

An analysis of the planning and implementation of the training of Equality Court personnel relating to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

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Opsomming

'n Ontleding van die beplanning en uitvoering van die opleiding van Gelykheidshofpersoneel tov die Wet op die Bevordering van Gelykheid en die Voorkoming van Onbillike Diskriminasie 4 van 2000

Hierdie artikel, in vier dele, fokus op een voorgestelde kenmerk van doeltreffende wetgewing; dat die afdwingingsmeganisme moet bestaan uit gespesialiseerde liggame en dat die voorsittende beamptes van hierdie liggame opleiding moet ontvang om spesialiskennis te verwerf. Die onderliggende tema van hierdie artikel is die (huidige) onvermoë van die Suid-Afrikaanse staat om hierdie kenmerk van effektiewe wetgewing te realiseer. Ek beskou die konsep "Staats-onvermoë" vanuit die hoek van die opleidingsprojek van die Department Justisie om voorsittende beamptes op te lei in terme van die Wet op die Bevordering van Gelykheid en die Voorkoming van Onbillike Diskriminasie 4 van 2000. Ek teen beginsels uit die dissipline van Publieke Administrasie en stel 'n raamwerk daar waarteen hierdie opleidingsprojek gemeet word. Ek ontleed dan in watter mate die projek in sy doel geslaag het. Ek verskaf 'n gedetailleerde kronologiese bespreking van die problematiese aspekte van die projek, wat insluit 'n ooroptimistiese besigheidsplan, ondoeltreffende monitering van vordering op die projek, bestuursinsensie, oormatige sensitiwiteit tot sommige belanghebbers se vrese; en onvoldoende finansiële steun.

Part 1

1 Introduction

This article, in four parts,** is mainly concerned with one suggested requirement of effective legislation: "the enforcement mechanism should consist of specialised bodies and the presiding officers of these enforcement mechanisms must receive training to acquire expertise".¹ The underlying

* This article is based on relevant parts from my doctoral thesis titled "A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000".

** Parts 1 and 2 appear in this issue and, 3 and 4 will appear in the 2010(2) *De Jure*.

1 Evan "Law as an Instrument of Social Change" in Evan (ed) *The Sociology of Law: A Social-structural Perspective* (1980) 559; Packer *Using Human Rights to Change*
continued on next page

theme of this article is the (current) incapacity of the South African state to ensure the effective existence of this requirement.

In this article I consider to what extent the Department of Justice succeeded in its mandate to ensure that a cadre of well-trained Equality Court personnel was established. In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act,² Equality Court personnel had to be trained before the equality courts could be created.³ Training

Tradition: Traditional Practices Harmful to Women's Reproductive Health in Sub-Saharan Africa (2002) 169; Bawa "Judicial education" (1999) *September Consultus* 28 at 30; Hepple "Equality laws and economic efficiency" (1997) 18 *ILJ* 598 606–607; Gutto *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* (2001) 192. Elsewhere I have recently argued that approximately 18 requirements of effective legislation may be identified – See Kok "The potential effectiveness of the Promotion of Equality and Prevention of Unfair Discrimination Act" (2008) *JJS* 42 and Kok "Why the law cannot drive the transformation of society" (2007) *August Without Prejudice* 60.

² Act 4 of 2000, hereafter "the Act".

³ The relevant parts of s 31(1) before it was amended by the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002 read as follows: "(1) Despite section 16(1)(a) and (b), and until the Minister determines by notice in the *Gazette*, no proceedings may be instituted in any court unless (a) a presiding officer is available who has been designated, by reason of his or her training, experience, expertise and suitability in the field of equality and human rights; and (b) one or more trained clerks are available. (2) For purposes of giving full effect to this Act and making the Act as accessible as possible (a) and in giving effect to subsection (1), the Minister may designate suitable magistrates, additional magistrates or judges, as the case may be, and clerks referred to in subsection (1) as presiding officers and clerks, respectively, for one or more equality courts . . . (3) The Minister must take all reasonable steps within the available resources of the Department to designate at least one presiding officer and ensure that a trained clerk is available for each court in the Republic. (4) The Minister must, after consultation with the Magistrates Commission and the Judicial Service Commission, issue policy directives and develop training courses with a view to (a) establishing uniform norms, standards and procedures to be observed by presiding officers and clerks in the performance of their functions and duties and in the exercise of their powers; and (b) building a dedicated and experienced pool of trained and specialised presiding officers and clerks." The amendment came into force on 15 January 2003 (*Government Gazette* No 24249, 2003–01–15). Since its amendment, the relevant parts of s 31 now read as follows: "(1) Despite section 16(1) no proceedings may be instituted in any court unless a presiding officer and one or more clerks are available . . . (4) The Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses with a view to building a dedicated and experienced pool of trained and specialised presiding officers, for purposes of presiding in court proceedings as contemplated in this Act, by providing — (a) social context training for presiding officers; and (b) uniform norms, standards and procedures to be observed by presiding officers in the performance of their functions and duties and in the exercise of their powers. (5) The Chief Justice must, in consultation with the Judicial Service Commission, the Magistrates Commission and the Minister, implement the training courses contemplated in subsection (4). (6) The Director-General of the Department must develop and implement a training course for clerks of equality courts with the view to building a dedicated and experienced pool of trained and specialised clerks, for purposes of performing their functions and duties as contemplated in this Act, by providing — (a) social

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commenced in April 2001. By June 2003 it was deemed that a sufficient number of trained judges, magistrates and clerks existed to allow the establishment of 60 courts.⁴ The remainder of the Act, barring the provisions of the Act dealing with the promotion of equality, came into force on 16 June 2003.⁵ At the date of finalisation of this article, 220 equality courts at magistrates' court level had been established, with a remaining 146 equality courts to be established by the second quarter of the 2007/8 financial year.⁶

In this part of the article, I set out what I understand to be state "incapacity", first as a general concept, and then as it translates to South Africa. I also provide a framework against which I will measure the Department's efforts. In parts 2 and 3 my focus becomes more specialised when I analyse in some detail one particular government project, namely the training of Equality Court personnel undertaken by the Department of Justice. I discuss the initial project undertaken from 2001 to 2003 in some detail, and provide an overview of more recent events. In part 4, I borrow principles from the discipline of public administration in analysing the management of the training project.

2 State Incapacity

Authors such as Fukuyama⁷ and Scott⁸ concern themselves with state capacity in the context of "Grand Schemes": Soviet collectivisation,⁹ compulsory "villagisation" in Tanzania,¹⁰ Le Corbusier's urban planning theory as realised in Brasilia,¹¹ agricultural modernisation in the tropics,¹² and American-led "state building" in Afghanistan and Iraq.¹³ Scott focuses on the ability of "high modernist" state plans to create much misery and disruption; Fukuyama argues that weak or failed states are the source of many of the world's problems ranging from poverty, AIDS and drugs to terrorism. Scott focuses on authoritarian states that had the ability and the political will to use the full weight of its coercive powers to bring its designs into being;¹⁴ Fukuyama's concern is with states at the other side of

context training for clerks; and (b) uniform norms, standards and procedures to be observed by clerks in the performance of their functions and duties."

4 GN No 878, *Government Gazette* No 25091, 2003-06-13.

5 GN No R49, *Government Gazette* No 25065, 2003-06-13.

6 Paras 3.1 & 3.2 of a "progress report on the implementation of the provisions of PEPUDA", drafted by the Department of Justice and Constitutional Development (hand delivered to me on 2007-07-12; report in my possession).

7 Fukuyama *State Building: Governance and World Order in the Twenty-First Century* (2005).

8 Scott *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998) 193-222.

9 Scott 223-261.

10 *Ibid.*

11 *Idem* 103-146.

12 *Idem* 262-306.

13 Fukuyama 124-160. Perhaps Rousseau *The Social Contract* (1968) 119 says it best: "It is easier to conquer than to administer".

14 Scott 4-6; 341.

the spectrum: Many countries in sub-Saharan Africa,¹⁵ state collapse or state weakness in Somalia, Haiti, Cambodia, Bosnia, Kosovo and East Timor.¹⁶

Clapham, Herbst and Mills examine state failure or state “dysfunctionality” in Africa and specifically consider the following “big” African states, who all exhibit signs of dysfunctionality: Angola, Sudan, Democratic Republic of Congo, Ethiopia, Nigeria, and to a much lesser degree, South Africa.¹⁷ In the opening chapter Herbst and Mills define “state dysfunctionality” for the purposes of this study as “the lack of provision of welfare and opportunity to the population, a sustained period of civil unrest, economic decline, state atrophy and social corrosion”.¹⁸ South Africa is then described as a “largely coherent nation exhibiting very little threat of balkanisation”,¹⁹ and as a “geographically coherent, politically stable, industrially developed and economically sophisticated country”.²⁰ Only if the definition of “dysfunctionality” is extended to “degrees of poor performance and implementation of state policy” does South Africa’s record become mixed and sometimes paradoxical.²¹ The study highlights three areas of concern: land reform,²² crime prevention,²³ and health policies relating to HIV/AIDS and tuberculosis.²⁴ Evaluated as a whole, South Africa still counts as a relative success in Africa, the study concludes.²⁵ Suggested reasons for South Africa’s success include the administrative capacity of its state apparatuses, high levels of social cooperation and the quality of its political leadership.²⁶ Hughes argues that the Apartheid state was highly organised and that the Apartheid policy required a highly bureaucratised country; “effectively administered in most respects of public and private life”; leading to a situation where the “state was . . . manifestly present” in

15 Fukuyama xix.

16 *Idem* xix.

17 Clapham, Herbst & Mills (eds) *Big African States* (2006). (Clapham *et al*) Mukandala, Fox and Liebenthal “The political economy of pro-poor policies in Africa: Lessons from the Shanghai Conference case studies” in Fox and Liebenthal (eds) *Attacking Africa’s Poverty Experience from the Ground* (2006) 3 refers to African states in general as “fractured, fragile, dependent, and weak”.

18 Herbst & Mills “Africa’s big dysfunctional states: An introductory overview” in Clapham *et al* 1.

19 Hughes “South Africa: The contrarian big African state” in Clapham *et al* 155.

20 *Idem* 182.

21 *Idem* 164.

22 *Idem* 169–171.

23 *Idem* 171–176.

24 *Idem* 176–181. Bhorat & Kanbur “Introduction: Poverty and well-being in Post-Apartheid South Africa” in Bhorat and Kanbur (eds) *Poverty and Policy in Post-apartheid South Africa* (2006) 13 refers to South Africa’s “policy inertia” regarding crime and HIV/Aids.

25 Hughes 181–183.

26 *Idem* 185. As to leadership, Ayee “Leading large states” in Clapham *et al* 263 describes all of South Africa’s leaders from Verwoerd to Mbeki, with the exception of Mandela, as “technocratic”, indicating being “grounded on administrative competence and professionalism”. Mandela is described as having been a “charismatic/reconciliatory/patriarchal” leader.

every “township, city, border area and most rural areas”.²⁷ The author seems to imply that this state of affairs was carried over into the democratic South Africa.

