



Human DNA Profiling Bill 2012 Analysis

(Working Draft version-29th April 2012)

Jeremy Gruber
Council for Responsible Genetics

Overview: India's updated 2012 Human DNA Profiling Bill offers largely superficial changes from its predecessor, the Draft DNA Profiling Bill 2007. Indeed, where there are significant departures from prior language, they tend to raise additional privacy and human rights concerns. Overall the current version of the Bill is littered with significant and striking human rights and privacy concerns and, if passed in its current form, would place India far outside the mainstream of both law and policy in this area. Beyond the privacy and human rights concerns that are addressed in this analysis of the Bill, the breadth of the structural and financial costs of enacting the Bill in its current form should also be seriously considered as they would most certainly be staggeringly high.

BILL ANALYSIS:

Introduction

The introduction of the Bill sets out the broad policy objectives of its drafters. The most telling portion in paragraph 1 states: "[DNA analysis] makes it possible to determine whether the source of origin of one body substance is identical to that of another, and further to establish the biological relationship, if any, between two individuals, living or dead *without any doubt*." (emphasis added). It is evident that the policy animating the Bill presupposes the objective infallibility of genetic analysis. This patent mistruth underpins the policy rationale for the Bill, and as such casts a long shadow over its substantive provisions. At the very least, it tells the reader (and perhaps one day the court) to broadly interpret the Bill's language to favor DNA analysis as the privileged solution to investigational and prosecutorial needs. This provision, and indeed the bill as a whole, ignores the occurrence of false matches, cross-contamination, laboratory error and other limitations of forensic DNA analysis.

The introduction goes on to state, truthfully, that "DNA analysis offers sensitive information which, if misused can cause harm to person or society." However this statement does not

acknowledge that DNA analysis often causes more harm when used as intended as part of unnecessarily expansive powers given to law enforcement authorities. Indeed this is further illustrated by language showing the legislative intent to draft a broad based bill that would govern the use of DNA in a variety of civil and criminal proceedings as well as for purposes to be determined at a later point.

Definitions (*Chapter II*)

A number of the Bill's definitions are overbroad, further expanding the scope of its later provisions. The "crime scene index" is defined to include "DNA profiles from forensic material found . . . on or within the body of any person, on anything, or at any place, associated with the commission of a specified offence." Chapter II(2)(iv). A "specified offence" is defined as any "offence listed in Part 1 of the Schedule [to the Bill]." Part 1 of the "Schedule," on page 56 of the Bill, includes in (A) "Offences under Indian Penal Code" without any specification. In the 2007 version of the bill, the language related to criminal offences was incredibly expansive but specified the various crimes covered inc. rape, "offences relating to dowry," defamation, and "unnatural offenses." (See 2007 Bill Schedule p. 34). The current Bill version dispenses with such identified crimes and seemingly expands the Schedule to create an "all crimes" database. The new Bill (Section B) further adds a variety of additional offences under special laws ranging from the Medical Termination of Pregnancy Act to the Motor Vehicles Act and empowers the Board to add any new law it wants to the Schedule. Section C of the Schedule identifies a wide variety of civil matters to be included in the Schedule including disputes related to paternity, pedigree, and organ transplantation. It adds additional civil categories not contemplated by prior versions of the Bill including issues related to assisted reproductive technologies, issues related to immigration/emigration and similar to Section B of the Schedule and in another significant departure from previous Bill versions, empowers the Board to include any other civil matter it chooses in the future. The Crime Scene Index also defines victim expansively to include a person "reasonably suspected of being a victim" (Section 2 ii). Taken together, the government is empowered to conduct genetic testing on almost anyone in any way connected with even minor infractions of the criminal law or involved in virtually any civil proceeding.

The definition of "offender" (Section 2y) is not limited to one with a criminal conviction but includes anyone even charged with an offense, thereby expanding coverage of the criminal provisions of the Bill to include individuals who have not yet been convicted of any crime.

The crucial term "suspect" (Section 2zi) is defined as anyone "suspected of having committed an offence." By intentionally leaving out the qualifier "specified," the drafters' intent is plain: to sweep within the Bill's breadth all persons suspected of any crime whatsoever even if there is insufficient probable cause for arrest. And, accordingly, the Bill defines the "suspects index" to include "DNA profiles derived from forensic material lawfully taken from suspects."

