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## CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL, 2021 ANALYSIS

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## 1. INTRODUCTION

The Criminal Law (Forensic Procedures) Amendment Act, 2013 (No. 37 of 2013) (“DNA Act”) came into operation on 31 January 2015. 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 two-year period of transition expired on 26 January 2017, but at the time, the South African Police Service (SAPS) had not managed to complete the process of taking buccal samples of all convicted Schedule 8 offenders already imprisoned.

At the time that the DNA Act was drafted, it was not expected that the SAPS would be unable to complete the sampling process within the two year-period and thus, the DNA Act did not make allowance for an extension of this timeframe. The sampling process of convicted Schedule 8 offenders had to stop because it was no longer provided in law. The DNA Act had to be amended to allow the SAPS to proceed with the sampling process, but due to various reasons, the amendment was delayed significantly.

Five years after the sampling process had to be stopped, the Criminal Law (Forensic Procedures) Amendment Bill, 2021 [B25-2021] (“DNA Amendment Bill”) was introduced in Parliament. As a result of this delay, a significant number of convicted Schedule 8 offenders have been released from prison without their DNA samples taken for analysis and were lost as an investigative tool in crime detection.

This paper provides an overview of the transitional arrangements relating to the DNA sampling of convicted Schedule 8 offenders as contained in the DNA Act, relevant proclamations, a summary of the factors that led to the delay in amending the DNA Act and deliberations by the Portfolio Committee on



Police. The paper further provides an analysis of the DNA Amendment Bill and suggests some key areas for engagement during initial deliberations on the DNA Amendment Bill.

## **2. DNA ACT: BUCCAL SAMPLES FROM SCHEDULE 8 OFFENDERS**

### **2.1. Transitional Arrangements**

The Criminal Law (Forensic Procedures) Amendment Act, 2013 (No. 37 of 2013) ("DNA Act") came into operation on 27 January 2015. The Act was written into the SAPS 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 (31 January 2015). The period of transition expired on 26 January 2017.

As a result, the buccal samples of imprisoned schedule 8 offenders that were not taken before the two years expired could no longer be taken as the Act did not make any provision for the extension of this period. It should be noted that this does not affect the taking of buccal samples from convicted offenders incarcerated after the commencement of the Act.

### **2.2. Proclamations related to the Act**

Proclamation No. 89 of 2014 published in the Government Gazette on 30 December 2014 (No. 38376) provided that the Act comes into operation on 31 January 2015 with the exception of section 2, which inserts section 36D(1) into the Criminal Procedures Act, 1977 (No. 51 of 1977). This exclusion was based on the fact that the SAPS was not fully prepared to take buccal samples of all persons arrested and formally charged for any offence related to Schedule 8 of the Criminal Procedures Act, 1977.

On 13 January 2022, Proclamation Notice 48 of 2022 was published in the Government Gazette (No 45739) and provides that section 2 of the Act shall come into operation, to the extent that it inserts section 36D(1) in the Criminal Procedures Act, 1977 (No. 51 of 1977), on 31 January 2022. The proclamation brings into effect that the SAPS must take buccal samples of all persons arrested and formally charged on a schedule 8 offence. The proclamation does not mean that the SAPS has not been taking buccal samples of arrested schedule 8 offenders.

### **2.3. Performance measuring**

The performance target for taking buccal samples from Schedule 8 offenders is located in *the Crime Investigations* subprogramme (Detective Services Programme), but relates directly to the utilisation of forensic investigative aids in the investigation of crime and the enhancement of the DNA database (*Forensic Science Laboratories subprogramme: Detective Service Programme*). During 2020/2021, a total of 86 969 buccal samples were taken from a total number of 199 507 suspects arrested for Schedule 8 offences. The performance target was set at, an already low, 60% of which the SAPS



achieved 43.59%, thus 16.41% less than the target. According to the SAPS, the underperformance was due to the under-utilisation of, and monitoring of the taking of buccal samples.<sup>1</sup>

In 2020/21, the size of the National Forensic DNA Database decreased to 743 730 forensic DNA profiles from 1 616 535 profiles in 2018/19. This is attributed to challenges with the poor compliance rates of detectives taking buccal samples from persons arrested and charged for Schedule 8 offences, as well as the significant increase in DNA backlogs. During 2020/21, 207 840 profiles were expunged on the NFDD, while only 4 693 new profiles were loaded.

