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TO: THE SUBCOMMITTEE ON THE RULES  
OF THE NATIONAL ASSEMBLY

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**EQUAL EDUCATION'S SUBMISSION ON RULE 67 OF THE NATIONAL  
ASSEMBLY, 7<sup>th</sup> EDITION**

*\*This Commentary has been endorsed by: the Parliamentary Monitoring Group (PMG); the Law, Race and Gender Unit (LRG), UCT; The Children's Institute, UCT; The New Women's Movement; Heinrich Boell Foundation (HBF), the Community Law Centre (CLC); UWC, the Public Service Accountability Monitor (PSAM) and Section 27.*

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## INTRODUCTION

1. The following commentary is submitted by the Equal Education Law Centre (EELC) on behalf of Equal Education (EE) in response to the call for comments by the Subcommittee on the Rules of the National Assembly in anticipation of a comprehensive review by the Rules Committee of the National Assembly to ‘*align its procedures and proceedings with practice and ensure that the Assembly fulfils its constitutional mandate in the most effective manner possible.*’<sup>1</sup>
2. EE is a movement of learners, parents, teachers and community members working for quality and equality in the South African education system through research, analysis and activism. EE recognises the valuable role that Parliament plays in a functioning democracy and the crucial oversight function that a robust National Assembly can provide in holding the Executive to account. For this purpose, EE has been closely involved with parliamentary functions and has a dedicated Parliamentary Liaison Officer to attend committee meetings and, where necessary, make submissions on EE’s behalf.
3. The EELC is a new, independently-funded law centre established in 2012 in order to provide specialised expertise in education law and policy in South Africa. The EELC is dedicated to advancing the right to a basic education through strategic litigation, sustained engagement with government and the provision of legal assistance to communities and community-based organisations. EELC recently participated in the in the “*People’s Power, People’s Parliament Conference on South Africa’s Legislatures, 13-15 August 2012*”. EELC’s contribution at this conference focused on the public’s right to participate in parliamentary processes.
4. A component of EELC’s work is assisting community based organisations, such as EE, to formulate their own policy inputs and interventions and to help inform their engagements with government, including Parliament. This commentary is prepared in that capacity.

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<sup>1</sup> Statement calling for submissions issued by Adv T M Masutha, Chairperson of the Subcommittee on Review of National Assembly Rules.

5. This commentary has been endorsed by the Parliamentary Monitoring Group (PMG), the Law, Race and Gender Unit (LRG), UCT, the Children's Institute (UCT), the New Women's Movement, the Heinrich Boell Foundation (HBF), the Community Law Centre, UWC, the Public Service Accountability Monitor (PSAM) and Section 27.
6. For the purposes of this commentary, EE will confine its focus to Rule 67 of the Rules of the National Assembly, 7<sup>th</sup> Edition, the so called sub judice rule. EE's decision to comment on the sub judice rule was precipitated by a recent event in Parliament. On 16 October 2012, EE's Parliamentary Liaison Officer, Hopolang Selebalo, sought to address parliament on EE's Basic Education Shadow Report which reviewed the Department of Basic Education's (DBE) performance. Despite receiving EE's submission in advance, Ms Selebalo was informed of the sub judice rule as she was about to commence her presentation. The Chairperson indicated that the presentation should not cover the legal services and policy development units, or the question of infrastructure as this was the subject of litigation against the DBE. This notwithstanding that the discussion concerning school infrastructure falls squarely within matters of significant public interest.
7. To stifle any comment on school infrastructure, even where this concerned information that was already in the public realm, provides a stark indication of how the sub judice rule can be illegitimately invoked. This application of the rule in essence muted EE's submission as the largest part of the presentation concerned the DBE's reporting on the state of school infrastructure. Here the sub judice rule was invoked against EE to silence any discussion on school infrastructure, even where this fell outside the ambit of EE's current court case.<sup>2</sup>
8. Rule 67 of the Rules of the National Assembly states:

***“67. Matters sub judice:***

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<sup>2</sup> *Equal Education and Others v Minister of Basic Education and Others*, Case No. 81/2012. EE's case is scheduled to be heard in the Bisho High Court, Eastern Cape on 20 November 2012.

