



05 June 2013

CLAUSE BY CLAUSE SUMMARY OF WRITTEN SUBMISSIONS RECEIVED ON THE CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL [B9-2013]

1. INTRODUCTION

The Criminal Law (Forensic Procedures) Amendment Bill, 2013 was referred to the Portfolio Committee on Police on 08 May 2013. Shortly afterwards the Committee called for public comments on the Amendment Bill, 2013. The closing date for submissions was on Friday, 31 May 2013 after which forty-five written submissions were received. The entire set of submissions are in support of the Bill and regard the proposed legislation as an important tool in the reduction of crime and further shows the commitment of Government to address crime. Eight of the submissions were substantial and invited for oral presentation to the Committee during public hearings on the Amendment Bill. These organisations are:

- 1) Forensics 4 Africa;
- 2) SA Society of Human Genetics;
- 3) Forensic DNA Consultants;
- 4) Forensic Genetics Policy Initiatives;
- 5) DNA Project;
- 6) SABRIC;
- 7) Legal Aid South Africa; and
- 8) Jes Foord Foundation.

It should be noted that several submissions were based on an apparent chain letter in support of the Amendment Bill, 2013 and contained the same line of reasoning. The issues were raised in bullet-point format and thus easy to spot. Of the forty-five submissions, eleven submissions contained the same points. These were in support of the Amendment Bill, 2013 and no recommendations for amendments were made by these submissions.

2. CLAUSE-BY-CLAUSE SUMMARY

The table below provides a clause-by-clause summary of the written submissions received on the Criminal Law (Forensic Procedures) Amendment Bill [B9-2013].

CLAUSE	NAME/ORGANISATION	SUBMISSION
CRIMINAL PROCEDURE ACT, 1977		
Clause 1: Section 36A: Definitions		
Section 36A(b)(ii)	Jes Foord Foundation (DNA/09)	Support the provision that trained Police Officers are allowed to take non-intimate DNA samples from arrestees and convicted offenders. This is done by a specially trained police officer and is quickly and



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		easily obtained. The “invasiveness” of the methods of obtaining DNA samples (rubbing a swab around the person’s mouth, or obtaining a drop or two of blood from a pin-prick to a finger), are no different to having a breathalyser taken on suspicion of drunken driving.
Section 36A1(b)(iii)	SABRIC (DNA/07)	The definition of “authorised person” under paragraph (iii) includes the proviso that the registered nurse or medical practitioner must be providing services to the Department of Correctional Services whilst this condition is not included in the definition of the proposed Section 15E to the South Africa Police Services Act, 1995. This creates the impression that bodily samples may only be taken by a nurse or medical practitioner providing services to the Department of Correctional Services, whilst this clearly not the intent of the Bill.
Section 36A1(c)(bA)	DNA Project (DNA/05)	In the definition of a ‘bodily sample’ – add the word ‘biological’ before ‘sample’ in the definition: ‘...means any type of biological sample taken from a person...etc’
Section 36A1(d)	SABRIC (DNA/07)	The definition of “comparative search”, through the inclusion of “by an authorised person of” creates the impression that comparative searches could be executed by any “authorised person” alternatively, that only an “authorised person” would be allowed to perform comparative searches. The intent is probably to indicate that a person authorised thereto, may perform comparative searches but since “authorised person” is specifically defined in the Bill, this creates confusion.
Section 36A1(e)(fC)	DNA Project (DNA/05)	A forensic DNA profile stored on the DNA Database is a sequence of letters and numbers from the non-coded regions of a person’s DNA, which ensures that no genetic disposition or other distinguishing feature may be read from that profile other than gender. It is therefore submitted that this fact should be included in the definition of ‘forensic DNA analysis’ as follows – see addition in bold italics: ‘forensic DNA analysis’ means the analysis of sections of the non-coding regions of the deoxyribonucleic acid of a bodily sample to



