

REPUBLIC OF SOUTH AFRICA

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# CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of  
Bill published in Government Gazette No. 31759 of 29 December 2008)  
(The English text is the official text of the Bill)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 2—2009]

ISBN 978-1-77037-547-5

No. of copies printed ..... 1 800

**GENERAL EXPLANATORY NOTE:**

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

                         Words underlined with a solid line indicate insertions in existing enactments.

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## **BILL**

**To amend the Criminal Procedure Act, 1977, so as to further regulate powers in respect of the ascertainment of bodily features of persons; to provide for the compulsory taking of finger-prints of certain categories of persons; to provide for the taking of prints and samples for investigative purposes; to provide for the taking of specified bodily substances from certain categories of persons for the purposes of DNA analysis; to provide that prints and samples taken under the Act are retained; to further regulate proof of certain facts by affidavit or certificate; to further regulate evidence of prints or bodily features of accused; to amend the South African Police Service Act, 1995, so as to regulate the storing and use of finger-prints, palm-prints, foot-prints and photographs of certain categories of persons; and to establish and regulate the administration and maintenance of the National DNA Database of South Africa; to amend the Firearms Control Act, 2000, so as to further regulate the powers in respect of bodyprints and bodily samples; to amend the Explosives Act, 2003, so as to further regulate the powers in respect of prints and samples for investigation purposes; and to provide for matters connected therewith.**

**P**ARLIAMENT of the Republic of South Africa enacts as follows:—

**Substitution of heading of Chapter 3 of Act 51 of 1977, as amended by section 1 of Act 64 of 1982**

1. The following heading is hereby substituted for the heading of Chapter 3 of the Criminal Procedure Act, 1977: 5

**“ASCERTAINMENT OF BODILY FEATURES OF PERSONS”.**

**Insertion of sections 36A, 36B and 36C in Chapter 3 of Act 51 of 1977**

2. The following sections are hereby inserted in the Criminal Procedure Act, 1977, after section 36: 10

**“Interpretation of Chapter 3**

- 36A.** (1) For the purposes of this Chapter, unless the context indicates otherwise—
- (a) **‘authorised person’** means in reference to—
    - (i) photographic images, finger-prints or body-prints, any police official in the performance of his or her official duties; or
    - (ii) the NDDSA, the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate;
  - (b) **‘body-prints’** means prints taken from a person’s ear, foot, nose, palm or toes;
  - (c) **‘child’** means a person under the age of 18 years;
  - (d) **‘DNA’** means deoxyribonucleic acid;
  - (e) **‘DNA analysis’** means analysis of the deoxyribonucleic acid identification information in an intimate sample, a non-intimate sample or any other bodily substance;
  - (f) **‘DNA profile’** means the results of forensic DNA analysis of an intimate sample, a non-intimate sample or any other bodily substance;
  - (g) **‘intimate sample’** means a sample of blood other than a blood finger prick;
  - (h) **‘NDDSA’** means the National DNA Database of South Africa, established in terms of section 15F of the South African Police Service Act;
  - (i) **‘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;
  - (j) **‘South African Police Service Act’** means the South African Police Service Act, 1995 (Act No. 68 of 1995); and
  - (k) **‘speculative search’** means that the body-prints, finger-prints, photographic images, intimate samples or non-intimate samples or the information derived from such samples taken, under any power conferred by this Chapter, may for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked by an authorised person, against—
    - (i) in the case of photographic images, body-prints or finger-prints, the databases of the South African Police Service, the Department of Home Affairs, the Department of Transport or any department of state in the national, provincial or local sphere of government, irrespective of whether the photographic images or prints stored on these respective databases were collected before or after the coming into operation of this Act; or
    - (ii) in the case of intimate samples or non-intimate samples, or the information derived from such samples, the NDDSA.
- (2) For the purposes of this Chapter, unless the context indicates otherwise, any reference to a ‘person’ includes a ‘child’.

**Powers in respect of finger-prints and non-intimate samples of accused and convicted persons**

- 36B.** (1) A police official must—
- (a) take the finger-prints or must cause such prints to be taken of any—
    - (i) person arrested upon any charge;
    - (ii) person released on bail or on warning under section 72, if such person’s finger-prints were 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 any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; 5
  - (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 10
  - (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; 15
- (b) 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 any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; 20
  - (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 30
  - (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. 35
- (2) (a) The finger-prints taken in terms of subsection (1)(a) must be stored on the finger-print database maintained by the South African Police Service as provided for in Chapter 5A of the South African Police Service Act. 40
- (b) A police official must immediately furnish each non-intimate sample taken under subsection (1)(b) to the National Commissioner of the South African Police Service or his or her delegate, who shall carry out a DNA analysis on each such sample in terms of Chapter 5B of the South African Police Service Act, and include the results in the NDDSA. 45
- (3) Nothing in this Chapter shall prohibit a police official from re-taking the finger-prints of any person referred to in subsection (1), if—
- (a) the finger-prints taken on the previous occasion do not constitute a complete set of his or her finger-prints; or 50
  - (b) some or all of the finger-prints taken on the previous occasion are not of sufficient quality to allow satisfactory analysis, comparison or matching.
- (4) Nothing in this Chapter shall prohibit a police official from re-taking a non-intimate sample from any person referred to in subsection (1), if the non-intimate sample taken from him or her was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient. 55
- (5) The finger-prints, non-intimate samples or the information derived from such samples, taken under any power conferred by this section, may be the subject of a speculative search. 60
- (6) (a) Subject to paragraph (b), the finger-prints, non-intimate samples or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes

for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(b) Nothing in paragraph (a) shall prohibit the use by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate, of any finger-prints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.

(c) Any person who uses or who allows the use of the finger-prints, non-intimate samples or the information derived from such samples as referred to in paragraph (a), for any purpose that is not related to the detection of crime, the investigation of an offence or the conduct of a prosecution, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

(7) Paragraphs (a)(iv) and (b)(iv) of subsection (1) apply to any person convicted of any crime, irrespective of sentence, including—

- (a) any person serving such a sentence at the time of the commencement of this section; and
- (b) where applicable, any person released on parole in respect of such a sentence, irrespective of the fact that such a person was convicted of the offence in question, prior to the commencement of this section.

(8) Despite subsection (6)(a), the finger-prints, non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.

### **Body-prints and samples for investigation purposes**

**36C.** (1) Any police official may without a warrant take finger-prints, 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.

(2) The person who has control over prints or samples taken in terms of this section may—

- (a) examine them for the purposes of the investigation of the relevant offence or cause them to be so examined; and
- (b) cause any prints, non-intimate samples or the information derived from samples, taken under any power conferred by this section, to be subjected to a speculative search.

(3) (a) The finger-prints, body-prints or non-intimate samples or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(b) Any person who uses or who allows the use of the finger-prints, body-prints, non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the detection of crime, the investigation of an offence or the conduct of a prosecution, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

(c) The finger-prints and body-prints referred to in paragraph (a) must 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.