***No member shall refer to any matter on which a judicial decision is pending.***

9. Whilst the rule is headed “*matters sub judice*”, a concept bearing a particular and technical legal meaning which has never operated as an absolute bar to public deliberation on matters pending before courts, the rule as presently formulated permits no exceptions. EE’s concern is that the rule as it is currently coached is impermissibly broad. Rule 67 completely bars any mention of any matter pending before our courts. In so doing it flies in the face of our democratically founded concept of participatory democracy by inhibiting parliamentary debate on matters of public interest. This constitutes an unjustifiable violation of the right to freedom of expression<sup>3</sup> and to the constitutional mandate of Parliament to oversee the Executive.<sup>4</sup>
10. EE does not advocate for a complete abolition of the rule. Instead EE proposes that the rule be reformulated so that it aligns with the Constitution and the values of accountability and transparency therein and so that it is harmonised with the manner in which the rule has been interpreted and diluted by our courts.
11. A strict application of the sub judice rule is the antithesis of participatory democracy and the attendant values of accountability and transparency. A reformulation of the rule to ensure that it does not operate as a blanket blindfold on the National Assembly will serve to enhance the Assembly’s constitutionally mandated law making and accountability functions. Retaining the rule in its current form will diminish and undermine the National Assembly’s ability to deliver on its constitutionally mandated responsibilities and leaves room for a successful court challenge on the constitutionality of the rule.

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<sup>3</sup> Section 16 of the Constitution.

<sup>4</sup> Section 55(2) of the Constitution:

*The National Assembly must provide for mechanisms*

*a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and*

*b) to maintain oversight of*

*i) the exercise of national executive authority, including the implementation of legislation; and*

*ii) any organ of state.*

## THE MEANING OF THE TERM SUB JUDICE

12. The term “*sub judice*” literally translated means “*before a court of law or a judge*” or “*under judicial consideration.*”<sup>5</sup> The term is commonly misunderstood as meaning “*you can’t talk about any matter that is before the courts.*”<sup>6</sup> In its correct sense, it is a term used to describe a species of the common law crime of contempt of court which prohibits statements/publications made outside of court which will prejudice the administration of justice in pending proceedings.
13. It appears that the main reasoning behind the existence of a legislative rule on sub judice lies in the fact that parliamentarians are immune from prosecution for any comments uttered on the parliamentary platform and thus cannot be censured by the courts for acting in contempt of court.<sup>7</sup> This immunity meant that legislatures were required to self-regulate in order to ensure 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.*”<sup>8</sup>

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<sup>5</sup> Queensland Parliamentary Library: Research and Information Service: Client Information Brief on Standing Order 233 of the Queensland Legislative Assembly Covering the Sub-judice rule, 15 November 2011 at p 1. Accessible at

<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2011/5311T5914.pdf>

<sup>6</sup> The Sub Judice Convention: What to Do When a Matter is ‘Before the Courts’, Graham Steele, Canadian Parliamentary Review, Volume 30, No.4 ; 2007. Accessible at [http://www.revparl.ca/30/4/30n4\\_07e\\_Steele.pdf](http://www.revparl.ca/30/4/30n4_07e_Steele.pdf).

<sup>7</sup> Section 58 of the Constitution:

“ 1) Cabinet members, Deputy Ministers and members of the National Assembly-

- a) have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
- b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for-
  - i. anything that they have said in, produced before or submitted to the Assembly or any of its committees; or
  - ii. anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.

<sup>8</sup> Above note 6 at p 2.

