



RESPONDING TO PUBLIC SUBMISSIONS MADE ON THE CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL, 2021

SOUTH AFRICAN POLICE SERVICE

Portfolio Committee on Police

- 18 March 2022

PRESENTATION OVERVIEW

1. Background
2. Current status of DNA backlog at Forensic Science Laboratories
3. Costing of the Criminal Law (Forensic Procedures) Amendment Bill, 2021
4. Implementation of section 36D(1) of the Criminal Law (Forensic Procedures) Amendment Act, 2013 (Act No. 37 of 2013)
5. Training: Investigation Capacity
6. Legal Implications - Refusal to submit to taking of a sample



BACKGROUND

BACKGROUND

The Portfolio Committee on Police (PCoP) is currently conducting public hearings on the Criminal Law (Forensic Procedures) Amendment Bill, 2021 (“the Bill”).

The Chairperson of the PCoP has requested the South African Police Service (SAPS), to respond to matters raised in the public submissions on the Bill.

Responses to the submissions has been included in the presentation.



CURRENT STATUS OF DNA BACKLOG AT FORENSIC SCIENCE LABORATORIES

OVERVIEW OF SUBMISSIONS FOR FORENSIC DNA ANALYSIS TO FSL

Two categories:

- **Crime samples (includes the post coital rape samples)**
 - DNA analysis is performed on the manual and Crime Index (CI) Semi-automation lanes.
 - Mixture and rape samples are the more challenging/ complex samples that are more labour intensive and time consuming to analyse – “slow/complex category”.
- **Buccal samples**
 - DNA analysis is performed on the Reference Index (RI) Semi-automation lanes
 - Single source and easy to analyse – “sprinter category”
 - The Bill aims to authorise the taking of buccal samples from offenders convicted in respect of offences referred to in Schedule 8 of the Criminal Procedure Act, 1977 (Act Np. 51 of 1977).

MEASURES TAKEN BY THE FORENSIC SCIENCE LABORATORY

OBJECTIVE	STRATEGIES
<p>To process all collected buccal samples (Reference index samples) as mandated by the section 36D(1) of the Criminal Procedure Act, 1977 (inserted by the Criminal Law (Forensic Procedures) Amendment Act, 2013 (Act No. 37 of 2013)) that will aid the efficiency of NFDD to generate potential leads to resolve cold case and identify serial repeated offenders by loading all forensic results generated from RI</p>	<p>1. MEASURES TO SUPPORT AND SUSTAIN PROCESSING</p> <ul style="list-style-type: none"> • Long term fixed contracts have been secured to support the maintenance/ service/ repair of the specialised equipment/ instruments and to acquire critical consumables for processing. <p>2. OPERATIONAL PLAN</p> <ul style="list-style-type: none"> • The work will be processed in the following manner: • New incoming work load and backlog is purified to ensure targeted customer focus prioritisation improving service delivery. • Reference Index category- Reference index exhibits: 82% processing of new work as per TID and 18% processing of backlog monthly. • Reference Index category- Reference index exhibits reduction of 90% backlog by end August 2022 with expectation of not having more than 10% backlog on hand compare to total entries received by the laboratory in this category. • Each analyst is trained and competent will be allocated 34hrs of overtime monthly to optimize production for the duration of the strategic recovery plan.

TOTAL REGISTERED ENTRIES: RI SAMPLES: BACKLOG PLUS CURRENT ENTRIES

Category	Biology HQ	Biology WC	Total
RI Intelligence > 90 days (backlog as on 17 th March 2022)	49 973	17 461	67 434
RI items registered within 35 days	28 482	27 593	56 075
Total	78 455	45 054	123 509

PROJECTED PERFORMANCE DURING NORMAL HRS FOR REFERENCE BUCCAL SAMPLES

CASE MANAGEMENT FOR RI (BUCCALS)

PTA MONTHLY INFLUX OF NEW ENTRIES : 8 000

WC MONTHLY INFLUX OF NEW ENTRIES: 13 000

PTA BACKLOG ON HAND: 49 973 [17/03/2022]

WC BACKLOG ON HAND: 17 461 [17/03/2022]



