

Date of Meeting:

19 Jun 2013

Chairperson:

Ms A van Wyk (ANC)

Documents handed out:

[Regulations for taking of buccal sample or withdrawal of blood from a living person for testing](#)

[Summary of submissions on Criminal Law \(Forensic Procedures\) Amendment Bill](#)

[Implementation of the DNA Bill Accreditation Plan](#)

[Criminal Law \(Forensic Procedures\) Amendment Bill \[B9-2013\]](#)

Audio recording of the meeting:

[PC Police: Further Committee Deliberations on Criminal Law \(Forensic Procedures\) Amendment Bill \[B9-2013\]](#)

Summary:

The Committee was briefed on pertinent aspects of the Protection of Personal Information Bill. The State Law Advisor was of the opinion that that Bill would not impact on the Criminal Law (Forensic Procedures) Amendment Bill. There were adequate safeguards in the Protection of Personal Information Bill to protect such information, and provision was made for such information to be used to combat crime. Members were cautioned about making too many assumptions, as this was still only a Bill and there might be changes. Members felt that there should be a complaints mechanism in the Criminal Law (Forensic Procedures) Amendment Bill, which could be addressed by the ethics committee, and were assured that there were penalties in place for the misuse of personal information.

Members were briefed on the forensic laboratory process. A phased approach was being followed, with two of the six phases completed. The accreditation process should be completed by May 2015. Although this was not a statutory requirement, being accredited would increase the confidence in the system. The application should be made in November 2013, but it was a long process.

Familial searches were used particularly to identify bodies. Family members had a similar DNA profile. In some countries this procedure was regarded as a violation of human rights, but Members agreed that this was a useful tool.

Various indices would be maintained. On conviction, a person's profile would be moved from the arrestee index to the index for convicted criminals. This process would eventually be automated. Members were concerned that information on

convictions might not be transferred quickly enough in the interim.

South Africa was a subscriber to the Interpol Gateway. Profiles from unsolved crimes were made available to all subscribers.

The SAPS Head of Legal Services took the Committee through the Criminal Law (Forensic Procedures) Amendment Bill and pointed out the differences to the 2009 version. There would still be provision for a warrant if a person would not volunteer to undergo a buccal sample. It was stressed that the wording in the Bill must be consistent. A National Forensic DNA Database would be established. All training in the taking of samples would be provided by the Department of Health at their facilities. Members felt that there would be practical problems involved, and were concerned that this would impact on the time available to fight crime. The Department of Health would compile a register of members trained. Members felt there was a need to have some sort of identifying badge, and this would be considered.

Members wanted clarity on who would be targeted for training. The first wave of training would be for investigating officers and branch commanders. This kind of training should form part of basic training. Members wanted to see more details on training. They also wanted the Bill to speak to the use of DNA profiles as a means of exoneration, and in locating missing persons. There was an accusation that the South African Police Service was not serious about missing persons.

Members felt that hair samples should be included in the Bill. Whilst hair was a source of DNA information, some felt that forcibly pulling out a suspect's hair could be seen as a form of assault.

Minutes:

The Chairperson announced that parliamentary committees busy with legislation would have to prioritise this work rather than undertake oversight visits. The South African Police Service (SAPS) Bill would go to Cabinet later in the year. The Bill would go to Parliament before the end of the year, which would give some time for public comment and public hearings. The SAPS Bill would be presented to the Committee in September. There might be some time after that to do an oversight visit to the two remaining provinces.

Impact on the Protection of Personal Information Bill

Mr Theo Hercules, State Law Advisor (SLA), said that the Protection of Personal

Information Bill (PPI) was currently being processed by Parliament. He went through the definitions of biometrics, child, competent person, data subject, personal information, public body, record, regulator, responsible party and special personal information. These definitions were contained in the PPI Bill and would be slightly modified.

Mr Hercules said that clause 2 of the PPI Bill would provide for the safeguarding of personal information, regulating the manner in which personal information might be processed, protecting personal information and establishing an Information Regulator. Clause 6 did make provision for certain exclusions. His opinion was that the PPI Bill would not apply - as adequate safeguards had been established as long as personal information was used to prevent or detect those involved in unlawful activities.

