

The Centre for Internet and Society comments and recommendations to the
THE HUMAN DNA PROFILING BILL, June 2015

The Centre for Internet and Society is a non-profit research organisation that works on policy issues relating to privacy, freedom of expression, accessibility for persons with diverse abilities, access to knowledge, intellectual property rights and openness. It engages in academic research to explore and affect the shape and form of Internet, along with its relationship with the Society, with particular emphasis on South-South dialogues and exchange. The Centre for Internet and Society was also a member of the Expert Committee which was constituted in the year 2013 by the Department of Biotechnology to discuss the draft Human DNA Profiling Bill.

Missing aspects from the Bill

The Human DNA Profiling Bill, 2015 has overlooked and has not touched upon the following crucial factors :

- Objects Clause

An ‘objects clause,’ detailing the intention of the legislature and containing principles to inform the application of a statute, in the main body of the statute is an enforceable mechanism to give directions to a statute and can be a formidable primary aid in statutory interpretation. [See, for example, section 83 of the Patents Act, 1970 that directly informed the Order of the Controller of Patents, Mumbai, in the matter of NATCO Pharma and Bayer Corporation in Compulsory Licence Application No. 1 of 2011.] Therefore, the Bill should incorporate an objects clause that makes clear that

“DNA profiles merely estimate the identity of persons, they do not conclusively establish unique identity, therefore forensic DNA profiling should only have probative value and not be considered as conclusive proof.

The Act recognises that all individuals have a right to privacy that must be continuously weighed against efforts to collect and retain DNA and in order to protect this right to privacy the principles of notice, confidentiality, collection limitation, personal autonomy, purpose limitation and data minimization must be adhered to at all times.”

- Collection and Consent

The Bill does not contain provisions regarding instances when the DNA samples can be collected from the individuals without consent (nor does the Bill establish or refer to an authorization procedure for such collection), when DNA samples can be collected from individuals only with informed consent, and how and in what instances individuals can withdraw their consent. The issue of whether DNA samples can be collected without the consent of the individual is a vexed one and requires complex questions relating to individual privacy as well as the right against self incrimination. While the question of whether an accused can be made to give samples of blood, semen, etc. which had been in issue in a wide gamut of decisions in India has finally been settled by section 53 of the Code of Criminal Procedure, which allows collection of medical evidence from an accused, thus laying to rest any claims based on the right against self incrimination. However there are still issues dealing with the right to privacy and the violation thereof due to the non-consensual collection of DNA samples. This is an issue which needs to be addressed in this Act itself and should not be left unaddressed as this would only lead to a lack of clarity and protracted court cases to determine this issue. An illustration of this problem is where the Bill allows for collection of intimate body samples. There is a need for inclusion of stringent safeguard measures regarding the same since without such safeguards, the collection of intimate body samples would be an outright infringement of privacy. Further, maintaining a database for convicts and suspects is one thing, however

collecting and storing intimate samples of individuals is a gross violation of the citizens' right to privacy, and without adequate mechanisms regarding consent and security, stands at a huge risk of being misused.

- Privacy Safeguards

Presently, the Bill is being introduced without comprehensive privacy safeguards in place on issues such as consent, collection, retention, etc. as is evident from the comments made below. Though the DNA Board is given the responsibility of recommending best practices pertaining to privacy (clause 13 (l)) – this is not adequate given the fact that India does not have a comprehensive privacy legislation. Though section 43A and associated Rules of the Information Technology Act would apply to the collection, use, and sharing of DNA data by DNA laboratories (as they would fall under the definition of 'body corporate' under the IT Act), the National and State Data Banks and the DNA Board would not clearly be body corporate as per the IT Act and would not fall under the ambit of the provision or Rules. Safeguards are needed to protect against the invasion of informational privacy and physical privacy at the level of these State controlled bodies. The fact that the Bill is to be introduced into Parliament prior to the enactment of a privacy legislation in India is significant as according to discussions in the Record Notes of the 4th Meeting of the Expert Committee - *"the Expert Committee also discussed and emphasized that the Privacy Bill is being piloted by the Government. That Bill will override all the other provisions on privacy issues in the DNA Bill."*

- Lack of restriction on type of analysis to be performed

The Bill currently does not provide any restriction on the types of analysis that can be performed on a DNA sample or profile. This could allow for DNA samples to be analyzed for purposes beyond basic identification of an individual – such as for health, genetic, or racial purposes. As a form of purpose limitation the Bill should define narrowly the types of analysis that can be performed on a DNA sample.