RI SYSTEM (BUCCAL SAMPLE) CAPACITY MONTHLY & HUMAN RESOURCE : 57 600

PTA 14 400 ENTRIES [1 LANE]:

WC: 43 200 ENTRIES [3 LANES]:

15 ANALYSTS

29 ANALYSTS



SPARE CAPACITY AFTER BACKLOG IS ERRADICATED AT END OF AUGUST 2022 TO SUPPORT ADDITIONAL BUCCAL SAMPLE SUBMISSION AS PER THE DNA BILL

MONTHLY: 36 600

NB: Current Buccal Sample backlog of 67 434 (as on 2022-03-17) to be eradicated by end of August 2022



**COSTING OF THE CRIMINAL LAW
(FORENSIC PROCEDURES) AMENDMENT
BILL, 2021**

COSTING OF THE BILL

- It is estimated that the total cost for implementation of the new Act will be R 78,480 million.
- Direct costs, such as acquisition of buccal sample kits and Forensic Science Laboratory analysis of the samples taken, had mostly been included in the costing model, in addition to training and stationary required.
- Baseline funding as per annual appropriation currently contains elements of costing in relation to the requirements of the legislation. In this regard both national and provincial competencies in the SAPS perform these activities and the level of funding is appropriate to meet the demands.
- Various types of consumables are being procured on an annual basis that are used during the investigation of crime, including the requirements of this legislation. On average approximately R200 million is being spent on consumable supplies of a forensic nature, including amongst others collection kits and analysis of samples taken.



**IMPLEMENTATION OF SECTION 36D(1) OF
THE CRIMINAL PROCEDURE ACT, 1977
(INSERTED BY THE CRIMINAL LAW (FORENSIC
PROCEDURES) AMENDMENT ACT, 2013**

IMPLEMENTATION OF SECTION 36D(1) OF THE CRIMINAL PROCEDURE ACT, 1977

- Detectives were encouraged to take buccal samples from priority Schedules 8 offences such as sexual offence related, property crime and murder related. Detectives were given the discretion to take from other offences if it directly would assist the investigation.
- Thus routinely buccal samples were not taken from persons arrested in respect of Schedule 8-offences such as public violence, arson, assault with the intention to cause grievous bodily harm, theft (shoplifting), and crimes against the state such as treason, sedition, and contraventions of the Firearms Control Act and Explosives Act.
- The above measures provided SAPS an opportunity to prepare for, and obtain all resources to support the eventual mandatory taking of buccal samples in respect of all persons arrested in connection with all Schedule 8 offences:
 - implementation and sustaining of contracts to procure buccal samples;
 - acquiring and distribution of buccal sample kits to all stations;
 - ensuring laboratory resources including adequate contracts to support DNA analysis and forensic analysts to analyse the buccal samples.

IMPLEMENTATION OF SECTION 36D(1) OF THE CRIMINAL PROCEDURE ACT, 1977 (CONTINUED)

- Permitting IJCS to facilitate projects within Department of Correctional Services & SAPS to enhance their IT systems and to integrate both Departments IT systems to facilitate the taking and monitoring of buccal samples taken from arrested, charged and incarcerated persons.
- The National Forensic DNA Database was not fully populated with forensic DNA profiles derived from all persons arrested and charged in connection with all offences referred to in Schedule 8.
- 1 023 708 buccal samples have been taken from persons arrested and charged in respects of prioritised Schedule 8 offence samples.
- The recent mandatory taking of buccal samples from *all* Schedule 8 offences will in the short-term require additional measures and place some strain on the resources to ensure that buccal samples are taken from persons arrested and charged and the timely analysis thereof.
- The IJCS project to enhance the integration of Department of Correctional Service and SAPS It system to communicate and monitor the taking of the buccal samples is still ongoing.
- In order to deal with the outstanding number of buccal samples, a project will be initiated on Provincial level where Correctional Detention Facilities are located to obtain buccal samples from inmates.

