

Date of Meeting:

20 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: Criminal Law \(Forensic Procedures\) Amendment Bill: Committee deliberations](#)

Summary:

Ms A van Wyk (ANC), having been nominated by the ANC Caucus, was duly formally elected as permanent Chairperson of the Committee.

The legal drafters from South African Police Service (SAPS), the Office of the Chief State Law Adviser, the Parliamentary Law Advisers and the Civilian Secretariat for Police, continued to take Members through the latest draft of the Criminal Law (Forensic Procedures) Amendment Bill, from the new section 15G. They described the different indices for Arrestees, Offenders, Crime Scenes, Volunteers, Elimination and Missing Persons, and described the process of migration of profiles from one index to another. Members asked that wording of the new section 15G be changed and noted that specific references were needed. Under the new section 15J, it was agreed that the title of “Convicted Offender Index” be used, and it was accepted that the migration process of profiles may have to be more specific. In discussing the volunteer index, under the new section 15K, Members asked that (c) be removed, as it repeated wording earlier in the Bill, and asked also that there should be clear separation of identification of human remains and familial searches, and crime scene databases. They also discussed who should bear the onus of having the record expunged, whether it should be automatic, and whether those providing the voluntary sample should be informed, were worried that profiles of innocent people might migrate to the wrong database, were worried about the administrative capacity of SAPS, and agreed that notification must be given of expungement within three months to volunteers and those eliminated as suspects. Under the new section 15L, a suggestion had been made that all South African Police Service members have a sample taken and stored in the Elimination Index. Members felt that such a ruling could be a human rights breach and rejected this suggestion, although one Member asked why in principle this was so different from retaining fingerprints. The Civilian

Secretariat suggested that this should be one of the issues on which the oversight body should report regularly to Parliament. It was noted that the requirement that samples be taken of everybody handling the equipment and consumables used in the forensic laboratories might be difficult to enforce, especially as much of this material was imported, and it was suggested that a rider be added. The new section 15M provided for comparative forensic searches, and was drafted in light of the European judgment on a similar issue. It was pointed out, in relation to the new section 15N, that results of comparative studies would be available to both sides of a case. Members noted South Africa's obligations in terms of international agreements, but asked for confirmation that only crime scene samples would be placed on the Interpol Gateway. Members wanted a new subclause added providing for reports to the oversight committee. It was also suggested that in regard to the index for unidentified bodies, the Bill must cross-reference the Aviation Act and determine whether SAPS or private facilities would be used for identification of remains. The Chairperson said that these issues should have been considered before the Bill had come to the Committee. The heading for section 15P should include a reference to "crime and samples".

Members discussed the provisions for expunging records at some length. Profiles from the Crime Scene, Arrestee and Offender Indices would be retained indefinitely. Those of victims and volunteers would be expunged when no longer needed. Members requested that these clauses be rewritten. A distinction was needed between cases where charges were temporarily withdrawn, and acquittals or appeals, with the terms and conditions for each case clearly set out. Members also wanted clarity on the procedure when an offender was pardoned, pointing out that some pardoned persons had gone on to commit heinous crimes after being released. Members asked for deletion of 15Q(c), but agreed with sub-sections (d), (e) and (f), and asked for definite report-backs from the legal advisers on Presidential pardons.

Members also debated the provisions for penalties, as set out in the new section 15S, noting that misuse of biological information was a serious offence, and one Member suggested that an individual acting for a company involved in the illegal exchange of biological information should also face imprisonment. Engagement would be held with the Portfolio Committee on Justice and Constitutional Development, on the Criminal Procedure Act. In relation to the new section 15T, Members wanted a distinction drawn between the regulations and National Instructions, and did not consider it appropriate for the National Instructions to affect the Independent Police Investigative Directorate. They felt that a number of issues were not covered, did not think the reference to 'awareness programmes' was sufficient, and asked for the whole clause to be redrafted, and for both IPID and the Secretariat to attend to public

awareness. It was clarified that the new section 15V was an empowering section that allowed the Minister to make regulations other than the compulsory ones specific elsewhere. Members reiterated their belief that, particularly because of rapid technological advances, a three-year review period was more appropriate for the new Act, and asked also that reports must be made to Parliament on any security breaches, and that routine reports under section 15W should also be included in SAPS Annual Reports. Members disagreed with the proposed structure of the oversight Board in the new section 15Y, said that the majority of its members should not be from Government, that their expertise and qualifications must be more clearly defined, that it should be chaired by a retired judge or human rights expert, wondered why the Department of Home Affairs and Correctional Services were represented and questioned why no science representatives were included. The Board must deal with substantive issues, not merely be a discussion forum. Members also repeated their wish that it deal with ethics, and be renamed accordingly. The Committee asked the drafters to reconsider and re-write this clause, having consideration to other models and countries, particularly the United Kingdom and Canada, and to include a reporting mechanism to Parliament.

