



TO : The Clerk of the Senate

THRO' : Senior Deputy Clerk (EG)

THRO' : Director, Committee Services

FROM : Senior Clerk Assistant

DATE : 16th May, 2018

Forwarded and recommended for approval for tabling.
Forwarded for consideration & approval
17/05/18

SUBJECT: REPORT OF THE INDUCTION WORKSHOP OF THE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION HELD AT FOUR POINT HOTEL BY SHERATON, NAIROBI FROM 10TH -12TH MARCH, 2018.

The Sessional Committee on Delegated Legislation held its induction workshop in Nairobi county from 10th to 12th March, 2018.

The report of the retreat has since been finalized and is ready for tabling in the Senate.

Attached is a copy of the report and the relevant minutes for your approval for tabling in the Senate.

*Paper laid on 5/6/2018
by the Senate
Majority member.*

[Signature]
Derick Koli

*Chairperson, Joint
Standing Committee
on Labour and Social
Welfare.*

[Signature]
18/05/18
[Signature]
29/5/2018



PARLIAMENT OF KENYA



THE SENATE

*Recommended for
tabling in the
Senate.*

*Rt. Hon. Speaker
You may approve.
18/05/18*

Eg 8/25/18

TWELFTH PARLIAMENT

REPORT OF THE SESSIONAL COMMITTEE ON
DELEGATED LEGISLATION ON THE INDUCTION
WORKSHOP HELD AT FOUR POINTS HOTEL BY
SHERATON, NAIROBI FROM 10TH – 12TH MARCH,
2018

Clerk's Chamber

May, 2018

The Senate

Parliament Buildings

NAIROBI

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ABBREVIATIONS AND ACRONYMS

AG	- Attorney General
RMA	- Regulatory Making Authority
SI	- Statutory Instruments
SIA	- Statutory Instruments Act
SO	- Standing Order(s)

FOREWORD

This report documents the proceedings of a four-day induction workshop for the Members of the Sessional Committee on Delegated Legislation held at Four Point Hotel by Sheraton, Nairobi from 10th -12th, March, 2018.

The induction workshop was convened to induct members of the Committee to their work and working of Committees in the Senate. The topics under review included an overview of the Mandate of the Committee; Overview of the Statutory Instruments Act and Requirements for Parliamentary Scrutiny; The Functions of Delegated Legislation Committee in Examining Statutory Instruments and the Role of Legal Counsel; Drafting and handling of Statutory Instruments: The Role of the Office of the Attorney General and Department of Justice; Statutory Instruments and the Litigation Process; and Procedures governing the conduct of business in the Committee – Managing Committee Sitzings.

ACKNOWLEDGEMENTS

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it during the planning and organization of the workshop including the allocation of the required resources.

The Committee is also greatly indebted to the resource persons especially the Clerk of the Senate and his secretariat and the representative of the office of the Attorney General, Mr. Fred Mwachi for their educative and insightful presentations.

Final appreciation goes to the Members of the Committee who created time to attend and actively participate in the proceedings of the workshop despite their busy schedules.

EXECUTIVE SUMMARY

The induction workshop for members of the Sessional Committee on Delegated Legislation was held at Four Point Hotel by Sheraton, Nairobi from 10th to 12th March, 2018. The workshop was an important avenue for inducting members to their roles as members of the Committee and the mandate of the Committee.

The induction workshop was convened to induct members of the Committee to their work and working of Committees in the Senate. The topics under review included an overview of the Mandate of the Committee; Overview of the Statutory Instruments Act and Requirements for Parliamentary Scrutiny; The Functions of Delegated Legislation Committee in Examining Statutory Instruments and the Role of Legal Counsel; Drafting and handling of Statutory Instruments: The Role of the Office of the Attorney General and Department of Justice; Statutory Instruments and the Litigation Process; and Procedures governing the conduct of business in the Committee – Managing Committee Sitzings.

This report documents the entire deliberations of the workshop including the opening remarks, the presentations, summary of the issues flagged out during the various sessions and the conclusions.

CHAPTER ONE

Introduction and Background

The Senate Sessional Committee on Delegated Legislation is established pursuant to standing order 215 of the Senate Standing Orders. The Committee is mandated to scrutinize statutory instruments laid before the House to ensure that they are consistent with the provisions of the Statutory Instruments Act, 2013. In this regard, the Committee deals with subsidiary legislation generated by all national government ministries and departments.

The Committee was constituted on 14th December, 2017 pursuant to standing order 183 of the Senate Standing Orders. The Election of the Chairperson and Vice Chairperson was conducted on 11th January, 2018 and Sen. Samuel Poghiso, EGH, MP and Sen.(CPA) Farhiya Haji, MP were elected as the Chairperson and Vice Chairperson respectively.

Mandate of the Committee

The Committee is mandated to consider in respect of any statutory instrument, whether it: -

- (i) is in accordance with the provision of the Constitution, the Act pursuant to which it is made or other relevant written laws;
- (ii) infringes on fundamental rights and freedoms of the public;
- (iii) contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
- (iv) contains imposition of taxation;
- (v) directly or indirectly bars the jurisdiction of the court;
- (vi) gives retrospective effect to any of the provision in respect to which the Constitution does not expressly give any such power;
- (vii) it involves expenditure from the consolidated fund or other public revenues;
- (viii) is defective in its drafting or for any reason form or part of the statutory instrument calls for any elucidation;
- (ix) appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;
- (x) appears to have had unjustifiable delay in its publication or laying before Parliament;

- (xi) makes rights, liberties or obligations unduly dependent upon non-renewable decisions;
- (xii) makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
- (xiii) inappropriately delegates legislative powers;
- (xiv) imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
- (xv) appears for any reason to infringe on the rule of law;
- (xvi) inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and,
- (xvii) accords to any other reason that the Committee considers fit to examine.

Committee Membership

The Committee on Delegated Legislation as constituted by the House in December 2017 comprises of the following Members: -

- | | |
|--------------------------------|----------------------------|
| 1) Sen. Samuel Poghio, EGH, MP | - Chairperson |
| 2) Sen. Farhiya Haji, MP | - Vice- Chairperson |
| 3) Sen. Okong'o Omogeni, MP | - Member |
| 4) Sen. Irungu Kangata, MP | - Member |
| 5) Sen. Judy Pareno, MP | - Member |
| 6) Sen. Victor Prengei, MP | - Member |
| 7) Sen. Mohammed Faki, MP | - Member |
| 8) Sen. Mutinda Kabaka, MP | - Member |
| 9) Sen. Millicent Omanga, MP | - Member |

Objectives of the induction workshop

It was envisaged that by the end of the induction, the members of the Committee would have: -

- a) gained a deeper understanding of the Committee's mandate and the importance of committees in a legislature;
- b) Understood the place of the committees in generation and processing of legislative business;
- c) Understood the sector specific policy directions of both the National and County Governments;
- d) gained understanding of the role of the committees in the budgetary cycle
- e) appreciated and utilized the various sources of parliamentary practice and procedures in transacting committee business;
- f) Utilized the available management, collaboration and cooperation structures to leverage on the success of Committee work.

Expected Outcomes

- a) Strengthened Members' capacity to effectively play their roles in the Twelfth Parliament; and
- b) Effective utilization of knowledge gained in the management of Committee and interaction with the relevant stakeholders.

Finally, it is now my pleasant duty, on behalf of the Sessional Committee on Delegated Legislation, to present this report to the House pursuant to the provisions of Standing Orders of the Senate.

Signed.....

SEN. SAMUEL POGHISIO, EGH

CHAIRPERSON, COMMITTEE ON DELEGATED LEGISLATION

Date.....

16TH MAY 2018

CHAPTER TWO

OPENING SESSION

The session chair, Sen. Farhiya Haji, MP welcomed members to the workshop and asked for a round of introductions from the members, staff and invited guests and thereafter invited the Clerk of the Senate to make his remarks.

Remarks by Mr. Jeremiah Nyegenye, CBS – Clerk of the Senate

The Clerk began by congratulating Members for their election to Senate and their nomination to the Delegated Legislation Committee. He informed the Members that the induction workshop follows a series of other activities since the election of members including the orientation and induction of all Senators conducted last year. The Clerk in his remarks informed the Committee that:

- The Committee work requires commitment. It involves a lot of work but many people view perceive it as a less busy Committee
- The Committee on Delegated Legislation is one of those few Committees established through a statute and standing orders.
- The Committee was the main tool used by the Senate to check the power of the executive to make subsidiary legislation and it is the only committee that can make resolutions that have a legal effect without seeking the approval of the House. All other Committees make resolutions but those resolutions have to be approved by the House.
- It is in the nature of the executive to make regulations beyond its purview and there is therefore the need for more vigilance as you look at any subsidiary legislation brought before the Committee.
- It is difficult to imagine regulations that do not affect counties. Nonetheless, the executive has been forwarding most regulations to the National Assembly without any reference to the Senate- this has been a key challenge. The Committee needs to engage the executive proactively on the matter to make a difference.
- The Committee has the longest mandate and it is the only Committee that is better placed to check misuse of discretion in the public administration
- In terms of the procedures involved in the review of the regulations, there were issues that the Committee needed to reflect about including the statutes enacted prior to the

promulgation of the Constitution of Kenya, 2010 with a view to consider amending such statutes; the concept of public participation in relation to the processing of regulations; the possibility of overlap of the Committee mandate with the mandates of other Committees of the Senate; follow-up mechanisms for ensuring recommendations of the Committee are implemented; and the need to adhere to deadlines- endeavour to meet deadlines

- Consider high impact areas where you can score easily and make an impact sooner during the life of the 12th Parliament.
- The Senate just like National Assembly has no 'police power' over the executive in ensuring enforcement of resolutions of the House emanating from motions, statements, petitions and other types of resolutions. However, it has other mechanisms at its disposal to ensure compliance including the refusal to pass budget making and stifling legislative agenda of the executive in the House among others.
- The Committee's role is limited to acceding or annulling of the regulations but there is need to explore the possibility of amending the Statutory Instruments Act to allow the Committee propose amendments to regulation.
- The Committee on Delegated Legislation wields immense powers that in the view of the secretariat required to be checked through annual reconstitution
- The secretariat will be available to assist the Committee fulfil its mandate-count on the support and commitment of the office of the Clerk.

Remarks by Sen Samuel Poghiso, Chairperson, Committee on Delegated Legislation

The Chairman started by welcoming Members and the secretariat to the induction workshop. He further relayed his congratulations to the senators on their successful appointment to the Committee. The Chairman also thanked members for electing him to lead the team and called on members' commitment to the work of the Committee in order to disapprove the notion that the Committee on Delegated Legislation is a less lucrative Committee.

The Chair further reiterated that the main objectives of the induction workshop included getting a deeper understanding of the Committee's mandate, interacting with key stakeholders and secretariat and getting clarifications on areas that may impede progress towards the realization of what the Committee sets out to achieve.

The Chair also emphasized that the place of delegated legislation in the legislative agenda could not be gainsaid or over-emphasized as it cuts across all sectors of the economy and urged members to work as a team in order to realize its mandate.

The Chairman in his remarks further thanked the Clerk for finding time to attend the workshop and noted that his presence was of great significance as it demonstrates his support and commitment to the work of the Committee

The Chairman further noted that the key challenges key challenges that affected the performance of the previous Committee included lack of quorum, lack of committee sitting venues, issues relating to procedures of processing reports of the Committee, non-compliance of the Ministries by failing to submit regulations to the senate and lack of a system of tracking regulations formulation, processing and approvals.

The Chairman in his address also urged members to be committed to the work of the Committee because without that Commitment, the Committee will not execute its work or mandate.

The Chairman noted that the mandate of this Committee was a long one but one that was not easily understood and urged members to take advantage of the presence of the clerk and other resource persons to get the sufficient clarity in the mandate of the Committee. He specifically asked a few questions including what is the mandate of the Committee. How will the Committee execute its mandate? Who are the key partners? What laws will guide the work of the Committee? What opportunities exist for support the work of the Committee? What challenges and how will the committee overcome them?

The Chairman reiterated that the success or failure of the Committee depended on two things. A vibrant and responsive secretariat and a committed membership that attends meetings promptly and prepares well for the activities of the Committee.

