

23 January 2009

The Secretary to Parliament  
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Dear Secretary

## COMMENT: CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL

### 1 INTRODUCTION

- 1.1 SABRIC, being a company mandated by the major South African banks to deliver services, products and strategies to address bank related organised crime, has noted and perused the proposed legislation and we are excited about the envisaged enactment thereof.
- 1.2 We also had the opportunity to read the comment submitted by Business Against Crime and we fully support the contents and gist of their submission (copy attached).
- 1.3 In addition to the above, SABRIC submits the following comments regarding the Bill.

### 2 COMMENT

- 2.1 **Section 36 B (1):** Since the term "police official" is not defined in the proposed amendment, it is suggested that the definition of the term as per section 1 of the *Criminal Procedure Act 51 Of 1977*, also be amended to refer to the definition as per section 1 of the *South African Police Service Act 68 Of 1995* and not the repealed *Police Act 7 of 1958*. This proposal should then, apart from general clarity, for purposes of the proposed Section 36 B (1), clarify whether the provisions of the proposed amendment would also apply to members of the municipal police services.

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- 2.2 **Section 36 B (1)(a)(iv):** the phrase “*if a **non-intimate** sample was not taken upon arrest*” seems to be an error since it would make no sense to compel a police official to take the **fingerprints** of a person convicted and sentenced by a court if “*a **non-intimate** sample was not taken upon arrest*”; the result of which could be that the fingerprints are taken twice whilst the intimate sample is never taken.
- 2.3 **Section 36 B (1)(b) :** Unless required for a specific investigation, it is suggested that the specific type of non-intimate sample to be taken in terms of this proposed section, be specified and that it not be left to the choice of the police official. From the text as it stands, the police official would have fulfilled his obligation by taking a sample from under a nail or, he/she could choose to always do a blood finger prick which, could be considered by some to be more of an invasive procedure than, for example, a swab taken from the mouth.
- 2.4 Given the high number of escapes, repeated offences by accused whilst released on bail, the number of foreigners and illegal immigrants involved in serious crimes, the use of false identification documents by offenders and the frequent use of aliases, it is suggested to insert section 36 B (1) (c) to provide for an **obligation** to also take **photographic images** of any person arrested for any offence referred to in Schedule 1, which must then be stored by the Division: Criminal Record and Forensic Science Service of the South African Police Service, as provided for in Chapter 5A of the South African Police Service Act.
- 2.5 **Section 36 B (3):** it is suggested to insert **(c)** ... the finger-prints taken was lost, misfiled or not successfully stored on the finger-print database maintained by the South African Police Service
- 2.6 **Section 36 B (6):** it is suggested to insert **(d)** ...  
(i) Any person who tampers with, manipulates, or in any way changes finger-prints, intimate or non-intimate samples to be submitted or  
(ii) any police official who submits finger-prints, intimate or non-intimate samples, falsely claiming it to have been taken from a specific person whilst knowing it to have been taken from another person or source,  
is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.

- 2.7 **Section 36 B:** In order to ensure compliance, it is suggested that a provision, similar to the provision contained in the *Domestic Violence Act 116 of 1998*, be inserted to read as follows: *Failure by a member of the South African Police Service to comply with an obligation imposed in terms of section 36 B of this Act or the national instructions referred to in section 15 C of the South African Police Service Act, 1995, constitutes misconduct as contemplated in the South African Police Service Act, 1995, and, unless the National Commissioner of the South African Police Service or his or her delegate directs otherwise in any specific case, the South African Police Service must institute disciplinary proceedings against any member who allegedly failed to comply with an obligation as referred to above.*
- 2.8 **Section 36 C (1):** after “Any police official may without warrant...” it is suggested to insert (and irrespective of whether such a person or persons have been arrested) “...take finger-prints, body-prints and non-intimate samples of a person or a group of persons, if there are reasonable grounds to...” -
- 2.9 **Section 37 (1)(a):** By merely referring to **body prints**, fingerprints are, in terms of the definition of body prints, effectively excluded from the proposed amended provision.
- 2.10 **Section 37 (1)(c):** This proposed amended section contains the condition “nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female...”: It is suggested that a condition stating that “nor shall a police official make any examination of the body of the person concerned where that person is a **male** and the police official concerned is **not a male**...”: be included.
- 2.11 **Section 37 (1)(d):** The proposed amended section contains the phrase “take a [photograph] photographic image or may cause a [photograph] photographic image to be taken of a person referred to in paragraph (a)(i) or (ii) or paragraph (a)(i) or (ii) of section 36B(1)”. It is suggested to insert: “... provided that if the photographic image is required to serve as evidentiary proof that the body of any person has any mark, characteristic, distinguishing feature or appearance **and** the taking of such a photographic image requires that person to undress fully or partially, such a photographic image shall, in the case of a male person, only be taken by a male and,

*in the case of a female person, only by a female."*

- 2.12 **Section 37 (2)(a):** The proposed amendment reads: "*Any medical officer of any prison or any district surgeon or, if requested thereto by any police official, **any registered medical practitioner** or registered nurse [may] **must** take such steps, including the taking of [a blood] an intimate sample, as may be deemed necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) 10 or (ii) of subsection (1) or paragraph (a)(i) or (ii) of section 36B(1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.*"
- 2.13 This provision seems to be too demanding and lends itself to abuse. For example, under the present wording, the police official who's offices just happen to be situated next to the consulting rooms of a plastic surgeon, might constantly choose to utilise the services of the latter for purposes of this provision, merely because it is convenient. It is suggested to rather provide that "*any registered medical practitioner or registered nurse **may**...*"
- 2.14 General: It is suggested that a provision be included to address resistance by any of the mentioned persons to submit to the taking of samples or prints.

Kind regards



**Kalyani Pillay**

**CEO: SABRIC**