



House of Commons
Procedure Committee

Application of the *sub judice* rule to proceedings in coroners' courts

Second Report of Session 2005–06

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

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Procedure Committee

The Procedure Committee is appointed by the House of Commons to consider the practice and procedure of the House in the conduct of public business, and to make recommendations.

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The following Members were also members of the Committee during the Parliament:

Sir Nicholas Winterton MP (*Conservative, Macclesfield*) (Chairman till 9.11.05)
Annette Brooke MP (*Liberal Democrat, Mid Dorset and Poole North*)

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Summary

Parliament's *sub judice* rule effectively prevents debate on individual cases while they are active before the courts. It is set out in a resolution which was agreed to by each House in 2001. Our predecessor Committee reported on the resolution as a whole in March 2005. In our report, we endorse many of the conclusions of the previous Committee. We trust that an early opportunity will be found for the House to consider both reports.

We have concluded that coroners' courts should remain within the scope of the House's *sub judice* rule. This is justified firstly by the risk of prejudice to specific inquests and secondly on the grounds of comity and non-interference with the judiciary. We do not, therefore, recommend any change to the wording of the resolution. Sometimes, matters raised by an active case deserve debate despite the rule. We believe that the Speaker's discretion to waive the rule should be exercised where appropriate. The need for debate must be established and balanced against the likelihood of causing prejudice.

In our view, debates on policy matters connected to an ongoing inquest (particularly where the inquest has been adjourned) could be allowed more frequently. If that is to happen, a clear distinction must be maintained between policy matters and the details of a case and the Chair must be in a position to take effective action to enforce the terms of the debate. We have examined whether it would be practicable to establish a later 'trigger point' for the application of the *sub judice* rule than the opening of an inquest, but we have been forced to conclude that there is no such alternative point.

During our inquiry, the Government published proposals for reform of the coroners' system. The proposals include the creation of a Chief Coroner's Office, which we recommend should be given the responsibility of providing information about inquests to House authorities.

We welcome the recent administrative improvements that have been introduced by the Table Office, but are concerned that some Members leave the Table Office with the impression that there is no further course of action available to them once a case has been found to be *sub judice*. We recommend that the Table Office should issue a concise guidance note for Members on *sub judice* issues. This could be based on our own draft guidance note.

Under the terms of the resolution, the chairman of a select committee has the power to waive the *sub judice* resolution in respect of the committee's proceedings. It is our strong view, however, that chairmen should make every effort to consult the Speaker before exercising their discretion.

Finally, our attention was drawn to apparent breaches of the *sub judice* rule in the House of Lords. Our predecessors' report strongly supported the existence of an identical resolution in both Houses and recommended that the two Houses should consider jointly any proposal for change. We agree with this recommendation and were therefore concerned that in practice the rule appeared to have been implemented differently in the two Houses. We welcome the efforts made by the House of Lords authorities to ensure that the rule is implemented in the same way in both Houses.

1 Introduction

1. The Committee's inquiry began in November 2005 and was prompted by calls from Members of Parliament to re-examine the *sub judice* rule (a subject our predecessors had reported on in the previous Parliament) specifically in regard to coroners' courts. The cases brought to our attention are set out in more detail below. The Members concerned felt that the application of the rule had obstructed Parliamentary consideration of important matters.

2. On the basis of these communications, we decided to look again at the application of the rule to coroners' courts. Our terms of reference were to consider whether there should be a separate *sub judice* rule for coroners' inquests; whether the point at which coroners' inquests become 'active' for the purpose of the rule should be redefined; whether the Chair's discretion to disapply the *sub judice* rule where necessary is an effective mechanism (including its operation in select committee proceedings); and how other Parliaments or legislatures apply the *sub judice* rule to similar proceedings.

3. A number of written submissions were received in connection with the inquiry and are printed as appendices to this report. We heard oral evidence from Rt Hon John Denham MP, Chairman, and Dr Robin James, Clerk, Home Affairs Committee; Ms Sally Keeble MP; Rt Hon Lord Goldsmith QC, Attorney General; Sir Roger Sands KCB, Clerk of the House and Mr Robert Rogers, Principal Clerk, Table Office, House of Commons.

The 2001 *sub judice* resolution

4. The House of Commons adopted its current *sub judice* resolution in 2001 on the basis of a recommendation from the Joint Committee on Parliamentary Privilege.¹ The resolution is reproduced in Annex 1 of this report (page 34). It replaced earlier resolutions of 1963 and 1972 and was the first to explicitly include coroners' courts within its scope. At the same time, an identical resolution was implemented in the House of Lords. The history of the resolution, and of the inclusion of coroners' courts within it, is considered in more detail in paragraphs 26-28 of this report.

5. The *sub judice* rule prevents reference to any 'active' case in the UK criminal or civil courts. The rule does not apply to cases at the European Court of Justice, the European Court of Human Rights or to proceedings in any other international or non-UK national courts, even though these courts may sometimes try UK citizens. The definition of when a case is 'active' is set out in paragraph (1) of the resolution:

(1)(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.

¹ Joint Committee on Parliamentary Privilege, *Report* HC (1998-99) 214-I to -III, HL Paper (1998-99) 43-I to -III. The Committee was established in 1997 and reported in 1999.

(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 [...]

(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.

6. The resolution begins with the important provision that its application shall be ‘subject to the discretion of the Chair’. The ability of the Speaker to allow reference to cases where he deems it necessary is therefore an integral part of the rule. Other specific exemptions are also set out in the resolution, namely where the House is considering primary or secondary legislation,² where a ministerial decision is in question, and where ‘in the opinion of the Chair a case concerns issues of national importance such as the economy, public order or the essential services’.

7. In his evidence, Lord Goldsmith, the Attorney General, set out three reasons for the House’s *sub judice* rule: the risk of prejudicing individual cases, the principle of comity between the Courts and Parliament, and the need to demonstrate that the judiciary operates independently of the political process:

The reasons for it include prejudice but I think they are wider than that and this does reflect the evidence that I gave before. The Joint Committee on Parliamentary Privilege when it reported in 1999 said, to my mind, rightly that there were three reasons for the rule. The first is the importance of not prejudicing a fair trial. Statements which are made outside any form of judicial tribunal might in certain circumstances prejudice a fair trial. [...] The second reason is comity. It is simply that Parliament and the court should each respect what the other does and should each let the other get on to deal with the business that they have. The risk of discussion in Parliament on an issue which is yet to be determined in a court or in an inquest is that comment is being made on evidence which is yet to be presented and tested. The third reason is an important constitutional reason. It is important that judges or other judicial tribunals do not appear to be subject to political pressure. The 1999 committee said that it is important constitutionally and essential for public confidence that the judiciary should be seen to be independent of political pressure. The danger there is that, if there are strong statements made in Parliament, it might be thought after the event by someone who is affected by the decision that the decision was in turn affected by the debate which had taken place in Parliament. Those, I think, are the reasons.³

We consider the risk of prejudice and the relationship between Parliament and the Courts below.

² But not motions for leave to bring in a Bill.

³ Q73

Prejudice of cases

8. A primary aim of the *sub judice* resolution is to prevent any prejudice being caused to an active court case as a result of advance publicity arising from its discussion. The rule aims to ensure that the decisions of the courts are taken entirely on the evidence presented to them and are not influenced or impeded by any argument made in Parliament.

9. In its objective to anticipate and prevent any damaging discussion of an active court case, the resolution stands in contrast to the approach of the Contempt of Court Act 1981, which provides the statutory framework for the retrospective punishment of prejudicial comments. Under Article IX of the Bill of Rights 1689, words spoken in Parliament cannot be the subject of legal action in the courts. It is partly for this reason that the House has established its own self-limiting resolution.

Comity and respect for the Courts

10. Whilst prejudice is often perceived as the main aim of the rule, comity, or the principle that Parliament and the courts should not trespass upon each other's jurisdiction, is equally important. The Clerk of the House set this out in oral evidence:

I think I have made clear that I do consider it [comity] as important as prejudice when considering the basis for the *sub judice* resolution. What is it appropriate for Parliament to be concerned with? Members raise these issues with ministers and therefore the implication is that there is something the minister can do about it. There is a problem in the administration of the minister's department; or there is a policy problem which the government by changing policy can put right. Nearly always, if that is *bona fide*, the purpose of the exercise, then we can put it in a way which avoids the *sub judice* resolution. But if what the Member wants to do [...] is to parade his or her version of what went wrong [...] and to get the minister to comment on it, I simply do not think that is appropriate, whether it prejudices the coroner's court or not, because there is nothing that the minister can do about that. He is not there to find fact; he would be put in an impossible position. Everybody else who was concerned in the case would feel that, even if the debate did not prejudice the case, the member had given one side of the case and they had not been given a chance to respond. That is what comity means. It means things being dealt with by the institution which is set up to deal with them.⁴

11. Two issues can be distinguished here: firstly, the constitutional principle that separates Parliament and the Courts. This principle, 'comity', arises from the conviction that Parliament should not presume to come to a decision on a matter for which the courts are responsible (and vice versa). Secondly, on a more practical level, the House should not be seen to be interfering in the work of the judiciary. As the Clerk notes, Ministers have no role in the finding of fact in a matter which is before the courts and they should not be pressed to comment in a form that may be perceived as interference.

⁴ Q117

The previous Committee's inquiry

12. At the end of the last Parliament, our predecessor Committee carried out an inquiry into the *sub judice* rule.⁵ Their report considered the rule generally and included a more detailed discussion of issues of comity and of the prejudice of cases which will not be repeated here. That inquiry set out to determine whether any changes to the 2001 resolution were desirable. Its report concluded that a change to the wording of the resolution was not necessary, but noted a level of disquiet amongst Members with the operation of the rule. This was particularly pronounced with regard to some coroners' cases, where long delays meant that any reference in Parliament to the issues involved was curtailed for a significant period. The Committee advised Members to seek the Speaker's discretion more readily in cases where they considered the rule to be unreasonably impeding the work of Parliament.

13. The previous Committee's report has not yet been debated on the floor of the House, not least because the current Committee has been looking again at the issue. This report builds on the valuable work of our predecessors and adds further conclusions and recommendations specifically in respect of coroners' courts. Now that our inquiry has been brought to a conclusion, we trust that an early opportunity will be found for the House to consider both our report and that of our predecessors.

Cases brought to the attention of the Committee

14. We were prompted to return to the *sub judice* rule by representations from Members who claimed to have experienced serious difficulty in discharging their parliamentary duties due to the interpretation of the rule. Two cases in particular were brought to our attention. The details of these cases are set out below.

15. The first case concerned an oral evidence session held by the Home Affairs Committee on the subject of 'Counter-terrorism and community relations in the aftermath of the London bombings'. Rt Hon John Denham MP, Chairman of the Home Affairs Committee, submitted a note on this session to the Liaison Committee, describing the difficulties his Committee had experienced with the *sub judice* rule, which he believed had acted to prevent discussion of many of the topics his Committee wished to explore with witnesses. Mr Denham's paper noted that:

the *sub judice* rule forbids references in proceedings in the House or its committees to cases which are active before the courts (including coroners' courts). Charges had been brought in relation to the 21 July attempted bombings, and inquests had been opened (and adjourned) on Mr Jean Charles de Menezes and on those killed in the 7 July attacks. There was a possibility of charges being brought against the police officers involved in the Menezes shooting.⁶

He went on to say that his Committee had been advised to steer clear of explicit reference to any of these cases, a decision he accepted at the time but later felt had severely limited the scope and value of the session:

⁵ *The Sub Judice Rule of the House of Commons*, First Report of Session 2004-05, HC 125.

⁶ Unprinted letter to the Liaison Committee.

I have to report that I and my colleagues felt that the effect of this strict application of the rule was to impose severe restrictions on questioning on a topic which was of real and legitimate public concern. It is possible that the circumstances of Mr Menezes' death may remain *sub judice* for up to 12 months, which will undoubtedly impede Parliament in its ability to discuss the question of a police 'shoot to kill' policy.⁷

16. Mr Denham added that he had considered whether, as Chairman of the Committee, he had power under the 2001 resolution to waive the *sub judice* rule: 'I considered whether it would be appropriate for me, at the hearing on 13 September, to exercise the "Chair's discretion" to allow questioning on some *sub judice* topics'. Mr Denham later gave oral evidence to the inquiry, expanding on the reasons why he had not ultimately felt able to exercise this discretion:

the practical problem that we found was that there was no guidance available to myself as chairman or to the clerks who were advising me on how exactly we should act once we had decided it was of national importance. In effect, I think we came back to doing no more than we would have done if there had not been a 2001 resolution.⁸

17. Mr Denham's oral evidence also raised the subject of 'national importance'. The 2001 resolution includes an exemption for issues of 'national importance', which we consider in more detail later in this report (paragraphs 49-53). Mr Denham argued that the London bombings were certainly a matter of national importance and, as such, deserved to be aired in Parliament at a time when discussion in the media and amongst the public was rife. The evidence session in question had been held in September, a period when the House had not been sitting. The Home Affairs Committee had thought it necessary to meet notwithstanding the recess due to the importance of the subject matter and the need for a timely Parliamentary response:

My particular concern is that when something of this importance happens, if the House of Commons becomes the one place where the issues cannot be aired because they are being widely discussed in the media, it seems to me that it damages the credibility of the House of Commons. That is really why I wrote on behalf of the committee to the Liaison Committee in the first instance and said could this matter be looked at again.⁹

18. In October 2005, the Procedure Committee received a letter from the Chairman of the Liaison Committee, Rt Hon Alan Williams MP, drawing this matter to our attention and asking us to look again at the operation of the *sub judice* rule in the light of this recent example.

19. Later that month, Ms Sally Keeble MP wrote to the Chairman of the Committee, noting the experience of the Home Affairs Committee and adding her own concerns about an ongoing case which she had originally raised with the previous Procedure Committee in their earlier inquiry. Ms Keeble had given evidence to the previous inquiry in regard to a

⁷ *Ibid.*

⁸ Q1

⁹ Q1

case of a death in custody in her constituency in April 2004. The coroner's inquest relating to this case had been opened and adjourned for many months pending police investigations and a Crown Prosecution Service decision whether or not to prosecute. At the time of writing, the coroner's inquest still has not been concluded and the case is still therefore caught under the *sub judice* rule. Ms Keeble had attempted to secure an adjournment debate on the case and to put down Parliamentary Questions, but had been unable to make specific reference to the case. In her letter, Ms Keeble explained that she had been encouraged by the previous Committee's report to refer the matter to the Speaker and to ask him to exercise discretion so that the case could be brought up and discussed. This had not proved successful.

20. In a written memorandum, Ms Keeble described the damage that she thought had resulted from the application of the *sub judice* rule in this case:

Given the continuing unwarranted injustices suffered by young people in secure training centres, I would argue that the application of the *sub judice* rule has been unwarranted, disproportionate and damaging. It has taken over 18 months to extract information that would have been available much more quickly, and still 18 months on, there is no indication as to when there will be proper action taken to prevent a repeat death.¹⁰

In oral evidence to the Committee, Ms Keeble repeated her view, given to the previous Committee's inquiry, that coroners' courts should not fall within the scope of the rule at all because the likelihood of causing prejudice to an inquest was minimal. She acknowledged that the previous Committee had not recommended this course of action and therefore argued that at the least, the period for which proceedings in coroners' courts were considered 'active' should be redefined:

Personally, I do not think the *sub judice* rule should apply to coroners' courts but I certainly think there has to be an issue about when proceedings are active. It is a nonsense that, just because a coroner's court meets and says, "We have opened and adjourned" it then stays adjourned for 18 months with no prospect in sight for when it is going to resume when it is an issue of major concern affecting young people. I really think there has to be some clearer thinking about what we are doing.¹¹

The *sub judice* resolution in the House of Lords

21. Another factor that led us to begin this inquiry was a number of apparent breaches of the rule in the House of Lords. These breaches related particularly to cases where coroners' inquests were active and included references to the shooting of Jean Charles de Menezes and the death in custody in Ms Keeble's constituency.¹²

¹⁰ Ev 8

¹¹ Q38

¹² HL Deb (2005-06) 675, c274 (Metropolitan Police Shoot to Kill Policy); c506 (Prisoners: Use of Restraint); WA13 (Death of Jean Charles de Menezes); 676, c6-7 (Deepcut Army Barracks).

22. In oral evidence, Ms Keeble expressed disquiet that the case she had been pursuing for some time had been brought up and discussed in the Lords, whereas she was prevented from discussing it in the Commons:

The other issue which has concerned me greatly which was not covered last time was the fact that there has been considerable discussion in particular in the Lords on a case that I was particularly concerned about. It seems to me that, particularly given that one of the issues that weighed very strongly with the Committee last time was that of comity between the different institutions, that has to apply between the Commons and the Lords. What was particularly galling was, given that the evidence that was provided to the Committee from the relevant minister was from a Lords minister, for a Lords minister to come and effectively silence the Commons and meanwhile for the Lords to be able to discuss the case in question, it seemed to me that that was completely unacceptable. The rule either has to apply equally across the board or, as I think very strongly, it should be relaxed.¹³

23. As we have noted, the *sub judice* rule in the House of Lords is identical in all material respects to that of the Commons. The only difference is that the discretion given to the Speaker of the House of Commons was given to the Leader of the House of Lords. This power has now been transferred to the Lord Speaker. **In its report, the previous Committee strongly supported the existence of an identical resolution in both Houses and recommended that the two Houses should consider jointly any proposal for change. We agree with this recommendation and were therefore concerned that in practice the rule appeared to have been implemented differently in the two Houses.**

24. In his memorandum, the Clerk of the Parliaments acknowledged the breaches and outlined the steps that had been taken to ensure that cases were identified more readily:

We have taken steps to ensure that staff in the Minute Room (the Lords “Table Office”) identify potential breaches in future. When in doubt as to how to apply the rule, we have always consulted the relevant government department, and sometimes the Commons Table Office, who are always helpful. The Minute Room and the Table Office are now sharing information in a more systematic way. [...] I will do what I can to ensure that the Lords observe the *sub judice* rule strictly, whatever form it may take in future. In particular, I have written to all front benches, and to the members involved in the incidents to which I have referred.¹⁴

25. **We welcome the efforts made by the House of Lords authorities to ensure that the rule is implemented in the same way in both Houses.** We are not currently aware of any prejudice that has been caused to a case due to its discussion in the Lords, however, prejudice to inquests may only be evident in retrospect. This is an issue we return to below.

¹³ Q37

¹⁴ Ev 45

Inclusion of Coroners' Courts in the rule

History

26. The 2001 *sub judice* resolution was the first to include coroners' courts explicitly within the scope of proceedings to which the rule applied. Fatal Accident Inquiries, which take the place of coroners' inquests in Scotland, are treated in the same way. In her evidence to the Committee, Ms Keeble cited the fact that coroners' courts had not previously been specifically mentioned in the House's resolution to support her argument that inquests should not be covered at all: 'In the UK the formal inclusion of coroners' courts in *sub judice* came only in the last Parliament. It was only included at a late stage, and there was no debate on the matter in the House'.¹⁵

27. Evidence from the Clerk of the House clarified the history of the inclusion of coroners' courts within the rule:

The explicit extension of the *sub judice* rule to cover inquests was agreed by the House following the report of the Joint Committee on Parliamentary Privilege of Session 1998-99. The Joint Committee did not offer specific argument on the point: the extension was simply incorporated in the text of a comprehensive new draft resolution which they recommended should be adopted by both Houses in order to secure greater clarity and consistency in the application of the rule and to make it conform to current legal processes.¹⁶

28. In oral evidence, the Clerk confirmed that the 2001 resolution simply codified existing practice:

It was not explicit but we assumed that [coroners' courts were covered]. It did not represent a substantial change but there was something that could be pointed to. [...] That is why the Joint Committee on Parliamentary Privilege whose recommendations led to that new form of the *sub judice* resolution just never mentioned the matter. I have trawled right through their report and I could not find any explicit reference to it. I think they just took it for granted that they were covered and that should be made clear.¹⁷

Thus, in practice, proceedings in coroners' courts have been deemed to fall within the scope of the rule for some time, and the 2001 resolution simply spelt out the existing situation, rather than introducing any new provisions.

Prejudice of inquests

29. Ms Keeble argued that the likelihood of prejudice to coroners' proceedings was minimal because the findings of an inquest could not be of anyone's guilt. She used this argument to support her view that coroners' courts should not be covered by the rule:

¹⁵ Ev 7

¹⁶ Ev 20

¹⁷ Qq 107-109

Another of the principles underpinning the *sub judice* rule, is that people have a right to a fair trial which should not be prejudiced by public debate or media coverage. However, this is not an issue for coroners' courts. Even where there is a jury, they are not deciding on the innocence or guilt of a defendant. Coroners' courts have a limited range of decisions open to them, and cannot decide on the culpability of anyone. So no debate on a matter before a coroner's court can influence the right of anyone to a fair trial in that court.¹⁸

30. Other evidence given to the Committee, however, has challenged this claim. For example, the Bar Council submitted evidence likening proceedings in coroners' courts to any other civil or criminal courts:

The scope for prejudice to coroners' proceedings is the same as it is in the case of any other proceedings, whether civil or criminal. When the coroner is sitting with a jury, the risk of prejudice is greater, but even where there is no prejudice to the fact-finding process, Parliamentary comment may put pressure, or may appear to put pressure, on the jury or on the coroner sitting alone, and may cast doubt on the validity of the outcome of proceedings.¹⁹

This view was supported by the Coroners' Society of England and Wales, who pointed to the recent introduction of 'narrative judgements' as further justification for the rule:

We are all concerned to see that comment outside the court room should neither affect nor appear to affect decisions made either by Judge or jury in cases where innocence or guilt, or liability to compensate is in question.

The decisions made by an inquest are admittedly less specific, but this brings its own problems. The range of verdicts is no longer seen as restricted to short traditional forms e.g. "suicide", "unlawful killing", "accidental death" etc. Verdicts in the form of a narrative saying what happened and how are becoming commonplace. These still do remain subject to legal restraints under rules 36 and 42 of the Coroners Rules 1984. As a result an inquest is not permitted to make findings of criminal liability on the part of a named person, nor to make findings of civil liability. Nevertheless they now have a very, very much wider ability to express a view of what happened unaffected by technical legal definitions.²⁰

31. A comparatively recent development in this area relates to the interpretation of Article 2 of the European Convention on Human Rights. The European Court of Human Rights has ruled that this Article imposes upon the state a duty to carry out an effective investigation into a death where there is reason to believe that the deceased died in contravention of Article 2 (right to life). The memorandum from the Law Society notes the effect of this interpretation upon inquests:

the inquiry must cover not only the means by which, but also the broad circumstances in which, the deceased came by his death. This will inevitably cover

¹⁸ Ev 7

¹⁹ Ev 49

²⁰ Ev 34

questions of system, regime, training and so on. As the scope of the inquest has therefore broadened, so too has the possibility of comments made in Parliament about a death or deaths prejudicing the relevant inquest(s).²¹

32. In its memorandum, the Law Society expanded on the types of coroners' decisions that might be prejudiced, apart from the final verdict:

Firstly, it should be noted that coroners make many procedural decisions after adversarial argument, e.g. whether to sit with a jury, whether to permit a particular line of questioning, whether to adjourn to call a particular witness, what conclusions to leave to the jury, and so on. There is no relevant distinction between this process of reasoning and that carried out in civil and criminal courts. Those involved in and affected by such decisions have the same expectations of fair process. Secondly, even where coroners are inquiring into what happened, they must inquire judicially, obeying the rules of natural justice, and following the relevant rules of procedure. Again, this is the same obligation as other judicial officers. It is quite different from, say, a minister or a local authority exercising a statutory power. Thirdly, there are in any event strong links between the inquest system and the other courts.²²

It went on to give an example of the type of prejudice that could be caused by parliamentary comment, saying that 'One of the main areas where politicians are likely to want to comment pre-inquest in ways which will prejudice the coroner's decisions is the scope of the inquest.'²³

33. In oral evidence, we asked Lord Goldsmith, Attorney General, whether he could give an example of the type of prejudice to which coroners' courts might be liable. He responded:

An example which would be very clear where there might be prejudice would be if there were a debate in which there were strong views being expressed that, for example, a particular safety mechanism or lack of safety mechanism operating in a particular public industry was likely to cause death. That might be the very issue which the inquest was being asked to consider: whether the death was by accident or by some criminal act or gross negligence²⁴

34. We also asked Lord Goldsmith and the Clerk to consider the recent breaches of the rule in the House of Lords and the appearance that no prejudice had resulted from these discussions. Lord Goldsmith said:

I do not think you could jump to that conclusion from those two examples because it obviously depends on the circumstances of the particular cases. I am sure it is right that there will be circumstances in which things can be said about ongoing inquests which would not prejudice those.²⁵

²¹ Ev 43

²² Ev 42

²³ Ev 42

²⁴ Q73

²⁵ Q102

The Clerk added that prejudice was normally not evident until proceedings took place and, in most cases, the inquests relating to these cases had not yet been held.²⁶

Comity and coroners' courts

35. Witnesses emphasised that the principle of comity was as important as the risk of prejudice where coroners' courts are concerned. The memorandum submitted by the Law Society defined comity as follows:

[it] is to separate legislative and executive powers on the one hand from judicial ones on the other, in order to demonstrate—and to ensure—the independence of the judicial branch of government and the integrity of its processes. For this purpose, there is no difference between different kinds of judicial officers or different kinds of proceedings. This function does not serve the rights of litigants, but instead underlies the structure of government in a democratic society.²⁷

The Law Society went on to give an example:

of course we hope that coroners, like other judges, would be sufficiently independent to avoid being influenced by what was being said outside. But it is important to notice that this in itself may have unwelcome features. For example, suppose there is discussion in Parliament of a particular death or deaths, and suggestions are made that the inquest should cover this or that aspect of the situation, or that such and such an expert, of a particular type, should be called to give evidence. This will embarrass the coroner when he comes to decide on the scope of the inquest or whether to call an expert, and if so of what type. He cannot be seen to have been influenced by the politicians. That is the whole point of the separation of powers.²⁸

36. The memorandum submitted by the Clerk of the House concurred with this view:

Nor is the purpose of the *sub judice* rule solely to prevent prejudice to individuals involved in cases which are still to come to court. As I said in my oral evidence to the previous Procedure Committee, Parliament has imposed this self-restraint on itself out of consideration for “the mutual respect that two central organs of the constitution with different functions ought to have one for another”. Parliament and the courts (including coroners' courts) have distinct functions, and it is right in principle that each should allow the other to do their job with a minimum of cross-interference.²⁹

37. The evidence we received suggests to us that the principle of comity is as important as the risk of prejudice. The *sub judice* resolution of the House of Commons aims both to minimise the chance of damaging any trial or inquest and to preserve the important distinction between the jurisdiction of Parliament and the Courts.

²⁶ Q144

²⁷ Ev 42

²⁸ Ev 43

²⁹ Ev 21

38. We conclude that the argument that coroners' courts should remain within the scope of the rule due to the possibility of prejudice is persuasive. Taken alongside the long standing precedent for inquests to have been included within the House's implementation of its *sub judice* rule, and the principle of comity, it forms a convincing case. We therefore concur with the view expressed in our predecessors' report that there is no justification for removing the protection of the rule from coroners' courts. Nevertheless, it is understandable that Members may sometimes feel that a case deserves debate despite the resolution. We consider how the House should best address these legitimate concerns in paragraphs 77-85.

Scope of the Rule

What can be discussed

39. Unless the Chair has chosen to exercise discretion, or one of the exemptions applies, the *sub judice* rule states that any active cases 'shall not be referred to' in the House. This provision appears to prevent the naming of any individual involved or even mentioning that a trial or inquest is in progress. As such, it may be considered stricter than the terms of the Contempt of Court Act 1981, which applies outside the House. This Act was a liberalising measure, bringing the law on contempt of court into conformity with Article 10 of the European Convention on Human Rights and providing a defence where the risk of prejudice to proceedings was merely incidental to a discussion in good faith of public affairs.³⁰ The strict liability rule established by the Act 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'.³¹ The Contempt of Court Act applies to coroners courts in the same way that it applies to other courts.

40. Some have argued that the *sub judice* rule should be brought into line with the Contempt of Court Act. For example, Ms Keeble explained that she had been able to discuss the case in her constituency freely in the media, whilst any mention of it within the House had been ruled out of order: 'I was able to speak about it outside here and everybody was able to cover it. There is no issue about journalists and the *sub judice* rule; it is just in here.'³²

41. In contrast, we also heard evidence to suggest that the particular context in which debates in Parliament took place required a more careful approach. The Clerk of the House told the Committee: 'assessing the possible degree of prejudice is a very difficult task for the Speaker or his deputies to undertake with certainty on the spur of the moment when (unlike a judge or a coroner) they are unaware of the detailed circumstances of the case.'³³ In these circumstances a rule that can be applied reliably and consistently may be preferable.

³⁰ S5

³¹ S2(2)

³² Q59

³³ Ev 21

42. Some witnesses also expressed the view that words spoken in Parliament held a greater authority than those in the press or local media. They argued that Members of Parliament therefore had a responsibility to monitor their words more carefully and refrain from making comments to which a greater weight might later be attached than had originally been intended. In oral evidence, the Attorney General said:

I emphasise again, if I may, what is said in Parliament I think is capable of being very important because it is potentially seen as very authoritative. Anything that is said in Parliament will be treated as authoritative to varying degrees, depending upon all the circumstances and, secondly, it is likely to be widely reported.³⁴

43. This view was, however, strongly disputed by others. Mr Denham said:

The argument in part about *sub judice* is that things that are said in the House of Commons when reported outside are likely to have a particular weight and therefore are more able to prejudice a trial than things that are said widely in the media. The fact that that does not seem to be a problem with the House of Lords suggests that that historic view, if it ever was true, is no longer true and that we are less likely to do damage than has been the perceived wisdom in the past.³⁵

44. As noted above (paragraph 34), no evidence of actual prejudice to an inquest has been presented to us, but prejudice is generally difficult to identify until the damage has been done and is not, in any case, the only grounds for the rule. The principle of comity and the need to avoid any perception of possible prejudice or interference with the judiciary also underpin the resolution

45. Nevertheless, most witnesses agreed that there was scope for allowing a discussion of policy matters related to a case, on the understanding that the specific facts of a case would not be brought up. Mr Denham described the difference that this might have made to his Committee:

For example, if we had had something that said to the committee, “You need to some extent to set aside *sub judice* but you need to be careful about the risk of prejudicing a trial. Therefore, committee witnesses should avoid making direct allegations or implications against named individuals” and had we had that sort of discretion we probably could have asked questions about the intelligence on the named suicide bombers, information about their foreign travel, known associates, knowledge of how they were recruited, if any, how knowledge of that compared with other studies by the intelligence services and questions about methods used by the suicide bombers. There is a whole series of questions which we felt unable to ask because we felt that would breach the *sub judice* rule as it was interpreted to us.³⁶

And later:

³⁴ Q73

³⁵ Q7

³⁶ Q18

there were questions like what was the nature of the officers who were on duty on 22 July. It was widely reported in the media that there were Army officers patrolling London on that particular day who may or may not, depending on which press report you read, have been involved in the events of that day. That was the sort of question which does not seem to me to directly relate to the responsibility of anybody who might subsequently be prosecuted but which would have been useful for us to air in a select committee. Had there been less of a blanket ban on asking questions about the specific events of 22 July we would have been able to raise those types of issues.³⁷

46. In his memorandum, the Clerk of the House discussed how this distinction might be reflected through the use of the Speaker's discretion:

I suggest that a distinction needs to be drawn between a matter or case which is *sub judice* before a coroner's court and an issue of public policy which is potentially raised by such a case. In the instance raised with the Committee by Mr Denham, for example, a distinction can be drawn between the particular circumstances of the shooting at Stockwell Underground station and the general issue of the policy of the police with regard to the use of firearms. In the instance raised by Sally Keeble, a similar distinction may be made between the particular circumstances of the death at a secure training centre in Northamptonshire in April 2004 and the general issue of policy on the use of restraint techniques in young offender institutions. The wording of the Procedure Committee's previous recommendation on this matter, which referred to issues "related" to pending inquests, appears to have been intended to encourage Mr Speaker to exercise his discretion in favour of allowing debate on issues of public policy potentially raised by cases, not to allow debate on the detailed circumstances of the particular case which will eventually have to be rehearsed before the coroner's court.³⁸

47. Whilst there was general agreement on the desirability of establishing a firm distinction between a discussion of public policy matters related to a case and the details of the case itself, witnesses expressed concern that once a debate had been secured, Members might introduce specific trial or inquest information without warning. The Attorney General said:

It is a bit of a slippery slope and you would have to leave the authority, the Speaker to have a strong ability to control. I can speak about colleagues in my House, if not in this House, who would have no difficulty at all in dressing up what is in fact a debate about a specific case by making it look as if it is a debate about general principle. One would want to watch that taking place so that the rule was not abused. In principle, that is the sort of area where you would want to allow something to take place whilst being very careful not to allow it to descend into a debate about the individual case.³⁹

The Clerk of the House added:

³⁷ Q27

³⁸ Ev 21

³⁹ Q84

One of the reasons why we tend to be cautious in giving advice to the Speaker on this matter is, to put it bluntly, that we have quite often been let down by Members in this matter. They put in an application, let us say, for an adjournment debate which is ostensibly about a matter of public policy, which would be perfectly in order, and then we suddenly find that they are getting up in the House and producing a string of details about a very specific case, referring to individuals by name and generally looking to the Minister to do the job which the judge or the coroner should properly do which can be prejudicial.⁴⁰

48. We acknowledge that in many ways the *sub judice* resolution may appear more limiting than the Contempt of Court Act, which applies outside Parliament. We believe that this perceived imbalance could be corrected by the use of the Speaker's discretion where appropriate. It may be that debates on policy matters connected to an ongoing inquest (particularly where the inquest has been adjourned) could be allowed more frequently. If that is to happen, a clear distinction must be maintained between policy matters and the details of a case and the Chair must be in a position to take effective action to enforce the terms of the debate. We therefore recommend that an explicit power to order a Member to resume their seat on the grounds of a breach of *sub judice* should be provided to the Speaker, or, in Westminster Hall, the Chairman.