Other authors are not as optimistic about the position of the South African State. Hirsch drafts “South Africa’s apartheid balance sheet” and in the column headed “liabilities” *inter alia* lists “most labour very poorly educated and trained, and severe shortage of management skills”.²⁸ Manning contends that South Africa has had a “management deficit” for a long time,²⁹ and laments the current woeful state of the South African public service.³⁰ In a much more thorough-going book Picard suggests that the institutional legacy of the Apartheid homelands policy lives on in current-day South Africa.³¹ He argues that in May 1994 the new democratic government inherited “an authoritarian local level state administration, tolerance of widespread corruption and the institutionalised use of patronage in the public service to advance Afrikaner ethnic claims”.³² Up to 1990 public sector workers were poorly educated, with as many as 600 000 whites in the late 1980s with a grade 10 education or less.³³ The Apartheid state led to a bloated government structure that provided sheltered employment for whites from poor socio-economic backgrounds.³⁴ The public sector in 1994 contained many whites ideologically opposed to social change and the public service became an affirmative action target for blacks.³⁵ The homelands policy led to a situation where by 1990 South Africa had 150 government departments, 5 State Presidents, 10 Prime Ministers, 206 Cabinet Ministers, 1190 Members of Parliament and 11 National Assemblies.³⁶ However, institutional transition and civil service reform was not a priority of Post-1994 Government of National Unity.³⁷ Over time though, pressure grew to make the public service more representative.³⁸ Generous voluntary retirement programmes were set up to create space for affirmative action appointments.³⁹ White officials were replaced by existing Black bureaucrats, mainly from the homelands,⁴⁰ as the homelands had more Black senior civil service positions than any other region in South Africa.⁴¹ Many skilled and

27 Hughes 160.

28 Hirsch *Season of Hope* (2005) 27. Also see Van der Berg “Public spending and the poor since the transition to democracy” in Bhorat & Kanbur 227.

29 Manning *Delivering the Dream* (2006) 29. Also see Hirsch 243.

30 Manning 30; 45. Also see Pillay “Introduction” in Pillay, Roberts & Rule (eds) *South African Social Attitudes: Changing Times, Diverse Voices* (2006) 3.

31 Picard *The State of the State* (2005) xii.

32 *Idem* 5.

33 *Idem* 56.

34 *Idem* 268–269.

35 *Idem* 12.

36 *Idem* 66. Also see Skjelten *A People’s Constitution* (2006) 43.

37 *Idem* 118.

38 *Idem* 121.

39 *Idem* 127.

40 *Idem* 139.

41 *Idem* 296.

experienced officials had left and their skills and expertise could not be replaced easily or immediately,⁴² while “unproductive and supernumerary workers remained”.⁴³ Apartheid South Africa had seriously neglected black civil service training.⁴⁴ Although the homelands presented an opportunity to blacks to be trained in the public service,⁴⁵ the quality of these administrators was generally poor.⁴⁶ During the 1990s many short-term (3 to 6 months) training courses were introduced at South African universities and institutes, but these programmes could not substitute a fully developed educational system and years of experience.⁴⁷ (It could be added that the ANC-in-exile did not prioritise management skills.)⁴⁸ Thus, the public service is faced with too many under-qualified employees unable to cope with huge backlogs.⁴⁹ Picard is forthright: “The ANC did not inherit a strong state but a weak one”.⁵⁰

3 The Benefits of a Microscopic Study

Like the studies referred to above, this article is also concerned with state incapacity. However, the focus is microscopic here: I describe the inability of the South African state to have devised and implemented an effective training programme for Equality Court personnel as obliged in terms of the Act. This chapter focuses on the Department of Justice’s planning and implementation of training programmes for judicial officers relating to the Act. I provide a detailed topical overview of the planning and training process, mainly sourced from minutes to the meetings of the Training Management Team (TMT), later called the Training Management Board (TMB), a committee set up in terms of the business plan relating to the training process.⁵¹ In the next parts, I analyse the training process and point out shortcomings in the planning and training stages.

As set out in the first few lines of this article, my main aim is to discuss, in some detail, how the Department of Justice mismanaged one of the

42 *Idem* 157.

43 *Idem* 181. Also see Pillay 3.

44 *Idem* 190. The establishment of access to basic services was also severely neglected by the Apartheid government, as pointed out in Leibbrandt, Poswell, Naidoo & Welch “Measuring recent changes in South African inequality and poverty using 1996 and 2001 Census Data” in Bhorat & Kanbur 129.

45 Picard 302.

46 *Idem* 303. Also see Calland *Anatomy of South Africa* (2006) 83.

47 Picard 213.

48 Calland 66.

49 Picard 148; Also see Calland 68: “The legacy of apartheid, especially in terms of the skills and education deficit for the majority community of the country, means that the period of transition [for the public service] is elongated”. Calland 93 suggests that while the vast majority of current Director-Generals are of very good quality, at middle-management levels the public service face serious skills shortages.

50 Picard 365.

51 I acted as minute secretary to most of the meetings.

suggested requirements of effective legislation. I show below that a well-trained cadre of Equality Court personnel had *not* been established. But this microscopic study may have a secondary purpose, or added benefit, as well. Kuye suggests that one aim of public administration research would be to reform public organisations and agencies and their work such as service delivery initiatives.⁵² Reform-minded “gap” studies in socio-legal research could have the same purpose in mind – once the “gap” between the suggested ideal in the law books and the factual reality have been identified, a further object of these kind of studies could be to identify ways of *narrowing* the gap. In this chapter I analyse *inter alia* the *management* of a training implementation project run within the Department of Justice and Constitutional Development, as part of a broader enquiry into the need for adequately trained enforcement officials to ensure more *effective legislation*. In this respect then, in this chapter there is an interplay between the disciplines of public administration and socio-legal studies. I paint a particularly, and perhaps painfully detailed picture of the surrounding facts and circumstances of the initial training implementation project, as context matters in public administration research.⁵³ If further socio-legal or public administration research is undertaken on the Act or future training programmes on the Act, it would be useful to have a contextualised and complete picture of the first of these training initiatives, as a standard against which future results could be measured. I would thus humbly describe the pages that follow as a quasi-empirical study,⁵⁴ written from a lawyer’s perspective, to add to other management studies.⁵⁵

4 Sketching the ideal?

I will utilise a short list of abstract “best management practices” in evaluating the training programme for Equality Court personnel. However, barring the establishment of rather abstract and general management principles, a single “formula for success” for measuring good performance in the public sector does not exist.⁵⁶ Pollitt argues that academia frowns

52 Kuye “The state of research and scholarship in public administration” in Kuye, Thornhill, Fourie, Brynard, Crous, Mafunisa, Roux, Van Dijk & Van Rooyen *Critical Perspectives on Public Administration: Issues for Consideration* (2002) 2.

53 See the discussion in parts 2 and 3 of this article.

54 Roux “Introduction to public policy analysis: Concept and methodology” in Kuye *et al* 84 distinguishes between “empirical”, “evaluating”, “normative” and “integrated” analysis. An “empirical” analysis is retrospective and descriptive and the primary focus is on the real facts involved.

55 Kuye 2.

56 Van der Waldt *Managing Performance in the Public Sector* (2004) 5. See Pollitt *The Essential Public Manager* (2003) 152: “Context matters. Public management is not all one thing. Different functions, performed in different administrative cultures and circumstances, require different mixtures of norms and values. Therefore, it is inherently unlikely that a single set of prescriptions will work well in every – or even in most – situations.”. At 152–156 Pollitt points out that pragmatists,

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upon management “gurus and their recipes” mainly for two reasons: (1) “Evidence of the beneficial impact of such formulaic approaches is distinctly mixed” and (2) the advice offered by these gurus “tends to be both unhelpfully abstract and laced with internal contradictions. As a result the cook finds that it is often hard to relate the general recipe to the specific task at hand”.⁵⁷ However, the main aim of this chapter is not to “give advice” as such to policy makers, or to empirically test the supposed beneficial impact of such a step-by-step approach to public sector management, but rather to point out the *shortcomings* of the training programme and to point out the *gap* between the suggested ideal in the Act and the messy reality that eventually came to pass. To evaluate any programme, some criteria must be established upfront against which the programme will be *measured*, and that is the only role I envisage for the “management principles” I set out below.⁵⁸ The analysis of the training programme in part 4 of this article will follow the same four “steps”. Reform-minded researchers in public administration may well be able to distil certain “lessons” for public administration managers wishing to avoid the same pitfalls that the management personnel of the project under consideration could unfortunately not avoid.

4 1 Plan: Determine the objectives⁵⁹

Many authors emphasise that as much clarity as possible should be aimed for when a particular activity is planned. The following “principles” in planning may be identified, or in other words, the business plan should set out:

- Why the proposed programme must be implemented.⁶⁰
- What action is necessary to achieve the goal(s).⁶¹ The goals should be clear and unambiguous.⁶² If clear goals are not set, activity is often

contingency theorists, social constructivists, post-modernists, those interested in the sociology of organisational knowledge, informatics theorists and decision theorists are all skeptical about the possibility of universal, scientifically-based generalisations about management. Roux 91 is blunt: “The determination of the best policy options using policy analysis might prove favourable on paper or in principle, but is handicapped by the realities of life.” Also see Fukuyama 58: “Most good solutions to public administration problems . . . will not be clear-cut ‘best practices’ because they will have to incorporate a great deal of context-specific information”. Also see Fukuyama 113: “[P]ublic administration is idiosyncratic and not subject to broad generalisation”.

⁵⁷ Pollitt 152.

⁵⁸ See Fukuyama 114: “The fact that organisational ambiguity exists does not mean that we throw up our hands and assert that ‘anything goes’ in public administration. While there may not be best practices, there are certainly worst practices, or at any rate bad practices to be avoided.”.

⁵⁹ Terry & Franklin *Principles of Management* (1982) 33.

⁶⁰ I.e., the problem that is to be solved must be clarified: Terry & Franklin 169.

⁶¹ Terry & Franklin 172; Roux 71 & 90.

⁶² Manning 47; Van der Waldt 129 & 292; Terry & Franklin 124.

mistaken for accomplishment.⁶³ Avoid vague, open-ended terms.⁶⁴ Too many goals should be avoided and goals should be prioritised.⁶⁵

- Where the activities will take place.⁶⁶
- When it will take place.⁶⁷
- Who will perform the activities.⁶⁸ Roux argues that financial requirements, the administrative and organisational capacity of the department who will be responsible for implementation and human resource requirements must be taken into account when drafting the suggested plan because available trained staff and their commitment to pursue the stated goals in a professional manner will be vital to effective implementation.⁶⁹
- How it will be completed.⁷⁰
- What the standard or measure of success will be.⁷¹ The plan must provide clear guidelines as to what is expected.⁷² Establish key performance indicators.⁷³

Terry and Franklin suggest that “planning” entails obtaining as much information as possible about the activities involved; analysing and classifying the information; establishing planning premises and constraints; determining alternate plans; choosing a proposed plan from this range of possibilities; arranging the detailed sequence and timing for the plan; and providing progress check-ups to the proposed plan.⁷⁴ Manning advocates the following sequence: Identify the issues; classify and rank the issues; consider the various options; define the purpose of the project; define the key programmes within that project; agree to goals for each of the projects; and agree to actions with deadlines for each of the key programmes.⁷⁵

63 Terry & Franklin 124 & 148.

64 Van der Waldt 48; Terry & Franklin 124. Eg Pollitt 11 criticises the UK Chancellor of the Exchequer who stated in 1998 that the government would deliver a “world class” education so that schoolchildren would reach their “full potential”. Pollitt suggests that these terms are too vague to be of any use – “how were [the Department of Education] supposed to discover and measure the ‘full potential’ of every schoolchild in the country? What is a ‘world class education service’ anyway, since different individuals, groups and cultures disagree about what the style, content and even purpose of education should be?”

65 Manning 26 & 47.

66 Terry & Franklin 172; Roux 71 & 90.

67 *Ibid.*

68 *Ibid.*

69 Roux 90.

70 Terry & Franklin 172; Roux 71 & 90.

71 Manning 76; Ströh “Personnel Motivation: Strategies to stimulate employees to increase performance” 2001 *Politeia* 67.

