Date of Meeting:
18 Jun 2013
Chairperson:
Ms A van Wyk (ANC)
Documents handed out:
Criminal Law (Forensic Procedures) Amendment Bill, 2013, with latest amendments proposed by the Committee
Relevant Document
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 noted the presence of several Members of the Portfolio Committee on Correctional Services and noted that an invitation had also been extended to the Portfolio Committee on Justice and Constitutional Development to sit in on these meetings. Drafters from the South African Police Service (SAPS) took Members through the latest changes to the Criminal Law (Forensic Procedures) Amendment Bill, with input also from the Parliamentary Legal Advisers and Office of the Chief State Law Advisers.

The first set of amendments described related to the definitions clauses, and a brief description was given of the amendments in relation to the designated area, and then of the bodily samples. The amendments would make provision for the use of bodily samples in the compilation of a DNA profile. Samples could be in the form of a buccal swab, blood or nails. There were both intimate and non-intimate methods to gather samples. These should be done by a medical practitioner, but the South Africa Police Service and Department of Correctional Services would train their members to take samples. Members asked that the Bill made specific provision that an authorised person must have undertaken training by the Department of Health. Members asked if it was possible to take a sample without consent of the person involved, and were worried that this could lead to officials taking a sample by force. If self-administration of sample was possible, it should be specified. Members also questioned the ability of officials from the Department of Correctional Services (DCS) to take samples, which would require a nurse or doctor at every facility. Members discussed whether crime scene investigators actually involved in that investigation would have to take the samples, and questioned the advice given by DCS that there was sufficient capacity, saying that this department must be invited to the Committee to answer questions. It was noted that SAPS would be required to cover the costs as there was no provision in the DCS budget.

Members enquired about the target groups for training and thought tighter definitions were needed. They questioned the rank of those taking swabs, but noted that there was provision for a review of the legislation, should it be discovered that other ranks were more appropriate. Members wanted the rank in the meantime to be specified in the Bill, and more emphasis placed on training, by amending the provision, as well as clarity on gender, particularly when children were involved. Members were also insistent that whoever took the samples must be identifiable. Some felt that provision should be made for hair-samples, whilst others said some groups may object to this n cultural or religious grounds, and agreed more discussion was needed and the clause needed reworking. Clause 1(g) and the taking of voluntary samples was also discussed, as well as the concept of a ‘designated area’. Members sought clarity on warrants to take a sample, including the area in which it must be issued, and in relation to what types of crime. The legal drafters were not in agreement whether the requirement could simply be deleted, or if there were privacy concerns.

Clause 2, inserting new sections into the Criminal Procedure Act, was outlined. Again, Members

questioned the wording and said that the reference to the Minister of Justice and Constitutional Development must be expanded to avoid confusion with the Minister of Police, mentioned elsewhere in the Bill. They felt that time frames for testing were needed, as well as provision for intimate samples being taken in private, and the possibility of time frames also for turning samples to profiles. Some Members believed that there should not be the option of a fine for misuse of samples, as the possibility of fraud and collusion were high, and thought that provisions for exoneration were needed. A Member commented that there was no sense in having clause 15(q), allowing for voluntary samples to be expunged in three months, if there was no provision for a voluntary database. A rewording was requested to cover exoneration and use of DNA by the defence, and the new subsection (7) was criticised as clumsily worded. Members expressed their frustration that SAPS seemed to be trying to shift some responsibilities to DCS, and said that SAPS should be taking samples of those detained in its own cells, and note that not everyone held in remand centres was held for Schedule 1 offences, and the clause must reflect this. The new section 36E was then discussed, including concerns around storage of samples by DSC, and responsibility lines. The Committee was concerned whether SAPS and DCS had capacity to deal with the issues, and time limits were suggested for collection of samples. The legal team was asked to attend to the necessary redraft.

Minutes:

Chairperson's opening remarks

The Chairperson acknowledged the presence of members of the Portfolio Committee on Correctional Services, and said that the Criminal Law (Forensic Procedures) Amendment Bill (the Bill) would have consequences for members of the Department of Correctional Services (DCS). She noted that an invitation had also been extended to members of the Portfolio Committee on Justice and Constitutional Development.

