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PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

APPLICATION TO UNDERTAKE A STUDY TOUR/ INTERNATIONAL TRIPS

To: House Chairperson: Committees, Oversight & ICT
Chief Whip of the Majority Party in the National Assembly
Speaker: National Assembly

From: Chairpersons of the Interim Joint Committee on Scrutiny of Delegated Legislation

Enquiries:

Committee Secretary: Jessie Shonhiwa

Contact details: 021 400 3741/0747737523

Date: 07 MAY 2012

Application by co-Chairpersons of INTERIM JOINT COMMITTEE ON SCRUTINY OF DELEGATED LEGISLATION to undertake a study tour to Australia and to India from 21 October to 02 November 2012

1. Decision required / brief summary of motivation and objectives:

Parliamentary scrutiny of delegated legislation forms a critical element in any modern system of constitutional democracy and has the potential to enhance constitutional values and principles, improve the quality of Acts of Parliament and save legal costs or court time in the future by anticipating challenges to the constitutional validity of such legislation. It is against this backdrop that the Interim Joint Committee on Scrutiny of Delegated Legislation (Joint Scrutiny Committee) was established.

In the orientation meetings held by the Joint Scrutiny Committee, Australia and India were identified as having the most developed scrutiny mechanisms in place. These democracies were recommended as having the most beneficial best practices worthy of study by any fledgling scrutiny mechanism.

The Report of the Subcommittee on Delegated Legislation (2002), which enabled the establishment of the Joint Scrutiny Committee, recommends that the Scrutiny Mechanism of Parliament be provided with the necessary capacity to perform its functions. It particularly highlights that the Australian Scrutiny Committee *'has the added task of acting as a watchdog over human rights'* and thus, would assist the Committee to use the scrutiny criteria to achieve its objectives and amongst others, to enhance constitutional values and principles and to improve the quality of Acts of Parliament.

In the Australian Parliament:

Australia is regarded as a pioneer and expert jurisdiction in the British Commonwealth on legislative scrutiny of both Bills and delegated legislation. Scrutiny Committees exist at central government (commonwealth) level which was established in 1932 and in all states and one of the territories established between 1938 and 1976. Some of these territories have a single committee which reviews both Bills and regulations (Queensland, South Australia, Victoria and the Australian Capital Territory), the rest review only delegated legislation (New South Wales, Western Australia, Tasmania and the Northern Territory).

At central level, committees of both Houses of Parliament contribute to such scrutiny. In the Senate, the regulations and Ordinances Standing Committee (1932) and the Standing Committee for the Scrutiny of Bills, and the Legal and Constitutional Affairs Committee of the House of Representatives are the relevant bodies. However, the nature of the respective composition and powers of each Committee means that the work of the Senate committees tends to be more critical and vigilant. These Committees are assisted by an outstanding research and library capacity, and they meet on a weekly basis, at affixed time, while Parliament is in session to review all Bills and regulations published in the previous week or since their previous meeting.

Current role and function of the Senate Scrutiny of Bills Committee

The Senate Scrutiny of Bills Committee (SBC) describes its current role as assessing 'legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety'. The SBC's membership, terms of reference and powers are contained in Senate Standing Order 24. Pursuant to Standing Order 24, the SBC is appointed to report on, in respect of the clauses of Bills introduced into the Senate, and in respect of Acts of the parliament, whether such Bills or Acts, by express words or otherwise have the following effects:

- Trespass unduly on personal rights and liberties;
- Make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- Make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- Inappropriately delegate legislative powers; or
- Insufficiently subject the exercise of legislative power to parliamentary scrutiny.

In addition, any Senator who wishes to draw to the attention of the Committee under its terms of reference is invited to do so. When undertaking its functions, the SBC may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate. The SBC may also move from place to place, and meet in private session. The Standing Committee Order 24 requires the SBC to report from time to time its proceedings and evidence and any recommendations and make regular reports of the progress of the proceedings of the committees.

The SBC comprises six senators: three government senators and three non-government senators nominated by the Leader of the Opposition in the Senate or by any minority groups or independent senators. The SBC must elect a chair, who holds a casting vote, and may form subcommittees for specific purposes. The SBC may also appoint a legal adviser, and since its inception, the Committee has taken the opportunity to engage eminent legal advisers to assist it in its work.

On the basis of the above wealth of information and experience of the Australian Parliament, the co-Chairpersons of the Interim Joint Committee on Scrutiny of Delegated Legislation are of the view that the Committee Members from the Parliament of South Africa can benefit a lot from their interaction with their counterparts from the Australian Parliament.

In the Indian Parliament:

The Indian Parliament is made up of the House of the People (Lok Sabha) and the Council of States (Rajya Sabha) which is similar to our NCOP and NA Houses of Parliament. Both Houses have a committee on Subordinate Legislation to scrutinize and ensure that powers to make rules, regulations, by-laws, schemes or other statutory instruments have been properly exercised within such delegation.