The 'national importance' exemption

49. The *sub judice* resolution includes an exemption for matters of 'national importance':

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 exemption was first inserted in the resolution of 28 June 1972. At that time, national industrial disputes might be brought before the National Industrial Relations Court and thus be caught by the *sub judice* resolution.⁴¹

50. The specific context of the 1970s that led to this provision is not reflected in the text of the 2001 resolution. A number of our witnesses attributed wider meanings to the term 'national importance', claiming that their cases fell into this category and that therefore, the rule should have been waived. Mr Denham expressed this view with regard to the evidence session held by the Home Affairs Committee:

I do not think we had any difficulty in deciding that this was an issue of national importance and in this particular case it was pretty self-evident even if it had just been the tragic shooting as an isolated incident. Even that I think we would have seen as an issue of national importance. Our problem was deciding what it was legitimate to do once we had decided it was of national importance.⁴²

⁴⁰ Q110

⁴¹ Procedure Committee, *The Sub Judice Rule of the House of Commons*, First Report of Session 2004-05, HC 125, paragraph 5.

⁴² Q2

the implication of the 2001 resolution is that, if it is of national importance, you can in some way vary, waive or ignore the *sub judice* rule, but it does not tell you how. The clerks had difficulty in advising us what bits of *sub judice* we could ignore because it was of national importance. In practice, I think the advice we had from the clerks was almost identical to what we would have got if there had not been the 2001 resolution. What I hope this Committee might consider is giving some guidance as to, once you have decided it is of national importance, the ways in which *sub judice* might be varied by select committees.⁴³

51. Ms Keeble argued that although the case of a death in custody did not fit into the definition of ‘national importance’, it could be considered under an enlarged exemption of issues of ‘public concern’:

I do not think my case was a matter of national security. It was much more a matter of public interest. I still think there should be definition about when a case is active. That is a bit of a compromise between not having it apply to coroners’ courts at all and having the application that we have now. The guidance should include cases where it might be thought that discretion should be allowed and something about how they should go about doing that. It may well be that you would not just say national security but perhaps also outstanding public interest or public concern, something like that.⁴⁴

52. In oral evidence, the Attorney General agreed that a specific ‘national importance’ exemption was not ideal:

I would not have thought that the waiver has to be restricted to that instance, no. I would not have thought it needs to be only in that example.⁴⁵

One can indicate perhaps that one would expect the Speaker to look more favourably on cases where it is clear that it is a debate about a matter of public importance which does not touch on the case, where it is a case where there is likely to be a very substantial delay between the debate and the inquest itself.⁴⁶

53. There is no established definition of the phrase ‘national importance’, although the resolution sets out some examples in its reference to matters ‘such as the economy, public order or the essential services’. **We do not believe that the interpretation of the phrase ‘national importance’ can be limited by reference to its 1970s origins. Instead, it must be interpreted as it would reasonably have been understood when the House agreed the resolution in 2001. Such issues may need to be discussed in Parliament from time to time, despite the existence of an active court case. In these cases, however, the need for debate must be established and balanced against the likelihood of causing prejudice. We would expect the Speaker’s discretion to be exercised more readily when a discussion in Parliament could result in a positive impact on the matter in question.**

⁴³ Q16

⁴⁴ Q58

⁴⁵ Q81

⁴⁶ Q91

Coroners' Courts and the House

Delay

54. Delay in holding inquests is one of the main sources of frustration with the application of the *sub judice* resolution to coroners' courts. Coroners' inquests are often opened and adjourned immediately, pending further investigations. The delay in these cases can be considerable. For example, the case *Ms Keeble* brought to our attention involved a death in custody in April 2004. An inquest was opened and adjourned immediately, rendering the case *sub judice*. Over two years later, the inquest has yet to be held.

55. The Coroners' Society of England and Wales provided us with a list of the most common causes of delay. This included external investigations, but also more practical and systemic difficulties such as a lack of courtroom accommodation:

They tend to share some of these common characteristics, namely they are cases which:

- perhaps most importantly require that the inquest investigate with regard to Article 2 ECHR the performance of the State in its efforts to protect Life.
- require the coroner to summon a jury
- require that jury to be accommodated, sometimes for weeks, for which a courtroom has to be found. (Following widespread court closures there is an acute shortage of suitable courts to borrow or hire)
- require a long and detailed police investigation
- require that the results are then passed to the Crown Prosecution Service to consider whether there is to be any prosecution (many such must precede and may replace an inquest)
- require that a parallel or successive investigation is carried out before the inquest can be heard by the Police, CPS, Health and Safety Inspectorate, Independent Police Complaints Commission, Prison and Probation Service Ombudsman, and others, sometimes more than one of them at the same or successive time, and sometimes even into the activities of each other.

The net result can often be that the coroner does not receive files to start evaluating until more than two years after the death. Only after (s)he has read them can begin the preparation process of pre-inquest disclosure, making a first selection of witnesses, identifying issues, estimating length of final inquest time and arranging the necessary pre-inquest Review hearings.⁴⁷

56. In oral evidence, the Attorney General told us that the *sub judice* rule acts only to delay debate, rather than to prevent it entirely: 'the *sub judice* rule wherever it applies does not

⁴⁷ Ev 33

stop debate; it delays it. It never prevents it for all time'.⁴⁸ He added that this justified a cautious approach to the application of the rule: 'I would understand that one should err on the side of caution because the damage could be very great and because debate is being delayed, not prevented'.⁴⁹

57. Others have argued that the length of delay that results from some long inquest adjournments is not reasonable. In her memorandum to the Committee, Ms Keeble argued that long delays not only prevent discussion of the case at a time when the issues raised most need to be addressed, but also limit any possibility to examine of the cause of delay itself:

The application of the *sub judice* rule has prevented proper examination of the failings of the Executive in two areas. One is the failings in the care [...]. The other is the failings in the Crown Prosecution Service which has resulted in 18 months going by with no decision on possible prosecution. Both of these are legitimate areas of concern that it is absolutely right that MPs should be able to question Ministers about on the floor of the House of Commons. The continuing delay in being able to hold the Government to account is completely disproportionate and unwarranted, given the seriousness of the issues involved.⁵⁰

Redefinition of 'active' proceedings

58. In order to deal with long adjournments, we heard suggestions that the period for which proceedings are considered 'active' could be redefined. At present, a case is considered active when the inquest is first opened and remains active despite any adjournments. An alternative option could be to consider that inquests are only 'active' once arrangements for the substantive hearing have been made, or for a specified period (for example, four weeks) before that date.

59. There are a number of practical difficulties with this suggestion. The main obstacle is the fact that coroners' courts vary significantly in the advance notice that they give of arrangements for substantive hearings. In some cases, a date is set down far in advance and in others, dates in the near future are set and subsequently pushed back time and again. In both these cases, proceedings could remain 'active' for more or less the same amount of time as under the current arrangements.

60. The memorandum from the Coroners' Society noted that there is 'no practical and widely applicable general definition that would assist'⁵¹ in defining a new time period. In oral evidence, the Attorney General added:

It would be attractive to have a sort of bright line rule which we defined when proceedings were active. It is quite difficult to find one which really meets the objective from the analysis I have seen. I know one suggestion is that you say only when a hearing has been set down, but it is not uncommon for an inquest to be

⁴⁸ Q78

⁴⁹ Q89

⁵⁰ Ev 7

⁵¹ Ev 34

opened and a date to be given which is a long way off but still the date is given. I am not sure that would meet the concern. That is why I think the discretion route is the better one.⁵²

61. The Attorney General's suggestion that the Speaker might exercise his discretion in cases of long adjournment was also taken up in evidence submitted by the Clerk of the House. Sir Roger said:

I was not intending to suggest that the Speaker's discretion should extend to allowing discussion of the details of the individual case, I should make that absolutely clear, but where there is an issue of policy raised by a case and that is being delayed for a long time then I would have thought that the delay was one factor among others that the Speaker might take into account but that is something which I think it would be very difficult to write into the resolution. In general, I am always opposed to over-prescriptive resolutions because you always find they then bite you in ways that you did not expect when you wrote in the additional detail.⁵³

62. We accept the view of the Attorney General that the *sub judice* rule acts to defer debate rather than to rule it out for all time. Nevertheless, in some cases, a timely response is required. Members may be subject to a number of pressures, including calls from constituents to raise the issue in Parliament, the need to influence ongoing events (other than the inquest itself) and to participate in a debate which may be widely held outside the House.

63. Some of the concerns over the consequences of protracted delay might be overcome if there were a later 'trigger point' for the application of the *sub judice* rule than the opening of the inquest, but we have been forced to conclude that there is no such alternative point. We therefore recommend that the Speaker should consider the question of delay along with other factors when deciding whether or not to exercise his discretion.

Draft Coroners Bill

64. During our inquiry, the Department for Constitutional Affairs published proposals for a reform of the coroners' system in the form of a draft Bill.⁵⁴ The proposals aim to improve people's experience of the coroners service and bring about more effective investigations, replacing the Coroners Act 1988 and adding substantial new provisions on governance and structure. They would reduce the current number of approximately 110 full and part-time coroners to 60-65 full-time professionals with a requirement for legal qualifications. Coroners would continue to be appointed and funded by their local authorities, but the Lord Chancellor would have power to determine new area boundaries. Local authorities would also be responsible for a pool of part-time assistant coroners to support full-time coroners.

⁵² Q93

⁵³ Q140

⁵⁴ *Coroner Reform: The Government's Draft Bill: Improving death investigation in England and Wales* (Cm. 6849).

65. The draft Bill also proposes the creation of a Chief Coroner's Office to oversee the system:

The Bill will introduce national leadership through a Chief Coroner and support staff, and an advisory Coronial Council. The Chief Coroner will be responsible for developing national standards and guidance, supporting coroners and advising Government and for considering appeals against coroners' decisions and responding to complaints. Through the Lord Chancellor, he or she will be accountable to Parliament.⁵⁵

66. Speaking in advance of the publication of the draft Bill, Rt Hon Harriet Harman QC MP, Minister of State in the Department for Constitutional Affairs, said:

what we lack is the capacity for leadership and certainty, which would enable the right inquiries to be made at the earliest possible opportunity. I agree that it is unfair that an inquiry has taken so long. The national leadership of the chief coroner means that there will be someone at a national level to liaise with the relevant parties and ensure that [...] does not happen in future. [...] Coroners have mediaeval jurisdictions, which they control—no one else is allowed to sit there, and they are not allowed to sit in anyone else's jurisdiction—so it is impossible to do something simple and straightforward such as re-allocating a coroner to another jurisdiction to deal with a backlog. That is the problem with the statutory legal framework, and it is a simple but important thing that we will change.⁵⁶

67. Lord Goldsmith seemed more cautious about the potential for the proposals to speed up inquests, noting that any improvements would depend not only on bureaucratic reorganisation, but also on the provision of resources:

The question as to whether it is going to make things better is one that you might want put to DCA ministers because they are responsible for resources which coroners will have and the way that procedures will operate. They will have a view as to how much that will speed up inquests. There will though always be some inquests which are opened and take a long time because they will stop whilst criminal proceedings take place.⁵⁷

68. If the draft Coroners Bill succeeds in creating a more professional coroners' system, and removing some of the bureaucratic obstacles such as the local boundaries within which coroners are presently confined, it might reduce some of the current delays in inquests. We note, however, the Attorney General's caveat that additional resources are likely to be necessary for a significant change to be effected.

69. We also see potential in the establishment of a Chief Coroner's Office. This Office would be well placed to provide a central point of information for the House on the timing and status of inquests. In oral evidence, we asked Mr Robert Rogers, Principal Clerk of the Table Office, how House authorities currently obtained information about 'active' cases:

⁵⁵ *Ibid*, page 3.

⁵⁶ HC Deb 6 Feb 2006 col. 616-17.

⁵⁷ Q97

One of the things that we have done fairly recently, with the help of the Law Officers' Departments, is to change the way in which we find out factual information about *sub judice* cases generally. Whereas before we had to rely on individual government departments, this was often not a very satisfactory way because it might have been that the parliamentary branch did not have the clout to get the quick reply or perhaps it was because the department did not understand the importance to the House of Commons of having swift factually accurate information. It was not the ideal method. Thanks to the Legal Secretary to the Law Officers, we now have a single point of contact in the Legal Secretariat so we would certainly use that. You have mentioned the draft Coroners Bill. If the streamlining and the structure of the Coroners Service, which is dealt with in part four of the Bill, were to come about, one would expect that there would be a single point of contact there for authoritative factual information and, of course, we would use whatever point of contact and source of information was quickest and best⁵⁸

70. We recommend that the proposed Chief Coroner's Office should be given the responsibility of providing information about inquests to House authorities. The Office should be well placed to offer timely and accurate data. It might also be in a position to assist the Speaker in making decisions on when to use his discretion to allow debate by providing information on the timing of inquests and, where appropriate, advice from the Chief Coroner on the likelihood of causing prejudice in a particular case. We hope that the Government will take account of these comments in the context of its current consultation on the draft Coroners Bill.

House authorities

Table Office

71. It is often in the Table Office that a Member will first realise that a case he or she wishes to raise, either in a Parliamentary Question or an adjournment debate, is *sub judice*. It is here also that Members should expect to receive advice on the application of the rule in their case and what options are available to them if they are unhappy with the situation. At this point, Members may appeal to the Speaker to use his discretion to waive the rule, but we have received evidence that the procedure for doing so is not well understood.

72. We asked the Principal Clerk of the Table Office and the Clerk of the House about the role of the Table Office in such cases. Sir Roger said that the first duty of the Office was to establish and agree the facts of a case with the Member concerned: 'What we are essentially, usually, trying to find out is simply the facts. Is there a case? What is the state of the case? Has somebody been charged? Has the case been set down for trial? We are not going into the details of the issues or the matters at issue.'⁵⁹ Mr Rogers added:

Very often if it is a constituency case the Member will know a lot about it, and my concern is to come to a situation where we are in agreement about the facts. If the

⁵⁸ Q141

⁵⁹ Q112

advice that we have is not in accordance with what the member thinks is the case, that is not something I would allow to continue. We obviously have to be absolutely certain of the ground on which we are standing and if the Member wishes to take it further, as I said earlier, as with any question that we think may offend against a rule of order, that is never something that we discourage a Member from doing.⁶⁰

73. The witnesses also told us of recent administrative improvements that had been made in the Table Office, including a running database of *sub judice* cases that is shared with the House of Lords, detailing the status of ongoing cases in which there is parliamentary interest.⁶¹ As noted above, the Office now communicates with one contact in the Legal Secretariat to the Law Officers in order to obtain information about cases, rather than attempting to extract details from individual departments. This has led to a speedier and more reliable service.

74. We welcome the recent administrative improvements that have been introduced by the Table Office and agree that the first duty of the Office must remain that of establishing the facts of a case. Nevertheless, we are concerned that Members should receive the clearest possible advice on the effects of the rule.

75. We are concerned that some Members leave the Table Office with the impression that there is no further course of action available to them once a case has been found to be *sub judice*. This impression may stem in part from Members' experiences when tabling Questions. When Questions are found to be disorderly, Members who are dissatisfied can usually negotiate an agreed solution with the Table Office involving some change to the wording of their Question. This takes place under authority delegated to the Office by the Speaker. If a mutually acceptable wording cannot be found, the Question cannot be tabled. In contrast, the Table Office has no authority to negotiate on matters of *sub judice*. The Speaker's power of discretion can be exercised only by the Speaker himself and he will decide whether to exercise that discretion according to the individual circumstances of the case. The Table Office has a duty to identify when matters are *sub judice* and to inform Members of the effect of the rule, but has no capacity to be flexible in its interpretation of the resolution.

76. In order to increase transparency and to improve Members' understanding of the *sub judice* rule and the Speaker's power of discretion, we recommend that the Table Office consider issuing a short guidance note for Members on *sub judice* issues. This could be based on our own draft guidance note, which is inserted in the back of this report as a dummy leaflet and reproduced in Annex 2.

The role of the Speaker

77. Under the 2001 resolution (as well as in preceding resolutions in the House of Commons), the *sub judice* rule is 'subject to the discretion of the Chair'. This gives the Speaker absolute discretion to waive the rule in the Chamber as he sees fit. Over the years, this power has been used sparingly and the rule has been relaxed only in exceptional

⁶⁰ Q125

⁶¹ Q143

circumstances.⁶² Whilst we would not expect the rule to be waived habitually, our inquiry has highlighted some areas of concern where cases which merit consideration for the Speaker's discretion are perhaps not always brought to his attention.

78. If the case does not fall into one of the exemptions within the resolution, a Member may bring the case to the Speaker's attention and ask him to consider waiving the rule and allowing debate. It may be helpful to Members and perhaps also to the Speaker to have some guidance as to the principles upon which any decision to exercise discretion should be based. The evidence and argument submitted to our inquiry has led us to conclude that certain criteria may make a case more suitable for discretion. These include cases where:

- a discussion of relevant policy matters is sought, rather than an exposition of the facts of the case themselves;
- the inquest has already been subject to a significant delay and proceedings are not expected to commence for a further lengthy period;
- it is thought important that the matters be debated in Parliament, due to the need to influence current events (other than the case itself) or to press for Government action (perhaps to prevent another death in similar circumstances);
- the likelihood of prejudice to a current inquest is very low (the view of the coroner may be sought in these cases);
- the Speaker is satisfied that a debate would not violate the principle of comity, or interfere or be *thought* to interfere with the role of the judiciary.

79. We would stress that it is not possible to set out hard and fast rules to determine which cases will be suitable for the Speaker to exercise his discretion. The list above is intended as a guide to the factors which might weigh in favour of allowing a debate or question, however, the exercise of the Speaker's discretion must remain a matter for him alone, and must be based on a consideration of the specific circumstances of each case.

80. In the course of our inquiry, our attention has been drawn to a number of individuals who might be able to offer assistance and advice to the Speaker. Mr Denham told us that his Committee had sought advice about the status of cases from the Attorney General, and that this information had been extremely useful.⁶³ In oral evidence, the Attorney General expressed his willingness to be consulted, not in his role as a Government Minister, but rather as Chief Legal Advisor and head of the Crown Prosecution Service.

I see myself as more an adviser to Parliament than perhaps to individual Members but I would certainly consider any question of an individual Members, although the Members might in any event want to go to the Speaker or to the Table for advice rather than me. [...] I would be very happy certainly to communicate with the Speaker on issues of that sort, absolutely, in case I had information that it may be helpful for the Speaker to have. I did want to make one other suggestion, if I may, in that area. I think it would be perhaps helpful if you have not already done so to talk

⁶² *Joint Committee on Parliamentary Privilege Report*, paragraph 200.

⁶³ Q1

to the Coroners' Association because it seems to me one possible source of information which might help the Speaker reach decisions on his discretion might be getting information from the relevant coroner, who might be able to give some factual information which might show where there is a real area of concern or there is not an area of concern or it is going to be a long time and he does not have much concern about it.⁶⁴

We concur with the Attorney General's suggestion that coroners might also provide useful information and repeat our hope that communications between the House and coroners will be improved if the Government's proposals to establish a Chief Coroner's Office are realised.

81. We also note the suggestion made by the Clerk of the Parliaments in the House of Lords that 'Where waiver is requested, it is perhaps to be hoped that the Leader [now Lord Speaker] and the Speaker would confer before either issued a ruling, if the circumstances made this practical, or would at any rate keep each other informed of rulings given'.⁶⁵ We agree that it is desirable to keep the communication channels between the Houses as open as practicable, while recognising that neither House can be bound by a decision made in the other House.

82. We share the conclusion of our predecessors that no change is needed to the status or wording of the 2001 *sub judice* resolution. In some respects, the provisions of the resolution are restrictive, but we believe that this can be balanced by the appropriate use of the Speaker's discretion. We endorse the previous Committee's call for a greater use of the Speaker's discretion in the small number of cases where a discussion in Parliament is desirable despite the existence of an 'active' inquest.

Guidance for Members

83. Members who gave evidence to our inquiry welcomed the suggestion that guidance should be drawn up for Members, explaining the *sub judice* resolution and outlining the steps involved in seeking the Speaker's discretion. **Whilst detailed guidance covering every eventuality would clearly be impossible to produce, we recommend that a short leaflet be issued summarising the general principles of the resolution and the procedures involved.**

84. We have prepared a draft upon which the House may decide to model this guidance. It is included as a dummy leaflet with this report and the text is reproduced in Annex 2. If the House endorses the principles of this report, we recommend that a guidance leaflet be made available in the Table Office and the Library and that the text be placed on the Parliamentary intranet.

⁶⁴ Qq 86-87

⁶⁵ Ev 45

Select Committees

85. The 2001 *sub judice* resolution states that the rule is 'subject to the discretion of the Chair'. Our predecessors' report explained that in committee proceedings, 'the Chair' refers to the chairman of the select committee. In oral evidence to the current inquiry, the Clerk of the House described the basis of this interpretation:

that is the case. It has to be because things come up at a moment's notice and the chairman has to decide. But I think it also said, and if it did not then certainly my memorandum to it did, that chairmen in those circumstances were well advised to clear their lines with the Speaker, particularly when launching a new inquiry or something like that, because obviously any decision that a select committee takes to allow something to be aired is likely to have repercussions on the floor of the House.⁶⁶

86. It is clear that under the terms of the resolution, the chairman of a select committee has the power to waive the *sub judice* resolution. It is our strong view, however, that wherever practicable, chairmen should first consult the Speaker, both to ensure that they have correctly understood their responsibilities, and so that consistency between the implementation of the rule in the House and in its committees can be maintained.

87. We observe that select committees have the power to take evidence in private. A number of committees have found this a useful way of conducting inquiries where *sub judice* issues have arisen. We asked Mr Denham whether the Home Affairs Select Committee had considered this option. He explained:

I did not feel we could go into private session in the circumstances of this one-off hearing. Given that the committee's intention was to show that Parliament was considering these matters of national importance—we were meeting in September; the House was not sitting—it made no sense to go into private session. Had we been carrying out an inquiry over a series of six or seven sessions, I would have felt quite comfortable going into private session. It would not necessarily have been entirely satisfactory from a public point of view but I would have been more relaxed about doing it. To have met in September for a one-off hearing and then to have held half of it in private would have undermined the point of the exercise.⁶⁷

Mr Denham went on to argue that the 'national importance' exemption was applicable to the case, because it was vital for Parliament to debate, and to be *seen* to debate issues like the London bombings:

There are cases though when an issue is of great national importance, if Parliament cannot be seen to ask obvious, basic questions about what is going on and questions are being asked every day on the television and in the newspapers, we are taking the rule too far. Our response needs to be proportionate. If it is a major, national event, we should perhaps give a somewhat lower priority than we have done historically to

⁶⁶ Q130

⁶⁷ Q24

the *sub judice* rule in the coroners' courts. I would not for one moment say that it does not matter or we should not have respect for the procedures. It is a matter of approaching it sensibly and in a proportionate way.⁶⁸

88. We understand that it will not always be appropriate for select committees to use private sessions to deal with issues of *sub judice*, however, we recommend that any select committee considering taking evidence on a *sub judice* case should give serious consideration to the option of hearing the evidence in private.

⁶⁸ Q34

Conclusions and recommendations

1. The previous Committee's report has not yet been debated on the floor of the House, not least because the current Committee has been looking again at the issue. This report builds on the valuable work of our predecessors and adds further conclusions and recommendations specifically in respect of coroners' courts. Now that our inquiry has been brought to a conclusion, we trust that an early opportunity will be found for the House to consider both our report and that of our predecessors. (Paragraph 13)
2. In its report, the previous Committee strongly supported the existence of an identical resolution in both Houses and recommended that the two Houses should consider jointly any proposal for change. We agree with this recommendation and were therefore concerned that in practice the rule appeared to have been implemented differently in the two Houses. (Paragraph 23)
3. We welcome the efforts made by the House of Lords authorities to ensure that the rule is implemented in the same way in both Houses. (Paragraph 25)
4. We conclude that the argument that coroners' courts should remain within the scope of the rule due to the possibility of prejudice is persuasive. Taken alongside the long standing precedent for inquests to have been included within the House's implementation of its *sub judice* rule, and the principle of comity, it forms a convincing case. We therefore concur with the view expressed in our predecessors' report that there is no justification for removing the protection of the rule from coroners' courts. (Paragraph 38)
5. We acknowledge that in many ways the *sub judice* resolution may appear more limiting than the Contempt of Court Act, which applies outside Parliament. We believe that this perceived imbalance could be corrected by the use of the Speaker's discretion where appropriate. It may be that debates on policy matters connected to an ongoing inquest (particularly where the inquest has been adjourned) could be allowed more frequently. If that is to happen, a clear distinction must be maintained between policy matters and the details of a case and the Chair must be in a position to take effective action to enforce the terms of the debate. We therefore recommend that an explicit power to order a Member to resume their seat on the grounds of a breach of *sub judice* should be provided to the Speaker, or, in Westminster Hall, the Chairman (Paragraph 48)
6. We do not believe that the interpretation of the phrase 'national importance' can be limited by reference to its 1970s origins. Instead, it must be interpreted as it would reasonably have been understood when the House agreed the resolution in 2001. Such issues may need to be discussed in Parliament from time to time, despite the existence of an active court case. In these cases, however, the need for debate must be established and balanced against the likelihood of causing prejudice. We would expect the Speaker's discretion to be exercised more readily when a discussion in Parliament could result in a positive impact on the matter in question. (Paragraph 54)

7. Some of the concerns over the consequences of protracted delay might be overcome if there were a later 'trigger point' for the application of the sub judice rule than the opening of the inquest, but we have been forced to conclude that there is no such alternative point. We therefore recommend that the Speaker should consider the question of delay along with other factors when deciding whether or not to exercise his discretion. (Paragraph 64)
8. If the draft Coroners Bill succeeds in creating a more professional coroners' system, and removing some of the bureaucratic obstacles such as the local boundaries within which coroners are presently confined, it might reduce some of the current delays in inquests. We note, however, the Attorney General's caveat that additional resources are likely to be necessary for a significant change to be effected. (Paragraph 69)
9. We recommend that the proposed Chief Coroner's Office should be given the responsibility of providing information about inquests to House authorities. The Office should be well placed to offer timely and accurate data. It might also be in a position to assist the Speaker in making decisions on when to use his discretion to allow debate by providing information on the timing of inquests and, where appropriate, advice from the Chief Coroner on the likelihood of causing prejudice in a particular case. We hope that the Government will take account of these comments in the context of its current consultation on the draft Coroners Bill. (Paragraph 71)
10. We welcome the recent administrative improvements that have been introduced by the Table Office and agree that the first duty of the Office must remain that of establishing the facts of a case. Nevertheless, we are concerned that Members should receive the clearest possible advice on the effects of the rule. (Paragraph 75)
11. In order to increase transparency and to improve Members' understanding of the sub judice rule and the Speaker's power of discretion, we recommend that the Table Office consider issuing a short guidance note for Members on *sub judice* issues. This could be based on our own draft guidance note, which is inserted in the back of this report as a dummy leaflet and reproduced in Annex 2. (Paragraph 77)
12. We share the conclusion of our predecessors that no change is needed to the status or wording of the 2001 sub judice resolution. In some respects, the provisions of the resolution are restrictive, but we believe that this can be balanced by the appropriate use of the Speaker's discretion. We endorse the previous Committee's call for a greater use of the Speaker's discretion in the small number of cases where a discussion in Parliament is desirable despite the existence of an 'active' inquest. (Paragraph 83)
13. Whilst detailed guidance covering every eventuality would clearly be impossible to produce, we recommend that a short leaflet be issued summarising the general principles of the resolution and the procedures involved. (Paragraph 84)
14. It is clear that under the terms of the resolution, the chairman of a select committee has the power to waive the *sub judice* resolution. It is our strong view, however, that wherever practicable, chairmen should first consult the Speaker, both to ensure that they have correctly understood their responsibilities, and so that consistency between

the implementation of the rule in the House and in its committees can be maintained. (Paragraph 87)

15. We understand that it will not always be appropriate for select committees to use private sessions to deal with issues of *sub judice*, however, we recommend that any select committee considering taking evidence on a sub judice case should give serious consideration to the option of hearing the evidence in private. (Paragraph 89)

Annex 1: *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

Annex 2: Draft Guidance Note

The sub judice resolution

The leaflet would be intended to explain the House's *sub judice* resolution and outline the courses of action available to Members who find that a matter they wish to pursue is before the courts.

It should also give contact information for Offices that can provide more detailed information and advice.

What is sub judice?

This first section should set out the reasons for the *sub judice* rule and the broad terms of the resolution agreed in 2001.

It should cover prejudice and comity, noting that the resolution aims to protect an individual's right to a fair trial and to make sure that the constitutional separation between Parliament and the Courts is preserved.

Which courts are covered by the rule?

This section should explain that the rule applies to UK courts only and emphasise that cases at the European Court of Justice and the European Court of Human Rights are not affected.

Other information about the scope of the rule should also be set out here, including its application to both civil and criminal courts, including inquests held in coroners' courts.

This section should also indicate when proceedings are considered 'active' for the purpose of the rule (in criminal cases, from the moment when a person is charged or leave to appeal is granted and in civil cases, from the time when arrangements for the hearing have been made until the proceedings are ended by judgment or discontinuance).

The leaflet should also note that in coroners' courts, the rule applies from the time when the inquest is opened, even if it is adjourned immediately.

This section should also set out those proceedings which are not subject to the rule. For example, the rule does not apply to Royal Commissions or non-statutory or departmental inquiries set up by the Government, even if conducted by judges, or to other tribunals set up by statute or to any judicial review of a Ministerial decision.

Which proceedings are exempt?

This section should indicate which Parliamentary proceedings are exempted from the rule (i.e. proceedings on legislation in the Chamber or Standing Committee as well as Standing Committees on Delegated Legislation, but not motions to introduce Ten Minute Rule bills).

Information from the Table Office

In this section, the leaflet should explain the role of the Table Office in informing Members who wish to table Questions or submit applications for an adjournment debate whether they will be caught by the *sub judice* rule.

It should note that the Table Office maintains a record of matters known to be *sub judice* and can check on the status of a case.

The leaflet should explain that, if a case is *sub judice*, Members may either wait until the court case has been resolved before raising the matter in the House, or they may ask the Speaker to exercise the discretion given to him by the Resolution on their behalf.

Seeking the Speaker's Discretion

Here, the leaflet should set out the Speaker's powers to exercise discretion and waive the *sub judice* rule; the procedure for approaching the Speaker to ask for discretion; and the considerations he may take into account when making his decision.

It should make clear the distinct roles of the Table Office and the Speaker's Office.

This section should include an indication that discretion may be granted to discuss policy matters relating to an ongoing court case without going into the details of the case itself, but that on such occasions the Speaker expects Members to respect any conditions attached to the granting of his discretion.

It is not possible to set out hard and fast rules to determine which cases will be suitable for the Speaker to exercise his discretion, but an indicative list based on the recommendations of our report could be included. The following list is based on the recommendations in paragraph 78:

- it is important that the matters be debated in Parliament, due to the need to influence current events (apart from the case itself) or to press for Government action;
- a debate on general policy matters in the context of an ongoing case is requested, rather than the details of the case itself;
- the likelihood of causing damage or prejudice to a case is demonstrably very low (for example, in some civil cases where there is no jury);
- there has been significant delay, and a further long delay is expected in bringing the case to court (for example, in an inquest).
- the Speaker is satisfied that a debate would not violate the principle of comity, or interfere or be *perceived* to interfere with the role of the judiciary.

The leaflet should stress that the Speaker's discretion in these cases is absolute and will be exercised according to the merits of the individual case.

Sub judice in select committees

This section should explain that, like the Speaker in the Chamber, the chairman of a select committee has the power to waive the *sub judice* rule.

Select committee chairmen should be strongly advised to consult the Speaker in advance if they consider that it might be necessary to waive the *sub judice* rule during an evidence session; both to ensure that they have correctly understood their responsibilities, and so that consistency between the implementation of the rule in the House and in its committees can be maintained.

The leaflet should remind Members that select committees have the power to take evidence in private and many committees have found this a useful and productive way of pursuing their inquiries.

The 2001 sub judice resolution

Finally, the leaflet should include the text of the 2001 resolution for reference.

Contact details

For information and advice relating to the *sub judice* resolution, contact the Table Office:

Phone: 0207 219 3302, 3303, 3305

Formal minutes

Wednesday 19 July 2006

Members present:

Mr Greg Knight, in the Chair

Mr David Gauke
John Hemming
Rosemary McKenna

Sir Robert Smith
Mr Rob Wilson

The Committee deliberated.

Consideration of draft Report

Draft Report [*Application of the sub judice rule to proceedings in coroners' courts*], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 88 read and agreed to.

Summary agreed to.

Annexes agreed to.

Resolved, That the Report be the Second 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 further deliberated.