14. Given this reasoning for the existence of the legislative rule it is clear that a proper, context sensitive correlation between the term as defined in its contempt of court setting and as defined in a rule governing its operation in Parliament must exist. It is thus imperative that the National Assembly harmonise its sub judice rule with the meaning which our courts have conferred upon the rule, as our courts have developed the common law in this regard to ensure that it is in line with our Constitution.
15. The Supreme Court of Appeal (SCA) has fairly recently pronounced on the use of sub judice by the Director of Public Prosecutions who invoked it in an attempt to prevent the broadcasting of a documentary, the contents of which formed the subject matter of a forthcoming criminal trial of five people who had been arrested and charged with murder. The SCA narrowed the application of the sub judice rule, so as to ensure its constitutional compliance, as follows:

*“In summary, a publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information.”*<sup>9</sup> [Our emphasis.]

16. The SCA has thus confined the application of the rule to those instances where the person seeking to rely on sub judice is capable of showing how the statement they seek to prevent from occurring can cause prejudice to the administration of justice, that the prejudice which the person anticipates occurring is not trivial, but in fact substantial, and that there exists ‘*a real risk that the prejudice will occur*’ if the statement is made. And even then still there must exist no less restrictive way outside

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<sup>9</sup> *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*; [2007] SCA 56 (RSA); [2007] 3 ALL SA 318 (SCA) (18 May 2007) at para 19.

of curbing the speech in order to protect the administration of justice.<sup>10</sup>

17. The SCA has made it clear that a party should not simply be allowed to invoke sub judice in order to freeze a publication/statement on an issue. In narrowing the ambit of the rule, the Court was acutely aware and appreciative of the fact that the administration of justice does not take place in a sealed setting completely removed from public scrutiny and discussion. Thus in restricting the rule the SCA explained:

*“For the administration of justice does not take place in private, completely shielded from public scrutiny and comment, and there is always the potential for some element of prejudice when the media report or comment on judicial proceedings. What must be guarded against . . . is the ‘facile assumption that if there is any risk of prejudice to a fair trial, however speculative, [a ban on publication] should be ordered.’<sup>11</sup>*

18. Given that the constitutionally mandated responsibilities of Parliament include *“providing a national forum for public consideration of issues,”*<sup>12</sup> Parliament should be loath to resort to the default position that a pending court case allows for the muting of citizens seeking to address it on matters of public interest. The immense importance of citizens’ rights to have a voice on public affairs has been recognised by our highest court, which explains it as follows:

*“The right to speak and be listened to is part of the right to be a citizen in the full sense of the word. In a constitutional democracy dialogue and the right to have a voice on public affairs is constitutive of dignity.”<sup>13</sup>*

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<sup>10</sup> Above at para 16.

<sup>11</sup> Above at para 13.

<sup>12</sup> Section 42(3) of the Constitution.

<sup>13</sup> *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (1) BCLR 1 (CC) at para 627.

19. From the above it is clear that the absolute manner in which rule 67 is currently coached fails to remain true to the proper meaning attached to the concept of sub judice and that a more nuanced formulation of the rule is necessary in order to ensure that the “*Assembly fulfils its constitutional mandate in the most effective manner possible.*”<sup>14</sup>

### **A CRITIQUE ON THE PURPOSE OF THE SUB JUDICE RULE**

20. Two reasons have been put forward as the basis for invoking the sub judice rule in Parliament<sup>15</sup> – That parliamentarians should refrain from making statements that will prejudice court proceedings and the “*principle of comity*”<sup>16</sup> which finds its home in the separation of powers doctrine and the undesirability of Parliament serving as an alternative forum for the adjudication of cases pending before the courts.

#### **(a) Prejudice to Court Proceedings**

21. Underpinning the existence of the sub judice concept is the need to preserve litigants’ rights to a fair trial. This is reflected in our Constitution which entrenches the rights of litigants to a fair trial in criminal proceedings<sup>17</sup> and to a fair public hearing in civil proceedings.<sup>18</sup>
22. It has been explained that the sub judice rule was grounded in the need to insulate members of a jury from influence while a trial was pending prior to the abolition of

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<sup>14</sup> Above note 1.