Finally, Members considered the amendments to other legislation, asked for consistency in references, discussed the taking of samples without warrants, and noted the decision of the Committee that the only reasonable alternative to the buccal test was a blood sample, to be taken by a medical practitioner. The drafters were asked to provide the next draft by 19 July, and indicated that it was hoped to adopt the Bill in early August.

Minutes:

Appointment of permanent Chairperson to the Committee

Ms M Molebatsi (ANC) announced that Ms van Wyk's permanent appointment as Chairperson had been suggested by the ANC caucus, but still had to be voted on by the Committee.

Ms P Mocumi (ANC) proposed that Ms van Wyk be appointed.

Mr M George (COPE) seconded this, and Ms van Wyk was unanimously elected as permanent Chairperson.

Criminal Law (Forensic Procedures) Amendment Bill: Continuation of deliberations on latest draft

Major-General (Gen) Philip Jacobs, Head: Legal Services, South African Police

Service (SAPS) continued to take Members through the latest version of the Criminal Law (Forensic Procedures) Amendment Bill (the Bill), from the new section 15G, where the Committee had stopped its discussions at the previous meeting.

New section 15G

Gen Philips noted that the new Section 15G(4) would provide that any profile compiled before the Act would be usable for comparative searches. Sub-section (5) listed the information that would not be included in the index, such as the appearance of the person, medical information, historical information or behavioural information.

New section 15H

Gen Jacobs said that section 15H would be amended to state that the Crime Scene Index might contain forensic deoxyribonucleic acid (DNA) profiles found at a crime scene, at a place where an offence might have been committed, on the body of a victim or a suspect, or on an item of clothing.

The Chairperson felt that 'must' was more appropriate than 'may'. Members were in agreement.

Ms D Kohler-Barnard (DA) said that there were many references to 'shall'.

The Chairperson agreed and pointed out that the Office of the Chief State Law Advisor (SLA), as a drafting convention, preferred the use of either 'must' or 'may', and in this case 'must' was more appropriate.

New section 15I

Gen Jacobs said that section 15I provided that the Arrestee Index must contain DNA profiles derived from bodily samples, taken under any power conferred by Chapter 3 of the Criminal Procedures Act, Firearms Control Act or the Explosives Act.

Ms Jenni Irish-Qhobosheane, Secretary for Police, Civilian Secretariat for Police (CSP), said that a profile might have to be moved from a volunteer index to another index.

Maj-Gen Adeline Shezi, Forensic Services, SAPS, said that the Arrestee Index only contained samples from arrestees. There were other indices.

Mr D Stubbe (DA) pointed out that profiles would only remain in the volunteer index for three months.

Gen Shezi said that profiles held in the Elimination Index were not expunged. She suggested that there should not be a single index used.

The Chairperson was confused over this point. She said that on the one hand, the Offender Index would not be expunged, but the Volunteer Index would be expunged. A suspect might not tell SAPS that he was on the Volunteer Index.

Gen Shezi said that the indices existed for comparative searches.

The Chairperson said that the sample would still be taken.

Ms Irish-Qhobosheane read out the proposed wording, changing 'Offender Index' to 'any other Index'.

Gen Jacobs said that the drafting team would check all the cross-references for relevance.

The Chairperson said that specific references were needed. The person contemplated in this case would be an arrestee and no longer just a suspect.

New section 15J

Gen Jacobs read the amendment to section 15J. This gave the requirements for the Offenders Index. This would contain profiles for all persons convicted of an offence.

The Chairperson asked why the word 'offender' was used. An arrestee could also be seen as an offender as well.

Gen Shezi suggested a title of 'Convicted Offender Index' for more clarity.

Ms Kohler-Barnard felt that an 'offender' was someone who had committed an offence. The guilt of an arrestee had still to be proven. She believed that 'offender' was a satisfactory term.

The Chairperson agreed with Gen Shezi's suggestion; whilst she took Ms Kohler-Barnard's point, not every person reading the law would make that distinction.

Gen Jacobs said that 15J(a) could be deleted.

Mr M George (COPE) was concerned that the Bill was linked to the Criminal Procedure Act (CPA), and therefore the terms used should be in line with those of the

CPA.

Adv Desiree Swartz, Parliamentary Legal Advisor, also agreed with Gen Shezi's proposal. She pointed out that 'Offender' was a very broad term.

Gen Shezi said that the migration process might have to be more specific.

Mr Stubbe foresaw substantial problems with the migration. The courts were full every day, already, and there would be massive numbers of people to be migrated.

Gen Shezi said that the migration would be automated

The Chairperson said that when the system worked, the information would come from the court. She asked if there was any provision for the removal of a profile, in the event of an acquittal.

Gen Shezi said this was dealt with later in the Bill.

