COMMENTS BY LEGAL AID SOUTH AFRICA ON THE CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL 25 OF 2021

MARCH 2022

1. INTRODUCTION

The Portfolio Committee on Police recently invited comments on the Criminal Law (Forensic Procedures) Amendment Bill [B25-2021]. The due date for submissions to parliament is 11 March 2022.

2. BACKGROUND

The Criminal Law (Forensic Procedures) Amendment Act, 2013 (Act 37 of 2013) provides for among other provisions, the taking of buccal samples from all persons who have been convicted of a sentence of imprisonment in respect of any offence listed in Schedule 8 of the Criminal Procedure Act, 1977 (for example murder, rape, sexual assault, any sexual offence against a child or a person who is mentally disabled, etc.) within a period of two years from the date of commencement of the Act. There was no possibility to extend the transitional period of two years in terms of the Act. The Act commenced on 27 January 2015 and the period of two years determined in the Act expired on 26 January 2017. However, the police service was not able to complete the process of taking of buccal samples from all convicted Schedule 8 offenders within the period of two years provided for in the Act.

This failure resulted in a large number of persons convicted and sentenced to imprisonment in respect of Schedule 8 offences, upon having served their sentences to be released without DNA samples having been taken.

Following the expiry of the transitional period of two years, it became necessary to amend the Act in order to again empower authorized members of the police service to take buccal samples from convicted Schedule 8 offenders serving sentences of imprisonment.

A significant obstacle encountered by the police in taking buccal samples from such persons serving sentences was the refusal by such person to have their buccal samples taken. The Bill proposes to address this obstacle.

3. AIMS OF THE BILL

The primary objective of the Bill is to contribute toward the population of the forensic DNA database which is provided for in the Act and which is maintained by the South African Police Service, for the purpose of conducting forensic investigations in respect of unresolved crimes**.**

Thus, the Bill seeks to:

i) make provision for the full implementation of certain transitional arrangements contained in the Criminal Law (Forensic Procedures) Amendment Act, 2013;

ii) provide for the enforcement of the obligation to submit to the taking of a buccal sample; and to provide for matters connected therewith.

4. CLAUSES OF THE BILL

4.1 Clause 1 of the Bill

Provides that any word or expression to which a meaning has been assigned in the Criminal Law (Forensic Procedures) Amendment Act, 2013, bears the meaning so assigned thereto.

4.2 Clause 2(a) of the Bill

Substitutes section 7(7) of the Act for a provision identical to the previous section (7) but without 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

- 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 South African Police Service at least three months prior to the planned release date of such persons. Furthermore, to also 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) requires the National Commissioner of the South African Police Service on a quarterly basis to submit a report to the Minister on the progress made concerning the taking of buccal samples from convicted schedule 8 offenders.

4.3 Clause 2(b) of the Bill

Proposes the insertion after Section 7(7) of the Act, the following subsections:

- Subsection (7A), which provides for the lodging of an application by the National Commissioner of the South African Police Service to a judge or a magistrate for a warrant against a convicted Schedule 8 offender who refuses to submit to the taking of his or her buccal sample.

- Subsection (7B), which provides, in order to ensure the enforcement of an obligation for taking of buccal samples, that an authorised person assisted by correctional officials, may use minimum force against a person who refuses to

submit to the taking of a buccal sample under authority of a warrant contemplated in subsection (7A).

- Subsection (7C), requiring the National Commissioner of the South African Police Service, in consultation with the National Commissioner of Correctional Services, to issue and publish in the Gazette National Instructions regarding the use of minimum force contemplated in subsection (7B).

- Subsection (7D), which provides that the provisions of section 32(5) and (6) of the Correctional Services Act, 1998, relating to use of force apply with the necessary changes to the use of force requirement as provided for in the proposed subsection (7)(B) in the Bill. (Requirement of a medical examination and treatment after use of force and reporting to the Inspecting Judge of any use of force).

