Gauteng workshops on legislative drafting

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DRAFT EVALUATION OF THE GAUTENG WORKSHOP ON
LEGISLATIVE DRAFTING
July 9-25, 1997

This evaluation reviews the experience of the sequential July 9-25 Gauteng legislative drafting workshops. Based on that evaluation, it discusses the next steps in producing transformatory legislation for the Province and, in the process, strengthening Provincial drafting capacity.

Workshop's aim: The Gauteng legislative drafting workshops aimed to attain three goals:

(1) To begin the process of drafting three priority transformatory bills, accompanied by adequate research reports;
(2) to use that occasion to build the capacity of Gauteng drafters to design and draft transformatory bills and structured research reports which justified those bills; and
(3) as the basis for developing an institutionalized process for designing and drafting transformatory legislation that Gauteng requires, to give leading Gauteng policy makers a sufficient knowledge of legislative theory and methodology for drafting bills required to translate policy into the effectively implementable legislation.

Workshops' structure: The first workshop lasted only three days. It sought to acquaint leading Gauteng policy makers and some 12 drafters with the problems involved in translating policy's broad precepts into effectively implementable legislation that actually produces the results that policy proclaims, and with a legislative theory and methodology to guide that process. It focused on designing bills addressed to three important social problems
confronting the Province: (1) The new local authority councils' seeming inability to supply sufficient municipal services equitably to their new constituencies (the Council Accountability Bill); (2) the inherited departmental structures' apparent failure to maximize the utilization of available human resources, especially those historically disadvantaged, to meet all communities' basic needs (the Human Resources Bill); and (3) in enacting subordinate legislation,\(^1\) Provincial departments exercised broad legislative authority without procedural guidelines likely to make probable rational decision-making, and without parliamentary review (the Subordinate Legislation Bill).

In the second two week workshop, the drafters worked in teams\(^2\) to prepare drafts of the three bills, accompanied by carefully-structured research reports. In the process, they deepened their knowledge of legislative theory and methodology. Preparation of the research reports both ensured that the drafters had grounded their bills in reason informed by experience, and provided the information the legislators would require adequately to assess those bills.

Because -- unexpectedly -- almost all the drafters had participated in the first three day workshop, it became necessary to restructure the initially proposed outline for the subsequent

\(^1\) Regulations drafted by departments for carrying out the policies that Parliament had voted into specific laws.

\(^2\) See Appendix I for the names and departments of the drafting team members.
two week workshop\textsuperscript{3} to give the participants a greater opportunity to write more complete first drafts of their research reports and bills. During the last two days of the second workshop, all the drafting teams' members met together for a systematically structured critique of each others' draft bills and reports. The teams agreed to continue their work together after the end of the workshop, taking the other participants' comments and suggestions into account to write more complete drafts. They also agreed to participate and submit their bills and reports for further critique in the context of a forthcoming one-day workshop (8th August) that aimed to build Gauteng Provincial legislators' capacity to assess legislation by exposing them to legislative theory and methodology.

**Evaluation of the workshop:** The drafters who took part in the ten day workshop participated in two forms of evaluation. First, they filled out a brief written evaluation form provided by Jennifer Pelzman of the National Democratic Institute;\textsuperscript{4} and, second, each

\textsuperscript{3} See Appendix II, The Gauteng Legislative Drafting Workshop Schedule.

\textsuperscript{4} Of the various tasks involved in organizing the workshop, freeing up the required amounts of officials' time to participate inevitably became one of the most difficult. Ms. Pelzman pulled the labouring oar in performing that task. In addition, she saw to all the indispensable administrative tasks that made the workshops possible. She made all the arrangements to hold the workshop in the USIS premises; ensured the provision of very good lunches, as well as coffee, tea and cookies; and uncomplainingly xeroxed copies of background materials and repeated drafts of the teams' bills and reports without which the sessions could hardly have functioned. For making the workshops work, we owe her unbounded gratitude.
participant individually commented on the good and bad aspects of the workshops as a basis for a general discussion of ways to improve the learning process. On this basis, they made recommendations for possible ways to institutionalize it.

