

REPUBLIC OF SOUTH AFRICA

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**CRIMINAL LAW  
(FORENSIC PROCEDURES)  
AMENDMENT BILL**

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*(As presented by the Portfolio Committee on Police (National Assembly))*

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(MINISTER OF POLICE)

**[B 9B—2013]**

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## GENERAL EXPLANATORY NOTE:

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

                         Words underlined with a solid line indicate insertions in existing enactments.

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# BILL

To amend the Criminal Procedure Act, 1977, so as to provide for the taking of specified bodily samples from certain categories of persons for the purposes of forensic DNA analysis; to provide in particular for the protection of the rights of women and children in the taking of DNA samples; to further regulate proof of certain facts by affidavit or certificate; to add to the Criminal Procedure Act, 1977, a Schedule 8 of offences in respect of which DNA samples must be taken; to amend the South African Police Service Act, 1995, to establish and regulate the administration and maintenance of the National Forensic DNA Database of South Africa; to provide for the conditions under which the samples or forensic DNA profiles derived from the samples may be retained or the periods within which they must be destroyed; to provide for the use of forensic DNA profiles in the investigation of crime and the use of such profiles in proving the innocence or guilt of persons before or during a prosecution or the exoneration of convicted persons, to assist in the identification of missing persons and unidentified human remains; to provide for protection of the rights of children in the retention and removal of forensic DNA profiles; to provide for oversight over the National Forensic DNA Database and the handling of complaints relating to the taking, retention and use of DNA samples and forensic DNA profiles; to repeal certain provisions of the Firearms Control Act, 2000, and the Explosives Act, 2003, which overlap with powers provided for in the Criminal Procedure Act, 1977, regulating the powers in respect of the taking of fingerprints and bodily samples for investigation purposes; to provide for transitional provisions in respect of the DNA database; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

### **Amendment of section 36A of Act 51 of 1977, as inserted by section 2 of Act 6 of 2010**

1. Section 36A of the Criminal Procedure Act, 1977, is hereby amended—5
  - (a) by the insertion before the definition of “authorised person” of the following definition:
    - “(aA) **‘authorised officer’** means the police officer commanding the Division responsible for forensic services within the Service, or his or her delegate;”;10

- (b) by the substitution for the definition of “authorised person” of the following definition:
- “(b) **‘authorised person’** means,—
- (i) with reference to photographic images, fingerprints or body-prints, any police official or a member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, in the performance of his or her official duties; and
- (ii) with reference to buccal samples, any police official or member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, who is not the crime scene examiner of the particular case, but has successfully undergone the training prescribed by the Minister of Health under the National Health Act, in respect of the taking of a buccal sample;”.
- (c) by the insertion after the definition of “body-prints” of the following definitions:
- “(cA) **‘bodily sample’** means intimate or buccal samples taken from a person;
- (cB) **‘buccal sample’** means a sample of cellular material taken from the inside of a person’s mouth;”;
- (d) by the substitution for the definition of “comparative search” of the following definition:
- “(f) **‘comparative search’** means the comparing [of fingerprints, body-prints or photographic images, taken under any power conferred by this Chapter,] by [an] the authorised officer of—
- (i) fingerprints, body-prints or photographic images, taken under any power conferred by this Chapter, against any database referred to in Chapter 5A of the South African Police Service Act; and
- (ii) forensic DNA profiles derived from bodily samples, taken under any power conferred by this Chapter, against forensic DNA profiles contained in the different indices of the NFDD referred to in Chapter 5B of the South African Police Service Act;”;
- (e) by the insertion, after the definition of “comparative search”, of the following definitions:
- “(fA) **‘crime scene sample’** means physical evidence which is retrieved from the crime scene or any other place where evidence of the crime may be found and may include physical evidence collected from the body of a person, including a sample taken from a nail or from under the nail of a person;
- (fB) **‘DNA’** means deoxyribonucleic acid which is a bio-chemical molecule found in the cells and that makes each species unique;
- (fC) **‘forensic DNA analysis’** means the analysis of sections of the DNA of a bodily sample or crime scene sample to determine the forensic DNA profile: Provided that this does not relate to any analysis pertaining to medical tests or for health purposes or mental characteristic of a person or to determine any physical information of the person other than the sex of that person;
- (fD) **‘forensic DNA profile’** means the results obtained from forensic DNA analysis of bodily samples taken from a person or samples taken from a crime scene, providing a unique string of alpha numeric characters to provide identity reference: Provided this does not contain any information on the health or medical condition or mental characteristic of a person or the predisposition or physical information of the person other than the sex of that person;
- (fE) **‘Independent Police Investigative Directorate Act’** means the Independent Police Investigative Directorate Act, 2011 (Act No. 1 of 2011);

- (fF) **‘intimate sample’** means a sample of blood or pubic hair or a sample taken from the genitals or anal orifice area of the body of a person, excluding a buccal sample;
- (fG) **‘National Health Act’** means the National Health Act, 2003 (Act No. 61 of 2003);
- (fH) **‘NFDD’** means the National Forensic DNA Database of South Africa, established in terms of section 15G of the South African Police Service Act;”;
- (f) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:
- “(2) Any police official who, in terms of this Act or any other law takes the fingerprints, a body-print or buccal sample or ascertains any bodily feature of a child must—”; and
- (g) by the addition of the following subsections:
- “(3) Buccal samples must be taken by an authorised person who is of the same gender as the person from whom such sample is required with strict regard to decency and order.
- (4) Notwithstanding any other law, an authorised person may take a buccal sample or cause the taking of any other bodily sample with the consent of the person whose sample is required or if authorised under—
- (a) section 36D; or
- (b) section 36E.
- (5) Any authorised person who, in terms of this Chapter or in terms of any other law takes a buccal sample from any person, must do so—
- (a) in accordance with the requirements of any regulation made by the Minister of Police; and
- (b) in a designated area deemed suitable for such purposes by the Departmental Heads: Police, Justice and Constitutional Development, or Correctional Services in their area of responsibility.”.

