Criminal Law (Forensic Procedure) Amendment Bill: public hearings day 2

Date of Meeting:
11 Jun 2013
Chairperson:
Ms A Van Wyk (ANC)
Documents handed out:
Jess Foord Foundation presentation
The Need for DNA Legislation in South Africa presentation
Substantial written submissions on the Criminal Law (Forensic Procedures) Amendment Bill, 2013
Forensic DNA Profiling: An introduction to scientific principles
Criminal Law (Forensic Procedures) Amendment Bill [B9-2013]

Audio recording of the meeting:
PC Police: Public Hearing on the Criminal Law (Forensic Procedure) Amendment Bill [B9-2013]

Summary:
The Members met for the second and final day of the public hearings into the Criminal Law (Forensic Procedures) Amendment Bill. The first presentation was given by the DNA Project who had divided their submission into two sections. The first section dealt with the technical and scientific context of the Bill. It discussed where DNA evidence could be found, the uniqueness of DNA, how samples were extrapolated to form DNA profiles, and reference sample analysis. Members raised questions of clarity around the possible contamination of samples, the possibility of buccal swab technology becoming outmoded and the training of police for taking buccal swabs.

The second section of the DNA Project's presentation looked more at the Bill itself, examining the need for legislation, and where the Bill was lacking, looking at international best practices, and areas in which there was a need for a specific focus on forensic awareness and training. The presentation also made a number of recommendations for retention periods and the oversight board. The Committee posed questions around human rights and the retention of profiles, readiness of the Police for implementation and suggestions for the oversight board.

The South African Banking Risk Information Centre (SABRIC) submission discussed the practical issues raised by the Bill in relation to commercial crime. The

submission spoke about the DNA found on devices used in scams, the need for training of police on this specialised crime and opportunities for linking with international policing.

A very touching and personal submission was made by Jes Foord, relaying her story of how she was gang raped, which prompted her to begin the inspirational Jes Foord Foundation. She discussed statistics, where samples were taken from, by whom and what happened to these samples. She hoped the Bill could be used to prevent re-offences and to encourage victims. Some Members were enraged by the treatment that SAPS officials exhibited toward rape victims, while other Members applauded the courage and bravery exhibited by the presenter.

The Committee Researcher presented submissions made by three organisations who could not be present. The first submissions were made by the Forensic Genetics Policy Initiative, who looked at collection practices for pre-convicters and volunteers, the establishment of a DNA database, DNA sample retention, unaddressed issues in the Bill, the oversight board and general comments. The Committee questioned costing, post-conviction access, indices and its relation to schedules and the oversight board. They were also concerned about timelines, alignment with other legislation and possible contradictions in this regard, backlogs and the expungment of samples. A key issue raised was that of familial searching, around which there was plenty of discussion and differing opinions.

Legal Aid South Africa had submitted a few comments on the retention of samples, suggesting that this might be contrary to the right to privacy, and also raised sounded a caution that the DNA Database could never replace good quality detective work and proper crime scene investigation. It generally felt that this Bill was an improvement on the 2009 version, and it welcomed differentiation between the serious and less serious offences. It still had some concerns about all-inclusiveness of the pre-convicted person provisions. The three-year retention period for the profile was held to be in line with international best practice.

The final submission was from Forensic DNA Consultants, who had discussed the inclusion of a missing and unidentified person's index, familial searching and independence of the database. This submission also spoke about international DNA information exchange, the establishment of a National Forensic Oversight Board, accreditation of the state's forensic biology laboratories and the conducting of reference sample testing. The Committee was concerned about the independence of the oversight board, the bias toward prosecution, accreditation of the labs,

expungment criteria and linking of SAPS forensic science database to Interpol's Gateway.

Minutes:

Criminal Law (Forensic Procedure) Amendment Bill: Continuation of Public hearing

Forensic DNA Profiling: An Introduction to Scientific Principles: Submission from DNA Project: Fighting Crime with Science

Ms Carolyn Hancock, Director: DNA Project, introduced herself as "the scientist of the team", and said she was a geneticist, and had been working in the field for 26 years. Her part of the presentation sought to give some scientific context to parts of the Bill. She started off noting the importance of evidence for securing a conviction of an individual. There were two types of evidence- subjective (eye-witness accounts) and physical evidence. There were many times where evidence like shoeprints and weapons had been used. South Africa relied extensively on fingerprints to place individuals at a crime scene and this was an important tool, as no two fingerprints were the same. DNA evidence could be found in many places such as in blood, saliva on the tip of cigarette butts, or saliva on the edge of a bottle, or saliva and hair on the inside of a balaclava, and, very importantly, in semen, which was very salient in rape cases where fingerprints were not that useful. She also noted that fingerprints could be lifted off a bottle through the advanced technology of touch DNA. All this showed that DNA was an extremely useful way of linking individuals to a crime scene.

In exactly the same way that fingerprints were unique, DNA was also unique. No two people in the world had the same DNA profile, except for identical twins. DNA in every cell of an individual was identical, and this was useful because, for instance in a rape case, DNA from a buccal swab could be compared to DNA taken from the semen to compare and match. Also important was that an individual's DNA profile remained unchanged throughout their lifetime, which enabled cold-cases to be solved.

Because the DNA of all people was different, it was possible to identify or exclude a suspect. The emphasis was not on using DNA evidence to prove someone guilty, but to use it to place someone at a crime scene, and state that person X was the source of the particular evidentiary sample being worked upon at that time. It was an exact science, in that the evidence from the crime scene could be directly matched to an individual.

DNA could also be used to identify missing persons, especially in the case of mass disasters. Ms Hancock noted a particular case which proved that South Africa did

have the expertise and technology to identify missing persons.

Ms Hancock then explained the technical details. She reiterated that DNA was found in the cells of the body but it was particularly looked for in saliva, blood or semen. In each cell there was a dense body called the nucleus, and in each nucleus were chromosomes which contained the DNA. All human beings had 46 chromosomes and each chromosome was arranged into pairs, which meant there were actually 36 pairs of chromosomes, one of which came from the mother and the other from the father.