<sup>15</sup> House of Commons Procedure Committee: The Sub Judice Rule of the House of Commons, First Report of Session 2004-2005, 4 April 2005 at p 3. Accessible at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmproced/125/125.pdf>

<sup>16</sup> Above at p 3.

<sup>17</sup> Section 35(3) of the Constitution.

<sup>18</sup> Section 34 of the Constitution.



trial by jury in 1969.<sup>19</sup> The need to insulate juries from outside influence is now absent. In contrast to juries the need to protect judges from outside influence is reduced in light of the fact that judges must provide reasons outlining how they came to their decision.<sup>20</sup> Further, judges' legal training and their constitutionally entrenched independence renders them far less likely to be swayed by comments made in Parliament.

23. An Australian judgment<sup>21</sup> has also carved out a public interest exception to contempt of court for discussions which have the potential to prejudice court proceedings. Contempt will not exist where it is shown that risk of prejudice is outweighed by the public interest to discuss freely matters of public concern. The New South Wales Court explained the public interest exception as follows:

*“ . . . 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 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.*

*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 criticized has become a party to litigation either as a plaintiff or as defendant, and whether in relation to the matter which*

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<sup>19</sup> Sub Judice: An Oppressive Relic, Business Day Opinion and Analysis, Johan Theron, 27 October 2004. Accessible at [http://www.armsdeal-vpo.co.za/articles07/sub\\_judice2.html](http://www.armsdeal-vpo.co.za/articles07/sub_judice2.html)

<sup>20</sup> Briefing Note: South African National Editors' Forum: The Sub Judice Rule, Glenn Penfold, Webber Wentzel Bowens, 4 March 2005 at para 6.4, p 8.

<sup>21</sup> *Ex Parte Bread Manufacturers Limited; Re Truth and Sportsman Ltd*, (1937) 37 SR (NSW) 242.

*is under discussion or with respect to some other matter.*"<sup>22</sup>

### (b) The Principle of Comity

24. The Principle of Comity is based on the notion that Parliament should not encroach upon the courts terrain by usurping the function entrusted to the courts to independently adjudicate disputes, since parliamentary privilege exists to ensure that parliamentarians are not unduly inhibited by the courts in fulfilling their constitutionally mandated functions. However, in paying heed to the independence of the courts the Legislature cannot act in a manner that unduly inhibits its ability to discharge its own functions. More so in instances where it involves the Legislature's duty to respect, protect, promote and fulfill constitutional rights such as the right to a basic education.
25. The sub judge rule serves to foster the institutional independence of the courts by ensuring that Parliament complies with its constitutional obligation not to "*interfere with the functioning of the courts*"<sup>23</sup> and to "*assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts*"<sup>24</sup>
26. The National Assembly is elected to represent the people and to ensure government by the people under the Constitution, which includes providing a national forum for public consideration of issues, passing legislation and overseeing executive action.<sup>25</sup>
27. The difficulty with the overly broad nature of rule 67 is that the National Assembly, in its efforts to pay appropriate deference to the institutional independence of the courts, has to a large extent usurped its own constitutionally mandated responsibilities.
28. A recent example illustrates how a strict application of the rule unconstitutionally detracts from Parliament's law making function. In the case of *DPP, Western Cape v*

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<sup>22</sup> Above at 249.

<sup>23</sup> Section 165(3) of the Constitution.

<sup>24</sup> Section 165(4) of the Constitution.

<sup>25</sup> Above note 12.

*Prins*,<sup>26</sup> the Western Cape High Court found that it could not sentence Mr Prins for sexual assault although this was specified as an offence in the Sexual Offences Act. It reached this conclusion on the basis that there was no corresponding penalty for such an offence in the legislation. This was also the case for another 29 offences listed in the Act.