72 Manning 26.

73 Pollitt 12.

74 Terry & Franklin 169–171.

75 Manning 81–84.

4 2 Organise: Distribute the work; establish and recognise needed relationships⁷⁶

Terry and Franklin define this “step” in management planning as “the establishing of effective behavioural relationships among persons so that they may work together efficiently and gain personal satisfaction in doing selected tasks under given environmental conditions for the purpose of achieving some goal or objective”.⁷⁷

A few “principles” may again be suggested:

- Create clear lines of authority⁷⁸ and responsibility in the organisation.⁷⁹
- Assign tasks to specific people with specific deadlines.⁸⁰
- Keep proper records of work to be done and completed work.⁸¹

4 3 Actuate: Ensure that the members of the group carry out their prescribed tasks willingly and enthusiastically⁸²

Terry and Franklin define actuating as “getting all the members of the group to want and to strive to achieve objectives of the enterprise and of the members because the members want to achieve these objectives”.⁸³ A large part of actuating involves effective communication.⁸⁴ The “message” must be consistent and must be repeated and the manager should encourage fast feedback from the bottom to the top.⁸⁵ “Effective” communication should be distinguished from “efficient” communication. Efficient communication minimises time and costs while effective communication entails the accurate sending and receiving of information, full comprehension of the message by both parties, and appropriate action taken on completion of the information exchange.⁸⁶ Organisational structure impacts on communication. A small number of organisational levels expedites communication.⁸⁷

⁷⁶ Terry & Franklin 33.

⁷⁷ *Idem* 194.

⁷⁸ Terry & Franklin 219 define “authority” as the legal right to command action by others and to enforce compliance. But even in the absence of this kind of authority, other ways of achieving compliance exist: persuasion, sanctions, requests, coercion, constraint or force.

⁷⁹ Terry & Franklin 194; Van der Waldt 293; Manning 50; Digue “Decision making: Stop making plans, start deciding” 2006 *Management Today* 51.

⁸⁰ Manning 49; Digue 2006 50.

⁸¹ Manning 49.

⁸² Terry & Franklin 33.

⁸³ *Idem* 272.

⁸⁴ See Terry & Franklin 353–384 for a detailed discussion of what communication entails in this context.

⁸⁵ Manning 77.

⁸⁶ *Idem* 353–384. For example, communication by letter or fax would be more efficient than a face-to-face meeting with a subordinate in another province, but a face-to-face meeting is likely to be more effective – Manning 75 116.

⁸⁷ Terry & Franklin 207.

Effective actuating entails enlisting support from subordinates at an early stage of implementation.⁸⁸ The manager-planner should also aim to win the support of key stakeholders who will facilitate implementation.⁸⁹ The manager must ensure that subordinates identify with the purpose of the project.⁹⁰ Subordinates must understand and support the initiative.⁹¹ Subordinates must know what is expected from them, must have the necessary information, resources and support,⁹² and must be motivated to perform the required task(s).⁹³

4 4 Control: Control the activities to conform to the plans⁹⁴

“Controlling is determining what is being accomplished – that is, evaluating the performance and, if necessary, applying corrective measures so that the performance takes place according to plans”.⁹⁵ Controlling therefore entails:

- Measuring the performance.⁹⁶
- Comparing the actual performance with the ideal standard.⁹⁷ The pre-set ideal standard is the key to control.⁹⁸ The standard should use some form of measurement, preferably quantitative.⁹⁹ The standard should be unambiguous, explicit and particular.¹⁰⁰ Performance measurement must happen relatively frequently.¹⁰¹
- Ascertaining the difference.¹⁰² Measuring the deviance between actual performance and the ideal pre-set standard is particularly difficult when the set standard is intangible or dependent on means such as judgment or indirect clues.¹⁰³

88 Manning 3 and 74.

89 *Idem* 4.

90 Brynard “Noodsaaklikheid van beheer” 1993 *Publico* 22 23; Hofmeyr “Employee attitudes: A key dimension in organisational success” 1997 *People Dynamics* 30 32 and 34.

91 Louw & Martins “Exploring inertia in a typical state organisation” 2004 *SA Journal of Industrial Psychology* 55 57.

92 Ströh 2001 *Politeia* 69.

93 Manning 76.

94 Terry & Franklin 33.

95 *Idem* 422. Manning 7 rather obliquely states that a manager must ensure that strategy becomes action. Brynard 1993 *Publico* 22 states that effective control requires compilation of information, processing of the information and reporting to the manager.

96 Terry & Franklin 424; Van der Waldt 310.

97 *Ibid.*

98 Terry & Franklin 437.

99 Terry & Franklin 437; Zammuto *Assessing Organizational Effectiveness* (1982) 9.

100 Brynard 1993 *Publico* 22; Ströh 2001 *Politeia* 64.

101 Ströh 2001 *Politeia* 67 & 69.

102 Terry & Franklin 424; Van der Waldt 310.

103 Terry & Franklin 424–425; Van der Waldt 48; Fukuyama 75; Zammuto 9.

- Correcting unfavourable deviation by means of remedial action.¹⁰⁴ When a significant deviation is identified between the actual performance and the results initially planned, vigorous and immediate action is imperative, and should be accompanied by fixed and individual responsibility.¹⁰⁵ The real cause of the deviance should be uncovered and appropriate action must be taken to eliminate the source of the deviance.¹⁰⁶ Subordinates charged with a particular action must be informed if their performance did not meet the required standard.¹⁰⁷

Control will only have the required effect if the person doing the controlling has adequate authority.¹⁰⁸

5 Conclusion

In the next parts of this article, I compare the “real” planning and implementation of this programme with the “ideal” yardstick I have set out above. I will discuss the main features of the planning and implementation of this project: an overly optimistic business plan, ineffective monitoring of progress, management inertia, too much sensitivity to some stakeholders’ interests, and inadequate budgetary support. Each of the subdivisions follows a detailed, chronological discussion of relevant events. In the last part of this article, I analyse and criticise the project by explicitly utilising the four “management steps” I have set out above.

Part 2

1 Introduction

In part 1 of this article, I considered the concept “state incapacity” in the context of a training project undertaken by the Department of Justice in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act. I also established a framework against which this training project could be measured. In parts 2 and 3 of this article, I provide a detailed chronological discussion of the main problematic aspects relating to the training project. In this part, I discuss the initial business plan that was overly ambitious, the ineffective oversight body that was established, too much sensitivity that was displayed towards the judiciary, inadequate budgetary support that was given to the project, bureaucratic bungling, an absent impact assessment, an ill-considered Australian study visit, and foot dragging in the finalisation of training material. I will discuss the inadequate nature of the training seminars in part 3.

104 Terry & Franklin 424; Van der Waldt 310; Brynard 1993 *Publico* 22; Ströh 2001 *Politeia* 69.

105 Terry & Franklin 426.

106 *Ibid.*

107 Crous “Enhancing people skills in the public sector” in 159 (Kuye *et al.*).

108 Terry & Franklin 438.

2 An Overly Ambitious Business Plan

Apparently, very little happened for a number of months after the Bill became an Act on 2 February 2000.¹⁰⁹ It was very clear that presiding officers of the to-be-established equality courts had to be trained and designated before the Act could come into force.¹¹⁰ The then Chief Director: Transformation and Equity within the Department of Justice (and one of the drafters of the Bill) drafted a business plan titled “Capacity building (through training and public education) for effective implementation of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000”.¹¹¹ The plan envisaged “decentralised training activities” that would target judges, magistrates, clerks of the court, prosecutors, masters of the High Court, managers and other personnel in the Department of Justice, state attorneys and law advisors.¹¹² It was suggested that the training and public education activities would be coordinated nationally and implemented provincially through local training providers and centres. “Service providers” (ie judges, magistrates and clerks of the court) would undergo “intensive training” over a period of one year, commencing with a three week programme. Thereafter, formal refresher courses would take place at least once a year. During the first year of training, a “train the trainer” component would be built into the training to facilitate the transfer of skills to understudies to the consultants, departmental trainers and other equality experts. Training materials would be developed nationally. The business plan stated the purpose of the project as “to ensure that there is adequately trained personnel to implement the Act within less than a year of its [sic] promulgation. The project also seeks to ensure that the public is adequately aware of the rights enshrined in the Act and the

109 I located a document titled “Chief Directorate Transformation and Equity: Second status report on implementation of the equality legislation” dated 2001–01–31, drafted by the Project Manager. This document states that the planning of the implementation of the Act commenced under the leadership of the Chief Directorate since December 1999. It is however not clear what form these planning activities took.

110 Ss 16(2) and 31 of the Act. The initial business plan drafted by the Project Manager noted on page 18: “The Act cannot be implemented without preceding such implementation with training and public education because this is a new area for service providers in this country. The Act makes training a precondition for implementation.”.

111 This document was distributed at a meeting of the TMT on 2000–08–23. I located an undated “project plan” drafted by the then Chief Director: Transformation and Equity and the then Chief Director: Legislation. This document anticipated that the Act would be incrementally implemented. The Act would have commenced within ten months of its enactment and would have been fully implemented within three years of commencement. This plan envisaged that that training materials would be developed by February 2000, that a team to develop policy would be appointed by August 2000 and that 14 judicial officers and court assistants would be appointed by February 2001. Funding would be sourced from the Department and donors. The envisaged costs for the first year of the project was almost R62 million. A much smaller amount was allocated to the project (see 5 below).

112 In this article I focus on the training of judges, magistrates, and clerks of the court.

legal processes for effective use of the Act to protect their rights”.¹¹³ The plan listed the following “key outputs/indicators”:¹¹⁴

- At least 300 judges and magistrates trained within 12 months and a target of 20% of these (ie 60) trained by 15 November 2000.
- At least 500 clerks trained within 12 months and a target of 20 % (ie 100) trained by 15 November 2000.
- A professionally packaged loose-leaf resource book produced for judicial officers.
- A professionally packaged loose-leaf resource book produced for clerks of the equality courts.
- Videos, books on equality, publications and other relevant educational material to form a resource pack, to be regularly updated, to support service providers.
- Training policy guidelines as envisaged in the Act, developed and tabled as prescribed in the Act, by 1 February 2001.
- At least 1200 persons in the other groups of service providers provided with some training *albeit* not as intensive as the Equality Court officials, by July 2001.
- Training coordinating mechanisms established and running effectively at national level, in all provinces and at cluster level.

The plan also contained a “schedule of activities and budget”. According to this schedule, trainers and trainees were supposed to be secured by May 2000; relevant academics (training consultants) identified by mid May 2000; training policy guidelines drafted by mid May 2000; two loose-leaf resource books developed and at least 500 copies printed by July 2000; training venues used from June 2000; and public awareness posters, pamphlets, print adverts and paid air time on radio and television commenced by June 2000.¹¹⁵ (None of these deadlines were met.) USAID was approached for funding and “existing departmental resources” were to be used where possible. The implementation of training would be based on “the 20:80 principle of achieving more with less resources”.¹¹⁶ R500 000 was allocated to raising public awareness and this allocation was based “on a communications strategy which uses existing resources and cost free communication avenues as much as possible”.¹¹⁷

The plan listed the following “risks and assumptions”.¹¹⁸

- 10.1 The Project Plan assumes that there will be buy-in and cooperation within the leadership of all potential service providers, including the Judiciary and Prosecutorial Services.

113 Business plan 4.

114 *Idem* 5–7.

115 *Idem* 8–17.

116 *Idem* 18.

117 *Ibid.*

118 *Idem* 19–20.

- 10.2 It is also assumed that existing Departmental resources including the Canada Justice Linkage Programme and other relevant training activities at Justice College will play a crucial role in the implementation of the training envisaged in this Project and ensuring the sustainability of such training. Another assumption is that government resources such as the South African Management Development Institute (SAMDI), Justice College and the Foreign Service Institute will play a central role in the training of the groups of service providers who will not be involved in the equality courts.
- 10.3 The Project Plan also assumes that adequate financial resources will be made available within Departmental resources to ensure that additional personnel required for the Equality Courts and co-ordination of the overall implementation as well as infrastructural requirements are provided speedily.
- 10.4 It is also assumed that government will continue to treat the issue of ending discrimination and achieving equality, as a national priority.