DNA was understood and read according to an alphabet, using the letters A, C, G and T, which enabled a scientist to read a sequence of DNA. She said that only 5% of the chromosomes were made up of functional genes (which essentially "made us who we are") while 95% were non functional DNA, otherwise called non-coding areas or "junk DNA". Scientists looking at the functional genes would be able to pick up personal traits of the individual, while in the non-coding regions, they would be able to see things which set individuals apart, with lots of different variations, and it was this area used for DNA profiling.

For DNA profiling, the important aspect was to look at how many times DNA fragments were repeated, and the number a sequence was repeated in, which was what was stored as the DNA profile. In this way the number 5/7 referred to the number of repeats and did not in any way refer to the personality of the individual.

Basically there were two possible outcomes of a DNA result –either there was a match between the evidence from the crime scene to the buccal swab taken from a suspect, or there was not. She said it was up to the court to decide if a suspect was guilty, but up to the scientist to establish DNA evidential matches.

Ms Hancock then looked at reference profile analysis showing the Committee how simply a buccal swab could be taken. Police officers could be quickly trained to do this. It could be done at the same place where fingerprints were taken. The whole procedure should take no longer than 30 seconds to complete. For reference samples, the DNA Project firmly believed that a buccal sample should be taken only by a police official, while any samples from underneath the nail should be taken by a medical practitioner. However, she noted such a sample was likely to be contaminated, and that hair from an individual's head would be more appropriate for another sample. The buccal swab would be placed in a tamper-proof bag and if it had been tampered with, it would not be used by the person at the laboratory. The outcome of the profile would be a list of numbers, of which the only personal information presented would be whether the individual was a male or female, and this

was what was entered into the database. After this, the sample should be destroyed so there should be no confusion as to what a profile was and what a sample was. The retention framework for the two must be different.

She reiterated that a DNA profile was stored on the database as a list of letters and numbers not associated with any physical trait, and the only personal information was the sex of the person. What was currently kept on the database was the case number, sample and code and laboratory number and no personal ID, name or address. However, through the case number the investigating officer could work out where the case came from.

The DNA Project urged that the legislation be passed immediately. Ms Hancock noted that no country, on review of its legislation, had ever overturned the database, but in fact had increased the scope and size of the database, which was something that could be looked at in South Africa.

The Need for DNA Legislation in South Africa (DNA Project)

Ms Vanessa Lynch, Director: DNA Project, said her part of the presentation would focus more on the Bill itself and that she will look at certain aspects of the Bill and the principle underlying why certain provisions should be included and in some cases extended. She referred to a detailed commentary on the Bill which The DNA Project has submitted to the committee, which due to time constraints, she could not deal with every comment, but the Committee were welcome to question her on any aspect of that written commentary not covered in the oral presentation. She welcomed the 2013 version of the Bill, which the DNA Project saw as providing a much better framework for the retention and taking of DNA profiles. She noted that there was a very personal reason for starting the DNA Project, when her own father was murdered, but due to the loss of DNA evidence at his crime scene, police were not able to link his murder to the perpetrators. She felt strongly that this was an area that needed to be legislated and should be used to the best advantage. The DNA Project was instrumental in creating awareness at crime scenes, and it was particularly noteworthy that often the family, emergency services or security guards interfered or contaminated the crime scene. The DNA Project used the media to get its message across, and developed a Forensic Honours course which was held at the University of the Free State and the University of Cape Town with the intention of providing skills to those working at the laboratories. DNA Project was one of the few organisations making a submission which did not financially benefit from the Bill. Currently, many issues relating to profiling and the collection of samples is being operated in a legal vacuum, because there are no governing regulations around the current forensic science infrastructure.

Ms Lynch looked at the need for legislation, noting the single most important factor contributing to an effective DNA database was the legislation describing the creation of the database and its legal use. Even when there was excellent forensic laboratory infrastructure, ineffective database legislation could reduce the potential of a Forensic DNA Database. It was the quality of DNA database laws that made DNA an effective investigative tool. The Criminal Procedure Act (CPA) was inadequate and outdated yet it had, to date, been the only legislative source that attempted to regulate DNA profiling in South Africa, despite the fact that it was drafted long before the advent of DNA profiling.

Currently the DNA Bill did not make sufficient provisions for categories of crimes, separation of indices, controls of buccal sample taking (setting out the method, environment and police officers), destruction of reference samples, retention frameworks for different categories of DNA profiles, the retrospective collection of convicted offender profiles, strict penalties for misuse of information, nor the creation of an Oversight Board.

Ms Lynch outlined that, in terms of international best practice, DNA was taken from arrestees and convicted offenders, buccal samples were taken by the police, convicted offender profiles were retained indefinitely in the majority of countries, and the convicted offender database was allowed retrospectively, the DNA database was given legal status to retain profiles for criminal investigation only, there was a separate custodian of the database, and the fingerprint and DNA legislation were aligned.

The recommendation for the retention period for the National Forensic DNA Database (NFDD) was that the profiles of convicted offenders must be kept indefinitely, and that arrestee profiles be kept for a minimum of six years (or twelve, if the arrestee was re-arrested during the six year period) and for removal to occur by application. This was particular pertinent, given the likelihood of early release or parole for many perpetrators in South Africa. She noted the study conducted by UNISA academic, Dr Rudolph Zinn, who interviewed a group of convicted house robbers in jail. He found that the average house robber was in his 20s, but was by then a very experienced criminal who had committed over 100 crimes by the time he was arrested. From the research conducted by the DNA Project it was found most countries had indefinite retention periods for convicted offender profiles remaining on the database. She noted the interesting case of a province in Canada, where prisoners could choose between early parole and having their profile entered on the database. Most of the prisoners did not choose early parole, which indicated their intention to

commit further crimes once released from prison, or their knowledge that they had committed other crimes with which they were not yet associated.

Ms Lynch discussed the NFDD inclusion data. It should not link to the seriousness of the offence, nor should it restrict the time period of arrestee profiles, that DNA profiles must be taken at the time of arrest to ensure that comparative searches were done against crime scene profiles, and that the presence of a DNA profile on a NFDD was an investigative lead and that the profile was not tantamount to a criminal record.