29. As the magnitude of this apparent legislative oversight became clear,<sup>27</sup> Parliament hastened to pass a Bill and accordingly rectify the apparent anomalies. Whilst Parliament deliberated on and subsequently passed the Bill, the Western Cape Director of Public Prosecutions had appealed the decision. Of interest to note is that the discussion of the omission of the penalties in the Act and whether a Bill was required were, in accordance with the current formulation of the sub judice rule, off limits. So was the passing of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill.<sup>28</sup>
30. Had Parliament failed to deliberate on and pass the Bill, the loophole could have meant unjust reprieve for offenders.<sup>29</sup> Thus, Parliament by its own conduct has already recognised that the Principle of Comity in fact requires, when the situation so dictates, that Parliament may need to discuss matters pending before courts in order to discharge its own constitutionally conferred mandate.
31. In this instance Parliament rightly applied its law making powers whilst the matter was before the courts. It did so in the public interest and to pre-empt the possibility of an intolerable court outcome regarding the prosecution of offenders.

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<sup>26</sup> *Director of Public Prosecutions, Western Cape v Prins*; 2012 (2) SACR 67 (WCC); [2012] 3 ALL SA 138 (WCC); 11 May 2012.

<sup>27</sup> The Women's Legal Centre estimated that there were 11 800 convictions between 16 December 2007 and 30 June 2011 that were affected by the 29 offences highlighted in the Act.

<sup>28</sup> The Criminal Law (Sexual Offences and Related Matters) Amendment Act, Amendment Act 6 of 2012 commenced on 26 June 2012. The Bill described the purpose of the Act as follows: "*It was decided that while the appeal is pursued as a matter of urgency, legislative amendments should also be promoted*". The Bill is accessible at: [http://www.jutalaw.co.za/media/filestore/2012/05/b\\_19\\_-\\_2012\\_-\\_Criminal\\_Law\\_Sexual\\_Offences\\_and\\_Related\\_Matters\\_Amendment\\_Act\\_Amendment\\_Bill.pdf](http://www.jutalaw.co.za/media/filestore/2012/05/b_19_-_2012_-_Criminal_Law_Sexual_Offences_and_Related_Matters_Amendment_Act_Amendment_Bill.pdf)

<sup>29</sup> The Supreme Court of Appeal subsequently overturned the judgment but Parliament, correctly so, thought it fit not to wait for the outcome of that decision.

32. The nonsensical nature of the current rule is amplified when one has regard to section 172 of the Constitution. That section contemplates a situation where a court can suspend an order declaring any law unconstitutional on any conditions whilst Parliament is given an opportunity to correct the defect. That section includes a situation where a court can suspend its final pronouncement precisely to allow Parliament an opportunity to deliberate upon it and to report to the court on efforts to resolve the unconstitutionality. The matter would then be deliberated in Parliament whilst the court was technically still seized with it.
33. The current formulation of the rule also serves as an unwarranted interference on the Assembly's ability to hold the Executive to account as Ministers may seek out a convenient sub judice hiding place when confronted with hard questions from the floor calling them to account.<sup>30</sup> In stressing the importance of '*subjecting government action to the test of critical debate*' in the National Assembly, Sachs J found<sup>31</sup>

“[T]he Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. . . . The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, ‘South Africa belongs to all who live in it . . .’.”

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<sup>30</sup> See the Standard Note on the sub judice rule, Richard Kelly, House of Commons Library, Parliament and Constitution Centre, 31 July 2007 at p 6: “*The purpose of the sub judice rule is to protect the courts from parliamentary interference; it is not to provide Ministers with a convenient protection against questioning in the House.*” Accessible at <http://www.scribd.com/doc/54046530/House-of-Commons-Library-note-on-sub-judice>

<sup>31</sup> *Democratic Alliance and Another v Masondo NO and Another*, 2003 (2) BCLR 128 (CC) (paras 42-3).