The plan estimated that up to 2000 service providers would be trained in the first year and that 40 million people would be reached through various media in the public awareness programme. It was envisaged that the public awareness programme would target “every person in society including rural and illiterate people” who would be “targeted mainly through the radio, TV and community visits. NGO’s would be drawn in to assist in the public education programme”.¹¹⁹ It was also envisaged that “some impact assessment” would be undertaken within a year of commencement of the Act.¹²⁰

3 An Ineffective Oversight Body and Unclear Lines of Accountability

The business plan referred to above set out the following structure relating to project management:¹²¹

- 11.1 A Project Manager located in the Department of Justice and Constitutional Development, will coordinate the project with the assistance of a National Equality Legislation Training Working Group.
- 11.2 The Working Group will comprise members of the Judicial Service Commission, the Magistrate’s Commission, Department of Constitutional Development, South African Human Rights Commission, the Commission on Gender Equality and representatives of Civil Society. Provincial Training Working Groups will also be established in the nine provinces to facilitate decentralisation and responsiveness.

119 *Idem*. In a document titled “Draft Project Plan” (drafted by the Project Manager and the Chief Director: Legislation) handed out at the first meeting of the TMT, it was estimated that 1.5 million people would use the dispute resolution mechanism in the first year; 150 000 personnel be trained and 40 million people reached through radio, billboards, posters, TV, bus/train adverts, newspapers and other media. Even without the benefit of hindsight, these estimates are absurdly optimistic.

120 Business plan 22.

121 *Idem* 21.

The “National Equality Legislation Training Working Group”, referred to in paragraph 11.1 of the business plan, held its first meeting on 23 August 2000.¹²² The letter of invitation to attend the meeting noted that the Department of Justice and Constitutional Development had “developed a general Project Plan for training which requires un-packing and implementation”. The letter also stated that the Department planned to implement the Act by 10 December 2000 and that it was therefore “critical that training commences soon and that there are enough adequately trained people to form a pool for designating those to deliver services in the pilot sites that will commence on December 10”.

This working group, initially titled the “Interim Training Management Team on Equality Legislation”, later the “Equality Legislation Training Management Team” (TMT) and then the “Equality Legislation Training Management Board” (TMB) eventually met seventeen times.¹²³ Initially the manager and coordinator of the training project chaired the meetings. Supreme Court of Appeal Judge Ian Farlam chaired the eighth to seventeenth meetings.¹²⁴ In a document drafted by the Project Manager titled “Proposed Annual Work Plan for the Period February 2001 to January 2002”, handed out at the eleventh meeting, this working group was described as an “advisory body” that assisted the Equality Legislation Education and Training Unit (ELETU) in the execution of its mandate.¹²⁵

122 A document titled “Proposed Annual Work Plan: Equality Legislation Education and Training Unit Implementation Plan for Capacity Building Project (Equality Legislation Implementation) February 2001 – January 31 2002” lists the team members as follows: The Hon Mr Justice Ian Farlam (Chairperson JSC Training Committee); Hon Mr Joe Raulinga (Chief Magistrate Bloemfontein); Hon Mr Justice Ralph Zulman (Judge of the Supreme Court of Appeal, resource person and seconded to ELETU up to November 2001); Hon Ms Justice Yvonne Mokgoro (Judge of the Constitutional Court and resource person); Hon Ms Justice Jeanette Traverso (Deputy Judge President Cape Provincial Division and resource person); Ms Valerie Gciba (Chief Magistrate Eastern Cape and resource person); Mr Andre Keet (SAHRC); Ms Mmathari Mashao (CGE); Prof Shadrack Gutto (CALS at WITS, Project Leader ELETU Programme 1 Tender No 1); Prof Frans Viljoen (CHR at UP, Project Leader: Resource Manual for Equality Court Clerks); Mr Anton Kok (CHR at UP, secretary); Prof Cathi Albertyn (CALS at Wits and resource person); Ms Sury Pillay (NIPILAR, resource person); Mr TP Mudau (Senior Magistrate and resource person); Hon Mr Justice Johann van der Westhuizen (Judge Transvaal Provincial Division, resource person); and Mr Reuben Mukhahvuli (Administrative Assistant).

123 The dates of the meetings were 2000-08-23, 2000-09-06, 2000-10-18, 2000-11-15, 2000-12-04, 2001-02-14, 2001-03-28, 2001-05-28, 2001-07-04, 2001-08-21, 2001-09-17, 2001-11-07, 2001-12-21, 2002-02-27, 2002-06-19, 2002-12-08 and 2002-10-08. The 18th meeting was cancelled due to “cash flow problems” and the team was dissolved. Regular attendees included Supreme Court of Appeal Judges Ian Farlam and Ralph Zulman, Cape High Court Judge Jeanette Traverso, Prof Cathi Albertyn and Shadrack Gutto from the Centre of Applied Legal Studies at the University of the Witwatersrand, Magistrate Joe Raulinga, Magistrate Valerie Gqciba, Cecile van Riet from Justice College and Dr Anton Kok, the author.

124 Judge Farlam would have chaired the 7th meeting but for an (unexplained) emergency that arose.

125 In the document headed “Executive Summary Report & Evaluation National Seminar for Equality Court Judicial Educators: Aloe Ridge Hotel Gauteng, April

continued on next page

At the first meeting, the team agreed to function as an interim body pending a planned meeting between the Minister of Justice and Constitutional Development, the Chief Justice, the Judicial Services Commission (JSC), the Magistrates' Commission (MC), the South African Human Rights Commission (SAHRC) and the Commission on Gender Equality (CGE). This meeting never took place.¹²⁶

At its second meeting, the TMT resolved that the role of the provincial training working groups would be mainly to implement training programmes rather than policy development. It was agreed that the Judges-President of each High Court division should be tasked to set up provincial training structures. At magistrates' court level the cluster heads would be tasked to coordinate localised training.

The members at the meeting were advised that the position of Project Manager would be advertised. The team members were asked to send suggestions relating to the job content and profile of the potential incumbent to the Department. At the third meeting the team was advised that the positions of Project Manager and Project Administrator had not yet been advertised due to a lack of funding. A subcommittee was set up to finalise the advertisement for the two positions, to consider the applications, to draft a shortlist, to coordinate interviews and to make a recommendation to the team.

At the fourth meeting the team discussed and then proposed a restructuring of the existing oversight body. The team agreed that an executive-driven process had to be avoided and that a judiciary-controlled training process should be put in place. The Project Manager undertook to talk to the Minister to obtain his approval for the suggestion that the judiciary should be more actively involved in the training process and training management. At the sixth meeting the Project Manager advised the team that after discussions between the Department, JSC and MC it was decided that future meetings of the team would be chaired by the judiciary. The chairperson of the JSC Committee on Education would chair the meetings and a delegate from the MC would act as deputy. At the seventh meeting the Project Manager confirmed that Judge Farlam would in future act as the Chairperson and Mr Raulinga as the Deputy Chairperson.

16–21 2001" distributed at the 8th TMT meeting, ELETU was described as the "main implementation agency" of training and education activities on the Act. The same document explained that ELETU comprised of two permanent personnel – the Project Manager and an administrative secretary.

¹²⁶ A draft project plan (copy in author's possession) envisaged that the overall management of the project would have vested in a "steering committee" chaired by the Minister of Justice and Constitutional Development and would have comprised of the Chief Justice, President of the Constitutional Court, Chairpersons of the Human Rights Commission and Commission on Gender Equality, the Director General of the Department of Justice and the Ministers that reviewed the Bill for Cabinet. Presumably the planned meeting had as its aim to discuss the establishment and working of this steering committee. When it became clear that the meeting would not be held, the *ad hoc* interim training management team took the place of the envisaged steering committee.

At the same meeting the team was advised that advertisements for the positions of Project Administrator and Project Coordinator had been placed. At the sixth meeting the Project Manager advised the team that she had been formally appointed. She told the meeting that the Project Manager would be held accountable to the task team.¹²⁷ Mr Reuben Mukhahuli was introduced to the team as Project Assistant. The Project Manager expressed a need for a secretary and undertook to discuss such an appointment with the Director-General. The team was also advised that it had been decided that the interim training management team would become the final training management team and that the JSC and other key stakeholders were satisfied with the composition of the team. At the eighth meeting Ms Meme Sejosengwe was introduced to the team as Project Manager: Broad Implementation of Equality Legislation while the existing Project Manager would remain as Project Manager: Equality Legislation Education and Training. The team was advised that the two managers reported directly to the Director General on separate and complementary projects.

At the eleventh meeting the Project Manager distributed an amended work plan for the period February 2001 – January 2002. This document does not clearly explain who would ultimately be responsible for the implementation of training and public awareness programmes. The plan indicated that ELETU's mandate was "managing the implementation of the Capacity Building Project . . . which seeks to provide judicial and public education" on the Act.¹²⁸ It stated that the "core personnel" of ELETU "included" a Project Manager and administrative secretary, that consultants were engaged from time to time for specific tasks, and that ELETU was *assisted in its mandate* by the TMT.¹²⁹ The document stated that the conceptualisation of projects, quality assurance and most of the administrative work were undertaken by ELETU in other words, the Project Manager and secretary.¹³⁰ The document indicated that the work was *fully supervised* by the Project Manager and that the Project Manager set relevant time frames with the assistance of the Executive Committee,¹³¹ the JSC, the MC and the TMT.¹³² The TMT and the Executive Committee met monthly to review the work of ELETU and to discuss the way forward.¹³³ The plan noted that ELETU submitted bi-monthly reports to the Director General and the Minister of Justice and Constitutional Development, the Chairperson of the JSC and the chairperson of the MC.¹³⁴ The

127 Although not explicitly referred to in the minutes, the Project Manager would presumably ultimately be held accountable to the Director-General, Department of Justice and Constitutional Development.

128 Page 1 of the document.

129 *Ibid.*, my emphasis.

130 *Idem* 5.

131 The workplan indicated that the Executive Committee consisted of Hon Mr Justice Ian Farlam, Hon Mr Justice Ralph Zulman, Hon Mr Joe Raulinga and the Project Manager.

132 Page 5 of the document; my emphasis.

133 *Ibid.*

134 *Idem* 5–6.

document stated that the Project Manager is the accounting officer at unit level with the *ultimate responsibility and accountability* for finance, procurement and performance management while the Director-General would be the accounting officer with *final responsibility* for financial and procurement management.¹³⁵

An item in the minutes to the fourteenth meeting titled “training guides” contains a hint that ELETU was not destined to continue in its then-existing format. The minutes reflect that it would be ELETU’s responsibility to coordinate the updating of training material “for as long as ELETU continued to exist”. The fifteenth meeting confirmed this state of affairs: The Project Manager advised the meeting that ELETU would cease to exist at the end of January 2003 and that avenues had to be explored for institutionalising the project to ensure the sustainability of the training project beyond ELETU’s lifespan. At that point the Head of Justice College, Ms Cecile van Riet, advised that Justice College would build equality training into its curriculum for the training of magistrates,¹³⁶ and Judge Farlam reported that the JSC would be setting up its own project relating to the training of judges.¹³⁷ The Project Manager reacted by saying that she had hoped that the joint training of judges and magistrates could be continued. Mr Raulinga shared this sentiment. The meeting agreed to defer the matter. It was not raised again.

4 Too Much Sensitivity to Judicial Opposition to Training

At the first TMT meeting concerns were already expressed about the possibility of the training process being seen as the provision of “secret riding instructions” to the judiciary. At the second meeting Judge Zulman suggested that peer group pressure be used to persuade recalcitrant

¹³⁵ *Idem* 6, my emphasis.