The Chairperson regretted to announce the murder of a senior police officer.

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

Major-General (Gen) Philip Jacobs, Head: Legal Services, South African Police Services, took Members through the latest version of the Bill, which the drafters had prepared following previous comments and requests by the Committee.

Clause 1

The first issue related to the definitions in clause 1. It had been said that the definition of a 'designated area' could be interpreted widely. If a DNA profile was taken outside a building, its use would be limited. He noted also that a warrant was needed to take a sample, and he tabled new wording (see attached presentation).

Gen Jacobs said that the next issue was the amendment of section 36A of the Criminal Procedure Act (CPA). A number of terms would be defined. A 'bodily sample' was any type of sample taken from a person. A 'buccal sample' was defined as a sample of cellular material taken from the inside of a person's mouth. A 'comparative search' would be the comparing of fingerprints or forensic DNA profiles against profiles stored in a database. A 'crime scene sample' referred to evidence retrieved from a crime scene. Bodily samples could be intimate, such as blood or pubic hair, or non-intimate, such as buccal samples, nails or scrapings from under the nails.

Ms D Kohler-Barnard (DA) said that in some countries a buccal sample was regarded as an intimate sample. The definition of 'authorised person' might exclude many SAPS members. There did not seem to be any prescription on which gender of official would take the sample.

Gen Jacobs said that a buccal sample would be taken by a South African Police Service (SAPS) or Independent Police Investigative Directorate (IPID) official, or a Department of Correctional Services (DCS) member. In practice, samples would normally be taken by a medical person. The taking of a sample was regarded as a search, and this would normally be done by an official of the same gender. This might be included in the Bill.

Major-General Adeline Shezi, Head: Quality, Forensic Division, SAPS, said that training would include the taking of buccal samples, so that officials could see that the correct procedure was followed.

Mr V Ndlovu (IFP) asked if it was possible to take a sample without the consent of the person involved.

Gen Shezi said that when a person had been arrested, there would be a warrant to collect a sample. She did not think that it would be a problem for a person to provide his or her own sample under appropriate supervision.

Ms Kohler-Barnard cautioned that an interpretation of the section could lead to officials taking a sample by force.

Mr M George (COPE) said that if self-administration could be done, then it should be specified. There were some SAPS members who behaved like 'wild animals'. The option for self-administration should be in the Bill.

The Chairperson said that the issue was whether this should be prescribed in the definitions of the Bill, or later in the text.

The Chairperson asked what was meant by 'who is not a crime scene investigator' (CSI).

Gen Shezi said that there was a possibility that evidence could be planted at a crime scene. If the investigating officer took the sample, there was a chance that this might happen.

The Chairperson asked the drafters to include a provision that any authorised person should have undergone the forensic training prescribed by the Department of Health (DoH). She asked if DCS had the capacity to take samples.

Mr Ndlovu said that this was the 'million dollar question'. He felt that this would be a challenge to DCS. There were many challenges to professionals in DCS. If government were to rely on the professionalism of this department, there could be problems.

Ms W Ngwenya (ANC) said that there had not been enough time to talk to DCS on this point at the previous meeting.

The Chairperson said that it boiled down to DCS having a nurse or doctor at every facility.

Mr George said that he felt the definition should refer to a person who could act with authority. It might be prudent to discuss this directly with DCS.

Ms Kohler-Barnard felt that the reference to crime scene investigators (CSI) should only exclude the CSI on that particular case. Some IPID sections might be exclusively CSIs.

Gen Shezi said that she had felt that the wording would be that an authorised person would take the

buccal sample, or cause it to be taken.

The Chairperson disagreed. There was a specific reference to a medical practitioner.

Gen Shezi said that one CSI might have three or four cases to deal with. Logically it seemed that another CSI could take the samples, and all would be trained in sample taking. It might be best to amend this clause.

The Chairperson asked the drafters to amend this clause to read 'the CSI' rather than 'a CSI'. She also asked about DCS officials. If there was no appropriate person, then SAPS should be called in to conduct the test.

Gen Jacobs said that there had been discussion with DCS, and this department was confident that it would be able to conduct its own procedures. He conceded that there was likely to be a huge backlog to start with.