(d) The non-intimate samples or the information derived from such samples, as referred to in paragraph (a), which shall include, but not be limited to, the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South African Police Service Act.

(4) Despite subsection (3)(a), the finger-prints, body-prints, non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.”.

**Amendment of section 37 of Act 51 of 1977, as amended by section 1 of Act 64 of 1982**

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3. The following section is hereby substituted for section 37 of the Criminal Procedure Act, 1977:

**“Powers in respect of prints and bodily appearance of accused and convicted persons**

- 37.** (1) Any police official may— 10
- (a) take the **[finger-prints, palm-prints or foot-prints]** body-prints or may cause any such prints to be taken—
- (i) of any person arrested upon any charge; 10
- (ii) of any such person released on bail or on warning under section 72; 15
- (iii) of any person arrested in respect of any matter referred to in paragraph (n), (o) or (p) of section 40(1);
- (iv) of any 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 any licence or permit or the disqualification in respect of any licence or permit is permissible or prescribed; or 20
- (v) of any person convicted by a court; or
- (vi) of any 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; 25
- (b) make a person referred to in paragraph (a)(i) or (ii) or paragraph (a)(i) or (ii) of section 36B(1) available or cause such person to be made available for identification in such condition, position or apparel as the police official may determine; 30
- (c) take such steps as he or she may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a)(i) or (ii) or paragraph (a)(i) or (ii) of section 36B(1) has any mark, characteristic or distinguishing feature or shows any condition or appearance: 35  
Provided that no police official shall take any **[blood]** intimate sample of the person concerned 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.
- (d) 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). 40
- (2) (a) 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) 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. 45
- (b) If any registered medical practitioner attached to any hospital is on reasonable grounds of the opinion that the contents of **[the blood]** an intimate sample of any person admitted to such hospital for medical attention or treatment may be relevant at any later criminal proceedings, such medical practitioner may take **[a blood]** an intimate sample of such person or cause such sample to be taken: Provided that such sample must be taken if requested by any police official. 50
- (3) Any court before which criminal proceedings are pending, may— 55

(a) in any case in which a police official is not empowered under subsection (1) or section 36B(1) to take finger-prints, **[palm-prints or foot-prints]** body-prints or a non-intimate sample or to take steps in order to ascertain whether the body of any person has any mark, characteristic or distinguishing feature or shows any condition or appearance, order that such prints be taken of any accused at such proceedings or that the steps, including the taking of **[a blood]** an intimate sample, be taken which such court may deem necessary in order to ascertain whether the body of any accused at such proceedings has any mark, characteristic or distinguishing feature or shows any condition or appearance;

(b) order that the steps, including the taking of **[a blood]** an intimate sample, be taken which such court may deem necessary in order to ascertain the state of health of any accused at such proceedings.

(4) Any court which has convicted any person of any offence or which has concluded a preparatory examination against any person on any charge, or any magistrate, may order that the finger-prints, **[palm-prints or foot-prints, or]** body-prints, a **[photograph]** photographic image, a non-intimate sample or an intimate sample of the person concerned be taken.

(5) **[Finger-prints, palm-prints or foot-prints, photographs and the record of steps taken under this section shall be destroyed if the person concerned is found not guilty at his trial or if his conviction is set aside by a superior court or if he is discharged at a preparatory examination or if no criminal proceedings with reference to which such prints or photographs were taken or such record was made are instituted against the person concerned in any court or if the prosecution declines to prosecute such person.]** Any finger-prints, body-prints, photographic images, non-intimate samples, intimate samples or the information derived from samples taken under any power conferred by this section, may be the subject of a speculative search.

(6) (a) Subject to subsection (7), the finger-prints, body-prints, photographic images, intimate samples or non-intimate samples or the information derived from such samples, taken under any power conferred by this section, and the record of steps taken under this section must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(b) Any person who uses or who allows the use of the finger-prints, body-prints, photographic images, intimate samples or non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the detection of crime, the investigation of an offence or the conduct of a prosecution, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

(c) The finger-prints, body-prints and photographic images referred to in paragraph (a), must 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.

(d) The intimate samples or non-intimate samples or the information derived from such samples, as referred to in paragraph (a), which shall include, but not be limited to, the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South African Police Service Act.

(7) Nothing in subsection (6) shall prohibit the use by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate, of any finger-prints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.

(8) Despite subsection (6)(a), the finger-prints, body-prints, photographic images, intimate samples or non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.”.

**Amendment of section 212 of Act 51 of 1977, as amended by section 12 of Act 56 of 1979, sections 46 and 47 of Act 97 of 1986, section 11 of Act 5 of 1991, section 40 of Act 122 of 1991, section 9 of Act 86 of 1996 and section 6 of Act 34 of 1998**

4. Section 212 of the Criminal Procedure Act, 1977, is hereby amended by—

(a) the substitution for subsection (6) of the following subsection: 5

“(6) In criminal proceedings in which the finding of or action taken in connection with any particular finger-print, **[or palm-print]** body-print, intimate sample or non-intimate sample, as defined under Chapter 3, or bodily substance is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is in the service of the State and that he in the performance of his official duties— 10

(a) found such finger-print, **[or palm-print]** body-print, intimate sample, non-intimate sample or bodily substance at or in the place or on or in the article or in the position or circumstances stated in the affidavit; or 15

(b) dealt with such finger-print, **[or palm-print]** body-print, intimate sample, non-intimate sample or bodily substance in the manner stated in the affidavit,

shall, upon the mere production thereof at such proceedings, be *prima facie* proof that such finger-print, **[or palm-print]** body-print, intimate sample, non-intimate sample or bodily substance was so found or, as the case may be, was so dealt with.”; and 20

(b) the substitution for subsection (8)(a) of the following subsection:

“(8) (a) In criminal proceedings in which the receipt, custody, packing, marking, delivery or despatch of any finger-print or **[palm-print]** body-print, article of clothing, specimen, tissue (as defined in section 1 of the Anatomical Donations and Post-Mortem Examinations Act, 1970 (Act 24 of 1970)), intimate sample or non-intimate sample, as defined under Chapter 3, or any object of whatever nature is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges— 25

(i) that he is in the service of the State or is in the service of or is attached to the South African Institute for Medical Research, any university in the Republic or any body designated by the Minister under subsection (4); 35

(ii) that he in the performance of his official duties—

(aa) received from any person, institute, State department or body specified in the affidavit, a finger-print or **[palm-print]** body-print, article of clothing, specimen, tissue, intimate sample or non-intimate sample, as defined under Chapter 3, or object described in the affidavit, which was packed or marked or, as the case may be, which he packed or marked in the manner described in the affidavit; 40

(bb) delivered or despatched to any person, institute, State department or body specified in the affidavit, a finger-print or **[palm-print]** body-print, article of clothing, specimen, tissue, intimate sample or non-intimate sample, as defined under Chapter 3, or object described in the affidavit, which was packed or marked or, as the case may be, which he packed or marked in the manner described in the affidavit; 50

(cc) during a period specified in the affidavit, had a finger-print or **[palm-print]** body-print, article of clothing, specimen, tissue, intimate sample or non-intimate sample, as defined under Chapter 3, or object described in the affidavit in his custody in the manner described in the affidavit, which was packed or marked in the manner described in the affidavit, 55

shall, upon the mere production thereof at such proceedings, be *prima facie* proof of the matter so alleged: Provided that the person who may make such affidavit in any case relating to any article of clothing, specimen, **[or]** tissue, intimate sample or non-intimate sample, as defined under Chapter 3, may issue a certificate in lieu of such affidavit, in which 60

event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.”.

