CLIENT INFORMATION BRIEF

For Mr. R. Messenger (MP)

Attention Bron Stewart

Request Standing Order 233 of the Queensland Legislative Assembly Covering Sub-judice Rule

Date 15th November 2011

1. Introduction

The law of sub judice has a long history from its common law base. Sub judice simply means 'under judicial consideration'. Elected members choose not to speak about current court cases during debates, if the debate could prejudice the matter before the court. This voluntary practice is known as the sub judice convention.

The adoption of the sub judice rule by Westminster legislatures dates back to 1889 in the United Kingdom.

Between 1889 and 1963 the Speaker of the House of Commons decided when elected members were not to discuss cases before the courts. In 1963 the House of Commons formalised a set of rules which in turn were re-written in 2001.

Westminster parliaments around the world have either developed their own set of rules or standing orders or use the House of Commons' procedures as a guide. For instance whilst the Queensland Legislative Assembly has adopted standing orders to provide for sub judice debate the as the Legislative Assembly of Victoria relies on the sub judice convention rules adopted by the House of Commons at Westminster.¹

2. Practical effects of the House of Commons convention

Elected members are not precluded from making general reference to court cases as the convention does not automatically prevent members from making broad references to cases. The key issue is whether a reference to a matter before the court could affect the administration of justice.

Neither does the convention preclude the parliament from passing bills about an issue that may be before a court. Therefore, debate can take place on a bill that covers the same subject as a court case.

In relation to criminal matters before the courts, the convention applies from when the police or prosecuting entity prefers charges up until the verdict and if applicable until sentence has been passed.

In relation to civil matters the convention applies at a later stage of the legal process. It commences when the parties concerned have arranged a hearing date and the court has set that date. The convention applies until the end of the case which ends in a judgement or perhaps, when the case is discontinued.

The convention applies to the lodgement of appeals. However, it does not apply during the lodgement time for an appeal when an appeal is still possible as it only applies when an appeal is formally lodged with the court.

3. Argument for enforcing sub judice law within parliament

Basically, the argument for providing for sub judice debate in parliament either through the use of the sub judice convention or through the development of standing rules or orders is that the courts cannot reach into parliament to protect the fairness of a trial. This then leads to the conclusion that sub judice debate etc should not be allowed when comments in parliament would be subject to proceedings for contempt if the pertinent comments had been made outside the chamber.

The wording of SO 233(1) of the Queensland Legislative Assembly reflects this argument specifically.

4. Victorian ruling on Royal Commission Hearings

The following ruling in the Victorian parliament highlights the distinction between finished and unfinished proceedings.

In the Victorian Legislative Assembly in 1971 the Speaker ruled that the House could debate the Report of the Royal Commission into the collapse of the West Gate Bridge as the Commission had finalised its report.

However, as a court case had begun during the sitting of the Commission the Speaker ruled that the House could not debate matters actually before the court.2

5. Adherence to the sub judice rule in the Victorian Parliament compared to the Queensland Parliament

On 25th May 2010 the Speaker of the Victorian Legislative Assembly made a ruling regarding the application of the sub judice rule to matters that were then before the Coroners Court:

Stated simply, the sub judice convention is a voluntary restriction the House imposes on itself to refrain from making reference to matters awaiting or under adjudication in a court of law in order to avoid prejudice to court proceedings or harm to specific individuals. There is


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no standing order dealing with sub judice, and the House has always been guided by the practice of the House of Commons in respect of the sub judice convention.³

The Victorian Legislative Assembly in contrast to Queensland Legislative Assembly does not have a Standing Order specifically dealing with the sub judice rule. However, the Speaker of the Victorian Chamber has ruled that the sub judice convention is a voluntary restriction that the House imposes on itself. This argument carries the perspective that the Victorian Lower House as a whole determines the application of the sub judice rule as opposed to individual members.

The Speaker of the Victorian Legislative Assembly went on to say:

_There may be instances where there is a pressing need to debate on policy matters connected to an ongoing inquest. The Chair will retain the right to exercise discretion and waive the sub judice rule where a need for public debate can be demonstrated. In such instances a clear distinction must be maintained between policy matters and the details of a case._⁴

The Speaker in the Victorian Legislative Assembly went on to list the factors that might weigh in favour of allowing a debate:

- A discussion of relevant policy matters is sought, rather than an exposition of the facts of the case themselves.
- The case had already been subject to a significant delay and proceedings are not expected to commence for a further lengthy period.
- It is thought 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.
- The Chair is satisfied that a debate would not violate the principle of comity,⁵ or interfere or be thought to interfere with the role of the judiciary.⁶

The Queensland Legislative Assembly clearly possesses a standing order concerning the discussion of matters that may offend against the sub judice rule. However, even if the Queensland Parliament like the Victorian Lower House did not possess such a standing order or rule but relied on the sub judice convention, the argument is compelling that it would be for the full House to decide its application as opposed to individual members.

