



20 October 2020

## **ESTABLISHMENT AND COMPOSITION OF THE NATIONAL OVERSIGHT AND ETHICS BOARD (DNA BOARD)**

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## **1. INTRODUCTION**

The South African Police Service Act, 1995 (Act 68 of 1995) (“the Act”) was amended through the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013, which inserted chapter 5B into the Act. The Chapter deals with the establishment, administration and maintenance of the National Forensic DNA Database (NFDD) of South Africa and came into operation in January 2015. The Chapter further provides a legislative framework for the taking, processing and storage of forensic DNA samples.

The Act establishes the National Forensic Oversight and Ethics Board (commonly referred to as the “DNA Board”) to provide oversight over the use of DNA and to advise the Minister on aspects of DNA sampling processes, including the ethical, legal and social implications of the use of forensic DNA.

This paper provides an overview of the establishment and composition of the DNA Board in preparation for the Portfolio Committee on Police meeting scheduled for 21 October 2020.

## **2. NATIONAL FORENSICS OVERSIGHT AND ETHICS BOARD**

Section 15V of the Act establishes the DNA Board with specific criteria for its Members. It stipulates:

- The Board consists of not more than ten persons appointed by the Minister of Police.
- The Minister must invite nominations from the public for the appointees from the private sector).<sup>1</sup>
- The Minister appoints the Board on a part-time basis for a period not exceeding five years.

<sup>1</sup> Sections 15V(2) and (3)



- The Minister may renew the appointment of a serving Board Member for an additional term, provided that the appointment is made before the expiry of the current term.<sup>2</sup>
- The Minister appoints 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.
- The Minister appoints a Deputy Chairperson from the remaining nominated members of the Board.
- The Board must consist of:<sup>3</sup>
  - five persons from the private sector with knowledge and experience in forensic science, human rights law or ethics relating to forensic science; and
  - four persons from the public sector on the level of at least a Chief Director, including:
    - the Secretary of Police or his or her representative;
    - a representative of the Department of Health who has knowledge in the field of DNA;
    - a representative from the Department of Justice and Constitutional Development who has a sound knowledge of constitutional law; and
    - a representative of the Department of Correctional Services.
- The Minister must submit the names of Board members, together with a synopsis of their expertise and suitability to the National Assembly within a specified period.<sup>4</sup> The Minister must also inform Parliament of the removal or resignation of members from the Board.

On 08 October 2020, the Minister of Police wrote to the Speaker of the National Assembly and the Chairperson of the National Council of Provinces to table the appointment of the second DNA Board as stipulated in section 15V(5) of the Act. The Speaker published the notice of appointment in the ATC No. 145-2020 on 14 October 2020 and referred such to the Portfolio Committee on Police. The Board consists of nine persons who have the necessary experience in forensic and law. The Members are:

Four persons from the public sector:

1. Adv. L Nkosi-Thomas (Judge)
2. Mr AP Rapea (Secretary of Police)
3. Mr NL Mthethwa (Department of Correctional Services)
4. Mrs AA Grove (Department of Health)

Five persons from the private sector:

1. Mr D Morema (Nkuli Investigators)
2. Dr K Ehlers (University of Free State). *This is the second term for Dr Ehlers.*
3. Mr R Sono (Dean of Faculty at Heritage of Faith Bible Institute)
4. Dr N Myeza (Sasol)
5. Adv. R Rawat (Adv. High Court)

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<sup>2</sup> Section 15V(7)

<sup>3</sup> Section 15V(2)

<sup>4</sup> Section 15V(5)



The Minister published a synopsis of the Curriculum Vitae's (CVs) of Member and their respective experience.

### Comments and questions

The Speaker referred the appointment of the DNA Board to the Committee for notice. The Committee does not play any role in the appointment of the DNA Board. Despite this, the Committee has an oversight role over the functioning of the DNA Board and can question the Minister of Police on the appointment of the Board.

- 1) How did the Minister solicit nominations for the appointment of Board members from the private sector?
- 2) How many nominations did the Minister receive?
- 3) How did the Minister select the private sector Board members from the nominations?
- 4) Was Dr Ehlers appointed for a second term before her five-year term expired?
- 5) Who will serve as Chairperson and Deputy Chairperson of the Board?
- 6) How did the Minister select the Board members from the public sector?

### 3. PARLIAMENTARY OVERSIGHT

Section 15AC(2) of the Act provides for Parliamentary oversight over the functioning of the DNA Database. It states:

*“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.”*

As the Act came into operation in January 2015, the Minister must table the report in Parliament before the end of 2020. In fact, the report should have already been tabled.

Furthermore, section 15AC(3) of the Act states:

*“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”.*

### Comments

It is imperative that the Committee ensures that the Minister complies with the provisions related to Parliamentary oversight as per section 15AC(2) and (3) of the Act.



#### 4. CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL

The Criminal Law (Forensic Procedures) Amendment Act, (Act 37 of 2013) came into operation in January 2015. The Amendment Act was written into the Act as Chapter 5B, titled the “Establishment, administration and maintenance of the National Forensic DNA Database of South Africa.” The transitional provisions included the taking of buccal samples (a sample of a person’s saliva taken from the person’s mouth) from all convicted Schedule 8 offenders for the purposes of forensic DNA analysis, within a period of two years from the date of commencement of the Act. The period of transition expired on 31 January 2017. As a result, buccal samples still need to be taken from convicted Schedule 8 offenders whose buccal samples were not taken prior to the date of commencement of the Criminal Law (Forensic Procedures) Amendment Act, 2013 (January 2015).

The DNA Board first mentioned the need for an amendment to the Transitional Provisions of the Criminal Law (Forensic Procedures) Amendment Act, 2013 during a Portfolio Committee on Police meeting on 26 November 2016 as part of its 2015/16 DNA Board Annual Report hearings. The Board highlighted this need again the following year, on 28 November 2017, during deliberations on the 2016/17 Annual Report.

The Secretariat’s 2018/19 Annual Report states that the drafting team had completed the draft Bill in 2017 and reiterated that the Bill was withdrawn from the agenda at the Cabinet Committee by the Minister of Police. According to the Secretariat, the Minister of Police requested the incorporation of other technical amendments and further stated that the Secretariat’s Drafting Team awaits further instructions from the Minister of Police. During the meeting, the Secretariat again stated that the Minister proposed to include all citizens in the country in the buccal sampling process to curb crime through the establishment of a population DNA database.

Since then, the Minister of Police wrote to the Minister of Home Affairs, requesting him to consider effecting amendments to the relevant legislation as this matter falls within the exclusive mandate of the Department of Home Affairs.<sup>5</sup> To date, the Minister of Home Affairs has not responded and as such, the process of amending the Criminal Law (Forensic Procedures) Amendment Act, 2013 remains stalled.

#### Comments

Is there any clarity on the future of the Criminal Law (Forensic Procedures) Amendment Bill?

#### 5. REFERENCES

Civilian Secretariat for Police Service (CSPS) (2019). *2018/19 Annual Report*.

South African Police Service Act, 1995 (No. 68 of 1995).

Parliament of RSA (2020). Announcements, Tablings and Committee Reports No. 145 of 2020. Dated 14 October 2020.

<sup>5</sup> Civilian Secretariat for Police Service (2019b) Pg. 37