The Chairman also informed members that he will endeavor to ensure fairness and equitable sharing of any opportunities and that nomination to attend foreign trips will be based on attendance of Committee meetings and participation in the activities of the Committee

The Chairman urged members to learn by asking as many questions as possible during the workshop and thereafter wished them fruitful deliberations.

CHAPTER THREE

PRESENTATIONS

In line with the objectives of the induction, the presentations included an overview of the mandate and functions of the Committee, an overview of the Statutory Instruments Act, 2013,

Presentation on Overview of the Mandate and functions of Committee on Delegated Legislation; Relationship between the Executive and the Committee; Stakeholders under the ambit of the Committee and Rules and Procedure in Committee by Ms. Emmy Chepkwony, Principal Clerk Assistant II

This presentation mainly covered the definition of the statutory instruments, the establishment of and appointment of the Committee on Delegated Legislation, the procedure of consideration of the statutory instruments by the Senate and concurrence with the National Assembly and procedure and practice in Committees generally as outlined below:-

- Statutory instrument refers to any rule, order, regulation, direction, form, tariff of costs or fees, letter patent, commission, warrant, proclamation, by-law, resolution, guideline or other instrument issued, made or established in the execution of a power conferred by or under an Act of the County Assembly under which that statutory instrument or subsidiary legislation is expressly authorised to be issued.
- The Sessional Committee is appointed pursuant to provisions of standing order 213 of the Senate Standing Orders and the members are nominated by the Senate Business Committee in consultation with parliamentary parties at the commencement of every Session.
- Unless a Senator is discharged in accordance to Standing Order 184, or the Senate otherwise resolves, serve for the period of the Session.
- The Committee is established and given its mandate pursuant to Standing Order 215
- The rationale for establishing a Committee on Delegated Legislation lies in the need for Parliament and County Assemblies to check whether the legislature delegated to the executive is not abused and in carrying out its legislative mandate, it is practically impossible to incorporate all the procedural aspects of every law they pass, secondary laws are therefore needed for the implementation of the provisions of the primary Acts enacted by Parliament

which improves efficiency in Service delivery. The input of the members and the power assigned to scrutinize delegated legislation is to protect the public from unjust and unfair conditions in the name of rules or orders. Most delegated legislations are developed by the Executive and therefore the Committee ensures that there is a balance in the interest of the Executive and the electorate. The Committee is key in minimizing incidences of delegated legislations being subjected to judicial processes on grounds of being unconstitutional.

- In consideration of any Statutory Instrument, the Committee shall consider in respect of any statutory instrument whether it- is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written law; infringes on fundamental rights and freedoms of the public; contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament; contains imposition of taxation; directly or indirectly bars the jurisdiction of the Courts; gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power; involves expenditure from the County Revenue Fund or other public revenues; is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation; appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; appears to have had unjustifiable delay in its publication or laying before Parliament; makes rights , liberties or obligations unduly dependent upon non-reviewable decisions; Inappropriately delegates legislative powers; imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation; appears for any reason to infringe on the rule of law; inadequately subjects the exercise of legislative power to County Assembly scrutiny; and, accords to any other reason that the Committee considers fit to examine.
- In Acceding and Annuling Statutory Instrument (4) If the Committee –Resolves that the Statutory instrument , be acceded to, the Clerk shall convey that resolution to the relevant department or the authority that published the statutory instrument; Does not accede to the Statutory Instrument, the Committee may recommend to the Senate that the Senate resolves that the Statutory Instrument be annulled; (5) If the Senate – Fails to agree to the recommendation of the Committee under paragraph (4) (b), the Statutory Instrument shall be deemed to have been approved by Parliament; Does not accede to the Statutory Instrument, the Committee may recommend to the Senate that the Senate resolves that the Statutory Instrument be annulled;

- In Concurrence with National Assembly's Resolution on Statutory Instrument :- (1) whenever the Senate receives a message from the National Assembly on a statutory instrument, the National Assembly's resolution shall stand referred to the Committee on Delegated Legislation which shall consider the resolution , together with the statutory and report to the Senate within twenty one days of the referral. If the Senate agrees with the resolution of the National Assembly , the Clerk shall, by way of a message, inform the Clerk of the Assembly and the relevant state department or authority that published the statutory instrument, that parliament has annulled the Statutory Instrument or part of the statutory instrument and the instrument or part of the Statutory instrument shall hence forth, be void, but without prejudice to the validity of anything previously done there under, or the making of any new delegated legislation; If the Senate fails to agree with the National Assembly's resolution, the resolution shall be referred to a Joint Committee and Standing Order 218 (Joint Sitings of corresponding Committees of Parliament t) shall , with necessary modifications , apply.
- In Procedure and practice in Committees: Convening Sitings (S.O. 190)– determined by Chairperson or upon a petition by at least 5 Members; Notice of meeting (S.O.) 189: issued and circulated by the Clerk (Committee Secretariat) in prescribed manner. Committee can creatively leverage on ICT for real time notification for meetings); Quorum (S.O. 186) – any 3 Members present constitute before commencement of business ; Adjournment for lack of quorum (SO 193): must be obtained within 30 minutes of scheduled time; Sub-Committees (SO 191): may be formed for effective & timely delivery on tasks; Frequency of meetings (S.O. 194) – at least once in two months ... frequency determined by mandate and calendar of plenary sittings; Note - committees cannot sit when Senate is sitting unless with Speaker's permission; meeting is suspended whenever division bell is rung (proceedings would become void); Non-attendance- (SO.195); A Senator must not miss at least 4 consecutive sittings without written permission of Chairperson; Chairing (SO 186,188,196: Chairperson presides in absence of whom vice-chairperson chairs and in absence of both, a Member of the Committee is elected by the Committee to chair that specific sitting; Procedure in Committees (SO 204) – similar to those in Committee of the Whole with necessary modifications; Joint Sitings (SO 210) – with other Committees of the Senate on a matter of crosscutting nature (co-chaired by Chairs of participating Committees); Attendance and failure to attend/temporary absence – avoid technical appearances (failure to attend leads to

removal and replacement (SO 195); Temporary absence substituted by a temporary Member leads to SO 200); Attendance by non-Members (S.O. 203)- may attend but cannot vote (precedence is accorded to substantive Members); Public Access to committee meetings (S.O. 206) – public entitled to attend unless justifiably excluded (with permission of Speaker); Proceedings (S.O. 198)– recorded as minutes and reports (list of attendance (S.O. 197) included); Minutes are validated by confirmation and custody maintained by Secretariat; Minutes are annexed to Committee Reports; Voting in Committee – arrived at through voting (S.O. 204(2) (minority or dissenting views are recorded) Chairperson has original vote but not casting vote (SO 202) (It is advisable as far as practicable to build consensus in making decisions); and Reports of Select Committees (S.O. 207) adopted (including minority report) is signed, tabled, and published) including records and annexes of evidence gathered.

Presentation on an introduction to Statutory Instruments: Type of statutory instruments; The Statutory Instruments Act, 2013 and Processing Statutory Instruments by Dr. Johnson Okello, Director Legal Services

This presentation entailed an introduction note on the statutory instruments, types of statutory instruments, Statutory Instruments Act, 2013 and its objects, the consultation process in the Statutory legislation making process under the Act, the regulatory impact assessment and statements, parliamentary scrutiny of regulation, concurrence with the National Assembly, automatic expiry of the statutory instruments and commencements of statutory instruments

Introduction: Primary and secondary legislation are two forms of law, created respectively by the legislature and the executive branches of government. Primary legislation also known as statutes (Acts) set out broad outlines and principles, but delegate specific authority to an executive branch to make more specific regulations under the auspices of the enabling Act.

Definition of statutory instrument as rules, regulations, by-laws, principles etc. made pursuant to power conferred by statute. Statutory Instrument is wider in scope than delegated legislation. In other jurisdiction, the USA calls it subsidiary legislation while Canada, UK and Australia call it Delegated Legislation. There are three main categorization of regulations namely; procedural regulations, descriptive /substantive regulations and appointive regulations. Parliament is mainly concerned about procedural and descriptive regulations and less concerned about the

appointive/directive regulations. That, Canada and Australia have an electronic register for subsidiary legislation and therefore easy to track the processing and approvals mechanisms.

Do we have a justification for continued delegation? Is it time to limit delegation?

Types of Statutory Instruments: Definition in the Act describes them to include rules, Regulations, bye-laws made in exercise of powers conferred by statute. Under the Act, statutory instrument means any rule, order, regulation, direction, form, and tariff of costs or fees, warrant, proclamation or other statutory instrument made in execution of a power conferred under an Act of Parliament.

The Statutory Instruments Act, 2013 and its objects: In relation to subsidiary legislation, the Act seeks to ensure – Consultation and public participation; High standards in the drafting of subsidiary legislation; Parliamentary scrutiny; and Periodic review and where necessary, the repeal of subsidiary legislation that no longer has a continuing purpose.

The consultation process in the statutory legislation making process under the Statutory Instruments Act, 2013: The Act requires the undertaking of consultations. The Consultation is required to ensure – Those that are likely to be affected are notified and have an opportunity to be heard; the involvement of experts in the area of concern; and Public participation through public hearings or submissions.

The regulatory impact assessment and statements: Act requires the preparation of regulatory impact statements where the statutory instrument is likely to impose significant costs on the community or part of the Community. The regulatory Impact Assessment and Statement should set out - Objectives of proposed legislation; Effect of legislation; Alternative existing practicable means of achieving objectives and why these are not appropriate; Cost benefit analysis; Any other matters specified in guidelines; Independent advice on the adequacy of the impact statement and that the regulatory impact assessment and statement should be submitted together with Cabinet Secretary's certificate. Regulatory Impact Assessment and Statement should be notified to the public and the notice should allow at least fourteen days from the date of publication for the making of comments. The Cabinet secretary is required to ensure that comments and submissions are – considered before instrument is made; and Submitted to the Committee after tabling of instrument in Parliament.

Parliamentary Scrutiny of regulations: The relevant Cabinet Secretary is required to submit statutory instrument together with memorandum within seven sitting days after publication to the

Clerk for tabling before Parliament. The Clerk registers instrument and the instrument stands referred to Committee. The Committee considers the instrument in line with principles of good governance, rule of law and the principles set out under section 13 of the Act. The Committee reports to Parliament only if it proposes revocation and the House passes a resolution on whether the instrument stands or should be revoked and where a resolution for revocation is passed, regulation making authority is required to publish a revocation within fourteen days. It is important to note that if the Committee does not make a report within 28 days of referral of the instrument to it, it shall be deemed that the instrument meets requirements of the Act.

Concurrence with the National Assembly: The Standing Order 216 envisages a situation where statutory instruments transmitted from one house to the other and the process has not worked simply because the National Assembly has reneged on this. If the procedure was followed, then the normal procedure of forming a joint committee in case of disagreement would be set up to agree on a version.

Automatic Expiry of the Statutory Instruments: Statutory instruments stand revoked upon the expiry of ten years from the date it is made unless – It is sooner repealed; or It is exempted from such expiry by a regulation.

Commencement of a Statutory Instruments: Statutory instruments come into operation on the date specified in the instrument or on the date of publication and cannot come into force before the parent Act or enabling legislation. They may operate retrospectively but not earlier than the commencement of the parent Act or enabling legislation and where a statutory instrument operates retrospectively, a person shall not be liable for any penalty in respect of an offence committed before the instrument came into force.

A presentation on the relationship between the executive and parliament in the area of subsidiary legislation, formulation, processing and approvals by Mr. Fred J. Mwachi, Senior Principal Parliamentary Counsel, State Law Office.

This presentation covered a number of issues including where the legislative power is vested, the necessity for delegated legislation, the validity of delegated legislation, the ultra vires subordinate legislation, the role of the State Law Office in delegated legislation, Criticism labelled against Delegated or Subsidiary Legislation and a conclusion.

Introduction: Generally, legislative powers in the Constitution of Kenya are vested in the Legislature. The doctrine of separation of powers notwithstanding, it is now legitimate for the Legislature to delegate powers to make laws to subordinate authority. The legislature exercises its discretionary power by conferring discretionary law making power on a subordinate authority. This is a method by which Legislature leaves the detailed provisions required under an Act of Parliament to a Cabinet Secretary, in effect to departmental officials. Therefore, subsidiary legislation referred to variously also as delegated legislation or subordinate legislation, occurs when Parliament gives its legislative power to another person, generally a Cabinet Secretary to deal with administrative or procedural matters to implement the objectives of an Act of Parliament. Therefore, subordinate legislation seems the most apt of the various titles commonly used to describe legislation made under a delegated power. The subsidiary legislation may be regulations, rules for procedural matters, By-laws, Orders and notices for specific places, persons and matters.