- Purpose Limitation

The Bill does not explicitly restrict the use of a DNA sample or DNA profile to the purpose it was originally collected and created for. This could allow for the re-use of samples and profiles for unintended purposes.

- Annual Public Reporting

The Bill does not require the DNA Board to disclose publicly available information on an annual basis regarding the functioning and financial aspects of matters contained within the Bill. Such disclosure is crucial in ensuring that the public is able to make informed decisions. Categories that could be included in such reports include: Number of DNA profiles added to each indice within the databank, total number of DNA profiles contained in the database, number of DNA profiles deleted from the database, the number of matches between crime scene DNA profiles and DNA profiles, the number of cases in which DNA profiles were used in and the percentage in which DNA profiles assisted in the final conclusion of the case, and the number and categories of DNA profiles shared with international entities.

- Elimination Indice

An elimination indice containing the profiles of medical professionals, police, laboratory personnel etc. working on a case is necessary in case they contaminate collected samples by accident.

Clause by Clause Recommendations

As stated the Human DNA Profiling Bill 2015 is to *regulate the use of DNA analysis of human body substances profiles and to establish the DNA Profiling Board for laying down the standards for laboratories, collection of human body substances, custody trail from collection to reporting and also to establish a National DNA Data Bank.*

Comment:

- As stated, the purpose of the DNA Human Profiling Bill is to broadly regulate the of DNA analysis and establish a DNA Data Bank. Despite this, the majority of provisions in the Bill pertain to the collection, use, access etc. of DNA samples and profiles for civil and criminal purposes. The result of this is an 'unbalanced Bill' - with the majority of provisions focusing on issues related to forensic use. At the same time the Bill is not a comprehensive forensic bill – resulting in legislative gaps.
- Additionally, the Bill contains provisions beyond the stated purpose. These include:
 - Facilitating the creation of a Data Bank for statistical purposes (Clause 33(e))
 - Establishing state and regional level databanks in addition to a national level databank (Clause 24)
 - Developing procedure and providing for the international sharing of DNA profiles with foreign Governments, organizations, institutions, or agencies. (Clause 29)

Recommendation:

- The Bill should ideally be limited to regulating the use of DNA samples and profiles for criminal purposes. If the scope remains broad, all purposes should be equally and comprehensively regulated.
- The stated purpose of the Bill should address all aspects of the Bill. Provisions beyond the scope of the Bill should be removed.

Chapter 1: Preliminary

- **Clause 2:** This clause defines the terms used in the Bill.
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- **Comment:** A number of terms are incomplete and some terms used in the Bill

have not been included in the list of definitions.

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- **Recommendation:**

- The definition of DNA Data bank manager - clause 2 (1)(g) - must be renamed as National DNA Data bank manager.
- The definition of “DNA laboratory” in clause 2(1)(h) should refer to the specific clauses that empower the Central Government and State Governments to license and recognise DNA laboratories. This is a drafting error.
- The definition of “DNA profile” in clause 2(1)(i) is too vague. Merely the results of an analysis of a DNA sample may not be sufficient to create an actual DNA profile. Further, the results of the analysis may yield DNA information that, because of incompleteness or lack of information, is inconclusive. These incomplete bits of information should not be recognised as DNA profiles. This definition should be amended to clearly specify the contents of a complete and valid DNA profile that contains, at least, numerical representations of 17 or more loci of short tandem repeats that are sufficient to estimate biometric individuality of a person. The definition of “DNA profile” does not restrict the analysis to forensic DNA profiles: this means additional information, such as health-related information could be analyzed and stored against the wishes of the individual, even though such information plays no role in solving crimes.
- The term “known sample” that is defined in clause 2(1)(m) is not used anywhere outside the definitions clause and should be removed.
- The definition of “offender” in clause 2(1)(q) is vague because it does not specify the offenses for which an “offender” needs to be convicted. It is also linked to an unclear definition of the term “under trial”, which does not specify the nature of pending criminal proceedings and, therefore, could be used to describe simple offenses such as, for example, failure to pay an electricity bill, which also attracts criminal penalties.

