



May 22, 2013

Babalwa Mbengo
Committee Secretary
Portfolio Committee on Police
P O Box15
Cape Town, SA 8000

RE: Comments on Criminal Law (Forensic Procedures) Amendment Bill
South Africa (April 2013)

Dear Ms. Mbengo,

Our organizations are members of the Forensic Genetics Policy Initiative, a global human rights project dedicated to ensuring that the expansion of DNA databases is consistent with human rights principles. We welcome the opportunity to comment on the Criminal Law (Forensic Procedures) Amendment Bill, which creates a legislative framework for the collection of DNA and the construction of a DNA database in South Africa. We appreciate the transparency and deliberation that has followed the development of this bill and the drafters concern that privacy and human rights principles be respected. While the current draft of this bill does address a number of inherent privacy and human rights issues attendant to these practices, significant privacy and human rights concerns remain.

The use of DNA profiling in criminal investigations can bring benefits to society by helping to solve crimes and assisting in the enforcement of the rule of law. However, DNA farming and warehousing on the scale contemplated by the Criminal Law (Forensic Procedures) Amendment Bill does not achieve a proper balance between the legitimate needs of law enforcement and human rights.

Unlike other established forms of identification such as fingerprints, DNA analysis is a window into an individual's medical history as well as that of his or her entire family. Furthermore it can be used for a wider range of surveillance methods, from familial searches to DNA-based profiling. Considering the immense weight of information that DNA carries, allowing law enforcement to seize demonstrably innocent persons DNA, DNA from individuals who have yet been proven guilty of any crime, and DNA from person's convicted of even minor crimes for which DNA evidence is not even relevant is to give law enforcement uncontrolled and

unprecedented access to the private lives of the citizens of South Africa. Adding innocent individuals and individuals convicted of minor crimes to the DNA database will have limited value in solving crimes.

Most countries that have launched national DNA databases have begun with a limited set of specified offences and expanded deliberately with legislative oversight. This is because the expansion of DNA collection practices increases the statistical probability for false matches and error, which can occur by chance or through poor police and laboratory practices and cause terrible miscarriages of justice.

Finally, we are very concerned that no clear assessment of the financial costs of this bill, which will necessarily be quite high, has been undertaken. Collecting the DNA of such large numbers of citizens and the maintenance of such a sizable database could very well overburden law enforcement in South Africa and serve to hinder its capacity to investigate and prosecute crimes; resulting in even more miscarriages of justice.

Attached is an overview of the relevant provisions of the Criminal Law (Forensic Procedures) Amendment Bill followed by a more comprehensive analysis of our concerns. The April 2013 draft of the Criminal Law (Forensic Procedures) Amendment Bill continues to raise concerns that must be addressed to ensure that forensic uses of DNA in South Africa are done in a manner consistent with principles of privacy and human rights and that societal benefits are properly balanced with social costs.

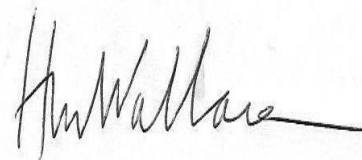
Our project expects to travel to South Africa this year and we are available to testify and assist in any manner, formal and informal, as this bill develops and proceeds through Parliament.

Sincerely,



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Criminal Law (Forensic Procedures) Amendment Bill Analysis

South Africa (April 2013)

Jeremy Gruber
Council for Responsible Genetics

Overview:

The use of DNA profiling in criminal investigations can bring benefits to society by helping to solve crimes and assisting in the enforcement of the rule of law. However, the storage of DNA collected from individuals and the inclusion of computerized DNA profiles on computer databases raises important human rights concerns. Proving the innocence or guilt of a suspect does not require a DNA database. Collecting DNA from a suspect and matching it to DNA taken from a crime scene will suffice. Moreover DNA by itself is insufficient evidence for a conviction, its value lies in its context and the totality of the evidence collected in any particular case.

DNA testing in criminal matters is currently being conducted on an ad hoc case by case basis in South Africa. In authorizing the collection of DNA by law enforcement and the databanking of DNA profiles, the Criminal Law (Forensic Procedures) Amendment Bill represents the framework with which a national DNA database is to be established in South Africa. While the current draft of this bill does address a number of inherent privacy and human rights issues attendant to these practices, significant privacy and human rights concerns remain. If left unaddressed, these dangers will obscure the very real societal benefits that could come from a more tailored bill.

BILL SUMMARY:

The main provisions of the bill can be summarized as follows:

Collection Practices:

General

The bill distinguished between intimate and non-intimate samples. Intimate samples, including blood or pubic hair, may only be taken by a medical professional. Non-intimate samples, such as a buccal swab or sample taken from a fingernail, can be taken by a police official.

