



House of Commons
Procedure Committee

The Sub Judice Rule of the House of Commons

First Report of Session 2004–05

*Report, together with formal minutes, oral and
written evidence*

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The Procedure Committee

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Summary

The House of Commons adopted its current sub judice rule (see p 19) by resolution in 2001 following the Report of the Joint Committee on Parliamentary Privilege in 1999. The House of Lords has a parallel resolution. The rule prevents reference being made in proceedings in the Chamber or in committees to cases which are active in the courts (as defined in the resolution). The rule does not apply when the House is considering primary or secondary legislation, and the Chair has discretion to disapply it on other occasions.

Two reasons are put forward for the rule: the need not to prejudice court proceedings (which applies also outside Parliament, where it is enforced by the contempt of court rules), and the principle of “comity”, whereby it is considered undesirable for Parliament to act as an alternative forum to decide court cases.

Few cases are referred to the Speaker for the exercise of his discretion, and even fewer are disputed on the floor of the House. However, the Committee received details of two cases (which are still active), one of which affected the consideration of a closely related case in a select committee, and the other of which inhibited questioning about the arrangements in force in an institution where a death had taken place.

Although the rule delays Parliamentary activity rather than prohibiting it altogether, the delay can run for several years. This delay can be particularly marked in coroners’ court proceedings; the Committee recommends that the Speaker should be willing to disapply the rule where the desirability of the House discussing a matter of public concern outweighs the likelihood of prejudicing the inquest. The resolution applies the provisions for criminal cases to coroners’ court proceedings, and the Committee recommends that both Houses should consider how the points at which such proceedings are treated as being active can be more suitably defined.

The Committee does not recommend that the rule be extended to tribunals (except those under the 1921 Act), even though the Contempt of Court Act 1981 applies to some of them.

The Speaker can exercise his discretion to disapply the rule only if a Member refers a case to him: the Committee encourages Members to do this whenever they consider that the rule is unreasonably impeding the work of Parliament.

Select Committee chairmen should consult the Speaker in advance, if practicable, if a sub judice issue arises; otherwise, the evidence concerned should be taken in private.

The Committee concludes that, with appropriate use of the Speaker’s discretion, it does not recommend changes to the sub judice rule at the moment (except for the clarification relating to coroners’ courts mentioned above), but may wish to return to the matter in the light of experience. It reminds Members of their responsibility not to say anything which would influence the outcome of a court case.

1 Introduction

Our inquiry

1. The sub judice rule of the House of Commons, which is set out on p 19, prevents reference being made in proceedings in the Chamber or in committees to cases which are active in the courts. There are two main exceptions:

- a) the rule does not apply when the House is considering primary or secondary legislation;
- b) the Speaker¹ may relax the rule at his discretion.

The rule relates only to the courts of the United Kingdom, and does not, in general, extend to tribunals, a matter to which we return in paragraph 29.

2. In the last few months we have received two representations about the operation of the rule: Donald Anderson MP, Chairman of the Foreign Affairs Committee, wrote to us about a case which had arisen there,² and the Leader of the House sent us a letter from Ms Sally Keeble MP, who had written to him about restrictions brought about by the application of the rule to coroners' courts.³

3. We decided to undertake an inquiry into the rule, not restricted to the two cases raised with us, but into the operation of the rule more generally. We have taken oral evidence from Mr Roger Sands, the Clerk of the House, Ms Helen Irwin, the Principal Clerk of the Table Office, Lord Goldsmith, the Attorney General, Lord Nicholls of Birkenhead, a Law Lord who chaired the most recent inquiry into the subject (see paragraph 7), and Ms Sally Keeble. We have also received some valuable written evidence, and our attention has been drawn to material relating to other Commonwealth countries (see paragraph 9). To everyone who helped with our inquiry, we express our thanks.

4. An inquiry into the sub judice rule will inevitably receive information about individual cases; the cases referred to by Mr Anderson and Ms Keeble are still active in the courts and we have had to be guarded in the way in which we have referred to them.

The history of the rule

5. The first codification of the sub judice rule in the House of Commons was a resolution of 23 July 1963, following a report by our predecessor committee.⁴ That report traces the development of the rule as a convention dependent on Speakers' rulings since 1889.⁵ A

¹ For the position of committee chairmen, see paragraph 36.

² Ev 35

³ Evidence not reported: later letters by Ms Keeble are at Ev 24, 25.

⁴ For the text of this resolution, see Ev 39. See Select Committee on Procedure, First Report, Session 1962–63, *The Rule Relating to Reference in the House of Commons to Matters Considered as Sub Judice*, HC 156. The matter was referred to the committee on 21 November 1962 following an instance of the rule being applied to a civil case in December 1961 (para 1).

⁵ The 1844 case mentioned in that report did not relate to a Speaker's ruling but to a case before the courts which was for that reason not referred to in the Queen's Speech nor by two Members in the debate on it: HC (1962–63) 156 pp 48, 56; Parl Deb (1844) 72, cc 5, 85–6, 98.

further resolution was made on 28 June 1972, following a further report from the committee, which exempted civil cases to some extent if the matter to be raised related to ministerial decisions or issues of national importance; at that time national industrial disputes might be brought before the National Industrial Relations Court.⁶ The application of the rule developed through individual rulings; for example, a ruling of 12 May 1992⁷ said that it applied to coroners' courts, which were not specifically mentioned in the 1963 resolution. Similarly, although the resolutions did not mention select committees, committees were advised that they should apply it, at least to proceedings taking place in public.

6. Meanwhile, the House of Lords had made no corresponding resolution, but guidance was inserted in the *Companion to the Standing Orders* following reports of their Procedure Committee.

7. The Joint Committee on Parliamentary Privilege, which was established in 1997 and reported in 1999, considered the sub judice rule.⁸ It recommended that the rule should be updated, and should be adopted as a resolution by both Houses. This was done on 11 May 2000 (Lords) and 15 November 2001 (Commons). The resolutions are identical except that the discretion given to the Speaker of the House of Commons is given to the Leader of the House of Lords.

8. The Scotland Act 1998 required the Scottish Parliament, when established, to have a sub judice rule, and that Parliament has made a Standing Order⁹ which defines cases as "active" if they are active for the purposes of section 2 of the Contempt of Court Act 1981.¹⁰ This is a somewhat wider definition than in the Westminster sub judice resolutions: in particular, it means that criminal cases are active from the time an arrest is made (or a warrant for arrest is issued), rather than from when someone is charged. The Joint Committee considered that the practical difficulties of ascertaining whether someone had been arrested (or released without charge) could be insuperable, and recommended that the existing starting point for the sub judice rule should be retained.¹¹

9. A report in 1997 by the Members' Ethics and Parliamentary Privileges Committee of the Legislative Assembly of Queensland contains a useful survey of the conventions in other legislatures in Australia, New Zealand and Canada. That Committee recommended that the rule should apply to civil cases only if a jury were involved, and then only starting four weeks before the date fixed for the trial, and the Legislative Assembly has adopted this recommendation.¹²

6 Select Committee on Procedure, Fourth Report, Session 1971–72, *Matters Sub Judice*, HC 298. The Court was established by the Industrial Relations Act 1971 and abolished by the Trade Union and Labour Relations Act 1974. The 1972 Resolution did not go as far as the Committee's report, which had recommended that reference should be allowed to cases, except defamation cases, in all civil courts, unless it appeared to the Chair that "there is a real and substantial danger of prejudice to the proceedings" (HC 298, para 24).

7 HC Deb, col 494, 497

8 Joint Committee on Parliamentary Privilege, Report, HC (1998–99) 214–I to –III, HL Paper (1998–89) 43–I to –III. The relevant paragraphs (189–202) are reproduced at Ev 37.

9 No. 7.5 (see Ev 45)

10 The criteria are set out in Schedule 1 to the Act.

11 Joint Committee Report, paras 195–6.

12 Report available on www.parliament.qld.gov.au, under "committees".

2 The justification for the rule

Prejudice of cases

10. Both the provisions of the Contempt of Court Act 1981 (which does not apply to proceedings in Parliament) and the sub judice rule are intended to ensure that the decisions of the courts are not impeded or prejudiced by advance publicity, but are taken entirely on the evidence presented to those courts. Obviously there is more concern that such publicity could prejudice a jury, but even in non-jury trials, the possibility exists of witnesses or the parties concerned being prejudiced by advance publicity;¹³ as the Clerk put it, “Even if ... the case is being heard by an experienced judge on his own, nonetheless there is a perception created which might after the event lead the person who was on the wrong side of the judge’s judgment to say ‘It was the House of Commons interfering; otherwise I would have got proper justice’.”¹⁴ The Joint Committee said: “Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures”.¹⁵ The Attorney General took the view that Parliament was more influential than the media:

... what is said in Parliament has potentially a particularly powerful impact: a powerful impact because it is well publicised; likely to be picked up and reported in many places; and a powerful impact because what is said in Parliament by the people’s elected representatives has a particular authority. If a minister is induced to say something, I suppose it can even be said that this is the Government’s view, and that may carry some authority as well.¹⁶

11. In his paper, the barrister Mr A. W. Bradley commented “... In view of the public interest in maintaining the ‘rule of law’, Parliament must be taken as being committed to the need for ‘due process’ in the system of civil and criminal justice. The courts have developed many rules that seek to achieve this ...”. He goes on to raise the possibility that some activity by Members could lead to a conviction being set aside or a trial in progress having to be abandoned.¹⁷ Ms Keeble thought that judges were immune from influence by debate: “perhaps judges are not quite the frail flowers that they have been presented as” and “people will always find someone to blame for a result that did not suit them”.¹⁸ She also doubted that what was said in Parliament was necessarily influential: “People are more likely to be influenced by the soaps than by me”.¹⁹ She explained that often a discussion in the House would go unreported.²⁰

13 See Q 88 (Attorney General); Ev 53 para 15 (Bar Council).

14 Q 14

15 Joint Committee Report, para 192.

16 Q 57

17 Ev 48, para 8. See also Ev 44 (Lord Advocate).

18 Qq 155, 157

19 Q 163

20 Q 192

12. We asked whether the Courts were becoming more relaxed in their attitude to coverage of active cases in the media. The Attorney General said that he did not think so: newspapers had been “pushing at the boundaries” of what was acceptable, but the courts took into account the time delay:

what the courts will recognise is that if there is a substantial period of time between the report and the date of the trial, then they will operate what the courts call the fade factor, and they will say, “It is likely that the jury will have forgotten these remarks, or at least their power will have diminished”.

However, he said that the considerations were different in Parliament as the rule was being applied in advance.²¹ Lord Nicholls of Birkenhead thought that the courts were taking “a more pragmatic view” on the issue of prejudice.²² The Attorney General thought that the courts were usually stricter in Scotland, but the Lord Advocate, Colin Boyd QC, thought that this difference had lessened recently under the influence of human rights legislation.²³

Comity

13. The Joint Committee report, and most of our witnesses, gave a second justification for the rule as it applies to Parliament (as distinct from the media), namely that Parliament and the Courts should not trespass upon each other’s jurisdiction, and that debates in Parliament should not presume to come to a decision on a matter for which the courts are responsible. This is sometimes referred to as the principle of “comity”. In words quoted by the 1963 committee, the purpose of the rule “is to avoid the House setting itself up as an alternative forum in which a case might be tried”.²⁴ The Clerk described the principle as

... the mutual respect that two central organs of the constitution with different functions ought to have one for another. We do not want the courts interfering with what goes on here. Indeed we fight like billyo to try to ensure that that does not happen. If that is right so also it is right that we should not be trying to do the job of the courts for them or be seen to be interfering, even if that interference is not in practice likely to prejudice the outcome of the case.²⁵

The Attorney General said:

I would describe it this way. It is important that the courts are left to get on with their work. Parliament should not be seen as an alternative forum for deciding upon rights and wrongs. It is better that they should be seen to be determined in what is the more controlled—perhaps some might say the more balanced—atmosphere of a court of law, with both sides being able to present their point of view more fully. ... Put in constitutional terms, it is a part of the separation of powers that we leave the

21 Q 59

22 Q 95. See also Qq 97 and 99.

23 Q 84; Ev 45

24 HC (1962–63) 156, Q 58 (quoted in para 3). The witness was Mr (later Sir) Richard Barlas, then Second Clerk Assistant (the equivalent of Principal Clerk of the Table Office) and later Clerk of the House.

25 Q 14

resolution of individual disputes to the courts, as the courts should leave to Parliament the business of legislating.²⁶

Lord Nicholls of Birkenhead put it like this:

On the other side, with our separation of powers, one has to take into account the proper discharge by the judiciary of their constitutional functions as the judicial arm of the state. It is essential, if that role of the judiciary is to be discharged properly, that the judiciary should not only be, but also be seen to be, the only constitutional body for determining issues which come before the courts. The second reason for having the *sub judice* rule is that it is intended by the Members—because of course it is a self-imposed rule, it is not a rule imposed by the judges—to ensure that Parliament is not seen to be an alternative constitutional forum for canvassing the rights and wrongs of issues which are coming before the judiciary, matters to be decided by the courts in discharging their constitutional function. The Attorney General I think in his evidence to you labelled that function ‘comity’, and I think I am right in saying a member of this Committee described it as ‘inter-institutional courtesy’. Those labels are right and that function is important because good neighbourliness and politeness oil the wheels. But this function of the *sub judice* rule goes much deeper than that, because it is inherent in the proper discharge by the courts and Parliament of their separate constitutional roles. If the system is going to work, the courts and Parliament too need to be astute to recognise their own roles and to recognise the limits of their roles. As I understand the *sub judice* rule, it is an effort to achieve a practical way of balancing those two separate constitutional functions.²⁷

The Lord President of the Court of Session, Lord Cullen of Whitekirk, wrote:

... more fundamentally, there is a need to avoid trenching on the independence of the judiciary. I am not so much concerned with a risk of the views of judges being influenced by what is said in the legislature. I am confident that judges can be expected to be robustly independent in arriving at their decisions. I am more concerned with the point that it is fundamentally inappropriate that the legislature should be treated as the alternative forum for the discussion of the issues in a pending court case. That would tend to blur the separation of functions, and to undermine public confidence in the judiciary.²⁸

14. However, Sally Keeble saw the rights of both Parliament and the courts as existing in order to protect the public: the right to a fair trial had to be balanced against the constituent’s right to have a case made in the House of Commons:

The overwhelming argument for a sub judice rule is the right of our constituents to a fair trial, and for this it is worth Parliament fettering its right to the freedom of speech. However, this fettering of the freedom of speech should not go further than is required to ensure that a trial is fair.²⁹

26 Q 57. See also evidence from the Bar Council, Ev 53, para 13.

27 Q 100. See also Q 105.

28 Ev 43

29 Ev 25

She also said: “Our respect for the courts and the integrity of their proceedings is based on our respect for our constituents’ right to a fair trial, rather than being purely out of institutional courtesy as such”.³⁰

3 Problems with the rule

Level of disquiet

15. It is difficult to quantify the level of disquiet with the operation of the rule, as it is often applied (to questions or applications for adjournment debates) by the clerks in the Table Office, and disputes seldom reach the floor of the House. The Principal Clerk of the Table Office said that checks on the status of court cases were made with Government departments on 18 occasions in July 2004, 12 in August and September (combined), 11 in October and 10 in November. Altogether 12 cases out of these 51 were found to be sub judice, but some of these figures refer to the same cases.³¹ Four cases had been raised with the Speaker in 2004.³² The Clerk of the House told us that the last occasion he could recall “when the rule gave rise to significant frustration on the floor of the House” was during the proceedings to extradite General Pinochet in 1998–99.³³

Related cases

16. The case reported to us by Donald Anderson involved allegations of abuse by the authorities of a foreign state, when that state was also the defendant in a civil case in the United Kingdom on similar grounds. The Foreign Affairs Committee was advised that referring to the allegations in a report might prejudice the court case. The Clerk of the House referred to this case as “extremely unusual”.³⁴

17. The case raised by Ms Sally Keeble concerned a death in an institution for offenders. The sub judice rule was applied because questions on policies in force at that institution might relate to questions being considered by the inquest. A question had been allowed about restraint procedures at institutions in general, and there had been a statement in the Lords about the specific institution.

18. More generally, Members may wish to raise the way that the current law operates, and suggest changes, in adjournment debates or debates on motions, rather than in debates on bills introduced for the purpose (to which the sub judice rule does not apply). Depending on the nature of the debate, there may well be numerous active cases (e.g. on causing death by dangerous driving), or, at the other extreme, the circumstances can be so rare that any raising of the issue would be linked in most people’s minds with a particular case (e.g. a court martial), even if the case were not mentioned or referred to.

30 Q 154

31 Q 2

32 Q 5

33 Ev 36; see also footnote to Q 7.

34 Ev 37

19. The Clerk of the House said that “if a matter of public policy is genuinely at issue, it is normally possible to find ways of addressing it in general terms without going into the details of the particular case before the courts in a way that might be prejudicial”.³⁵ Ms Keeble was disappointed that the Table Office had declined her questions, given that the rule was “normally restricted to the very narrow matter before the court. It is recognised that wider general issues of public concern still have to be debated and discussed, especially by those of us who are MPs and usually want to see general public policy issues dealt with by the Government”.³⁶

20. The Clerk said that there had been occasions on which Members had been allowed an adjournment debate on a general issue, but:

... They [Members] take a general issue and get an adjournment debate on it and then you suddenly find that they are actually talking about a very specific case and rehearsing the sort of facts that ought properly to be set out in the prosecution’s case and then adjudicated by the judge rather than by the minister who is answering the debate.³⁷

Delay

21. The Attorney General and Lord Nicholls of Birkenhead pointed out that the rule does not prohibit references to a case, but merely delays such references.³⁸ However, cases may be active, within the terms of the rule, for several years. In these circumstances there may be justification in asking the Speaker to exercise his discretion, a point to which we return in paragraph 32 below.

Reference to cases not impinging on the merits

22. The rule states that “cases ... shall not be referred to”, and we asked if this aspect of the rule is too strict: for example, should Members be able to refer to a case in terms of how long it is taking? The Clerk doubted “whether anyone would in fact be pulled up by the Chair simply for referring to the length of time a case is taking. Difficulties would be more likely to occur if references to length of time widened into references to the conduct of the trial or the possibility of discontinuing it”. However, he added that references in a debate would be treated differently from references in a question or the title of an adjournment debate, where the rule was applied strictly.³⁹ The Attorney General said:

I can well understand ... that colleagues and Members of this House raise the question of why it is taking so long for a particular legal proceeding to be determined. As I say, I am very sympathetic to that. However, if there were a discussion about that particular issue ... that could end up potentially influencing the outcome of applications taking place in the case. There might be, for all we know, an application for an adjournment the following week. If the adjournment were refused,

35 Ev 36

36 Ev 24

37 Qq 11, 25. See also Ev 54, para 21 (Bar Council).

38 Qq 49, 102

39 Ev 37; Q 44

it might be said, “The court has only refused it because it saw that Parliament was unhappy about the time that is being taken”, or somebody might try and stop the proceedings on the grounds that they have gone on too long.⁴⁰

The Faculty of Advocates said:

The reference to a case taking too long may also be seen as an interference in the course of justice. It may be seen as a criticism, express or implied, of the parties involved, their legal team, or indeed the judge.⁴¹

Similarly, the Hon. Secretary of the Coroners’ Society for England and Wales, Mr Victor Round, pointed out that decisions affecting timing, e.g. a request for an adjournment, could be affected by comments in the House:

... the judicial officer sitting without jury certainly could be affected in decision-making by comments made in the House. Dealing with requests for an adjournment is a particularly good example. In addition a court has always to demonstrate that each *individual* decision can be seen to be made on the basis only of what is proceeding in the courtroom, isolated from matters outside it.⁴²

Inquests

23. Normally, when a death is suspected to be from other than natural causes, an inquest is opened as soon as possible, so that permission can be given for a funeral, and then adjourned until the evidence has been assembled. The rule is applied from the time the inquest is opened, not when it is resumed, and therefore the period concerned can be considerable.

24. The Attorney General drew our attention to this and said:

I suspect there is room ... for some clarification as to when the rule should apply in relation to coroners’ courts. It is clear what the time frame is when it relates to criminal proceedings. It is from the moment of arrest. In relation to civil proceedings, it is in relation to particular proceedings. I do not think that it is so clear, however, what the point of time is in relation to inquests. It may be that it would be helpful therefore to consider what the alternatives might be. One alternative could be that the rule should apply from the moment that the inquest is opened, but not before. That could still sometimes lead to quite a protracted period of time, because inquests can start and be adjourned for a period of time. ... So that may not be the right solution. It does occur to me, however, that there is not the same clarity of timing in relation to it and it may well be helpful therefore to indicate that there could be a time put on that, which would lessen the impact of the rule in relation to coroners’ courts without excluding coroners’ courts from protection of the rule.⁴³

40 Q 54

41 Ev 42

42 Ev 46. See also Ev 54, para 22 (Bar Council).

43 Q 80. See also Ev 55, para 11.

However, Mr Round did not support the suggestion from Queensland of a ban on discussion for only four weeks before the hearing began; he also said: “it may not be clear for many months after the death whether or not a jury will be called to the inquest”.⁴⁴

25. One justification put forward for relaxing the rule in the case of coroners’ courts was that nobody is on trial: as Ms Keeble pointed out, the courts are precluded from making decisions about the guilt or innocence of any individual person.⁴⁵ However, the Clerk said “the consequence for individuals can be serious, as the recent inquest involving police firearms officers has demonstrated”,⁴⁶ and Lord Nicholls of Birkenhead said: “... the coroner is discharging a judicial function, and that function should retain its integrity and not be seen to be possibly influenced by a discussion in Parliament in relation to the same subject before he has given his decision”.⁴⁷

26. Ms Keeble pointed out that the rule had first been applied to coroners’ courts by a Speaker’s ruling and that it had been included in the Joint Committee’s recommended resolution without comment.⁴⁸ She argued that the rule should not apply to coroners’ courts at all, or if it did, only when a hearing was imminent and involved a jury.⁴⁹ “To stop an MP standing up and making some statement on a hearing which is taking place seems to be quite fair but to apply that for the duration of an adjournment would seem to me to be completely disproportionate.”⁵⁰

27. It is clear that the length of time for which inquests count as “active” under the sub judice rule could seriously inhibit Members in raising related issues in the House, perhaps to press for changes to prevent another death in similar circumstances. We have considered whether a change to the rule is needed; however, we believe that it would be preferable to rely on the Speaker’s discretion. We would expect the Speaker to balance the desirability of the House discussing a matter of public concern against the likelihood of prejudice, which might well be low if the resumption of the inquest were not expected for several months.

28. The Bar Council point out that paragraph (3)(a) of the sub judice resolution treats cases before coroners’ courts as falling within the provisions of paragraph (1)(a), concerning criminal cases (which are active when a charge has been made or a summons to appear has been issued), and describes this as “hardly apposite”.⁵¹ **We recommend that the two Houses should consider jointly how the points at which cases before coroners’ courts are to be treated as active can be more suitably defined.**

44 Ev 46

45 Ev 24

46 Ev 37

47 Q 133

48 Q 160

49 Qq 160, 163, 182

50 Q 165

51 Ev 54, para 24

Tribunals

29. The sub judge rule applies to tribunals set up under the Tribunals of Inquiry (Evidence) Act 1921, by virtue of paragraph 2 of the resolution of 2001.⁵² It does not extend, however, to Royal Commissions or non-statutory inquiries set up by the Government, even if conducted by judges,⁵³ and it does not extend to the large number of tribunals now provided for by statute. The 1963 committee considered that applying the rule to such tribunals would be “too restrictive of the rights of Parliament” and recommended leaving the decision to the discretion of the Chair; the 1963 resolution makes no reference to such tribunals.⁵⁴

30. We received a memorandum from the Adjudication Panel for England asking us to consider extending the rule to proceedings before that body, which considers references about the possible failure of members of local authorities to abide by the local government code of conduct. This arose from an exchange of correspondence with the Clerk of the House about a debate in Westminster Hall on 1 February 2005 on the work of the Standards Board for England.⁵⁵ The Law Society of Scotland and Mr Bradley also suggested that we should consider extending the rule to tribunals.⁵⁶ The Contempt of Court Act 1981 applies to tribunals “exercising the judicial power of the State” and to tribunals under the 1921 Act.⁵⁷ The Bar Council describes this as a “very uncertain area”: for example valuation courts have been held not to be included, but employment tribunals are.⁵⁸

31. We understand that remarks made in Parliament could prejudice cases before tribunals, and would expect Members to take care to avoid doing so. But we agree with our predecessors in 1963 that extending the rule to tribunals would be too restrictive.

4 The Chair’s discretion

32. Several witnesses said that the solution to any practical difficulties arising from the rule lay with the use by the Chair of its discretion to waive the rule in appropriate cases, granted by the opening words of the resolution: “subject to the discretion of the Chair”.⁵⁹ The Joint Committee described this as “the key to the successful operation of the sub judge rule in the House of Commons” and said that “there will be times when the Chair has to strike a balance between the public interest in the unimpeded progress of judicial proceedings and other aspects of the public interest”.⁶⁰

52 “Specific matters which the House has expressly referred to any judicial body for decision and report”. The most recent occasion on which the 1921 Act was applied was on 23 January 2001, to the Harold Shipman Inquiry.

53 Erskine May’s *Parliamentary Practice*, 23rd edition, p 438, and see also Q 28 (Clerk of the House).

54 HC (1962–63) 156, para 17. There had been a ruling in 1935 relating to inquiries before the Wreck Commissioner.

55 Ev 50

56 Ev 46, 50

57 Contempt of Court Act 1981, s 19: “In this Act ... ‘court’ includes any tribunal or body exercising the judicial power of the State, and ‘legal proceedings’ shall be construed accordingly”. Section 20 applies the Act to tribunals under the 1921 Act.

58 Ev 52, para 10

59 Qq 49 (Attorney General), 102 (Lord Nicholls of Birkenhead); see also Ev 50, para 15(3).

60 Joint Committee Report, para 200

33. The Principal Clerk of the Table Office explained that this discretion is exercised by the Speaker personally, not by her or by the Clerks in the Table Office.⁶¹ This can, of course, be done only in those few cases that reach the Speaker: often, a Member accepts the advice of the Table Office and does not take the matter further.⁶²

34. Ms Keeble pointed out that, in exercising his discretion, the Speaker would be advised by the same officials as had already considered the issue, and said this had influenced her decision not to seek the Speaker's discretion in the instance which she quoted to us.⁶³ However, there is a distinction between the Table Office's role in deciding whether the rule is applicable (e.g. whether coroners' courts are included or whether a case is active)—on which the Speaker might often come to the same view as the Table Office—and the Speaker's specific role, set out in the resolution, in deciding whether, in all the circumstances, the rule should be disapplied—a decision which the Table Office cannot take.

35. We agree that the exercise of discretion should continue to be a matter for the Speaker personally; therefore, we encourage Members who consider that the rule is unreasonably impeding the work of Parliament to refer the matter to the Speaker, stating their case, and ask him to exercise his discretion.

5 Select committees

36. As mentioned in paragraph 5, the 1962 resolution did not apply in terms to select committees, but the 2001 resolution does, and the discretion in applying the resolution is given to “the Chair”. In select committee proceedings, this is taken as referring to the chairman of the select committee, rather than the Speaker, and it was Mr Anderson who had to decide on the application of the rule to the case before the Foreign Affairs Committee.

37. In his memorandum, the Clerk of the House suggests that, if a select committee chairman decided to exercise discretion to allow an active case to be referred to, this might later cause difficulties to the Speaker and his deputies in ruling on questions or matters raised in debate in the House. He suggested that, where the timing allowed, select committee chairmen might consult the Speaker in advance; but he also said that it was rare for sub judice issues to arise in select committees.⁶⁴

38. We believe that there are circumstances in which select committee chairmen may wish to consult the Speaker in advance if time allows; otherwise the right course would be to take the evidence concerned in private, so that consideration could be given to how much of it could properly be published before the relevant case ceased to be active.

61 Q 10

62 See Q 40

63 Qq 184–6, 189

64 Ev 34–5; Qq 35–7

39. We also considered the issue of select committee witnesses abusing their position by making gratuitous references to cases before the courts. The *Guide for Witnesses*⁶⁵ explains the position, and the Clerk of the House thought that committee chairmen would be able to spot if a witness were behaving irresponsibly and stop it; he did not think that it was a significant problem.⁶⁶

6 Conclusions

40. In framing our conclusions, we are mindful of the Joint Committee's desire that the rule should, as far as possible, be the same in both Houses, a point emphasised by the Clerk of the House in evidence.⁶⁷ Lord Brabazon of Tara, Chairman of the Lords' Procedure Committee, wrote in October 2004 (at that time, with particular reference to proceedings in coroners' courts):

This is clearly an area in which it is desirable that the two Houses should keep broadly in line. We shall await with interest the outcome of any inquiry by the Commons' Procedure Committee and then consider whether any change is appropriate in the Lords.⁶⁸

41. The Clerk of the Parliaments asked for the opportunity to comment on any recommendations for change affecting both Houses.⁶⁹

42. We are faced with a wide range of possible recommendations. At one extreme is the possibility of abolishing the rule and leaving the issue to the responsibility of individual Members. The Table Office would still be able to check whether a case was active, but it would be up to the Member whether to pursue his question or adjournment debate. We do not believe that this would be a sensible rule, because Members would interpret their responsibility in different ways, and cases could be prejudiced inadvertently.

43. Alternatively, we could recommend that the rule be disapplied when an unreasonable delay would be imposed on Members by long-lasting proceedings. For example, for coroners' courts, an adjourned inquest could be considered to be active only when a date was set for resumption.

44. We could, alternatively, rely on our recommendation in paragraph 35 that Members should be more ready to ask the Speaker to exercise his discretion: in this way the rule could be disapplied whenever the balance of benefit led to that being appropriate.

65 The Guide is available from www.parliament.uk, under "Committees". The relevant passage reads: "*Matters before a Court: When giving evidence in public to a Committee witnesses should take care not to comment on matters currently before a court of law. The same consideration may apply in certain cases where court proceedings are imminent. If witnesses think this is likely to be a problem or that the evidence they may give is likely to breach an injunction or order of a court of law, they should discuss the matter in advance with the Clerk of the Committee.*"

66 Q 39

67 Joint Committee Report, para 201; Q 46

68 Ev 40

69 Ev 40

45. We could, as did our predecessors in 1972,⁷⁰ set out various considerations which the Speaker might have in mind when considering whether to exercise his discretion. (We have already done this in relation to coroners' courts in paragraph 27.)

46. We have already recommended that Members should be ready to put their cases before the Speaker so that he can exercise his discretion. Apart from a clarification of the rules relating to coroners' courts, we do not recommend a change to the text of the sub judice rule at the moment, although we may wish to return to the matter in the light of experience. However, we remind Members that they should not utter anything on the floor of the House which would affect the evaluation of the merits of proceedings which are imminent or before the courts, or influence the result of proceedings, in particular the likelihood of an acquittal.

Conclusions and recommendations

Inquests

1. It is clear that the length of time for which inquests count as “active” under the sub judice rule could seriously inhibit Members in raising related issues in the House, perhaps to press for changes to prevent another death in similar circumstances. We have considered whether a change to the rule is needed; however, we believe that it would be preferable to rely on the Speaker's discretion. We would expect the Speaker to balance the desirability of the House discussing a matter of public concern against the likelihood of prejudice, which might well be low if the resumption of the inquest were not expected for several months. (Paragraph 27)
2. We recommend that the two Houses should consider jointly how the points at which cases before coroners' courts are to be treated as active can be more suitably defined. (Paragraph 28)

Tribunals

3. We understand that remarks made in Parliament could prejudice cases before tribunals, and would expect Members to take care to avoid doing so. But we agree with our predecessors in 1963 that extending the rule to tribunals would be too restrictive. (Paragraph 31)

The Speaker's discretion

4. We agree that the exercise of discretion should continue to be a matter for the Speaker personally; therefore, we encourage Members who consider that the rule is unreasonably impeding the work of Parliament to refer the matter to the Speaker, stating their case, and ask him to exercise his discretion. (Paragraph 35)

⁷⁰ HC 298 (1971–72), paras 23–28. Speaker Selwyn Lloyd had asked the Committee to produce such guidelines (*ibid*, Q 220).