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		determine the forensic DNA profile:... etc'
Section 36A1(e)(fG)	Forensics 4 Africa	Section 1(e)(fG) – sample take from ‘.....from the nail or from under the nail of a person.....’ Submits that this sample cannot be regarded as a reference sample because when the victim scratches an assailant, the sample taken from under the nails or nail clippings might contain the DNA of the assailant and not of the victim and then that sample will be regarded as <i>evidence</i> and not as a reference sample. <u>Proposal:</u> It should be clear that the sample taken for under the nail or under the nail should not be used as a reference sample
Section 36A(5)(a)		Section 1(g)(a) ‘.....takes a buccal swab.....in a designated area deemed suitable for such purpose ...’ This specific sentence should also make provision for the taking of a buccal swab at a roadblock as an example and not only as a designated area in a building. The value of a DNA database could be for example when someone is arrested for a driving offense and due to a comparative search on the DNA database linked this person to another serious offense. <u>Proposal:</u> A designated area as referred to in section 36A(5)(a) be defined as a designated inside or outside area deemed suitable for such purpose
Section 36A(5)(a)	Karin Elhers (DNA/23)	Questions the reference made to a ‘designated area’ in terms of the rationale for taking samples in a separately designated area. Further questions whether this procedure will contaminate the environment. In addition, whether an authorised person first has to go look for a designated area before you can take a sample. In addition, questions what the designated area contribute to the reliability of the sample that other places would not have.
Clause 2: Section 36D - Powers in respect of buccal samples and bodily samples		
Section 36D	Legal Aid SA (DNA/08)	The insertion of a revised Clause 2 in the current Bill (B9 of 2013) provides for the insertion of a new section 36D in the Criminal Procedure Act, 1977. This is a vast improvement to the previously mentioned provision contained in Bill 2 of 2009. This improvement is welcomed, as there is a



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		<p>differentiation between offenders who have been convicted of offences justifying custodial sentences (Offences listed in Schedule 1) and those who have been convicted of minor offences that only justify a warning, fine, suspended sentence or non-custodial sentence.</p> <p>There is still a concern relating to the all-inclusiveness of reconvicted persons, who are constitutionally presumed to be innocent, as this remains an unequal and arbitrary invasion of an individual's privacy.</p> <p>The all-inclusiveness of pre-convicted persons remains an unequal and arbitrary invasion of an individual's privacy, especially as an accused person is presumed to be innocent until convicted by a competent court. It is therefore proposed that the taking of samples for DNA testing should be limited to persons accused of Schedule 1 offences.</p>
Section 36D(2)	Jes Foord Foundation (DNA/09)	The Bill makes it mandatory to take DNA samples from suspects at the time of arrest and I believe that it should extend to all arrestees and not just those arrested for schedule one offences.
Section 36D(a)		Section 36D (a): <i>'...buccal swab be taken...person arrested for any offence referred to in Schedule 1'</i> . A Suspect is per definition an individual within the scope of the investigation by the South African Police Service who has not yet been cleared by the investigation of the South African Police Service. Not all suspects might be arrested. Therefore, when an individual is still a suspect but not arrested a comparative forensic DNA search on the DNA Database might not be allowed based on the stipulations of section.
Section 36D(a)	Forensic Genetics Policy Initiative (DNA/04)	The greatest privacy and human rights concerns attendant to the current version of this bill surround the expansive categories of persons whose DNA is to be collected and added to the database. The current draft of the Bill in Section 36D lays out two separate lists of categories of persons. One list is limited to individuals associated with Schedule 1 offenses and the second list contemplates



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		<p>individuals associated with any offense. There is no clear explanation as to why there are separate lists but the result is to collect the DNA of nearly anyone in South Africa who comes into contact with the criminal justice system.</p>
<p>Collection Practices</p>	<p>Forensic Genetics Policy Initiative (DNA/04)</p>	<p>Convicted: Collection of DNA from individuals convicted of violent crimes, such as murder and rape, crimes, which have both an increased likelihood of repeat offense, and DNA evidence left at the crime scene are generally accepted by most countries as sufficient justification for including such populations on a DNA database. Yet there is a significant difference between offenders who meet the above criteria and offenders who have committed non-violent crimes for which DNA evidence is not relevant and minor crimes that do not include custodial sentences.</p> <p>It is unclear from an analysis of this bill exactly which criminal offences it applies to since the Schedule of offenses referred to in the bill does not appear publicly available but 36D(2) appears to expand the purview of the bill to any offense.</p> <p>It is fair to conclude from the bill's language that there has been insufficient attention paid to ensuring that the categories of offenses to be included within the purview of this bill are carefully chosen. They appear to be expansive and the Minister is given unusually broad authority to expand such categories even further without legislative approval. Most countries that have launched national DNA databases have begun with a limited set of specified offences and expanded deliberately with legislative oversight.</p>
<p>Section 36D(7)</p>	<p>DNA Project (DNA/05)</p>	<p>The use of the words 'must ensure' is not as strong as 'must' or 'shall'. It is important that the taking of convicted offenders' DNA samples is done retrospectively so this clause should read: (7) Subject to subsection (6)(a) and (d), the head of the Correctional Centre or Remand Detention Facility in which the person was or is incarcerated, or his or</p>