Intimate or non-intimate samples can be collected by medical professionals/police either with consent, a warrant or for the following classes of accused and convicted person:

As per Section 36D(1)

- a) Person arrested for a Schedule 1 offense
- b) Person released on bail for Schedule 1 offense if DNA was not taken upon arrest
- c) Person served with a summons for a Schedule 1 offense
- d) Persons on the National Register of Sex Offenders
- e) Person convicted of offense the Minister by notice has declared to be an offense for purposes of the Act

As per Section 36D(2)

- a) Person arrested for any offense
- b) Person released on bail for any offense if DNA was not taken upon arrest
- c) Person served with a summons for any offense
- d) Person convicted of any offense the Minister by notice has declared to be an offense for purposes of the Act

The use of any forensic profile derived from a DNA sample is limited to detection of a crime, investigation of an offense, conducting of a prosecution, or identification of missing persons/human remains. Any person who uses a DNA profile or bodily sample other than for an authorized purpose under the Act is guilty of an imprisonable offense.

Investigatory:

An authorized person may take a buccal swab of a person/group of persons if they have reasonable grounds to believe the person has **or one or more of the persons in that group** has committed a Schedule 1 offense AND that the sample will be of value in including or excluding one or more of such persons as the perpetrator of the offense.

Establishment of National Forensic DNA Database:

The bill authorizes the creation of a national forensic DNA database for the specified purposes of serving as an investigatory tool and identification tool for persons involved in committing crimes, missing or unidentified remains. It shall include forensic DNA profiles separated into five different indices:

- 1) Crime scene index
- 2) Arrestee Index
- 3) Offenders Index (including offences committed prior to the Act's creation)
- 4) Volunteers Index (with specified informed consent (for child- parents consent is required)
- 5) Elimination Index (police officers, lab personnel etc)

None of the indices shall contain the following information:

- 1) Appearance other than sex
- 2) Medical info
- 3) Historical info
- 4) Behavioral info

Bodily samples are to be destroyed and disposed of within three months after a DNA profile has been created and entered into the database.

An authorized officer may, upon receipt of a forensic DNA profile from a foreign state, compare it to profiles on the database or may share such a profile for comparison in a foreign state's database subject to the international obligations of the Republic of SA.

Quality Management

The authorized officer must develop and recommend standards for quality management of the forensic science laboratories and analysts including proficiency and performance tests.

Retention of DNA samples

Bodily samples not relating to the crime scene sample or used to populate the NFDD with forensic DNA profiles shall be destroyed within 3 months after a DNA profile has been created and entered into the database. The authorized officer must ensure safe storage of crime scene samples.

Retention/Storage/Expungement of forensic DNA profiles

Arrestee Index: Profile must be expunged **within 3 years** after the authorized officer has been notified that:

- 1) Person was not prosecuted
- 2) Person was acquitted
- 3) Person's conviction was set aside

(Amendment 10diii) on p 17 of the bill mentions a 6 month time period-it's unclear to this author the context of this time period as compared to the above)

Volunteer Index: Victim's profile must be expunged within 3 months of notice that their case has been finalized. Profile must be expunged within 3 months of request when profile is retained by consent only.

Crime Scene Index: Profiles are stored indefinitely.

Elimination Index: Profiles are stored indefinitely.

Offenders Index: Profiles of children are to be retained on the database and subject to expungement in accordance with the Child Justice Act, 2008.

Infrastructure

National Commissioner must maintain and develop adequate information technology infrastructure and systems to support the efficient analysis of DNA samples, performing of comparative searches and maintenance of the NFDD.

Offences and Penalties

Any person with regards to any intimate or non-intimate samples and forensic DNA profiles derived from them uses or allows their use for any purpose not related to crime investigation or identification of missing persons/human remains, tampers with such samples or falsely claims such samples or profiles have been taken from a specific person while knowing them to have come from a different source is guilty of an offense and subject to imprisonment.

National Instructions

National Commissioner shall issue instructions for law enforcement who are tasked with collection and use of DNA samples and profiles which shall address the following:

- 1) Securing crime scene
- 2) Collection and transfer of DNA samples to lab
- 3) Manner of requesting info in the NFDD
- 4) Manner of DNA sample destruction

Training

Adequate training programs shall be ensured by the National Commissioner to implement and administer the NFDD.

Regulations

Minister may make regulations regarding any administrative or procedural matter necessary to give effect to the Act

Parliamentary Oversight

National Commissioner shall provide annual reports to the Minister on the performance of the NFDD and the use of forensic DNA and such report shall be tabled in Parliament. No later than five years after commencement of the NFDD the Commissioner shall submit a report to Parliament on whether any legislative actions are necessary to improve the NFDD and use of forensic DNA.