- The term “proficiency testing” that is defined in clause 2(1)(t) is not used anywhere in the text of the DNA Bill and should be removed.
- The definitions of “quality assurance”, “quality manual” and “quality system” serve no enforceable purpose since they are used only in relation to the DNA Profiling Board’s rule making powers under Chapter IX, clause 58. Their inclusion in the definitions clause is redundant. Accordingly, these definitions should be removed.
- The term “suspect” defined in clause 2(1)(za) is vague and imprecise. The standard by which suspicion is to be measured, and by whom suspicion may be entertained – whether police or others, has not been specified. The term “suspect” is not defined in either the Code of Criminal Procedure, 1973 ("CrPC") or the Indian Penal Code, 1860 ("IPC").
- The term volunteer defined in clause 2(zf) only addresses consent from the parent or guardian of a child or an incapable person. This term should be amended to include informed consent from any volunteer.

Chapter II: DNA Profiling Board

- **Clause 4:** This clause addresses the composition of the DNA Profiling Board.

Comment: The size and composition of the Board that is staffed under clause 4 is extremely large. The number of members remains to be 15, as it was in the 2012 Bill.

Recommendation: Drawing from the experiences of other administrative and regulatory bodies in India, the size of the Board should be reduced to no more than five members. The Board must contain at least:

- One ex-Judge or senior lawyer
- Civil society – both institutional and non-institutional
- Privacy advocates

Note: The reduction of the size of the Board was agreed upon by the Expert Committee from 16 members (2012 Bill) to 11 members. This recommendation has not been incorporated.

- **Clause 5(1):** The clause specifies the term of the Chairperson of the DNA Profiling Board to be five years and also states that the person shall not be eligible for re-appointment or extension of the term so specified.

Comment: The Chairperson of the Board, who is first mentioned in clause 5(1), has not been duly and properly appointed.

Recommendation: Clause 4 should be amended to mention the appointment of the Chairperson and other Members.

- **Clause 7:** The clause requires members to react on a case-by-case basis to the business of the Board by excusing themselves from deliberations and voting where necessary.

Comment: This clause addresses the issue of conflict of interest only in narrow cases and does not provide penalty if a member fails to adhere to the laid out procedure.

Recommendation: The Bill should require members to make full and public disclosures of their real and potential conflicts of interest and the Chairperson must have the power to prevent such members from voting on interested matters. Failure to follow such anti-collusion and anti-corruption safeguards should attract criminal penalties.

- **Clause 12(5):** The clause states that the board shall have the power to co-opt such number of persons as it may deem necessary to attend the meetings of the Board and take part in the proceedings of the board, but such persons will not have the right to vote.

Comment: While serving on the Expert Committee, CIS provided language regarding how the Board could consult with the public. This language has not

been fully incorporated.

Recommendation: As per the recommendation of CIS, the following language should be adopted in the Bill: *The Board, in carrying out its functions and activities, shall be required to consult with all persons and groups of persons whose rights and related interests may be affected or impacted by any DNA collection, storage, or profiling activity. The Board shall, while considering any matter under its purview, co-opt or include any person, group of persons, or organisation, in its meetings and activities if it is satisfied that that person, group of persons, or organisation, has a substantial interest in the matter and that it is necessary in the public interest to allow such participation. The Board shall, while consulting or co-opting persons, ensure that meetings, workshops, and events are conducted at different places in India to ensure equal regional participation and activities.*

- **Clause 13:** The clause lays down the functions to be performed by the DNA Profiling Board, which includes its role in regulation of the DNA Data Banks, DNA Laboratories and techniques to be adopted for collection of the DNA samples.

Comment: While serving on the Expert Committee, CIS recommended that the functions of the DNA Profiling Board should be limited to licensing, developing standards and norms, safeguarding privacy and other rights, ensuring public transparency, promoting information and debate and a few other limited functions necessary for a regulatory authority.