New section 15K

Gen Jacobs read the amended section 15K, which dealt with the Volunteer Index. The legal team had discussed sub-section (c), which dealt with the role of an authorised person.

The Chairperson said that this sub-section could be removed. It was a repeat of wording that appeared earlier in the Bill. Members agreed to this.

Gen Jacobs continued that the new subsection (2) made provision for the taking of a buccal sample. The subject must be informed of the manner of the taking of the sample, that the volunteer was under no obligation to give a sample, that it might be used as evidence in a court of law and that the profile would only be used to combat crime. He suggested that an extra provision should be inserted, relating to informing the person that the profile would eventually be expunged.

The Chairperson asked why the identification of human remains was in this sub-section.

Gen Shezi said that this would be moved to the Missing Persons Index.

Ms Irish-Qhobosheane disagreed, and said that familial searches came in here. A sample might be taken from the parent of a missing child.

The Chairperson said that there must be separation from the crime scene database.

Mr Stubbe asked if the volunteer sample would stay in the index.

Gen Jacobs said that the person providing the sample must be informed of his or her right to have the record expunged.

The Chairperson suggested that the Volunteer Index should have an automatic expungement provision.

Ms Irish-Qhobosheane said this would be the case, but the person providing the voluntary sample should be informed that the profile would be expunged.

The Chairperson said that the onus should not be on the person providing the sample.

Mr Stubbe clarified that the text should refer to an automatic expungement.

Ms Swartz pointed out that, in terms of the new section 15Q, the person providing the sample would have to request the expungement.

The Chairperson countered that then the new section 15Q was worded incorrectly.

Ms Kohler-Barnard said a fixed date might be a problematic. Cases could drag on, and there was always the possibility of an appeal. She agreed with the Chairperson that it was a huge imposition to ask civilians to make applications, and agreed that when the case was eventually closed, the record should be expunged automatically.

The Chairperson said that there should be an obligation on SAPS to inform the person that the case was concluded. She proposed that the clause could be worded 'three months after the case is closed'.

Mr Stubbe felt that once a person was eliminated as a suspect, the profile should be deleted.

Mr George did not think it was necessary for SAPS to inform the volunteer, and pointed out that this too could have logistical problems, as people might change addresses in the interim. He felt that the section should be worded so that the profile should be expunged immediately it was no longer required.

Ms Kohler-Barnard quipped that whilst she did not often agree with Mr George, she did on this occasion. This would be an enormous administrative burden on SAPS. She guessed that there were 1 000 cases concluded in South African courts every day. Three months might not be long enough.

Mr V Ndlovu (IFP) suggested that the records should be expunged as soon as the case was concluded. This clause only dealt with volunteers. He felt that three months was a long time.

Mr George was not convinced with the obsession over the period. Three months could not be ruled out, but once the DNA profile had been used it was no longer needed. If the term was fixed in the legislation, there would be a problem if the term expired.

The Chairperson said that the people contemplated in this clause were volunteers. There needed to be an obligation on SAPS to process the samples according to the law. The Firearms Control Act had led to chaos, as the deadlines set could not be met. The profiles of arrestees and offenders would not be expunged. She asked why the profiles of innocent volunteers should be retained. A truly professional police service should be communicating with clients. The computer system should be able to handle this. She was worried that a profile could migrate to the wrong index.

Mr George said that the Bill was assuming, incorrectly, that the majority of South Africans had access to modern communication aids. The law was being made for the elite.

The Chairperson said that in other matters of communication between SAPS and the public, text messages (SMS) were used. South Africa had the highest number of mobile telephones per capita. She, were she in this situation, would want to be assured that her voluntary sample did not go to the incorrect index.

Ms Kohler-Barnard wanted to hear if SAPS had the administrative capacity to send out up to 2 000 letters a day to people, some of whom might have moved since their samples were taken. SAPS should not be put into a position to do so, if it was clear that it could not handle this.

Mr George said that SMS messages were not reliable. This was an option, but had to be handled with care.

Ms Irish-Qhobosheane said that sending the SMS messages was not a problem. There

should be provision for this on the Crime Administration System (CAS). However, it was known that people lost their telephones and changed their numbers. Her only concern was that SAPS would be unable to trace people who had changed their numbers.

Gen Shezi said that the volunteer results would not even go to court. Once no link was found they would not be processed further.

The Chairperson said that an in-principle decision was needed. She was not convinced that the notification and expungement could not be done. The Department of Home Affairs was managing with millions of identity document and other notifications. SAPS had to retain proof that the message had been sent. She suggested that notification be given within three months of the conclusion of the case.

Mr Stubbe asked about people who were eliminated as suspects.

Gen Shezi said that those persons eliminated as suspects would have their profiles expunged once it was apparent that they were no longer suspects.