¹³⁶ Since ELETU’s demise Justice College has apparently trained most of the current clerks and magistrates. As to magistrates, cluster heads identify magistrates to be trained and training occurs on a decentralised level. As to clerks, court managers identify clerks to be trained and clerks are trained nationally in Pretoria where 40 clerks can be accommodated at one time. Training for clerks occurs over three days and for magistrates over four days. The training is optional and attendance-based, ie no tests are written but exercises are discussed. (As established per email correspondence with the relevant Justice College trainer.) I have not been able to establish the following: (a) what training material is used; (b) once a clerk/magistrate has been on the Justice College course, is that clerk/magistrate then deemed fully trained and may then preside in an Equality Court; (c) were clerks/magistrates who were trained under ELETU’s auspices (2001–2002) trained again by Justice College, or were they deemed fully trained and designated to sit in the first equality courts?

¹³⁷ Since ELETU’s demise, no further training of judges on the Act has been arranged nationally or centrally. Provincial training seminars may have been arranged. Tele-faxes sent to Judge Farlam dated 2005–02–15 and 2006–08–29 respectively; and telephone conversations with Judge Farlam during February 2005 and August 2006.

judges to participate in the training programmes but that a confrontational approach should not be adopted. At the third meeting Judge Zulman said that the Minister had to engage the judiciary in the planning and implementation of the training if the process were to have any credibility. He said that the judiciary was a critical constituency that needed to be approached sensitively. At the same meeting some team members remarked that antagonistic views towards the Act and the obligatory training programmes had been expressed by members of the judiciary and magistracy and that a consultative process had to be followed. The team thought that the JSC and MC, had to form part of the training and implementation process and that the time frames could be amended to allow for proper participation by the JSC and MC. At the fourth meeting proposals were put forward regarding the restructuring of the TMT, specifically for the process to be seen as controlled by the judiciary. At that point the JSC had not yet been informed about the training process. The team agreed that a formal slot be requested at the next JSC meeting (that would have occurred on 22 January 2001) to address the JSC on the training process and to gauge the JSC's views on the suggested changes to the TMT's structure and the envisaged way forward. After discussions between the Department, JSC and MC the TMT's meetings were chaired by Judge Farlam from the eighth meeting onwards. At the sixth meeting it was reported that the JSC and heads of courts met to discuss the proposed "draft policy directives" relating to the training process. It was reported that the chairperson of the JSC thought that aspects of the directives were unconstitutional in that the Minister could not issue "directives" to the judiciary. The team was told that the heads of court accepted judicial training in principle, with the *proviso* that the process had to remain judge-controlled. The minutes to the tenth meeting contain suggestions that tensions existed between judges and magistrates. At this meeting the team discussed the second national training seminar that had occurred at Helderfontein Estates. Mr Raulinga mentioned that members of the magistracy felt sidelined and that a perception existed that magistrates did not know Civil Procedure and did not know the law. He felt that training should occur in mixed groups (ie, judges and magistrates combined).¹³⁸ At the same meeting Judge Zulman expressed concern about the lack of participation from judges in Gauteng in the training that had occurred at Helderfontein Estates. At the eleventh meeting Judge Traverso presented the draft training programme for Western Cape-based judges and magistrates. When Professor Gutto criticised the programme on the basis that all the main facilitators were white, Judge Traverso responded by noting that the presenters were not hand-picked but that institutions were approached that put forward certain names. She also mentioned that she had experienced resistance to the training from Cape judges and that the draft programme was the best way to start with the process. Ms van Riet thought that resistance from judges had to be approached strategically and that the composition of the facilitators would be such a strategy.

138 Many of the provincial training programmes were presented in separate groups.

Judge Traverso repeated that the Cape training committee did not start out with the idea of having an all-white training team.¹³⁹ At the twelfth meeting a report by Judge Zulman on some of the provincial training seminars was presented. Paragraph 6 of his report dealt with training in the Eastern Cape. He reported that only 2 judges attended the training, although the other judges in the region were invited to attend. Some of the judges were apparently critical of the need for the seminar. The Judge President of that region had also not attended the training programme. Reporting on Natal, he noted that the coordinating judge had received very little support from his colleagues and that only three judges attended the Natal seminar. At the Mmabatho training seminar, the leadership left after the morning session. He also reported that many regional magistrates seemed to have boycotted the training programmes. Three (black) regional magistrates attended the Gauteng seminar; one (black) regional magistrate attended the Bloemfontein seminar and no regional magistrates attended the Northern Province seminar. The Witwatersrand Local Division Deputy Judge President boycotted the Johannesburg-based training seminar. The minutes to the last meeting reflects that Judge Zulman noted that the difficulty with the training seminars was to persuade people to attend and to convince them that the training was not “brainwashing”.

The Project Manager drafted a memorandum to the Director-General and Minister of Justice and Constitutional Development relating to the letter drafted by Judge Farlam in which it was proposed that certain amendments be made to the Act. The memorandum notes that “the success of the equality courts and general implementation of the Act will be substantially affected by the attitude of the judiciary towards the Act and courts set up under it”.¹⁴⁰ The memorandum suggests that “while the Act currently stands on sound legal grounds and can definitely withstand impartial judicial scrutiny, strategically, it may be proper for the Minister to demonstrate some sensitivity to the concerns of the bench. However, this should not be done at the expense of potential justice seekers, the majority of whom clearly do not have confidence in the inherited judicial system regardless of the few black and female faces that have been added over the last seven years”.¹⁴¹ The memorandum recommends that the Minister should respond immediately and should indicate that a process of amending the Act had been initiated and indeed initiate such a process. At the same time the equality courts should be implemented on the basis provided for in the Act but administratively adjusted along the lines of the amendment proposed in the memorandum.¹⁴² The memorandum notes that “the strategic question relating to judicial buy-in must be addressed while the Act is being implemented as it is . . . Implementation will ensure that while changes are being considered, the legitimacy of the equality courts at the level of the general public, is not compromised”.¹⁴³

139 The panel of facilitators was subsequently altered to be more representative.

140 The memorandum para 10.7.

141 *Idem* para 12.

142 *Idem* para 14.

143 *Idem* 16.

At the second national seminar for judges and magistrates, the Minister of Justice again confirmed that he intended to designate presiding officers in consultation with the court leadership rather than after consultation as set out in the Act. He also confirmed that he understood “in consultation with” to indicate that the agreement or consent to the designation would be sought. He said that he foresaw that in the short-term he would “gazette” those judicial officers who had completed the appropriate levels of training, simply to “kick-start” the process but that he would in the meantime look into ways of effecting technical changes to the Act to ensure that any possible existing ambiguities are removed. He called on the participants to “read creatively into the sections that you are not comfortable with, with the view of ensuring that the interest of justice for the poor, the weak and the vulnerable are not sacrificed at the altar of literal and formalistic interpretations of the legislation in question”. He concluded by saying that “from the government’s point of view, it is the capacity building through training and continuing education that is more important than who does the designation”.¹⁴⁴

In a published article, Judge Zulman stated that the purpose of the training seminars was to provide judges with information and orientation concerning important and unfamiliar legislation without any attempt to prescribe, and that the concern of some judges that the training aimed at indoctrinating them in the “party line” and would seriously compromise judicial independence, was misplaced.¹⁴⁵ However, to a degree the training would have needed to be “prescriptive” in the sense that a judge who would apply the Act in a way that would frustrate societal transformation, would not be fulfilling his ostensible role as an agent of transformation, as required in terms of the Constitution and the Act. Being sensitive to the misplaced fears of the judiciary meant that the project lost valuable time. The Minister of Justice, Director-General and Project Manager should have met with the judges-president and Chief Justice prior to the first TMT meeting to address any fears that may have existed at that stage.

5 Inadequate Budgetary Support

The minutes reflect that the training and public awareness projects were not sufficiently funded. It could be argued that the project had never been sufficiently funded.¹⁴⁶

¹⁴⁴ I located a hard copy of the Minister’s speech in a file at the ELETU offices. (The Project Manager graciously allowed me unrestricted access to the files in the ELETU office.) I did not attend the Helderfontein seminar and do not know if the Minister read the entire printed speech aloud.

¹⁴⁵ Zulman “South African Judges and Human Rights” 2002 *Austr LJ* 34 46.

¹⁴⁶ A document emailed to me by Mr Skosana, Department of Justice, titled “Project Plan Implementation Report” dated April 2004 5 states that “an incremental approach to implementation mitigates *resource constraints* thereby compelling us to adopt a phased approach” (my emphasis); “there is tremendous pressure to have the Act wholly operational and *the issue of budgetary constraints remains an obstacle*” (my emphasis; p 2); “at this stage due to *lack of funds* we encounter difficulties

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The initial business plan stated that funding was being requested from USAID and that existing departmental resources would be used where possible. The plan noted that the costing would only cover the first 12 months of the project and that the department had been requested to integrate future training and public awareness costs into its Medium Term Expenditure Framework. Paragraph 9.2 states that the strategy that underpins the implementation of the training is based on the “20:80 principle of achieving more with less resources”. Under “risks and assumptions” the plan notes that it is assumed that “adequate financial resources will be made available within departmental resources to ensure that additional personnel required for the equality courts and coordination of the overall implementation of the Act as well as infrastructural requirements are provided speedily”.

The minutes of the first meeting erroneously reflect that USAID allocated \$3.5 million towards capacity building for the implementation of the Act and that \$3 million was set aside for training – the amounts allocated were R570 000 for salaries and administration, and R2 985 000 for direct costs – training, workshops, materials development, consulting, travel and *per diem*.¹⁴⁷ This funding became available from September 2000.¹⁴⁸ It would appear as if USAID funding also paid the Project Manager and

in carrying out our mandate” (my emphasis; p 43). According to this document, R10 million was allocated to the project for the 2003/2004 financial year, which is much less than the initial R50 million asked for in the “Memorandum on the Objects of the Promotion of Equality and Prevention of Unfair Discrimination Bill” that accompanied Bill B57B–99 (ISBN 0 621 29135 8): In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. Accessed at <http://www.pmg.org.za/viewminute.php?id=8330> on 2007–05–15. During these hearings, the Aids Law Project argued that the Department of Justice must address budgetary issues as some magistrates’ courts had indicated that lack of funds had prevented them from establishing an Equality Court or from undertaking training activities and public awareness campaigns. During the same hearings, the CGE also argued that the allocation of resources to the equality courts was not sufficient. The Department of Justice indicated in its submission that for the 2006/2007 financial year, R12 million was allocated to the Equality Court Project, of which R6 million was earmarked for the appointment of permanent clerks (salaries) and R6 million for furniture, stationery and the like.

147 In a letter dated 2000–10–02 and addressed to the then Minister of Justice by the team leader, Democracy and Governance, USAID/SA confirms that a funding proposal was submitted to USAID by the Transformation and Equity Unit of the Department of Justice and that the funding proposal sought funding to support the training of justice officials who would be involved in the implementation of the Act. In a memorandum drafted by the Project Manager to the then Director-General (dated 2001–12–13) she notes that R3.5 million had been provided by USAID while the Department contributed office space, furniture, equipment and administrative support.

148 This is presumably the reason why the project relating to the training of judicial officers only became operational in September 2000.