5. COMMENTS BY LEGAL AID SA

Legal Aid SA supports the fact that the Bill empowers authorised persons to take samples from only those arrested for Schedule 8 offences and not all arrestees. If that had not been the case it would have been a major breach of those persons' rights to privacy and a violation of the presumption of innocence.

Subsection (7A), which provides for the lodging of an application by the National Commissioner of the South African Police Service to a judge or a magistrate for a warrant against a convicted Schedule 8 offender who refuses to submit to the taking of his or her buccal sample.

Legal Aid SA reiterates that where a suspect does not consent to having a buccal sample taken, the authorised person can approach the court for a warrant. In such an application the authorised person must provide the court with an affidavit stating that they have reasonable grounds for believing that a schedule 8 offence has been committed by the person refusing to give a sample and that the results of testing will be of value by excluding or including that person as possible perpetrator. Such authorization should take cognisance of the *audi alteram partem* rule and therefore a judicial warrant for collecting a buccal sample from a person should only be issued upon notice and after an opportunity for a hearing.

Legal Aid SA notes that provision is made that an authorised person assisted by correctional official, may use minimum force against a person who refuses to submit to

the taking of a buccal sample under authority of a warrant contemplated in subsection (7A). We also note that the National Commissioner is required to issue and publish National Instructions regarding the use of minimum force. (emphasis added).

We suggest that South African case law dealing with the taking of blood samples and the removal of bullets can serve as guidance.

In the matter of ***S v Orrie 2004 (1) SACR 162 (C)*** an application was made by the State following the accused's' refusal to furnish blood samples in response to an informal request thereof. The application was opposed by the accused on various grounds which included that being subjected to such blood tests for the purposes of compiling a DNA profile will infringe the accused's' fundamental constitutional rights to dignity, to freedom and security of the person, the right to bodily integrity, the right to privacy and the right to be presumed innocent and not to have to assist the prosecution in providing its case. Bozalek J granted the application and an order was made in terms of section 37(1)(c) of the Criminal Procedure Act, authorizing the medial officer of any prison or district surgeon to take a blood sample of each of the accused persons.

In the matter of ***Minister of Safety and Security v Gaqa 2002 (1) SACR 654 (C)*** the applicants applied for an order compelling the respondent to submit himself to an operation for removal of a bullet from his leg. The applicants alleged that they had reason to believe that the respondent had been shot and injured in the course of an attempted robbery in which two people were killed. The respondent opposed the application. The Court held that section 27 of the Criminal Procedure Act which provided for the use of force in order to search a person permitted the granting of the order. The Court held furthermore that section 37(1)(c) of the Criminal Procedure Act which permitted an official to take such steps as he deemed necessary to ascertain whether the body of any person had any mark, characteristic or distinguishing feature also permitted the order even though the bullet was clearly not such mark, characteristic or distinguishing feature. The Court held that the police would be hamstrung in fulfilling their constitutional duty if the order were not granted. The application was accordingly granted.

In the matter of ***Minister of Safety and Security v Xaba 2003 (2) SA 703 (D)*** the applicants applied for the confirmation of a *rule nisi* which would declare the second applicant, a police officer, entitled to 'use reasonable force' including any necessary surgical procedure performed by medical doctors' to remove a bullet lodged in the respondent's thigh, and directing the respondent to subject himself to the procedure, failing which the Sheriff was to furnish the necessary consent on his behalf It appeared that the respondent was a suspect in a motor-vehicle hijacking case and that the police believed the bullet would connect him with the crime. The respondent refused to undergo

the procedure. The applicants relied on section 27 of the Criminal Procedure Act which deals with legitimate use of force by police in the event of resistance against search or seizure and section 37 which deals with police powers in respect of prints and bodily features of the accused.

Section 27 of the Criminal Procedure Act authorises a police official to use such force as may be 'reasonably necessary to overcome any resistance' against a lawful search of any person or premises. The court held that the decision in ***Minister of Safety and Security v Gaqa 2002 (1) SACR 654 (C)*** in which the Court concluded that sections 27 and 27(1)(c) allowed a police official to use necessary violence to obtain the surgical removal of a bullet in circumstances similar to those in the instant case was wrong and should not be followed.