34. A strictly circumscribed interpretation of the sub judice rule as it relates to the deliberations of Parliament would fail to subject laws and governmental action to the test of critical debate.

### A COMMONWEALTH COMPARISON

35. The sub judice rule as it applies in the parliamentary context has its origins in the Westminster legislatures of the United Kingdom. From as early as 1889 to 1963 the unwritten rule was that the speaker of the House of Commons made a determination as to when discussions of matters pending before the courts were off limits to elected representatives seeking to debate matters in that forum.<sup>32</sup>
36. Thus from the outset, the presiding officer in the House of Commons was afforded a discretion as to when to invoke the rule and the rule did not serve as an absolute bar to inhibit parliamentary debate on matters that the courts had been called upon to adjudicate.
37. In 1963 the House of Commons passed a resolution that matters pending before courts were not to be discussed in motions, debates or questions. The rule was subject to two qualifications. First, the speaker of the House at all times retained a discretion as to when a discussion on a matter was off limits because it was pending before the courts. The second qualification ensured that the sub judice rule could not usurp the right of the House to legislate on any matter.<sup>33</sup>
38. A 1972 resolution saw the rule watered down even further. The resolution read in relevant part:

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<sup>32</sup> Queensland Parliamentary Library: Research and Information Service: Client Information Brief on Standing Order 233 of the Queensland Legislative Assembly Covering the Sub-judice rule, 15 November 2011 at p 1. Accessible at <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2011/5311T5914.pdf>.

<sup>33</sup> Above note 30 at p 15.

*“subject to the discretion of the chair reference may be made in Questions, Motions or debate to matters awaiting or under adjudication in all civil courts . . . in so far as such matters relate to a Ministerial decision which cannot be challenged in a court except on grounds of misdirection or bad faith, or concern issues of national importance such as the national economy, public order or the essentials of life; (2) in exercising its discretion the Chair should not allow reference to such matters if it appears that there is a real and substantial danger of prejudice to the proceedings.”<sup>34</sup> [Our emphasis.]*

39. In 2010 the Speaker of the Victorian Legislative Assembly (the bicameral legislature of the Australian state of Victoria) made a ruling on their use of sub judice. Since no written rule existed in their Assembly, the Speaker described it as a *“voluntary restriction which the house imposes upon 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.”*<sup>35</sup> The Speaker ruled that the *“Chair will retain the right to exercise discretion and waive the sub judice rule where a need for public debate can be demonstrated.”*<sup>36</sup> Part of the Speaker’s ruling contained a set of factors which should guide the Chair in determining when a need for public debate can be demonstrated. A ruling should favour deliberation where:

- *A discussion of relevant policy 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 likelihood to the prejudice of the case is very low.*
- *The Chair 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.*

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<sup>34</sup> Above note 30 at p 16.

<sup>35</sup> Parliament of Victoria, Parliamentary Debates (Hansard) Tuesday, 25 May 2010 at p1753. Accessible at [http://www.parliament.vic.gov.au/images/stories/daily-hansard/February\\_2010/Assembly\\_Daily\\_Extract\\_25\\_May\\_2010\\_from\\_Book\\_71.pdf](http://www.parliament.vic.gov.au/images/stories/daily-hansard/February_2010/Assembly_Daily_Extract_25_May_2010_from_Book_71.pdf)

<sup>36</sup> Above at p1753.

40. The rule as formulated in Scotland,<sup>37</sup> Wales<sup>38</sup> and Northern Island<sup>39</sup> confers a discretion on the presiding officer and expressly reserves the Legislatures' ability to legislate on any matter.