Furthermore the definitions include a category of persons entitled "volunteers," (Section 2 zo) defined as "a person who volunteers to undergo a DNA procedure and, in case of a child or incapable person, his parent or guardian having agreed..." There is no additional clarification as to how this category might be treated in practice but without any clear provisions for informed consent, it is highly unlikely that such participation will be truly voluntary; especially without

provisions for decision making subsequent to offering the sample such as future expungement from the system.

Taken together the definitions of victim, offender and suspect expand the reach of this Bill to a broad range of potentially innocent individuals involved in the criminal justice system, while the Schedule and definition of “volunteers” sweep a broad range of categories of innocent citizens into the purview of this Bill- including children and the mentally incapacitated-having nothing to do with the criminal justice system. There is simply no corollary in any other country to such expansive authority. The Bill places India far outside the mainstream of policy in this area and raises serious and far ranging human rights concerns

DNA Profiling Board (Chapter III)

The DNA Profiling Board (hereinafter “Board”) is responsible for administering and overseeing the Indian DNA database . Oversight is an important and valuable concept, however the value of such principles in this Bill are completely overshadowed by the expansive powers given to the Board.

The Bill lays out a number of fields from which the members are to be chosen inc. molecular biology, population biology, criminal justice and bioethics. There is no representation from civil society human rights organizations or the criminal defense bar to ensure that privacy, human rights and the general public interest are ensured. Furthermore the Chief Executive Office of the Board is to be a scientist and therefore unlikely to be familiar with criminal justice matters and evaluations of their efficacy. (Chapter III, Section 10)

The Board is given an almost limitless list of responsibilities including “recommendations for maximizing the use of DNA techniques and technologies (Section 10k) and identifying scientific advances that may assist law enforcement (Section 10L). Such powers are particularly concerning because the Bill does not include any privacy provisions whatsoever but rather invests in the Board the power to make “recommendations for privacy protection laws, regulations and practices relating to access to, or use of stored DNA samples or DNA analyses,” as well as “mak[ing] specific recommendations to . . . ensure the appropriate use and dissemination of DNA information [and] take any other necessary steps required to be taken to protect privacy.” (Section 10o and p). Furthermore the Board is given the responsibility of “deliberating and advising on all ethical and human rights issues emanating out of DNA profiling.” (Section 10t).

These provisions are in lieu of any substantive language limiting the scope of the legislation, and protecting privacy and human rights principles (which the bill otherwise lacks.) These are significant omissions. As expressed in the introduction, the stated purpose of the Bill is “to enhance protection of people in the society and [the] administration of justice.” Taken alone, this Bill actually expresses only the government’s interest in the legislation, suggesting an ambiguously wide scope for its provisions. Substantive concepts of individual privacy and human rights are required to counterbalance the interests of the government and provide

protections for the equally vital privacy and human rights interests of the individual. As such, limiting privacy and human rights principles should be included alongside the expression of the government's security interest. Without it, the Board will effectively have *carte blanche* with regard to what privacy and human rights protections are—or are not—adopted.

Also in a departure from previous versions of this Bill, this Bill expands the Board's powers to include areas of policy beyond the coverage of the Bill's other provisions including "intellectual property issues. (Section 10i)

Finally, as noted earlier in the discussion of the Schedule (and in a significant departure from previous versions of the Bill), the Board is given total control to expand every category of person to be included under the Bill. In a democratic system of government, such decisions should rest exclusively with the Parliament and therefore be subject to the checks and balances of government as well as the transparency necessary to ensure public participation. Leaving such decision making to an unelected body raises serious human rights concerns.

Approval of Laboratories (Chapter IV)

Sections 13 to 17 provide for the approval by the DNA Profiling Board of DNA laboratories that will process and analyze genetic material for eventual inclusion on the DNA database. Under Section 13, all laboratories must be approved in writing prior to processing or analyzing any genetic material. However, a conflicting provision appears in the next section, Section 14(2), which permits DNA laboratories in existence at the time the legislation is enacted to process or analyze DNA samples immediately, without first obtaining approval.

Either an oversight on the part of the drafters, or the product of overly-vague language, the result is that established genetic laboratories—including whatever genetic material or profiles they may already have for whatever reason—are in effect "grandfathered" into the system. The only review of these laboratories is the *post hoc* approval of the laboratory by the DNA profiling board. The potential for abuse and error that this conflict of provisions would be best addressed in keeping with the rule articulated in Section 13, i.e. correcting the language of Section 14(2) that allows for laboratories to be "grandfathered" into the system.