#### Insertion of sections 36D and 36E in Act 51 of 1977

2. The following sections are hereby inserted in the Criminal Procedure Act, 1977, after section 36C:

#### **‘Powers in respect of buccal samples, bodily samples and crime scene samples**

- 36D.** (1) Subject to section 36A(5), an authorised person must—
- (a) take a buccal sample; or
- (b) cause the taking of any other bodily sample by a registered medical practitioner or registered nurse defined in the National Health Act, of any person—
- (i) after arrest but before appearance in court to be formally charged for any offence referred to in Schedule 8;
- (ii) released on bail in respect of any offence referred to in Schedule 8, if a buccal sample or a bodily sample of that person was not taken upon his or her arrest;
- (iii) upon whom a summons has been served in respect of any offence referred to in Schedule 8;
- (iv) whose name appears on the National Register for Sex Offenders; or
- (v) charged or convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette*, and after notification of Parliament, declared to be an offence for the purposes of this subsection.
- (2) Subject to section 36A(5), an authorised person may—
- (a) take a buccal sample; or
- (b) cause the taking of any other bodily sample by a registered medical practitioner or registered nurse,
- of any person—
- (i) after arrest but before appearance in court to be formally charged in respect of any offence;

- (ii) released on bail in respect of any offence, if a buccal sample or bodily sample was not taken upon his or her arrest;
  - (iii) upon whom a summons has been served in respect of any offence;
  - (iv) whose name appears on the National Register for Sex Offenders; or
  - (v) charged or convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette*, and after notification of Parliament, declared to be an offence for the purposes of this subsection. 5
- (3) The authorised person must supervise the taking of a buccal sample from a person referred to in subsection (1) or (2) who is required to submit such sample and who requests to take it himself or herself. 10
- (4) The Station Commander or other relevant commander must within 30 days furnish every bodily sample taken under subsection (1) or (2) to the authorised officer, who must carry out a forensic DNA analysis on every such sample in terms of Chapter 5B of the South African Police Service Act. 15
- (5) Subject to section 36A(5), nothing in this Chapter prohibits—
- (a) an authorised person from re-taking or supervising the re-taking of a buccal sample from any person referred to in subsection (1), (2) or (3), if the buccal sample taken from him or her was either not suitable or insufficient for forensic DNA analysis; or 20
  - (b) a registered medical practitioner or registered nurse from re-taking a bodily sample taken from any person referred to in subsection (1) or (2), if the bodily sample taken from him or her was either not suitable or insufficient for forensic DNA analysis. 25
- (6) The forensic DNA profile derived from bodily samples, taken under any power conferred by this section, may be used to conduct a comparative search.
- (7) (a) Any forensic DNA profile derived from such sample, taken under any power conferred by this section must only be used for the purposes referred to in section 15F of the South African Police Service Act. 30
- (b) The forensic DNA profile derived from bodily samples, taken under any power conferred by this section must be retained on, or removed from, the NFDD in accordance with the provisions of Chapter 5B of the South African Police Service Act. 35
- (c) Any person who uses or allows the use of a bodily sample, crime scene sample or any forensic DNA profile derived from such sample for any purpose other than as contemplated in paragraph (a), is guilty of an offence and liable in the case of a natural person, to imprisonment for a period not exceeding 15 years, and in the case of a juristic person, to a fine. 40
- (d) Intimate samples may only be taken—
- (i) by a registered medical practitioner or registered nurse; and
  - (ii) in accordance with strict regard to decency and order.

### **Samples for investigation purposes**

- 36E.** (1) Subject to subsection (2) and section 36A(5), an authorised person may take a buccal sample of a person or a group of persons, or supervise the taking of a buccal sample from a person who is required to submit such sample and who requests to do so himself or herself if there are reasonable grounds to— 45
- (a) suspect that the person or that one or more of the persons in that group has committed an offence referred to in Schedule 8; and 50
  - (b) believe that the buccal sample or the results of the forensic DNA analysis thereof, will be of value in the investigation by excluding or including one or more of those persons as possible perpetrators of the offence. 55
- (2) If a person does not consent to the taking of a buccal sample under this section, a warrant may be issued by a judge or a magistrate if it appears from written information given by the authorised person on oath or affirmation that there are reasonable grounds for believing that—
- (a) any person from whom a buccal sample is required has committed an offence listed in Schedule 8; and 60

(b) the sample or the results of an examination thereof, will be of value in the investigation by excluding or including that person as a possible perpetrator of the offence.

(3) The provisions of section 36D(6) and (7) apply with the necessary changes, to a sample or forensic DNA profile derived therefrom as contemplated in subsection (1).” 5

**Amendment of section 212 of Act 51 of 1977, as amended by section 12 of Act 56 of 1979, sections 46 and 47 of Act 97 of 1986, section 11 of Act 5 of 1991, section 40 of Act 122 of 1991, section 9 of Act 86 of 1996, section 6 of Act 34 of 1998 and section 4 of Act 6 of 2010** 10

3. Section 212 of the Criminal Procedure Act, 1977, is hereby amended by—

(a) the substitution for subsection (6) of the following subsection:

“(6) In criminal proceedings in which the finding of or action taken in connection with any particular fingerprint [**or**], body-print, bodily sample or crime scene sample is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State and that he or she is in the performance of his or her official duties— 15

(a) found such fingerprint [**or**], body-print, bodily sample or crime scene sample at or in the place or on or in the article or in the position or circumstances stated in the affidavit; or 20

(b) dealt with such fingerprint [**or**], body-print, bodily sample or crime scene sample in the manner stated in the affidavit, shall, upon the mere production thereof at such proceedings, be *prima facie* proof that such fingerprint [**or**], body-print, bodily sample or crime scene sample, was so found or, as the case may be, was so dealt with.”; and 25

(b) the substitution in subsection (8) for paragraph (a) of the following paragraph:

“(a) In criminal proceedings in which the collection, receipt, custody, packing, marking, delivery or despatch of any fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue (as defined in section 1 of the National Health Act), or any object of whatever nature is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges— 30

(i) that he or she is in the service of the State or of a provincial administration, any university in the Republic or anybody designated by the Minister under subsection (4); 35

(ii) that he or she in the performance of his or her official duties—

(aa) received from any person, institute, State department or body specified in the affidavit, a fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he or she packed or marked in the manner described in the affidavit; 40

(bb) delivered or despatched to any person, institute, State department or body specified in the affidavit, a fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit, which was packed or marked or, as the case may be, which he or she packed or marked in the manner described in the affidavit; 50

(cc) during a period specified in the affidavit, had a fingerprint or body-print, article of clothing, specimen, bodily sample, crime scene sample, tissue or object described in the affidavit in his or her custody in the manner described in the affidavit, which was packed or marked in the manner described in the affidavit, 55

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged: Provided that the person who may make such affidavit in any case relating to any article of clothing, specimen, bodily sample, crime scene sample or tissue, may issue a certificate in lieu of such affidavit, in which event the provisions of this 60

paragraph shall mutatis mutandis apply with reference to such certificate.”.

**Amendment of section 225 of Act 51 of 1977, as amended by section 5 of Act 6 of 2010**

4. The following section is hereby substituted for section 225 of the Criminal Procedure Act, 1977:

**“Evidence of prints, bodily samples or bodily appearance of accused**

**225.** (1) Whenever it is relevant at criminal proceedings to ascertain whether—

(a) any fingerprint [or], body-print or bodily sample, as defined under Chapter 3, or the information derived from such prints or samples, of an accused at such proceedings corresponds to any other fingerprint [or], body-print, bodily sample, crime scene sample or the information derived from such samples; or

(b) [whether] the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance,

evidence of the fingerprints or body-prints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test on a bodily sample of the accused, shall be admissible at such proceedings.

(2) Such evidence shall not be inadmissible by reason only thereof that the fingerprint [or], body-print, or bodily sample as defined in Chapter 3, in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of sections 36A, 36B, 36C, 36D, 36E or 37, or that it was taken or ascertained against the wish or the will of the accused concerned.”.