Participants' written assessments: Written evaluations reflected participants overall enthusiasm about the course and their satisfaction with its results. The drafters clearly welcomed learning an organized, strategic approach to their task:

"When I came here...I had little idea about how to go about drafting...it was indeed, great."

"Extremely helpful in increasing my awareness of inarticulated work methods, and helping to substitute bad habits with better methods."

"It is an eye opener and mind broadner, especially to people like me who have just joined the civil service, it is very beneficial."

Ninety three percent of participants reported that the course "greatly increased" both their understanding of and capacity to draft legislation. All participants were impressed with the Seidmans' methodology - described by one as "a major breakthrough into a new and different way of looking at law and its role in society" - and particularly excited by its emphasis on detailed analysis of social behavior; the identification of the major role players; and, comprehensive research. However, 71 percent of the participants described themselves as only "somewhat confident" (as opposed to "very") that they will be able to use independently the strategies and procedures learned at the workshop. This response is clearly linked to the most frequent criticisms of the workshop;
first, that the program should have lasted longer, and; second, that participants should have received the topic, background information and research materials for the bills assigned to the workshop in advance. Participants wrote that too much workshop time was spent coming to grips with the policy issue and locating and reading research materials which they could have pursued independently, devoting the time spent with the Seidmans to developing their mastery of the legislative drafting methodology.

However, all of the participants would unconditionally recommend the course to their colleagues, and all are willing to provide any assistance to an initiative to institutionalize the legislative drafting procedures learned at the workshops.

Participants' oral assessments: In responding to a request for at least one positive and one negative comment on the workshop, not all participants agreed in their assessments. The following summary includes the main points made by the individual participants:

Negative aspects:

*The participants did not receive enough background materials -- departmental white papers, relevant statistics, reports, etc. -- they required to write research reports adequate to justify their proposed bills.

*The workshop provided insufficient time for preparing the draft research reports and bills; a month would have been more appropriate.

*One participant suggested that the Seidmans should have lectured at more length before the participants began their own work.
Another participant said that the Seidmans did not always agree with each other which seemed confusing.

The policy makers should have stayed for the full workshop in order better to understand the problems of translating their policies into effectively implementable legislation.

Positive aspects:

In the past, Gauteng drafters too often copied bills from elsewhere so they did not fit Gauteng circumstances; the workshop's methodology provides a guide for addressing the Province's real problems.

Unlike practically all past training for Gauteng drafters -- typically focused on legislative techniques -- this workshop helped participants understand how to use law as an instrument for transforming inherited institutions to meet Gauteng citizens' needs.

Before the workshop, participants did not know where to start in drafting transformatory legislation; the problem-solving methodology enabled them to structure the available knowledge in order to overcome that difficulty.

The teaching style -- involving the participants in a learning-by-doing process of actually drafting bills and research reports -- helped the participants to understand better how to use legislative theory and methodology.

That the Seidmans did not always agree with each other on detailed aspects of group's reports and bills put the onus on the participants to make their own decisions about those details in light of logic and facts.

Implications for institutionalization of the learning process:

Drafters, who are just beginning to work for the Province, should attend similar workshops to learn the legislative theory, methodology and techniques so they can begin to work productively.

Provincial universities should include a drafting course to enable final year law students to learn the theory, methodology and techniques while actually producing needed subsidiary legislation and council-level bills.

The learning process' 'target group' should include legal counsellors to local governments.
Existing educational institutions that teach courses in legal drafting focuses too much on technical aspects; they should incorporate legislative theory and methodology to help drafters design and to justify transformatory bills.

Need attention to many additional issues that came up at the workshop, including the relationship between the Legal Services Director and the Departments; whether Departments have adequate libraries; the potential use of internet; data bases; links with research institutes and universities.

Our own evaluation and the implications for institutionalizing the learning process:

Building on the discussion with the participants, we make the following observations. First, the organizers deserve congratulations on the overall arrangements for the workshop. In particular, the preliminary luncheon and the first three days with policy-makers and drafters seemed likely to prove useful in helping ensure that the Provincial leadership understood and assumed 'ownership' of the learning process. Experience elsewhere has shown that their 'ownership' will likely determine the long-run success in institutionalizing it.

