Overview and Concerns Regarding the Indian Draft DNA Profiling Act

Council for Responsible Genetics

I. Background

The Indian Code of Criminal Procedure was amended in 2005 to enable the collection of a host of medical details from accused persons upon their arrest. Section 53 of the CrPC provides that upon arrest, an accused person may be subjected to a medical examination if there are "reasonable grounds for believing" that such examination will afford evidence as to the crime. The scope of this examination was expanded in 2005 to include "the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case."

In *Thogorani Alias K. Damayanti v. State of Orissa and Ors*, 2004 Cri. LJ 4003 (Ori), the Orissa High Court affirmed the legality of ordering a DNA test in criminal cases to ascertain the involvement of persons accused. Refusal to cooperate would result in an adverse inference drawn against the accused.

After weighing the privacy concerns involved, the court laid down the following considerations as relevant before the DNA test could be ordered: "(i) the extent to which the accused may have participated in the commission of the crime; (ii) the gravity of the offence and the circumstances in which it is committed; (iii) age, physical and mental health of the accused to the extent they are known; (iv) whether there are less intrusive and practical ways of collecting evidence tending to confirm or disprove the involvement of the accused in the crime; (v) the reasons, if any, for the accused for refusing consent." *Id.*

In brief, the 2007 draft DNA Profiling Bill (hereinafter "Bill") pending before parliament attempts to create an ambitious centralized DNA bank that would store DNA records of virtually anyone who comes within any proximity to the criminal justice system. Specifically, records are maintained of suspects, offenders, missing persons and "volunteers." The schedule to the Bill

contains an expansive list of both civil and criminal cases where DNA data can be collected including cases of abortion, paternity suits and organ transplant. In all fairness, the Bill contains provisions limiting access to and use of information contained in the database, and provides for the deletion of a person's DNA profile upon their acquittal.

II. 2007 Draft DNA Profiling Bill

A. Preamble (§ 1)

Section 1 of the Bill sets out the broad policy objectives of its drafters. The most telling portion of § 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*." Bill, § 1 (emphasis added). Although it later makes mention of potential harms resulting from governmental misuse of genetic information technology, 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.

B. Definitions (§ 2)

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." *Id.*, § 2(1)(vii) *et seq.* A "specified offence" is defined as any of a number of more serious crimes, "or any other offence specified in the Schedule [to the Bill]." The so-called "Schedule," tucked neatly on page 34 of the Bill's 35 pages, lists a hodge-podge of various crimes from rape, to "offences relating to dowry," defamation, and "unnatural

offenses."[1] 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.

Furthermore, the crucial term "suspect" is defined as anyone "suspected of having committed an offence." *Id.*, § 2(1)(xxxvi). 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. And, accordingly, the Bill defines the "suspects index" to include "DNA profiles derived from forensic material lawfully taken from suspects." *Id.*, § 2(1)(xxxvix). It is hard to imagine anybody of subsequent regulation that could adequately circumscribe this manifest affront to personal privacy and bodily integrity.

C. DNA Profiling Board (§§3 to 13)

The DNA Profiling Board (hereinafter "Board") is responsible for administering and overseeing the Indian DNA database. §3 *et seq.* Among its several enumerated powers, the Board is charged with "recommend[ing] privacy protection statutes, 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 require to be taken to protect privacy." §13(1)(xv) to (xvi). This provision is in lieu of any substantive principle limiting the scope of the legislation, which the bill otherwise lacks.

This is a significant omission. As expressed in the preamble, the stated purpose of the Bill is "to enhance protection of people in the society and [the] administration of justice." §1. Taken alone, this expresses only the government's interest in the legislation, suggesting an ambiguously wide scope for its provisions. A substantive concept of individual privacy is required to counterbalance the interests of the government and provide protections for the equally vital privacy interests of the individual. As such, a limiting privacy principle should be included alongside the expressing in §1 of the government's security interest. Without it, the Board will effectively have *carte blanche* with regard to what privacy protections are—or are not—adopted.

[1] No examples are given as to which unnatural offences are intended, leaving the reader wondering. Perhaps a DNA test of witchcraft?

D. Approval of Laboratories (§§14 to 18)

Sections 14 to 18 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 §14, all laboratories must be approved in writing prior to processing or analyzing any genetic material. However, a conflicting provision appears in the next section, §15(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.[2]

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 §14, i.e. correcting the language of §15(2) that allows for laboratories to be "grandfathered" into the system.

