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The Chairperson
Portfolio Committee on Justice and Constitutional Development
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Dear Sir

CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL [B 2-2009]

Attached please find a report on the abovementioned Bill for your urgent attention and appropriate circulation.

Yours faithfully



RUDI VAN ROOYEN SC
Chairperson
Cape Bar Council

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***IN RE:* CRIMINAL LAW (FORENSIC PROCEDURES)
AMENDMENT BILL [B 2-2009]**

From:

**R.F. VAN ROOYEN SC
Chairperson
GCB Parliamentary
Committee**

23 January 2009

MEMORANDUM

1. It is accepted that the strengthening of the forensic investigative powers and capacity of the South African Police Service is a top priority. Modern scientific methods of crime detection must be available to law enforcement officers, lest we have a disempowered and paralysed police force which is unable to protect the public. The values which the Constitution of the Republic of South Africa, 1996

(“*the Constitution*”) seeks to nurture are dependent on a pro-active police force with the availability of modern technology and scientific research at its fingertips.

2. Modern technology and scientific research are fundamental to the detection, investigation and solving of crime. It is also fundamental to maintaining the confidence of the general public in the police to protect society from crime. Without modern technology the confidence of the general public in the Court’s ability to administer justice may well be undermined with large percentages of crime going undetected.
3. These powers may well make serious inroads into the individual’s Constitutional rights but such limitations may be justified provided that they are reasonable and justifiable in the circumstances of a particular case.
4. For present purposes, the relevant provisions of the Constitution will be referred to below.

5. **THE CONSTITUTION**

HUMAN DIGNITY

10. Everyone has inherent dignity and a right to have dignity respected and protected.

FREEDOM AND SECURITY OF THE PERSON

- 12. (1) Everyone has the right to freedom and security of the person, which includes the right –**
- (a) not to be deprived of freedom arbitrarily or without just cause;**
 - (b)**
 - (c) To be free from all forms of violence from either public or private sources;**
 - (d) Not to be tortured in any way; and**
 - (e) Not to be treated or punished in a cruel, inhuman or degrading way.**
- (2) Everyone has the right to bodily psychological integrity, which includes the right –**
- (a) ...**
 - (b) to security in and control over their body; and**
 - (c) not to be subjected to medical or scientific experiments without their informed consent.**

PRIVACY

14. Everyone has the right to privacy, which includes the right not to have –

- (a) their person or home searched**
- (b)**
- (c)**
- (d)**

ARRESTED, DETAINED AND ACCUSED PERSONS

35(1) Everyone who is arrested for allegedly committing an offence has the right –

- (a) to remain silent;**
- (b)**
- (c) not to be compelled to make any confession or admission that could be used in evidence against that person;**
- (d)**
- (e)**
- (f)**

(2)

(3) Every accused person has the right to a fair trial which includes the right –

- (a) ...**
- (b) ...**

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) **to be presumed innocent, to remain silent, and not to testify during proceedings;**

(i) ...

(j) **not to be compelled to give self incriminating evidence;**

(k) ...

(l) ...

(m)...

(n) ...

(o) ...

(4) ...

(5) **Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.**

6. Given the above values which the Constitution seeks to protect and nurture certain provisions of the proposed amendment to Chapter 3 of the Criminal Procedure Act, 51 of 1977, (“CPA”) may well not pass constitutional muster.

7. Clause 36B seeks to insert a new Clause into Chapter 3 of the CPA to provide the police with powers making compulsory the taking of fingerprints and non-intimate samples in respect of accused and convicted persons.

8. Clause 36B (1)(b)(i) provides that: **“A police official must take a non-intimate sample or must cause such sample to be taken of any –**
 - (i) person arrested upon any charge;**
 - (ii) person released on bail or on warning under section 72, if a non-intimate sample was not taken upon arrest;**
 - (iii) person upon whom a summons has been served in respect of any offence referred to in Schedule 1 or any offence with reference to which the suspension, cancellation or endorsement of license or permit or the disqualification in respect of any license or permit is permissible or prescribed;**
 - (iv) person convicted by a court and sentenced to –**
 - (aa) a term of imprisonment, whether suspended or not; or**
 - (bb) any non-custodial sentence,**

if a non intimate sample was not taken upon arrest;

- (v) person convicted by a court in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph ; or**
- (vi) person deemed under section 57(6) to have been convicted in respect of any offence, which the Minister has by notice in the *Gazette* declared to be an offence for the purposes of this subparagraph.”**

9. Clause 36A. (1)(i) provides:

“non-intimate sample” means –

- (i) a sample of hair other than pubic hair;**
- (ii) a sample taken from a nail or from under a nail;**
- (iii) a swab taken from the mouth (buccal swab);**
- (iv) a blood finger prick; or**
- (v) a combination of these.**

10. In effect Clause 36B (1) (b) makes it compulsory for any police officer to take a non-intimate sample from all arrested persons irrespective of logical connection between the taking of the sample and the offence. For example a woman arrested for stealing baby food from a super-market may well have to submit to a buccal

swab or a blood finger prick even though there is no logical connection between the sample taken and the offence in question. If the woman were to resist the taking of such a sample the police would presumably be entitled to use such force as was reasonably necessary to secure the non - intimate sample even in an instance where the woman admitted her guilt.

11. It is doubtful that such intrusive and invasive conduct on the part of the police could be constitutionally justified. Rather it would be an affront to the woman's dignity, privacy and bodily integrity. It is open to abuse and may well be considered to be cruel and unusual intervention, offensive to society's norms of what is fair and reasonable.