CONSEQUENCE MANAGEMENT

- The non-achievement of the 2020/2021 target must be seen in the context of the prevailing circumstances at the time. During 2019 there was a shortage of buccal kits due to procurement issues, which almost halted the taking of buccal samples.
- The first few months of 2020 saw the distribution of kits to stations and management took steps to re-institutionalise the taking of buccal samples. The Covid-19 pandemic, which commenced the lockdown period during March/April 2020, had a significant impact on the whole of society, including the Detective Service, who had to amongst others, police the Disaster Management Act Regulations as well as investigate contraventions thereof.
- The severity of the Covid-19 pandemic coupled with the lack of knowledge at the time, caused a hesitancy amongst police officials to take buccal samples. A lot of effort had to be put into overcoming these fears and to re-institutionalise the taking of buccal samples.
- The statistics for the 2020/2021 financial year show a steady increase in the performance from a low of 31,3% during the 1st quarter to 68% In the 4th quarter. The overall performance for the year was however only 46%. As at the end of the 3rd quarter of 2021/2022, the percentage compliance for the taking of buccal samples was 78,71%.
- Against this background, the decision was taken not to institute departmental action against individuals for the failure to take buccal samples during a very challenging 2020/2021 financial year.

DNA POPULATION DATABASE

- A population DNA database within law enforcement is considered as unconstitutional and also not aligned to international practice. This view is supported by the National Forensic Oversight & Ethical Board and SAPS Legal Service.
- The proposed purpose and use of such a database is unclear and raise numerous concerns including on the protection of personal information of an individual.
- SAPS has been experiencing resource challenges from 2018 onwards with forensic DNA analysis and increasing DNA casework backlog, FSL did not have the current capacity or could afford to take on additional DNA analysis of this magnitude.
- The resources and cost required to implement and sustain a population forensic DNA database is extremely resource intensive and costly (several billion rand to acquire the laboratory & IT system and equipment , and at another least R1 billion to collect and perform DNA analysis).
- A population DNA database should be hosted with Department of Home Affairs. SAPS should be permitted as in the case with fingerprints, to only perform comparison searches against such a database of Department of Home Affairs (Ministerial and Cabinet responsibility to take the matter forward).

BUCCAL SAMPLES TAKEN AT CORRECTIONAL SERVICE CENTRES

- Buccal samples had been taken from 100 342 inmates convicted of Schedule 8 offences at Correctional Detention Centres at the time when the DNA Act came into operation in January 2015 (during the two year transitional period).
- SAPS is unable to indicate the number of persons convicted of Schedule 8 offences who have been released since January 2017 without their DNA samples being taken. (The Department of Correctional Services is the custodian of this information).
- The Service is also unable to indicate the number of persons currently serving sentences relating to Schedule 8 offences who will be affected by the implementation of the Bill. (The Department of Correctional Services is the custodian of this information).
- It is impossible for the SAPS to anticipate the number of offenders that will refuse the taking of buccal samples.



TRAINING: INVESTIGATION CAPACITY

CAPACITY TO INVESTIGATE CRIME AT VARIOUS LEVEL

- The SAPS has the capacity to investigate the crime at various levels.
- The investigators are capacitated with the basic and specialised investigation skills and techniques to investigate different types of crimes assigned within the area of their responsibility.
- The below table is the illustration of the training of active investigators that have been trained as on 2021-03-17:

NAME OF PROGRAMME	TOTAL TRAINED
Basic Crime Investigative Practice	13167
Resolving of Crime Skills Programme	16838
Detective Learning Programme	3854
Law of Criminal Procedure Amendment Act: DNA	18 862

CAPACITY TO INVESTIGATE CRIME AT VARIOUS LEVELS (CONTINUED)

- The Detective Learning Programme was phased out in 2009 and replaced by the Resolving of Crime Skills Programme.
- The Resolving of Crime Skills Programme was enhanced and it is continuously updated to reflect existing legislative provisions and legal developments and address procedures related to the investigation of crimes.
- There is 475 investigators who are currently undergoing the Resolving of Crime Skills Programme that will be completed on 2022-03-21, in addition to the number that has already been trained.