Furthermore, this clause delegates a number of functions to the Board that places the Board in the role of a manager and regulator for issues pertaining to DNA Profiling including functions of the DNA Databases, DNA Laboratories, ethical concerns, privacy concerns etc.

Recommendation: As per CIS's recommendations the functions of the Board should be limited to licensing, developing standards and norms, safeguarding

privacy and other rights, ensuring public transparency, promoting information and debate and a few other limited functions necessary for a regulatory authority.

Towards this, the Board should be comprised of separate Committees to address these different functions. At the minimum, there should be a Committee addressing regulatory issues pertaining to the functioning of Data Banks and Laboratories and an Ethics Committee to provide independent scrutiny of ethical issues. Additionally:

- Clause 13(j) allows the Board to disseminate best practices concerning the collection and analysis of DNA samples to ensure quality and consistency. The process for collection of DNA samples and analysis should be established in the Bill itself or by regulations. Best practices are not enforceable and do not formalize a procedure.
- Clause 13(q) allows the Board to establish procedure for cooperation in criminal investigation between various investigation agencies within the country and with international agencies. This procedure, at the minimum, should be subject to oversight by the Ministry of External Affairs.

Chapter III: Approval of DNA Laboratories

- **Clause 15:** This clause states that every DNA Laboratory has to make an application before the Board for the purpose of undertaking DNA profiling and also for renewal.

Comment: Though the Bill requires DNA Laboratories to make an application for the undertaking DNA Profiling, it does not clarify that the Lab must receive approval before collection and analysis of DNA samples and profiles.

Recommendation: The Bill should clarify that all DNA Laboratories must receive approval for functioning prior to the collection or analysis of any DNA samples and profiles.

Chapter IV: Standards, Quality Control and Quality Assurance Obligations of DNA Laboratory and Infrastructure and Training

- **Clause 19:** This clause defines the obligations of a DNA laboratory. Sub-section (d) maintains that one such obligation is the sharing of the 'DNA data' prepared and maintained by the laboratory with the State DNA Data Bank and the National DNA Data Bank.

Comment: 'DNA Data' is a new term that has not been defined under Clause 2 of the Bill. It is thus unclear what data would be shared between State DNA data banks and the National DNA data bank - DNA samples? DNA profiles? associated records? It is also unclear in what manner and on what basis the information would be shared.

Recommendation: The term 'DNA Data' should be defined to clarify what information will be shared between State and National DNA Data Banks. The flow of and access to data between the State DNA Data Bank and National DNA Data Bank should also be established in the Bill.

- **Clause 22:** The clause lays down the measures to be adopted by a DNA Laboratory and 22(h) includes a provision requiring the conducting of annual audits according to prescribed standards.

Comment:

- The definition of "audit" under Chapter VI in clause 22 under 'Explanation' is relevant for measuring the training programmes and laboratory conditions. However, the term "audit" is subsequently used in an entirely different manner in Chapter VII which relates to financial information and transparency.
- The standards for the destruction of DNA samples have not been included within

the list of measures that DNA laboratories must take.

Recommendation:

- The definition of ‘audit’ must be amended or removed as it is being used in different contexts. The term “audit” has a well established use for financial information that does not require a definition.
- Standards for the destruction of DNA samples should be developed and included as a measure DNA laboratories must take.
- **Clause 23:** This clause lays down the sources for collection of samples for the purpose of DNA profiling. 23(1)(a) includes collection from bodily substances and 23(1)(c) includes clothing and other objects. Explanation (b) provides a definition of 'intimate body sample'.

Comment:

- Permitting the collection of DNA samples from bodily substances and clothing and other objects allows for the broad collection of DNA samples without contextualizing such collection. In contrast 23(b) *Scene of occurrence or scene of crime* limits the collection of samples to a specific context.
- This clause also raises the issue of consent and invasion of privacy of an individual. If “intimate body samples” are to be taken of individuals, then this would be an invasion of the person’s right to bodily privacy if such collection is done without the person’s consent (except in the specific instance when it is done in pursuance of section 53 of the Criminal Procedure Code).