Access and Security

National Commissioner must secure the integrity of info in the database by taking measures to prevent

- 1) Loss or damage to info on the database
- 2) Unlawful access to or processing of info on the database including reasonable measures to identify and address safeguards. National Commissioner in liaison with the National Forensic Oversight Board must develop procedures for access to the database and safety measures for the data within.

National Forensic Oversight Board

National Forensic Oversight Board is hereby established consisting of:

- 1) A rep. from Dept of Health
- 2) The Sec of Police or her rep.
- 3) A rep. from the Dept of Home Affairs
- 4) A rep. from the Dept of Correctional Services
- 5) A rep from the Dept. of Justice and Constitutional Development
- 6) A total of two reps. From NGOs who the chairperson believes can substantially contribute to the proceedings of the Board

The Board shall formally invite the SA Human Rights Commission to be part of the Board or to participate in its proceedings.

The Board has the following duties:

- 1) Monitor implementation of legislation related to sample collection, analysis and the NFDD
- 2) Make proposals on the governance, performance and integrity of the NFDD

- 3) Monitor compliance with ethics and privacy issues
- 4) Propose minimum quality standards in performing DNA analysis
- 5) Promote public accountability and transparency of the NFDD
- 6) Advise the Minister on reviewing legislation, regulations, and policy regarding matters under the Act.

BILL ANALYSIS:

There are a number of concerns about the use of DNA forensic testing and profiling in the current bill draft. Generally, these concerns relate to consent and collection; the chain of custody and contamination; storage and destruction of DNA profiles and systems; privacy; and future expansion.

Collection Practices:

Clearly the greatest privacy and human rights concerns attendant to the current version of this bill surround the expansive categories of persons whose DNA is to be collected and added to the database. The current draft of the Bill in Section 36D lays out two separate lists of categories of persons. One list is limited to individuals associated with Schedule 1 offenses and the second list contemplates individuals associated with any offense. There is no clear explanation as to why there are separate lists but **the result is to collect the DNA of nearly anyone in South Africa who comes into contact with the criminal justice system.**

Convicted:

Collection of DNA from individuals convicted of violent crimes, such as murder and rape, crimes which have both an increased likelihood of repeat offense and DNA evidence left at the crime scene are generally accepted by most countries as sufficient justification for including such populations on a DNA database. Yet there is a significant difference between offenders who meet the above criteria and offenders who have committed non violent crimes for which DNA evidence is not relevant and minor crimes that do not include custodial sentences. It is unclear from an analysis of this bill exactly which criminal offences it applies to since the Schedule of offenses referred to in the bill does not appear publicly available but 36D(2) appears to expand the purview of the bill to any offense. It is fair to conclude from the bill's language that there has been insufficient attention paid to ensuring that the categories of offenses to be included within the purview of this bill are carefully chosen. Quite the opposite, they appear to be expansive and the Minister is given unusually broad authority to expand such categories even further without legislative approval. Most countries that have launched national DNA databases have begun with a limited set of specified offences and expanded deliberately with legislative oversight.

Pre-Convicted:

The bill sets out to include a wide variety of pre-convicted categories of persons including individuals arrested, on bail or summonsed for an offense, and those persons for whom reasonable grounds exist to believe they or one or more of the persons in that group (i.e.

individuals with no suspicion attached at all) has committed either a Schedule 1 offense or any offense whatsoever and that the sample will be of value in including or excluding one or more of such persons as the perpetrator of the offense. Collecting the DNA of individuals yet to be convicted of a crime, many of whom will never be convicted of a crime and some of whom are known to be innocent at the time but whose DNA is being collected because they are part of a suspicious group is a serious intrusion into the privacy and human rights of the public. It obviates the state's primary restraints on search and seizure and its responsibility to prove guilt. The amount of law enforcement discretion attendant to the decision to stop and arrest a suspect additionally offers law enforcement substantial discretion in determining whose DNA to collect. Such provisions open up the opportunity for law enforcement to engage in "DNA dragnets", which necessarily entail the collection of DNA from innocent persons who happen to be in the wrong place at the wrong time. Moreover, the collection of DNA upon arrest is not for the purposes of identification of an individual. The individual will necessarily already have been identified at the time DNA is collected. Rather, the taking of DNA upon arrest is to investigate individuals for crimes unrelated to the crime for which they were even arrested. Because only a fraction of those who are arrested are ultimately charged and convicted, however, this practice necessarily will permit the government to collect DNA from and conduct DNA based surveillance on innocent South African citizens.