LEGAL IMPLICATIONS - REFUSAL TO SUBMIT TO TAKING OF A SAMPLE

INVASIVE NATURE OF BUCCAL SAMPLES

- Buccal samples are the least invasive option available to obtain a DNA sample from a person.
- It involves the collection of saliva from the inside of the mouth of a person, by means of an apparatus with a soft surface (about the size of a teaspoon). The apparatus is repeatedly rubbed against the cheek area inside the person's mouth.
- It is far less invasive than a blood sample. The person is conscious and the process is painless.
- First option: The person voluntarily submits to the taking of a buccal sample and takes his or her sample himself or herself under the supervision of an authorized person.
- Second option: The sample is taken by an authorized person (a police official who has successfully completed the training prescribed by the Department of Health) from a voluntary person.
- Both these options involve no need to use any force.
- Force only becomes necessary when the person refuses the taking of such a sample.

CONSTITUTIONAL CONSIDERATIONS

- Legislation requires that blood samples must be taken by medical practitioners and courts have enforced the requirement accordingly. (S v Orrie 2004 (1) SACR 162 (C) and S v R 2000 (1) SACR 33 (W)).
- In contrast, a buccal sample is far less invasive than a blood sample.
- The collection of DNA is an investigating tool utilised in the investigation of offences, similar to interviewing of a suspect or the taking of fingerprints and photos of a suspect.
- DNA offers evidence with high evidentiary value.
- DNA evidence is not only used to secure the conviction of a person, but may also be used to exonerate an innocent person.
- In view of the high number of unsolved cases (especially of serious offences) and the substantial number of repeat offenders, it is submitted that the authority to take a sample from an offender will be a justified limitation of the rights of the person.

MINIMUM FORCE

- In terms of section 13(2)(b) of the South African Police Service Act, a member shall, where the use of force is authorized by law, use only the minimum force which is reasonable in the circumstances.
- This principle entails that the desired objective with the use of the force (ie to obtain a buccal sample by overcoming the refusal of the person) and the means (the person or persons and the equipment available) to achieve the desired objective, must be considered.
- Where it is reasonably foreseeable that a specific duty may require the use of force (such as where a warrant has been obtained after the person has refused to the taking of his or her buccal sample), an assessment of the risk must be made before embarking on the duty.
- Adequate personnel and equipment must, as far as reasonably possible, be deployed to ensure that the duty can be performed with the use of the minimum force. All the surrounding circumstances must be considered such as the place where the duty is to be performed, the resistance likely to be encountered, etc.

MINIMUM FORCE (CONTINUED)

- If the use of force is inevitable in order to obtain the desired aim, the minimum force must be used, and the use of force must be discontinued as soon as the aim has been achieved.
- Force must always be used with the greatest circumspection. If force is used, members are expected to exercise self-control and restraint.
- The principle of proportionality is essential to determine whether the force that was actually used in a specific instance, was legally permissible.
- Members must ensure that the harm which may result from the use of the force, will be proportional in the circumstances.
- The aim of the force must be to use the degree of force (minimum force) necessary to confine the body of the offender in order to enable the taking of a buccal sample.

PRINCIPLES TO CONSIDER IN THE PROPOSED NATIONAL INSTRUCTION

- The offender must be informed that a buccal sample will be taken from him or her and the procedure that it involves should be explained.
- The offender must be afforded an opportunity to take his or her own buccal sample under the supervision of an authorised person, or alternatively, submit to the taking thereof by the authorised person.
- If the offender refuses, the process must be stopped and an application must be lodged for a warrant as contemplated in clause 2(b) of the Bill.
- If a warrant has been obtained, the force used in order to take the buccal sample, must be reasonable, necessary and proportional.
- Force may only be used if the offender refuses or resists to submit to the taking of such a sample and must cease immediately after the sample has been obtained.
- Proper records must be kept of any force used and all incidents must be reported to the Inspecting Judge.

FINALISATION OF THE PLANNED NATIONAL INSTRUCTION

- The National Instruction may only be finalised once the Bill has been adopted by Parliament (to ensure compliance with the wording and requirements of the legislation).
- Consultation with the Department of Correctional Services may only be completed once the parliamentary process has been finalised.
- It is envisaged that the National Instruction will be issued from the date of the commencement of the legislation to support the effective implementation of the legislation.



THANK YOU