The Chairperson was satisfied with this. She suggested that three months also be given to expunge profiles of those who had been eliminated as suspects.

Gen Shezi said that another issue was creating an index for suspects within the Volunteer Index, and also an indication of those who only provided a sample after a warrant had been procured.

New section 15L

Gen Jacobs read the amended section 15L, which would establish an Elimination Index. This would contain the profiles of police or other officials required to attend a crime site, or who had been involved with manufacturing the materials used in forensic laboratories, or any person who entered a laboratory.

The Chairperson suggested that sub-sections (2) and (3) should be deleted. There had been a submission from an SAPS member that there should be an index for all SAPS members. This would be a deterrent against these members attempting to commit crime.

Mr Stubbe asked if this would be an infringement of their rights.

Mr George asked if there was an assumption that SAPS members would not provide

voluntary samples.

Mr Ndlovu said that such an idea was discriminatory. There might be a call to extend this to other bodies, such as the judiciary. SAPS members were members of the community.

Mr George understood this to be a noble idea. However, this might result in a legal challenge on the basis of an infringement of human rights.

Ms Kohler-Barnard said that DNA was not some mythical business, but was the same as fingerprints. SAPS members would be leaving fingerprints on evidence and at crime scenes in the course of their duties. She asked how this might be different.

Mr Stubbe added that the fingerprints of everybody present should be on record. DNA samples should be taken of any SAPS member attending a crime scene, but not of those in administrative positions.

Gen Jacobs replied that when vetting was done on a SAPS official, fingerprints were taken but were sent back to the applicant once the vetting once completed. The fingerprints were compared to the database. He was not afraid to provide a DNA sample, but the unions might raise objections on a human rights basis.

Mr George said that fingerprints were a different issue from DNA testing, and he would like to hear a legal opinion on the matter.

Ms Kohler-Barnard said that DNA samples could also be run during vetting and destroyed when this was done.

Ms Irish-Qhobosheane said that some countries did take DNA samples from all security force members. The Bill made provision for the oversight body to report to Parliament on possible amendments. This was an issue to be explored further with labour and other organisations. Once the DNA process was set up, the oversight body should consider all government officials. She proposed that this matter should be part of the regular reviews required by the Bill.

Adv Swartz said that the legislation did not allow for the taking of DNA profiles for the purpose of vetting.

Gen Shezi said that 80% of the consumables for use in the forensic laboratories came from overseas. This might create a difficulty in enforcing the Bill, once it was passed,

in relation to those involved with the equipment. One sole supplier had already refused to provide DNA samples.

Ms Kohler-Barnard wondered why there was a distinction between fingerprints and DNA, for vetting purposes.

Adv Swartz said that there was a specific list of purposes for DNA profiles in clause 2 of the Bill.

Gen Jacobs said that vetting was also addressed in legislation dealing with national intelligence matters.

The Chairperson asked if Members were satisfied that providers were being covered.

Gen Shezi said that this might have to be removed. Subsection 15L(1)(c) might have to be qualified.

Mr Stubbe asked if a sample could not be taken of incoming supplies.

Gen Shezi said that international channels could be used to clarify issues of contamination. Cases were rare, and SAPS had not experienced any. However, there had been reports from overseas that indicated that there could be problems.

Gen Jacobs agreed that a rider should be attached to this sub-clause.

New section 15M

Gen Jacobs then read the new section 15M, which provided for comparative forensic DNA searches. Information resulting from such a comparison could not be given to anyone not involved with the case, but would be available to the prosecution and defence in a trial. An addition would be made to provide for the use of DNA for exoneration.

Mr Stubbe asked if there was a penalty associated with the offence described.

The Chairperson said that a fifteen year jail sentence was being contemplated.

Gen Shezi said that this clause was the one where the reference to comparative and familial searches, to determine the identity of a dead body, would be included.

Ms Kohler-Barnard said that there had been a judgment in Europe on comparative

searches. She asked if the drafters had considered this case.

The Chairperson said that that was the reason for the first draft being rejected.

Ms Irish-Qhobosheane said that the judgment had been considered very seriously in the drafting process.

New section 15N

Gen Jacobs read section 15N, which provided for cooperation with foreign and international law enforcement agencies. A profile received from such an agency could be used for a comparative study. South Africa had a cooperation agreement with Southern African countries and with Interpol and its member countries. There should be a legal mechanism to follow, rather than just the international agreement. Even if powers were conferred by agreements, they should also be in legislation.

The Chairperson asked if the defence and exoneration should be included in this clause.

Ms Irish-Qhobosheane said that there should be some accountability. Certain protocols had been bypassed before.

The Chairperson proposed that a new sub-clause should be added to make provision for reports to the oversight committee.

New section 15O

Gen Jacobs read the proposed new section 15O, which made provision for compliance with a quality management system.

The Chairperson quipped that the deadline for accreditation should be written into the Bill to spur them on.