**Amendment of section 225 of Act 51 of 1977**

5. The following section is hereby substituted for section 225 of the Criminal Procedure Act, 1977:

5

**“Evidence of prints, samples or bodily appearance of accused**

**225.** (1) Whenever it is relevant at criminal proceedings to ascertain whether any finger-print, **[palm-print or foot-print]** body-print, intimate sample, non-intimate sample or the information derived from such samples, as defined under Chapter 3, of an accused at such proceedings corresponds to any other finger-print, **[palm-print or foot-print]** body-print, intimate sample, non-intimate sample, bodily substance or the information derived from such samples or bodily substance or whether the body of such an accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, evidence of the finger-prints[, **palm-prints or foot-prints**] or body-prints of the accused or that the body of the accused has or had any mark, characteristic or distinguishing feature or shows or showed any condition or appearance, including evidence of the result of any blood test or DNA analysis of an intimate sample or a non-intimate sample, as defined under Chapter 3, of the accused, shall be admissible at such proceedings.

(2) Such evidence shall not be inadmissible by reason only thereof that the finger-print, **[palm-print, or foot-print]** body-print, intimate sample or non-intimate sample in question was not taken or that the mark, characteristic, feature, condition or appearance in question was not ascertained in accordance with the provisions of **[section]** sections 36B, 36C or 37, or that it was taken or ascertained against the wish or the will of the **[accused]** person concerned.”.

**Insertion of Chapters 5A and 5B in Act 68 of 1995, as amended by Act 41 of 1997, Act 47 of 1997, Act 83 of 1998 and Act 40 of 2002**

30

6. The following Chapters are inserted in the South African Police Service Act, 1995, after section 15:

**“CHAPTER 5A**

**STORAGE AND USE OF FINGER-PRINTS, BODY-PRINTS AND PHOTOGRAPHIC IMAGES OF PERSONS**

35

**Storage and use of finger-prints, body-prints and photographic images**

**15A.** (1) The National Commissioner or his or her delegate must ensure that finger-prints, body-prints and photographic images taken under—  
(a) section 36B(1)(a), section 36C(1) or section 37 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977);  
(b) section 113 of the Firearms Control Act, 2000 (Act No. 60 of 2000);  
(c) section 9 of the Explosives Act, 2003 (Act No. 15 of 2003); or  
(d) any Order of the Department of Correctional Services, are stored, maintained, administered, and readily available, whether in computerised or other form, and shall be located within the Division: Criminal Record and Forensic Science Service.

(2) The National Commissioner or his or her delegate must ensure that the finger-prints and photographic images of persons whose names must be included in the National Register for Sex Offenders, as determined under section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), are taken and dealt with in accordance with subsection (1).

(3) The provisions of this Chapter apply *mutatis mutandis* to the finger-prints, body-prints and photographic images stored, maintained and administered by the Division: Criminal Record and Forensic Science Service prior to the coming into operation of this Act, and nothing in this Chapter shall affect the use of such prints and photographic images for the purposes set out in subsections (4) and (5). 5

(4) Subject to subsection (5), the finger-prints, body-prints and photographic images referred to in subsections (1), (2) and (3) shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution. 10

(5) Nothing in subsection (4) shall prohibit the use by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate of any finger-prints stored in terms of this section, for the purposes of establishing if a person has been convicted of an offence. 15

(6) Any person who uses or who allows the use of finger-prints, body-prints and photographic images referred to in subsection (1), for any purpose that is not related to the circumstances set out in subsections (4) and (5), is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years. 20

### **Speculative search against other databases**

**15B.** (1) Any finger-prints, body-prints or photographic images stored in terms of this Chapter, may for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked against the databases of the Department of Home Affairs, the Department of Transport or any department of state in the national, provincial or local sphere of government, irrespective of whether the photographic images or prints stored on these respective databases were collected before or after the coming into operation of this Act. 25

(2) Any person who conducts a speculative search, as contemplated in subsection (1), for any purpose that is not related to the circumstances set out in that subsection, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years. 30

### **National instructions relating to collection, storage, maintenance, administration and use of finger-prints, body-prints and photographic images** 35

**15C.** (1) The National Commissioner must, in consultation with the Minister, issue national instructions regarding all matters which are reasonably necessary or expedient to be provided for in relation to this Chapter and which must be followed by all police officials, including the following: 40

- (a) The collection of finger-prints, body-prints and the taking of photographic images;
- (b) the storage, maintenance and administration of finger-prints, body-prints and photographic images in terms of this Chapter; 45
- (c) the use of the information made available in terms of this Chapter; and
- (d) the manner in which statistics must be kept by the Division: Criminal Record and Forensic Science Services in relation to all information collected, stored and analysed in terms of this Chapter, which shall include the recording and maintaining of statistics on all exhibits collected at crime scenes. 50

(2) The National Commissioner must develop training courses in reference to the national instructions referred to in subsection (1).

(3) The police official commanding the Division: Criminal Record and Forensic Science Services within the South African Police Service, is responsible for— 55

- (a) the development, implementation and maintenance of a personal identification services strategy, to give effect to the provisions of this Chapter and Chapter 5B; and

- (b) the development, implementation and maintenance of systems and processes, including the required information technology infrastructure and systems, to support such a strategy.

## CHAPTER 5B

### ESTABLISHMENT, ADMINISTRATION AND MAINTENANCE OF NATIONAL DNA DATABASE OF SOUTH AFRICA 5

#### Interpretation

**15D.** (1) For the purposes of this Chapter, unless the context indicates otherwise—

- (a) **‘authorised person’** means the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate; 10
- (b) **‘child’** means a person under the age of 18 years;
- (c) **‘Criminal Procedure Act’** means the Criminal Procedure Act, 1977 (Act No. 51 of 1977); 15
- (d) **‘DNA’** means deoxyribonucleic acid;
- (e) **‘DNA analysis’** means analysis of the deoxyribonucleic acid identification information in an intimate sample, a non-intimate sample or any other bodily substance;
- (f) **‘DNA profile’** means the results of forensic DNA analysis of an intimate sample, a non-intimate sample or any other bodily substance; 20
- (g) **‘Explosives Act’** means the Explosives Act, 2003 (Act No. 15 of 2003);
- (h) **‘Firearms Control Act’** means the Firearms Control Act, 2000 (Act No. 60 of 2000); 25
- (i) **‘intimate sample’** means a sample of blood other than a blood finger prick;
- (j) **‘NDDSA’** means the National DNA Database of South Africa, established in terms of section 15F;
- (k) **‘non-intimate sample’** means— 30
- (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; and 35
- (l) **‘volunteer’** means a person who freely gives his or her informed consent to the taking of an intimate sample or a non-intimate sample in accordance with section 15J.

