

INDIA DNA BILL: Collection of DNA

Collection of DNA from individuals: issues for discussion

- Collection of DNA with consent: Should volunteers have DNA profiles and other information entered on a database? Or used only for a specific investigation (e.g. from a victim or for elimination purposes)? What about police officers and laboratory workers? And missing persons?
- Collection of DNA without consent: Should this be 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? Should there be a requirement for an order by a court? Or should this be allowed in other circumstances?
- Process of DNA collection from individuals: Should samples be collected by police officers, or only by medical professionals? Must this take place in a secure location i.e. not on the street etc.? Should there should be provision of information for all persons from whom DNA is taken?

Relevant provisions in draft India DNA Bill

Collection of samples

The Bill defines “intimate” and “non-intimate” samples. According to the Schedule Part II, intimate samples can only be taken by medical professionals (e.g. samples of blood, semen or vaginal swabs) but non-intimate samples (mouth swabs or hairs other than public hair) can be performed by other technical staff.

Schedule Part II: Source of collection of samples for DNA test

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7) Already preserved body fluids and other samples

8) Intimate body samples from living persons shall be collected, and intimate forensic procedures on living person shall be performed in Hospital/Medical college by a Registered Medical Practitioner as defined in Sl. No.53(b) of criminal procedure, who is familiar with DNA collection procedure required to be followed by the laboratory to whom the sample has to be forwarded.

9) The non-intimate body samples can be collected and non-intimate forensic procedure can be performed by the technical staff trained for the collection of samples for DNA test under the supervision of Medical Officer/Scientist.

However, the power to collect samples (and restrictions on it) seems to be missing from the Bill. Nowhere does it actually appear to state that samples can be collected and analysed only in relation to the offences listed in the Schedule Part I. Nor does the Bill state when consent is required. A “non-intimate forensic procedure” includes taking a buccal swab with consent, but appears to allow collection of other samples (e.g. hairs except public hairs) without consent (or at least consent is not mentioned) (II.2(1)(w)). Would this allow a police officer to pull hairs from someone’s head without consent in order to obtain a sample? Nor is consent mentioned in relation to an “intimate forensic procedure” (II.2(1)r), although no other country in the world would allow any such procedure to be conducted without consent. Since neither of these procedures is actually referred to in the text of the Bill it also remains unclear when they can be used. “Volunteers” are defined in II.2(2)(zo) and presumably this means they give consent: is it to be assumed that all other persons can have their samples taken without consent? Does this include intimate and non-intimate procedures? Are police officers allowed to use force to obtain samples? If so, is this only from suspects for criminal offences? Can people involved in civil disputes and other matters (listed in the Schedule, Part I.C)

also have their DNA taken without consent? Can “Already preserved body fluids and other samples” (Schedule Part II(7)) also be DNA tested without consent? If so, in what circumstances? Does this include testing paternity? Is this compatible with medical confidentiality (e.g. if samples stored in hospitals are used)? Judicial oversight for decisions to test is also omitted: and it is unclear when a person becomes a suspect. The definition “suspect means a person suspected of committing an offence” (II.2(1)(zi)) allows anyone falsely accused of an offence to have their sample taken. Is the person supposed to have been charged with an offence or merely arrested, or even merely accused by someone? Is the collection of the sample required to be relevant to solving the alleged offence or could it just be taken in order to add the individual to the DNA database?

No location for collecting samples appears to be specified: this would appear to allow testing on the street. This may be unsafe for officers and would significantly increase privacy concerns. For suspects and convicted persons, testing may be performed when they are under detention in a police station or prison. For other persons, testing in court or at a hospital may be appropriate. Special safeguards may be needed for vulnerable persons, e.g. children and the mentally ill.

There appears to be no requirement to provide information to individuals (whether volunteers or suspects) on why their sample is being taken and what their rights are e.g. to object if their privacy is breached or their data is not expunged when necessary.

