**Report of the Portfolio Committee on Police on public participation: Criminal Law (Forensic Procedures) Amendment Bill [B25 – 2021] (National Assembly – sec 75), dated 30 March 2022**

The Portfolio Committee on Police (the Committee), having held public hearings on the Criminal Law (Forensic Procedures) Amendment Bill [B25 – 2021] referred to it and classified by the Joint Tagging Mechanism (JTM) as a section 75 Bill, reports as follows:

1. **Introduction**

The Criminal Law (Forensic Procedures) Amendment Bill [B25 – 2021] (“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).

1. **Background to the introduction of the DNA Amendment Bill**

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 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.

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.

1. **Criminal Law (Forensic Procedures) Amendment Bill [B25-2021]: Proposed clauses**

The purpose of the Criminal Law (Forensic Procedures) Amendment Bill [B25-2021] is to make provision for the full implementation of certain transitional arrangements contained in the Criminal Law (Forensic Procedures) Amendment Act, 2013; to provide for the enforcement of the obligation to submit to the taking of a buccal sample; and to provide for matters connected therewith.

The Criminal Law (Forensic Procedures) Amendment Bill [B25-2021] proposes the following clauses:

* 1. **Clause 1: Definitions**

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

* 1. **Clause 2(a): Removal of time limit and reporting requirements**

Clause 2(a) essentially removes the time limitation on the taking or 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.
  1. **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. *(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).*

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.

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.

1. **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.

1. **Public Hearings**

The call for public submissions was opened on 04 February 2022 and closed on 18 February 2022. The call for submission was published in all official languages in a national and regional newspapers. Unfortunately, due to a technical issue the Amendment Bill had to be re-advertised (some newspapers contained the incorrect email address for submissions). Based thereon, the Committee sought advice from the Parliamentary Legal Services on the process to be followed. As part of this process, the call for public submissions was re-opened on 04 March 2022 and closed on Friday, 11 March 2022 and widely circulated on the Parliamentary Website and social media platforms. The Committee further contacted stakeholders that made substantial submissions during the consideration of the DNA Act (then Bill) in 2013.

It should be noted that based on the technical nature and content of the 2021 DNA Amendment Bill, the Committee did not expect many submissions. The Committee received eight submissions, which were from:

1. Ms Laura Heathfield;
2. Ms Diana Thomson;
3. Legal Aid South Africa;
4. Ms Vanessa Lynch;
5. African Criminal Justice Reform (ACJR) / Dullah Omar Institute;
6. Rape Crisis Cape Town Trust;
7. Congress of South African Trade Unions (COSATU); and
8. Judicial Inspectorate for Correctional Services (JICS).

From the eight submissions, five were substantial and invited for oral presentation to the Committee during public hearings on the DNA Amendment Bill on 16 March 2022. These organisations were:

1. Legal Aid South Africa;
2. Ms Vanessa Lynch;
3. African Criminal Justice Reform (ACJR) / Dullah Omar Institute;
4. Rape Crisis Cape Town Trust; and
5. Congress of South African Trade Unions (COSATU).

Legal Aid South Africa declined the invitation to make an oral presentation and the African Criminal Justice Reform (ACJR) was unable to attend the scheduled meeting. The Acting Content Advisor made the oral presentation on these two submissions on their behalf. As such, Ms Vanessa Lynch, Ms Jeanne Bodenstein from Rape Crisis and Mr Matthew Parks from COSATU and made oral presentations to the Committee during the public hearings.

1. **Clause-by-clause summary of public submissions**

From the submissions received, five submissions support the DNA Amendment Bill, one submission did not indicate support or not, and two submissions do not support the DNA Amendment Bill, based on concerns regarding the capacity of SAPS to collect and analyse buccal samples.