The Chairperson wanted the person from DCS who had given SAPS this advice to appear before the Committee. There were challenges, despite SAPS saying that it was ready to implement the Bill. DCS must provide information on the number of medical staff. The Commissioner of DCS would be called in. She asked who would carry the costs of taking samples.

Gen Shezi said she would provide the name of the Deputy Director-General who had given this advice. There had been some agreement over costs. The SAPS budget would have to cover the costs, as there was no provision in the DCS budget.

Training issues
The Chairperson asked who the target group would be for training. She commented that she would rather take the sample herself. IPID would deal mainly with SAPS officers rather than the public. A tighter definition might be needed.

Gen Shezi said that every SAPS member should be trained. However, there was a categorisation for the training, the first being branch and cluster commanders. This would later be spread to all detectives and CSIs.

Ms M Molebatsi (ANC) asked if this meant that only the branch and cluster commanders would be taking the swabs.

Mr George asked if there would be a specific rank, and commented that many young recruits came out of training with an attitude problem.

Gen Shezi said that the minimum rank would be Warrant Officers. In rural areas there might be no officers. The training would be introduced into the colleges. Training was improving.

The Chairperson asked why the rank was not specified in the Bill and asked if there was any difficulty in including it.

Gen Shezi said that it would not be a problem to include a rank. She thought that the Act would be reviewed within five years, at which stage amendments could be made.

Mr George noted the upgraded training. He agreed that the rank should be specified. Within five years, it might be possible to make a change, depending on the level that students from training colleges had reached.

Ms Molebatsi asked how long it would take to develop the competency.

Mr Ndlovu said this would be a transitional period, after which requirements would be assessed. He asked how long this would take.

The Chairperson said that such details could be incorporated later in the Bill, not necessarily in the definitions. The public would have the right to demand proof that the official was authorised and competent to do so. This was clear in the Act. Greater emphasis should be placed on the training aspect, and the order of the wording might be changed to emphasise this requirement. She asked this in the context of fifteen years of training on the Domestic Violence Act that had apparently had little effect.

Access to database
Ms Molebatsi asked who would be able to access the database, and how a trained official could be identified.

Gen Shezi felt that a badge might be appropriate. The competence of an official was always challenged in court.

The Chairperson said that an ideal situation was being sketched. So many fingerprints were being sent back as they had not been taken correctly. There should be a requirement that the SAPS official taking the sample must be identifiable. National Instructions now seemed to be treated as mere suggestions.

Ms Kohler-Barnard felt that specifying a rank in the interim arrangements was a consideration. She wanted clarity on the gender of the sample collector, as Gen Jacobs had spoken specifically of children. She felt that in (f)(i) and (ii) the possibility of using databases from other countries was being excluded.

Gen Jacobs said that the search was of the database itself. A crime scene profile could be developed and compared to the information available in other countries.

Gen Jacobs asked the Committee to note an incorrect reference; the reference to Chapter 5A of the Act should be to 5B.

Mr George asked if international agreements covered all countries.

Gen Jacobs said that the interchange of information was subject to the same sort of reciprocal agreements as for extradition, with perhaps some slight differences. However, there were strict rules in place. Even when there were no agreements, special arrangements could be made to exchange information.

Specification of samples
The Chairperson said that some of the presentations had referred to 'biological samples', but this was not defined. A number of comments had been made during the public hearings on this point.

Gen Shezi asked what other sample could come out of the body. The SAPS was essentially in place to fight crime. A bodily sample was what it said it was. There might be chemical samples taken as well.

The Chairperson agreed then that there was no need for a definition. However, it was important to at

least raise the concerns from the hearings for comment by SAPS. She asked who would take non-intimate samples.

Gen Shezi said that an investigating CSI would collect the samples.

The Chairperson noted that the early definitions of buccal samples referred to a required level of training.

Gen Shezi said that nail samples could be crime samples and not reference samples. Buccal samples were used for reference purposes, and then compared to evidence found at the scene. Deposits under the nails might result from physical contact with another person.

The Chairperson asked why hair could not be used as a reference sample.

Gen Shezi said that certain religious groups might not permit hair to be displayed or cut.

The Chairperson said that if hair was not specified in the Bill, it could never be used.