[Adjourned to a day and time to be fixed by the Chairman

Witnesses

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Rt Hon Lord Goldsmith QC , Attorney General	Ev 15
Sr Roger Sands KCB , Clerk of the House, and Mr Robert Rogers , Principal Clerk, Table Office, House of Commons	Ev 22

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Reports from the Procedure Committee

Session 2005–06

Second Report	Application of the <i>sub judice</i> rule to proceedings in coroners' courts	HC 714
First Report	Legislative and Regulatory Reform Bill	HC 894

Oral evidence

Taken before the Procedure Committee

on Tuesday 29 November 2005

Members present:

Mr Greg Knight, in the Chair

Annette Brooke
Ms Katy Clark
Mr David Gauke
Andrew Gwynne

Rosemary McKenna
Sir Robert Smith
Mr Rob Wilson

Asterisks in the Oral and Written Evidence denote that part or all of a question, answer or memorandum has not been reported on grounds of *sub judice* and with the agreement of the Committee.

Witnesses: **Rt Hon John Denham**, a Member of the House, Chairman of the Home Affairs Committee, and **Dr Robin James**, Clerk of the Home Affairs Committee, gave evidence.

Q1 Chairman: Welcome. At the close of the last Parliament the Procedure Committee, as you are well aware, looked into the operation of the *sub judice* rule and published a report which has not yet been debated or approved by the House. In the light of further representations that we have received and a request we have received from the Liaison Committee,¹ we have decided to revisit this area in particular in relation to coroners' courts, but also looking at the issue again, so nothing is ruled out in this second visit to this area because the operation of the *sub judice* rule is giving cause for concern for a number of Members in carrying out their constituency duties as well as the concerns you have expressed from a select committee point of view. Thank you for coming and offering to give evidence. Although we have no television cameras here, we are on a webcast so everything that is said will reach a wide audience. We are also anxious to see that we obtain as much evidence as possible to assist us with our deliberations. If, towards the end of your evidence, you feel it would be helpful to allude to a specific *sub judice* case we are happy at that point to resolve to go into private session so that any evidence you may care to give which might fall foul of that rule is not denied us.

Mr Denham: Thank you very much indeed. I very much welcome this inquiry. If I set the scene very briefly, after the London bombing on 7 July the Home Affairs Select Committee decided to have a one-off hearing in September, anticipating that we would want to look at the broad state of affairs two months after the bombing. There then was the attempted bombing on 21 July and the shooting of Jean Charles de Menezes on 22 July, so as we approached the September meeting we wanted to give all of those issues as good an airing as we could. The difficulty that faced the select committee was that we were advised very clearly that almost everything to do with the three events, 7, 21 and 22, was *sub judice* by virtue either of them being the

subject of coroners' courts because of course 52 people were killed on 7 July, or because people had been arrested and charged in relation to the 21 July or because it was at least possible that charges might be brought at some time in the future against some of those involved in the shooting. We had therefore some difficulty in preparing the hearing in September. We looked at the very helpful report that this Committee produced last year and it was very clear from that that the 2001 resolution gave the chairman discretion on the *sub judice* rule in cases of national importance. This was clearly a case of national importance. However, the practical problem that we found was that there was no guidance available to myself as chairman or to the clerks who were advising me on how exactly we should act once we had decided it was of national importance. In effect, I think we came back to doing no more than we would have done if there had not been a 2001 resolution. The advice erred strongly on the side of caution. There is no criticism at all of the clerks who were very helpful throughout, as was the Attorney General in his role as the supervisor of prosecutions. I felt though that in practice the committee was not able to ask a number of questions that were being very widely discussed in the media that would have been helpful to ask. My particular concern is that when something of this importance happens, if the House of Commons becomes the one place where the issues cannot be aired because they are being widely discussed in the media, it seems to me that it damages the credibility of the House of Commons. That is really why I wrote on behalf of the committee to the Liaison Committee in the first instance and said could this matter be looked at again. I am happy to go into more detail about some of the things we would have liked to ask and the way the rules were applied.

Q2 Sir Robert Smith: You mentioned the issue of national importance. Do you think any guidance to chairmen on how that could be defined would have been helpful?

¹ Written Ev 31.

29 November 2005 Rt Hon John Denham MP and Dr Robin James

Mr Denham: I do not think we had any difficulty in deciding that this was an issue of national importance and in this particular case it was pretty self-evident even if it had just been the tragic shooting as an isolated incident. Even that I think we would have seen as an issue of national importance. Our problem was deciding what it was legitimate to do once we had decided it was of national importance. Clearly there was already a number of people who had already been arrested and charged. We would not have wanted to do anything that could prejudice the trial of those individuals. That would be completely unacceptable. However, not to be able to discuss some at least of the detail concerning the shooting because it was in front of the coroner's court and because it was just theoretically possible one or more police officers might have been charged at some point in the future seemed to me to be too limiting on such an important issue. Similarly on 7 July. So far as everybody knew the perpetrators were dead. It was put to us strongly that there might be subsequent arrests and charges and we should therefore avoid prejudicing those. That seemed to me to be too tight a restriction on what we could ask.

Q3 Sir Robert Smith: Where did the subsequent arrest advice come from?

Mr Denham: That came as I recall in discussion with clerks when we were seeking background advice. That was the most substantive point. It also was the case of course that the 7 July was subject to a coroner's inquiry.

Q4 Sir Robert Smith: The Attorney General's evidence was that the moment of arrest was the point. The fact that someone may be arrested in the future has not normally been—

Mr Denham: I am inclined to agree.

Q5 Sir Robert Smith: If we split the three things apart, there are obviously people arrested, facing charge. That is probably the most difficult one and you probably felt you would not want to tread in that area. Then there is the slightly grey area where people might be arrested, where in the past we have not restrained ourselves. Then there is the coroner's inquiry which was a part of the report. That was the grey area about when that trigger point should be and whether there was scope for redefining it because obviously there can be a long delay from when they open to when there is a chance of being prejudiced.

Mr Denham: Indeed. There were two types of coroner's inquiry going on. One was for 7 July where, at least in terms of the immediate perpetrators, there was not going to be much doubt about how people came to be killed. There was also the coroner's inquiry into the shooting on 22 July which clearly might play a very important role in identifying responsibility. I would put it to this Committee that in both those cases it would have been in the broad public interest for our committee to have been able to explore those events in some more detail than we were able to.

Q6 Andrew Gwynne: What action did you take before and during the evidence session to ensure that the *sub judice* rule was respected?

Mr Denham: Prior to the public session, I went through the issues with members of the committee. Dr James had also provided quite a helpful note which, if you like, we can share with the Committee, suggesting the areas that should not be covered and those that could be covered. We went through that in the private session. In the public session, I read out a prepared statement to the press and public explaining the *sub judice* rule. In practice, once the session was underway, nobody came near to flouting the rule. Indeed, the truth is, rereading the transcript, we probably stayed incredibly within the comfort zone. This was one of the difficulties. If you have very restrictive and cautious advice, members then probably do not go anywhere near breaching that advice. I suspect there were many things that could have been asked in the committee session, even within the guidance we had been given, that were not asked because people were so nervous about making a mistake.

Q7 Andrew Gwynne: In the House of Lords the *sub judice* rule has been interpreted less strictly than in the House of Commons. The shoot to kill policy has been discussed in the House of Lords. Are you concerned by this?

Mr Denham: I am. It points to one of the flaws. The argument in part about *sub judice* is that things that are said in the House of Commons when reported outside are likely to have a particular weight and therefore are more able to prejudice a trial than things that are said widely in the media. The fact that that does not seem to be a problem with the House of Lords suggests that that historic view, if it ever was true, is no longer true and that we are less likely to do damage than has been the perceived wisdom in the past. The question is: is what we do proportionate to the importance of the issue that we are discussing.

Q8 Mr Wilson: In your opening remarks, you said you took quite a bit of advice and, as I understand it, you took advice from the Attorney General, Mr Speaker and House officials. Have I missed anybody?

Mr Denham: No. There would be a number of House officials involved.

Dr James: That would be principally the Clerk of the House who, as this Committee will be well aware, is the House's chief adviser on procedure and the Clerk of the Journals who specialises in *sub judice* and privilege issues.

Q9 Mr Wilson: Did you find that the advice they gave was all pretty similar or was there a range of advice? Was it something you could pick and choose from?

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Mr Denham: The advice was pretty consistent. It will be no surprise that Mr Speaker's advice was consistent with the advice that I had had from the House officials because I am sure he would have taken the same briefing as me. The Attorney General was very consistent with that advice as well. He had some broader concerns about other terrorist cases. He was concerned that we should not prejudice those by raising them in the session but that was the only new issue he raised.

Q10 Mr Wilson: Can I tease out of you a little more detail about what the *sub judice* issues were facing the Committee?

Mr Denham: The *sub judice* issues were, one, that we should not prejudice criminal actions that were going to proceed in the courts. The second was that we should not, in a more general sense, offend the *sub judice* rule on matters that were going to be in front of the coroners' courts and the third was the suggestion that we should avoid prejudicing matters where charges might be laid in the future, particularly in relation to the shooting but also possible arrests under the 7 July bombings. Those were the three areas of concern.

Q11 Mr Wilson: How did you make the committee aware of those issues?

Mr Denham: As I recall, we did circulate members in advance of the meeting to warn them that there was going to be an issue and then it was discussed in a private session before the main hearing.

Q12 Mr Wilson: Did they support those objectives?

Mr Denham: I think they accepted the guidance that they were being given. I do not think there was anybody in the committee who wanted to have an argument about it before we went into the main session. Equally when we discussed this matter after the hearing, everybody agreed that I should write to the Liaison Committee because everybody felt that we had not done as good a job in airing issues in public as they would have liked.

Q13 Mr Wilson: Do you think there was a difference in feeling at the end of the meeting from the start of the meeting in the acceptance of what you could and could not ask?

Mr Denham: The committee is very disciplined and if the committee gets advice from the clerks as to what is permissible the Members I have on the Home Affairs Select Committee are going to follow that advice because they will trust the source of it. The frustration perhaps is that we were not able to get a different set of advice. Had there been some clearer guidance to the clerks, we could have had some advice that would have enabled us to go further.

Q14 Mr Wilson: What do you think the outcome of all this will be? Do you think there will be an effect on the final report you are able to present?

Mr Denham: This was a one-off hearing and therefore it was particularly important that we aired the issues in public. If we had been carrying out an inquiry over six or seven sessions in the normal way,

we might have taken the advice of the Procedure Committee and met to hear some evidence in private. It is a little difficult to say whether, had we been producing a report, we could have produced a report having had some sessions in private, but we were having a one-off hearing which we do on a number of issues from time to time and therefore it made no sense to have a private evidence session.

Q15 Rosemary McKenna: All the advice you were given was based on the resolution of the House of 2001?

Mr Denham: Yes.

Q16 Rosemary McKenna: Were you aware of the Procedure Committee's subsequent report, although it had not been before the House?

Mr Denham: Yes, we were. We found it very helpful up until, if you like, the last point in the proceedings because the Procedure Committee report referred to the 2001 resolution, so it was very clear this was a matter of national importance. It was very clear therefore that the chair had discretion. It was very clear from your report that I was the chair for the purposes of that resolution, although it advised me to talk to Mr Speaker. However, the implication of the 2001 resolution is that, if it is of national importance, you can in some way vary, waive or ignore the *sub judice* rule, but it does not tell you how. The clerks had difficulty in advising us what bits of *sub judice* we could ignore because it was of national importance. In practice, I think the advice we had from the clerks was almost identical to what we would have got if there had not been the 2001 resolution. What I hope this Committee might consider is giving some guidance as to, once you have decided it is of national importance, the ways in which *sub judice* might be varied by select committees.

Q17 Rosemary McKenna: If this report said that the select committee chairs would have the power to exercise chair's discretion, that would not be sufficient?

Mr Denham: That is the way I read the report but it does not tell me what I can then do. As the chairman I would not want to go so far as to ruin the trial of the people who had been arrested for 21 July. When it came to the question of the shooting, it was very difficult to be clear. In principle, we would have liked to have set aside the fact that the shooting was subject to the coroner's court, at least to some degree. How far I could go in ignoring the *sub judice* rule was not at all clear.

Q18 Rosemary McKenna: What advice would you like this Committee to give? Should we say that in those specific instances where it was of national importance—?

Mr Denham: For example, if we had had something that said to the committee, "You need to some extent to set aside *sub judice* but you need to be careful about the risk of prejudicing a trial. Therefore, committee witnesses should avoid making direct allegations or implications against

named individuals” and had we had that sort of discretion we probably could have asked questions about the intelligence on the named suicide bombers, information about their foreign travel, known associates, knowledge of how they were recruited, if any, how knowledge of that compared with other studies by the intelligence services and questions about methods used by the suicide bombers. There is a whole series of questions which we felt unable to ask because we felt that would breach the *sub judice* rule as it was interpreted to us.

Q19 Rosemary McKenna: It is a different interpretation of the *sub judice* rule?

Mr Denham: It is a narrower interpretation, looking at the 2001 resolution which says that, if it is of national importance, I as the chairman have the discretion to set it aside but it does not help decide what I can and cannot do. Nobody believes the 2001 resolution simply means you can ignore *sub judice* and be as irresponsible as you want and nobody would want to be that irresponsible. It is giving some clearer guidance on how to operate the 2001 resolution in practice that is needed.

Q20 Rosemary McKenna: A single form of publicised guidance to select committee chairs would be of particular help?

Mr Denham: Yes, and we could anticipate the sorts of issues that arose over these three events and say that these were the sorts of questions that would have been permissible and those would not have been.

Q21 Sir Robert Smith: Do you think you can really prepare generic guidance without looking at the individual case?

Mr Denham: It ought to be possible to look at a range of individual cases and lay down some principles that the clerks could then interpret for chairmen in giving us advice. At the moment, I agree you cannot have an exhaustive list of all the things you can and cannot ask but it ought to be possible to identify some principles that the clerks could rely on.

Q22 Ms Clark: Would you feel confident handling a *sub judice* matter that was raised without warning during a committee meeting?

Mr Denham: Yes. I do not think that is too difficult. That does come up from time to time on the Home Affairs Select Committee. We had a hearing just last week about the UK/US Extradition Treaty where there are a number of live and highly publicised cases. It is not too difficult for the chair to simply stop a line of questioning on the spot.

Q23 Ms Clark: How can the House ensure that committee chairmen have access to the advice they need in order to apply the *sub judice* rule appropriately?

Mr Denham: The main way the House could do that is by, hopefully, this Committee giving further guidance to the clerks about how committees could approach the *sub judice* rule when there is a matter of national importance. That seems to me to be the

missing element at the moment. I feel strongly that the advice I received—I make no criticism of the clerks—would not have been any different had the 2001 resolution not been in place. The 2001 resolution clearly implied that things should be different in cases of national importance.

Q24 Rosemary McKenna: Even in private? You did not feel you could have gone into private session?

Mr Denham: I did not feel we could go into private session in the circumstances of this one-off hearing. Given that the committee’s intention was to show that Parliament was considering these matters of national importance—we were meeting in September; the House was not sitting—it made no sense to go into private session. Had we been carrying out an inquiry over a series of six or seven sessions, I would have felt quite comfortable going into private session. It would not necessarily have been entirely satisfactory from a public point of view but I would have been more relaxed about doing it. To have met in September for a one-off hearing and then to have held half of it in private would have undermined the point of the exercise.

Q25 Rosemary McKenna: The problem was exacerbated by the fact that it was a one-off hearing?

Mr Denham: It certainly was.

Q26 Rosemary McKenna: There was not going to be a report?

Mr Denham: That is right.

Q27 Mr Gauke: You mentioned earlier the coroners’ courts and the implications for the 7 July and 22 July matters. At a practical level, would there have been a substantial difference to your committee’s hearings if the coroner’s court proceedings had fallen outside the *sub judice* rule?

Mr Denham: There would have been. For example, there were questions like what was the nature of the officers who were on duty on 22 July. It was widely reported in the media that there were Army officers patrolling London on that particular day who may or may not, depending on which press report you read, have been involved in the events of that day. That was the sort of question which does not seem to me to directly relate to the responsibility of anybody who might subsequently be prosecuted but which would have been useful for us to air in a select committee. Had there been less of a blanket ban on asking questions about the specific events of 22 July we would have been able to raise those types of issues.

Q28 Mr Gauke: You talked about guidance being available to chairmen of select committees. Would there be an argument for specific guidance that related to coroners’ courts, particularly tailored to that area rather than court proceedings as a whole?

Mr Denham: I think that certainly would be helpful because the issues that arise in the coroners’ courts are slightly different. The implication of this is that the interpretation of *sub judice* would be a lot

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narrower on issues of national importance. It is really giving guidance on where and when you can narrow it.

Q29 Mr Gauke: Would there be an argument for not applying the *sub judice* rule other than, say, a month before a hearing because one of the difficulties with coroners' courts is that proceedings can last years. I do not know whether you would favour some flexibility on that so that you only have to apply it in a very limited period?

Mr Denham: I have not considered a strict time limit of that sort but the position we were in was certainly unsatisfactory. We were meeting in September. We already knew that the earliest that the coroner's court would reconvene would be February or March, depending on the time of the IPCC inquiry, so something that allowed for a period of grace would be very useful indeed.

Q30 Chairman: Would it be fair to say that the concerns you have expressed to us today are shared by all members of your committee?

Mr Denham: Yes. I have raised this with the committee on two occasions, once when I first wrote to the Liaison Committee and again when I reported that I was giving evidence today. I have support from the committee. No committee member has raised any concerns about this.

Q31 Chairman: Do you think there is fairly wide dissatisfaction amongst Members generally over this matter?

Mr Denham: Yes, I am sure there is.

Q32 Chairman: You mentioned in your evidence that you had a note prepared for your committee which you are happy to let us see. Could I make a plea that we have that fairly speedily, please? Could you send a note attached to it identifying who put the note together if that is not obvious from the document itself?

Mr Denham: Yes. It was Dr James. It was the first two pages of the normal committee brief but we will send you the documents.²

² Not printed.

Q33 Chairman: Is there anything you wish to add, Dr James?

Dr James: There were two pages in the committee brief with a very prominent warning on the front page of the brief asking all Members to read these pages as a matter of urgency. I compiled the advice on the basis of my consultation within the Clerk's Department and on the basis of the discussions that Mr Denham and I had with the Attorney General.

Q34 Sir Robert Smith: One of the suggestions from some is that maybe the coroners' courts are something we do not have to worry about prejudicing. Would you accept that we should still be careful in terms of Parliament and even the coroners' courts that we are not seen to prejudice?

Mr Denham: I do not think we should dismiss all of the concerns in this area. There are quite legitimate concerns that we should not prejudice the courts in a wilful way, for very good reasons that were set out in your report. There are cases though when an issue is of great national importance, if Parliament cannot be seen to ask obvious, basic questions about what is going on and questions are being asked every day on the television and in the newspapers, we are taking the rule too far. Our response needs to be proportionate. If it is a major, national event, we should perhaps give a somewhat lower priority than we have done historically to the *sub judice* rule in the coroners' courts. I would not for one moment say that it does not matter or we should not have respect for the procedures. It is a matter of approaching it sensibly and in a proportionate way.

Q35 Chairman: Is there anything you want to add which has not been covered by the questions?

Mr Denham: I think we have covered all the substantial points I wanted to raise. It may be helpful to the Committee if, when we submit the note of our meeting, perhaps I could expand that with a further list of some of the questions that I think the committee might have liked to raise which we felt unable to.

Q36 Chairman: Please feel free to do so. Is there anything you want to add in private today?

Mr Denham: I do not think so, no, thank you.

Chairman: Can I thank you both for coming? We share your concerns on this matter. It is a question to which there is no easy answer but we are going to see if we can find some way of perhaps refining the situation which would be of help to the House. Thank you for contributing.

Letter from Rt Hon John Denham MP, Chairman of the Home Affairs Committee, (P 23)

As requested at yesterday's meeting of the Procedure Committee, I enclose a copy of the written advice on *sub judice* given to the Home Affairs Committee in advance of our evidence session on 13 September (not printed). The advice was incorporated in the brief for that session and was headed "Note by the Clerk of the Committee on the effect of the House's *sub judice* rule on scope of questioning".

In addition, I undertook to submit a list of topics which the Home Affairs Committee might have wished to raise on 13 September, had a more liberal interpretation of the rule been permitted. These are as follows:

Events of 7 July

- intelligence on named suicide bombers and any national or international links;
- background on named suicide bombers including family, community and overseas travel;
- knowledge if any of how they were recruited, and how this compares with others studied by the intelligence service;
- methods used by the suicide bombers.

(All the above would have allowed the Committee to test various propositions that had been widely canvassed in the press.)

Events of 21 July

- background of arrested suspects;
- knowledge of terrorism activity in the East African community;
- progress in tracking purchase of bomb making equipment (a subject which the police themselves had publicly discussed).

Events of 22 July

- command and control structures set out in Operation Kratos and those in place on the day;
- nature of officers on duty (it had been widely suggested that soldiers were on duty on that day);
- statements made by Sir Ian Blair (which are now subject to IPCC inquiry);
- details of any previous “near-miss” incidents under Kratos.

As I pointed out in my oral evidence, the detailed advice supplied by the House authorities on what topics in questioning were and were not permissible in effect followed the boundaries of what was *sub judice*, and made no allowance for any exercise of the discretion envisaged in the 2001 resolution. In practice, therefore, I felt that it was not possible for me to exercise that discretion—which is surely not what was intended by the framers of the resolution. Clarification of the circumstances in which a select committee chairman can realistically exercise that discretion seems to me the most urgent and useful task that could be carried out by the Procedure Committee as part of its present inquiry.

November 2005

Letter from Ms Sally Keeble MP (P 13)

I am writing again about the *sub judice* rule, as I believe that your committee is to revisit the issue following a recent meeting of the Liaison Committee.

Following my appearance at your Committee, I took your advice to ask the Speaker to use his discretion in the matter. I thought of applying for an adjournment debate, which would be more useful than a question, so I put in a request and wrote to the Speaker asking for a meeting so that I could explain the situation. The title of the debate was Restraint in Secure Training Centres.

However, I got a letter back from the Speaker’s Secretary saying that the Speaker would not meet me because the selection of adjournment debates was done on a random basis, and meeting with me might be seen as influencing that. So my request went into the ballot as normal and was not successful.

On the second occasion I put in my request for an adjournment debate I got a phone call from the Table Office saying that there was a problem with my request because the matter was *sub judice* and I would need to speak to the Speaker! There followed a discussion, and I then got a letter from the Speaker saying that provided I didn’t refer to the matter that was *sub judice*, my request for an adjournment debate could go ahead.

This is *not* an “I told you so letter”. What it appears is that the area in which the Speaker can use his discretion is so light that it does not provide a remedy when there is a matter of real public concern that is caught by the *sub judice* rule. In addition, there is an issue about the impartiality of the advice provided to the Speaker, where it is provided by the same people who have initially told the MP that the matter in question is *sub judice*.

I can usefully have an adjournment debate on the general matter of Restraint in Secure Training Centres, and there is a huge scandal surrounding that. However, an even bigger scandal is around the death of this poor boy, and the delay in a CPS decision on prosecution. It really is important that the Home Office can be called to account over issues such as this, and I do hope that your committee will be able to find a way to improve the present procedures.

October 2005

Memorandum from Ms Sally Keeble MP (P 20)

1. BACKGROUND

In my last evidence to the Procedure Committee,¹ I set out my real concerns about the impossibility of holding the Government to account for a death in a secure training centre ***.

At the time I had expected that a decision would be made relatively quickly by the Crown Prosecution Service, and events would move on. This, however, has not happened, and at present there is still no decision on whether charges will be laid. As a result the coroner's hearing can still not be resumed, and, in the terms of the House rules, the matter is still *sub judice*.

That means, although questions can be put about the general issue, there can be no direct questioning about the death ***. The information gleaned from the indirect questions demonstrates the need for urgent action over the regime in secure training centres, and calls into question the contracts with the private companies that run the centres. If he had only been seriously injured, and not died, these matters could have been scrutinised in the House, and action may well have been taken. It is completely unacceptable that the more serious the incident, the less the chance of scrutiny and action.

2. OTHER LEGISLATURES

In the note I provided for my previous evidence to the Procedure Committee, I set out the results of some limited research into the *sub judice* rules of other legislatures. Where others had such rules, they were limited in their operation. A much higher value was placed on the importance of elected representatives being able to speak freely in Parliament. I can't recall finding any other legislature which included coroners' courts within a *sub judice* rule.

In the UK the formal inclusion of the coroners' courts in the *sub judice* came only in the last Parliament. It was only included at a late stage, and there was no debate on the matter in the House.

3. CORONERS' COURTS

There are five main reasons that it is completely inappropriate for coroners' courts to be included under a *sub judice* rule:

- (i) Usually there is no jury—the legal convention that informs the *sub judice* rule which applies to journalists is, I believe, that members of the judiciary are thought to be immutable to influence by media coverage and public debate, and therefore publication of material about such cases is not restricted. In most cases, coroners' courts involve the coroner sitting alone—there is no jury to be influenced by public debate. Therefore a blanket application of the *sub judice* rule to matters before coroners' courts does not conform to the more general principles underpinning *sub judice* rules, and is considerably more draconian.
- (ii) There cannot be a finding of guilt—no-one is on trial. Another of the principles underpinning the *sub judice* rule, is that people have a right to a fair trial which should not be prejudiced by public debate or media coverage. However, this is not an issue for coroners' courts. Even where there is a jury, they are not deciding on the innocence or guilt of a defendant. Coroners' courts have a limited range of decisions open to them, and cannot decide on the culpability of anyone. So no debate on a matter before a coroner's court can influence the right of anyone to a fair trial in that court.
- (iii) Length of adjournments—*** the inquest can be opened immediately after the death of the person and then adjourned for a very long period of time. The adjournment was pending a decision by the Crown Prosecution Service on charges relating to the death. No decision has yet been taken. The application of the *sub judice* rule has prevented proper examination of the failings of the Executive in two areas. One is the failings in the care *** which culminated in the death. The other is the failings in the Crown Prosecution Service which has resulted in 18 months going by with no decision on possible prosecution. Both of these are legitimate areas of concern that it is absolutely right that MPs should be able to question Ministers about on the floor of the House of Commons. The continuing delay in being able to hold the Government to account is completely disproportionate and unwarranted, given the seriousness of the issues involved.
- (iv) Lack of a remedy—it has been suggested that one of the possible ways to resolve difficulties caused by the *sub judice* rule has been via the discretion that can be exercised by the Speaker. At the previous committee hearing I was urged to take up this option.

However, this did not prove successful. I put in for an adjournment debate and at the same time put in a letter to the Speaker's office asking for a meeting to talk through the issues, to see whether there could be any relaxing of the *sub judice* rule. However, a reply came back saying that the

¹ *The Sub Judice Rule of the House of Commons* First Report of Session 2004–05, HC 125, Ev 24.

Speaker would not meet me because it might be seen to prejudice the adjournment debate ballot. Eventually my request for an adjournment debate was successful. I then got a letter saying that concerns were being expressed because the subject was possibly *sub judice*. So I then had to guarantee that I would not say anything that was *sub judice*.

In effect, then, there is no appeal against a ruling by House Officials that a matter is *sub judice*, and there is no independent route to appeal to the Speaker. Thus there is a complete control on MPs freedom of speech and ability to raise matters that are of real public concern.

- (v) Lack of comity between the Houses—one of the principles the Procedure Committee set out in support of the *sub judice* rule was the principle of comity between different institutions—in this case Parliament and the courts. What is especially galling is that this principle of comity does not seem to apply between the Commons and the Lords.

It is ironic that the Attorney General, who sits in the Lords, argued strongly for this rule to be applied to the Commons, but the rule is not applied to his own House which is also the ultimate Court of Appeal. It is very noticeable that there have been a series of references in the House of Lords. Peers have been allowed much more freedom in asking questions about secure training centres to refer more directly to the circumstances ***.

Some of the information provided in the Lords in response to these questions has been very misleading, and it has not been possible to challenge this in the Commons.

Given the continuing unwarranted injustices suffered by young people in secure training centres, I would argue that the application of the *sub judice* rule has been unwarranted, disproportionate and damaging. It has taken over 18 months to extract information that would have been available much more quickly, and still 18 months on, there is no indication as to when there will be proper action taken to prevent a repeat *** death.

November 2005

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

Q37 Chairman: Thank you for coming. As you know, the Committee has looked at the operation of the *sub judice* rule before but because of ongoing concerns we have decided to revisit this, particularly as it is applied in respect of coroners' courts. We are grateful to you for coming along today to give evidence. We are in public session but, if there is any aspect of your evidence where you wish to refer to a particular *sub judice* case to make a point which you feel it is essential we should hear, we are prepared to go into private session but I would like to leave that to the end. If you feel when we come to the end of questioning that you wish to emphasise a point by referring to a particular case we are happy to go into private session. Would you like to make an opening statement to the Committee?

Ms Keeble: Yes, thank you. I am extremely glad that you have decided to look at this issue again because it is one that has concerned me greatly. I put in a short note updated from my previous note, which I assume people have. It moves things on a bit from the evidence I gave last time because last time we went through issues about the wider *sub judice* rule and dealt with coroners' courts in particular. The Committee then took a view, amongst other things, that it would be appropriate to look at the discretion which the Speaker has and see if that provided a remedy. I went down that road and it did not because of a variety of procedural issues about getting to put the point to the Speaker. There is also an issue that, if the case that you are concerned about, as mine was, was fair and square, right in the middle of the *sub judice* rule as it applies to coroners' courts, there is not much room for discretion. It turned out that what might have provided a remedy did not and I think that is quite important because

it means that not only are Members unable to raise questions about matters that they are particularly concerned about but there is no way you can appeal against that. There is no room for manoeuvre. The other issue which has concerned me greatly which was not covered last time was the fact that there has been considerable discussion in particular in the Lords on a case that I was particularly concerned about. It seems to me that, particularly given that one of the issues that weighed very strongly with the Committee last time was that of comity between the different institutions, that has to apply between the Commons and the Lords. What was particularly galling was, given that the evidence that was provided to the Committee from the relevant minister was from a Lords minister, for a Lords minister to come and effectively silence the Commons and meanwhile for the Lords to be able to discuss the case in question, it seemed to me that that was completely unacceptable. The rule either has to apply equally across the board or, as I think very strongly, it should be relaxed. It should not apply to coroners' courts. The case I was concerned about last time is still *sub judice*. There has still been no decision from the Crown Prosecution Service. The incident was very serious and I would appreciate perhaps commenting on it right at the end. It occurred in April last year and there is still no prospect of being able to hold ministers to account for what happened. I think that is terrible. It cuts against the whole reason that we are elected and come to this place. I will leave it there because I have put this in writing and you have had the previous evidence. That covers the detail of my view. The statement serves perhaps to give some feeling to the prosaic words.

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Q38 Sir Robert Smith: After reading the report, do you still believe that coroners' courts do not need the protection of the *sub judice* rule at all?

Ms Keeble: That is right. There are a few issues. I have thought about this quite a bit and I have talked with friends about it as well, obviously, and the media. There has been quite a bit of media coverage on it. It does seem that some of the thinking that informs the *sub judice* rule as it applies to the media is different from what informs ours in terms of who can be influenced, because that was part of the thinking, that we might through debate here influence somebody's right to a fair trial. We dealt last time with when proceedings are active and influencing a jury, but I understand that there are also issues about whether you can influence a single judge or judicial figure sitting alone. We do get back to: can you influence a coroner. It seems also that there is a major issue—the Committee in a sense conceded this last time—about when proceedings are active. Personally, I do not think the *sub judice* rule should apply to coroners' courts but I certainly think there has to be an issue about when proceedings are active. It is a nonsense that, just because a coroner's court meets and says, "We have opened and adjourned" it then stays adjourned for 18 months with no prospect in sight for when it is going to resume when it is an issue of major concern affecting young people. I really think there has to be some clearer thinking about what we are doing.

Q39 Sir Robert Smith: In our report we looked at that point and a closer trigger to the case that could be prejudiced rather than 18 months out, not being able to talk about something. Do you accept at all the argument though that decisions of a coroner's court can have an impact on future proceedings or on insurance policies?

Ms Keeble: No. If we could not talk about things that affect insurance policies, there would be all kinds of things we could not talk about, as you know.

Q40 Sir Robert Smith: The outcome of the coroner's case can have an impact, obviously.

Ms Keeble: No, because the findings cannot be of anybody's guilt.

Q41 Sir Robert Smith: No, but they can have an impact. If someone's insurance policy says that suicide means they cannot be paid out on their life insurance, if the coroner's court decides they committed suicide—?

Ms Keeble: In terms of what influences an insurance policy, I do not think there is any argument at all for saying that we cannot talk about things that might at some time or another influence an insurance policy. We might as well say that there is no point talking in the Commons about anything that influences anything.

Q42 Sir Robert Smith: It is the separation between the court's decision being seen by the person affected by the decision and the confidence that the court made the decision on its own merits and not because Parliament chose to interfere.

Ms Keeble: There are several issues involved there. One is about who you influence. Part of the thinking that informs the contempt rules that journalists have to abide by—I cannot remember the detail; I am a bit fuzzy on it now—is that a jury is open to being influenced but a judge, for example, is not so there is much more freedom, as I understand it, about reporting matters where it is a judge or a single person sitting on their own. The real issue is about influencing juries. That influences a person's right to a trial. That is not about what happens to the institution; that is purely about the individual's right to a fair trial. By extension, if nobody is on trial, contempt does not arise and that is a big bit of my argument about the coroners' courts. Nobody is on trial because that is not what coroners' courts do. They have a variety of findings. It might imply that a death was not wholly accidental but it is not finding anyone guilty of anything.

Q43 Chairman: Although what you say is correct, what do you say to the Attorney General's comments when interviewed by this Committee when he accepted the point you have made but he went on to say, in effect, that although the coroner's court itself was not a trial, the coroner's court conclusion may determine whether criminal or civil proceedings then take place?