The necessity for delegated legislation: There are a number of reasons for delegated legislation. These include- pressure upon Parliamentary time is great. The more procedural and subordinate matters can be withdrawn from detailed Parliamentary discussion, the greater will be the time which Parliament can devote to consideration of essential principles in legislation; the inability of Parliament to deal with technical matters also give rise to the need for delegated legislation. Apart from broad principles, technical matters are difficult to include in a Bill, since they cannot be effectively discussed in Parliament. If large and complex schemes of reform are to be given a technical shape, it is difficult to work out the administrative machinery in time to insert in the Bill all the provisions required. It is impossible to see all the contingencies and local conditions for which provision must eventually be made; c) there is also the need for flexibility. Delegated legislation provides for a power of constant adaptation to unknown future conditions without the necessity of amending legislation. Flexibility is essential. With delegated legislation there is sufficient time to consult interests affected by the operation of new Acts of Parliament; and d) in a modern State there are many occasions when there is a sudden need of legislative action. For many such needs, delegated legislation is the only convenient or even possible remedy. However, where there is time, on legislative issues of great magnitude, it is right that Parliament itself should either decide what the broad outlines of the legislation shall be, or at least indicate the general scope of the delegated powers which it considers are called for by the occasion.

The validity of delegated legislation: Although Parliament has discretion to delegate its powers; there are limits to the exercise of such delegated powers. The drafting of subsidiary legislation is subject to the following two limitations- the validity of subsidiary legislation may be subject to challenge by the Courts of law; and subsidiary legislation is construed in light of the enabling statute and must give way in case of inconsistency with its plain terms. In *Shah Vershi –Vs- Transport Licensing Board* (1971) E.A. 289 at pg. 295, Chanan Singh, J said, “Subsidiary Legislation must not go beyond the ‘purposes’ or ‘dominant purposes of the Act...’ The regulation in case of a conflict, must give way to the Act.” Delegated powers have to be limited. The “greater the power, the more dangerous the abuse”. So where a regulation is in conflict with the parent Act or covers matters not provided for in the parent Act, the regulation is ultra vires. An attack on the validity of subsidiary legislation is normally directed at- The manner in which that delegated power has been exercised e.g. if Statutory conditions attached to the exercise of the power by the enabling provision or some other law of general application were not fulfilled; and alternatively, the content of subsidiary legislation. I.e. the exercise of the power was not in its substance within the scope of the delegated power. The power to make subsidiary legislation must be checked to ascertain whether that power has not expired or repealed and where a power is conferred on the holder of a public office, the power may be exercised by the holder for the time being of that office. Care must be taken to avoid formal defects in the manner of the power by the person or authority to which it is delegated. e.g. Defects of this kind include failure to comply with statutory requirements concerning- a) Consultation. For instance, section 5(1) of the Statutory Instruments Act, 2013 stipulates that in coming up with Regulations under the Act, the regulations must be made after consultation with the persons who are likely to be affected by the proposed instrument; b) Approval, consent or confirmation; c) Laying before National Assembly (see sec. 11 of the Act); and d) Printing and publication (see sec. 22(1) of the Act.

Ultra Vires Subordinate Legislation: An attack on the content of subsidiary legislation alleges that the legislation is ultra vires and therefore void because it does not fall within the scope of what is authorized by the enabling power. The drafters of subsidiary legislation at the Office of the Attorney-General must- refer to the source of power; give it a reasonable and fair construction; and ask themselves, whether the provisions which the instructions require to be drafted fall within the power. Powers of a substantive nature which interfere with personal rights and freedom will obviously be scrutinized by the Office much more rigorously than those of procedural nature. For instance, do they bind the State? Do they impose taxes? Are they inconsistent with the Constitution?

Do they impose penalties beyond those conferred by an Act of Parliament? Subsidiary legislation is construed in light of the enabling provisions. It is prudent to have a thorough understanding, knowledge and mastery of the enabling Statute. The aim must be to achieve consistency in language and content with the enabling statute and any other relevant statute. The Office of the Attorney-General ensures that the expressions in subsidiary legislation have the same meanings as they have in principal legislation, unless the contrary intention appears- to avoid ambiguity.

The Office also ensures that the regulations to be made are within the scope of the enabling power. The subsidiary legislation may be considered to be outside the enabling power on the following grounds- a failure to comply with legal rules that control the making of subsidiary legislation; the subsidiary legislation is not authorized by the empowering provision; the subsidiary legislation contains an unlawful sub-delegation; the subsidiary legislation is inconsistent with other written laws other than the empowering Act; the power to make the subsidiary legislation has been exercised for an improper purpose; and the subsidiary legislation is uncertain in its application.

The Office ensures that the empowering provision and the general law is complied with. If there are preconditions to be satisfied before the delegated power is exercised, the drafters must check that the consultation between the relevant parties has occurred. The ultra vires doctrine is treated with healthy respect by the Office. The empowering provision must be in force before the subsidiary legislation is made. If the Cabinet Secretary is empowered to make regulations to regulate an activity, this will not permit the Cabinet Secretary to prohibit the activity.

Regulatory provisions generally list the matters on which regulations can be made and conclude with a general provision or omnibus clause. e.g. “.....and provide for any other matter necessary for the effective implementation of the provisions of this Act.” These general words cover matters incidental or ancillary to what is enacted in the statute itself. They will not support a widening of, or departure from the general intent and purpose of the Act.

The Office ensures that the person given the delegated power does not sub-delegate it. For example, where the power is given to the Rules of Court Committee to make Rules signified under the hand of the Chairperson but the Rules are made by the Attorney-General instead. Before the power to make subsidiary legislation is exercised, the Office ensures that the proposed regulations are not inconsistent with any other enactment, particularly the Constitution. The Office further ensures that the obligations to be imposed under subsidiary legislation are certain and understandable.

Words and expressions in subsidiary legislation have the same meaning as in the substantive legislation and should not be defined again except if the word or expression is to have a different meaning. It is not necessary to repeat in subsidiary legislation definitions that appear in the principal legislation. An exception nevertheless, is for example in instances where subsidiary legislation is of such substantial nature that it is likely in practice to stand alone and can be used without recourse to the enabling legislation by interested members of the public .e.g. a Code of building By-laws or regulations.

Matters concerning taxation should not be delegated. This should be left to Parliament; otherwise it could lead to untold suffering of members of the public. One of the causes of the renowned French Revolution was the heavy taxation of the proletariat.

To avoid the abuse of delegated powers, therefore, the delegation must be to a specified authority or person. And it must be a trustworthy authority such as the Cabinet Secretary. And before a subsidiary legislation is approved by Parliament, it must be ascertained that the person authorized is the one who made the Regulations. And before Regulations are approved, there must be consultation with the persons affected or other affected interests. And consultations have to be made to ensure that the Rules or Regulations do not violate fundamental human rights. Section 5 of the Statutory Instruments Act, 2013 and the principle of public participation enshrined in the Constitution of Kenya, serves to illustrate this.

Criticism labelled against Delegated or Subsidiary Legislation: There are several criticisms against subsidiary or delegated legislation- there is a possibility the subsidiary legislation may extend to matters of policy; the wide discretion given to the Cabinet Secretary without, in some cases, a specific limit on the exercise of those powers; subtle amendment of Acts of Parliament. A Drafter of legislation must consider these potential problems and advise both himself or herself and the sponsoring Cabinet Secretary accordingly.

Conclusion: In Kenya, the Office of the Attorney-General plays a very important role in development of sound subsidiary legislation by ensuring that the subsidiary legislation do not contravene provisions of the Constitution and that only the authorized person makes them. In cases where the Legislative Drafting Department in the Office of the Attorney-General & Department of Justice, establishes that the subsidiary legislation are contrary to the enumerated requirements above, it automatically rejects them forthwith. Litigation is costly and should be avoided. In *Gallie –vs- Lee*

(1969) 2 Ch. 17 at pg. 41, Russell L.J. said: “Litigation is an activity that does not markedly contribute to the happiness of mankind”.

The presenter concluded his presentation by thanking the Committee for the invitation and fruitful deliberations during the induction workshop and reiterated the need for the Committee to work closely with the State Law Office and the National Assembly Committee on Delegated Legislation for better and harmonious cooperation and working for better regulation making. He requested the Committee to consider organizing a stakeholder’s workshop that brings together all the relevant actors in the formulation, processing and approval of regulations soonest possible.

The first plenary session

The above presentations were followed by a plenary where the senators raised a number of issues in the form of questions as follows: -

- Whether public participation was mandatory during the consideration of regulations by the Committee?
- What was the effect of tabling the report of the Committee in the House?
- Who submits the statutory instruments to the Committee and what happens when they do not submit?
- What falls within the statutory instruments and what does not?
- Concurrence with the National Assembly. Was it one directional?
- How does the Committee relate to county assemblies’ committees on delegated legislation?
- What are we checking in the imposition of tax?
- Suppose the Committee annuls a regulation. How does it ensure compliance or enforcement of the annulment?
- Are committee sittings valid after one hour has elapsed without a quorum being attained?
- What strategies for addressing the challenges faced by the previous committee?
- Whether laws passed by county assemblies are subsidiary legislation?
- Whether the Committee can amend the regulation under its consideration?
- Whether the State Law Office gives proper advice to the executive due to impunity that the executive continues to potent-does the Attorney General check the executive on regulation making?

- What trainings can members of the committee attend to sharpen their skills in carrying out their mandates?
- Why is Parliament delegating? Is it because of lack of expertise?

Key Lessons from the 11th Parliament (Lessons learnt, Challenges faced and Opportunities for growth by Hon. Judith Sijeny, MP, former vice chairperson of the Committee on Delegated Legislation of the 11th Parliament)

The former vice chairperson started her presentation by congratulating the members of the Committee for their election to the 12th Parliament and informed the committee that:-

- It was an honor to serve as a member of Parliament and time flies- members should get their bearing quickly and determine what they want to achieve within the five years term
- She was a vice chair for 5 years courtesy of the political goodwill they received from the leadership of the House
- The Committee members should work as a team in order to achieve all they plan-bi-partisan approach will help the Committee in executing its mandate. This includes carrying out certain roles that are primarily for the Chairperson for instance reports tabling and statements issuance among others.
- The Committee members should leave politics out of the Committee work and endeavor to make a difference in the life of Kenyans
- The members should conceptualize the mandate of the Committee in order to embark on its functions with clarity
- The regular transfer of Committee Clerks servicing the Committee affected the performance of the Committee in the overall and this should be avoided as much as possible.
- The Committee should always endeavor to confirm minutes of the previous sitting before embarking on any other business before the Committee.
- In order to manage quorum issues, the members should always caucus amongst themselves to ensure that a sufficient number will be available for any planned meetings.
- During county visits, the Committee meetings can also be held in the sidelines of the visits in order to ensure that matters before the Committee are dispensed without undue delay.
- In the 11th Parliament, a foreign trip was postponed due to lack of the requisite quorum

- The membership of the Committee should remain focused and proactive in creating networks that make things move or happen. It is important that they reach out to their colleagues at the National Assembly and the executive
- Pre-publication engagements could be the best option available for engaging the executive in the regulation making in order to avoid any controversies that could lead to nullification of any regulations brought to the Committee.
- Some of the challenges faced by the previous Committee included perception of the Committee as one of those inferior Committees of the Senate, lack of sufficient budget to finance the activities of the Committee and Sibling rivalry between the Committee and its counter-part Committee of the National Assembly
- The Committee should reach out to its various stakeholders including the Cabinet Secretaries, Registrar of the court and the counter-part Committee of the National Assembly for better results in its work.
- There is an urgent need for a joint sitting of the Committee and the counter-part Committee of the National Assembly in order to have a working relationship.
- It is important on the part of the members to have flexibility and work closely with the secretariat in all matters before the Committee.
- The Committee should be alive to all topical issues forming the headlines and deliberative agenda of the country.
- The Committee should plan to finalize the most important business before the election fever creeps in at the tail end of the 12th Parliament when members become busy with campaigns.