**Addition of Schedule 8 to Act 51 of 1977**

5. The following Schedule is hereby inserted in Act 51 of 1977:

**“Schedule 8**

**(Sections 36D and 36E)**

- Treason.
- Sedition.
- Public violence.
- Murder.
- Any offence referred to in Part I or Part II of Schedule 1 to the Implementation of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002).
- Culpable homicide.
- Rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.
- Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), respectively.
- Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), respectively.
- Trafficking in persons for sexual purposes by a person contemplated in section 71(1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).
- Robbery.
- Kidnapping.
- Childstealing.
- Assault, when a dangerous wound is inflicted.
- Arson.



Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.

Theft, whether under the common law or a statutory provision.

Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in Schedule 1, or is in such custody in respect of the offence of escaping from lawful custody. 5

Any—

- (a) offence under the Firearms Control Act, 2000 (Act No. 60 of 2000), which is punishable with imprisonment for a period of five years or longer in terms of the said Act; 10
- (b) offence under the Explosives Act, 2003 (Act No. 15 of 2003), which is punishable with imprisonment for a period of five years or longer in terms of the said Act;
- (c) Convention offence or specified offence as defined in section 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004); 15
- (d) offence of trafficking in persons as defined in section 1 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013); or
- (e) offence of torture as defined in the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013). 20

Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.”.

**Insertion of Chapter 5B in Act 68 of 1995, as amended by Act 41 of 1997, Act 47 of 1997, Act 83 of 1998, Act 40 of 2002 and Act 6 of 2010**

6. The following Chapter is hereby inserted in the South African Police Service Act, 1995, after section 15D: 25

**“CHAPTER 5B**

**ESTABLISHMENT, ADMINISTRATION AND MAINTENANCE OF  
NATIONAL FORENSIC DNA DATABASE OF SOUTH AFRICA**

**Interpretation 30**

**15E.** For the purposes of this Chapter, unless the context indicates otherwise—

- (a) **‘authorised officer’** means the police officer commanding the Division responsible for forensic services within the Service or his or her delegate; 35
- (b) **‘authorised person’** with reference to buccal samples, means a police official or a member of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, who is not the crime scene examiner of the particular case and who has successfully completed the training prescribed by the Minister of Health under the National Health Act, in respect of the taking of a buccal sample; 40
- (c) **‘Board’** means the National Forensic Oversight and Ethics Board established under section 15V;
- (d) **‘bodily sample’** means an intimate or buccal sample taken from a person; 45
- (e) **‘buccal sample’** means a sample of cellular material taken from the inside of a person’s mouth;
- (f) **‘child’** means a person under the age of 18 years;
- (g) **‘comparative search’** means the comparing by the authorised officer of forensic DNA profiles derived from bodily samples, taken under any power conferred by this Chapter, against forensic DNA profiles contained in the different indices of the NFDD referred to in this Chapter; 50
- (h) **‘crime scene sample’** means physical evidence which is retrieved from the crime scene or any other place where evidence of the crime 55



- may be found and may include physical evidence collected from the body of a person including a sample taken from a nail or from under the nail of a person;
- (i) **‘Criminal Procedure Act’** means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
  - (j) **‘DNA’** means deoxyribonucleic acid which is a bio-chemical molecule found in the cells and that makes each species unique;
  - (k) **‘Executive Director’** means the person appointed in terms of section 6 of the Independent Police Investigative Directorate Act;
  - (l) **‘forensic DNA analysis’** means the analysis of sections of the DNA of a bodily sample or crime scene sample to determine the forensic DNA profile: Provided that it does not relate to any analysis pertaining to medical tests or for health purposes or mental characteristic of a person or to determine any physical information of the person other than the sex of that person;
  - (m) **‘forensic DNA profile’** means the results obtained from forensic DNA analysis on bodily samples taken from a person or a crime scene, providing a unique string of alpha numeric characters to provide identity reference: Provided that it does not contain any information on the health or medical condition or any information on the predisposition or physical information of that person other than the sex of that person;
  - (n) **‘Independent Police Investigative Directorate Act’** means the Independent Police Investigative Directorate Act, 2011 (Act No. 1 of 2011);
  - (o) **‘intimate sample’** means a sample of blood or pubic hair or a sample taken from the genitals or anal orifice area of the body of a person, excluding a buccal sample;
  - (p) **‘National Health Act’** means the National Health Act, 2003 (Act No. 61 of 2003); and
  - (q) **‘NFDD’** means the National Forensic DNA Database of South Africa, established in terms of section 15G.

### Objective of Chapter

- 15F.** The objective of this Chapter is to establish and maintain a national forensic DNA database in order to perform comparative searches for the following purposes:
- (a) To serve as a criminal investigative tool in the fight against crime;
  - (b) to identify persons who might have been involved in the commission of offences, including those committed before the coming into operation of this Chapter;
  - (c) to prove the innocence or guilt of an accused person in the defence or prosecution of that person;
  - (d) to exonerate a person convicted of an offence; or
  - (e) to assist with the identification of missing persons or unidentified human remains.

### Establishment of national forensic DNA database

- 15G.** (1) A national forensic DNA database within the Service, to be known as the National Forensic DNA Database of South Africa (NFDD) is hereby established.
- (2) The authorised officer, as the custodian of the NFDD, must ensure that the—
- (a) analysis, custody and disposal of DNA samples at a forensic DNA analysis laboratory; and
  - (b) administration and maintenance of the NFDD,
- are managed independently of each other.
- (3) The NFDD must consist of the following indices which contain forensic DNA profiles:
- (a) A Crime Scene Index;
  - (b) an Arrestee Index;

- (c) a Convicted Offender Index;
  - (d) an Investigative Index;
  - (e) an Elimination Index; and
  - (f) a Missing Persons and Unidentified Human Remains Index.
- (4) Sub-indices for children must be created under the relevant indices referred to in subsection (3). 5
- (5) The indices must not contain the following information:
- (a) The appearance of the person, other than indicating the sex of that person;
  - (b) medical information of the person; 10
  - (c) historical information relating to the person; and
  - (d) behavioural information of the person.
- (6) Nothing in this Chapter affects the use and storage of such forensic DNA profiles derived from samples taken in accordance with this Act for—
- (a) comparative searches against forensic DNA profiles derived prior to the coming into operation of this Chapter; and 15
  - (b) the use of the results of the comparative searches as evidence in a court of law.