Secondly, the participating drafters seemed to take their tasks seriously, regularly attending and working on their bills and research reports. This reflects, in part, the Provincial leadership's recognition of the workshop's importance, as well as the organizers' efforts to ensure that it proceeded smoothly. Representatives from each of the three drafting teams' have undertaken to help prepare a memorandum to Cabinet requesting

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5 As they engaged in discussions and individuals undertook to write up parts of their reports and bills, they gave up their coffee breaks.

6 Again, many thanks to Ms. Pelsman!
authorization to complete their drafts. That seems a reasonable strategy for ensuring that they will continue working together to complete the three priority bills and accompanying research reports. If successful, that output should help to strengthen the leadership's awareness of the importance of institutionalizing a process to facilitate the enactment of priority, transformatory legislation.

Third, the workshop demonstrated the necessity for transforming the drafting process, itself. As in most countries, line departments prepare detailed drafting instructions, sometimes even a 'layperson's draft' bill. All but invariably, their authors have qualification in the substantive subject-matter, not in how to use legislation to resolve social problems. The line department forwards the instructions to the central drafting office (in Gauteng, the Legal Services Directorate). The expertise of drafters in that office, however, mainly centers on legislative techniques (mainly linguistic), not in transforming the departments' stated policies into legislation likely to overcome the perceived social problems. As a result, most legislation proposed to address deep-seated social problems rarely ever gets drafted, let alone effectively implemented. This underscores the importance of a process in which both substantive and legal experts collaborate together in designing transformatory laws.

Fourth, the workshop experience underscores the advantages, as quickly as possible, of providing personal computers for
Provincial drafters. The two teams with access to computers had a real advantage over the one that did not in preparing more finished drafts more quickly. The marginal benefits of providing computers far outweigh the costs (especially taking into account the reduced costs of secretarial staff, and the probability that a donor agency might foot the bill.)

Fifth, establishment and coordination of departmental libraries should help make available the essential background materials as to the nature, causes and policy options relating to the social problems which bills must address. A Provincial computerized database on the existing laws and subsidiary legislation would facilitate the drafters' essential review of existing rules as a necessary basis for formulating the revised measures required for institutional change. Over time, the computer database should incorporate the results of all relevant studies, not only from departments, but also research institutes and universities. As soon as possible, too, drafters should be hooked into internet to give them quick access to foreign law and experience.

Sixth, the drafters' own realization that they did not fully understand the relationships between the national, provincial and local government structures suggests the necessity, as soon as possible, of focusing attention on reviewing and up-dating the rules governing those relationships.

Seventh, the workshop experience underscored the importance of institutionalizing the learning process at all levels.
Occasional workshops, run by foreign consultants, cannot meet the Province's need for transformatory legislation (including subordinate legislation) to transform all aspects of inherited institutions to meet the needs of the people of Gauteng. Training a core of Gauteng personnel, both in the Legal Services Directorate and the Departments, to provide leadership in training drafters in the course of preparing essential legislation would go a long way to ensuring the institutionalization of the kind of in-service, on-going learning process needed at all levels of the Gauteng government.

They could undertake the following tasks:

* Work with departmental (and, when appropriate, interdepartmental) drafting teams to prepare essential bills and research reports on an on-going basis, and, in the process, to strengthen the team members' grasp of legislative theory, methodology, and drafting techniques.

* Ensure coordination of Gauteng legislation to create a strong provincial legal framework to foster a continually developing rule of law.

* Work with Gauteng universities to establish drafting courses that equipped graduating law students with essential legislative theory and techniques while drafting needed subsidiary legislation and council bills, accompanied by adequate research reports.

* Work with universities and research institutes to develop the kinds of research needed to prepare research reports and bills grounded in the relevant realities of Gauteng, and, once those bills become enacted into law, to evaluate their social impact in transforming the lives of Gauteng citizens.

