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**Medical Rights Advocacy Network (MERAN)**

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23 October 2009

**Submission to the Portfolio Committee on Safety and Security**

To : Mr Jeremy Michaels  
Secretary of the Portfolio Committee of Police (National Assembly)  
CAPE TOWN

Per email to: jmichaels@parliament.gov.za

Dear Sir,

**RE: CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL, 2009**

**Introduction**

MERAN fully supports the earlier submissions made by the South African Human Rights Commission and the Law Society of South Africa.

The Criminal law (Forensics Procedures) Amendment Bill of 2009, which includes provisions for the establishment of a national DNA database, is being marketed as an indispensable tool in the fight against crime. As crucial as DNA can be in showing innocence or guilt, this Bill should definitely not be passed in its present form. It does not sufficiently address issues relating to individual and family privacy, and some of its provisions are unethical. It also places far too much power in the hands of the SA Police Service without adequate oversight. Further, the analysis of genetic material has serious implications for an individual from whom such a sample is taken, especially if he/she voluntarily offers to do so. The majority of our South African population are illiterate, and may not appreciate the risks of having their biological samples on a national database. In a medical setting, when a tissue sample is obtained for analysis from a patient, a health professional has a legal and ethical duty to obtain the patient's informed consent, ie, a patient must have *knowledge* and *appreciation* of all the true & essential facts concerning the nature and effect of the act consented to, in a manner, language & literacy level of patient. In promoting the advent of a national DNA database, great emphasis is placed on the 'eradication of crime', which is presently the vision of every South African; however, the associated risks, and enormous resources required for such an operation are played down.

DNA carries the genes that define biological identity. Almost all human DNA is shared, but the way in which sequences in certain regions of the individual genome are repeated, known as Variable Number Tandem Repeats (VNTR) vary from one person to another. Although the probability of two people having the same VNTR is extremely small, there are similarities among family members. DNA thus has important implications for both individual and family privacy. DNA, which can be cloned, has health implications, so it is of potential interest to powerful entities, including insurance companies and the pharmaceutical industry. Over 20 per cent of the human genome has already been patented, often at the expense of populations in developing countries. Many see this appropriation as biocolonialism. It is argued that only the VNTRs, not the whole genomic sequence, will be stored, minimising risks to individual privacy. However, this is not specified in the Bill. Although, according to Wikipedia, only short tandem repeats (STR) are stored on the UK database, DNA samples containing complete genetic information are also stored and linked to the database. Although it has been argued that familial tracing is not possible from DNA profiles, concerns have been raised about Britain and the United States of America performing familial searching, making persons in the databases, many innocent volunteers, 'genetic informers' when family members are suspected of a crime.

However, the bill specifies that a sample will be retained against the profile and identity of the individual (Section 15). Similarly, the stipulation that persons who voluntarily offer their DNA for storage may not withdraw informed consent once they have given it is contrary to international norms about the storage of donated human tissue. Further, it will allow police to take further samples at a later date if the sample was inadequate, and, further analysis can be done if and when newer technologies become available; all without the consent of a volunteer. Minors can also be on this database, and can only have their profiles removed when they become adults; which is unconstitutional, as being on the database may not be in the best interests of the minor, since his/her samples can be used to track a parent who becomes a suspect.

A sample must be retained after it has fulfilled the purposes for which it was taken but, if there has been no conviction by a court of law, it must be destroyed after five years. Why should it be retained if a person has not been charged or convicted? In a unanimous judgement, the European Court of Human Rights ruled recently against the retention of the DNA of innocent people in the UK, terming it a violation of the right to respect for private and family life. [CASE OF S. AND MARPER v. THE UNITED KINGDOM, ECHR]

The Bill gives awesome powers to the police over this intensely private and commercially valuable material. No matter how junior, any member may take blood or a non-intimate sample, not only from people who have been arrested, but from any person, provided there are "reasonable grounds" to suspect involvement in crime. The Bill also updates relevant legislation to allow the police to extend their fingerprint and body print (palm, for example) database, which is not particularly controversial. However, the provisions allowing for the SAPS to "establish and regulate the administration and maintenance of the national database of SA" raise extremely important questions. Of concern, too, are provisions allowing police to instruct health professionals to examine people and take intimate samples, which raises ethical problems relating to patient privacy and informed consent. The police will also be given 'speculative powers', which allows the police to access to information held by government department; MERAN is concerned that these may include medical institutions that maintain DNA databases for research purposes, and which will become

vulnerable if the Bill is passed. An invasion of this nature will breach the trust in the relationship between a health practitioner and patient.

While the Bill aims to provide the SAPS with increased crime-fighting powers, existing problems in the service need addressing first. The use of DNA as evidence should go hand in hand with good detective work, especially as criminals may plant fake DNA at crime scenes. With notable exceptions, there are serious shortcomings in police detective work, including shoddy statement taking, and the failure to lift fingerprints at crime scenes. Crime intelligence is another area in need of urgent attention. There is already a serious lack of capacity in the forensics division, and clarification is needed about the role of private laboratories.