### **Crime Scene Index**

- 15H.** (1) The Crime Scene Index must contain the relevant forensic DNA profiles derived by means of forensic DNA analysis, from samples that are found and collected, including at a crime scene— 20
- (a) at any place where an offence was or is reasonably suspected of having been committed;
  - (b) on or in the body of the victim or suspect which may be used to identify DNA left by that person who was in contact with that person during the commission of the offence; or 25
  - (c) on anything worn or carried by the victim or suspect at the time when an offence was, or is reasonably suspected of having been committed.
- (2) The authorised officer must ensure the safe and secure storage of crime scene samples, which samples must be kept indefinitely. 30

### **Arrestee Index**

- 15I.** (1) The Arrestee Index must contain forensic DNA profiles, derived by means of forensic DNA analysis, from a bodily sample taken under any power conferred by Chapter 3 of the Criminal Procedure Act where an arrestee's forensic DNA profile does not form part of any other Index. 35
- (2) The forensic DNA profile in the Arrestee Index must be removed by the authorised officer immediately upon application, in the prescribed manner, when a—
- (a) child is diverted in accordance with Chapter 8 of the Child Justice Act, 2008 (Act No. 75 of 2008); 40
  - (b) decision was made not to prosecute a person;
  - (c) person is discharged at a preparatory examination;
  - (d) person is acquitted at his or her trial; or
  - (e) person's conviction is set aside on appeal or review: 45
- Provided that there is no other outstanding criminal investigation against the person.
- (3) The application referred to in subsection (2) must be submitted to the authorised officer and a copy thereof provided to the Board.
- (4) If no application for removal of a forensic DNA profile, contemplated in subsection (2) is received, the profile of the relevant person must be removed immediately after the authorised officer has been notified in accordance with subsection (5) or (6), but may not be retained for longer than— 50
- (a) three years, in the case of an adult; or 55
  - (b) twelve months, in the case of a child.
- (5) The Clerk of the Court or Registrar of the High Court must notify the authorised officer of an acquittal, conviction, setting aside or finding of a

preliminary investigation within 60 days from the date of the verdict or outcome of the matter.

(6) In respect of a decision not to prosecute or the diversion of a child in accordance with Chapter 8 of the Child Justice Act, the prosecutor who made the decision must notify the authorised officer within 60 days from the date of the decision.

(7) If an application contemplated in subsection (2) is received by the authorised officer before a notification referred to in subsection (5) or (6) has been received, the authorised officer must enquire from the relevant authority in that regard.

(8) The authorised officer must notify the relevant person referred to in subsection (2) of the removal of his or her forensic DNA profile from the Arrestee Index.

(9) The authorised officer must inform the Board quarterly of any removal of a forensic DNA profile from the Arrestee Index in terms of subsections (2) and (4).

### **Convicted Offender Index**

**15J.** (1) The Convicted Offender Index must contain forensic DNA profiles, derived by means of forensic DNA analysis, from a bodily sample—

(a) that was entered into the Arrestee Index, but an arrestee has subsequent to the entering of his or her forensic DNA profile on the Arrestee Index been convicted of an offence; or

(b) that was taken from a person convicted of an offence either before or after the coming into operation of this Chapter.

(2) Upon the conviction of a child, the child's forensic DNA profile must be retained on a database referred to in this Chapter, subject to the provisions relating to expungement of a conviction or sentence of a child as provided for in section 87 of the Child Justice Act, 2008 (Act No. 75 of 2008).

(3) The forensic DNA profile of a convicted offender who has been pardoned in terms of section 84(2)(j) of the Constitution of the Republic of South Africa, 1996, or whose criminal record has been expunged in terms of sections 271B to 271D of the Criminal Procedure Act, must be removed by the authorised officer from the Convicted Offender Index within three years of being notified of the pardon or expungement by the Director-General: Justice and Constitutional Development.

(4) In the case of a child, the forensic DNA profile on the Convicted Offender Index must be removed within 12 months if no application for expungement referred to in subsection (2), or pardon, referred to in subsection (3) has been received from or on behalf of such child.

(5) Subject to subsections (2), (3) and (4) the forensic DNA profiles in the Convicted Offender Index must be stored on the NFDD and be retained indefinitely.

### **Investigative Index**

**15K.** (1) (a) An Investigative Index must contain forensic DNA profiles, derived by means of forensic DNA analysis from a bodily sample taken from a person with his or her informed consent or authorised in accordance with section 36E(2) of the Criminal Procedure Act.

(b) If the person referred to in paragraph (a) is a child, the sample may be taken with the informed consent of the child's parent or guardian.

(2) For the purposes of this section, "informed consent" means that the person consents, in writing, to the taking of a buccal sample, after a police official has informed him or her—

(a) of the manner in which the buccal sample will be taken;

(b) that he or she is under no obligation to give a buccal sample;

(c) that the sample or the forensic DNA profile derived from it may produce evidence that might be used in a court of law;

- (d) that the buccal sample taken under this section, and the forensic DNA profile derived from it, may only be used for purposes referred to in section 15F; and
- (e) that any profile derived from a sample taken under this section will be removed and the person will be notified within three months after the authorised officer is notified that the case is finalised. 5
- (3) A profile in the Investigative Index must—
- (a) be stored on the NFDD; and
- (b) be removed within three months after the authorised officer is notified that the case is finalised and the relevant person must be notified, within the same 10 period of such removal.

### **Elimination Index**

**15L.** (1) The Elimination Index must contain forensic DNA profiles, derived by means of forensic DNA analysis, from a buccal sample from—

- (a) a police official, or any other person, who as part of his or her official duties attends or processes a crime scene; 15
- (b) a police official or any other person, who may be handling or processing or examining crime scene samples or bodily samples under this Chapter; 20
- (c) any person directly involved in the servicing or calibration of equipment or in laboratories used in the forensic DNA analysis process; 25
- (d) any person who enters an examination area in a forensic DNA laboratory, or processes, handles or examines crime scene samples or bodily samples, under this Chapter; and 25
- (e) where possible, any person directly involved in the manufacturing of consumables, equipment, utensils or reagents.

(2) From the commencement of this Chapter, all new recruits to the Service must be required to submit a buccal sample for purposes of forensic DNA profiles derived therefrom to be included in the Elimination Index. 30

(3) The forensic DNA profiles in the Elimination Index must be stored on the NFDD and be retained, unless the profile has been migrated to another Index or is no longer required.

(4) A person referred to in subsection (1) may apply, in the prescribed manner, to have his or her profile removed from the Elimination Index when it is no longer required. 35

(5) Nothing in this section prohibits the forensic DNA profile derived from a sample taken from any person mentioned in subsection (1) or (2) to be subjected to a comparative search for purposes referred to in section 15F.

### **Missing Persons and Unidentified Human Remains Index** 40

**15M.** (1) The Missing Persons and Unidentified Human Remains Index must contain forensic DNA profiles, derived by means of forensic DNA analysis, from—

- (a) any bodily sample of a missing or unidentified person; or
- (b) any bodily sample or crime scene sample taken from unidentified human remains. 45

(2) Familial searches may be conducted in respect of forensic DNA profiles referred to in subsection (1).

(3) Forensic DNA profiles referred to in subsection (1) must be stored until the purpose for which they have been stored have been achieved, and must then be removed. 50

(4) A request to conduct a familial search must be submitted to the authorised officer and a copy thereof provided to the Board.

