

Submission to the NCOP SECURITY & JUSTICE COMMITTEE

On the Criminal Law (Forensic Procedures)
Amendment Bill [B25-2021] (National
Assembly – sec 75)

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To Hon. S Shaikh

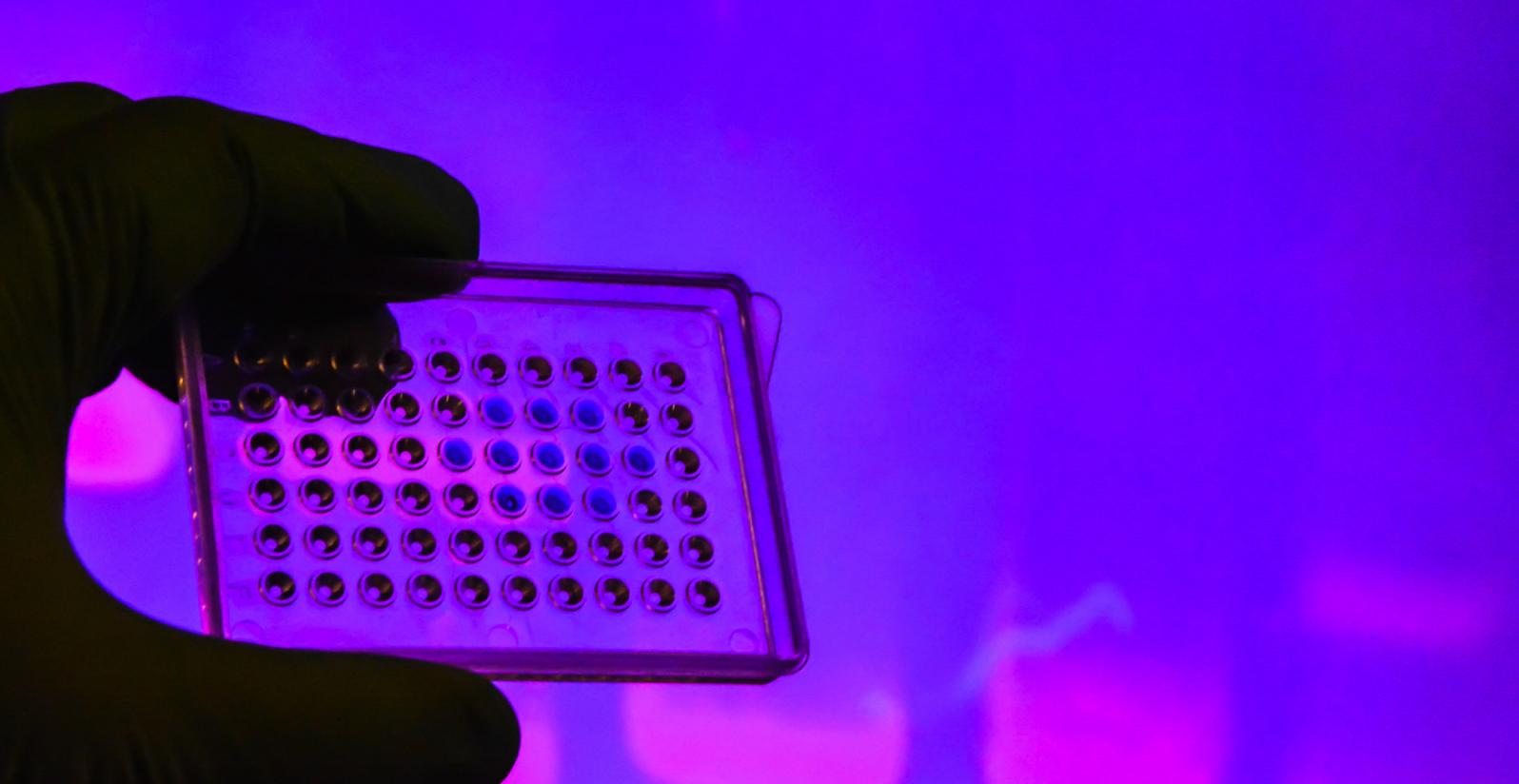
Chairperson: Select Committee on Security and Justice

For attention: NCOP Security & Justice Committee

Per email: CrimLawAmend2021@parliament.gov.za

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1. INTRODUCTION

We submit our comment on the Criminal Law (Forensic Procedures) Amendment Bill [B25-2021] (National Assembly – sec 75) with this document.