Why give the police even more powers when some members abuse the power they already have, with impunity, through assaulting suspects and carrying out malicious arrests. Guns are stolen regularly while in police storage. If the SAPS cannot even look after guns, should they be entrusted with the powers to take and store vast quantities of DNA? 14 117 guns, and 2 500 case dockets were reported to be missing whilst in the custody of the police. MERAN has evidence that police brutality and torture is prevalent in South Africa.

While the Bill makes it clear that DNA is to be used only for purposes relating to crime, and there are stiff penalties for transgressions, the lack of effective monitoring and control (the Independent Complaints Directorate lacks resources to deal adequately with existing problems) render these provisions toothless.

Full public debate, preceded by the provision of adequate information to the majority of South Africans, is essential before this Bill is reworked. Such debate should address questions relating to the right to privacy (for example, is there a role for encryption in data storage?) and the type of independent oversight which is essential to ensure transparency and professionalism in the handling of such precious material.

Since the proposal for legislation regarding a forensic DNA database is based on the UK and USA models, it is important to consider the following:

- The Houston Police Department (HPD) shut down the DNA and serology section of its crime laboratory in late 2002 after a television expose revealed serious deficiencies in the laboratory's procedures that were confirmed by subsequent investigations. Two men who were falsely convicted based on botched laboratory work have been released from prison after subsequent DNA testing proved their innocence. In dozens of cases DNA retests by independent laboratories have failed to confirm the conclusions of the HPD laboratory. The DNA lab remains closed while an outside investigation continues.  
[www.hron.com/content/chronicle/special/03/crime/lab/index.html](http://www.hron.com/content/chronicle/special/03/crime/lab/index.html)
- In Virginia, post-conviction DNA testing in the high-profile case of Earl Washington, Jr. (who was falsely convicted of capital murder and came within hours of execution) contradicted DNA tests on the same samples performed earlier by the State Division of Forensic Sciences. An outside investigation concluded that the state laboratory had botched the analysis of the case, failing to follow proper procedures and misinterpreting its own test results. The outside

investigators called for, and the governor ordered, a broader investigation of the lab to determine whether these problems are endemic. Problematic test procedures and misleading testimony have also come to light in two additional capital cases handled by the state laboratory.

[Confusion over DNA a threat to Justice, Virginian-Pilot, Aug. 29, 2005]

- 1987 In the UK, police use DNA profiling in the celebrated Pitchfork case to clear a seventeen year old suspect of two rape-murders. Police collect blood samples from over 5,000 local men to identify the perpetrator, Colin Pitchfork.
- 2000 Following the sexual assault of a 91 year old woman in Wee Waa, New South Wales police took DNA samples from 500 local men aged between 18 and 45. Stephen Boney confesses shortly afterwards, before his sample can be analysed.
- In early 2007 in the UK, five civil servants were arrested on charges of industrial espionage for allegedly stealing DNA information from the database and using it to establish a rival firm. [ Five civil servants suspended over "DNA espionage" | the Daily Mail ] In 2009 the Home Office was consulting on plans to extend the period of DNA retention to twelve years for serious crimes and six years for other crimes.<sup>1</sup> According to the official figures, enough searches (around 2.5 trillion by 2009) have been run on the NDNAD such that statistically at least two matches (a 1 in a trillion chance, under ideal conditions) should have arisen by chance. However, depending on factors such as the number of incomplete profiles and the presence of related individuals, the chance matches may actually be higher. However the official position is that no chance matches have occurred.  
[Brian Costello, *Crimeline*, Are DNA 'cold hits' resulting in miscarriages?]

The attached letter below is a personal response from Prof SR Naidoo, who is a member of MERAN.



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22 October 2009

**TO:** Mr Jeremy Michaels  
Secretary of the Portfolio Committee of Police (National Assembly)  
[jmichaels@parliament.gov.za](mailto:jmichaels@parliament.gov.za)

Dear Sir

CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL

It is with *deep concerns* that I, as a state employed senior forensic pathologist and academic, make submission regarding the above Bill. Whilst the intentions behind the enacting of new legislation are

commendable, I believe that there are multiple aspects of the proposal legislation that need to be reviewed and amended BEFORE this is allowed to become law. DNA is unlike fingerprints or other prints, and is so biologically replete with such intimate identification characteristics of the individual, and my concerns are several.

Because the biological samples themselves (apart from the alphanumeric coded STR profiles) will be retained for a period of time, and for a minimum of 5 years in any case, there has to be put into place an extremely exacting, precise and irrefutably foolproof system of security and integrity of storage of the exhibit to ensure that there absolutely no possibility of breaching its security and that may allow for any unauthorized access and use of the DNA material for any other purpose whatsoever other than that which is intended and legislated for. This requires not only a major amount of funding but a secure and well-managed system of repository of DNA material.

