

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 on 23 April 2014

Introduction

1. The maintenance of an effective working relationship between parliament, the executive and the courts is essential to constitutional government in Australia and New Zealand. While the proper limits of the constitutional functions of each branch of government are generally understood, the Council of Chief Justices of Australia and New Zealand considers it would be helpful to set out guidelines for the conduct of the relationship between the courts and the other branches of government and for communication between them.
2. These guidelines are not concerned with constitutional limits upon legislative power and executive action. Cases in which questions arise about such limits may come before the courts. The answers to those questions will be as determined by the courts.
3. There are important non-curial interactions between the judiciary and the other branches of government. Such interactions require effective and mutually respectful communications in order to ensure that the courts are adequately resourced to discharge their functions efficiently and that they do so and to ensure that their institutional and decisional independence and their distinctive function as the third branch of government are maintained. The need for such communication may arise in relation to proposed legislative or executive action affecting the functioning of the courts. Legislative action is considered first.

Legislative action

4. Categories of proposed laws which may affect courts and upon which it may be appropriate for courts to offer their views, include:
 - 4.1 Proposed laws relating to the abolition of existing courts and the creation of new courts.
 - 4.2 Proposed laws affecting the jurisdiction and powers of the courts.
 - 4.3 Proposed laws relating to judicial office holders including laws which:
 - 4.3.1 Affect criteria and processes for the appointment of judicial officers.
 - 4.3.2 Define specific performance obligations on judicial officers.
 - 4.3.3 Impose continuing education and training obligations on judicial officers.
 - 4.3.4 Affect the criteria for the removal of judicial officers.
 - 4.3.5 Provide for disciplinary sanctions short of removal to be imposed upon judicial officers by a non-judicial body.
 - 4.3.6 Confer disciplinary functions and powers upon the head of jurisdiction.
 - 4.4 Proposed laws affecting the judicial function including laws which:
 - 4.4.1 Mandate particular procedures such as ex parte hearings, closed courts, suppression orders and pre-litigation alternative dispute resolution processes.
 - 4.4.2 Create new exclusionary rules in relation to evidence or direct particular modes of taking evidence.
 - 4.4.3 Prescribe matters to be taken into account or to which judicial officers must have regard in making certain classes of decision.

- 4.4.4 Remove or restrict judicial discretion - eg by mandating orders to be made where certain conditions are satisfied and sometimes reflected in the statutory formula "... the court must...".
- 4.5 Proposed laws affecting the administration of the courts including laws which:
 - 4.5.1 Create accountability mechanisms in relation to the efficient use by the courts of public resources.
 - 4.5.2 Affect lines of administrative authority in courts eg, imposing obligations on court administrators to report directly to executive government officials or to a Minister.
 - 4.5.3 Provide for executive government management and oversight of court administration including expenditure of funds appropriated for the purposes of the courts.
 - 4.5.4 Transfer to courts support functions previously provided by the executive government eg security and protection.
- 4.6 Proposed laws affecting the distinctive character of the courts including laws which:
 - 4.6.1 Classify courts for administrative purposes in a way that is indistinguishable from the classification of agencies or authorities of the executive government.
 - 4.6.2 Confer functions on the courts which are functions of the executive government – eg non-judicial dispute resolution processes incorporated in, or closely connected to the judicial process.
- 5. It is appropriate for the courts to expect, and to respond to, consultation by the executive branch of government in relation to the above categories of proposed laws.