Ms Keeble: That still is not influencing somebody's right to a fair trial which seems to me to be one of the fundamental principles which we, as elected Members, have to accept. If you then say that what happens in a coroner's court can affect something that happens elsewhere, then yes, but this comes back to the fact that there is not a jury involved. If you have a single judicial figure or a judge sitting on their own, are they open to influence? That is where, as I understand it, the principles that affect the rules as they apply to journalists would say no, they do not, in the same way as we would say that if the courts say something about Parliament are we influenced by it.

Q44 Sir Robert Smith: North of the border in Scotland there is quite a protection on interfering with judges. If an appeal is on, there is no way politicians would start discussing it.

Ms Keeble: There is a third point which is about the principle of comity, the equality between institutions. It would seem to me that that is given away completely by the fact that the Lords are quite entitled to discuss the particular case which I have been barred from mentioning and they have discussed it in quite some detail. The ministers in the Lords have also mentioned it. They have referred to it by name.

Q45 Sir Robert Smith: We need to look at that relationship between the Lords and the Commons.

Ms Keeble: I do not see that the discussion in the Lords has had any influence at all on the coroners' courts and nor will it. It has had no influence on the CPS. Nothing has speeded up the Crown Prosecution's decision. I cannot see that things that have happened here have had any influence in terms of prejudicing the coroner's court.

Q46 Sir Robert Smith: It is not a question whether it has influence but whether someone could reasonably believe it could have had an influence. That is one of the worries. For justice to be seen to be done and for people to have confidence in the system, we may think we have not had an influence but if the aggrieved parties feel the process is no longer fair because—?

Ms Keeble: Who is the aggrieved party in a coroner's court?

Q47 Sir Robert Smith: Presumably, if you were the relatives of someone who was found to have committed suicide and you did not receive any insurance payment you would be fairly aggrieved when you thought it had not been a suicide and someone in Parliament had been—

Ms Keeble: It seems to me that insurance pay-outs are a whole different issue and you cannot limit Parliament's right to free speech because of what insurance companies might do.

Q48 Sir Robert Smith: No, what courts might do that impacts on people.

Ms Keeble: The issue at stake is not whether or not people get paid out; it is whether or not people have a fair trial. In some instances it might be whether or not somebody who is vested with a great deal of authority and respect is capable of making a decision without being influenced by an adjournment debate in Westminster Hall.

Q49 Mr Gauke: To give another example rather than an insurance pay-out, say you have a hypothetical case of a coroner's report on a death of somebody in custody. If there is a finding of unlawful death, that may relate specifically to, for example, a police officer, an individual who will be potentially adversely affected by any coroner's report because it will lead directly to criminal proceedings and there is, if you like, a better relationship there than with an insurance pay-out. Is there not a danger there that discussion in Parliament may prejudice or be seen to prejudice a coroner's hearing and in turn that would have quite an impact upon a criminal case?

Ms Keeble: You obviously get these sequential events and you have to work out at what point it is appropriate to discuss them in Parliament and at what point it is not. As you pick your way through that, you have to, first of all, respect a person's right to a fair trial. The trial might come quite some way down the line. There are decisions further on as to whether charges are brought against somebody. There are also issues about in-house disciplinaries.

In the instances you are talking about, those would come somewhere down the line. To limit Parliament's right to free speech to protect someone's right to a fair trial is absolutely proper. I would not criticise that. To limit Parliament's free speech because of somebody's disciplinary at work I think is not appropriate because that is an internal mechanism to the employer. To limit Parliament's right to free speech pending a decision by the Crown Prosecution Service I also think is wrong because the Crown Prosecution Service is well shielded and protected. That would be key to the issue that you have raised because somebody might have been killed in particular circumstances and, hard though it might be for the relatives, it might not be possible to bring a prosecution. I have been in that situation myself when my own sister died so I understand from the inside how it feels when that happens. To stifle debate around the process of the CPS making a decision would be wrong. When it comes to a coroner's court, I think it is right that for the duration of the court hearing the matter should not be discussed in Parliament. Obviously this idea that you cannot even refer to it is very hard to police but it is right that something should not be discussed where there is a jury sitting and where it is a death in custody. What is happening might well influence a jury but the hearing itself can be quite short. If it is a decision without a jury, in which case it is a different set of circumstances from the ones you are talking about, or if the inquest is simply opened and adjourned and remains adjourned, it seems a nonsense to limit Parliament's free speech for the whole of that period of time, particularly when the issues at stake are of key concern to the public. We should as MPs be able to raise our issues in a general sense and also in a direct sense hold the executive to account for what has happened.

Q50 Rosemary McKenna: In your letter you say, "The area in which the Speaker can use his discretion is so slight that it does not provide a remedy when there is a matter of real public concern that is caught by the *sub judice* rule." Is it simply a wider use of the chair's discretion that you would look for or a more generously defined rule on the chair's discretion? You say there is a difference between how it applies in the Lords and the Commons. Are the Lords given different advice? Is the Leader?

Ms Keeble: The Leader serves a different function. The Lords do not have anyone organising them so they organise themselves. They chat about what they want.

Q51 Rosemary McKenna: The guidance to the Speaker is far too narrowly defined?

Ms Keeble: I could not get to the Speaker. I do not want to criticise the Speaker for this because I think he behaved absolutely properly. There is no procedure. There is no clear route. I have had no indication at any stage that there is any possibility for discretion or how a discretion might be operated. The people who advise the Speaker are the same people who rule us out of order. You are stuck. I do not think it is any fault at all of the Speaker. If the

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Speaker is told that a coroner's court is open, that a case has been opened and adjourned and the matter is *sub judice* until it is concluded, that is pretty straightforward. If a Member tries to raise something before a coroner's court where it has been opened and adjourned, then they are bang to rights; it is *sub judice*. I tried the discretion route but I could not even get to the Speaker so I could never discuss this. I do not see how it works.

Q52 Rosemary McKenna: Do you think that should apply to chairs of select committees who also have a very narrowly defined discretion, it would appear, given the advice from the clerks?

Ms Keeble: I think the *sub judice* rule needs rewriting. I do not think it should be a matter for discretion. I believe that very strongly. I think what has happened in this instance is an absolute outrage.

Q53 Rosemary McKenna: It is not the operation of guidance that is the problem; it is the actual *sub judice* rule?

Ms Keeble: That is right.

Q54 Rosemary McKenna: Looking at the procedures of the House in terms of the application of the *sub judice* rule would not really resolve the problem?

Ms Keeble: I suppose you could draw up some guidance as to how you think the discretion might operate so that everybody knows. I think the more important thing is to look at what the *sub judice* rule means because if the Committee wants to continue to apply the *sub judice* rule to matters before coroners' courts—I personally disagree with that—and if that is the conclusion the Committee reaches, I think it should be much more precise about when matters are before a coroner's court. I would argue that opening and adjourning a case and leaving it there for 18 months should not stifle debate on the issue at hand for 18 months. I think that is a nonsense.

Q55 Rosemary McKenna: I think that is a different issue. That is to do with the length of time it can take the Crown Prosecution service to bring it to trial.

Ms Keeble: It is not unusual. If you think of the Marchioness disaster on the river, that coroner's court was adjourned for several years.

Q56 Chairman: In your view, the scope of the *sub judice* rule should be looked at. You would like to see guidance given to the Speaker and to chairmen of committees and the contents of that guidance should be made known to Members.

Ms Keeble: Yes. If the *sub judice* rule is going to continue to apply to coroners' courts, this is not a matter of guidance. That section of the *sub judice* rule should be more narrowly defined so that it should only apply to coroners' courts when proceedings are active, ie when the hearing is taking place. You then do not prejudice the hearing and that is absolutely clear. Further, if there are issues which are felt to be so outstanding that there still needs to be discretion, it must be clear how that should be applied and how Members are to go about

asking for discretion, because it was unclear to me and simply writing to the Speaker was not the way to do it.

Q57 Chairman: In the light of the questions you have had today, are you still maintaining that, in your view, the *sub judice* rule should not apply at all to coroners' courts whatever the case and the circumstance?

Ms Keeble: I personally think it should not.

Q58 Ms Clark: If the Committee decides that the *sub judice* rule should still apply in coroners' courts, do you think it would be of assistance to have formal guidelines outlining the Speaker's power of discretion and defining what counts as a matter of national security?

Ms Keeble: I do not think my case was a matter of national security. It was much more a matter of public interest. I still think there should be definition about when a case is active. That is a bit of a compromise between not having it apply to coroners' courts at all and having the application that we have now. The guidance should include cases where it might be thought that discretion should be allowed and something about how they should go about doing that. It may well be that you would not just say national security but perhaps also outstanding public interest or public concern, something like that.

Q59 Annette Brooke: We are greatly concerned about the inconsistency. I do not recall the exact events. Once it had been raised in the Lords, did you then make further inquiries in the Commons as to whether you could raise it?

Ms Keeble: It had been raised in the Lords before I gave evidence at the Committee last time. The Committee then said, "Try to see if you can get the Speaker's discretion" so I tried to do that. After that, about a couple of weeks ago, the Lords discussed it again in much more detail after I had done some media coverage of it. I was able to speak about it outside here and everybody was able to cover it. There is no issue about journalists and the *sub judice* rule; it is just in here. I have not been back to the Speaker again. I have tried to chase up the CPS through questions to the Solicitor General but I have not gone back to the Speaker to ask to raise it in the Commons, no.

Q60 Chairman: Has the fact that the House of Lords discussed this led to you having any difficulty locally with people either stating or inferring that you are not discharging your duties as an MP?

Ms Keeble: No. Because these are very disadvantaged children in the care of the state, this is one of the tragedies of it all. They do not have people who by and large are prepared to speak up for them so I do not think anybody would.

Q61 Chairman: Is there anything else you want to say before we have a short, private session?

Ms Keeble: It might be helpful if the Committee understood a bit about the circumstances as to why it is so acute.

Chairman: Perhaps this would be better in private.

Q62 Chairman: Ms Keeble?

Ms Keeble: I appreciate the opportunity to set out the concerns in a little more detail. It has been 17 months that I have been trying to get questions raised and answered about this particular case. Since I last came to speak to the Committee, partly because I got very exasperated and I was then expecting a CPS decision quite quickly but that did not happen at all, I did quite a lot of press coverage and people did come up and speak to me about it locally, people who knew about what had happened in that home. They had been outraged by what had happened and it was absolutely clear, so far as I could see, that the procedures used ***, were completely wrong. *** It is absolutely clear that the procedures used would not be acceptable. *** I think it is outrageous, ***, that it has been possible to go on for 18 months without anyone held to account ***. All you can do is put down general queries about this, that and the other.

Q63 Chairman: That is not strictly accurate, is it? Have you pursued this privately with the Home Secretary? You said the only avenue open is to put down questions. We all know there are certain cases where it is better if you go and see the Minister and lay on the table your concerns. Has the Home Secretary been prepared to see you on this?

Ms Keeble: Yes. I have seen him. I have seen the parliamentary under-secretary.³ I have put down questions. I have had an adjournment debate on the general issues. The only piece of information for which I did not have two other independent sources the Minister herself confirmed. *** There is a difference between being able to go and have a private conversation with somebody in an office and being able to raise something on the floor of the House and be absolutely clear with people about what your concerns are. I suspect that there will not be a prosecution. It comes back to the point that you raise. It is quite possible for someone to have been killed in circumstances that were highly debateable without anyone being criminally culpable. I suspect nobody will be prosecuted. Different reasons are given for there not having been a decision by the

³ *Note by witness:* This is a bit unclear, and could be taken as meaning that I have just spoken to the parliamentary under-secretary. So I would like to make clear that I did see the Home Secretary to speak about the issues surrounding the *** case—the case itself of course is *sub judice*. I have also spoken on several occasions with the parliamentary under-Secretary in the Commons. I have also spoken formally once, and informally several times, with the Solicitor General who is responsible for the CPS, about the delays in the CPS making a decision. The Solicitor General is also constrained in what he can say.

CPS. I understand it is now due fairly soon. 18 months down the line, you have to start from square one ***. That is too long ***.

Q64 Chairman: Can you share with us some of the reasons given to you as to why it has taken so long?

Ms Keeble: I do not know. The most recent reason that I have been given is that they sent some papers off—I have no reason to doubt this—to the family solicitors for them to send to their expert witness and they have not come back yet. In July I had a meeting with the head of the Crown Prosecution Service in Northamptonshire and I was told that the decision was expected by the end of August.

Q65 Sir Robert Smith: The coroner has adjourned until?

Ms Keeble: Whenever.

Q66 Sir Robert Smith: Are they waiting for some event?

Ms Keeble: They say they are waiting for a decision by the CPS. If the CPS decides for a prosecution, it will be *sub judice* again so it will just roll on for several years. *** Issues like that are proper issues of public concern that need to be raised and discussed. I do not have an ideological objection to private companies providing public services but I do have an objection to this type of thing happening. I think it is outrageous and it should be discussed. It is completely wrong that *** there should not be proper scrutiny for 18 months just because a coroner's court opened and said, "We are opening; now we are adjourned" and for 18 months nothing happens.

Q67 Sir Robert Smith: If we had a half-way house of opening and adjourning, you still would not be prejudicing them.

Ms Keeble: You can deal with the issues surrounding the death. I have discussed the general issues *ad nauseam* in an adjournment debate and through questions. ***

Q68 Rosemary McKenna: ***

Ms Keeble: ***

Q69 Chairman: Do you have in your office details of the reference in Lords *Hansard* where they have referred to this case? It would help us to pinpoint precisely what was said in the Lords, if you could send it to the clerk.

Ms Keeble: I will, yes. They had one of these unstarred questions so they had a ping-pong to and fro. They referred to this and the Minister referred to it as well.

Q70 Chairman: If that is information you have fairly easily to hand, it would be helpful.

Ms Keeble: I will find it.

Q71 Chairman: Thank you very much. Your evidence has been very helpful to us. It is not a question of black and white here. It is not just a question of us having to decide should the *sub judice*

rule apply to coroners' courts or not. As I think you gathered by the flavour of the questioning, there is also the aspect, if we feel it should apply to coroners' courts, should there be some way of narrowing its operation to get round the problem you have clearly

identified. That is what we will be looking at in the months ahead. It is an issue we are taking seriously and we are going to be as thorough as we need to be in trying to put to the House a way forward.

Ms Keeble: Thank you very much.

Wednesday 21 June 2006

Members present:

Mr Greg Knight, in the Chair

Mr Christopher Chope
Ms Katy Clark
John Hemming

Rosemary McKenna
Sir Robert Smith
Mr Rob Wilson

Letter from Rt Hon Lord Goldsmith QC, Attorney General (P 27)

Thank you for your letter of 14 November 2005 and your invitation to comment on your new inquiry. As you will appreciate, such comments as I might have would be made in my capacity as custodian of the public interest, and not as a member of the Government. The scope of the *sub judice* rule is a matter for the House.

You will appreciate as well that it is not possible to make any sort of detailed contribution to the debate until the scope of the Committee's inquiry has been resolved. In that connection, I note that your proposed inquiry is prompted by John Denham's experience. My recollection is that his difficulties were principally because of the application of the *sub judice* rule to criminal proceedings. However, it may be that the question of inquests was also an issue. Against that background, I thought it might be helpful to reiterate some of the points which I made when I gave my evidence earlier this year.¹

First, I do not believe that there is a case for excluding coroners' courts from the scope of the rule: there is a real possibility of prejudice in relation to the operation of these courts, and coroners do bring to my attention the concerns they have about media comment on cases they are dealing with. The questions which coroners determine can have very important consequences, and for this reason, the Contempt of Court Act 1981 applies to proceedings in their courts.

Secondly, it is important to remember the particular significance which attaches to Parliamentary proceedings, and the different ways in which they may impact on judicial proceedings. It is recognised that there is generally an increased risk of prejudice where issues of fact are to be determined by a jury as opposed by a coroner. But that a coroner will not sit with a jury does not remove the need for the rule. Witnesses who appear before the coroner may be influenced by what has been said in Parliament. There may also be problems of perception. If a coroner were to enter the same verdict as suggested in Parliament, it might create the impression that he had given inappropriate regard to the views of Parliament regardless of whether he had in fact done so.

As I indicated when I gave my evidence, it may be that there is room for clarification for when the *sub judice* rule should apply in relation to coroners' courts. For the purposes of the Contempt of Court Act 1981, proceedings are active from the moment an inquest is opened. I recognise that this can lead to quite a protracted period of time during which the rule would be in operation, and accepted before the Committee that for this reason it may not be the right solution to the problems identified. Of course, another approach is to explore the solution identified by the Committee: namely, to rely on the discretion of the Speaker to balance the desirability of the House discussing a matter of public concern against the likelihood of prejudice. I agree with the Committee that the risk of prejudice in any given case may well be low if the resumption of the inquest were not expected for several months. But delay may not be in itself determinative of risk, and it may be helpful for the Committee to explore the full variety of factors the Speaker would have to bear in mind when carrying out the balancing exercise. It may also be helpful to consider whether there would be ways of enabling the Speaker to have access to information about the ongoing inquiries, directly or indirectly, to enable him to make a judgement.

I hope these comments are helpful. I will follow your inquiry with great interest. If I can offer any further assistance, I would be pleased to do so.

December 2005

¹ First Report, HC 125, Ev 9 (2004-05).

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

Q72 Chairman: Welcome, Attorney, and thank you for coming. We are aware that you have given evidence to our predecessor Committee but this is still a difficult issue that we are grappling with so we are grateful to you for agreeing to come again. We are sorry that we have had a few hiccups before today. We have had to defer twice, I think, for various reasons. Can I remind Members of the Committee that the Attorney is here in his capacity as custodian of the public interest and not as a member of the government. Do you wish to make an opening précis of your position before we go into questions?

Lord Goldsmith: I do not think it is necessary. I am sure what I have to say will come out in the course of the questions you want to put to me.

Q73 Sir Robert Smith: Could you reinforce the view you held last time? You still felt that coroners' courts should be covered by the *sub judice* rule to avoid the risk of prejudice. Although they are not necessarily making specific decisions on people, the outcome of their cases could cause prejudice if they were interfered with. Can you give some examples of the sort of prejudice that would be caused and cause you the greatest concern?

Lord Goldsmith: Absolutely. I absolutely still hold the view that there is a need for a *sub judice* rule in relation to inquests. Perhaps I can come on to quite what its content and definition are and how it applies but I think there is a strong need for it. The reasons for it include prejudice but I think they are wider than that and this does reflect the evidence that I gave before. The Joint Committee on Parliamentary Privilege when it reported in 1999 said, to my mind, rightly that there were three reasons for the rule. The first is the importance of not prejudicing a fair trial. Statements which are made outside any form of judicial tribunal might in certain circumstances prejudice a fair trial. The classic example is of a jury who are influenced or may be thought to be influenced by something which has been said outside on an issue which they have to decide, but it is not limited to what a jury may think because witnesses sometimes can be affected in what they say to the police or what they say in evidence because they think, as a result of public comment, it is unpopular to say that or it would be popular to say it, or just that their recollection is influenced by that. I emphasise again, if I may, what is said in Parliament I think is capable of being very important because it is potentially seen as very authoritative. Anything that is said in Parliament will be treated as authoritative to varying degrees, depending upon all the circumstances and, secondly, it is likely to be widely reported. That is the first reason. An example which would be very clear where there might be prejudice would be if there were a debate in which there were strong views being expressed that, for example, a particular safety mechanism or lack of safety mechanism operating in a particular public industry was likely to cause death. That might be the very issue which the inquest was being asked to consider: whether the death was by accident or by some criminal act or gross negligence. The second reason is comity. It is simply that Parliament and the

court should each respect what the other does and should each let the other get on to deal with the business that they have. The risk of discussion in Parliament on an issue which is yet to be determined in a court or in an inquest is that comment is being made on evidence which is yet to be presented and tested. The third reason is an important constitutional reason. It is important that judges or other judicial tribunals do not appear to be subject to political pressure. The 1999 committee said that it is important constitutionally and essential for public confidence that the judiciary should be seen to be independent of political pressure. The danger there is that, if there are strong statements made in Parliament, it might be thought after the event by someone who is affected by the decision that the decision was in turn affected by the debate which had taken place in Parliament. Those, I think, are the reasons. I have tried in the course of that to give an example of potential prejudice. Others would be if there were an event in which someone had been killed perhaps in the course of a police operation. That is obviously a matter of very strong public interest and debate but views expressed about it in Parliament and the causes and so forth might well affect the very decision which the inquest has to make as to whether or not someone is in what sense responsible for it.

Q74 Sir Robert Smith: In the current climate, it is quite important to understand that judges need to be seen to be independent in the political process.

Lord Goldsmith: That is a view I hold.

Q75 Sir Robert Smith: For the Members of the House who are concerned, they feel that coroners' courts do not put people in prison. Before you indicated that there can be a cascade effect with what comes out of coroners' courts. Is the prejudicing of the decision of a coroner's court then likely to affect a trial based on that?

Lord Goldsmith: It could. You are absolutely right. There can be a cascading effect, for example, if an inquest reaches a decision that there has been an unlawful killing. Prosecutors, even if they have already made a decision not to prosecute, are required by the rules that they have set themselves and that I have set them to re-examine all the evidence and see what decision to make. It could affect that decision but coroners' decisions can have impacts in other ways. They can affect insurance claims. A decision that some families can be concerned about is whether or not the effect of the decision of a coroner is that somebody commits suicide. That can have an impact on all sorts of areas. It can certainly affect decisions about civil liability for compensation. If the effect of a verdict appears to be a criticism by the jury or the coroner of an employer or an occupier, something like that, that can have a powerful effect on subsequent proceedings. We have coroners' inquests because people care about the result. It is important to know why somebody died these days, since the courts have interpreted our obligations under Article 2 of the European Convention to mean that coroners, when they look at the question of how somebody died,

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actually have to go further than just the narrow causative effect and examine sometimes the responsibility particularly of public authorities in that death.

Q76 Mr Chope: In your letter to the Committee you note that coroners' courts are subject to the Contempt of Court Act. What are the current criteria for assessing what constitutes contempt of court?

Lord Goldsmith: There are two issues. One is whether or not proceedings are active. This applies to all courts. In relation to coroners' courts the law is that in effect the coroner's proceedings are active from the moment that they are opened. That is exactly the point that gives rise to the difficulty that you are grappling with because it can be opened in some cases at a point in time which is a long way from when the substantive inquest takes place. The second consideration for when there is a contempt is whether or not, under the strict liability rule, what is said is likely to give rise to a risk of prejudice to the proceedings. That is not an element which applies of course to the *sub judice* rule.

Q77 Mr Chope: One of the concerns Members have is that there seems to be a lack of enforcement of these principles as they affect newspapers and yet the consequence of having strict rules for ourselves is that the principles can be flouted by the newspapers with impunity. Have you any examples of where a coroner's court has been able to take action under the Contempt of Court Act for breaches of that Act or other examples recently of where the Contempt of Court Act has been used rather than ignored? It seems as though the press are ignoring it with impunity and yet we are seeking to impose very rigid principles upon ourselves.

Lord Goldsmith: I agree it is not that often but I do from time to time prosecute newspapers for contempt of court. They might say even more regularly I threaten them. What does happen not infrequently in very high profile cases is, where there is a concern that newspapers look as if they are likely to go too far, then I will one way or another warn them. Sometimes there may be a very good reason for that. We had, for example, an issue in a high profile case which was an alleged gang rape of a young woman by premiership footballers. The concern I had was that naturally the newspapers wanted to publish the names of the alleged suspects and perhaps print their photographs. That would have been a mistake. They would not have known this at the time but the young woman needed to identify in an identification parade who it was that she said had done certain things. We had a discussion with the newspapers which did not resolve it entirely satisfactorily and I got an injunction against the newspapers from publishing those photographs. That is just an example of taking action to stop it because it would have prejudiced the administration of justice. In other cases I have taken different action. The Contempt of Court Act is very much there. There is one aspect of it though which probably accounts for the observation that you

make. That is that the courts take the view that, in order to judge how much prejudice there is and if there is a serious risk of prejudice, you have to look at the period of time between when something is said and when the jury may be seized of the issue. If it is nine months ahead, unless it is a very striking statement, the courts tend to say, "They probably will not remember that that had been said and in any event that may be part of the evidence that they will hear so there is no problem" or, "We will direct them to consider just by reference to the evidence." In those cases they would not necessarily accept that there was a contempt. If it is closer to the events, they may well do. I have prosecuted newspapers that have done things closer to the events and they have been fined quite substantial sums of money for doing that. As to inquests, I cannot recall an occasion—my officials who are with me may—where we have taken contempt proceedings in relation to an inquest, but I do know of examples where coroners have come to me expressing concern. I think from recollection in at least one of those cases we then made contact with the newspaper and said, "Hang on. You have to be careful what you are saying because this may prejudice the outcome of the inquest."

Q78 Ms Clark: You have said this afternoon that anything said in Parliament is authoritative. You have argued on previous occasions that words spoken in Parliament have a greater influence than the media and that therefore Parliament has a responsibility to limit its own freedom of speech in some cases. Would you accept that this must be balanced against the expectation that Parliament also has a need to address and discuss issues of national importance?

Lord Goldsmith: Of course. Absolutely. I think the question is how you balance the two things. There are two points. First of all, the *sub judice* rule wherever it applies does not stop debate; it delays it. It never prevents it for all time. The second is, I recognise though the concern, that there will be some matters which are matters of public interest, which there is a strong reason to want to debate now, but there is a risk of getting into an individual case. I wanted to suggest that part of the solution to the problem that you are looking into at the moment probably lies, you may think, in the way that discretion is exercised by the Speaker, by the House authorities, to allow debate in certain circumstances where it is not really talking about the case but about wider issues of public concern. That would be one of the circumstances that could be taken into account.

Q79 Ms Clark: Some Members have expressed concern that there is currently a very cautious interpretation of the *sub judice* rule by the chair. When John Denham, the chair of the Home Affairs Select Committee, spoke to us, one of the comments he made was that he has a particular concern when something of this importance happens—he was referring to the London terrorist bombings—that, if the House of Commons becomes the one place where the issues cannot be aired because they are

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being widely discussed in the media, “. . . it seems to me that it damages the credibility of the House of Commons.” Would you comment on that?

Lord Goldsmith: John Denham came to talk to me about this before he opened his Committee’s inquiries because he was concerned about that and I tried to give as much help as I could. It was not so much an issue about inquests. It was more likely to be an issue about criminal proceedings. I recognise the problem. Whilst a comment made in a newspaper may not carry ultimately a great deal of weight because there are likely to be competing comments made, I think that conclusions, for example, reached by a select committee, strong statements made in the House, statements made by ministers perhaps particularly in response to inquiries about a case, could carry a lot more weight than a comment in a single newspaper. That is one of the reasons why there is a more cautious approach. I think the other reason is the practicality. It is difficult to police a debate unless you have a clear rule as to what you can and cannot speak about.

Q80 John Hemming: You have indicated that the *sub judice* rule is stricter than the provisions of the Contempt of Court Act. You have also indicated that there are practical reasons in terms of managing debate but would you say there are also reasons of principle in terms of respect for the courts? Where would the main source of the reasoning be for the rule to be more strict than the Contempt of Court Act?

Lord Goldsmith: I think it is both of those points. It is difficult to police. You need a clearer rule because of the constitutional position of Parliament and the courts. It is perfectly legitimate for newspapers or others to comment on what is happening in courts. If Parliament does it, that really does potentially interfere with the balance between what are the two arms of the state.

Q81 Mr Wilson: The 2001 *sub judice* resolution by the House of Commons states that the *sub judice* rule can be waived where “in the opinion of the chair a case concerns issues of national importance.” Firstly, do you accept the need for a national importance provision?

Lord Goldsmith: I would not have thought that the waiver has to be restricted to that instance, no. I would not have thought it needs to be only in that example.

Q82 Chairman: You are saying there ought to be a wider discretion with the chair?

Lord Goldsmith: Yes.

Q83 Mr Wilson: We have had witnesses who have argued that there would be little prospect of prejudice if discussions in Parliament were confined to general issues of policy rather than the facts of a case. Rather than having a national importance exemption, would it be better to go along that route?

Lord Goldsmith: There is force in that. I think there is a difficulty in spelling out too clearly just what the cases are and what they are not. That is the point, I suppose, about having a discretion. There is a problem with inquests that there can be a substantial delay between the moment that they become active and therefore the rule starts and when the actual proceedings take place. The greater the distance in time, the less force there is in being concerned about at least prejudice.

Q84 Mr Wilson: Could you have a general discussion of the policy areas on a case by case basis as long as you did not go into the detail of the facts of an individual case?

Lord Goldsmith: I think in many cases you could. It is a bit of a slippery slope and you would have to leave the authority, the Speaker to have a strong ability to control. I can speak about colleagues in my House, if not in this House, who would have no difficulty at all in dressing up what is in fact a debate about a specific case by making it look as if it is a debate about general principle. One would want to watch that taking place so that the rule was not abused. In principle, that is the sort of area where you would want to allow something to take place whilst being very careful not to allow it to descend into a debate about the individual case.

Q85 Chairman: In practice, how do you get involved and how regularly do you get involved in advising Members of either House or indeed select committees on issues of *sub judice*?

Lord Goldsmith: I can only think of one example which is where John Denham came to see me.

Q86 Chairman: Your door is open to any Member or select committee who wishes to seek your advice?

Lord Goldsmith: I see myself as more an adviser to Parliament than perhaps to individual Members but I would certainly consider any question of an individual Member, although the Member might in any event want to go to the Speaker or to the Table for advice rather than me.

Q87 Chairman: Are you able to provide advice on specific cases where, for example, there may be some information you have which would not be available to the Speaker?

Lord Goldsmith: I would be very happy certainly to communicate with the Speaker on issues of that sort, absolutely, in case I had information that it may be helpful for the Speaker to have. I did want to make one other suggestion, if I may, in that area. I think it would be perhaps helpful if you have not already done so to talk to the Coroners’ Association because it seems to me one possible source of information which might help the Speaker reach decisions on his discretion might be getting information from the relevant coroner, who might be able to give some factual information which might show where there is a real area of concern or there is not an area of concern or it is going to be a long time and he does not have much concern about it.

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Q88 Chairman: In due course maybe a system could be in operation where there was a direct link between this case and the chief coroner?

Lord Goldsmith: Yes.

Q89 Chairman: Do you agree with what I think is a fairly widely held perception that advice given to the Speaker and to the chair of a select committee tends to be, in the main, overly cautious?

Lord Goldsmith: I do not know if it is overly cautious. I am not privy to the advice that is given to them so I could not say whether it is. I would understand that one should err on the side of caution because the damage could be very great and because debate is being delayed, not prevented.

Q90 Chairman: Would it give you a difficulty if we formed the view that there ought to be a greater consultation with your office before rulings are made?

Lord Goldsmith: I would try and do everything I could to make that work. We would have to discuss with the Table and with the Speaker just what we wanted. There have been occasions where I have had communications with the Speaker about particular issues which have arisen. Sometimes there is quite a lot of pressure of time which makes it a bit difficult but I always respond in the best way I can.

Q91 Mr Chope: One suggestion is that there should be published guidance for the chair setting out when it would be appropriate to waive the *sub judice* rule and under what conditions the waiver would operate. Do you think that would be practical? Is it something you would support?

Lord Goldsmith: I am concerned as to whether it would be practical. It is difficult to envisage all the circumstances in which it would be right to waive and all the circumstances where there may be dangers which are not foreseen. I think it would be right to leave it to the Speaker. One can indicate perhaps that one would expect the Speaker to look more favourably on cases where it is clear that it is a debate about a matter of public importance which does not touch on the case, where it is a case where there is likely to be a very substantial delay between the debate and the inquest itself. For my own part, I would not want to tie the Speaker down. The interest I have particularly in trying to assist the House is that I have a responsibility to deal with contempt if it happens and of course what happens in Parliament cannot be contempt so there cannot be a prosecution for something that is said in the House or a report of it, but it could have the damage on proceedings which I am concerned to avoid in the interests of the administration of justice.

Q92 Mr Chope: You are saying that, because there is no effective sanction, it means you have to be extra cautious?

Lord Goldsmith: No, I am not saying that at all. I think you should be as cautious as the circumstances require, no more and no less. I am just indicating that I have an interest in not seeing proceedings damaged but I rightly do not have in relation to Parliament the sanction of the criminal law.

Q93 Rosemary McKenna: You referred earlier on to the fact that the *sub judice* rule delays discussion but does not prevent discussion. However, a lot of the frustration of Members is that very fact. Sometimes a coroner's inquest can be opened and immediately closed and stay closed for something like 18 months. How do you think that issue could be addressed? What is the best solution to that problem? Is it greater use of the Speaker's discretion or maybe redefining the period for which inquest proceedings are considered active?

Lord Goldsmith: I think it is the former. It would be attractive to have a sort of bright line rule which we defined when proceedings were active. It is quite difficult to find one which really meets the objective from the analysis I have seen. I know one suggestion is that you say only when a hearing has been set down, but it is not uncommon for an inquest to be opened and a date to be given which is a long way off but still the date is given. I am not sure that would meet the concern. That is why I think the discretion route is the better one.

Q94 Rosemary McKenna: You are saying there is not a clear trigger point when an adjourned inquest could be reclassified as active?

Lord Goldsmith: It is difficult to find one which would meet the concerns that Members have expressed.

Q95 Rosemary McKenna: You are coming down on the side of clearly saying that there should be greater use of the Speaker's discretion and the chair's discretion?

Lord Goldsmith: Yes.

Q96 Rosemary McKenna: I think the John Denham one is interesting because he has chaired a select committee. We were asking him why he could not use his discretion and I think he had obviously discussed it with you. Somewhere around that we have to find a solution to this issue because I think they are afraid to use their discretion. Would you agree with that?

