

REPUBLIC OF SOUTH AFRICA

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# CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL

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*(As presented by the Portfolio Committee on Police (National Assembly))*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

**[B 2B—2009]**

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**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 provide for the compulsory taking of fingerprints of certain categories of persons; to provide for the taking of fingerprints and body-prints for investigative purposes; to further provide for the retention of fingerprints and body-prints taken under the Act; to further regulate the destruction of fingerprints taken under the Act; to further regulate proof of certain facts by affidavit or certificate; to amend the South African Police Service Act, 1995, so as to regulate the storing and use of fingerprints, body-prints and photographic images of certain categories of persons; to provide for the keeping of databases and to allow for comparative searches against those databases; to provide for security measures relating to the integrity of information stored on these databases; to make provision for the development of standing operating procedures regarding access to the databases of other state departments; to amend the Firearms Control Act, 2000, so as to further regulate the powers in respect of fingerprints and body-prints for investigation purposes; to amend the Explosives Act, 2003, so as to further regulate the powers in respect of fingerprints and body-prints for investigation purposes; and to provide for matters connected therewith.**

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

**Substitution of heading to Chapter 3 of Act 51 of 1977**

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

**“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:

### “Interpretation of Chapter 3

**36A.** (1) For the purposes of this Chapter, unless the context indicates otherwise—

- (a) **‘appropriate person’** means any adult member of a child’s family, or a care-giver of the child, which includes any person other than a parent or guardian who factually cares for a child including— 5
- (i) a foster parent;
  - (ii) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
  - (iii) a person who cares for a child whilst the child is in temporary safe care; 10
  - (iv) the person at the head of a child and youth care centre where a child has been placed;
  - (v) the person at the head of a shelter;
  - (vi) a child and youth care worker, who cares for a child who is without appropriate family care in the community; and 15
  - (vii) a child at the head of a child-headed household, if such a child is 16 years or older;
- (b) **‘authorised person’** means with reference to photographic images, fingerprints or body-prints, any police official in the performance of his or her official duties; 20
- (c) **‘body-prints’** means prints other than fingerprints, taken from a person and which are related to a crime scene, but excludes prints of the genitalia, buttocks or breasts of a person; 25
- (d) **‘child’** means a person under the age of 18 years;
- (e) **‘Child Justice Act’** means the Child Justice Act, 2008 (Act No. 75 of 2008);
- (f) **‘comparative search’** means the comparing of fingerprints, body-prints or photographic images, taken under any power conferred by this Chapter, by an authorised person against any database referred to in Chapter 5A of the South African Police Service Act; and 30
- (g) **‘South African Police Service Act’** means the South African Police Service Act, 1995 (Act No. 68 of 1995). 35
- (2) Any police official who, in terms of this Act or any other law takes the fingerprints, a body-print or ascertains any bodily feature of a child must—
- (a) have due regard to the personal rights relating to privacy, dignity and bodily integrity of the child; 40
  - (b) do so in a private area, not in view of the public;
  - (c) ensure the presence of a parent or guardian of the child, a social worker or an appropriate person; and
  - (d) treat and address the child in a manner that takes into account his or her gender and age. 45

### Powers in respect of fingerprints of accused and convicted persons

**36B.** (1) A police official must take the fingerprints or must cause such prints to be taken of any— 45

- (a) person arrested upon any charge related to an offence referred to in Schedule 1;
  - (b) person released on bail if such person’s fingerprints were not taken upon arrest;
  - (c) person upon whom a summons has been served in respect of any offence referred to in Schedule 1; 50
  - (d) person convicted by a court and sentenced to a term of imprisonment without the option of a fine, whether suspended or not, if the fingerprints were not taken upon arrest;
  - (e) 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. 55
- (2) A police official may take or cause—
- (a) fingerprints to be taken of any person arrested upon any charge; or

(b) fingerprints to be taken of a 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 subsection.

(3) The fingerprints taken in terms of this section must be stored on the fingerprint database maintained by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act.

(4) A police official may again take the fingerprints of any person referred to in subsection (1), if—

(a) the fingerprints taken on the previous occasion do not constitute a complete set of his or her fingerprints;

(b) some or all of the fingerprints taken on the previous occasion are not of sufficient quality to allow satisfactory analysis, comparison or matching; or

(c) the fingerprints taken were lost, misfiled or not stored on the database.