We note that the Bill aims to ensure the effective maintenance of a comprehensive forensic DNA database, in order to enhance the forensic investigative powers and capacity of the South African Police Service. This is expected to have a positive impact on the reduction of high crime rates, and shall contribute to the protection of a person's constitutional right to freedom and security of a person. It is also noted that a costing model has been conducted, and it is estimated that the total cost for the implementation of the new Act would be R78 480 000.00. It is envisaged that the funding for the implementation of the new Act shall be covered from monies appropriated to the SAPS by Parliament.

Although Legal Aid SA applauds all efforts to reduce the high crime rates in SA, the collection of DNA samples could give rise to logistical problems such as administrative and analytic burdens for the police and the laboratories.

Furthermore, the UK experience provides important evidence that widening the net to include large numbers of arrestees does not contribute to more crimes being solved.[1]

In 2010 the Home Office recognised that it was the increased number of crime scene profiles added to the DNA Database that resulted in the increase in DNA detections and not the number of DNA profiles taken and stored from the individuals. When the National DNA database grew in size by adding more profiles from arrestees, the proportion of DNA detections remained roughly constant at 0.36%.[2]

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[1] See Genewatch UK 'Facts and figures' available at http://www.genewatch.org/sub-539481 accessed on 2 March 2022.

[2] House of Commons Home Affairs Committee The National DNA Database: Eight Report of Session 2009-2010. (Volume II: Oral and written evidence) accessible at https://publications.parliament.uk/pa/cm200910/cmselect/cmhaff/222/10010504.htm on 2 March 2022. The following question was posed to Minister Campbell during the Bill deliberations in the UK: "***Q126 Bob Russell:*** *Minister, that last response shows you to be the most enthusiastic*

Santos[3] notes that there are multiple factors that can affect the performance of DNA databases and several metrics and dimension of utility to evaluate DNA databases have been critically analysed. The two metrics that have been used to measure the success of DNA databases, like "counting hits" and "investigations aided" while interesting, have limited value in assessing the overall effectiveness, concluding that there should be more research into actual impacts and case outcomes, such as evaluating relevance for case resolution, the reduction of investigative costs or the exoneration of suspects.

On the basis of insights gained in other jurisdictions, it can be concluded that if there were a choice between increasing the collection of subject samples and increasing funding for expert crime analysis, the latter should be given preference.

Submitted by Legal Aid South Africa

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person to come before the Committee in support of DNA. Given your wonderful grandstanding and cheerleading, and the emphasis that the Government has on the importance of DNA in solving crime, would you like the Database to contain DNA from a greater proportion of the population as a whole? ***Mr Campbell:*** *Let me balance that by saying that if there was less criminality (which as the Minister for crime reduction I am very much in favour of), and from that there were fewer arrests, then it follows that the Database would, perhaps, over time, shrink. If that was the case I would be one of the first to applaud that. Let me get on to the substance of your question, which is about how big the Database needs to be. It is not a question of size, it is about making sure that the right people are on the Database, and that is what the Crime and Security Bill is all about; getting the right people on and getting that balance between public protection. I am an enthusiast for the DNA Database because I think it is a crucial tool for helping to protect the public. However, I also accept that there are concerns (you will have heard some of them this morning) and that is why we need to have a balanced approach which balances public protection and the right of individuals. I do want to emphasise, I think DNA is a crucial tool in the fight against crime*.

[3] F Santos, H Machado and S Silva 'Forensic DNA databases in European countries: is size linked to performance?' (2013) 9 *Life Sciences, Society & Policy* 12 mentioned in 'The Criminal Law (Forensic Procedures) Amendment Act 37 of 2013: A critical analysis.' Lirieka Meintjes-Van der Walt and Izette Knoetze SACJ 2015 at page 131.