

**Written evidence submitted by Rt Hon Alison Johnstone MSP, Presiding Officer,
Scottish Parliament (SJR 07)**

10 October 2025

Sub judice resolution of the House of Commons

Thank you for your letter seeking information on how sub judice rules are dealt with in the Scottish Parliament.

I enclose a submission which I hope will be helpful to the Committee.

Please do not hesitate to contact me if we can be of further assistance. I would be interested to be kept up to date on the progress of your inquiry and its conclusions in due course.

Yours sincerely

A handwritten signature in dark ink, reading 'Alison Johnstone'. The signature is written in a cursive, flowing style.

Rt Hon Alison Johnstone MSP
Presiding Officer

House of Commons Procedure Committee inquiry – Sub judice resolution in the House of Commons

Thank you for the opportunity to contribute the perspective of the sub judice rule in the Scottish Parliament to the House of Commons Procedure Committee inquiry. This response sets out the framework of the sub judice rule in the Scottish Parliament, how it operates in practice, provides an example of where the matter of contempt of court has come under the spotlight, and notes calls for reform.

The sub judice rule in the Scottish Parliament

Privilege in the Scottish Parliament differs from the broad concept of parliamentary privilege that operates at Westminster. The Scottish Parliament is subject to the law and the powers, protections and responsibilities given to the Parliament and its Members are set out within the Scotland Act 1998. The sub judice rule provides a mechanism for balancing the role of the Parliament with that of the courts, by informing and managing parliamentary debate which intersects with active legal proceedings.

The Scotland Act 1998¹ provides the statutory basis for the sub judice rule in the Scottish Parliament. Section 22(1) of the Scotland Act 1998 provides that proceedings of the Parliament shall be regulated by Standing Orders and gives effect to Schedule 3 which makes provision as to how certain matters are to be dealt with by Standing Orders. Paragraph 1 of Schedule 3 provides that Standing Orders shall include provision for preserving order in the proceedings of the Parliament, including provision for— (a) preventing conduct which would constitute a criminal offence or contempt of court, and (b) a sub judice rule.

The rule relating to contempt of court is found in Rule 7.2 of the Standing Orders², covering order in the Chamber:

2. Members shall at all times conduct themselves in an orderly manner and, in particular, shall not conduct themselves in a manner which would constitute a criminal offence or contempt of court.

The sub judice rule is found in Rule 7.5 of the Standing Orders:

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.

¹ The Scotland Act 1998: <https://www.legislation.gov.uk/ukpga/1998/46/contents>

² Standing Orders of the Scottish Parliament: <https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders>

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.

These rules apply to proceedings in the Chamber as well as to those of committees by virtue of Rule 7.8 of the Standing Orders. The discretion to grant permission to reference to active proceedings in committees rests with the Presiding Officer.

The admissibility criteria for questions (Rule 13.3.3) and motions (Rule 8.2.2) require that the sub judice rule not be contravened and therefore references to active legal proceedings will require the permission of the Presiding Officer.

Petitions to the Parliament are inadmissible if they refer to any matter in relation to which legal proceedings are active (Rule 15.5.1).

Sub judice/ Strict liability rule

The operation of the sub judice rule involves, like the Speaker in the House of Commons, the Presiding Officer's discretion. However, unlike Westminster the sub judice rule and parliamentary proceedings are underpinned by the Contempt of Court Act 1981. Therefore, even where the Presiding Officer's discretion is exercised so as to allow reference to active legal proceedings that does not remove the requirement to comply with the strict liability rule in the Contempt of Court Act 1981³ which treats conduct as a contempt of court where there is a substantial risk that the course of justice in particular proceedings will be seriously impeded or prejudiced, regardless of intent. Failure to comply, could lead to the Scottish Parliamentary Corporate Body which is responsible for publications being found in contempt.