(5) The fingerprints taken under any power conferred by this section, may be the subject of a comparative search.

(6) (a) Subject to paragraph (c), any fingerprints, taken under any power conferred by this section—

(i) must upon the conviction of an adult person be retained on a database referred to in Chapter 5A of the South African Police Service Act;

(ii) must, upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act; and

(iii) in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceedings with reference to such fingerprints or body-prints were instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified.

(b) Fingerprints retained in terms of this section, may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution.

(c) Subparagraphs (a)(i) and (ii), do not prohibit the use of any fingerprints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.

(d) Any person who, with regard to any fingerprints, body-prints or photographic images referred to in this Chapter—

(i) uses or allows the use of those fingerprints, body-prints or photographic images for any purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or

(ii) tampers with or manipulates the process or the fingerprints, body-prints or images in question; or

(iii) falsely claims such fingerprints, body-prints or images to have been taken from a specific person whilst knowing them to have been taken from another person or source,

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

(7) The National Commissioner must destroy the fingerprints of a child upon receipt of a Certificate of Expungement in terms of section 87(4) of the Child Justice Act.

(8) Subsection (1)(d) applies to any person convicted of any crime, irrespective of the 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.

### **Fingerprints and body-prints for investigation purposes**

- 36C.** (1) Any police official may without warrant take fingerprints or body-prints 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 referred to in Schedule 1; and
- (b) believe that the prints or the results of an examination thereof, will be of value in the investigation by excluding or including one or more of those persons as possible perpetrators of the offence.
- (2) Prints taken in terms of this section may—
- (a) be examined for the purposes of the investigation of the relevant offence or caused to be so examined; and
- (b) be subjected to a comparative search.
- (3) (a) Subject to paragraph (c), any fingerprints or body-prints, taken under any power conferred by this section—
- (i) must upon the conviction of an adult person be retained on a database referred to in Chapter 5A of the South African Police Service Act;
- (ii) must, upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act; and
- (iii) in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceeding with reference to such fingerprints or body-prints were instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified of such event as referred to in this paragraph.
- (b) Fingerprints or body-prints which may be retained in terms of this section, may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution.
- (c) Paragraphs (a)(i) and (ii), does not prohibit the use of any fingerprints or body-prints taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.
- (d) The fingerprints or body-prints referred to in paragraph (a) must be stored on the database maintained by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act.
- (e) The National Commissioner must destroy the fingerprints of a child upon receipt of a Certificate of Expungement in terms of section 87(4) of the Child Justice Act.”.

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

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

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

- 37.** (1) Any police official may—
- (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;
  - (ii) of any such person released on bail **[or on warning under section 72]**;
  - (iii) of any person arrested in respect of any matter referred to in paragraph (n), (o) or (p) of section 40(1); 5
  - (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; 10
  - (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; 15
- (b) make a person referred to in paragraph (a)(i) or (ii) or paragraph (a) or (b) 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;
- (c) take such steps as he or she may deem necessary in order to ascertain 20 whether the body of any person referred to in paragraph (a)(i) or (ii) or paragraph (a) or (b) of section 36B(1) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that **[no]** a police official **[shall]** may not —
- (i) take **[any]** a blood sample of **[the]** any person **[concerned nor shall a police official make any examination of]**; or 25
  - (ii) examine the body of **[the]** a person **[concerned where that person is a female and the police official concerned is not a female]** who is of a different gender to the police official;
- (d) take a **[photograph]** photographic image or may cause a **[photo-** 30 **graph]** photographic image to be taken of a person referred to in paragraph (a)(i) or (ii) or paragraph (a) or (b) of section 36B(1).
- (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 take such steps, including the taking of a blood 35 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) or (b) of section 36B(1) has any mark, characteristic or distinguishing feature or shows any condition or appearance.
- (b) If any registered medical practitioner attached to any hospital is on 40 reasonable grounds of the opinion that the contents of the blood 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 sample of such person or cause such sample to be taken.
- (3) Any court before which criminal proceedings are pending may— 45
- (a) in any case in which a police official is not empowered under subsection (1) or section 36B(1) to take **[finger-prints]** fingerprints **[, palm-prints]** or **[foot-prints]** body-prints 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 50 that such prints be taken of any accused at such proceedings or that the steps, including the taking of a blood 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; 55
- (b) order that the steps, including the taking of a blood 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, 60 or any magistrate, may order that the **[finger-prints]** fingerprints, **[palm-prints or foot-prints, or]** body-prints or a **[photograph,]** photographic image 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 fingerprints, body-prints or photographic images taken under any power conferred by this section, may be the subject of a comparative search. 5 10

