



**Submission to the Portfolio Committee on Police in respect of the  
Criminal Law (Forensic Procedures) Amendment Bill, 2013.**

**31 May 2013**

This document is written submission to the Portfolio Committee on Police in respect of the Criminal Law (Forensic Procedures) Amendment Bill, 2013. It is intended to provide the necessary support of the Bill as well as to provide suggestions as to how the Bill may be improved in order for it to be applied as effectively and ethically as possible. This document may be reproduced in whole or in part provided that the source of the document and the above-mentioned purpose of the document are clearly stated.

## About Forensic DNA Consultants

Forensic DNA Consultants (Pty) Ltd (hereafter referred to as FDC) is a private sector company that specialises in providing expert services in forensic DNA profiling to laboratories, legal professionals, academics and the general public. Such services include providing assistance to laboratories to set up or upgrade forensic DNA profiling processes, standard operating procedures (SOPs) and policies and provide recommendations as to the continued maintenance and support of those operational systems. FDC provides services for case review where DNA evidence is involved in a case and can review DNA results independently. FDC is involved in training of forensic scientists as well as of legal professionals in the use of DNA evidence for court purposes.

## Selected Abbreviations

|      |                                    |
|------|------------------------------------|
| FDC  | Forensic DNA Consultants (Pty) Ltd |
| FSL  | Forensic Science Laboratory        |
| NFDD | National Forensic DNA Database     |
| SAPS | South African Police Service       |
| SOP  | Standard Operating Procedure       |

## Introduction

Forensic DNA Consultants (Pty) Ltd (FDC) supports the introduction of long-awaited and much needed legislation that provides the required framework to support the use of forensic DNA profiling in South Africa. This latest version of the Criminal Law (Forensic Procedures) Amendment Bill shows that a great deal of additional research has been carried out in order to develop effective legislation specifically for the South African context that should not attract harsh criticism or challenges in court. Aspects of human rights and privacy have been well balanced with the need to exploit the advantages of DNA profiling as a criminal intelligence tool and make the National Forensic DNA Database (NFDD) as effective as possible.

The points below are those that FDC suggests be taken into consideration prior to the enactment of the final version of this Bill. Many points aim to address the effectiveness of the DNA profiling system and database in place and others address certain policy issues, which aim to bring the field of DNA profiling in South Africa in line with *best international practice* and also to ensure that the *most ethical and scientific practices* will be followed after the promulgation of this Bill.

## **Inclusion of a Missing and Unidentified Persons Index**

Although the Bill makes provision to perform comparative searches on the stored profiles for missing or unidentified persons' cases, there is no provision specifically made for where those profiles should be stored, or which retention or expungement criteria are set for those profiles.

A significant problem in South Africa is that, every year, *tens of thousands* of unidentified bodies pass through the state mortuaries. Following conventional methods of identification, no further attempts are made to identify those remaining bodies. Tissue samples are usually taken by the pathologists for DNA profiling purposes but these samples often then remain at the mortuaries and are not processed any further. These may prove to be valuable samples in the investigation and detection of crimes as the deceased individuals are often victims of violent attacks.

The database indexes mentioned in the Bill do not make allowance for the storage of reference samples from these missing or unidentified persons, to which other reference or crime scene samples can be compared. A separate index, 'Missing and Unidentified Persons Index', should be set up in this regard. Reference samples obtained for missing persons are often from the *personal effects* of that individual, usually provided by the family. For unidentified persons, the reference samples are obtained from the *mortuary* after the post mortem examinations are conducted.

This proposed index should also have *specific profile retention and expungement criteria*. It is suggested that the profiles in this index be retained on the database indefinitely or until such a time as the person has been found or identified. As the sample quantity may be limited and the quality may be poor, any samples collected should ideally be retained as evidence in a missing person's case for as long as possible.

In order for an investigation into an unidentified body to proceed further with the help of DNA profiling and analysis, it is suggested that an accredited third party laboratory be tasked with typing these samples. The reference profiles that are generated by that laboratory can then be securely uploaded to the relevant index of the NFDD. This will also serve to allow the Forensic Science Laboratory (FSL) to focus attention and resources on the processing and analysis of the many crime scene samples that it receives. Ideally, the Bill should put in place a provision for reference profiles of missing persons and unidentified persons to be added to the 'Missing and unidentified persons' index and specify that an effective process of identifying unidentified and missing individuals should be established.