Unlike the sub judice resolution in the House of Commons which references issues of national importance in relation to the discretion of the Chair, there is no public interest exemption to the strict liability rule. There is the defence in section 5 of the Contempt of Court Act 1981, that a publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion. However, the requirement that the risk is "incidental" to the discussion means that this defence is often not relevant to matters before the Parliament.

The one exception to the application of the strict liability rule is when considering legislation. Rule 7.5.4 of the Standing Orders states that nothing in the sub judice

³ Contempt of Court Act 1981: <https://www.legislation.gov.uk/ukpga/1981/49>

rule shall prevent the Parliament from considering legislation. This reflects section 42 of the Scotland Act 1998, which disapplies the strict liability rule in the case of statements made in “proceedings of the Parliament” (which include committee meetings) if those statements are in relation to a Bill or subordinate legislation. Section 42 also ensures that it is not a breach of the strict liability rule to publish a fair and accurate report of such proceedings, made in good faith (e.g. in the Official Report of committee proceedings on a Bill or secondary legislation). This covers parliamentary proceedings but other related parliamentary activities, such as the publication of reports and evidence require to be considered on a case by case basis.

The period for which a case, whether criminal or civil, is active for the purpose of the sub judice rule is the same as for the period for which cases are active for the purpose of the strict liability rule, as set out in Schedule 1 to the Contempt of Court Act 1981. These are similar but slightly different and more detailed to those set out in the House of Commons sub judice resolution, for example, criminal proceedings are active from the point of an arrest.

Other forms of contempt

There is no protection in Scottish Parliament proceedings from other forms of contempt of court, either under the common law or the Contempt of Court Act 1981 and the terms of any court orders must be complied with. This includes orders under section 11 of the Contempt of Court Act 1981, which can be used to protect the identity of an individual in relation to proceedings.

Operation of the sub judice rule in the Scottish Parliament

If a question or a motion engages the sub judice rule, it is the role of the Presiding Officer to consider the level of risk of prejudicing the relevant proceedings in reaching a decision on admissibility. Similarly, when presiding over proceedings in the Chamber, the role of the Presiding Officer in deciding the extent to allow reference to active legal proceedings is to balance the importance of the Parliament being able to debate a matter of public interest with the level of risk of prejudice towards the proceedings. The sort of factors that will be considered when assessing the level of risk include, the type of proceedings (civil or criminal), the stage the proceedings are at and the potential for influence (for example of a juror versus a judge).

Where the level of risk is such to warrant active involvement, the Presiding Officer may contact Members in advance or give a short opening statement to flag to Members any areas of concern, otherwise the Presiding Officer may intervene to remind Members that the sub judice rule is engaged if debate strays into detail in relation to an active case. For example, in relation to recent debate on knife crime following the deaths of a number of young people, the Presiding Officer reminded Members there were a number of active cases in Scotland relating to knife crime and those are sub judice. For that reason, and because of the age of many of those involved, Members were asked not to refer to details of any criminal proceedings in relation to those incidents.

In terms of the Presiding Officer's disciplinary powers, rule 7.5.3 of the Standing Orders provides that 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. If a Member is in breach of rule 7.3.2 of the Standing Orders highlighted above, i.e. does not conduct themselves in an orderly manner or conducts themselves in a manner that would constitute contempt of court, under rule 7.3.3 the Presiding Officer may order the Member to leave the chamber for such a period as the Presiding Officer thinks fit (not beyond the end of the next sitting day).

When committees are considering matters relating to active legal proceedings, the Convener will seek the permission of the Presiding Officer to allow any such reference and committee members and witnesses will be informed accordingly.

Whilst the legal structures governing sub judice are different in Westminster and the Scottish Parliament, the aim is similar, to strike the right balance between allowing Members to address matters of public interest and avoiding prejudice to active legal proceedings. Sometimes, as in Westminster, there can be tension in achieving this balance. At other times it will not be a question of balance, (e.g. risk of prejudice) rather ensuring that court orders and any other legal frameworks are complied with.