Project Assistant. The minutes to the third meeting indicate that at that point the positions of Project Manager and Project Administrator had not yet been filled “because of a lack of funding”. A subcommittee was then set up that included a USAID representative to settle the advertisement and to consider applications for the positions. The minutes to the third meeting also indicate that the project business plan would be made available as soon as USAID had approved it. It would therefore appear that the entire training project was funded with USAID money.¹⁴⁹ When the Act was passed, Parliament was told that the Act would require additional resources – R50 million – to be properly implemented.¹⁵⁰ After the Act was passed, the Department was told to implement the Act with existing resources.¹⁵¹ In a document titled “Chief Directorate Transformation and Equity: Second Status Report on Implementation of the Equality Legislation” dated 31 January 2001, it is noted that “initially, no allocation was made for the implementation of the Act from the Department’s budget”.¹⁵² Not surprisingly, “the inability of the Department to allocate a budget for the implementation of the Act has *inter alia* had a negative effect on the state of readiness for the implementation of the Act, particularly the identification and preparation of pilot sites for equality courts”.¹⁵³ The same document indicates that in view of limited governmental resources the Department had taken a policy decision to incrementally implement the Act.¹⁵⁴

By October 2000 it was clear that USAID funding would be available for the first year of the project as the remaining uncommitted USAID funds were to be used to “support activities related only to the recently revised program description relating to Criminal Justice Strengthening Program”.¹⁵⁵ For the second round of training, EU Foundation for Human Rights funding was obtained for an “Equality Court Judicial Educators’

149 The USAID letter reflected an amount of R570 000 for “salaries and administration”, which would presumably have been set aside for the Project Manager’s and Project Assistant’s salaries. Also see para 1 of the “Executive summary report & evaluation, national seminar for Equality Court judicial educators, Aloe Ridge Hotel, Gauteng, April 16–21, 2001”, distributed at the 8th TMT meeting, which seems to confirm this conclusion.

150 “Memorandum on the Objects of the Promotion of Equality and Prevention of Unfair Discrimination Bill” that accompanied Bill B57B–99 (ISBN 0 621 29135 8).

151 Minutes to the 9th TMT meeting para 4.3.

152 *Idem* para 3.

153 *Ibid.*

154 At its first meeting the TMT was informed that due to “infrastructural and human resource requirements”, implementation would commence with a small number of equality courts, to be increased annually. At the 6th meeting the TMT was informed that all magistrates’ courts would be operationalised at the same time, as it was deemed “socially unacceptable” that only a selected number of courts would function as equality courts. At the 17th TMB meeting Judge Zulman noted with surprise that the Department had, during August 2002, re-taken the decision to establish pilot courts.

155 USAID letter para 4.

Symposium” that was held in April 2002.¹⁵⁶ Funding was obtained from the Department at a very late stage for 2002 projects. The Project Manager’s report distributed at the thirteenth TMT meeting indicated that although the Director General had approved phase II funding, “the business plan and extent of finance, is still under discussion”.¹⁵⁷ The same document reflects that “generally all provinces would like to undertake more activities in the coming year. Until now ELETU could not guarantee the availability of money. The DG has now provided assurance”.¹⁵⁸ For the funding cycle starting in 2002 USAID changed its focus to “strengthening the criminal justice system” and it obviously became very difficult, if not impossible, to fit Equality Court training into this funding cycle.¹⁵⁹ The unused funds at that point were estimated to be R400 000 and it was agreed with USAID that the residual funds multiplied by ten (approximately four million rands) would be reallocated to ELETU for interim use until discussions on the new funding cycle had been finalised.¹⁶⁰ The same document indicated that for 2002/3 an amount of 32 million rands¹⁶¹ had been asked for, and for 2003/4 an amount of 43 million rands¹⁶² had been asked for. The Director General approved the business plan that set out the breakdown of these amounts, had assessed the plan to determine its place in the new USAID funding programme, and requested the Project Manager to approach other donors as well.¹⁶³

However, in the Project Manager’s report tabled at the 17th meeting, it is stated that “no additional finance” had been allocated to the project. Provinces who had indicated that the R100 000 afforded to them was inadequate were informed that they would have to forward a business plan to ELETU, who would then take it up with the Department and potential funders.¹⁶⁴ At the same meeting a letter drafted by Ms Sejosengwe was read to the TMB that indicated that the Act was one of the “unfunded mandates” in the Department. The eighteenth meeting was cancelled due to a “cash flow problem” and no further TMB meetings were called. Presumably ELETU closed down at about the same time (ie towards the end of 2002).

The Equality Review Committee has also been under-funded.¹⁶⁵

¹⁵⁶ Project Manager’s report, distributed at the 13th TMT meeting para 4 and Project Manager’s report distributed at the 14th meeting para 3.5.

¹⁵⁷ Project Manager’s report, distributed at the 13th TMT meeting para 3.

¹⁵⁸ Para 5. The report was dated 12 December 2001.

¹⁵⁹ Para 4.3 of the minutes to the 14th TMB meeting.

¹⁶⁰ Para 3.2 and 3.3 of the Project Manager’s report distributed at the 14th TMT meeting.

¹⁶¹ R20 million of which consisted of proposed expenditure relating to public awareness.

¹⁶² R31 million which consisted of proposed expenditure relating to public awareness.

¹⁶³ Para 3.4 of the Project Manager’s report and para 4.3 of the minutes to the 14th meeting.

¹⁶⁴ Para 3.1 of the Project Manager’s report dated 2002–10–08.

¹⁶⁵ The minutes to the 5th meeting reflects that “it is imperative that the Equality Review Committee brings it to the attention of the Minister that the Committee cannot fulfil its legislative mandate without adequate budgetary support”. At a

continued on next page

6 Deadlines Missed: Bureaucratic Bungling

Another unhappy aspect to the implementation of the requisite training of judges, magistrates and clerks was that deadlines and target dates shifted continuously.

In the letter that invited participants to the first TMT meeting, it is mentioned that the Department of Justice planned to implement the Act by 10 December 2000 and that it was therefore “critical that training commences soon and that there are enough adequately trained people to form a pool for designating those to deliver service in pilot sites . . .”. This letter was dated 14 August 2000, which left approximately 4 months to set up the necessary mechanisms to meet the December deadline. This deadline existed on paper only and at the first TMT meeting the target date for implementation shifted to 21 March 2000. The rationale for the extension at that stage was that judges would only become available for training towards January/February 2001 and the workload of academics in November did not allow for training to take place then.¹⁶⁶

At the second TMT meeting the following time frame was agreed to:¹⁶⁷

Closing date for expression of interest ¹⁶⁸	30 September 2000
Draft policy directives ¹⁶⁹	9 October 2000
Final date for submission of training materials ¹⁷⁰	30 October 2000
Finalisation of policy directives	30 November 2000
Finalisation of training materials	30 November 2000
Trainers Seminar	January 2001

conference arranged by the SAHRC titled “Equality Indaba” from 2004–06–24 to 25, the Deputy Minister of Justice indicated that the future existence of the ERC was under discussion within the Department. In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 2006–10–16 to 19. Accessed at [http://www.pmg.org.za/viewminute .php?id=8330](http://www.pmg.org.za/viewminute.php?id=8330) on 2007–05–15. Pursuant to these hearings, the Justice and Constitutional Development Portfolio Committee met on 2007–05–27 to debate a draft “Equality Review Report” that was drafted after the October 2006 hearings. At this meeting in March 2007, the Chairperson of the committee informed its members that the ERC no longer existed. <http://www.pmg.org.za/viewminute.php?id=8875> (2007–05–15).

¹⁶⁶ Paras 3.6 and 4.9 of the minutes to the 1st TMT meeting.

¹⁶⁷ Judge Zulman expressed concern that this time frame was unrealistic at the third TMT meeting.

¹⁶⁸ The “expression of interest” related to a public announcement by the Department of Justice that it was seeking the assistance of academic institutions to develop training materials and to provide training on the Act.

¹⁶⁹ The “draft policy directives” related to s 31(4) of the Act – as the Act read prior to its amendment in 2002, the Minister of Justice had to issue policy directives *inter alia* relating to the training of Equality Court personnel.

¹⁷⁰ The “training material” related to a “bench book” for judges and magistrates and a “resource manual” for clerks.

Provincial seminar for practitioners	February 2001
Implementation of equality courts	21 March 2001
At the third meeting team members agreed that it was obligatory that the JSC and MC form part of the training and implementation process and that it may therefore become necessary to move dates forward to ensure proper participation by the JSC and MC. The time frame was amended as follows at the third meeting:	
Draft policy directives	9 October 2000
Closing date for expression of interest	10 November 2000
Finalisation of policy directives	30 November 2000
Final date for submission of training materials	30 December 2000
Review of materials	15 January 2001
Submission of materials to JSC, MC	end of January 2001
Trainers Seminar	5–9 February 2001
Fine-tuning of training material	After 9 February 2001
Provincial seminar for practitioners	After 9 February 2001
Implementation of equality courts	21 March 2001

At the fifth TMT meeting the deadline for the submission of training material was extended to 15 January 2001.

By the time that the sixth TMT meeting took place the JSC and heads of court had met and it was agreed that judges would become available for training in April 2001 and training of clerks could proceed during March 2001. The deadline for the submission of the resource manual for training of clerks was extended to 7 March 2001 and the submission date of the bench book for training of judicial officers was extended to 30 March 2001. The sixth meeting was also informed that an implementation date for the Act had not yet been decided but that it would not be later than 16 June 2001.

At the seventh TMT meeting the deadlines for the submission of the bench book and resource manual were extended again, to early April 2001 and 15 April 2001 respectively.

At the eighth meeting copies of the finalised resource manuals were distributed to team members. The deadline for the submission of the bench book was extended to June 2001.¹⁷¹

The minutes to the ninth meeting reflect that a delay was caused in the editing of the bench book when a disk was misplaced at the ELETU offices. The Project Manager indicated that she would provide additional comments to the drafters of the (finalised) resource manual which she had received from the trained clerks. A deadline of 31 July 2001 was set to finalise the resource manual.

¹⁷¹ Para 7 of the minutes to the 8th meeting and para 2 of the Executive Summary Report relating to the Aloe Ridge Seminar for presiding officers, distributed at the 8th meeting.

At the tenth meeting a deadline was set of 27 August 2001 by which date all comments on the bench book had to reach the drafters. The final product had to reach ELETU by 3 September 2001.

At the eleventh meeting it was agreed that final comments relating to the bench book had to reach the drafters by 19 September 2001 and the final product delivered to ELETU by 27 September 2001. The minutes to the same meeting indicate that it was uncertain at that stage when the Act would come into force.

At the fourteenth meeting a document was distributed titled "Schedule of activities & Budget Feb 2002 – Jan 2003" which reflected that all judicial officers, about 200 judges and 1500 magistrates, were to be reached by July 2002 and fully trained by November 2003. Each province was to run at least 4 Equality Court Judicial Education seminars per annum. The schedule also anticipated that "at least every court has a clerk or registrar who has received some basic training on the Act by April 2002 and all clerks and registrars have been introduced to the Act by 31 December 2002". These deadlines were not met.¹⁷²

At the same meeting Judge Zulman asked whether a list existed of people who had attended training sessions. The Project Manager reported that some provinces had provided reports and that a list would be drawn up by her office. At the fifteenth meeting the Project Manager distributed a list of trained magistrates and indicated that a list of trained judges would also be provided. The meeting agreed that Judge Zulman would liaise with heads of court to verify the names of those presiding officers who had been trained.

At the sixteenth meeting a number of participants expressed their unhappiness about the ineffectiveness of ELETU. The Project Manager did not attend the meeting. Judge Zulman found this disturbing. Judge Farlam agreed that there was no reason why she could not attend and that he was not informed that she would not be present. Prof Gutto asked for clarification about other positions she might be occupying and referred to the previous meeting's minutes that referred to the Project Manager's "CRES office". Ms Van Riet said that the previous meeting had also not gone well and that it was important that the project not become derailed. Prof Albertyn wished to know to whom the Project Manager was accountable and that it appeared that there was a total lack of accountability. The meeting resolved that Judge Farlam would speak to the Project Manager and to the Director General.