### 6. Sub judice and the timing of court cases

The High Court in Ireland decided (in 2003) that the sub judice rule only commenced when a person is brought before a court for the purpose of charge. This decision was said to have clarified the application of the sub judice rule. The Court’s ruling was that the sub judice rule is only applicable from the time when criminal proceedings are issued before the court.

There had been previous lower court authority (in 1962) in Ireland that the sub judice rule applied when court proceedings were ‘imminent but not yet issued’ but there had also been

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³ Victoria, Legislative Assembly (2010) Debates, 25th May p. 1753
⁴ Ibid. p. 1753
⁵ The underlying principle that exists between the legislature and the judiciary that is applicable across all Westminster parliaments is that the legislature and the judiciary have a mutual respect for each other’s role and that neither should intervene into the work of the other.
⁶ Ibid. 25th May 2010 p 1753

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 previous lower court authority (in 1985) to the effect that the court must have ‘seisin of the case’ (the matter must actually be before the court) before an application alleging breach of the sub judice rule can be made.

It has been said that this 2003 ruling in Ireland means that comment on controversial issues in which criminal prosecution is anticipated is acceptable provided that no court has, at the time of publication, assumed control of the matter - provided that no person has been brought before the court and formally charged. It guarantees freedom of expression by providing a clear cut limitation on the application of the sub judice rule.7

7 Landmark Ruling Clarifies Irish Law on Contempt of Court.
http://www.simonmcaleese.com/asp/article.asp?objectid=1061&Mode=0&RecordID=1...

7. The notion of public interest

In 2006 the President of the Victorian Legislative Council indicated that he had considered ‘public interest’ in determining whether or not a matter that was before the courts should be allowed to be discussed in the Legislative Council.8 In that ruling the President said:

…it does not necessarily follow that, just because a matter is before a court, every aspect of it must be sub judice and beyond the limits of permissible debate in Parliament. Such a limit would be too restrictive on the rights of parliament.

In applying the sub judice convention to this particular case I have considered the following matters:

• Whether there is a real danger of prejudicing the case if debate is allowed to occur in the House.
• The danger of prejudice occurring versus the public interest in this matter.
• Whether the danger of prejudice will occur if the case is being heard by a judge or judges as opposed to a jury.
• Whether an individual’s rights will be unduly transgressed or injured if the matter is discussed prior to judgement.

I see no real danger of prejudicing the outcome of this case by allowing debate to occur as I believe members of the High Court bench are highly unlikely to be influenced in their judgment of this particular case by parliamentary debate.

The danger of prejudice would be much greater if a jury were involved in the proceedings. There is also considerable public interest in this matter, and no single individual’s rights will be unduly prejudiced or injured by allowing the issue to be debated in this House.9

In recent times the Lord Chief Justice in the United Kingdom has connected the notion of public interest with the workings of parliament in relation to the sub judice rule:

There are clear conventions about the circumstances in which Parliament will or will not discuss proceedings in court and I have no doubt these conventions will be followed so as to avoid any possible interference with the administration of justice. That is not because a court


9 Ibid.

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has sought to order it, but because Parliament has chosen in the public interest not to insist on its inherent privileges.\textsuperscript{10}

The notion of public interest can also be expressed in another way. Standing order 112(2) of the New Zealand House of Representatives obliges members to notify the Speaker in writing when the member intends to refer to a matter that is before a court. Standing order 112(3) refers to the public interest in maintaining confidence in the judicial resolution of disputes process.

8. The risk of prejudicing a court case

The level of perceived risk to the administration of justice that could be occasioned if matters were discussed sub judice rises and falls within different jurisdictions across the globe.