Ms Lynch noted that the current Bill did not separate the custodian of the database from the forensic science laboratory, and this was something that needed to be considered. In order to ensure civilian confidence, the legislation needed to be clear. Furthermore, the National Forensic Oversight Board (NFOB) currently did not contain sufficient provision for civilian society or NGOs, but was mainly comprised of government bodies. For it to truly be an oversight body, it needed to be more representative, especially of ethical bodies and bodies that could provide it with expertise. The DNA Project recommended a dual role for the NFOB - an ethical arm and an oversight arm. In terms of ethical oversight, she said that she would urge that the South African Human Rights Commission (SAHRC) should have a permanent seat on the board and not be 'invited' to participate. The other arm should oversee implementation to ensure, particularly during the first five years, that provisions, regulations, operating procedures and national instructions were adhered to, passed and monitored. The appointment of the Chair of the Board was also important. Currently, the appointment was at the discretion of the Minister, but the DNA Project suggested the Chair should be appointed by the members of the oversight board themselves, and should, for example be a human rights advocate with the relevant expertise to ensure civilian confidence.

Ms Lynch highlighted that the Combined DNA Index System (CODIS) was an open sourced free software to oversee the database and that in light of the presentation given by SITA the previous day, that the Committee must seriously consider this as an option to manage the NFDD.

Finally, the Project believed that forensic awareness and training needed to focus on the public, crime scene examiner, first-on-crime-scene responder, authorised officer and officers of the court. The emphasis was that there could not be legislation or forensic infrastructure, when the evidence at the scene was not collected correctly and this was essential to ensure the successful implementation of the Bill.

Discussion

The Chairperson noted that the Committee had previously raised the suggestion that the oversight body should be called something such as "Oversight and Ethics" body, and handle complaints as well. She felt the public participants needed to take note of what the Committee had already raised and highlighted. She opened the floor for questions of clarity.

Ms M Molebatsi (ANC) asked what the chances were of intentional or unintentional contamination in buccal swabs.

Ms D Kohler-Barnard (DA) asked if, given that science progressed almost as fast as cell phone technology, there could be a chance of the buccal swab method being outmoded, from a scientific viewpoint, three or four years down the line. She wanted a scientist's perspective on this, and comment on maybe allowing the board to oversee the implementation of new technology.

Mr M George (COPE) agreed there was a need for the legislation to be passed now, but he was concerned that the enforcers of the legislation, the South African Police Services (SAPS) were not ready. He was also concerned about possible human rights offences and constitutional issues, as the convictees could not be punished forever.

The Chairperson explained that it had been mentioned on the previous day that although the Bill currently required a review of the legislation every five years, a suggestion was made that perhaps a three-year review might be more appropriate, after the initial five-years. The review could take the form of the NFOB (whatever it was subsequently called) applying its mind and stating whether or not there was a need for a full review. Given the Constitutional imperatives, the decision whether to change the method of taking DNA must rest with Parliament, as Parliament could not privatise its legislative responsibilities. She asked how the DNA Project realistically and practically envisaged the oversight body. It was simply not practical to have everyone represented. Other bodies making submissions had also wanted to be included on the board. She wanted to know, realistically, how the ideal Board should look. The Committee agreed with representation from the SAHRC, but wanted other suggestions.

Mr George asked if the DNA Project really believed the SAPS needed no training to take a buccal sample.

Ms Hancock clarified that the buccal kit was very simple. She was not suggesting that training was unnecessary, but was saying that it would also not be an overwhelming

task, taking a few hours, rather than a few weeks. To ensure that there no contamination, ideally the person taking the swab should be wearing a face mask and gloves, and this should prevent contamination, if only the officer and suspect were present, and the swab was placed in a tamper proof bag. She also explained the buccal sample could be re-taken and the legislation made provision for this if the sample had been contaminated. There was a small chance for contamination but any contamination would be picked up and the sample retaken.

Ms Hancock commented on the need for review, saying that no great change in the buccal swab testing methods was likely in the foreseeable future, as buccal swabs had been used in the last number of years and she did not know of anything proposed which was better than that swab. She agreed with the Chairperson that only a very major breakthrough would change this. However, in relation to the review of the legislation, the DNA Project did welcome the comment for a three year review, given that technology moved ahead quite quickly.

Ms Lynch explained that SAPS was ready to implement the legislation since they were already attending to taking samples. The DNA Project stressed that there was an urgent requirement to pass this legislation, because there was an existing forensic infrastructure, but it was *unregulated*, so whilst this was advantageous insofar as having a platform to implement legislation, it was not ideal that there were no laws regulating the collection, expungement and retention of profiles and samples. For the convicted offender profiles, in the majority of cases, the profiles were kept indefinitely. She cautioned that South Africa should not fall into the trap of keeping the profile for too short a time, given the likelihood of suspended sentences and early parole, which made it valuable to keep the profile. In addition there was a high rate of re-offending in South Africa. She felt there needed to be a balance of interests and rights, between the human rights perspective, the rights of the convicted person and of the victim. Holding a profile on the database was not a criminal record but an investigative lead.

Ms Lynch noted the comment on the Board representation and agreed that it was not possible to have everyone represented, but her concern was that the current composition was largely weighted in favour of government. There were a number of NGOs to consider, like the DNA Project, university forensic laboratories, (who could also assist the state FSL's with capacity as they were essentially quasi-government institutions), the Law Society or Bar Council, and that there should be a provision for the board to co-opt expertise when required. She did not think that the Board should be too limited, or to have no people with actual experience or expertise in forensic DNA matters. The structure of the current Board in terms of the Bill did not seem to

have any people with a specialist knowledge of DNA forensics or ethics.

South African Banking Risk Information Centre (SABRIC) submission

Ms Kalyani Pillay, Chief Executive Officer, SABRIC, began by noting that the South African Banking Risk Information Centre (SABRIC) was owned by the four major banks (ABSA, Standard Bank, FNB and Nedbank) and currently represented 13 banks, the three major cash-in-transit companies and two ATM service providers. SABRIC assisted these industries in addressing organised crime and also dealt with submissions relating to Bills and other legislative imperatives. SABRIC had, by way of its first submission in January 2009, and again in May 2013, expressed support for the Bill. She said noted that the presentation would highlight practical issues around commercial crime.

