



Africa Criminal Justice Reform  
Organisation pour la Réforme de la Justice Pénale en Afrique  
Organização para a Reforma da Justiça Criminal em África



# **Submission on the Forensic Procedures Amendment Bill**

11 March 2022

# Introduction

1. Africa Criminal Justice Reform (ACJR) is a project of the Dullah Omar Institute for Constitutional Law, Governance and Human Rights at the University of the Western Cape. ACJR seeks to carry out engaged research, teaching and advocacy on criminal justice reform and human rights in Africa.

## Purpose of the Bill

2. The Bill has become necessary because of the failure to comply with section 7(7) of the Criminal Law (Forensic Procedures) Amendment Act, 2013 (Act No. 37 of 2013), which sought to obtain a DNA sample from any person convicted of a Schedule 8 offence (broadly, sexual offences) before 31 January 2015.
3. The state has not been able to comply with this provision and now seeks to provide for the forced collection of samples from non-consenting sentenced offenders from their mouths, in order to populate the database with the DNA of persons previously convicted of sexual offences.
4. The collection is intended to be made from, firstly, (section 7(a)(i)) from those whose DNA was not taken on arrest. It is unclear how the Department of Correction Services will know whether or not this is the case.
5. The collection is also intended to be made from, secondly, (section 7(a)(ii)) those who are released early under correctional supervision or parole. It is unclear why only those subject to early release are to be targeted.

## Concerns with the impact of the Bill

6. It is well known that there is a backlog in the processing on DNA samples. This backlog in turn is hampering the expeditious conclusion of sexual offence matters before the courts. *News24* reported that the backlog of sexual offence cases in the court system is currently at over 80 percent of sexual offence cases, compared to 52 percent in March 2021.<sup>1</sup>
7. Moreover, recent reports indicate that the capacity of SAPS to properly investigate crime is severely curtailed. For example, 46% of SAPS officials in the Western Cape deployed as detectives (a total of 2,785) have not completed the Basic Detective Learning Programme.<sup>2</sup> The problem is not a new one and in early September 2012 the Portfolio Committee on Police was informed as follows: "Major-General Charles Johnson of the detective services division

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<sup>1</sup> Compiled by Nompilo Kunene, 'Shocking Figures Reveal Sexual Offences Court Backlog Now at over 80%', *Witness* <<https://www.news24.com/witness/news/kzn/shocking-figures-reveal-sexual-offences-court-backlog-now-at-over-80-20220308>> [accessed 11 March 2022].

<sup>2</sup> "Policing in W-Cape - Are W- Cape officers not adequately trained?", eNCA, 7 March 2022, <https://www.enca.com/news/policing-wcape-watch-are-wcape-officers-not-adequately-trained>

said while his unit had more than 23,000 detectives in its employ, more than 4,900 were not trained to do detective work."<sup>3</sup>

8. Based on the preceding it then appears that addressing the skills shortages in the police to collect, handle and analyse evidence would be a justifiable response and indeed a much needed one. Throwing more evidence at the police is not going to assist them in dealing with the cases currently on hand.
9. It is obvious that the collection of these samples will contribute to the DNA backlog and have the perverse effect of further slowing down prosecutions currently proceeding before the courts. The number of sentenced offenders in custody remains reasonably stable; given that there are tens of thousands of admissions every year, this must mean that there are tens of thousands of releases each year and a large proportion of these are sex offenders, whose samples will need to be taken.
10. The estimated cost of the Bill is R74 million. It is unclear whether this costing takes into account the additional administrative burden on the Department of Correctional Services. In any event, the calculated cost is equal to 35 percent of the amount spent on rehabilitation by the Department. If the state is incapable of processing these samples, it will result in wasteful and fruitless expenditure which could have been better spent on rehabilitation or any of the pressing priorities.
11. Taking samples from a person without their consent is *prima facie* an infringement of bodily integrity. This may be reasonable and justifiable in situations in which evidence clearly links an accused person to a specific case. But taking samples without consent from persons in this manner is less justifiable, as it amounts to a "fishing expedition". The previous Bill was passed during a time in South Africa's history which paid less attention to the rights of all persons.
12. A buccal sample is a relatively invasive process. It is unclear why other methods of collection are not available.

## Conclusion and recommendations

13. From the above it is clear that the South African Police Service (SAPS) does not currently have the capacity to process the DNA samples currently before it. By passing this Bill, the backlog will increase, hampering the conclusion of current cases before court, which is likely to amount to wasteful expenditure if the state does not have the capacity to process these.
14. It is further submitted that addressing contract management by SAPS in respect of forensic services should be the priority to ensure that the capacity is in place, stable and assured to handle DNA analysis in an efficient and effective manner. The Committee is reminded that on

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<sup>3</sup> "4,900 detectives not trained for job", *Sowetan*, 6 September 2012, <https://www.sowetanlive.co.za/news/2012-09-06-4900-detectives-not-trained-for-job/>

11 May 2021, the Minister of Police informed Parliament that "The reality is that this particular shortage was due to poor contract management in the SAPS".<sup>4</sup>

15. It is recommended the Bill be held in abeyance until the Portfolio Committee has been provided with clear evidence that SAPS has the capacity and willingness to process the DNA samples in current cases, and that the number of outstanding DNA samples does not exceed the average number usually taken in during one month. This is a matter of absolute urgency and should take absolute priority over the passage of any legislation.
16. Once the Portfolio Committee has satisfied itself of the above, the details of the Bill can be considered anew. Impact on the right to bodily integrity should be reconsidered, when the time comes.

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<sup>4</sup> "Speaker notes by the Minister of Police, General Bheki Cele at the occasion of the parliamentary debate on DNA hosted by the National Assembly" 11 May 2021, SAPS, <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=32499>