**Report on Jan. 20 Meeting of the South African Parliament Committee Working on the Protection of Information Bill (Reprinted by Freedominfo.org with permission of the author)**

**By Sarah Duff**

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Dear all

A group of us from Right2Know attended yesterday’s meeting of the committee responsible for the Protection of Information Bill, and what follows is an account of the proceedings.

Turn-out today was a little better, but with representatives of the IFP and ACDP missing. Patrick Maynier and Dene Smuts from the DA were there, as were Llewellyn Landers, Nkosinathi Fihla, and at least one other ANC member. Cecil Burgess mentioned that Vytjie Mentor had not sent apologies, despite not attending, which seems to suggest that she is still on the committee.

The focus of the meeting was the State Law Adviser’s presentation on Working Document 1, which dealt further with the harmonisation of POIB with PAIA. Sthe attached the document to yesterday’s email, but I’ve added it to this message for good measure. The document seeks to answer three questions:

1.             Is it constitutional for there to be two pieces of legislation which provide access to information? In other words, would it be constitutional for PAIA and POIB to exist side-by-side?

2.             It is legal for the information officer (under PAIA) to be the same person who decides who classifies information (under POIB)?

3.             To which organs of state should POIB apply?

 The SLA concluded:

1.             PAIA – specifically section 5 of the Act – would have to be amended in order for it to harmonise with POIB as the Bill currently stands.

2.             The SLA suggested that the classifying officer should be the head, director-general, chief executive (or of similar status) of organs of state. They went on to argue that deciding who fulfils the roles of information and classifying officers in organs of state is a policy decision, and should be dependent on the nature of departments, levels of officials’ security clearance, and so on. Practically, though, it would be almost impossible for these positions to be held by different people, as only those people with security clearance would be able to have access to classified information.

 3.             POIB would apply to ALL organs of state. Enver Daniels added that it was impossible for him to provide a list of all these organisations within the time constraints.

 The committee then discussed these points relatively systematically, beginning with the third question – and Daniels’s comment that he was not able to provide a full list of organs of state.

 This argument, which took up most of the meeting, was both extraordinarily petty and extremely significant. Burgess noted that because it is relatively difficult to define what organs of state are – technically, they are any organisation created by statute, which includes, then, chapter 9 organisations, the TRC, universities and law societies, for example – it would be pointless to attempt to compile a list of them. (In his words, it would be like ‘counting grains of sand’.) The DA, though, insisted that the SLA compile such a list. Maynier noted that because of the length of the list of organs of state – estimated to be between six and seven hundred – POIB would give the Minister of State Security very wide powers. Smuts argued that POIB would have very limited applicability to nearly all of the organisations listed there, and that only a handful of departments had any reason to classify information on the grounds of national security. Burgess – who suggested that the DA MPs find the list themselves, and argued that it was not the SLA’s role to do so – again reiterated his point that POIB is not a ‘secrecy bill’ (kudos to Right2Know, I think) and said that the role of POIB was to protect organs of state from having their information destroyed or altered, and that all these organisations should be allowed to classify information. The courts, he suggested, could help to determine if these organisations were truly ‘organs of state’ and, thus, would fall under POIB’s remit.

         Smuts countered with the point that public administration, and not the intelligence ministry, should be responsible for classifying information. Maynier then noted that the Department of State Security probably lacks the capacity to administer POIB, if it were to apply to nearly a thousand organs of state (particularly in the light of the fact that it seems to find it so difficult to keep tabs on its own documents – Burgess bridled at this jab), and that the financial implications of such extremely wide applicability need to be taken into consideration. The Department of State Security should provide an estimate of the cost of this. Smuts suggested that ‘organs of state’ be replaced by ‘executive organs of state’ to limit the applicability.

         Landers, like Burgess, opposed including a schedule of organs of state, arguing that PAIA does not include one – although, as Smuts made the point, this is because PAIA has a different purpose to POIB and ensures access to all government information – and that MISS does not apply to all organs. He said that it would ‘cause uproar’ if universities and so on were subject to MISS. (I suspect, though, that, technically, MISS does apply all organs of state.) Daniels added that the first draft of POIB did include provision for the exclusion of some organs of state (is this true?), and that POIB seeks to harmonise existing systems of classification currently used in a range of organs of state – from municipal to state level.

            At that point, Burgess brought an end to the debate, remaining absolutely adamant that no schedule of organs of state would be provided to – and, presumably, studied by – the committee. They will continue the discussion next week.

            In contrast, debate around the second point – on information and classifying officers – was relatively muted. Smuts agreed with the SLA that deciding on who fulfils these roles is a policy decision, and she and Landers said that they were happy – provisionally – for the two positions to be held by the same person. This is, they believe, the most practical solution, as the information officer would need to have the same level of security clearance as the one doing the classifying. (This seems to represent a potential conflict of interest to me, but I'm probably mistaken.)

            The final part of the discussion related to having two pieces of legislation – PAIA and POIB – regulating access to information. Here, Burgess asked the SLA for more information about where ‘Parliament can have more than one go at creating legislation to ensure the constitutional right to access information’. The SLA replied that, yes, this is possible, but that section 5 of PAIA will overwrite any legislation which limits access to government information. Smuts reiterated that any legislation passed subsequent to PAIA must square with PAIA – and not the other way around. Burgess then cited an example of a section of PAIA being declared unconstitutional by the Constitutional Court – I didn’t catch the name of the relevant case – and I suspect that this was an attempt to imply that PAIA could be changed, if needs be. Landers concluded matters by saying that PAIA should remain the main instrument for access to information – and NOT POIB.

            The meeting adjourned then, and the committee will gather again on Tuesday at 9.30am.

This was an interesting discussion. Sthe and I thought that the following points are really worth noting:

1.     Both Landers and Daniels suggested that POIB seeks to legislate existing practise in most organs of state. In other words, officials’ default position towards information is already secrecy – this confirms comments made by Ambrosini last year. I wonder if R2K should investigate how officials – particularly on municipal level – classify documents?

2.     It’s clear that the ANC intends POIB to be MISS in legal form. We need to study MISS.

3.     It’s worth pursuing the financial implications of POIB. Maynier – speaking to us afterwards – said that the issue of the tagging of POIB seems to have fallen by the wayside, but that it could be revived if linked to the cost of applying POIB to seven hundred (or however many) organs of state.

We met afterwards at Idasa to discuss today’s meeting, and took another look at how R2K’s demands are being met. Alas, there’s been little or no progress on them since our last evaluation, and particularly on the issue of scrutinising the work of state agencies. This has barely been discussed in committee meetings, and we should lobby around it to a greater extent.

I hope that this makes sense.
Regards
Sarah