She highlighted the publicised case of Bongani Moyo, a well known bank robber and "serial escapee" who was involved in 40 bank robberies before he was finally successfully arrested. She highlighted the importance of focusing on commercial crime in relation to the use of DNA evidence. The training of police to deal with commercial crimes was vitally important and as a non-profit organisation, SABRIC assisted in the training and would make itself available, at no cost, for briefing sessions.

She noted the increase of crimes at ATMs, and showed the Committee a video of how perpetrators committed such crimes through card-cloning devices. The point was that there were so many pieces of equipment used that could be analysed. She highlighted a vault attack on a bank where R18 616 980 was stolen. At the scene, there were numerous items from which DNA could be taken, including a milk carton. A training session could highlight such facts to the police.

Ms Pillay noted that SABRIC worked closely with the local and international police, as in the case where an international request was sent from Interpol in a case of credit card "skimming", where there was a DNA profile, but it needed to be matched up with other countries to find the perpetrator. Such opportunities and benefits could come from the database and its practical implementation.

Discussion

The Chairperson said the important point raised was that the DNA was not just received from a buccal swab, but could be obtained through other things at a crime scene, and this was where comparison was so important. She was pleased to note the presence of General Philip Jacobs, from SAPS, as offers for training needed to be pursued. She added that this was even free of charge, and she would not like to hear

any excuses from SAPS that it was unable to take up outside training because it would cost too much.

Gen Philip Jacobs, Head: Legal Support and Crime Operations, SAPS, noted that all points were covered and he had nothing to add.

The Chairperson asked if there was anyone present from the SAPS Forensic Laboratories, as she did not see Major General Shezi.

Gen Jacobs apologised on behalf of Gen Shezi, but said she had arranged for other personnel from the Forensic Laboratories in Cape Town to be present.

The Chairperson said it was important to have representatives, in case there were questions of clarity.

The Jes Foord Foundation

Ms Jes Foord, Founder: Jes Foord Foundation, started by explaining her personal and touching story to the Committee, asking Members to close their eyes and think about the special women in their lives as she told the story. She was gang-raped in 2008, when she and her father were taking their dogs for a walk. The image of being accosted by a group of men and staring down the barrel of a gun would stay with her forever. The perpetrators took all their possessions and tried to get their car started. These men then pushed them into a ditch, tied her father's legs and hands together and pushed his fishing hat down his throat with a knife. One of the men stayed with her father while the other four turned her, kissing her and calling her all sorts of horrible names, before each in turn gang-raping her at knifepoint. Her father was forced to watch.

Once the ordeal was over, she and her father went to the police station to report the incident, but it took a while to take her statement. Once her statement was taken, she was to Pinetown Police Station, where she waited for two hours for the District Surgeon. The room was still dirty from the person who had used it before. She was told to remove her clothes, but there was not even a curtain where she could do so, and lie on the bed. The surgeon undid the rape sample kit and took hair samples, skin scrapings, a sample from under her nails, a swab from her mouth, vagina and anus. Once he was done, he "chucked everything in the box". From there, she was taken to the Hillcrest Medi-Cross, where she was given several injections, including ARVS, TB shots, the morning-after pill and other medication, and she hoped that it was not for nothing.

She highlighted the scary statistics were that one in three women would be raped before the age of 21, and 50% of those women would be under the age of ten. A young girl living in South Africa had a greater chance of being raped than she did of learning how to read. These children could not speak for themselves, but the DNA would play that role. South Africa had the highest rate of sexual assault per capita than anywhere else in the world, and 90% of rapists were re-offenders, as highlighted by the women entering her Foundation for counselling.

It was a terrifying experience for the victim to be subjected to so many samples being taken, especially after having been raped. The perpetrator had only to go through the taking of a single buccal swab of the mouth. The evidence taken from the victim was taken by a professional doctor, while a trained policeman would take the sample from the perpetrator. The sample from the victim was destroyed as soon as the case was closed while for the perpetrator, the sample was kept until the profile was placed on the database and then the sample was destroyed.

Ms Foord said she would like to know that when she spoke to survivors in the very near future, she could truthfully tell them that when they reported a rape, and went through the evidence taking process and went to court, this would not come to naught. This was why this issue was so important to her. She said if everyone came together they could make this country beautiful once again.

Discussion

The Chairperson thanked her for what was clearly not an easy presentation to make, for her bravery in standing up against rape and said that it was through victims like herself that Parliament needed to look at many pieces of legislation, including the DNA legislation.

Ms Kohler-Barnard hoped the members of SAPS present listened very carefully to what Ms Foord had said. She said she had met Ms Foord many times, but every time she heard her story she wanted to weep. The very reason that so many rapes went unreported was that SAPS put them through additional trauma, such as having no sensitivity in the examination rooms, or by making crude remarks, which made the woman feel that she was victimised again. Everyone should be hanging their heads in shame.

The Chairperson urged the Members to be sensitive around this issue, and not try to abuse the situation. SAPS challenges needed to be looked at, but it was clear from the presentation that the District Surgeon was involved in sample taking. SAPS needed, however, to look at its facilities and she stressed that each and every police station

needed a victim support room, where victims could regain their humanity, and be treated in the humane manner they needed.

Mr Ndlovu thanked Ms Foord and said whatever assistance was needed to pass this legislation would come from the victims, not the perpetrators, as the former retained their memories for ever. He noted that everyone else present, including SAPS, could not truly appreciate what she had been put through.

Ms Molebatsi commended Ms Foord for her courage, asked for God's blessing on her, and asked her to keep up the good work to help others who might fall victim to the same crime.

Substantial additional written submissions on the Criminal Law (Forensic Procedures) Amendment Bill, 2013: Authors unable to attend public hearings

The Chairperson noted this presentation would be made by the Committee Researcher on behalf of three organisations who could not attend. This was so that Members could take cognisance of what these organisations wished to say.