Mr Hercules said that clause 12 of the PPI Bill provided for the collection of personal information from the data subject. However, there was an exception in that collection of information could come from another source in order to maintain law and order, for the conduct of court proceedings or in the interests of national security.

Mr Hercules continued with clause 14 of the PPI Bill. This made provision for retention and restriction of records. A responsible party was responsible for destroying or deleting personal information as soon as practicably possible. Clause 19 provided for security measures to protect the integrity of personal information. Clause 35 provided for circumstances in which personal information of a child could be gathered. The processing of information regarding a child was dealt with in more depth than for deoxyribonucleic acid (DNA) collection. Clause 40 provided for a regulator for information. Chapter 10 of the PPI Bill dealt with enforcement provisions concerning interference with the protection of personal information.

Mr Hercules was of the opinion that the PPI Bill was not in conflict with the Criminal Law (Forensic Procedures) (CLFP) Bill.

Discussion

The Chairperson said that it might be difficult for one department to exercise oversight over the activities of another. The PPI Bill might be amended still before being enacted.

Ms D Kohler-Barnard (DA) asked if there was any sanction prescribed for unlawful activities regarding personal information.

Mr V Ndlovu (IFP) said that the CLFP Bill would have an impact on the PPI Bill. There had to be a complaint mechanism in the CLFP Bill.

Mr G Lekgetho (ANC) asked what personal information was being protected from.

The Chairperson suggested that the mandate of the ethics committee should be extended. This could then deal with complaints.

Mr Hercules replied that clause 60 of the PPI Bill would make provision for codes of conduct to the industry. A fine or prison sentence was applicable for misuse of personal information. Its purpose was to provide a legislative framework for the protection of personal information.

The Chairperson said that the PPI Bill would not apply to state information. The PPI Bill would provide for guidelines and codes of conduct.

Maj-Gen Philip Jacobs, Divisional Commissioner, Legal Services, SAPS, said that it would be an offence for any official to sell or buy personal information.

The Chairperson asked for a written summary of the schedule of offences and sanctions.

DNA Bill Accreditation Plan

Maj-Gen Adeline Shezi, SAPS Head: Quality Management, Division Forensic Services, presented a schematic diagram of the forensic process. There were laws and standards impacting on the laboratory process, which also depended on facilities, instruments, reagents, procedures and personnel. The objective was to take in exhibits and produce affidavits. There was a quality management process. Cross-contamination had to be avoided. A sample might have to be made optimal before being processed. Private laboratories might be used, but there had to be a strict accreditation process.

Gen Shezi outlined the evidence recovery process. A new case would be registered. The Property Control and Exhibit Management (PCEM) system was now working optimally. SAPS were now picking up cases of bags which were not uniquely marked. There were processes to be followed to ensure that there was no tampering with the evidence. Exhibits had to be stored correctly. The Forensic Services Laboratory (FSL) system was a legacy system. The first step in the accreditation process was to assign a priority. Training of staff was also an issue. If the process did not conform then corrective action would be taken. The next stage was the storage of

samples. There could be some duplication although this should be avoided. The last stage was presumptive testing. Body fluids were already identified at this stage. At the cut samples stage, an automated process would be followed. If no DNA, semen, blood or other bodily fluid was found, the exhibit would be dispatched.

The Chairperson appreciated the passion in the presentation, but asked Gen Shezi to be brief.

Gen Shezi discussed the analytical process. As buccal swabs came into the lab they would go directly into the amplification stage as there was no casework involved. The amplification stage would determine how many samples could be processed. Allele designation was the process in which the DNA results were delivered.

Gen Shezi said that there were 81 laboratory processes to be followed. In accrediting the DNA unit another six processes had to be followed. These were evidence recovery, which was the last process. The results would be analysed after which the profile would be compiled.