Case Study - Committee on the Scottish Government Handling of Harassment complaints against the former First Minister Alex Salmond

The Scotland Act 1998, Standing Orders and Contempt of Court Act 1981, came under the spotlight during the proceedings of the Committee on the Scottish Government Handling of Harassment complaints against the former First Minister Alex Salmond (2019 – 2021). The Committee waited for the conclusion of the related criminal proceedings before beginning the substantive element of its inquiry, therefore the sub judice rule was not engaged. However, there were two relevant court orders in terms of section 11 of the Contempt of Court Act 1981 which the Committee and the Parliament had to comply with, for the reasons set out above. The orders prevented publication of information likely to lead to the identification of (i) the complainers in the related complaints process which was subject to judicial review; and (ii) the identity of the complainers in the criminal case of *HMA v Alexander Elliot Anderson Salmond*.

In reflecting on the implications of the court orders for the work of the Committee, the Committee stated in their report⁴:

“The need to protect the identity of the complainers has rightly been an absolute priority of the Committee. In particular, the Committee has been very

⁴ Report of the Committee on the Scottish Government Handling of Harassment complaints (23 March 2021): <https://webarchive.nrscotland.gov.uk/20240327030527/https://archive2021.parliament.scot/parliamentarybusiness/PreviousCommittees/111053.aspx>

aware of the need to avoid the jigsaw identification of any complainers. However, on occasion this approach has meant that the Committee was restricted in the questions that it could ask witnesses or the documents it could publish. The Committee wishes to acknowledge, without revisiting the specific details, that it was sometimes required to take a number of challenging and finely balanced decisions regarding the publication of material during the course of the inquiry.

The Committee accepts that these restrictions are both understandable and necessary. However, they have had an impact on the Committee's ability to scrutinise all the matters within its remit in full. One of the particular challenges is that the Committee has not been able to explain why certain decisions have had to be taken and has not even been able to highlight particular areas that it has not been able to explore in full as this of itself could contribute to jigsaw identification.

The need for these court orders, was because in Scotland, unlike England and Wales there was no statutory protection of the identity of complainers in sexual offence cases. Rather protection was provided by the Editor's Code and in some cases, such as this, specific court orders. This will change in due course as a result of the provisions of the Victims, Witnesses and Justice Reform (Scotland) Bill which was passed by the Parliament on 17 September 2025.

The Scottish Parliament will then be bound by this law in its proceedings, as it is by others it has passed. Such as section 162 and 163 of the Criminal Justice and Licensing (Scotland) Act 2010 which prevent an accused person from using material disclosed by prosecutors to the accused's solicitors for any purposes other than the criminal proceedings in relation to which the information was disclosed or an appeal.

Going forward

During and following the work of the Committee described above there were a number of calls for MSPs to have similar protections/ privileges as MPs.⁵ In the current session of the Parliament, the Scottish Parliament's Standards, Procedures and Public Appointments Committee carried out an inquiry into 'Privilege'. However, following engagement with political parties, there was no consensus as to what exactly required reform. Any reform, including to the sub judice rule, through the Scottish Parliament would need to be within the Parliament's powers as set out in the Scotland Act 1998.

⁵ For example, in the 2022 Labour Report of the Commission on the UK's future recommended that "Members of the Scottish Parliament should enjoy the same privileges and protections as Members of Parliament In relation to statements made in their proceedings." Scottish Labour https://scottishlabour.org.uk/wp-content/uploads/2022/10/Stronger_Holyrood.pdf

Going forward the Scottish Parliament will be alive to any changes made to the Contempt of Court Act 1981 as a result of the ongoing work of the Law Commission of England and Wales and how this impacts on the operation of the sub judice rule.

Thank you again for the opportunity to contribute to the Committee's inquiry into the operation of the sub judice rule in the House of Commons. We will follow the work and outcome of the inquiry with close interest and consider what learnings there are for the Scottish Parliament as it enters its seventh session.