DEBATING THE LRA

Jumping the gun:

problems in the drafting of the new LRA

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Over the last decade the shortcomings of the Labour Relations Act (LRA) have become ever more obvious, but its reform has so far proved impossible. Though it spent years on the task, the National Manpower Commission (NMC) could achieve nothing. Capital and labour were forever at odds on the issue, and the imposition of a solution on them from above (never desirable, but sometimes justifiable) was impossible in a climate in which the government, seeing out its days in office, possessed neither political will nor legitimacy.

As the wrangling continued, the pressure for change mounted, and by the time the new government took power, action was imperative. So much was clear to the new minister, Tito Mboweni. Initially he toyed with the idea of establishing another commission of enquiry (a 'Wiehahn Mark 11' he termed it), but then, hustled into action by several highly publicised strikes, he by-passed this important stage and appointed a committee of lawyers to produce a draft Bill.

At the time we expressed our concern about this decision. In an editorial in *Employment Law*, we asked whether it was wise to begin drafting before matters of principle and policy were settled. To define the problems, which were far from obvious, and fashion their solutions, which would inevitably be complex, required more than just technical expertise; thorough, open and transparent consultation was needed so that the widest range of views, standpoints, ideas and information could be canvassed. By no means all of the information to be gathered was in the nature of opinions; data concerning human and financial resources should be compiled, collated and assessed so that proper projections and feasibility studies could be drawn up. What the government was envisaging was little short of a revolution in labour relations; to entrust the task to a technical committee of lawyers was to invite disaster.

To his committee the minister, emulating Noah, appointed two people with a management perspective, two with a labour perspective, two with an institutional perspective and so on. He spared no effort to ensure that the committee had the requisite gender and racial balance. By these means he hoped that his group would be both representative and multi-faceted, but in this he was naive.

Comprising only lawyers, the committee lacked the participation of other experts, such as economists, dispute systems specialists, industrial psychologists and sociologists; being nominated, committee members spoke for no one, accounted to no one and, operating in secret, were scrutinisable by no one.

Broadening the base

Sensibly, the committee made great efforts to broaden its base. International labour lawyers were retained to advise on policy,

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local lawyers were consulted on matters of detail, and the views of key figures on both sides of the industrial relations divide were frequently canvassed. But the deficiencies in process were too fundamental to be remedied by such makeshift expedients.

Warm reception

Eager for results, the minister set a first deadline calculated in weeks rather than months. It proved impossible to keep and had to be extended several times. When the Bill eventually emerged — in January this year, five months after the process began — people felt it had been worth waiting for. Promising greater workplace co-operation, extensive organisational rights, streamlined dispute resolution, it seemed to have something for everybody. The press were explicit in their praise, management was cautiously approving, and the unions, traditionally suspicious of such measures, kept the sort of silence that seemed to suggest assent.

Sober assessment

For this warmth of reception the Bill's explanatory memorandum must take the credit. Vigorously argued and eloquently written, it makes an extremely plausible case. But in the intervening months people have turned their attention to the Bill itself, and their enthusiasm has waned. Recent reports indicate that COSATU rejects key elements of the Bill (including workplace forums and the much trumpeted but actually illusory omission of a duty to bargain). Employers, for their part, are said to be concerned about the ambit of the strike protections and the feasibility of the dispute resolution systems. Judges, it is rumoured, reject the structure of the labour court, believing that it will compromise their Supreme Court status. Lawyers are unhappy at their exclusion from large parts of the dispute-resolution processes, which will have an impact on their pockets.

Part of this dissent and hostility was inevitable. Changes to labour relations legislation affect interests that are diverse and deeply entrenched. They have a direct impact on people's earnings and the disposition of power between collectivities. Those whom changes affect adversely are bound to complain angrily. But much of the current dissatisfaction would have been avoided if the process had been correct. As South Africans we have learnt, by bitter experience, how important process is. We should be the last people to treat it so cavalierly on a matter that is so important.

A flawed result

Out of a process so narrow, unrepresentative, secretive and opaque was bound to come a product that bore those selfsame characteristics. So it has proved. For example:

- Influenced by foreign experts, the drafters based their system of workplace forums on the model — the German one — that is only partially corporatist and (originating as it does in the last century) now rather antiquated. In the process they seem to have overlooked — or at any rate downplayed — the comprehensive corporatist structures that are being developed indigenously in such institutions as Volkswagen and Rand Water.
- Though professing to want stronger central bargaining, they created a system of bargaining forums that is actually less centralised than the current system. In the past an agreement could be extended to non-parties if it had the support of a majority of those it covered, under the Bill it can be extended only if it has the support of the majority of the parties to the council
- Without a feasibility study, the drafters propose a system of dispute-resolution that is probably the most sophisticated and comprehensive in the world. People are trying to guess how much it will cost — estimates range from three to ten times the current system, which is itself breaking down for want of money — and they are simultaneously wondering where the money will come from.

Can NEDLAC solve the problems?

In NEDLAC it may be possible to rescue the

A problem with process? Ministers Maharaj and Mboweni at the LRA launch

Bill, but we doubt it. Once again, the problem is one of process. NEDLAC will be operating without the requisite facts and figures, without a broad understanding of attitudes and positions and without any semblance of consensus over matters of principle or policy. As confusion mounts, the negotiators, anxious not to compromise themselves, will be inclined to dig in their heels and the deliberations will become positional and adversarial rather than constructive and creative. At best we will see compromises that keep the Bill alive, but they will probably take the form of trade-offs which compromise its integrity. At worst there will be deadlock and dissension, with grave consequences.

Is it too late to do the job properly?

There is much in the Bill that is good. Can we not send it off to a commission that can gather the facts, solicit the standpoints of the parties, define the problems, generate creative options and assess the merits of the possible solutions? Out of this process will come more than just a better product. People — lay as well as expert — will have an opportunity to participate actively in the deliberations; the media will be able to report on it and educate us about the problems; and the outcome will enjoy greater understanding and acceptance. Proposals as radical as these need time to sink in; at the moment, people find it bewildering.

In the editorial of which we spoke, we acknowledged that prompt action was important. But, we pointed out, other ministers were also under pressure to act and yet they were managing to do the task properly. We have waited more than 100 years for a legitimate and effective labour relations statute. Would a few more months really make such a difference? ☆