Ms Nicolette Van Zyl-Gous, Committee Researcher, began by explaining that the Portfolio Committee on Police invited several organisations to make oral presentations to the Committee. Three organisations were unable to attend the public hearings, namely, the Human Genetics Policy Initiative, Legal Aid South Africa and Forensic DNA Consultants.

Forensic Genetics Policy Initiative

The first organisation's submissions that Ms van Zyl-Gous read out were those from the Forensic Genetics Policy Initiative. The Forensic Genetics Policy Initiative was a global human rights project dedicated to ensuring that the expansion of DNA databases was consistent with human rights principles. The submission was made by Jeremy Gruber, the President of the Council for Responsible Genetics, based in New York, USA, jointly with Ms Helen Wallace, Executive Director of Gene Watch, based in the United Kingdom, whom the Committee had met during its 2011 Study Tour to the UK. The authors had thanked the Committee for the invitation, but could not make the trip to South Africa due to the distance.

This submission noted that in terms of collection practices, the greatest privacy and human rights concerns from the current version of this Bill were around the expansive categories of persons whose DNA was to be collected and added to the database. The current draft of the Bill, in Section 36D, laid out two separate lists of categories of persons from whom samples could be collected. The one list was

limited to individuals associated with Schedule 1 offences and the second list contemplated individuals associated with any offences. There was no clear explanation as to why there were separate lists, but the result was to collect the DNA of nearly anyone in South Africa who came into contact with the criminal justice system.

It was felt that the collection of DNA from individuals convicted of violent crimes (like murders and rapes) and repeat offences were generally accepted by most countries as sufficient justification for including such populations on a DNA database. However there was a significant difference between offenders who met these criteria, and offenders who had committed non-violent crimes for which DNA evidence was not relevant, or who had committed minor crimes that did not include custodial sentences. It was unclear exactly for which criminal offences DNA samples would be taken, since the schedule of offences referred to in the Bill was not listed and 36D(2) appeared to expand the purview of the Bill to any offence. It was felt that insufficient attention was paid to the choosing of the categories of offences to be included under the scope of this Bill. They appeared to be expansive and the Minister was given unusually broad authority to expand such categories even further without legislative approval. Most countries that had launched national DNA databases had begun with a limited set of offences, and expanded deliberately with legislative oversight.

The next aspect related to collection practices in terms of those pre-convicted. The Bill set out to include a wide variety of pre-convicted categories of persons including individuals arrested, on bail or summonsed for an offence, and persons for whom reasonable grounds existed to believe that they, or one or more of the persons in a group, had committed either a Schedule 1 offence or any offence whatsoever, and that the sample would be of value in including or excluding one or more of such persons as the perpetrators. It was suggested that collecting the DNA of individuals yet to be convicted of a crime, many of whom probably never would be convicted of a crime, and some of whom were known to be innocent at the time but who were being included because of their inclusion in a group, was regarded as a serious intrusion into the privacy and human rights of the public. It obviated the State's primary restraints on search and seizure and its responsibility to prove guilt.

The degree of law enforcement discretion attendant on the decision to stop and arrest a suspect was of concern, because this posed the risk that law enforcement could engage in "DNA dragnets", entailing the collection of DNA from innocent persons who happened to be in the wrong place at the wrong time. Moreover, the collection of DNA on arrest was not for the purposes of identification, since the identification would already have occurred, but was clearly intended to investigate individuals for

other crimes also, unrelated to the crime for which they were arrested. Only a fraction of those arrested were ultimately charged and convicted. It was felt that this practice would permit government to collect and conduct DNA based surveillance on innocent South African citizens.

It was noted that volunteers who consented to the collection of their DNA should have the use of this DNA limited to a specified investigation, and it was suggested that it would not be necessary to have it entered on a database before it could be used for this purpose. The volunteer index contemplated the inclusion of children, with the consent of their parents, and could be in conflict with the principle that children should have the right to participate in decision making involving them, as contemplated by the Child Justice Act.

It was felt that the Bill did a generally good job of separating the categories of included persons into indices, rather than mixing such categories of individuals together. However, the Bill had no provisions for ensuring that such indices remained separate, with separate access and use rules. This was particularly of concern, as categories such as those of missing persons, were not part of any criminal investigations.

In terms of the DNA sample retention, the Bill did recognised the robust information value of biological samples and the potential for their misuse, and it did require that such samples were destroyed within three months after a profile was created and uploaded to the NFDD. However there was no time requirement as to creation of the profile in the first place. Backlogs were often a very serious problem with DNA database maintenance, therefore what might appear on its face to be a timely privacy protective requirement could very easily turn into a longer term collection issue, and raise serious privacy concerns. The current Bill allowed the state to retain a DNA profile of an individual for up to three years, even after the case against that individual had concluded without a finding of guilt. Moreover, there were no provisions for time lines around notification to an authorised officer to begin this period. Consequently, the current Bill allowed for the retention of the DNA of innocent persons long past any reasonable time for expunging their record, and thus represented an unwarranted intrusion into the private lives of innocent persons. Furthermore, the DNA profiles of all categories of convicted persons were retained indefinitely, with no retention distinction between serious, violent crimes and minor non-violent crimes. The permanent retention of all offender profiles without distinction raised serious questions as to the power of the state to maintain control over an individual even after they had met the burdens of their conviction.

The Bill also failed to address a number of other important issues, such as familial searching. This practice had a low success rate and raised serious privacy and human rights concerns as it necessarily involved searches of individuals that law enforcement knew to be innocent. However, the general language of the Bill related to "reasonable use" of the database would appear to allow such searches.

In relation to post conviction DNA access, one of the most often-repeated arguments by supporters of this Bill was the power of DNA to exonerate those wrongly convicted of a crime. However, no part of this Bill was devoted to ensuring post conviction access to one's own DNA, for exoneration purposes. The widely heralded recent launch of a South African Innocence Project, whose supporters were often proponents of the Bill, made clear the need for strong post-conviction DNA access provisions, and the lack of this in the Bill was a serious omission with profound human rights implications.