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		<p>her delegate, shall (must) take a buccal sample or shall (must) cause the taking of any other bodily sample by a registered medical practitioner or registered nurse of any person who is serving a sentence of imprisonment for any offence at the time of the coming into operation of this act or on admission to a Correctional Centre or Remand Detention Facility or before the release of such person from the Correctional Centre or Remand Detention Facility, if it had not already been taken upon his or her arrest.</p>
<p>Section 36D(7)</p>	<p>Jes Foord Foundation (DNA/09)</p>	<p>It is also crucial that all convicted offenders DNA samples are taken retrospectively and before their release from prison. This will ensure that an offender is not released from prison when in fact his DNA is a match for unsolved rape cases that are out there. 50% of child rapists are repeat offenders. Catching them before they are released is a hugely effective tool of prevention.</p>
<p>Clause 2: Section 36E - Samples for investigation purposes</p>		
<p>Section 36E Collection Practices</p>	<p>Forensic Genetics Policy Initiative (DNA/04)</p>	<p>Pre-Convicted:</p> <p>The bill sets out to include a wide variety of pre-convicted categories of persons including individuals arrested, on bail or summonsed for an offense, and those persons for whom reasonable grounds exist to believe they or one or more of the persons in that group (i.e. individuals with no suspicion attached at all) has committed either a Schedule 1 offense or any offense whatsoever and that the sample will be of value in including or excluding one or more of such persons as the perpetrator of the offense.</p> <p>Collecting the DNA of individuals yet to be convicted of a crime, many of whom will never be convicted of a crime and some of whom are known to be innocent at the time but whose DNA is being collected because they are part of a suspicious group is a <u>serious intrusion into the privacy and human rights of the public</u>. It obviates the state's primary restraints on search and seizure and its responsibility to prove guilt. The amount of law enforcement discretion attendant to the decision to stop and arrest a suspect additionally offers law</p>



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		<p>enforcement substantial discretion in determining whose DNA to collect. Such provisions open up the opportunity for law enforcement to engage in “DNA dragnets”, which necessarily entail the collection of DNA from innocent persons who happen to be in the wrong place at the wrong time.</p> <p>Moreover, the collection of DNA upon arrest is not for the purposes of identification of an individual. The individual will necessarily already have been identified at the time DNA is collected. Rather, the taking of DNA upon arrest is to investigate individuals for crimes unrelated to the crime for which they were even arrested. Because only a fraction of those who are arrested are ultimately charged and convicted, however, this practice necessarily will permit the government to collect DNA from and conduct DNA based surveillance on innocent South African citizens.</p> <p>Volunteer: Volunteers who consent to the collection of their DNA should have its use limited to a specified investigation and is not necessary to have it entered on a database to ensure it can be used for this purpose. Furthermore, the volunteer index contemplates the inclusion of children with the consent of the parent and could be in conflict with the principle that children shall have the right to participate in decision making involving them as contemplated by the Child Justice Act.</p>
Clause 3		
<p>Clause 3 amends section 37 of the CPA, referring to determining of distinguishable features and provides that police officials may not take an intimate sample (previously blood sample). The Committee did not receive any substantial submissions suggesting amendments to clause 3. However, the submissions regarding Clause 1 (CPA) affect this clause.</p>		
Clause 4		
<p>Clause 4 amends section 212 of the CPA to provide for the <u>collection</u> of specimens. The amendment allows for affidavits on issues around the collection of specimens (not only receipt, custody, packing, delivery or despatch of these specimens). The Committee did not receive any substantial submissions suggesting amendments to clause 4.</p>		



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Clause 5		
<p>Clause 5 provides for the results of the analysis of evidence taken from bodily samples of the accused to be admissible at proceedings.</p> <p>The Committee did not receive any substantial submissions suggesting amendments to clause 5.</p>		
SOUTH AFRICAN POLICE SERVICE ACT, 1995		
Clause 6: Sections 15E to 15Y		
Section 15E: Interpretation		
<p>The Committee did not receive any substantial submissions proposing amendments to section 15E. However, the submissions regarding Clause 1 (CPA) affect this section.</p>		
Section 15F: Purpose of Chapter		
<p>The Committee did not receive any substantial submissions proposing amendments to section 15F.</p>		
Section 15G: Establishment of forensic DNA Database		
Section 15G	Forensic Genetics Policy Initiative (DNA/04)	<p>The bill does a generally good job of separating the categories of included persons into indices, rather than mixing such categories of individuals together. However, the bill has no provisions for ensuring that such indices remain separate with separate access and use rules. This is particularly of concern, as there are categories of persons, such as missing persons, who are not part of any criminal investigations.</p>
Section 15G(3)	Forensic DNA Consultants (DNA/03)	<p>Inclusion of a Missing and Unidentified Persons Index</p> <ul style="list-style-type: none"> • There is no provision specifically made for where profiles for missing persons and unidentified human remains should be stored, or which retention or expungement criteria are set for those profiles. • Proposes a separate index, 'Missing and Unidentified Persons Index' to be established. • This proposed index should also have <i>specific profile retention and expungement criteria</i>. 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.