(5) The Board must be notified of any request for the use of familial searches and the outcome thereof. 55

(6) The Minister must ensure that a policy relating to familial searches is developed.

(7) (a) For the purposes of this section, ‘**familial searches**’ means a technique whereby a forensic DNA profile derived from a sample—

- (i) of a missing person; or 60

(ii) obtained from a family member of a missing person, is deliberately searched against the Missing Persons and Unidentified Human Remains Index and the Crime Scene Index of the NFDD to obtain a list of forensic DNA profiles that are almost similar to the forensic DNA profile derived from a sample referred to in subparagraph (i) or (ii). 5

(b) The Service may use the results of the familial searches referred to in paragraph (a) as an investigative lead, by a specially trained police official, to—

- (i) interview family members of the near matches; or
- (ii) identify unidentified human remains. 10

(c) The results of familial searches must be dealt with in a sensitive manner. 10

### **Comparative forensic DNA search and communication of information**

**15N.** (1) The authorised officer must perform comparative searches on forensic DNA profiles that are entered onto the NFDD for the purposes referred to in section 15F, and communicate the outcome of the comparative search as contemplated in subsection (2). 15

(2) No person may disclose any information which he or she had obtained in the exercise of any powers or the performance of any duties in terms of this Chapter, except— 20

- (a) to a person who of necessity requires it for the performance of his or her functions in terms of this Chapter or any other Act or as provided for in section 15O;
- (b) if he or she is a person who of necessity supplies it in the performance of his or her functions in terms of this Act or any other Act; 25
- (c) in respect of information which is required in terms of any law or as evidence in any court of law;
- (d) to any competent authority which requires it for the institution of any criminal proceedings, including a preliminary investigation or an inquest; 30
- (e) to an accused person, or where the person is a child to his or her parent or guardian, or his or her legal representative, for criminal defence purposes; or
- (f) to a person convicted of an offence, or his or her legal representative, for exoneration purposes. 35

### **Foreign and international law enforcement agencies**

**15O.** (1) The authorised officer may, subject to the provisions of this Act and any other applicable law, upon receipt of a forensic DNA profile from a foreign state or a recognised international law enforcement organisation, court or tribunal, compare the forensic DNA profile with any of the Indices in the NFDD, except the Investigative Index, for the purposes set out in section 15F. 40

(2) The authorised officer may for the purposes referred to in section 15F, communicate a forensic DNA profile contained in the Crime Scene Index and the Missing Persons and Unidentified Human Remains Index to a foreign state or a recognised international law enforcement organisation, court or tribunal. 45

(3) Subsections (1) and (2) may only be utilised for investigative purposes and should forensic DNA results be required for purposes of evidence in a court of law, the processes referred to in the International Cooperation in Criminal Matters Act, 1998 (Act No. 75 of 1996), must be utilised. 50

(4) The communication of the outcome of the comparative search contemplated in subsection (1) or the profile contemplated in subsection (2) may only be done subject to the international obligations of the Republic. 55

(5) Any request in terms of this section and the outcome thereof must be reported to the Board.

### Compliance with Quality Management System

- 15P.** (1) The authorised officer must develop and recommend standards for quality management, including standards for testing the proficiency of forensic science laboratories and forensic analysts conducting forensic DNA analysis. 5
- (2) The standards referred to in subsection (1) must—
- (a) comply with the South African National Accreditation System established under section 3 of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, 2006 (Act No. 19 of 2006), and standards set by the International Organization for Standardization; 10
- (b) specify criteria for quality management and proficiency tests applied to the various types of forensic DNA analysis; and
- (c) include a system for grading proficiency testing performance to determine whether a laboratory or forensic analyst is performing acceptably. 15

### Analysis, retention, storage, destruction and disposal of samples

- 15Q.** (1) Bodily samples and crime scene samples received at the forensic laboratory must be analysed and loaded on the NFDD within 30 days, unless there is a compelling reason in terms of priorities why such samples cannot be analysed and loaded within that period. 20
- (2) The authorised officer must report to the Board any compelling reason contemplated in subsection (1) when it occurs.
- (3) If a sample is not analysed within the period referred to in subsection (1) such non-compliance will not have any effect on the investigation or prosecution concerned. 25
- (4) The authorised officer must institute disciplinary action for any failure to analyse and load the samples on the NFDD within the period referred to in subsection (1) without a compelling reason.
- (5) Any bodily sample taken from a person from the commencement of this Chapter and which is not a crime scene sample must be destroyed and disposed of within three months after a forensic DNA profile is obtained and loaded on the NFDD. 30
- (6) Records of the destruction of bodily samples must be kept by the authorised officer in the prescribed manner and must be reported to the Board annually. 35

### Infrastructure

- 15R.** The National Commissioner or his or her delegate must acquire and maintain adequate information technology infrastructure and systems to support the efficient analysis of DNA samples, the performance of comparative searches against the NFDD and the administrative maintenance of the NFDD. 40

### Offences and penalties

- 15S.** (1) Any person who, with regard to any bodily sample, crime scene sample or a forensic DNA profile derived therefrom— 45
- (a) uses or allows the use of those samples or forensic DNA profiles derived therefrom for any purpose other than those referred to in this Chapter; or
- (b) tampers with or manipulates the process or the samples or forensic DNA profiles; 50
- (c) falsely claims such samples or forensic DNA profiles derived therefrom to have been taken from a specific person whilst knowing them to have been taken from another person or source;
- (d) discloses information in contravention of section 15N(2); or
- (e) unlawfully loses, damages or destroys information on the NFDD, 55



is guilty of an offence and liable in the case of a natural person, to imprisonment for a period not exceeding 15 years, and in the case of a juristic person, to a fine.

(2) Any person who causes the unlawful loss of, damage to or unauthorised destruction of information on the NFDD is guilty of an offence and liable in the case of a natural person, to imprisonment for a period not exceeding 15 years, and in the case of a juristic person, to a fine.

### **Awareness and training programs**

**15T.** (1) The Secretary of Police must ensure that guidelines relating to awareness programs contemplated in subsections (2) and (3) are developed and their implementation monitored and assessed on a regular basis.

(2) The National Commissioner and the Executive Director, must develop awareness and training programs for the Service and the Independent Police Investigative Directorate respectively, on the regulations referred to in section 15AD in order to support the implementation and their application of this Chapter.

(3) The National Commissioner must develop awareness programs to make the public aware of the provisions of this Chapter and in particular their rights relating to the taking of DNA samples, the keeping and destruction of DNA samples and powers of the Board to receive and assess complaints relating to DNA.

### **Access to and security of NFDD**

**15U.** (1) The National Commissioner must secure the integrity of information on the NFDD provided for in this Chapter by taking appropriate, reasonable technical and organisational measures to prevent—

- (a) loss of, damage to or unauthorised destruction of information on the NFDD; and
- (b) unlawful access to, communication or processing of information on the NFDD.