(2) For the purposes of this Chapter, unless the context indicates otherwise, any reference to a ‘person’ includes a ‘child’.

#### Purpose of Chapter

**15E.** The purpose of this Chapter is to establish and maintain a national DNA Database, which may only be used for purposes related to the identification of missing persons, the identification of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution and not for any unauthorised purpose in order to, amongst others— 45

- (a) serve as a criminal intelligence tool in the fight against crime;
- (b) identify persons alleged to have committed offences, including those committed before the coming into operation of this Chapter; 50
- (c) where applicable, prove the innocence or guilt of accused persons; or
- (d) where applicable, identify missing persons or unidentified human remains.

### Establishment of DNA Database

**15F.** (1) There is hereby established a national DNA Database within the South African Police Service, to be known as the National DNA Database of South Africa (NDDSA).

(2) The NDDSA, whether in computerised or other form, shall be administered and maintained by the National Commissioner or his or her delegate and shall be located within the Division: Criminal Record and Forensic Science Service.

(3) The NDDSA shall consist of the following indices:

- (a) A Crime Scene Index;
- (b) a Reference Index;
- (c) a Convicted Offenders Index;
- (d) a Volunteer Index; and
- (e) a Personnel, Contractor and Supplier Elimination Index, to be used only in the investigative repository for DNA analysis.

(4) The provisions of this Chapter apply *mutatis mutandis* to the DNA profiles stored, maintained and administered by the Division: Criminal Record and Forensic Science Service prior to the coming into operation of this Act, and nothing in this Chapter shall affect the use of such DNA profiles for the purposes set out in this Chapter.

### Crime Scene Index

**15G.** (1) The Crime Scene Index shall contain DNA profiles, derived by means of DNA analysis, from bodily substances that are found—

- (a) at any place where an offence was, or is reasonably suspected of having been, committed;
- (b) on or within the body of the victim, or a person reasonably suspected of being a victim, of an offence;
- (c) on anything worn or carried by the victim at the time when an offence was, or is reasonably suspected of having been, committed; or
- (d) on or within the body of any person or thing, or at any place, associated with the commission of an offence.

(2) In addition to the DNA profiles referred to in subsection (1), the NDDSA shall contain, in relation to each of the profiles, the following information:

- (a) The case number of the investigation associated with the bodily substance from which the profile was derived;
- (b) where applicable, the case number of any other investigation associated with the same DNA profile on the Crime Scene Index; and
- (c) where applicable and scientifically possible, the bodily substance used to derive the profile from.

(3) Forensic DNA analysis of bodily substances stored, in terms of subsection (2)(c), may be performed if an authorised person is of the opinion that the analysis is justified due to significant technological advances having been made since the time when a DNA profile of the person who provided the bodily substances, or from whom they were taken, was last derived or for any other legitimate purpose.

(4) Nothing in subsection (3) shall prohibit the re-taking of a bodily substance under the circumstances set out in subsection (1), if a bodily substance taken as such was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient.

### Reference Index

**15H.** (1) The Reference Index shall contain DNA profiles, derived by means of DNA analysis, from an intimate sample or a non-intimate sample, taken under any power conferred by—

- (a) Chapter 3 of the Criminal Procedure Act;
- (b) the Firearms Control Act; or
- (c) the Explosives Act,

where such person's DNA profile does not form part of the Convicted Offenders Index.

(2) In addition to the DNA profiles referred to in subsection (1), the NDDSA shall contain, in relation to each of the profiles, the following information:

- (a) The identity of the person from whose bodily substance the profile was derived; and
- (b) where applicable and scientifically possible, the intimate sample or the non-intimate sample used to derive the profile from.

(3) Forensic DNA analysis of samples stored, in terms of subsection (2)(b), may be performed if an authorised person is of the opinion that the analysis is justified due to significant technological advances having been made since the time when a DNA profile of the person who provided the samples, or from whom they were taken, was last derived or for any other legitimate purpose.

(4) Nothing in subsection (3) shall prohibit the re-taking of a sample under the circumstances set out in subsection (1), if a sample taken as such was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient.

### **Convicted Offenders Index**

**15I.** (1) The Convicted Offenders Index shall contain DNA profiles, derived by means of DNA analysis, from an intimate sample or a non-intimate sample—

- (a) taken under any power conferred by section 36B(1)(b)(iv), (v) or (vi) of the Criminal Procedure Act; or
- (b) that was entered into the Reference Index, but such person has subsequent to the entering of his or her DNA profile on the Reference Index been convicted of an offence.

(2) In addition to the DNA profiles referred to in subsection (1), the NDDSA shall contain, in relation to each of the profiles, the following information:

- (a) The identity of the person from whose bodily substance the profile was derived; and
- (b) where applicable and scientifically possible, the intimate sample or the non-intimate sample used to derive the profile from.

(3) Forensic DNA analysis of samples stored, in terms of subsection (2)(b), may be performed if an authorised person is of the opinion that the analysis is justified due to significant technological advances having been made since the time when a DNA profile of the person who provided the samples, or from whom they were taken, was last derived or for any other legitimate purpose.

(4) Nothing in subsection (3) shall prohibit the re-taking of a sample under the circumstances set out in subsection (1) if a sample taken as such was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient.

(5) The National Commissioner or his or her delegate must take all necessary steps to ensure that DNA profiles of persons whose names must be included in the National Register for Sex Offenders, as determined under section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), are loaded onto the Convicted Offenders Index.

### **Volunteer Index**

**15J.** (1) (a) The Volunteer Index shall contain DNA profiles, derived by means of DNA analysis, from an intimate sample or a non-intimate sample, taken from a person with his or her informed consent.

(b) If the volunteer is a child, a sample may only be taken for the purposes of paragraph (a), with the informed consent of the child's parent or guardian.

(c) Any police official may take a non-intimate sample for the purposes of paragraph (a), but an intimate sample may only be taken by a registered medical practitioner or a registered nurse.

(2) For the purposes of this section, informed consent means that the volunteer consents, in writing, to the taking of an intimate or a non-intimate sample, after a police official has informed him or her of the following:

- (a) The way in which the intimate sample or non-intimate sample is to be taken;
- (b) that the volunteer is under no obligation to give a sample;
- (c) that the sample or the DNA profile derived from it may produce evidence that might be used in a court of law;
- (d) that the consent given under this section cannot be withdrawn;
- (e) that the sample taken under this section, the DNA profile derived from it or any other information obtained from the analysis of such sample will be retained on the NDDSA, together with the identity of the person, in accordance with this Chapter; and
- (f) that the sample taken under this section, the DNA profile derived from it or any other information stored on or within or associated with the NDDSA, may only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(3) In addition to the DNA profiles referred to in subsection (1), the NDDSA shall contain, in relation to each of the profiles, the following information:

- (a) The identity of the person from whose bodily substance the profile was derived; and
- (b) where applicable and scientifically possible, the intimate sample or the non-intimate sample used to derive the profile from.