Further possibilities in this regard may be presented in a verbal presentation to the Committee upon request.

## **Making provision for Familial searches to take place**

The effectiveness of a DNA database stems from its ability to provide investigative leads in cases of a criminal nature or for the identification of missing persons. This is further enhanced by the innate ability of a database system to relax the search stringency criteria of DNA profiles within the database and thus allow for partial matches to be discovered. For both criminal and missing person scenarios, this can provide valuable information in the form of *possible familial associations* to the suspect or the missing or unidentified individual.

In this situation, the immediate family members of the identified person are contacted and asked to voluntarily provide a reference sample for either inclusion or elimination purposes. It must be noted that this must involve informed consent and the family members must be made fully aware of the possible implications of providing such a sample as it may ultimately lead to an inclusion and further investigation. These samples are submitted to the volunteer index, as no arrests would have been made as yet. Also, for purposes of following up on familial searches, the related individuals are under no obligation to provide this reference sample if they do not wish to.

The use of familial searches should by no means be thought of as implicating a person who is not the true suspect, but rather as allowing an existing and powerful technology to be used to its fullest potential and as identifying possible investigative leads for a case.

## **International DNA Information Exchange**

Allowing for requests for information on DNA profiles submitted by international agencies is necessary in order to promote cross-border crime prevention and allow for more effective identification of missing persons and victims of crimes such as those involved in *human trafficking*. The current situation, however, is that the database held by the SAPS FSL was at one point uploaded to the Interpol DNA Gateway database and is very likely still held there. This is in contrast to regulations made by the Bill, which states that a DNA profile must be received from the requester and then, subject to the Act and other applicable laws, the outcome of the comparative search may be reported to the requester.

It is unlikely that the previously uploaded database information was correctly screened for inaccuracies or properly administrated and thus it is suggested that the SAPS make a formal request to Interpol to revoke those DNA profiles and any associated information uploaded. This will ensure that any future requests from Interpol or other recognised agency be directed to the authorised officer and be carried out under their control. This will also ensure that there are no conflicts with the regulations laid down by the Bill, which could be challenged in court in future if this is not done.

## Independence of the DNA Database

In the report of the Portfolio Committee on their 2011 study tour to Canada and the United Kingdom, it was mentioned that one of the key database governance challenges for the UK was that there was a lack of independence of database management as 60% of the members are from the police environment. Through the National DNA Database Strategy Board (which is responsible for the governance and oversight of the UK National DNA Database), the UK now ensures that access to their DNA database is restricted to vetted staff only. Additionally, no police officer or police force has direct access to the information held on the database (National DNA Database Annual Report: 2011-2012).

This is an even *more serious* concern in the South African context, given that the DNA database is administered solely by the SAPS. This provides the SAPS with an unrestricted ability to determine policies such as the *search criteria* on the database (when the database can be searched and against which other profiles), *reporting rules* (when matches or hits on the database are reported and to whom they are reported), *stringency of search criteria* (whether partial profile hits generated, allowing for familial inferences to be made) and *profile retention and expungement criteria* (whether profiles are being retained indefinitely or if there procedures in place to remove profiles after specific time periods or events).

For this reason, it is recommended that the DNA database established in terms of this Bill be administered and maintained by an external, independent body such as the *National Forensic Oversight Board* that is to be set up in terms of this Bill.

## Establishment of the National Forensic Oversight Board

The establishment of a National Forensic Oversight Board is supported as a necessary means to monitor the performance of all parties involved in the forensic environment within South Africa, as well as to provide expert recommendation and advice to the Minister of Justice and Constitutional Development and to the Minister of Police on a regular basis. The appointment of this Board, however, should be made the responsibility of the Minister of Justice and Constitutional Development, and *not* of the Minister of Police. It is essential that this Board remain as independent as possible, even more so than the laboratory, and thus it should not be aligned solely with the Ministry of Police. This lack of independence and bias towards the prosecution in the use of DNA results has been noticed throughout many court cases in the past. It is important that *any* forensic science results be interpreted in an unbiased, scientific manner that neither favours the prosecution nor the defence.