Ms P Mocumi (ANC) asked from which part of the body a blood sample would be drawn, as it was listed as an intimate sample. She asked if blood from another person could be used.

The Chairperson said that drawing of blood for sample purposes was regarded as an intimate sample, as it would be drawn by a medical official inserting a needle.

Mr George agreed on the need to include hair as a reference sample. There were no absolute rights.

Ms Molebatsi said that there were rights affecting people. While government might want to introduce strict laws, they might be challenged on the basis of human rights violations. If the hair samples could not be used, some discussion was needed.

The Chairperson said that (fH) needed to be reconsidered. Reference samples should not be limited to buccal samples. One possible solution might be to split this sub-clause. After some discussion during an adjournment, Members felt that this clause must be reworked.

Gen Jacobs continued with clause 1(g). A new subclause would be inserted, detailing the procedure to be followed with the taking of a bodily sample. This could be done with the consent of the person, or by a warrant, or in terms of section 36D. The sample had to be taken in a designated area.

Mr George asked what would happen if the person did not give consent.

Gen Jacobs said that the sample could be taken, even if it involved a degree of force. The Act made provision for mandatory taking of fingerprints.

Mr George did not believe that an authorised person would want to take a bodily sample without good reason. If the person refused, any delay in obtaining a warrant might defeat the purpose of the Act.

The Chairperson understood the clause to mean that a voluntary sample might be taken to exonerate a person, while a suspect could be forced to have a sample taken.

Mr Ndlovu said that SAPS would need to build a case against a suspect.

Gen Jacobs explained that a voluntary sample would be used mainly for exclusion purposes.

Ms Kohler-Barnard made the point that people could volunteer themselves for a sample, but there was no provision for self-administration. A person might be reluctant to cooperate if another person was to take the sample.

Gen Jacobs said that the concerns would be addressed.

Ms Kohler-Barnard said that there had been a problem with the concept of a 'designated area'. This might be a problem at an outside location, such as a roadblock.

Warrants
The Chairperson asked what would happen if a suspect was arrested outside the area in which the crime was committed.

Gen Jacobs said that the problem was with the issue of the warrant, as only the magistrate with jurisdiction over the area in which the crime was committed could issue a warrant. If it was a Schedule 1 offence then the suspect could be arrested without a warrant. The warrant for the mandatory sample would have to be taken up with a magistrate in the area of the crime. The sample could be taken at the station where the person was detained.

Mr D Stubbe (DA) said that a warrant could be obtained from the area in which the suspect was believed to be.

The Chairperson commented that this was not what Gen Jacobs was saying.

Ms Kohler-Barnard said that any 'self-respecting' criminal would refuse to allow a sample to be taken.

The Chairperson asked why this provision was needed

Ms Kohler-Barnard said that there was no need for a warrant to take fingerprints. The same should apply to non-intimate samples.

Mr Theo Hercules, State Law Advisor, Office of the Chief State Law Adviser, agreed that there was no warrant needed for an arrest for a Schedule 1 offence.

The Chairperson said that she was becoming increasingly concerned with the quality of the drafting in this Bill. A number of new issues were now coming to light. The cross-reference was not needed.

Gen Shezi read through the relevant clause, and agreed that there seemed to be an error in the references.

The Chairperson asked for a clear explanation on when a warrant was needed to take a DNA sample.

Gen Jacobs said that this part had been added right at the end of the process. If a person was arrested on a Schedule 1 offence, no warrant was needed to take a sample. He thought that perhaps the wording relating to the need for a warrant could be deleted from the Bill.

Mr Hercules said he would have to look at this more carefully, and said that a different concern was around the right to privacy.

The Chairperson said that Members were correct to equate the procedure with the taking of fingerprints. The legal team needed to formulate a single opinion, to avoid wasting the time of the Committee.

Ms Kohler-Barnard asked if she was correct in thinking that a warrant would not be needed, only in relation to Schedule 1 crimes.

The Chairperson said that there was some leeway. A suspect could be arrested for a minor offence, but could then also be found to be a suspect in a serious offence.

Clause 2
Gen Jacobs said that clause 2 would insert new sections 36D and 36E, which would prescribe the procedure for taking buccal and bodily samples. The new Section 36C would amend the provisions regarding the taking and storage of fingerprints.