Presentation on Consideration of Statutory Instruments- a practical guide (Consideration of Land Registration (Registration Units) Order, 2017 and Consideration of the Land Registration (General) Regulations, 2017) by Ms. Josephine Kusinyi, Principal Legal Counsel

The Committee was taken through the Land Registration (Registration Units) Order, 2017 and Land Registration (General) Regulations, 2017 as a means of demonstrating how the Committee will be executing its mandate and the Committee noted that:

- The regulations were referred to Parliament by the Court and the timelines given by the court were to expire in June, 2018

- The Committee in consideration of the said regulations would invite the National Lands Commission, the Cabinet Secretary and all other relevant stakeholders to submit their views and memorandum
- The Committee will require to act urgently in seeking extension of time for consideration of the said regulations from the House- the time was expiring on 20th March, 2018

The second plenary session

The following issues arose during the second plenary session

No.	Issue	Response
1.	Which gazette notices are considered subsidiary legislation?	Gazette notices with administrative content are not subsidiary legislation and do not fall within the purview of the Committee but only those with Legislative content are Subsidiary Legislation
2.	Concurrence from the National Assembly	Concurrence should be sought either way as the process can be initiated by either House with corresponding concurrence sought from the other House.
3.	Whether annulment of Regulations by the Committee is final	Section 19 of the Statutory Instruments Act (SIA) provides for revocation or annulment of regulations. A revocation becomes affective after it is reported to plenary and adopted by the House. Similarly, Section 14 of the SIA provides that the Committee may exempt certain statutory instruments or class of instruments from scrutiny if the Committee is satisfied that the scrutiny is not practical due to the number of regulations A proposal to amend the Act to provide for substitution of text was recommended.
4.	Why the committee is Sessional and not Standing	The standing orders envisaged a very powerful committee whose Members could misuse the powers, hence designed membership not to run the entire five year period.

No.	Issue	Response
5.	Whether the Senate mandate on Delegated Legislation covers the Counties as well	The Senate's mandate is only on a national level and does not extend to legislations passed by Counties
6.	Whether Parliament can force the Executive to implement House resolutions and motions	Parliament cannot be forced to implement House resolutions. The only tool at the disposal of the legislature is the Legislation (Acts of Parliament). Other mechanisms may include budget making and passage of bills initiated by the Executive
7.	Whether the AG's office may be drafting regulations not anchored on a parent Act. Similarly, why many of the regulations were voided by the courts signaling that there is a lack of coordination with the AG's office. It was noted that subsidiary legislation is prone to abuse.	Drafting regulations not based on a parent law is ill advised and should be discouraged. The AG's office gives professional advice in accordance with the law but the clients sometimes do not heed such advice.
8.	Extent of Committee members' engagement with the media on matters before the committee.	Standing Order 180(c) provides for the chair's responsibilities including being the Committee's spokesperson. Members should consult and allow the Chair to lead any engagements with the press.
9.	Underestimation of the Committee understanding of Regulations on technical matters.	That the technical nature of some regulations should not be used as an excuse for subsidiary legislation not to submitted for the Committee's scrutiny. It was emphasized that the technical capacity of Members should not be underestimated, but always enhanced through capacity building.

No.	Issue	Response
10.	Stage at which the Committee can engage the regulation making authorities (RMA)	The committee was advised and encouraged to involve itself in pre-publication scrutiny of regulations before they are formally published and submitted to the Committee, as the law only provides for engagement once regulations are published.
11.	Engagement of experts and Professional bodies	Standing Orders provides for engagement of experts on technical matters before the Committee, and mutual partnerships with professional bodies are encouraged.
12.	Whether certain Committee are allocated more funds than others	All Committees have an equal annual budget for local and foreign activities. Requests for travel are made on need basis.
13.	What criteria is used in nominating members to foreign trips	Other nominations are done by the Speaker but the Committee nominations are done by the Chairperson based on members attendance and participation in committee activities

Presentation on the Legacy Report of the 11th Parliament's Delegated Legislation Committee by Ms. Gloria Wawira, Clerk Assistant

This presentation afforded the Committee an opportunity to be apprised of the activities of the Committee during the 11th Parliament in order to appreciate the existing framework that was likely to affect its operations.

The Committee was therefore taken through the inaugural experiences of the Committee including what was accomplished, what was pending before the Committee at the time of expiry of the term of the 11th Parliament for the purposes of continuity, the challenges faced by the Committee in the 11th Parliament and a summary of county visits, benchmarking visits, conferences and retreats among others.

The Committee's achievements included undertaking of eleven (11) county visits, three benchmarking visits to Canada, Australia and United Kingdom, held a retreat with the Ministry of Mining while reviewing the draft regulations on Mining, convened several meetings with the chairpersons of the counter-part Committees in the county assemblies and tabled a total of seven (7) reports.

On the challenges, the Committee was informed that its performance was hampered by lack of cooperation from the government ministries and departments, lack of reliable database and tracking system of delegated legislation, inadequate committee rooms, lack of quorum during committee sittings, inadequate funds for undertaking activities, strained relations with the National Assembly and lack of a clear understanding of the concept of subsidiary legislation

Presentation on the Committee's Work Plan and Budget Estimates by *Mr. Derick Koli, Senior Clerk Assistant*

The Committee was taken through the draft Committee Work Plan and its key objectives as well as the budget estimates. The Committee noted the said Work Plan and agreed to continue including other activities that required to be given priority in line with the budgetary allocation.

The work plan was developed with the following broad objectives: -

1. To strengthen the capacity of Members to effectively play their roles in the new constitutional dispensation
2. To strengthen the capacity of Members in their oversight role over Public Financial Management
3. To enhance public engagement with parliament
4. To enhance service delivery

CHAPTER FOUR

WAY FORWARD AND CONCLUSION

The Chairman in his closing remarks thanked the members for their Commitment to the work of the Committee and urged them to keep up the spirit to the end of the term of Parliament. The Chairman further thanked the secretariat for the good work.

Way forward

The resolutions of the workshop/ way forward were adopted by the Committee having been proposed and seconded by Sen. Erick Okong'o Omogeni, MP and Sen. Judith Pareno, MP as outlined below: -

ACTIVITY	TIMELINE	RESPONSIBLE OFFICER(S)
1. Training on Regulatory Impact Statement Assessment for both Members and Staff	Immediate	Chairperson Secretariat
2. Engage the Ministries (Executive) on the referral of S.I. to Parliament (both Houses).	Immediate Staggered engagement	Chairperson Secretariat
3. Conduct an audit on the status of regulations made prior to CoK 2010	Immediate	Secretariat State Law Office
4. Conduct Audit of lapsed and annulled Statutory Instruments	Immediate	Secretariat State Law Office Government Printer
5. Compile a register of all laws passed by the Senate and follow up on compliance of regulations arising from them.	Immediate	Secretariat /DLS

6. Meeting between the State Law Office, Parliament, Ministries and Professional bodies	April 2018	The Senate
7. Dialogue on proposal to Amend Statutory Instruments Act to allow Parliament to amend S.I instead of only annulling or approving	Continuous	Committee
8. Continuous engagements with Ministries and State Departments	Continuous	Chairperson Committee Clerk
9. Meeting with County Assemblies Forum (CAF) and Council of Governors (CoG)	August, 2018	Secretariat
10. Meeting with Chairpersons of counterpart County Assembly Committees	November, 2018	Secretariat
11. Mapping of key stakeholders and S.I Liaison officers in Ministries and State Agencies	Immediate	Secretariat
12. Bench marking visit to Canada, UK, Australia and USA on S.Is	Immediate	Chairperson Secretariat
13. Proactive engagements through building working relationships with the National Assembly's counterpart committee	Immediate	Chairperson Secretariat The Senate
14. Design and implement an Electronic register of all statutory instruments	Immediate	Secretariat State Law Office
15. Invest in pre-publication scrutiny of all regulations to avoid nullifications and/or controversies.	Continuous	Secretariat State Law Office
16. Conduct County Visits	Continuous	Secretariat

17. Initiate a motion to extend time for consideration of Land Act regulations	Immediate	Secretariat Chairperson
18. Legislation on Assumption of Office by Governors, Bill	Immediate	The Committee

Conclusion

The induction workshop afforded the members an opportunity to understand the mandate of the Committee, its stakeholders, the opportunities and challenges and the necessity for commitment of members as a key ingredient of the Committee's success.

The induction workshop was well attended and this signified the commitment of members to the work of the Committee.

**MINUTES OF THE 11TH SITTING OF THE SENATE SESSIONAL COMMITTEE ON
DELEGATED LEGISLATION HELD AT CPA ROOM, GROUND FLOOR, MAIN
PARLIAMENT BUILDINGS ON WEDNESDAY, 28TH MARCH, 2018 AT 9:00 AM**

PRESENT

- | | |
|---------------------------------|--------------------|
| 1. Sen. Samuel Poghisio, MP | - Chairperson |
| 2. Sen.(CPA) Farhiya Haji, MP | - Vice Chairperson |
| 3. Sen. Judith Pareno, MP | - Member |
| 4. Sen. Okong'o Omogeni, MP, SC | - Member |
| 5. Sen. Mohamed Faki, MP | - Member |

ABSENT WITH APOLOGY

- | | |
|------------------------------|----------|
| 6. Sen. Victor Prengei, MP | - Member |
| 7. Sen. Mutinda Kabaka, MP | - Member |
| 8. Sen. Millicent Omanga, MP | - Member |
| 9. Sen. Irungu Kang'ata, MP | - Member |

THE SECRETARIAT

- | | |
|-----------------------|---------------------------------------|
| 1. Mr. Derick Koli | - Senior Clerk Assistant |
| 2. Ms. Lucy Radoli | - Legal Counsel II |
| 3. Mr. Donald Manyala | - Research Officer and Policy Analyst |
| 4. Mr. Alex Rithi | - Media Relations Officer |

MIN.53/2018: PRELIMINARIES

- (a) The Chairperson called the meeting to order at 09:15am and the meeting started with a word of prayer.
- (b) The agenda of the meeting was adopted as outlined below having been proposed and seconded by Sen. Farhiya Haji, MP and Sen. Judith Pareno, MP respectively.

AGENDA

1. Preliminaries;
2. Adoption of the Agenda;
3. Confirmation of Minutes;
4. **Consideration and Adoption of the report of the Induction workshop**
5. **Regulations pending before the Committee**
6. **Setting dates for inaugural county visits**

7. Any Other Business & Adjournment.

MIN.54/2018: CONFIRMATION OF THE MINUTES OF THE PREVIOUS MEETING

The following minutes were confirmed and signed by the Chairperson: -

1. The Minutes of the 10th Sitting held at CPA Room, Ground Floor, Main Parliament Buildings on 21st March, 2018 at 09:00am having been proposed and seconded by Sen. Okong'o Omogeni, MP and Sen. Judith Pareno, MP respectively.

MIN.55/2018: MATTERS ARISING

Under Min. No. 42(3): The Committee directed the secretariat to follow-up the matter and ensure that the Cabinet Secretary is notified of the decision of the Committee to continue considering the regulations subject to the courts timelines.

Under Min. No. 42(5): The Committee directed the secretariat to continue exploring possible ways of actualizing the resolution of the Committee on the matter.

MIN.56/2018: CONSIDERATION AND ADOPTION OF THE REPORT OF THE INDUCTION WORKSHOP

The Committee considered and adopted the report of its induction workshop held at the Four Point Hotel by Sheraton from 10th to 12th March, 2018. The Secretariat was directed to process the report for tabling in the House.

MIN.57/2018: REGULATIONS PENDING BEFORE THE COMMITTEE

The Committee was informed that the Cabinet Secretary for the Ministry of Transport and Infrastructure Development had forwarded the National Transport and Safety Authority (Operation of Commercial Vehicles) Regulations, 2018 together with the relevant Explanatory Memorandum to the Senate through a letter, Ref. No. MOT&1/C/RTD/001 VOL.V(91) dated 14th March, 2018.

The Committee further noted that the Land Registration (Registration Units) Order, 2017 and Consideration of the Land Registration (General) Regulations, 2017) were pending before the Committee

The Committee deliberated on the matter and resolved that: -

- The Committee prioritizes the consideration of the regulations before it and finalizes by the end of May, 2018
- A meeting of the Committee to consider the land regulations and NTSA regulations should be scheduled for 10th April, 2018 and invitation be sent to the relevant stakeholders.