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Section 15G(5)	SA Society of Human Genetics (DNA/02)	Submits that the organisation raised the fact that in the future it may be possible to use DNA data to predict the appearance of a person e.g. eye, hair and skin colour. We asked whether this would be permissible in the case of identification of unidentified human remains, which may prove useful.
Section 15G(7)	Forensics 4 Africa	The South African Police Services implemented DNA analysis as a crime fighting tool since 1998 and their current DNA database contains thousands of DNA profiles derived from suspects, arrestees, volunteers, (victims & laboratory personnel) and crimes samples <u>Proposal:</u> DNA profiles on the current DNA Database (<i>repository</i>) be incorporated on the new national forensic DNA database and managed as determined by legislation.
Section 15H: Crime Scene Index		
Section 15H	SABRIC (DNA/07)	Proposed Section 15H to the South African Police Services Act, 1995: subsection (b) therefore, with respect, does not read well and the wording should be reconsidered. It currently reads "...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".
Section 15I: Arrestee Index		
The Committee did not receive any substantial submissions proposing amendments to section 15I.		
Section 15J: Offenders Index		
Section 15J	SABRIC	To allow for any DNA profile of a sample taken under any power conferred by s36D of the CPA to be included under the Offenders Index firstly carries the risk of duplication with the Arrestee Index and also creates the risk of the DNA profile belonging to an "innocent" arrested person to be included into the Offender Index.
Section 15K: Volunteer Index		
Section 15K	SABRIC (DNA/07)	The submission presumes that the DNA profile of a sample taken from an innocent party, e.g. the DNA sample of the husband of a rape victim, will be contained in the Volunteer Index (as opposed to the Elimination Index) notwithstanding the fact that the



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		profile will actually serve to eliminate the husband as a suspect.
Section 15L: Elimination Index		
Section 15L(1)(c)	Forensics 4 Africa	Section 15L (1)(c) – ‘The Elimination Index shall contain forensic DNA profiles...from any person...manufacturing of consumables’ The majority of DNA consumables are being purchased from companies abroad and not from local companies in South Africa. This will have a negative impact on the implementation of the Amendment Bill. <u>Proposal:</u> To add the words ‘ <i>where possible</i> ’ in the sentence of Section (c),
Section 15L	Nicole Kaplan (DNA/28)	Submits that all SAPS members should provide a DNA sample to be included as a DNA profile on a separate index and not the Elimination Index. This will act as a deterrent to those officers who might otherwise be persuaded to commit crime. This should be seen as an act of goodwill by the SAPS to build public trust.
Section 15M: Comparative forensic DNA search and communication of information		
The Committee did not receive any substantial submissions proposing amendments to section 15M.		
Section 15N: Foreign and international law enforcement agencies		
Section 15N	Forensic DNA Consultants (DNA/03)	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 <i>human trafficking</i> . 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 suggested that the SAPS make a formal request to Interpol to revoke those DNA profiles and any



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		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.
	Mark Reitz (DNA/38)	International co-operation: Positive step towards crime fighting across borders which is becoming more and more necessary. Unsure as to what “the obligations of the Republic” refers to but trust that it will not impede this section unnecessarily.
Section 150: Compliance with Quality Management System		
Private laboratories	Forensics 4 Africa (DNA/01)	Private Forensic/Paternity laboratories in South Africa have the capacity to analyse approximately 600 000 reference samples. It is essential that the Arrestee Index (& SUSPECT Index) of the National Forensic DNA Database be populated as soon as possible in order to for South Africa to have an effective DNA database. <u>Proposal:</u> To make provision for private laboratories in South Africa to assist the South African Police Service to determine the DNA profile of arrestees and suspects (NOT crime samples) for a period of at least 5 years which could be reviewed every 5 years until the South African Police Service have established the required capacity. These laboratories should comply with the same requirements and follow the same procedures as the South African Police Services and the South African Police Service or the National Forensic Oversight Board could oversee their functions.
Private Laboratories	Forensic DNA Consultants (DNA/03)	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