Select committee chairmen

5. We believe that there are circumstances involving sub judice issues in which select committee chairmen may wish to consult the Speaker in advance if time allows; otherwise the right course would be to take the evidence concerned in private, so that consideration could be given to how much of it could properly be published before the relevant case ceased to be active. (Paragraph 38)

General

6. We have already recommended that Members should be ready to put their cases before the Speaker so that he can exercise his discretion. Apart from a clarification of the rules relating to coroners' courts, we do not recommend a change to the text of the sub judice rule at the moment, although we may wish to return to the matter in the light of experience. However, we remind Members that they should not utter anything on the floor of the House which would affect the evaluation of the merits of proceedings which are imminent or before the courts, or influence the result of proceedings, in particular the likelihood of an acquittal. (Paragraph 46)

Annex: Sub Judice Resolution, 2001

Resolved, That, subject to the discretion of the Chair, and to the right of the House to legislate on any matter or to discuss any delegated legislation, the House in all its proceedings (including proceedings of committees of the House) shall apply the following rules on matters sub judice:

(1) Cases in which proceedings are active in United Kingdom courts shall not be referred to in any motion, debate or question.

(a)(i) Criminal proceedings are active when a charge has been made or a summons to appear has been issued, or, in Scotland, a warrant to cite has been granted.

(ii) Criminal proceedings cease to be active when they are concluded by verdict and sentence or discontinuance, or, in cases dealt with by courts martial, after the conclusion of the mandatory post-trial review.

(b)(i) Civil proceedings are active when arrangements for the hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance.

(ii) Any application made in or for the purposes of any civil proceedings shall be treated as a distinct proceeding.

(c) Appellate proceedings, whether criminal or civil, are active from the time when they are commenced by application for leave to appeal or by notice of appeal until ended by judgment or discontinuance.

But where a ministerial decision is in question, or in the opinion of the Chair a case concerns issues of national importance such as the economy, public order or the essential services, reference to the issues or the case may be made in motions, debates or questions.

(2) Specific matters which the House has expressly referred to any judicial body for decision and report shall not be referred to in any motion, debate or question, from the time when the Resolution of the House is passed until the report is laid before the House.

(3) For the purposes of this Resolution—

(a) Matters before Coroners Courts or Fatal Accident Inquiries shall be treated as matters within paragraph (1)(a);

(b) ‘Motion’ includes a motion for leave to bring in a bill; and

(c) ‘Question’ includes a supplementary question.

15 November 2001

Formal minutes

Wednesday 16 March 2005

Members present:

Sir Nicholas Winterton, in the Chair

Mr John Burnett

Sir Robert Smith

Mr Tony McWalter

Mr Desmond Swayne

The Committee deliberated.

Draft Report (Sub Judice Rule of the House of Commons), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 46 agreed to.

Resolved, That the Report be the First Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[The Committee adjourned.]

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Oral evidence

Taken before the Procedure Committee

on Wednesday 8 December 2004

Members present:

Sir Nicholas Winterton, in the Chair

Mr John Bercow
David Hamilton
Mr Tony McWalter

Sir Robert Smith
Mr Desmond Swayne
David Wright

Witnesses: **Mr Roger Sands**, Clerk of the House of Commons, and **Ms Helen Irwin**, Principal Clerk, Table Office, House of Commons, examined.

Q1 Chairman: Can I welcome very warmly the Clerk of the House of Commons, Mr Roger Sands, and he is accompanied today by Helen Irwin, the Principal Clerk, Table Office, of the House of Commons. Can I welcome you both and thank you very much for coming. Mr Clerk of the House, can I thank you for the paper that you have produced for us. Our inquiry is into the *sub judice* rule. Can I start the questioning from the chair with a very straightforward, factual question: how often do *sub judice* issues currently arise, one, in the House of Commons and, two, and this is particularly relevant to Helen Irwin, with questions or motions in the Table Office? Roger Sands?

Mr Sands: Thank you, Chairman. I think the two questions may be linked in a way because it is very rare for cases actually to erupt on to the floor of the House, and one reason for that is that we do try to spot difficulties in advance and prepare and try where necessary to head them off. I cannot think of a recent case when I have been at the table when there has been a serious issue. There have been one or two cases at Question Time that we were worried that somebody might be referring to a case that we were not aware of but there has not been a major problem recently. That is partly because of the pre-emptive work that goes on in Helen's office perhaps.

Q2 Chairman: Perhaps then we should turn to Helen Irwin for the other half.

Ms Irwin: The Office makes it its business to check if it has any reason to suppose that an active case may be being referred to. I asked the office just as I came up here when they last checked a question to see if *sub judice* might be involved, and it was this morning. They rang up the department and the case was not *sub judice*. The business in question is over. I do not have any details. Not for any particular reason but just to make us a little bit more efficient, we have been keeping a running check in the office since last July of the *sub judice* checks going on at any one time so that when the clerks hand over one to another they are fully aware of what is going on. I would not pretend these figures are scientific but in July of this year we checked 18 sets of questions. Some of those checks may relate to questions, some may be proposed early day motions, some may be

proposed adjournment debates, or any or all of those. There were 18 cases, if you like, that were potentially *sub judice*; we found that four were. In August and September we checked 12, and four were *sub judice*, but two were the same case and had already been checked out so that was, if you like, a continuing check. In October we checked 11 and one turned out to be *sub judice*, and that one was this continuing case which this Committee has had referred to it. In November we checked 10 and three were *sub judice*.

Q3 Chairman: Can I just ask you a question which may dovetail in with some of the subsequent questions. Do you believe that the strict implementation of the *sub judice* rule restricts Members of Parliament in doing the job that they are here to do?

Mr Sands: No, honestly I do not, Chairman. Obviously it depends how you interpret the job that Members are here to do; I am aware that, increasingly, Members do get involved in issues in their constituencies and perhaps come under pressure to raise matters which are concerning constituents and these matters may arise from court cases. One reason that the *sub judice* rule has been defended in the past is that it provides a protection to Members against pressures of that sort. Members can say to a constituent who comes to them, "Look, I am very sympathetic but I am afraid I really cannot raise that, that is a matter for the courts. I am a legislator and not an operator of the law once it has been passed and I really must steer clear of that in the House."

Q4 Chairman: Despite the fact that very many Members of the House are lawyers, barristers, solicitors and legal experts?

Mr Sands: Well, their professional qualifications do not affect the role that they are here to perform. Indeed, it is generally speaking, in my experience, the lawyers among politicians who are the most intent on these niceties being observed.

Chairman: It is very helpful to have that on the record. Sir Robert Smith?

Q5 Sir Robert Smith: Can I keep on with the practical experience of the use of the Table Office and its role. As you have said, if the Speaker is in the chair and it is happening in the Chamber that is where the Speaker has direct involvement; but on those cases you highlighted where there have been decisions made by the Table Office, people if they are unhappy could go to the Speaker and say, "I do not agree with what they have done." How often, if ever, does that happen in cases that the Table Office have told a Member, "Sorry that is *sub judice*," and they have said, "I do not accept that"?

Ms Irwin: The case that I mentioned which we checked on a number of occasions in recent months is one of which the Committee is aware, and on that occasion the Member did write to Mr Speaker. Personally I have not recently taken any question to the Speaker on a Member's instructions to ask for his view. Again I have done a bit of checking. We do not keep comprehensive statistics of all our conversations with Members, as it would not be practicable. As all Members know, quite a lot of things happen without anything being written down on paper at all. As far as I can gather, there were three occasions on which Members have contacted the Speaker, apart from the one I mentioned, in 2004. On one occasion the Speaker exercised his discretion to allow a question to be asked. This was a case that was extending over a very long period. On one occasion we had accepted a question on the understanding that all proceedings were complete. Another Member pointed out that in fact the case had gone to appeal, so in discussion with the Speaker we took the question off the order paper without notice. On the third occasion the Table Office had interpreted the rule very stringently. It concerned a coroner's inquest and in discussion with Mr Speaker I came to the conclusion that we had perhaps been a bit too strict, and with Mr Speaker's agreement we advised the Member that he could if he wished ask the question.

Q6 Chairman: Following up the earlier part of your answer, do you think you should take a question off the order paper without notice?

Ms Irwin: That is only done with Mr Speaker's authority of course, but yes I do, if a question so completely infringes the rule. In this particular case there was an appeal and it was a very serious case and it would not have been proper for the question to be answered. I do not suppose the Minister would have answered it actually.

Q7 Mr Bercow: Are you aware of any situations in which having offered your advice that the matter in question is *sub judice*, the Member concerned, dissatisfied with that advice, has decided nevertheless to raise the issue with Mr Speaker, not in the form of a written or oral question, which you would indeed have the opportunity to intercept and prevent, but in the form of a point of order?

Ms Irwin: I do not think I can remember a recent point of order about *sub judice* matters, Mr Bercow. I will have a look and correct myself if I am wrong. I think when the *Pinochet* case was live there were

certain points of order on this issue and on many other aspects of that case, but that precedes my time in the Table Office.

Q8 Chairman: Could you do some research, because I think John Bercow has raised an important matter and if you do come up with any matter that would be of interest to the Committee if you could contact us?

Ms Irwin: I will see what I come up with.¹

Chairman: Thank you very much. Robert?

Q9 Sir Robert Smith: In applying the rule then in the Table Office, is there one person who acts as a judge of this issue or is there a set of guidelines and whoever is on duty at the time would say this is *sub judice*? How is consistency enforced?

Ms Irwin: My mention earlier on of our attempt to keep a running record on the Office's computer suggests that there was a bit of a problem, not so much in ensuring consistency but making sure that when the shift of clerks changes once or twice a day those coming on are fully aware of all the questions that have been asked of government departments earlier in the day. As all Members will know, it is sometimes a bit hectic in there. As regards the rule, the rule is so clear that there is very little need for arbitration. If the clerks in the office are in doubt they will first ask each other—and there is a lot of collaborative discussion in the office—second ask me, and if I was really stuck I would probably ring the government department for a chat myself. The cases are very unusual and Members nearly always take the office's advice.

Q10 Sir Robert Smith: The one area where maybe there is a bit of judgment is "where a ministerial decision is in question or in the opinion of the chair a case concerns issues of national importance such as the economy, public order or the essential services." How is an issue of "national importance" interpreted?

Ms Irwin: That is a matter for Mr Speaker and Mr Speaker's discretion on every occasion. I do not have any discretion nor do the clerks in the office.

Q11 Chairman: Does the Clerk?

Mr Sands: I think it is pretty rare that that national importance provision would come into play. I think, like an elephant, you would spot it when it lumbered over the horizon. It is pretty rare for a humdrum case in the courts to raise an issue of national importance, and where it has issues attached to it which could be regarded as having wider significance then, as I have said in my paper, we can nearly always advise a Member, if the Member is *bona fide* wanting to raise the issue—and that can be quite a big "if" and I will come back to that in a moment—we can nearly always detach the issue from the case. I think Mrs Keeble's letter which you have in front of you refers to the fact that Dr Vis was allowed an adjournment

¹ *Note by witness:* I have not since located any examples in the period since I moved to this post in April 2001. In my experience Members wishing to contest the Office's advice on the subject would generally write privately to the Speaker on the subject as in the examples I gave in answer to Q5.

8 December 2004 Mr Roger Sands and Ms Helen Irwin

debate on the subject of the policy about restraint in custody, which was one of the issues raised in the case which she wanted to refer to. If you are *bona fide* just wanting to talk about the policy on restraint in custody, that is fine, but if you are starting then to elaborate, that is unacceptable. We have found Members are sometimes a wee bit unscrupulous in doing this. They take a general issue and get an adjournment debate on it and then you suddenly find that they are actually talking about a very specific case and rehearsing the sort of facts that ought properly to be set out in the prosecution's case and then adjudicated by the judge rather than by the minister who is answering the debate. So there is usually quite a clear distinction to be made.

Q12 Sir Robert Smith: What is the procedure whereby the Member is scrupulous and careful and frames that question in a general way but then the minister, not thinking, walks in and goes and gives a detailed, case specific answer? I presume the *sub judice* rule applies to the minister's answer?

Mr Sands: Government departments are not aware of many parliamentary rules but this is one they are aware of, and I think they normally advise ministers pretty carefully about that sort of thing. I do not recall a case of things happening that way round.

Q13 Sir Robert Smith: There might have been a recent one, but we will see!

Mr Sands: Sometimes there is an inwardness to these things.

Chairman: A member of this Committee is not going to be specific?

Sir Robert Smith: No, no!

Chairman: John Bercow?

Q14 Mr Bercow: On the subject of the justification for the rule, it seems clear that where prejudicing of court proceedings is not an issue the only reason for the application of the rule is to preserve comity between the courts and Parliament, and that it seems to me raises two issues. First of all, what harm in practical terms, Mr Sands or Ms Irwin, can actually be done if Parliament discusses an issue which is also before the courts? After all, this would be allowed, would it not, in the event that Parliament were legislating, so on the harm issue, what is it?

Mr Sands: I think harm is perhaps over-stating it but I think it is the mutual respect that two central organs of the constitution with different functions ought to have one for another. We do not want the courts interfering with what goes on here. Indeed we fight like billyo to try and ensure that that does not happen. If that is right so also it is right that we should not be trying to do the job of the courts for them or be seen to be interfering, even if that interference is not in practice likely to prejudice the outcome of the case. Even if that is not a risk because, for example, the case is being heard by an experienced judge on his own, nonetheless there is a perception created which might after the event lead the person who was on the wrong side of the judge's

judgment to say, "It was the House of Commons interfering; otherwise I would have got proper justice."

Q15 Mr Bercow: Really it is a matter of what one might call inter-institutional courtesy?

Mr Sands: I think so.

Q16 Mr Bercow: Secondly, is there any distinction between a matter which is *sub judice* being raised in the House of Commons and the House of Commons coming to a view on it? If a matter was raised, the Government might express a view in reply and if it did not it could be criticised for not doing so. Is that not a matter of greater significance than what an individual Member actually says?

Mr Sands: The House comes to relatively few decisions in the course of a week, but an awful lot is said!

Q17 Chairman: You do not want to think about that one again?

Mr Sands: No. If one were to restrict the *sub judice* rule to decisions I think it would be restricting it very tightly indeed. I know that Members feel that when they are speaking in the Chamber they are speaking to themselves, but they are not. It goes out in *Hansard*, it goes out on the web, it is picked over by the newspapers and if there is a juicy item which can be linked to a case you can be pretty sure that somebody somewhere will.

Q18 Mr Bercow: Is it your impression that the courts are becoming more relaxed about the coverage of cases in newspapers, both the extent of the coverage and indeed for that matter its nature and, if your judgment is that that is so and the courts are becoming more relaxed and sanguine about that coverage, should that have implications for how Parliament applies its rules?

Mr Sands: I would be very reluctant to answer the first question, Mr Bercow. You are taking evidence from the judicial representative bodies and I would want to leave that to them. I think it is certainly true that the media test the boundaries of what is allowed more and more assiduously and it may be, I can imagine, that the courts are not happy about that. But I suspect that they would only want to pick off really glaring cases, as they have done on one or two spectacular occasions, the Leeds United footballers being the most obvious case when effectively the newspapers wrecked that case and it had to be re-run, very expensively. That is perhaps a point I should have made in answer to your earlier question, which is that of course if anyone other than Parliament offends against the contempt of court rules they can be punished for that by the court; if Parliament offends against the contempt of court rules the courts have no redress.

Q19 Mr Swayne: Quite right.

Mr Sands: And of course quite right but I think it is against that background that Parliament has imposed this self-restraint.

Q20 Chairman: This leads me to a question I want to put to you before I bring Desmond Swayne in. You said a little earlier that Members of Parliament think they are speaking for themselves, but they are not—
Mr Sands: To themselves, I said.

Q21 Chairman: There is a tendency for people to downplay the importance of the Chamber which is a great mistake and unfortunate, but what you are saying is that if a Member is speaking in the Chamber of the House of Commons, he or she is speaking for Parliament and it is Parliament that could get into trouble for interfering or seeking to influence. Is that what you are saying?

Mr Sands: Well, he is speaking as a member of the institution. He is not speaking on behalf of Parliament, no, of course.

Q22 Chairman: This is what I am trying to establish because in fact Members do speak for themselves although they are part of an institution.

Mr Sands: Yes, but his speech is read as a speech made by a Member of the Parliament of the United Kingdom and that gives it a significance which it would not have if he were not a Member.

Mr Swayne: Can I put to you an alternative point of view and that is that this is the high court of Parliament and Members enjoy enormous privilege in what they can say in the Chamber unchallenged and the Speaker, quite properly, reminds Members from time to time that with that privilege comes responsibility and that they should exercise that responsibility with discretion. Why should therefore Members not exercise that same responsibility that they do with respect to what they might say which might be libellous outside the Chamber? Why are they not enabled to exercise precisely that same discretion with respect to what might be *sub judice*? I must say I think the whole notion of something being *sub judice* is an impertinence as far as this high court of Parliament is concerned.

Q23 Chairman: Think carefully, Mr Sands, before you reply to that missive.

Mr Sands: Being very careful, I would say it is a point of view but not one that I share!

Q24 Mr Bercow: I hear what you say.

Ms Irwin: It might be worth saying also that this is something that the Joint Committee on Parliamentary Privilege looked at not very long ago before it recommended the present text of the *sub judice* resolution. In its report it linked the question to contempt of court and both Houses accepted that conclusion.

Q25 Mr Swayne: Can I ask you to consider a specific example. Let us say that a Member of Parliament has a constituent who has been serving in the armed forces overseas and there has been a case of medical negligence where that serviceman was being treated in a foreign hospital, having the duty of care being sub-contracted to that foreign hospital by the Ministry of Defence. In taking that through the courts in this country, the question comes down to

whether the Secretary of State is able to sub-contract his duty of care and therefore is the constituent able to sue the Ministry of Defence or should they really be suing the foreign hospital? That is a positive question that the courts will decide, but whilst that is being decided by the courts and is still the subject of appeal it seems to me perfectly proper that a Member of Parliament should be able to raise that on adjournment or in questions and tackle the minister using the example of that constituent on the normative question. Should that be the case? Should that be the law? The courts will determine what the law is but what is just is a matter that Parliament ought to be able to discuss whilst that is going on. Would that fall foul of the *sub judice* rule?

Mr Sands: I think it could be presented in a way which did not but it would require enormous self-restraint on the part of the Member not to present it in practice as a special plea on behalf of the constituent, trying to influence the outcome of the hearing and perhaps the settlement that is made. So that is very marginal territory. I am not sure if you were here earlier when I was trying to make the distinction between the issue and the particular facts of a particular case. You can normally separate the one from the other but it requires self-restraint on behalf of the Member and we have occasionally been sold pups, you know.

Q26 Chairman: Would you deal with Desmond Swayne's specific question that the *sub judice* rule is an impertinence in inhibiting the work of this high court of Parliament?

Mr Sands: It is Parliament's own rule so I do not know who is being impertinent to whom.

Q27 Chairman: I am merely asking you to deal with the question from my Committee colleague, Desmond Swayne. So what you are saying is you do not think there is any impertinence?

Mr Sands: No, I do not think so. It is something that has been found by experience over a long period, and over a longer period than it has actually been a stated rule because this started as Speaker's rulings, as far as we can make out, in the mid-19th century and it was only relatively recently in Parliamentary time, the 1960s, that it was formulated into a written rule. I do not know whether there were some egregious cases of Members getting up and obviously trying to do the work of the prosecution barrister for him; but one can imagine the House saying, "This is entirely inappropriate, we should not be doing this," and then trying to lay down a rule which expresses when it is appropriate to refer to court cases and when it is not, and it is that which is difficult. I accept that. That is why the rule that we have got is subject to the discretion of the chair and people can bring cases, like the one you have mentioned, Mr Swayne, to the attention of the chair if they feel that there is a good reason for pursuing it and try and persuade the Speaker that this is a special case.

Chairman: Two quick supplementaries, one from Sir Robert and then Tony McWalter.

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Q28 Sir Robert Smith: Just a quick one on the workings of the resolution because it is very much to do with criminal proceedings, civil proceedings and judicial bodies where the Houses refer the matter but does it apply in other cases such as public inquiries where the Government have referred a matter?

Mr Sands: No, it does not. It does not apply to Royal Commissions, it did not apply to Hutton, it did not apply to the Butler Inquiry. If the Government sets something up, ministers may then use the fact of that inquiry to say, "No, I do not want to say anything to prejudice the outcome of the inquiry," but it does not stop Members tabling questions or raising the subject in debate.

Q29 Chairman: I do not want to anticipate a question that I know David Wright is going to raise about select committees but do you not think that is why Parliament has been a little concerned that it is inhibited when the Government can set up Hutton or whoever to look into a matter and there is no such problem in those circumstances?

Mr Sands: I think that that is a political issue that goes rather wider than the *sub judice* rule, with respect, Chairman. I think there is an issue there and I know it is one that the Liaison Committee is considering, that the Government seems to make a habit of being more helpful when it has set up an inquiry than it is when dealing with the House itself.

Q30 Chairman: When it is a parliamentary inquiry.

Mr Sands: But I do not think the *sub judice* rule affects that issue.

Q31 Mr McWalter: To follow up the point that Desmond Swayne raised, it does seem to me if a Member of Parliament raises an individual case that the presumption should be that that individual case is in part being raised because of the general consequences that flow from it and indeed the implications for the potential legislation that flow from it so, in other words, I think the presumption should be that, whatever the individual case, Members should be allowed to raise it unless there are very strong reasons for the chair to think, and indeed to wish to rule, that the case is only being argued on its own individual merits. Is there anything in *Erskine May* or other such places which makes clear that the preponderance of proof should be on the chair to find that the Member is using a case only and entirely as a single case rather than using it as a case which is end on to potential legislative change?

Ms Irwin: Starting from the point of view of the Table Office, it is very, very difficult for the Table Office to know exactly what is involved in a case, and somebody who may appear to be a victim and whose position throws up an apparent anomaly which the House ought to consider as a matter of public policy might also be involved in a case as a witness when somebody else's life and liberty is at stake. I do not know how the House could get behind the proceedings in court to be sure enough that by taking a decision on the one hand to take up an apparent injustice, the House was not also seriously

prejudicing somebody's chance of a fair trial. I think this requires so much research that we could not be sure to get it right, and therefore the straightforward rule is safer for the individual in court.

Q32 Mr McWalter: But what we then have is a situation where we are so worried about that we gag Members of Parliament. I agree with Mr Swayne, approaching the same point from a slightly different direction, that the onus of proof should always be in favour of the Member being able to raise the case even if some people are damaged by the Member raising the case because, after all, that is what happens, sometimes we do damage people by raising cases because we take the view that the overall public benefit exceeds the particular damage that might be done to an individual when we slag off our strategic health authorities or whatever it might be. That is what we do in Parliament in part. I just feel that if we have not got a clear understanding, the onus of proof, as it were, should be that Members are allowed to raise anything unless there are overwhelming reasons why not. That seems to be the way round it should be rather than thinking that the courts should be allowed to gag Members of Parliament unless Members of Parliament can fight their way through the Clerk and the Table Office and everybody else and get, as it were, great resistance to them raising things. I would be grateful if there was anything in *Erskine May*, as I said, which indicated where that balance lies.

Mr Sands: I think in the way the resolution is drafted now, I have to be honest, Mr McWalter, the onus is the other way round.

Q33 Mr McWalter: I noticed, yes.

Mr Sands: The onus is that reference to court cases is not allowed unless the Speaker can be persuaded that there is a reason for exercising his discretion to allow it to be raised, so I think the onus is on the Member of Parliament to demonstrate that there is either an issue of national importance in terms of the resolution or some other overriding reason which needs to be raised, and that it can be done in a way that would not be regarded as prejudicing the court proceedings.

Chairman: So you are really emphasising—and I am going to pass on now to David Wright—that Parliament must not be seen in any way to be prejudicing a matter which is before the courts and that might prejudice the prosecutor or prosecution or it might prejudice the defendant—

Q34 Mr McWalter:—Or it might prejudice the Member of Parliament from being able to raise legitimate parliamentary business, which is Mr Swayne's point I think.

Mr Sands: If there is legitimate parliamentary business in that sense and it can be separated from the facts and the arguments which are going to be properly paraded in court, then obviously the Table Office, or whichever office is involved, will try and work out a way in which that can be done; but, as I say, we have been let down in one or two spectacular cases where we have done this and then the Member,

having got his adjournment debate or whatever it is, has proceeded to parade exactly the facts that will be at the centre of the court case, and I do think that that is wrong.

Q35 David Wright: It would seem from the discussion we have had so far that there is a mechanism through which Members can pick their way to debate and raise the issues that Mr Swayne and Mr McWalter have talked about on the floor of the House. The problem I would like to focus on is select committees because clearly within the remit of select committees the public are called in to give evidence and issues will break out during those evidence sessions that may relate to *sub judice*. How often does that happen? Is there any record of how often *sub judice* issues have arisen within select committee inquiries and within the scope of the work of select committees?

Mr Sands: Well, we checked in the last week to see if there had been another case that my colleagues in the Committee Office were aware of since the one which initially led this Committee to take up this inquiry in the summer (which was the Foreign Affairs Committee) and no-one was aware of anything. It is very rare. I think it only happens when a select committee, almost self-consciously, steers close to the wind as, for example, the Social Security Committee did when they summoned the Maxwell brothers and the Maxwell brothers sat there and just refused to answer any questions because, although they were not actually under charge at the time, there was an imminent threat of legal proceedings against them. I would say that is an example of unwise choice of inquiry; but in the normal sort of inquiry that committees conduct it is a fairly rare thing to arise.

Q36 David Wright: Is there much dialogue—from what you have said probably not—between select committee chairmen and Mr Speaker in relation to the application of the rules? There is great responsibility on the shoulders of the chair and indeed the clerk of the committee to make sure they do not stray into this area of debate. Is it practical to have a dialogue with the Speaker? From what you are saying there has not been a need for it. Do you think we need to perhaps look at training for chairs of committees in terms of the evidence that they take?

Mr Sands: My earlier paper, which was specifically directed to the Foreign Affairs Committee case, did suggest that select committee chairmen might be made aware that there was this possibility of checking with the Speaker privately when a problem was foreseen and asking if it would embarrass him if a particular chairman exercised discretion in favour of allowing the subject to be pursued. What I think would be difficult for the Speaker would be if a select committee chairman took it upon himself to exercise a discretion without having that consultation, because anything that is allowed in select committee could then potentially become a subject for debate in the House, and we have got to try and apply the rules consistently across all types of proceedings.

Q37 David Wright: Is there any guidance given out to witnesses? That is the other point. Somebody can come along and if they are determined to do it place an issue on to the agenda in a select committee during a piece of evidence. Is it regular for us to put out information to witnesses? Are you aware of that? It may not be a question for you, it may be a question we need to pursue with our own clerks and other people involved, but I would think that it is important that people when they come before the House—and it can be a stressful experience for many people coming before the House to give evidence—are given some guidance about what they are and are not allowed to raise.

Mr Sands: There is a guide for witnesses but I am not up-to-date on its contents, I am afraid.

Ms Irwin: I do not think it includes any mention of *sub judice*.²

Q38 David Wright: Perhaps it should.

Ms Irwin: Perhaps it should. That is maybe a matter to pursue with the select committee chairmen. I think the committee clerk would generally have had a conversation with a witness in advance and would be fairly well aware of the issues that were going to be raised during the session, so antennae would have been raised in advance.

Q39 Chairman: But clearly, and I say this to both Roger Sands and Helen Irwin, people should not be interfered with who are coming before a select committee to influence them on what they wish to say. Would you agree with that?

Mr Sands: Yes, I would certainly agree with that, but I think that chairmen are experienced people and they would spot when a witness was just using the opportunity to behave irresponsibly and get something into the local press or annoy some neighbour. I think they would be able to spot that and stop it. I am not aware that that is a significant problem in select committees.

Q40 David Hamilton: Just before I go on to the final question, I have been a witness before a select committee before coming here and I would say there are several types of witnesses that come before any committee. There are a number of professionals who come before committees but there are also a number of people who have never been used to public speaking in a public arena but because of their expertise or the area they are involved in they end up being in front of a select committee. It is an extremely difficult process to go through sitting where you are at the present time if you are not used to it. I would guard against giving too much information out to witnesses coming when they are already nervous before getting here and telling them a whole host of rules that must apply too. Roger gives an excellent answer and that is that it should be in the hands of the chair, who can guide the committee and, indeed, stop proceedings if

² *Witness correction:* The current guide does include advice about commenting in evidence on “Matters before a court” (paragraph 23, though the phrase “*sub judice*” is not used).

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somebody wants to get over a message on the side. I say that because I remember the experience I had. I think I was a stone lighter (which would be helpful nowadays!) by the time I left the House of Commons that day. If you have never been in the Chamber or the House of Commons it is an experience that some people never get over. Anyway that is the only reason I came here. As is usual when you get to the end of any questions some of the answers have already been given, but on related cases how closely does an issue have to relate to a case which will be before the court to fall within the scope of the rules in related cases? It is difficult to give examples but I can think of examples where there are similarities or indeed people who are in simultaneous court cases where they may be in one case involved but they might also in another case be involved. How do you work on that part of it?

Ms Irwin: This is where there is a bit of a problem. The resolution, of course, is very precise. It says that things may not be referred to, which covers everything. There must be some circumstances where issues can be brought up in a question. Practice in a prison or a custody centre or whatever was mentioned earlier. It is possible to ask the general question without necessarily asking the particular. Questions which worry me a little are questions which I think the Clerk mentioned in his paper about the costs of a case or the length of time a case is taking or the length of time an inquest is taking, which are not necessarily related to the case but coming back to what I said earlier it is very, very difficult for us to be sure that the length of an inquiry, the cost of a case or the sorts of witnesses that are being called are not germane to the case. We cannot look behind the court proceedings to check in detail so I think the office is right to be pretty careful when accepting notice, for example, of an oral question which could give rise to a supplementary without the chair having much opportunity to come in or an application for an adjournment debate which might be elaborated on as well. Members always do have the right of appeal to the Speaker. I am sometimes quite surprised—and perhaps this is a dangerous thing to say—how few Members do go from the Table Office and ask me to put their case to the Speaker.

Q41 David Hamilton: Maybe that is an indication of how much Members trust the Table Office. It may be a back-handed compliment that Members do not proceed any further. You have already answered my second question. Does the rule not apply only to mentioning the case which is in court rather than commenting on the same or similar issues? We have touched on that already.

Ms Irwin: We have touched on it already. It was touched on in the paper you had from the Foreign Affairs Committee and it involves a situation where the same body of evidence is before a court as is the subject of a question. This was a very unusual case but I think the House has to take advice that for all practicable purposes this is the same case.

Chairman: Sorry, I was about to ask our witnesses whether they wanted to add anything to the evidence that they have given but as you are a member of the Committee who wants to put a question you take priority.

Q42 Sir Robert Smith: This could be a bit academic but it strikes me that this country signed up to the European Convention of Human Rights, part of which guarantees the right of somebody to be heard before an independent impartial tribunal. Therefore, in considering the *sub judice* rule if we were not to have any rule and we were to have a free-for-all is there not a danger that somebody would be in a position to claim, if their case was interfered with by Parliament, that they no longer had an impartial tribunal hearing their case?

Mr Sands: It is possible. The Parliament of Malta certainly got itself into trouble for punishing somebody after proceedings before the Parliament and it was considered by the European Court not to have proceeded in a fair and impartial manner; but that was a contempt of parliament case rather than anything else. I would find it difficult to imagine that a court would ever abandon a case, in the way that the case of the Leeds footballers was abandoned, because of something that was said here, but that is not inconceivable if we took all the restraints off in the way that has been suggested or implied from either side of this committee room.