(4) Forensic DNA analysis of samples stored, in terms of subsection (3)(b), may be performed if an authorised person is of the opinion that the analysis is justified due to significant technological advances having been made since the time when a DNA profile of the person who provided the samples, or from whom they were taken, was last derived or for any other legitimate purpose.

(5) Nothing in subsection (4) shall prohibit the re-taking of a sample under the circumstances set out in subsection (1) if a sample taken as such was either not suitable for DNA analysis or, though so suitable, the sample proved insufficient.

(6) Notwithstanding subsection (2)(d), a child, unless found guilty by a court of law, may upon reaching majority apply to a court of law to have his or her consent contemplated in that subsection withdrawn.

### **Personnel, Contractor and Supplier Elimination Index**

**15K.** (1) The Personnel, Contractor and Supplier Elimination Index shall contain DNA profiles derived, by means of DNA analysis, from a non-intimate sample of—

- (a) a police official, who may, due to the nature of his or her official duties in relation to a crime scene, have contaminated any bodily substance to be analysed in terms of this Chapter;
- (b) a police official or any other person, who may, due to the nature of his or her official duties in the conduct of forensic procedures under this Chapter, have contaminated any substance or process to which this Chapter is applicable;
- (c) any person directly involved in the manufacture of consumables, equipment, utensils or reagents used in the DNA analysis process; or
- (d) any person who is responsible for the maintenance of DNA equipment.

(2) (a) A non-intimate sample may only be taken from a person mentioned under subsection (1) with his or her written consent.

(b) Any police official may take a non-intimate sample for the purposes of paragraph (a).

(3) The Personnel, Contractor and Supplier Elimination Index may only be used for elimination purposes and forms part of the administration of the NDDSA.

(4) Nothing in this section shall prohibit the taking of an intimate or a non-intimate sample from any person, mentioned under subsection (1), in terms of Chapter 3 of the Criminal Procedure Act. 5

### **Speculative DNA search and communication of information**

**15L.** (1) The National Commissioner or his or her delegate or an authorised person shall compare any DNA profile that is entered in the Crime Scene Index, Reference Index, Convicted Offenders Index or the Volunteer Index with those DNA profiles that are already contained in the NDDSA, and may then for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, communicate the following information: 10

- (a) If the DNA profile is not already contained in the NDDSA, the fact that it is not; or 15
- (b) if the DNA profile is already contained in the NDDSA, all the information contained in the NDDSA in relation to that DNA profile.

(2) The information referred to in subsection (1) may only be communicated in the circumstances set out in that subsection and may only be communicated to— 20

- (a) a police official;
- (b) a prosecutor;
- (c) a judge;
- (d) a magistrate; 25
- (e) a court; or
- (f) for criminal defence purposes, an accused person, or where the accused is a child to his or her parent or guardian, or his or her legal representative.

(3) Nothing in this Chapter shall prohibit the National Commissioner or his or her delegate or an authorised person to compare a DNA profile, derived by means of DNA analysis from an intimate sample or a non-intimate sample of persons who are missing, with the DNA profiles that are already contained in the NDDSA, for purposes related to the investigation of missing persons. 30 35

(4) Nothing in this Chapter shall prohibit the National Commissioner or his or her delegate or an authorised person to make use of DNA analysis to identify unidentified human remains.

### **Foreign law enforcement agencies**

**15M.** (1) Subject to subsection (3), the National Commissioner or his or her delegate may, on receipt of a DNA profile from a foreign state, compare the profile with those in the NDDSA, for purposes related to the investigation of missing persons, the investigation of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution, and may then communicate the following information: 40 45

- (a) If the DNA profile is not contained in the NDDSA, the fact that it is not; or
- (b) if the DNA profile is contained in the NDDSA, all the information that the National Commissioner or his or her delegate considers appropriate, as contained in the NDDSA in relation to that DNA profile. 50

(2) Subject to subsection (3), the National Commissioner or his or her delegate may, on the request of an investigating officer, for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, communicate a DNA profile contained in the Crime Scene Index to a foreign state. 55

(3) Any steps taken under subsection (1) or (2), other than requests relating to missing persons or unidentified human remains that do not relate to the detection of crime, the investigation of an offender or the conduction

of a prosecution, must be in accordance with the provisions of the International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996), or, where applicable, in terms of an existing Treaty.

### **Compliance with Quality Management System**

**15N.** (1) The National Commissioner or his or her delegate must develop recommended standards for quality assurance, including standards for testing the proficiency of forensic science laboratories and forensic analysts in conducting analysis of DNA. 5

(2) The standards referred to in subsection (1) must—

- (a) specify criteria for quality assurance and proficiency tests to be applied to the various types of DNA analysis used by forensic laboratories; and 10
- (b) include a system for grading proficiency testing performance to determine whether a laboratory is performing acceptably.

(3) Any privately operated forensic science laboratory that performs any DNA analysis, for the purposes of this Chapter, pursuant to a contract with the State, must comply with the quality assurance standards developed in accordance with subsection (1) and any other requirements, such as confidentiality requirements, specified by the National Commissioner or his or her delegate. 15 20

(4) Any person who—

- (a) contravenes any confidentiality requirements, as contemplated in subsection (3); or
- (b) uses or communicates any information obtained as a result of any DNA analysis performed pursuant to a contract with the State, in a manner that is not envisaged in such a contract, 25

is guilty of an offence and liable on conviction to a fine or imprisonment not exceeding 15 years.

### **Retention, storage and destruction of samples and DNA profiles**

**15O.** (1) (a) Subject to paragraph (c), any bodily substance or intimate sample or non-intimate sample used to populate the NDDSA with DNA profiles may, if scientifically possible, be retained after it has fulfilled the purposes for which it was taken or analysed. 30

(b) The National Commissioner or his or her delegate must ensure the safe storage of such retained samples and must develop guidelines for the safe storage and destruction, where applicable, of retained samples. 35

(c) An authorised person may at any time destroy any of the stored bodily substances or intimate samples or non-intimate samples, in accordance with the guidelines set out in paragraph (b), if such samples are no longer suitable or required for the purposes of forensic DNA analysis. 40

(d) A register must be kept, by the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate, of any stored bodily substances or intimate samples or non-intimate samples destroyed in accordance with paragraph (c), and such register must be submitted to the Minister and the National Commissioner on a monthly basis. 45

(2) (a) Subject to paragraph (b), no DNA profile loaded onto the NDDSA may be destroyed.

(b) Nothing in subparagraph (a) prohibits the updating of any DNA profile at a later stage, which may include the substitution of a DNA profile with an updated profile. 50

(3) Any bodily substance, intimate sample, non-intimate sample, DNA profile or any information stored on or within or associated with the NDDSA may only be used in accordance with section 15L, or by an authorised person for purposes related to, the investigation of missing persons, the investigation of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution. 55

(4) Despite subsection (1)(a), any bodily substance or intimate sample or non-intimate sample shall be destroyed after five years, if the person is not convicted by a court of law.