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		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
Private Laboratories	Forensic DNA Consultants (DNA/03)	Provision for ISO17025 accredited private laboratories to conduct reference sample testing Provision should be made in the Bill for the processing and analysis of reference DNA samples to be done by <i>external accredited</i> laboratories.
Section 15P: Retention, storage, destruction and disposal of crime and buccal samples		
Section 15P	Forensic Genetics Policy Initiative (DNA/04)	The bill does recognize the robust information value of biological samples and the potential for their misuse and it does require that such samples are destroyed within three months after a profile is created and uploaded to the NFDD. However, there is no timeliness requirement as to creating the profile in the first place. Backlogs are often a very serious problem with DNA database maintenance, therefore what might appear on its face to be a timely privacy protective requirement could very easily turn into a longer-term collection issue and raise serious privacy concerns.
Section 15P(1)	DNA Project (DNA/05)	This paragraph does not make sense in its current form – we suggest that the words 'which is' are used to replace 'or' in order to ensure that the paragraph has its intended meaning. '(1) Any bodily sample taken from a person and not relating to a crime scene sample 'which is' used to populate the NFDD...etc'
Section 15P(1) and 15PQ(a)	Forensics 4 Africa	Section 15P(1) '...Bodily sample taken...not relating to crime scene sample...be destroyed within 3 months...' and Page 11: Section 15Q(a) "...DNA profiles in the Arrestee Index must be expunged within 3 years ...' Questions whether this is a typing error with regards to the 3 years and 3 months. <u>Proposal:</u> The DNA profiles in the SUSPECT and the ARRESTEE Indexes must be destroyed within 3



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		months after been notified. Furthermore, our submission is that all DNA samples (DNA extract, Quantified- & amplified DNA) of such an individual must ALSO be destroyed.
Section 15P(3)	DNA Project (DNA/05)	Suggests that 15P(3) must be amended to read: “(3) The authorised officer must ensure the safe storage of crime scene samples” <u>‘which will be held indefinitely’</u> .
Section 15Q: Retention, storage and expungement of forensic DNA profiles		
Section 15Q	Forensic Genetics Policy Initiative (DNA/04)	<p>The current bill allows the state to retain a DNA profile of an individual for up to three years even after the case against them has concluded without a finding of guilt. Moreover, there are no provisions for ensuring the timeliness of notification to an authorized officer to begin this period. Consequently, the current bill allows for the retention of the DNA of innocent persons long past any reasonable time for expunging their records and represents an unwarranted intrusion into the private lives of innocent persons.</p> <p>Furthermore, the DNA profiles of all categories of convicted persons are retained indefinitely with no retention distinction between serious, violent crimes and minor non-violent crimes. The permanent retention of all offender profiles without distinction raises serious questions as to the power of the state to maintain control over an individual even after they have met the burdens of their conviction.</p>
Section 15Q(a)	DNA Project (DNA/05)	If matches are found during this time, can they be used? This is the reason for retention over this period, e.g., if a person is out on bail and commits another offence, their profile could be matched to that additional offence if a match is found during this time. We must ensure that their profile is not rendered inadmissible if it is subsequently removed after 3 years due to a non-conviction on the first offence. Consider specifying that comparative searches as against that profile will be able to be conducted during this 3-year period, regardless of the fact that it may be subsequently removed due to a non conviction.
Section 15Q	Legal Aid SA (DNA/08)	The three-year retention period for the profile is