Ms Kohler-Barnard said that many sections referred to an 'authorised officer'. She asked who determined these persons.

Gen Shezi said that 'authorised officer' and 'authorised person' were defined.

New section 15P

Gen Jacobs read section 15P, dealing with retention, storage, destruction and disposal of crime and buccal samples. He noted that samples had to be stored securely.

Ms Irish-Qhobosheane said that there were obligations imposed by the prescripts of international agreements. There were extradition process in place, but these were governed both by the Constitution and by international agreements. The oversight Committee was a third mechanism.

The Chairperson said that there had been a report of 10 000 cases lodged on the Interpol Gateway, from South Africa. She asked if these would be withdrawn.

Mr George said that South Africa would have certain obligations as a member of Interpol. The legislation would have to be amended every time an international agreement changed.

The Chairperson said that only a portion of the South African database should be registered with Interpol.

Gen Jacobs said that only crime scene samples would be on the Interpol database. Interpol was not the only international organisation where such information was held.

The Chairperson noted that the State Law Advisers should revert to the Committee on this issue. She felt that the wording of the clause should be changed.

Ms Irish-Qhobosheane said that there were obligations. The closing sentence, as it stood, was sufficient. Whatever information was provided would be governed by the agreements.

The Chairperson said that officials often signed off agreements without politicians having sight of the documents. Care was needed with the handling of DNA profiles. Government needed to be sure of the framework within which information was provided. She asked if the cases of unidentified bodies or victims of an air crash, as an example, would be covered.

Gen Jacobs said that this would be covered.

Ms Kohler-Barnard understood that DNA would be collected from a crash site. Information would be passed on to Interpol, but not stored in a criminal database. The chances of identifying bodies by searching a criminal database were small.

Gen Shezi said this was why an index was needed for unidentified bodies.

Mr Stubbe added that the Bill should also talk to the Aviation Act. It must be

specified whether SAPS or private facilities would be used to analyse the remains of unidentified persons.

Gen Jacobs said that air crashes were normally investigated jointly by SAPS and civil aviation authorities. There was a chance that there was some form of criminal involvement, such as a bomb on the aircraft.

Ms Irish-Qhobosheane said that there was also a link to human trafficking. The Committee needed to look carefully at provisions for sexual offenders.

The Chairperson said that these issues should have been considered before the Bill had come to the Committee.

Mr George was concerned about the amount of responsibility being shifted to the oversight body.

The Chairperson said that the Committee would determine what roles were given to the oversight body, which would not replace the Portfolio Committee. This Committee would have the ultimate oversight role.

Ms Kohler-Barnard asked if it was standard procedure for detectives to collect DNA from the home of a missing person. A body might be found in another country, which could be identified by DNA.

Gen Shezi said that such a case would be treated like an inquest. There were not categories in the database to cover all possibilities. Comparative samples from the family would be done and likelihood ratios would be calculated.

The Chairperson said that a specific index was needed. The procedure mentioned by Ms Kohler-Barnard should be covered.

Ms Kohler-Barnard asked why 'buccal' was being omitted from the heading of the sub-section, which would make it read 'crime and samples'. She felt that the reference should be more specific.

Gen Jacobs took note of this, and said the heading would be reworded.

New section 15Q

Gen Jacobs read the amended section 15Q. This provided for retention, storage and expunging of DNA profiles. In the case of a decision being taken not to prosecute, or

a person being acquitted or a conviction being set aside on appeal, or a person being discharged, the DNA profile would be destroyed within three years. The profile of victims in the Volunteer Index would be expunged within three months of the case being finalised.

Mr Theo Hercules, Senior State Law Adviser, Office of the Chief State Law Adviser, was confused by the wording of new sub-sections (1) and (2).

The Chairperson noted that crime scene samples would be stored indefinitely.

Ms Kohler-Barnard asked what was meant by 'safe' in the new sub-section (3). She asked if this meant physically safe from damage, or kept in a secure place where there was no unauthorised access.

Mr Stubbe said that if the crime had been solved there was no need to retain the crime scene samples.

Mr George said that the sentence covered all types of samples, and these should all be properly secured. The only use he could think of was for case studies.

The Chairperson felt that exoneration would be one use.

Gen Shezi said that there could be appeals. Studies could be used for training purposes. This was international practice. This was why the Bill made provision for indefinite retention. The wording would be changed to 'safe and secure' to cover both aspects raised by Ms Kohler-Barnard. The idea for indefinite retention had come from a public comment.

Ms Kohler-Barnard asked why, if a person was innocent, the DNA was still kept for three years.

Mr George was worried about new sub-section (a)(I), which would apply when the prosecutor declined to proceed with the case. He could not understand why the evidence would then be retained for such a lengthy period.