In order for this Board to have any true *value* as an independent oversight body, it is crucial that the majority of the Board representatives be those individuals with no vested interest in the activities of the Forensic Science Laboratory (FSL) or in the administration of the NFDD. In addition to those representatives mentioned in the Bill, the Board should also be

comprised of individuals from various independent entities with a broad spectrum of interests allied to forensic science, and in particular, to DNA profiling.

Such individuals may include local independent forensic scientists, who have the necessary knowledge and understanding of the DNA process in the context of the justice system as a whole; those academic/ university members who are involved with training programmes of a forensic science nature and who are experts in forensic DNA related fields such as population genetics and statistics; individuals representing legal professionals from both the prosecution (NPA) and defence as well as additional members of non-governmental organisations such as those involved with victim support. By including individuals from such entities, the Board can partake in informed discussions as the experts in the relevant fields will be present and they will be familiar with the application of their respective fields for forensic purposes. These experts should then also have the ability to be able to consult with other international experts on matters requiring further clarification or research.

The criteria that will determine the appointment of the Board representatives should be *transparent* and should only be considered after careful consultation with both the general public as well as with those individuals identified above.

### **Accreditation and the Representation of the State's Forensic Biology Laboratory**

From the Portfolio Committee's report on their 2011 study tour to Canada and the United Kingdom, it is stated that "Quality assurance and the accreditation of laboratories are critical to ensure that sufficient measures are in place to prevent the mix-up and contamination of DNA samples." The SAPS' Forensic Science Laboratory (FSL) is currently not accredited to international guidelines (being ISO17025). Accreditation is an *international standard* that forensic laboratories employ as a minimum requirement to assure the quality of the work performed by that laboratory. The FSL needs to be accountable to these international standards, which will allow for it to be audited annually and for its procedures and management to be evaluated by an independent, external body.

The FSL currently has its own internal quality management system in place to which it ascribes the quality of its processes and, ultimately, the validity of its results. In light of this, the legislation should make provision for a transitioning of the laboratory towards accreditation. This should allow the laboratory *reasonable time* to become accredited, and thereafter allow for forensic DNA testing to only be done by accredited laboratories in future. This should apply to *all laboratories* that are and will be involved in forensic DNA profiling.

In the event that the laboratory does not become accredited, the *only viable alternative measure* to ensure that the laboratory is producing valid and quality results is for the laboratory to be audited annually by an external and independent technical advisory

committee. Here the protocols, procedures and applications of the science in the laboratory will be audited and feedback provided to the relevant laboratory and Minister. This audit will also aid in identifying improvements that should be made to the policies and procedures where necessary and will provide the verification that the laboratory is following the policies and procedures that it says it follows as part of its Quality Management System.

The roles of forensic science and the responsibilities of forensic scientists are to provide as much of an independent and unbiased analysis of evidence as possible to its clients. In South Africa, these clients are the SAPS, the prosecution, the defence and the associated experts involved in each case. Even though it is the mandate of the SAPS to investigate crime, its *dominance* of the forensic services in South Africa is a major concern as it has been regulating the environment to suit its own interests and agendas for many years. This does not necessarily equate to international best forensic practices or objective scientific practices. The victims of crime thus become victims of institutionalised scientists who work in the interest of prosecution and not in the interest of justice. The fact that there are no significant independent (non-SAPS) forensic services available to the South African public indicates the serious lack of balance in providing assurance against prosecutorial bias. In order to avoid tendencies of prosecution bias, this dependency of forensic services in South Africa on the SAPS and the close association of the NFDD with the FSL and the SAPS should be revisited as it is not in the interest of the unbiased scientific practices in service to the people of South Africa.

### **Provision for ISO17025 accredited private laboratories to conduct reference sample testing**

Upon promulgation of this Bill, there will be a *massive influx* of reference samples to the laboratory as a result of samples that will need to be taken mandatorily from arrestees, convicted persons, crime scene personnel, equipment vendors and the suppliers of consumables. Demand for processing of these samples will remain high and will thus allow and necessitate external parties providing assistance in the processing of these samples. Provision should be made in the Bill for the processing and analysis of reference DNA samples to be done by *external accredited* laboratories.

FDC trusts that this information presented herein will prove useful in the further development of the final Bill. An opportunity for FDC to make a verbal presentation to the Committee will also be greatly appreciated. Kindly refer to the contact information below should there be any further questions or comments regarding the content of this submission or for further advice on related matters.

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