At the same meeting Mr Mudau, the magistrate who was tasked with arranging the Gauteng training of presiding officers, reported that the procedure set up to deal with the payment of expenses caused tremendous difficulties. Judge Zulman confirmed that Natal and the Eastern Cape experienced the same problems. Prof Gutto said that the procedure set

¹⁷² As at 2006-08-31 this was still not the case. E-mail correspondence with the relevant Justice College trainer, August 2006; and telephone conversations with Judge Farlam during February 2005 and August 2006.

out in the fax sent to the provinces was ambiguous and vague. Prof Albertyn reported that log-jams existed in the system and that ELETU had not dealt efficiently with claims in the past. The team also heard that an insufficient number of bench books had been printed and distributed and that a small number of clerks had been trained. Prof Albertyn noted that these facts indicated that ELETU was not functioning effectively.

The available documentation reflects organisational problems at some of the training seminars:

- At the first national training seminar for judges and magistrates the majority of participants were not satisfied with the organisation of the seminar. Participants were, *inter alia*, concerned about not receiving training materials in advance and the length of presentations at plenary.¹⁷³
- At the second national training seminar for judges and magistrates, the programme and training materials were again not distributed in advance.¹⁷⁴
- At the first national training seminar for clerks, communication and coordination of arrangements for the seminar were less than perfect.¹⁷⁵ Administrative bungling caused a number of previously identified clerks and registrars to miss the first national seminar for clerks and registrars and a shortened training programme that took place from 22–24 October in Durban was devised to accommodate these clerks and registrars. At the seminar it transpired that the clerks were only informed of the seminar on 19 October. The clerks were telephoned directly without involving their heads, which led to some agitation.
- Insufficient numbers of bench books were sometimes distributed at the training seminars and were sometimes put together in a completely disorganised and incorrect order.¹⁷⁶
- Funding for training sessions in Kwazulu-Natal in 2002 ran into difficulties and was resolved at a very late stage.¹⁷⁷ Once again, bench books were not distributed in advance.¹⁷⁸
- The Project Manager's report relating to the "National Symposium for Equality Court Educators" that took place during April 2002 indicates that "planning at short notice led to various administrative hiccups".¹⁷⁹

173 The Project Manager's report relating to the first training seminar, para 4. One of the reasons why the planning was less than perfect was because the tender relating to the seminar was awarded to CALS at a very late stage – summary minute of the TMT executive committee meeting, 2001–05–15, Bloemfontein.

174 Judge Zulman's report relating to the second training seminar paras 3.9 and 3.15.

175 Prof Mbaob's report on the trainers' seminar, distributed at the 10th TMT meeting.

176 Judge Zulman's report to the 17th TMB meeting para 2.

177 *Idem* para 4.

178 Fax from Judge McCall to The Project Manager dated 2002–10–03, distributed as part of Judge Zulman's report to the 17th TMB meeting.

179 Project Manager's Report, para 4.

7 Absent Impact Assessment

Although mentioned in the initial business plan, an impact assessment of the Act was never seriously considered. Paragraph 13.4 of the initial business plan noted that “some impact assessment will be conducted with the training participants and members of the public, within a year of commencement”. The minutes to the fifth meeting of the TMT indicates that Germany at that point had indicated that it wanted to assist the Department of Justice in monitoring the implementation of the Act and that it was willing to assist in the establishment of an information support system. This matter was not raised again at any of the subsequent meetings.

8 An Ill-considered Australian Study Visit

It is difficult to assess the value of a visit undertaken to Australia by a number of TMT members. A report on the visit was never tabled at any of the TMT meetings despite repeated promises. The Project Manager, Judge Zulman, and Professor Gutto presented brief reports on the visit at the fourth TMT meeting.

Judge Zulman thought the visit to have been “interesting” and “valuable”. The team members visited three states (Western Australia, Queensland and New South Wales). Each of the states has their own peculiar institutions in place and a nationwide anti-discrimination statute does not exist. Non-discrimination commissions exist at state and federal level. These are conciliatory bodies and most of the cases are settled with little, if any publicity. Apparently a large number of complaints are brought by minority groups. Should a litigant not be satisfied with the outcome of the commission proceedings, recourse may be had to a tribunal presided over by a judicial officer. The tribunals have a heavy workload, as these bodies also attempt to conciliate cases. Judge Zulman mentioned that the team did not witness a live hearing and he suspected that they were given a “sanitised” version of the system. He thought that the Australians established a good system in theory. As to judicial education, New South Wales take it very seriously and judges at senior level are involved.

Professor Gutto mentioned that the commissions used informal and inexpensive procedures and he hoped that the same approach would be used in the drafting of the regulations to the Act. Limited legal aid is available. At commission and tribunal level the commission in effect becomes the applicant’s lawyer (unless represented), which removes the need for legal aid to some degree.

The Project Manager reported that the Australian system had a number of weaknesses: It used a formal approach to equality; did not recognise systemic discrimination as a cause of action; lacked affirmative action legislation on race and had adopted a fragmentary approach to equality issues. Its strengths included well-resourced courts; a good public education system; and good data collection procedures.

The only lesson learnt from the visit seems to have been to set up accessible and inexpensive enforcement bodies, as reflected in the regulations to the Act. The drafters of the Act had however, already anticipated the use of accessible forums,¹⁸⁰ and many of the bodies and institutions that appeared before the *ad hoc* Parliamentary Committee related to the drafting of the Act argued for an accessible, informal enforcement mechanism.¹⁸¹ The visit to Australia seems to have been a rather costly and wasteful exercise.

180 See ss 4(1)(a), 4(1)(b), 4(1)(c) and 30(1)(a) of the Act.

181 I sourced the following written representations from the files graciously made available to me by Prof Gutto, one of the drafters of the Act. COSATU stated that the enforcement mechanism “must be accessible and understandable to ordinary people”. COSATU supported, in principle, the establishment of equality courts. It suggested that a gradual or incremental approach be followed in implementing the Act and that priority be given to the training of presiding officers. The Human Rights Committee supported the establishment of equality courts. It noted that magistrate’s courts are the most accessible existing forums but not affordable for the majority of people who would want civil claims settled in a court. The committee noted that the Bill empowered the Minister to draft regulations relating to appropriate cases qualifying for legal aid and proposed that the litigant’s socio-economic status be considered as a guideline in drafting the regulations. It also proposed that the regulations be put in place within six months to allow for simple, fair and affordable procedures. The committee also referred to clause 53 in the Bill that suspended the enforcement of the Act pending the designation of presiding officers. The committee proposed that a six-month timeframe be put in place for the designation of presiding officers. As to the possibility of referring matters to more appropriate forums, the committee proposed that the Act must define relevant role-players and that accessibility must be the overarching principle governing the determination of the most appropriate forum. IDASA submitted that tribunals should be utilised instead of courts as they are “speedy, coherent and effective . . . inquisitorial and user-friendly . . . cost-effective . . . accessible and not intimidating”. It also suggested adjudication by a representative jury and in cases of sector-specific discrimination, a jury selected from stakeholders within the relevant sector. The Act should clearly indicate the complaints procedure so that people wanting to enforce their rights will be able to easily access the relevant procedure. It also proposed that the SAHRC be mandated to accept and investigate complaints. It submitted that the Act must incorporate an investigation procedure that provides for *inter alia* the gathering of documents, interviewing of witnesses and obtaining search warrants. The National Coalition for Gay and Lesbian Equality supported the Equality Alliance and its members in the call for “clear, enforceable and accessible enforcement mechanisms”. The South African Council of Churches (SACC) argued that the enforcement mechanisms must be speedy and accessible (physically and financially) to all people and in principle supported the establishment of equality courts. The SACC also appreciated the Human Rights Committee’s concerns and endorsed its submission. The Women’s Legal Centre and the Socio-Economic Rights Project, Community Law Centre (WLC/CLC) argued that the forum of first instance must be accessible to poor and vulnerable groups and suggested that the Act should make the magistrates’ courts the mandatory courts of first instance, unless otherwise agreed between the parties. WLC/CLC also supported the development of new rules of court for the equality courts that would facilitate an inquisitorial approach, flexibility, limited pre-trial procedures, expedited hearings and ease of access for complainants.

9 Foot-dragging in the Development of Training Material

The initial business plan distributed at the first TMT meeting envisaged national co-ordination and provincial implementation of training.¹⁸² Universities would be asked to assist with training.¹⁸³ Selected service providers would undergo intensive training over a one year period, starting with a three week programme.¹⁸⁴ Formal refresher courses would take place annually.¹⁸⁵ The project would have included a train-the-trainer component: This would have entailed attaching presiding officers as understudies to the trainers at the initial training seminar.¹⁸⁶ Centralised development of training material would include the drafting of a resource book to foster a common national approach to the Act.¹⁸⁷ A trainers' seminar would have taken place to have the trainers agree on a common approach to training.¹⁸⁸ The broad objectives of the plan included the existence (therefore the drafting) of a training policy framework to facilitate judicial education and the existence of training resource packs (two loose leaf resource books, one for presiding officers and one for clerks).¹⁸⁹ The key outputs of the programme included the development and tabling of training policy guidelines by 1 February 2001.¹⁹⁰ The plan envisaged national (ie central) materials development and standard setting while the training as such would take place on provincial level.¹⁹¹ The drafters of the plan envisaged that 2000 service providers would be trained in the first year.¹⁹²

At the first TMT meeting it was agreed that a "call for expression of interest" to academic institutions relating to the development of training materials and the provision of training would be reviewed at the second meeting. Mr André Keet from the SAHRC would assist the Department of Justice to prepare a document on training design that would be discussed together with the "call for expression of interest". At the second meeting Mr Keet presented a draft framework on training design. The framework envisaged outcomes-based training material. The framework set out the objectives of the training material as to translate the legislation and its philosophical framework into interactive training and learning materials; to train practitioners on the objectives of the Act, the Act's provisions, the Act's relationship to relevant international obligations and other national legislation and the Act's implications for the daily execution of their duties; and to develop an enhanced operational understanding of equality

182 The business plan para 2.2.

183 *Ibid.*

184 *Idem* para 2.3 (erroneously marked 2.2).

185 *Idem* para 2.3.

186 *Idem* para 2.4.

187 *Idem* para 2.5.

188 *Ibid.*

189 *Idem* para 4.

190 *Idem* para 5.

191 *Idem* para 5.

192 *Ibid.*

and the role of this legislation in facilitating the transition to a democratic society. The framework envisaged interactive peer-group education, using a peer (a judge or magistrate), an “expert” and a “facilitator”. The framework document suggested that the outcomes of the project would be that participants:

- would demonstrate a clear understanding of the Act and its social context;
- would display a sound comprehension of the Act, its role in the South African democracy, and international customary law and international obligations relevant to the Act;
- would exhibit a sound grasp of the notions of equality, diversity, equity, social justice, human dignity and how these notions are linked to the objectives of the Act;
- would be perceptive to the global and national struggle against unfair discrimination; and
- would demonstrate a critical understanding of anti-discrimination, anti-bias and multicultural approach and application to issues of diversity and equality.

The framework also envisaged assessment instruments. The minutes to the second meeting indicate that the training design framework was accepted with minor amendments and agreed that some of its elements would be incorporated into the “call for expression of interest”. The design framework would apparently also have been used to form the basis for evaluating responses to the “call for expression of interest”. At the same meeting the “call for expression of interest” was settled.

At the second meeting it was agreed that the Department of Justice would develop terms of reference for the national and provincial structures to clarify roles, particularly with regard to policy development and implementation. The minutes to the second meeting indicates that one of the issues that needed to be clarified was who would appoint or accredit trainers. This never happened – the provinces were allowed to appoint their own training panels. At the same meeting it was agreed that people trained in other courses (for example a Master’s degree in Equality Law) could be deemed to have been trained in accordance with the provisions of the Act, provided that the training was accredited. The team agreed that international and local judicial officers would be involved in the training and that university lecturers in law, sociology, psychology and other relevant fields would be involved to the extent of their strengths. To my knowledge, university lecturers in law were involved in the training but lecturers in other fields were not asked to assist either in the national or provincial seminars.