(2) In order to give effect to subsection (1), the National Commissioner must take reasonable measures to—

- (a) identify all reasonable foreseeable internal and external risks to information on the NFDD under his or her control;
- (b) establish and maintain appropriate safeguards against the risks identified;
- (c) regularly verify that the safeguards are effectively implemented; and
- (d) ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.

(3) The National Commissioner must have due regard to generally accepted information security practices and procedures which may apply to the Service generally or be required in terms of specific laws and regulations relating to security of information applicable to the Service.

(4) The National Commissioner, after consultation with the Board, must within six months of the commencement of this Chapter develop standard operating procedures regarding—

- (a) access to the NFDD; and
- (b) the implementation of safety measures to protect the integrity of information contained on the NFDD.

(5) The National Commissioner must report to the National Assembly and the Board—

- (a) any breach of the access and security measures referred to in this section as and when such breach occurs;
- (b) any loss of, damage to or unauthorised destruction of information on the NFDD; and
- (c) steps taken to address such breach and to prevent the recurrence thereof.

(6) The Secretary of Police must monitor and oversee the security measures instituted by the National Commissioner.



### **Establishment and composition of National Forensic Oversight and Ethics Board**

**15V** (1) A National Forensic Oversight and Ethics Board is hereby established.

(2) The Board must consist of not more than ten persons appointed by the Minister on a part-time basis for a period not exceeding five years of whom—

- (a) five persons must be from outside the public sector with knowledge and experience in forensic science, human rights law or ethics relating to forensic science; and
- (b) three persons must be from the public sector on the level of at least a Chief Director, namely—
  - (i) the Secretary of Police or his or her representative;
  - (ii) a representative of the Department of Health and who has knowledge in the field of DNA; and
  - (iii) a representative from the Department of Justice and Constitutional Development who has a sound knowledge of constitutional law; and
- (c) a representative from the South African Human Rights Commission.

(3) The members of the Board, referred to in subsection (2)(a), must be appointed by the Minister after inviting nominations from the public.

(4) The Minister must appoint—

- (a) the chairperson of the Board who must be a retired judge or a senior advocate with knowledge and experience in the field of human rights; and
- (b) a deputy chairperson from the remaining members of the Board.

(5) The Minister must report to the National Assembly on the—

- (a) appointment of the Board, including the names of the members of the Board and a synopsis of their expertise and suitability to serve on the Board; and
- (b) removal or resignation of members from the Board, within 14 days of the appointment, removal or resignation, if Parliament is in session or, if Parliament is not in session, within 14 days after the commencement of its next ensuing session.

(6) The deputy chairperson must exercise all the powers and perform all the duties of the chairperson whenever the chairperson is unable to do so.

(7) The term of appointment of a member of the Board may, before the expiry thereof, be renewed for an additional term.

(8) In the case of a vacancy, the Minister must fill the vacancy within a reasonable period of time, which period must not exceed six months.

### **Disqualification, removal and resignation from Board**

**15W.** (1) A person is disqualified from being appointed or continuing to serve as a member of the Board if he or she—

- (a) is not a citizen of the Republic;
- (b) is an unrehabilitated insolvent;
- (c) has been declared by a court to be mentally ill or unfit; or
- (d) has been convicted of a criminal offence.

(2) The Minister may, after due enquiry, remove a member from the Board on account of—

- (a) misconduct;
- (b) incapacity;
- (c) incompetence;
- (d) absence from three consecutive meetings of the Board without the prior permission of the Board, except on good cause shown;
- (e) ill health;
- (f) conflict of interest;
- (g) unethical conduct; or
- (h) disqualification as contemplated in subsection (1).

(3) A member may resign by giving 30 days written notice of his or her resignation to the Minister.

(4) A member of the Board may be suspended from the Board by the Minister pending the consideration of the removal of such member from the Board.

### Meetings of Board

**15X.** (1) The first meeting of the Board must be convened by the Minister and thereafter the meetings of the Board must be held at least quarterly.

(2) The Board may determine its own governance rules and procedures.

### Funding, secretariat and remuneration of members of Board

**15Y.** (1) The Board must be funded from the budget allocation of the Civilian Secretariat for Police.

(2) The Minister must, in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994), appoint a full-time secretariat to provide administrative support to the Board.

(3) The Minister may, in consultation with the Minister of Finance, determine the remuneration or payment of expenses for members of the Board, who are not appointed in terms of the Public Service Act, 1994, or the Human Rights Commission Act, 1994 (Act No. 54 of 1994).

### Functions of Board

**15Z.** (1) The Board must—

- (a) monitor the implementation of this Chapter;
- (b) make proposals to the Minister—
  - (i) on the improvement of practices regarding the overall operations of the NFDD;
  - (ii) the ethical, legal and social implications of the use of forensic DNA; and
  - (iii) on the training and the development of criteria for the use of familial searches;
- (c) provide oversight over the processes relating to—
  - (i) the collection, retention, storage, destruction and disposal of DNA samples;
  - (ii) the retention and removal of forensic DNA profiles, as provided for in this Act;
  - (iii) familial searches;
  - (iv) any breach in respect of the taking, transporting, analysis, storing, use and communication of DNA samples and forensic DNA profiles, including security breaches; and
  - (v) security and quality management systems.
- (d) handle complaints by—
  - (i) receiving and assessing complaints about alleged—
    - (aa) violations relating to the abuse of DNA samples and forensic DNA profiles;
    - (bb) security breaches,
 and reporting to complainants in respect thereof;
  - (ii) gathering such information which will assist the Board in discharging its duties and carrying out its functions under this section;
  - (iii) attempting to resolve complaints by means of dispute resolution mechanisms such as mediation and conciliation;
  - (iv) referring complaints to relevant authorities where applicable; or
  - (v) reporting to the Minister the outcome of every complaint;
- (e) consider all reports submitted to it in terms of this Chapter; and
- (f) consider any other matter related to this Chapter.

(2) The Board may gather such information which will assist it in discharging its duties and carrying out its functions under this Chapter.

(3) A copy of the report contemplated in section 15AC(5) must be submitted to the National Commissioner to follow up and address the issues contained therein.

(4) The National Commissioner must report to the Board within 90 days of receipt of the report contemplated in section 15AC(5) on the steps taken to rectify the issues contained therein.

(5) The Board may establish committees to deal with specific matters as and when required.

(6) The Board must submit a report on the execution of its functions to any authority established by law regulating the protection of personal information.

### **Procedure for handling of complaints**

**15AA.** (1) The Board may, either as a result of a complaint lodged with it or of its own accord consider a complaint.

(2) The Board must refer a complaint contemplated in subsection (1) to a committee of the Board for assessment in the prescribed manner.

(3) The committee must, after its assessment of the complaint, report to the Board on the outcome of such assessment including recommendations relating thereto.

(4) In the case where a criminal act is alleged to have been committed by a person subject to an assessment, the Board must refer the matter to the relevant authorities for further action.

(5) The Board must ensure that recommendations regarding disciplinary matters are referred to—

- (a) the National Commissioner;
- (b) the Executive Director; or
- (c) any other relevant authority.