(6) (a) Subject to subsection (7), the body-prints or photographic images, taken under any power conferred by this section, and the record of steps taken under this section—

- (i) must upon the conviction of an adult person be retained on a database provided for in section 5A of the South African Police Service Act; 15
- (ii) must, upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act; and
- (iii) in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceeding with reference to such body-prints or photographic images was instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified. 20 25

(b) Body-prints or photographic images which may be retained in terms of this section, may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of a missing person, the identification of unidentified human remains or the conducting of a prosecution; 30

(c) The body-prints or photographic images referred to in paragraph (a)(i) and (ii), must be stored on the database established by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act. 35

(7) Subsection (6) does not prohibit the use of any body-prints or photographic image taken under any powers conferred by this section, for the purposes of establishing if a person has been convicted of an offence.”. 40

**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— 45

(a) the substitution for paragraph (a) of subsection (4) of the following paragraph:

“(a) Whenever any fact established by any examination or process requiring any skill—

- (i) in biology, chemistry, physics, astronomy, geography or geology; 50
- (ii) in mathematics, applied mathematics or mathematical statistics or in the analysis of statistics;
- (iii) in computer science or in any discipline of engineering;
- (iv) in anatomy or in human behavioural sciences;
- (v) in biochemistry, in metallurgy, in microscopy, in any branch of pathology or in toxicology; or
- (vi) in ballistics, in the identification of **[finger-prints]** fingerprints or **[palm-prints]** body-prints or in the examination of disputed documents, 55

is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges 60

that he or she is in the service of the State or of a provincial administration **[or is in the service of or is attached to the South African Institute for Medical Research]** or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the *Gazette*, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be *prima facie* proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.”;

(b) the substitution for subsection (6) of the following subsection:

“(6) In criminal proceedings in which the finding of or action taken in connection with any particular **[finger-print] fingerprint [or palm-print] or body-print** is relevant to the issue, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State and that he or she in the performance of his or her official duties—

(a) found such **[finger-print] fingerprint or [palm-print] body-print** at or in the place or on or in the article or in the position or circumstances stated in the affidavit; or

(b) dealt with such **[finger-print] fingerprint or [palm-print] body-print** in the manner stated in the affidavit, shall, upon the mere production thereof at such proceedings, be *prima facie* proof that such **[finger-print] fingerprint or [palm-print] body-print**, was so found or, as the case may be, was so dealt with.”; and

(c) 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] fingerprint 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 No. 24 of 1970)] National Health Act, 2003 (Act No. 61 of 2003)**, 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—

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

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

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

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

(cc) during a period specified in the affidavit, had a **[finger-print] fingerprint or [palm-print] body-print**, article of clothing, specimen, tissue or object described in the affidavit in his or her custody in the manner described in the affidavit, which was packed or marked in the manner described in the affidavit,

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, may issue a certificate in lieu of such affidavit, in which 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:

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

225. (1) Whenever it is relevant at criminal proceedings to ascertain whether any **[finger-print] fingerprint** [, **palm-print or foot-print**] or body-print of an accused at such proceedings corresponds to any other **[finger-print] fingerprint** [, **palm-print or foot-print**] or body-print 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] fingerprints** [, **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 of the accused, shall be admissible at such proceedings.

(2) Such evidence shall not be inadmissible by reason only thereof that the **[finger-print] fingerprint** [, **palm-print, or foot-print**] or body-print 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 concerned.”.

**Insertion of Chapters 5A and 5B in Act 68 of 1995**

6. The following Chapter is hereby inserted in the South African Police Service Act, 1995, after section 15:

**“CHAPTER 5A**

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

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

15A. (1) The National Commissioner must ensure that fingerprints, body-prints or photographic images taken under—  
(a) section 36B(1), 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 of the Service responsible for criminal records.

(2) The National Commissioner must ensure that the fingerprints 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 fingerprints, body-prints or photographic images stored, maintained and administered by the Division of the Service responsible for criminal records 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).