Gen Shezi listed all the elements of the generic FSL process. The quality management team had now expanded to 160 people. In the current year about 700 new staff would be appointed. R15 million had been budgeted for the accreditation of the entire unit. Some issues were not yet complete. Training still needed to be done. Stage 1 of the accreditation was completed, namely decision and awareness. The document and implementation process was also complete. The internal review process was expected to be concluded by December 2013. The next stage was a closing the gap stage. Corrective action would be taken where needed, and this was expected to be complete by March 2014. Storage and maintenance facilities would be addressed by December 2014. The accreditation process would last between six and ten months, and the expected completion date was May 2015. She felt that the closing the gap phase would be the longest.

Discussion

Ms Kohler-Barnard had listened to the accreditation plan. She asked if there was a date when the application to the relevant international body would be made. She asked what was entailed in the accreditation process.

Ms M Molebatsi (ANC) asked why there was no reporting format as was required of the private laboratories. She asked if reagents were methods and procedures was how the methods would be implement.

Mr M George (COPE) asked how duplication arose and how SAPS thought it could be avoided. He asked how the accreditation process would impact on the DNA Bill. He asked if the costs of integrated technology (IT) was included in the budget.

Gen Shezi said that the anticipated date for the accreditation application was November 2013. In terms of the Criminal Procedure Act, the contents of reporting were prescribed. Private laboratories reported strictly according to ISO standards. Reagents were actually consumables, such as water. These were used to isolate DNA. The procedures were the ways to process exhibits. A contract had been drawn up for the bags, specifying unique serial numbers and materials. The company would be responsible for this, and this would be part of the accreditation procedure. Accreditation was good practice but not a legal requirement in South Africa. Having accreditation would improve the confidence in the system. A quality management system must be in place. In several countries accreditation was not a legal requirement. IT costs were considered separately.

The Chairperson said that the first meeting after the recess would be on the implementation of the criminal justice system. Members would be expecting a detailed cost break-down. The use of technical jargon was not helping Members.

Gen Shezi said that there was a time-scale for the accreditation process in the presentation. The overall time would be about a year.

Familial searches

Maj-Gen Shezi said that familial search was a technique of running evidence through existing databases in order to trace family members. The relative of a perpetrator could be identified. A kit was used in the laboratory that would identify sixteen areas of the DNA which were different from one person to another. In a family relationship, ten areas would be common and six different. The software had to make provision to search a specific value range to determine if the search was possible or not. A new algorithm should be included in the software.

Gen Shezi said that familial search was different to incomplete matches. Special software would be used to calculate likelihood ratios. Comparative searches would provide detectives with information to investigate possible matches.

Discussion

Ms Kohler-Barnard recalled some consternation on an overseas visit. A group had protested against familial searches as a breach of human rights, but many suspects had been arrested as a result. She asked if fingerprints could be used in the same way.

If a group of suspects could be identified, this would mitigate against human rights protests.

Mr Ndlovu asked how familial searches could be applied. In the cases of multiple births, he thought that all of the children might have identical profiles.

Ms Molebatsi asked if there was anything that could be found if a victim had been burnt to ashes.

Gen Shezi said that comparative searches on fingerprints were not being done.

Gen Jacobs said that it was clear from the legislation that fingerprints could only be taken if there was reasonable suspicion. A warrant would be needed for DNA samples from a group of people.

Gen Shezi said that there were two cases of multiple births. If they were identical they would have the same DNA profile. Fraternal twins were conceived at the same time but from a different egg and sperm cell. Their profiles might then be different. There was a way of doing a DNA search from ashes. It worked better with familial searches.

Migration between indices

The Chairperson raised the question of the migration between indices. She asked if there was sufficient security.

Gen Shezi said that there would be sufficient security. An automated process would be followed once a person was convicted to move the profile from the arrestee index to the offenders index..

The Chairperson knew that it would not be ready. She asked if there would be manual processing.

Gen Shezi said that this would be the case. The time-frames in the Bill would have to be reviewed, or provision should be made for the lengthier process in the interim measures.

The Chairperson said that investigating officers should be informed on what was happening in the case. Too often people played the 'blame game'. SAPS should be informed about convictions within a reasonable time.

Mr Ndlovu said that this placed importance on the IT system.

The Chairperson said that even if there were no IT systems in place, there were still modern communication tools such as e-mail.

