

**IN RESPONSE TO THE CALL FOR COMMENTS IN RESPECT OF THE
CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL [B25-2021]**

**PLEASE FIND BELOW THE SUBMISISON IN SUPPORT OF THE B25-2021
AMENDMENT BILL [HEREAFTER THE “CO BILL”]**

BY VANESSA LYNCH

10 MARCH 2022

HISTORY OF THE CO BILL

The transitional period for collecting DNA samples from Convicted Offenders (CO's) initially fell under the chapter headed “Transitional Arrangements” in the Criminal Law (Forensic Procedures) Amendment Act 37 of 2015 [the DNA Act], in particular, section 7(7), namely:

(7) The National Commissioner of the South African Police Service must, with the assistance of the National Commissioner of Correctional Services, from the date of commencement of this section, ensure that a buccal sample is taken within two years of any person serving a sentence of imprisonment in respect of any offence listed in Schedule 8 of the Criminal Procedure Act—

*(a) before the release of the person, if the buccal sample had not already been taken upon his or her arrest; or
(b) who is released before their sentence is completed either on parole or under correctional supervision by a court.*

The strict interpretation of this section was taken to read that sampling of convicted offenders may not continue after the expiration of the two year period from the date of operation of the DNA Act which was 31 January 2015. Notably however, the intention of the legislature at the time of drafting this provision was to expedite the sampling of CO's. As per the representations made to the Portfolio Committee of Police at the time by Correctional Services, it was deemed possible to collect samples of all the CO's within a two year period from date of promulgation of the DNA Act.

This is further evidenced by the following excerpt recorded by the Parliamentary Monitoring Group and taken from the deliberations in Parliament during 2013 which indicate this intention - *note my highlights in bold where the DCS representative, [**Ms Rotman,**] **assured the Portfolio Committee that all sentenced inmates would be processed within 12-18 months after the implementation date and the work would be done by the newly trained SAPS officials.**

“Ms Rotman noted that with an aggressive approach the entire population within the DCS system could be processed within two years and assured the

Committee that all sentenced inmates would be processed within 12-18 months after the implementation date and the work would be done by the newly trained SAPS officials. Once the backlogging was completed, the need for buccal swabbing in Correctional or Remand facilities would diminish to almost zero as most would have been processed upon arrest. The need for DCS to take samples would exist only in exceptional circumstances. DCS's primary role in the implementation would primarily be to aid SAPS in the taking of samples by providing a place to do so and support.

It was recommended by Ms Rotman that the samples be taken by SAPS officials under DCS supervision as it negated the need for DCS to provide any storage of buccal samples and ensured that the samples were brought to SAPS and FSL as quickly as possible. SAPS would have to provide DCS with information on swabs that had been newly collected from newly admitted detainees for DCS records. Ms Rotman concluded her presentation by assuring the Committee that the Joint Implementation Team consultation between all parties was happening and that implementation planning was on track. She stated that approving this Bill would aid the Justice, Crime Prevention and Security Cluster (JCPS) in its endeavors to substantially reduce crime.”

Despite these assurances and the CO sampling programme being endorsed, from date of operation of the DNA Act, the sampling of the CO population was not completed within the specified time period indicated by s.7(7) of the DNA Act. This was due to there not enough trained officials to process the entire population of CO's as well as several unexpected operational issues which arose which delayed the taking of samples from CO's. The Convicted Offender Index on the NFDD was therefore never fully populated within the prescribed period and CO's, who make up the most important contributors to an effective NFDD, have not all been sampled. Further, sampling of CO Offenders has been has been suspended which further undermines the intention of the legislature to sample this critical population for inclusion in the NFDD. Moreover, prisoners are being released from prison without buccal samples having been provided and are therefore not being included in the NFDD.

In order to overcome this unfortunate result the first draft of the CO Bill was drafted in 2018 to extend the two year period stated in s.7(7) of the DNA Act to allow the CO population to be sampled as intended.

SUPPORT FOR THE DNA BILL BY THE DNA OVERSIGHT BOARD

In its April 2020 report, signed by Justice Yvonne Mokgoro, the National Forensic Oversight and Ethics Board [DNA Board] confirmed that it had proposed an

amendment during 2017 to the DNA Act to remedy the shortcoming in the legislation following the expiry of the two-year transitional period to allow for the continuation of the convicted offender sampling programme. The DNA Board also emphasized that the *“Convicted Offender Index of the NFDD is [a] vital component of the NFDD as it provides potential links to cold cases and other crimes. If this crucial index is not populated, the NFDD the loses its efficacy as a criminal intelligence tool”*.