Lord Goldsmith: I think they may be. I do think there is a good reason. Take John Denham's work. It is terribly important. On the other hand, at the time that he was doing this potentially there were some criminal proceedings taking place. Nobody here or in the House would want to see criminal proceedings prejudiced by something that had been said because it is people's liberty; or still—and this is what happens—the judge saying, “These people cannot have a fair trial any more.” It is commonplace now.

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People will say, "Look at the degree of press comment. I cannot have a fair trial. You should stop this." It is not in the public interest that these things should not ultimately be decided in court. I am sure it is frustrating for Members but I think there are very good reasons for us not to overstep the bounds.

Sir Robert Smith: On the issue of delay, do you think the reforms in the draft Coroners Bill will do anything to speed up the process and maybe in a sense take away some of this frustration?

Q97 Chairman: Or make it worse with appeals?

Lord Goldsmith: I do not know about making it worse because we have appeals in a sense but through a different route. Another of my responsibilities is to filter applications to reopen inquests. The question as to whether it is going to make things better is one that you might want put to DCA ministers because they are responsible for resources which coroners will have and the way that procedures will operate. They will have a view as to how much that will speed up inquests. There will though always be some inquests which are opened and take a long time because they will stop whilst criminal proceedings take place.

Q98 Sir Robert Smith: Whilst criminal proceedings are taking place that is another reason for it to be *sub judice*.

Lord Goldsmith: Yes.

Q99 Ms Clark: Are you aware of the recent cases in the Lords where incidents subject to coroners' inquests have been mentioned and discussed? Do these apparent breaches of the *sub judice* rule give you any cause for concern?

Lord Goldsmith: I am only aware of it because I have been provided with the memorandum which has come from the Clerk of the Parliaments to you.¹ I am not responsible for regulation and how the Lords regulate their affairs. I think it is unsatisfactory if breaches of the rule have taken place because, as he says in his memorandum, the rule ought to be the same in both Houses. I am sure that is right because I am sure that the Members of both Houses should have the same opportunities to debate matters which otherwise are *sub judice* and perhaps the same restraints on debating them.

Q100 Ms Clark: Is it fair to say that you have not been required to take any action in relation to any of those cases?

Lord Goldsmith: I do not think there is any action I could take because Parliament regulates its own affairs ultimately. It is for Parliament to determine, not for me.

Q101 Ms Clark: Are you aware of or do you believe that there has been any prejudice to any inquests as a result of these cases?

Lord Goldsmith: I am not aware of any in relation to the two incidents of which I know.

Q102 Ms Clark: I suppose one of the points that could be made is, if these cases have been discussed and there has not been any prejudice created, does that suggest in any way that Parliament maybe can debate these issues in coroners' cases without causing prejudice?

Lord Goldsmith: I do not think you could jump to that conclusion from those two examples because it obviously depends on the circumstances of the particular cases. I am sure it is right that there will be circumstances in which things can be said about ongoing inquests which would not prejudice those. That is not the only reason for having a rule, as I have suggested, but the difficulty when you lay a rule down is avoiding the case where you could have prejudice arising, which is why the discretion is important.

Q103 John Hemming: The Public Administration Select Committee has told us of the difficulties it has experienced when considering decisions of the Ombudsman that have been taken to judicial review. Is it your understanding or view that judicial review cases are, can be or should be subject to the *sub judice* rule?

Lord Goldsmith: I would have to think about that a bit further. In terms of prejudice, judicial review is a much less likely road to see prejudice because it would be judges who are deciding it, not anybody else, and there will not be any witnesses at that stage. There is still a question mark about the constitutional relationship between courts and Parliament at that point. I am not otherwise alive to those issues. I will, if I may, see if we have any more information and if there is anything further I can add to that perhaps I can send it to the Committee.

Chairman: Certainly.

Q104 Mr Chope: Can I ask about this issue of comity between Parliament and the courts? Sometimes we feel that there is not much reciprocity. What do you think can be done about that?

Lord Goldsmith: I think there is a great deal of reciprocity. Judges might think it is the other way round. The Bill of Rights, for example, is very well understood by the courts and it will crop up from time to time. The courts will say, "Should we be looking at this at all?" We had a recent instance, for example, when we had a debate which ended up in court proceedings about the Hunting Act and whether or not the Parliament Acts were valid. It was tremendously important. It was about the powers of the Commons versus the Lords. The Court of Appeal were very concerned as to whether they should be considering the issue at all on the grounds that it was interfering with the sovereignty of Parliament even to be considering whether an Act

¹ Written Ev 44.

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of Parliament was valid. In the end, we took the view that it was right that they should because nobody else could rule on this. Otherwise, one would have uncertainty about it but I am confident they do take it seriously, even if that does not always seem to be the case.

Q105 Chairman: Is there anything else you want to say to us today?

Lord Goldsmith: I do not think so. Thank you very much.

Q106 Chairman: Thank you very much for coming and thank you for your comprehensive and detailed answers to our questions. I am sure if, when we reflect on today's session, we have any further questions we can deal with those by an exchange of letters.

Lord Goldsmith: Yes, of course.

Memorandum from the Clerk of the House of Commons (P 26)

THE *SUB JUDICE* RULE AND INQUESTS

Introduction

1. The Procedure Committee has decided, following representations from the Liaison Committee, Mr John Denham, MP and Sally Keeble, MP, to revisit certain aspects of the inquiry into the *sub judice* rule which was conducted by its predecessor committee in 2004–05². My understanding is that the focus of the Committee's interest is primarily on the application of the *sub judice* rule to proceedings in coroners' courts, and this memorandum concentrates on that issue. For my views on the *sub judice* rule more widely, I refer the Committee to my written and oral evidence to the previous inquiry.³

Background

2. The explicit extension of the *sub judice* rule to cover inquests was agreed by the House following the report of the Joint Committee on Parliamentary Privilege of Session 1998–99.⁴ The Joint Committee did not offer specific argument on the point: the extension was simply incorporated in the text of a comprehensive new draft resolution which they recommended should be adopted by both Houses in order to secure greater clarity and consistency in the application of the rule and to make it conform to current legal processes.

3. The Procedure Committee in its report of 2004–05 reached two conclusions about the *sub judice* rule in relation to inquests. First, while recognising 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,” the Committee preferred to rely on the Speaker's discretion to get round this problem rather than to recommend a change in the wording of the rule. Secondly they recommended that “the two Houses should consider jointly how the points at which cases before coroners' courts are to be treated as active could be more suitably defined”.⁵ The memorandum deals with the latter issue, in paragraphs 9–11 below; but in view of the evidence given by Mr Denham and Sally Keeble, it also rehearses the arguments of principle about the application of the *sub judice* rule to coroners' courts.

Issues of principle

4. One guiding principle which the Joint Committee on Parliamentary Privilege followed when recommending the revised formulation of the *sub judice* rule in 1999 was the desirability of ensuring as much conformity as practicable between the provisions of the rule and the provisions of 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 regardless of intent to do so. For the purpose of this strict liability rule, section 19 of the 1981 Act defines “court” as including any tribunal or body exercising the judicial power of the State. It is well established that a coroner's court is an inferior court of record which has an inherent jurisdiction to impose a penalty in respect of contempts committed in the face of the court; and so it is clear that it is a body exercising the judicial power of the State. It was no doubt for that reason that the Joint Committee took it for granted that inquests should be included in the *sub judice* rule, and saw no need to advance specific argument to support their inclusion.

² First Report, HC 125 (2004–05).

³ Ibid. Ev.1–8, Ev.34–5, Ev. 36–7.

⁴ HL Papers 43-I, HC214-I (1998–99), paragraphs 189–200. The relevant resolution of the House implementing the Joint Committee's recommendations was on 15 November 2001.

⁵ HC 125 (2004–05), paragraphs 27 and 28.

5. Apart from these technical and legal considerations, however, there are other substantial arguments to support continuing to apply the *sub judice* rule to inquests. Although the purpose of an inquest is to make a finding of fact rather than adjudge an individual guilty or not guilty of an offence or to impose penalties, a finding (for example of unlawful killing) can on occasion have serious repercussions for individuals involved in the case. The danger of prejudice affecting the right of an individual to a fair hearing can, therefore, be as considerable as in a criminal case.⁶ Nor is the purpose of the *sub judice* rule solely to prevent prejudice to individuals involved in cases which are still to come to court. As I said in my oral evidence to the previous Procedure Committee, Parliament has imposed this self-restraint on itself out of consideration for “the mutual respect that two central organs of the constitution with different functions ought to have one for another”.⁷ Parliament and the courts (including coroners’ courts) have distinct functions, and it is right in principle that each should allow the other to do their job with a minimum of cross-interference.

6. Against this background, I suggest that a distinction needs to be drawn between a matter or case which is *sub judice* before a coroner’s court and an issue of public policy which is potentially raised by such a case. In the instance raised with the Committee by Mr Denham, for example, a distinction can be drawn between the particular circumstances of the shooting at Stockwell Underground station and the general issue of the policy of the police with regard to the use of firearms. In the instance raised by Sally Keeble, a similar distinction may be made between the particular circumstances of the death at a secure training centre in Northamptonshire in April 2004 and the general issue of policy on the use of restraint techniques in young offender institutions. The wording of the Procedure Committee’s previous recommendation on this matter, which referred to issues “related” to pending inquests, appears to have been intended to encourage Mr Speaker to exercise his discretion in favour of allowing debate on issues of public policy potentially raised by cases, not to allow debate on the detailed circumstances of the particular case which will eventually have to be rehearsed before the coroner’s court. Sally Keeble, however, has made clear in her evidence to the Committee that she does indeed wish to debate and question Ministers about the particular circumstances of the individual’s death.

7. In practice the distinction between policy issues related to a pending case and the particular circumstances of that case may not always be clearcut. A Member may wish to illustrate an argument about a policy issue by reference to particular circumstances: provided the reference is passing and phrased in non-prejudicial terms, the Chair is unlikely to intervene immediately. Greater difficulty arises when a Member applies for a debate which is ostensibly about an issue of general policy, but when the debate takes place proceeds to enter into the details of a particular case which is pending. This type of incident causes serious problems for the occupant of the Chair and leads Clerks to be more circumspect when advising about *sub judice* issues than they might otherwise be.

8. My fear is that if coroners’ courts were to be removed from the ambit of the *sub judice* resolution altogether, in response to understandable concern about the circumstances of one particularly distressing case, an expectation might quickly develop among constituents dissatisfied with lengthy delays in the holding of inquests that it was the normal and acceptable course to ask their Member to pursue the case in Parliament rather than to wait for the coroner’s verdict. Delay in the holding of inquests, which is evidently a widespread phenomenon, was attributed by the Hon Secretary of the Coroners’ Society of England and Wales largely to shortage of investigative resources and court accommodation.⁸ It might be appropriate for the House to address itself to pressing for a resolution of those difficulties, in preference to a change in its own practices which might in time lead to a confusion in roles between Parliament and the coroners’ courts.

When does an inquest become “active”?

9. As previously stated, the intention of the *sub judice* resolution in its current (2001) formulation was to align the House procedures as closely as practicable with those of the Contempt of Court Act 1981. That Act makes no special provision for the coroners’ courts. In particular Schedule 1 (which deals with when proceedings are active) distinguishes only between criminal proceedings, other proceedings at first instance and appellate proceedings. Coroners’ inquests are lumped in together with other proceedings at first instance. Paragraph 12 states that these proceedings are active from the time when arrangements for the hearing are made, or if there are no such arrangements, from the time the hearing begins until the proceedings are disposed of or discontinued or withdrawn. It was held in *Peacock v London Weekend Television*⁹, applying paragraph 12 to the circumstances of an inquest, that it is to be treated as “active” once it has been opened; and that ruling has been applied in interpreting the relevant provisions of the *sub judice* resolution.

10. The 1981 Act was a liberalising measure, intended to bring the law on contempt of court into conformity with Article 10 of the European Convention on Human Rights. The Act’s clear objective is to permit comment on legal proceedings save where such comment seriously prejudices the case; but assessing the possible degree of prejudice is a very difficult task for the Speaker or his deputies to undertake with certainty on the spur of the moment when (unlike a judge or a coroner) they are unaware of the detailed

⁶ Ibid, Ev. 54, para.23.

⁷ Ibid, Ev. 3, Q. 14–19.

⁸ Ibid, Ev 45–6.

⁹ (1985) 150 J.P. 71, 81.

circumstances of the case. More relevantly to the circumstances of the House, the Act (section 5) provides a defence where the risk of prejudice to proceedings is merely incidental to a discussion in good faith of public affairs. This provision might, I suggest, be recommended to the House and the Speaker as an appropriate criterion for the exercise of discretion in the application of the *sub judice* rule, particularly in relation to inquests.

11. It would be possible for the Committee to go further and recommend a change in the definition of the time when an inquest becomes active. It might, for example, be proposed that this should apply only when arrangements have been made for a *substantive* hearing before a coroner's court. But for the reasons I have indicated in the previous section of this memorandum, my preference would be for such a modification to be proposed not as an amendment to the *sub judice* resolution itself but as guidance to the Speaker on the period during which his discretion to allow debate on policy issues related to a pending inquest might be exercised with greater liberality. Such an approach would chime in with the recommendation already made by the previous Procedure Committee in 2004–05;¹⁰ but it would not relax the rule to such an extent that Members would be at liberty to initiate debates or Committees conduct inquiries about the particular circumstances of individual deaths which are the subject of coroners' inquiries. Such a relaxation would, I believe, run counter to the proper separation of functions between Parliament and the courts.

Roger Sands
December 2005

¹⁰ See paragraph 3 above.

Witnesses: Sir Roger Sands, KCB, Clerk of the House, and Mr Robert Rogers, Principal Clerk, Table Office, House of Commons, gave evidence.

Chairman: Gentlemen, welcome.

Q107 Sir Robert Smith: In your memorandum you talk about the explicit extension of the *sub judice* rule to cover inquests being agreed by the House following the report in 1998–99. Before then were coroners' courts not covered by *sub judice*? How did the House operate?

Sir Roger Sands: It was not explicit but we assumed that they were. It did not represent a substantial change but there was something that could be pointed to.

Q108 Sir Robert Smith: In effect, *sub judice* was applied to coroners' courts by the way the House operated before the rule was changed?

Sir Roger Sands: That is my recollection.

Q109 Chairman: You see the rule change as clarifying rather than being a watershed?

Sir Roger Sands: Exactly. That is why the Joint Committee on Parliamentary Privilege whose recommendations led to that new form of the *sub judice* resolution just never mentioned the matter. I have trawled right through their report and I could not find any explicit reference to it. I think they just took it for granted that they were covered and that should be made clear.

Q110 Mr Wilson: You also suggest in your note that "... assessing the possible degree of prejudice is a very difficult task for the Speaker or his deputies to undertake with certainty on the spur of the moment ...". Would you agree that the *sub judice* rule of the House of Commons is significantly more restrictive than the Contempt of Court Act?

Sir Roger Sands: No, I do not think I would. The Contempt of Court Act allows people to refer in

good faith to issues of public policy which may be relevant to a particular case. The whole burden of my memorandum is to try to draw a distinction between referring to issues of policy which may arise out of particular court or coroners' cases and referring to the details of those cases themselves. One of the reasons why we tend to be cautious in giving advice to the Speaker on this matter is, to put it bluntly, that we have quite often been let down by Members in this matter. They put in an application, let us say, for an adjournment debate which is ostensibly about a matter of public policy, which would be perfectly in order, and then we suddenly find that they are getting up in the House and producing a string of details about a very specific case, referring to individuals by name and generally looking to the Minister to do the job which the judge or the coroner should properly do, which can be prejudicial. Once one has been bitten like that once or twice, I think there is a tendency for people in the Table Office, which Robert is in charge of, to err on the side of caution when advising the Speaker.

Q111 Mr Wilson: You see no difference. It is really just the interpretation of the *sub judice* rule by the Speaker or the chairmen of the select committees?

Sir Roger Sands: I am looking for the exact phrase which is used. The Contempt of Court Act was a liberalising measure, as my paper says, and it was intended to allow as much reference as was possible without going into areas that would be prejudicial. That Act is applied by judges who have at their fingertips the details of the cases which are in question and they are in a very good position to judge whether a comment might be prejudicial or not. The Speaker does not have that sort of detail at his fingertips; nor do we who advise him always. Obviously we tend to be more cautious in our

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interpretation of it than a particular judge or coroner might be, but I think there is no difference in principle.

Q112 Chairman: As a matter of practice, how often would you seek to contact the Coroners' Association, which the Attorney General referred to, to get further and better particulars where you have an application pending from a Member for perhaps an adjournment debate?

Sir Roger Sands: We tend not to do it that way because we have more routine avenues of communication to find out. What we are essentially, usually, trying to find out is simply the facts. Is there a case? What is the state of the case? Has somebody been charged? Has the case been set down for trial? We are not going into the details of the case or the matters at issue. I will ask Robert Rogers because his office is involved with this virtually on a daily basis. There are two cases that you have here which have led to this inquiry, but this comes up on a very frequent basis.

Mr Rogers: It is probably two or three a day, I should think. I have been in this job since October. In preparation for today, what I have done is to tot up all the inquiries that we made from then until now. Right across the range of *sub judice* it comes to 190, of which 14 related to cases where we thought there might be an issue, where there was an inquest which was live. I would very much reinforce what the Clerk says. When we are seeking information it is about the status of a case, not about the interpretation of the rule or about the degree to which discretion might be applied to it. What we want is a firm, factual basis on which decisions may be taken by the Speaker if necessary.

Q113 Mr Chope: Was not the Attorney General implying in his evidence that you could go further than that and follow that up by asking the coroner or the Coroners' Association to advise you of their consideration as to whether the *sub judice* rule might be relaxed in that particular case?

Mr Rogers: If I can take my platform analogy, what one would then be seeking is a more fleshed out picture of where things were, were a matter to be appealed to the Speaker and the Speaker were minded to consider exercising his discretion. In other words, where some of the issues closer to events in a particular case might make a decision on that easier, if it was a route that the Speaker was minded to go down.

Q114 Mr Chope: That would be triggered by effectively the Member appealing from the Table Office ruling to the Speaker?

Mr Rogers: We do not make rulings. We try and identify where there might be a problem. The only instance that has happened since I have been in my present job was one where I took it to the Speaker myself because I thought the rule was going to bear rather unfairly on the Member. I suggested, "If you want to take this further, I think it is something that the Speaker might be prepared to look at."

Q115 Mr Chope: In principle, is it agreed by the Clerk that it would be possible to have a more restrictive *sub judice* rule which was consistent with preserving people's right to a fair trial?

Sir Roger Sands: More restrictive?

Q116 Mr Chope: Yes, a less wide ranging *sub judice* rule whilst at the same time preserving the right to a fair trial.

Sir Roger Sands: The whole rule is stated right at the outset to be subject to the discretion of the chair. It does depend on how the discretion is exercised and the Speaker, I am sure, takes note of recommendations from committees such as this when deciding how to do that. I noted what the Attorney said about the great difficulty of trying to prescribe for all circumstances. One can imagine, given the number that Robert has just produced to you, that that would be extremely difficult. It has to be said that the two instances which have led to you reopening this issue are both pretty untypical. In the coroner's case which has concerned Sally Keeble obviously the delay there is quite extraordinary. I can understand the pressure that she is under from the people who are concerned. In John Denham's case, we had a Committee wishing to conduct an instant hearing into the events of 7 July during the summer recess when the Speaker was not readily available. I and the clerk of the Committee were endeavouring to advise Mr Denham and there were all sorts of uncertainties swilling around the events of that day. There was the de Menezes shooting which was the subject of an Independent Police Complaints Commission investigation and possible charges; there was possibly an inquest for the unfortunate Brazilian and possible terrorism charges against the people who had committed the outrages or been involved in them in some other way. There were the possible civil claims from people caught up in the incidents which might have led to compensation claims against the police. There was a whole range of things there and I think we were quite cautious when giving our advice.

Q117 Mr Chope: In deciding how to exercise your discretion to what extent is the question of comity a relevant consideration?

Sir Roger Sands: I think I have made clear that I do consider it as important as prejudice when considering the basis for the *sub judice* resolution. What is it appropriate for Parliament to be concerned with? Members raise these issues with ministers and therefore the implication is that there is something the minister can do about it. There is a problem in the administration of the Minister's department; or there is a policy problem which the government by changing policy can put right. Nearly always, if that is *bona fide* the purpose of the exercise, then we can put it in a way which avoids the *sub judice* resolution. But if what the Member wants to do—Sally Keeble has been very straightforward and said this is what she wants to do—is to parade his or her version of what went wrong when this unfortunate young man died and to get the minister to comment on it, I simply do not think that is

appropriate, whether it prejudices the coroner's court or not, because there is nothing that the minister can do about that. He is not there to find fact; he would be put in an impossible position. Everybody else who was concerned in the case would feel that, even if the debate did not prejudice the case, the Member had given one side of the case and they had not been given a chance to respond. That is what comity means. It means things being dealt with by the institution which is set up to deal with them.

Q118 John Hemming: What sort of *sub judice* issues do House officials deal with when advising Members? How serious are they and what steps are taken to ensure a consistent application of the rules?
Mr Rogers: It is the whole gamut, anything that might be an active criminal or indeed civil proceeding as defined in the *sub judice* rule.

Q119 John Hemming: Do you include judicial review in that?

Mr Rogers: If it is judicial review of a ministerial decision, or perhaps it might be of decisions taken by agents of the minister with the minister's authority, of course there is a specific saving for that in the *sub judice* resolution. For a number of areas where we might have thought there was doubt or need to investigate further, we discover that it is judicial review of a ministerial decision. In this case, it was questions that were at issue and we allowed the questions.

Q120 Rosemary McKenna: What about select committees? How do they face *sub judice* issues in their inquiries? Is it possible these could be dealt with by taking evidence in private?

Mr Rogers: Certainly. That was one option in the Home Affairs Committee's dealings with the *sub judice* issue. Select committees may be very much closer to the subject and to sources of information. They would, in particular circumstances such as the difficult circumstances the Clerk has outlined, perhaps take advice from the Clerk or his senior colleagues, but those are judgments as to whether to proceed in public in a more limited way, or in private with greater freedom, that are up to an individual committee to take.

Q121 Rosemary McKenna: If they had come to you for advice on any issue, you would give them what you consider is your advice. Why then would John Denham go to Lord Goldsmith?

Sir Roger Sands: I can perhaps throw some light on that. As Robert has described in relation to routine items that come up in the Table Office, we went to both the Home Office and the Law Office to try and establish the facts and what cases there were or might be and what the state of play was. Mr Denham did not query that advice but he did query the whole issue of prejudice and whether this would seriously interfere with investigations. He wanted to talk to the Law Office's department and he made quite clear to his Clerk that he wanted to go right to the top and Lord Goldsmith agreed to see him.

Q122 Rosemary McKenna: What I am hearing is that there are lots of avenues open to Members and chairs of select committees to explore how they can go forward.

Sir Roger Sands: I do not think Lord Goldsmith would be very keen if select committee chairmen were knocking on his door every week but, yes, there are. I think it is also fair to say that the advice Mr Denham got from Lord Goldsmith was stronger than the advice we gave him.

Q123 Ms Clark: Some Members, I think as you are aware, have complained that the rule prevents discussion of issues relating to a case even where specific matters before a coroner are not being brought up by the Member. In your opinion, how closely does an issue have to relate to a case before a coroner to fall within the scope of this rule?

Sir Roger Sands: It is very difficult to give a generalised answer to that. I have said in my paper that, if you were genuinely raising an issue of public policy—in the case which Sally Keeble has brought to your attention the public policy issue I suppose would be the use of restraining techniques in young offenders' institutions—that is a subject that has been raised in the House in a variety of ways while this case has been pending. I have no doubt that if the Member just referred in passing to it being an issue in this particular case, the chair would not intervene, but it is only just a short step away from doing that to referring by name to the people involved and possibly referring to what the Member thinks actually happened in this case. That immediately gets onto delicate ground and the chair starts to feel uncomfortable. It is not an easy line to draw but I think, when one is sitting there listening, one instinctively knows when somebody has gone over the line. I think probably in their heart of hearts the Member knows too.

Q124 Ms Clark: So far as the House Authorities are concerned, do you think there is a culture of caution that the rule has been interpreted too strictly and in a way that is far wider than the strict letter of it would require?

Sir Roger Sands: No, I do not believe that. We have to react fairly instantaneously to a great number of cases. If a considered argument is put and the Member indicates what exactly they want to raise then we can either facilitate it or take it to the Speaker and say, "We are not entirely happy about this, Mr Speaker, but if you wish to exercise your discretion, then that is up to you to do so".

Mr Rogers: I draw a distinction between an application for an adjournment debate where there is an umbrella title, and one has got to explore a little bit what lies behind it, and questions, where there have been considerable increases in the numbers of questions in recent months, and, indeed, the number of examples that I gave to you earlier on is considerably greater than the number of examples my predecessor gave you in 2004. I would say in practical terms it is the strict interpretation rather than a cautiously wider interpretation of the resolution which we regard as very helpful, because

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our discussions in the Table Office are sometimes vigorous with the Member concerned. We must be absolutely certain in the advice we are giving and that we are on absolutely firm ground. It is a precise application of the rule to see whether the circumstances that the Member wishes to raise in a question which will help us, let us say, perhaps not arrive at an absolutely satisfactory outcome for the Member, but one that the Member recognises as absolutely in accordance with the rules of the House as they stand and that he or she is not being a victim of an over-zealous Table Office.

Q125 Chairman: In a case like that, if you are indicating to a Member, you are minded to say what he wants to do is not going to be allowed because it will breach the rule, and if the Member has what appears on the face of it a valid point of argument as to why he believes you should not take that view, would you in a case like that merely refer him to the Speaker or would you make further inquiries with your contacts and then reassess your decision?

Mr Rogers: Certainly the latter. Very often if it is a constituency case the Member will know a lot about it and my concern is to come to a situation where we are in agreement about the facts. If the advice that we have is not in accordance with what the Member thinks is the case, that is not a situation I would allow to continue. We obviously have to be absolutely certain of the ground on which we are standing and if the Member wishes to take it further, as I said earlier, as with any question that we think may offend against a rule of order, that is never something that we discourage a Member from doing.

Q126 Sir Robert Smith: You touched before on the chairman's discretion and the previous Committee's report talked about encouraging Members to seek the Speaker's discretion to waive the *sub judice* rule on issues of national importance. How often has the chairman exercised that waiver?

Mr Rogers: There are some examples set out in the latest edition of *Erskine May* from which you will see immediately that it is not very frequent. Less logged, so to speak, are the examples of the sort that I quoted earlier on, where something does not really get above the parapet because the problem or the exercise of the discretion is slightly at the margins. In the House, it is a rather different matter, I would say, because it is a matter of degree rather than an explicit decision announced to exercise the waiver; but I defer to the Clerk on that.

Sir Roger Sands: I cannot answer the question, Sir Robert, in any precise terms. It is comparatively rare that a single criminal case raises issues of national importance. What is more common is that an issue of national importance may have exemplars in one or two individual cases; Members may refer to them in passing and, generally speaking, that is perfectly allowable. The other point I would just draw to your attention is that there is a general waiver in the *sub judice* resolution for proceedings on legislation. If the House is legislating, *sub judice* rules do not apply,

it is changing the law. In the past Lord Campbell-Savours, as he now is, was a master of this. He would sometimes take that waiver to extremes and try and use the excuse that the House was on legislation to raise details of a pending case but it is usually possible to rule that out on the grounds of relevance.

Q127 Chairman: Would that waiver in your judgment apply to a ten-minute rule bill which is proposed legislation?

Sir Roger Sands: There have been arguments about this but again I think the motion has to be there on the paper and discussion of a particular case would almost certainly fall foul of the rule of relevance if a Member tried to do that.

Mr Rogers: There is a saving in paragraph three of the resolution, a motion for leave to bring in a bill. If I could add a practical point on the question of exercise of discretion, I think if you have got the national importance provision in the resolution, instances of that sort are likely to come up quite rarely and they will raise issues which, as it were, can be dealt with in a compartment. On the other hand, if you are going to have an area-type of proceeding which is consistently going to concern Members and their constituents then the accretion of case law may produce something of a difficulty for the chair. If we are talking, for example, about deaths in custody and the particular circumstances of the case lead the chair to think that in this instance there should be an exercise of discretion, the question is automatically asked in any other set of circumstances when that comes forward, that the discretion should be exercised again. You may get a situation, and I do not suggest whether it is good or bad, a bit like Gulliver being tied down with a whole series of ropes where case law, or at least a succession of decisions, has removed quite a bit of the latitude of discretion from the chair.

Q128 Sir Robert Smith: National importance exemption does not distinguish between different kinds of cases where prejudice is more or less likely and you have already touched on your concerns about what Members may do once discretion has been allowed. Would it be better to have a general discussion of policy issues raised by a case but prohibit specific mention of the facts of the case, or do you come back to your fear that, having got through the hurdle, people will bring the facts in anyway?

Sir Roger Sands: I think that is the danger; but that is a distinction which I certainly try to make and it is the distinction I have made in my paper—it is a distinction I try to make when giving advice myself, to encourage a member to raise a general underlying policy issue. And going back to the point which I was discussing with Mr Wilson earlier, that is what is specifically allowed under the Contempt of Court Act. I think possibly guidance from this Committee that that provision might specifically be taken into account by the Speaker when deciding how to exercise his discretion would be helpful.

Q129 Chairman: Presumably if the Speaker does exercise his discretion and allows the debate, the rules having been clearly set out to the Member by you privately, the Member then goes over that line, presumably the sanction is he is ordered to resume his seat?

Sir Roger Sands: The chair will pull him up, yes. That does create a very difficult situation for the chair particularly if it is at the end of a sitting when people want to go home, and so we try to avoid that. The key phrase in the Contempt of Court Act is *bona fide* discussion of public policy issues. If the Member is *bona fide* no problem is likely to arise.

Q130 Rosemary McKenna: The previous Procedure Committee report stated that the power to exercise discretion in select committee proceedings rested with the chairman of the Committee, do you agree with that statement?

Sir Roger Sands: Yes, that is the case. It has to be because things come up at a moment's notice and the chairman has to decide. But I think it also said, and if it did not then certainly my memorandum to it did, that chairmen in those circumstances were well advised to clear their lines with the Speaker, particularly when launching a new inquiry or something like that, because obviously any decision that a select committee takes to allow something to be aired is likely to have repercussions on the floor of the House.

Mr Rogers: In the Home Affairs Committee example, which was referred to earlier, with which I was involved in in my previous job, one of the things that we had very much in mind was that the exercise of discretion in terms of the hearing of evidence would have an immediate knock-on effect, very likely, into the range of questions which Members would then want to table as a result of discretion having been exercised in a rather different forum. Obviously that will be a matter of concern for the Speaker.

Q131 Rosemary McKenna: That is right and that is the follow-on question I want to ask. What if we had a rogue select committee chairman who decided that they were going to wing it, there are implications there. Are there any recommendations that we could make to say, "You must have regard to the Speaker or to yourself?"

Sir Roger Sands: The previous report which you mentioned did say: "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 can be given to how much of it could properly be published." They did refer to that possibility, I would have wished them to refer to it in slightly stronger terms, but the idea is there.

Q132 John Hemming: Would published guidance on the interpretation of the rule be helpful to clerks and Members?

Sir Roger Sands: I think I give the same answer that Lord Goldsmith did that it would be very, very difficult to come up with published guidance of any detail that would usefully cover every sort of circumstance. I have made one suggestion that specific reference to the wording of the Contempt of Court Act, in relation to the *bona fide* discussion of issues of public affairs, might be helpful. But I think more detailed guidance would be very, very difficult to draw up.

Q133 Chairman: Before I call on Rob Wilson to ask a question, it looks like we are going to be subject to a division in the House in two minutes' time. I think it is fair to say we are three quarters of the way through this session. Are you both available to resume in 10 minutes time if there is a division at four o'clock?

Sir Roger Sands: Yes.

Q134 Mr Wilson: I will quote you some of the things that Sally Keeble said when we took oral evidence from her, "The implication of the 2001 resolution is that if it is of national importance you can in some way vary, waive or ignore the *sub judice* rule, but it does not tell you how". Then she went on to say, "There is no procedure. There is no clear route. I have had no indication at any stage that there is any possibility for discretion or how that discretion might be operated". Does the Table Office inform Members affected by the *sub judice* rule that they can ask the Speaker to exercise discretion?

Sir Roger Sands: I think there have been lengthy negotiations with Sally Keeble over the months and years.

Mr Rogers: There have indeed, and Ms Keeble has been absolutely punctilious in the way that she has approached this, I should say that for the avoidance of any doubt, and entirely open with us about the case that she wished to raise. We certainly do tell Members of the opportunity, but nine times out of 10 a Member will say, "it is a matter for the courts no, I do not want to go there" and will immediately say, if asking a question is going to cause a problem or might cause prejudice to the proceedings, "that is fine, it is going to be over in a month's time, I will pursue it then". For Members who want to pursue the matter more vigorously, yes, I hope we do on every occasion give that advice.

Chairman: The Committee will be suspended until 10 minutes past four.

The Committee suspended from 4.01 pm to 4.10 pm for a division in the House.

Q135 Chairman: The previous Committee's report has not yet been considered by the House. Do you think it would make a difference if the House endorsed the recommendation that Members should seek the Speaker's discretion more readily in this area?