We submit that there are two critical aspects relating to the implementation of the Forensic Procedures Act that require urgent attention to facilitate the proper implementation and operation of the National Forensic DNA Database of South

Africa (NFDD) so that it may take its rightful place as an essential and effective crime-fighting tool in the hands of the South African Police Services and the National Prosecuting Authority. This document will discuss in detail the implementation of Section 36D(1) and the extension of the operation of Section 7(7).

Action Society acts on its members' behalf to be a voice for the voiceless.

2. ACTION SOCIETY'S VIEW ON THE CRIMINAL OFFENDERS BILL

Action Society is concerned about our country's unacceptably high crime rate and poor prosecution statistics. It has made it its mission to promote effective crime-fighting and the prosecution of criminals.

The extremely negative effects these circumstances have on the citizens of our country raise important constitutional issues about the responsibilities of the South African Police Services, who are constitutionally required to do everything in their power to combat crime and protect the citizens of South Africa.

It is a common cause among all right-minded people that the National Forensic DNA Database of South Africa (the "NFDD") is an essential and effective weapon in the fight against crime. No one disputes that it has enhanced the ability of the South African Police Services to identify criminals and that it provides considerable assistance to the prosecuting authorities to achieve convictions of those who have been apprehended. There is a significant body of literature about the effectiveness of a properly implemented and maintained National Forensic DNA Database in the fight against crime.

Notwithstanding its obvious benefits, the implementation of the NFDD has been fraught with difficulties and delays since its inception in 2015. These challenges have resulted in the fight against crime and Gender-Based Violence being deprived of the benefit of a fully operational National Forensic DNA Database of South Africa. Unfortunately, this situation persists even today.

A fundamental challenge to the implementation of the NFDD arises out of the failure of the government and the Police Ministry to implement all of the legislative provisions contained in the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 (the "Forensic Procedures Act"), enacted by Parliament and promulgated by the President some eight years ago.

- **Implementation Of Section 36d(1)**

On 1 December 2014, the President of the Republic of South Africa, by Proclamation 89 of 2014, fixed 31 January 2015 as the date on which the Forensic Procedures Act came into operation. The Presidential Proclamation, however, excluded Section 2 to the extent that it inserts section 36D(1) into the Criminal Procedure Act from operation. As a result, section 36D(1) of the Criminal Procedure Act has never been implemented.

Section 36D(1) provides for the mandatory taking of buccal samples from arrested, charged or convicted persons in respect of certain offences listed in Schedule 8.

We are concerned that in the seven years since then, the exception has not been removed and that Section 36D(1) remains inoperable. In other words, it is still not mandatory for the South African Police Services to take buccal samples in

the appropriate circumstances, notwithstanding that this is a legislated procedural requirement.

We consider this a serious impediment to the proper implementation and population of the NFDD, and it calls upon you to implement section 36D(1) of the Criminal Procedure Act forthwith by proclaiming that it should come into operation immediately.

Our call is in accordance with the recommendations of the National Forensic Oversight and Ethics Board's Handover Report of April 2020, which recommended that section 36D(1) be brought into operation.

Without a mandatory requirement that buccal samples be taken in the defined circumstances, the NFDD will never achieve its full potential in the fight against crime, and the citizens of South Africa will continue to suffer the consequences.

- **Extension of the operation of Section 7(7)**

Section 7(7) of the Forensic Procedures Act requires taking buccal samples from Convicted Offenders in prison. It provides that "*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 to the Criminal Procedure Act – (a) before the release of the person if the buccal sample has 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*".

This section forms part of the "transitional arrangements" for transferring existing forensic databases to the NFDD. It also required

cooperation between the National Commissioner of the South African Police Service and the National Commissioner of Correctional Services to ensure that buccal samples would be taken from any person already serving a sentence of imprisonment in respect of Schedule 8 offences. In addition, the Commissioners were required to ensure that the buccal samples were taken within two years.