Gen Shezi replied that arrestees still had to go through the court process. In a number of cases charges were dropped. In many cases the detectives were thought to be unable to make a case. Many cases were returned on the basis of a lack of evidence, despite the presence of DNA. A new profile would be required if the case was

reinstated

The Chairperson said that if the accused was acquitted there could be no retrial. There was a human rights issue brewing.

Mr Stubbe agreed partially. A case could be thrown out of court due to poor investigation. Perhaps such cases could be retained in a separate index for a given period. There were many cases of arrestees being released only to commit a similar offence.

Gen Jacobs said that the provision in the section on fingerprints referred to a three month period. This was related to capacity. Gen Shezi had suggested three years.

Mr Ndlovu asked why the DNA profile would be retained after there was a finding of not guilty.

The Chairperson said that this sub-section needed to be split further. In the cases of acquittal or a successful appeal, these should be separated from the cases where the case was withdrawn without any finding on guilt or innocence. Sub-section (v) should be withdrawn.

Ms Kohler-Barnard said that many cases were temporarily withdrawn due to a lack of evidence.

Gen Jacobs agreed with what Members were saying.

Gen Shezi also agreed that the cases of acquittal or appeal should see the profiles being deleted within three months. In cases where decisions were taken not to prosecute the profile would be retained for three years.

Mr George said that the decision not to prosecute was made by the National Prosecuting Authority (NPA) and not by a judge.

Adv Swartz said that sometimes there was a decision to prosecute, but the case was withdrawn for further investigation and might be reinstated some time later. She was not clear how long the DNA evidence would be retained. The three year period was acceptable.

Gen Jacobs said that there might be a certificate that there would be no prosecution. It was another case where there was no final decision on whether or not to continue

with the prosecution.

The Chairperson tried to summarise what Gen Jacobs was saying. Where a definite decision was taken not to prosecute it should be treated in the same way as an acquittal.

Ms Kohler-Barnard said that the conditions and terms of expungement should be made explicit in each case. This might make the wording clearer.

The Chairperson agreed with this proposal. These provisions could also be moved to the sections dealing with the respective indices. She asked why the victim's profile was being included in sub-section 15Q (b). She asked why the victim's profile would be in the Volunteer Index. This should be in the Crime Scene Index.

Mr Stubbe said that the whole of section 15Q could be deleted by linking the provisions to those in the sections dealing with each index.

The Chairperson said that 15Q (c) should be deleted. There was a difference between physical evidence and DNA profiles. Members were in agreement with sub-sections 15Q (d), (e) and (f).

Adv Swartz would have to check on the cross-reference to the Child Justice Act.

Mr Stubbe noted that a number of criminals had received Presidential pardons, but had committed the same offences again.

Gen Jacobs said that in this case, the offence for which the person had been pardoned could not be regarded as a previous offence.

Mr George agreed with Mr Stubbe. It was not correct to expunge the DNA profiles. There was doubt if such persons were rehabilitated.

Ms Kohler-Barnard asked where Chapter 5B was, as referenced in sub-section (f). She believed that there was legislation to cover pardons which probably required that all previous convictions be set aside. It was an absurd arrangement.

Mr Ndlovu said that pardons and expunging should be separated. The President could direct that records be expunged.

Ms Irish-Qhobosheane said that SAPS had no discretion in the retention or deletion of records. This came in the form of an instruction from the Department of Justice and Constitutional Development (DoJCD).

Gen Jacobs said that the concept of a Presidential pardon was covered in the Constitution. This must not be confused with persons released early by the Department of Correctional Services (DCS). There was no expunging of the records in this case. A child could apply, and expunging could only be given in a limited range of offences.

Adv Swartz agreed with Gen Jacobs. She would check if fingerprints and DNA profiles must be expunged.

Ms Kohler-Barnard felt that the old legislation would not refer to DNA profiles. It was unconscionable that the expunging of the records of violent criminals should be considered.

The Chairperson felt that pardoning meant that there was no longer any trace of a crime.

Mr Stubbe said that the DNA of an offender who had served his sentence was kept, but the record of a serious offender was expunged on pardon. This was unfair.

The Chairperson said it would not help to speculate on this matter. The legal team must go find the answers.

Mr George said that even the lawyers were speculating.

New section 15R

Gen Jacobs read the new section 15R, which dealt with infrastructure. The reference to software in section 8 would be transferred to this section, unless it could be interpreted as being included already.

New section 15S

Gen Jacobs read the new section 15S, which dealt with offences and penalties. This included disclosure of information, tampering with processes and making false claims regarding evidence. There was provision for a sentence of up to fifteen years.

Ms Kohler-Barnard said this was a serious offence and the punishment should not be watered down.

The Chairperson said that there should be provision for a fine. If information was sold to a third party, then that company or person could be liable to a fine.

Mr Hercules pointed out that there was a section in the CPA relating to a company involved in a crime. This prevented a jail sentence and could only be punished by a fine.