Standards, Obligations of DNA Laboratory (Chapter V)

Chapter V, which concerns the obligations of and the standards to be observed by approved DNA laboratories, lacks adequate administrative requirements. For example, Section 21 requires that labs ensure "adequate security" to minimize contamination without providing for accountability in the event of contamination. Similarly, Section 27 provides for audits of DNA laboratories only, withholding from similar scrutiny of the DNA Profiling Board itself. However, the greatest limitation of every Section of this Chapter is that rather than offering any specific substantive requirements, they instead offer categories requiring attention "as may be specified "

by the DNA Board. Any actual standard or obligation by a laboratory is set entirely by the DNA Board. Minimum standards must be set by law to ensure compliance.

Infrastructure and Training (*Chapter VI*)

Similar to Chapter V, this section offers no legislative benchmarks but rather categories of activities, with further regulation “as may be specified” by the Board. As noted earlier, there are serious concerns in using DNA analysis with regards to false matches, cross-contamination and laboratory error. Not taking such concerns seriously, and taking serious steps to minimize their occurrence, can lead to significant distrust of government and police authority when such incidents occur.

DNA Databank (*Chapter VII*)

In addition on one national DNA database, the Bill sanctions the several Indian states to maintain their own DNA databases, provided these state-level databases forward copies of their content to the national database. Section 32(3). Section 32(5) states that the indices should include records related thereto” the DNA analysis. (See also Section 35(b)) Such provisions allow for access to “the information” contained in the database, not simply “the DNA profiles” contained in the database. Without further clarification it would appear to authorize an unlimited amount of private information unrelated to identification to be included in the indices.

The national database is envisioned to comprise several sub-databases (Section 32(4)), each to contain the genetic information of a subset of persons/samples, namely: (a) unidentified crime scene samples, (b) samples taken from suspects, (c) samples taken from offenders inc. persons convicted or currently subject to prosecution for criminal offenses (d) samples associated with missing persons, (e) samples taken from unidentified bodies, (f) samples taken from “volunteers,” and finally (g) samples taken for reasons “as may be specified by regulations made by the Board. Section 33 (4) *et seq.* Putting to one side the breadth of persons subject to inclusion under subcategories (1) through (6), subsection (7) appears on its face to be a “catch all” provision, leaving one only to guess at the circumstances under which its specificities may be promulgated.

A close reading of Section 32(6) strongly suggests that the agency conducting the forensic analyses and populating the DNA database shall retain the actual DNA samples thereafter. This section reads in relevant part:

The “DNA Data Bank shall contain . . . the following information, namely: (a) in case of a profile in the offenders index, the identity of the person from whose body substance or body substances the profile was derived, and (b) in case of all other profiles, the case reference number of the investigation associated with the body substance or body substances from which the profile was derived.

Allowing retention of the biological sample, even after a profile has been created from it, in conjunction with the unlimited ability of the Board to create regulations for additional uses of that sample raises serious privacy and human rights concerns.

Moreover, rather than choosing to link the DNA profile data to a specific offender or case, the drafters of the Bill instead link the “body substance or body substances” with that specific offender or case. Whether sloppy drafting or clever nuance, this provision equates the DNA *profile* with the DNA *sample*, injecting unneeded—and potentially harmful—ambiguity into the proposed law.

Section 37 (1) allows for indefinite retention of information in the offenders index (which includes individuals charged with an offense but not convicted). This provision raises serious human rights concerns as it would appear to allow indefinite retention of profiles of individuals who have not been convicted of a crime. This directly conflicts with Section 37 (II) which allows for expungement when a certified copy of a court order stating that the individual in question has been acquitted. This provision also appears to conflict with Chapter VIII Section 43(b) which appears to allow indefinite retention of DNA of suspects even after they’ve been excluded from an investigation. Indeed no process or procedures for expungement and removal of records are in place for suspects generally who are never charged or for any of the other categories of indices that are present in the Bill, thereby raising serious question as to how and even whether such profiles can be removed from the Databank.

Confidentiality, Access to DNA Profiles, Samples, and Records (*Chapter VIII*)

Two further provisions regarding access to the database warrant close scrutiny. First, Sections 39 and 40 confers upon the Board the unlimited power to expand categories for which DNA profiles, samples and records can be used. Considering that the Bill (Section 40(e)) already questionably allows such records to be used for population research, these provisions raise serious questions as to the classes of potential use such private information might be subject.