We understand that the prescribed period of two years was imposed to prevent delays in the implementation of the section. But unfortunately, the requirements of the section were not fulfilled during the specified period, and buccal samples were not taken from all persons serving sentences of imprisonment in respect of the scheduled offences. The Convicted Offender Index was, therefore, never fully populated within the prescribed period.

The failure to take the buccal samples within the original two-year period has given rise to a situation where certain convicted offenders refuse to provide buccal samples. They justify their refusal by relying on the expiry of the two years referred to above. As a result, Convicted Offenders, who constitute the most important contributors to an effective NFDD, have not been appropriately sampled. To make matters worse, members of this essential category of individuals are being released from prison without buccal samples having been provided. Therefore, they are not included in the NFDD.

This has the effect that many thousands of samples that would be invaluable in the fight against crime are not being included in the NFDD. Unfortunately, with each passing day, the situation is compounded.

It is well known that Convicted Offenders are more likely to be involved in crime than the general population and that their inclusion in the DNA database is paramount. However, as a consequence, the opportunity to include these critical samples in the DNA database is being lost, to the detriment of the crime-fighting capabilities of the South African Police Services and the National Prosecuting Authority.

To resolve this difficulty in mind, the Police Ministry produced a Draft Bill entitled the Criminal Law (Forensic Procedures) Amendment Bill of 2018 (the "Amendment Bill"). However, to emphasise the extent of the delay that has occurred already, we point out that the Draft Bill was prepared in 2018 and has yet to be placed before Parliament. The Amendment Bill is aimed at amending section

7 of the Forensic Procedures Act to avoid the opportunistic reliance by Convicted Offenders on the apparent limit of the two-year period for taking buccal samples from the prison population to refuse to cooperate. The Amendment Bill also provides an essential mechanism for the relevant authorities to obtain buccal samples where cooperation is refused.

We disagree that there is, in fact, such a time limitation on the powers of the state to take buccal samples from Convicted Offenders when the Forensic Procedures Act is considered as a whole, but this is unfortunately how the Act is being implemented on the ground. The result is that Convicted Offenders are being released without being required to provide buccal samples for the NFDD.

Action Society supports the Draft Bill, but notwithstanding numerous attempts by the Standing Committee, the National Forensic Oversight and Ethics Board and others, the Minister of Police has failed or refused to place the Draft Bill before Parliament for the past three years.

We consider this a serious dereliction of duty by the Minister of Police as it runs counter to his obligation to implement the provisions of the Criminal Law (Forensic Procedures) Amendment Act of 2013 and to act in accordance with the best interests of the citizens of this country. Accordingly, Action Society requires this dereliction of duty to be remedied forthwith. It is simply unacceptable that this critical aspect of the NFDD is being neglected to the detriment of the citizens of South Africa.

3. PROPOSED SOLUTION AND RECOMMENDATION

In summary, Action Society requires you to take the following steps as a matter of urgency:

- to issue a proclamation implementing section 36D(1) of the Criminal Procedure Act No. 51 of 1977; and**
- to ensure that the Draft Bill is placed before Parliament for consideration.**

4. CONCLUSION

Action Society is concerned about our country's unacceptably high crime rate and poor prosecution statistics. It has made it its mission to promote effective crime-fighting and the prosecution of criminals.

A fundamental challenge to the implementation of the National Forensic DNA Database arises from the failure of the government and the Police Ministry to implement all of the legislative provisions contained in the Forensic Procedures Act, enacted by Parliament and promulgated by the President.

Our call in terms of the implementation of section 36D(1) is in accordance with the recommendations

of the National Forensic Oversight and Ethics Board's Handover Report of April 2020.

We consider the Minister of Police's failure to place the Draft Bill before Parliament until Action Society threatened legal action a serious dereliction of duty to implement the provisions of the Forensic Procedures Act and to act in accordance with the best interests of the citizens of this country.

Accordingly, Action Society requires this dereliction of duty to be remedied forthwith. It is simply unacceptable that this critical aspect of the NFDD is being neglected to the detriment of the citizens of South Africa.

5. CONTACT DETAILS

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