APPENDIX I: Names and posts of drafting team members

Team on Subsidiary Legislation

Chair: Veli Hlophe (Sports Promotion Office, phone 355-2633)
Muzi Sakhathane, (Deputy Director, Stratric Unit, Premiere's
A.B. Mbele (Development, Legal Administration, phone 355-5000)
Peter Maake (Housing and Land Affairs, Legal Advisor, 355-4018)
Venitia Govender (Police Security, Legal Advisor)

Team on Council Accountability Bill
Chair: Shirley Meso (Legal Services, Legal Administration Officer, phone: 355-6281)
Cyril Monyele (Deputy Sport Recreation Ac, Youth Coordinator, phone: 355-508)
B.J. Ralekhetho (Legal Services, Senior Administrative Officer, phone: 355-508)
Geert Kuit (Legal Services, Legal Administration Officer, phone: 355-508)

Team on Human Resources in Local Authorities
Chair: Christa Roodt (Legal Services Director, State Law Advisor, phone: 355-508)
Dorothy knonyana (Legal Services, Legal Administration Officer, phone: 355-627)
Anna Smit (Legal Services, Legal Administration Officer, phone: 355-2588)
Thomas Muthole (Sports & Recreation, Deputy Director, phone: 355-2588)

APPENDIX II:
GAUTENG WORKSHOP ON DRAFTING TRANSFORMATORY LEGISLATION,
July 14-25
WORK SCHEDULE
WEEK I

Monday

AM: Plenary: Review (see "Not a treasure chest, a tool box")

PM: Small groups:

1. How does the problem area your bill aims to solve fit into Model 1? How might your bill's problem area affect the tendency for a bureaucratic bourgeoisie to grow?

2. Prepare a detailed description of the "difficulty" section of the research report for your bill. Fill in the blanks concerning the Difficulty in the outline for a bill included in the Workbook, p. 1) Assess your outline: Do you think the description of whose and what behavior constitutes the difficulty is valid and sufficient? Do the facts prove the research report's assertions? Can you think of other facts that might disprove it? Where you do not know the facts, put down your best guess about what they are, to serve as
a guide to future research. (Your research report will remain incomplete until it provides the facts to prove the probable validity of your 'guess' about whose and what behavior constitutes the difficulty addressed; and -- in subsequent sections -- your explanatory hypotheses, and your social cost-benefit assessments.)

Tuesday:

AMPenry: Discuss the form of research report (Outline, pp. 23-25)

Small groups:

1. Write a 'table of contents' paragraph for your research report, following the problem-solving agenda.

2. Write a mini-conclusion for the explanations section of the research report.

3. What form of citation should your report use?

4. Each member of the small group should write one of the following:
   a. The Introduction to the research report;
   b. the statement of the social difficulty the bill aims to address;
   c. the statement describing each of the role occupants and their behaviors that constitute the social difficulty.

PM. Small Groups:

1. For your bill, insofar as you now can, for each role occupant, complete the outline of your research report in terms of Exercise 2, Workbook, p. 2, relating to explanations and the use of the ROCCIPI agenda. Where you do not have enough facts to prove a causal hypothesis, list it and indicate the additional facts, that, if time and resources allow, you must obtain to test it.

2. Include what you now know about or have heard about foreign law and experience.
indicate points at which you think you probably should do more reading about it. Can you think of areas of foreign law and experience about which you should know more, or questions you would like to ask foreign experts on the subject?
Wednesday:

**AMP&i**enary: Discuss sources of facts to falsify your hypotheses ('educated guesses'); and how to assess the social science techniques which might be used to gather them.

**Small groups**: Select three explanatory hypotheses in your draft research report, and identify the sorts of facts you need to falsify them. How might you best gather them (see Workbook, pp. 1-4).

**PMSmall Groups**: Each group member (or two members working together) should write the 'explanations' section of the research report for one of the role occupants identified.

Thursday:

**AM**: **Plenary**: Discuss strategic choices drafters must make in deciding on proposals for solutions (ie measures to include in a bill; Outline, p. 30)

**Small groups**: (Workbook, Task #4, p. 7)

1. What major social problems will you address in your bill? Should the proposed bill address all those problems? 'Which should it include? Which should it exclude?

2. Tentatively decide if you plan to draft mainly a transitive or an intransitive bill, and outline the reasons you plan to include in the research report. Write the section of the research report to adequately justify your recommendations in this respect.

