government policy operates to prevent a judge’s impartiality from being called into question in the event of subsequently being asked to apply or interpret those provisions in a case in court, and is a crucial aspect of judicial independence.

3. The sub judge rule is a self denying ordinance which, subject to the right of either House to legislate on any matter, prevents MPs or Lords from referring to a current or impending court case unless the case concerns a Ministerial decision. Although either House is entitled by virtue of privilege to discuss any subject, the rule applies to prevent either House from debating a subject and possibly influencing, or being perceived to influence, the outcome of such a case. As the then Speaker explained in 1976, “it is...an important principle that Parliament shall not influence, or seem to be seeking to influence, the administration of justice. The sub judge rule is therefore a self-denying ordinance instituted by the House in order to protect that principle” (HC Deb 29 July 1976 vol. 916, col. 882). The rule reflects the relationship between Parliament and the courts. The text of the sub judge resolution is appended to the Standing Orders of the House of Commons relating to public business, successive editions of which are published online at <http://www.publications.parliament.uk/pa/cm/cmstords.htm> ; for the House of Lords, see Chapter 4 of the House of Lords Companion to the Standing Orders, <http://www.publications.parliament.uk/pa/ld/ldcomp/compos2010/ldctso07.htm#a65> .

4. Published by the Judges’ Council in October 2004; first supplement published June 2006; second supplement published March 2008; revised version published August 2011.

5. For legislative recognition and one method of making such comments, see section 5 of the Constitutional Reform Act 2005, but making representations to Parliament under section 5 is not the only way of appropriately making such comments. See also, the LCJ’s Review of the Administration of Justice in the Courts.

11. The convention is acknowledged in the Cabinet Manual, which states “principles of judicial independence mean that the judiciary should not be asked to comment on the merits of proposed government policy, and individual judicial office-holders should not be asked to comment on matters that may then require the judge to disqualify him or herself in subsequent litigation”⁶. Paragraphs 3.3 and 3.10 of the Guide to Judicial Conduct similarly reflect the convention. Judges should be aware that comment on the merits of policy or Bill provisions may be taken to represent the views of the judiciary as a whole. A perception of bias may thereby taint more than the individual judge.
12. With respect to the meaning or merits of existing legislation, there is an accepted practice of responsible comment on the way in which an Act works, including unexpected consequences of legislation. Such comment has been made, for example, in academic writing, and might contribute to learning or to the public interest. However, comment on matters of political controversy traverses what the Attorney General Sir Hartley (Later Lord) Shawcross described as ‘a most important principle of our constitutional practice that judges do not comment on the policy of Parliament, but administer the law, good or bad, as they find it. It is a traditional doctrine upon which the independence of the judiciary rests’⁷.
13. There are two qualifications to the convention against comment on Bill provisions or government policy. They both apply where the Bill or policy directly affects the operation of the courts or aspects of the administration of justice within the judge’s particular area of judicial responsibility or expertise. The first is that, in these circumstances, the judge may comment on the practical operation or technical aspects of the Bill or policy. This exception reflects the judiciary’s interest in the effective administration of justice and the judiciary’s jointly held responsibility for the operation of the courts. The second is that, in these circumstances, a judge may properly comment on the merit of a Bill or policy which affects the independence of the judiciary⁸.

IV: Issues which are subject to government consultation on which there is to be a formal response by a judge or judicial body with responsibility for governance

14. Where government consultations are about issues for which judicial comment is appropriate, a response might be given by the Lord Chief Justice, the Heads of Division, the Judicial Executive Board (“JEB”) or the Judges’ Council.
15. If one of these judges or bodies with responsibility for governance has indicated that it will be making a formal response, it is desirable for individual judges or judicial institutions which may wish to respond not to do so until the formal view is known, so as not to pre-empt that response.
16. The practice in paragraph 15 is not intended to compromise the independence of individual judges or judicial institutions which may wish to respond to the consultation: (a) if there is no response from the LCJ, the HoDs, or by the JEB or the Judges’ Council; (b) once their views are known: or (c) where particular circumstances (such as an unusually short deadline for responses) justify it.

6. Cabinet Manual 1st Edition October 2011, para 6.40.

7. 474 H.C. Deb., 1762 - 1763 (3 May 1950).

8. The Rt Hon the Lord Judge, CJ has said “when judges speak out, as they do, in defence of this principle, they [...] are speaking out in defence of the community’s entitlement to have its disputes, particularly those with the government of the day, heard before an impartial judge who is independent of them all. The principle must be defended, not for our own sake as judges, but for the sake of every community which truly embraces the rule of law” (speech entitled “Judicial Independence and Responsibilities” delivered in Hong Kong on 9 April 2009).

17. Nor is it meant to suggest that a judge who is appearing before a committee should not answer a question about a consultation, although desirable practice would be to indicate that there is, or is to be, a formal institutional response by the Lord Chief Justice, the Heads of Division, the JEB or the Judges' Council to the relevant government department, and not to pre-empt that response.

18. Judges are invited to contact the Private Office of the Lord Chief Justice with any queries relating to responses to government consultations by those referred to in paragraph 14.

Application of the conventions to retired judges

19. The Guide to Judicial Conduct states “even in retirement a former judge may still be regarded by the general public as a representative of the judiciary and any activity that might tarnish the reputation of the judiciary should be avoided” (paragraph 9.2). The conventions set out above apply to retired judges for this reason, notwithstanding that the risk of disqualification for expressing an opinion on the merits or meaning of prospective legislation will not arise.