Q43 Mr McWalter: Just coming back on that, I did not suggest taking all the constraints off. I just suggested, as it were, balancing the pressure on the various parties in a rather different way, so instead of the onus of proof being on the Member to show that he will not be rehearsing a court case, the onus of proof should be on the Speaker to perhaps raise it with him and then find out whether he is indeed going to be infringing this rule, so the assumption should be that Members can speak unless there is strong reasons for them not speaking, as opposed to being silenced and having to prove that they are going to comply with the *sub judice* rule. I did not want all the restraints off.

Mr Sands: I had realised what was being suggested. I think, if I might just add a further comment on that, the difficulty of trying to do that would be that the chair could only then discharge the onus that rested on him when it was getting too late—four paragraphs into the speech, and the chair is starting to say, “That sounds . . .”

Q44 Mr McWalter: That might be life anyway, but the other thing to ask about is you just mentioned “referring” to a case. The wording is not “adverting to a case”, which is clearly a much weaker wording. You can refer to a case in the sense of giving a fairly full-blooded account of it. Adverting would be almost taking cognisance of it in passing. Is there any weight to be given to the fact that the word “referred” is used rather than “adverted”?

Mr Sands: I have said in my paper that I do not think anybody would be pulled up in the Chamber just for referring to a case by name but I should perhaps

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have made clear that there is a distinction here between referring in debate and referring in a notice that is going to appear on the order paper, a question, the title of an adjournment debate, or something like that. There we have to be absolute; you cannot refer to a case.

Q45 Chairman: Is it not really, Mr Sands, that you can refer to a case, as Mr McWalter has said, but if you start going into the merits or otherwise of that case you are then breaching the *sub judice* rule?

Mr Sands: That is correct. I think that is how the chair would apply it. If somebody just tossed off a reference—as for example a Member might say “in the recent cases of doorstep burglary, such as the one in my constituency . . .” he is not going to get pulled up for that, but if he then starts to rehearse the details of the case and pre-empt the prosecution case then it is a different matter.

Q46 Chairman: Thank you. Is there anything that either you, Mr Sands, or Helen Irwin would like to say to the Committee? This has been a relatively short session but I think very valuable in that it has

focused our minds on precisely what the issues are. Is there anything that you would like to say to the Committee?

Mr Sands: No, Mr Chairman, I think I am happy to rest on my two notes. One thing that I might just mention, because it has not come up in questioning, is the fact that the *sub judice* rule is now the same in the Commons as in the Lords. I think there is a certain amount of importance and significance to be attached to that. It would be regrettable if, having laboured over some time to get the two rules into line, they were then to get out of line again, so I hope that the Committee will keep an eye on the Lords’ interests.

Q47 Chairman: I had hoped that would be your reply to the opening question that I put to you because I am well aware of the concern that is felt on that matter. Helen Irwin?

Ms Irwin: I do not think so.

Chairman: Can I on behalf of the Committee thank you very much for coming to give extremely helpful and valuable evidence to us as part of this important inquiry. Thank you very much indeed.

Wednesday 19 January 2005

Members present:

Sir Nicholas Winterton, in the Chair

Mr Iain Luke
Rosemary McKenna
Sir Robert Smith

Mr Desmond Swayne
David Wright

Witness: Rt Hon Lord Goldsmith QC, a Member of the House of Lords, Attorney General, examined.

Q48 Chairman: Attorney General, may I welcome you most warmly to the Procedure Committee? We were very grateful to you for your letter, going back to November, and also for the fact that you were very willing to come and speak to us on this important subject of the *sub judice* rule. It is a pleasure to have the Rt Hon the Lord Goldsmith, the Attorney General, with us this afternoon. May I put the first general question to you? In your view, as Attorney General, how well is the House's current *sub judice* rule working?

Lord Goldsmith: May I first of all thank you for the welcome? I am pleased to be here. I am obviously here not so much on behalf of the Government as wearing my particular hat of concern for administration of justice. From that point of view, it appears to me that in general the rule is working well. That is to say, the concerns which underlie the existence of the rule are not being defeated.

Q49 Chairman: Do you feel some concern about the criticism that has been levelled at the *sub judice* rule by experienced, leading, long-serving Members of the House of Commons?

Lord Goldsmith: There is plainly a tension between the constitutional right of Parliament to debate those things that it thinks right to debate. That is a very important principle. However, there is also a principle of separation of powers, of respect for the courts, as the courts must respect Parliament, and also the issue of the prejudice to proceedings. It seems to me there are three important considerations which mitigate what otherwise might be the effect of the rule. The first is the discretion which the Speaker has in the Commons, and indeed in the House of Lords. Secondly, that it does not preclude debate on general issues which may be thrown up by cases, although I recognise that sometimes that can be a bit of a slippery slope on both sides. Thirdly, and ultimately, that the rule is temporal rather than absolute. It does not prevent parliamentarians from debating particular issues, but it may delay their ability to debate those issues. Those seem to me to be three important palliatives to what otherwise the rule would appear to be.

Q50 Chairman: Before I pass on to Sir Robert Smith—and I am not sure whether I am entirely in order myself in asking this question—there was a question raised on a point of order in the House today by a very senior Member, in fact the Father of the House, on the *sub judice* rule in respect of the court martial which is currently taking place in

Osnabrück. Mr Speaker was entirely right to indicate that, as far as he was concerned, this was not a matter for him. Would you have any observation to make on that matter?

Lord Goldsmith: I would respectfully agree with Mr Speaker that the question, as I understood it—and I have not seen the text, but it has been reported to me—was more a question of whether or not comments ought to have been made relating to the court martial while it was taking place. It is therefore not so much a question of the application of the *sub judice* rule which relates to the debate of matters in Parliament, but more an application of the rules relating to contempt of court, and contempt of court rules do apply to courts martial. It is a matter which could be of relevance to me, if I took the view that public comments made by anybody, other than in Parliament because of the immunity of Parliament, in relation to a pending court martial had the effect of risking substantial prejudice to that court martial. I could take steps in relation to it, as I can in relation to, for example, media comments on regular trials.

Chairman: For clarification, just so that nobody is in any doubt, it is my understanding that the point of order was raised because of the remarks made by the Chief of the Defence Staff about the behaviour of British troops, without direct reference necessarily to the particular court martial in Osnabrück. However, I may not be entirely up to date with other matters that may have been said publicly about this particular issue. I do not want to pursue it, but I was interested because *sub judice* was raised in the House and this clearly is relevant to our inquiry.

Q51 Sir Robert Smith: We are wanting to get some background on the current operation of the rules and how people deal with it practically. We wondered to what extent you were consulted by government departments about issues which may arise in Parliament as to whether they might or might not be *sub judice*.

Lord Goldsmith: I think the answer to that must be very rarely, if it happens. It obviously does affect, as it were, my own activities; particularly Harriet Harman, Solicitor General, my deputy, when she is answering questions, those could quite easily relate to pending cases. I know that the Speaker and officers of the House will from time to time rule questions out, or advise Members that questions would be inappropriate to put to her because of the *sub judice* rule. However, I cannot particularly recall questions being put to me by other departments about whether the *sub judice* rule prevented a debate.

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I should indicate for the record that Ms Carmen Dowd is with me, and perhaps I may ask her whether she can recall any examples. No. It may happen but—

Q52 Sir Robert Smith: So they make their own judgments and obviously the House authorities make theirs.

Lord Goldsmith: Yes.

Q53 Sir Robert Smith: As you mentioned earlier, this rule does not apply to debates on legislation, and can be left to the discretion of the Chair or, in the Lords, the Leader of the House. Does this cause any potential difficulties from the point of view of the courts—that obviously matters can be discussed in those exceptions?

Lord Goldsmith: I am not aware that it has, and that may be because of—if I may put it this way—the very responsible way in which those discretions have been exercised. I think it is recognised that it is important to protect the court process. I suspect it is also recognised that it is often very difficult to tell, for example in the hurly-burly of debate or when something comes up very quickly, whether there may be a problem which really could affect an ongoing trial. I suspect that the House authorities would therefore probably err on the side of caution in those circumstances and not permit that discussion to take place, at least at that stage.

Q54 Sir Robert Smith: The other area we are interested in is not the actual issues in a case but maybe the conduct of a case, the cost or duration of a case that is live. Would you have any concerns if those issues were raised?

Lord Goldsmith: Those can also be issues in the case. Take, for example, the time it takes. I can well understand—and I see correspondence to this effect, with which I am very sympathetic—that colleagues and Members of this House raise the question of why it is taking so long for a particular legal proceeding to be determined. As I say, I am very sympathetic to that. However, if there were a discussion about that particular issue, a debate about it, views expressed about it, that could end up potentially influencing the outcome of applications taking place in the case. There might be, for all we know, an application for an adjournment the following week. If the adjournment were refused, it might be said, “The court has only refused it because it saw that Parliament was unhappy about the time that is being taken”, or somebody might try and stop the proceedings on the grounds that they have gone on too long. It also illustrates the point I was making a moment ago: it is quite difficult to know, at that moment, whether there may be an issue proceeding in court which could be affected by what is said. At a later stage, when that particular case has come to a conclusion, there is no reason at all why there should not be a debate about the length that the case took, and there may be very good reasons why that should happen. It may be very helpful that that

should happen. Equally, there is no reason why there may not be a general discussion about delay, without getting into the details of the particular case.

Q55 Chairman: Before I pass on to Rosemary McKenna, while I note what you have said—that you cannot recall any actual cases which have been prejudiced by anything said in the House of Commons—if your office or your assistant is able to do a little bit of research for us, if that is possible—
Lord Goldsmith: Certainly.

Q56 Chairman: It would be very helpful to us to have, if you can find any, details of any cases where that case has been prejudiced by something that was said in the House of Commons.

Lord Goldsmith: Certainly, I will. I was thinking of recent years, but we will have a look. I suspect that there may be cases where the courts have been concerned about comments made, but I cannot recall them at the moment.

Chairman: That is most helpful. Thank you very much.

Q57 Rosemary McKenna: I think that we need to look next at the justification for the rule. One of the areas we want to explore is that the reason the rule is applied is to preserve comity between the courts and Parliament. What harm do you think would be done if Parliament discussed an issue which was also before the courts?

Lord Goldsmith: I think that there are two overlapping justifications for the rule. One of those is the importance of not prejudicing court proceedings. That is clear and, in this context, what is said in Parliament has potentially a particularly powerful impact: a powerful impact because it is well publicised; likely to be picked up and reported in many places; and a powerful impact because what is said in Parliament by the people’s elected representatives has a particular authority. If a minister is induced to say something, I suppose it can even be said that this is the Government’s view, and that may carry some authority as well. There is the other side, however, which, as you say, we put under the rubric of comity. I would describe it this way. It is important that the courts are left to get on with their work. Parliament should not be seen as an alternative forum for deciding upon rights and wrongs. It is better that they should be seen to be determined in what is the more controlled—perhaps some might say the more balanced—atmosphere of a court of law, with both sides being able to present their point of view more fully. I think that there is a real risk that, even if actually the proceedings are not prejudiced by what is said, a party who loses the debate, if there has been a debate in Parliament, may always feel aggrieved that it has happened; that he has lost the case because Parliament, in one way or another, expressed a view on what the outcome should be. That may be entirely unjustified and quite unfair on the tribunal that is deciding it, but I think that there is a real risk that that may happen. Put in constitutional terms, it is a part of the separation of

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powers that we leave the resolution of individual disputes to the courts, as the courts should leave to Parliament the business of legislating.

Q58 Rosemary McKenna: Is there a distinction between a matter which is raised in the House and the House coming to a view on it?

Lord Goldsmith: I think that it is a very difficult dividing line, because raising a matter is unlikely not to involve some judgment being expressed, at least implicitly, about the matter. Whilst if Parliament were to reach a conclusion and there were a formal vote on a particular case, that would obviously be the most serious of all, for views to be expressed, to be reported and to be supported, as they might well be, by other Members, that could still carry quite a weight with it in any event. I would therefore not regard it as a satisfactory distinction and a line that one could easily and safely draw.

Q59 Mr Luke: What are the common criteria for assessing whether the coverage of active cases in newspapers constitute contempt of court? Are the courts becoming more relaxed about coverage of cases in newspapers? If that is so, should Parliament follow suit?

Lord Goldsmith: Can I take it in two parts? Are the courts becoming more relaxed about what is said in newspapers about pending cases? I do not think that they are becoming more relaxed about it. I think that they remain very concerned about the potential prejudice to court proceedings by what is said in newspapers. It is also fair to say that, in some people's view, newspapers have been pushing at the boundaries of what is acceptable. However, what the courts will recognise is that if there is a substantial period of time between the report and the date of the trial, then they will operate what the courts call the fade factor, and they will say, "It is likely that the jury will have forgotten these remarks, or at least their power will have diminished". That, combined with clear directions from the judge—"You shall only take into account what has been said in court. You shall not have regard to something that has been said outside"—may mean that the courts will not actually regard a particular statement in a newspaper as being contempt of court, and may therefore not punish the newspaper with a fine or imprison the editor, which is what they can do. I would not describe it as relaxation, therefore. I would recognise that the courts are realistic about what does and does not constitute criminal conduct on the part of newspapers. As to whether that means there should be a relaxation of the approach in Parliament, I think that there are these differences. First, that what Parliament says is more powerful. Second, that there is this additional justification for the rule as far as Parliament is concerned, which we put under the comity rubric, which does not really apply to the newspapers. Third—and this is an important practical consideration—when it comes to considering whether a newspaper is guilty of contempt of court, we look at it after the event. We are able, after the event, to examine very closely what were the issues in the case. Was the very thing

that was said likely to have caused a prejudice? We have long affidavits and substantial argument in relation to it. These are things which it simply is not possible to have at the time one is advising whether or not a particular question should be put or can be answered in Parliament, because there is not the time at that stage to investigate all of those circumstances. So I think that is a practical reason why, to be workable, one ends up with a different rule.

Q60 Mr Luke: It is a perception held by some colleagues that Parliament is the only place in which a matter cannot be discussed, when it is being talked about throughout the rest of the UK. Is that perception justified?

Lord Goldsmith: I understand the point, and I understand also that part of it is whether some broadcast media are going further than they would have done in the past. If they do it at a time which is close to the trial itself, then they are likely to be severely reprimanded, or worse, for doing it. But I come back to this: however influential a newspaper, it does not have the same authority, nor is likely to be as widely reported, as what is said in Parliament. Secondly, there is a special relationship between Parliament and the courts which the newspapers do not have. Parliament is the most powerful and important branch of government and it has a relationship with and respect for the courts, as it expects the courts to have respect for it. I think that results in a special responsibility and perhaps sometimes, you may feel, self-denial.

Q61 Chairman: May I go back to the matter that was raised, without specific reference, at the beginning of our meeting? Is it your advice, Attorney General, that Members of Parliament should refrain from making outspoken reference to matters relating to the court martial in Osnabrück? I know that it is borderline to this, but you talked about contempt of court and the *sub judice* rule and that there was a close connection between the two. I am just seeking to clarify this matter.

Lord Goldsmith: May I distinguish two things? I would not presume to take it upon myself to advise Members of Parliament how they should act in relation to the *sub judice* rule. That is a matter for the House authorities and for Mr Speaker to police. I give my views on how it works and the significance of it, but it is for them to determine how the rule should operate. As to the contempt of court position, where I do have a particular responsibility, I think it is important for everybody—whether it is Members of Parliament, newspapers, or commentators—to recognise that it is a fundamental part of our principles that people should have a fair trial. That means a trial which is determined in accordance with the evidence which is presented before the tribunal. That does require a responsible attitude to comment which is made—not to the reporting of what happened, which it is right that people should know, but comment on what is taking place—if there is a real risk that might otherwise prejudice the proceedings. Quite how far one can properly go in certain circumstances is a different

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matter, as I understand that people will, where there are matters of great public concern, want to say something about it.

Chairman: Attorney General, I thank you on behalf of the Committee for that very sound advice.

Q62 Sir Robert Smith: On a related issue to the press and what is happening in Parliament, what constraints are there on ministers outside Parliament as to how they can comment on court cases?

Lord Goldsmith: Ministers, outside Parliament, are subject to the same rules as to contempt of court as anyone else.

Q63 Sir Robert Smith: So the ministerial code does not have any guidance, as such?

Lord Goldsmith: I do not immediately recall anything specific, but there may be.

Q64 Sir Robert Smith: Outside Parliament, it is a straightforward contempt of court issue?

Lord Goldsmith: Yes, that is how I would view it. If there is anything in the code, we will let you know.

Q65 Sir Robert Smith: Some colleagues have raised the issue that ministers may, in a public arena, make comment on an arrest or some other matter which then, because of the House's *sub judice* rule, the minister cannot be questioned on.

Lord Goldsmith: I am smiling slightly, because I am not terribly happy if my ministerial colleagues comment on those things—but for a different reason. There has certainly been one occasion where comments which were made by a ministerial colleague, at the time of the arrest, did give rise to my having to consider whether those comments were themselves a contempt of court. I concluded that they were not, particularly given the passage of time between the comments and the likely trial; but I had to look at it for that reason.

Q66 Chairman: Is Sir Robert correct that if a minister says something outside the House, which Members of the House would then wish to raise with that minister on the floor of the House, they could be ruled out of order by the Speaker under the *sub judice* rule?

Lord Goldsmith: I think that must be right, as a matter of the application of the rule. Whether the Speaker would take the view in a particular case that his discretion should be exercised to allow some questioning would be for him to consider. I was rather indicating that there might be a case where I would be really unhappy about any further debate about it, because it might simply—

Q67 Sir Robert Smith: The ideal would be for the minister not to tread too far, outside Parliament, on the courts?

Lord Goldsmith: Yes.

Chairman: I think that was very firmly explicit in what the Attorney General said.

Q68 David Wright: I would like to touch briefly on select committees. They were brought within the scope of the rule in 2001, although in principle the rule had very much applied in terms of select committee proceedings.

Lord Goldsmith: Yes.

Q69 David Wright: Are you aware of any issues that have arisen through select committee hearings which have created difficulties for the courts?

Lord Goldsmith: I am, but I think the other way round: where there has been an issue about whether or not the courts are able to refer to and rely upon things which have been said in select committees which are relevant to court cases taking place.

Q70 David Wright: Can you expand slightly on that, if you are able to?

Lord Goldsmith: It is quite different from the *sub judice* rule. It is to do with Parliament's privilege and Article 9. I think that, in the course of consideration of the Corruption Bill, which was looked at by a select committee, this was one of the issues noted. The draft Bill included the ability for the House to lift privilege in certain circumstances, and one of the reasons for that was so that it might be possible in a court of law to rely upon what had been said in a select committee as part of the court proceedings. In fact, the instance I have in mind was not something that was said by a Member; it was something that was said by a witness.

Q71 David Wright: That is a really difficult issue.

Lord Goldsmith: It is.

Q72 David Wright: Because a very determined witness can come before a select committee and manufacture an opportunity for themselves to say something, on the record in a select committee, that can then influence other proceedings. So there have been examples potentially where that has happened?

Lord Goldsmith: Yes.

Q73 David Wright: Do you think it is an area where we need better guidance for those in the chair? You said earlier that you would not want to dictate to the Members of Parliament how they handle themselves, but perhaps guidance to witnesses coming in—to caution them about the role that they are playing as a witness, and how their evidence may be taken on in other environments?

Lord Goldsmith: Perhaps I may put it this way. I am sure that if you, as a result of your consideration of this, took the view that the system was not working in select committees as well as it should do, and that chairmen of select committees might benefit from some guidance as to how they operated it to prevent people exploiting it, it would be welcome. However, I think that it is for you to say. Again, I think that I would not want to be in a position to say that I know enough examples of potential abuse to suggest that is something that needs to be done.

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Q74 Chairman: If such advice or guidance were to be given to chairmen of select committees, or for that matter members of select committees—not just the chairman, although the chairman has the authority from the chair—who would give that advice? The Clerk of the House? Would you, sir, as the Attorney General in the Government? Who do you suggest would give that advice? Perhaps I may put this direct question to you, going a bit further than my colleague David Wright: do you think that such advice is necessary?

Lord Goldsmith: It certainly would not be for me, it would not be for the Government; it is a House matter. I would think that it is a matter for the House authorities and for the Speaker to determine. I mentioned the chairmen of select committees because I understood that the particular concerns were the witnesses coming, who might, as it were, be taking the opportunity to abuse the position and the privilege that they were provided with, and therefore it would be for the chairman to control the proceedings, with the assistance of the clerk. However, I do not have the evidence of abuse which would justify my saying to you in this Committee that I think it is necessary that such guidance should be given. That is why I left it simply as saying that if you considered, having looked at this as you are doing, that there was a problem in relation to it, it seems to me it would be a proper matter for consideration as to whether you would recommend that advice should be given so as to control that; but that is a very mild recommendation—and intended to be so.

Chairman: Thank you very much. Can I now pass the questioning to Desmond Swayne?

Q75 Mr Swayne: How closely does an issue have to relate to a case before the rule bites? Is it the case that, taken literally, the rule only applies if you mention the court case by name?

Lord Goldsmith: Again, I think that is not a question for me. I think that it is a question for the House authorities, because they are the ones who have to enforce and police the rule. I am sure that they have such a degree of experience in policing it that they will spot—

Q76 Mr Swayne: Let us take a for instance, if we may. Let us say that, at a time when there was going through the courts a case not dissimilar from the Tony Martin issue, and at that time Parliament was discussing legislation to give householders more scope to defend their property, changing the definition of “reasonable force” to something perhaps stronger. My understanding is that would not be *sub judice* because it was legislation, and legislation is exempt. But let us say that someone had wished to raise an Adjournment or a Question, or were asking questions across the floor of the House, as indeed took place not more than three weeks ago on this very issue, that could potentially fall foul of the *sub judice*—but the actual issue would not differ. I cannot see why the principle should be exempt with respect to legislation but not so with respect to

Questions or Adjournments. What is the difference in principle between these different matters of business before the House?

Lord Goldsmith: I think that there is a difference. If legislation were being proposed—and, if I may say, I absolutely agree with you that if it was a question of legislation then the House would be free to debate the merits of the legislation—even in those circumstances, I would expect that Members and ministers would not identify a particular case and say, “. . . and the case which is taking place in the courts at the moment of Tony Martin is one which demonstrates why we need to change the law”. They might all know what they are talking about, but I do not think they would say that. The difference would be because legislation, whilst referring to the present state of the law, is actually talking about changing the law. It is not as directly saying what the answer ought to be on the existing law in this case. Saying the law ought to be changed is not saying to the jury in the Tony Martin case, as it were, putting it quite crudely, “You ought to convict him” or “You ought to acquit him”—because Parliament is talking about what the law might be in the future, not what the law is at the moment which applies to that particular case. So I think that there is a difference in principle, and in fact too.

Q77 Chairman: On the specific case that Major Swayne has raised, the Tony Martin case, the debate that was going on and the reference made by somebody, who perhaps regretted what Mr Martin had done, about the outrageous event of shooting a man in the back—would that be, without, as it were, making reference to the name of the individual in court, breaching the *sub judice* rule?

Lord Goldsmith: Again, I think that is probably not a question for me to answer. I think that would be a question for the House and the House authorities as to whether someone had breached the rule.

Q78 Chairman: Because, as I have just had it whispered in my ear, would such a comment prejudice the case before the court?

Lord Goldsmith: I think that is a different question. Whether it would do so would depend on all the circumstances. I can see that a comment which is made where it is clear that, even without reference to the name of the case, it is referring to the case—where the issue in the case is whether or not the conduct was reasonable or not reasonable—for someone strongly to express the view that it was unreasonable by using the word “outrageous” could prejudice the case. What attitude the trial judge would take in relation to that is a different matter. He might take the view that he did not think it was going to influence; he might take the view that he wants to know which members of the jury, if any, had heard that remark. Sometimes, of course, we end up in the position where a case has to be stopped because the judge is not satisfied that the trial can continue. I do not mean as a result of a comment by an MP; I mean as a result perhaps of comment by a newspaper from time to time—which they will have to judge. It would depend on the circumstances.

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However, I think that it is a different question from whether or not that would be a breach of the rule and whether, if someone had been reminded of the *sub judice* rule and then made that comment in the course of debate, exception would be taken to it. Without reference to naming the cases, I think that the matter would not be for me to comment but for the House to consider whether that was breaching the rule in those circumstances.

Q79 Chairman: I am tempted, and I am going to be tempted, to go back again to the case that we have referred to two or three times. Do you think somebody appearing in public, condemning very openly and forcibly any actions that might be taken against prisoners so closely associated with the individual who is subject of a court martial, is going close to being contempt of court?

Lord Goldsmith: It is my responsibility to consider whether comments constitute contempt of court. If I take the view that they do, and it is appropriate to do so, then I may take action in relation to them. So I am always reluctant to express views hypothetically or in advance of a formal ruling, if I am called upon or consider it right to do so in relation to particular comments. I would not like that to be taken as indicating that I have taken one view or another in relation to comments which are made. I made the general observation before—it is important that people should have a fair trial and it is important that it should not be prejudiced. Tempting though it may be, there is a line beyond which people ought not to cross in commenting on what is taking place.

Q80 Chairman: I thank you for that frank and helpful response, Attorney General. Before I give you the opportunity of perhaps expressing any other views that you wish to this Committee, could I finally move to coroners' courts, which is an area in which we are interested. Inquests can last for a significant length of time. Is there an argument, in your view, for relaxing the rule in relation to coroners' courts?

Lord Goldsmith: The straightforward answer to the question whether the relaxation should be to the extent of excluding coroners' courts—which I know is one suggestion which has been raised—is no, there is not a case for excluding coroners' courts. The reason for that is that the possibility of prejudice in relation to coroners' courts certainly exists. It is not merely fanciful; it can be considerable in some cases. I have had coroners bring me concerns that they have had about cases, as a result of media comment of course. The Contempt of Court Act applies to proceedings in coroners' courts for that reason. It is true to say that coroners' courts do not determine guilt or innocence, but they are determining very important questions of fact which can, in themselves, have very important consequences. They may determine whether an insurance policy pays out. They may in fact determine whether criminal proceedings take place, or whether civil proceedings take place. So they can be significant and they can be prejudiced. Sometimes they have

juries: not always, but the prejudice does not simply relate to the jury or non-jury point. What I would say, however, is that I suspect there is room, on the other hand, for some clarification as to when the rule should apply in relation to coroners' courts. It is clear what the time frame is when it relates to criminal proceedings. It is from the moment of arrest. In relation to civil proceedings, it is in relation to particular proceedings. I do not think that it is so clear, however, what the point of time is in relation to inquests. It may be that it would be helpful therefore to consider what the alternatives might be. One alternative could be that the rule should apply from the moment that the inquest is opened, but not before. That could still sometimes lead to quite a protracted period of time, because inquests can start and be adjourned for a period of time. We can think of one very well known one where that has happened. So that may not be the right solution. It does occur to me, however, that there is not the same clarity of timing in relation to it and it may well be helpful therefore to indicate that there could be a time put on that, which would lessen the impact of the rule in relation to coroners' courts without excluding coroners' courts from protection of the rule.

Q81 Chairman: There is nothing that you would like to say in addition to what you have said which you feel you, as Attorney General, would like to say to this Committee—either orally this afternoon or by way of a letter or written submission—before we produce our report in this matter?

Lord Goldsmith: I will certainly consider, with officials, whether there is anything further that I can add. I have come here in the hope of assisting you, sir, and your colleagues in the important task which you have. It does not immediately appear to me that there is. I would just add this comment, if I may—and I refer to my own responsibilities as responsible for prosecutions and therefore regularly receiving requests from Members of both Houses, as well as members of the public, for information about cases. Both Harriet Harman and I recognise our responsibilities to Parliament and to be accountable to Parliament, and we will always do what we can to provide information. We see colleagues from both Houses, particularly Members of this House, and seek to give them as much information as we can. We also recognise that, while cases are taking place, we are constrained by what we can say. I think that the way the rule operates at the moment at least makes it easier for us to be able to respond to general concerns that there are about the operation of prosecutions in the criminal justice system, without having to refuse to answer questions on the floor of the House about pending cases—because there is a clear rule which everyone operates to. I am not by that saying it makes our job easier. I am trying to emphasise that we want to be accountable in these matters; we want to give as much information as we can. But it is quite important and helpful that there is a rule which is workable and that can be operated.

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Q82 Sir Robert Smith: On that issue of timing and the coroners' courts, in the contempt issue outside of Parliament is there a window in which people can say things where they would be considered contempt, and is there a point at which it is safe for someone to make comment on an apparent death?

Lord Goldsmith: The Contempt of Court Act says when proceedings are active for the purposes of the Contempt of Court Act, and we can perhaps provide you with a note on that, if that would be helpful.

Q83 Chairman: Yes, please.

Lord Goldsmith: In practice, as I have indicated, whilst there is no science in this at all, the longer ahead of an actual proceeding a comment is made the less likely it is to be regarded as a comment which sufficiently risks prejudice to the trial as to bring criminal consequences with it. Something which is said a long time ahead of a trial, unless very memorable, probably will not result in a fine or imprisonment.

Rosemary McKenna: I was reading quickly through some written evidence we have received, and it refers to the rules in the Scottish Parliament. What they have said is that we should not change our rules because the Scottish Parliament, by statute, has to have the contempt in its standing orders. What they are saying is this. "It would be most unsatisfactory for an MP to be able to raise questions in Parliament in relation to a matter before a Scottish court when such questions could not be raised by an MSP in Scotland." Is there not already a difference between English law and Scottish law in this regard? I seem to remember that Scottish newspapers are allowed to print more than—

Q84 Sir Robert Smith: I would say it is less. Courts are much tougher in Scotland.

Lord Goldsmith: Yes, that is my understanding. Of course I have no jurisdiction whatsoever in relation to Scots law, but it is my understanding that the Scottish courts are tougher on this, and therefore they permit less to be published in the newspapers than is the practice in England and Wales.

Q85 Rosemary McKenna: So to have a difference between the two Parliaments would simply be in line with the different legal system?

Lord Goldsmith: I think that the question of to what extent there are differences between the two Parliaments is a matter for you, and one on which I would not comment. The question of what the impact on the Scottish courts would be is a matter for the Scottish judiciary or the Lord Advocate to comment on, if you thought that was helpful.

Q86 Chairman: Can I say to the Attorney General that we have written to the Lord Advocate in Scotland, so we are well aware of the differences that exist in the legal system between these two important parts of the United Kingdom. Attorney General, are

there any other issues or matters which you would like to draw to our attention while you are here giving evidence to us?

Lord Goldsmith: May I take advice for a moment?

Q87 Chairman: Of course.

Lord Goldsmith: The suggestion that is being made to me is that we know that one of the questions you had at one stage related to where there was a difference between jury and non-jury, and I do not know whether it is an issue that it would be helpful for me to say a word about.

Q88 Chairman: It would be most helpful.

Lord Goldsmith: Obviously, when it comes to prejudice, there can be a difference between a jury and a non-jury trial, because we give more credence to certain tribunals as being able to resist outside influence; but I do not myself think for a moment that means the rule should be a different rule in relation to jury and non-jury—for two reasons. First, because there are these broader questions of comity, which apply at least as much to a non-jury trial as they do to a jury trial. Indeed, there may even be some who would take the view that if a litigant receives an adverse decision following strong comment in Parliament—and it is a judge who has done it rather than a jury—they may be even more inclined to suspect that it is the influence of Parliament. I do not know. The other reason is that prejudice in any event is not just about the effect on the jury. Comment can affect witnesses, for example, and witnesses may be either encouraged or discouraged from coming forward by public comment which is made in relation to the cases, or they may, consciously or subconsciously, tailor the content of their evidence as a result of what has been said publicly about the case. The parties may also be affected by what is said, in an extreme case. The parties may feel themselves under great pressure to settle the case as a result of apparent condemnation of their conduct, or the justice of the other side's case. I therefore do not think that the fact that there is a jury makes all the difference at all as to whether there is prejudice, and I do not think that the question of prejudice to court proceedings, as I understand the *sub judice* rule, is the entirety of the rule in any event.

Q89 Chairman: Thank you. Do any of my colleagues wish to put any further questions to the Attorney General? It appears not. On behalf of the Procedure Committee, Attorney General, may I thank you very much indeed for coming to give your time and to answer so helpfully the questions that have been put to you as part of this inquiry, and also to your colleague for listening, taking notes, and perhaps silently adding one or two issues which we were very interested to hear from you about.