**Plenary**: By now you will already have begun thinking about what your bill will likely contain. In accordance with the principle of researching, writing the research report, and drafting the bill simultaneously, discuss how to draft the bill. Begin with the bill's basic outline (see Manual on Drafting Techniques, Part V).

**Small groups**: Outline the Parts, Chapters and sections of your bill, as you presently conceive it, being sure to think through the logic of the way you grouped and ordered them (Workbook, p.32).

**PMPlenary**: Neva Makgetla, Deputy Director-General, Public Service Department: Analysis of problems of developing
human resources in the national public service, and
state of existing research relating to relevant facts.

Friday

AMPlenary: Choosing your bill's detailed measures (see
outline).

Small groups:

Solutions", Workbook, p. 7.

2. Assign someone to write up the part of the
"Solutions" section of the research report
concerning alternative solutions.

PM Plenary: Discuss how to weigh social costs and benefits
in research report (Outline, pp. 29-31).

Small groups:

1. Prepare social cost-benefit analysis of the bill's
proposed measures for the research report (Workbook,
Tasks #6 (p. 8) and 7 (p. 10).

2. Participants critique portions of draft research reports
already written.

WEEK II

Monday: AMPlenary: Discuss conformity inducing measures and
implementation agencies (Outline, p. 34-5; Techniques Manual).

Small groups:

1. Outline the section of your research report concerning
conformity-inducing measures (Workbook, Task #8, p.
10). Show how each measure you propose seems logically
likely to help change or eliminate causes of undesired
behaviors.

2. Outline the section of your research report concerning the
proposed implementing agency (Workbook, Task #9, pp 10-
11; see Manual, Part V, p. 52): (a) Will implementation
take place through a dispute settlement agency (a
courts or a tribunal)? the bureaucracy? a government
corporation? (b) Will the proposed implementing agency
be proactive or reactive? Explain reasons for your
decisions.
3. Outline section of research report concerning the points at which your bill will grant officials discretion (Workbook, Task #5, p. 8).

PM Plenary: Discuss how to draft the bills (Outline, pp. 39-40; see also Techniques.

Small groups: Draft the title, a preamble and a general principles section for your bill.

Tuesday:

AMP Plenary: Discuss drafting critical sections of bill: focus on who and what (Outline pp. 41-2)

Small groups: Draft one or more provisions of your bill that instructs one set of primary role occupants how to behave, or empowers them to behave in specific ways (Workbook, p. 32).

PM Plenary: Discuss drafting section on implementing agency (Outline, p. 42).

Small groups: Each group member draft parts of provisions relating to the proposed implementing agency and monitoring procedures: Following the check list that you earlier used for your research report (Workbook, pp. 11 ff), draft the part of your bill setting up an implementing agency.

Wednesday

AMP Plenary: Discuss monitoring procedures (Outline, p. 42).

Small groups: Draft bill's provisions dealing with supervision and evaluation of your bill, and write the section of your research report giving the reasons for choosing these provisions (Workbook, p. 32).

PM Plenary: Discuss amendments, transitional provisions, insertions and additions (Outline, p. 45)

Small groups: Each group participant write provisions for the group's bill relating to amendments, transitional provisions.

Xeroxed draft bills and draft research reports provided to all participants in preparation for critique sessions on Thursday and Friday. Each member of two groups not presenting their reports will take assignments to critique specific aspects of the bill presented.
Thursday:

AMPlenary: Discuss use of critique sessions as a way of ensuring adequacy of draft bills and research reports.

Presentation of Group #1's draft bill and research report; systematic critique by other groups' members.

PM Plenary: Presentation of Group #2's draft bill and research report; systematic critique by other groups' members.

Friday:

AMPlenary: Presentation of Group #3's draft bill and research report; systematic critique by other groups' members.

PMPlenary: Evaluation of workshop.

1. Every workshop participant will comment on at least one good aspect of workshop, and make at least one suggestion for improving future workshops.

2. Workshop participants will discuss what measures they might introduce in their departments to continue to strengthen drafting capacity in the course of drafting real bills and research reports.