### Offences and penalties

- 15P.** Any person who— 5
- (a) accesses or uses the NDDSA, or who enables another person to access or use the NDDSA, for any purposes not related to the investigation of missing persons, the investigation of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution; 10
  - (b) intentionally communicates any information that is contained in the NDDSA or allows such information to be communicated, in circumstances not related to the administration of the NDDSA, or in contravention of sections 15L and 15M;
  - (c) intentionally communicates the information referred to in section 15L(1) to any person or institution other than those listed in section 15L(2); 15
  - (d) knowingly and without authorisation, obtains or uses any information stored on or in the NDDSA;
  - (e) apart from the National Commissioner, is not an “authorised person” for the purposes of this Chapter and who performs any function in terms of this Chapter that is reserved to only be performed by an authorised person; or 20
  - (f) intentionally or recklessly stores a DNA profile on the NDDSA, in circumstances not authorised under this Chapter, 25
- is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

### National instructions relating to collection, storage and use of DNA evidence

- 15Q.** (1) The National Commissioner must, in consultation with the Minister, issue national instructions regarding all matters which are reasonably necessary or expedient to be provided for and which must be followed by all police officials, in particular those who are tasked with the collection of bodily substances from a crime scene or the taking of non-intimate samples, or who must take such steps as deemed necessary in order to have an intimate sample taken, or who are authorised under this Chapter to conduct a speculative DNA search, in order to achieve the objects of this Chapter as set out in section 15E, including the following: 30
- (a) The manner in which to secure a crime scene for the purposes of collecting bodily substances; 40
  - (b) the manner in which to identify and collect bodily substances from a crime scene;
  - (c) the manner in which to take non-intimate samples as provided for in Chapter 3 of the Criminal Procedure Act;
  - (d) the manner in which to safely preserve and ensure timely transfer of collected samples to the forensic science laboratories; 45
  - (e) the manner in which to conduct speculative DNA searches, in accordance with section 15L of this Chapter;
  - (f) the manner in which to communicate or request DNA profiles and information in accordance with section 15M of this Chapter; 50
  - (g) the manner in which the investigative repository for DNA analysis in the Forensic Science Laboratories of the South African Police Service should operate;
  - (h) the manner in which to request access to information stored on the NDDSA; 55

- (i) the manner in which the information provided under this Chapter may be used for purposes related to the investigation of missing persons, the investigation of unidentified human remains, the detection of crime, the investigation of an offence or the conduct of a prosecution; and
- (j) the manner in which statistics must be kept by the Division: Criminal Record and Forensic Science Services in relation to all information collected, stored and analysed in terms of this Chapter, which shall include the recording and maintaining of statistics on all exhibits collected at crime scenes.
- (2) The National Commissioner must develop training courses in reference to the national instructions referred to in subsection (1).
- (3) The National Commissioner or his or her delegate must develop and maintain adequate information technology infrastructure and systems to support the efficient analysis of DNA samples and speculative searches against the NDDSA.
- (4) The national instructions contemplated in this section, must be tabled in Parliament within three months after the commencement of this section.

### Regulations

- 15R.** (1) The Minister may make regulations regarding—
- (a) any matter which is required or permitted by this Chapter to be prescribed; or
- (b) any administrative or procedural matter necessary or expedient to give effect to the provisions of this Chapter.
- (2) A regulation made under subsection (1) may prescribe a penalty of a fine or a period of imprisonment for any contravention thereof or failure to comply therewith.

### Report to Parliament

- 15S.** The National Commissioner must—
- (a) within three months after the end of each financial year, submit to the Minister a written report on the operations of the NDDSA for the year, which report shall be tabled in Parliament by the Minister within 14 days after receipt thereof or, if Parliament is not in session, to the Speaker of Parliament; and
- (b) at any time when requested to do so by the Minister or duly authorised Parliamentary Committee, submit a report on the operations of the NDDSA to the Minister or that Committee.”.

### Amendment of section 1 of Act 60 of 2000, as amended by section 1 of Act 28 of 2006

7. Section 1 of the Firearms Control Act, 2000, is hereby amended by—
- (a) the insertion after the definition of “Appeal Board” of the following definitions:
- “**‘authorised person’** means in reference to—
- (a) finger-prints, any police official in the performance of his or her official duties; or
- (b) the NDDSA, the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate;
- ‘bodyprints’** means prints taken from a person’s ear, foot, nose, palm or toes;”;
- (b) the insertion after the definition of “Designated Firearms Officer” of the following definitions:
- “**‘DNA’** means deoxyribonucleic acid;
- ‘DNA analysis’** means analysis of the deoxyribonucleic acid identification information in an intimate sample, a non-intimate sample or any other bodily substance;”;

- (c) the insertion after the definition of “imitation firearm” of the following definition:  
 “**‘intimate sample’** means a sample of blood other than a blood finger prick;”;
- (d) the insertion after the definition of “National Commissioner” of the following definitions: 5  
 “**‘NDDSA’** means the National DNA Database of South Africa, established in terms of section 15F of the South African Police Service Act, 1995 (Act No. 68 of 1995);  
**‘non-intimate sample’** means— 10  
 (a) a sample of hair other than pubic hair;  
 (b) a sample taken from a nail or from under a nail;  
 (c) a swab taken from the mouth (buccal swab);  
 (d) a blood finger prick; or  
 (e) a combination of these;”;
- (e) the insertion after the definition of “semi-automatic” of the following definition: 15  
 “**‘speculative search’** means that the bodyprints, fingerprints, intimate samples or non-intimate samples or the information derived from such samples taken, under any power conferred by this Act, may for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked by an authorised person, against— 20  
 (i) in the case of bodyprints or fingerprints, the databases of the South African Police Service, the Department of Home Affairs, the Department of Transport or any department of state in the national, provincial or local sphere of government, irrespective of whether the prints stored on these respective databases were collected before or after the coming into operation of this Act; or 25  
 (ii) in the case of intimate samples or non-intimate samples, or the information derived from such samples, the NDDSA.”. 30

**Amendment of section 113 of Act 60 of 2000, as amended by section 35 of Act 28 of 2006**

8. The following section is hereby substituted for section 113 of the Firearms Control Act, 2000:

**“Bodyprints and bodily samples for investigation purposes”** 35

- 113.** (1) [Any] Subject to subsection (3), any police official may without warrant take fingerprints, [palm-prints, footprints] bodyprints, non-intimate samples and [bodily] intimate samples of a person or a group of persons or may cause any such prints or samples to be taken, if—
- (a) there are reasonable grounds to suspect that that person or that one or more of the persons in that group has committed an offence punishable with imprisonment for a period of five years or longer in terms of this Act; and 40
- (b) there are reasonable grounds to 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 a possible perpetrator of the offence. 45
- (2) The person who has control over prints or samples taken in terms of this section—
- (a) may examine them for purposes of the investigation of the relevant offence or cause them to be so examined; and 50
- (b) [must immediately destroy them when it is clear that they will not be of value as evidence] may cause any prints, non-intimate samples, intimate samples or the information derived from samples, taken under any power conferred by this section, to be subjected to a speculative search. 55
- (3) [Bodily] Intimate samples to be taken from the body of a person, may only be taken by a registered medical practitioner or a registered nurse.

