

Revealed: hidden effects of info bill

The protection of information law could impede co-operation between the government and civil society with costly results, writes **Stuart Rothgiesser**



SILENT PROTEST: Independent Newspapers staff protest against the proposed media laws. It was noted at a recent forum discussion that the Protection of Information Bill would have an effect on ordinary citizens trying to get information from local government. PICTURE: JEFFREY ABRAHAM'S



THE PROTECTION of information bill has come under much criticism – particularly from the media – for its potentially harmful effects on freedom of expression.

But a recent Goedgedacht Forum discussion, featuring 26 leading thinkers, advocates and researchers, focused on the bill's potentially damaging effects in the socio-economic arena.

The discussion, held jointly with the Open Democracy Advice Centre, was opened by Felicity Harrison, the Forum's project director, who noted anxiety over the proposed legislation in many quarters.

"The fear card can introduce particularly unhelpful elements to a debate that destroys common sense. We therefore wanted to get a range of people from different organisations to discuss the issue, to debunk the myths and the hysteria and also to look at issues that have not been covered to date – especially with regard to the implications of the bill for socio-democratic values."

Two keynote speakers opened the proceedings. Dr Laurie Nathan, Research Fellow at the Department of Environmental and Geographical Science at UCT, argued the bill did not have a sinister motivation or intent – even if its effects were sinister.

Nathan noted that the Ministry of State Security had already begun a review of apartheid legislation in 2003. "The bill before us is exactly what one would expect from an intelligence service; it reflects their functional imperatives." He added that South Africans could not expect the Ministry of State Security to come up with a new draft that would be acceptable to a constitutional democracy in that the very department determined to protect secrecy could not meet the needs of openness and transparency that marked a constitutional democracy.

In short, they were the wrong authors of the bill.

Nathan also maintained the bill was unequivocally unconstitutional

and would not make it through the Constitutional Court. For one, the Constitution was an enabling document, and enabled rights – the rights to freedom of expression and access to state information to enable accountability and expose and check abuse of power. If these initial rights were limited, many more would also be infringed.

Nathan also argued the ministry was taking the wrong conceptual approach in thinking we needed to balance state security against secrecy. In a democracy, national security encompassed rights and freedoms (not "balanced against" as in a totalitarian state).

The right conceptual approach was to say that the Constitution was the supreme law of the land and the ministry (or any other organ of state) needed to justify any and all exclusions of that law.

Nathan highlighted several "sur-realist" implications of the bill (if passed) that had not been thought through, including the fact that because responsibility for keeping information secret would lie with different bodies, the heads of those bodies would need to delegate staff to scrutinise each organ and the state would need to appoint a cadre of censors to work in all these state bodies. This would lead to individuals having excessive discretion and therefore excessive power in deciding what was allowable.

Finally, Nathan noted the bill did not meet its stated purposes ("threats of espionage", "economic espionage", "information peddling" and "prevention of destruction or alteration of critical information held in government databases) and would therefore not pass constitutional muster.

Alison Tilley, executive director of the Open Democracy Advice Centre, spoke about South Africa's history of secrecy.

"For many people, we have grown up with an understanding that we should not be told things for our own good, and this creates a

unique relationship with secrecy. This is often about valuing secrecy." While Tilley believed some secrets should be kept (such as military information) she found the arrangement of secrecy in the bill problematic. One of the key criticisms was that the minister had refused to narrow a definition of who could classify information.

Tilley also criticised the bill for its extremely broad definition of materials to be classified. According to the bill, any "sensitive information, the release of which would harm the national interest, which includes all matters relating to the public good" as well as commercial information and personal information, were subject to classification.

Thus, if the bill was passed, South Africans would not be able to access their own health files. The fact the ministry was not aware of the work done on the protection of and access to health information by parliament's justice committee was evidence of the lack of a coherent approach to managing information.

Another problem area was whistle blowing: The bill penalised those who were in possession of classified information unlawfully, even if the information was in the public domain, and received second-hand. Citizens who blew the whistle and disclosed documents revealing unlawfulness were liable under the bill, even if going to the Public Protector or Auditor General. The Right2Know Campaign was calling for a defence of those who could show in court that they revealed secrets – documents showing illegality or criminality – in the public interest.

Tilley also noted the bill had not been costed, a legal requirement for any bill that would affect provincial or municipal government. She believed implementation of the law would be prohibitively expensive.

Tilley ended by noting the protection of information bill would have most impact on ordinary South Africans in their efforts to get information from local government.

Tilley cautioned that access to information was already difficult: 64 per cent of requests for information went unanswered. Discussion focused on three questions: the political/legal motivations for the bill, its likely socio-economic consequences, and what legislation (if any) did civil society want? Participants agreed there seemed to be four different groups backing the bill: securocrats – some schooled under apartheid and in the nature of intelligence agencies around the globe to close the democratic state; ever-changing actors who had private vested interests in corruption and seeking access to state

resources; people who wanted private records – that might reveal corruption or lavish living – kept hidden from the public, and officials struggling with record management and who needed a better system.

The potential socio-economic consequences were seen as severe and included lack of communication between government departments leading to lack of service delivery, a lack of public information, and poor monitoring and evaluation of government programmes and interventions arising from inadequate information being available. The bill could also severely limit the potential of civil society and govern-

ment to work together.

Participants noted that the criteria for continued classification were good and worth keeping. Advocacy should focus on Parliament, and the media needed to be used more by civil society as a platform for opinions as well as a partner in advocacy. Some participants noted the need for an advocacy campaign that alerted ordinary South Africans to the advantages of access to information. Others noted that the government was paying attention to the protests of advocacy groups – and that these must continue as the ANC was open to negotiation on the bill. The Right2Know Campaign was to

stage a march on parliament today.

● *Stuart Rothgesser is a freelance researcher, writer and editor living in Cape Town. The Goedgedacht Forum for Social Reflection seeks to deepen democracy through robust dialogue on the country's most pressing issues. Full transcripts of all the forums are available at www.goedgedachtforum.co.za The Open Democracy Advice Centre is a non-profit company in Cape Town committed to promoting democracy, fostering a culture of corporate and government accountability, and helping people realise their human rights. Visit www.opendemocracy.org.za for more information.*