- If need be, a motion to extend time for consideration of the National Transport and Safety Authority (Operation of Commercial Vehicles) regulations, 2018 pursuant to section 15(2) of the Statutory Instrument Act, 2013

MIN.58/2018: SETTING DATES FOR INAUGURAL COUNTY VISITS

The Committee was briefed on the status of county visits during the 11th Parliament and proposed clusters for county visits. The committee deliberated on the matter and resolved that:

- The inaugural county visit will include a visit to Trans Nzoia , West Pokot, Bungoma and Busia counties. The dates for the visit were to be agreed upon during the meeting of the Committee on 10th April, 2018.
- The second county visit will include a visit to Migori, Nyamira and Homa Bay counties.

MIN.59/2018: ANY OTHER BUSINESS

The Committee noted that there was need to flag out all actionable issues raised by the Committee during its induction workshop under the way forward and continuously report on their implementation. The secretariat was directed to move with speed and prepare this matrix accordingly.

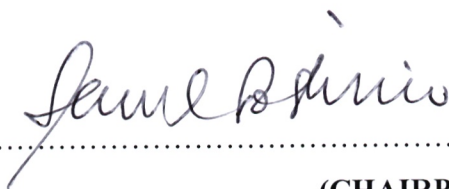
MIN.60/2018: DATE OF THE NEXT MEETING

The next meeting of the Committee was to be held on 10th April, 2018 at CPA Room, Ground Floor, Main Parliament Buildings at 09:00am

MIN.61/2018: ADJOURNMENT

There being no other business the Committee adjourned its sitting thirty minutes after ten o'clock.

SIGNED:



(CHAIRPERSON)

DATE:

16 - 5 - 2018

MINUTES OF THE 8TH SITTING OF THE SENATE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION HELD AT MT. KILIMANJARO 1 ROOM, FOUR POINT BY SHERATON HOTEL, JKIA, NAIROBI ON SUNDAY, 12TH MARCH, 2018 AT 09:00 AM

PRESENT

- | | |
|-------------------------|--------------------|
| 1. Sen. Samuel Poghisio | - Chairperson |
| 2. Sen. Farhiya Haji | - Vice Chairperson |
| 3. Sen. Judith Pareno | - Member |
| 4. Sen. Mohamed Faki | - Member |
| 5. Sen. Okong'o Omogeni | - Member |
| 6. Sen. Victor Prengei | - Member |
| 7. Sen. Irungu Kang'ata | - Member |

ABSENT WITH APOLOGY

- | | |
|--------------------------|----------|
| 1. Sen. Mutinda Kabaka | - Member |
| 2. Sen. Millicent Omanga | - Member |

IN ATTENDANCE:

1. Dr. Johnson Okello
2. Ms. Emmy Chepkwony
3. Ms. Josephine Kusinyi
4. Mr. Derick Koli
5. Ms. Gloria Wawira
6. Ms. Diana Munene
7. Ms. Lucy Mwaniki
8. Mr. Mariko Roche

THE SENATE SECRETARIAT

- Director Legal
- Principal Clerk Assistant II
- Principal Legal Counsel
- Senior Clerk Assistant
- Clerk Assistant
- Secretary
- Assistant Sergeant-At- Arms
- Office Attendant

MIN.35/2018: PRELIMINARIES

The Chairperson called the meeting to order at 09:27am and the meeting started with a word of prayer.

MIN.36/2018: WORKSHOP RESOLUTIONS /WAY FORWARD BY SEN. POGHISO LOSURON, MP AND CHAIRMAN OF THE COMMITTEE

The Chairman in his closing remarks thanked the members for their Commitment to the work of the Committee and urged them to keep up the spirit to the end of the term of Parliament. The Chairman further thanked the secretariat for the good work and urged them to quickly finalize the induction workshop report so that the Committee could consider and approve it in the next meeting.

The resolutions of the workshop/ way forward were adopted by the Committee having been proposed and seconded by Sen. Erick Okong'o Omogeni, MP and Sen. Judith Pareno, MP as outlined below: -

ACTIVITY	TIMELINE	RESPONSIBLE OFFICER(S)
1. Training on Regulatory Impact Statement Assessment for both Members and Staff	Immediate	Chairperson Secretariat
2. Engage the Ministries (Executive) on the referral of S.I. to Parliament (both Houses).	Immediate Staggered engagement	Chairperson Secretariat
3. Conduct an audit on the status of regulations made prior to CoK 2010	Immediate	Secretariat State Law Office
4. Conduct Audit of lapsed and annulled Statutory Instruments	Immediate	Secretariat State Law Office Government Printer
5. Compile a register of all laws passed by the Senate and follow up on compliance of regulations arising from them.	Immediate	Secretariat /DLS
6. Meeting between the State Law Office, Parliament, Ministries and Professional bodies	April 2018	The Senate
7. Dialogue on proposal to Amend Statutory Instruments Act to allow Parliament to amend S.I instead of only annulling or approving	Continuous	Committee
8. Continuous engagements with Ministries and State Departments	Continuous	Chairperson Committee Clerk
9. Meeting with County Assemblies Forum (CAF) and Council of Governors (CoG)	August, 2018	Secretariat

10. Meeting with Chairpersons of counterpart County Assembly Committees	November, 2018	Secretariat
11. Mapping of key stakeholders and S.I Liaison officers in Ministries and State Agencies	Immediate	Secretariat
12. Bench marking visit to Canada, UK, Australia and USA on S.Is	Immediate	Chairperson Secretariat
13. Proactive engagements through building working relationships with the National Assembly's counterpart committee	Immediate	Chairperson Secretariat The Senate
14. Design and implement an Electronic register of all statutory instruments	Immediate	Secretariat State Law Office
15. Invest in pre-publication scrutiny of all regulations to avoid nullifications and/or controversies.	Continuous	Secretariat State Law Office
16. Conduct County Visits	Continuous	Secretariat
17. Initiate a motion to extend time for consideration of Land Act regulations	Immediate	Secretariat Chairperson
18. Legislation on Assumption of Office by Governors, Bill	Immediate	The Committee

(The induction workshop was concluded through closing ceremony where the Committee Chairman thanked the members and directed the secretariat to continue working on the report of the induction workshop on the venue and closed the induction officially at 12:45 pm)

MIN.38/2018: DATE OF THE NEXT MEETING

The next meeting of the Committee was to be held on 14th March, 2018, at 09:00am at CPA room, Ground Floor, Main Parliament Buildings.

MIN.39/2018: ADJOURNMENT

There being no other business the Committee adjourned its sitting at forty-five minutes after six o'clock.

SIGNED: *James R. Smith*

.....
(CHAIRPERSON)

DATE: *14-3-2018*

MINUTES OF THE 7TH SITTING OF THE SENATE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION HELD AT MT. KILIMANJARO 1 ROOM, FOUR POINT BY SHERATON HOTEL, JKIA, NAIROBI ON SUNDAY, 11TH MARCH, 2018 AT 2:30 PM

PRESENT

- | | |
|-------------------------|--------------------|
| 1. Sen. Samuel Poghiso | - Chairperson |
| 2. Sen. Farhiya Haji | - Vice Chairperson |
| 3. Sen. Judith Pareno | - Member |
| 4. Sen. Mohamed Faki | - Member |
| 5. Sen. Okong'o Omogeni | - Member |
| 6. Sen. Victor Prengei | - Member |
| 7. Sen. Irungu Kang'ata | - Member |

ABSENT WITH APOLOGY

- | | |
|--------------------------|----------|
| 1. Sen. Mutinda Kabaka | - Member |
| 2. Sen. Millicent Omanga | - Member |

IN ATTENDANCE:

1. Mr. Jeremiah M. Nyegenye
2. Dr. Johnson Okello
3. Ms. Emmy Chepkwony
4. Ms. Josephine Kusinyi
5. Mr. Derick Koli
6. Ms. Gloria Wawira
7. Ms. Diana Munene
8. Ms. Lucy Mwaniki
9. Mr. Mariko Roche

THE SENATE SECRETARIAT

- Clerk of the Senate
- Director Legal
- Principal Clerk Assistant II
- Principal Legal Counsel
- Senior Clerk Assistant
- Clerk Assistant
- Secretary
- Assistant Sergeant-At- Arms
- Office Attendant

IN ATTENDANCE:

Mr. Fred J. Mwachi
Hon. Judith Sijeny

STATE LAW OFFICE

- Senior Principal Parliamentary Counsel
- Former Vice Chairperson of the Sessional Committee on delegated legislation

MIN.29/2018: PRELIMINARIES

The Chairperson called the meeting to order at 2:36pm and the meeting started with a word of prayer.

MIN.30/2018: Presentation of the Legacy Report of the Committee on Delegated Legislation of the 11th Parliament by Ms. Gloria Wawira, Clerk Assistant

The Committee was taken through the legacy report of its predecessor Committee on Delegated Legislation. The Committee noted the report especially the challenges faced by the previous Committee. The Legacy report is herein attached.

MIN.31/2018: Presentation on the Committee Work plan and Budget estimates by Mr. Derick Koli, Senior Clerk Assistant

The Committee was taken through the draft Committee Work Plan and its key objectives as well as the budget estimates. The Committee noted the said Work Plan and agreed to continue including other activities that required to be given priority and in line with the budgetary allocation. The Committee Work Plan and Budget estimates are herein attached.

(The meeting was adjourned at 6:50 pm and induction workshop was to continue on 12th March, 2018 at 09:00am.)

MIN.32/2018: ANY OTHER BUSINESS

The Committee agreed to adjourn the sitting at 6:50 pm and the induction workshop was to continue on 12th March, 2018 at 09:00am.

MIN.33/2018: DATE OF THE NEXT MEETING

The next meeting of the Committee was to be held on 12th March, 2018, at 09:00am at Four Point by Sheraton, JKIA, Nairobi. (continuation of the induction workshop).

MIN.34/2018: ADJOURNMENT

The Committee adjourned its sitting at fifty minutes after six o'clock.

SIGNED: 
.....

(CHAIRPERSON)

DATE: 14-3-2018
.....

MINUTES OF THE 6TH SITTING OF THE SENATE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION HELD AT MT. KILIMANJARO 1 ROOM, FOUR POINT BY SHERATON HOTEL, JKIA, NAIROBI ON SUNDAY, 11TH MARCH, 2018 AT 11:35 AM

PRESENT

- | | |
|-------------------------|--------------------|
| 1. Sen. Samuel Poghio | - Chairperson |
| 2. Sen. Farhiya Haji | - Vice Chairperson |
| 3. Sen. Judith Pareno | - Member |
| 4. Sen. Mohamed Faki | - Member |
| 5. Sen. Okong'o Omogeni | - Member |
| 6. Sen. Victor Prengei | - Member |

ABSENT WITH APOLOGY

- | | |
|--------------------------|----------|
| 1. Sen. Mutinda Kabaka | - Member |
| 2. Sen. Millicent Omanga | - Member |
| 3. Sen. Irungu Kang'ata | - Member |

IN ATTENDANCE:

1. Mr. Jeremiah M. Nyegenye
2. Dr. Johnson Okello
3. Ms. Emmy Chepkwony
4. Ms. Josephine Kusinyi
5. Mr. Derick Koli
6. Ms. Gloria Wawira
7. Ms. Diana Munene
8. Ms. Lucy Mwaniki
9. Mr. Mariko Roche

THE SENATE SECRETARIAT

- Clerk of the Senate
- Director Legal
- Principal Clerk Assistant II
- Principal Legal Counsel
- Senior Clerk Assistant
- Clerk Assistant
- Secretary
- Assistant Sergeant-At- Arms
- Office Attendant

IN ATTENDANCE:

Mr. Fred J. Mwachi
Hon. Judith Sijeny

STATE LAW OFFICE

- Senior Principal Parliamentary Counsel
- Former Vice Chairperson of the Sessional Committee on delegated legislation

MIN.24/2018: PRELIMINARIES

- a) The Chairperson called the meeting to order at 11:38am and the meeting started with a word of prayer.
- b) The chairman reorganized the programme to accommodate requests of presenters who had requested to present consecutively for purposes of responding to the issues together because of the interrelatedness.