The submission also addressed the oversight board. The collection and processing of DNA in laboratories, in particular, was a system prone to contamination, malfeasance and error, without sufficient protections. A custodian played a crucial role in ensuring the accuracy and security of the system. The Bill did a good job of creating such an authority. However, the NFOB did not include any categories of members who could be considered to be watchdogs on behalf of the public. For instance, there was no specific provision for inclusion of members of legal defence or human rights associations, but the Board was merely required to invite the SAHRC, and the latter could decline to participate, or participate to only a limited degree, and its decision-making authority in either scenario was unclear. The inclusion of NGOs, without further refinement of their description, did not alleviate this concern. If the public were to be able to trust the Board as representing the public interest, it should include permanent representatives of bodies devoted to ensuring protection of individual rights.

Some general comments were that while the oversight powers given to the Board, Minister and National Commissioner with regard to oversight of laboratories, privacy and security and other necessary features to ensure the integrity of the forensic system were broad, there was a glaring lack of specificity, to ensure that the highest standards and oversight were met.

The financial costs of creating and maintaining such expansive DNA collection practices, as well as a national DNA database, were quite high and, if under-funded, could result in serious miscarriages of justice. Even well funded databases and practices in many countries had had serious incidents of mistake and error, and

significant backlogs. It did not appear that any financial analysis of the Bill had taken place.

The submission concluded that the Bill continued to raise some concerns that needed to be addressed to ensure that forensic uses of DNA in South Africa was done in a manner consistent with principles of privacy and human rights, and that societal benefits were properly balanced with social costs.

Discussion

The Chairperson noted that although the Committee Researcher could not answer questions, Members could ask questions of the drafters of the Bill and SAPS.

Gen Jacobs commented that the drafters had followed the same model as in the Fingerprint legislation, where for Schedule One offences, DNA must be taken. He had given the Committee Secretary a copy of Schedule One offences. It was misleading to make reference to a link between DNA and violent crime, as he pointed out that DNA could be used also to solve financial crimes. He noted the issues raised around the oversight Board, and said they would be considered.

Mr Ndlovu asked for further clarity on familial searching, in relation to the infringement of individual rights, and on the backlog spoken about.

Ms Kohler-Barnard also wanted more comment on familial searches, stating that the Committee had learned from its oversight visit that only through searches for similar DNA in the database had many mass murderers been tracked down.

Ms Kohler-Barnard wanted clarification of whether the DNA of convicted offenders was expunged. If so, then she asked where this appeared in the Bill.

Ms Molebatsi could not find armed robbery in Schedule One, and asked where it fell.

Gen Jacobs said robbery in general was listed in Schedule One.

The Chairperson said there were a number of contradictions between the Bill and the Fingerprints Act. She asked the legal team and the state law advisors to check if the provisions of the Bill were in line with the Protection of Personal Information legislation, which was not yet enacted but was with the NCOP. Parliament should not pass any contradictory legislation. She also wanted assurance that there was alignment, specifically on the issue of DNA, between these two pieces of legislation.

The Chairperson felt the issue of different indices needed to be cleared up, and commented that it might be necessary to have a separate suspect index, so as to keep the voluntary and arrestee indices clean. She wanted to see the migration between the indices and sought clarity on how to deal with this so as not to contaminate the indices unnecessarily.

The Chairperson noted the comment on the time lines and said that this was something raised also in the previous week and the previous day. It was clear that the systems were not talking to each other. She suggested the drafters go back and look at this specific issue.

She found it interesting that this submission felt the proper financial costing was done. She herself would love to get a Bill from the SAPS where she felt that proper costing was done. She knew and accepted that this would be a very expensive Bill, which was all the more reason why it must be properly costed, to ensure that the Department of Police did not run into trouble five years down the line. It was not possible to rely on funding by the Integrated Justice System (IJS) alone, as that source would be shut off at some point in time.

The Chairperson asked about the provisions for post-conviction access, and how this would be done. She felt this was important, citing the USA where prisoners had sometimes sat for years in jail before developments in the science of DNA proved them innocent. The Department needed to be fair and to indicate where they could not answer.

Gen Jacobs said the issue of backlogs could have an effect, even in the expungement of records. It was correct that the Bill was not totally in-line with the fingerprints legislation especially in terms of the expungement of samples of people who were found not guilty. However, there had been developments in other legislation in this regard. He said the period would have to be determined, as the Fingerprint legislation stipulated six months after notification, while the DNA legislation said three years, so the issue definitely had to be looked into.

He also confirmed that he would check the provisions of the Protection of Personal Information Bill and ensure consistency.

He also agreed that the SAPS needed to revisit the clean-up of the different indices, and the migration of the suspect to other indices.

Gen Jacobs responded that there were some inconsistencies in regard to

contamination and destruction. He also conceded that more attention was needed on the financial costing and implementation issues.

He commented on the post-conviction access, and stated there were many cases in which a person needed to access their fingerprints for a job or security clearance, but, in relation to the fingerprint database, permission for fingerprints could only be given by the person to whom the fingerprints belonged. It was possible to insert wording to allow for own access.

Gen Jacobs said that the SAPS was not in favour of familial searching, because of the limitations of the type of DNA information kept.

The Chairperson needed more clarity on this from the policy side.

Ms Bilkis Omar, Chief Director: Policy and Legislation, Civilian Secretariat for Police, said it was not something that had been expanded on, but thought needed to be given to it as it was a question quite frequently raised. She asked the Chairperson to give the SAPS some time to consider and draft some options.

The Chairperson reiterated that she had been expecting Gen Shezi to be at these hearings, as the Committee expected these questions to be answered immediately and she was not particularly happy that the issue was now to be deferred. She wanted it to be relayed to the National Commissioner that the Committee expected the people who would be the implementers to be at these meetings, and to provide the Committee with input. The Committee was warned, by the Ethics Committee in the UK, on the risks and difficulties around familial searching but the issue would be left over to next week. She reiterated that operational officials needed to attend the meetings and deliberations.

Ms Kohler-Barnard said she had done a lot of work on familial searching, and it was used all over the world as a crime fighting tool to track down mass murderers. She felt it should not just be rejected because somebody had warned that it could or had been abused somewhere. She felt that it should be carefully studied and an informed decision should then be taken. She was of the impression that it was only used to search criminal databases, which did not make it so open to abuses. She pleaded for more information.