Ms Kohler-Barnard felt that companies budgeted for fines. The individual acting on behalf of the company should go to jail.

The Chairperson said that engagement was needed with the Portfolio Committee on Justice and Constitutional Development on the CPA.

New section 15T

Gen Jacobs said that section 15T dealt with National Instructions regarding DNA evidence and handling of samples. Such instructions on the storage and destruction of samples must be made within six months of the enactment of the Bill.

Ms Kohler-Barnard felt that there were existing provisions for the collection and handling of evidence from a crime scene.

The Chairperson had a problem with the National Commissioner of SAPS making Instructions for the Independent Police Investigative Directorate (IPID).

Ms Irish-Qhobosheane said that regulations made by the Minister would have a higher status. The National Commissioner and head of IPID could then issue instructions.

The Chairperson said that a number of issues were not covered in this section. The list should either be exhaustive or open-ended. She noted that Members agreed that regulations should be promulgated.

Gen Jacobs said that there was a possibility that this section could come into force at a date different to the Act.

Adv Swartz said that 'Act' would be better. The Interpretation Act provided that this would cover the case where certain sections came into force at a different date.

The Chairperson noted the reference to awareness programs in sub-section (3). This

was not enough.

Ms Irish-Qhobosheane said that this was referring to internal programs. There was a separate issue to training. SAPS must have an obligation to ensure that every member understood what the Bill was about.

The Chairperson said that this entire clause should be redrafted. There was some value in the public being made aware of the provisions of the Act. The Secretariat should deal with this, and the head of IPID must do the same.

New section 15U

Gen Jacobs read section 15U, which dealt with training.

New section 15V

Section 15V dealt with regulations. This would empower the Minister to make regulations. A fine or prison sentence might be prescribed for offences under the Act. The provision was very wide.

Mr George said that the Minister might make regulations, but was not compelled.

Mr Hercules said that this was an empowering provision rather than simply a discretion.

Adv Swartz said that from the earlier discussion, there was an area where regulations would be mandatory but this section would make provision for regulations in other areas.

New section 15X

Gen Jacobs read the amended section 15X, providing for Parliamentary oversight. The National Commissioner would be directed to provide a report to the Minister. There would be a five year review period.

The Chairperson felt that with technological advances, a three year review might be more appropriate.

New section 15X

Gen Jacobs read the amended section 15X. This dealt with access and security. This had not been in the Bill as introduced to Parliament. It provided for the National Commissioner securing the integrity of information of the database. The Commissioner would have to identify all risks and establish appropriate safeguards.

Generally accepted security measures must be followed. In liaison with the National Forensic Oversight Board, the National Commissioner must develop standard operating procedures regarding access to the database and the implementation of safety measures.

The Chairperson requested that another measure be added to require a report to Parliament in the event of any security breach.

Ms Kohler-Barnard suggested that the routine reports contemplated in section 15W be included in the SAPS Annual Report.

Adv Swartz preferred the wording 'in consultation with' rather than 'in liaison with'.

Mr George reminded Members of the different meanings of 'in' and 'after consultation with'.

New section 15Y

Gen Jacobs read section 15Y, which provided for the establishment of a National Forensic Oversight Board. The composition of the Board would be representatives of the Department of Health (DoH), the Secretary of Police, the Department of Home Affairs (DHA), the DCS, the DoJCD and two representatives of non-governmental organisations (NGO).

The Chairperson felt that two representatives of NGOs was too few. Human rights organisations also needed to be represented. The NGOs had made valuable contributions during the public hearings. The Board must be named 'Oversight and Ethics'. There must be a complaints mechanism.

Ms Kohler-Barnard said that the board would be substantive, and not just a discussion forum. She suggested that the Board be chaired by a retired judge. The Departments had to be represented at a high level. It was odd that there was no requirement for scientists in this highly complex field.

Mr Ndlovu asked that sub-sections (4) and (5) be considered as well

Gen Jacobs said that these provided for the appointments being made by the Minister. The legislation on data privacy had been considered as a model.

The Chairperson went through the membership of the board. She questioned the presence of the DHA. Whilst this Department did play a role with fingerprints, she

could not see a role in terms of DNA. Members agreed that there was no need for such a representative. She also questioned the representative from DoJCD.

Ms Irish-Qhobosheane said that there would be a number of constitutional issues.

Ms Kohler-Barnard felt that a board should look at policy and best practice. It seemed that this would be a general discussion forum. A level of representation should be specified.

Mr Stubbe said that this was an oversight body. SAPS did not belong there, but he accepted that the Secretary of Police was the oversight body.

The Chairperson said that more specific representation was needed. Departments did not do oversight over each other. The public must see this Board as the custodians of DNA, but this did not seem to be what was in the Bill.