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Sir Roger Sands: We would have no problem with that. The Speaker might not entirely welcome it quite in those terms but if by that is meant seeking to persuade us that this is an area where the Speaker's discretion might be exercised—

Q136 Chairman: Do you regard that as an arm's length process or are you anxious for the Speaker to follow your advice? For example, if you had a case where you thought a Member had an arguable point but on balance you were minded to advise against there being a debate, would you then encourage the Member to rely on what you saw were his strong points in his argument in his representations to the Speaker? Do you give him assistance to that extent?

Mr Rogers: In the particular case I quoted, Chairman?

Q137 Chairman: No, in any case. I will tell you what my thinking is. You did indicate earlier that there may be cases where your office is split, you referred to heated discussions where it may be that some of your colleagues take a different view. I do not know whether I was right to read that into that.

Mr Rogers: I think I did not express myself clearly enough. I have never known the Table Office to be split on any matter. The vigorous discussions take place between one plenipotentiary and the Member concerned.

Q138 Chairman: If a Member asks for help in setting out the grounds upon which he relied, would you offer that help to him?

Mr Rogers: Of course, yes. I should say I gave a rather light hearted answer to your previous question, but we do discuss these matters in a great deal of depth in the office. There is a discussion involving the whole office every day where, for example, if we were in doubt or if we wanted to explore and indeed test and challenge the advice that one of us was minded to give, that is a very good opportunity for doing it. If a Member came to us and said, "On each side, what is the essence of my case, what are the strong points", we would certainly help to the best degree that we could. At the same time, of course, we have got to have in mind what the practicalities might be if that adjournment debate, or whatever it might be, actually came on, the position that the chair might be in if, in the circumstances which the Clerk described earlier on, the trade description of what was intended to happen was not quite realised in practice.

Sir Roger Sands: It is the same when we advise the Speaker on anything. If we feel that this is an area where it is ultimately down to the Speaker, whether it is an urgent question or the selection of an amendment or anything of that sort, we do put both sides of the argument to him as fairly as we can.

Q139 Mr Chope: Can I come on to this issue of delay. We think the delay in the coroners' courts is one of the reasons for the frustration. When you did your memorandum you recited correspondence or information you received from the honorary executive of the Coroners' Society saying that the

delay was caused largely by a lack of investigative resources and court accommodation. We have now got a draft Coroners Bill, in the light of your discussions with the Coroners' Society, do you think that Bill, if implemented, would result in a reduction in the delays to the coroners' court system?

Sir Roger Sands: I have had no specific exchanges with the Coroners' Association about this, I was simply quoting from written evidence given to the Committee in the previous inquiry which is published at the back of that report. I seem to recall that when Harriet Harman made a statement to the House about this draft Bill, delay was one of the issues that was mentioned as being something that was going wrong, something that was dysfunctional, in the coroners' system. The implication, therefore, is that that problem will be addressed by the changes that this Bill will introduce, but I would not like to reach a judgment about that myself. Obviously, there is a distinction between a framework—and this Bill is intended to set up a new framework—and the resources which are provided to make that framework work smoothly.

Q140 Rosemary McKenna: Your memorandum suggests that guidance could be issued to the Speaker encouraging him to use his discretion more readily in cases where an inquest is adjourned for a long time. What are the advantages of a system based on the Speaker's discretion rather than a clear rule?

Sir Roger Sands: I was not intending to suggest that the Speaker's discretion should extend to allowing discussion of the details of the individual case, I should make that absolutely clear. But where there is an issue of policy raised by a case and that is being delayed for a long time then I would have thought that the delay was one factor among others that the Speaker might take into account, but that is something which I think it would be very difficult to write into the resolution. In general, I am always opposed to over-prescriptive resolutions, because you always find they then bite you in ways that you did not expect when you wrote in the additional detail.

Q141 Chairman: The Attorney General accepted that where there was a long delay between, let us say, a debate and a hearing this was something which ought to be taken into account, although not necessarily the deciding factor. If the House decided to amend the rules so that inquests were only *sub judice* when arrangements for the substantive hearing had been set, how would you be able to gather the information necessary, both speedily and reliably, so that quick decisions could be made. You say you did not make use of the Coroners' Association which the Attorney General referred to but you used other means. If, as part of your decision-making process, you wanted to know what the time lag was in a particular case, how would you go about it?

Mr Rogers: One of the things that we have done fairly recently, with the help of the Law Officers' Department, is to change the way in which we find

out factual information about *sub judice* cases generally. Whereas before we had to rely on individual government departments, this was often not a very satisfactory way because it might have been that the parliamentary branch did not have the clout to get the quick reply or perhaps it was because the department did not understand the importance to the House of Commons of having swift factually accurate information. It was not the ideal method. Thanks to the Legal Secretary to the Law Officers, we now have a single point of contact in the Legal Secretariat, so we would certainly use that. You have mentioned the draft Coroners Bill. If the streamlining and the structure of the Coroners' Service, which is dealt with in part four of the Bill, were to come about, one would expect that there would be a single point of contact there for authoritative factual information and, of course, we would use whatever point of contact and source of information was quickest and best.

Q142 Chairman: I agree very much with what you just said and I think it is important that someone, whether it is this Committee or yourself, feeds in to the department whilst the Bill is in draft form that it would be helpful to have a central point of contact which may be someone in the Chief Coroner's Office on issues such as this.

Mr Rogers: I think the authority of your Committee will be a very good way of ensuring that that is taken full account of.

Chairman: We take the point. The Attorney, in his letter to us, has said that he feels it would be helpful to consider whether there would be ways of enabling the Speaker to have access to information about ongoing inquiries. I think this is something that subject to deciding this at a later point, we would want to pursue.

Q143 Ms Clark: Are you aware of the cases in the Lords this session where incidents subject to the coroners' inquests have been mentioned and discussed? On the basis that you are well aware of these cases, do you believe that these apparent breaches of the *sub judice* rule are cause for concern?

Sir Roger Sands: Yes, I do. The whole purpose of the exercise in 2001, not the whole purpose but a very useful side benefit of it, was that both Houses ended up with the same *sub judice* rule and if they are being interpreted in totally different ways at each end of the building, then all that benefit goes down the drain. Yes, it was a matter of concern and I think in effect in his paper to you the Clerk of the Parliaments has held his hand up and said it is a matter of concern to him too. We have subsequently had another case of an attempt to raise an issue before the coroner's court where we noticed it appeared on their paper and I believe you made strong representations?

Mr Rogers: Yes. It had not got as far as the order paper of the House of Lords but it was a case in which the waiver was sought and we were able to say to our colleagues in the Lords that this was a case which we knew very well and which had been the subject of decisions as to the approach to be taken in this House. So far as our colleagues in the Lords are

concerned, they have been re-examining the way in which they organise the tabling of questions and they are, indeed, establishing a Table Office rather similar to our own, although there is less of a throughput of questions than there is in this House. I think the examples which are quoted in paragraphs three to nine of the Clerk of the Parliaments' memorandum have raised awareness of the issues, and our colleagues in the Lords do from time to time consult us on the line that is being taken in this House for information, although obviously the two Houses are separate and independent. The other thing is that the grid which I referred to earlier on about the current status of the cases, not just the coroners' courts but right across the board, we email to them every Monday morning, I have got an example here which I am happy to let the Committee have if that would be helpful [not printed].

Q144 Ms Clark: Are you aware that any prejudice has resulted to any inquest as a result of anything that has happened in the Lords?

Mr Rogers: I would not be in a position to know that.

Sir Roger Sands: In some cases the inquests have not been held yet, but it is potential prejudice to the position of individuals who would be concerned in those cases, it is not just prejudice to the outcome.

Q145 Sir Robert Smith: You have touched on this already about the communication improving and the Clerk of the Parliaments in the House of Lords suggested that the Leader of the House of Lords and the Speaker of the House of Commons could confer before issuing the rulings on matters of *sub judice*. Does what you are talking about make this more practical?

Mr Rogers: I think that it would rather depend on the circumstances in which, perhaps after the report of this Committee, considerations of *sub judice* were handled. If there were, let us say, an increased expectation that discretion would be exercised, then clearly it would be very important for the ambit of that discretion to be at least comparable in the two Houses, otherwise we have a situation again rather similar to that referred to in the Clerk of the Parliaments' paper. Certainly any increase in shared understanding as to the way we approach these matters would make the sort of consultation that you referred to much easier.

Q146 Mr Chope: Do you think it would be a fair thing to say that now there have been some different rulings in their Lordships' House which have resulted in the *sub judice* rule being breached in our terms that we should look and see whether any prejudice did result? If prejudice did not result then that might be the argument for saying are we not being altogether far too cautious about this.

Sir Roger Sands: I think I come back to the point I raised that prejudice is not the only reason for the *sub judice* rule. I would not regard the fact that a rule has been breached from time to time—and there is no doubt that it has been breached inadvertently occasionally at our end of the building too—as a

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reason for a wholesale rewriting of it simply because I think it would expose the House to an increased number of issues being raised which are appropriate to a judicial court and not Parliament. That is really it. The other point that I made, I do not know whether it is at all attractive to the current members of the Committee but I did make to your predecessors, is that in a way the *sub judice* rule can be a protection to Members of Parliament. We know that constituents become agitated about cases in which they are involved and they want then to involve a lot of other people and I would imagine—I would find this if I were in your position—that it would be a help to be able to say, “Well, I am afraid, Mr Smith, I am very sympathetic to your position but the rules of the House just simply do not allow me to pursue this”. I feel that a wholesale rewriting of the rule might leave Members open to much greater pressures than they are already subject to.

Q147 John Hemming: Coming back to the issue of judicial review, the Public Administration Select Committee expressed concern about issues relating to judicial review, particularly about the Ombudsman. Having looked at the papers there I am wondering if you think there is perhaps merit in expanding the exemption from ministerial decisions to cover other public authorities. The point about PASC is that they do not want to concern themselves with the lawfulness of the decision. The Attorney General made the point earlier that actually there was not such a challenge in terms of prejudice because almost all the time judicial review does not involve witnesses and a single judge is judging on the lawfulness of the decision, whereas the Public Administration Select Committee wish to look at the merits of the case. Is there perhaps a case to be made

to expand on the areas in which there can be an exemption from the *sub judice* rule to include other public authorities, including the Ombudsman and maybe other ones?

Sir Roger Sands: I have to admit that I am rather blind-sided on this issue, I do not think I am aware of the particular case that has caused difficulty here.

John Hemming: Shall I expand on those?

Q148 Chairman: Would it be helpful if we were to send you the details and you then respond to this question in writing?

Sir Roger Sands: Yes, certainly. On the surface of it I would agree that there may well be a case for expanding the expression “a ministerial decision” because of the proliferation of public bodies and types of public body. There are now many decisions that are made not by a minister but on behalf of a minister and if this is one such, I do not know, then there might well be a case for saying—

Chairman: I think it relates to a particular parliamentary Ombudsman.

Q149 John Hemming: I will give you this paper for the written response but I think we could spend about half an hour on the issue now and I am not sure everybody wants to do that.

Sir Roger Sands: This is the Ombudsman?

John Hemming: Yes.

Q150 Chairman: Is there anything else you want to say to us before we close the session?

Sir Roger Sands: No, I think we have covered all the ground that I had envisaged.

Chairman: Can I, on behalf of the Committee, thank you both for coming along and giving such comprehensive evidence. Thank you very much indeed.

Supplementary Note from the Clerk of the House (P 80)

THE OMBUDSMAN AND THE *SUB JUDICE* RULE

1. Towards the end of the Committee’s evidence session on 21 June, when the Principal Clerk of the Table Office and I were appearing in connection with the Committee’s inquiry into the *Sub Judice* Rule and Inquests, Mr John Hemming asked me about application of the Rule in cases where the Ombudsman is taken to judicial review. Not at that stage having seen the representations from the Chairman of the Public Administration Committee on which Mr Hemming’s question was based, I was unable to answer off the cuff; but I promised to provide a note when I had read them.

2. Many judicial review cases on matters likely to be of interest to the House of Commons are exempted from the *Sub Judice* Rule by virtue of a proviso at the end of paragraph (1) of the resolution of 15 November 2001, which reads as follows:

“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.”

3. Where a ministerial decision is taken to judicial review, therefore, there is no bar on the House continuing to discuss the decision or the underlying issues. The same principle would apply if a Government decision not to accept the findings or recommendations of the Ombudsman were to be taken to judicial review; and, if a generous interpretation of the *Sub Judice* Rule proviso were adopted by the Chair, it could also apply to a case where the Ombudsman’s findings on a complaint which involved a ministerial decision were challenged by recourse to judicial review. But the exemption does not apply if a decision of the

Ombudsman herself, for example not to entertain or continue an investigation on a particular complaint, is taken to judicial review. I understand that this has caused some difficulty for the Public Administration Committee, for instance in relation to the Equitable Life case.

4. The Ombudsman, or Parliamentary Commissioner for Administration as she is formally titled, has a close relationship to Parliament. She can deal with complaints only if they are referred to her by Members of the House of Commons; she is accorded the privileges of an officer of the House (*Erskine May*, 23rd edition, p 247), and the Public Administration Committee has the specific remit to examine her reports and “matters in connection therewith” (Standing Order No 146). The three-way relationship between the Commissioner, the Government and the House is always a potentially delicate one when issues of political sensitivity become the subject of a complaint; and the involvement of the courts may add a further complicating factor.

5. I can, therefore, understand the concern that has been expressed by the Chairman of the Public Administration Committee. It would not be appropriate if the Committee, or the House more widely, were to be inhibited by a rash of judicial review cases from reviewing the work and findings of the Parliamentary Commissioner for Administration. If that point were to be reached, there would be a case for the House to consider an extension of the proviso in the *Sub Judice* Rule to cover her decisions and reports. On the evidence available to me it is not yet apparent that this point *has* been reached; but the Public Administration Committee and the Procedure Committee will no doubt wish to keep the matter under review.

Sir Roger Sands KCB
July 2006

Written evidence

Letter from Rt Hon Alan Williams MP, Chairman of the Liaison Committee (P 11)

SUB JUDICE AND SELECT COMMITTEES

At the meeting of the Liaison Committee on 20 October, John Denham, Chairman of the Home Affairs Committee, described to us the problems faced by his Committee in organising a public evidence session on “counter-terrorism and community relations in the aftermath of the London bombings” because of the implications of the House’s *sub judice* resolution.

After discussion, in which Tony Wright took part to describe some examples of the Public Administration Select Committee’s evidence from the Ombudsman on matters subject to judicial review, where the resolution had not prevented the desired exchanges, the Liaison Committee agreed to ask the Procedure Committee to look again at the *sub judice* resolution in respect of committees. John set out the issues well in a note which he submitted to us, which I enclose (not printed). We are of course aware of your Report, not yet debated in the House, which stops short of explicit guidance to us.

We would be grateful if your Committee could re-examine the issue and, as John proposes, in particular “the role of Committee Chairmen, how this relates to the Speaker, and in which circumstances it would be appropriate for Chairmen to exercise the ‘Chair’s discretion’”.

October 2005

Letter from Rt Hon Geoffrey Hoon MP, Leader of the House of Commons (P 19)

Debate on Procedure Committee Report on *Sub Judice* (First Report 2004–05)

Thank you for your letter of 27 October asking for a debate on the Procedure Committee’s First Report of Session 2004–05 on the *sub judice* rule, which you also raised in Business Questions on 27 October.

As all colleagues are aware, opportunities for debate are subject to many competing claims and it would not be straightforward to arrange the debate you seek before you begin your inquiry. But I think there is every indication that the further work you envisage—whether or not the House assents to any final proposals—has the support of the House.

In respect of coroners’ courts, the Government has, as you know from your earlier inquiry, expressed the view already that there is scope for looking at the way the rule bites in terms of the times at which it has effect. It looks forward to the results of the consideration of the issue by the two Houses envisaged in the earlier report and this is work which your new inquiry can no doubt take forward. In respect of the issues raised by John Denham, particularly the way in which the rule is to be applied by select committee chairmen, I think colleagues will recognise how his Committee’s recent experience can shed further light on the work already done.

For its part, the Government would welcome the work envisaged in the new inquiry. I think therefore that, rather than holding a debate now, the House would instead find it helpful to have the benefit of your Committee’s further thoughts before considering the matter further.

November 2005

Further letter from Rt Hon Geoffrey Hoon MP, Leader of the House of Commons (P 36)

Thank you for the letter from your Clerk of 14 November seeking any further comments I might have for your Committee’s inquiry into the application of the *sub judice* rule to proceedings in coroners’ courts. As I indicated in my letter of 14 November to your predecessor as Chairman, the Government looks forward to the results of the consideration of the issue by the two Houses envisaged in the earlier report.

As Leader of the House I will of course be following the inquiry. I recognise the importance of balancing the proper functioning of coroners’ proceedings with the needs and duties of Members and of the House. In terms of the substance of the particular issue, I think it would be best at this stage for me to leave it to my Right Hon Friends the Attorney General and the Secretary of State for Constitutional Affairs, to whom you have written separately, to respond in more detail. I await the outcome of your deliberations with interest and look forward to considering in due course whether changes to the operation of the *sub judice* rule might be appropriate.

January 2006

Letter from The Sheriffs' Association (P 22)

Thank you for your letter of 28 November in which you advised me that the *sub judice* rule of the House of Commons applies to Fatal Accident Inquiries in Scotland in the same manner as to proceedings in coroners' courts in England and Wales.

I have discussed your request for views with fellow Office Bearers of the Association. It is the practice of the Association not to comment on matters which are essentially policy issues and we do not therefore consider it appropriate to offer a view on the question of whether or not the *sub judice* rule should apply in respect of Fatal Accident Inquiries in Scotland. We would, however, observe that the operation of the rule would appear likely to arise much less frequently in Scotland, as there is no general requirement for the convening of an Inquiry by a court into the circumstances of a death or deaths. The circumstances in which the law in Scotland requires that there be a Fatal Accident Inquiry are limited and even in such cases the procedure for holding such an Inquiry may often not be initiated until long after the occurrence of the death or deaths. It would appear therefore that the impact of the rule on the proceedings of the House of Commons is likely to be considerably more limited in the case of deaths in Scotland.

Sheriff Andrew Normand
December 2005

Memorandum from the Police Federation of England and Wales (P 28)

CORONERS COURT CONSULTATION DOCUMENT

INTRODUCTION

The Police Federation of England and Wales represents 138,000 police officers from the rank of constable to the rank of chief inspector.

We welcome the opportunity to respond to the consultation document.

Our response to the particular questions posed are as follows:

1. *Should there be a separate sub judice rule for coroners' inquests?*

Changing the rules of *sub judice*, to accommodate the seemingly very occasional requirements of Parliamentary committees could undermine the very evidential principles established over hundreds of years. We are minded to suggest that the answer could be found in some form of senior legal representation for the committee Chairman to be appropriately advised as the committee meets, and where the procedures or evidential submissions are likely to intrude into the role of an ongoing coroners' inquest or criminal investigation to exercise due caution and awareness.

We are at odds with some of the comments that the *sub judice* rule should not apply to coroners' courts. We feel there is a danger of undermining the sanctity of the inquest process with such suggestions, without a wider consideration of the cause/effect outcomes.

2. *Should the point at which coroners' inquests become 'active' for the purpose of the rule be redefined?*

Once again this is part of the wider debate on the whole inquest process. However, one of the reasons coroners' inquests are delayed for long periods is to enable the Police to undertake their work and investigate fully the incident in hand. Often such inquiries, by their very nature, including the incidents to which the Committee are concerned, require a lot of patience, dedication and inordinate police time to reach a conclusion. Hence a coroner has little option but to adjourn proceedings for Police investigative purposes. Where a violent death occurs, an inquest may follow a criminal trial, (generally not before) and it can take many months to bring an accused to trial. In which case the *sub judice* rule against an accused must be preserved to establish a fair trial.

One other concern we would highlight, is that such proposals could bring changes to the generally disciplined reporting from the media on cases of public interest. If Parliamentary committees can examine the facts outside the current legal framework, then would this open up matters for the media to do likewise? The PFEW have some serious reservations over the general thoughts being suggested here.

3. *Is the chair's discretion to disapply the sub judice rule where necessary an effective mechanism? How does it operate in select committee proceedings?*

The PFEW cannot comment on the process of committee proceedings.

We do feel that where it is of national importance for the committee to inquire into incidents that are under either sensitive and delicate Police investigation, or subject to the judicial process then a mechanism could be introduced whereby subject to certain Parliamentary rules information can be given and witnesses examined within closed doors and hearings 'in camera'. That said, we would wish to ensure that the chair's ruling and or judgement, were such a decision taken, becomes properly accountable, or subject to approval from higher authority.

4. *How do other Parliaments or legislatures apply the sub judice rule to similar proceedings?*

The PFEW has no knowledge or research information from which to make any useful comment in response.

5. *Additional comments*

Where there is a death as a result of contact with police, consideration should be given in all those cases to a delay in the coroners' court system until after the conclusion of any subsequent Independent Police Complaints Commission and/or Criminal trial that may be brought against any officer.

I hope the above response provides a useful contribution to the invitation for written submissions on this important subject.

January 2006

Memorandum from the Coroners' Society of England & Wales (P 29)

We are grateful for the opportunity to expand upon the reply we made to the earlier inquiry of the Procedure Committee into the *sub judice* rule of the House, and also to reflect upon the other contributions made in evidence to that Committee. Since the observations I tendered in relation to your kind invitation on the last occasion related exclusively to inquests may I simply refer to them as HC 125 (Ev 45) and amplify rather than repeat them here.

1. Approximately 70% of all inquests are heard within six months of the death, but it may put this in context to say that even in the more straightforward traffic deaths the investigation file will frequently arrive too late for that. We do of course appreciate that it is in relation to the cases that wait longer that concern most keenly arises.

2. It may therefore be appropriate very briefly to sketch some of the more frequent causes of delay in getting certain classes of inquest heard.

They tend to share some of these common characteristics, namely they are cases which:

- perhaps most importantly require that the inquest investigate with regard to Article 2 ECHR the performance of the State in its efforts to protect Life;
- require the coroner to summon a jury;
- require that jury to be accommodated, sometimes for weeks, for which a courtroom has to be found. (Following widespread court closures there is an acute shortage of suitable courts to borrow or hire.);
- require a long and detailed police investigation;
- require that the results are then passed to the Crown Prosecution Service to consider whether there is to be any prosecution (many such must precede and may replace an inquest);
- require that a parallel or successive investigation is carried out *before the inquest can be heard* by the Police, CPS, Health and Safety Inspectorate, Independent Police Complaints Commission, Prison and Probation Service Ombudsman, and others, sometimes more than one of them at the same or successive time, and sometimes even into the activities of each other.

The net result can often be that the coroner does not receive files to start evaluating until more than two years after the death. Only after (s)he has read them can he begin the preparation process of pre-inquest disclosure, making a first selection of witnesses, identifying issues, estimating length of final inquest time and arranging the necessary pre-inquest Review hearings.

3.1 I should have mentioned these interim hearings in my submission to your earlier inquiry. They are very often held in public, but the press are warned that they cannot be reported until after the inquest.

It is now almost universal practice, voluntarily introduced, to have a number of these hearings before a major inquest in a manner modelled to some extent on the long-standing practice in the civil courts. The purpose is to resolve the problems already mentioned together also with securing the availability of a court, expert witnesses, Counsel, etc., in order that the inquest can be ensured ready to run properly when the jury are summoned.

3.2 The need for such interim hearings and use of them has become more widespread since the widening of the Coroner's jurisdiction which resulted from modern interpretation of the application of Article 2 of the European Convention on Human Rights. Some inquests now have to serve as the first port of Inquiry as to whether or not the State has or has not discharged its duty to protect life under Article 2. ECHR.

We can very well appreciate that this in particular is an area where Members of your House and the local coroner would have parallel areas of concern, but the matter I wish to highlight is the effect of the Article on the scope of some inquests where the State is involved. The scope of many inquests has thereby been greatly enlarged while the appropriate limitation by terms of reference giving boundaries of inquiry has become very hard to discern. Argument about the scope of enquiry has introduced still more hours of contested discussion, formal legal submissions and ensuing argument all heard in court some months before the final inquest itself takes place. The decisions then made are themselves occasionally also Judicially Reviewed before the final inquest hearing to which they relate can be concluded.

3.3 Furthermore, it is now not uncommon for a coroner to receive various written and opposing submissions as to how the inquest should be dealt with which will be dealt with in writing. The decisions given may well be seen as affected by reports of things said by Members in your House. I again respectfully agree with the Attorney General that comments initiated by the media themselves are not seen as capable of affecting courts in the same way, nor as similarly authoritative as those made by Members in your House.

An inquest may therefore be acutely and publicly "active" not only when it is first opened, but during the various pre-Inquest Review hearings well before it comes to the final hearing.

In addition the period after the inquest opening is often intensely occupied by Police and the Crown Prosecution Service considering at length whether any form of prosecution relating to causing the death is to be mounted. The protection your House currently accords the inquest protects those processes simultaneously, but would not otherwise do so unless separate thought was given to it.

4. This may be the appropriate point to explore the distinction between the verdicts and decisions made in the different kinds of court. We are all concerned to see that comment outside the courtroom should neither affect nor appear to affect decisions made either by Judge or jury in cases where innocence or guilt, or liability to compensate is in question.

The decisions made by an inquest are admittedly less specific, but this brings its own problems. The range of verdicts is no longer seen as restricted to short traditional forms eg "suicide" "unlawful killing" "accidental death" etc. Verdicts in the form of a narrative saying what happened and how are becoming commonplace. These still do remain subject to legal restraints under rules 36 and 42 of the Coroners Rules 1984. As a result an inquest is not permitted to make findings of criminal liability on the part of a named person, nor to make findings of civil liability. Nevertheless they now have a very, very much wider ability to express a view of what happened unaffected by technical legal definitions.

Could I therefore most earnestly urge upon you this proposition:

That while an inquest does not determine the legal rights and freedoms of an individual or body it now has a considerably increased capacity to affect them and to affect their public standing and reputation.

Ensuring a transparently fair and independent verdict in this new situation is a matter of intense concern to coroners themselves, quite separately from concerns about the *sub judice* rule. Comment outside the inquest has a considerable power to affect the phrasing of such new "narrative verdicts", particularly as they are not subject as are the older verdicts to precise legal definition.

5. I learned much from the evidence of Mr Roger Sands and Helen Irwin² about the perception and diligence applied to make the *sub judice* rule work well. It drove me to reconsider some form of redefinition of when an inquest is active or some form of time limit to both of which you referred at paragraph 24 of the First Report. I have tried to envisage the work that would be involved in enquiries to various coroners about the progress and position of inquests, given what that now entails.

The specific questions were:

Should there be a separate *sub judice* rule for coroners' inquests?

My response would be that inquests are so inextricably tied in with the processing of both civil and criminal court processes that it is not practicable to separate them in this way.

Should the point at which coroners' inquests become "active" for the purposes of the rule be redefined?

It would be helpful to be able to do it, but my attempts suggest to me no practical and widely applicable general definition that would assist.

² HC 125 (2004-05) Ev 1-8.

While regretting my inability to generate any new solution, may I say on behalf of my colleagues that we do very much appreciate the nature of the concerns raised and are again grateful for the fresh opportunity to contribute.

*Victor Round
Hon Sec
January 2006*

Letter from Rt Hon Lord Nicholls of Birkenhead (P 30)

Thank you for your letter and for the transcript of the evidence of Mr Denham, Dr James and Ms Keeble subsequently sent to me.

I understand the primary matter being considered further by the Procedure Committee is the application to coroners' courts of the *sub judice* rule adopted by both Houses in 2001.

Having read the evidence given to the Committee on 29 November I have three comments.

(1) I can see no good reason for excluding coroners' courts from the rule.

(2) Given the lengthy periods for which proceedings in coroners' courts are sometimes adjourned after being formally opened, I can see a case for treating proceedings in coroners' courts as active only when arrangements for the substantive hearing have been made.

(3) The discretion of the Chair is an important element of the existing *sub judice* resolutions. It provides an essential safety valve. Where issues of national importance are involved it is for the Chair to consider whether, and to what extent, permitting the proposed debate or questions would be likely to impinge adversely upon the two principles underlying the *sub judice* rule. He has to balance these different aspects of the public interest.

Clearly Mr Denham was unhappy at some of the advice he received from the House authorities about how he should exercise his discretion in discussions concerning 7/7 or the shooting on 22 July. He considers some clearer guidance is needed: Q 19–21. I have considerable sympathy with this. But without knowing precisely what advice he, or the Speaker, was given, and what were the matters unsuccessfully sought to be raised by members of his Committee, I cannot usefully express a view on what further guidance is most needed or what form it might best take.

January 2006

Memorandum from Rt Hon Colin Boyd QC (P 31)

Thank you for your letter of 14 November 2005 seeking a written submission concerning the application of the *sub judice* rule of the House of Commons to proceedings in coroners' courts.

The office of the Coroner does not exist in Scotland and the system for the investigation of deaths here is different from that which exists in England. I am happy of course to provide the Committee with such information as is available concerning the application of this rule in relation to Fatal Accident Inquiries in Scotland, but I think it would also be of assistance if I provide some background information about the system of deaths investigations in Scotland.

THE INVESTIGATION OF DEATHS IN SCOTLAND

The investigation of deaths in Scotland is one of the functions of the Procurators Fiscal—who are part of the Crown Office and Procurator Fiscal Service (COPFS)—and who also investigate and prosecute crime. There are 11 COPFS Areas in Scotland, and each is the jurisdiction of an Area Procurator Fiscal. Within each Area there are a number of Districts, each of which is the jurisdiction of a District Procurator Fiscal.

It is the duty of the Area Procurator Fiscal assisted by the appropriate District Procurator Fiscal to make initial enquiry into all deaths of which the Procurator Fiscal is made aware, and to further investigate any sudden, suspicious, accidental, unexpected and unexplained deaths.

In terms of the Fatal Accident and Sudden Deaths Inquiry (Scotland) Act 1976 (the 1976 Act), Procurators Fiscal also require to:

- investigate and hold a Fatal Accident Inquiry (FAI) into all deaths occurring in Scotland resulting from accident in the course of employment or occupation;
- investigate and hold a FAI into all deaths occurring in Scotland while in legal custody; and
- investigate all deaths occurring in Scotland in which the Lord Advocate has a discretion to instruct a FAI and hold such a FAI where any death was sudden, suspicious or unexplained or occurred in circumstances such as to give rise to serious public concern and where it appears to the Lord Advocate to be in the public interest that an inquiry should be held into the circumstances.

The principal aims of initial enquiry into and further investigation of deaths by Procurators Fiscal are:

- to minimise the risk of undetected homicide or other crime;
- to determine whether a death has resulted from the criminal actions of another and take appropriate action in relation to such deaths;
- to eradicate dangers to health and life in pursuance of the public interest;
- to allay public anxiety;
- to preserve evidence. Evidence obtained in the course of the Procurator Fiscal's enquiry may be relevant to the interests of others, for example a civil action for damages may result;
- to determine whether a Fatal Accident Inquiry (FAI) or any other form of Public Inquiry is to be held and to take appropriate steps to prepare for such an Inquiry and to preserve and present evidence thereto;
- to ensure that full and accurate statistics are compiled.

FAIs are judicial proceedings and are presided over by a Sheriff—although the proceedings are started and presented by the Procurator Fiscal. They are conducted in terms of civil rules of procedure and are not criminal proceedings.

You indicated in your letter that coroners' inquests could be opened and then adjourned for significant periods of time. This is not the practice in Scotland. Here, the FAI will only begin after the investigations by the Procurator Fiscal are completed and the decision has been taken that an FAI is necessary. It is possible for an FAI to be adjourned or put back, but that is usually for a specific purpose, for example, to allow a party time to secure representation at the FAI or for the Sheriff to write the final Determination after the conclusion of the evidence. The adjourned periods do not tend to be lengthy.

SUB JUDICE

It does not appear that either the Westminster or the Scottish Parliament's *sub judice* rules have been invoked in relation to a Fatal Accident Inquiry.

The *sub judice* rule of the Scottish Parliament is contained in Rule 7.5 of its Standing Orders. This rule is as follows:

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.

The operation of this rule depends very much on whether proceedings are active within the meaning of section 2 of the Contempt of Court Act 1981. The Act applies to all judicial proceedings before all courts in Scotland and FAI proceedings would therefore fall within the ambit of Rule 7.5, but only when a hearing is fixed (Schedule 1, para 14 of the 1981 Act).

While it may be surprising that the *sub judice* rule has not been invoked in relation to a FAI, parliamentary interest is often more in the question whether and when an inquiry will be held and there is likely to be less call for parliamentary discussion of matters relevant to the inquiry while it is pending or in progress.

I hope that this information about the investigation of deaths in Scotland and the application of the *sub judice* rule is of assistance to the Committee.

January 2006

Memorandum from INQUEST (P 32)

INTRODUCTION

1. INQUEST is the only non-governmental organisation in England and Wales that works directly with the families and friends of those who die in all forms of custody—deaths in prison, young offender institutions, immigration detention centres, police custody or while being detained by police or following pursuit, and those detained under the Mental Health Act. It provides an independent free legal and advice service to bereaved people on inquest procedures and their rights in the coroner's court. It also provides specialist advice to lawyers, advice agencies, policy makers, the media and the general public on contentious

deaths and their investigation. INQUEST has a free information pack for any bereaved family that explains the whole process and where to find emotional and practical support. It also monitors deaths in custody, where such information is publicly available, and identifies trends and patterns arising.

2. We have accrued a unique and expert body of knowledge on issues relating to deaths in custody and seek to utilise this towards the goal of proper post-death investigation, the prevention of custodial deaths and improvements to the inquest system. Since it was founded in 1981 INQUEST has been at the forefront of working alongside bereaved people to bring the circumstances of the deaths into the public domain and under public scrutiny and to hold the relevant authorities to account. We have reported our concerns about custodial deaths and their investigation at a national and international level.³

3. Over many years there have been a significant number of deaths in custody that have raised public and parliamentary disquiet. These and other contentious deaths often raise policy issues and issues of accountability which we believe are the proper business of parliament.