Sections 40-42 purport to confer upon the police and other authorized individuals direct access to all of the information contained in the national DNA database. While administratively expedient, this arrangement opens up the possibility for misuse. A more prudent system would place the Board (or some administrative subordinate portion thereof) between the police and the content of the DNA database, with the latter having to make specific and particular requests to the former. This would minimize the risks inherent in the more expansive model of database access the bill currently envisions.

Section 45 related to post-conviction DNA testing has the laudable goal of offering “any individual undergoing a sentence of imprisonment or death pursuant to conviction for an offence, may apply to the court which convicted him for an order of DNA testing” in order to prove their innocence. However such an application lists eleven separate criteria that such an applicant must meet before qualifying, and allows a court total discretion in deciding whether all such criteria have been met. High barriers and absolute discretion make such testing highly unlikely and therefore make a provision seeming to offer human rights protections completely hollow.

Offences and Penalties (Chapter X)

This chapter lays out penalties for misuse of the Database. Most notably, the bill specifically excludes a private cause of action for the unlawful collection of DNA, or for the unlawful storage of private information on the national DNA database. A new provision in Section 58 does allow for an aggrieved person to petition the Central Government or Board if an instance of misuse is not being addressed but such provision does not contain any required processes such entities must follow in responding to such a petition, making an otherwise positive new provision relatively empty. Nor does the bill grant an individual right to review one's personal data contained on the database. Without these key features, there are limited checks against the unlawful collection, analysis, and storage of private genetic information on the database.

BEST PRACTICES ANALYSIS

Collection of DNA

With consent: only for a specific investigation (e.g. from a victim or for elimination purposes). Volunteers should not have information entered on a database	No provision
Without consent: only from persons suspected of a crime for which DNA evidence is directly relevant i.e. a crime scene sample exists or is likely to exist. Or, broader categories?	No provision
Requirement for an order by a court? Or allowed in other circumstances?	No provision
Samples collected by police officers, or only medical professionals? Must take place in a secure location i.e. not on the street etc.	No provision
Provision of information for all persons from whom DNA is taken	No provision
Crime scenes should be promptly examined if DNA evidence is likely to be relevant, and quality assurance procedures must protect against contamination of evidence	No provision; regulated at discretion of DNA Profiling Board

Analysis of DNA

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

Storage of DNA and linked data

Data from convicted persons should be separate from others e.g. missing persons' databases	Unclear.
Access to databases and samples must be restricted and there must be an independent and transparent system of governance, with regular information published e.g. annual reports, minutes of oversight meetings	Access to database at discretion of DNA Data Bank Manager
Personal identification information should not be sent with samples to laboratories	No provision; regulated at discretion of DNA Profiling Board
Any transfer of data e.g. from police station to lab or database, must be secure	No provision; regulated at discretion of DNA Profiling Board

Uses of samples and data

Research uses should be restricted to anonymised verification of database performance (e.g. checking false matches etc.). Third party access to data for such purposes should be allowed, provided public information on research projects is published. There should be an ethics board.	No provision
Research uses for other purposes e.g. health research, behavioral research should not be allowed.	No provision
Uses should be restricted by law to solving crimes or identifying dead	Ambiguous

bodies/body parts. Identification of a person is not an acceptable use. Missing persons databases (if they exist) should be separate from police databases	provisions suggest much wider scope
Familial searching should be restricted e.g. ordered by a court? Or not used? Or regulated for use in special cases?	No provision

Destruction of DNA and linked data

DNA samples should be destroyed once the DNA profiles needed for identification purposes have been obtained from them, allowing for sufficient time for quality assurance, e.g. six months	DNA samples are retained
An automatic removals process is required for deletion of data from innocent persons. This must take place within a reasonable time of acquittal etc.	No provision
There should be limits on retention of DNA profiles from persons convicted of minor crimes	No provision
There should be an appeals process against retention of data	No provision
Linked data on other databases (e.g. police record of arrest, fingerprints) should be deleted at the same time as DNA database records	No provision
Crime scene DNA evidence should be retained for as long as a reinvestigation might be needed (including to address miscarriages of justice)	DNA evidence permitted to be retained indefinitely

Use in court

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

Other

Relevant safeguards must be proscribed by law and there should be appropriate penalties for abuse	No provision
Impacts on children and other vulnerable persons (e.g. mentally ill) must be considered	No provision
Potential for racial bias must be minimized	No provision