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		<p>welcomed as this conforms to international best practice for the retention of such profiles.</p> <p>S15Q: the forensic DNA profiles from crime scene samples as well as the forensic DNA profiles in the Elimination Index shall be stored indefinitely. In principle, the retention of DNA samples and profiles remains a breach of the right to privacy as contained in section 14 of the Constitution. A DNA sample and to a lesser degree, a DNA profile contain information regarding a person's health including life expectancy, ethnic markers, familial markers which could be used to infringe the rights of persons, other than those who have been convicted of Schedule 1 Offences.</p>
Section 15Q	Mark Reitz (DNA/15Q)	Submits that section 15Q does not specifically mention the period for expungement regarding the Offender Index.
Section 15R: Infrastructure		
Section 15R	DNA Project (DNA/05)	Consider including a provision, which refers to the Custodian of the DNA Database. Who is the Custodian of the DNA Database and what will that entail?
Section 15S: Offences and penalties		
The Committee did not receive any substantial submissions proposing amendments to section 15S.		
Section 15T: National instructions relating to collection, storage and use of forensic DNA evidence and destruction of DNA samples		
Section 15T	DNA Project (DNA/05)	<p>The National Instructions must be clear on which police officials are authorised to take buccal samples i.e. rank and /or Detective and it should be stated that they should carry identification with them that identifies them as a trained official for this purpose?</p> <p>The training of each Detective must also be captured on a Training Administration System and each person must be given a unique number, which he/she also needs to provide and complete on the form with the details of the sample, which is sent to the FSL for analysis.</p> <p>Also: a crime scene examiner' is excluded from</p>



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		taking a buccal sample from an arrestee or convicted offender. As such, a crime scene examiner should be defined in the National Instructions.
Section 15U: Training		
Section 15U	DNA Project (DNA/05)	Training – please refer to Annexure “C” attached to this submission, which provides full details in respect of national forensic awareness training, which is already taking place to support the implementation of the NFDD.
Section 15V: Regulations		
The Committee did not receive any substantial submissions proposing amendments to section 15V.		
Section 15W: Parliamentary oversight		
Section 15W	DNA Project (DNA/05)	Parliamentary oversight requires obligatory registration or feedback by the FSL or the Custodian of the DNA Database on the use of reported matches by the police and or the NPA – if this is not done it is very difficult to measure the effectiveness of the DNA Database afterwards. Because DNA-databases have a very important but also very delicate role in society, the custodian of a DNA-database should develop tools to make objective information about the DNA-database available to politicians, the public and the media. The use of a public website is ideal to achieve this.
Section 15X: Access and security		
Section 15X	SA Society of Human Genetics (DNA/02)	This new version of the Bill states that no medical, historical, behavioural information or information about appearance will be included in the database. Presumably, a unique identifier will be used for each sample, which will connect somehow to personal identification through an RSA ID number. What will be the personal identification for illegal immigrants or refugees? In addition, the issues of ethical and privacy compliance with respect to data security and access should be monitored and discussed by the board.
Section 15Y: Establishment and composition of National Forensic Oversight Board		
Section 15Y(2)(f)	Forensics 4 Africa (DNA/01)	Oversight Board: Forensics4Africa employs DNA experts who will be able to contribute substantially to the proceedings of the Board and therefore requests that Forensics4Africa be considered to



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		take up one of the two seats mentioned.
Section 15Y(2)(f)	DNA Project (DNA/05)	<p>It is important that the National Forensic Oversight Board (NFOB) is adequately represented by non-government organisations that have an interest in Forensic DNA analysis and law enforcement. Without public participation this becomes a purely government body — it is not then truly an oversight body as it is made up of only government departments overseeing another government department. The role of NGO's in this area is critical to create balance and by saying 'in the opinion of the chairperson' it means there exists the possibility that board may consider it unnecessary to involve NGO's. [who is the chairperson here anyway?] This provision should therefore not be restricted to two people to represent all NGO's nor should it be at the discretion of the chairperson of the committee. The section (2)(f) of the paragraph should accordingly read:</p> <p><i>Representatives from non-government organisations that have an interest in Forensic DNA analysis and or law enforcement.</i></p> <p>Question: Why is the Division: Forensic Sciences not represented on the NFOB? It is suggested that there should be an ethical body represented on the Oversight Board. Other suggestions for inclusion in the NFOB are:</p> <ul style="list-style-type: none"> - a representative from the SA Society of Human Genetics; -any person who may be co-opted by the NFOB (this provides scope to include representatives which may be considered to be useful but have not been specified in the Bill) - University Forensic Labs; - a representative from a law society/bar council;
Publishing of Data	Forensics 4 Africa (DNA/01)	The effect of the National Forensic DNA Database on crime investigation should be annually published in the media
Section 15Y	SA Society of Human Genetics (DNA/02)	It is recommended that the independence of the FSL from police and prosecutor should be considered in terms of the National Forensic Oversight Board in order to support the integrity of