The table below provides a clause-by-clause summary of the written submissions received on the Criminal Law (Forensic Procedures) Amendment Bill [B25-2021]:

| **SUBMISSION NUMBER** | **ORGANISATION/**  **CLAUSE** | **SUMMARY OF SUBMISSION** | **SUPPORT/ DO NOT SUPPORT/ COMMENTS** |
| --- | --- | --- | --- |
| **DNA/01** | **Ms Laura Heathfield** |  | Supports the Amendment Bill |
|  |  | No objections to the proposed amendments and no further comments. |  |
| **DNA/02** | **Ms Diana Thomson** |  | The submission is on sections outside the scope of the 2021 DNA Amendment Bill. |
|  |  | There should be no time limit on the keeping of DNA samples. Evidence can crop up years later and a  criminal is found. Conversely, it can also be used years later to prove the innocence of a wrongly convicted  person. |  |
| **DNA/03** | **Legal Aid South Africa** |  | Supports the Amendment Bill |
|  | Clause 2(a)  Proposed Subsection (7)(a) | If the Amendment Bill allowed the taking of samples from all arrestees, and not only for Schedule 8 offences, it would have been a major breach of prisoners’ rights to privacy and a violation of the presumption of innocence. |  |
|  | Clause 2(b)  Proposed Subsection 7A | 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. |  |
|  | Clause 2(b)  Proposed Subsection 7A  Refusal to submit sample | Legal Aid SA cited 4 case laws dealing with the taking of blood samples and the removal of bullets as a guidance:   * ***S v Orrie 2004 (1) SACR 162 (C):*** *Judge Bozalek granted the application by the State to take blood samples and an order was made in terms of section 37(1)(c) of the Criminal Procedure Act, authorizing the medical officer of any prison or district surgeon to take a blood sample of each of the accused persons.* * ***Minister of Safety and Security v Gaqa 2002 (1) SACR 654 (C):*** *The Police applied for an order to compel the respondent to submit himself to an operation for the removal of a bullet from his leg. 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 further held that the police would be hamstrung in fulfilling their constitutional duty if the order was not granted. However, in a subsequent appeal, the Court held that the judgement was wrong and should not be followed.* * ***Minister of Safety and Security v Xaba 2003 (2) SA 703 (D):*** *The case dealt with the removal of a bullet lodged in the respondent’s thigh. The Court approved the removal under section 27 of the Criminal Procedures Act.* |  |
|  | General Comments | 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.  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. |  |
| **DNA/04** | **Vanessa Lynch** |  | Supports the Amendment Bill |
|  | Clause 2(b)  Proposed Subsection 7A | The DNA Amendment 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 Amendment 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.  A case study is provided in the case of S v Mki, Western Cape High Court Case No. 49/2016 to illustrate the use of DNA in crime fighting and the importance of loading samples of Schedule 8 offenders onto the DNA Database. |  |
| **DNA/05** | **African Criminal Justice Reform (ACJR) / Dullah Omar Institute**  Submission made by: Prof Lukas Muntingh and Dr Jean Redpath |  | Not in support of the Amendment Bill |
|  | Clause 2(a)  Proposed Subsection (7)(a) | 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”. |  |
|  |  | A buccal sample is a relatively invasive process. It is unclear why other methods of collection are not available. |  |
|  | Backlog, capacity and training | 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.  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. |  |
|  | Costing | It is unclear whether the costing of the Amendment Bill takes into account the additional administrative burden on the Department of Correctional Services. The calculated cost for the implementation (R78 million) is equal to 35 percent of the amount spent on rehabilitation by the Department of Correctional Services. 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. |  |
|  | Recommendation | 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.  The impact on the right to bodily integrity should be reconsidered, when the time comes. |  |
| **DNA/06** | **Rape Crisis Cape Town Trust** |  | Not in support of the Amendment Bill. |
|  |  | The current backlog in processing DNA samples and the additional collection of the samples envisioned in this Bill will contribute to exacerbating the backlog and will further slowdown prosecutions that are currently proceeding before the courts.  Considering that a very small portion of sexual offences reach the prosecution stage due to attrition, this will mean that even less survivors of sexual violence receive justice. |  |
|  | Costing | It is not clear if this figure (R78 million)  even encompasses all of the associated costs.  This is unjustifiable in context of the great need for budget to fight and respond to gender-based violence and femicide (GBVF) and this Bill only  make justice more unattainable for survivors by adding to the DNA backlog.  In addition, if the state is incapable of processing these samples, it will result in wasteful expenditure which could  have been better spent on rehabilitation or other priorities. |  |
|  | Recommendation | Recommends that the consideration of the Amendment Bill should be suspended until the Portfolio Committee has received evidence proving that the 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. |  |
| **DNA/07** | **COSATU** |  | Supports the Amendment Bill |
|  | Clause 2(a)  Proposed Subsection (7)(a) | Cosatu proposed that the Amendment Bill needs to be amended to require SAPS to take buccal samples of all persons who are charged, irrespective of the schedule of offence the person is accused of having committed. |  |
|  | Capacity and funding | South Africa’s existing forensic capacity is severely limited. This is due to insufficient buccal and other forensic data but also to being chronically underfunded. This has a dire impact on the capacity of the SAPS to determine and apprehend countless criminals. |  |
|  | General |  | The submission by COSATU touched on issues relating to fingerprints, photos, physical descriptions and identity information, which fall outside the scope of the Amendment Bill before the Committee and thus will not be discussed. |
| **DNA/08** | **Judicial Inspectorate for Correctional Services (JICS)**  Inspecting Judge Edwin Cameron |  | JICS supports the Bill both in principle and in its operational details. |
|  |  | JICS specifically noted the following:   * the Bill creates a process for the National Commissioner of SAPS (or delegate) to apply to a judge or magistrate for a warrant authorising the taking of a buccal sample; * samples are limited to Schedule 8 convictions (which include sexual offences, robbery, human trafficking and culpable homicide); * the Bill allows "minimum force" to be used, and this is linked to "use of force" as envisaged in section 32 of the Correctional Services Act and expressly mentions section 32(6), which provides that all instances of the use of force must be reported to JICS. |  |