(4) Subject to subsection (5), the fingerprints, body-prints or 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, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution.

(5) Subsection (4) does not prohibit the use by the police officer commanding the Division of the Service responsible for criminal records or his or her delegate, of any fingerprints stored in terms of this section, for the purpose of establishing if a person has been convicted of an offence.

(6) Any person who, with regard to any fingerprints, body-prints or photographic images referred to in this Chapter—

(a) uses or who allows the use of those fingerprints, body-prints or photographic images for any purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or

(b) tampers with or manipulates the process or the fingerprints, body-prints or images in question; or

(c) falsely claims such fingerprints, body-prints or images to have been taken from a specific person whilst knowing them to have been taken from another person or source,

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

### **Comparative search against other databases**

**15B.** (1) Any fingerprints or photographic images stored in terms of this Chapter, may for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting 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 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 section.

(2) Any person who conducts a comparative 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 imprisonment for a period not exceeding 15 years.

(3) Any person who in respect of the taking of fingerprints, body-prints or photographic images—

(a) tampers with or manipulates the process;

(b) falsely claims it to have been taken from a specific person whilst knowing it to have been taken from another person or source,

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

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

**15C.** (1) The National Commissioner must in consultation with the Minister, within six months of the commencement of this section 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:

(a) The collection of fingerprints, body-prints and the taking of photographic images;

(b) the storage, maintenance and administration of the fingerprints, body-prints and photographic images collected in terms of this Chapter;

(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 of the Service responsible for criminal records 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 with reference to the national instructions referred to in subsection (1) and ensure that adequate training takes place within the Service.

#### Security measures on integrity of information on database

**15D.** (1) The National Commissioner must secure the integrity of information on the database provided for in this Chapter by taking appropriate, reasonable technical and organisational measures to prevent—

(a) loss of, damage to or unauthorised destruction of information on the database; and

(b) unlawful access to or processing of information on the database.

(2) In order to give effect to subsection (1), the National Commissioner must take reasonable measures to—

(a) identify all reasonable foreseeable internal and external risks to information on the database under his or her control;

(b) establish and maintain appropriate safeguards against the risks identified;

(c) regularly verify that the safeguards are effectively implemented; and

(d) ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.

(3) The National Commissioner must have due regard to generally accepted information security practices and procedures which may apply to the Service generally or be required in terms of specific laws and regulations relating to security of information applicable to the Service.

(4) The National Commissioner and the Directors-General of the Departments of Transport, Home Affairs and Correctional Services must, under the chairpersonship of the National Commissioner, within six months of the commencement of this section develop standard operating procedures regarding—

(a) access to the databases; and

(b) the implementation of safety measures to protect the integrity of information contained on the relevant databases.

(5) Other databases may only be accessed in terms of standard operating procedures referred to in subsection (4).”

#### 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 with reference to fingerprints, any police official in the performance of his or her official duties;

**‘body-prints’** means prints other than fingerprints, taken from a person and which are related to a crime scene, but excludes prints of the genitalia, buttocks or breasts of a person;”;

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

“ **‘child’** means a person under the age of 18 years;

**‘comparative search’** means the comparing of body-prints, fingerprints or photographic images, taken under any power conferred by section 113, by an authorised person against any database referred to in Chapter 5A of the South African Police Service Act;”.

**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:

**“Fingerprints, [Bodyprints] body-prints and bodily samples for investigation purposes** 5

**113.** (1) [Any] Subject to subsection (3) any police official may without warrant take fingerprints [, **palm-prints, footprints**] or body-prints and bodily samples of a person or a group of persons or may cause any such prints or samples to be taken, if— 10

- (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
- (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. 15

(2) The person who has control over prints or samples taken in terms of this section— 20

- (a) may examine them for purposes of the investigation of the relevant offence or cause them to be so examined; and
- (b) **[must immediately destroy them when it is clear that they will not be of value as evidence]** may cause any prints taken under any power conferred by this section, to be subjected to a comparative search. 25

(3) Bodily 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. 30

(5) (a) The fingerprints, body-prints and bodily samples, taken under any power conferred by this section, and the record of steps taken under this section—