Lord Goldsmith: Sir Nicholas, thank you very much indeed.

Wednesday 23 February 2005

Members present:

Sir Nicholas Winterton, in the Chair

Mr John Bercow
David Hamilton
Huw Irranca-Davies
Mr Iain Luke
Rosemary McKenna

Mr Tony McWalter
Sir Robert Smith
Mr Desmond Swayne
David Wright

Witness: Rt Hon Lord Nicholls of Birkenhead, examined.

Q90 Chairman: On behalf of the Procedure Committee of the House of Commons, can I welcome the Rt Hon Lord Nicholls of Birkenhead to give evidence to us and help us with our inquiry into the *Sub Judice* Rule. Can I say that Lord Nicholls has been a Law Lord since 1994 and of course we all know chaired with distinction the Joint Committee on Parliamentary Privilege which sat between 1997 and 1999, and of course we are aware of the relevant passages of that report. Can I welcome you, Lord Nicholls, and ask if you would like to make an opening statement before I put the first question from the chair?

Lord Nicholls of Birkenhead: Only to say thank you for your welcome and to say I am very pleased to help you in any way I can.

Q91 Chairman: We are very grateful for that. The current *sub judice* rules in both Houses were adopted following the report of the Joint Committee which you chaired. In your view and from your experience, how well is the current rule working?

Lord Nicholls of Birkenhead: I am not really in a position to express a view on how well it is working in the House of Commons; I have no idea. But I have heard nothing, either in relation to what is happening in the Commons or seen or heard anything myself in relation to what is happening in the Lords, to think that the rule is not working satisfactorily.

Q92 Chairman: So you have no example to quote to us from which you could say the rule is working very well or that the rule is not working?

Lord Nicholls of Birkenhead: The rule is working well, as far as I am aware, in the sense that no particular problems have emerged from the operation of the rule.

Chairman: I cannot ask for a more direct and succinct answer to my question.

Q93 Mr Bercow: As we are Members of the House of Commons, and the Procedure Committee is a Committee of the House of Commons, we are necessarily and I think overwhelmingly pre-occupied with the relevance of the House of Commons to the rule, the impact of the rule on the Commons and the way in which the behaviour of the Commons might impact upon or have implications for the credibility of the rule. So my follow-up

question is fairly predictable, are you aware of any cases which may have been prejudiced by something said in the House of Commons?

Lord Nicholls of Birkenhead: The answer to that is no, but as far as I am aware that would be on the basis that by and large the rule is being applied.

Q94 Mr Bercow: You think there is a familiarity with it and there is a self-denying ordinance exercised?

Lord Nicholls of Birkenhead: As I have said, I have no experience of what has been happening in the Commons, but I would have assumed that the House authorities indeed are very much aware of the rule. So I would have assumed, but I may be wrong.

Q95 Mr Bercow: Can I ask as an adjunct to that, my Lord, whether you think that the courts are becoming more relaxed about what is said in newspapers about pending cases?

Lord Nicholls of Birkenhead: In some ways it is a question perhaps better addressed to somebody who has perhaps more immediate experience at the coalface, like the Lord Chief Justice, but my feeling is that over the last 30 years or so the press generally, the media generally but perhaps particularly the press, have become more aggressive in pressing out, seeing how far they can go. At the same time, I think the courts have become very conscious of the need to be realistic, and so I would not say they are more relaxed but I would have thought they are tending to take a more pragmatic view of what might give rise to a risk of prejudice to a trial.

Mr Bercow: I will leave it there but I have a suspicion others will not. Thank you very much.

Q96 Huw Irranca-Davies: Just to tease it out a little further, from what you are saying it seems you have no evidence it is not working, you seem content with the way it is working. Is that because there may have been examples where people have skated very close to, not deliberately, abusing the system of *sub judice*, have gone pretty close to it but it has not become an issue? Would you think there are examples in the Lords or in the Commons where there has been potential for abuse of the *sub judice* rule but it has not blown up into any great shenanigans?

Lord Nicholls of Birkenhead: My impression is that in the Lords people are very conscious of the existence of the rule and would be careful not to overstep the boundary.

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Huw Irranca-Davies: Right.

Q97 Sir Robert Smith: If I could expand on the attitude of the courts as it has developed towards newspapers and their likely influence in contempt of court, the Attorney General said that as well as maybe becoming more realistic they started to operate a fade factor, that if the report was far enough away from the actual trial they would assume the impact on the trial would be reduced.

Lord Nicholls of Birkenhead: Yes, that is part of what I meant by being realistic.

Q98 Sir Robert Smith: Also in a recent case, in Scotland, because human rights applies directly to Scottish cases, they have had to interpret Article 10 in a way which means they have to be more favourably disposed towards allowing reporting?

Lord Nicholls of Birkenhead: Yes.

Q99 Sir Robert Smith: What we were wondering therefore was, is there any argument to say that as the fade factor applies to the media it could be applied to the House's procedure, that if it were far enough removed from the time of the trial it would be less prejudicial and therefore more could be said?

Lord Nicholls of Birkenhead: Yes, but I would want to emphasise that there is a difference between the media and Parliament, and the fact something may or may not prejudice the trial is the relevant criterion, put loosely, for the media, but that is only part of the reason for the existence of the *sub judice* rule.

Q100 Chairman: Can I comment from the chair, my Lord, that there are certain Members of Parliament who believe their ability to represent their constituents and perhaps a constituency case is impeded by the *sub judice* rule, particularly in relation to the point that Sir Robert has raised, where a matter may be taking a great deal of time to come to court. Do you accept in that situation there is criticism of the *sub judice* rule, although you have indicated to us quite clearly you see no problem with the current *sub judice* rule from your point of view?

Lord Nicholls of Birkenhead: The *sub judice* rule is all about striking a balance. It is striking a balance between, on the one side, the right and obligation of Members of Parliament to discuss anything they choose freely. That is the discharge by Members of both Houses of their responsibilities as members of the legislature. On the other side, with our separation of powers, one has to take into account the proper discharge by the judiciary of their constitutional functions as the judicial arm of the state. It is essential, if that role of the judiciary is to be discharged properly, that the judiciary should not only be, but also be seen to be, the only constitutional body for determining issues which come before the courts. The second reason for having the *sub judice* rule is that it is intended by the Members—because of course it is a self-imposed rule, it is not a rule imposed by the judges—to ensure that Parliament is not seen to be an alternative constitutional forum for canvassing the rights and

wrongs of issues which are coming before the judiciary, matters to be decided by the courts in discharging their constitutional function. The Attorney General I think in his evidence to you labelled that function “comity”, and I think I am right in saying a member of this Committee described it as “inter-institutional courtesy”. Those labels are right and that function is important because good neighbourliness and politeness oil the wheels. But this function of the *sub judice* rule goes much deeper than that, because it is inherent in the proper discharge by the courts and Parliament of their separate constitutional roles. If the system is going to work, the courts and Parliament too need to be astute to recognise their own roles and to recognise the limits of their roles. As I understand the *sub judice* rule, it is an effort to achieve a practical way of balancing those two separate constitutional functions.

Q101 Rosemary McKenna: That leads very nicely into my question. Where prejudicing of court proceedings is not an issue, the only reason the rule is applied is to preserve comity between the courts and Parliament. In your opinion, what harm would actually be done if Parliament discussed an issue which was also before the courts; just discuss the issue?

Lord Nicholls of Birkenhead: Because it would then be seen by members of the public that these issues are not just going to be decided by the courts, they are going to be canvassed, discussed, first by Parliament. That is to negate the role the judges are meant to discharge under our constitution.

Q102 Rosemary McKenna: One of our colleagues who has raised this issue says the implication is that members are not able to represent their constituents in that kind of area, without coming to a view on it but simply raising the issue. Do you still feel that?

Lord Nicholls of Birkenhead: Yes, I do. If I may say so, I quite understand the position in which Members can be put by their constituents, but I think the answer has to be that this is a matter at this stage for the courts, because of course the *sub judice* rule does not preclude discussion, it simply postpones discussion. I know that can be very important but that is the effect of it only. Coupled with this, of course, there is always the safeguard of the Speaker's discretion. As a general rule the idea you will have headlines in the newspapers, “MPs discuss . . .” and then there is a reference to a case which is just about to come on in the courts, I would suggest is undesirable. Of course the ordinary man in the street can say what he wants, subject to not prejudicing the trial, so can the newspapers but—

Q103 Rosemary McKenna: Yes, but that of course is a problem for MPs because they say, “But the newspapers are really pushing the boundaries on this”.

Lord Nicholls of Birkenhead: I wholly understand that. Before the recent terrorist case all the newspapers, or certainly some of the newspapers,

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delighted in having editorials telling us what we should decide, but that is the prerogative of newspapers.

Q104 Chairman: But it is not just the editors, Lord Nicholls, of tabloid or other newspapers, it is, as Rosemary McKenna has said, our constituents who can discuss this matter with what appears to be total freedom, and yet their representative in Parliament, who does have duties of representation and seeking to obtain justice, is not able to raise the matter within Parliament. Do you see any conflict?

Lord Nicholls of Birkenhead: No, I do not, because I think there is a reason, which I have sought to express, why, for the period just before the trial and during the trial it is not desirable—Members can say what they want outside Parliament—for Members to use the legislature to discuss matters which our constitution has given to the judges.

Chairman: Thank you, my Lord.

Q105 Mr Bercow: I am keen to push this a bit further, my Lord, because I am interested to try to isolate which is your objection, or indeed if there are two which is the greater of your two objections, to parliamentary representation in circumstances of this kind. Is your grump the pure constitutional objection to the idea that a Member of Parliament might raise such a matter, thereby breaching the spirit of the separation of powers and the proper role as you see it of the judiciary on the one hand and Parliament on the other, or is it the likelihood that in raising such a matter in Parliament it will spawn press coverage?

Lord Nicholls of Birkenhead: No. The difficulty I feel is the two-fold one I mentioned earlier, and I would not like to put them in order of importance. If a matter is raised and there is then press coverage, that might prejudice the trial; that is one objection. But even in cases where this would not prejudice the trial of an individual case, for the general reason I have sought to give I still think it is undesirable that the message should get around that constituents can raise these questions with a Member, the Member can raise it in Parliament and then there will be a discussion on the very matters which are going to come up in front of the courts for decision.

Q106 Mr Bercow: Can I follow that up? I am genuinely not being pedantic, but I am intrigued by this. You said a moment ago towards the end of one of your answers that Members of Parliament discussing it elsewhere, rather as our constituents might discuss it in a public house, is one thing but raising it in Parliament is another matter. Let us suppose a Member of Parliament decided, because of the rule, to pursue the matter in the form of interviews, discussions over the radio or on television. That, as far as you are concerned, would be acceptable, even though it might in fact generate greater coverage than for example raising the issue in Parliament in a late night Adjournment Debate? You would not object to the matter being raised on

the radio or on television, but you would object to the idea of the matter being raised very late at night in the House of Commons.

Lord Nicholls of Birkenhead: What you suggest is not objectionable so long as it does not prejudice the individual case. Obviously, if it does, then the Member might be liable for contempt of court just as much as anybody else. The reason why that is not objectionable is of course that the *sub judice* rule is aimed at what goes on in Parliament, because the Member speaking in Parliament has, and has still, a particular cachet, and that is the problem. Parliament, the Chamber downstairs, can become to be regarded as an appropriate place, and it ain't, if I might say so.

Q107 Huw Irranca-Davies: Could I throw a very specific case at you which is no longer *sub judice*, you will be pleased to know. If there were an incident where, for example, the rules of legal aid were being re-written and yet there was a case before the courts which was a particular exemplar of the very need to re-write the rules on a certain sub-set for the grant of legal aid, and yet the Member was unable to raise that in the House of Commons because of fear that it might prejudice the substance of the case as opposed to the process of granting legal aid, would it be reasonable for that Member to raise it in the Commons, or should he on the basis of the principle of *sub judice* keep well away from it? What I am asking you in effect is, if a Member has problems, for example, with the way in which legal aid is granted, or perhaps even something different such as an inordinate delay in a particular case as it is proceeding through court, is it fair for them to raise that, the process, the procedural point, in the House of Commons and their frustration, or their constituent's frustration, or should they keep well away from that as well?

Lord Nicholls of Birkenhead: You are getting very near the border line. As I understand it, what is being raised is that a general discussion is taking place in Parliament, for example on the administration of legal aid, and the Member wishes to make a point by reference to a specific case which is currently before the courts. I would have thought that might be on the okay side of the line.

Huw Irranca-Davies: Thank you.

Chairman: That is very good advice, I say to my colleague on the Committee.

Q108 David Hamilton: I have to say that I think *sub judice* sometimes acts as a favour for Members of Parliament.

Lord Nicholls of Birkenhead: Yes.

Q109 David Hamilton: They can say, "I am sorry, I cannot discuss that"!

Lord Nicholls of Birkenhead: Yes, I have heard that!

Q110 David Hamilton: You indicated there was a sort of understanding, a gentleman's agreement, for want of a better word, between the legal system and indeed Parliament. In Scotland, however, it is a different position. Evidence has been submitted to us

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by Colin Boyd, from the Lord Advocate's Office, stating, "As far as the Parliamentary *sub judice* rule is concerned, the proceedings in the Scottish Parliament, unlike those in Westminster, are subject to the law of contempt of court." If the system ever broke down, would you be in favour of that position being imposed on the Westminster Parliament?

Lord Nicholls of Birkenhead: This was canvassed, I remember, I think, in the Joint Committee. One of the problems which I think I remember with the ordinary contempt rules was that the boundary marked out for contempt was not a satisfactory boundary for application in the House. I have not got the detail in mind but my recollection is that it involved knowing when somebody had been charged, or whatever it was, and in practice that is not workable in the House, where the House authorities may have to make decisions at very short notice as to whether or not an issue can or cannot be raised. So, for purely practical reasons, I am not sure it would work satisfactorily.

Q111 David Hamilton: If that is the case, recognising within the Scottish Parliament they also pass legislation, how is it they are able to deal with that under the legislation which exists up there? Are you saying there is not a comparable down here?

Lord Nicholls of Birkenhead: I do not know how they are coping.

Q112 Sir Robert Smith: It is not the difference but what happens, in answer to Mr Bercow's point, outside Parliament when you speak to a newspaper is that the courts can get hold of the Member and control them in any way that they can control any other member of the public. But inside Parliament, because they have that privilege, we have to have our own internal self-disciplines.

Lord Nicholls of Birkenhead: Absolutely.

Q113 Sir Robert Smith: The Scottish Parliament, of course, is a creature of statute and therefore subject to the courts, I think.

Lord Nicholls of Birkenhead: I am not sure about that.

Sir Robert Smith: It makes legislation but it is also a creature of statute; it is created by Parliament.

Chairman: What I hope we are not doing, my Lord, is putting you in an unfair position, seeking to get you to rule on matters relating to matters north of Hadrian's Wall.

Mr Bercow: I do not think he will allow us!

Q114 Sir Robert Smith: The second point I wanted to raise on the issue, going back to Rosemary McKenna's question of not just a prejudicing issue, is there not also an issue as far as comity goes that in the end courts make decisions and people are happy or unhappy with those decisions. In a way, if Parliament is also involved, then the unhappy person is going to feel that, whether it did or not, Parliament influenced the result?

Lord Nicholls of Birkenhead: Yes.

Chairman: That is a very succinct reply. We come on to another Scottish member, Iain Luke.

Mr Luke: My Lord, I will not take you north of Hadrian's Wall but I will take you to the other side of the Irish Sea. I have served on the Northern Ireland Affairs Select Committee and members have raised it with me, that they feel there are many times when Irish Members will name names and link them to possible cases of—

Mr McWalter: Bank robberies!

Q115 Mr Luke: Not bank robberies but things like smuggling diesel across the border, and name specific names, frequently in the House or in Committees, and they were wondering, testing the boundaries again, could that be treated as being *sub judice*, given that it may prejudice a case which comes up in front of the Irish courts?

Lord Nicholls of Birkenhead: If it may prejudice the case, then, yes, it will be within the rule. But the rule here—I do not know the position in Ireland—seeks to keep its limits within bounds by setting out a date from which the rule applies and a date at which it ceases to apply, and that does not mean that before proceedings have reached the stage where the rule applies there cannot be discussion in Parliament.

Q116 Chairman: What are these dates, my Lord, can you indicate?

Lord Nicholls of Birkenhead: I have a copy of the current rule in the Lords, and I understand it is the same as in the Commons. The relevant provision in the Lords is that proceedings have to be active before they are the subject of the *sub judice* rule. The resolution which has been passed I think in the Commons as well as in the Lords then makes provision as to when proceedings become active and when they cease to be active. For example, in criminal matters, "When a charge has been brought or a summons to appear has been issued." Until then, the *sub judice* rule does not apply.

Q117 Chairman: Thank you, my Lord, it is extremely helpful to have that on the record.

Lord Nicholls of Birkenhead: Equally, the proceedings cease to be active when they are concluded by verdict and sentence and so forth. So it is that period of time, which I do appreciate may be quite extended sometimes, for which Members have chosen, by virtue of their resolution, to exercise self-restraint and not discuss matters which are before the courts.

Q118 Mr McWalter: One of the reasons why this came up at all is because a member of a Select Committee was seeking to pursue a line of inquiry and was told it was *sub judice*, hence that line of inquiry was not going to be permitted, and the ruling was made by the Select Committee chairman who probably did not have the training or necessarily the expertise perhaps that the Speaker of the House or the Deputy Speakers might have. So it has come to us as Members of Parliament to some extent as, "People are trying to stop us from pursuing lines of inquiry" and (a) the rule might be being widened and (b) it seemed in the particular case we are looking at that it was not directly relevant to the case but it was

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what you might call a related case or possibly a closely related case. So that is a concern of this Committee, which is a sort of custodian of the rights of Members to be able to represent the interests of their constituents and to have a framework in terms of which they can do that effectively. Would you at least sympathise with our concern that that be done?

Lord Nicholls of Birkenhead: I have every sympathy with your wish to represent your constituents properly.

Q119 Mr McWalter: Would you have sympathy with the view that if this principle goes over to related cases, or is interpreted by those chairing committees who may have a rather more strict view or a more repressive view on freedom of speech than others, that that is a legitimate cause for concern and clear instructions perhaps might be made by this Committee, both to such chairpersons and to Members to remind them of their rights?

Lord Nicholls of Birkenhead: Certainly, yes, anything which can be done to clarify the position must be very welcome.

Q120 Mr McWalter: How does it go with related cases? I am on the Science & Technology Committee and one of the issues I have been very interested in is the analysis of the rib cages of children. That sounds rather technical but it is to do with the fact some people claim children who are born prematurely can be bruised and have ribs broken very easily, other people claim this cannot happen very easily and would require very significant pressure or force to be exerted before such fractures occur. If as a Select Committee we are investigating that and meanwhile somewhere else there is a case going on in which this is highly relevant, are you suggesting that perhaps we should not be permitted to conduct that inquiry for fear it might—your word is—prejudice a case, although we might say that our inquiry might inform a case? Is your view that that should not be permitted or that it should be?

Lord Nicholls of Birkenhead: At the end of the day, as so often, these questions come down to, if I may say so, exercising commonsense. If the Committee is embarked on a general inquiry of the nature you have described, I do not foresee in principle that Committee should be inhibited from discharging its role because there is somewhere going on in the country a case which involves a similar issue.

Q121 Mr McWalter: Okay, so you view it as permissive. That is welcome but the issue then is, one of the reasons why we often conduct inquiries is precisely because there is some great brouhaha going on about, to give you another example of an inquiry in which I have been involved, whether forensic scientists are reliable or whether they agree or disagree or whatever. So this is a matter which the country gets agitated about, Select Committees begin to make inquiries and then the case that generated all the brouhaha comes before trial, so these things cannot always be kept apart as conveniently or as nicely as one might wish.

Lord Nicholls of Birkenhead: Yes.

Q122 Mr McWalter: Your view, even under those circumstances, would still be to favour permissiveness and freedom of speech for Members of Parliament rather than to have people suggesting they shut their traps?

Lord Nicholls of Birkenhead: The two purposes of the rule I mentioned at the outset. At the end of the day, it is always going to be a question of judgment and applying those principles in a particular case.

Q123 Mr McWalter: But the judgment here is exercised by a Speaker or by a Select Committee chairman or someone in equivalent position.

Lord Nicholls of Birkenhead: Yes.

Q124 Mr McWalter: This Committee is responsible for giving them effectively some kind of guidance in these matters, so we are trying to come up with a formula, with your help, which will somehow allow us to give fairly clear instructions as to which parameters they should be using in order to exercise their judgment.

Lord Nicholls of Birkenhead: We thought on the Joint Committee that we had done what we could in that regard.

Q125 Chairman: Would you not accept, my Lord, that of course the Speaker of the House is advised by an experienced and generally distinguished lawyer?

Lord Nicholls of Birkenhead: Yes.

Q126 Chairman: So to an extent we are getting a legal input in the decision that the Speaker may well announce to the House in relation to a particular case which he or she considers to be *sub judice*.

Lord Nicholls of Birkenhead: Of course defining the boundaries in a way which is going to work satisfactorily in every case is really impossible, and it is partly for that reason that built into the system is of course this, that the *sub judice* rule is always subject to the discretion of the Speaker. It is that safety valve which I would hope will in practice cope with the difficult case.

Q127 Mr Swayne: Would one potential way of defining the boundaries be to say that it is the proper role of the courts to determine what the law is, and it is the proper role of Parliament to establish what the law ought to be, and it would be perfectly proper therefore for discussion in Parliament to revolve around a case which is yet to be determined by the courts as to what the law is and perfectly possible for Members of Parliament to discuss with reference to that case what ought to be the case, where justice truly lies?

Lord Nicholls of Birkenhead: I myself would have thought it would be very undesirable that in a case which is yet to be heard Parliament should be expressing a view as to what the law should be.

Mr Swayne: Let me give you an example. I do not know whether I breached the *sub judice* rule or whether the clerks were asleep and had not spotted what I was up to, and I will give you the specifics—

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Chairman: Not so much the clerks but the chairman, Mr Swayne!

Q128 Mr Swayne: It was not you, Sir Nicholas! I explored in Adjournment a constituency case where a constituent of mine had suffered medical negligence overseas whilst in the Armed Forces, and the question revolved around the issue of whether the Secretary of State for Defence was able to sub-contract his duty of care in the same way that the Secretary of State for Health cannot. For example, if you are treated overseas under the National Health Service and it goes wrong you still sue your local primary care trust and not the overseas hospital. If, however, you are treated overseas by a foreign hospital, sub-contracted by the Defence Medical Services, the Secretary of State for Defence has in effect sub-contracted that duty of care and you are up against your hospital in Cyprus or in Germany with all the disadvantages that may entail. It seems to me perfectly proper for a Member of Parliament to discuss that issue in an Adjournment Debate and hold the Secretary of State to account on what ought to be the case, whether it is right that members of the Armed Forces should be disadvantaged by comparison with a civilian, even if it revolves around, in terms of the example, a particular case, given the House of Lords has yet to establish whether the Secretary of State for Defence has such a right to sub-contract his duty of care in a way the Secretary of State for Health does not. I do not see we are treading on each other's patch at all. We are discussing in the House of Commons what ought to be the case. It is for the lawyers and for the courts to determine what actually is the case.

Lord Nicholls of Birkenhead: I would have thought myself that discussing what the position should be is something which should take place after the courts have decided what the position is, not the other way around.

Q129 Mr Bercow: But could it not take place after one case and before another?

Lord Nicholls of Birkenhead: Yes, certainly.

Chairman: Do you wish to pursue that, Mr Swayne?

Q130 Mr Swayne: I just want it on the record that there are "the law's delays".

Lord Nicholls of Birkenhead: I am taking it, Chairman, that that was not a question!

Chairman: We now move to coroners' courts and Huw Irranca-Davies.

Q131 Huw Irranca-Davies: This is an issue which has been raised by Sally Keeble, MP, but I might illustrate it for you by an example from my own constituency. There was a blast furnace explosion in Port Talbot Steelworks in which a number of people died, the cause of death was fairly self-evident—the blast furnace cracked, not only were there gases and fumes but also the lava which came out of the equipment itself—but despite it being self-evident the coroner's court had to be involved, clearly, and we awaited the coroner's investigation and statement. In a situation like that you could be

waiting on the disposal of the estate of the individual, insurance, et cetera, et cetera, and if it goes on for an unduly long time this could cause great problems to the family and dependents. In that sort of situation, when we are talking about the *sub judice* rule, if something is within a coroner's court as opposed to some other court, would it not be reasonable to raise this issue, if an MP thought there was an undue delay, undue complications, when clearly there was a self-evident reason for the death and it was simply that we were awaiting a decision, in order that we can move ahead so the family could come to decisions about the disposal of assets and disposal of the estate? My question to you really is, should there be a difference in the application of the *sub judice* rule between other courts and something like a coroner's court?

Lord Nicholls of Birkenhead: I do not think in principle there should be. I sympathise with the example you have given, but the basic purpose underlying the *sub judice* rule in the two Houses as I understand it is to assist in the demarcation of the boundary in practice between the legislature on the one hand and the judiciary on the other in discharge of their own functions.

Q132 Huw Irranca-Davies: As it happens in this particular example I gave we found other ways round it and I have to say the coroner was of great assistance in coming to a rapid conclusion. However, if I can put to you the point Sally Keeble MP made, she stated there is a difference from some other courts and tribunals, nobody is on trial, the court does not make decisions on the guilt of any individual person, and that is the bone of her contention, that because that is not the issue we should be freer to be able to comment on proceedings in a coroner's court.

Lord Nicholls of Birkenhead: I am not sure I see the distinction you have mentioned will lead to it being appropriate to adopt a completely different approach.

Q133 Huw Irranca-Davies: Because there is not somebody's guilt or the sentence of an individual necessarily hanging in the balance here.

Lord Nicholls of Birkenhead: But the coroner is discharging a judicial function, and that function should retain its integrity and not be seen to be possibly influenced by a discussion in Parliament in relation to the same subject before he has given his decision.

Q134 Huw Irranca-Davies: That is helpful because you are quite categorical about it, that the same principles should apply regardless of the nature of the court.

Lord Nicholls of Birkenhead: Yes. It is just an inherent part of our constitutional system with its separation of powers, and we have to try and deal with points where the two run together in a practical and satisfactory way, and the *sub judice* rule seeks to do that.

Q135 Chairman: So you do not think the fact that somebody in a coroner's court is not being found guilty or innocent puts the coroner's court in a slightly different category from other courts?

Lord Nicholls of Birkenhead: Not relevantly for the present purpose, no.

Q136 Mr Bercow: To be absolutely clear: questions of guilt and innocence in this instance would not be involved, therefore there is no question of justice being frustrated or flouted. The issue is professional integrity, and perhaps pride, of the coroner.

Lord Nicholls of Birkenhead: The coroner is discharging a statutory function, or perhaps a common law function, and what one is concerned to do is for it to be seen that he is discharging that independently, and it is undesirable that at the same time the House of Commons should be covering the same ground and perhaps expressing its view.

Q137 Mr Bercow: That is not because you really think any coroner of any weight or standing, worth his or her salt, will be influenced by a pronouncement of a Member of Parliament in the House of Commons but that the appearance might be given?

Lord Nicholls of Birkenhead: Well, the appearance also. What is desirable is that the role that the coroner is intended to discharge should be dischargeable without there being any sort of cloud around it because Parliament has expressed views. After the coroner has expressed his views certainly discussion can take place, because the whole of this *sub judice* rule is concerned with postponing discussion, not preventing discussion.

Q138 Mr Bercow: You talk about a cloud, am I not right in thinking, my Lord, that is your very polite way of saying, "Well, the coroner is making an important decision, and he should not be subject to background noise"?

Lord Nicholls of Birkenhead: No, I was not trying to say "subject to background noise". I would hope we could be quite confident that any coroner worth his salt would reach his own independent conclusion. But public impression matters, and what needs to be seen is that the coroner has reached his own independent conclusion and has not had, as it were, Parliament leaning on him from the side.

Chairman: Would you comment, my Lord—and Huw Irranca-Davies did draw this into his question earlier—on cases where some inquests do appear to last for a very, very, significant length of time and there is frustration, not only with those involved but perhaps those who take an interest in these matters who are the laymen and lay women, ie the general public, about what they see as a failure of the system because of the time that an inquest is taking to reach a decision?

Q139 Mr McWalter: Could I add a rider to your question, Chairman? Clearly, sometimes that time gap is of crucial importance for Members of Parliament to be seen to be carrying out their duties. For instance, if you take the fire at Bradford

Football Stadium, where the inquest took a very long time, Members of Parliament became apprised very quickly that there were issues about the safety of people at football matches—and I do not know how many people go to see football matches every Saturday, 8 million, 10 million, whatever it is. So Parliament becomes apprised quite quickly that there is something at fault in the way these matters are staged, and wishes to take action and wishes to debate the actions they are hoping to take, and if none of that happened you would get MPs actually in dereliction of their duty while they hang on, waiting for this interminable process to grind to its conclusion. We do not, we carry on doing it actually.

Lord Nicholls of Birkenhead: You carry on doing—
Mr McWalter: We ignore the *sub judice* rule and represent our constituents.

Q140 Chairman: I am not sure we ignore the law or even the convention, but we seek perhaps to raise the matter and represent our constituents. How would you respond, firstly to my question and then to Mr McWalter's?

Lord Nicholls of Birkenhead: Forgive me, I am not actually sure what your question was now.

Q141 Chairman: Do you not think that perhaps inquests do take an abnormal length of time to reach a decision and therefore there is pressure for things to be said and actions to be taken, not least in the case that Mr McWalter highlighted because public safety for instance might be at stake or at risk?

Lord Nicholls of Birkenhead: Yes, and the safety valve is the Speaker.

Q142 Sir Robert Smith: One thing Lord Goldsmith did suggest in his evidence was whether there should be some exploration of exactly when the rule should apply in terms of the time of the proceedings of the coroner's court, in the sense of when they start. Re-reading what he said, he suggested maybe there should be an alternative but he was not that clear on what the alternative might be. Have you considered any thoughts about when the start time would be?

Lord Nicholls of Birkenhead: No, I have not. I am sorry, I was not aware I was expected to.

Q143 Sir Robert Smith: No, no, I just wondered.

Lord Nicholls of Birkenhead: I quite agree, it is desirable, probably, there should be a similar provision in the *sub judice* legislation, if I can call it that, dealing with coroners.

Chairman: That is very helpful.

Q144 Huw Irranca-Davies: I apologise for testing at the margins but I think it is the margins which are of most interest. If you have a situation, and again it is helpful for me if I deal in particulars and these are past cases, where there is a specific case which raises other issues because of it, such as crown immunity from prosecution, corporate manslaughter, and you want to raise that but you want to raise it using the specifics of the case which is in process, maybe to higher courts, would it be appropriate on the floor of the Commons or in Questions to raise this issue with

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regard to a specific instance which is proceeding through court, when what you are trying to do is amend the legislation in terms of crown immunity or corporate manslaughter?

Lord Nicholls of Birkenhead: In principle, I would say in that sort of case you should wait until the trial has taken place.

Chairman: We are grateful for that frankness.

Q145 Mr Luke: When talking about coroners' courts, my colleague mentioned tribunals, and in some of the evidence we have received, specifically from the Law Society of Scotland, they made the point it may be appropriate for the rule to apply to tribunals as well as courts. I wonder what your views would be on this. There has been some difficulty about deciding which tribunals it would cover. Could I have your views on that as well?

Lord Nicholls of Birkenhead: I have not given any thought to widening the scope of the *sub judice* rule.

Q146 Chairman: But from your experience, do you believe it would be appropriate and beneficial to all parties concerned for the *sub judice* rule to be extended to tribunals?

Lord Nicholls of Birkenhead: I think I would need to know rather more about the circumstances where it has been said a problem has arisen. I am not sure when the Joint Committee considered this there was any evidence given there were problems in relation to tribunals. That is the area which would need more investigation before one decided whether or not it was desirable to extend the *sub judice* rule.