The Chairperson stood by her point that clarity was needed, and the Committee had to be able to understand what had informed the policy decisions taken. She was frustrated that nobody could explain it to the Committee today. Over and above the

human rights concerns, there was a point that it could put an extra burden on the laboratories. She made it clear that the Committee wanted a briefing on familial searches at the following Tuesday's meeting, to enable the Committee to take an informed decision.

Submission from Legal Aid South Africa

Ms Van Zyl-Gous summarised the second written submission, from Legal Aid South Africa. It had firstly commented that the Bill of 2013 was a vast improvement from the 2009 version, in relation to categories of convicted persons, retention, storage and expungement of DNA samples and profiles. However, it had sounded a caution that the DNA Database could never replace good quality detective work and proper crime scene investigation. This was a critical aspect that required substantial attention from the SAPS, if the detection rate for unknown perpetrators was to improve. A DNA database alone would not improve detection rates, despite the assumption in some quarters that it would.

Legal Aid South Africa had also raised several other comments. The new section 36C, to be inserted in the CPA, was seen as a vast improvement on what had been suggested in the 2009 version, and was welcomed because there was a differentiation between offenders who had been convicted of offences justifying custodial sentences (offences listed in Schedule One) and those who had been convicted of minor offences that only justified a warning, fine, suspended sentence or non-custodial sentence. However, despite this, there was still a concern relating to the all-inclusiveness of pre-convicted persons, who were presumed to be innocent unless otherwise proven guilty, and it was suggested that this was unequal and arbitrary invasion of an individual's privacy.

The three-year retention period for the profile was welcomed as this conformed to international best practice for the retention of such profiles. It was noted that under the new section 15Q, the forensic DNA profiles from crime scene samples as well as the forensic DNA profiles in the Elimination Index were to be stored indefinitely. In principle, the retention of DNA samples and profiles remained a breach of the right to privacy as contained in section 14 of the Constitution. Legal Aid noted, however, that provision was made in section 15Q, for the retention of a DNA profile of a child upon conviction, subject to the provisions of Section 87 of the Child Justice Act of 2008.

Discussion

Mr Ndlovu wanted SAPS to elaborate on Section 14, relating to privacy, as it was important not to contradict the Constitution.

Gen Jacobs said there were many issues which could impact on human rights but what was important were the limitations placed on taking the DNA. He highlighted a case in the Supreme Court of the USA, where it was ruled that taking a swab from a suspect's cheek was usually done by a policeman, as stated under the Fourth Amendment. He felt the limitations placed on taking of DNA were in line with the Constitution. In terms of the Fingerprint Act, a submission could be made to the Directorate to have a fingerprint removed which was in line with the Child Justice Act.

The Chairperson said the Committee would need to discuss this point further.

Forensic DNA Consultants

Ms Van Zyl-Gous then looked at the comments of the third organisation, Forensic DNA Consultants (FDC), noting that they supported the introduction of long-awaited and much-needed legislation that provided the required framework to support the use of forensic DNA profiling in South Africa. This Bill showed that a great deal of additional research had been carried out in order to develop effective legislation, specifically for the South African context. Aspects of human rights and privacy had been well balanced with the need to exploit the advantages of DNA profiling as a criminal intelligence tool and make the NFDD as effective as possible.

FDC commented that although the Bill made provision to perform comparative searches on the stored profiles, for missing or unidentified persons' cases, there was no provision as to where those profiles should be stored, or for any retention or expungement criteria. A significant problem in South Africa related to the huge number of unidentified bodies that passed through the state mortuaries. After conventional methods of identification, no further attempts were made to identify those remaining bodies. Tissue samples were usually taken by the pathologists for DNA profiling purposes, but these samples often then in practice remained at the mortuaries and were not processed any further. They may prove to be valuable samples in the investigation and detection of crimes, because deceased individuals were often victims of violent attacks. It was suggested also that a separate index for missing and unidentified persons should be considered.

FDC had also commented on familial searches and had noted that the effectiveness of a DNA database stemmed from its ability to provide investigative leads for criminal matters or for the identification of missing persons. This was further enhanced by the innate ability of a database system to relax the search stringency criteria of DNA profiles and thus allow for partial matches to be discovered. This could provide valuable information, in the form of possible familial associations to the suspect or

the missing or unidentified individual and the immediate family of the identified person could be contacted and asked to voluntarily provide a reference sample for either inclusion or elimination purposes. However, this must involve informed consent and the family members must be made fully aware of the possible implications of providing such a sample, and be under no obligation to provide the sample.

FDC noted that allowing for requests for information on DNA profiles submitted by international agencies was necessary, in order to promote cross-border crime prevention and allow for more effective identification of missing persons and victims of crimes, particularly human trafficking. At one point, the database held by the SAPS Forensic Science Laboratory (FSL) was uploaded to the Interpol DNA Gateway database, and it was likely still to be held there. However, this was contrary to the Bill, which stated that a DNA profile must be received from the requester and then, subject to the Act and other applicable laws, the outcome of the comparative search may be reported to the requester. It was unlikely that the previously uploaded database information was correctly screened for inaccuracies, or properly administrated. For these reasons, it was suggested that the SAPS must make a formal request to Interpol to revoke those DNA profiles and any associated information uploaded, to ensure that there would not be any conflict with the regulations under this Bill and to allay potential court challenges.

After the Committee's Study Tour, the Committee had commented that one of the key database governance challenges for the UK was a lack of independence of database management, as 60% of the members were from the police environment. Through the National DNA Database Strategy Board, the UK now ensured that access to its DNA database was restricted to vetted personnel only. It was of serious concern that the DNA database was administered solely by the SAPS, which provided SAPS with an unrestricted ability to determine policies such as the search criteria on the database, reporting rules, stringency of search criteria and profile retention and expungement criteria. FDC strongly recommended that the DNA database established under this Bill should be administered and maintained by an external, independent body, such as the NFOB.

