



LEGISLATIVE COUNCIL FACT SHEETS

FACT SHEET 25: THE SUB JUDICE CONVENTION

In the interests of justice and the judicial process, a convention has developed in parliamentary practice that members refrain from making reference, either in debate or through motions, questions and committee proceedings, to matters before the courts, in order to avoid prejudice to court proceedings or harm to specific individuals. This is known as the sub judice convention, ‘sub judice’ meaning before a judge or court of law.

There is no specific standing order or law preventing Parliament from considering a matter that is *sub judice*. For this reason it is called a convention – a voluntary restraint to protect participants in court proceedings against public discussion of the issue.

The convention also recognises that the Parliament has an inherent right and fundamental duty to legislate on any issue or debate any matter of public interest.

The President is the final arbiter of *sub judice* issues and has absolute discretion, subject to the will of the House expressed through a motion of dissent, in making a ruling to prevent discussion on the ground of *sub judice*. The Chair may decide to intervene of his or her own volition or may be called upon to decide on a point of order brought to his or her attention. In determining any question regarding the *sub judice* convention the President rules on the side of further discussion unless it is clear that to do otherwise could create prejudice; and even then the President may determine that the public interest on the matter outweighs possible prejudice.

The application of the *sub judice* convention was dealt with in a substantial ruling by President Johnson on 16 May 1990. In ruling on the convention, President Johnson referred to the following principles which serve to direct the application of the convention:

- the Chair must be apprised of the specific matter before the court and hear enough of the member’s contribution to determine whether the member should be allowed to proceed
- the Chair must take a realistic attitude by not automatically excluding discussion in the House on matters of public importance which are already being freely debated in the media
- because a matter is before a court it does not follow that every aspect of the case must be *sub judice* and beyond the limits of permissible debate. Issues that are cognate and circumstantial to the actual issue to be tried would be allowed to be debated
- the convention does not prevent the introduction and passage of bills on a matter before the courts
- whether a jury is empanelled is also relevant because a jury is more likely to be prejudiced than a judge.

The following three principles also apply. Firstly, in criminal cases the convention applies from the moment a charge is made until the moment the verdict and sentence has been announced or judgement given. It becomes relevant again from the time a notice of appeal is lodged until the appeal has been decided.

Secondly, in civil matters it applies when relevant documents are filed until judgement is entered. However regard must be had to the likelihood of the matter coming before the courts in the reasonably foreseeable future. The mere issue of a writ should not lead to invoking of the convention and the curtailing of debate on a particular matter.

Finally, the convention is limited in its operation. It does not apply unless the necessity of its operation has become quite clear. Any member objecting to the continuation of discussion on the basis of *sub judice* must clearly justify the objection. The convention must be applied strictly to only prevent discussion of the precise issue before the courts and not to prevent general discussion of collateral or related matters.

***Sub judice* and royal commissions and other similar bodies**

The question sometimes arises as to whether the *sub judice* convention applies to royal commissions, special commissions of inquiry, the Independent Commission Against Corruption (ICAC) and similar bodies.

In the Legislative Council, as a general rule, the *sub judice* convention does not apply to such inquiries, despite some precedent to the contrary. However, it does apply in cases where the Parliament has established a royal commission or commission of inquiry, or where the Parliament has expressly referred a specific matter to an existing royal commission or standing commission of inquiry such as the ICAC.