(4) A police official may do such tests, or cause such tests to be done, as may be necessary to determine whether a person suspected of having handled or discharged a firearm has indeed handled or discharged a firearm.

(5) (a) The fingerprints, bodyprints, intimate samples or non-intimate samples or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

(b) Any person who uses or who allows the use of the fingerprints, bodyprints, intimate samples, non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the circumstances set out in that paragraph, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years.

(c) The finger-prints and body-prints referred to in paragraph (a), must 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, 1995 (Act No. 68 of 1995).

(d) The intimate samples or non-intimate samples or the information derived from such samples, as referred to in paragraph (a), which shall include, but not be limited to, the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South African Police Service Act, 1995 (Act No. 68 of 1995).

(6) Despite subsection (5)(a), the fingerprints, bodyprints, intimate samples or non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.”.

#### Amendment of section 1 of Act 15 of 2003

9. Section 1 of the Explosives Act, 2003, is hereby amended by—

(a) the insertion after the definition of “authorised explosive” of the following definitions:

“**‘authorised person’** means in reference to—

(a) finger-prints, any police official in the performance of his or her official duties; or

(b) the NDDSA, the police officer commanding the Division: Criminal Record and Forensic Science Service within the South African Police Service or his or her delegate;

**‘body-prints’** means prints taken from a person’s ear, foot, nose, palm or toes;”;

(b) the insertion after the definition of “detonate” of the following definitions:

“**‘DNA’** means deoxyribonucleic acid;

**‘DNA analysis’** means analysis of the deoxyribonucleic acid identification information in an intimate sample, a non-intimate sample or any other bodily substance;”;

(c) the insertion after the definition of “inspector” of the following definition:

“**‘intimate sample’** means a sample of blood other than a blood finger prick;”;

(d) the insertion after the definition of “Minister” of the following definitions:

“**‘NDDSA’** means the National DNA Database of South Africa, established in terms of section 15F of the South African Police Service Act, 1995 (Act No. 68 of 1995);

**‘non-intimate sample’** means—

(a) a sample of hair other than pubic hair;

(b) a sample taken from a nail or from under a nail;

(c) a swab taken from the mouth (buccal swab);

(d) a blood finger prick; or

(e) a combination of these;”;

(e) the insertion after the definition of “regulation” of the following definition:

“**‘speculative search’** means that the body-prints, fingerprints, intimate samples or non-intimate samples or the information derived from such

- samples taken, under any power conferred by this Act, may for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution, be checked by an authorised person, against—
- (i) in the case of body-prints or fingerprints, the databases of the South African Police Service, the Department of Home Affairs, the Department of Transport or any department of state in the national, provincial or local sphere of government, irrespective of whether the prints stored on these respective databases were collected before or after the coming into operation of this Act; or
  - (ii) in the case of intimate samples or non-intimate samples, or the information derived from such samples, the NDDSA.”.

#### Amendment of section 9 of Act 15 of 2003

10. The following section is hereby substituted for section 9 of the Explosives Act, 2003:

#### “Prints and samples for investigation purposes 15

9. (1) [Any] Subject to subsection (3), any police official may without warrant take fingerprints, [palmprints, footprints] body-prints, non-intimate samples and [bodily] intimate samples of a person or a group of persons or may cause any such prints or samples to be taken, if there are reasonable grounds to— 20

- (a) suspect that the person or that one or more of the persons in that group has committed an offence punishable with imprisonment for a period of five years or longer in terms of this Act; 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. 25

(2) The person who has control over prints or samples taken in terms of this section—

- (a) may examine them for the purposes of the investigation of the relevant offence or cause them to be so examined; and 30
- (b) **[must immediately destroy them when it is clear that they will not be of value as evidence]** may cause any prints, non-intimate samples, intimate samples or the information derived from samples, taken under any power conferred by this section, to be subjected to a speculative search. 35

(3) [Bodily] Intimate samples to be taken from the body of a person may only be taken by a registered medical practitioner or a registered nurse.

(4) A police official may do such tests, or cause such tests to be done, as may be necessary to determine whether a person suspected of having handled or detonated an explosive has indeed handled or detonated an explosive. 40

(5) (a) The fingerprints, body-prints, intimate samples or non-intimate samples or the information derived from such samples, taken under any power conferred by this section, must be retained after it has fulfilled the purposes for which it was taken or analysed, but shall only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution. 45

(b) Any person who uses or who allows the use of the fingerprints, body-prints, intimate samples, non-intimate samples or the information derived from such samples, as referred to in paragraph (a), for any purpose that is not related to the circumstances set out in that paragraph, is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 15 years. 50

(c) The fingerprints and body-prints referred to in paragraph (a), must 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, 1995 (Act No. 68 of 1995). 55

(d) The intimate samples or non-intimate samples or the information derived from such samples, as referred to in paragraph (a), which shall

include, but not be limited to, the DNA profiles derived from such samples, must be stored on the NDDSA in accordance with the provisions of Chapter 5B of the South African Police Service Act, 1995 (Act No. 68 of 1995).

(6) Despite subsection (5)(a), the fingerprints, body-prints, intimate samples or non-intimate samples or the information derived from such samples shall be destroyed after five years, if the person is not convicted by a court of law.”

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#### **Short title and commencement**

**11.** This Act is called the Criminal Law (Forensic Procedures) Amendment Act, 2009, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