- (i) must upon the conviction of an adult person be retained;
- (ii) must upon the conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child as provided for in section 87 of the Child Justice Act, 2008 (Act No. 75 of 2008); and 35
- (iii) in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceeding with reference to such fingerprints or body-prints was instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified. 40

(b) The fingerprints or body-prints which may be retained in terms of this section, may only be used for purposes related to the detection of crime, the investigation of an offence the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution. 45

(c) Any person who, with regard to any fingerprints, body-prints or bodily samples referred to in this section— 55

- (i) uses or who allows the use of those fingerprints, body-prints or bodily samples for any purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or 60

- (ii) tampers with or manipulates the process or the fingerprints, body-prints or bodily samples in question; or
  - (iii) falsely claims such fingerprints, body-prints or bodily samples to have been taken from a specific person whilst knowing them to have been taken from another person or source,
- is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.
- (d) The fingerprints and body-prints referred to in paragraph (a)(i) and (ii), must be stored in the database maintained by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act, 1995 (Act No. 68 of 1995).”.

#### 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 with reference to fingerprints, any police official in the performance of his or her official duties;
  - ‘body-prints’** means prints other than fingerprints, taken from a person and which are related to a crime scene, but excludes prints of the genitalia, buttocks or breasts of a person;”;
- (b) the insertion after the definition of “**chief inspector**” of the following definitions:
  - “**‘child’** means a person under the age of 18 years;
  - ‘comparative search’** means the comparing of fingerprints, body-prints, or photographic images, taken under any power conferred by section 9, by an authorised person against any database referred to in Chapter 5A of the South African Police Service Act;”.

#### 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

9. (1) [Any] Subject to subsection (3), any police official may without warrant take fingerprints [, **palmprints, footprints and**] body-prints, or bodily 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—
- (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 that person or one or more of [the] those persons as possible perpetrators of the offence.
- (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
  - (b) **[must immediately destroy them when it is clear that they will not be of value as evidence]** may cause any prints taken under any power conferred by this section, to be subjected to a comparative search.
- (3) Bodily 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.
- (5) (a) The fingerprints, body-prints and bodily samples, taken under any power conferred by this section, and the record of steps taken under this section—

- (i) must upon the conviction of an adult person be retained;
  - (ii) must, upon conviction of a child be retained on a database referred to in Chapter 5A of the South African Police Service Act, subject to the provisions relating to the expungement of a conviction and sentence of a child, as provided for in section 87 of the Child Justice Act, 2008 (Act No. 75 of 2008); and
  - (iii) in a case where a decision was made not to prosecute a person, if the person is found not guilty at his or her trial, or if his or her conviction is set aside by a superior court or if he or she is discharged at a preparatory examination or if no criminal proceeding with reference to such fingerprints or body-prints was instituted against the person concerned in any court or if the prosecution declines to prosecute, must be destroyed within 30 days after the officer commanding the Division responsible for criminal records referred to in Chapter 5A of the South African Police Service Act has been notified.
- (b) The fingerprints, body-prints or bodily samples which must be retained in terms of this section, may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution.
- (c) Any person who, with regard to any fingerprints, body-prints or bodily samples referred to in this section—
- (i) uses or who allows the use of those fingerprints, body-prints or bodily samples for any purpose that is not related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution; or
  - (ii) tampers with or manipulates the process or the fingerprints, body-prints or bodily samples in question; or
  - (iii) falsely claims such fingerprints, body-prints or bodily samples to have been taken from a specific person whilst knowing them to have been taken from another person or source,
- is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years.
- (d) The fingerprints and body-prints referred to in paragraphs (a)(i) and (ii), must be stored in the database maintained by the National Commissioner, as provided for in Chapter 5A of the South African Police Service Act, 1995 (Act No. 68 of 1995).”.

### Short title and commencement

**11.** This Act is called the Criminal Law (Forensic Procedures) Amendment Act, 2010, and comes into operation on a date determined by the President, by proclamation in the *Gazette*.

