RE: THE HUMAN DNA PROFILING BILL, 2012

Clause-by-clause comments on the Working Draft version of 29 April 2012
From the Centre for Internet & Society, Bangalore

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1. This short note speaks to legal issues arising from the proposed Human DNA Profiling Bill, 2012 (**"DBT Bill"**) that was circulated within the Experts Committee constituted under the aegis of the Department of Biotechnology of the Ministry of Science and Technology, Government of India.

2. This note must be read against the relevant provisions of the DBT Bill and, where indicated, together with the proposed Forensic DNA Profiling (Regulation) Bill, 2013 that was drafted by the Centre for Internet & Society, Bangalore (**"CIS Bill"**). These comments must also be read alongside the two-page submission titled "A Brief Note on the Forensic DNA Profiling (Regulation) Bill, 2013" (**"CIS Note"**). Whereas the aforesaid CIS Note raised issues that informed the drafting of the CIS Bill, this present note seeks to provide legal comments on the DBT Bill.

Objects Clause

4. 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 DBT Bill should incorporate an objects clause that makes clear that (i) the principles of notice, confidentiality, collection limitation, personal autonomy, purpose limitation and data minimisation must be adhered to at all times; (ii) DNA profiles merely estimate the identity of persons, they do not conclusively establish unique identity; (iii) all individuals have a right to privacy that must be continuously weighed against efforts to collect and retain DNA; (iv) centralised databases are inherently dangerous because of the volume of information that is at risk; (v) forensic DNA profiling is intended to have probative value; therefore, if there is any doubt regarding a DNA profile, it should not be received in evidence by a court; (vi) once adduced, the evidence created by a DNA profile is only corroborative and must be treated on par with other biometric evidence such as fingerprint measurements.

Definitions

5. The definition of "analytical procedure" in clause 2(1)(a) of the DBT Bill is practically redundant and should be removed. It is used only twice – in clauses 24 and 66(2)(p) which give the DNA Profiling Board the power to frame procedural regulations. In the absence of specifying the content of any analytical procedure, the definition serves no purpose.

6. The definition of "audit" in clause 2(1)(b) is relevant for measuring the training programmes and laboratory conditions specified in clauses 12(f) and 27. However, the term "audit" is subsequently used in an entirely different manner in Chapter IX which relates to financial

information and transparency. This is a conflicting definition. The term "audit" has a well-established use for financial information that does not require a definition. Hence, this definition should be removed.

7. The definition of "calibration" in clause 2(1)(d) is redundant and should be removed since the term is not meaningfully used in the DBT Bill.

8. The definition of "DNA Data Bank" in clause 2(1)(h) is unnecessary. The DBT Bill seeks to establish a National DNA Data Bank, State DNA Data Banks and Regional DNA Data Banks *vide* clause 32. These national, state and regional databases must be defined individually with reference to their establishment clauses. Defining a "DNA Data Bank", exclusive of the national, state and regional databases, creates the assumption that any private individual can start and maintain a database. This is a drafting error.

9. The definition of "DNA Data Bank Manager" in clause 2(1)(i) is misleading since, in the text of the DBT Bill, it is only used in relation to the proposed National DNA Data Bank and never in relation to the State and Regional Data Banks. If it is the intention of DBT Bill that only the national database should have a manager, the definition should be renamed to 'National DNA Data Bank Manager' and the clause should specifically identify the National DNA Data Bank. This is a drafting error.

10. The definition of "DNA laboratory" in clause 2(1)(j) 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.

11. The definition of "DNA profile" in clause 2(1)(l) 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.

12. The definition of "forensic material" in clause 2(1)(o) needs to be amended to remove the references to intimate and non-intimate body samples. If the references are retained, then evidence collected from a crime scene, where an intimate or non-intimate collection procedure was obviously not followed, will not fall within the scope of "forensic material".

13. The terms "intimate body sample" and "non-intimate body sample" that are defined in clauses 2(1)(q) and 2(1)(v) respectively are not used anywhere outside the definitions clause except for an inconsequential reference to non-intimate body samples only in the rule-making provision of clause 66(2)(zg). "Intimate body sample" is not used anywhere outside the definitions clause. Both these definitions are redundant and should be removed.

14. The terms "intimate forensic procedure" and "non-intimate forensic procedure", that are defined in clauses 2(1)(r) and 2(1)(w) respectively, are not used anywhere except for an inconsequential reference of non-intimate forensic procedure in the rule-making provision of

clause 66(2)(zg). "Intimate forensic procedure" is not used anywhere outside the definitions clause. Both these definitions are redundant and should be removed.

15. The term "known samples" that is defined in clause 2(1)(s) is not used anywhere outside the definitions clause and should be removed for redundancy.

16. The definition of "offender" in clause 2(1)(y) if vague because it does not specify the offences for which an "offender" need be convicted. It is also linked to an unclear definition of the term "undertrial", which does not specify the nature of pending criminal proceedings and, therefore, could be used to describe simple offences such as, for example, failure to pay an electricity bill, which also attracts criminal penalties.

17. The term "proficiency testing" that is defined in clause 2(1)(zb) is not used anywhere in the text of the DBT Bill and should be removed.

18. 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 clauses 18 and 66. Their inclusion in the definitions clause is redundant. Accordingly, these definitions should be removed.