10

## **MEMORANDUM ON THE OBJECTS OF THE CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL, 2009**

### **1. BACKGROUND AND PURPOSE**

- 1.1 The Office for Criminal Justice System Reform (OCJSR), which is responsible for the Review of the Criminal Justice System, has identified as a priority the need to strengthen the forensic investigative powers and capacity of the South African Police Service (SAPS). Through an analysis of existing legislation and regulations in South Africa, together with a comparative overview of recent crime scene and forensic developments in other jurisdictions, certain major legislative constraints and lacunas have been identified, in respect of at least two pivotal aspects of our forensic crime fighting capacity, namely the collection, storage and use of fingerprinting and DNA evidence.
- 1.2 Despite the fact that a number of Government Departments administer databases containing fingerprints, the SAPS currently, due to legal and information technology reasons, only have access to the fingerprints stored on the SAPS AFIS system. As a result, the SAPS have no access to the HANIS system of the Department of Home Affairs, where fingerprints of 31 million citizens and about 2.5 million foreigners are kept, or to the E-NATIS system of the Department of Transport, where a further 6 million thumbprints are located. In this regard it must be noted that the Review, through an analysis of a compendium of statistics, found that in a large proportion of cases the perpetrator remained undetected. In addition, the current legislative scheme as set out in section 37 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (CPA), does not make the taking of fingerprints compulsory, even in instances where a person has been convicted of an offence. Section 37(5) of the CPA, further requires the destruction of fingerprints, palm-prints, foot-prints, photographs and the record of steps taken to obtain such evidence if a person is found not guilty or if no prosecution was instituted against a person from whom such evidence was collected. Therefore, the manner in which fingerprints are currently collected, loaded onto the SAPS's fingerprint database and used, means that a fingerprint lifted at a crime scene will most likely only be checked against the "limited" number of fingerprints from convicted offenders, which have been included in the database.
- 1.3 Although the taking of blood samples in criminal cases and the ascertainment of other bodily features are broadly regulated by section 37 of the CPA, no mention is made of the collection of DNA evidence. There is no legislation in South Africa which specifically provides for the establishment and administration of a DNA database as a criminal intelligence tool. The advantages of a strengthened forensic crime fighting capacity in these two areas can be summarised as follows:
  - 1.3.1 A DNA database and an expanded fingerprint capacity are important intelligence tools, particularly in crimes where detection is generally low, such as property crimes and can lead to a significant increase in suspect-to-crime-scene matches.
  - 1.3.2 DNA scene-to-scene matches help identify patterns of criminal behaviour that may solve past, existing and future crimes. In other words, not only will an expanded fingerprint database and DNA database increase the likelihood of identifying unknown perpetrators, but it will also increase the possibility of linking perpetrators to multiple crime scenes.
  - 1.3.3 Plea bargains increase when suspects are confronted with real evidence, such as fingerprints and DNA evidence linking them to a crime scene.

1.3.4 It should also always be borne in mind that fingerprints and especially DNA evidence are used not only to prove guilt, but also to prove innocence.

1.4 In response to the above mentioned legislative shortcomings, the Criminal Law (Forensic Procedures) Amendment Bill (the Bill) has been drafted to provide the SAPS with access to fingerprint databases of other Government Departments for criminal investigation purposes, the expansion of the SAPS's powers to take and retain fingerprints and other biometric materials and to provide for the establishment, administration and use of a DNA database. The Bill aims to achieve these objectives whilst providing for strict safeguards and penalties to ensure that forensic materials are collected, stored and used only for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution.

## 2. PROVISIONS OF THE BILL

2.1 **Clause 1** seeks to amend the heading of Chapter 3 of the CPA, in order to ensure that the provisions of Chapter 3 are not limited in its application to accused persons only.

2.2 **Clause 2** seeks to—

2.2.1 insert a definition clause into Chapter 3 of the CPA, in order to, amongst others, clarify the new terminology associated with the establishment of a DNA database.

2.2.2 insert a new clause into Chapter 3 of the CPA to provide the police with powers in respect of the taking of fingerprints and non-intimate samples of accused and convicted persons. This clause makes the taking of fingerprints and non-intimate samples from certain categories of accused and convicted persons compulsory and it provides for the retention of such prints and samples, but stipulates that it may only be used for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution. The clause further provides that the fingerprints, non-intimate samples or the information derived from such samples (DNA profiles), may be subjected to a speculative search against other databases, in the case of fingerprints, or against the National DNA Database of South Africa (NDDSA) in the case of non-intimate samples or the information derived from such samples. Clause 3 applies retrospectively to any convicted person serving a sentence at the time of the commencement of the Act.

2.2.3 insert a new clause into Chapter 3 of the CPA to provide the police with powers to take fingerprints, body-prints and non-intimate samples for investigative purposes.

2.3 **Clause 3** seeks to amend section 37 of the CPA by making certain consequential amendments as a result of the insertion of a new section 36B. Section 37 is further amended to ensure that prints and samples taken under this section are no longer destroyed, but are retained to be used only for purposes related to the detection of crime, the investigation of an offence or the conduct of a prosecution. Provision is also made for prints and samples taken under any power conferred by section 37 to be subjected to a speculative search.

2.4 **Clause 4** seeks to affect certain consequential amendments to section 212 of the CPA, which deals with proof of certain facts by affidavit or certificate.

2.5 **Clause 5** seeks to affect certain consequential amendments to section 225 of the CPA, which deals with evidence obtained not in accordance with Chapter 3 of the CPA or against the will of the accused.

- 2.6 **Clause 6** seeks to amend the South African Police Service Act, 1995 (Act No. 68 of 1995) (SAPS Act), by inserting a new Chapter 5A, in order to deal with the storage and use of finger-prints, body-prints and photographic images of persons.
- 2.6.1 Further amend the SAPS Act, by inserting a new Chapter 5B, in order to deal with the establishment, administration, maintenance and use of the National DNA Database of South Africa.
- 2.7 **Clause 7** seeks to affect certain consequential amendments to section 1 of the Firearms Control Act, 2000 (Act No. 60 of 2000), in order to bring the provisions dealing with the powers of the police to take prints and samples in line with the new provisions in the CPA.
- 2.8 **Clause 8** seeks to affect certain consequential amendments to section 113 of the Firearms Control Act, 2000 (Act No. 60 of 2000), which deals with the taking of body-prints and bodily samples for investigation purposes.
- 2.9 **Clause 9** seeks to affect certain consequential amendments to section 1 of the Explosives Act, 2003 (Act No. 15 of 2003), in order to bring the provisions dealing with the powers of the police to take prints and samples in line with the new provisions in the CPA.
- 2.10 **Clause 10** seeks to affect certain consequential amendments to section 9 of the Explosives Act, 2003 (Act No. 15 of 2003), which deals with the taking of prints and samples for investigative purposes.

### **3. DEPARTMENTS/BODIES/PERSONS CONSULTED**

The Bill was developed in consultation with the South African Police Service, the National Prosecuting Authority, the Department of Correctional Services, the Department of Home Affairs, the Department of Transport, National Treasury and the DNA Project.

### **4. IMPLICATIONS FOR PROVINCES**

None.

### **5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS**

The implementation of the Bill will require significant capacity expansion in respect of both human and other resources, which will require funding to undertake the development of a business systems reengineering plan (including current and to be process mapping). Additional personnel will have to be trained and retention strategies, such as an occupation specific dispensation, must be implemented to retain scarce skills within the forensic science field. A business plan has been developed to map the incremental implementation of the Bill.

### **6. FINANCIAL IMPLICATIONS FOR STATE**

The Bill has been costed and a business plan has been developed to map the incremental implementation of the Bill. National Treasury has been consulted in order to secure a budget for the implementation of the Bill.

### **7. COMMUNICATION IMPLICATIONS**

The implementation of the Bill must be accompanied by a communication strategy and training for all role players, including the public at large, in order to create an awareness amongst everyone as to the importance of finger-print and DNA evidence and the need not to contaminate crime scenes.

## **8. PARLIAMENTARY PROCEDURE**

- 8.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this Bill should be dealt with in terms of the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 8.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.



Printed by Creda Communications

ISBN 978-1-77037-547-5