Although the House can scrutinize these instruments from whatever source, their system requires that these rules and regulations be "laid before the House" (be tabled). Both committees report to their respective Houses on whether the powers to make rules and regulations delegated by Parliament have been exercised properly. They can recommend amendments and process according to their legislative procedures.

In India, there are two Scrutiny Committees: The Lok Sabha Committees on Subordinate Legislation and the Rajya Sabha Committee on Subordinate Legislation. The function of these Committees is to scrutinise and report to the respective Houses whether the power to make regulations, rules, sub-rules, bye-laws, etc, conferred by the Constitution or delegated by Parliament are being properly exercised within such delegation. These Committees act as watch-dogs for Parliament to ensure that there is no transgression of the powers granted.

Delegated legislation has become inevitable, but the question of control has become crucial. Controls over the delegated legislation may be divided into three categories: Judicial control; Legislative control, and other controls. The rationale behind these controls is to ensure that if Parliament delegates legislative powers to any other authority such as the executive, it must also ensure that those powers are properly exercised by the administration and there is no misuse of authority by the executive. The underlying object of parliamentary control is to watch over the rule-making authorities and also to provide an opportunity to criticise them if there is abuse of power on their part. This mechanism is described as 'legislative veto'.

In the same vein, legislative control can be effectively exercised through the following initiatives: Laying on the Table and Scrutiny Committees. The procedure of Laying on the Table serves two purposes:

- Firstly, it informs the legislature as to what rules have been made by the executive authorities in the exercise of delegated legislative power; and
- Secondly, it provides an opportunity to the legislators to question or challenge the rules already made or proposed. Through this safety-value the legislature exercises supervision, check and control over executive rule-making power.

There are several types of 'laying'. The extent of legislative control necessarily differs in these cases. The Select Committee on Delegated Legislation summarised the procedure under the following seven headings:

- Laying without further provision for control - Here the parent Act merely provides that the rules shall be laid before Parliament. They become operative from the date they are laid before the Houses and in exceptional cases, even before they are so laid. This procedure is only to inform Parliament as to what rules were made by the executive authorities.
- Laying with deferred operation - The requirement of laying is linked with postponement of operation of the rules and thus Parliament gets more control.
- Laying with immediate effect but subject to annulment - Here the rules come into force when laid before Parliament, but cease to be in operation if disapproved by it within a specified period.
- Laying in draft but subject to resolution that no further proceedings be taken - This is also a 'negative resolution' procedure. Here draft of statutory rules are required to be laid before Parliament but the parent Act provides that the rules should not be made effective until a particular period has expired.
- Laying in draft and requiring affirmative resolution - This belongs to the realm of 'positive resolution' and provides a stringent parliamentary supervision over delegated legislation unlike the 'negative resolution' procedure. The draft rules do not become effective until an affirmative resolution approving the same has been passed by Parliament. An opportunity is provided to the members to discuss and react to the rules before they can finally be given effect to by the executive.
- Laying with operation deferred until approval given by affirmative resolution - Here the rules are actually made but they do not come into operation until approved by Parliament.
- Laying with immediate effect but requiring affirmative resolution as a condition for continuance - This form of laying is used where prompt operation of delegated legislation is essential but strict parliamentary supervision is also necessary. The confirmatory resolution keeps the delegated legislation alive, which would otherwise die. It is often applied in cases of taxation or to rules made during Emergency.

However, in India, there is no statutory provision requiring 'laying' of all delegated legislation. According to the Committee on Delegated Legislation, the statutes contain four methods of laying:

- Requirement of mere publication of rules in the Official Gazette;
- Requirement of such publication and laying on the Table;
- Over and above the aforesaid two conditions, some statutes allowed modification by Parliament; and
- Requirement of laying of rules for a specified period before they are published in the Official Gazette.

Objective of Study Tour

Therefore the objective of the Study Tour is for the entire Joint Scrutiny Committee to meet with the relevant committees or structures that are tasked to deal with the scrutiny of delegated legislation in Australia and in India in order to study their operating procedures and best practices.

2. Proposed composition of delegation:

A consequence of establishing this new Joint Scrutiny Committee is that it is imperative for all members of the Joint Scrutiny Committee to understand the scope of its mandate and constructively contribute to its operations. It is understood that the Joint Scrutiny Committee has a very technical mandate. In light of this understanding, it is envisioned that all **14 members** and the designated support staff (Approximately 4) of the Joint Scrutiny Committee study the recommended mechanisms together and at the same time.

3. Impact on Parliamentary Programme:

It is suggested that, in an effort to allay costs of travel, the Joint Committee members visit both countries in one trip, instead of at different times. In so doing, the members will be better prepared and empowered for the optimum achievement of the mandate of the Joint Scrutiny Committee in the following term of Parliament.