12. It is submitted that there must be a reasonable connection between the taking of the non-intimate sample and the investigation of the offence. Clause 36(B)(1)(b) may well not pass Constitutional muster. It would also place an inordinate burden on an already overburdened police force in that further unnecessary and illogical investigation (taking of a non-intimate sample) would be required in each case by the new legislation. Similarly it would burden the prosecution with the additional work of having to view non-intimate samples that do not furnish evidence and are unconnected to the offence in question. In order to be admissible at the trial the non-intimate sample obtained by the police must be relevant to the offence with which the Accused has been charged. Clause 36(B)(1) would have the illogical

effect that the evidence taken could be irrelevant and accordingly inadmissible at the trial.

13. Clause 36B(1)(b)(iv) which requires the police official to take a non-intimate sample of all convicted persons if such sample was not taken on the arrest of the Accused is illogical and unjustifiable. It makes no sense to take a non-intimate sample once the conviction has been obtained and the investigation completed. The taking of a non- intimate sample ought logically to form part of the investigation before conviction.

14. It is suggested that section 36B should read “a police official may, if he has a reasonable suspicion that such evidence would assist in the solving of an offence, cause a sample to be taken”, or words to similar effect. The general idea is to afford the police official with a discretion which must be exercised rationally.

15. It is illogical to commence Chapter 3 of the CPA with Clause 36A. Chapter 2 deals with the seizure and forfeiture of assets and ends crisply on Section 36 which deals with the disposal of an article concerned in an offence committed outside of the Republic. The “**Ascertainment of Bodily Features of Persons**” stands alone and is not logically related to Chapter 2. It accordingly is illogical and unfitting to commence Chapter 3 of the CPA with what would seemingly be a continuation of Chapter 2. This could well cause confusion.

16. It is submitted that Clause 36B(1)(a)(i) – (vi) provides that:

“a police official must –

- (a) take the fingerprints or must cause prints to be taken of any ..”** of the persons listed in categories (i) – (vi). It goes no further than the existing Section 37 save to make the taking of fingerprints compulsory. Section 37(1) is discretionary and provides that: “any police official may – **(a) take the fingerprintsor may cause any such prints to be taken.”** In practice fingerprints are taken as a matter of course on the arrest of a suspect in order (i) to confirm his or her identity; and (ii) to ascertain his or her past criminal record. Fingerprints are again taken as a matter of course on the passing of sentence. It is submitted that it would have made more sense to amend the existing section 37 in respect of fingerprints rather than to introduce a separate Section 36B(1)(a).

17. Clause 36B(1) makes the taking of fingerprints and non-intimate samples pre-emptory yet the proposed amendment of section 37 still reads:

“37(1) Any police official may (our underlining).

18. It appears that these two provisions are mutually destructive and may cause problems in their proper interpretation.

19. Clause 36C (1) provides that **“Any police official may without (a) warrant take fingerprints, body prints and non-intimate samples of a person or a group of persons, if there are reasonable grounds to –**

- (a) suspect that the person or that one or more of the persons in that group has committed an offence; and**
- (b) believe that the prints or samples or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of the persons as possible perpetrators of the offence.”**

It is submitted that Clause 36C (1) (a) – (b) makes the taking of fingerprints, body prints and non-intimate samples dependent upon their reasonable connection with the offence in question. The taking of such samples forms part of the pre-trial investigation and we are of the view that the suspect or person from whom the sample is to be taken ought to be entitled to Legal Counsel should he or she so desire and ought to be promptly informed of this right. The CPA ought to make provision for this as it may well form part of the right to a fair trial. The Constitutional right to legal representation only applies to detained and arrested persons. It is suggested that section 73(1) of the CPA ought to be amended to encompass such a right.

The legal representative would be able to ensure that the taking of bodily prints and non-intimate samples are necessary and reasonably connected to the

investigation and that such samples are taken in an acceptable manner, and that the client cooperated with the police official. It is a legal representative's primary function to advise his or her client of the protection afforded by the various constitutional rights and how best to exercise these rights.

20. Clause 36C provides that any police official may take a non-intimate sample. It is submitted that the taking of a mouth (buccal) swab or a blood finger prick are invasive procedures. The envisaged legislation permits even the most junior of police officers to take such samples. If the person were to refuse the police would no doubt be entitled to use force. Since the taking of samples is open to abuse, it is submitted that the taking of intimate as well as non-intimate samples ought to be left in the hands of trained medical personnel who are independent and not involved in the investigation of the case. The bodily invasion must be justifiable and carried out in a proper clinical manner, including the washing of hands, the wearing of surgical gloves by the official taking the sample, and the use of sterile instruments, swabs and pins, especially given the high risk of hepatitis and HIV infection.

21. It is fundamental to the proper functioning of our criminal justice system that exhibits and/or samples are properly preserved, properly sealed and in more serious cases properly retained. This goal cannot be attained if the task of taking, preserving and presenting such evidence is left in the hands of "any police official" for "any offence".

22. It is suggested that the proposed provisions ought to be re-evaluated giving proper weight to the following points :

- (1.) It is not desirable for a police officer to take non-intimate samples;
- (2.) Persons taking the non-intimate sample should be properly qualified and have no ties whatsoever with the police station and/or the investigation unit;
- (3.) It should not be peremptory to take a non-intimate sample in all matters and this should be limited to more serious offences such as those set out in Schedule 5 and 6 of Act 51 of 1977;
- (4.) A non-intimate sample should only be taken if it may assist in the investigation of the crime;
- (5.) An independent unit, specifically tasked with the obtaining, sealing, preservation, presentation and analysis of these samples ought to be established, in order that there is no vested interest in the outcome of any investigation and/or potential bias and/or any tampering with the exhibits.



RUDI VAN ROOYEN