6. Any such response should be given by the relevant head of jurisdiction after consultation with the members of the court concerned.
7. If a proposed law affects more than one court in a State or Territory, it may be desirable that any response or comment on the proposed law be made by the Chief Justice of the State or Territory after appropriate consultation with the heads of other courts similarly affected. Alternatively, a joint response may be offered.
8. In responding to an invitation to express its views on a proposed law, a court should not offer interpretations of it nor opinions as to its validity. They are matters which may come before the court.
9. If a proposed law has significant resource implications for a court it is appropriate to draw those implications to the attention of the executive government.
10. If a proposed law is likely to affect the functioning or administration of the court, either generally or in relation to particular classes of proceedings it would be appropriate to provide the executive government with advice to that effect.
11. If a proposed law may affect the fact or appearance of the decisional or institutional independence of a court and its judges, it may be appropriate to point that out to the executive government. There may be a question in any case about how far such comment can go without reflecting upon constitutional questions which might end up coming before the court for determination.
12. It may be appropriate for a court to point to ambiguities or uncertainties in the text of a proposed law. This should be done with caution as it may involve questions of interpretation which may come before the court.

13. In offering comment on any proposed law, a court should not engage in public policy debates save to the extent necessary to protect the legitimate institutional interests of the court.
14. In making comment to the executive government on a proposed law, a court should be aware that such comment may become public

Parliamentary and executive action

15. There are classes of parliamentary and executive action which may not involve proposed legislation but nevertheless have an effect upon the functioning of the courts and their judges and their decisional independence. Two categories of such action are criticism of the courts and funding of the courts.
16. Criticism of the courts can occur in the following ways:
 - 16.1.1 Criticism of particular judicial decisions.
 - 16.1.2 Criticism of an individual judge related to a particular judicial decision.
 - 16.1.3 Criticism of an individual judge related to that judge's performance in judicial office not limited to a particular decision of the judge.
 - 16.1.4 Criticism of the court as an institution in relation to its efficiency generally and in connection with the use of public resources.
17. It is appropriate that there be an understanding between the heads of jurisdiction and the relevant Attorney-General that if the Attorney-General becomes aware that a member of the executive government intends to voice a

criticism of a court or of a particular decision or judge, the head of jurisdiction should, if practicable, be notified in advance.

18. The head of jurisdiction may decide that no response is appropriate or that information can be supplied, particularly in relation to the function of the court, which would correct factual matters upon which such criticism is based.
19. It is generally undesirable for a head of jurisdiction to become involved in public exchanges with the members of the executive government or members of parliament in relation to criticism of the court or individual judges. Where a public response is necessary the preferable course is a formal statement by the head of jurisdiction on behalf of the court.
20. Funding of the Courts and changes to judicial remuneration arrangements may involve:
 - 20.2.1 Significant changes to the basis upon which a court is funded.
 - 20.2.2 Mandated provision of corporate and support services by agencies of the executive government.
 - 20.2.3 Privatisation of court services including court buildings, security services and corporate support and IT services.
 - 20.2.4 Specific directions as to the application of funds for particular purposes.
 - 20.2.5 The imposition of "efficiency dividends".
 - 20.2.6 The imposition of judicial salary caps or freezes or requests for voluntary reduction of salaries.
 - 20.2.7 Changes to judicial pension scheme arrangements and criteria – eg increases in minimum service periods, qualifying age, limitations on post retirement employment.

21. Communication between the courts and the executive in relation to matters affecting the funding of courts and judicial remuneration is essential. Such communication should not generally be conducted in the public arena unless the relevant head of jurisdiction considers it necessary to do so in order to protect the legitimate interests of the court. Consultation between heads of jurisdiction in any State or Territory may be desirable before any head of jurisdiction engages in public comment or debate on such matters.
22. It may be appropriate for a head of jurisdiction or a nominated judicial representative of a court to appear before a parliamentary committee considering legislation which may affect the functioning of the court in any of the various ways outlined above.
23. Generally speaking it is undesirable for judicial officers to appear before parliamentary committees expressing their views on changes to the substantive law which might subsequently come before the courts for interpretation and application. A fortiori, it is undesirable that judicial officers engage in public controversy about proposed laws. In cases involving public controversy about proposed laws or executive action affecting the functioning of the courts, a first question about involvement in public debate is whether or not there are persuasive and reputable protagonists outside the courts who are likely to put the arguments in the public arena which are protective of the courts legitimate interests.