Interpol Gateway

Gen Jacobs had received feedback from the laboratory. Clause 6 of the CLFP Bill would introduce a new section 15N to the SAPS Act. The proposal was that only routine DNA profiles would be loaded on the Interpol DNA Gateway. At present some 10 308 crime scene profiles and three missing person profiles were on the gateway. For the proper forensic interchange of profiles a regulatory framework would be needed.

Ms Kohler-Barnard asked these profiles were loaded routinely or on request.

The Chairperson asked when the information would be expunged. Profiles were run daily, but she asked who was doing this.

Gen Jacobs said that this was run daily by Interpol against current profiles. Profiles were loaded as they became available. Most of the countries in the world were members of Interpol, but he could not say how many were loading DNA profiles. He believed that the samples should remain in place as long as a crime was still unsolved, and could be expunged when solved. There was a broader database now.

Discussion

The Chairperson said that there was a difference between loading a crime scene profile and the entire database.

Mr George asked what link there was between diplomatic relations and the Gateway.

Ms Molebatsi asked if countries had the option of not loading profiles.

Gen Jacobs said that police cooperation was often better than diplomatic relations. There was cooperation in detecting fugitives in foreign countries. He thought that the loading of the DNA was part of the process of solving crime. Once the crime was solved, the profile could be removed.

Gen Shezi said that it was not compulsory to load profiles onto the Gateway. Samples had been loaded in 2004 at a time when the Gateway was still a pilot project. It was now procedure that samples loaded were only for unsolved crimes.

The Chairperson was interested in how many of the 10 000 cases had been solved, and which countries were on the database. Smaller countries might comply while bigger countries simply used the information.

Changes in Bill since the 2009 version

Maj-Gen Philip Jacobs, Divisional Commissioner, Legal Services, SAPS, noted differences in wording from the previous version of 2009:

Clause 2 Insertion of sections 36D and 36E in Act 51 of 1977

Gen Jacobs said that the section on warrants had been moved to the amendment to section 36E. The clause had been redrafted. At present a warrant was needed to take a sample from someone who was not under arrest and was reluctant to provide a sample voluntarily.

Mr George said that reasonable grounds were needed for a warrant. He asked if a person could refuse to comply with a warrant.

Gen Jacobs said that the warrant was only for the sample, not for arrest. They were still looking at voluntary sampling, and would revert to the Committee on that issue.

The Chairperson said that the warrant was a court order, and could not be ignored.

Clause 3 Amendment of section 37 of Act 51 of 1977

Gen Jacobs said the wording of 'blood sample' would be changed to 'intimate sample'.

The Chairperson said that the wording of the Bill needed to be consistent.

Mr George did not see the need for a person of the same gender to take an under nail sample.

The Chairperson said that a woman would have a different perspective on that kind of test.

Gen Jacobs said that this section spoke to a full examination of the body, and this was the reason for the gender matching.

Clause 4 Amendment of section 212 of Act 51 of 1977

The word 'collection' would be included as this process had not been covered.

The Chairperson again stressed the need for consistent wording.

Clause 5 Amendment of section 225 of Act 51 of 1977

Gen Jacobs said this clause dealt with evidence of prints, bodily samples or bodily appearance.

Ms Kohler-Barnard asked how a detainee's state of health could be determined by the court.

Gen Jacobs said that this legislation had been written for fingerprints. However, blood samples could be taken to determine if the suspect had used drugs.

The Chairperson said the court would decide on this and not SAPS.

Mr Hercules said this was part of the court proceedings.

Clause 6 Insertion of Chapter 5B in Act 68 of 199

This clause would deal with the establishment, administration and maintenance of the National Forensic DNA Database of South Africa (NFDD). In a document provided to Members, the Minister of Health had regulated how buccal samples could be taken.

The Chairperson said that the SAPS officers taking either a buccal or blood sample would have to be on a database of the Department of Health (DoH).

Gen Jacobs said that a certificate must be issued to the person to take the sample.

Ms Molebatsi asked if this would hamper the work of SAPS.

Ms Kohler-Barnard asked if the 10 000 samples on the Interpol Gateway had been taken by certified personnel.