David Hamilton: In answer to an earlier point in relation to coroners, you seemed to think that because the coroner holds a legal position he should be, or she should be, treated similar to that of a court. In a tribunal, it is a solicitor or, in Scotland's case, a sheriff who sits as chair of an industrial tribunal and therefore holds the weight of the law or the statute the same as I would have thought the other people we are talking about. Therefore, the point which has been raised by the Law Society of Scotland is that the same rules should apply as happens in a court because, after all, when you go to industrial tribunal it is about unfair dismissal normally and if it is about unfair dismissal there should be nothing which could prejudice the case before the industrial relations court. I think that is what the Law Society of Scotland is aiming for. I can give you examples of where this might lead to discussion before a case goes to court, especially if more than one person is sacked, which happens on a not infrequent basis. There were a thousand miners sacked in 1984, 400 ended up in tribunals, and it was the most debated thing which happened in

Parliament and outside Parliament. The Law Society seem to be saying that the law about *sub judice* should apply in tribunals as it does here or indeed in a coroner's court.

Q147 Mr Luke: The point was also made by an Adjudicating Panel in England, that they thought as well it might be appropriate to extend that.

Lord Nicholls of Birkenhead: I see that in principle the reasoning underlying the *sub judice* rule could be regarded as equally applicable to employment tribunals and the like. Whether in practice it has been shown the *sub judice* rule's non-application in those cases gives rise to difficulties, I do not know.

Q148 Sir Robert Smith: Is there any constraint on the media in those kind of tribunals?

Lord Nicholls of Birkenhead: Constraint?

Q149 Sir Robert Smith: In the reporting of tribunals? There is no procedure for saying that the public reporting of tribunals is prejudiced in any way?

Lord Nicholls of Birkenhead: They are subject to the usual restraints, it must be fair, et cetera, et cetera, et cetera, yes.

Q150 Chairman: We have come to the end of our questioning. Is there any final message or observation which you would like to leave with us? This is a complicated matter. We think it is important, as you think it is important, there should be this proper separation of the judiciary and the legislature, is there any final advice you would like to leave with us?

Lord Nicholls of Birkenhead: I think only to suggest, if I might, that unless there is some good reason for thinking a change is needed, so that the present system is not working satisfactorily, there may be merit in leaving matters substantially as they are.

Mr Bercow: Chairman, you will recall it was Lord Falkland who said, "That which it is not necessary to change, it is necessary not to change". A very good Conservative doctrine.

Q151 Chairman: From the chair, I could not possibly comment. On behalf of the Committee, can I very much thank Lord Nicholls of Birkenhead for coming and giving his advice and responding with clarity and directness to the questions which have been put to him. My Lord, your answers to our questions will be very helpful to the report which we will be drawing up shortly. On behalf of the Committee, I would like to thank you very much for giving us an hour of your very valuable time this afternoon. Thank you very much.

Lord Nicholls of Birkenhead: Thank you very much, Chairman.

Wednesday 9 March 2005

Members present:

Sir Nicholas Winterton, in the Chair

Mr Eric Illsley
Huw Irranca-Davies
Mr Tony McWalter

Sir Robert Smith
Mr Desmond Swayne
David Wright

Submission from Ms Sally Keeble MP

Many thanks for your letter, and for the very close interest you have taken in this issue.

As I mentioned to you in the House, your committee clerk very kindly phoned up and I have already made arrangements to come and give evidence to your committee's inquiry.

I did some research into the issue, and considered very carefully before raising the issue with the Leader of the House last year. As I probably made clear in my last letter,¹ the issue is one of balancing the right to ensure that people get a fair trial with freedom of speech, and the need for MPs to balance their role as legislators with their role as advocates for their constituencies.

There will always be a tension. However, it seems to me that there are a few points which make the application of the House's present *sub judice* rule—in particular as it applies to matters before coroners' court—militate against fair speech, and MPs' ability to represent their constituents. It is also out of line with the *sub judice* rule as it applies to the media. I would make the following points:

- (i) No-one is on trial at a coroner's court. Although it seeks to establish the facts in relation to deaths, there is a real limit to the verdicts that the court can deliver—and they cannot impute blame to an individual.
- (ii) The *sub judice* rule generally only applies to trials heard by a jury. It is generally assumed that judges are not influenced by others' views and opinions expressed via the media and elsewhere. I would have thought that where a coroner sits on their own without a jury, the same approach should apply.
- (iii) The application of the *sub judice* rule is normally very time-limited, either from a warrant being issued, or charges laid. Arguably whenever there is a suspicious death, there is likely to be an inquest. This could mean that the matter would be *sub judice* from the moment of the death until the end of the final piece of legal action—which is a very long time. If you take, for example, the death of the late Princess of Wales, the inquest in the UK has been many years after the event.
- (iv) The application of the *sub judice* rule is normally restricted to the very narrow matter before the court. It is recognised that wider general issues of public concern still have to be debated and discussed, and especially by those of us who are MPs and usually want to see general public policy issues dealt with by the Government.

The *sub judice* rule in relation to matters before coroners' courts has been hard to apply consistently. For example, the House of Lords has had an oral statement on Rainsbrook. Rudi Vis MP had a written question answered on matters at the heart of the issue about use of restraint at youth training centres. So it is unclear why my inquiries on the subject have been so comprehensively blocked.

I have trawled through the internet to see what happens in other legislatures, and enclose some of the findings (not printed). The Australians seem to have given it the most thought, and the report on the matter in Queensland is helpful in identifying the different strands of the argument. It also includes some comparison with the Canadian approach and our own. Also enclosed is a copy of the Canadian procedures, an interesting set of recommendations from the Indian Parliament. And finally, for more lively reading, an article from Trinidad which makes similar points in blunter language.

¹ Not printed.

I'm sorry if this arrives late, but it may be of interest and assistance to the committee to see the way that parliamentarians elsewhere have wrestled with this issue.

I look forward to meeting with your committee.

February 2005

Supplementary submission from Ms Sally Keeble MP

BACKGROUND NOTE

There are four basic functions that MPs fulfil in Parliament:

- (i) legislative
- (ii) holding the executive to account
- (iii) advocacy for constituents
- (iv) sounding board on general issues

The issue which I am seeking to raise relates to (ii), as I am seeking to hold the executive, in particular to hold the Home Office, and the Department for Education and Skills, which has the lead responsibility for children's services, (and to a lesser extent the Department of Health and the Office of the Deputy Prime Minister) to account for standards in residential establishments for children and young people serving my constituency.

Contrary to what seems to have been assumed, I am not seeking to raise a case of a constituent.

My particular concern, as set out in my previous letter, is that the *sub judice* rule as it is being applied to matters before coroners' courts, is preventing me carrying out my functions as an MP to question the standards of care being provided for children and young people in establishments that serve my constituency. There may be a need for the establishments, both Home Office and local authority, to be fully investigated, as I fear that there may be something of a culture of violence against children and young people in them. However, it would not be fair on the institutions or the staff to press for such an investigation without at first at least getting some further information. This is what I have been trying to get.

Constitutional position of parliament, and the sub judice rule

In the evidence before the committee, much has been made of the separation of powers as being the basis of the *sub judice* rule. However, the doctrine of the separation of powers is one which is more relevant to the written constitution of the United States, with the clear separation between the executive, the legislature and the judiciary. In the UK, our constitution is not written, but is an amalgam of history, convention, precedence and various pieces of legislation. Thus "Statements about the existence and importance of the separation of powers in the United Kingdom must be treated with caution . . . In the United Kingdom the separation of powers plays a secondary role, the lead being taken by the legislative supremacy of parliament." (John Marston and Richard Ward *Constitutional and Administrative Law*).

The overwhelming argument for a *sub judice* rule is the right of our constituents to a fair trial, and for this it is worth Parliament fettering its right to the freedom of speech. However, this fettering of the freedom of speech should not go further than is required to ensure that a trial is fair.

Previous versions of the *sub judice* rule applied to the Commons did not refer to coroners' courts, and it was not until 1992 that the Speaker ruled that cases before coroners' courts were covered by the House's *sub judice* rule. In the speech by Stephen Twigg in December 2002 when the new *sub judice* rule was agreed, no justification or explanation was given to extending the rule to coroners' courts.

The use of the *sub judice* rule as it applies to the media is instructive. Broadly, the rule is applied to cases where there are trials, either pending or in process, which are heard by juries. It is not applied to proceedings that are heard by judges, because it is assumed that a judge is immune from influence by external pressures of this type. In addition, while the media will take cognisance of the *sub judice* rule when deciding whether to publish an article, the legality of a decision to publish will be tested after the event in the court.

In effect then, the rule applied to Parliament is very much more stringent than that which applies to the media. In addition, although we have the right to appeal to the Speaker, he is advised by the officers of the House who also apply the rule to members. There is no testing after the event as to whether the *sub judice* rule has been broken.

Therefore our right to free speech, much less our ability to hold the executive to account, is very much less than that of the media in these circumstances.

Looking at international comparisons, it appears that Canada, New Zealand, Australia and India do not have such restrictive rules. The report of the inquiry in Queensland, Australia, which has been submitted to the committee, sets out very well the tension between the *sub judice* rule and free speech.

Effectiveness of the sub judice rule

The impracticality of the *sub judice* rule is well demonstrated in the case that I have been seeking to raise. It concerns the death of a boy in a residential institution in April 2004 following an incident when restraint was used. The inquest was opened and adjourned on 28 April 2004, and there it remains.

However, the case has been raised publicly in the following ways:

- (i) the Home Office issued a news release on the subject.
- (ii) Rudi Vis put down a question which was answered on the wider issue of use of restraint in youth training centres.
- (iii) 28 April 2004 Lord Elton specifically named the case and asked about the disciplinary measures being taken in a question in the House of Lords that was followed by a number of other questions from other peers.
- (iv) Lord Listoval named the boy and the institution during the debate in the Lords on the Children Bill in May 2004.
- (v) 29 November 2004 Baroness Vivien Stern specifically named the boy and the institution during the debate on the Gracious Speech in the House of Lords.
- (vi) 9 February 2005 Paul Goggins, prisons minister, specifically named the boy and the institution during a debate in Westminster Hall.

Present situation in relation to the Northamptonshire case

At present the coroner's court is still waiting for a decision from the Crown Prosecution Service as to whether there will be any prosecutions in the case of ****. There has been no indication as to when a decision will be forthcoming. The Home Office has been looking into the situation, but it has not been possible to get full information about what it is doing—because no statement was made to the House about any investigations after the boy's death, and it is now not possible to get information because the matter is said to be *sub judice*.

My concern remains that during the time that the coroner's court has been adjourned—almost a year—progress could have been made in calling the executive to account for the management of youth training centres and in particular the use of restraint techniques in them. Progress could also have been made in holding the executive to account for standards of staff training, disciplining of children and young people and checking of records during the year.

One of the arguments that has been put is that the *sub judice* rule does not prevent debate, it only delays it. Meanwhile, MPs cannot hold the executive to account on the use of restraint in youth training centres, the checking of records of staff moving from institutions which have had incidents of child abuse, or the training of staff in these centres or related institutions. That seems to me to be a completely intolerable restraint on the proper role of an MP, and something of a dereliction of duty towards those of our constituents' children who are in these institutions.

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Witness: Ms Sally Keeble, a Member of the House, examined.

Q152 Chairman: Can I welcome Sally Keeble, Member of Parliament for Northampton North, who has a considerable interest in our inquiry into the *sub judice* rule. She has submitted evidence to us and we are very interested in the evidence that she has submitted. Between us, we felt that it would be very useful for her to come and give oral evidence to us. Sally, can I welcome you to the Procedure Committee as part of this important inquiry into the *sub judice* rule? In your latest note to the Committee you said, "The overwhelming argument for a *sub judice* rule is the right of our constituents to a fair trial, and for this it is worth Parliament fettering its right to the freedom of speech. However, this fettering of the freedom of speech should not go further than is required to ensure that a trial is fair." We are all aware that you have a legal position and a legal qualification. Where do you think the line should be drawn between what you have highlighted—that is, free speech—and a fair trial?

Ms Keeble: I do not have a legal qualification.

Q153 Chairman: I was under the impression that you appeared to know rather more about this than the average Member of Parliament.

Ms Keeble: I have done some studying of it while I have been an MP in the evenings but being an MP does not make it possible to complete a study and get a legal qualification. The balance has to be struck in terms of the scope of the *sub judice* rule, both in terms of the courts, tribunals or hearings to which it applies, and also the timing of it. The rule as it applies in journalism applies in particular where there are jury trials, it being assumed that the general public who do not have legal training are going to be more influenced by general arguments than a judge or magistrate is. It is right that particular attention should be taken over jury trials. Where somebody is not on trial, it seems to me inappropriate to have a *sub judice* rule. Also, perhaps when somebody has

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not been charged or when there is not a hearing in prospect, it would seem to be inappropriate to have a *sub judice* rule. That would mean employment tribunals would not have a *sub judice* rule. There are rules in terms of journalists, reporting such hearings. Where you can have years between a sudden death and an inquest even being completed and nobody is on trial, it would be quite wrong there to have a *sub judice* rule apply. If I could give an example which is perhaps at the extreme end, the inquest in this country into the death of the late Princess Diana took a very long time to open. Is one seriously saying that in all that time there should be a *sub judice* rule?

Q154 Chairman: You will, I am sure, have read some of the evidence that has been given by learned and distinguished judges, the Clerk of the House and others to us. This House must not be seen to be in conflict in any way with the courts of this country and the judicial system of this country. Do you think there should be that proper separation and therefore Members of Parliament should be responsible for what they say in this House, where there is of course freedom of speech and privilege, so that in no way do utterances in this House affect a court case that is being held?

Ms Keeble: I have read all the evidence carefully. Obviously, there are competing pressures here. The evidence that was given was given by people perhaps whose emphasis was very much on the protection of the position of the courts. I am concerned, as all MPs must be, about the position of our constituents and their rights and privileges, the burden of responsibility that is placed on us as MPs to represent them in taking decisions about legislation before the House, in holding the executive to account for its performance and in standing up for their interests. We have, with due respect, I would argue, more claims on our attention and I think it is absolutely vital that we should take those important responsibilities very carefully on board. At the same time, obviously we have to think about the position of the courts. It is important that our constituents should have a right to a fair trial. Our respect for the courts and the integrity of their proceedings is based on our respect for our constituents' right to a fair trial, rather than being purely out of institutional courtesy as such. Perhaps that is one of the missing links in some of the evidence that was given.

Q155 Chairman: We have the huge advantage as Members of Parliament in speaking within Parliament covered entirely by the privilege that we have. We can say anything and we cannot be challenged, having said it within Parliament. Do you think it is important that Parliament should not be seen as an alternative to the courts and do you not feel that it is important that Parliament does not seek to establish a point of view through what is said here which might prejudice what occurs in a court?

Ms Keeble: Absolutely, but part of the argument as it applies to journalism—that is my background—is that it is thought that judges at least are somewhat immune from influence by wider debate. Therefore, whilst of course we have to have respect for trials and

for legal proceedings, I would venture that perhaps judges are not quite the frail flowers that they have been presented as. They are pretty robust about what they think about us sometimes as well. I think it is really important that, whilst we respect the courts, we also respect the importance for our constituents of having us here and able to raise issues on their behalf.

Q156 Sir Robert Smith: Are there not two issues here? You mentioned juries but in a case without a jury but with a judge there are witnesses. Is it not also important that those witnesses do not have their evidence prejudiced by what may be said in Parliament?

Ms Keeble: I have made no suggestion whatsoever that we should in any way prejudice trials. I have dealt purely with coroners' courts. I do not think anyone would in any way suggest that you should do anything during the course of a trial that would taint the process. It is absolutely right that it is very easy for general media coverage to influence what happens in a trial. I think that is completely beyond the pale.

Q157 Sir Robert Smith: Back on the grand principle where you were saying that judges are not frail flowers likely to be swayed by what we say or decide in Parliament, it is a bit of a cliché but it is not just about justice being done; it is about it being seen to be done. Obviously in any case there is more than one party. If Parliament has been seen to take issue or side during the process of a legal proceeding, is there not a danger that the party that is not happy with the result, whether we are confident that judges will not be influenced by what we do, it is about them being seen not to have been placed in a position of being influenced?

Ms Keeble: People will always find someone to blame for a result that did not suit them. To a certain extent people saying it is all the fault of Parliament can be quite a vacuous thing for them to do. It is important that justice should be seen to be done and that Parliament should not be seen to be interfering in a trial or a legal process, but I think it is possible to achieve that without having what is basically a gagging of an MP trying to go about their job in a proper way. One of the other problems with this is that as the *sub judice* rule applies to newspapers, if a journalist breaks that, there is a legal process to deal with it. It can be tried, thought through and discussed but here we do not have that because we are immune from prosecution. If we have a voluntary restraint, there is a risk that it can be too tightly applied and I think it is if it is applied to coroners' courts and in particular if it is applied to the general issue, because if there is one thing we are supposed to be doing here it is dealing with those broad policies issues.

Q158 Huw Irranca-Davies: I am not from a legal background either so I find this quite intriguing. I note in one of the briefing notes we have a description of four basic functions that MPs fulfil in Parliament. One of them is advocacy for

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constituents. Would you agree that sometimes part of that advocacy is trying to influence public opinion on a particular issue and it may be to do with a case that is proceeding through a court or a coroner's court or possibly even a tribunal. By trying to influence public opinion where an injustice might be evident in the eyes of an MP, you may inevitably influence proceedings that are currently underway.

Ms Keeble: I do not think the matter should be raised if proceedings are underway. That is perfectly fair, but proceedings do not last a particularly long time except for, for example, in the case of a coroner's court, if you take the time from the opening and adjourning of the case to the time of the inquest being heard, given that an inquest is not a trial. Where you cannot ask questions about violence towards children and young people for a whole year because an inquest has opened and adjourned, it seems to me to be a bit of a dereliction of duty when it comes to dealing with child care and child protection issues. There is a reverse side. The delay can cause more harm than the *sub judice* rule is intended to prevent.

Q159 Huw Irranca-Davies: Do you feel that you can do that in the abstract, taking up an issue—if you like, a generic problem—with the way something is dealt with whilst at the same time proceedings are continuing?

Ms Keeble: Yes. That has to be the case because there are heaps of court cases, tribunals and all sorts going on up and down the country pretty much every single day. They will cover a whole range of different issues. I have been quite clear that that normal parliamentary work, holding the executive to account, discussing general policy issues, has to continue, whilst also recognising that you do not in the process of that mention particular cases. There are also procedures in place so that if an MP is seen to be abusing their position the Speaker should be able to deal with it. People would not have any problems in criticising an MP—I am sure the media might even help—who abused their position and sought improperly to influence court proceedings.

Q160 Mr Illsley: Throughout the submission you have made and the case that you referred to, the Princess Diana case, is it a question of delay which is the whole problem here in achieving an inquest? Are we not in danger of disguising the problem being that of delay by looking at the *sub judice* rule? In other words, if a case in your constituency, for example, occurred in April 2004, if an inquest had been held and decided upon by May of that year and a decision had been taken as to whether any criminal proceedings would follow on from that, the problem would not have arisen, would it? You would perhaps have been happy to have allowed that coroner's inquest to proceed and then a decision to be taken. Most of the problems that you would want to refer to flowing from that incident might have been addressed. Is it a question that we could be confusing the real villain of the piece here?

Ms Keeble: I have thought about that point because it was raised during the process. I am not convinced about that. One thing that is clear is that there has never been any rationale for extending the *sub judice* rule to the coroner's court. If you look at the joint committee's report, it is slipped in, in 3(a), that a coroner's court counts as a court of law and it is slipped in in Stephen Twigg's speech as well. There has never been any justification or explanation for it. It is right that the mischief would not be so bad if there was not sometimes such a delay about coroners' courts, but there is still a principle issue there about why and whether it is right that a coroner's court should be included as a court in terms of the rule. It is made much worse by the delay but quite often you do see coroners' courts opening and adjourning and they remain adjourned for a long time; or you get a sudden death and some years later you get the inquest. Life has gone on in the meantime and it does not influence the inquest. Is it really right that theoretically during that time presumably you should not have discussed the case? If you really look at it, it is probably not appropriate to have a *sub judice* rule apply to coroner's court.

Q161 Sir Robert Smith: One issue that was put to us as to why you would want to include coroners' courts was that their decisions can have an impact on people in terms of the decisions they make and the outcome of the decisions of the court can impact on people's lives. Therefore, it is a decision that still should not be prejudiced.

Ms Keeble: Everything can have an impact on people. Anything that is said in Parliament can have an impact on people for a whole variety of reasons. When you are talking about the *sub judice* rule, you are not just talking about the courts; you are talking about the right of the individual to have a fair trial and to be properly represented by their Member of Parliament and therefore the right of free speech and how you balance those two rights. If there is not a right to a fair trial because it is a coroner's court, it would seem to me that the *sub judice* rule is inappropriate because it prevents an MP doing their job in other ways.

Q162 Chairman: Do you not take the view that Parliament is the high court of Parliament and, because it is the high court of Parliament and an exceptional place and people often take what is said here as gospel, do you think therefore that Members of Parliament need to be particularly and exceptionally careful about what they say relating to a matter that is either before a judicial court or even a coroner's court or, for that matter, even an employment or other tribunal, where people cannot necessarily be found guilty? What is said in Parliament might well have an influence on the ultimate decision of a coroner's court or a tribunal.

Ms Keeble: Being careful about something is different from not being able to talk about it at all. The *sub judice* rule means you cannot raise it. Because we have the privilege here of freedom of speech, it is right that we have to take that seriously about a whole range of different things. That

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includes sometimes libelling or slandering people and the kind of remarks that we make on that level. It seems to me quite wrong that the *sub judice* rule which is intended to protect a person's right to a fair trial should then be extended not just to cover something which is not a trial but also even a tangential reference to the underlying issue.

Q163 Huw Irranca-Davies: Specifically on coroners' courts which you make a particular case for, you do put a powerful case forward that they should be in some ways an exception. You have probably seen Lord Goldsmith's evidence where he says that there is an impact of discussion in the public domain. A coroner's court may determine, he says, whether an insurance policy pays out, subsequent criminal proceedings or whether civil proceedings take place. They can, in his words, be significant and prejudiced. Also, the Coroners' Society goes on to talk about the impact that it could have on a jury within a coroner's court. How would you respond to those concerns?

Ms Keeble: Take a concrete example which is the Northamptonshire one. Opened on 28 April last year after a boy died, adjourned since then and when it is heard, because it was a death in custody, it will be heard by a jury. There is not even a date for it resuming. There will be a general election before then so if I am not around afterwards who knows? The whole affair of the violence towards children in these centres might simply disappear off the agenda completely, which I think would be outrageous. There might well be a case for saying once you have a date for the hearing, where it is an inquest that is going to be heard by a jury, it should not be raised in Parliament while the court is sitting, but for the whole year that it is adjourned, to say that you cannot ask about violence towards children in residential institutions in Northamptonshire I think is an outrage. Let us put it the other way. Yes, I would feel dreadful if something I said interfered with an inquest, even if nobody was being tried. People are more likely to be influenced by the soaps than by me. If in the meantime there is another death in one of these places how do you think I will feel then? I am very clear about which I would feel worse about. As it happens, there has been another child apparently who has had some difficulties in one of these places.

Q164 Huw Irranca-Davies: You raise a very interesting and fine distinction there, between raising an issue which is not necessarily specific to an individual constituent but it could be an issue that could affect many other people. For example, issues around corporate manslaughter, Crown immunity from prosecution. I have had cases on my patch where I have raised the issues that have come out of individual cases whilst proceedings were underway but not with reference, because of the worries of *sub judice*, to the individual constituent *per se*. Would you think that is the fine distinction that we need to focus on?

Ms Keeble: I have been stopped from asking any questions about the issue. It is not just about the individual case which is not a constituent in any

event. You have to be absolutely clear if you are going to limit freedom of speech and more importantly the right of MPs to hold the executive to account there has to be a very good reason for it. My constituents' right to a fair trial is a good reason. I am not convinced about the other reasons. The importance of not influencing a jury that is making a decision is obviously an important issue but I would argue that that is limited to the duration of the hearing and it does not extend even weeks in advance of that. I think it is quite wrong to say, just because there might be some theoretical influencing of the people who are looking at the facts of this particular case, that questions around the issue should not be asked at all.

Q165 Huw Irranca-Davies: Do you think it is appropriate within a coroner's court case whilst proceedings are underway to raise specific, individual instances of a case as opposed to your very valid point which is possibly protecting lives that may arise out of similar instances unless they are tackled? Do you think it is fair to raise individual circumstances?

Ms Keeble: You would have to define "while the hearings are underway" because if a court is adjourned it would seem to me to apply a gag for the whole duration while the coroner's court is adjourned is quite wrong. To stop an MP standing up and making some statement on a hearing which is taking place seems to be quite fair but to apply that for the duration of an adjournment would seem to me to be completely disproportionate.

Q166 Huw Irranca-Davies: Do you think there is some case to be made for perhaps at the Speaker's discretion to say that, if a coroner's court is sitting for an unduly long period or has not even convened for a year or two years, that is a case where an MP should be able to go to the Speaker and say, "I am now frustrated on behalf of my constituent. I want at your discretion to be able to raise the individual case, to push it forward both as a general issue and the specifics because it is not being addressed within the coroner's court"?

Ms Keeble: The rule should be clearer in the first place. I think it should not apply to a coroner's court unless it is before a jury and then only when the inquest is being heard, which is normally only a matter of a couple of days anyway.

Q167 Chairman: Is it your view that coroners' courts adjourn a matter for far too long and that an adjournment of great length is unjustified?

Ms Keeble: I do not know. It is dependent on the investigations. The other problem with coroners' courts is that sometimes they are only convened or reconvened quite long after the event. I am thinking of the Marchioness one here. It was adjourned for a long time because the police investigations were very

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complicated. I know in the case of the Northamptonshire one that there is some concern about the length of the adjournment and the length of time it is taking to complete the investigations and to get a decision out of the Crown Prosecution Service. If you take the Princess Diana one, that came a very long time after the event. I would not say whether that is right or wrong. It highlights the unfairness or injustice that can be caused by having a *sub judice* rule applying during adjournments.

Chairman: Can I give you an assurance that the Procedure Committee hopes to produce its report before the next general election—ie, before the dissolution of this current Parliament—and whatever the election result in Northampton North the evidence given by Sally Keeble will be there for posterity and your evidence will be fully and properly taken into account by this Committee in drawing up its report. I hope that gives you some reassurance.

David Wright: It is nice to know that we have a year in which to consider this before the date of the general election.

Chairman: I did not say that!

Q168 David Wright: I wanted to focus on a point that you made in your evidence about a question that Rudi Vis was able to put down in relation to this situation, about the death of this boy in a residential institution. I know we cannot go into the details of the case but could you talk to us about the difference that you see in the way that Rudi Vis was able to structure his question and why you feel that is not effective enough or does not go far enough or does not allow us to delve deeply enough into the issues?

Ms Keeble: I am perfectly confident about the results in Northampton North. Rudi's question—and I had very similar questions to him—was put down as a general question about youth training centres. I said, "Listen, I have a problem" so I alerted them to what was going on before I put the question down. If I had not been so honest, perhaps it might not have been picked up. The second thing relates also to the time because I was putting my question down very soon after it happened, whereas his were later. It is interesting that the question was raised on 29 November and 9 February of this year so with the passage of time presumably memories or awareness of the officers of the House have lapsed slightly, understandably so. One of the issues I was particularly concerned about was staffing. That is problematic. That is partly why some of my questions would run into more difficulties. If you are looking at some of the general policy areas around the death, it is an issue you would want to look at. It is not about the culpability of anybody; it is about the training systems in place, the staffing and vetting procedures. I did indeed put down some questions about the vetting procedures.

Q169 David Wright: Were those answered?

Ms Keeble: Yes.

Q170 David Wright: Would that not suggest that the current parameters of the rule do allow us to operate?

Ms Keeble: No, I do not think they do because the amount of information that I need is much more detailed. I confess I partly did it out of pure mischief to see if I could do it. MPs should be able to say, "This is what is going on in the constituency. This is what is going on in the area. This is what these questions relate to" and put in questions quite openly and honestly that are around a particular issue and that do not get ruled out of order. I find it personally quite offensive that the Home Office can put out a press statement on something, the press can ask questions about it and get information and I as an MP with a really serious concern about the child care services in Northamptonshire cannot get information and ask questions. I think that is outrageous because it means that the press can get information about what is happening on my patch which I cannot get.

Q171 Mr Illsley: In your evidence you suggest and you have just said that the media are able to comment more freely on court cases than Parliament. Therefore, our right to free speech, much less our ability to hold the executive to account, is very much less than that of the media. If there was ever a reason to do away with the *sub judice* rule, as I see it, that would be it. I do not understand why the media should get more access to information than should a Member of Parliament. Has any explanation ever been given to you as to why that is the case? Unless one recognises that the media are bound by what they can print and we have freedom of speech and they do not, that assumes they have not abided by that.

Ms Keeble: Our *sub judice* rule is more stringent than theirs. Theirs is tried after the event; ours is a voluntary gag before the event. That makes a difference. Also, the rule extends to any discussion here. It is not just that you cannot put your questions down and you cannot raise them on the floor. You do not even seem to be able to get replies in writing from the Home Office because it says it is *sub judice*. If it had been a different type of death and there had been a statement in the House, there might have been a statement about an investigation being set up but in this case it was not dealt with that way so there was no statement in the House and there was not the opportunity to question. The whole thing instantly became *sub judice* because it was a death in custody, the inquest was opened and adjourned. That is it.

Mr Illsley: Would there be a case for saying to government or the powers that be that if the media can gain factual information in relation to an issue which to us is *sub judice*, there is a case that we should be allowed the same information? Then it is up to each individual Member of Parliament, as it would be with the members of the press, as to what they do with that information and how they use it. It is up to each individual MP as to how he looks upon the *sub judice* rule, whether he stands by it and abides by it or whether he or she breaches it and stands the consequences of that.

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Q172 Chairman: I think what Mr Illsley is asking is does the press have an advantage over Members of Parliament.

Ms Keeble: Yes, they do. People can say to us, "If you want information go and look on the Home Office website and look at the press release." Of course we can do that but our function as MPs is to hold the executive to account on the floor of the House and through questions. That is supposed to be where we do our questioning and our holding to account, not by looking at press releases on the Home Office website.

Q173 Sir Robert Smith: Are we meant to reserve questions for finding out information we cannot obtain from other sources? Is the theoretical guidance to Members that we should check in the Library and use other sources? This is not how most Members practise it but the idea is the questions are there to get that information which is not available through any other process.

Ms Keeble: Yes, but when we ask questions because we have the information, we are simply directed back to the press release which the journalists are able to ask questions about but which we cannot. They can ask questions and print articles based on the press release but we, having seen the press release, cannot table questions.

Q174 Mr Illsley: To me, this is perhaps one of the most important parts of this evidence. We are disadvantaged *vis-à-vis* the media in terms of a case before a coroner's court. In your last bit of evidence, you made reference to Rudi Vis asking a wider question but then you make the point that Lord Elton specifically named a case, Lord Listowel named the individual involved, Baroness Vivienne Stern named the individual involved and a couple of weeks ago Paul Goggins, the Prisons Minister, specifically named the individual during a debate in Westminster Hall. Do you look upon that as a breach of the *sub judice* rule in all those instances or is this simply another extension of what you were saying, in that the media perhaps have more advantages and these namings have followed on from that; or were these people simply in breach of the rule?

Ms Keeble: Perhaps the Committee is in a better position to decide on breaches of the rule. There has been a certain amount of discussion taking place outside the House about this death and what is going to come out of the investigation that the Home Office has, which I have not been able to get that much information about. There is some scepticism about how much will come out. It is obviously something which in certain circles is being talked about. I suspect that these people putting things down is because it has slipped through the net.

Q175 Mr Illsley: It is still a breach.

Ms Keeble: The Home Office Minister was talking about youth training centres generally and made these comments as part of a much wider debate. Probably, it was not picked up at the time and it is probably a cock up rather than a conspiracy. Also if,

like me, you make a point about being concerned about this case and are told you cannot put questions down, you are honour bound gagged until you are ungagged, whereas other people who have not flagged up their concerns in the same way are not subjected to the same level of scrutiny. I am very aware that I cannot ask questions about this and I am not supposed to talk about it and raise it.