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The CO Bill caters for an additional issue which relates to the enforceability of the requirement to provide buccal samples. In the past, some Convicted Offenders have refused to provide their samples and the CO Bill contains provisions which are aimed at overcoming this challenge. This important mechanism provides for the relevant authorities to obtain buccal samples where cooperation is refused. The use of minimum force is further an already established law found in the s 13(3)(b) of the SAPS Act 68 of 1995, namely:

(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.

(2) Where a member becomes aware that a prescribed offence has been committed, he or she shall inform his or her commanding officer thereof as soon as possible.

(3) (a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.

(b) Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances.

CASE STUDY:

The case of *S v Mki*, Western Cape High Court Case No. 49/2016 illustrates the urgent need to sample Convicted Offenders. In this case a series of rapes occurred in the Western Cape between 2011 and 2015 and a number of innocent people were identified as suspects based on the incorrect identification by the victims. Five of these people were tortured and killed by the community on the basis of these incorrect identifications. During 2016, after matching reports on the DNA database, 26 cases of rape were linked to a single unknown perpetrator.

In the meanwhile, Mki was convicted on a charge of common assault, for which he received a suspended sentence. His buccal sample was included in the Convicted Offenders Index, as a new entrant, and he was then linked to the DNA obtained as a consequence of these rapes. Mki was arrested and pleaded guilty to 12 counts of robbery with aggravating circumstances, 6 counts of attempted robbery with aggravating circumstances, 3 counts of attempted robbery, 2 counts of robbery, 4 counts of assault with intent to do grievous bodily harm, 27 counts of kidnapping and 30 counts of rape. He was sentenced to 15 terms of life imprisonment and to 12 terms of ten years' imprisonment. This predator has been removed from society because of the operation of the Convicted Offenders Index of the NFDD. **His case serves as an extreme, but important example of the necessity for the implementation of all aspects of the NFDD and for the inclusion of existing Convicted Offenders' buccal samples into that Index.**

CONCLUSION

The rate of recidivism in South Africa is one of the highest in the world, meaning that many CO's are more likely to be involved in crime than the general population and that their inclusion in the CO index in the NFDD is critical. Having already lost the best part of the last four years to include these critical samples in the NFDD, the delay in processing this CO Bill has reduced the overall effectiveness of the CJS in South Africa

Thousands of Convicted Offenders are being released from incarceration without their buccal samples having been taken, potentially leaving them unlinked to previous crimes and future crimes and the failure to capture this data undermines an essential element of the NFDD.

It is without question that the CO Bill should be prioritized as being one of the most crucial pieces of legislation in the crime fighting arsenal available to SAPS today. The promulgation of this CO Bill will moreover counteract the opportunistic reliance by Convicted Offenders on the apparent limit of the two-year period for the taking of buccal samples from the prison population, as well as to dealing with any refusals to cooperate.

In conclusion, this submission fully supports the CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL [B25-2021] in all respects.

I will be willing to present my submission to the Committee if required.

Sincerely,
Vanessa Lynch

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ABOUT: Vanessa Lynch established The DNA Project and The DNA Project Africa, both non profit organisations dedicated to the use of advocacy outreach and forensic expertise to aid the development of DNA databases, forensic DNA skills and DNA specific legislation in criminal justice systems throughout Africa.

Vanessa was appointed by the Minister of Police as the Deputy Chair of the National Forensic Oversight and Ethics Board in January 2015, tasked with monitoring the implementation of the provisions of the DNA Act as well as providing oversight over the overall operations of the DNA database in SA for the first five years.

Since establishing The DNA Project, Vanessa has assisted with the drafting of essential DNA specific legislation, learnt the scientific principles of forensic DNA analysis and how this translates into crime resolution, and supported the development of a specific career path in Forensic Analysis both in science and law, to generate much needed skills in both of these sectors. In particular, she helped develop and provide a series of legal workshops aimed at training public defenders, prosecutors and magistrates on various aspects of DNA evidence and the laws pertaining thereto.

The work that Vanessa has undertaken as the founder and director of The DNA Project has been widely recognised in South Africa, as well as internationally and I have been invited to present at various International Conferences.