(6) The relevant authority referred to in subsections (4) and (5) must report the outcome of such further action to the Board.

### **Disciplinary recommendations**

**15AB.** (1) The National Commissioner or the Executive Director must, with regard to recommendations on disciplinary matters referred to him or her in terms of section 15AA(5)—

- (a) within 30 days of receipt thereof, initiate disciplinary proceedings in terms of the recommendations made by the Board; and
- (b) immediately on finalisation of the disciplinary matter inform the Minister in writing of the outcome thereof and provide a copy thereof to the Board.

(2) The National Commissioner or the Executive Director must finalise disciplinary proceedings relating to DNA within 60 days from the initiation thereof and must report to the Board and the Minister the reasons for not finalising the proceedings within that period.

(3) If the disciplinary proceedings are not instituted and finalised within the periods referred to in subsections (1) and (2), it would not invalidate the proceedings.

### **Parliamentary oversight**

**15AC.** (1) The National Commissioner must provide, as part of the annual report of the Service to the National Assembly in terms of section 55(d) of the Public Finance Management Act, 1999 (Act No. 1 of 1999), a report—

- (a) in respect of the performance of the NFDD;
- (b) relating to the use of forensic DNA evidence in the investigation of crime; and
- (c) relating to disciplinary proceedings concerning forensic DNA matters.

(2) The Minister must not later than five years after the commencement of this Chapter, submit a report to the National Assembly on whether any

legislative amendments are required to improve the functioning of the NFDD and the use of forensic DNA evidence in the combating of crime.

(3) After the initial period of five years referred to in subsection (2), the Minister must every three years submit a report referred to in subsection (2) to the National Assembly.

(4) The Executive Director must submit a report, as part of the Independent Police Investigative Directorate's annual report, to the National Assembly in terms of section 55(d) of the Public Finance Management Act, 1999 (Act No. 1 of 1999), on the performance of the functions of the Directorate in terms of this Chapter, including disciplinary proceedings concerning forensic DNA matters.

(5) The Board must annually submit a report to the National Assembly on its functions in terms of this Chapter.

### Regulations

**15AD.** (1) The Minister must make regulations regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials or members of the Independent Police Investigative Directorate, referred to in the Independent Police Investigative Directorate Act, in order to achieve the objects of this Chapter, including the following:

- (a) The requirements for the suitability of areas to be designated in terms of section 36A(5)(b) of the Criminal Procedure Act;
- (b) The manner in which to secure a crime scene for the purposes of collecting crime scene samples;
- (c) the manner in which to safely preserve and ensure timely transfer of collected samples to the forensic science laboratories;
- (d) the manner in which to request access to information stored on the NFDD;
- (e) the manner in which DNA samples must be destroyed;
- (f) the manner in which complaints must be lodged to, and assessed by, the Board;
- (g) the application process for access to the forensic DNA profile and crime scene sample for exoneration purposes;
- (h) the process to be followed by the Minister in the appointment, suspension and removal of members of the Board;
- (i) the process to be followed with regard to the destruction of DNA samples and the removal of forensic DNA profiles derived therefrom;
- (j) the requirements for the taking of buccal samples in a designated area; and
- (k) the development of strict protocols and training relating to familial searches.

(2) The Minister may make regulations regarding—

- (a) any matter which is required or permitted by this Chapter to be prescribed; and
- (b) any administrative or procedural matter necessary or expedient to give effect to the provisions of this Chapter.

(3) A regulation made under subsection (1) may prescribe a fine or a period of imprisonment for a maximum of five years for any contravention thereof or failure to comply therewith.

(4) The regulations contemplated in subsection (1) must be tabled in Parliament for notification within six months after the commencement of this Chapter.

### Transitional arrangements

7. (1) For the purpose of this section—

“**Casework Index**” means the index containing the forensic DNA profiles derived from crime scene samples collected before the commencement of this Act;

“**Reference Index**” means the index containing the forensic DNA profiles derived from bodily samples of—

- (a) a victim;

- (b) a suspect;
- (c) a convicted offender;
- (d) a person who has consented to provide a sample;
- (e) a contractor or supplier of re-agents or equipment to the forensic DNA laboratory; 5
- (f) personnel employed at the forensic DNA laboratory; and
- (g) a visitor to the forensic DNA laboratory, taken before the commencement of this Act;

“**this Act**” means the Criminal Law (Forensic Procedures) Amendment Act, 2013.

(2) Comparative searches between forensic DNA profiles may be conducted using the repository categorised into a Casework Index and a Reference Index. 10

(3) The forensic DNA profiles which were administered and maintained before this Act came into operation, must be maintained by the authorised officer until the system solution to support the NFDD is operational, which must be within four years from the date of the coming into operation of this Act. 15

(4) The forensic DNA profiles contained in the Casework Index and the Reference Index must be transferred to the NFDD within three months of the system solution referred to in subsection (3) being operational.

(5) The period of four years referred to in subsection (3) may be extended by the Minister, on the request of the National Commissioner of the South African Police Service, or of his or her own accord and after approval by the National Assembly. 20

(6) The National Commissioner of the South African Police Service must report quarterly, in writing, to the National Assembly and the Board on the progress made in the acquisition of the system solution to support the NFDD until it is fully operational.

(7) The National Commissioner of the South African Police Service must, with the assistance of the National Commissioner of Correctional Services, from the date of commencement of this section, ensure that a buccal sample is taken within two years of any person serving a sentence of imprisonment in respect of any offence listed in Schedule 8 of the Criminal Procedure Act— 25

- (a) before the release of the person, if the buccal sample had not already been taken upon his or her arrest; or 30
- (b) who is released before their sentence is completed either on parole or under correctional supervision by a court.

(8) The National Commissioner of Correctional Services must, from the date of commencement of this Act, provide the National Commissioner of the South African Police Service with the list of offenders who are serving a sentence in respect of any offence listed in Schedule 8 and have been released on parole or under correctional supervision. 35

(9) The National Commissioner of the South African Police Service, with the assistance of the National Commissioner of Correctional Services, must ensure that the forensic DNA profiles of persons who are in custody pending their reappearance in court in respect of any offence referred to in Schedule 8 of the Criminal Procedure Act, and whose DNA samples were not taken upon arrest when this Act commences, are taken. 40

(10) For the purposes of subsections (7) and (8), a buccal sample must be taken by an authorised person who is a police official. 45

(11) The National Forensic Oversight and Ethics Board must—

- (a) be appointed before the commencement of this Act, and
- (b) have its first meeting convened within 30 days after the commencement of this Act.