Q176 Chairman: You are raising this matter before a Committee of this House which is being broadcast. I think we were absolutely right to give you the opportunity, because of your commitment, knowledge and involvement in the particular case, to come before us to give evidence. Do you not think that that is a real opportunity?

Ms Keeble: I certainly appreciate that and I appreciate the fact that it has been possible to look into it. What I very much want is the opportunity to ask questions about the substantive issue which is a whole array of factors around this particular case. Depending on what comes out of that, I will perhaps ask the Home Office to go further on it or ask Northamptonshire County Council to go further on it. I have some information on it through discussing things with colleagues in Northamptonshire but there are some missing links here.

Q177 Sir Robert Smith: Given that the Minister has gone so far as to raise it on the floor of the House, have you tried again through correspondence, as there is no vetting on letters you send, to pin them down again and say, "In the light of the fact that you have taken this case forward . . .?"

Ms Keeble: That is a fair point. I will try to do that. Having watched quite carefully what was said and asked about this case, it was only in preparation for this that I went back and looked through the search engine. This one on 9 February came up, which I was quite surprised to see.

Q178 Mr Illsley: It is either a breach of the *sub judice* rule by the four individuals and the Minister or it suggests that the *sub judice* rule is not working because it is too difficult to police it. The very issue you are talking about, delay between an incident and an inquest, means that perhaps the table office police forget the name of the individual or whatever and it slips into a question.

Ms Keeble: There seem to be slight differences between what happens in the Lords and what happens in the Commons. The length of time it can take to get an inquest heard is an absolutely major issue. It demonstrates why a *sub judice* rule applied to coroners' courts does not make sense in its present form because you have to keep people quiet about things for a very long time and it is difficult to do.

Q179 Chairman: You are giving an answer to the question I put earlier: do you think that in coroners' courts, in adjourning a case, the length of time they can adjourn for is abnormal and unfair to those involved. You have now indicated that it is.

Ms Keeble: If an inquest does not have a jury, it comes under a different category completely.

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Q180 Chairman: Lord Nicholls, who gave evidence to us stated quite to the contrary, if my memory serves me correctly, when I said should what is happening in a coroner's court be treated differently from a normal court of justice in this country. He said it was basically the same.

Ms Keeble: The presentation of the rule in the Commons and in the joint committee's report never gave any justification for the coroner's court. The Speaker's ruling in 1992 just said that the Speaker had taken advice and this was the decision. There was never any rationale given. I can understand the point about juries but if you start saying that any hearing before anybody—of course anyone can be influenced by anything—but a coroner can be influenced by what is said in the House, a judge can, magistrates can, anyone can. Then you get into very sweeping restrictions on the right to free speech.

Q181 Chairman: I think I have been a little unfair because the question to Lord Nicholls of Birkenhead was by my colleague Huw Irranca-Davies, who asked, "My question to you really is should there be a difference in the application of the *sub judice* rule between other courts and something like a coroner's court?" Lord Nicholls of Birkenhead replied, "I do not think in principle that there should be. I sympathise with the example you have given but the basic purpose underlying the *sub judice* rule in the two Houses, as I understand it, is to assist in the demarcation of the boundary and practice between the legislature on the one hand and the judiciary on the other in discharge of their own functions." How would you respond to that?

Ms Keeble: With some frustration because, on the one hand, that does not give any extensive justification at all. It does not distinguish between different types of coroners' courts or deal with the point about the difference between juries, judges etc. Also, with all due respect, it does not deal with the obligations that we have in terms of our constituents. The point of us fettering our right to free speech is not just to be nice to the courts; it is to protect our constituents' right to a fair trial. That is the grounding of it. It is not just a matter of inter-institutional courtesies which is the impression I got out of quite a lot of the evidence. There is a whole basic difference between myself and Lord Nicholls over the origins of the *sub judice* rule and for me it is because of a respect for my constituents and their right to a free trial.

Q182 Sir Robert Smith: The Attorney General did think aloud to us that maybe we should be looking at a different trigger point as to when it might apply to a coroner's court so that you did not have such a long period of no comment, but he did not come up with a new trigger point. Are you suggesting that once it starts meeting would be a time to hang on?

Ms Keeble: I would have thought the hearing and where it is a jury. If you say that the coroner can be influenced, you are open to saying that a judge can be influenced and an array of people who currently

cannot be influenced can be influenced. That would make the imposition of a rule very sweeping and would not recognise the realities of court life.

Q183 Chairman: In your evidence, page two, you argue, "There is no testing after the event as to whether the *sub judice* rule has been broken" and I presume you imply in the House of Commons.

Ms Keeble: That is right.

Q184 Chairman: Should there be and how would this work?

Ms Keeble: I wondered about that. I was greatly influenced by the previous histories of some of the MPs in Northampton who have run foul of various things, including refusing to take the oath and such like. Ours is a voluntary gag. We cannot be arrested for contempt. We cannot be tried as journalists can be taken to court. The only thing that would happen if we raised it improperly would be exclusion from the House but we cannot raise it because we are ruled out of order. That is the problem and that is why the rule has to be very carefully drawn. We can ask the Speaker for his discretion but the people advising him are the same people who apply the rule in the first place. There is no completely independent court of appeal. You could say the Procedure Committee could be but that would seem to undermine the Speaker. Therefore, it seems to me much more important to get a properly workable and fair rule in the first place and not have one which unnecessarily gags MPs.

Q185 Mr Swayne: Did you refer this case to the Speaker?

Ms Keeble: I did consider it but, no, I did not.

Q186 Mr Swayne: Why did you decide not to?

Ms Keeble: The main influence was the fact that it seemed a pretty circular argument, because the people advising him would be the same people who had told me very firmly that I could not ask questions. I thought I would be just going round the houses. I had not really thought that the adjournment of the inquest was going to take quite as long as it has. The closer it got to the election, the more I thought this was a nonsense. It also seemed clear that there was a problem about the rule being applied to the coroner's court and therefore that was partly why I raised it with the Leader of the House, to see if it was possible to get the rule revisited.

Q187 Mr Swayne: If you had felt that the Speaker was not going to be advised by the very people who had made the decision, if there was some other avenue for the Speaker reviewing a matter like that, would you have had more confidence to do that and, secondly, have you any suggestion as to who might properly advise the Speaker in these matters?

Ms Keeble: The answer to the first one is probably yes. It still would not have stopped me raising it with the Leader of the House because it seemed to me there was a basic problem about the *sub judice* rule and I do believe that very strongly. Who else could advise him? My tendency is to say not a lawyer

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because, whilst there are some legal issues at stake, there are some basic issues about how we function as MPs. I have not seen that reflected in the evidence presented to the Committee thus far. I am sure there are lots of other Members who have views on this.

Q188 Chairman: We are concerned to learn from somebody like yourself whether there are any circumstances in which the Speaker, using his discretion, might relax the rule which is, to an extent, very much what Desmond Swayne has said. Can you go any further?

Ms Keeble: If you are not in a position to be able to recast the rule or suggest recommendations, it might be helpful to give some guidance to the Speaker about when the rule should not apply, perhaps in cases where an inquest has been opened and adjourned and therefore there is not a hearing anywhere on the horizon; and/or where there is not a jury involved.

Q189 Chairman: You have been very persuasive to us in giving the evidence which you have. Do you now regret in any way that you did not approach the Speaker to ask him perhaps to assist you and to use his discretion, because you indicated in answer to Desmond Swayne that you had not done so. Do you now regret that you did not? Might you not have prevailed upon him to use an element of his discretion in this matter?

Ms Keeble: I am torn on that because, on the one hand, I do not like to think that an avenue I could have gone down to unpick some of the problems was not explored. To that extent, yes, I do regret it. Given that the rule as it was applied to this was very clear and I was told very clearly no, it applies to coroners' courts and it is not on, it would have been very difficult for the Speaker in all honesty to have relaxed the rule to the extent I needed to be able to ask questions about some of the background.

Q190 Huw Irranca-Davies: On the very point that the Speaker, by his very nature, will err on the side of caution when approached on an issue such as this, should we be looking not at a guide for the Speaker—although that might be one way of proceeding—but a guide to MPs? I am just being provocative here. From my own experience, the *sub judice* rule is there to be tested in some ways within the discretion of the individual MP as well and what I am suggesting is that sometimes, if MPs in their individual persuasion thought they could test it on an individual case and so on, that might be the way to go and wait to be hauled in to the Speaker, as compared with the other approach which is bound to be cautionary. That might have got your case onto the floor in a delicately phrased manner. You mentioned Rudi Vis earlier on.

Ms Keeble: The problem with testing it is that you do not get past square one because you put something down and it is ruled out. You are not in a position to do that. You could piggy back on the back of another question. I did consider that but I thought it was probably a bit dishonest because it would place the Speaker in an impossible position. He would

have to rule you out of order. You can do that if you want to but personally I think it is much better to go back to square one, change the rule and get something which does recognise the realities of the coroner's court and the problems around them; and also, an MP's right to represent their constituents and ask questions and hold the executive to account and to proceed from there. The other one is to go and ask the Speaker to use his discretion but in this instance, if you look at it in writing, the rule is very clear: anything before a coroner's court, once the court has opened, is *sub judice*, out of order and that is it.

Q191 Huw Irranca-Davies: Are we becoming too focused here on the whole *sub judice* rule when there are a lot of other methods as well by which a Member of Parliament can push to obtain information which are not raising it within the House specifically?

Ms Keeble: You cannot because when you write to the Home Office it comes back to you saying that it is *sub judice*. It is completely circular. That means the only way you can do it is informally. I have done that to an extent but by its very nature that informal, off the record information is not always very reliable. What is important in this instance is not just to get the information; it is then to get steps taken to make sure that if there are problems in the way young people are treated in these institutions action is put in hand to stop that. That needs to be done quickly because a kid that was 14 or 15 when this death happened will now probably have left the child care system completely.

Q192 Mr Illsley: Do you not think that the authorities involved in a case might give more weight to a House of Commons opinion rather than the media? You said earlier that perhaps your constituents take more notice of the soaps than of anything you say. Do you not think that discussion here about a case might be more likely to influence opinions in an inquest instead of in the media?

Ms Keeble: Only if it is reported. Otherwise, people do not see it. I am not sure how the coroner in Northamptonshire is going to know something is being raised here unless I write and tell her or it is reported in the local newspaper. One would hope also that the debate that would take place here about a subject would be more responsible than just a general debate through a local newspaper. That might be hopeful but that is what one would expect, bearing in mind that we have to take our responsibilities seriously.

Chairman: Is there anything else that you would like to say to the Committee? We are very grateful to you for the frank way you have dealt with the wide range of questions that we have put to you. Is there anything else that you would like to tell us which you do not think has been covered by any questions that we have put? My colleague, Tony McWalter, has turned up late but he has turned up and we are grateful for that. I know he has had important

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engagements which have delayed his attendance. Tony, is there anything you would like to put to Sally Keeble?

Mr McWalter: I would like to say on the record that I have been dealing with some people from Poland, not even constituents, but I would like to thank Sally for the contribution she has made. I would like to associate myself with her concerns. I hope this Committee will respond very positively to what she has said because it is a nonsense if, in the end, you cannot raise things in Parliament that you can raise in the press. That seems crazy.

Q193 Chairman: Is there anything else you would like to say, Sally?

Ms Keeble: I appreciate the amount of time you have let me have on this and I appreciate also the fact that you are looking into it. It is not a light issue. It is a very fundamental one. If you think about what would have happened with anyone else dying in custody, there would be an uproar. This is a young

person with very few safeguards. He is not one of my constituents. The fact that happened in the custody of the state is outrageous. My feeling about not being able to have it raised properly in the Commons is not just a small matter for me. It is a very, very major issue that it has not been possible to get this done. One can completely respect that you do not want to prejudice anyone's right to a fair trial but there is a major issue here about what happened.

Chairman: Can we thank you for your consistency and your persistency and indicate that there are Members of this House of all parties, not least in your own party the Father of the House, who have never missed an opportunity to raise an issue even if it is extremely unpopular and to stretch the tolerance of the Speaker in doing so, because that is what Parliament is about. I am grateful to you for your contribution and the fact that you feel so deeply on this subject and you have been prepared, unlike many, to offer yourself to come before the Procedure Committee to state your case. On behalf of the Committee, I thank you very much.

Note by the Clerk of the House

1. The Committee has asked me for a note on the operation of the *sub judice* rule, covering the points raised in the letter of 11 June from the Chairman of the Foreign Affairs Committee (Annex).

2. A copy of the current resolution of the House relating to matters *sub judice* is attached for ease of reference.² The Committee will note that it dates from November 2001, having been passed in a revised and more precise form in response to recommendations made by the Joint Committee on Parliamentary Privilege in 1999.³

3. The circumstances which have led the Foreign Affairs Committee to raise this issue are set out in the second paragraph of Mr Anderson's letter. The circumstances were unusual, in that the case before the High Court, which led the Clerks concerned to advise that the *sub judice* rule was applicable, was not identical to the case to which Members of the Foreign Affairs Committee wished to refer in their report. The advice was based on the understanding (which seems to me to have been well-founded) that the basis of the High Court case was substantially the same as the allegations which had been brought to the Committee's attention. Notwithstanding what Mr Anderson says in the second half of the third paragraph of his letter, I would suggest that the circumstances in this case were sufficiently unusual for it to be unnecessary to consider revising the *sub judice* resolution solely on that account.

4. A member of the Foreign Affairs Committee subsequently wrote to Mr Speaker expressing concern about the ruling that had been given. Not surprisingly, at that stage (after the event) Mr Speaker was unwilling to comment on the decision that the Committee had made or the advice that had been given. Whenever points are raised with him in the Chamber about proceedings in select committees, the Speaker similarly declines to second guess the actions or decisions of a committee or its chairman. This does not mean that he would be unwilling to be approached informally by a chairman who was concerned about the interpretation of the *sub judice* rule, provided this was done after adequate notice and while the relevant decision was still pending in the committee.

5. This raises a more general question. The *sub judice* resolution lays down a general rule, the application of which is stated to be "subject to the discretion of the Chair". Does this mean that the chairman of a select committee could, at his own discretion, set the rule aside in a particular case? Necessarily it sometimes falls to an occupant of the Chair other than Mr Speaker to have to enforce the *sub judice* rule when the need becomes apparent. This may happen with a Deputy Speaker in the Chamber, a member of the Chairmen's Panel in a Standing Committee or in Westminster Hall, or (as in this case) with a Select Committee chairman. There are greater difficulties over any occupant of the Chair other than Mr Speaker exercising the discretion to waive the rule in a particular case, except perhaps in very marginal or minor cases. First,

² [Not reproduced here. See p 19 of Report].

³ HC Paper 214-I, paragraphs 189–202.

any such decision could have repercussions for subsequent proceedings in the Chamber or for rulings on the admissibility of Parliamentary Questions, both of which are properly the preserve of Mr Speaker. And secondly there is the evident danger of inconsistency in the interpretation of the *sub judice* rule.

6. The Procedure Committee may therefore agree that, if any general guidance is to be given to Select Committee chairmen about the application of the *sub judice* rule to Select Committee proceedings, it should be to the effect that, if in doubt, they should refer any potential problem to Mr Speaker in good time, and should always do so if they wish a discretion to be exercised to waive the rule in a particular case. If the Committee agrees with this approach, I will be happy to make the necessary arrangements with my senior colleagues in the Committee Office to ensure that this guidance is conveyed to current and future chairmen.

7. Mr Anderson's letter raises a further question, namely whether the *sub judice* resolution should apply to cases (such as civil cases) heard before a judge alone rather than before a judge and jury: the argument being that a judge alone is unlikely to be influenced by parliamentary comment whereas a jury may be.

8. This issue was carefully reconsidered by the Joint Committee on Parliamentary Privilege in 1999, who commented as follows:

“[It] is not only a question of prejudicing a fair trial. Parliament is in a particularly authoritative position and its proceedings attract much publicity. The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work. No matter how great the pressure at times from interest groups or constituents, Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented and tested. Although the risk of prejudice is greater in a jury trial, it would not be right to remove appeal cases or other cases tried without a jury from the operation of the [*sub judice*] rule. Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures. Thus restrictions on parliamentary debate should sometimes exceed those on media comment.⁴

9. I respectfully agree with those observations. The consideration that there is no substantial risk of prejudicing court proceedings may occasionally be one factor among many which may lead the Speaker to decide to exercise his discretion to allow matters to be discussed which strictly fall within the *sub judice* rule. This possibility is recognised in *Erskine May*.⁵ But it is a big step beyond that to suggest that the *sub judice* resolution should be amended so that it does not apply at all to civil cases not being heard by a jury; and I would not myself support such a proposal.

Roger Sands

July 2004

Annex

**Letter from Rt Hon Donald Anderson MP, Chairman, Foreign Affairs Committee,
to Sir Nicholas Winterton MP, Chairman, Procedure Committee**

The Foreign Affairs Committee has asked me to write to you about the operation of the House's rule on matters *sub judice*.

The Committee is concerned that in its recent Report on human rights abroad it was unable to comment on allegations made to it ***,⁶ because of proceedings in the High Court relating not to the case in question but to another case. The second case was brought by a group of people who had been arrested at the same time as the individual who had submitted evidence to the Committee and who were making essentially the same allegations against the same authorities. The Committee reluctantly accepted the advice of the Clerk that it should not make any substantive comment in its Report on the evidence it had received, because it was clearly the intention of the House in passing its *sub judice* Resolution to exercise a self-denying ordinance and not to allow anything in its proceedings—or in the proceedings of its committees—which might have a bearing on a case.

Two distinct issues arise from the Committee's experience. First, I have very strong doubts that a senior judge considering a civil matter is going to be influenced in his judgment by anything a select committee states in its Report. At least insofar as it concerns civil cases in the High Court—or, arguably, any civil case not being heard by a jury (in itself a rare event)—the Resolution appears to be unduly restrictive and may require amendment. Second, I question whether the House is acting in the best interests of political debate

⁴ HC 2 14-I, 1998–99, paragraph 192.

⁵ *Erskine May's* Parliamentary Practice, 23rd edition, page 438.

⁶ Material shown by asterisks has been removed because the High Court case is still active.

and justice alike if it denies itself the right to comment on the substance of a matter which is not before the courts, for the sole reason that there is an analogous case in which proceedings are active. Either the Resolution itself should be changed to clarify this point, or it should be interpreted in a less restrictive way.

As well as those difficulties which arose in the course of the Committee's proceedings, I should mention that a member of the Committee encountered a similar problem when attempting to table Parliamentary Questions about the civil case being pursued in the High Court.

The Foreign Affairs Committee therefore requests the Procedure Committee to take an early opportunity to inquire into the operation of the *sub judice* rule, with particular reference to the two points made above.

June 2004

Supplementary note by the Clerk of the House

1. I am submitting this note in response to the Chairman's letter of 4 November inviting me to supply a more comprehensive note following the Procedure Committee's decision to widen the scope of its inquiry since my earlier note of 9 July.

2. As the Committee is aware, the *sub judice* rule arose from rulings from the Chair since the middle of the 19th century and was first codified in the form of a resolution of the House of Commons in July 1963 following a report of the Select Committee on Procedure in that year.⁷ The current resolution was adopted on 15 November 2001 following detailed consideration by the Joint Committee on Parliamentary Privilege in 1999. The relevant passage of their report (paragraphs 189–202) is appended to this note, and I quoted from paragraph 192, on the purpose of the rule, in paragraph 8 of my earlier paper.

3. Given the nature of the Joint Committee's membership, this passage has been taken to be an extremely authoritative statement of the current position, and the resolution of 15 November 2001 was adopted by the House after a half-hour debate and without controversy. The House of Lords adopted a very similar resolution on 11 May 2000, the difference being that the discretion to waive the rule is granted to the Leader of the House instead of the Chair. Apart from that, the Joint Committee recommended (paragraph 201) that the rule should be identical and it is obviously desirable that this should continue to be the case.

4. Although commonly referred to as a rule, the *sub judice* resolution, like the less formally stated convention that preceded it, is applied less strictly than a standing order. Its use is subject to the discretion of the Chair, and proceedings on legislation (including delegated legislation) are expressly exempted.

5. The last occasion of which I am aware when the rule gave rise to significant frustration on the floor of the House was during the protracted proceedings relating to the extradition of General Pinochet in 1998–99. I am not aware of any serious problem since the resolution was agreed to in its present form, although of course I should be happy to comment in more detail on any problems that are brought to the Committee's attention if the Committee wishes me to do so.

6. As the Joint Committee said (paragraph 200), "No rule can anticipate every situation that may arise, and there will be times when the Chair has to strike a balance between the public interest in the unimpeded progress of judicial proceedings and other aspects of the public interest." It is impossible to give detailed or explicit guidance as to the circumstances in which it might be appropriate for the Chair to exercise discretion to waive the rule; but if a matter of public policy is genuinely at issue, it is normally possible to find ways of addressing it in general terms without going into the details of the particular case before the courts in a way that might be prejudicial. I suggest that it would be highly undesirable to make the rule more complicated than it is by adding qualifications and detailed guidance.

7. The Chairman's letter listed some topics which might be raised during the Committee's inquiry, and it may be helpful if I deal with them in turn.

8. *What is the purpose of the rule: preventing prejudicing of court proceedings, or comity between courts and Parliament (keeping out of each other's areas of responsibility)?* The rule has both purposes, and it is implicit in the Joint Committee's report that the latter purpose is at least as important as the former: it is as much in the interests of Parliament that the courts should respect its territory as it is that Parliament should respect the territory of the courts.

9. *If the rule is to prevent prejudice: is there a distinction between jury and non-jury proceedings? Should the rule be stricter than that applying elsewhere, eg to newspapers?* It follows from my previous answer that, to preserve comity, the rule should continue to apply to non-jury trials. The Joint Committee said, in paragraph 192:

"Although the risk of actual prejudice is greater in a jury trial, it would not be right to remove appeal cases or other cases tried without a jury from the operation of the rule. Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially

⁷ HC 156 (1962–63).

careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures. Thus, restrictions on parliamentary debate should sometimes exceed those on media comment.”

10. *How closely does the matter have to relate to a case to fall within the rule?* As I mentioned above, it is usually possible to address a genuine issue of public policy without going into the details of (or even mentioning) a particular case before the courts. The case raised by the Chairman of the Foreign Affairs Committee, dealt with in my earlier paper, was extremely unusual in involving allegations very similar to those already made against the defendants in an existing civil case.

11. *Is the “cases . . . shall not be referred to” provision too restrictive? Would it be justifiable to refer to a case in terms of how long it is taking, rather than on its merits?* It might be possible to add words such as “Matters at issue in” to the beginning of paragraph (1) of the resolution; but I doubt whether anyone would in fact be pulled up by the Chair simply for referring to the length of time a case is taking. Difficulties would be more likely to occur if references to length of time widened into references to the conduct of the trial or the possibility of discontinuing it.

12. *Should coroners’ courts be excluded, on the basis of nobody being on trial, and proceedings often being protracted?* I understand that the Committee is approaching the Coroners for their views. Although nobody is on trial at an inquest, the consequence for individuals can be serious, as the recent inquest involving police firearms officers has demonstrated.

13. As the Committee will see from the above, I would advise against altering the *sub judice* rule unless its current operation raises significant difficulties. I would of course be willing to expand on anything mentioned in this note, or to comment on any problems brought before the Committee during the course of its inquiry.

November 2004

Extract from Report of Joint Committee on Parliamentary Privilege, 1999

CHAPTER 4: FREEDOM OF SPEECH AND SELF-REGULATION

188. The privilege of freedom of speech in Parliament places a corresponding duty on every member to use the freedom responsibly. The duty is all the greater now that the debates of the two Houses may be broadcast live anywhere in the world. For Parliament itself to make detailed rules on what may be said in Parliament would destroy the privilege, and this course has always been shunned. The rules and conventions which apply to debate in both Houses are directed primarily towards achieving orderly debate and good temper, not to restricting the subject matter of debate. However, absolute freedom of speech is a far reaching privilege and the Joint Committee has considered whether it is necessary or desirable to provide more formal safeguards against its abuse, while protecting the essential privilege.

The sub judice rule

189. One significant limitation already exists. Both Houses abstain from discussing the merits of disputes about to be tried and decided in courts of law. This practice, long established in criminal cases but of comparatively recent origin in civil cases⁸, is known as the *sub judice* rule. The House of Commons rule is embodied in resolutions of 23 July 1963 and 28 June 1972; the House of Lords rule in various decisions of its procedure committee set out in the Companion to the Standing Orders. The rules of the two Houses are set out in annex E to this report. Both Houses have accepted that, by implication, the *sub judice* rule applies also to select committees, but it is a defect of the existing resolutions that this is not made clear. The rule is not absolute. In the Commons it may be waived at the discretion of the Chair. In the Lords there is no general power of waiver, but in certain circumstances a power of waiver is given to the Leader of the House.⁹

190. Shortly stated, the rule provides that matters awaiting adjudication in a court of law should not be brought forward in motions, debates, questions or supplementary questions. This is qualified, expressly in the case of the Commons, implicitly in the case of the Lords, by Parliament’s right to legislate on any subject. The 1972 Commons resolution further qualifies the rule by providing that in the case of civil proceedings and subject to the discretion of the Chair, reference may be made to matters relating to ministerial decisions “which cannot be challenged in court except on grounds of misdirection or bad faith” and matters concerning issues of national importance such as the national economy, public order or the essentials of life. The House of Lords adopted a similar qualification in 1995. When doing so, however, the Lords did not adopt from the Commons rule the quoted (limiting) wording relating to ministerial decisions. The Lords rule permits discussion of matters relating to any ministerial decision, as well as issues of national importance, at the discretion of the Leader of the House.

⁸ For a historical account, see Patricia Leopold. “The Changing Boundary between the Courts and Parliament”, in Buckley (ed) *Legal Structures* (Wiley, 1998).

⁹ See paragraphs 199–200 below.

191. The present rule rightly tries to strike a balance between two sets of principles. On the one hand, the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament, and Parliament should not prevent the courts from exercising their functions. On the other hand, Parliament has a constitutional right to discuss any matters it pleases.

192. It is important that a debate, a committee hearing, or any other parliamentary proceeding should not prejudice a fair trial, especially a criminal trial. But it is not only a question of prejudicing a fair trial. Parliament is in a particularly authoritative position and its proceedings attract much publicity.¹⁰ The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work. No matter how great the pressure at times from interest groups or constituents, Parliament should not permit itself to appear as an alternative forum for canvassing the rights and wrongs of issues being considered by the judicial arm of the state on evidence yet to be presented and tested. Although the risk of actual prejudice is greater in a jury trial, it would not be right to remove appeal cases or other cases tried without a jury from the operation of the rule. Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures. Thus, restrictions on parliamentary debate should sometimes exceed those on media comment.

193. Criminal proceedings are a sensitive area. Finding the right balance will always be difficult. There is something to be said for the *sub judice* rule applying once it is known police investigations are taking place and charges may be brought. But, to be workable, the rule must have a clear boundary. There must be clear starting and finishing points for the rule in each case. The mere existence of police investigations, and the possibility of charges, do not satisfy this test.

194. Although not an exact parallel, some assistance can be gained from the provisions in the Contempt of Court Act 1981 regarding the “strict liability rule”. This is a rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so. Under the Act the strict liability rule does not apply to publications before proceedings are “active” or after they have ceased to be active. In general, the statutory definitions of when proceedings become active or cease to be active are unexceptional. For example, civil proceedings at first instance become active when arrangements are made for the hearing. The relevant provisions of the Act are set out in annex F.

195. However, there is a practical difficulty over Parliament applying in criminal cases precisely the same criteria as those contained in the 1981 Act. Under the Act criminal proceedings become active when an arrest is made or a warrant or summons to appear is issued. The difficulty lies in the different circumstances in which the Act and the *sub judice* rule are applied. Under the strict liability rule as modified by the 1981 Act, it is for the publishers of such material to satisfy themselves that proceedings are not active or face the consequences. However, proceedings for contempt of court by breach of the strict liability rule are exceptional and can only proceed with the consent of the Attorney General or by direction of the court. In contrast, the *sub judice* rule is applied routinely by the authorities of each House and used to prevent members doing anything which might breach the rule. If the 1981 Act formula were applied, it would be necessary to establish, in the time available to vet, say, a question in the Commons, whether an arrest had been made, and that time is often a few hours or less. If the Contempt of Court Act were followed, the House authorities would also have to be alerted to the release of an arrested person without charge, at which point the *sub judice* rule would cease to apply.

196. The practical difficulties in this would be considerable and could be insuperable. We consider that for the purposes of the *sub judice* resolutions, criminal cases should continue to become active only when the case against an individual is formulated in a charge or summons to appear. It should be emphasised that drawing the line at this point does not remove the obligation on individual members and select committees to act responsibly and avoid actions which impede criminal investigations or abort trials.

197. In line with the Contempt of Court Act 1981, one desirable relaxation in the *sub judice* rule concerns pre-trial applications in civil cases. Under the 1981 Act a pre-trial application, for example, an application for an interlocutory injunction, is treated as a distinct proceeding. Adapting this to the *sub judice* rule, a member would be permitted to comment on an interim decision after it had been given, for example, granting an interlocutory injunction against a strike, so long as the proceedings as a whole had not been set down for trial.

198. In the Commons the exception to the *sub judice* rule for matters relating to ministerial decisions is confined to ministerial decisions which can be challenged in a court only on grounds of misdirection or bad faith. It seems questionable how far there are any ministerial decisions that can be challenged only on these limited grounds. We consider, therefore, that this exception should be drawn more widely so as to include any ministerial decision. In this respect the Lords rule is preferable. At the same time it is desirable to retain the absolute discretion of the Chair (or, in the Lords, the Leader of the House) over discussion of ministerial decisions. There may be special circumstances, even in judicial review, where debate in either House could be highly prejudicial.

¹⁰ “The fact that newspapers sometimes feel free to comment on issues that are *sub judice* . . . is another matter, since the courts may deal with them for contempt, and their views do not carry with them the weight of having been delivered in Parliament”. Mr Speaker’s statement, HC Deb 916 (28 July 1976), c 883.

199. A further exception should exist, as at present, subject to the discretion of the Chair in the House of Commons or the Leader in the House of Lords, for any matter where issues of national importance arise, for example, the national economy, public order, or “the essentials of life”, such as the maintenance of essential services. Further, each House should retain the right to legislate on any matter. This cannot be otherwise, though it is rare that the circumstances of a particular case current in the courts are directly relevant to pending legislation.

200. The key to the successful operation of the *sub judice* rule over the years in the House of Commons has been the sensitive use by the Speaker of discretionary powers. In exercising this discretion the Chair is rightly vigilant to enforce the *sub judice* rule and relax it only in exceptional circumstances. The Lords have recently sought to replicate this discretion in part, by giving powers to the Leader of the House to waive the rule in the specific circumstances mentioned above. No rule can anticipate every situation that may arise, and there will be times when the Chair has to strike a balance between the public interest in the unimpeded progress of judicial proceedings and other aspects of the public interest.

201. In the application of a newly worded rule, the exercise of discretion in both Houses will continue to be important. In practice this discretion must be applied separately in each House. But it is clearly desirable that the two Houses should have an identical *sub judice* rule, and that each House should also be in the same position to permit debate on a *sub judice* matter when the circumstances warrant it. We recommend that a general discretion to waive the *sub judice* rule and permit discussion, comparable to that of the Speaker in the Commons, should be introduced into the House of Lords. The occupant of the Chair in the House of Lords has no special powers to impose order or give rulings. The Leader of the House would therefore probably be the appropriate person to exercise such a general power of waiver.

