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GENERAL NOTICE

NOTICE 3385 OF 2010



**THE STANDING COMMITTEE ON SCRUTINY OF SUBORDINATE LEGISLATION
INTENDS TO INTRODUCE GAUTENG SCRUTINY OF SUBORDINATE
LEGISLATION AMENDMENT BILL, 2010
IN THE GAUTENG PROVINCIAL LEGISLATURE**

The above-mentioned Bill is hereby published in English in the Gauteng Provincial Extraordinary Gazette No. 213 on 30 November 2010 for public comments and general information.

The Bill seeks to amend the Gauteng Scrutiny of Subordinate Legislation Act, 2008, so as to delete a superfluous definition, to insert certain new definitions and to redefine "subordinate legislation"; to do away with the procedure whereby subordinate legislation is scrutinized by the Legislature only after publication of the legislation in the Provincial Gazette, and to make provision instead for the tabling of subordinate legislation in draft form and the scrutiny and approval or disapproval of such draft subordinate legislation by the Legislature through the Standing Committee for the Scrutiny of Subordinate Legislation; to make further provision regarding the publication of an index of subordinate legislation; and to provide for matters connected therewith..

People, who wish to comment on the Bill, may send their written comments to:

Office of the Secretary
C/o Committee Coordinator (Ms Paballo Mohapi)
Gauteng Provincial Legislature
Private Bag X52

Johannesburg

2000

Tel: (011) 498 6491

Mobile: (072) 560 9032

Fax: (011) 498 5719

Comments must reach the above office on or before Thursday, 27 January 2011.

**Copies of the *Gazette* may be obtained from Government Printers,
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R2.50 per**

GENERAL EXPLANATORY NOTE

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Gauteng Scrutiny of Subordinate Legislation Act, 2008, so as to delete a superfluous definition, to insert certain new definitions and to redefine “subordinate legislation”; to do away with the procedure whereby subordinate legislation is scrutinized by the Legislature only after publication of the legislation in the *Provincial Gazette*, and to make provision in stead for the tabling of subordinate legislation in draft form and the scrutiny and approval or disapproval of such draft subordinate legislation by the Legislature through the Standing Committee for the Scrutiny of Subordinate Legislation; to make further provision regarding the publication of an index of subordinate legislation; and to provide for matters connected therewith.

BE IT ENACTED by the Gauteng Provincial Legislature, as follows:—

Amendment of section 1 of Act 5 of 2008

1. Section 1 of the Gauteng Scrutiny of Subordinate Legislation Act, 2008 (in this Act referred to as the principal Act), is amended—

(a) by the insertion, before the definition of “**legislation**” of the following definitions:

“**Committee**” means the Standing Committee for the Scrutiny of Subordinate Legislation referred to in section 3;

'Constitution' means the Constitution of the Republic of South Africa, 1996;

'Executive Council' means the Executive Council of the Province of Gauteng contemplated in section 132 of the Constitution;

'House' means the Legislature meeting in plenary;"

(b) by the substitution for the definition of "Legislature" of the following definition:

"'Legislature' means the Gauteng Provincial Legislature, and includes the Committee;"

(c) by the insertion, after the definition of "**Legislature**", of the following definition:

"'provincial functionary' means—

(a) a Member of the Executive Council; or

(b) the Speaker of the Legislature;"

(d) by the deletion of the definition of "**provincial legislation**";

(e) by the substitution for the definition of "**subordinate legislation**" of the following definition:

“**subordinate legislation**’ means a regulation **[promulgated]** made by a [Member of the Executive Council] provincial functionary, after commencement of this Act, in terms of a legislative power conferred on **[it]** that provincial functionary by—

- (a) a Gauteng Provincial Act;
- (b) legislation which was in force when the Constitution took effect and which is administered by the Gauteng Provincial Government;
- (c) legislation assigned to a Member of the Executive Council in terms of the Constitution; or
- (d) national [or provincial] legislation;”; and

(f) by the addition of the following definition:

“**working days**’ means Mondays, Tuesdays, Wednesdays, Thursdays and Fridays, excluding public holidays.”.

Substitution of section 2 of Act 5 of 2008

2. The following section is substituted for section 2 of the principal Act:

“Tabling of draft subordinate legislation in Legislature

2. (1) Before a provincial functionary makes any subordinate legislation, a draft of the subordinate legislation must be tabled in the Legislature.

- (2) Where the provincial functionary concerned is a Member of the Executive Council, the draft subordinate legislation must be accompanied by an appropriate certificate by a State Law Adviser in the Office of the Premier.
- (3) The Speaker must refer the draft subordinate legislation to the Committee for scrutiny.”.
-

Substitution of sections 4 and 5 of Act 5 of 2008

3. The following sections are substituted for sections 4 and 5 of the principal Act:

“Scrutiny of draft subordinate legislation by Committee

4. (1) The Committee must scrutinize tabled draft subordinate legislation to determine whether it—
- (a) is consistent with the Constitution;
 - (b) is authorized by the Act under which it is to be made;
 - (c) complies with any condition set out in that Act; and
 - (d) does not constitute an unfair use of the power under which it is to be made.
- (2) In fulfilling its functions under subsection (1), the Committee must have regard to such other considerations as may be specified in the Standing Rules of the Legislature.
- (3) If the Committee is of the view that any provision of the draft subordinate legislation does not comply with the standards set out in subsection (1), it may request the provincial functionary concerned to

amend the draft in order to remedy the defect and to submit the amended draft to the Committee.

(4) Where the provincial functionary concerned is a Member of the Executive Council, the amended draft subordinate legislation must be accompanied by an appropriate certificate by a State Law Adviser in the Office of the Premier.