Lists of offences

The Schedule, Part I, lists offences for which human DNA profiling may be applied. Part A lists offences under the Indian Penal Code in two categories: offences affecting the human body (including e.g. homicide, rape, hurt, and accidents under the Motor Vehicles Act); and offences related to marriage (co-habitation with a woman by deceit, adultery, enticing a married woman with criminal intent). It also gives the Board the (unlimited) power to specify any other offence under the Indian Penal Code via regulations. The inclusion of this power would presumably allow “mission creep” so that DNA could be collected from persons suspected of very minor offences in future.

Part B lists offences under special laws (such as human trafficking) and Part C lists civil disputes and other civil matters, including parental disputes (maternity or paternity), and issues relating to pedigree, assisted reproduction, transplantation, immigration or emigration, issues relating to the establishment of individual identity, and “*any other civil matters as may be specified by the regulations*”. It is unclear exactly what many of these civil offences are (except transplantation which refers to the Transplantation of Human Organs Act, 1994). For example, testing paternity may be relevant to an offence (e.g. adultery, kidnapping, fraud, blackmail) but non-paternity may not be an offence in itself and several persons may be tested some or all of whom may not have committed (or even have been suspected of committing) an offence. There may be offences relating to immigration or emigration for which DNA testing may be relevant, but surely the Bill is not proposing blanket testing of all immigrants or emigrants?

Part D lists other offences or cases including medical negligence, unidentified dead bodies and identification of abandoned or disputed children. The police may have a legitimate interest in tracking missing persons if they are suspected of committing an offence, may be a victim of an offence, or are minors or other vulnerable persons. However, care should be exercised in defining who may be tracked without consent since being missing is not a criminal offence and people sometimes flee for legitimate reasons (e.g. to escape domestic abuse).

Examples of misuse and bad practice

Police 'arrest innocent youths for their DNA', officer claims. The Telegraph. 4th June 2009.
<http://www.telegraph.co.uk/news/uknews/law-and-order/5444332/Police-arrest-innocent-youths-for-their-DNA-officer-claims.html>

Police put 100,000 innocent children on DNA database. Daily Mail. 23rd May 2007.
<http://www.dailymail.co.uk/news/article-457046/Police-100-000-innocent-children-DNA-database.html>

A 12-year old-schoolboy arrested for allegedly stealing a pack of Pokemon cards. From schoolboy squabble to DNA database in one easy step - if you're black. The Times. 24th November 2009.
<http://www.timesonline.co.uk/tol/news/uk/crime/article6929014.ece>

Grandmother arrested for stealing football 'for revenge'. The Daily Mail. 5th October 2006.
<http://www.dailymail.co.uk/news/article-408819/Grandmother-arrested-stealing-football-revenge.html>

Fingerprinted and checked for DNA...the ten-year-old 'bullying victim'. The Evening Standard. 11th September 2009. <http://www.thisislondon.co.uk/news/article-23366449-fingerprinted-and-checked-for-dnatheten-year-old-bullying-victim.do>

Arrested and DNA tested - for jokingly pinging a bra. The Daily Mail. 28th July 2006.
<http://www.dailymail.co.uk/news/article-398002/Arrested-DNA-tested--jokingly-pinging-bra.html>

Litter lout DNA samples a step too far. The Telegraph. 2nd August 2007.
<http://www.telegraph.co.uk/news/uknews/1559185/Litter-lout-DNA-samples-a-step-too-far.html>

Nature [Editorial] Genome abuse. Citizens are right to resist government pressure to expand population DNA databases. 27th September 2007.
<http://www.nature.com/nature/journal/v449/n7161/full/449377b.html>

Stop, armed police! Put down your MP3 player. The Guardian. 13th February 2008.
<http://www.guardian.co.uk/uk/2008/feb/13/ukguns.police>

Teen arrested by Southport police for handing in phone. Crosby Herald. 2nd April 2009.
<http://www.crosbyherald.co.uk/news/crosby-news/2009/04/02/teenager-arrested-by-southport-police-for-handing-in-mobile-phone-68459-23291295/>

Examples of good practice

In most countries the police require authorisation by a judge to take a DNA sample from an individual suspect. An example is Canada's law.