Volunteer:

Volunteers who consent to the collection of their DNA should have its use limited to a specified investigation and is not necessary to have it entered on a database to ensure it can be used for this purpose. Furthermore, the volunteer indice contemplates the inclusion of children with the consent of the parent and could be in conflict with the principle that children shall have the right to participate in decision making involving them as contemplated by the Child Justice Act.

Establishment of National DNA Database:

The bill does a generally good job of separating the categories of included persons into indices, rather than mixing such categories of individuals together. However the bill has no provisions for ensuring that such indices remain separate with separate access and use rules. This is particularly of concern as there are categories of persons, such as missing persons, who are not part of any criminal investigations.

DNA sample retention:

The bill does recognize the robust information value of biological samples and the potential for their misuse and it does require that such samples are destroyed within three months after a profile is created and uploaded to the NFDD. However there is no timeliness requirement as to creating the profile in the first place. Backlogs are often a very serious problem with DNA database maintenance, therefore what might appear on its face to be a timely privacy protective

requirement could very easily turn into a longer term collection issue and raise serious privacy concerns.

DNA profile retention:

The current bill allows the state to retain a DNA profile of an individual for up to three years even after the case against them has concluded without a finding of guilt. Moreover there are no provisions for ensuring the timeliness of notification to an authorized officer to begin this period. Consequently the current bill allows for the retention of the DNA of innocent persons long past any reasonable time for expunging their records and represents an unwarranted intrusion into the private lives of innocent persons.

Furthermore the DNA profiles of all categories of convicted persons are retained indefinitely with no retention distinction between serious, violent crimes and minor non violent crimes. The permanent retention of all offender profiles without distinction raises serious questions as to the power of the state to maintain control over an individual even after they have met the burdens of their conviction.

Unaddressed Issues:

Familial Searching

The bill does not address familial searching, the deliberate search of a DNA database conducted for the intended purpose of potentially identifying close biological relatives to the unknown forensic profile obtained from crime scene evidence. This practice has a low success rate and raises serious privacy and human rights concerns as it necessarily involves searches of individuals that law enforcement knows to be innocent. The general language of the bill related to reasonable uses of the database would appear to allow such searches.

Post Conviction DNA Access

One of the most often repeated arguments by supporters of this bill is the power of DNA to exonerate. Indeed the most powerful uses of DNA can be for exonerating those individuals who have been wrongly convicted of a crime. However no part of this bill is devoted to ensuring post conviction access to one's own DNA for exoneration purposes. The widely heralded recent launch of a SA Innocence Project, some of whose biggest supporters are proponents of the bill, makes clear the need for strong post conviction DNA access provisions. The lack of such provisions in this bill is a serious omission with profound human rights implications.

Oversight and Regulation of NFDD:

National Forensic Oversight Board

To ensure privacy and human rights, there must be adequate measures to ensure oversight, regulation, quality assurance and accreditation of the system. The collection and processing of DNA in laboratories, in particular, is a system prone to contamination, malfeasance and error without sufficient protections. A custodian plays a crucial role in ensuring the accuracy and security of the system. The bill does a good job of creating such an authority. However, the National Forensic Oversight Board does not include any categories of members who can be considered to be watchdogs on behalf of the public. No members of legal defense or human rights associations are included; rather the Board is required to invite the SA Human Rights Commission to participate. From its inception, or at any time, the Human Rights Commission could decline to participate or participate in a limited degree and their decision making authority in either scenario is unclear. The inclusion of NGOs without further refinement of their description does not alleviate this concern as NGOs unrelated to ensuring the rights of the accused and convicted could be included.

For the public to trust the Board in representing the public's interest, its makeup must include permanent representatives of bodies devoted to ensuring that individuals that come into contact with the tenets of this bill and law enforcement generally have their rights protected.

General

While the oversight powers given to the Board, Minister and National Commissioner with regards to oversight of labs, privacy and security and other necessary features to ensure the integrity of the forensic system are broad, there is a glaring lack of specificity to ensure the highest standards and oversight are met.