Recommendation:

- Sources for the collection of DNA samples should be contextualized to prevent broad, unaccounted for, or unregulated collection. Clause (a) and (c) should be deleted and replaced with contexts in which the collection DNA collection would be permitted.

- The Bill should specify circumstances on which non-intimate samples can be collected and the process for the same.
- The Bill should specify that intimate body samples can only be taken with informed consent except as per section 53 of the Criminal Procedure Code.
- The Bill should require that any individual that has a sample taken (intimate and non-intimate) is provided with notice of their rights and the future uses of their DNA sample and profile.

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Chapter V: DNA Data Bank

- **Clause 24:** This clause addresses establishment of DNA Data Banks at the State and National Level. 24(5) establishes that the National DNA Data Bank will receive data from State DNA Data Banks and store the approved DNA Profiles as per regulations.

Comment:

- As noted previously, 'DNA Data' is a new term that has not been defined in the Bill. It is thus unclear what data would be shared between State DNA data banks and the National DNA data bank - DNA samples? DNA profiles? associated records?
- The process for sharing Data between the State and National Data Banks is not defined.

Recommendation:

- The term 'DNA Data' should be defined to clarify what information will be shared between State and National DNA Data Banks.
- The process for the National DNA Data Bank receiving DNA data from State DNA Data Banks and DNA laboratories needs to be defined in the Bill or by regulation. This includes specifying how frequently information will be shared etc.

- **Clause 25:** This clause establishes standards for the maintenance of indices by DNA databanks. 25(1) states that every DNA Data Bank needs to maintain the prescribed indices for various categories of data including an index for a crime scene, suspects, offenders, missing persons, unknown deceased persons, volunteers, and other indices as may be specified by regulation. **25(2)** states that in addition to the indices, the DNA Data Bank should contain information regarding each of the DNA profiles. It can either be the identity of the person from whose bodily substance the profile was derived in case of a suspect or an offender, or the case reference number of the investigation associated with such bodily substances in other cases. **25(3)** states that the indices maintained shall include information regarding the data which is based on the DNA profiling and the relevant records.

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Comment:

- 25(1): The creation of multiple indices cannot be justified and must be limited since collection of biological source material is an invasion of privacy that must be conducted only in strict conditions when the potential harm to individuals is outweighed by the public good. This balance may only be struck when dealing with the collection and profiling of samples from certain categories of offenders. The implications of collecting and profiling DNA samples from corpses, suspects, missing persons and others are vast. Specifically a 'volunteer' index could possibly be used for racial/community/religious profiling.
- 25(2): This clause requires the names of individuals to be connected to their profiles, and hence accessible to persons having access to the databank.
- 25(3) The clause states that only information related to DNA profiling and will be stored in an indice. Yet, it is unclear what such information might be. This could allow inconsistencies in data stored in an indice and could allow for unnecessary

information to be stored on an indice.

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Recommendation:

- **25(1)** Ideally, DNA databanks should be created for dedicated purposes. This would mean that a databank for forensic purposes should contain only an offenders' index and a crime scene index while a databank for missing persons would contain only a missing persons indice etc. If numerous indices are going to be contained in one databank, the Bill needs to recognize the sensitivity of each indice as well as the difference between each indice and lay down appropriate and strict conditions for collection of data for such indice, addition of data into the indice, as well as use, access, and retention of data within the indice.
- **25(2)** DNA profiles, once developed, should be maintained with complete anonymity and retained separate from the names of their owners. This amendment becomes even more important if we consider the fact that an "offender" may be convicted by a lower court and have his profile included in the data bank, but may get acquitted later. However, till the time that such person is acquitted, his/her profile with the identifying information would still be in the data bank, which is an invasion of privacy.
- **25(3)** What information will be stored in indices should be clearly defined in the Bill and should be tailored appropriately to each category of indice.
- **Clause 28:** This clause addresses the comparison and communication of DNA profiles. 28(1) states that the DNA profile entered in the offenders or crime scene index shall be compared by the DNA Data Bank Manger against profiles contained in the DNA Data Bank and the DNA Data Bank Manager will communicate such information with any court, tribunal, law enforcement agency,

or approved DNA laboratory which he may consider appropriate for the purpose of investigation. 28(2) allows for any information relating to a person's DNA profile contained in the suspect's index or offenders' index to be communicated to authorised persons.