SUMMARY OF OUR SUBMISSION

4. INQUEST has considered the four points that the committee ask written submissions to be guided by, namely:

- (i) Should there be a separate *sub judice* rule for coroners' inquests?
- (ii) Should the point at which coroners' inquests become "active" for the purpose of the rule be redefined?
- (iii) Is the Chair's discretion to disapply the *sub judice* rule where necessary an effective mechanism? How does it operate in select committee proceedings?
- (iv) How do other Parliaments or legislatures apply the *sub judice* rule to similar proceedings?

5. INQUEST does not have the expertise to address the third and fourth points. Rather, we have restricted our comments to the first two and present background information about the investigation of contentious deaths, our views about the current legal context, examples of past practice and our recommendations for the future. We set out our experience of how the *sub judice* rule has worked effectively in the past; why we do not consider it to be working effectively at the present time in the Commons and what we think should be changed.

THE INVESTIGATION OF CONTENTIOUS DEATHS

6. As set out above INQUEST has expertise in relation to the investigation of deaths in detention and the operation of the inquest system in general. After any sudden and unnatural death there will be an investigation and an inquest if there are no criminal charges.

7. In many deaths in police and prison custody the investigations by the Independent Police Complaints Commission (IPCC)/Prison and Probation Ombudsman (PPO) and previously the police on behalf of the PCA often take months and sometimes years to complete. The file has then sometimes been handed to the CPS for consideration as to whether charges will be brought and in the majority of cases this too has taken months and sometimes years. Once a decision has been made—again in most cases not to prosecute—the papers are then handed to the coroner and again there will be a delay of months or years until the inquest date is set.

8. In specific cases as set out in the Coroners Act 1988 the inquest will take place in front of a jury. These are when:

- (i) the death occurred in prison or in such circumstances as to require an inquest under any Act other than the Coroners Act 1988;
- (ii) the death occurred while the deceased was in police custody, or resulted from an injury caused by a police officer in the purported execution of his duty (see Section 5 on deaths in police custody);
- (iii) the death was caused by an accident, poisoning or disease, notice of which is required to be given under any Act to a government department, or to any inspector or other officer of a government department or to an inspector appointed under Section 19 of the Health and Safety at Work, etc, Act 1974;

³ The Ashworth Inquiry 1992; United Nations Committee on the Elimination of Racial Discrimination 1996 and 2000; Council of Europe Committee on the Prevention of Torture 1997; Home Affairs Select Committee on Police Complaints and Discipline 1997; United Nations Committee Against Torture 1998; Inquiry into the death of Steven Lawrence 1998; Health Select Committee into Adverse Clinical Incidents and Outcomes in Medical Care 1999; Health Select Committee Inquiry into the Provision of Mental Health Services 2000; Attorney General's review of the role of the Crown Prosecution Service in deaths in custody 2002; Fundamental Review of Coroners' Services 2002; Joint Committee on Human Rights—deaths in prison 2002; Independent Inquiry into the death in psychiatric care of David Bennett 2003; Joint Committee on Human Rights Inquiry into Deaths in Custody 2004; Home Affairs Committee Evidence Session on Prisons and Overcrowding 2005.

- (iv) the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public (Coroners Act 1988 Section 8.3). This gives the coroner the general discretion to order an inquest to be held with a jury if he or she believes it to be necessary.

9. The latest published figures show that in 2003 there were 210,700 deaths reported to coroners; inquests held into 27,100 of the deaths and of those only 640 were held in front of a jury.⁴

10. Our advice to our service users about commenting on the circumstances of a death before an inquest is:

“*Sub judice* and inquests

In relation to inquests there is no strict *sub judice* rule. The reporting of the matter in and of itself is not contempt.

In cases of deaths where possible criminal charges are to be considered and where papers have been given to the CPS it is inadvisable for anyone to make in depth public comment where a description of the events involved in the death is the primary focus. This is a matter of tactics rather than law. If the CPS did decide to prosecute, then this would be ammunition for lawyers defending those charged. They would then have the possibility of arguing that a fair trial is not possible because of the fact that there had been adverse publicity in the media. This would be detrimental to the concerns of the deceased’s relatives or friends.

If a decision is made to prosecute then the matter becomes *sub judice* once an arrest is made. If civil proceedings are to follow an inquest then the matter becomes *sub judice* once it is set down for trial—not when proceedings are commenced. The same applies after an inquest where papers are referred back to the CPS. This is rare but happens when an inquest has concluded that the death was an unlawful killing.

It is not a good idea to make public comment while an inquest or any other proceedings are imminent on the facts of the case beyond what is already in the public domain. However, it is still possible to speak about the general issues and concerns the death raises and the way a family has been treated.”⁵

Should there be a separate sub judice rule for coroners’ inquests?

11. There are good positive legal arguments that coroners’ courts should be treated differently for these purposes.

12. Although the Human Rights Act 1988 expressly excludes Parliament from the categories of “public authority” it is to be assumed that Parliament nevertheless wishes to abide by the HRA, and therefore, Article 2.

13. Unlike other legal proceedings bound by the *sub judice* rule, inquests are the primary means by which the State will discharge its Article 2 investigative obligation.

14. The European Convention on Human Rights does regard Article 2 as conceptually different to the rights which may govern other sorts of legal proceedings covered by the *sub judice* rule, such as Article 6 (the right to a fair hearing in a criminal case or civil dispute). See, for example, *Jordan v UK* [2001] ECHR 24746/94 at para 102, quoting *McCann* and others v UK [1995] ECHR 18984/91, where the ECHR held: “Article 2 . . . ranks as one of the most fundamental provisions in the Convention . . . Together with Article 3 it also enshrines one of the basic values of democratic societies making up the Council of Europe . . . The object and purpose of the Convention as an instrument for the protection of individual human rights also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective . . .”.

15. It is a specific requirement of Article 2 inquiries, unlike other trials, that they include a sufficient element of public scrutiny, in order to ensure practical as well as theoretical public accountability for deaths occurring under the State’s responsibility (*Jordan* at paras 105 and 107). This is effectively a right of the public, and so is different to the defendant’s right to a trial in public in a criminal case, or the comparable right of parties to a civil dispute under Article 6.

16. Article 2 also generates a particular need for openness and transparency, given the public purposes of an Article 2 inquiry, which are: “. . . to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relatives may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others . . .” (*Amin v Secretary of State* [2004] 1 AC 653, per Lord Bingham at para 31).

⁴ Deaths Reported to Coroners 2003 Research and Statistics Directorate Home Office June 2004.

⁵ Inquests—An Information Pack for Families, Friends and Advisors (INQUEST 2003).

17. The prevention of similar fatalities is clearly part of the Article 2 function (see *Amin* above) but has always historically been part of the coroner's function at common law, and this does not apply to other sorts of trials. Under Rule 43 of the Coroners Rules 1984 after the verdict the coroner may announce that he or she will write to the person or authority that has the power to take action to prevent the recurrence of similar fatalities.

18. Articles 2 and 13 have also been held to require the state to permit the public, and especially the relatives of the deceased, to have access to the investigative process, which the *sub judice* rule clearly limits. As the Court held in *Jordan* at para 109, "For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests . . .".

19. Although a key requirement of Article 2 is that the investigation is conducted "promptly" and with "reasonable expedition" (see *Yasa v Turkey* [1998] ECHR 22495/93 at para 98; *Jordan* at para 108; and R on the application of *Wright and another v Secretary of State for the Home Department* [2001] EWHC Admin 520 where Jackson J included reasonable promptness as one of the five necessary features of an investigation compliant with Article 2) we know from experience (as set out below) that inquests into contentious deaths are subject to uncharacteristic delays due to the investigations by the IPCC/PPO/Police/other investigation bodies, the CPS process, delays in arranging juries and lack of available appropriate court space etc. This means that the problems referred to above caused by the *sub judice* rule which are particularly stark and worrying in inquest cases (lack of scrutiny, failure to prevent similar fatalities with immediate effect, exclusion of the family), ironically, can last for a particularly long time given the frequent delays in inquest proceedings.

20. By a further twist, the delays are likely to be particularly long in the most serious cases by virtue of the fact that it is only those where the CPS are likely to be involved, and hence likely to take a lengthy period of time in their deliberations.

21. In this submission we hope to show by example how both Houses of Parliament have addressed such cases in the recent past and how important it is that Parliament can debate the issues arising from contentious deaths before the inquest has been held. This is particularly important given the current state of the inquest system there can be delays of years before the inquest is held. We raised these concerns in our written evidence to the Joint Committee on Human Rights Inquiry into Deaths in Custody 2004⁶;

"144. One of INQUEST's key concerns about the way in which deaths in custody are investigated is the serious delay from the death through to the investigation and subsequent inquests. Delays of over a year are not uncommon—in part due to the length of time such investigations take, the lack of resources available to coroners and the fact that these are jury inquests and can last up to two weeks. This is often made worse by the shortage of suitably qualified forensic pathologists and other experts. The delay clearly causes all concerned great difficulty but this is particularly so for bereaved people who have described how their lives have been put on hold until they have been through the inquest process. INQUEST's evidence-based research on families' experience of the inquest system has highlighted the detrimental effects that delays in finding out how a relative has died has placed on the physical and mental health of family members.⁷

As there is no public scrutiny of the death for such a long period, the opportunity for identifying what went wrong and to seek to prevent recurrences in the future, learning the lessons and preventing other deaths is seriously delayed.

Delays in holding inquests into Article 2 cases ***.

Delays of one to two years are not uncommon—indeed of the families that gave oral evidence to the Committee all have had serious delays in the inquests being heard.

22. Since INQUEST made the submission the Committee published its report and the Government its response which is set out below:

The JCHR said at paragraph 304:

"The Article 2 obligation to hold a prompt investigation is at risk of breach due to significant delays in the inquest system. INQUEST cite delays of more than two years in a number of recent deaths in custody cases . . . such delays are particularly disturbing in cases where systemic failings are in issue, and may remain unaddressed pending the inquest. (*Where the inquest is the means by which the Article 2 duty of investigation is satisfied following a death in custody, then significant delays may breach Article 2, which requires that an investigation into a death be prompt. We are concerned that current delays may in some instances lead to breaches of Article 2. We emphasise the need for the reviews of the coronial system, both in England and Wales and in particular in Northern Ireland, to address delays in the system.*)"

⁶ Joint Committee on Human Rights Deaths in Custody Third Report of Session 2004–05 Vol II: Oral and Written Evidence HC 15 Vol II (2004–05).

⁷ Chapter 5—How the inquest system fails bereaved people—INQUEST's submission to the Fundamental Review of Coroner Services—2002.

[original emphasis]

The Government said:

“The Government shares the concern expressed here about the delays in the holding of some inquests. There are often good reasons why it can take time to investigate complex cases like custody deaths and it is essential for such investigations to be thorough as well as to take into account other inquiries being made. While recognising that there can be reasons for delay it is also crucial to minimise such delays. There have been some cases where delay is unacceptable; work is underway to ensure these backlogs are tackled and reduced.

The Northern Ireland Court Service will shortly publish a response to their recent consultation exercise on Administrative Redesign of the Coroners Service in Northern Ireland. This response will set out what changes will be made to reform the coroner service. It will include the appointment of a High Court Judge as head of the service supported by three full-time coroners. It is anticipated that these changes will alleviate the current backlog of cases and provide the public with a more professional and effective coroner service.”⁸

23. INQUEST is aware that the government is intending to announce its proposals for reform of the inquest system shortly but the problems of delay are still current and do not apply only to custodial deaths.

24. In addition even with reform of the system there will always be some delay to allow the cases to be properly investigated to the required standard. Therefore it will still be appropriate that the policy issues are able to be debated in the House of Commons before the full inquest hearing is held. The case of Phillip Prout, the first IPCC police shooting investigation and in which the CPS moved reasonably swiftly, had a certain delay—he died on 4 May 2004 and the inquest did not start until 3 October 2005.

25. There is a further artificial distinction between cases where there has been a death (and where the inquest would mean that the *sub judice* rule would bite) and where there has not been (and where the lack of an inquest would mean there was no such restriction on parliamentary questions). Such a distinction did not impress *Munby J in R (on the application of D) v The Secretary of State for the Home Department* [2005] EWHC 728 (Admin) when he ordered a public inquiry in such a “near miss” case. *Menson v UK*, Application No 47916/99, ECHR, 6 May 2003 also makes clear that the Article 2 requirement to undertake an effective investigation in any situation where there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances, even if they do not lead to death.

26. The fact that the rule did not historically apply in its current form to coroners’ courts as we show in appendix 1 (not printed) to this submission would suggest there is no principled reason for it. To reverse the rule would therefore seem hard to justify on common law grounds, and it looks particularly odd when the effect of it is to raise serious Article 2 concerns—when the trend is towards changing established practices and laws to recognise and accommodate such human rights issues, post implementation of the HRA in October 2000.

27. Similar anomalies flow from the fact that (as the first report of the Procedure Committee notes at para 29 *et seq*)⁹ the *sub judice* rule would not apply to other tribunals or inquiries (nor does the Committee recommend it be so extended), which can raise issues of comparable gravity to an inquest—such as in Bloody Sunday or the de Menezes case (where there is still a debate as to whether the appropriate investigation is an inquest or a public inquiry).

28. As well as Article 2, the right to speak in Parliament arguably raises the MP’s Article 10 rights to free expression. Unlike Article 2 which is non-derogable and absolute, to infringe Article 10 requires justification under one of the grounds set out in Article 10 (2), and proof that the intervention is necessary in a democratic society and proportionate. The points suggest that such justification may be difficult to find.

Should the point at which coroners’ inquests become “active” for the purpose of the rule be redefined?

29. In the most contentious deaths (which are a tiny minority of the deaths examined before a jury at inquests) where there is a real possibility of criminal charges, INQUEST has always taken the view that it is appropriate to comment on the broad issues raised by the death but to avoid speculation about the precise and detailed circumstances of a death prior to the conclusion of the investigation and inquest.

30. The Attorney General acknowledged (see para 24 of the Procedure Committee report) the unusual delay in coroners’ cases caused by the fact that inquests are usually formally opened within a couple of days of the death, but then not concluded for some years. If the inquest is regarded as “active” for this entire period it is much longer than in conventional trial proceedings, where the case is not “opened” within a few days of, eg the road traffic accident or criminal act, but only when civil proceedings are commenced or a criminal charge laid.

⁸ Joint Committee on Human Rights: Government Response to the Third Report from the Committee: Deaths in Custody: Eleventh Report of the Session 2004–05 HC 416.

⁹ HC 125 (2004–05).

31. One way to strike the balance more appropriately might be for the Committee to follow the practice set out in INQUEST's advice to service users, ie to only consider the inquest "active" when it has been set down for hearing. We do not regard the formal opening of the inquest some days after the death as a key date—the key date with an inquest is when the date has been set for the full hearing.

32. In our experience and as we set out at appendix 1 [not printed] we believe MPs can be trusted to raise issues in parliament in a manner that follows the advice INQUEST gives to families and their advisors (see above) and that they exercise their judgement in such a way as to not prejudice inquest proceedings by asking inappropriate questions. Also, if a particular question was asked which it was felt might prejudice the inquest or other proceedings could the Speaker's discretion to disallow a particular question not bite at that stage? We urge that if this approach were adopted it should be used on a question by question basis and not in a manner which forbids any serious discussion of the issues raised by individual deaths.

33. Given this context parliamentary scrutiny of the issues that arise is crucial. The examples set out in appendix 1 [not printed] demonstrate how parliament has addressed some of these issues in the last six years. MPs commented sensibly and with discretion, and were allowed to do so, at the time of Roger Sylvester's death in Metropolitan Police custody 1999. Lords continue to be able to comment sensibly and with discretion in the second chamber ***. Committees continue to take evidence on death in custody case histories and the perspective of the organisations involved in those cases.

34. In the view of INQUEST recent discussions of the application of the *sub judice* rule in the Commons and its application undermine the democratic process. We are not aware that any complaints were made in the past, or that there was intrusion into the full effective investigation of deaths in custody by the legitimate and appropriate exercise of judgement by the MPs concerned, the Speaker, and relevant House Officials, for example in the Table Office. Our understanding and experience has always been that the rule as previously interpreted operated effectively to ensure that debate upon those cases which raise political questions of public importance did not interfere with the legal process.

35. INQUEST is of the opinion that the appropriate balance between the political public interest and the legal process, which must of course be protected and allowed to operate effectively in all cases, has to be considered in inquest cases as distinct from other legal cases. As we have set out it is common for an inquest to be held at least two years after the death and not unusual for the family, and society, to wait much longer to find out how and why their loved one died and what the lessons are that can be learnt. In some cases the risk to which the deceased was exposed was such that reform of procedure and legislation cannot wait for the inquest verdict and this is recognised by all concerned. Thus the political debate continues but it is muted and cannot operate effectively if the *sub judice* rule is applied in an over zealous manner in order to neuter all discussion rather than to filter inappropriate comment but allow informed debate.

36. A different rule applies in the House of Lords which, unlike the Commons, has a dual legislative/judicial function, and so is arguably more closely analogous to a court, but treated more generously for these purposes.

37. It is for these reasons that we submit it would be appropriate for the operation of the rule in the House of Lords to be taken as the precedent in this instance and the application of the rule in the Commons to be brought in line with the second chamber. This would ensure comity between the two Houses. It is important for the parliamentary process, in our view, that the two Houses operate according to the same standard of scrutiny of debate in this instance.

January 2006

Memorandum from the Law Society (P 33)

INTRODUCTION

This response has been prepared on behalf of the Law Society by the Law Society's Inquest Working Party. The Law Society is the professional body for solicitors in England and Wales. The Society regulates and represents the solicitors' profession and has a public interest role in working for reform of the law.

The Society recognises the difficulty that Parliament is faced with due to the application of the *sub judice* rule in relation to proceedings in coroners' courts. However, the Society does not believe that the *sub judice* rule should be modified as suggested by the House of Commons Procedure Committee. This evidence seeks to explain the reason for the Society's view and seeks to explain the work of coroners for better understanding of the issues. This evidence also includes a brief analysis of the point at which coroners' inquests become 'active' for the purpose of the rule, however it does not seek to address the Chair's discretion to disapply the rule nor the use of the *sub judice* rule by other Parliaments or legislatures.

USE OF THE *SUB JUDICE* RULE IN RELATION TO CORONERS' COURTS

The *sub judice* rule has two main functions. One is to separate legislative and executive powers on the one hand from judicial ones on the other, in order to demonstrate—and to ensure—the independence of the judicial branch of government and the integrity of its processes. For this purpose, there is no difference between different kinds of judicial officers or different kinds of proceedings. This function does not serve the rights of litigants, but instead underlies the structure of government in a democratic society.

The other function, however, is to help ensure the fairness of the legal process in individual cases, by protecting decision makers, witnesses and others from material and other influences which come from outside the process itself and which might predispose a decision maker to a particular result, or a witness to give particular evidence. It is part of the protection conferred by English law upon participants in the legal process, and helps the UK to comply with its international obligations to ensure the fairness of legal proceedings, in particular the ECHR.

The first function clearly covers all exercise of the judicial power of the state, including inquests. If coroners and their juries can be instructed on what to do, the legislative/executive branches will not be properly separated from the judicial, even if (for example) circuit judges and their juries are not specifically instructed on how to decide cases.

The second function also covers inquests as well as ordinary litigation. Firstly, it should be noted that coroners make many procedural decisions after adversarial argument, eg whether to sit with a jury, whether to permit a particular line of questioning, whether to adjourn to call a particular witness, what conclusions to leave to the jury, and so on. There is no relevant distinction between this process of reasoning and that carried out in civil and criminal courts. Those involved in and affected by such decisions have the same expectations of fair process. Secondly, even where coroners are inquiring into what happened, they must inquire judicially, obeying the rules of natural justice, and following the relevant rules of procedure. Again, this is the same obligation as other judicial officers. It is quite different from, say, a minister or a local authority exercising a statutory power. Thirdly, there are in any event strong links between the inquest system and the other courts.

INQUEST/CRIMINAL COURT OVERLAP

Take as an example the (frequent) case where suspected criminal activity results in death. This could be the result of terrorist acts, of breaches of health and safety legislation, road accidents, hospital negligence, etc. The legal consequences are (i) there must be an inquest, and (ii) there may be a criminal prosecution and/or civil proceedings. All these proceedings will be focussed on the same events, albeit from different viewpoints. The inquest procedure will probably start first, as there is a dead body, an autopsy will be carried out within a day or two, and an inquest formally opened.

The coroner is informed if subsequently a person faces criminal charges including a “homicide offence”. In that case, the coroner must adjourn his inquest until the criminal charges have been disposed of. If he later resumes the inquest, the inquest verdict must not be inconsistent with that in the criminal proceedings. If there are no criminal proceedings (which is very commonly the case in custody death cases), the inquest will proceed, but if evidence then arises during the inquest suggesting the commission of a homicide offence, the coroner must adjourn the inquest and refer the matter to the CPS.

In addition, there are a number of procedural rules that protect the rights of a person who may, now or in the future, be accused of a homicide offence. The coroner must warn a witness that he need not answer incriminating questions. If the inquest is held with a jury, the coroner must give certain warnings to them, before they make their decision, about what can and what cannot be included in its content. A conclusion of unlawful killing (for which the elements of which the inquest must be satisfied are the same as for the criminal offences of murder or manslaughter) may only be returned if the decision maker is satisfied to the criminal standard of proof. It is true that at an inquest no-one is on trial, and that the verdict must not name anyone as responsible criminally for the death. However, the reality is that the ‘virtual accused’ is on trial before public opinion. Consequently the proceedings are treated as extremely prejudicial from that person’s point of view, leading to the need for all the procedural protective rules just mentioned.

At the very least, the close links between inquests and criminal proceedings mean that it is undesirable to make any significant changes to the *sub judice* rule for inquests unless similar changes are being made to the rule in relation to criminal proceedings.

THE SCOPE OF INQUESTS

One of the main areas where politicians are likely to want to comment pre-inquest in ways which will prejudice the coroner’s decisions is the scope of the inquest. It must therefore be noted that, if an inquest was conducted today under the law as it was applied, say, 30 years ago, the scope for prejudice would actually be very small, and therefore the scope for non-prejudicial comment correspondingly large.

This is because 30 years ago the scope of an inquest was accepted to be very narrow: it covered only who the deceased was, and when, where and by what (direct) means the deceased came by his death. Consideration of background circumstances, system or regime was generally excluded. So, for example, if

there was a fire and people died in it, the result would be that W, X, and Y died of burns sustained in a fire at Z on such and such a date. There would normally have been no consideration of how the county organised its fire service or the ambulance service. The inquest might not have even investigated how the emergency services were informed in the particular case of the fire and how long it took them to respond.

It is very different nowadays. The law was developing to some extent before the Human Rights Act 1998, but without doubt that Act has radically altered the landscape. It is now clear that, if an inquest is to comply with Art 2 of the ECHR, the inquiry must cover not only the means by which, but also the broad circumstances in which, the deceased came by his death. This will inevitably cover questions of system, regime, training and so on. As the scope of the inquest has therefore broadened, so too has the possibility of comments made in Parliament about a death or deaths prejudicing the relevant inquest(s).

Who is affected?

Laymen are thought to be most at risk from prejudicial comment. Thus the paradigm case for the operation of the rule is where a lay jury decides the facts. This most frequently occurs in criminal cases on indictment, though the more serious inquest cases are also cases where a jury sits to decide the facts. This occasionally happens even in civil litigation cases. However, it is not only juries that are protected by the rule. There are also lay magistrates sitting in magistrates' courts (criminal and civil jurisdiction). Witnesses too can be affected by outside comment, and may be tempted to tailor their evidence to avoid certain consequences from outside sources.

It should be noted that, so far as inquests are concerned, the law requires a jury in one of four cases, and gives the coroner discretion to sit with one in all others. Where a case falls into one of the four compulsory cases, it will be known from the outset that there will have to be a jury. However, the converse is not true. If a case is considered initially to fall outside the compulsory cases, it is not certain that there will not be a jury when the inquest is resumed. The coroner's appreciation of the facts may change, so that he may later become aware of circumstances requiring a jury to be summoned. Or he may accede to an application—maybe not made even until the day fixed for the resumed hearing—by the family of the deceased that in the exercise of his discretion a jury should sit with him to hear the case. We note that it would be very hard on the applicants in such a case to be told that, were it not for prejudicial comments made in Parliament, the coroner would have exercised his discretion in their favour, but that the effect of the comments is such that a jury might not be able to deal fairly with the case and so the coroner will sit alone. Yet this scenario would be perfectly possible if the rule were modified.

The consequence of this is that it is difficult to fix a point in time by which it ought to be known with certainty that there will or will not be a jury at the resumed inquest. Of course with the simplest and most straightforward cases, one can be reasonably confident that there will not in fact be a jury. However, those are not the cases that MPs are likely to want to comment on. They will want to comment on the cases of disasters, multiple homicides, hospital neglect etc—the very cases where an application to sit with a jury may be acceded to at a late stage.

Turning now to the position of judicial officers themselves, of course we hope that coroners, like other judges, would be sufficiently independent to avoid being influenced by what was being said outside. But it is important to notice that this in itself may have unwelcome features. For example, suppose there is discussion in Parliament of a particular death or deaths, and suggestions are made that the inquest should cover this or that aspect of the situation, or that such and such an expert, of a particular type, should be called to give evidence. This will embarrass the coroner when he comes to decide on the scope of the inquest or whether to call an expert, and if so of what type. He cannot be seen to have been influenced by the politicians. That is the whole point of the separation of powers. If therefore he decides he should so extend the scope or call the witness he will obviously be concerned (at the least) to put some time between the Parliamentary debate and his decision. On the other hand, if he would otherwise decide not so to extend the inquest or to call the witness, he will be concerned that he may be attacked in the media and elsewhere for ignoring what the MP says. He cannot win. At the very least, this is likely to slow down the inquest process, to allow the “fade factor” to have maximum effect. That is hardly in the public interest. The better course is that politicians and the media refrain altogether from making suggestions as to what the inquest should cover, or who should be called to give evidence etc.

Plainly the easiest way to achieve that is not to discuss the matter at all, though that may be a counsel of perfection. In any event, it must be understood that, if inquests are discussed before they have been concluded, then this will create problems. In particular it will create the risk, especially where a jury inquest is concerned, that a person aggrieved by the result of the inquest successfully applies for judicial review of the verdict, on the basis that, because of the prejudicial comments made in Parliament, it was not possible to conduct the inquest proceedings fairly, and the verdict must be quashed. This quashing may be with or without a fresh inquest being ordered, depending on the circumstances, but with all the waste of costs that quashing the existing verdict implies. Indeed, a rerun inquest where the first was conducted with a jury in the exercise of the coroner's discretion would probably have to be conducted without a jury in order to ensure a fair hearing. Since Parliament is not bound by the ordinary rules contained in the Contempt of Court Act 1981, the decision of whether to take that risk is one for Parliament itself. But if the risk matures, it will be Parliament's responsibility, and not that of coroners or of those who take part in inquests.

When does a case become “active”?

The Contempt of Court Act 1981 operates from the time the inquest is opened. In inquest terms, this has the merit of being an event whose occurrence is clear and unambiguous, even if, as the law stands, there is no fixed point in time at which it must occur. Other possibilities include (i) the date when the date is fixed for the resumed hearing; (ii) the date on which the jurors are summoned, and (iii) the first day of the hearing.

Of these, (iii) is obviously far too late in the day to avoid prejudice to the inquest, whilst (ii) only applies to jury cases, and will be capricious, depending on the practice of the particular court. One court might summon jurors three weeks before the hearing, whilst another may do so three months before. Option (i) has some attraction, and corresponds in broad terms to the date when the date of the trial is fixed in criminal and civil litigation. But it too is capricious. Some coroners fix resumed hearings from the beginning, and then push them back from time to time when it becomes clear that they cannot be met. Even if they are realistic they can be altered by subsequent decision, which is much more common than alteration of trial dates in criminal or civil litigation. Further, coroners could be tempted to fix a date a long way off well in advance just so as to attract the benefit of the rule. Moreover, given the relationship between the inquest process and the criminal justice system, in cases where there are or may be criminal charges, there seems no good reason for having dates for engaging the rule which are different.

Perhaps a better approach may be to distinguish different kinds of information, ie to have not one rule, but two. One would deal with the core inquest information, and would be strict, and bite early on. The other would deal with wider social issues, less likely to be raised in inquests, and could be less strict, or bite later, once the issues to arise at the inquest were clearer.

With such an approach, the critical question is how to distinguish these two concepts. If it could be done, drafting in advance would be best. However, given the huge variety of potential fact situations, this may prove impossible. Another suggestion would be to rely on some kind of self-certification by the coroner, who states when he opens the inquest(s) what he considers the core issues to be. Then, if he later considers that further issues arise, he issues a further certificate. Plainly this imposes an extra burden on the coroner concerned. One further problem with this is that it might lead to multiple communications between the Parliamentary authorities and the coroner, fuelling suspicion of an establishment “cover up”.

January 2006

Letter from Crown Office and Procurator Fiscal Service (P 34)

I refer to your letter of 14 November 2005 seeking a written submission concerning the application of the *sub judice* rule of the House of Commons to proceedings in coroners’ courts. I apologise for the delay in responding.

I can confirm that I have seen the written submission that the Lord Advocate has sent to you on 5 January. This response covers the interests of the Crown Office & Procurator Fiscal Service and therefore I have nothing further to add.

Norman McFadyen CBE
The Crown Agent & Chief Executive
January 2006

Memorandum from the Clerk of the Parliaments, House of Lords (P 38)

Comity between the Houses

1. The *sub judice* rule is and ought to be the same in both Houses, as far as possible. Both Houses adopted in almost identical terms the resolution on *sub judice* recommended by the Joint Committee on Parliamentary Privilege (the Lords on 11 May 2000, the Commons on 15 November 2001). And the House of Lords *Companion to Standing Orders* says,

“4.53 The House has agreed that the practice governing motions and questions relating to matters *sub judice* should be similar in both Houses of Parliament. It is desirable that each House should be in the same position to debate a *sub judice* matter when the circumstances warrant it.”

2. The bicameral Resolution explicitly applied the rule to coroners’ courts. The question of coroners’ courts was not discussed in the report of the Joint Committee on Parliamentary Privilege. It was not raised in the Lords Procedure Committee when it discussed the bicameral Resolution in April 2000, nor in the House when the matter was debated on 19 April and 11 May that year. But if the Commons were to revise the rule in this respect, in the light of your inquiry, I would expect the Lords to follow suit. If your Committee were minded to call for change, I suggest that officials in both Houses should consult to ensure that any changes can readily be applied in both Houses.

Recent breaches of the rule in the Lords

3. Your Committee's inquiry has highlighted some recent breaches of the rule in respect of coroners' courts in the House of Lords. Two of these were on the Order Paper. The first was a Starred (Oral) Question by Lord Elton on 28 April 2004—the case, I believe, which first gave rise to concern in your House. I understand the coroner's inquest opened that day; so, while the Question was properly tabled, it should not have been proceeded with.

4. The second was a Question for Written Answer by Lord Dykes on Jean Charles de Menezes, the Brazilian man shot dead by police at Stockwell in July 2005, tabled on 11 October 2005 and answered on 1 November (HL1627). In that case I gather the inquest opened on 23 August 2005. Therefore this Question undoubtedly breached the rule, and was accepted in error. The Minister's reply did not mention the opening of the inquest, though it was somewhat guarded.

5. We have taken steps to ensure that staff in the Minute Room (the Lords "Table Office") identify potential breaches in future. When in doubt as to how to apply the rule, we have always consulted the relevant government department, and sometimes the Commons Table Office, who are always helpful. The Minute Room and the Table Office are now sharing information in a more systematic way.

6. The other breaches of which I am aware arose, in the course of proceedings and without warning. On 9 June 2005, during a debate on the general issue of deaths in custody, Baroness Neuberger referred to the case. Her remarks breached the rule but went unchallenged. The Government Whip on the front bench at the time might have been briefed to interrupt Baroness Neuberger.

7. On a Starred (Oral) Question on police shootings on 3 November 2005, Lord Berkeley referred to Mr Menezes (col 274). The Minister properly declined to comment. On 22 November the Menezes case was again referred to at Question Time, by Viscount Bridgeman (col 1501); the topic was broader, so the infringement less foreseeable.

8. I have traced two further references of a death in custody. On 29 November 2004, Baroness Stern referred to it in her speech in the Debate on the Address, as one in a list of cases. And on 8 November 2005, on a Starred Question on the restraint of teenage prisoners, the Minister referred to the non-completion of proceedings on the death in custody case as the reason for the postponement of a visit. Although it is hard to see how either reference could in fact have prejudiced proceedings, they were nonetheless breaches of the rule.

9. I will do what I can to ensure that the Lords observe the *sub judice* rule strictly, whatever form it may take in future. In particular, I have written to all front benches, and to the members involved in the incidents to which I have referred.

When are proceedings active?

10. The bicameral Resolution as drafted says that matters before coroners' courts shall be treated like criminal proceedings for the purpose of determining whether they are active. I can see that this could cause a difficulty, since the course of a coroner's inquest and a criminal trial are different, at least in terminology. I note that your predecessor Committee, in its First Report 2004–05 on *sub judice*, recommended 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). No such joint consideration has taken place; but we are ready to take part, if invited to do so.