The Chairperson felt that there was repetition.

Ms Kohler-Barnard said that in the new section 36D(1) the authorised person must take a sample for a person arrested for a Schedule 1 offence, but for other offences the person might take a sample. There was a difference in meaning.

Gen Jacobs said that the wording used was in line with other legislation.

The Chairperson asked which Minister was being cited in this reworded section.

Gen Jacobs replied that in terms of the CPA, it was the Minister of Justice and Constitutional Development.

The Chairperson said that this should be made clear, as the Bill also referred elsewhere to the Minister of Police. She instructed that the repeated wording at the end of (2) be deleted.

The Chairperson asked why there was no time-frame to the testing. SAPS stations could sit with samples, and then send them all through to the laboratory at once. The word 'immediately' needed to be quantified.

Gen Shezi agreed.

Privacy considerations
Ms Kohler-Barnard asked if there was any reference to intimate samples being taken in private. She had not seen anything.

Gen Jacobs said that this was provided for in the definition of 'designated place'. Intimate samples could only be taken by a registered medical practitioner. Privacy would be one of the ethical considerations for a medical practitioner.

Ms Kohler-Barnard said there had been cases where a person had been investigated without regard to her privacy.

The Chairperson felt that there could be a reference later in the Bill to privacy and ethics.

Gen Jacobs agreed on the need for a provision for privacy.

Samples to profiles
The Chairperson asked if there would be a time frame attached to the process of a sample being turned into a profile.

Gen Shezi said that the drafters could look into a time frame, but some cases were more complicated than others. There was a different approach needed for the various categories of crimes. It was a case of prioritisation, and there were international examples of this.

The Chairperson asked the team to look into this and report back.

Gen Jacobs read through the amendment to subsections (6) and (7). This dealt with the purposes for creating a DNA profile, and the storage and ultimate destruction of the profile. A sample would be taken from any person incarcerated after conviction.

Ms Mocumi asked about the value of the fine contemplated in (6)(c). There was no uniformity in the amounts associated with bail.

The Chairperson asked why there was an option of a fine for misuse of DNA samples. She felt that this was a serious offence, and a mere fine should not be a sentencing option.

Mr Ndlovu asked under what circumstances a person could abuse a bodily sample.

The Chairperson raised the possibility of a body sample being provided to an insurance company to warn the company of medical problems affecting risk. Another provision should be included under (6)(a)(vi) for exoneration purposes.

Ms Kohler-Barnard agreed that abuse of the sample was a serious crime, as the insurance companies would be prepared to pay handsomely to acquire such information. She agreed that there should be no option for a fine. There was provision for a jail term for a person misusing a sample. She also commented that the reference to (a) could be ambiguous.

Mr George was not sure about removing the fine. There might be an offence warranting no more than a fine. He felt that the penalty should be left up to the court to decide upon.

The Chairperson said that there would no doubt be SAPS officers willing to commit this crime. In Canada, Members had been urged to include a provision for using DNA for exoneration.

Mr Hercules said that the defence would have access to any DNA profiles offered as evidence by the prosecution.

Gen Shezi said that if there were to be a provision of exoneration, there should also be a provision for proof of guilt.

The Chairperson said that a convicted criminal should be given the chance to prove his innocence by use of DNA.

Mr Hercules said prosecution included all facets of a case, including defence and the consideration in court. He felt that the Bill was adequate. The court would have to adhere to the defence's chosen option. A convicted person could lodge an appeal and the case could be reopened.

Ms Kohler-Barnard referred to the Committee’s visit to the laboratories overseas, and noted that

there, there was provision for samples to a voluntary database. There was no such provision in this Bill. There might be a need to add to the list of uses as technology developed.

The Chairperson said that the Board (set up in the Bill) could not make legislation, but could advise Parliament. There would be reviews conducted regularly.

Mr Hercules said that in terms of clause 15(q), there was provision for voluntary samples to be expunged within three months.

Ms Kohler-Barnard felt that this was contradictory, as there was no provision for a voluntary database.

The Chairperson said that the Bill was not referring to voluntary samples, but to samples taken in the course of a criminal investigation.