MIN.25/2018: Key Lessons from the 11th Parliament (Lessons learnt, Challenges faced and Opportunities for growth by Hon. Judith Sijeny, MP, former vice chairperson of the Committee on Delegated Legislation of the 11th Parliament)

The former vice chairperson started her presentation by congratulating the members of the Committee for their election to the 12th Parliament and informed the committee that:-

- It was an honour to serve as a member of Parliament and time flies- members should get their bearing quickly and determine what they want to achieve within the five years term
- She was a vice chair for 5 years courtesy of the political goodwill they received from the leadership of the House
- The Committee members should work as a team in order to achieve all they plan-bi-partisan approach will help the Committee in executing its mandate. This includes carrying out certain roles that are primarily for the Chairperson for instance reports tabling and statements issuance among others.
- The Committee members should leave politics out of the Committee work and endeavour to make a difference in the life of Kenyans
- The members should conceptualize the mandate of the Committee in order to embark on its functions with clarity
- The regular transfer of Committee Clerks servicing the Committee affected the performance of the Committee in the overall and this should be avoided as much as possible.
- The Committee should always endeavour to confirm minutes of the previous sitting before embarking on any other business before the Committee.
- In order to manage quorum issues, the members should always caucus amongst themselves to ensure that a sufficient number will be available for any planned meetings.
- During county visits, the Committee meetings can also be held in the sidelines of the visits in order to ensure that matters before the Committee are dispensed without undue delay.
- In the 11th Parliament, a foreign trip was postponed due to lack of the requisite quorum
- The membership of the Committee should remain focused and proactive in creating networks that make things move or happen. It is important that they reach out to their colleagues at the National Assembly and the executive
- Pre-publication engagements could be the best option available for engaging the executive in the regulation making in order to avoid any controversies that could lead to nullification of any regulations brought to the Committee.
- Some of the challenges faced by the previous Committee included perception of the Committee as one of those inferior Committees of the Senate, lack of sufficient budget to finance the activities of the Committee and Sibling rivalry between the Committee and its counter-part Committee of the National Assembly
- The Committee should reach out to its various stakeholders including the Cabinet Secretaries, Registrar of the court and the counter-part Committee of the National Assembly for better results in its work.

- There is an urgent need for a joint sitting of the Committee and the counter-part Committee of the National Assembly in order to have a working relationship.
- It is important on the part of the members to have flexibility and work closely with the secretariat in all matters before the Committee.
- The Committee should be alive to all topical issues forming the headlines and deliberative agenda of the country.
- The Committee should plan to finalize the most important business before the election fever creeps in at the tail end of the 12th Parliament when members become busy with campaigns.

Presentation on Consideration of Statutory Instruments- a practical guide (Consideration of Land Registration (Registration Units) Order, 2017 and Consideration of the Land Registration (General) Regulations, 2017) by Ms. Josephine Kisinyi, Principal Legal Counsel

The Committee was taken through the Land Registration (Registration Units) Order, 2017 and Land Registration (General) Regulations, 2017 as a means of demonstrating how the Committee will be executing its mandate and the Committee noted that:

- The regulations were referred to Parliament by the Court and the timelines given by the court were to expire in June, 2018
- The Committee in consideration of the said regulations would invite the National Lands Commission, the Cabinet Secretary and all other relevant stakeholders to submit their views and memorandum
- The Committee will require to act urgently in seeking extension of time for consideration of the said regulations from the House- the time was expiring on 20th March, 2018

The second plenary session

The following issues arose during the second plenary session

No.	Issue	Response
1.	Which gazette notices are considered subsidiary legislation?	Gazette notices with administrative content are not subsidiary legislation and do not fall within the purview of the Committee but only those with Legislative content are Subsidiary Legislation
2.	Concurrence from the National Assembly	Concurrence should be sought either way as the process can be initiated by either House with corresponding concurrence sought from the other House.

No.	Issue	Response
3.	Whether annulment of Regulations by the Committee is final	Section 19 of the Statutory Instruments Act (SIA) provides for revocation or annulment of regulations. A revocation becomes affective after it is reported to plenary and adopted by the House. Similarly, Section 14 of the SIA provides that the Committee may exempt certain statutory instruments or class of instruments from scrutiny if the Committee is satisfied that the scrutiny is not practical due to the number of regulations A proposal to amend the Act to provide for substitution of text was recommended.
4.	Why the committee is Sessional and not Standing	The standing orders envisaged a very powerful committee whose Members could misuse the powers, hence designed membership not to run the entire five year period.
5.	Whether the Senate mandate on Delegated Legislation covers the Counties as well	The Senate's mandate is only on a national level and does not extend to legislations passed by Counties
6.	Whether Parliament can force the Executive to implement House resolutions and motions	Parliament cannot be forced to implement House resolutions. The only tool at the disposal of the legislature is the Legislation (Acts of Parliament). Other mechanisms may include budget making and passage of bills initiated by the Executive
7.	Whether the AG's office may be drafting regulations not anchored on a parent Act. Similarly, why many of the regulations were voided by the courts signaling that there is a lack of coordination with the AG's office. It was noted that	Drafting regulations not based on a parent law is ill advised and should be discouraged. The AG's office gives professional advice in accordance with the law but the clients sometimes do not heed such advice.

No.	Issue	Response
	subsidiary legislation is prone to abuse.	
8.	Extent of Committee members' engagement with the media on matters before the committee.	Standing Order 180(c) provides for the chair's responsibilities including being the Committee's spokesperson. Members should consult and allow the Chair to lead any engagements with the press.
9.	Underestimation of the Committee understanding of Regulations on technical matters.	That the technical nature of some regulations should not be used as an excuse for subsidiary legislation not to be submitted for the Committee's scrutiny. It was emphasized that the technical capacity of Members should not be underestimated, but always enhanced through capacity building.
10.	Stage at which the Committee can engage the regulation making authorities (RMA)	The committee was advised and encouraged to involve itself in pre-publication scrutiny of regulations before they are formally published and submitted to the Committee, as the law only provides for engagement once regulations are published.
11.	Engagement of experts and Professional bodies	Standing Orders provides for engagement of experts on technical matters before the Committee, and mutual partnerships with professional bodies are encouraged.
12.	Whether certain Committee are allocated more funds than others	All Committees have an equal annual budget for local and foreign activities. Requests for travel are made on need basis.
13.	What criteria is used in nominating members to foreign trips	Other nominations are done by the Speaker but the Committee nominations are done by the Chairperson based on members attendance and participation in committee activities

(The meeting was adjourned at 1:48 pm for a lunch break of 45 minutes.)

MIN.26/2018: ANY OTHER BUSINESS

The Committee proceeded on a lunch break that lasted forty-five minutes

MIN.27/2018: DATE OF THE NEXT MEETING

The next meeting of the Committee was to be held on 11th March, 2018, at 2:30am at Four Point by Sheraton, JKIA, Nairobi. (continuation of the induction workshop).

MIN.28/2018: ADJOURNMENT

The Committee adjourned its sitting at forty-eight minutes after one o'clock for a lunch break.

SIGNED: *Samuel B. Phiso*

.....
(CHAIRPERSON)

DATE: *14-3-2018*

MINUTES OF THE 5TH SITTING OF THE SENATE SESSIONAL COMMITTEE ON DELEGATED LEGISLATION HELD AT MT. KILIMANJARO 1 ROOM, FOUR POINT BY SHERATON HOTEL, JKIA, NAIROBI ON SUNDAY, 11TH MARCH, 2018 AT 09:00 AM

PRESENT

- | | |
|-------------------------|--------------------|
| 1. Sen. Samuel Poghiso | - Chairperson |
| 2. Sen. Farhiya Haji | - Vice Chairperson |
| 3. Sen. Judith Pareno | - Member |
| 4. Sen. Mohamed Faki | - Member |
| 5. Sen. Okong'o Omogeni | - Member |
| 6. Sen. Victor Prengei | - Member |

ABSENT WITH APOLOGY

- | | |
|--------------------------|----------|
| 1. Sen. Mutinda Kabaka | - Member |
| 2. Sen. Millicent Omanga | - Member |
| 3. Sen. Irungu Kang'ata | - Member |

IN ATTENDANCE:

1. Mr. Jeremiah M. Nyegenye
2. Dr. Johnson Okello
3. Ms. Emmy Chepkwony
4. Ms. Josephine Kusinyi
5. Mr. Derick Koli
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THE SENATE SECRETARIAT

- Clerk of the Senate
- Director Legal
- Principal Clerk Assistant II
- Principal Legal Counsel
- Senior Clerk Assistant
- Clerk Assistant
- Secretary
- Assistant Sergeant-At- Arms

IN ATTENDANCE:

Mr. Fred J. Mwachi
Hon. Judith Sijeny

STATE LAW OFFICE

- Senior Principal Parliamentary Counsel
- Former Vice Chairperson of the Sessional Committee on delegated legislation

MIN.19/2018: PRELIMINARIES

- a) The Chairperson called the meeting to order at 09:05am and the meeting started with a word of prayer.
- b) The Programme of the induction workshop having been proposed and seconded by Sen. Farhiya Haji, MP and Sen. Judith Pareno, MP respectively.

MIN.20/2018: OPENING CEREMONY (First and Second Sessions)

The session chair, Sen. Farhiya Haji, MP welcomed members to the workshop and asked for a round of introductions from the members, staff and invited guests and thereafter invited the Clerk of the Senate to make his remarks.

Remarks by Mr. Jeremiah Nyegenye, CBS – Clerk of the Senate

The Clerk began by congratulating Members for their election to Senate and their nomination to the Delegated Legislation Committee. He informed the Members that the induction workshop follows a series of other activities since the election of members including the orientation and induction of all Senators conducted last year. The Clerk in his remarks informed the Committee that:

- The Committee work requires commitment. It involves a lot of work but many people view perceive it as a less busy Committee
- The Committee on Delegated Legislation is one of those few Committees established through a statute and standing orders.
- The Committee was the main tool used by the Senate to check the power of the executive to make subsidiary legislation and it is the only committee that can make resolutions that have a legal effect without seeking the approval of the House. All other Committees make resolutions but those resolutions have to be approved by the House.
- It is in the nature of the executive to make regulations beyond its purview and there is therefore the need for more vigilance as you look at any subsidiary legislation brought before the Committee.
- It is difficult to imagine regulations that do not affect counties. Nonetheless, the executive has been forwarding most regulations to the National Assembly without any reference to the Senate- this has been a key challenge. The Committee needs to engage the executive proactively on the matter to make a difference.
- The Committee has the longest mandate and it is the only Committee that is better placed to check misuse of discretion in the public administration
- In terms of the procedures involved in the review of the regulations, there were issues that the Committee needed to reflect about including the statutes enacted prior to the promulgation of the Constitution of Kenya, 2010 with a view to consider amending such statutes; the concept of public participation in relation to the processing of regulations; the possibility of overlap of the Committee mandate with the mandates of other Committees of the Senate; follow- up mechanisms for ensuring recommendations of the Committee are implemented; and the need to adhere to deadlines- endeavour to meet deadlines
- Consider high impact areas where you can score easily and make an impact sooner during the life of the 12th Parliament.

- The Senate just like National Assembly has no ‘police power’ over the executive in ensuring enforcement of resolutions of the House emanating from motions, statements, petitions and other types of resolutions. However, it has other mechanisms at its disposal to ensure compliance including the refusal to pass budget making and stifling legislative agenda of the executive in the House among others.
- The Committee’s role is limited to acceding or annulling of the regulations but there is need to explore the possibility of amending the Statutory Instruments Act to allow the Committee propose amendments to regulation.
- The Committee on Delegated Legislation wields immense powers that in the view of the secretariat required to be checked through annual reconstitution
- The secretariat will be available to assist the Committee fulfil its mandate-count on the support and commitment of the office of the Clerk.

Opening Remarks by Sen Samuel Poghio, Chairperson, Committee on Delegated Legislation

The Chairman in his remarks started by welcoming members and secretariat to the inductions workshop. He further relayed his congratulations to the senators on their successful appointment to the Committee. The Chairman also thanked members for electing him to lead the team and called on members’ commitment to the work of the Committee in order to disapprove the notion that the Committee on Delegated Legislation is a less lucrative Committee.