BEST PRACTICES ANALYSIS:

Collection of DNA

With consent: only for a specific investigation (e.g. from a victim or for elimination purposes). Volunteers should not have information entered on a database	Allows for broad investigatory powers. The bill contemplates a volunteer indice for the database.
Without consent: only from persons suspected of a crime for which DNA evidence is directly relevant i.e. a crime scene sample exists or is likely to exist. Or, broader categories?	Significantly broader categories of persons inc demonstrably innocent persons are contemplated.
Requirement for an order by a court? Or allowed in	In many cases law enforcement discretion

other circumstances?	alone is sufficient for collection.
Samples collected by police officers, or only medical professionals? Must take place in a secure location i.e. not on the street etc.	“Intimate” samples are to be collected by medical professionals and “Non-intimate” samples by law enforcement. Appropriate location is mandated.
Provision of information for all persons from whom DNA is taken	No provision
Crime scenes should be promptly examined if DNA evidence is likely to be relevant, and quality assurance procedures must protect against contamination of evidence	Regulated at discretion of the National Forensic Oversight Board

Analysis of DNA

Should take place only in laboratories with quality assurance	Regulated at discretion of the National Forensic Oversight Board
Laboratories should be independent of police	No provision; regulated at discretion of the National Forensic Oversight Board
Profiling standards must be sufficient to minimize false matches occurring by chance. This must take account of increased likelihood of false matches in transboundary searches, and with relatives.	No provision; regulated at discretion of the National Forensic Oversight Board

Storage of DNA and linked data

Data from convicted persons should be separate from others e.g. missing persons’ databases	Separate indices are created for such categories, however regulations for separate standards of access and use are unclear
Access to databases and samples must be restricted and there must be an independent and transparent system of governance, with regular	Addressed generally- reports are required but there is no provision for transparency of the daily proceedings of the National Forensic

information published e.g. annual reports, minutes of oversight meetings	Oversight Board. Access to database at discretion of database managers.
Personal identification information should not be sent with samples to laboratories	No provision; regulated at discretion of National Forensic Oversight Board
Any transfer of data e.g. from police station to lab or database, must be secure	Addressed generally; regulated at discretion of National Forensic Oversight Board

Uses of samples and data

Research uses should be restricted to anonymised verification of database performance (e.g. checking false matches etc.). Third party access to data for such purposes should be allowed, provided public information on research projects is published. There should be an ethics board.	No provision. Uses other than by law enforcement would appear to be prohibited
Research uses for other purposes e.g. health research, behavioral research should not be allowed.	No provision. Uses other than by law enforcement would appear to be prohibited
Uses should be restricted by law to solving crimes or identifying dead bodies/body parts. Identification of a person is not an acceptable use. Missing persons databases (if they exist) should be separate from police databases	Use does appear to be limited to investigation of crime, however broadly defined. Non criminal indices are separate but there are no separate access and use provisions.
Familial searching should be restricted e.g. ordered by a court? Or not used? Or regulated for use in special cases?	No provision

Destruction of DNA and linked data

DNA samples should be destroyed once the DNA profiles needed for identification purposes have been obtained from them, allowing for sufficient time for quality assurance.	DNA samples are destroyed within three months after profile is created. No timeline for profile creation is given.
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An automatic removals process is required for deletion of data from innocent persons. This must take place within a reasonable time of acquittal etc.	A three year time period of expungement is created which begins upon notification of the authorized officer. No provisions are included to ensure such timely notification.
There should be limits on retention of DNA profiles from persons convicted of minor crimes	DNA from individuals convicted of minor crimes is retained indefinitely.
There should be an appeals process against retention of data	No provision
Linked data on other databases (e.g. police record of arrest, fingerprints) should be deleted at the same time as DNA database records	No provision
Crime scene DNA evidence should be retained for as long as a reinvestigation might be needed (including to address miscarriages of justice)	DNA evidence is retained indefinitely

Use in court

Individuals must have a right to have a second sample taken from them and reanalyzed as a check	No provision
Individuals must have a right to obtain re-analysis of crime scene forensic evidence in the event of appeal	No provision
Expert evidence and statistics must not misrepresent the role and value of the DNA evidence in relation to the crime	No provision

Other

Relevant safeguards must be proscribed by law and there should be appropriate penalties for abuse	Safeguards are generally prescribed but specific safeguards are to be created by the Board. There are penalties for misuse of DNA samples and database profiles.
Impacts on children and other vulnerable persons (e.g. mentally ill) must be considered	No provision

Potential for racial bias must be minimized	No provision
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Financial Analysis:

The financial costs of creating and maintaining such expansive DNA collection practices as well as a national DNA database are quite high and, if underfunded, could result in serious miscarriages of justice. Even well funded databases and practices in many countries have had serious incidents of mistake and error and significant backlogs. It does not appear that any financial analysis of the bill has taken place.

Conclusion:

The April 2013 draft of the Criminal Law (Forensic Procedures) Amendment Bill continues to raise concerns that must be addressed to ensure that forensic uses of DNA in South Africa are done in a manner consistent with principles of privacy and human rights and that societal benefits are properly balanced with social costs.