At the same meeting the TMT agreed that Judge Zulman and Professor Gutto would draft policy directives relating to training, as envisaged in the Act, which would be tabled at the third meeting.

At the third meeting the “draft policy directives on training of equality court presiding officers, court clerks and auxiliary personnel” were tabled. The directives *inter alia* provided that:

...

4. Operational strategy for training potential equality courts' presiding officers and clerks

1. By the end of January 2001, a core of dedicated volunteer judges drawn from the Constitutional Court, Supreme Court of Appeal and the High Courts, some senior magistrates and legal academics and practitioners with appropriate expertise and seniority would have been trained **as trainers** for the Equality Courts' presiding officers, clerks and auxiliary personnel, especially assessors and interpreters.
2. In February 2001, training of a core of judges, magistrates, clerks and some auxiliary staff, selected through a consultative process . . . would be accomplished in time for the designation of presiding officers and court clerks by 21 March 2001.
3. Thereafter, all the sitting magistrates and judges, as well as court clerks and other auxiliary personnel will be encouraged to participate in the training programmes that will be undertaken on regional basis under a central co-ordination unit.
4. Equality courts will be established in all courts presided over by judges and magistrates who have participated in the training programme.

5. Composition of training teams and the development and content of training courses

1. To ensure the development of uniform norms, standards and procedures in the equality courts, the basic substantive and procedural aspects of the training programme shall be the same.
2. The composition of the training teams shall include trained judges or magistrates, as the case may be, and trained legal academics and other experts from the profession and civil society.
3. The basic substantive and procedural aspects of the training programme shall include the following:
 - 3.1 the broader historical and social context, with particular reference to the policy, laws and practices of *apartheid* and the introduction of *constitutional democracy*;
 - 3.2 the meaning of equality as expressed in section 9 of the Constitution with reference to local, international and comparative jurisprudence;
 - 3.3 South Africa's international obligations under international law, especially under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination against Women;
 - 3.4 the structure and content of the Equality Act, including aspects of promotion of equality;
 - 3.5 the Bill of Rights set forth in chapter 2 of the Constitution;
 - 3.6 the role of the equality courts, including the determination of fairness and unfairness of a discriminatory act or omission, listed and unlisted grounds, the significance of section 29 and the Schedule to the Act, procedural requirements, representation of complainants, referrals, appeals, orders and remedies;

- 3.7 understanding diversity awareness and consciousness, especially with regard to differentiation based on class, race, gender and disability in the South African legal and social context.

Various TMT members suggested changes to the draft directive.¹⁹³

At the same meeting the TMT was informed that the internet-advertised “call for expression of interest” received a very poor response, only the University of Cape Town based Race and Gender Unit had responded. The TMT was informed that the advertisement would appear in the Mail & Guardian newspaper as well. The minutes to the fourth meeting indicate that six responses to the advertisement were received. However, the State Tender Board had advised that a “call for expression of interest” was not sufficient and that a formal tender process should have been followed. To solve this problem, the Director General was asked to issue a certificate of urgency relating to the drafting of the training material. New advertisements would be published relating to the provision of training.

Prof Gutto tabled an amended draft policy directive on training at the fourth meeting. Team members suggested a number of changes. It was also agreed that the Minister would discuss the final wording of the directive with the JSC and MC.

Somewhat amended policy directives were again tabled at the fifth meeting.¹⁹⁴

193 I list a few of these suggested amendments, as reflected on page 3 of the minutes to the meeting: The directive should make it clear that the training process envisages the dissemination of expert knowledge and that the Act is based on the understanding that a specialist approach be followed in applying the Act; the long title and preamble to the Act could be used in this regard; it must be made clear in the directive that new and unique courts are being set up and that the training is aimed at equipping judicial officers to effectively deal with the Act; mention could be made in the purpose statement of the directive of the need to prepare standardised training material; para 4.1 and para 5.2 of the draft directive needs to be reconciled in that the composition of the training teams is described differently in these two paragraphs; para 4.1 should not mention assessors as the team is still discussing if and how assessors should be trained. (Para 4.1 should simply mention that “auxiliary personnel” will be trained.); paras 4 and 5 blur the three stage training process (development of materials, train the trainers, trainers train the groups) and should be clarified; the time frames in para 4 should be adapted to read “by 15 February 2001” in para 4.1 and “by 21 March 2001” in para 4.2; reference could be made to an annual trainer’s seminar; the sequencing of the training programme as set out in para 5.3 needs to be fine-tuned; the document should be described as a “preliminary draft”; it should be made very clear that the Minister and the Department of Justice are not married to the document and that it will serve as a mere starting point in the consultative process with the JSC and MC.

194 “ . . . 4. Operational strategy for training potential Equality Court presiding officers and clerks. A three stage education and training process is envisaged, namely, the development of appropriate training and resource materials, the training of trainers and the training of groups by the trainers. 1. By 15 February 2001, ~~By the end of January 2001~~ a core of dedicated volunteer judicial officers, ~~judges drawn from the Constitutional Court, Supreme Court of Appeal and the High Courts, some senior magistrates~~ legal academics and practitioners with appropriate expertise and seniority would have been trained as trainers for the Equality Court presiding

continued on next page

It was resolved that the draft policy directives would serve as the basis for the development of the training material. At that point the Minister had not yet taken up the wording of the policy directives with the JSC or MC. The meeting was informed that a committee consisting of members of the Department, the judiciary and magistracy had decided that judicial training material would be developed by the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand in cooperation with the Centre for Human Rights at the University of Pretoria while the training material and curriculum¹⁹⁵ for the training of clerks would be drafted by Justice College, Professor Frans Viljoen and Anton Kok from the University of Pretoria.

At the sixth meeting it was decided that the Project Manager and Mr Keet would modify the training design document and that the document would be used to evaluate the training material, the structuring of the training seminars and to evaluate tenders for training delivery. The meeting was informed that the JSC and heads of court had met to discuss the draft

officers, clerks and auxiliary personnel, especially assessors and interpreters. 2. By 21 March 2001, ~~in February 2001~~ training of a core of judges, magistrates, clerks and some auxiliary staff, selected through a consultative process . . . will be accomplished in time for the designation of presiding officers and court clerks ~~by 21 March 2001~~. 3. Thereafter, all the sitting magistrates and judges, as well as court clerks and other auxiliary personnel will be encouraged to participate in the training programmes that will be undertaken on a regional basis under a central co-ordination unit. 4. Equality courts will be established in all courts presided over by judges and magistrates who have participated in the training programme. It is anticipated that an annual trainers' seminar will be held. 5. Composition of training teams and the development and content of training courses. 1. To ensure the development of uniform norms, standards and procedures in the equality courts, the basic substantive and procedural aspects of the training programme shall be the same. 2. The composition of the training teams shall include the persons referred to in paragraph 4.1 hereof, trained judges or magistrates, as the case may be, and trained legal academics and other experts from the profession and civil society. 3. The basic substantive and procedural aspects of the training programme shall include the following: 3.1 understanding diversity awareness and consciousness, especially with regard to differentiation based on class, race, gender and disability in the South African legal and social context; 3.2 the Bill of Rights as set forth in Chapter 2 of the Constitution; 3.3 the meaning of equality as expressed in s 9 of the Constitution with reference to local, international and comparative jurisprudence; 3.4 South Africa's international obligations under international law, especially under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination against Women; 3.5 the structure and content of the Equality Act, including aspects of promotion of equality; 3.6 the role of the equality courts, including the determination of fairness and unfairness of a discriminatory act or omission, listed and unlisted grounds, the significance of s 29 and the Schedule to the Act, procedural requirements, representation of complainants, referrals, appeals, orders and remedies; 3.7 the broader historical and social context, with particular reference to the policy, laws and practices of *apartheid* and the introduction of constitutional democracy; 3.8 other relevant skills."

195 The curriculum for the training of presiding officers was drafted by two Australian experts who were commissioned by the Department. The TMT suggested certain changes to this draft curriculum at the 5th TMT meeting.

policy directives. The Chairperson of the JSC thought that aspects of the directives were unconstitutional and the status of the directives had therefore become unclear. (The original intention was that a number of these directives would be published in the *Government Gazette*.¹⁹⁶ To date not a single “directive” has been published.)

The TMT agreed that technical teams had to be established that would review the content of the bench book and resource manual. The technical teams would use the curriculum, policy guidelines, previous policy “directives”, and a training design document to evaluate the two texts.

The TMT was informed that the Department had issued a tender relating to the provision of training and that the closing date for tenders was 19 February 2001. The tender document envisaged an initial six day trainers’ seminar to be attended by twenty to thirty people which would include presentation techniques and adult training skills, a subsequent education programme for judicial officers of five to eight days and a further series of half day seminars over a six month period thereafter. A similar process was envisaged for clerks and registrars.

The minutes to the sixth meeting indicate that “some difficulty” arose between the Department and CALS as to the format and process of training of judges and magistrates.¹⁹⁷ As to the curriculum of the bench book, the sixth TMT meeting was informed that the Department made certain changes to the curriculum pursuant to the previous meeting’s suggestions. CALS and the Project Manager would meet to discuss further changes to the curriculum. The JSC accepted that the judges and magistrates on the TMT would monitor the curriculum and did not wish to approve the curriculum. At the seventh meeting the Project Manager reported that she had met with CALS and that they had agreed on a few minor changes.

As to the curriculum of the resource manual, Professor Viljoen distributed a suggested draft curriculum to the TMT members at the sixth meeting and requested that suggested changes and improvements be sent to him. At the seventh meeting it was reported that a technical team had

¹⁹⁶ Prior to its amendment s 31(4) of the Act read that “[T]he Minister must, after consultation with the Magistrates Commission and the Judicial Service Commission, issue policy directives and develop training courses with a view to— (a) establishing uniform norms, standards and procedures to be observed by presiding officers and clerks in the performance of their functions and duties and in the exercise of their powers; and (b) building a dedicated and experienced pool of trained and specialised presiding officers and clerks.”. Act 52 of 2002 amended s 31(4) and it now reads that “[T]he Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses with a view to building a dedicated and experienced pool of trained and specialised presiding officers, for purposes of presiding in court proceedings as contemplated in this Act, by providing – (a) social context training for presiding officers; and (b) uniform norms, standards and procedures to be observed by presiding officers in the performance of their functions and duties and in the exercise of their powers.”.

¹⁹⁷ CALS was tasked to coordinate the first training seminar for judges and magistrates.

met on 22 March 2001 to discuss the resource manual. The manual was emailed to the technical team on 20 March with the intention that the manual be read on the public holiday. At the meeting it became clear that most members of the technical team either did not receive the emailed version or had not read it. It was then agreed that comments would be emailed to me by 30 March 2001. The technical team met again on 11 April 2001 to discuss the edited version of the manual. The Project Manager and team members sent a few comments to me via email during the next few months. The manual was eventually finalised during November 2001, although older versions of the manual were utilised during 2001 training seminars.

10 Conclusion

In this second part of the article, I discussed a number of troublesome aspects relating to the training project undertaken by the Department of Justice. I illustrated that the initial business plan was unrealistic, that the oversight body set up in terms of the project was ineffective or that unclear lines of accountability were established, that too much sensitivity was displayed towards the judiciary when deadlines were set or training seminars arranged, that an impact assessment of the project was never undertaken, that public funds were unnecessarily spent on a study visit to Australia, and that many delays were experienced in the drafting of training materials. In part 3 I will illustrate that the training seminars arranged for clerks, magistrates and judges were inadequate.¹⁹⁸

¹⁹⁸ Parts 3 and 4 will appear in the next issue of *De Jure*.