A late submission was received from the Commission for Gender Equality (CGE) noting concerns around the use of minimum force and recommended that gender dynamics need to be considered. The CGE submitted that this is particularly important when considering female inmates, as this clause could potentially create opportunities for sexual harassment. Although the submission did not form part of the public hearings, the concerns raised were addressed during deliberations.

The majority of the submissions received expressed significant concern about the capacity of the Forensic Science Laboratory (FSL) Division of the SAPS. The Committee has had several engagements on the turnaround strategy to address the challenges experienced by SAPS FSL. Efforts should be increased to ensure the efficient functioning of SAPS FSL.

1. **Responses to concerns raised during public hearings**

The Committee started deliberations on the Amendment Bill on Friday, 18 March 2022 by receiving responses on the public submissions from the Civilian Secretariat for Police Service (CSPS), the South African Police Service (SAPS) and the National Forensic Oversight and Ethics Board (hereafter referred to as “the Board”). The key discussions were on the following aspects discussed below.

* **Buccal samples from Schedule 8 offenders and the Criminal Procedures Act, 1977**

During the presentation by the CSPS, it was stated that “section 36D(1)(b)(v) of the Criminal Procedure Act, 1977 provides that buccal samples may be taken from any person charged or convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette*, and after notification of Parliament, declared to be an offence for the purposes of this subsection.” The CSPS further stated that “without amendment to the Act it is provided for in above section to expand the number of offences in respect of which DNA samples may be taken, when DNA sampling and analysis is useful to solve the particular crime.”

Members raised concerns about what necessitate the Criminal Law (Forensic Procedures) Amendment Bill, 2021, if provision is already made to take buccal samples from all offenders, including Schedule 8. The CSPS explained that the aim of the Amendment Bill is to allow for the taking of buccal samples from already convicted (and imprisoned) Schedule 8 offenders. This addressed the lapsing of the transitional period included in the DNA Act.

