

INDIA DNA BILL: Retention of DNA and other data

Retention of DNA and other data: issues for discussion

- € Should data from convicted persons should be separate from others e.g. missing persons' databases and police elimination databases?
- € Should volunteers have data retained at all? Or only with consent? Can they withdraw consent and get their records deleted?
- € Should 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?
- € Is there an automatic removals process for deletion of data from innocent persons? Does this take place within a reasonable time of acquittal or a decision not to proceed with a case?
- € Should there be limits on retention of DNA profiles from persons convicted of minor crimes?
- € Is there an appeals process against retention of data? Are their penalties for not deleting data when required?
- € What data is linked on other databases (e.g. police record of arrest, fingerprints)? Should this be deleted at the same time as DNA database records?
- € How long is crime scene DNA evidence retained? Is reinvestigation of crime scene evidence possible (including to address miscarriages of justice)?

Relevant provisions in draft India DNA Bill

Retention of DNA profiles and other information

Chapter VII of the Bill creates a National DNA database (and multiple State-level DNA databases) containing a crime scene index (of DNA profiles from crime scenes) plus indexes from several different types of individuals, i.e. suspects, offenders, missing persons (including the missing persons themselves and volunteers who are relatives, as defined in II.2(u)), unknown deceased persons, volunteers, and "*such other DNA indices as may be specified by regulations made by the Board*" (VII.32(4)).

Confusingly, the Bill defines some suspects who may be innocent as offenders: i.e. persons undertrial with a specified offence are regarded as offenders. This undermines the principle of "innocent until proven guilty".

Chapter II DEFINITIONS 2. (1)

(y) "offender" means a person who has been convicted of or an undertrial charged with a specified offence;

(z) "offenders' index" means an index of DNA profiles from known samples of body substances taken from offenders;

...

(zk) "undertrial" means a person against whom a criminal proceeding is pending in a court of law.

Since specified offences also include the civil offences listed in the Schedule Part I.C, the "offenders index" will presumably also include DNA profiles collected during the investigation of such offences e.g. parents and children involved in paternity disputes, immigrants and emigrants, persons whose identity has been disputed or needed to be established for some reason. However, it is unclear what "convicted" or "undertrial" means in this context and whether any of these people ever have their records expunged. In reality, there is no need to create indices of most such people, as their DNA

can simply be collected, analysed and used in their specific case.

The Bill requires "*information in the offenders' index pertaining to a convict*" to be kept indefinitely. Consideration should be given as to whether all persons convicted of the crimes listed in the Schedule should have their DNA profiles retained permanently (or indefinitely): for example the crime of "hurt" can include minor crimes (according to the Indian Penal Code 1860, whoever causes bodily pain, disease or infirmity to any person is said to cause hurt), whereas "grievous hurt" is obviously more serious. Retention of children's DNA profiles (from age ten) for life for minor crimes was widely criticised in the UK and the law has now been changed. The age of criminal responsibility in India is age 7. In addition to ethical concerns, permanent retention may not be practicable: in other countries police may have the power to retain DNA profiles from (some) convicted persons indefinitely, but this is not usually a requirement. In the UK, police policy is to keep convicted person's DNA profiles for 100 years, otherwise over the long term the database would fill up with profiles from deceased persons.

The Bill includes provisions for the removal of records from innocent persons who have been suspected of committing an offence (37(2) and (3)). It is not clear why such individuals are in any case added to the "offenders' index" rather than the "suspects' index" when they have not been convicted (this follows from the definition of an "offender" in 11.2(1)(y)). However, the inclusion of a removals process is welcome: the retention of innocent people's DNA in England and Wales led to a judgment against the UK Government in the European Court of Human Rights. Nevertheless, it can be questioned whether the proposed process is practical and whether it will be properly implemented in a timely manner: the process relies on the DNA Data Bank Manager receiving a certified copy of the order of the court that the individual has been acquitted or set aside. This raises two questions: (1) where is the requirement on the court to provide such orders (what happens if they are not sent?); (2) what happens to persons (presumably entered on the suspects' index) whose cases are dropped before they get to court? In fact there is no provision for expungement from the suspects' index at all, or from the State DNA Banks which will presumably collect many of the DNA profiles in the first place. Further, Section (37)(2) and (3) refer only to expungement of the DNA profile, not of the whole record, which contains other identifying information (Section 32(6)).

The Bill includes no provision for deletion of records from the missing persons' index or the volunteers' index (or other indices that may be created by the Board). Volunteers may, for example, withdraw their consent for inclusion, and missing persons may be found. Since it is unclear on which indices persons involved in civil offences and matters will be included (Schedule Part I.C) it is also unclear under what circumstances their records will be retained. It is also unclear whether the volunteers' index (or another index) will include police officers and laboratory workers (whose DNA profiles will be needed for elimination purposes): hence it is unclear whether their records may also be retained permanently or whether they will be expunged e.g. on retirement or leaving their job.