41. Rule 7.13 in the Wales National Assembly gives direction to the Chair on how the discretion must be exercised. The rule provides:

*“Subject to the right of the Assembly to legislate on any matter within its competence, a member shall not raise or pursue in any proceedings of the Assembly any matter where courts have been initiated, or where notice of appeal has been given, unless the Presiding Officer is satisfied that:*

- (i) *the matter is clearly related to a matter of general public importance;*
- (ii) *the matter does not relate to a case which is to be heard or is being heard, before a criminal court or before a jury or to a case which is to be heard, or is being heard, in family proceedings;*
- (iii) *the matter is raised by means of motion or question, due notice having been given; and*
- (iv) *the Member does not, in his or her comments, create a real and substantial risk of prejudice to the proceedings of a court . . . either generally or in respect of a particular case.*<sup>40</sup>

42. Northern Island's Standing Order 68 explicitly allows, subject to the Chair's discretion, for questions, motions or debate in relation to matters to be heard or in the process of being heard in civil courts where it concerns “*issues of importance such as the economy, public order or the essentials of life*”<sup>41</sup> and states that “*in exercising its*

<sup>37</sup> Rule 7.5: “1. A member may not in the proceedings of Parliament refer to any matter in relation to which legal proceedings are active except to the extent permitted by the Presiding Officer. . . 4. Nothing in this rule shall prevent the Parliament from legislating about any matter.”

<sup>38</sup> Rule 7.13.

<sup>39</sup> Standing Order 68: “Subject always to the discretion of the Chair and the right of the Assembly to legislate on any matter within its legislative competence, matters awaiting or under adjudication in all courts . . . shall not be referred to”.

<sup>40</sup> Accessible at <http://www.wales.gov.uk/keypubstandingorders/index.htm>.

<sup>41</sup> Northern Island Assembly Standing Order 68(5). Above note 30 at p 13.

*discretion the Chair should not allow reference to such matters if it appears that there is a real and substantial danger of prejudice to the proceedings.*"<sup>42</sup>

43. In Canada<sup>43</sup> a report by a Special Committee on the rights and immunities of parliamentary members made certain key findings in relation to the sub judice rule. These included:

- *The responsibility to show restraint should principally rest on the member asking the question and the minister answering it.*
- *The Speaker should remain the final arbiter, but he should only exercise his discretion in exceptional cases where it is clear to him that to do otherwise would be harmful to specific individuals.*
- *Where there is doubt in the mind of the Chair, a presumption should exist in favour of allowing debate and against the application of the [sub judice] convention.*<sup>44</sup>

44. Of particular interest to note is that not a single comparable commonwealth legislature has a sub judice rule coached in absolute terms as all other jurisdictions permit discretion on the side of the Chair. In many jurisdictions the rule is explicitly confined to ensure that it does not impede upon the legislature's law making functions and that it is only invoked when there is a real or substantial danger of prejudice to court proceedings. Recognised exceptions to the rule include the need to discuss matters of national or public importance, the need to influence current events and the need to press government for action.

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<sup>42</sup> Northern Island Assembly Standing Order 68(6). Above note 30 at p 13.

<sup>43</sup> On the Canadian front the Ontario Standing Order 23(g) states:

*"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 (i) that is pending in a court or before a judge for judicial determination . . . Where it is shown to the satisfaction of the Speaker that further reference would create a real and substantial danger of prejudice to the proceeding."*

<sup>44</sup> Above note 7 at p 7.