Members raised concern about the low rates of compliance by detectives in taking buccal samples from Schedule 8 offenders. The SAPS confirmed that buccal samples have been taken from Schedule 8 offenders since November 2021 and that compliance by detectives in taking buccal samples is being monitored.

* **Capacity for DNA analysis in SAPS FSL**

Members raised concern about the significant backlog in DNA analysis and noted that a contributing factor possibly was the reluctance of SAPS officers to take buccal samples from suspects during the height of the COVID-19 pandemic for health and safety concerns. The fact that SAPS officers could have been (and possible were) scared to take samples was acknowledged by the SAPS.

Members questioned whether any of the 1 200 SAPS trainees will be deployed to the forensic sciences division to assist with DNA analysis or Supply Chain Management Division to assist with challenges related to contract management. The SAPS indicated that the trainees will not be deployed in these areas as specialised training is required. The SAPS further indicated that a Contract Management Committee has been established to identify those contracts that are about to expire in order to put remedial steps in place to avoid contracts expiring leading to consumables not being procured.

Members requested clarity on the influx of DNA analysis samples. The SAPS indicated that the current monthly capacity is 30 000 samples and that the total current influx is at 21 000, thus the influx is within their monthly capacity limit.

* **Expungement of entries**

Members raised concern about the number of expungements reported on the National Forensic DNA Database. The principle Act deals extensively with the removal of DNA profiles from all indexes of the Database.

* **Contract management**

A significant concern resulted from the retraction of the statement made by the DNA Board that the backlog in DNA analysis was created by, amongst others, poor contract management. The Board indicated that the backlog was created by a lack of funding, specifically the shifting of CJS funding. The Committee indicated that the Board essentially misled the Committee in its presentation that stated that poor contract management led to the backlog in DNA analysis. The Committee resolved that a letter will be sent to the Minister of Police to highlight this issue and the concerns raised by the Committee in relation to the interactions with the Board.

* **Sustainability of intervention model/strategy**

Members raised concerns about the sustainability of the model to address the backlog in terms of funding and the impact on forensic DNA analysts’ workload that could lead to burnout. The SAPS assured the Committee that the model to address the backlog through provisions for overtime is a short term arrangement and that the backlog will be cleared by August 2022. Once the backlog is cleared, the intervention strategy will be stopped and staff working overtime will no longer be needed.

* **Lack of equal resourcing at laboratories**

Members raised concern about the lack of equal resourcing at all the DNA laboratories countrywide. It seemed like the Western Cape Laboratory is better resourced compared to the Pretoria facility. The SAPS noted this concern and indicated that the resourcing is being addressed. The laboratory in the KwaZulu-Natal will be brought into full operation soon and it is envisaged that all provinces will have a basic forensic science laboratory in future, but that this is a costly exercise.

* **Use of minimum force**

Members raised concern about the fact that an application must be made to use minimum force to take a buccal sample. The concern was noted and the CSPS indicated that the use of minimum force is established in law, notably Section 13(3)(b) of the SAPS Act, 1995. The Amendment Bill also provides that National Instructions on the use of minimum force must be developed and implemented.

* **Concerns raised about the Board**

The Committee raised significant concern about recent interactions with the Board. It was stated that the Board should have taken a leading role in the processing of the Amendment Bill as it pertains directly to the Board’s oversight mandate. It was further stated that the Board should have proactively engaged the Committee to request an engagement rather than to wait for the Committee to invite the Board for a briefing. The Committee resolved to take these matters up with the Minister of Police and the Chairperson of the Board.

1. **Conclusion**

The Committee is satisfied with the positive and detailed discussions that took place during public hearings. The Committee expresses its gratitude to the organisations and individuals that made submissions on the Amendment Bill and reiterates the importance of public participation when Parliament deals with legislation.

**Report for noting**