For instance, it has been said that the formulation of the sub judice rule in the common law of South Africa is more restrictive than prohibitions found in other democratic countries.\textsuperscript{11}

In the United Kingdom the general test is whether there is a substantial risk that the administration of justice in the proceedings in question will be seriously impeded or prejudiced.\textsuperscript{12} In Canada, the test is whether there is a substantial risk of prejudiced.\textsuperscript{13}

An appeal decision handed down in South Africa in 2007 brought South Africa into line with global trends and what may be expected in contemporary democracies. The court determined that mere conjecture or speculation that prejudice might occur, is not enough.\textsuperscript{14}

In the United Kingdom, s5 Contempt of Court Act provides a defence for the publication of material that creates substantial risk of impeding the administration of justice if that effect is merely incidental to a discussion in good faith of public affairs or other matters of general public interest.

This defence in the UK Act was successfully used in the case of English.

The circumstances were that a newspaper editorial was published supporting a by-election pro-life candidate. The pro-life candidate campaigned against the perceived practice of handicapped babies being left to die if medical staff considered that their lives would be intolerable. The editorial was published at the same time a doctor was on trial for allegedly leaving a Down’s Syndrome baby to die. The court held that although the editorial was likely to prejudice the administration of justice in the doctor’s trial (and would otherwise amount to contempt of court), the public interest defence applied and the newspaper was thus acquitted.\textsuperscript{15}

In the Canadian Court of Appeal in 2003 the issue of public interest was raised as a defence. The case related to the publication of the fact that a man had previously been convicted of assaulting his step-son. The publication of this fact took place shortly after his arrest for the murder of the child. The step-son had recently been returned to the stepfather by the social services department. The edition of the newspaper that contained the previous conviction


\textsuperscript{12} S2(2) Contempt of Court Act 1981 (UK)

\textsuperscript{13} Dagenais v Canadian Broadcasting Corporation (1994) 3 SCR 835


\textsuperscript{15} Attorney-General v English (1983) 1 AC 116

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information was not provided to the area in which the offence occurred and in which the
court case would be held and from where the jury members would be drawn.

The court held that having regard to a list of relevant factors including the delay period prior
to the commencement of the trial and the limited publication in the area from which a jury
was likely to be chosen the publication did not give rise to a 'real and substantial risk to the
course of justice'. The court emphasised that its conclusion was based on the particular facts
of the case.\textsuperscript{16}

Factors to be considered in determining whether a publication has the necessary tendency
to cause serious prejudice to a trial include:

- The nature and the extent of the publication
- The mode of trial (whether by judge or jury), and
- The time lapse between the publication and the actual trial\textsuperscript{17}

In relation to the extent of publication there is support for the view that parliamentary
comments do not, in themselves, receive wide publicity and Hansard does not have the
readership levels of local daily newspapers.\textsuperscript{18}

9. The New South Wales case of Bread Manufacturers Limited

A person may avoid liability for contempt for a publication that relates to a matter of public
interest. A publication may be found to contain sufficient information to prejudice court
proceedings thereby attracting sub judice liability. However, where the detriment arising from
this possible prejudice is outweighed by the public interest that is served by freedom of
discussion of, and dissemination of information about a matter of public importance then
liability may be avoided.

This ground of exoneration is commonly referred to as the public interest principle and in
Australia it was first authoritatively formulated in \textit{Bread Manufacturers}.\textsuperscript{19} It is a principle that
can apply to both civil and criminal proceedings.\textsuperscript{20}

A piece that is often quoted from the \textit{Bread Manufacturers} judgment is:

\begin{quote}
...the administration of justice, important though it undoubtedly is, is not the only matter in
which the public is vitally interested; and if in the course of the ventilation of a question of
public concern matter is published which may prejudice a party in the conduct of a law suit, it
does not follow that a contempt has been committed. The case may be one in which as
between competing matters of public interest the possibility of prejudice to a litigant may be
required to yield to other and superior considerations.

The discussion of public affairs and the denunciation of public abuses, actual or supposed,
cannot be required to be suspended merely because the discussion or the denunciation
may, as an incidental but not intended by-product, cause some likelihood of prejudice to a
person who happens at the time to be a litigant.
\end{quote}

\begin{footnotes}
\item[16] Alberta \textit{v} The Edmonton Sun 2003 ABCA 3
\item[17] Hinch \textit{v} Attorney General (Vic) (1987) 164 CLR 15
\item[18] Ex parte Bread Manufacturers Ltd; Re Truth
\item[19] Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd (1937) 37 SR (NSW) 242
\item[20] Hinch \textit{v} Attorney General (Vic) (1987) 164 CLR 15
\end{footnotes}
It is well settled that a person cannot be prevented by process of contempt from continuing to discuss publicly a matter which may fairly be regarded as one of public interest, by reason merely of the fact that the matter in question has become the subject of litigation, or that a person whose conduct is being publicly criticised has become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which is under discussion or with respect to some other matter.