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		the criminal justice system, as is the case in the United Kingdom.
Section 15Y	SA Society of Human Genetics (DNA/02)	In our 2009 and 2012 correspondence, we raised several concerns about quality management. More emphasis must be given to these important issues by both the National Forensic Oversight Board (tasked with proposing minimum quality standards) and the National Commissioner (who shall issue national instructions, ensure security of the database and ensure adequate training and regulations).
Section 15Y	Forensic DNA Consultants (DNA/03)	<p>Independence is an even <i>more serious</i> concern in the South African context. This is because the SAPS alone administer the DNA database, which provides the SAPS with an unrestricted ability to determine policies. These are:</p> <p>(1) the <i>search criteria</i> on the database (when the database can be searched and against which other profiles);</p> <p>(2) <i>reporting rules</i> (when matches or hits on the database are reported and to whom they are reported);</p> <p>(3) <i>stringency of search criteria</i> (whether partial profile hits generated, allowing for familial inferences to be made); and</p> <p>(3) <i>profile retention and expungement criteria</i> (whether profiles are being retained indefinitely or if there procedures in place to remove profiles after specific time periods or events).</p> <p>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 <i>National Forensic Oversight Board</i> that is to be set up in terms of this Bill.</p>
Section 15Y	Forensic DNA Consultants (DNA/03)	The appointment of this Board should be made the responsibility of the Minister of Justice and Constitutional Development, and <i>not</i> 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.



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		<p>In order for this Board to have any true <i>value</i> as an independent oversight body, it is crucial that the majority of the Board representatives be those individuals with no stake 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.</p> <p>It is suggested that these 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. In addition, 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. And 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.</p>
Section 15Y	Forensic Genetics Policy Initiative (DNA/04)	<p>To ensure privacy and human rights, there must be adequate measures to ensure oversight, regulation, quality assurance and accreditation of the system. The collection and processing of DNA in laboratories, in particular, is a system prone to contamination, malfeasance and error without sufficient protections. A custodian plays a crucial role in ensuring the accuracy and security of the system. The bill does a good job of creating such an authority.</p> <p>However, the National Forensic Oversight Board does not include any categories of members who can be considered watchdogs on behalf of the public. No members of legal defense or human rights associations are included; rather the Board is required to invite the SA Human Rights Commission</p>



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		<p>to participate. From its inception, or at any time, the Human Rights Commission could decline to participate or participate in a limited degree and their decision-making authority in either scenario is unclear. The inclusion of NGOs without further refinement of their description does not alleviate this concern, as NGOs unrelated to ensuring the rights of the accused and convicted could be included.</p> <p>For the public to trust the Board in representing the public's interest, its makeup must include permanent representatives of bodies devoted to ensuring that individuals that come into contact with the tenets of this bill and law enforcement generally have their rights protected.</p>
Clause 6: Section 15Y(6) Additional para. (h)	DNA Project (DNA/05)	Include additional function to the roles of the Oversight Board: <i>(h) Review the annual report of the National Commissioner</i>
Clause 6: Section 15Y(6) Additional para. (i)	DNA Project (DNA/05)	Include second additional function to the roles of the Oversight Board: <i>(i) Review the use of reported matches by the National Commissioner and the National Prosecuting Authority to measure the effectiveness of the DNA Database.</i>
Clause 6 : Section 15Y(6) Additional para. (j)	DNA Project (DNA/05)	Include third additional function to the roles of the Oversight Board: <i>(j) Establish performance parameters for the DNA Database, which must be made publicly available.</i>
General Comment regarding Custodianship of the database	DNA Project (DNA/05)	The Custodian of the Database is not mentioned nor defined. There should also be a provision separating the powers of the custodian of the database from the DNA Forensic Analysis Biology Unit. Presently the DNA Database is not part of the Biology Unit nor is it part of the FSL. The NFDD will fall under the Quality Management Division of the Forensic Services Division and therefore whilst it is separate it will enhance public confidence to specify this fact.
Clause 6: Section 15Y	Jes Foord Foundation (DNA/09)	Suggests that more non-governmental organisations be included on this Oversight Committee and that the total number of such members not be restricted to two people.