Mr George said that SAPS should be preventing crime. He was satisfied that officers would be trained, but this would now be done at a DoH institution. Police officers might be kept out of work by all the training required of them.

Mr Ndlovu asked how the qualified officers would be identified.

The Chairperson said that there was an Act in place already. The more certificates policemen had the better, as it would move SAPS members towards being more

professional.

Gen Jacobs said that this Bill specifically provided for the taking of buccal samples. Blood samples had been used in the past, but had all been taken by medical practitioners. Competent SAPS officers would be entered in a register and could produce a certificate in court. The records would be available for proof in court. It was not impossible that a certificate be provided to the individual, but he or she would be on the register.

Gen Shezi said that some visible form of identification could be provided. SAPS would consider this.

Ms Kohler-Barnard would be happier if the training was done by SAPS, but the Bill provided that the training must be done by DoH personnel. This Department was in a chaotic situation and there might be massive backlogs.

Mr Ndlovu said that any loopholes must be closed. The name of the person taking the sample must be recorded.

The Chairperson felt that loopholes were being closed.

Ms Molebatsi said that SAPS was bad at keeping records.

The Chairperson said that DoH would maintain the register.

Mr George asked if the competency to take samples would be limited to a certain rank group, or newly trained recruits would be trained by DoH.

The Chairperson said that Members were forgetting how easy it was to take a buccal swab. Perhaps the SAPS delegation could bring one with to demonstrate to Members. A DoH official could provide the training at SAPS Colleges.

Gen Shezi said that when they had consulted with DoH, the law required any health training must be done by DoH. A schedule of needs must be provided. DoH had undertaken to offer the training at any of their numerous facilities. The first categories would be investigating officers and branch commanders. The training would be for five days, and could include other health issues such as waste management and legal issues surrounding packaging. She felt that three days was more realistic. The Act did speak to less than three hours, but some people were quicker learners than others.

The Chairperson was getting more worried. She wanted to see the practicalities of the implementation. She wanted to see a plan for the approach to training. Parliament passed excellent legislation, but fell on its face in the implementation aspect. The training should have started already. Advance planning was not a strong feature of SAPS.

Ms Kohler-Barnard said that a person not part of DoH would have to be trained at a DoH facility. This would bring in issues of transport. SAPS members were not getting enough time on the shooting range as it was. She asked if DoH had a backlog amongst their own officials. There would be a big problem if SAPS stumbled at this stage.

The Chairperson repeated her call for a detailed time-frame. There should be Memorandum of Understanding (MoU) with DoH, and clarity on why the training could not be given at SAPS facilities.

Gen Shezi said that SAPS might have to have another look into the costs. DoH had stopped training plans pending discussions on funding. She anticipated that MoU would be finalised by their next visit to Parliament.

15E Interpretation

Gen Jacobs said that section 15E would contain a number of definitions. The definition of 'forensic DNA profile' would be changed to refer to 'gender' rather than 'sex'.

The Chairperson disagreed. Gender was more a matter of association, while sex was a scientific distinction between male and female.

Ms Kohler-Barnard asked if hair should be included amongst the option for non-intimate samples. She believed that hair was perfectly acceptable for DNA analysis.

Mr George said that if hair was being used, the person should have the sample of pulling their own hair rather than letting SAPS pull it out.

Ms Kohler-Barnard said that a buccal sample involved inserting something inside a person's mouth. It should not be painful nor draw blood, but was still an invasive procedure. Overseas experience was that people rather provided the buccal sample than having their hair pulled. There was nothing in the Bill to specify what could be done if the person refused.

The Chairperson said that hair could be collected, but if included in the Bill there must be clarity on the consequences.

Gen Jacobs said that the follicle of at least five strands of hair had to be included to make it useful. The buccal sample provided all the information that was needed.

Mr Hercules said that buccal sample was a better option as pulling a subject's hair could be regarded as a form of assault, depending on how it was done.

Ms Desiree Swartz, Parliamentary Legal Advisor, said that there would be many considerations for someone that was bald. Training would be needed on how to do this.

Gen Shezi said that the DNA testing was done on the follicle of the hair.