### THE NEED TO REFORMULATE RULE 67

45. EE notes that the call for comments on the rules of the National Assembly was brought on by the Assembly's need to '*align its procedures and proceedings with practice and ensure that the Assembly fulfils its constitutional mandate in the most effective manner possible.*'<sup>45</sup> This laudable and necessary objective is in line with the Constitution which confers the power on the National Assembly to '*make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.*'<sup>46</sup>
46. In the recent case of *Oriani-Ambrosini v Sisulu*,<sup>47</sup> the Constitutional Court had cause to analyse the National Assembly's power to determine its own internal arrangements, proceedings, procedures, rules and orders concerning its business. Taking the centrality of transparency, public involvement and representative and participatory democracy into account, the Court found it would be inappropriate to interpret this power in a way that allows the rules to undermine the power of a Member to initiate or prepare legislation and introduce a Bill. In reaching this conclusion the Court reasoned that the Assembly's power to determine its own rules '*does not entitle the Assembly to impose substantive or content-based limitations on the exercise of the constitutional powers of its members, but rather contemplates rules that are procedural in nature.*'<sup>48</sup>
47. A strict application of the sub judice rule offends the notion of participation in the proceedings of the Assembly and does so in a manner which unconstitutionally limits the powers of its Members. Representative and participatory democracy, as principles underlying our multi-party democracy, can only be achieved if elected representatives can continuously participate in actions and decisions that affect the lives of their constituencies.<sup>49</sup> This is so even in instances where matters of public interest form the

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<sup>45</sup> Above note 1.

<sup>46</sup> Section 57(b) of the Constitution.

<sup>47</sup> *Oriani-Ambrosini v Sisulu* (CCT 16/12) [2012] ZACC 27 (9 October 2012).

<sup>48</sup> Above at para 65.

<sup>49</sup> Kruger, J. 2012. Oriani-Ambrosini v Sisulu: Introducing a private bill more than ceremonial. Accessible at <http://www.polity.org.za/article/oriani-ambrosini-v-sisulu-introducing-a-private-bill-more-than-ceremonial-2012-10-16>

subject matter of litigation, as pending court proceedings should not detract from the “*collective responsibility of both the majority and minority parties and their individual members to deliberate critically and seriously on legislative proposals and other matters of national importance*”.<sup>50</sup>

48. EE submits that rule 67 of the National Assembly as currently formulated impedes the ability of the Assembly to fulfill its constitutional mandate effectively. The rule ought to be reformulated in order to ensure that an appropriate balance is struck between the need to avoid an unwarranted interference with the law making and accountability functions of Parliament, to preserve the independence and impartiality of our courts, to protect citizens’ rights to address Parliament and to protect a litigant’s rights to a fair trial.

#### **RECOMMENDATIONS FOR REFORMULATING RULE 67**

49. EE submits that rule 67 be reformulated in order to explicitly preserve the Assembly’s law making functions, to confer a guided discretion on the Speaker of the Assembly in making a ruling on the applicability of the rule, to preserve the public’s ability to address the Assembly on any matters of public concern, to insert a presumption in favour of non-application of the rule and to preserve the Assembly’s ability to interrogate any Ministerial conduct or Executive action.
50. EE puts forward the following suggestion as a possible way in which the rule could be reconstructed:

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<sup>50</sup> Above note 47 at para 48.

**67. Matters Sub Judice:**

- (1) *Members of the Assembly may raise and debate any matter in the Assembly subject to the Speaker's discretion to apply the sub judice rule in order to prevent deliberation on an issue pending before the Courts, where such deliberation has the serious potential to prejudice the administration of justice or the independence of the Courts.*
- (2) *The Speaker may not use this discretion to frustrate the ability of the-*
- (i) *Assembly to legislate on any matter;*
  - (ii) *Assembly to interrogate any Ministerial conduct;*
  - (iii) *public to address the Assembly on any issue of public interest;*
  - (iv) *Assembly to address a court challenge to executive conduct or action.*
- (3) *There exists a presumption in favour of deliberation.*
- (4) *In exercising the discretion a Speaker must favour deliberation where-*
- (a) *The matter is of general public interest;*
  - (b) *The matter forms the subject of civil proceedings.*
- (5) *The Speaker can only invoke this rule where-*
- (a) *the prejudice which the statement may cause to the administration of justice is demonstrable and substantial and there exists a real risk that the prejudice will occur if publication takes place and*
  - (b) *the Speaker provides the Assembly with reasons as to why the rule applies.*

## CONCLUSION

51. EE is grateful for the opportunity to provide input on the review of the Rules of the National Assembly by the Rules Committee of the National Assembly.

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