Comment:

- 28(1) (a-c) allows for the DNA Bank Manager to communicate the following: 1.) if the DNA profile is not contained in the Data Bank and what information is not contained, 2.) if the DNA profile is contained in the data bank and what information is contained, and if in the opinion of the Manager, 3.) the DNA profile is similar to one stored in the Databank. These options of communication are problematic as they 1. allow for all associated information to be communicated – even if such information is not necessary, 2.) Allows for the DNA Databank Manager to communicate that a profile is 'similar' without defining what 'similar' would constitute.
- 28(1) only addresses the comparison of DNA profiles entered into the offenders index or the crime scene index against all other profiles entered into the DNA Data Bank.
- 28(1) gives the DNA Data Bank manager broad discretion in determining if information should be communicated and requires no accountability for such a decision.
- 28(2) only addresses information in the suspect's and offender's index and does not address information in any other index.

Recommendation:

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- Rather than allowing for broad searches across the entire database, the Bill should be clear about which profiles can be compared against which indices. Such distinctions must take into consideration if a profile was taken on consent and what was consented to.

- Ideally, the response from the DNA Databank Manager should be limited to a 'yes' or 'no' response and only further information should be revealed on receipt of a court order.
- The Bill should define what constitutes 'similar'
- A process for determining if information should be communicated should be established in the Bill and followed by the DNA Data Bank Manager. The Manager should also be held accountable through oversight mechanisms for such decisions. This is particularly important, as a DNA laboratory would be a private body.
- Information stored in any index should be disclosed to only authorized parties.
- **Clause 29:** This clause provides for comparison and sharing of DNA profiles with foreign Government, organisations, institutions or agencies. 29(1) allows the DNA Bank Manager to run a comparison of the received profile against all indices in the databank and communicate specified responses through the Central Bureau of Investigation.
- **Comment:** This clause allows for international disclosures of DNA profiles of Indians through a procedure that is to be established by the Board (see clause 13(q))
- **Recommendation:** The disclosure of DNA profiles of Indians with international entities should be done via the MLAT process as it is the typical process followed when sharing information with international entities for law enforcement purposes.
- **Clause 30:** This clause provides for the permanent retention of information pertaining to a convict in the offenders' index and the expunging of such information in case of a court order establishing acquittal of a person, or the

conviction being set aside.

Comment: This clause addresses only the retention and expunging of records of a convict stored in the offenders index upon the receipt of a court order or the conviction being set aside. This implies that records in all other indices - including volunteers - can be retained permanently. This clause also does not address situations where an individuals DNA profile is added to the databank, but the case never goes to court.

Recommendation: The Bill should establish retention standards and deletion standards for each indice that it creates. Furthermore, the Bill should require the immediate destruction of DNA samples once a DNA profile for identification purposes has been created. An exception to this should be the destruction of samples stored in the crime scene index.

Chapter VI: Confidentiality of and Access to DNA Profiles, Samples, and Records

- **Clause 33:** This provision lays down the cases and the persons to which information pertaining to DNA profiles, samples and records stored in the DNA Data Bank shall be made available. Specifically, 33(e) permits disclosure for the creation and maintenance of a population statistics Data Bank.

Comment:

- This clause addresses disclosure of information in the DNA Data Bank, but does not directly address the use of DNA samples or DNA profiles. This allows for the possibility of re-use of samples and profiles.
- There is no limitation on the information that can be disclosed. The clause allows for any information stored in the Data Bank to be disclosed for a number of circumstances/to a variety of people.

- There is no authorization process for the disclosure of such information. Of the circumstances listed – an authorization process is mentioned only for the disclosure of information in the case of investigations relating to civil disputes or other civil matters with the concurrence of the court. This implies that there is no procedure for authorizing the disclosure of information for identification purposes in criminal cases, in judicial proceedings, for facilitating prosecution and adjudication of criminal cases, for the purpose of taking defence by an accused in a criminal case, and for the creation and maintenance of a population statistics Data Bank.