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FIREARMS CONTROL ACT, 2000		
Clause 7: Provides for alignment of definitions, similar to clause 1.		
The Committee did not receive any substantial submissions suggesting amendments to clause 7. However, the submissions regarding Clause 1 (CPA) affect this clause.		
Clause 8: Amends section 113 of the Firearms Control Act, 2000, to provide for the taking of buccal samples by an authorised person and the taking of bodily samples by a registered medical practitioner or registered nurse.		
The Committee did not receive any substantial submissions proposing amendments to clause 8.		
EXPLOSIVES ACT, 2003		
Clause 9: Amends section 1 of the Explosives Act and provides for the alignment of definitions.		
The Committee did not receive any substantial submissions suggesting amendments to clause 3. However, the submissions regarding Clause 1 (CPA) affect this clause.		
Clause 10: Amends section 9 of the Explosives Act and provide for the taking of buccal samples by an authorised person and the taking of bodily samples by a registered medical practitioner or registered nurse.		
The Committee did not receive any substantial submissions proposing amendments to clause 10.		
OTHER ISSUES RAISED NOT PERTAINING TO SPECIFIC CLAUSES		
Implementation		
	Forensics 4 Africa (DNA/01)	The Portfolio Committee on Police should further oversee a detailed implementation plan of the South African Police Service regarding inter <i>alia</i> the taking of reference samples of arrestees
Funding		
	SA Society of Human Genetics (DNA/02)	Adequate funding to ensure that the activities proposed in this Bill can be fully implemented.
	Forensic Genetics Policy Initiative (DNA/04)	The financial costs of creating and maintaining such expansive DNA collection practices as well as a national DNA database are quite high and, if underfunded, could result in serious miscarriages of justice. Even well funded databases and practices in many countries have had serious incidents of mistake and error and significant backlogs. It does



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		not appear that any financial analysis of the bill has taken place.
Familial Searching		
	Forensic DNA Consultants (DNA/03)	<p>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 partial matches to be discovered. For both criminal and missing person scenarios, this can provide valuable information in the form of <i>possible familial associations</i> to the suspect or the missing or unidentified individual.</p> <p>It must be noted that this <i>must involve informed consent</i> 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 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.</p>
	Forensic Genetics Policy Initiative (DNA/04)	<p>The bill does not address familial searching, which is the deliberate search of a DNA database conducted for the intended purpose of potentially identifying close biological relatives to the unknown forensic profile obtained from crime scene evidence. This practice has a low success rate and raises serious privacy and human rights concerns as it necessarily involves searches of individuals that law enforcement knows to be innocent. The general language of the bill related to reasonable uses of the database would appear to allow such searches.</p>
Accreditation		
	Forensic DNA Consultants (DNA/03)	<p>The SAPS' Forensic Science Laboratory (FSL) is currently not accredited to international guidelines (being ISO17025). Accreditation is an <i>international standard</i> that forensic laboratories employ as a minimum requirement to assure the quality of the work performed by that laboratory. The FSL needs</p>



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		<p>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.</p> <p>In light of this, the legislation should make provision for a transitioning of the laboratory towards accreditation. This should allow the laboratory <i>reasonable time</i> to become accredited, and thereafter allow for forensic DNA testing to only be done by accredited laboratories in future. This should apply to <i>all laboratories</i> that are and will be involved in forensic DNA profiling.</p> <p>In the event that the laboratory does not become accredited, the <i>only viable alternative measure</i> to ensure that the laboratory is producing valid and quality results is for the laboratory to be <i>audited annually</i> by an external and independent technical advisory committee.</p> <p>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.</p>
Post Conviction DNA Access (Power to exonerate)		
	<p>Forensic Genetics Policy Initiative (DNA/04)</p>	<p>One of the most often repeated arguments by supporters of this bill is the power of DNA to exonerate. Indeed the most powerful uses of DNA can be for exonerating those individuals who have been wrongly convicted of a crime. However, no part of this bill is devoted to ensuring post conviction access to one's own DNA for exoneration purposes. The widely heralded recent launch of a SA Innocence Project, some of whose biggest supporters are proponents of the bill, makes clear the need for strong post conviction DNA access</p>



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		provisions. The lack of such provisions in this bill is a serious omission with profound human rights implications.
Oversight		
	Forensic Genetics Policy Initiative (DNA/04)	While the oversight powers given to the Board, Minister and National Commissioner with regards to oversight of labs, privacy and security and other necessary features to ensure the integrity of the forensic system are broad, there is a glaring lack of specificity to ensure the highest standards and oversight are met.

3. CONCLUSION

The submissions raised a variety of issues and valid concerns around several sections of the Amendment Bill, 2013. The recommendations for improvement will prove valuable during committee deliberations. The majority of submissions raised concerns around the taking of samples and the establishment of the National Forensic Oversight Board. The importance of an independent oversight body to monitor the implementation of the legislation was a central focus of many submissions. A number of submissions were received from victims of crime, especially survivors of rape and armed robberies, and strong views were raised regarding the balance of privacy and the obligation of the state to safeguard citizens against crimes. The majority of these submissions believe that the taking of DNA samples is not invasive and should be permitted.