Gen Shezi said that if a group of people volunteered samples to eliminate suspects, these voluntary samples would still be used for criminal investigation. The voluntary database would be searched in criminal investigations.

Ms Desiree Swartz, Parliamentary Legal Adviser, asked how the defence could use DNA evidence if this was not offered by the state.

Mr G Lekgetho (ANC) returned to the issue of exoneration, making the point that a guilty person would rarely confess to being guilty, and he said that if this provision was included, the judiciary would at some stage be rendered useless, as everybody would claim to be innocent. The victims also had rights. He found this a very sensitive issue.

The Chairperson said that justice would not be served if an innocent person was convicted. An even-handed approach was needed.

Mr George said that the argument was being resuscitated. If a group was suspected of a crime, and all but the guilty party volunteered samples, guilt could not be proven.

Gen Shezi asked how an unknown person could be assessed without doing a familial search.

The Chairperson said that Members would get to that part later. The legal team would need to convince the Committee otherwise. This clause had to make provision of use of DNA by the defence and for exoneration.

Ms Kohler-Barnard referred to sub-clause (7). The word 'was' implied that any person who had been incarcerated in the past could be sampled. The word 'is' would be more appropriate.

The Chairperson agreed that the wording was clumsy. She asked what would happen with remand facilities. Some people had spent five years awaiting trial. She asked why the DNA samples of all remand prisoners should be taken, or if this would only apply to those charged with Schedule 1 offences.

Mr George said that many of the suspects SAPS were looking for were already in jail for other offences.

The Chairperson needed clarity. She said that such wide sampling would place enormous strain on the laboratories. There were many people being held in SAPS cells as well as DCS.

Gen Shezi said that this matter had also been alluded to by the Deputy Director General of DCS.

Ms Kohler-Barnard asked if DCS had asked for the 'was' provision.

The Chairperson said that convicted prisoners could not be in remand centres. She was extremely irritated by the whole process and said that this Bill should be “owned” by SAPS. There should not be a bigger responsibility cast on DCS than SAPS. SAPS arrested many people each day, and some of them were unlawfully detained in SAPS cells for lengthy periods.

Gen Shezi asked for some time to consult on this issue.

The Chairperson also added that not all those held in remand centres were being held for Schedule 1 offences. SAPS should take samples of all those detained in SAPS’ own cells. She directed that this clause should be corrected to reflect this.

Clause 2(8)
Gen Jacobs continued with sub-clause (8). This would place an obligation on the head of a Correctional or Remand facility to draw bodily samples and prepare these for analysis by SAPS, within a given time-frame. The reworded section 36E would provide for a group of people to be sampled, in cases where a Schedule 1 crime had been committed.

Gen Shezi said that DCS did not have the capacity to convey all samples to laboratories. This was why this department had requested that the SAPS be responsible for collecting the samples. There was consideration to outsourcing the delivery process.

The Chairperson said that DSC correctional facilities would not have the capacity to store samples.

Gen Shezi said that DCS was of the opinion that secure storage was available. Major centres could transport the samples, but those in rural areas might battle.

Mr George returned to the practical issues. He felt that Gen Shezi was skirting the issue. There was talk of seven days, outsourcing and the capacity of both SAPS and DCS. He asked how practical this clause would be. He asked who would be held responsible. He did not expect an immediate answer but asked the SAPS to think further on it.

The Chairperson said, in relation to the question on responsibility, that SAPS would have to take responsibility. 'Bodily sample' covered all forms of DNA sample. She shared Mr George's concern. The Committee had heard often enough that SAPS had the capacity for a certain task, only for this statement to be proved wrong. The collection of samples had to be a SAPS responsibility. DCS could use the new section to lobby National Treasury for additional funding. She asked that this clause be rewritten.

Ms Kohler-Barnard commented that she had seen rape kits sitting in storage facilities for more than four years. While an impossible time-frame should not be set, samples needed to be processed timeously. She asked what enforcement measures were available.

The Chairperson suggested that samples should be collected within fourteen days of notification that they were ready. Gen Jacobs said that most of the changes to the Bill had been covered. A document showing the connection and interface with the Protection of Personal Information legislation had been distributed to Members. The meeting was adjourned.