## **MEMORANDUM ON THE OBJECTS OF THE CRIMINAL LAW (FORENSIC PROCEDURES) AMENDMENT BILL, 2010**

### **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 pivotal aspects of our forensic crime fighting capacity, amongst others, the collection, storage and use of fingerprinting 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 has access to the fingerprints stored on the SAPS AFIS system. As a result, the SAPS has 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. 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 The advantages of a strengthened forensic crime fighting capacity in respect of fingerprints, body-prints and photographic images can be summarised as follows:
  - 1.3.1 An expanded fingerprint capacity is an important intelligence tool, 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 Plea bargains increase when suspects are confronted with real evidence, such as fingerprints linking them to a crime scene.
  - 1.3.3 It should also always be borne in mind that fingerprints are used not only to prove guilt, but also to prove innocence.
- 1.4 In response to the abovementioned 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 original Bill had been introduced in the Portfolio Committee on Justice and Constitutional Development, but was referred to the Portfolio Committee on Police, which has decided to deal with the Bill in two phases, namely Phase dealing with fingerprints only and Phase 2, addressing issues relating to DNA. This Bill deals with Phase 1, therefore it will only address issues relating to fingerprints, body-prints and photographic images.
- 1.5 The Bill provides for strict safeguards and penalties to ensure that fingerprints, body-prints and photographic images are collected, stored and used only for

purposes related to the detection of crime, the investigation of an offence, the identification of missing persons and the identification of unidentified human remains or the conducting 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 insert the new sections 36A, 36B and 36C, after section 36, in the CPA. These sections provide for the following:

(a) **The new section 36A provides for** definitions of “**authorised person**”, “**body-prints**”, “**child**” and “**comparative search**”, as well as definitions of the “**South African Police Service Act, 1995 (Act No. 68 of 1995)**” (SAPS Act) and the “**Child Justice Act, 2008 (Act No. 75 of 2008)**” (**Child Justice Act**). It furthermore provides for the safeguarding of the rights of a child when fingerprints and body-prints are taken by a police official in terms of the CPA, or any other Act.

(b) **The new section 36B provides:**

- The police with powers in respect of the taking of fingerprints of accused and convicted persons;
- for the compulsory taking of fingerprints from certain categories of accused and convicted persons and for the retention of such prints, but stipulates that it may only be used for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution;
- for the storing of fingerprints on a database kept by the National Commissioner of the SAPS, and that it be subjected to a comparative search;
- the police with powers to take fingerprints in certain circumstances in addition to fingerprints that are compulsory to take, for purposes related to the detection of crime, the investigation of an offence, the identification of missing persons, the identification of unidentified human remains or the conducting of a prosecution;
- for the storing of fingerprints taken in terms of the section on a database maintained by the National Commissioner as provided for in Chapter 5A of the SAPS Act.
- for the retaking of fingerprints, where necessary;
- for the retention of fingerprints of adult persons and the retention of the fingerprints of children subject to the provisions of section 87 of the Child Justice Act;
- for the destruction of fingerprints in case of the acquittal of an accused, if no prosecution is instituted, within 30 days from the date in which the officer commanding the Division responsible for criminal records in the South African Police Service had been notified, and the destruction of fingerprints of a child once a Certificate of Expungement issued in terms of the Child Justice Act, is received; and
- for crimes that are committed if fingerprints are used for any purpose not provided for in the Bill, with a maximum penalty of 15 years imprisonment without the option of a fine.

(c) **The new section 36C provides:**

For the taking of fingerprints or body-prints, without a warrant, in respect of suspected offences in Schedule 1 of the CPA, if there are reasonable grounds to suspect that a person who is part of a group has committed an offence to determine whether the person could be included or excluded from the suspected commission of the crime.

The measures in respect of section 36B relating to the retention, destruction, use and abuse of fingerprints are replicated in this section.

- 2.3 **Clause 3** seeks to amend section 37 of the CPA, by effecting certain consequential amendments as a result of the insertion of the new section 36B. Section 37 is further amended to provide for subjecting body-prints and photographic images taken under this section to be subjected to a comparative search, the retention of body-prints and photographic images and the destruction thereof in line with the measures described above in respect of section 36B.
- 2.4 **Clause 4** seeks to effect 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 effect certain consequential amendments to section 225 of the CPA, which deals with the admissibility of evidence not obtained in accordance with Chapter 3 of the CPA or against the will of the accused.
- 2.6 **Clause 6** seeks to amend the 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.
- 2.7 **Clause 7** seeks to effect 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 effect 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 effect 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 effect 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). The Bill will be implemented in an incremental fashion to move from a manual access to databases to a fully computerised system.

### **6. FINANCIAL IMPLICATIONS FOR THE 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 fingerprint 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.



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