The Bill appears to allow indefinite retention of crime scene DNA profiles, although this is not specified. Retention of crime scene DNA profiles allows old cases to be revisited (including to correct miscarriages of justice) but retention of crime scene evidence is often also necessary as material may need to be reanalysed (for example, blood stains etc.). Some attention needs to be given to the practicalities of this.

Role of the Board

The Board is responsible for ensuring the timely removal and destruction of obsolete, expunged or inaccurate DNA information (12(p)(iii)). However, there is no sanction included in Chapter X for failure to do so and no process by which individuals could find out that their information is inaccurate or unlawfully held and seek its removal. Nor is an independent body or process identified to resolve cases of dispute.

Identifying informat

The main purpose of retaining an individual's DNA profile on a DNA database is so that they can be identified and arrested in the case of a match between a DNA profile from a crime scene and their own DNA profile. It is important to stress that the creation of a DNA database containing anything more than crime scene profiles is unnecessary if the individual's profile is only required for the investigation of a specific offence (or the resolution of a specific dispute e.g. non-paternity). This is because their DNA can be collected during the investigation in which they are a known suspect and compared with the relevant crime scene DNA profile (and, if appropriate, other stored crime scene profiles from past crimes). The added value of creating a DNA database of individuals is only to introduce new suspects into an investigation via 'cold hits' (unanticipated matches) between a crime scene DNA profile and a stored individuals' DNA profile. This requires not only their DNA profile to be stored but also other information which allows them to be tracked down in the event of a match.

Stored information will include the individual's name, but this will of course be insufficient to identify and track down an individual in a country as large as India. Chapter VII.32(6) specifies that "the identity of the person" should be stored in the DNA Data Bank in the case of a profile in the offenders' index and, in the case of all other persons, the case reference number of the investigation should be stored. Two problems could arise here: either insufficient information will be stored, rendering the database effectively useless in the event of a match; or excessive information will be stored which is open to abuse or misuse. Possibly both situations will occur. The information required to establish the identity of the person should be specified.

There appears to be no provision for deletion of identifying information (only DNA profiles). Retained identifying information could be misused e.g. to reveal that a person has been arrested at some point in the past (even if they were never prosecuted or convicted). Such information might be used to refuse visas or jobs. For example, the US Government now requires UK citizens to apply to the police for copies of their own records of arrest and reveal these during the visa application process: people who have been arrested but not convicted are no longer eligible for the US Visa Waiver scheme. By making this a requirement of the visa application, rules which would prevent the police revealing the record are bypassed, as the individual is required to pass on this information themselves in order to obtain the visa.

State DNA banks

Chapter VII, Article 32 allows the creation of a National DNA Data Bank "and as many Regional DNA Data Banks thereunder for every State or a group of States as necessary". Every State may, by notification, establish a State DNA Data Bank, which will share information with the National DNA Data Bank. There appear to be no provisions in the Bill regulating what information can be retained in State DNA Data Banks, or requiring any records to be deleted, even when DNA profiles are expunged from the National DNA Bank.

DNA samples

The Bill does not discuss what happens to samples after they have been analysed. In the UK, it is normal practice to take two samples from individuals for quality assurance purposes. Until recently, one of these samples was stored indefinitely by the laboratory and a bar code number stored with the sample allowed it to be linked back to the individual. This meant that anyone accessing the samples could reanalyse them and find out personal health information. The new UK law, the Protection of Freedoms Act 2012, will now require all samples collected by the police to be destroyed within 6 months of collection (after the analysis has been done and the DNA profiles obtained). Some other countries, such as Germany, already destroy samples.

Examples of misuse and bad practice

B Europe DNA th December 2008
<http://news.bbc.co.uk/1/hi/uk/7765484.stm>

DNA database 'is causing suicides', MPs are warned. Daily Mail. 4th February 2010.
<http://www.dailymail.co.uk/news/article-1248358/DNA-database-causing-suicides-MP-warned.html>

'Orwellian' CCTV in shires alarms senior police officer. The Guardian. 21st May 2007.
<http://www.guardian.co.uk/uk/2007/may/21/ukcrime.humanrights>

A simple prank by a 13-year-old. Now her genetic records are on the National DNA Database for ever
New Statesman. 25th April 2005. <http://www.newstatesman.com/200504250026>

Innocent 'terror techie' purges DNA records The Register. 17th September 2007.
http://www.theregister.co.uk/2007/09/17/dna_purge/