#### Comments and questions

- 1) The Department should explain what effect the exclusion of section 2 of the DNA Act coming into operation in 2015 had on the taking of buccal samples from schedule 8 offenders?
- 2) Is the SAPS ready for the implementation of Section 2 of the DNA Act?
- 3) What consequence management measures have been implemented against those detectives failing to take, utilise and monitor the taking of buccal samples, as this was provided as a reason for the poor performance on the performance target to take buccal samples of 60% of persons arrested on a schedule 8 offence?

### 3. DELAYS IN THE AMENDMENT OF THE DNA ACT

The National Forensic Oversight and Ethics Board (DNA Board) first mentioned the need for an amendment to the Transitional Provisions of the DNA Act during a Portfolio Committee on Police meeting on 26 November 2016 as part of its 2015/16 Annual Report hearings (*at this time, the two-year transitional period was about to lapse*). The Board highlighted this need again the following year on 28 November 2017 during deliberations on its 2016/17 Annual Report (*at this time, the two-year transitional period had already lapsed*).

The Portfolio Committee on Police in the Sixth Parliament had several discussions on the need to amend the DNA Act to allow for the taking of buccal samples of Schedule 8 offenders. The main cause for the delay in the Amendment Bill was the Minister of Police's aspiration to establish a national population DNA database, to store DNA samples of all South African citizens.

The key discussions in Committee meetings included:

- **Committee meeting on the Legislation Programme for Sixth Parliament, held on 11 September 2019**

On 11 September 2019, the CSPA briefed the Portfolio Committee on Police on the legislation programme for the Sixth Parliament.<sup>2</sup> The Secretariat presented seven Bills for processing, including the DNA Amendment Bill.

According to the Secretariat, they would have presented the Amendment Bill to the Justice, Crime Prevention and Security (JCPS) Cabinet Committee in May 2018, but the Minister of Police deferred

<sup>1</sup> SAPS 2020/21 Annual Report

<sup>2</sup> Civilian Secretariat for Police Service (2019a)



the presentation as he sought information regarding figures of outstanding sampling of Schedule 8 offenders. At the time, the Department of Correctional Services was unable to provide this information (it seems as if this information is still outstanding). Furthermore, the JCPS Cabinet Committee advised the Minister to consider the buccal sampling of all citizens (thus establishing a population database).

- **Committee meeting on the CSPA 2018/19 Annual Report, held on 10 October 2019**

The Secretariat's 2018/19 Annual Report stated that the drafting team had completed the draft Amendment Bill in 2017 and reiterated that the Bill was withdrawn from the agenda at the JCPS 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>3</sup> The Minister of Home Affairs did not respond and as such, the process of amending the DNA Act remained stalled at that time.

- **Committee meeting on the DNA Board 2018/19 Annual Report, held on 13 November 2019**

On 13 November 2019, the DNA Board presented its 2018/19 Annual Report to the Portfolio Committee on Police. The Board again highlighted the need to amend the DNA Act and raised concern about the proposed establishment of a population database. Notably, the concerns included the constitutionality of such database, as it would infringe on a person's privacy (Bill of Rights: Chapter 2 of the Constitution) and the administrative burden this will place on the SAPS Forensic Science Laboratory in managing a database of this magnitude.<sup>4</sup>

#### **Comments and questions**

- 1) The Executive Authority should be held accountable for the delay in the drafting of the Amendment Bill and tabling it in Parliament. The effect of this delay on justice for victims of crime is immeasurable.
- 2) The SAPS should explain the reasons for the inability to complete the process of taking buccal samples from already imprisoned schedule 8 offenders within the two-year transitional period between 2015 and 2017.
- 3) The Department should explain why the development (and establishment) of a population DNA database was not taken forward? What led to the abandonment of this idea?
- 4) The SAPS should indicate what was the size of the Schedule 8 offender population in correctional detention centres at the time when the DNA Act came into operation (January 2015).

<sup>3</sup> Civilian Secretariat for Police Service (2019b) Pg. 37

<sup>4</sup> DNA Board (2019)



- 5) What number of buccal samples were taken by the SAPS from Schedule 8 offenders during the two-year transitional period from January 2015 to January 2017?
- 6) What number of buccal samples from schedule 8 offenders are still outstanding?
- 7) What number of schedule 8 offenders have been released since January 2017 without their DNA samples being taken?