In the Bread Manufacturers case it was held that contempt will not be established if it is shown that the risk of prejudice to the administration of justice is outweighed by the public interest in freedom of discussion on matters of public concern. The Bread Manufacturers case in 1937 has subsequently been cited in later cases.\(^{21}\)

10. Intentional contempt and unintentional contempt in common law

The New South Wales Law Reform Commission in its examination of contempt by publication recommended the abolition of the common law category of intentional sub judice contempt and its replacement with legislation that provided that a mere intent to interfere with the administration of justice does not constitute sub judice contempt, in the absence of a publication which creates a substantial risk of prejudice to the administration of justice.\(^{22}\)

In Australia it has been held that whilst the act of publication must be intentional, an intention to prejudice the due administration of justice it is not a necessary element of contempt.\(^{23}\)

11. Connecting Parliamentary Law with the general law of sub judice

In Queensland, the sub judice rule is no longer a convention but is expressed in Standing Order 233 and has the effect of law as far as the workings of the House are concerned.\(^{24}\)

The Ethics Committee of the Queensland Parliament highlighted the fact that SO233 makes no specific mention of the term 'public interest' and as a consequence does not provide for a public interest exception or defence to the sub judice rule.\(^{25}\)

The Ethics Committee expressed a view that SO 233 makes no mention of a 'public interest' exception to the sub judice rule beyond the right of the House to legislate on any matter. The Committee also reported that it is unaware of any authority in Parliamentary Law that would substantiate the existence of a public interest exception or defence to the sub judice rule beyond the recognition that the House is free to legislate on any matters within its competence.\(^{26}\)

It is arguable, that in making a direct connection to the general law of the sub judice rule as SO 233(1) does, that members of the Legislative Assembly may be afforded access to a public interest exception as does the general law or common law of sub judice.

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\(^{22}\) New South Wales Law Reform Commission.

\(^{23}\) John Fairfax & Sons Pty Ltd and Reynolds v McRae (1955) 93 CLR 351


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In the ruling made by the President of the Victorian Legislative Council on 30th May 2006 the President said that in reaching his decision on the matter concerning sub judice he did consider the notion of public interest.

S0233(7) does indicate that the general law of sub judice is subject to the right of the House to consider and legislate on any matter. Thus, S0233(7) does provide the House with a proviso to the general law on sub judice that it may consider and legislate on any matter.

The argument may follow that S0233(7) is addressed to the House as a whole whilst S0233(1) is addressed to the individual members of the House. If the House as a whole is provided with a ‘proviso’ in S0233(7) as to the full application of the general law of sub judice then perhaps it is arguable that members of the House could be provided with a proviso in S0233(1). The Ethics Committee in its report indicated that members would not be given latitude beyond that which is afforded to them by S0233(7).

Even if S0233(1) does afford individual members of the House access to a public interest exception as the general law to which S0233(1) specifically refers that latitude, may not in practice, be of any greater magnitude than that afforded by S0233(7). Also in the final analysis it must be acknowledged that the Legislative Assembly as a whole will be the authoritative interpreter of the meaning and relevance of S0233(1) to the House.

The sub judice convention becomes a principled parliamentary courtesy to the courts. In other words it is a parliamentary counterpart to contempt of court, but interpreted and applied by parliamentarians. The very nature of self-regulation means that these rules are free from any external interference by the courts and thus it is up to parliament to decide what should or should not be discussed.

Members will appreciate that the House has the overriding powers to discipline its members for conduct regarded by the House as irresponsible.

Within the wording of the sub judice convention that was adopted by both the House of Lords and the House of Commons in 2000/2001 there is no mention of public interest. The Victorian Lower House and the New South Wales Upper House both refer to the sub judice convention to determine issues of sub judice as they arise.

Despite this, there have been rulings in both the Victorian Legislative Assembly and the New South Wales Legislative Council that have incorporated an examination of the public interest or public importance in a particular matter.

12. Canada

12.1 Province of Ontario

The example of the removal of a notice of motion in the Legislative Assembly of Ontario highlights the powers of Speakers to disallow the parliament dealing with matters determined to be sub judice.