Janet Street-Porter: I'm innocent. So the police have no right to keep my DNA on file. The
Independent. 31st July 2008. <http://www.independent.co.uk/opinion/columnists/janet-street-porter/janet-streetporter-im-innocent-so-the-police-have-no-right-to-keep-my-dna-on-file-881272.html>

Comedian Mark Thomas. How I got my genes deleted. The Guardian. 19th March 2009.
<http://www.guardian.co.uk/commentisfree/2009/mar/19/dna-database-comment>

Tory MP demands return of DNA sample as decision not to press charges leaves ministers red-faced
but police in clear. DPP's verdict on papers leaked in Damian Green affair - Not a threat to security.
The Guardian. 17th April 2009. <http://www.guardian.co.uk/politics/2009/apr/17/damian-green-arrest-jacqui-smith>

Remove my DNA sample from government files, demands MP. Daily Mail. 3rd August 2008.
<http://www.dailymail.co.uk/news/article-1041267/Remove-DNA-sample-government-files-demands-MP.html>

DNA of one-year-old baby stored on national database. The Telegraph. 10th March 2009.
<http://www.telegraph.co.uk/news/politics/4966168/DNA-of-one-year-old-baby-stored-on-national-database.html>

Learning to live with Big Brother. The Economist. 27th September 2007.
http://www.economist.com/node/9867324?story_id=9867324

Police retain DNA of 'petty crime suspects'. The Telegraph. 4th November 2007.
<http://www.telegraph.co.uk/news/uknews/1568269/Police-retain-DNA-of-petty-crime-suspects.html>

Black church leaders concerned over criminal DNA database. Christian Today. 18th July 2008.
<http://www.christiantoday.com/article/black.church.leaders.concerned.over.criminal.dna.database/20635.htm>

More information about the expansion of the UK DNA database is available in reports.
The Nuffield Council on Bioethics: <http://www.nuffieldbioethics.org/bioinformation>
Williams, R. and Johnson, P. and Martin, P. (2004) 'Genetic information and crime investigation :
social, ethical and public policy aspects of the establishment, expansion and police use of the

National DNA Database.', Project Report: <http://dro.dur.ac.uk/2555/>
GeneWatch UK Police National DNA Database report
<http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/NationalDNADatabase.pdf>

Examples of good practice

Countries with missing persons' DNA databases which are separate from criminal DNA databases include the USA:

<http://www.nij.gov/topics/forensics/investigations/missing-persons/welcome.htm>

Often the information that is useful for missing persons is different from forensic DNA profiles e.g. it might include mitochondrial DNA (passed down the maternal line) or different profiling systems that may be needed to identify mixed or degraded samples in mass disasters:

<https://www.ncjrs.gov/pdffiles1/nij/214781.pdf>

Although it is extremely important for the police to be able to test the DNA of volunteers and victims during an investigation, it is rarely useful to retain these DNA profiles on a DNA database. In the UK, the National DNA Database Ethics Group recommended in 2008 that volunteers' DNA profiles should not be loaded on to the DNA database and that all information and material should be destroyed after they are used. It is now standard practice not to include volunteers on the UK database: their DNA is collected and used only for the specific offence where it is relevant.

"Importantly, the work presented to the DNA Strategy Board illustrated that DNA matches between volunteer profiles and crime stains are satisfactorily achievable irrespective of whether or not the volunteer profiles are loaded from the analysing laboratory to the NDNAD. With the exception of sex offenders (who are sometimes sampled under the volunteer procedure), on the results to date, all of the matches useful to the police would have been obtained without speculative searching of the NDNAD. There would therefore be no loss to operational policing if, for the majority of crimes, volunteer samples were not loaded onto the NDNAD and were used only in relation to the investigation of the crime for which they were obtained." Paragraph 5.4:

http://www.homeoffice.gov.uk/publications/agencies-public-bodies/fsr/NDNAD_Ethics_Group_Annual_Report?view=Binary

Canada has a convicted offenders index and a crime scene index on its DNA database: a court order is required to collect these samples. It does not retain records from unconvicted suspects:

<http://www.rcmp-grc.gc.ca/nddb-bndg/index-accueil-eng.htm> (However Canada does retain samples as well as DNA profiles from convicted persons: retention of samples is unnecessary once the DNA profile has been obtained, see below).

In the UK, the Protection of Freedoms Act will require samples collected by the police for DNA analysis to be destroyed within 6 months (instead of keeping them for 100 years), once the computerised DNA profiles have been obtained from them. Destruction of individuals' samples is already required in some other countries (e.g. Germany). It will also require the police to comply with the 2008 judgment of the European Court of Human Rights by requiring automatic removal of innocent people's DNA records.