The Chair further reiterated that the main objectives of the induction workshop included getting a deeper understanding of the Committee’s mandate, interacting with key stakeholders and secretariat and getting clarifications on areas that may impede progress towards the realization of what the Committee sets out to achieve.

The Chair also emphasized that the place of delegated legislation in the legislative agenda could not be gainsaid or over-emphasized as it cuts across all sectors of the economy and urged members to work as a team in order to realize its mandate.

The Chairman in his remarks further thanked the Clerk for finding time to attend the workshop and noted that his presence was of great significance as it demonstrates his support and commitment to the work of the Committee

The Chairman further noted that the key challenges that affected the performance of the previous Committee included lack of quorum, lack of committee sitting venues, issues relating to procedures of processing reports of the Committee, non-compliance of the Ministries by failing to submit regulations to the senate and lack of a system of tracking regulations formulation, processing and approvals.

The Chairman in his address also urged members to be committed to the work of the Committee because without that Commitment, the Committee will not execute its work or mandate.

The Chairman noted that the mandate of this Committee was a long one but one that was not easily understood and urged members to take advantage of the presence of the clerk and other resource persons to get the sufficient clarity in the mandate of the Committee. He specifically asked a few questions including what is the mandate of the Committee? How will the Committee execute its mandate? Who are the key partners? What laws will guide the work of the Committee? What opportunities exist for support the work of the Committee? What challenges and how will the committee overcome them?

The Chairman reiterated that the success or failure of the Committee depended on two things. A vibrant and responsive secretariat and a committed membership that attends meetings promptly and prepares well for the activities of the Committee.

The Chairman also informed members that he will endeavor to ensure fairness and equitable sharing of any opportunities and that nominations to attend foreign trips will be based on attendance of Committee meetings and participation in the activities of the Committee

The Chairman urged members to learn by asking as many questions as possible during the workshop and thereafter wished them fruitful deliberations.

Presentation on Overview of the Mandate and functions of Committee on Delegated Legislation; Relationship between the Executive and the Committee; Stakeholders under the ambit of the Committee and Rules and Procedure in Committee by Ms. Emmy Chepkwony, Principal Clerk Assistant II

This presentation mainly covered the definition of the statutory instruments, the establishment of and appointment of the Committee on Delegated Legislation, the procedure of consideration of the statutory instruments by the Senate and concurrence with the National Assembly and procedure and practice in Committees generally as outlined below:-

- Statutory instrument refers to any rule, order, regulation, direction, form, tariff of costs or fees, letter patent, commission, warrant, proclamation, by-law, resolution, guideline or other instrument issued, made or established in the execution of a power conferred by or under an Act of the County Assembly under which that statutory instrument or subsidiary legislation is expressly authorised to be issued.
- The Sessional Committee is appointed pursuant to provisions of standing order 213 of the Senate Standing Orders and the members are nominated by the Senate Business Committee in consultation with parliamentary parties at the commencement of every Session.
- Unless a Senator is discharged in accordance to Standing Order 184, or the Senate otherwise resolves, serve for the period of the Session.
- The Committee is established and given its mandate pursuant to Standing Order 215
- The rationale for establishing a Committee on Delegated Legislation lies in the need for Parliament and County Assemblies to check whether the legislature delegated to the executive is not abused and in carrying out its legislative mandate, it is practically impossible to incorporate all the procedural aspects of every law they pass, secondary laws are therefore needed for the implementation of the provisions of the primary Acts enacted by Parliament which improves efficiency in Service delivery. The input of the members and the power assigned to scrutinize delegated legislation is to protect the public from unjust and unfair conditions in the name of rules or orders. Most delegated legislations are developed by the Executive and therefore the Committee ensures that there is a balance in the interest of the Executive and the electorate. The Committee is key in minimizing incidences of delegated legislations being subjected to judicial processes on grounds of being unconstitutional.
- In consideration of any Statutory Instrument, the Committee shall consider in respect of any statutory instrument whether it- is in accord with the provisions of the Constitution, the Act pursuant to which it is made or other relevant written law; infringes on fundamental rights and freedoms of the public; contains a matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament; contains imposition of taxation; directly or indirectly bars the jurisdiction of the Courts; gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power; involves expenditure from the County Revenue Fund or other public revenues; is defective in its drafting or for any reason the form or purport of the statutory instrument calls for any elucidation; appears to make some unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made; appears to have had unjustifiable delay in its publication or laying before Parliament; makes rights, liberties or obligations unduly dependent upon non-reviewable decisions; Inappropriately delegates legislative powers; imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation; appears for any reason to infringe on the rule of law; inadequately subjects the exercise of legislative power to County Assembly scrutiny; and, accords to any other reason that the Committee considers fit to examine.
- In Acceding and Annuling Statutory Instrument (4) If the Committee –Resolves that the Statutory instrument, be acceded to, the Clerk shall convey that resolution to the relevant department or the authority that published the statutory instrument; Does not accede to the

Statutory Instrument, the Committee may recommend to the Senate that the Senate resolves that the Statutory Instrument be annulled; (5) If the Senate – Fails to agree to the recommendation of the Committee under paragraph (4) (b), the Statutory Instrument shall be deemed to have been approved by Parliament; Does not accede to the Statutory Instrument, the Committee may recommend to the Senate that the Senate resolves that the Statutory Instrument be annulled;

- In Concurrence with National Assembly's Resolution on Statutory Instrument :- (1) whenever the Senate receives a message from the National Assembly on a statutory instrument, the National Assembly's resolution shall stand referred to the Committee on Delegated Legislation which shall consider the resolution , together with the statutory and report to the Senate within twenty one days of the referral. If the Senate agrees with the resolution of the National Assembly , the Clerk shall, by way of a message, inform the Clerk of the Assembly and the relevant state department or authority that published the statutory instrument, that parliament has annulled the Statutory Instrument or part of the statutory instrument and the instrument or part of the Statutory instrument shall hence forth, be void, but without prejudice to the validity of anything previously done there under, or the making of any new delegated legislation; If the Senate fails to agree with the National Assembly's resolution, the resolution shall be referred to a Joint Committee and Standing Order 218 (Joint Sitzings of corresponding Committees of Parliament t) shall , with necessary modifications , apply.
- In Procedure and practice in Committees: Convening Sitzings (S.O. 190)– determined by Chairperson or upon a petition by at least 5 Members; Notice of meeting (S.O.) 189: issued and circulated by the Clerk (Committee Secretariat) in prescribed manner..... Committee can creatively leverage on ICT for real time notification for meetings); Quorum (S.O. 186) – any 3 Members present constitute before commencement of business ; Adjournment for lack of quorum (SO 193): must be obtained within 30 minutes of scheduled time; Sub-Committees (SO 191): may be formed for effective & timely delivery on tasks; Frequency of meetings (S.O. 194) – at least once in two months ... frequency determined by mandate and calendar of plenary sittings; Note - committees cannot sit when Senate is sitting unless with Speaker's permission; meeting is suspended whenever division bell is rung (proceedings would become void); Non attendance- (SO.195); A Senator must not miss at least 4 consecutive sittings without written permission of Chairperson; Chairing (SO 186,188,196: Chairperson presides in absence of whom vice-chairperson chairs and in absence of both, a Member of the Committee is elected by the Committee to chair that specific sitting; Procedure in Committees (SO 204) – similar to those in Committee of the Whole with necessary modifications; Joint Sitzings (SO 210) – with other Committees of the Senate on a matter of crosscutting nature (co-chaired by Chairs of participating Committees); Attendance and failure to attend/temporary absence – avoid technical appearances (failure to attend =removal and replacement (SO 195); Temporary absence substituted by a temporary Member=SO 200); Attendance by non-Members (S.O. 203)- may attend but cannot vote (precedence is accorded to substantive Members); Public Access to committee meetings (S.O. 206) – public entitled to attend unless justifiably excluded (with permission of Speaker); Proceedings (S.O. 198)– recorded as minutes and reports (list of attendance (S.O. 197) included); Minutes are validated by confirmation and custody maintained by Secretariat; Minutes are annexed to Committee Reports; Voting in Committee

– arrived at through voting (S.O. 204(2) (minority or dissenting views are recorded) Chairperson has original vote but not casting vote (SO 202) (It is advisable as far as practicable to build consensus in making decisions); and Reports of Select Committees (S.O. 207) adopted (including minority report) is signed, tabled, and published) including records and annexes of evidence gathered.

Presentation on an introduction to Statutory Instruments: Type of statutory instruments; The Statutory Instruments Act, 2013 and Processing Statutory Instruments by Dr. Johnson Okello, Director Legal Services

This presentation entailed an introduction note on the statutory instruments, types of statutory instruments, Statutory Instruments Act, 2013 and its objects, the consultation process in the Statutory legislation making process under the Act, the regulatory impact assessment and statements, parliamentary scrutiny of regulation, concurrence with the National Assembly, automatic expiry of the statutory instruments and commencements of statutory instruments

Introduction: Primary and secondary legislation are two forms of law, created respectively by the legislature and the executive branches of government. Primary legislation also known as statutes (Acts) set out broad outlines and principles, but delegate specific authority to an executive branch to make more specific regulations under the auspices of the enabling Act.

Definition of statutory instrument as rules, regulations, by-laws, principles etc. made pursuant to power conferred by statute. Statutory Instrument is wider in scope than delegated legislation. In other jurisdiction, the USA calls it subsidiary legislation while Canada, UK and Australia call it Delegated Legislation. There are three main categorization of regulations namely procedural regulations, descriptive /substantive regulations and appointive regulations. Parliament is mainly concerned about procedural and descriptive regulations and less concerned about the appointive/directive regulations. That Canada and Australia have an electronic register for subsidiary legislation and therefore easy to track the processing and approvals mechanisms.

Do we have a justification for continued delegation? Is it time to limit delegation?

Types of Statutory Instruments: Definition in the Act describes them to include rules, Regulations, bye-laws made in exercise of powers conferred by statute. Under the Act, statutory instrument means any rule, order, regulation, direction, form, tariff of costs or fees, warrant, proclamation or other statutory instrument made in execution of a power conferred under an Act of Parliament.

The Statutory Instruments Act, 2013 and its objects: In relation to subsidiary legislation, the Act seeks to ensure – Consultation and public participation; High standards in the drafting of subsidiary legislation; Parliamentary scrutiny; and Periodic review and where necessary, the repeal of subsidiary legislation that no longer has a continuing purpose.

The consultation process in the statutory legislation making process under the Statutory Instruments Act, 2013: The Act requires the undertaking of consultations. The Consultation is required to ensure – Those that are likely to be affected are notified and have an opportunity to be heard; The involvement of experts in the area of concern; and Public participation through public hearings or submissions.

The regulatory impact assessment and statements: Act requires the preparation of regulatory impact statements where the statutory instrument is likely to impose significant costs on the community or part of the Community. The regulatory Impact Assessment and Statement should set out - Objectives of proposed legislation; Effect of legislation; Alternative existing practicable means of achieving objectives and why these are not appropriate; Cost benefit analysis; Any other

matters specified in guidelines; Independent advice on the adequacy of the impact statement and that the regulatory impact assessment and statement should be submitted together with Cabinet Secretary's certificate. Regulatory Impact Assessment and Statement should be notified to the public and the notice should allow at least fourteen days from the date of publication for the making of comments. The Cabinet secretary is required to ensure that comments and submissions are – considered before instrument is made; and Submitted to the Committee after tabling of instrument in Parliament.

Parliamentary Scrutiny of regulations: The relevant Cabinet Secretary is required to submit statutory instrument together with memorandum within seven sitting days after publication to the Clerk for tabling before Parliament. The Clerk registers instrument and the instrument stands referred to Committee. The Committee considers the instrument in line with principles of good governance, rule of law and the principles set out under section 13 of the Act. The Committee reports to Parliament only if it proposes revocation and the House passes a resolution on whether the instrument stands or should be revoked and where a resolution for revocation is passed, regulation making authority is required to publish a revocation within fourteen days. It is important to note that if the Committee does not make a report within 28 days of referral of the instrument to it, it shall be deemed that the instrument meets requirements of the Act.

Concurrence with the National Assembly: The Standing Order 216 envisages a situation where a statutory instruments transmitted from one house to the other and the process has not worked simply because the National Assembly has reneged on this. If the procedure was followed, then the normal procedure of forming a joint committee in case of disagreement, would be set up to agree on a version.