Furthermore, both the Australian and Indian Parliaments will only be able to accommodate the Joint Scrutiny Committee during the period 22 October to 02 November 2012. As a result of communications via the relevant consulates and commissions, it was established that it would not be feasible to visit both countries earlier for the given reason that the same countries are currently occupied in hosting other Committees of the Parliament of RSA.

As a joint committee of Parliament, it is difficult to avoid clashes of activities of both NCOP and NA committees. During the anticipated study tour period, the provisional fourth term programme indicates that Parliament Plenaries and Committees will meet during the period. Although no specific dates have been indicated, it is anticipated that the Introduction of 2012 Medium-Term Budget Policy Statement and Adjustments Budget will take place in October.

In this regard and for ease of reference, a copy of the Provisional Fourth Term Programme is pasted below as *Table 1*:

Table 1: As at 25 April 2012

FOURTH TERM 2012 (provisional)	
8 October – 7 December (9 weeks)	
NA Committees (<i>BRR Reports</i>)	9 – 19 October
NCOP Oversight Week	1 – 5 October
Plenaries/Committees	23 October – 23 November
Introduction: 2012 Medium-Term Budget Policy Statement And Adjustments Budget	October
Revised Fiscal Framework, <i>if applicable (Within 9 days)</i>	November
Division of Revenue Amendment Bill (<i>If applicable</i>)	November
Taking Parliament to the People (NCOP)	5 – 9 November
Committees / Oversight December	27 November – 7
Passing of Adjustment Appropriation Bill by Parliament	December
Constituency period	10 – 14 December
Leave period 2013	17 December – January

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4. Does the visit form part of the committee's programme and have letters been prepared to inform the relevant country/countries of the visit?

If approved, the study tour will form part of the Joint Scrutiny Committee programme of the fourth term. Communications have been made with the relevant liaison officers via DIRCO and relevant consulates and approval for the said dates of study tour has been obtained.

5. Status of committee's previous oversight report:

Not applicable.

The Interim Joint Committee on Scrutiny of Delegated Legislation is a new joint committee of Parliament.

Details of Portfolio Committee meetings cancelled for 2012

<i>Dates</i>	<i>Reasons for cancellation</i>
06 June 2012	NCOP members in attendance of NCOP Plenary. No quorum available.

Details of outstanding minutes not adopted by the Committee for 2012

<i>Dates</i>	<i>Type of meeting</i>	<i>Reasons for minutes not adopted</i>
20 June 2012	Rules, procedures and guidelines of operation of the Joint Scrutiny Committee	Awaiting next meeting for adoption of minutes. Scheduled meeting for 25 July has since been postponed.

Details of outstanding reports on oversight visits, study tours and workshops attended by Committee Members for 2012

<i>Dates</i>	<i>Activity</i>	<i>Reasons for report(s) not adopted</i>
NOT APPLICABLE	NOT APPLICABLE	NOT APPLICABLE

Part 2 - Financial Implications

1. Balance available in Committee Budget

R660830.60

2. Estimated cost (Reflecting air travel, ground travel, accommodation & S & T)

Air travel	R225000.00
Accommodation and Ground travel	R700000.00
S&T	R83000.00
Vaccination costs (recommended for India)	<u>R18000.00</u>

ESTIMATED COST TOTAL **R1,026,000.00**

It is suggested that the required funding could be sourced from the consolidated fund.

Part 3 - Comments & Signatures



10/07/2012

Name: Mr VG Smith, MP
CO-CHAIRPERSON – NA Component

COMMENTS & SIGNATURES

NO FURTHER COMMENTS

Date: _____

Name: Ms MG Boroto, MP
CO-CHAIRPERSON – NCOP Component

COMMENTS BY THE UNIT/SECTION MANAGER:

Date: _____

Name:
Unit / Section Manager: Committees

COMMENTS BY THE HOUSE CHAIRPERSON (NCOP):



Approved



Not Approved

Date: _____

R J TAU, MP
HOUSE CHAIRPERSON: NCOP

COMMENTS BY THE CHIEF WHIP OF THE MAJORITY PARTY IN THE NCOP:



Approved



Not approved

Date: _____

N D NTWANAMBI, MP
CHIEF WHIP: NATIONAL COUNCIL OF PROVINCES

COMMENTS BY THE HOUSE CHAIRPERSON (NA):



Approved



Not Approved

Date: _____

C T FROLICK, MP
HOUSE CHAIRPERSON: COMMITTEES, OVERSIGHT & ICT

COMMENTS BY THE CHIEF WHIP OF THE MAJORITY PARTY IN THE NA:



Approved



Not approved

Date: _____

M S MOTSHEKGA, MP
CHIEF WHIP: NATIONAL ASSEMBLY