E. Standards, Obligations of DNA Laboratory (§§19 to 28)

Chapter V, which concerns the obligations of and the standards to be observed by approved DNA laboratories, lacks adequate administrative provisions. For example, §22 requires that labs ensure "adequate security" to minimize contamination without providing for accountability in the event of contamination. Similarly, §28 provides for audits of DNA laboratories only, withholding from similar scrutiny of the DNA Profiling Board itself.

F. National DNA Database (§§33 to 37)

[2] Section 15(2) does mandate that such laboratories petition the DNA Profiling Board for approval within six months after the legislation is enacted.

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. *Id.*, § 33(3). The national database is envisioned to comprise several sub-databases, each to contain the genetic information of a subset of persons/samples, namely: (1) unidentified crime scene samples, (2) samples taken from suspects, (3) samples taken from persons convicted or currently subject to prosecution for "subject offences," (4) samples associated with missing persons, (5) samples taken from unidentified bodies, (6) samples taken from "volunteers,"[3] and finally (7) samples taken for reasons "as may be specified by regulations. *Id.*, § 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. *Id.*

A close reading of § 33(6) strongly suggests that the agency[4] conducting the forensic analyses and populating the DNA database shall retain the DNA samples thereafter. This section reads in relevant part:

> The DNA Data Bank shall contain . . . the following information, namely: (i) in the 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 (ii) 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. *Id.*, § 33(6).

Rather than choose to link the DNA profile data to a specific offender or case, the drafters of the Bill instead like the "body substance or body substances" with that specific offender or case. Whether sloppy drafting or clever nuance, this provision elides the DNA *profile* with the DNA *sample*, injecting unneeded—and potentially harmful—ambiguity into the proposed law.

G. Confidentiality, Access to DNA Profiles, Samples, and Records (§§ 38-44)

[3] Per § (2)(1)(xxxxiii) of the Definitions, a "volunteer" is "a person who volunteers to undergo a DNA procedure." The definition does not require that the "volunteer" be informed of the nature, purpose, or possible consequences of his generosity; nor is any such requirement specified elsewhere in the Bill.

[4] Or, as is laid out in great detail in §§ 14-32, at the privately-contracted forensics laboratory.

Further compounding this ambiguity, § 36 entitled "Access to Information" opens the door to much more than DNA profiles alone being kept on the government database. In all three of its subsections it purports to govern access to "the information" contained in the database, not "the DNA profiles" contained in the database. *Id.*, § 36(1) *et seq.* Subsection 2 employs even broader language, covering "the information in the offenders' index pertaining to a convict." Id. Taken at face value, this provision of the Bill suggests that any and all sort of "information . . . pertaining to a convict" that might be derived from his or her DNA can be stored on the database. Even if prudential oversight provisions elsewhere in the Bill suggests a tightly-controlled techno-forensic apparatus, the overbroad construction of provisions such as §§ 33 and 36 raise significant questions about the wisdom of enacting the text in this form.

Two further provisions regarding access to the database warrant close scrutiny. First, §§ 39 and 40 purport to confer upon the police 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.

Second, and more concerning, § 41 permits the Data Bank Manager to grant access to the database to "any person or class of persons that the Data Bank Manager considers appropriate." This is a sweeping provision. It vests in one individual the ability to permit almost anyone access to the DNA database—without administrative review or oversight of any kind. Taken together with the general lack of administrative safeguards in the bill, § 41 again places the government's interest in investigating crime far above individual privacy rights.

III. Omissions

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. Nor does the bill grant an individual right to review one's personal data contained on the database. Without these two key features, there is effectively no check against the unlawful collection, analysis, and storage of private genetic information on the database.

IV. 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 minimise	No provision; regulated at discretion of DNA

false matches occurring by chance. This must take account of increased likelihood of false matches in transboundary searches, and with relatives.	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, behavioural research should not be allowed.	No provision
Uses should be restricted by law to solving crimes or identifying dead bodies/body parts. Identification of a person is not an acceptable use. Missing persons databases (if they exist) should be separate from	Ambiguous provisions suggest much wider scope

police databases	
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 reanalysed as a check	No provision
Individuals must have a right to obtain re-analysis of crime scene forensic evidence in the event of appeal	No provision

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 minimised	No provision