Automatic Expiry of the Statutory Instruments: Statutory instruments stand revoked upon the expiry of ten years from the date it is made unless – It is sooner repealed; or It is exempted from such expiry by a regulation.

Commencement of a Statutory Instruments: Statutory instruments come into operation on the date specified in the instrument or on the date of publication and cannot come into force before the parent Act or enabling legislation. They may operate retrospectively but not earlier than the commencement of the parent Act or enabling legislation and where a statutory instrument operates retrospectively, a person shall not be liable for any penalty in respect of an offence committed before the instrument came into force.

The presentation on the relationship between the executive and parliament in the area of subsidiary legislation, formulation, processing and approvals by Mr. Fred J. Mwachi, Senior Principal Parliamentary Counsel, State Law Office.

This presentation covered a number of issues including where the legislative power is vested, the necessity for delegated legislation, the validity of delegated legislation, the ultra vires subordinate legislation, the role of the State Law Office in delegated legislation, Criticism labelled against Delegated or Subsidiary Legislation and a conclusion.

Introduction: Generally, legislative powers in the Constitution of Kenya are vested in the Legislature. The doctrine of separation of powers notwithstanding, it is now legitimate for the Legislature to delegate powers to make laws to subordinate authority. The legislature exercises its discretionary power by conferring discretionary law making power on a subordinate authority. This is a method by which Legislature leaves the detailed provisions required under an Act of Parliament to a Cabinet Secretary, in effect to departmental officials. Therefore, subsidiary

legislation referred to variously also as delegated legislation or subordinate legislation, occurs when Parliament gives its legislative power to another person, generally a Cabinet Secretary to deal with administrative or procedural matters to implement the objectives of an Act of Parliament. Therefore, subordinate legislation seems the most apt of the various titles commonly used to describe legislation made under a delegated power. The subsidiary legislation may be regulations, rules for procedural matters, By-laws, Orders and notices for specific places, persons and matters.

The necessity for delegated legislation: There are a number of reasons for delegated legislation. These include- pressure upon Parliamentary time is great. The more procedural and subordinate matters can be withdrawn from detailed Parliamentary discussion, the greater will be the time which Parliament can devote to consideration of essential principles in legislation; the inability of Parliament to deal with technical matters also give rise to the need for delegated legislation. Apart from broad principles, technical matters are difficult to include in a Bill, since they cannot be effectively discussed in Parliament. If large and complex schemes of reform are to be given a technical shape, it is difficult to work out the administrative machinery in time to insert in the Bill all the provisions required. It is impossible to see all the contingencies and local conditions for which provision must eventually be made; c) there is also the need for flexibility. Delegated legislation provides for a power of constant adaptation to unknown future conditions without the necessity of amending legislation. Flexibility is essential. With delegated legislation there is sufficient time to consult interests affected by the operation of new Acts of Parliament; and d) in a modern State there are many occasions when there is a sudden need of legislative action. For many such needs, delegated legislation is the only convenient or even possible remedy. However, where there is time, on legislative issues of great magnitude, it is right that Parliament itself should either decide what the broad outlines of the legislation shall be, or at least indicate the general scope of the delegated powers which it considers are called for by the occasion.

The validity of delegated legislation: Although Parliament has a discretion to delegate its powers, there are limits to the exercise of such delegated powers. The drafting of subsidiary legislation is subject to the following two limitations- the validity of subsidiary legislation may be subject to challenge by the Courts of law; and subsidiary legislation is construed in light of the enabling statute and must give way in case of inconsistency with its plain terms. In *Shah Vershi –Vs- Transport Licensing Board* (1971) E.A. 289 at pg. 295, Chanan Singh, J said, “Subsidiary Legislation must not go beyond the ‘purposes’ or ‘dominant purposes of the Act...’ The regulation in case of a conflict, must give way to the Act.” Delegated powers have to be limited. The “greater the power, the more dangerous the abuse”. So where a regulation is in conflict with the parent Act or covers matters not provided for in the parent Act, the regulation is ultra vires. An attack on the validity of subsidiary legislation is normally directed at- The manner in which that delegated power has been exercised e.g. if Statutory conditions attached to the exercise of the power by the enabling provision or some other law of general application were not fulfilled; and alternatively, the content of subsidiary legislation. I.e. the exercise of the power was not in its substance within the scope of the delegated power. The power to make subsidiary legislation must be checked to ascertain whether that power has not expired or repealed and where a power is conferred on the holder of a public office, the power may be exercised by the holder for the time being of that office. Care must be taken to avoid formal defects in the manner of the power by the person or authority to whom it is delegated. e.g. Defects of this kind include failure to comply with statutory requirements Concerning- a) Consultation. For instance, section 5(1) of the Statutory Instruments Act, 2013 stipulates that in coming up with Regulations under the Act, the regulations must be made after consultation with the persons who are likely to be affected by the proposed instrument; b) Approval, consent or confirmation; c) Laying before National Assembly (see sec. 11 of the Act); and d) Printing and publication (see sec. 22(1) of the Act.

Ultra Vires Subordinate Legislation: An attack on the content of subsidiary legislation alleges that the legislation is ultra vires and therefore void because it does not fall within the scope of what is authorized by the enabling power. The drafters of subsidiary legislation at the Office of the Attorney-General must- refer to the source of power; give it a reasonable and fair construction; and ask themselves, whether the provisions which the instructions require to be drafted fall within the power. Powers of a substantive nature which interfere with personal rights and freedom will obviously be scrutinized by the Office much more rigorously than those of procedural nature. For instance, do they bind the State? Do they impose taxes? Are they inconsistent with the Constitution? Do they impose penalties beyond those conferred by an Act of Parliament? Subsidiary legislation is construed in light of the enabling provisions. It is prudent to have a thorough understanding, knowledge and mastery of the enabling Statute. The aim must be to achieve consistency in language and content with the enabling statute and any other relevant statute. The Office of the Attorney-General ensures that the expressions in subsidiary legislation have the same meanings as they have in principal legislation, unless the contrary intention appears- to avoid ambiguity.

The Office also ensures that the regulations to be made are within the scope of the enabling power. The subsidiary legislation may be considered to be outside the enabling power on the following grounds- a failure to comply with legal rules that control the making of subsidiary legislation; the subsidiary legislation is not authorized by the empowering provision; the subsidiary legislation contains an unlawful sub-delegation; the subsidiary legislation is inconsistent with other written laws other than the empowering Act; the power to make the subsidiary legislation has been exercised for an improper purpose; and the subsidiary legislation is uncertain in its application.

The Office ensures that the empowering provision and the general law is complied with. If there are preconditions to be satisfied before the delegated power is exercised, the drafters must check that the consultation between the relevant parties has occurred. The ultra vires doctrine is treated with healthy respect by the Office. The empowering provision must be in force before the subsidiary legislation is made. If the Cabinet Secretary is empowered to make regulations to regulate an activity, this will not permit the Cabinet Secretary to prohibit the activity.

Regulatory provisions generally list the matters on which regulations can be made and conclude with a general provision or omnibus clause. e.g. ".....and provide for any other matter necessary for the effective implementation of the provisions of this Act." These general words cover matters incidental or ancillary to what is enacted in the statute itself. They will not support a widening of, or departure from the general intent and purpose of the Act.

The Office ensures that the person given the delegated power does not sub-delegate it. For example, where the power is given to the Rules of Court Committee to make Rules signified under the hand of the Chairperson but the Rules are made by the Attorney-General instead. Before the power to make subsidiary legislation is exercised, the Office ensures that the proposed regulations are not inconsistent with any other enactment, particularly the Constitution. The Office further ensures that the obligations to be imposed under subsidiary legislation are certain and understandable.

Words and expressions in subsidiary legislation have the same meaning as in the substantive legislation and should not be defined again except if the word or expression is to have a different meaning. It is not necessary to repeat in subsidiary legislation definitions that appear in the principal legislation. An exception nevertheless, is for example in instances where subsidiary legislation is of such substantial nature that it is likely in practice to stand alone and can be used

without recourse to the enabling legislation by interested members of the public .e.g. a Code of building By-laws or regulations.

Matters concerning taxation should not be delegated. This should be left to Parliament, otherwise it could lead to untold suffering of members of the public. One of the causes of the renowned French Revolution was the heavy taxation of the proletariat.

To avoid the abuse of delegated powers, therefore, the delegation must be to a specified authority or person. And it must be a trustworthy authority such as the Cabinet Secretary. And before a subsidiary legislation is approved by Parliament, it must be ascertained that the person authorized is the one who made the Regulations. And before Regulations are approved, there must be consultation with the persons affected or other affected interests. And consultations have to be made to ensure that the Rules or Regulations do not violate fundamental human rights. Section 5 of the Statutory Instruments Act, 2013 and the principle of public participation enshrined in the Constitution of Kenya, serves to illustrate this.

Criticism labelled against Delegated or Subsidiary Legislation: There are several criticisms against subsidiary or delegated legislation- there is a possibility the subsidiary legislation may extend to matters of policy; the wide discretion given to the Cabinet Secretary without, in some cases, a specific limit on the exercise of those powers; subtle amendment of Acts of Parliament. A Drafter of legislation must consider these potential problems and advise both himself or herself and the sponsoring Cabinet Secretary accordingly.

Conclusion: In Kenya, the Office of the Attorney-General plays a very important role in development of sound subsidiary legislation by ensuring that the subsidiary legislation do not contravene provisions of the Constitution and that only the authorized person makes them. In cases where the Legislative Drafting Department in the Office of the Attorney-General & Department of Justice, establishes that the subsidiary legislation are contrary to the enumerated requirements above, it automatically rejects them forthwith. Litigation is costly and should be avoided. In *Gallie -vs- Lee* (1969) 2 Ch. 17 at pg. 41, Russell L.J. said: "Litigation is an activity that does not markedly contribute to the happiness of mankind".

The presenter concluded his presentation by thanking the Committee for the invitation and fruitful deliberations during the induction workshop and reiterated the need for the Committee to work closely with the State Law Office and the National Assembly Committee on Delegated Legislation for better and harmonious cooperation and working for better regulation making. He requested the Committee to consider organizing a stakeholder's workshop that brings together all the relevant actors in the formulation, processing and approval of regulations soonest possible.

The first plenary session

The above presentations were followed by a plenary where the senators raised a number of issues in the form of questions as follows: -

- Whether public participation was mandatory during the consideration of regulations by the Committee?
- What was the effect of tabling the report of the Committee in the House?
- Who submits the statutory instruments to the Committee and what happens when they do not submit?
- What falls within the Statutory instruments and what does not?
- Concurrence with the National Assembly. Was it one directional?

- How does the Committee relate to county assemblies' committees on delegated legislation?
- What are we checking in the imposition of tax?
- Suppose the Committee annuls a regulation. How does it ensure compliance or enforcement of the annulment?
- Are committee sittings valid after one hour has elapsed without a quorum being attained?
- What strategies for addressing the challenges faced by the previous committee?
- Whether laws passed by county assemblies are subsidiary legislation?
- Whether the Committee can amend the regulation under its consideration?
- Whether the State Law Office gives proper advice to the executive due to impunity that the executive continues to potent-does the Attorney General check the executive on regulation making?
- What trainings can members of the committee attend to sharpen their skills in carrying out their mandates?
- Why is Parliament delegating? Is it because of lack of expertise?

The meeting was adjourned at 11:05am for a photo session and a thirty minutes' tea break.

MIN.21/2018: ANY OTHER BUSINESS

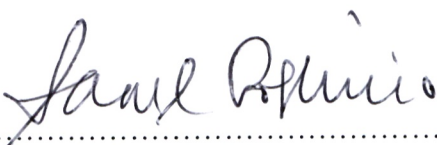
The Committee took a health break of thirty minutes

MIN.22/2018: DATE OF THE NEXT MEETING

The next meeting of the Committee was to be held on 11th March, 2018, at 11:35am at Four Point by Sheraton, JKIA, Nairobi. (continuation of the induction workshop).

MIN.23/2018: ADJOURNMENT

The Committee adjourned its sitting at five minutes after eleven o'clock.

SIGNED: 

(CHAIRPERSON)

DATE: 14 - 3 - 2018