Ms Irish-Qhobosheane suggested that DoJCD would be more appropriate than DCS.

The Chairperson said that more qualification was still needed, such as defining a constitutional expert from DoJCD.

Mr George felt that the departments would send anyone available to these board meetings.

Mr Stubbe said that the roles of the board should first be considered, and then it would be clearer what calibre of person was needed.

Ms Kohler-Barnard felt that people with an interest should be able to apply to be on the Board.

Ms Molebatsi asked if it was necessary to have a legal person if DoJCD was represented.

The Chairperson felt that an independent legal person was needed.

Gen Jacobs read sub-section (6), which detailed the functions of the Board. The Board should also monitor the destruction of samples in accordance with the Act. It could receive complaints about violations. The board would also gather information and attempt to reconcile parties. If there was evidence of a crime, this should be communicated to the National Director of Public Prosecutions (NDPP).

Mr Stubbe said that these functions made it clear on the type of person needed.

The Chairperson suggested that the whole issue of this clause be reconsidered, and that the models in other legislation and other countries, particularly the United Kingdom and Canada, be considered. She asked what was meant by 'make a proposal'. Proposals must be sanctioned by the Minister or some other authority. They needed to apply their minds. Specialists were needed on the Board, with a minimum of departmental representatives. The complaints mechanism had to be brought in. The Bill should allow the capacity to be made available.

Ms Kohler-Barnard said that the ethics issue made the case for a retired judge to chair the board.

The Chairperson said that judges were often reluctant to serve on boards. A legal expert in human rights could also be considered.

Mr George said that laws could be made to contradict this Act. The constitution and governance of the Board must be in line in with the national Constitution.

The Chairperson said that the Board must report to Parliament. A reporting mechanism must be included. Members agreed that the majority of Board members should not be from government.

Other amendments

Gen Jacobs said that the Firearms Control Act would be amended. The amendment would include provision for body-prints and buccal samples. The definition of bodily sample and buccal sample would be included. The definitions of comparative search would be replaced.

The Chairperson said that the modification of 'a crime scene investigator' to 'the crime scene investigator' must be applied consistently. She noted that there was no provision for blood or other samples.

Gen Jacobs said that bodily samples would include blood and all forms of intimate or non-intimate samples. The drafting teams would consider this aspect when they deliberated on the Bill.

Mr George asked if there would be any confusion.

Adv Swartz said that there would be two things meaning the same. The legal interpretation was that there would be a different meaning. She proposed that the definition of 'non-intimate sample' be removed as this was only the buccal sample.

The Chairperson wanted to avoid comparative tests being run against all the indices. There were some other areas which needed to be clarified.

Gen Jacobs said that the Firearms Control Act and the Explosives Act did provide for a buccal sample without a warrant. The intention was that when a buccal sample was taken from a person not under arrest, there should be a warrant.

The Chairperson still wanted more clarity. This section was not easy reading.

Gen Jacobs said that an authorised person could take samples without a warrant if there were reasonable grounds to suspect that a serious crime had been committed, which could result in a prison sentence of longer than five years. Body samples, except for buccal samples, could only be taken by a registered medical practitioner. A new sub-section would make provision for the test to see if the person had recently discharged a firearm, which was less invasive than a buccal sample. If the person was acquitted, or charges were not pressed, the records would be expunged. Bodily samples could only be used to detect a crime.

Gen Jacobs said that similar amendments would be made to the Explosives Act.

Mr George returned to the issue of hair samples.

The Chairperson said that the Committee had decided that the only reasonable alternative to the buccal test was a blood sample. This would be done by a medical practitioner.

Ms Kohler-Barnard said that the Health Act made a clear statement about who could take a buccal sample. There was some reference to trained personnel.

Mr George said that if a person refused the buccal sample, then that person must be taken to a doctor. The person might refuse to undergo this test as well.

Gen Jacobs said that there was a requirement for a warrant. Training was an issue in terms of the CPA. Gaining a warrant would solve most of the issues. Minimum force could be used.

The Chairperson said that proper legislation would be needed.

Mr Stubbe said that if the person refused to act according to the warrant, he or she should be imprisoned for contempt of court.

The Chairperson felt that there was a misalignment in the drafting.

Short title

Gen Jacobs said that clause 11 would amend the short title.

Memorandum on Objects

The Chairperson said that it was not necessary to go through the Memorandum. The objectives might change as the Bill was updated. By 19 July 2013 the Department must provide the Committee Secretary with a cleaned up version of the Bill so that it could be distributed to Members in good time to prepare for the next deliberations. She hoped to adopt the Bill by 8 August. She sketched the programme for the Committee after the recess period. This would be the last meeting before Parliament rose.

Ms Kohler-Barnard reminded the delegation that parties would wish to caucus on the Bill before the Committee's next deliberations.

The meeting was adjourned.