The instruction to and empowerment of ANY police officer to take even non-intimate samples (buccal swabs and finger-pricks) from any person arrested is bound to lead to abuse of this capacity. Taking the buccal or fingerprick sample is quite an invasive procedure, although not attendant with much risk to health, in terms of how closely it samples the person's body characteristic, again unlike the simple fingerprint. Police generally (in any jurisdiction) have a lack of finesse and sensitivity and are well-known to be capable of unmatched brutality at times, and therefore such empowerment is deeply troubling. This is the ambit of the health professional. Granted, health professional resources are in scarce supply, but appropriate alternatives MUST be employed. The matter of the crime "epidemic" in the country is serious enough for us to invest appropriately into all areas of the criminal justice system and its improvement, also in order to ensure that the appropriate checks and balances are in place to ensure that there is no exploitation of weak points or loopholes when introducing new legislation, particularly one as drastic as this. The inability of the police service to currently manage criminal investigations is well-known. In respect of evidentiary samples from scenes of crime, death and injury, they are known to be unable to collect the right material; they mislay or lose specimens, or incorrectly label them, or incorrectly preserve them, violating any modicum of a chain-of-custody required by law towards successful prosecution. THIS is what first needs to be taught to detectives and uniformed officers first at the scene of a crime. Intense training and coaching in correct procedure must first be the undertaking if any measure of progress is to be made in combating crime and ensuring public safety. There have been many "new" initiatives to try and combat crime and, like the SAPS "Missing Person's Bureau" created to find missing persons and identify unidentified bodies regularly found, many are doomed to failure if not wholesomely initiated.

It is a grounding principle in ethics, whether it is medical ethics or any other ethics, that any individual is able to withdraw his/her consent at any time in a medical process agreed into. This applies greatly to medical ethics and to the security and integrity of the individual which is guaranteed by the Constitution of South Africa. The matter of consent to the taking of a biological sample and its retention is squarely a matter of medical ethics. Therefore, the Bill's contention that such consent CANNOT be withdrawn is simply un-Constitutional.

I am deeply concerned about the issues of privacy of the individual and innocent citizens, as I do not see in any section of the Bill, any adequate and comprehensive address to the maintenance of this all-important constitutional right. I believe, from the international experience, that many areas of interference with this integrity will arise, with devastating consequences for the common person and total loss of faith in the criminal justice system.

It is also clear that massive funding will be required for such a mammoth task, including training of personnel, development of policy, implementation, technology, repository for samples, database, laboratories, and maintenance of the database and related matters. It is my contention that disposal of such scarce funding should be reviewed. The idea of massive funding of a database is not only premature, but is ill-advised at this time in this country trapped in an epidemic of violence and crime. The rational use of scarce funding and resources should include an overhaul of the criminal justice system, beginning FIRST with the basic training of policemen and detectives to deal with basic matters of crime investigation, statement-taking, securing the crime scene and collection of specimens and exhibits correctly, the training of medical and health professionals (which I am involved in but need more funding for my efforts to be adequate), the prosecutorial staff, developing the current capacity of the laboratories that are available (there is only one SA Forensic DNA laboratory currently).

There is very little attention paid to Clinical Forensic Medical Services which deals with the victim as well as evidence collection, as well as the social health and welfare services because the victims of crime still

needs rehabilitation into family and society. Attention to the epidemic of sexual violence and abuse is critical and more fundamental than funding a laboratory or a DNA database.

There is tremendous need for more funding of the health services, the forensic pathology services (which are currently crumbling due to lack of funding) as well as the Forensic Chemistry Laboratories (which are reeling without capacity and funding).

In summary:

- A national DNA database helps in crime-solving and in successful prosecution. However, there are a number of OTHER AREAS WHERE SCARCE FUNDING IS NEEDED to be injected, including prevention, education and training of health staff and police and prosecutors, developing the capacity of the forensic chemistry laboratories, forensic pathology services, clinical forensic services, social welfare services, etc. Funding needs to be evenly distributed into these areas.
- Allowing any police officer to take the biological samples is also tantamount to ALLOWING FOR ABUSE AND MISCONDUCT.
- I do not believe that the South African Police Service have the capacity in their current state, or is in a position or will be for some time, to properly implement this Bill if it becomes legislation.
- There are major areas of concern for the PRIVACY of the individual that have not been addressed to any satisfaction.
- INTERNATIONAL EXPERIENCES with national DNA databases MUST be considered; please do not let us REPEAT their mistakes. Other countries have sewn themselves into a fabric of law and regulation that is difficult to undo. This matter deals with SECURITY and INTEGRITY of the biological samples, as well as the major ethical and legal issues that have arisen.

CONCLUDING:

The writer is not averse to any innovation or intervention, such as a DNA database, that would help in the detection, solving, prosecution and prevention of crime, but asks that the State give proper attention and consideration to the risks inherent in enacting such legislation, where minds have not been fully applied to the protection of the individual and society, and checks and balances have not been comprehensively inserted and created.

Thank you

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