Recommendation:

- The Bill should establish an authorization process for the disclosure of information stored in a data bank. This process must limit the disclosure of information to what is necessary and proportionate for achieving the requested purpose.
- Clause 33(e) should be deleted as the non-consensual disclosure of DNA profiles for the study of population genetics is specifically illegal. The use of the database for statistical purposes should be limited to purposes pertaining to understanding effectiveness of the databank.
- Clause 33(f) should be deleted as it is not necessary for DNA profiles to be stored in a database to be useful for civil purposes. Instead samples for civil purposes are only needed as per the relevant case and specified persons.
- Clause 33(g) should be deleted as it allows for the scope of cases in which DNA can be disclosed to be expanded as prescribed.
- **Clause 34:** This clause allows for access to information for operation maintenance and training.
- **Comment:** This clause would allow individuals in training access to data stored

on the database for training purposes. This places the security of the databank and the data stored in the databank at risk.

- **Recommendation:** Training of individuals should be conducted via simulation only.
- **Clause 35:** This clause allows for access to information in the DNA Data Bank for the purpose of a one time keyboard search. A one time keyboard search allows for information from a DNA sample to be compared with information in the index without the information from the DNA sample being included in the index. The clause allows for an authorized individual to carry out such a search on information obtained from a DNA sample lawfully collected for the purpose of criminal investigation, except if the DNA sample was submitted for elimination purposes.
- **Comment:** The purpose of this clause is unclear as is the scope. The clause allows for the sample to be compared against 'the index' without specifying which index. The clause also allows for 'information obtained from a DNA sample' rather than a profile. Thus, the clause appears to allow for any information derived from a DNA sample collected for a criminal investigation to be compared against all data within the databank – without recording such information. Such a comparison is vast in scope and open to abuse.
- **Recommendation:** To ensure that this provision is not used for conducting searches outside of the scope of the original purpose, only DNA profiles, rather than 'information derived from a sample' should be allowed to be compared, only the indices relevant to the sample should be compared, and the search should be authorized and justified.
- **Clause 36 :** This clause addresses the restriction of access to information in the crime scene index if the individual is a victim of a specified offense or if the person has been eliminated as a suspect of an investigation.

Comment:

- This clause only addresses restriction of access to the crime scene index and does not address restriction of access to other indices.
- This clause only restricts access to the indice for certain category of individual and for a specific status of a person. Oddly, the clause does not include authorization or rank as a means for determining or restricting access.

Recommendation:

- This clause should be amended to lay down standards for restriction of access for all indices.
- Access to all information in the databank should be restricted by default and permission should be based on authorization rather than category or status of individual.
- **Clause 38:** This clause sets out a post-conviction right related to criminal procedure and evidence.

Comment: This clause would fundamentally alter the nature of India's criminal justice system, which currently does not contain specific provisions for post-conviction testing rights.

Recommendation: This clause should be deleted and the issue of post conviction rights related to criminal procedure and evidence referenced to the appropriate legislation. Clause 38 is implicated by Article 20(2) of the Constitution of India and by section 300 of the CrPC. The principle of autrefois acquit that informs section 300 of the CrPC specifically deals with exceptions to the rule against double jeopardy that permit re-trials. [See, for instance, Sangeeta Mahendrabhai Patel (2012) 7 SCC 721.] The person must be duly accorded with a right to know rules may provide for- the authorized persons to whom information relating to a person's DNA profile contained in the offenders' index shall be communicated.

Alternatively, this right could be limited only to accused persons who's trial is still at the stage of production of evidence in the Trial Court. This suggestion is being made because unless the right as it currently stands, is limited in some manner, every convict with the means to engage a lawyer would ask for DNA analysis of the evidence in his/her case thereby flooding the system with useless requests risking a breakdown of the entire machinery.

Chapter VII: Finance, Accounts, and Audit

Clause 39: This clause allows the Central Government to make grants and loans to the DNA Board after due appropriation by Parliament.

Comment: This clause allows the Central Government to grant and loan money to the DNA Board, but does not require any proof or justification for the sum of money being given.