(12) The removal of the forensic DNA profiles in the Casework Index and Reference Index must be performed within one year after the system solution to support the operation of the NFDD has been established. 50

(13) The Director-General of the Department of Justice and Constitutional Development must, on a monthly basis provide the National Commissioner of the South African Police Service with an updated list of all persons that were ordered to be entered on the National Register for Sexual Offenders, until the system solution referred to in subsections (3) and (12) comes into operation. 55

(14) Any forensic DNA profile derived from a crime scene sample or derived from a sample related to a missing person or unidentified human remains and which was received from or communicated with a foreign state or a recognised international law enforcement organisation, court or tribunal before the commencement of this Act, must be deemed to have been received from or communicated in terms of section 150 of the South African Police Service Act, 1995 (Act No. 68 of 1995). 60

### Repeal of laws

8. The following laws are hereby repealed to the extent indicated in column 4 of the table hereunder:

Act No.	Year	Name of Act	Extent of amendment or repeal	
60	2000	Firearms Control Act	1. The definitions of “authorised person”, “body-prints”, “child” and “comparative search” in section 1 are hereby repealed. 2. Section 113 is hereby repealed, except for subsection (4).	5 10
Act No.	Year	Name of Act	Extent of amendment or repeal	
15	2003	Explosives Act	1. The definitions of “authorised person”, “body-prints”, “child” and “comparative search” in section 1 are hereby repealed. 2. Section 9 is hereby repealed, except for subsection (4).	15

### Short title and commencement

9. This Act is called the Criminal Law (Forensic Procedures) Amendment Act, 2013, and comes into operation on a date determined by the President by proclamation in the *Gazette*.



## MEMORANDUM ON THE OBJECTS OF THE CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL, 2013

### 1. BACKGROUND AND PURPOSE

- 1.1 Following recommendations made by the Office for Criminal Justice System Reform (OCJSR), recommendations pertaining to fingerprints as well as a forensic DNA database were included in the Criminal Law (Forensic Procedures) Amendment Bill, 2009.
- 1.2 The Portfolio Committee on Police, when it considered the Criminal Law (Forensic Procedures) Amendment Bill, 2009, decided to deal only with the fingerprint aspects thereof and deal with aspects relating to DNA at a later stage in a separate Bill. The Portfolio Committee on Police thereafter embarked on a study visit to a number of countries in order to gain first-hand experience on how DNA is used in other jurisdictions in the combating of crime.
- 1.3 Following the study visit, the Minister of Police finalised a policy on the Establishment and Administration of a National DNA database that was presented to the Portfolio Committee on Police. This policy formed the basis for the drafting of the current Criminal Law (Forensic Procedures) Amendment Bill, 2013.

### 2. PROVISIONS OF THE BILL

- 2.1 **Clause 1** Seeks to amend terminology and inserts new definitions in chapter 3 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), such as definitions for “bodily sample”; “buccal sample”, “DNA”, “forensic DNA analysis”, “forensic DNA profile” and “comparative search”. It also provides for the taking by a police official of a buccal sample, subject to training requirements set by the Minister of Health and subject to certain circumstances, in a designated area. It furthermore provides that the measures relating to children in respect of fingerprints would also apply in respect of the taking of fingerprints. The titles of the legislation referred to in the Chapter are also abbreviated in the definitions.
- 2.2 **Clause 2** inserts a new section 36D in the Criminal Procedure Act, 1977, which provides for the categories of offences in respect of which a buccal sample must be taken and may be taken if a person is arrested upon a charge, released on bail or summonsed in connection therewith. The clause also deals with the forwarding of samples to the Forensic Laboratory, the re-taking of samples, subjecting samples to a comparative search, a limitation upon the use of such samples or profiles derived from such samples, and the keeping and destruction of such samples. A crime is provided for the abuse of DNA samples or forensic profiles, punishable with a period not exceeding 15 years imprisonment. The taking of buccal swabs of persons serving sentences of imprisonment when the Act comes into operation is provided for. Clause 2 also inserts section 36E to provide for the taking of a buccal sample of a person or group of persons where it is required to exclude or include a person in the investigation of a crime and to subject the sample taken for a forensic DNA analysis and a comparative search. DNA samples of persons who are not arrested may only be taken with their consent or with a warrant authorising the taking thereof.
- 2.3 **Clause 3** substitutes section 212(6) and (8) of the Criminal Procedure Act, 1977, to provide also for bodily sample or crime scene sample.
- 2.4 **Clause 4** substitutes section 225 of the Criminal Procedure Act, 1977, to include bodily samples.
- 2.5 **Clause 5** provides for the insertion of a new Schedule 8 in the Criminal Procedure Act, 1977.



**2.6 Clause 6** inserts a new chapter 5B in the South African Police Service Act, 1995, in order to provide for the establishment, administration and maintenance of a National Forensic DNA database, consisting of a Crime Scene Index, Arrestee Index, Offenders Index, Investigative Index; Elimination Index and Unidentified Human Remains Index. It furthermore provides for comparative forensic DNA searches and communication of information, compliance with the quality management system, the retention, storage and destruction of samples and forensic DNA profiles offences and penalties, regulations which must be made by the Minister pertaining to collection, storage and use of forensic DNA evidence, the regulation of Parliamentary oversight, access and security and the establishment and composition of a National Forensic Oversight and Ethics Board, which is also empowered to assess, and to report on or refer complaints filed regarding the possible abuse of DNA samples and profiles to other relevant authorities. It also provides for familial searches in respect of missing persons and unidentified human remains.

**2.7 Clause 7** provides for transitional provisions.

**2.8 Clause 8** provides for the amendment and repeal of provisions in the Firearms Control Act, 2000 (Act No. 60 of 2000), and the Explosives Act, 2003, in view of the provisions of section 36C of the Criminal Procedure Act, 1977, which relates to fingerprints and body-prints for investigation purposes, inserted by the Criminal Law (Forensic Procedures Act, 2010 (Act No. 6 of 2010), and clause 36E in the Bill, providing for the taking of bodily samples for investigating purposes provide for the taking of (buccal samples by an authorised person and bodily samples by a registered medical practitioner or registered nurse). DNA samples may only be taken of non-arrested persons with a warrant authorising the same. DNA samples of persons who are not arrested may only be taken with their consent or with a warrant authorising the taking thereof.

**2.9 Clause 9** deals with the short title and commencement of the Act.

**3. DEPARTMENTS / BODIES / PERSONS CONSULTED** The Bill was developed in consultation with the Department of Justice and Constitutional Development, the National Prosecuting Authority, the Department of Health and the Department of Correctional Services.

**4. IMPLICATIONS FOR PROVINCES**

None

**5. FINANCIAL IMPLICATIONS FOR STATE**

**6. COMMUNICATION IMPLICATIONS**

The implementation of the Bill must be accompanied by a communication strategy and training for all roleplayers, including the public at large, in order to create an awareness amongst everyone as to the importance of DNA evidence and the need not to contaminate crime scenes.

**7. PARLIAMENTARY PROCEDURE**

**7.1** The State Law Advisers and the Department of Police are of the opinion that this Bill should be dealt with in terms of the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in sections 74 or 76 of the Constitution applies.

**7.2** The State Law Advisers are of the opinion that it's not necessary to refer this Bill to the National House of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional Communities.

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