Gen Jacobs said that it was permissible to use a reasonable amount of force. A person was legally obliged to provide fingerprints. The court had ruled that a bullet needed as evidence be removed from the leg of a suspect.

Ms Kohler-Barnard was still waiting for an answer in the case of a person refusing to undergo a buccal test. Holding the suspect down and forcing his mouth open was a less acceptable option than pulling a few hairs out. It seemed like a reasonable choice.

Mr Ndlovu said that the police would pull out hair aggressively. A warrant could be obtained to enforce the buccal sample. 'Minimum force' was open to wide interpretation. Not all SAPS officers were angels.

The Chairperson understood that hair was not excluded as evidence, and was normally gathered at a crime scene. She wanted the Department to apply their minds to the issue of the buccal swab. The suspect could be taken to a medical facility for a blood sample to be drawn. The decision should be taken from an informed position.

Mr Lekgetho said that the community should be educated on the powers of the SAPS.

The Chairperson said that a person under arrest was now in a different position.

Gen Jacobs had been working on a draft in terms of section 36B. This dealt with self-administered samples.

15F Purpose of Chapter.

Gen Jacobs said this purpose was to establish the National Forensic DNA Database (NFDD) for the use of DNA in fighting crime.

The Chairperson said that the purpose of exoneration should also be addressed.

15G Establishment of forensic DNA Database

Gen Jacobs said that the new 15G would provide for the establishment of a forensic DNA database. The database would have indices for crime scenes, arrestees, offenders, volunteers and elimination.

The Chairperson asked about the missing persons index. The volunteer index could also be used for solving crimes. There should be a pure index for missing persons.

Gen Shezi replied that this related to familial searching. In many instances there were unidentified bodies. Where an unidentified person had died, nuclear DNA could be analysed from the corpse. This would then result in a familial search in order to try to find relatives.

The Chairperson gave an example of a parent giving a voluntary sample, or a sample from the child, in order to locate a missing child.

Gen Shezi said that the current practice was to use a direct comparison. The drafting team would need guidance from the Committee on a policy surrounding familial searches.

The Chairperson said that there was provision in the Bill for familial searches and identifying bodies. She asked if an index was needed for identifying a body through DNA.

Gen Shezi said that one of the questions posed was the implication that there would be familial searches. A new index might have to be opened. There were chemical considerations in the analytical process. It was a technical issue.

Mr George asked if this would lead to more resources being required.

The Chairperson referred to the original Bill. In clause 2 there was specific provision for using DNA to identify bodies. So many children went missing in the country, and DNA could be a big help in identifying bodies. She asked what would be done with the profiles developed. She felt that the attitude of SAPS showed that they were not

serious about missing people.

Gen Shezi said that an arrestee index was now being used rather than a suspect index. People who were not under arrest were regarded as volunteers. If such a volunteer then fell under suspicion, the profile would be elevated from volunteer to arrestee status.

The Chairperson asked how quickly the migration would take place. The databases should be kept pure.

Gen Shezi said that the migration could be done manually. SAPS was dependent on information to conduct analysis.

Mr George felt that the detailed discussion was a bit premature. Some issues could be discussed in more detail. He was worried about putting forward a system without the technology being in place.

The Chairperson said that section 15K was clouded. This referred to voluntary samples. Section 36E dealt with warrants for testing of persons not under arrest, and both these categories of people would be included in the same index. All the information would be coming from SAPS internal sources.

Ms Kohler-Barnard said that DNA might be found at a crime scene. She asked if there was a search through the volunteer and elimination indices.

Gen Shezi said that there had to be rules for the search. If the Committee so ruled, then all indices could be searched. Voluntary samples could be deleted after the case in hand was cleared up.

Mr Ndlovu said that the missing persons index could not be implemented, but perhaps there should be a decision to incorporate this now.

The Chairperson said that a missing person was often the victim of crime. It seemed that SAPS could not find missing people or identify bodies, but it did this on a daily basis.

Gen Jacobs said that section 15G dealt with the establishment of a forensic DNA database. Provision would be made for samples to be destroyed within three months of the compilation of a profile.

Mr George asked if there was enough storage space.

Gen Shezi said that new technologies had different storage requirements.

The meeting was adjourned.