Recommendation: This clause should require a formal cost benefit analysis, and financial assessment prior to the giving of any grants or loans.

Chapter VIII: Offences and Penalties

Chapter IX: Miscellaneous

Clause 53: This clause allows protects the Central Government and the Members of the Board from suit, prosecution, or other legal proceedings for actions that they have taken in good faith.

Comment: Though it is important to take into consideration if an action has been taken in good faith, absolving the Government and Board from accountability for actions leaves little course of redress for the individual. This is particularly true as the Central Government and the Board are given broad powers under the Bill.

Recommended: If the Central Government and the Board will be protected for actions

taken in good faith, their powers should be limited. Specifically, they should not have the ability to widen the scope of the Bill.

Clause 57: This clause states that the Central Government will have the powers to make Rules for a number of defined issues.

Comment: 57(d) allows for the regulations to be created regarding the use of population statistics Data Bank created and maintained for the purposes of identification research and protocol development or quality control.

Recommendation: 57(d) should be deleted as any use for the creation of a population statistics Data Bank created and maintained for the purposes of identification research and protocol development or quality control is beyond the scope of the Bill.

- **Clause 58:** This clause empowers the Board to make regulations regarding a number of aspects related to the Bill.
- **Comment:** There a number of functions that the Board can make regulations for that should be defined within the Bill itself to ensure that the scope of the Bill does not expand without Parliamentary oversight and approval.
- **Recommendation:** 58(2)(g) should be deleted as it allows the Board to create regulations for other relevant uses of DNA techniques and technologies, 58(2)(u) should be deleted as it allows the Board to include new categories of indices to databanks, and 58(2) (aa) should be deleted as it allows the Board to decide which other indices a DNA profile may be compared with in the case of sharing of DNA profiles with foreign Governments, organizations, or institutions.
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- **Clause 61:** This clause states that no civil court will have jurisdiction to entertain any suit or proceeding in respect of any matter which the Board is empowered to determine and no injunction shall be granted.

Comment: This clause in practice will limit the recourse that individuals can take

and will exclude the Board from the oversight of civil or criminal courts.

Recommendation: The power to collect, store and analyse human DNA samples has wide reaching consequences for people whose samples are being utilised for this purpose, specially if their samples are being labeled in specific indexes such as “index of offenders”, etc. The individual should therefore have a right to approach the court of law to safeguard his/her rights. Therefore this provision barring the jurisdiction of the courts should be deleted.

Schedule

- **Schedule A:** The schedule refers to section 33(f) which allows for disclosure of information in relation to DNA profiles, DNA samples, and records in a DNA Data Bank to be communicated in cases of investigations relating to civil disputes or other civil matters or offenses or cases listed in the schedule with the concurrence of the court.
 - **Comment:** As 33(f) requires the concurrence of the court for disclosure of information, it is unclear what purpose the schedule serves. If the Schedule is meant to serve as a guide to the Court on appropriate instances for the disclosure of information stored in the DNA databank – the schedule is too general by listing entire Acts, while at the same time being too specific by naming specific Acts. Ideally, courts should use principles and the greater public interest to reach a decision as to whether or not disclosure of information in the DNA databank is appropriate. At a minimum these principles should include necessity (of the disclosure) and proportionality (of the type/amount of information disclosed).
 - **Recommendation:** As we recommended the deletion of clause 33(f) as it is not necessary to databank DNA profiles for civil purposes, the schedule should also be deleted.
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- **Note:** The schedule differs drastically from previous drafts and from discussions

held in the Expert Committee and recommendations agreed upon. As per the Meeting Minutes of the Expert Committee meeting held on November 10th 2014 “*The Committee recommended incorporation of the comments received from the members of the Expert Committee appropriately in the draft Bill...Point no. 1 suggested by Mr. Sunil Abraham in the Schedule of the draft Bill to define the cases in which DNA samples can be collected without consent by incorporating point no. 1 (I.e 'Any offence under the Indian Penal Code, 1860 if it is listed as a cognizable offence in Part I of the First Schedule of the code of Criminal Procedure, 1973)*”