Practicalities of giving evidence

Process: receiving and responding to a request to give evidence

20. The expectation, following discussions between the senior judiciary and parliament, is that a request for a judge to attend or give written evidence to a parliamentary committee will be directed to the Private Office of the Lord Chief Justice, which is part of the Judicial Office.
21. The involvement of the Private Office of the Lord Chief Justice is for administrative convenience. It provides for centralised record-keeping and support for judges. It is not intended to compromise the independence of individual judges.
22. A judge who is asked to give evidence should therefore hear from the Private Office of the Lord Chief Justice in the first instance. If a judge receives a request by another route, such as directly from a committee, they are requested to forward it to the Private Office of the Lord Chief Justice. The Private Office will assist if a clerk to a committee wishes to ascertain which judge might appropriately speak to a particular topic.
23. The Lord Chief Justice's Private Office will assist a judge in considering a request to give evidence. Matters to be considered will include:
- a. Keeping the relevant Head of Division or the Senior Presiding Judge informed and involved as necessary;
 - b. The nature of the subject matter which the committee is addressing;
 - c. The extent to which the judge feels able to provide evidence going to that subject matter;
 - d. Whether the judge is being asked to appear in an individual or a representative capacity;
 - e. Whether there is any risk that the judge will be asked questions which it would be inappropriate for them to answer given the conventions to which they are subject; and
 - f. What options there are for answering questions which limit the risk of conflict with the judge's legitimate and proper judicial role, such as providing written evidence or giving oral evidence in private.
24. Usually, the Lord Chief Justice's Private Office will be able to discuss the judge's attendance informally with the clerk to the committee and reach an agreement as to whether the matter is best dealt with by judicial attendance at a public Committee hearing or by another means, for example a written judicial submission to the committee, and as to the general area of questioning and the areas which should be avoided.
25. In the unlikely event that agreement as to judicial attendance cannot be reached through informal channels and the select committee indicates it is unhappy with a proposed non-attendance or with a judge declining to answer particular questions, the Lord Chief Justice will be consulted.
26. It is extremely unusual and very unlikely to be the case that a parliamentary committee will order a judge to attend.

Preparing to give evidence

27. The Private Office of the Lord Chief Justice will be able to coordinate support for judicial witnesses at every level of the judiciary.

28. It is general practice for the committee staff to give witnesses advice about the likely subjects to be brought up during an evidence session. The Private Office of the Lord Chief Justice will maintain contact with the clerk to the Committee and can assist in preparing the judge for a hearing in the following ways:

- a. assisting with liaising with the clerk to the committee, identifying the committee's interest and potential area of questioning;
- b. putting a judicial witness in touch with judges who have appeared in front of committees;
- c. running through practicalities and arranging for Judicial Office staff to accompany the judge to the hearing if appropriate;
- d. putting a judicial witness in touch with the Judicial Press Office who can advise on media handling and help handle press inquiries after a hearing.

29. A judge may also wish to:

- a. Attend a select committee session or watch one by webcast at www.parliamentlive.tv, or on television (BBC Parliament);
- b. Familiarise themselves with the committee's recent line of work (usually detailed on the Parliament website www.parliament.uk);
- c. Read the House of Commons guidance on appearing before a Commons select committee <http://www.parliament.uk/old/selcom/witguide/>, or the House of Lords guidance on appearing before a Lords select committee as appropriate <http://www.parliament.uk/documents/commons-committees/witnessinfo.pdf>;
- d. Familiarise themselves with the allocation of responsibilities between the government and the judiciary as set out in the Concordat, available here <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/lcoffice/judiciary.htm>;
- e. Read the Media Guide for the Judiciary, available here: https://judiciary.sut1.co.uk/docs/info_about/mediaguide2012.pdf.

30. Usually, witnesses who are to appear before committees are asked to provide written evidence in the form of a memorandum on the subject of inquiry. Oral questioning will normally concentrate on matters raised in the written evidence. A Terms of Reference document is usually sent out which shows the areas of interest of the committee. In addition, witnesses are usually sent copies of the earlier oral and related written evidence which the committee has received.

At the hearing

31. Committees can depart from the clerk's suggested line of questioning. Members of the committee may ask questions which it would be inappropriate for the judge to answer. It is up to the judge in these circumstances to explain why it would be inappropriate for them to answer.
32. If a judge is in doubt about the answer to a question they may say so, and offer to submit a written memorandum to the committee.
33. Most committee proceedings are webcast and therefore accessible over the internet.

After the hearing

34. The press may ask further questions of a judge who has given evidence. Particularly where there is media interest in the work of a committee, judicial witnesses are strongly encouraged to read the Media Guide (https://judiciary.sut1.co.uk/docs/info_about/mediaguide2012.pdf) in advance of attending a committee session and to seek the support of the Judicial Press Office. Answers to questions asked by the media in such circumstances are not protected by parliamentary privilege.
35. Witnesses will be sent the transcript of the hearing for checking. Small errors can be altered but the House authorities will not allow evidence to be substantially changed. It is possible to insert a footnote explaining anything which is unclear. It is also possible to send in further memorandum to deal with any substantial points arising from the oral evidence. However, uncorrected transcripts are often put on the internet soon after the hearing and the judge must act quickly at this stage. The transcript of the evidence attracts parliamentary privilege.