202. We recommend that the two Houses should adopt a resolution to the following effect. This resolution incorporates the points made above and certain minor improvements:

“That, subject always to the discretion of the Chair, and to the right of the House to legislate on any matter or to discuss any delegated legislation, the House in all its proceedings (including proceedings of committees of the House) shall apply the following rules on matters *sub judice*:

1. Cases in which proceedings are active in United Kingdom courts shall not be referred to in any motion, debate or question.
 - (a) (i) Criminal proceedings are active when a charge has been made or a summons to appear has been issued, or, in Scotland, a warrant to cite has been granted.
 - (ii) Criminal proceedings cease to be active when they are concluded by verdict and sentence or discontinuance, or, in cases dealt with by courts martial, after the conclusion of the mandatory post-trial review.
 - (b) (i) Civil proceedings are active when arrangements for the hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance.
 - (ii) Any application made in or for the purposes of any civil proceedings shall be treated as a distinct proceeding.
 - (c) Appellate proceedings, whether criminal or civil, are active from the time when they are commenced by application for leave to appeal or by notice of appeal until ended by judgment or discontinuance.

But where a ministerial decision is in question, or in the opinion of the Chair a case concerns issues of national importance such as the economy, public order or the essential services, reference to the issues or the case may be made in motions, debates or questions.

2. Specific matters which the House has expressly referred to any judicial body for decision and report shall not be referred to in any motion, debate or question, from the time when the Resolution of the House is passed, until the report is laid before the House.

3. For the purposes of this Resolution—

- (a) Matters before Coroners Courts or Fatal Accident Inquiries shall be treated as matters within paragraph 1(a);
- (b) “Motion” includes a motion for leave to bring in a bill; and
- (c) “Question” includes a supplementary question.”

Annex E: Sub Judice Resolutions and Practice

House of Commons Resolution of 23 July 1963

Resolved, That, subject always to the discretion of the Chair and to the right of the House to legislate on any matter,

(1) matters awaiting or under adjudication in all courts exercising a criminal jurisdiction and in courts martial should not be referred to—

- (a) in any Motion (including a Motion for leave to bring in a Bill), or

- (b) in debate, or
- (c) in any question to a Minister including a supplementary question;
- (2) matters awaiting or under adjudication in a civil court should not be referred to—
 - (a) in any Motion (including a Motion for leave to bring in a Bill), or
 - (b) in debate, or
 - (c) in any question to a Minister including a supplementary question from the time that the case has been set down for trial or otherwise brought before the court, as for example by notice of motion for an injunction; such matters may be referred to before such date unless it appears to the Chair that there is a real and substantial danger of prejudice to the trial of the case.
- (3) Paragraphs (1) and (2) of this Resolution should have effect—
 - (a) in the case of a criminal case in courts of law, including courts martial, from the moment the law is set in motion by a charge being made;
 - (b) in the case of a civil case in courts of law, from the time that the case has been set down for trial or otherwise brought before the court, as for example by notice of motion for an injunction;
 - (c) in the case of any judicial body to which the House has expressly referred a specific matter for a decision and report from the time when the Resolution of the House is passed.
- (4) Paragraphs (1) and (2) of this Resolution should cease to have effect—
 - (a) in the case of courts of law, when the verdict and sentence have been announced or judgment given, but resumed when notice of appeal is given until the appeal has decided;
 - (b) in the case of courts martial, when the sentence of the court has been confirmed and promulgated, but resumed when the convicted man petitions the Army Council, the Air Council or the Board of Admiralty;
 - (c) in the case of any judicial body to which the House has expressly referred a specific matter for decision and report, as soon as the report is laid before the House.

House of Commons Resolution of 28 June 1972

Resolved, That—

(1) notwithstanding the Resolution of 23 July 1963 and subject to the discretion of the Chair reference may be made in Questions, Motions or debate to matters awaiting or under adjudication in all civil courts, including the National Industrial Relations Court, in so far as such matters relate to a Ministerial decision which cannot be challenged in court except on grounds of misdirection or bad faith, or concern issues of national importance such as the national economy, public order or the essentials of life;

(2) in exercising its discretion the Chair should not allow reference to such matters if it appears that there is a real and substantial danger of prejudice to the proceedings; and should have regard to the considerations set out in paragraphs 25 to 28 of the Fourth Report from the Select Committee on Procedure.

Letter from The Lord Brabazon of Tara, DL, Chairman of Committees, House of Lords, to Rt Hon Peter Hain MP, Leader of the House of Commons

Thank you for copying to me your letter to the Chairman of the House of Commons' Procedure Committee proposing that the resolution on matters *sub judice* should be reconsidered in respect of matters before a coroner's court.

This is clearly an area in which it is desirable that the two Houses should keep broadly in line. We shall await with interest the outcome of any inquiry by the Commons' Procedure Committee and then consider whether any change is appropriate in the Lords.

I am copying this letter to Sir Nicholas Winterton MP.

October 2004

Letter to the Chairman from Mr PDG Hayter, LVO, the Clerk of the Parliaments, House of Lords

Thank you for your letter of 4 November and for the invitation to give evidence to the Procedure Committee on the *sub judice* rule.

The present resolution of this House on *sub judice* was passed to give effect to the recommendations of the Joint Committee on Parliamentary Privilege in 1999, and since then the resolution has not given rise to difficulties in its application in the Lords. Since there is no mischief that has caused problems here, I do not have much to offer your enquiry on the practical side. Answers to the more theoretical or philosophical questions might be better left to the Law Lords and other judges.

This House will of course consider very carefully the report of your Committee, and will look with interest at any recommendations for change that it might propose. If you are minded to make any such recommendations affecting both Houses, I would welcome the opportunity to comment before any firm decisions are taken.

November 2004

Letter to the Chairman from J L Leckey, HM Coroner for Greater Belfast

I am writing to acknowledge receipt of your letter of 16 November inviting me to give my views on the use of the *sub judice* rule in the proceedings of the House of Commons.

I must say that in the 20 years I have been Deputy Coroner and Coroner it is not something that has been an issue affecting the holding of inquests and, accordingly, it is not something that has exercised my mind to any great extent. The internet is a marvellous tool to have and it enabled me to acquire a report on the Sub Judice Convention by the Members' Ethics and Parliamentary Privileges Committee of the Legislative Assembly of Queensland. I am enclosing a copy of it but I would imagine that this is a document you are aware of and may have considered.¹¹

I would not pretend to have reached a final view on the *sub judice* issue and I accept that my views may change as the debate evolves. However, I was impressed by the submission of Mr Anthony J H Morris QC to the Committee and which is dealt with at length commencing on page 7. In particular, I would refer you to the views he expressed on page 13.

I feel I can add nothing further at this stage other than to thank you for seeking my views and to assure you that I will be most interested in learning the outcome of the deliberations of the Procedure Committee.

November 2004

Memorandum from the Faculty of Advocates

INTRODUCTION

On 4 November 2004 the Clerk to the House of Commons' Procedure Committee wrote to the Dean of the Faculty of Advocates indicating that the Procedure Committee had decided to hold an inquiry into the *sub judice* rule in the House of Commons. It was indicated that the decision arose following two instances where the rule had prevented comments and questions into ongoing court proceedings. It was also indicated that the Committee's intention was to consider general principles of the *sub judice* rule. The Committee invited views on the subject.

MATTERS RAISED

A list of possible topics to be considered by the Committee were listed in the Committee's letter. These were:

- (i) What is the purpose of the rule: preventing prejudicing of court proceedings or comity between courts and Parliament?
- (ii) If the rule is to prevent prejudice, is there a distinction between jury and non-jury proceedings?
- (iii) Should the rule be stricter than that applying elsewhere, eg to newspapers?
- (iv) How closely does the matter have to relate to a case to fall within the rule?
- (v) Is the "cases . . . shall not be referred to" provision too restrictive? Would it be justifiable to refer to a case in terms of how long it is taking, rather than on its merits?
- (vi) Should coroners' courts be excluded, on the basis of nobody being on trial, and proceedings being protracted?

RESPONSE

Before commenting on these individual points, we note that the Resolution of the House of Commons which relates to matters *sub judice* was passed by the House on 15 November 2001. We also note that this Resolution followed upon an extensive inquiry by the Joint Committee on Parliamentary Privilege whose report was ordered to be printed on 30 March 1999 (HC 214 of 1998-99). We are not aware of any developments since their report and recommendations which would require the general approach to the matter of *sub judice* to be reconsidered.

¹¹ Not printed. Available on www.parliament.qld.gov.au, under "committees".

(i) *The purpose of the rule*

The Joint Committee identified three different aspects of the rule. Firstly, the rule was required in order to prevent the right to a fair trial being prejudiced. Secondly, the rule was necessary in order to recognise the different roles of Parliament and the courts. Thirdly, it was “important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures” (paragraph 192). We agree that the *sub judice* rule is necessary and serves each of these purposes.

(ii) *If the rule is to prevent prejudice, is there a distinction between jury and non-jury proceedings?*

As already noted, we do not consider that the purpose of the rule is *purely* to prevent prejudice. If the other purposes of the rule are to be met, there is no reason to draw a distinction between jury and non-jury proceedings. We note that the Joint Committee rejected such an argument (see paragraph 192). We agree with that approach. In any event, the introduction of a distinction between jury and non-jury proceedings risks confusion.

(iii) *Should the rule be stricter than that applying elsewhere, eg to newspapers?*

It may not be helpful to make comparisons between the rules applying to the media and those applying to Parliament. Where the media transgress the rules applicable to them, the courts can deal with the matter by a finding of contempt of court. Further, the weight that is accorded to a statement or comment made in Parliament may be greater than that accorded to that in the media. There may be constitutional reasons why Parliament should operate a stricter *sub judice* rule than that applying to the media, for the reasons mentioned in (i) above.

(iv) *How closely does the matter have to relate to a case to fall within the rule?*

This is a matter which we consider must be left by necessity to the discretion of the Speaker. It is not possible to formulate hard and fast rules as each case will depend on its own facts and circumstances. If the matter is one which the Speaker considers may pose a risk of prejudice to the proceedings or would appear to an independent observer to be an attempt to impede or interfere in the course of justice, then the matter is, we would suggest, sufficiently close to fall within the rule.

(v) *Is the “cases . . . shall not be referred to” provision too restrictive? Would it be justifiable to refer to a case in terms of how long it is taking, rather than on its merits?*

We consider that some care should be taken in reviewing this aspect. The reference to a case taking too long may also be seen as an interference in the course of justice. It may be seen as a criticism, express or implied, of the parties involved, their legal team, or indeed the judge. In slightly different circumstances, recently in Scotland a judge convened a special hearing where an MSP had written to him asking on behalf of his constituent (the pursuer in the litigation) when his decision was to be issued. That led to reporting in the press of the judge’s comments about what he perceived to be an attempt to subject him to political pressure (reported in *The Herald* 1/12/04).

Delay may be a legitimate cause for concern in some cases but the length of time a case takes is often bound up with the nature and complexity of the subject matter. Meaningful comment on delay will almost always depend on a full understanding of the background circumstances, the facts, the legal position and administrative practicalities. It is not reasonable to make simple criticisms of delay when a full explanation of the length of time taken necessitates consideration of the merits of the case.

(vi) *Should coroners’ courts be excluded, on the basis of nobody being on trial, and proceedings being protracted?*

We can make no comment on this matter as coroners’ courts do not sit in Scotland. We do note, however, that the Resolution refers at 3(a) to both Coroners’ Courts and Fatal Accident Inquiries. We see no reason to exclude Fatal Accident Inquiries from the rule. Although nobody is on trial, there are still interests which may be prejudiced and witnesses to Inquiries who may be influenced. We do not consider protracted proceedings to be a particular problem in relation to Fatal Accident Inquiries.

We would wish to make a further point concerning compatibility with the *sub judice* rule of the Scottish Parliament. The Procedure Committee will be aware that the Scottish Parliament is bound by statute to have a *sub judice* rule (paragraph 1(1)(a) of Schedule 3 to the Scotland Act 1998) and that its Standing Orders

contain the appropriate provision. Although, of course, it is a different body, it would be highly desirable for the rules in the Scottish Parliament and in the Westminster Parliament to be consistent. It would be most unsatisfactory for an MP to be able to raise questions in Parliament in relation to a matter before a Scottish court when such questions could not be raised by an MSP in Scotland.

January 2005

Letter to the Chairman from The Rt Hon The Lord Cullen of Whitekirk, President of the Court of Session

Thank you for your letter of 4 November 2004 inviting views on the current *sub judice* rule.

I would like to offer the following observations on the rule.

The need for a *sub judice* rule seems to me to rest on two important considerations. First, the need to minimise the risk of the views of jurors being influenced by the discussion of the case in the legislature, and by the ensuing publicity which that discussion might attract. Account should also be taken of the effect on potential witnesses, whether they are to give evidence before a jury or before a judge. In these respects the point of the rule would have much in common with the object of the law relating to the contempt of court. Secondly, and more fundamentally, there is a need to avoid trenching on the independence of the judiciary. I am not so much concerned with a risk of the views of judges being influenced by what is said in the legislature. I am confident that judges can be expected to be robustly independent in arriving at their decisions. I am more concerned with the point that it is fundamentally inappropriate that the legislature should be treated as the alternative forum for the discussion of the issues in a pending court case. That would tend to blur the separation of functions, and to undermine public confidence in the judiciary.

As regards the formulation of a *sub judice* rule, I agree with the view that it should be expressed in such a way as to be certain in its application. The main provisions should be subject to a power to override in exceptional circumstances.

It may be of interest if I draw to your attention that, for the Scottish Parliament, the position is regulated by section 22 of, and paragraph 1(1) of Schedule 3 to, the Scotland Act 1998. Rule 7.5 of the current standing orders of the Scottish Parliament provides:

- “1. A member may not in the proceedings of the Parliament refer to any matter in relation to which legal proceedings are active except to the extent permitted by the Presiding Officer.
2. For the purposes of paragraph 1, legal proceedings are active in relation to a matter if they are active for the purposes of section 2 of the Contempt of Court Act 1981 (c 49).
3. Where any member refers to a matter in relation to which legal proceedings are active the Presiding Officer may order that member not to do so.
4. Nothing in this rule shall prevent the Parliament from considering legislation.”

I hope that this information is useful.

January 2005

Letter to the Chairman from the Rt Hon Colin Boyd QC, Lord Advocate

Thank you for your letter of 9 December 2004 inviting me to comment on how the *sub judice* rule of the House of Commons, or any possible changes to it, might impact on the courts in Scotland.

The *sub judice* rule operates as a “self-denying ordinance” by which the House of Commons chooses to impose a limitation on its members’ freedom of speech to prevent any statement in the House of Commons from prejudicing court proceedings. The need for such a limitation, in respect of court proceedings in Scotland, is no different from that in relation to court proceedings in England or Wales or Northern Ireland.

My observations apply to both civil and criminal proceedings but, given my responsibility for prosecutions in Scotland, I have an obvious interest in ensuring that the publication of a statement about a live case does not prejudice any criminal proceedings relating to that case. Potential for prejudice is most apparent in cases being tried by a jury, although the publication of prejudicial information may also have an impact on a professional judge and on witnesses. The position in relation to jurors was stated by Lord Justice General Emslie in *HMA v Newsgroup Newspapers, Irvin and Scottish Express Newspapers* 1989 SCCR 157:

“Our system of criminal justice in Scotland depends essentially upon the proposition that jurors called to try an accused person should arrive in the jury box without knowledge or impression of facts, or alleged facts, relating to the crime on the indictment”

And in the case of *HMA v Caledonian Newspapers Ltd and others* 1995 SCCR 330, Lord Hope observed:

“The court must do what it can to minimise the risk of prejudice because it is in the public interest that proceedings for the detection and punishment of crime should not be interrupted by the effect on the course of justice of publicity.”

The Contempt of Court Act 1981 was designed to harmonise the law in Scotland and England and Wales. Section 1 of the Act introduces the strict liability rule, which provides that conduct may be treated as contempt of court if it tends to interfere with the course of justice, in particular legal proceedings, regardless of any intent to do so. The rule only applies to publications that “create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.”

The law of contempt of court is designed to protect the integrity of court proceedings by ensuring that judges and jurors are not influenced by anything that they may have read about the issues in a case or that they will allow themselves, whether consciously or subconsciously, to take account of anything other than the evidence and arguments presented in court.

I acknowledge that a statement in Parliament about a live court case would not necessarily create a substantial risk of serious prejudice to court proceedings. Nevertheless during Parliamentary sessions the focus of political debate in the country centres on Parliament. Parliamentary proceedings are widely reported. Political passions can be raised by proceedings in court, particularly in high profile and sensitive cases, and a comment or statement by a Member of Parliament in such a case has, at least, the potential to prejudice court proceedings.

There is another sensitivity which the committee may wish to bear in mind. The independence of the courts and of the judiciary is a corner stone of our constitution. Accordingly they should be free from political interference or pressure. If statements made about a case in Parliament suggested that Members had a particular interest in the way a case was decided that might be interpreted as indirect political pressure and call into question the independence of the courts. Once the case has been decided those who were aggrieved might reasonably ask whether the statements made in Parliament and reported in the media influenced the decision. I am sure that our judges are scrupulous in putting such matters to one side but the public perception may be different.

The *sub judice* rule can be seen as an attempt to reconcile the principle that the rights of parties to legal action are not prejudiced by discussion of their case in Parliament with the principle that Parliament is supreme and has a basic right to discuss any matter it chooses. The latter principle is based, of course, on the Bill of Rights and the established “custom” of Parliament.

The House of Commons has chosen to impose a limitation on its members, but one which remains within the power of the House of Commons to disregard in appropriate circumstances.

For my part, I would argue that the rule is justified on the basis that it achieves its purpose in preventing prejudice to court proceedings while at the same time respecting the boundaries between the different responsibilities of the courts and of Parliament. I think this therefore answers the Committee’s first question about the purpose of the rule. In other words, I would suggest that the rule is designed both to prevent prejudice to court proceedings and to respect the different roles of Parliament and the courts.

Turning to the other questions raised by the Committee, the only distinction between jury and non-jury proceedings is that in the case of the latter, the potential for a publication to create a substantial risk of serious prejudice is bound to be less than in the former. This was recognised by Lord Bridge of Harwich in the case of *RE Lonrho PLC* 1992 AC 154 when he observed that:

“The possibility that a professional judge will be influenced by anything that he has read about the issues in a case which he has to try is very much more remote. He will not consciously allow himself to take account of anything other than the evidence and argument presented to him in court.”

While judges are less likely to be affected by what they read about a case, nevertheless, there is still the potential for prejudice. In this connection, it has to be recognised that what is said in Parliament, especially if it were to be said by a Minister, has the potential to have a greater impact than comments by a journalist or some other party making comment on the proceedings. I think these comments will apply also in relation to proceedings in a fatal accident inquiry: there is no jury, but still the potential for prejudice. And, in any court proceedings, there is the risk that prejudicial comments may influence the evidence of witnesses.

THE SCOTTISH PARLIAMENT

The position of the Scottish Parliament is fundamentally different in that it relies on the statutory protection afforded by the Scotland Act 1998. Section 41 provides that for the purposes of the law of defamation (1) any statement made in proceedings of the Parliament and (2) the publication under the authority of the Parliament of any statement shall be absolutely privileged. This ensures that members are free to debate matters of public interest (and that such debates can be properly reported) without fear of an action for defamation being raised.

Section 41 provides that the strict liability rule in the Contempt of Court Act 1981 does not apply in relation to any publication made in proceedings of the Parliament in relation to a Bill or subordinate legislation or to the extent that it consists of a fair and accurate report of such proceedings made in good faith. This section is intended to ensure that the Scottish Parliament is not prevented from legislating on any matter simply because anything said or done in the proceedings for the purpose of considering a Bill or subordinate legislation might be treated as contempt of court under the strict liability rule.

The need to limit the potential for prejudicing court proceedings was recognised in the Scotland Act 1998 which requires (Schedule 3, paragraph 1(b)) that the Standing Orders include provision for a *sub judice* rule. The Standing Orders contain such a rule, which is in the following terms:

- “1. A member may not in the proceedings of the Parliament refer to any matter in relation to which legal proceedings are active except to the extent permitted by the Presiding Officer.
2. For the purposes of paragraph 1, legal proceedings are active in relation to a matter if they are active for the purposes of Section 2 of the Contempt of Court Act 1981.
3. Where any member refers to a matter in relation to which legal proceedings are active the Presiding Officer may order that member not to do so.
4. Nothing in this rule shall prevent the Parliament from considering legislation.”

The rule is essentially the same as that applied by the House of Commons in the Resolution of 15 November 2001. One difference is that the Standing Order does not define the circumstances in which the Presiding Officer may permit a member to refer to legal proceedings. The intention was to provide a workable *sub judice* rule which does not attempt to anticipate every eventuality in advance but rather gives a discretion to the Presiding Officer.

It will also be noted that the Standing Order refers to legal proceedings and makes no mention of the courts. Interpretation of the Standing Order is a matter for the Presiding Officer but it is my understanding that the intention was that the rule applies to legal proceedings in all criminal, civil and courts martial and also to tribunals established under the Tribunals of Inquiry (Evidence) Act 1921.

I have had the opportunity to consider the transcript of the evidence provided to the Committee by the Attorney General. There is a discussion, towards the latter part of the evidence, of a possible difference in practice between Scottish and English Courts in interpretation of contempt of court. While the Scottish Courts have traditionally interpreted the law in this area more strictly than in England and Wales, in recent years the approach of the High Court of Justiciary has, I believe, been much closer to that of the English Courts. Article 10 of the European Convention on Human Rights has been a factor in the courts reading a more liberal interpretation of the section. For example, in the case of *HMA v Scottish Media Newspapers Ltd and others*, 1999 SCCR 599, the Court held that the Contempt of Court Act fell to be interpreted in accordance with Article 10. In assessing the risk of prejudice in that case, the Court had regard to the time likely to elapse between publication of the press article (about a Scottish celebrity who was being prosecuted) and the date of trial, which they considered would be around 9 months, and dismissed the petition.

So far as the Parliamentary *sub judice* rule is concerned, the proceedings in the Scottish Parliament, unlike those of Westminster, are subject to the law of contempt of court. While it certainly would be undesirable if interpretation of the Westminster rules led to Scottish matters being commented on and reported on in England and Wales where they could not be so in Scotland, publication in Scotland would still be subject to interpretation by the Scottish courts. So far as publication in England and Wales only is concerned, I think it likely that the impact on the Scottish public and thus the potential prejudice would be less in those circumstances—but that would be a matter for the Courts. And nowadays with web publication it is more difficult to regard publication as confined to one jurisdiction.

I hope this is helpful.

February 2005

Letter to the Chairman from Mr V F Round, Honorary Secretary, the Coroners' Society of England and Wales

I am grateful for the opportunity to give this written evidence and for sight of the (unapproved) transcript of the evidence of the Attorney General the Rt Hon Lord Goldsmith QC. I have also read the Report on the Sub Judice Convention of the Legislative Assembly of Queensland, Report No 7 to which I know my colleague Mr John Leckie, HM Coroner for Greater Belfast has already referred. If I may I will concentrate upon observations as to the practical effects of the present rule, and as to some alterations I have seen proposed, as they would impinge upon us “at the coal face”.

We do readily recognise the frustration that must be felt by Members at their inability to discuss in the House an inquest which they can see being discussed in the Press, apparently unrestrained. Coroners keenly feel an opposite but parallel apprehension when they see jury members arriving at court each day carrying newspapers discussing the very inquest in which they are engaged.

The matter of media restraint is for the Attorney General but may I note the important distinction he made. This is that your House is of right “self policing” and seeks to prevent problems *before they can arise*: the Attorney General contrasted the position in relation to Contempt, where he acts to prosecute in respect of pronouncements outside the House *after the damage has been done*. This oversimplifies in abbreviation, but if I understood him correctly it does suggest a good reason for the current higher level of restraint in your House.

I would add that juries appreciate that different media outlets will produce a different view of the same facts as a result of their differing viewpoints and house styles and their need severely to compress information. By contrast, concerns expressed by a Member of Parliament are seen to be in an entirely different category. Again, we would suggest that their greater weight of itself merits different treatment. This seems to us to render inappropriate an initially attractive compromise solution in the Queensland deliberations. This was the idea of a one month pre hearing “ban” on discussion.

There is a further practical difficulty with this proposal. It would depend upon the House demanding maintaining and monitoring a constant running update of a multiplicity of forthcoming court hearing dates, or making individual enquiry as each arose!

I understand Members feel the obstruction to discussion can be aggravated by delay in getting the inquests heard. It is a matter of which coroners are acutely conscious and various case management methods are being actively explored. However, the coroner is totally dependent upon the time taken by the various investigative agencies to investigate and obtain relevant prosecution decisions. A substantial number then struggle in addition to find any court available in which to sit. A recent seminar revealed, amongst other acute resource problems, a further shared cause of personal work stress. This was applications made for a further adjournment of the inquest after the witnesses and jury had been summoned, and court time set aside. When such applications are made by family who may be having difficulty coping it seems hard to refuse them on the grounds of the further delay: but the criticism for overall delay later received by the coroner as a result is keenly felt.

I mention this because I was grateful to see the Attorney General’s evidence that there was good reason to maintain the same *sub judice* protection without altering stance depending upon whether or not a jury was involved. In our case there is again a merely practical difficulty: it may not be clear for many months after the death whether or not a jury will be called to the inquest: it can be affected by many matters, including representations made at a later stage, almost always on behalf of the family.

I respectfully concur with two more important points of principle which the Attorney General was making about the same jury/non jury issue:

Firstly I have no doubt that the evidence witnesses give can be affected by concerns authoritatively expressed elsewhere: this I have personally noted in relation to the evidence of expert witnesses who sometimes have to be restrained from making reference to comment in an inappropriate way.

Secondly the judicial officer sitting without jury certainly could be affected in decision-making by comments made in the House. Dealing with requests for an adjournment is a particularly good example. In addition a court has always to demonstrate that each *individual* decision can be seen to be made on the basis only of what is proceeding in the courtroom, isolated from matters outside it.

Once that is done we should, and do of course pay attention thereafter to questions raised and answers given in the House.

We are most grateful for the opportunity to comment.

February 2005

Letter from Michael P Clancy, Director, The Law Society of Scotland

I am sorry it has taken me so long to come back to you following your letter of 4 November 2004, but I have very little comment to make upon the Rule.

In the Law Society of Scotland’s view, the Rule is basically sound especially in its application to Jury cases.

I have been unable to detect any groundswell of opinion which indicates that the Rule needs to be changed.

There is one issue, however, and that is the application of the Rule to Administrative Tribunals. It may be appropriate for Administrative Tribunals to be included in the Rule.

I hope the foregoing is helpful.

February 2005

Submission from A W Bradley¹²

THE SUB JUDICE RULE—A COMMENT

1. I have been asked by the Law Reform Committee of the Bar Council to prepare a short paper on the *sub judice* rule in Parliament, in connection with the current inquiry by the Procedure Committee of the House of Commons into the operation of that rule. I have prepared this paper primarily on the basis of knowledge of the subject that I have acquired from published sources. However, I have since 1990 practised as a barrister, specialising in public law, and that experience has to an extent influenced my views on the subject. The views expressed are my own and should not be read as views of the Bar's Law Reform Committee or any section of the practising bar.

2. This paper seeks to answer three questions:
- (a) what are the reasons for the *sub judice* rule?
 - (b) is the rule still needed?
 - (c) should aspects of the rule be changed?

What are the reasons for the sub judice rule?

3. The "*sub judice* rule" in its present form exists in both Houses by reason of resolutions embodying the rule that were adopted on 15 November 2001, by the Commons, and on 11 May 2000, by the Lords. These resolutions gave effect to a recommendation of the Joint Committee on Parliamentary Privilege made in 1999.¹³ Earlier forms of the resolution had been adopted by the Commons on 23 July 1963 and 28 June 1972; before that the "rule" had depended on rulings given by the Speaker. I need not reproduce the texts of the current resolutions here: the essence of the rule in the Commons (which does not apply to debates on primary or delegated legislation) is that cases in which civil or criminal proceedings are active in United Kingdom courts "shall not be referred to in any motion, debate or question", whether in proceedings of the whole House or in committee. Nor shall reference be made to matters which the House has referred to any judicial body for decision and report. However, the Speaker has a discretion not to apply the rule. Further, the rule does not apply to cases or issues "where a ministerial decision is in question" or where in the opinion of the Chair, a case concerns "issues of national importance such as the economy, public order or the essential services". In the House of Lords, the resolution is much the same, except that the Speaker's discretion is vested in the Leader of the House.

4. One reason why a rule on this matter is needed relates to the historic privilege of freedom of speech that each House enjoys under Article 9, Bill of Rights 1689, which declares that—

"the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

The effect of this is that no court may question or inquire into what has been said in the course of parliamentary proceedings, and thus no court may impose a penalty or other liability in respect of what has been said. This privilege applies even though it would have been a criminal offence to say the same thing outside Parliament (when, for example, it might have breached the Official Secrets Acts, or been an incitement to racial hatred), would have given rise to civil liability (whether for defamation, breach of confidence or breach of copyright) or would have constituted a contempt of court—for instance, by prejudicing proceedings before a court, by seeking to influence a judge or jury, or by breaching a court order, such as an order not to reveal the identity of a witness or a child affected by the proceedings.

5. The protection afforded to parliamentary proceedings by Article 9 continues to be of great significance. It is closely related to another important principle of constitutional law, namely that the courts do not intervene in the internal proceedings of each House. Judicial review of executive decisions has developed to a remarkable extent in the last thirty years, and it is now accepted that statements made by Ministers in Parliament may be referred to in judicial review proceedings.¹⁴ However, so far as Westminster is concerned,¹⁵ the courts refuse to inquire into alleged defects of procedure within Parliament and would not review the legality of a decision by the House to discipline a member for committing a contempt of the House or a breach of privilege. Thus the courts would not countenance a complaint by an MP that the Speaker had improperly exercised his authority, that an agreement between the main parties had prevented a topic

¹² Barrister; Visiting Research Fellow, Institute of European and Comparative Law, University of Oxford; and legal adviser, House of Lords' Committee on the Constitution. Formerly Professor of Constitutional Law, Edinburgh University (1968–1989) and editor of the journal *Public Law* (1986–1992). Author (jointly with KD Ewing) of *Constitutional and Administrative Law* (13th edn, 2003). Since 2004, a vice-president of the International Association of Constitutional Law.

¹³ Report of the Joint Committee on Parliamentary Privilege, HL Paper 43; HC 214 (1998–99), paras 189–202.

¹⁴ *Ibid.*, paras 46–55.

¹⁵ The position is not necessarily the same in respect of the Scottish Parliament: *Whaley v Lord Watson of Invergowrie* 2000 SC 125, where it is suggested that the Westminster Parliament is uniquely privileged. Such privilege certainly does not apply to local councils and other statutory bodies, whose proceedings may be closely investigated by a court when it is claimed (for instance) that rules of procedure have been breached or that members with a financial interest have voted.

from being debated, that a pairing-arrangement between two MPs had been broken, or that a Minister had misled Parliament—nor a complaint that an Act of Parliament had been obtained through a breach of the rules of the House.¹⁶

6. But there is nothing in Article 9 to prohibit each House from imposing limitations on the freedom of speech in Parliament, whether by means of standing orders or a resolution. Each House has authority to impose rules of order and other limitations on the freedom of debate. Ultimately, such rules are enforced by the House itself, if necessary on a vote to give effect to a report of the Committee of Standards and Privileges, but on a day to day basis they are applied by the officials of the House, acting under the authority of the Speaker. These rules include a variety of limitations on the freedom of debate, such as the rule that criticism of the Sovereign may not be expressed except on a substantive motion. A similar rule exists (for different reasons) in respect of criticism of a judge. A full statement of these limitations is to be found in *Erskine May*.

7. In other words, the House has long recognised that the freedom of speech that members enjoy in the course of parliamentary proceedings means that members are immune from restraints enforced in the courts, but not from restraints imposed by the House itself.