Discretion to waive

11. As in the Commons, there is in Lords procedure a discretion to waive the *sub judice* rule. Since the House gives no powers to the Speaker, the discretion is vested in the Leader of the House. The relevant sections of the rules are set out below.

12. Your predecessor Committee's Report of April 2005 recommended relying on discretionary waiver to deal with difficult cases involving coroners' courts. It may be that some of the cases which have given rise to concern about the rule could, with hindsight, have been dealt with in this way. I would observe however that the discretionary approach involves the risk (albeit small) of different decisions in the two Houses; or of Mr Speaker feeling obliged by comity to have regard to a previous ruling of the Leader of the Lords about which he had doubts, or *vice versa*. I suggest therefore that the rule for coroners' courts should be framed in a way which is accepted as satisfactory in most situations, with discretionary waiver as the back-stop for exceptional cases.

13. Where waiver is requested, it is perhaps to be hoped that the Leader and the Speaker would confer before either issued a ruling, if the circumstances made this practical, or would at any rate keep each other informed of rulings given.

14. As you will be aware, the House is currently considering changes to the nature of its Speakership, and it is possible that this might affect the position. The Select Committee on the Speakership of the House, which reported in December, has recommended that the Leader's discretion over *sub judice* should transfer to the new Speaker (HL Paper 92, paragraph 33).

15. I have consulted Lord Brabazon of Tara, Chairman of Committees and Chairman of the Lords Procedure Committee. He endorses these remarks.

DISCRETION TO WAIVE

The *Companion* says,

4.52 The *sub judice* rule is not absolute. In the Commons it may be waived at the discretion of the Chair. In the Lords the Leader of the House exercises a general power of waiver and also a power of waiver in specific circumstances such as ministerial decisions and issues of national importance (see below and Appendix N [ie the bicameral Resolution]). . . .

4.58 This [ie the general rule] is subject to the proviso that, where a ministerial decision is in question, or a case concerns issues of national importance such as the economy, public order or the essential services, reference to the ministerial decision or to the case may be made at the discretion of the Leader of the House who must be satisfied that there is no real danger of prejudice to the court proceedings.

4.59 The Leader must be given at least 24 hours' notice of any proposal to refer to a matter which is *sub judice*. The exercise of the Leader's discretion may not be challenged in the House.

And the Lords version of the Resolution confers discretion on the Leader in two places:

Subject to the discretion of the Leader of the House, 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*: . . .

But where a ministerial decision is in question, or in the opinion of the Leader of the House 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.

Paul Hayter
January 2006

Memorandum from the Bar Council (P 40)

INTRODUCTION

1. On 4 April 2005 the Procedure Committee published a Report entitled *The sub judice rule of the House of Commons ("the Report")*.¹⁰ In summary, the Committee did not recommend changes to the *sub judice* rule, although it expressed some concern about the effect of the rule in the case of coroners' court proceedings, where (as the Committee observed) delay in the proceedings may inhibit discussion of a matter of public concern for long periods.

2. The Bar Council submitted written evidence to the Committee in March 2005.¹¹ That evidence considered the strict liability rule established by the Contempt of Court Act 1981, and the purpose and application of the Parliamentary *sub judice* rule. The view of the Bar Council was, and remains, that the *sub judice* rule serves a number of valuable purposes and should be maintained substantially in its present form. However, some reservations were expressed by the Bar Council about the effect of the *sub judice* rule on coroners' proceedings.

3. The Procedure Committee has now decided to hold an inquiry into the application of the *sub judice* rule of the House of Commons to proceedings in coroners' courts. A press notice dated 10 November 2005 asks that written submissions to the inquiry should be guided by the following particular points for consideration:

- (1) Should there be a separate *sub judice* rule for coroners' inquests?
- (2) Should the point at which coroners' inquests become "active" for the purpose of the rule be redefined?
- (3) Is the Chair's discretion to disapply the *sub judice* rule where necessary an effective mechanism? How does it operate in select committee meetings?
- (4) How do other Parliaments or legislatures apply the *sub judice* rule to similar proceedings?

¹⁰ House of Commons Procedure Committee, *The Sub Judice Rule of the House of Commons*, First Report of Session 2004–2005.

¹¹ *Ibid.*, Ev 51. For convenience, some of that evidence is incorporated, where relevant, into this submission.

THE PARLIAMENTARY *SUB JUDICE* RULE

4. It is understood that the rule in its present form stems from a resolution of the House of Commons dated 15 November 2001,¹² 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.

5. The resolution defines when proceedings are active for its purposes. That definition embraces criminal proceedings after charge or summons until verdict, sentence or discontinuance, 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. With one exception considered below (see paragraphs 29 and 30), this definition broadly recalls Schedule 1 of the Contempt of Court Act 1981 ("the 1981 Act"), which determines when proceedings become active for the purposes of section 2 of that Act.

6. 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:¹³

- (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.

7. As to (i), it is suggested that the primary purpose of the rule is 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, 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.

8. Purpose (ii) underlines the separation of the legislature and the judiciary. It is 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.

9. As to (iii), the independence of the judiciary is of huge importance and value to this country. 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.

THE STATUTORY STRICT LIABILITY RULE

10. It may be helpful to note in brief outline the effect of the strict liability rule of contempt of court as it affects freedom of speech outside Parliament, because it both offers some close analogies with Parliamentary practice, and in one substantial respect adopts a different approach.

11. The 1981 Act establishes a rule of strict liability,¹⁴ 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 intention to do so. The strict liability rule applies to publications, which includes any speech, writing, programme or

¹² The House of Lords had adopted its own resolution on 11 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).

¹³ HL Paper 43; HC 214 (1998–99), para 192.

¹⁴ It should be noted that 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.

other communication addressed to the public at large or any section of the public. However, it applies only if the proceedings in question are active 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.

12. It follows that to breach the strict liability rule, the publication must create a risk that the course of justice in active proceedings will be impeded or prejudiced; that risk must be substantial; 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.

13. 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. There has been particular emphasis in recent times 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.

14. 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.

15. The main exceptions to the strict liability rule are the entitlement to publish a fair and accurate report of public legal proceedings,¹⁵ and 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.¹⁶

16. By s 19, the strict liability rule applies to the proceedings of any tribunal or body exercising the judicial power of the state. That has been held to include coroners’ courts.¹⁷

17. It is important to note the provisions of schedule 1 of the 1981 Act, which determine when proceedings become “active” for the purposes of the strict liability rule. Criminal proceedings are active from the relevant initial step, which may be arrest, the issue of a warrant for arrest, oral charge or the service of an indictment or other document specifying the charge, until acquittal or sentence (in court-martial cases, until review of finding or sentence) or any other verdict, finding, order or decision which puts an end to the proceedings. Appellate proceedings of all kinds are active from the time when they are commenced (usually by application for permission to appeal or by notice of appeal) until disposed of or abandoned, discontinued or withdrawn.

18. There are different provisions for “proceedings other than criminal proceedings and appellate proceedings”. This residual category includes civil proceedings generally, and coroners’ proceedings, which are neither criminal nor appellate.¹⁸ Such proceedings are active from the time when arrangements for the hearing are made or (if no such arrangements have previously been made) from the time the hearing begins, until the proceedings are disposed of or discontinued or withdrawn, and any motion or application made in or for the purposes of the proceedings is to be treated as a distinct proceeding.

19. It will be seen at once that the regime for non-criminal proceedings is much more liberal than it is for criminal matters. In crime, the strict liability rule bites as soon as a suspect is arrested; whereas (for instance) in a civil case it applies only once arrangements for a hearing are made, which may be many months after proceedings have begun.

CORONERS’ PROCEEDINGS

20. So far as is relevant to the present inquiry, the main duty of a coroner is to hold an inquest to inquire into the cause of death and circumstances surrounding the death of any person when there is reasonable cause to suspect that the deceased has died a violent or unnatural death, or has died suddenly from an unknown cause, or has died in prison or in a place or circumstances such that the law requires an inquest. It is worth noting in this connection that Article 2 of the European Convention on Human Rights imposes an obligation on the State to protect “the right to life” and, in circumstances where Article 2 is engaged due to the involvement of the State (for example, following a death in custody), it also imposes a procedural obligation on the State to provide an effective official investigation into the death.¹⁹ In many cases it will be the inquest that discharges that procedural obligation.²⁰

¹⁵ S4(1), 1981 Act.

¹⁶ S5, 1981 Act.

¹⁷ *Peacock v London Weekend Television* (1985) 150 JP 71.

¹⁸ Paragraph 12 of Schedule 1 of the 1981 Act. See *Peacock v London Weekend Television*, above.

¹⁹ See *McCann v UK* (1995) 21 EHRR 97, para 193.

²⁰ As to the scope of the inquest in circumstances where Article 2 is engaged, see the House of Lords in *R (on the application of Middleton) v West Somerset Coroner* [2004] 2 AC 182).

21. Generally, the coroner sits alone, without a jury. However, in certain circumstances a jury must be summoned, in particular where there is reason to suspect that the death occurred in prison or police custody, or as a result of a notifiable accident, poisoning or disease, or in circumstances which, if they continued or recurred, would be prejudicial to the health and safety of the public. The jury may be summoned in the course of the inquest, if the reason for suspicion only emerges after the inquest has been opened.

22. The purpose of the inquest is to find facts. The primary facts are the identity of the deceased, the time and place of death, and how the deceased came by his or her death. The proceedings are inquisitorial, unlike the usual English trial process which is adversarial.

23. It is a feature of coroners' proceedings that they are often opened and then adjourned, frequently for long periods. The inquest is usually opened promptly, so that the body may be released after evidence of identification has been given, but adjournment often follows. Adjournment is often an obligation imposed by law: for example, if the coroner is informed that a person has been charged with killing the deceased,²¹ or with an offence committed in circumstances connected with the death of the deceased, he or she will generally be obliged to adjourn the inquest until the conclusion of the criminal proceedings. Sometimes, the coroner will be requested by the Chief Constable or Director of Public Prosecutions to adjourn an inquest on the grounds that a person may be charged with such an offence. Such an adjournment will be for 28 days or such longer period as the coroner thinks fit,²² and a further adjournment may be granted at any time before the date fixed for the resumed hearing.²³ It may be that evidence is given during the inquest from which it appears that the death may have been caused by a criminal act. In that event also the coroner is generally obliged to adjourn for 14 days or such longer period as he or she thinks fit and in this case also the DPP may request a further adjournment.²⁴ It sometimes happens that the conduct of some individual is criticised on what the coroner believes to be substantial grounds. If the person criticised is not present and has not been summoned to appear, the inquest will be adjourned to enable him or her to be present.²⁵ An adjourned inquest may never be resumed—for example, because the coroner takes the view that there is no longer sufficient reason to do so in the light of the outcome of criminal proceedings; or the adjournment may continue for a very long time.²⁶

24. The inquest concludes with a verdict, which is certified by inquisition. Possible verdicts include death from natural causes, abuse of drugs, lack of care, suicide, misadventure, and unlawful or lawful killing, while an open verdict is appropriate where there is a real doubt as to the cause of death. The inquisition records findings as to the facts found, which should include the identity, sex, occupation and usual address of the deceased, the disease or injury which caused death, and how, when and where the deceased came by his or her death.²⁷ However, there must be no verdict which appears to determine a question of criminal liability on the part of a named person, or a question of civil liability on anyone's part, whether named or not.

SCOPE FOR PREJUDICE TO CORONERS' PROCEEDINGS

25. Coroners' proceedings inquire into questions of fact which may be of great importance and, as explained above, in many cases provide the forum in which the State's procedural obligations under Article 2 of the European Convention on Human Rights are met. The importance of their role is not diminished by the fact that it is no part of their function to determine guilt or innocence, and it is understandable that Parliament, in passing the 1981 Act, should have given coroners' courts the protection of the strict liability rule.

26. The scope for prejudice to coroners' proceedings is the same as it is in the case of any other proceedings, whether civil or criminal. When the coroner is sitting with a jury, the risk of prejudice is greater,²⁸ but even where there is no prejudice to the fact-finding process, Parliamentary comment may put pressure, or may appear to put pressure, on the jury or on the coroner sitting alone, and may cast doubt on the validity of the outcome of proceedings.²⁹

27. It is therefore submitted that coroners' proceedings should in principle remain protected by the Parliamentary *sub judice* rule.

²¹ In a charge of murder, manslaughter, infanticide, causing death by dangerous driving or by careless driving when under the influence of drink or drugs, or aiding, abetting, counselling or procuring suicide.

²² Coroners Rules 1984, SI 1984/552, rr26(1), 27(1).

²³ *Ibid.*, rr26(2), 27(2).

²⁴ *Ibid.*, r28.

²⁵ *Ibid.*, r25.

²⁶ Three years, in the case of *R v HM Coroner for South Glamorgan, ex parte BP Chemicals Ltd* (1987) 151 JP 799, DC.

²⁷ When the inquest constitutes an inquiry for the purposes of Article 2 of the ECHR, the Coroner is required to consider "by what means and in what circumstances" the deceased came by his death, which may involve further findings; for example, as to whether there were any defects in the systems operating in a prison that caused or contributed to a death in custody. See Middleton, n.11 above.

²⁸ See House of Commons Procedure Committee, *The Sub Judice Rule of the House of Commons*, First Report of Session 2004–2005, Ev 52–53 paragraphs 7–8, 15.

²⁹ See paragraphs 7 to 9 above.

 PROPOSALS FOR CHANGE

28. The main problem presented by coroners' proceedings as far as the *sub judice* rule is concerned is the procedure which requires proceedings to be opened promptly and then, in many cases, adjourned for long periods.

29. The current House of Commons resolution departs from the scheme of the 1981 Act by treating matters before coroners' courts as criminal proceedings, which are active when a charge has been made or a summons to appear has been issued.³⁰ Under that regime, comment and discussion are inhibited from the moment when an inquest is opened, until it is finally concluded, which (with adjournments) may be substantially longer than criminal proceedings.

30. The 1981 Act, by contrast, 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.³¹

31. However, the distinction is not of great substance, since even the civil proceedings test entails treating coroners' proceedings as active from—at the latest—the moment when they are opened. That is because coroners' proceedings, uniquely, are opened not by the issue of process (such as the claim form used in civil proceedings) but by the initial hearing itself.

32. There is a superficial attraction in suggesting that the answer to this problem may lie in (a) treating coroners' proceedings as civil proceedings and (b) adapting the civil proceedings test for the purposes of the Parliamentary *sub judice* rule so as to restrict comment to the period before arrangements are made for any particular hearing. The difficulty with that suggestion is that when the hearing is adjourned, it is generally adjourned to a fixed date (in which case arrangements for the hearing have been made and comment would be inhibited), or until after the conclusion of a criminal trial (in which case comment would be inhibited in any event). It would only be in cases where a hearing had been adjourned *sine die* without any criminal proceedings being commenced that it could be said that no arrangements had been made for the next hearing, so that proceedings would no longer be active and discussion of the issues could proceed without offending against the strict liability rule.

33. A more plausible proposal may be to distinguish between those cases where coroners' proceedings are adjourned for lengthy periods in order to allow criminal proceedings to take their course, and those where proceedings have been adjourned but no criminal proceedings have been commenced. In the former situation, it seems most unlikely that the House would wish to comment on the issues before the coroner's court, because of the risk that to do so would be to comment on the issues before the criminal court.

34. However, in cases where inquests are adjourned for lengthy periods but no criminal proceedings have been commenced,³² it is suggested that it would be open to the House to take the view that the Parliamentary rule should be amended to enable the House to comment on the proceedings even though arrangements have been made for the resumed hearing, subject to imposing a limit on discussion within a reasonable period (which would need to be at least one month and possibly longer)³³ before the resumed hearing, and subject to no criminal proceedings being started in the interim. However, even in such a case, it is submitted that the House should impose restrictions on criticism of the conduct or decisions of the coroner while the proceedings are pending.

 THE GOVERNMENT'S PROPOSALS FOR REFORM OF THE LAW RELATING TO CORONERS

35. Following the two reports on the coroners' service in 2003,³⁴ and the Home Office Position Paper in March 2004,³⁵ responsibility for the coroners' service has passed to the Department for Constitutional Affairs. The Lord Chancellor has announced that a White Paper and Draft Bill for reform of the coroners' service will be introduced in spring 2006, with the intention that a Bill be introduced in November 2006. It is not known how far the Government's proposals may affect the operation of the *sub judice* rule as regards coroners' proceedings.

³⁰ See paragraph 3 of the resolution of the House of Commons dated 15 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.

³¹ Paragraph 12 of schedule 1 of the 1981 Act. See *Peacock v London Weekend Television*, n8 above.

³² It appears that the case cited by Ms Sally Keeble MP, where a decision on prosecution was still awaited from the Crown Prosecution Service nearly a year after the death of a boy in custody, was such a case: see House of Commons Procedure Committee, *The Sub Judice Rule of the House of Commons*, First Report of Session 2004–2005, Ev 26.

³³ A rather longer period might be desirable, to avoid so far as possible the risk of prejudicing the findings of a jury (which might be summoned for the first time at the resumed hearing).

³⁴ *Death Certification and Investigation in England, Wales and Northern Ireland—The Report of a Fundamental Review*, HMSO June 2003, Cm 5831; *Death Certification and the Investigation of Deaths by Coroners*, HMSO 14 July 2003, Cm 5854 (The Third Report of the Shipman Inquiry).

³⁵ *Reforming the Coroner and Death Certification Service: A position paper*, HMSO March 2004, Cm 6159.

CONCLUSION

36. In answer to the first and second points raised for consideration by the Committee (see paragraph 3 above), it is the view of the Bar Council that the protection of the Parliamentary *sub judice* rule should continue to apply to coroners' proceedings, but that there is limited scope for devising a separate Parliamentary *sub judice* rule for such proceedings. If that is done it will be necessary to redefine the point at which coroners' inquests become "active" for the purposes of the rule.

37. The Bar Council cannot usefully comment on the third point which the Committee has raised for consideration (as to the effectiveness of the Chair's discretion to disapply the rule), nor on the fourth (as to the practice of other Parliaments and legislatures). However, as regards the fourth point it may be appropriate to sound a note of caution to the effect that any comparative examination of the practice of other Parliaments and legislatures might have little value without a simultaneous examination of the laws of contempt of court, and of the relationship between legislature and judiciary, in the countries in question.

Richard Parkes QC
Christopher Mellor
January 2006

Memorandum from Dr Tony Wright MP, Chairman of the Public Administration Committee (P 48)

1. Thank you for inviting me to comment on matters relating to your current inquiry into the operation of the *sub judice* rule. I note that the focus of your inquiry is on the rule as it is applied to proceedings in coroners' courts. This is not a matter which, as far as I am aware, has arisen in connection with the work of the Public Administration Select Committee, but it does raise wider questions about the effect of the *sub judice* rule on the timeliness of Committee proceedings, and on the relationship between Parliamentary accountability and legal accountability which have arisen in context of our work on the Parliamentary Commissioner for Administration (the "Ombudsman").

2. Judicial review can affect our proceedings in a variety of ways:

- the Ombudsman's decisions can be challenged through Judicial Review;
- a Ministerial decision may be simultaneously the grounds for complaint to the Ombudsman and for Judicial Review proceedings;
- Judicial Review proceedings may be brought about an aspect of a ministerial decision which is closely related to an Ombudsman's finding.

3. It may be worth noting that although the presumption is that the *sub judice* resolutions will not automatically bite when "a ministerial decision" is in question, this does not, of course, apply to review of the Ombudsman, since she is not a Minister. The Speaker and Chairman retain also discretion to limit reference to judicial review proceedings, if they consider it is appropriate to do so.

4. Since 2003 our work has been affected by all these measures. I will sketch the particular cases before drawing more general conclusions.

EQUITABLE LIFE

5. In June 2003, the Ombudsman issued a special Report to Parliament saying that, as a result of the investigation of a particular case:

I did not find evidence to suggest that FSA acting as a prudential regulator had failed in their regulatory responsibilities during the period under investigation. Nor did I find that the decisions which the prudential regulator had taken in relation to Equitable were outside the bounds of reasonableness and that she saw nothing to be gained from investigations into further complaints about the regulation of Equitable.³⁶

6. This decision was challenged through judicial review and I expressed my frustration about the inevitable restriction on our work when we took evidence from the Ombudsman in November 2003.³⁷ However, we were able to discuss many of the general principles with the Ombudsman at the hearing, and were reassured by her announcement that she would be reconsidering her decision after the Penrose Report had been published. The Ombudsman is now conducting a further inquiry, and we will obviously await its findings before deciding how to proceed.

7. The Procedure Committee may like to know that the Petitions Committee of the European Parliament is currently itself conducting an inquiry into the regulation of Equitable Life.

³⁶ *The Prudential Regulation of Equitable Life*, Fourth Report of the Ombudsman, Session 2002–03, HC 89-I, paras 9, 14.

³⁷ *The Work of the Ombudsman*, Minutes of Evidence, 27 November 2003, HC 41-I, Q2.

DEBT OF HONOUR

8. While Equitable Life demonstrated the difficulties involved when the Ombudsman's decisions are themselves reviewed, we are currently involved in a case in which Judicial Review of ministerial decisions has affected our work.

9. Briefly, the case concerns civilians who had been interned in the far east during the Second World War. In November 2000, the Government announced that there would be an *ex gratia* scheme for former prisoners of war in the far east, and "British civilian internees". It was only after the scheme had begun that the Government came to a full definition of "British civilian internees". That definition excluded many British passport holders, some of whom had spent their entire adult lives in the United Kingdom.

10. The Government's actions were the subject both of Judicial Review, and of a complaint to the Ombudsman. The Ombudsman deferred a decision on whether to conduct an investigation until the Judicial Review proceedings, which held that the Government had acted lawfully, were concluded. That meant that the first complaint was received in December 2001, while the decision to investigate was taken in June 2003.

11. Although this first judicial review delayed the Ombudsman's investigation, and hence our intervention, it did not directly affect it. However, the Government was also challenged on the grounds that its decisions had been unlawfully racially discriminatory by a Mrs Elias. The decision partially upheld Mrs Elias's case. The Government is appealing, and Mrs Elias is cross appealing. At the time we arranged our hearing, which was to take place in December, the case was expected to return to court in January.

12. In the course of arranging a hearing with the Ministry of Defence, committee staff were asked by the Ministry to consider whether the *sub judice* rule did not mean that the hearing should be postponed, since the Minister would not be able to comment on issues relating to the Elias case. They replied robustly, pointing out that the presumption was the rule did not apply "where a ministerial decision was in question", and that there was no reason to delay the hearing, especially given the age of those affected.

13. After correspondence between the Chairman and the Speaker we decided that the court hearing and the committee proceedings were so close in time that we should not go into the issues raised by the Elias case, although we might make incidental reference to it. In the event, this hardly arose, since the Minister announced that in preparing for our evidence session officials had discovered that they might well have decided cases inconsistently, something which had been denied throughout judicial review proceedings and the Ombudsman's investigation. Naturally, our questioning focused on this.

14. In fact, the hearing in the Elias case has been deferred until April.

15. The Committee has reported on this case, recommending that the Government reconsider its refusal to accept all the Ombudsman's findings. It is possible that if the Government does not accept this recommendation we may wish to return to the issue. It is quite possible that the Elias case will not be concluded by then. Although the Ombudsman is precluded from considering illegality rather than maladministration, we are able in principle to look at a department's actions more broadly. It would be a source of frustration for us if we could not assess the full impact of the Government's actions because judicial review proceedings were continuing.

16. The *sub judice* rule also had an effect on the evidence we printed with our report. The Committee received evidence from Mr Halford, a solicitor at Bindmans, who acted for Mrs Elias. On 12 August he wrote to each Member of the Committee, urging us to examine the Ombudsman's report; his letter contained extensive discussion of the Elias case. Later on, he sent a note on *sub judice* issues and shortly before the Committee hearing on 1 December Mr Halford sent an extensive briefing to each member.

17. We decided that the first submission should not be printed, since it contained so much material directly relating to the Elias case, but did decide to print the other two documents, including the note on *sub judice*, although they contained references to the case. Our decision was taken on the following grounds:

- The document did not advance the Elias case, but discussed matters of principle about the scope of committee investigations;
- this was not a document that the Committee discussed or endorsed and it was a matter of record that the Elias case was continuing;
- if the case had been decided, we would have wanted to publish the note; the proceedings in question were Judicial Review which is normally exempt from the rule, so there seemed no compelling reasons for artificial delay; and
- the Committee has decided that witnesses should normally have the right to publish the evidence they submit, so Mr Halford could have published in any event.

BROADER ISSUES

The relationship between Parliamentary and legal accountability

18. The Parliamentary Commissioner Act 1967 is based on the idea that there can be injustice which is not susceptible to legal redress. Indeed, the Ombudsman is precluded from investigating if it would be reasonable for the complainant to seek redress through legal proceedings. Since 1967, Judicial Review has increased enormously. It is now more likely that some people will bring complaints to the Ombudsman, at the same time as others launch legal proceedings on the same matter, either on the same grounds as the complaint, or on related grounds.

19. There may be cases in which political and judicial accountability have to run along side one another. Committees, and the House as a whole, have to respect the fact that it is for the courts to decide whether a particular action is legal or illegal. It would be most unfortunate if we ever appeared to usurp that function, and the *sub judice* rule must be applied if necessary to prevent it.

20. However, to say something is legal is not to say that something is just. In those cases, parliamentary accountability is more effective than legal accountability. A significant delay in Parliamentary proceedings may entrench the Government in its position, as well as delaying justice.

21. It seems to me that the issues raised by this delay are similar to those raised by the effect of the *sub judice* rule when coroners' courts have opened and adjourned an inquest. It is certainly not for the House or its Committees to attempt to usurp the functions of an inquest; on the other hand there may well be questions of wider public interest which it is appropriate for us to deal with, and to consider speedily.

22. Decisions on these matters can obviously only be made in the light of the circumstances of the particular case. But I believe it is important that when those decisions are made proper account is taken not just of the fear that Parliament may improperly interfere in judicial proceedings, but of the danger that too great a deference to the courts may reduce our ability to carry out our own proper functions—to influence policy or hold governments to account in a timely way. The constraints on us are, quite rightly, far greater than those on the press, avowedly because what we say has more weight and authority; that will not remain the case if we are prevented from engaging with the political issues underlying particular court proceedings until long after the wider debate has ended.

23. A further consideration is that Parliamentary intervention may reassure members of the public that their case is being taken seriously. We know that our hearing on the Debt of Honour Report brought some feeling of recognition to many former internees, whether or not our report changes Government policy. It is sadly also true that had we delayed, there would be fewer alive to receive even this small satisfaction.

Direct Review of the Ombudsman's Decisions

24. Although Judicial Review of the Ombudsman's decisions has been frustrating for us, I do not think it inevitably would always have a major adverse effect on our work. It is possible that we might consider a court judgement revealed that the Ombudsmen needed new powers, or that she has been badly advised, or her office had not worked well. In all these cases we could take evidence and report after the court judgement had been made.

25. On the other hand, we were greatly frustrated by the proceedings in relation to Equitable Life; they meant that we were unable to discuss the Ombudsman's findings as fully as we would have liked. This was particularly unfortunate since our terms of reference give us responsibility for examining the reports of the Ombudsman and related matters; there is a risk that in this case judicial accountability was not filling a void, but displacing Parliamentary accountability. The judicial proceedings were not concluded; it is possible that had we been able to intervene and press for a further investigation the same end would have been reached more speedily and cheaply. Nor would our intervention have turned on the legality or otherwise of the Ombudsman's decision.

Judicial review of matters which are also the subject of complaints

26. As we have seen, Judicial Review of matters which are also the subject of complaints can mean that a lengthy legal process is followed by a lengthy Ombudsman's investigation before any final determination is made. This has been particularly unfortunate in the case of the former civilian internees, who are, by definition, elderly, but we do not think that anybody should have to wait 3½ years to have a decision on their case.

27. In our report on *A Debt of Honour* we recommended that there might be cases in which the Ombudsman considered it appropriate to conduct an investigation in parallel with Judicial Review proceedings, to enable her to report quickly at the conclusion of such proceedings, if it was appropriate.

28. That might mean that in future the Ombudsman could report at the conclusion of Judicial Review proceedings, but only for the matter to become *sub judice* again if an appeal was lodged. I do not think it is sensible to speculate about what the Committee and the House would then do; so much would depend on the circumstances of the case.

Judicial Review about matters related to an Ombudsman's finding

29. Here again each case must be decided on its merits. Clearly, it is undesirable for a court and a committee to consider the same matter at the same time. However, if there is likely to be a significant delay in court proceedings, and there are good reasons for holding committee hearings quickly then I believe we should be prepared to take advantage of the fact that the *sub judice* rule does not automatically apply to judicial review proceedings of a ministerial decision. If we do not do that, then there is a real danger that Ministers will use the prospect of such proceedings as a way of avoiding Parliamentary accountability.

February 2006

Letter from Mr Andrew Dismore MP, Chairman, Joint Committee on Human Rights (P 64)

My Committee has noted with interest the inquiry which you are currently conducting into the application of the House's *sub judice* rule to coroners' courts, following up your report at the end of the last Parliament into the rule more generally, and it welcomes your decision to consider this matter.

The application of the *sub judice* rule to coroners' courts has not caused my Committee any particular difficulties in the way we operate, to a large extent because our terms of reference preclude us from giving consideration to individual cases. Nevertheless, on the understanding that one of the questions you are considering is the application of the rule during lengthy adjournments of inquests, we would like to draw to your attention a related human rights concern which has arisen for us as a result of such delays.

In the previous JCHR's report into deaths in custody (Third Report of Session 2004–05, *Deaths in Custody*, HL Paper 15-I, HC 137-I), that Committee considered the extent to which the inquest system was capable of meeting the procedural obligation on the Government, under Article 2 (Right to life) of the European Convention on Human Rights as amplified by the case-law of the European Court, to undertake an effective investigation into the circumstances of deaths in which agents of the state may be implicated. One of the criteria established by the European Court in assessing the effectiveness of any investigative mechanism is that it must be sufficiently prompt and must proceed with reasonable expedition (*Jordan v UK* (2003) 37 EHR 2). In paragraph 304 of the Report cited above, the JCHR concluded that "current delays may in some instances lead to breaches of Article 2" and called for reviews of the coronial system to address delays in the system. When the Government publishes its draft Coroners Bill later this spring we will give consideration to whether its provisions meet this and other concerns about the effectiveness of inquests when Article 2 rights are engaged.

I hope that this information may be of interest to you.

April 2006

**Memorandum from Rt Hon Harriet Harman QC MP, Minister of State,
Department for Constitutional Affairs (P 39)**

Thank you for your invitation to comment on your new inquiry.

I have seen the Attorney General's response to you of 22 December 2005 and I agree with him that there is not a case for excluding coroners' courts from the scope of the *sub judice* rule. My particular concern is that excluding inquests from the scope of the rule would be both difficult practically and raise issues of risk.

Firstly, suspected criminal activity often results in death. This could be the result of terrorist acts, breaches of health and safety legislation, road accidents or hospital negligence (amongst other matters). The legal consequences of this are that there must be an inquest and there may be a criminal prosecution or civil proceedings. All these proceedings will be focussed on the same events although from different standpoints. I think that the close links between inquests and criminal proceedings would make it undesirable to make any significant changes to the *sub judice* rule for inquests without making similar changes in relation to criminal proceedings.

Furthermore, although there may be a long interval between a death and the inquest, there may be one or more pre-inquest hearings—often held in public—before the substantive inquest is heard. The use of these pre-inquest hearings has become more widespread since the scope of the inquest was extended to include the "broad circumstances in which the deceased came by his death" following the House of Lords' interpretation of the meaning of Article 2 of the ECHR in *Middleton*. There may thus be considerable discussion in open court before the inquest is heard when the inquest is effectively active. And one of the main areas where I think MPs would most likely wish to comment before the inquest would most likely be around the increased scope of the inquest in issues such as failings in systems, regime or training.

I would also be concerned about the potential prejudice to jurors if the *sub judice* rule were to be relaxed. Although there are certain cases where there has to be an inquest jury and this is known from the outset e.g. deaths in custody, the coroner also has discretion on when to summon a jury. Indeed it is precisely in those

cases on which MPs would be most likely to want to comment— disasters, multiple homicides, hospital neglect etc.—where the decision to sit with a jury might be made by the coroner at a later stage when those summoned could have been exposed to parliamentary reports in the meantime.

But it is not only in jury inquests where there would be potential prejudice. Witnesses too could be affected by outside comment and might be tempted to tailor their evidence to avoid certain consequences from outside sources. If MPs were allowed to discuss inquest proceedings, a person aggrieved by the eventual verdict could apply for judicial review on the ground that it was not possible to conduct a fair inquest because of prejudicial comments made in parliament, and have the inquest verdict quashed. And coroners themselves could equally be affected by discussion in Parliament on how they might conduct a particular inquest, what the inquest should cover or which witnesses to call.

I also think that there would be serious practical difficulties in modifying the *sub judice* rule by changing the point in time from which it should operate. The various options all appear to have serious difficulties and high risks.

In my view, the better solution—highlighted by the Attorney General—would be to explore further the discretion of the Speaker to balance the desirability of the House discussing a matter of public concern against the likelihood of prejudice. I agree with the Attorney that it would be helpful for the Committee to consider the various factors the Speaker would have to bear in mind when carrying out the balancing exercise.

As for coroner reform, my plan is to announce how, in broad terms, we intend to proceed in February, and to publish a draft Bill, for scrutiny by the Departmental Committee, in the late Spring. We do not at present see our reforms as diminishing in any way the considerations I have set out in this letter. But will, I hope, improve the time it takes before coroners' proceedings are concluded—and therefore the time *sub judice* in coroners' proceedings applies.

January 2006