#### 4. CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL, 2021

The DNA Amendment Bill was introduced in Parliament and referred to the Portfolio Committee on Police for processing on 20 December 2021 (ATC No 173-2021). The notice of its introduction was published by the Civilian Secretariat for Police Service in the Government Gazette on 10 December 2021 (No. 45616). The DNA Amendment Bill contains only two clauses, one deals with definitions and the other deals with the sampling of convicted Schedule 8 offenders.

##### 4.1. Clause 1: Definitions

**Definitions:** The clause provides for any word or expression to which a meaning has been assigned in the Act.

##### 4.2. Clause 2(a): Removal of time limit and reporting requirements

Clause 2(a) essentially removes the time limitation on the taking of buccal samples from already convicted (and imprisoned) persons on Schedule 8 offences and further imposes several reporting requirements on the National Commissioners of the SAPS and Correctional Services.

Clause 2(a) substitutes section 7(7) of the Act for a provision identical to the previous subsection (7), but without a limitation to the period allowed to take buccal samples of persons convicted for Schedule 8 offences.

The proposed subsection (7)(a) provides for the taking of buccal samples from any person serving a sentence of imprisonment in respect of any offence listed in Schedule 8 of the Criminal Procedure Act 51 of 1977 (*see Annexure A for the list of offences*) –

- before the release of the person, if the buccal sample had not already been taken upon his or her arrest;
- before the release of a person either on parole or under correctional supervision by a court.

The proposed subsection (7)(b) provides that the National Commissioner of Correctional Services must:

- report the prescribed information of Schedule 8 offenders to the National Commissioner of the SAPS at least three months prior to the planned release date of such persons; and
- report on the implementation of the requirement for taking of buccal samples from convicted Schedule 8 offenders, on a quarterly basis.

The proposed subsection (7)(c) provides that the National Commissioner of the SAPS must:



- submit quarterly reports to the Minister of Police on the progress made concerning the taking of buccal samples from convicted Schedule 8 offenders.

### Comments and questions

- 1) The Committee should consider including a reporting requirement on the Minister of Police to account to Parliament on the implementation of the DNA Amendment Bill once it comes into operation regarding the taking of buccal samples of convicted Schedule 8 offenders.

#### 4.3. Clause 2(b): Refusal by convicted offender to submit to a buccal sample

Clause 2(b) focusses on convicted schedule 8 offenders (inmates) refusing consent for taking a buccal sample. The clause provides that a warrant should be obtained from a judge or magistrate and that, if after such warrant was obtained, the offender continues to refuse a buccal sample to be taken, minimum force may be used to obtain such sample. It further provides that the inmate concerned must receive medical attention and that the incident must be reported to the Inspecting Judge immediately.

Subsection (7A) provides that, if a person does not consent to the taking of a buccal sample,

- The National Commissioner of the SAPS (or his/her delegate) must apply for individual cases (*ex parte*) to a judge or magistrate for a warrant authorising the taking of a buccal samples which application must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based; and
- A judge or magistrate may issue such warrant if satisfied that:
  - the person to whom it relates is a person serving a sentence of imprisonment on conviction of a schedule 8 offence; and
  - the provisions of section 15J(2), (3), (4) or (5) of the South African Police Service Act 1995 (Act No. 68 of 1995), relating to the removal of a forensic DNA profile, do not apply.<sup>5</sup> (*These sections relates to the expungement of a conviction or sentence of a convicted child, application for removal of DNA sample from a person whose conviction was set aside on appeal or review, pardoned convicted offenders, removal of a DNA profile of a child within 12 months even if no application for removal was received*).

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<sup>5</sup> **SAPS Act, 1995 Section 15J(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 75 of 2008).

(3) The forensic DNA profile in the Convicted Offender Index must be removed by the authorised officer immediately upon application in the prescribed manner when-

(a) a person's conviction is set aside on appeal or review; or

(b) the relevant notice in terms of section 15I (5) has been received: Provided that section 15I (4), (7), (8) and (9) are applicable with the necessary changes to the removal of forensic DNA profiles from the Convicted Offender Index.

(4) 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.

(5) 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.





Subsection (7B) allows for an authorised person (police officer), assisted by correctional officials, to **use minimum force** against a person who refuses to submit to the taking of a buccal sample under authority of a warrant. This is despite the provisions of section 32(1)(c) of the Correctional Services Act, 1998 (Act No. 111 of 1998), which provides for the circumstances under which force may be used against an inmate.<sup>6</sup>

Subsection (7C), requires the National Commissioner of the SAPS, in consultation with the National Commissioner of Correctional Services, to issue and publish in the *Gazette* **National Instructions regarding the use of minimum force**.