8. The *sub judice* rule of the House exists primarily to protect the integrity of judicial proceedings in the civil and criminal courts. In view of the public interest in maintaining the “rule of law”, Parliament must be taken as being committed to the need for “due process” in the system of civil and criminal justice. The courts have developed many rules that seek to achieve this—for example, the rules of natural justice, that seek to minimise the risk of judicial bias and protect the right to a fair trial. The law on contempt of court serves the same purpose, and one of its effects is to restrict the freedom of expression.¹⁷ However, it is fundamental to a fair trial in the Crown Court (among other rules) that the previous criminal record of an accused person should be withheld from the jury; and newspapers, radio and television are barred by the law of contempt of court from commenting on the credibility of witnesses as a trial proceeds. MPs cannot claim to be free to do the same at Westminster. If they do intervene (for instance, by revealing the accused’s criminal record), the probable result will be that a conviction affected by the revelation will be set aside on appeal, and an ongoing trial would have to be aborted. Under the Human Rights Act 1998, an individual affected by such acts can also rely on his or her right under Article 6 of the European Convention on Human Rights to a fair hearing “by an independent and impartial tribunal”.

9. While the maintenance of “due process of law” is the primary reason for the *sub judice* rule, a general justification for it is found in the constitutional relationship that exists between the legislature and the courts. The independence of the judiciary is a key aspect of that relationship. This means protecting a judge from attempts from whatever source to subvert that independence by (for instance) getting the judge to favour one or other side, especially if a case involves controversial issues of politics or public policy. Such matters are not confined to the criminal law, and the need to protect the judicial process goes wider than jury trial alone.¹⁸ In my opinion, it is particularly important that Ministers and other members of the executive should fully respect judicial independence: and the current Constitutional Reform Bill opens with a clause that sets down in writing the duties of Ministers in this respect.

10. MPs who do not hold ministerial office are in a somewhat different position, and are certainly much freer than Ministers to express their own views about decisions by the courts once they have been taken. In course of their constituency duties, many MPs may be asked by constituents for support and assistance in finding a way through their personal difficulties relating to issues arising in the courts (instances might include a father deprived of access to his children, a pensioner who is unable to pay council tax or heating bills, tenants afflicted by nuisance from abusive neighbours, or a young man harassed by police searches). The response of an MP in an individual case will depend on the circumstances, and may include assisting a constituent to have access to good legal advice. When court proceedings are in progress or imminent, an MP would be ill-advised to seek to pre-empt a particular outcome or to disparage the integrity of the courts (whether at a local or national level) by raising the specific case in Parliament. Nonetheless, a constituent’s difficulties may well raise issues of general concern unrelated to the facts of a particular dispute.

11. A further aspect of the constitutional relationship between Parliament and the courts is that “there has for long been an unresolved conflict of authority at the centre of the unwritten constitution” in respect of parliamentary privilege.¹⁹ At its height, the conflict led to the cases of *Stockdale v Hansard* (1839) and *The Sheriff of Middlesex* (1840). The courts held in the first case that the House of Commons could not by its own resolution authorise defamatory material to be published, but (in the second case) that the House

¹⁶ *Pickin v British Railways Board* [1974] AC 765.

¹⁷ Under the European Convention on Human Rights, article 10 (freedom of expression) provides that the use of the freedom of expression “since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society” for (among other things) “maintaining the authority and impartiality of the judiciary”.

¹⁸ Civil trials for defamation may still be held with a jury.

¹⁹ This is a view often found in the text-books. The quotation comes from a paper that I submitted to the Joint Committee on Parliamentary Privilege in 1998—see Volume 2 of the Report, in HL Paper 43-II, HC 214-II (1998–99) at page 122.

could decide to punish for contempt of Parliament officers of the court who were seeking to enforce an order of the court. That particular conflict was resolved by legislation, the Parliamentary Papers Act 1840.²⁰ But the potential for conflict remains. In 1974, a senior judge, Lord Reid said,

“For a century or more both Parliament and the courts have been careful not to act so as to cause conflict between them”.²¹

The wisdom of such a policy can be illustrated from an unfortunate affair in Australia in 2002 when a senator abused his freedom of speech and debate in the Senate by accusing a senior Commonwealth judge of sex offences against young boys, deliberately withholding the name of the judge until the last sentence of his speech. A week later, the senator withdrew his allegations and apologised to the judge, the Senate and his parliamentary colleagues. In a short statement read to the House of Representatives by the Speaker, the judge accepted the apology with manifest dignity, the last paragraph of the statement recording his view that

“Out of this sorry episode Australians should emerge . . . with a determination to be more careful in future to uphold our national institutions—the Parliament and the Judiciary”.²²

12. I do not offer this unfortunate affair as an obvious instance of the *sub judice* rule being breached, although the senator’s speech and the publicity given to it in the media could have given rise to fears about the possibility of a fair trial had the allegations been substantiated. And I do not for a moment wish to suggest or imply that MPs who question the present operation of the *sub judice* rule wish to emulate the conduct of the Australian senator. My point is to emphasise that considerations of common sense and constitutional propriety lie behind rules that regulate how MPs use their freedom to speak in Parliament. One justification for the *sub judice* rule is that it helps to govern conduct in border-line cases in which even an experienced MP might find it difficult to know what course of action to take. Certainly events may occur (for instance, the Morecambe Bay tragedy) which are of public concern and on the basis of which MPs may properly call for the better enforcement of the criminal law. But in doing so, they should not make it impossible for alleged offenders to receive a fair trial.

Is the sub judice rule still needed?

13. For the reasons indicated above, my answer to this question is an undoubted yes. Given the pressures to influence the media that can result from well-organised economic or commercial interests, from the wish of some individuals or organisations to obtain favourable publicity, or from a desire to use whatever means are open to them to gain a favourable result in the courts, the need for the rule may even be greater today than at times in the past. The recent comments made about the court-martial of British soldiers in Germany for allegedly abusing Iraqi detainees illustrate the importance of both the media and MPs refraining from comment on current trials that might prejudice the outcome. Another illustration of the value of the *sub judice* rule is, in my opinion, provided by the Hutton inquiry into the death of David Kelly: this was conducted by a judge but on a non-statutory and extra-judicial basis: both in Parliament and in the media generally there were, almost on a daily basis, questions and comment about the subject-matter of the inquiry that would have been excluded had, say, the proceedings been taking place in a coroner’s court. Questions were asked of Ministers about aspects of the matter, giving rise to the predictable reply that Ministers were awaiting the result of the inquiry.

14. However, if some aspects of the rule are felt to be unduly rigorous in practice or are difficult to justify, they should be reviewed and as necessary revised. The law on contempt of court itself was subject to reform by Parliament (by means of the Contempt of Court Act 1981) after the European Court of Human Rights held that it had been too strictly applied when the *Sunday Times* was banned from publishing articles about the thalidomide scandal at a time when victims were engaged in protracted attempts, including litigation, to obtain compensation from the manufacturers.²³

Does the sub judice rule need to be changed?

15. Since I have no direct experience of the manner in which the rule is applied in the two Houses, I am unable to make specific proposals for changes either in the content of the present rule or the manner in which it is applied. However, I have a few comments on the present rule.

(1) Although the present rule does not apply to debates on bills or delegated legislation, I assume that it is not in order for an MP to discuss the need for legislative reform by referring to current legal proceedings in a way that could (for instance) prejudice the possibility of a fair trial. If I am wrong in this assumption, this may be a feature of the present rule that deserves attention.

²⁰ Two informative articles about this affair are E Stockdale, “The Unnecessary Crisis—the Background to the Parliamentary Papers Act 1840” [1990] *Public Law* 20 and P M Leopold, “The Parliamentary Papers Act 1840 and its Application today” [1990] *Public Law* 183.

²¹ *British Railways Board v Pickin* [1974] AC 765, 768.

²² See the article by E Campbell and M Groves, “Attacks on judges under parliamentary privilege: a sorry Australian episode”, [2002] *Public Law* 626.

²³ *Sunday Times Ltd v United Kingdom* (1979) 2 EHRR 245.

(2) A second respect in which the present rule is not absolute is contained in the following provision:

“But where a ministerial decision is in question, or in the opinion of the Chair a case concerns issues of national importance such as the economy, public order or the essential services, reference to the issues or the case may be made in motions, debates or questions”.

This is an important provision, particularly in view of the extent to which ministerial decisions are challenged in the High Court today by the judicial review procedure. It is the proper task of the House to call Ministers to account for their decisions, and it would be wrong for this to be obstructed whenever someone affected by a decision applies for judicial review. In such a case, there is no possibility of the matter being heard by a jury, and a High Court judge would ordinarily be well able to exclude from consideration references in Parliament to the merits of the Ministerial decision. However, following on my comment in (1), I assume that the formulation of this part of the rule (“reference to the issues or the case may be made . . .”) does not permit an MP to cross the line and make comments that are intended to influence the decision of the court or to pour scorn on one of the parties.

(3) The present rule is subject in the Commons to the discretion of the Speaker (in the Lords, of the Leader of the House). If the rule is felt to apply too strictly in some instances, there may be a need to find a way for making it easier than at present for an MP to know the kinds of situation in which the Speaker might be disposed to exercise his discretion. I do not know whether there are sufficient recent instances of the discretion having been exercised to make such information available.

(4) As I have indicated above, one reason for maintaining the *sub judice* rule is to make it possible for all persons accused of criminal offences to have a fair trial. In this respect, the role of the jury is particularly important and must be insulated from extraneous pressures. Different arguments apply when a civil trial takes place before a judge alone, or on appeal when the arguments (whether about the facts or the law) take place before several senior judges. However, on the broader constitutional grounds outlined above, I do not wish to see the *sub judice* rule narrowed so that it applies only to criminal trials, or to proceedings in the magistrates’ court or the Crown court.

(5) The terms of the *sub judice* rule refer only to “proceedings which are active in United Kingdom courts”. While this is broad enough to apply to all civil and criminal courts, I do not know whether in practice it is interpreted as applying also to the many tribunals which decide innumerable disputes that may be of great importance to individuals. These tribunals, since the Franks Report on tribunals and inquiries in 1957 and the Tribunals and Inquiries Act 1958 (now the Tribunals and Inquiries Act 1992), have been accepted as providing machinery for adjudication. The current practice of the Department of Constitutional Affairs is for many purposes to assimilate tribunals to the civil and criminal courts, and many of their decisions come within Article 6(1) of the European Convention on Human Rights. Many tribunals are specifically entrusted with disputes in which an individual appeals against executive decisions (such as immigration and social security appeals), but employment tribunals deal with disputes between employers and employed persons which concern matters of civil right—in cases of alleged discrimination, the sums at stake are without legal limit and the issues are sometimes of great public interest. In my opinion, and I make the point without knowing the present position in this respect, there is a good argument to be made for extending the *sub judice* rule to proceedings before tribunals.

(6) Finally, and again I make this observation without knowing the actual position at Westminster, it occurs to me that some MPs would find it useful to have access to a short leaflet explaining the *sub judice* rule, giving examples of what may and may not be said in different situations and outlining the steps that need to be taken if the Speaker is to be asked to exercise his discretion not to apply the rule on a particular matter.

16. I am of course willing to amplify any points in this paper if this would be of assistance to the Committee on Procedure.

February 2005

E-mail to the Clerk from David Laverick, President, Adjudication Panel for England

I am attaching an exchange of correspondence between Roger Sands and myself which followed a recent Westminster Hall Debate.²⁴

You will see that he ends by suggesting I make contact with you. I have not been able to do so by telephone and so have obtained your e-mail address from the duty Clerk.

The Adjudication Panel for England, of which I am the President, was established by the Local Government Act 2000 as a tribunal to consider references about the possible failure of Members of Local Authorities to abide by the Code of Conduct which applies in local government, following its being laid before Parliament in accordance with the Act. I and members of the Panel are appointed by the Lord

²⁴ Not printed.

Chancellor in accordance with the usual process for judicial appointments. The Panel operates through Case Tribunals which comprise at least three members of the Panel. There is a right of appeal to the High Court against the decision of a Case Tribunal.

I confess to having a little difficulty in understanding the reasoning behind the House's practice of requiring Members not to comment upon matters before the Courts whilst apparently leaving them free to comment on matters which are about to be heard by a Case Tribunal. If one of the reasons for the *sub judice* rule is to avoid giving the impression that there is an attempt to influence the decision of the body whom Parliament has charged with making a judicial decision I cannot see why the rule should be different if that body is in the first instance a tribunal rather than a court.

The point I made in the above paragraph could of course apply generally to other Tribunals apart from my own and is perhaps a matter I could pursue with Lord Justice Carnwath who now has an overall responsibility for Tribunals. But that would take time and I am unsure of the timescale of your Committee's enquiry. Not all tribunals will be affected to the same extent but it is probably inevitable that the Adjudication Panel will have coming before it some issues of considerable political interest. Case Tribunals have already had cause to consider the propriety of the actions of various Leaders of Political Groups on local authorities and on more than one occasion have disqualified or suspended such Respondents. I know that members of Parliament, of whatever political persuasion, are often approached, mostly by their political contacts but also sometimes by constituents in connection with those proceedings.

I do need to stress that I hold no brief from other parts of the Tribunal system, but I do think a case could be made out for extending the House's *sub judice* rule to take accounts of matters before my own tribunal and perhaps also some others.

Could the Committee be persuaded to widen their inquiry to encompass consideration of the point?

February 2005

Submission from Richard Parkes QC for the Bar Council

INTRODUCTION

1. On 4 November 2004 Mr Simon Patrick, Clerk of the Procedure Committee, wrote to the then Chairman of the Bar Council, Stephen Irwin QC, requesting the Bar Council's views on the *sub judice* rule of the House of Commons, for the assistance of the inquiry into the rule by the Procedure Committee.²⁵

2. It is understood that the rule in its present form stems from a resolution of the House of Commons dated 15th November 2001,²⁶ by which it was determined that (subject to the discretion of the Chair and to the right of the House to legislate on any matter or to discuss delegated legislation) the House should not in its proceedings (including proceedings of committees of the House) refer in any motion, debate or question to cases in which proceedings are active in the United Kingdom. However, where a ministerial decision is in question, or where in the opinion of the Chair a case concerns issues of national importance such as the economy, public order or the essential services, reference may be made to the issues or the case in motions, debates or questions, even if proceedings are active.

3. The resolution defines when proceedings are active for its purposes. That definition embraces criminal proceedings after charge or summons until verdict, sentence or discontinuance (or the mandatory post-trial review in the case of courts-martial), civil proceedings after arrangements for trial have been made until judgment or discontinuance (any application in or for the purposes of civil proceedings being treated as a distinct proceeding), and appellate proceedings from application for leave to appeal or notice of appeal until judgment or discontinuance. The proceedings of coroners' courts and fatal accident inquiries are treated as criminal proceedings. This definition broadly recalls Schedule 1 of the Contempt of Court Act 1981, which determines when proceedings become active for the purposes of section 2 of that Act.

4. The Clerk's letter listed the following as topics which might be raised in the course of the Committee's inquiry:

- (i) What is the purpose of the rule—preventing prejudice of court proceedings, or comity between the courts and Parliament?
- (ii) If the rule is to prevent prejudice, is there a distinction between jury and non-jury proceedings?
- (iii) Should the rule be stricter than that applying elsewhere, eg to newspapers?

²⁵ The writer has become involved in this question very late in the day, but has been informed that written evidence may be able to be considered by the Committee up to the middle of March 2005.

²⁶ The House of Lords had adopted its own resolution on 11th May 2000. Both gave effect to a recommendation of the Joint Committee on Parliamentary Privilege (HL Paper 43; HC 214 (1998–99), paras 189–202).

- (iv) How closely does the matter have to relate to a case to fall within the rule?
- (v) Is the “cases shall not be referred to” provision (in the resolution of November 2001) too restrictive? Would it be justifiable to refer to a case in terms of how long it is taking, rather than on its merits?
- (vi) Should coroners’ courts be excluded, on the basis of nobody being on trial, and proceedings often being protracted?

THE STRICT LIABILITY RULE

5. This submission will briefly consider each of those matters, on the assumption that evidence relevant to them will be of particular assistance to the Committee. However, it may be helpful to note in very brief outline the effect of the strict liability rule of contempt of court as it affects freedom of speech outside Parliament, because it offers some close analogies with Parliamentary practice.

6. The Contempt of Court Act 1981 (“the 1981 Act”) establishes a strict liability rule, whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so. The strict liability rule applies to publications, which includes any speech, writing, programme or other communication addressed to the public at large or any section of the public. However, it applies only if the proceedings in question are active²⁷ at the time of publication, and applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. In other words, the publication must create a risk that the course of justice in proceedings will be impeded or prejudiced; that risk must be substantial;²⁸ the substantial risk must be that the proceedings will be seriously impeded or prejudiced; and the court will not convict of contempt unless it is sure that these factors are all present.

7. This question arises most commonly in the context of jury trials, whether in criminal or civil cases, and in assessing it, the courts will consider in particular the likelihood of the publication in question coming to the attention of a particular juror, the likely impact of the publication on an ordinary reader at the time of publication, and (most importantly) the residual impact of the publication on a notional juror at the time of trial.²⁹ There has been particular emphasis in recent time on the “fade factor”, namely the extent to which the effect of a potentially prejudicial publication will tend to be forgotten with the lapse of time, and the courts have also taken into account the focusing effect of listening to evidence in a case, and the likely effect of the judge’s directions to the jury to put out of their minds anything which they have not learned in the course of hearing the evidence.

8. There is an expectation that professional judges are unaffected by prejudicial material, and for that reason it is rare for a publication to pose a substantial risk of serious prejudice to a trial by judge alone.³⁰

9. The main exceptions to the strict liability rule are the entitlement to publish a fair and accurate report of public legal proceedings,³¹ and (perhaps more materially for present purposes) the entitlement to publish material which is or is part of a discussion of public affairs or other matters of general public interest, as long as the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.³²

10. The strict liability rule applies to the proceedings of any tribunal or body exercising the judicial power of the state,³³ and of tribunals established under the Tribunals of Inquiry (Evidence) Act 1920.³⁴ However, the bulk of the law of contempt of court lies outside the scope of the 1981 Act. For example, the Act leaves intact the common law relating to intentional contempts.³⁵

²⁷ As defined by schedule 1.

²⁸ “Substantial risk” has been held to mean “not remote”: *Attorney-General v English* [1983] AC 116.

²⁹ See in particular *Attorney-General v MGN Ltd* [1997] 1 All ER 456; *Attorney-General v Unger* [1998] EMLR 280.

³⁰ However, there are two views: compare Lord Salmon in *A-G v BBC* [1981] AC 303 at 342 (“I am and have always been satisfied that no judge would be influenced in his judgment by what may be said in the media. If he were, he would not be fit to be a judge”), and Viscount Dilhorne in the same case (p335): “It is sometimes asserted that no judge will be influenced in his judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a judicial office does his utmost not to let his mind be affected by what he has seen or heard or read outside the court and he will not knowingly let himself be influenced in any way by the media . . . Nevertheless, it should . . . be recognised that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it”.

³¹ S4(1), 1981 Act.

³² S5, 1981 Act.

³³ S19, 1981 Act. This is a very uncertain area. Valuation courts are not included: *Attorney-General v BBC* [1981] AC 303. What appears to matter particularly is the purpose of the tribunal: if its main function is administrative, then even though it may be obliged to act judicially, it is excluded. A good example of a body falling outside the 1981 Act is magistrates acting as a licensing authority. Employment tribunals and mental health review tribunals both fall within the protection of the 1981 Act, as do coroners’ courts: *Peacock v London Weekend Television* (1985) 150 JP 71.

³⁴ S20, 1981 Act.

³⁵ S6(c) of the 1981 Act provides that nothing in the Act restricts liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice.

 THE QUESTIONS RAISED BY THE CLERK'S LETTER

What is the purpose of the Parliamentary sub judice rule—preventing prejudice of court proceedings, or comity between the courts and Parliament?

11. In 1999, the Joint Committee on Parliamentary Privilege, recommending that the two Houses should adopt a resolution on *sub judice* in terms set out in its report, suggested that the rule served three purposes:³⁶

- (i) To prevent prejudice to fair trials, particularly criminal trials;
- (ii) To recognise the different roles of Parliament and the courts, so as to ensure that Parliament did not permit itself to become an alternative forum for canvassing the rights and wrongs of issues being considered by the courts;
- (iii) To ensure that the judiciary is seen to be independent of political pressures.

12. As to (i), it is surely the primary purpose of the rule to prevent prejudice to the fair trial of judicial proceedings and, more broadly, to protect their integrity. Parliamentary debate is well reported; if that debate concerns pending legal proceedings, it will usually be prominently reported; and the views of members of either House of Parliament tend to be accorded substantial weight. If views are expressed about the issues in a case, or about the credibility of witnesses, or about the desirability of a particular outcome, the risk of prejudice is obvious, particularly in the case of a jury trial or a case tried by lay magistrates. Although it is unlikely that a professional judge would be affected by prejudicial material,³⁷ it may be harder for a judge to be immune to strong remarks in Parliament about his or her conduct of a pending case, and that is to say nothing of the effect on witnesses or parties to litigation, even if the fact-finding tribunal is not in fact influenced.

13. Purpose (ii) underlines the separation of the legislature and the judiciary, a matter of particular current concern given the Government's proposals for reform of the role of the Lord Chancellor and of the judicial business of the House of Lords. It is plainly desirable in principle that there should be mutual respect between the courts and Parliament, and that Parliament should so far as possible leave the courts to perform their function, just as the courts leave legislation to Parliament.

14. As to (iii), the independence of the judiciary is something of which this country is entitled to be proud, and it is well worth defending. Almost as important as the actual independence of the judiciary is the confidence of the public that the judiciary is indeed independent and immune to political pressure. That confidence is an essential part of the citizen's willing submission to the rule of law. It is therefore important that Parliament should tread very warily before commenting on the conduct of pending cases by the judiciary, because there is potential for great damage to be done even though the judge is not influenced by what is said. To take a trivial example: a Member of Parliament makes a comment on the length of a current trial; the next day, one of the parties to the case applies for an adjournment (if not deterred by Parliamentary criticism); and the judge refuses the application. No doubt the application would have been refused in any event: but there is a risk that the public (and the media) might see the decision as evidence that the judge had bowed to pressure. That damage might be done whatever the intrinsic importance of the case; but it will be greater still if the case involves sensitive political or social issues.

If the rule is to prevent prejudice, is there a distinction between jury and non-jury proceedings?

15. There is undoubtedly some distinction, since laymen considering the evidence in a case are likely to be more susceptible to prejudicial comments and to outside pressures than professional judges: see paragraphs 7–8 above. However, it should be remembered that the parties to litigation, whether tried by a jury or not, may be deterred by Parliamentary comment from seeking their rights or defending claims made against them, and witnesses may be deterred from coming forward or from speaking freely. Moreover, there remains a danger, as discussed above, that even professional judges may be influenced by Parliamentary criticism, or (even if they are not) that the public may conclude that they are.

Should the rule be stricter than that applying elsewhere, eg to newspapers?

16. The premise, namely that the Parliamentary *sub judice* rule is stricter than that which applies outside Parliament, appears to be well-founded, in that the *sub judice* rule as presently formulated prevents discussion in Parliament of cases which, if discussed in the press, would not necessarily amount to a strict liability contempt under the 1981 Act, for example because a pending criminal trial is sufficiently far off for the "fade factor" to make it unlikely that there will be serious residual prejudice. However, the press and media are constrained to make careful judgments on the facts of each case by the risk of proceedings for contempt, which, it should be remembered, may lead to grave penalties, including imprisonment.³⁸ But for

³⁶ HL Paper 43; HC 214 (1998–99), para 192.

³⁷ See paragraph 8 above.

³⁸ As occurred to the editor of the Daily Mirror, who published a story that the (then alleged) acid-bath murderer Haigh had committed other murders: *R v Bolam ex parte Haigh* (1949) 93 SJ 220.

the self-denying ordinance of the *sub judice* rule, no similar constraints would apply to Parliament,³⁹ and it is difficult to see how in practice there could be a Parliamentary mechanism which, before a question could be asked or a motion put down, assessed the risk in each individual case of serious prejudice to pending proceedings. No general guidance could suffice: there are some facts which, if revealed even immediately after charge, would raise a substantial risk of serious prejudice to a defendant's fair trial, and there are others which might be safely published even a matter of two or three months before a trial.

17. Moreover, considerations of comity and of the importance of judicial independence (real and perceived), coupled with the weight that attaches to the expression of opinion or allegation in Parliamentary debate, justify Parliament in imposing on itself tighter constraints than apply to the press and media.

18. Ultimately, such harshness as the rule may have is mitigated by two factors: one is that any debate which seeks to consider an individual case is not ruled out for all time, but only postponed; and the other is that the Speaker retains a discretion to permit debate which would otherwise breach the rule.

How closely does the matter have to relate to a case to fall within the rule?

19. The writer is not equipped to express a view on the precise scope of the rule as falls to be interpreted by Parliamentary authority, but some general observations may be made.

20. Presumably, just as reference to the issues in dispute in a particular case, or an expression of opinion as to the conduct or likely outcome of particular proceedings, is more likely to cause prejudice to the fair administration of justice than a debate about generalities, so it is more likely to offend against the *sub judice* rule. But what of more general discussion, prompted by a particular pending case?

21. Some guidance may be obtained from the analogy of section 5 of the 1981 Act, which permits the press and media to publish material which is (or is part of) a discussion of public affairs or other matters of general public interest, as long as the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion. It may be that the Speaker's discretion to permit debate which would otherwise infringe the rule would be more readily exercised in a case which, outside Parliament, would fall within s5. In general terms, it seems often unnecessary that there should be any restriction of debate about general issues thrown up by a pending case, but it is often difficult to judge whether debate about apparently general issues may cause prejudice. To take up again an example given earlier, general debate (expressly prompted by a particular pending case) critical of the length of litigation, might have the effect of inhibiting the parties to that litigation from exercising their rights under the law.

Is the "cases shall not be referred to" provision (in the resolution of November 2001) too restrictive? Would it be justifiable to refer to a case in terms of how long it is taking, rather than on its merits?

22. For the reasons discussed above, even debate about how long a particular case is taking may impose undesirable pressures on judge or litigants. It is difficult to see how, given the infinite variety of factual situations that may arise, it is possible to formulate an alternative provision which properly safeguards the fair and proper conduct of litigation. Rather than re-formulate the rule, it may be preferable in particular cases to rely on the Speaker's discretion to permit debate.

Should coroners' courts be excluded, on the basis of nobody being on trial, and proceedings often being protracted?

23. They should not be excluded. They are not excluded from the protection of the 1981 Act,⁴⁰ for good reason. Coroner's courts (with or without a jury) determine important questions of fact which can have profound consequences, and it is just as possible to prejudice the outcome of a coroner's investigation as it is to prejudice any other court proceedings.

24. However, given the practice whereby coroners' inquests are opened and then adjourned, often for lengthy periods, there may be scope for clarification of the point at which coroners' proceedings become active for the purpose of the rule. What is clear is that the current House of Commons resolution treats matters before coroners' courts as criminal proceedings, which are active when a charge has been made or a summons to appear has been issued.⁴¹ With respect, that is hardly apposite. By contrast, the general law provides that the test for coroners' proceedings is the same as for civil proceedings, namely that they are active from the time when arrangements for the hearing are made, or, if no such arrangements are made, from the time the hearing begins, until the proceedings are disposed of or discontinued or withdrawn.⁴² Even

³⁹ The Bill of Rights 1689 Art. 9 prevents the courts from impeaching or questioning the proceedings of Parliament, so no penalty may be imposed by the courts for conduct which, outside Parliament, would be a contempt of court or indeed a criminal offence.

⁴⁰ See n33 above.

⁴¹ See paragraph 3 of the resolution of the House of Commons dated 15th November 2001: "For the purposes of this Resolution, (a) Matters before Coroners Courts . . . shall be treated as matters within paragraph 1(a)". Paragraph 1(a) covers criminal proceedings.

⁴² Paragraph 12 of schedule 1 of the 1981 Act. See *Peacock v London Weekend Television*, n33 above.

that definition entails treating coroners' proceedings as active from—at the latest—the moment when they are opened, but it may be worth considering whether it is possible to adapt that test for the purposes of the *sub judice* rule so as to restrict comment to the period before arrangements are made for the substantive rather than the initial hearing, or (given that the initial hearing may be the substantive hearing) to the period before arrangements are made for any hearing. No doubt any such proposal would have to be put to the Coroners' Society before there could be any question of taking it further.

CONCLUSION

25. It is the view of the Bar Council that the *sub judice* rule serves a number of valuable purposes and should be maintained substantially in its present form.

March 2005

Note from Rt Hon Lord Goldsmith QC, Attorney General

Further to the Attorney General's evidence to the Procedure Committee on 19 January 2005, the Attorney General agreed to provide further information with regard to three issues.

1. At Question 55 of the transcript of evidence the Chairman requested information with regard to any cases prejudiced by comments made in the House of Commons.

2. Research has revealed a number of cases worthy of note:

3. *Attorney General v Leveller* [1979]—The original criminal proceedings related to committal proceedings for an Official Secrets Act offence. A witness in the proceedings was allowed to be referred to in court as "Colonel B". As a result of evidence given in the proceedings his identity was established and was published in the *Leveller Magazine* and others. Contempt of Court proceedings were brought against the *Leveller Magazine*. During the currency of the contempt proceedings "Colonel B" was named in Parliamentary Question Time. The Divisional Court found the magazine guilty of contempt. However, the House of Lords overturned this. The Members' actions were referred to the Select Committee on Privileges who ruled that in naming "Colonel B" they had breached the *sub judice* convention.

4. *Attorney General v Sunday Times Newspaper* [1973]—This case related to an action being taken against the drugs company, Distillers, by parents whose children had been affected by the thalidomide drug. As negotiations were continuing in an attempt to settle the claims no steps had been taken to bring the matter to trial. The *Sunday Times* newspaper published an article criticising Distillers, the drug company. The Attorney of the day was invited to issue contempt proceedings. The *Sunday Times* were asked for their observations and in replying also submitted a further article which they proposed to publish.

5. The Attorney successfully obtained an injunction against the *Sunday Times* in respect of the proposed article. Criticisms were then made of Distillers in a Parliamentary debate, not dissimilar to the criticisms made in the *Sunday Times* newspaper. This debate was widely reported. An appeal to the Court of Appeal to discharge the contempt injunction was successful—one of the grounds upon which the injunction was discharged was the Parliamentary debate and the reporting of that debate in the media. However, the injunction was later restored by the House of Lords. This led in turn to an appeal to the ECHR and to the passing of the Contempt of Court Act.

6. The case of *R v Z* [1997] related to the breach of an anonymity order affirmed by the Court of Appeal. A Member of Parliament named the child in the House. The Member would have been afforded the protection of Article 9 of the Bill of Rights. It appears that the order had not been publicised and an application was then made by the Official Solicitors to publicise the terms of the order.

7. At Question 63 and 64 of the transcript a question was raised as to whether the Ministerial Code contained any guidance with regard to comments made by Ministers outside Parliament.

8. The Attorney General could not recall any such reference but offered to check. Checking has revealed that there is no reference or guidance in the Ministerial Code as such with regard to statements made by Ministers outside of Parliament in this context, ie relating to pending court proceedings. It is worth noting however, that there is a general reference to "upholding the administration of justice" at the beginning of the Ministers of the Crown section of the Code.

9. At Question 82 of the transcript the Attorney General agreed to provide a note detailing when proceedings are active for the purposes of the Contempt of Court Act.

10. Proceedings are active for the purposes of the Contempt of Court Act 1981 as set out in Schedule 1 to the Contempt of Court Act, which is attached for your information [not printed].

11. More specifically, the case of *Peacock & Others v London Weekend Television* [1995] held that proceedings are active for the purposes of contempt of court in a Coroner's Court at the moment the inquest is opened. A copy of the transcript of the judgment is also attached for your information [not printed].

March 2005

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The following reports have been produced since the beginning of the 2001 Parliament:

Session 2004–05

First Report The Sub Judge Rule of the House of Commons HC 125

Session 2003–04

First Report Estimates and Appropriation Procedure HC 393 (*Reply: 1st Special Report, HC 576*)

Second Report Results of Sitting Hours Questionnaire HC 491

Third Report Joint activities with the National Assembly for Wales HC 582 (*Reply: 4th Special Report, HC 681*)

Fourth Report Programming of Legislation HC 325 (*Reply: 5th Special Report, HC 1169*)

Fifth Report Public Petitions HC 1248

Session 2002–03

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