(5) The committee must within 21 working days—

(a) from the referral of draft subordinate legislation to it in terms of section 2(3); or

(b) where it has requested the provincial functionary to amend the draft subordinate legislation, from the date on which it received the amended draft,

decide whether to approve or disapprove the draft subordinate legislation.

(6) If the Committee needs more time to make its decision—

(a) the Chairperson of the Committee, after consultation with the Speaker, must inform the responsible provincial functionary of—

(i) the reasons why more time is needed; and

(ii) the date by which the Committee expects to finalize the matter; and

(b) the Committee must make its decision on or before that date.

(7) The Committee may disapprove draft subordinate legislation only if it finds that the subordinate legislation does not comply with the standards set out in subsection (1).

(8) If the Committee approves draft subordinate legislation, the Chairperson of the Committee must—

- (a) notify the provincial functionary concerned in writing of the Committee's decision; and
- (b) ensure that a notice of the Committee's decision is published in the official document of the Legislature titled "Announcements, Tablings and Committee Reports".

Consequences of approval or disapproval of draft subordinate legislation

5. (1) Despite any other law, a provincial functionary may not make any subordinate legislation unless the draft of that subordinate legislation, as it is to be made, has been approved by—

- (a) the Committee in terms of section 4; or
- (b) the House by virtue of subsection (2).

(2) If the Committee disapproves draft subordinate legislation, the Committee must report the disapproval to the House for consideration and decision."

Amendment of section 6 of Act 5 of 2008

4. Section 6 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

"(1) The Office of the Premier must compile and maintain an up-to-date and accessible index, with a precise description of the contents, of

subordinate legislation, proclamations and notices made or issued by a provincial functionary and published in the *Provincial Gazette*."

Substitution of long title of Act 5 of 2008

5. The following long title is substituted for the long title of the principal Act:

"ACT

To provide for the scrutiny of draft provincial subordinate legislation by the Gauteng Provincial Legislature; **[to provide for the publication and tabling of provincial subordinate legislation and the consequences of non-compliance;]** to provide for the establishment of a Legislature Committee responsible for scrutiny; to provide for **[disallowance]** approval or disapproval of provincial subordinate legislation by the Legislature through the said Committee; to provide for publication of an index of subordinate legislation; and to provide for matters connected therewith."

Short title

6. This Act is called the Gauteng Scrutiny of Subordinate Legislation Amendment Act, 2010.

MEMORANDUM ON THE OBJECTS OF THE GAUTENG SCRUTINY OF SUBORDINATE LEGISLATION AMENDMENT BILL, 2010

Background

1. The Gauteng Scrutiny of Subordinate Legislation Act, 2008 (the Act), provides for the scrutiny of subordinate legislation by the Legislature through a Standing Committee (the Committee for the Scrutiny of Subordinate Legislation). For that purpose, section 2 of the Act requires the responsible Member of the Executive Council to table subordinate legislation within 14 days after the publication thereof in the *Provincial Gazette*. In terms of section 2(3), no subordinate legislation takes effect unless it has been tabled and has been published in the *Provincial Gazette*.
2. The Committee for the Scrutiny of Subordinate Legislation (the Committee) must scrutinize tabled subordinate legislation in accordance with standards set out in section 4(1) of the Act. If the Committee determines that subordinate legislation fails to comply with those standards, it must report the legislation to the Legislature. The Legislature is given the power to disallow any provision of such subordinate legislation, which then becomes invalid.
3. In practice, certain difficulties have been experienced in the application of the Act. The Committee has identified some deficiencies in the Act, in particular arising from the fact that

subordinate legislation has to be tabled only after its publication in the *Provincial Gazette*. This means that subordinate legislation comes into force before the Committee has had the opportunity to scrutinize it. In the Committee's view, this defeats the object of the Legislature's approval of subordinate legislation as envisaged by section 140(3) of the Constitution of the Republic of South Africa, 1996.

Purpose of Bill

4. The purpose of the Bill is to amend the Act so as to rectify the deficiencies identified by the Committee, and as further set out in the long title of the Bill and in paragraph 7 below. The main change that the Bill seeks to achieve is that all provincial subordinate legislation should be tabled in draft form and approved by the Legislature before the legislation is promulgated.

Implications of Bill

5. The Bill has no social, environmental or financial implications. Neither has it implications for local government.

Consultation

6. The Committee consulted the Chief State Law Adviser in the Office of the Premier.

Clause by clause explanation

7. The various clauses of the Bill provide as follows:

Clause 1 proposes the deletion of the superfluous and incomplete definition of “provincial legislation”, the replacement of the definition of “subordinate legislation” and the insertion of several new definitions.

Clause 2 seeks to replace section 2 of the Act. Provision is being made for draft subordinate legislation to be tabled in the Legislature for scrutiny by the Committee. Where the provincial functionary responsible for the making of that subordinate legislation is a Member of the Executive Council, the draft has to be certified by a State Law Adviser.

Clause 3 proposes the replacement of sections 4 and 5 of the Act.

The new section 4 redefines the functions of the Committee in scrutinizing subordinate legislation and the factors to be taken into account by the Committee in doing so. The Committee will have 21 working days to decide whether to approve or disapprove draft subordinate legislation, but provision is being made for the extension of that period when necessary.

The new section 5 makes it clear that no provincial subordinate legislation may be made unless a draft thereof has been approved by the Committee or by the House. If the Committee disapproves draft subordinate legislation, the House has to decide the matter.

Clause 4 provides that the index of subordinate legislation that has to be published in terms of section 6 of the Act should include only instruments made or issued by provincial functionaries.

Clause 5 replaces the long title of the Act to bring it in line with the amendments introduced by this Bill.

Clause 6 is the short title.