19. The term "suspect" defined in clause 2(1)(zi) 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 DNA Profiling Board

20. The size and composition of the Board that is staffed under clause 4 is extremely large. Creating unwieldy and top-heavy bureaucratic authorities and investing them with regulatory powers, including the powers of licensing, is avoidable. The DBT Bill proposes to create a Board of 16 members (now reduced to 11 members).

Drawing from the experiences of other administrative and regulatory bodies in India, the size of the Board should be drastically reduced to no more than five members. The Board must contain at least one ex-Judge or senior lawyer since the Board will perform the legal function of licensing and must obey the tenets of administrative law.

To further multi-stakeholder interests, the Board should have an equal representation from civil society – both institutional (e.g NHRC and the State Human Rights Commissions) and non-institutional (well-regarded and experienced civil society persons). The Board should also have privacy advocates.

22. Clauses 5(2) and 5(3) establish an unequal hierarchy within the Board by privileging some members with longer terms than others. There is no good reason for why the Vice-Chancellor of a National Law University, the Director General of Police of a State, the Director of a Central Forensic Science Laboratory and the Director of a State Forensic Science Laboratory should serve membership terms on the Board that are longer than those of molecular biologists, population geneticists and other scientists. Such artificial hierarchies should be removed at the

outset. The Board should have one pre-eminent chairperson and other equal members with equal terms.

23. The Chairperson of the Board, who is first mentioned in clause 5(1), has not been duly and properly appointed. Clause 4 should be modified to mention the appointment of the Chairperson and other Members.

24. Clause 7 deals with the issue of conflict of interest in narrow cases. The clause requires members to react on a case-by-case basis to the business of the Board by recusing themselves from deliberations and voting where necessary. Instead, members should 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 these anti-collusion and anti-corruption safeguards should attract criminal penalties.

25. Clause 10 anticipates the appointment of a Chief Executive Officer of the Board who shall be a serving Joint Secretary to the Central Government. Clause 10(3) further requires this officer to be scientist. This may not be possible because the administrative hierarchy of the Central Government may not contain a genetic scientist.

26. The functions of the Board specified in clause 12 are overbroad. Advising ministries, facilitating governments, recommending the size of funds and so on – these are administrative and governance functions best left to the executive. Once the Board is modified to have sufficient legal and human rights representation, then the functions of the Board can non-controversially include 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.

DNA Laboratories

27. The provisions of Chapters V and VI may be simplified and merged.

DNA Data Banks

28. The creation of multiple indices in clause 32(4) cannot be justified and must be removed. The 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 and have either not been properly understood or deliberately ignored. At this moment, the forcible collection of biological source material should be restricted to the categories of offenders mentioned in the Identification of Prisoners Act, 1920 (**"Prisoners Act"**) with a suitable addition for persons arrested in connection with certain specified terrorism-related offences. Therefore, databases should contain only an offenders' index and a crime scene index.

29. Clause 32(6), which requires the names of individuals to be connected to their profiles, and hence accessible to persons connected with the database, should be removed. DNA profiles, once developed, should be anonymised and retained separate from the names of their owners.

30. Clause 36, which allows international disclosures of DNA profiles of Indians, should be removed immediately. Whereas an Indian may have legal remedies against the National DNA Data Bank, he/she certainly will not be able to enforce any rights against a foreign government or entity. This provision will be misused to rendition DNA profiles abroad for activities not permitted in India. Similarly, as in data protection regimes around the world, DNA profiles should remain within jurisdictions with high privacy and other legal standards.

Offences

The law prohibits the delegation of "essential legislative functions" [*In re Delhi Laws*, 1951]. The creation of criminal offences must be conducted by a statute that is enacted by Parliament, and when offences are created via delegated legislation, such as Rules, the quantum of punishment must be pre-set by the parent statute.

Since the listing of offences for DNA profiling will directly affect the fundamental right of personal liberty, it is an undeniable fact that the identification of these offences should be subject to a democratic process of the legislature rather than be determined by the whims of the executive.

Use

31. The only legitimate purpose for which DNA profiles may be used is for establishing the identity of individuals in criminal trials and confirming their presence or absence from a certain location. Accordingly, clauses 39 and 40 should be re-drafted to specify this sole forensic purpose and also specify the manner in which DNA profiles may be received in evidence. For more information on this point, see the relevant provisions of the CIS Note and the CIS Bill.

32. The disclosure of DNA profiles should only take place to a law enforcement agency conducting a valid investigation into certain offences and to courts currently trying the individuals to whom the DNA profiles pertains. All other disclosures of DNA profiles should be made illegal. Non-consensual disclosure of DNA profiles for the study of population genetics is specifically illegal. The DBT Bill does not prescribe stringent criminal penalties and other mechanisms to affix individual liability on individual scientists and research institutions for improper use of DNA profiles; it is therefore open to the criticism that it seeks to sacrifice individual rights of persons, including the fundamental right to privacy, without parallel remedies and penalties. Clause 40 should be removed in entirety.

33. Clause 43 should be removed in entirety. This note does not contemplate the retention of DNA profiles of suspects and victims, except as derived from a crime scene.

34. Clause 45 sets out a post-conviction right related to criminal procedure and evidence. This would fundamentally alter the nature of India's criminal justice system, which currently does not contain specific provisions for post-conviction testing rights. However, courts may re-try cases in certain narrow cases when fresh evidence is brought forth that has a nexus to the evidence upon which the person was convicted and if it can be proved that the fresh evidence was not earlier adduced due to bias. Any other fresh evidence that may be uncovered cannot prompt a new trial. Clause 45 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.]