FDC had supported the establishment of NFOB as necessary to monitor the performance of all parties involved in the forensic environment. However, it suggested that this Board be appointed by the Minister of Justice and Constitutional Development, and not the Minister of Police, to ensure that it remain as independent as possible. It was even more important that the Board, over and above the laboratory, should not be aligned solely with the Minister of Police. Lack of independence and

bias towards the prosecution, in the use of DNA results, had been noted in many court cases in the past and it was crucial that the majority of the Board representatives be individuals with no vested interest in the activities of the FSL, of SAPS, or in the administration of the NFDD. They should be individuals from various independent entities with a broad spectrum of interests allied to forensic science, and in particular, to DNA profiling.

It was noted that the SAPS' FSL was currently not accredited to international guidelines, or ISO17025. Accreditation was an international standard that forensic laboratories employed as a minimum requirement to assure the quality of the work performed by that laboratory. It was also necessary for the laboratories to be audited annually, and for their procedures and management to be evaluated by an independent, external body. The FSL currently had its own internal quality management system in place, to which it ascribed the quality of its processes, and ultimately, the validity of its results. However, it was felt that the legislation should make provision for a transitioning of the laboratory towards accreditation, over a reasonable period of time, so that in future, forensic DNA testing would only be done by accredited laboratories. If the laboratory did not become accredited, then it was suggested that the only viable alternative was that it must be audited annually by an external and independent technical advisory committee.

The dominance of the SAPS of forensic services in South Africa was a major concern, as it had been regulating the environment to suit its own interests and agendas for many years. The fact that there were no significant independent non-SAPS forensic services available to the South African public indicated the serious lack of balance in providing assurance against prosecutorial bias.

Finally, it was noted that when this Bill was promulgated there would be a massive influx of reference samples to the laboratory as a result of samples that would need to be taken mandatory from arrestees, convicted persons, crime scene personnel, equipment vendors and the suppliers of consumables. The demand for processing of these samples would remain high. It was suggested that there would be a need for external parties to provide assistance in the processing of these samples, and provision should be made for this in the Bill.

Discussion

Mr George found that FDC's calls for the independence of the Board seemed to suggest the Bill was linked to the Ministry of the Police. He thought the inclusion of certain individuals, like the SAHRC and scientists, would make it more independent, but he questioned the points made about lack of bias on the prosecution side. He had

not been happy with Gen Jacob's earlier response to the question on constitutional limitations.

Ms Molebatsi was worried about some of the statements in the submission.

Mr Ndlovu asked what the vetting referred to, and questioned how accreditation was done and how far it was, saying it would be a serious omission if the laboratories were not accredited.

The Chairperson was concerned about the issue of missing persons and the expungement of criteria, and thought that perhaps something needed to be included on this point. In relation to expungement of records of those found not guilty, the Bill also should contain something specific on the obligations of the Department of Justice and Constitutional Development to inform SAPS, within a certain time after judgment was handed down, of the judgment, giving SAPS then a certain further time to effect the expungement. This would mean some of the responsibility would fall on the courts instead of resting solely with SAPS.

The Chairperson noted her concern that the present IT systems did not speak to each other.

The Chairperson asked if SAPS's forensic science records were still within Interpol. She commented that it was indeed a pity that these organisations were not present to give more insight, particularly on suggestions such as the appointment of the Board by the Minister of Justice and Constitutional Development. The Committee Members would need to apply their minds carefully to ensuring that the Board would be independent, but did not necessarily agree with those suggestions, since the prosecution services fell under that Ministry.

The Chairperson also questioned the accreditation of the laboratories, noting that she had been hearing about accreditation for the past five years.

Gen Jacobs responded that the issue of independence needed careful consideration and said that the involvement of other departments and the community on the Board was important also.

Gen Jacobs said he noted the comments made by the Committee on the matter of accreditation but he was not in the position to answer on this.

In relation to Interpol, he highlighted there was an investigative and a court process. SAPS was supposed to provide for investigative procedures preceding the actual evidence.

The Chairperson interjected, saying that he was not actually answering the question of whether the SAPS DNA database was on the Interpol Gateway. She felt it was important to understand the human rights implications around this exchange, and asked why provisions for exchange were inserted in the Bill if Interpol already had access to the databases. She found it frustrating that South Africans tended to bend backwards to assist others, but did not receive the same treatment in return. If the SAPS did not know the answer, it must be investigated and provided in the following week.

Gen Jacobs said he would consult with Interpol and come back to the Committee on this issue.

Ms Kohler-Barnard did not envisage having departments on the oversight Board at all, and thought more input from SAPS was needed on how it envisaged the composition of the Board.

The Chairperson said the Bill did set out whom the Department recommended for the Board, but it was up to the Committee to ensure that this was amended, if necessary, to achieve independence. It was clear that SAPS could never be a member of the board, as this would clearly impact on its independence, but it was equally clear that the number of members could not be indefinite.

Mr Ndlovu agreed that SAPS could not be a player and a referee at the same time.

Programme for the following week

The Chairperson said the next meeting would be held on the following Tuesday at 09h30. She noted that some Members would not arrive at the airport until later on that day, but said that it was not possible to postpone, in view of the amount of work to be completed. She noted that the Portfolio Committees on Justice and on Correctional Services would be involved in relation to the clauses impacting on the Criminal Procedure Act.

Mr Ndlovu requested Ms Van Zyl-Gous to summarise all the presentations.

The Chairperson said there was already a clause by clause summary by the Parliamentary Research Unit, but she had also noted issues that the Committee

wanted to highlight, and said that a one-page summary of these could be given to Members. She had also asked the State Law Advisers to note of them.

Mr Theo Hercules, State Law Advisor, Office of the Chief State Law Adviser, had noted the comments and issues flagged and would liaise with SAPS. He thought next week's meeting with the Justice Committee could be used to raise issues with the Criminal Procedure Act,

The Chairperson said she had a serious problem with the State Law Advisers deferring their work, and reminded them that she had asked for certain aspects to be dealt with: firstly, the alignment with the Protection of Personal Information legislation, secondly, alignment with the Fingerprint legislation. A report should be made on these before the Committee proceeded to clause-by-clause deliberations. The Committee had a strict programme to finalise, and she reminded Mr Hercules that since he had participated in the Study Tour, she expected serious input from him.

The meeting was adjourned.