The wording of the sub judice standing order in the Ontario Provincial Parliament is:


29 House of Commons Privileges Committee. (1999)
In debate, a member shall be called to order by the Speaker if he or she:

(g) Refers to any matter that is the subject of a proceeding:

1. that is pending in a court or before a judge for judicial determination, or
2. that is before any quasi-judicial body constituted by the House or by or under the authority of an Act of the Legislature,

Where it is shown to the satisfaction of the Speaker that further reference would create a real and substantial danger of prejudice to the proceedings.  

The Speaker of the Assembly ordered that a notice of motion be removed from the notice paper as it offended the sub judice convention. The notice of motion called for the establishment of a public inquiry into the circumstances surrounding an accused person's release on bail.

The Ontario Speaker ruled that although a strict interpretation of Standing Order 23(g) would limit the sub judice rule to debate, a motion makes provision for the context of the debate and therefore must also be subject to the rules of debate.

Beyond the strict application of Ontario's sub judice Standing Order the Speaker also examined the motion with respect to the broad parliamentary convention of sub judice and found that the motion identified the names of individuals associated with a very serious incident that was still before the criminal courts. The Speaker also held that the motion drew conclusions on certain evidence and on the actions of officials involved in the administration of criminal justice in Ontario.

Consequently, the Speaker ruled that the motion offended the sub judice convention in that it offered much potential for prejudice to an ongoing criminal proceeding.

12.2 Province of Alberta

The Province of Alberta along with Ontario and Quebec has adopted Standing Orders to provide for the law of sub judice within its parliament.

One member of the Nova Scotia House of Assembly wrote that it is difficult to find any reported instances where speech in parliament has demonstrably affected a judicial proceeding. We should perhaps be cautious about over-using the sub judice convention if the actual threat to judicial proceedings is so rare.

In 2006 a member of the Legislative Assembly of Ontario raised a matter that was before a court. The direct reference to the court case was made both inside the parliament and outside the parliament. Another member of the Legislative Assembly referred the matter to the Integrity Commissioner in relation to the comments made outside the parliament.

The comments were directed to the plea bargaining that was taking place between the prosecution and the defence under the authority of the Criminal Code of Canada. This plea bargaining was a formal part of the judicial process before the court.
In his findings the Integrity Commissioner reported that the comments made by the member were not inadvertently made but were specifically directed to an aspect of criminal proceedings whilst making it clear that he opposed particular aspects of the ongoing discussion between the Crown and the defence counsel.

The Integrity Commissioner held that the offending member intended to influence the disposition of the criminal prosecution arising out of the victim’s shooting and that the comments made, constituted a clear violation of the sub judice rule that is part of ‘parliamentary convention’ as that term is defined in the Members Integrity Act.

Section 34(i) of the Members Integrity Act provided for a range of penalties consequent upon a finding that a member had contravened parliamentary convention:

(a) that no penalty be imposed;
(b) that the member be reprimanded;
(c) that the member’s right to sit and vote in the Assembly be suspended for a specified period, or until a condition imposed by the Integrity Commissioner is fulfilled; or
(d) that the member’s seat be declared vacant.

The Integrity Commissioner reported that the criminal proceedings before the court were not affected in any way and the member ceased making comments when formally approached by the defence counsel.

In recommending a penalty the Integrity Commissioner said:

Taking into account all of the circumstances, it seems to me that the finding that the member contravened the Members' Integrity Act is sufficient.

I thus recommend in accordance with s34(i)(a) that no penalty be imposed.

I caution all members to be vigilant about raising issues concerning matters that are before a court, however well intended the comments may be.33

13. United Kingdom

The House of Commons has the power of self-regulation in relation to sub judice rules but it has been said that despite reports from the House of Commons Ethics Committee the House has understandably been reluctant to tighten its self-regulatory sub judice rules given the relative rarity of members of the House straying into this area.34

14. Conclusion

It is arguable that the direct reference to the general law of sub judice that is contained in S0233 of the Queensland Legislative Assembly may afford members a commensurate haven from sub judice liability in a similar form as does the public interest exception in the general law. However the House as a whole would be the arbiter of any such interpretation.

In jurisdictions that oblige members of elected houses of parliament to inform the Speaker of any intention to mention matters before a court there are no examples of elected members being disciplined for offending against the sub judice rule.

The Canadian example mentioned in this Information Brief resulted in the elected member who made direct reference to a specific matter before a court not being subject to any penalty.

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