Subsection (7D) provides that when force was used to obtain a buccal sample from an inmate, the inmate concerned must undergo an immediate **medical examination** and receive the treatment prescribed by the correctional medical practitioner and must be reported to the Inspecting Judge, immediately, as provided in section 32(5) and (6) of the Correctional Services Act, 1998.

#### Comments and questions

- 1) The SAPS should indicate whether they anticipate a large proportion of convicted Schedule 8 offenders to refuse to submit to a buccal sample being taken. What was the experience during the two-year transitional period (2015 – 2017)? What number of convicted Schedule 8 offenders refused a buccal sample?
- 2) The inclusion of any provision to use force, even if specifying that it should be minimum force, is a cause for concern, especially in a custodial setting. The Department should unpack this provision. Minimum force is not defined in South African law and must be accompanied with appropriate accountability and oversight.
- 3) The Department should provide a timeframe for the publication of the National Instructions regarding the use of minimal force when taking buccal samples from convicted Schedule 8 offenders.

<sup>6</sup> **Correctional Services Act, 1998 (No. 111 of 1998) Section 32: Use of Force - 32.** (1)(a) Every correctional official is authorised to use all lawful means to detain in safe custody all inmates and, subject to the restrictions of this Act or any other law, may use minimum force to achieve this objective where no other means are available.

(b) A minimum degree of force must be used and the force must be proportionate to the objective.

(c) A correctional official may not use force against an inmate except when it is necessary for—

- (i) self-defence;
- (ii) the defence of any other person;
- (iii) preventing an inmate from escaping; or
- (iv) the protection of property.

(2) Force may be used only when authorised by the Head of the Correctional Centre, unless a correctional official reasonably believes that the Head of the Correctional Centre would authorise the use of force and that the delay in obtaining such authorisation would defeat the objective.

(3) If, after a correctional official has tried to obtain authorization, force is used without prior permission, the correctional official must report the action taken to the Head of the Correctional Centre as soon as reasonably possible.

(4) Any such permission or instruction to use force may include the use of non-lethal incapacitating devices or firearms, subject to the restrictions set out in sections 33 and 34.

(5) If force was used, the inmate concerned must undergo an immediate medical examination and receive the treatment prescribed by the correctional medical practitioner.

(6) All instances of use of force in terms of subsections (2) and (3) must be reported to the Inspecting Judge, immediately.



- 4) The Amendment Bill provides that all incidents of force being used to obtain a buccal sample must be reported to the Inspecting Judge, however, it could be considered that this should also be reported to the DNA Ethics Board, and in turn to Parliament.

#### 4.4. Costing

It is estimated that the total for the implementation of the Criminal Law (Forensic Procedures) Bill (once enacted) will be R78.480 million (R78 480 000.00) and will be derived from the SAPS budget.

#### Comments

- 1) The SAPS should indicate where the budget will be derived from and whether adequate provisions have been made to support the implementation of the Amendment Bill.
- 2) The SAPS should indicate their average annual expenditure on forensic DNA consumables.
- 3) The SAPS should provide a cost estimation for the implementation of the entire DNA Act, especially with section 36D of the Criminal Procedures Act that came into operation at the end of January 2022.

### 5. CONCLUSION

The delay in amending the DNA Act to allow the SAPS to continue taking buccal samples from convicted Schedule 8 offenders resulted in a presumably significant number of these offenders being released from correctional facilities without their DNA samples being taken.

### 6. REFERENCES

Civilian Secretariat for Police Service (CSPS) (2022). *Criminal Law (Forensic Procedures) Amendment Bill, 2022 Presentation to the Portfolio Committee on Police*, dated 16 February 2022.

Correctional Services Act, 1998 (No. 111 of 1998).

Criminal Law (Forensic Procedures) Amendment Bill, 2021 [B25-2021].

Criminal Law (Forensic Procedures) Amendment Act, 2013 (No. 37 of 2013).

Parliament of the RSA (2021). *Announcements, Tablings and Committee Reports (ATC) No. 173-2021*, dated 20 December 2021.

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





## 7. ANNEXURE A – SCHEDULE 8 OFFENCES

Schedule 8 offences as per the Criminal Procedures Act, 1977 include:

- 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 (Act No. 32 of 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.
- Any
  - 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;
  - 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;
  - 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);
  - 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
  - offence of torture as defined in the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule."