

This response was submitted to the consultation held by the Nuffield Council on Bioethics on *The Forensic use of bioinformation: ethical issues* between November 2006 and January 2007. The views expressed are solely those of the respondent(s) and not those of the Council.

Anon 13

List of questions

1. The interpretation of bioinformation

- a. In your view, is the SGM Plus® system, which uses ten STR markers, sufficiently reliable for use in ascertaining the identity of suspects in criminal investigations and/or criminal trials?

The larger the database and the larger the scope of comparisons being made, the larger the chances for error and bias. This is particularly concerning considering attempts to 'profile' criminals by ethnic or family membership.

In short: I think that for its originally intended purpose (direct match of a crime scene sample to that of a small number of suspects) the system is reliable. I have reservations for extended use of the system.

2. Sampling powers

- a. From whom should the police be able to take fingerprints and DNA samples? At what stages in criminal investigations and for what purposes? Should the police be able to request further information from DNA analysts, such as physical characteristics or ethnic inferences?

I think regulations as established in some other countries strike a reasonable balance: Samples can be taken when there is evidence for a subject to be suspected of a serious/violent crime (like rape, manslaughter, or assault with actual bodily harm, but not offences like theft or littering ...). The samples should be used only to check for a perfect match between crime scene samples and subject samples. When there is no charge, or there has been a charge with acquittal, the samples and corresponding records must be destroyed. Even when a subject is guilty of a crime, samples and records should be destroyed after an appropriate time (e.g., 9 years). I have strong reservations regarding the use of bioinformation for profiling by ethnic or other groups.

- b. Should police expenditure on bioinformation collection and analysis be given priority over other budgetary demands?

No, I think that is neither an efficient use of resources nor appropriate considering privacy implications. In particular as long as less sensitive data like surveillance information such as records from phone taps are not permissible evidence, I find the political drive for an extension of bioinformation collection hard to justify.

- c. Do you consider the current criteria for the collection of bioinformation to be proportionate to the aims of preventing, investigating, detecting and prosecuting criminal offences? In particular: is the retention of bioinformation from those who are not convicted of an offence proportionate to the needs of law enforcement?

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I do not think that the construction of a permanent collection of samples with a proportion of samples from innocent citizens is appropriate. It is already clear that the collection is ethnically and socio-economically biased. In this respect a collection of samples from all citizens would be preferable. On the other hand, construction and maintenance of such a collection is expensive and intrusive. Its mere existence would create pressure to find further uses for it, with huge privacy implications. It must in this context be emphasized that storage of physical samples harbours much increased abuse potential in comparison to storage of only a computer record of the DNA fingerprint.

- d. Is it acceptable for bioinformation to be taken from minors and for their DNA profiles to be put on the NDNAD?

I think that the question of the treatment of minors just highlights fundamental problems of the entire collection and storage process altogether. If permanent storage of samples of minors is considered damaging to them (which it is), it is similarly damaging to innocent adults. So, given reasonable arrangements for the destruction of samples and records for innocent donors, DNA should also be collected from minors when they are suspected of a serious/violent crime.

3. The management of the NDNAD

- a. Is it proportionate for bioinformation from i) suspects and ii) volunteers to be kept on forensic databases indefinitely? Should criminal justice and elimination samples also be kept indefinitely? How should the discretion of Chief Constables to remove profiles and samples from the NDNAD be exercised and overseen?

Like all other criminal evidence on record, bioinformation should be destroyed after a certain period, even for convicted subjects. This is necessary to avoid creating an 'underclass' of 'tainted' people whose samples have been taken. Innocent people, and one-time offenders who have been completely rehabilitated should not bear such a mark for the rest of their lives. Volunteers should have full control over what happens to their samples and records. One would think that this constitutes an essential aspect of volunteering samples.

- b. Is the ethical oversight of the NDNAD adequate? What, if any, research on NDNAD profiles or samples should be permitted? Who should be involved in the oversight of such databases and granting permission to use forensic DNA profiles or samples for research?

Research using these resources exploits bodily samples of identifiable individuals and should hence be governed by the same principles as all clinical research. It seems reasonable, therefore, that access and oversight should be controlled by the same institutions (MRC?).

- c. Who should have access to information on the NDNAD and IDENT1 databases and how should bioinformation be protected from unauthorised uses and users? Should forensic databases ever be made available for non-criminal investigations, such as parental searches, or the identification of missing or deceased persons?

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Access should be restricted to criminal law enforcement for serious/violent offences. All access should automatically be recorded in permanent tamper-proof logs for auditing purposes. All individuals should have the right to learn what samples and information are on their own file, and how it has been accessed.

Fully anonymized research use should be permitted under the same criteria as clinical research on anonymized samples is permitted.

Any other use should require the written consent of the individual concerned (or its relatives in the case of deceased or missing persons).

d. What issues are raised by the transfer of bioinformation between agencies and countries? How should such transfers be facilitated and what safeguards should be in place for the storage and use of transferred data?

Bioinformation should not be transferred but kept in a central database where it is easier to control what information is on file and who has access. This database can be used by multiple agencies as long as logs are kept for auditing purposes.

Regarding sharing of information across countries, I think it is essential that similar transparency is maintained, *i.e.*, citizens should be able to trace what happened to their samples at any time. Bioinformation should only be shared when the receiving country guarantees to uphold similar or higher standards of data protection and this can be verified and audited. In general, it would be preferable to not transfer the bioinformation abroad but execute a justified search on behalf of a foreign agency and only report the result of the search.

4. Ethical issues

a. Is the use of DNA profiles in 'familial searching' inquiries proportionate to the needs of criminal investigations? Do you consider the use of familial searching may be an unwarranted invasion of family privacy?

I consider this to be a disproportionate invasion of privacy. It should also be emphasized that a surprisingly high number of children in families have unexpected biological parents (scientific estimates range from 2% to 20%). Therefore familial screening can not only be error-prone but also turn out to be highly intrusive when such situations are uncovered as part of a screen.

b. Certain groups, such as ethnic minorities and young males, are disproportionately represented on forensic databases. Is this potential for bias within these databases acceptable?

It is not acceptable if these are the profiles of innocent citizens. If there was a bias in the profiles of *convicted* criminals then this has to be accepted as a reflection of socio-economic reality.

c. Is it acceptable that volunteers (such as victims, witnesses, mass screen volunteers) also have their profiles retained on the NDNAD? Should consent be irrevocable for individuals who agree initially to the retention of samples voluntarily given to the police? Are the provisions for obtaining consent appropriate? Should volunteers be able to withdraw their consent at a later stage?

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I think that volunteers should be entirely in control of what happens to their bioinformation. I do not see any justification for other arrangements other than the wish to build an extensive database. In perfect analogy, no one would ever question that volunteers for police identity parades can at any time withdraw from the program.

d. Would the collection of DNA from everyone at birth be more equitable than collecting samples from only those who come into contact with the criminal justice system? Would the establishment of such a population-wide forensic database be proportionate to the needs of law enforcement? What are the arguments for and against an extension of the database?

While an extension would certainly be more equitable, a comprehensive database would in any case be more prone to questionable exploitation. The large investment that such a resource constitutes would also create pressure to find additional uses for the resource.

5. The evidential value of bioinformation

a. What should be done to ensure that police, legal professionals, witnesses and jury members have sufficient understanding of any forensic bioinformation relevant to their participation in the criminal justice system?

Considering the recent exposure of difficulties in the presentation and assessment of statistical/technical information in the courts (Sally Clark case, *vide* misleading evidence by expert Sir Roy Meadow), more complex uses of bioinformation implicitly harbours an increased danger of erroneous judgments.

b. How much other evidence should be required before a defendant can be convicted in a case with a declared DNA match? Should a DNA match ever be taken to be sufficient to prove guilt in the absence of other evidence?

The courts must be aware that crime scene samples can have been planted or tampered with. I am not even primarily thinking of errors by the force but of offenders who wish to cover their tracks. In any case, the decision of weighing up evidence and all circumstances of a case should remain firmly with the courts, who should treat DNA match evidence like any other evidence rather than as 'absolute proof'.

6. Other issues

a. Are there any other issues, within our terms of reference, which we should consider?

1.) It is my understanding that at present, 'data protection' laws actually work to the disadvantage of people who have bioinformation recorded by the police. Extended disclosure as requested by some employers will just reveal that 'there is information on file' for an individual, reducing their employability. 'Data protection' prevents authorities from saying that the

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information is just from a DNA sample. As these records are permanent, however, that constitutes a permanent 'stain' on someone's 'reputation'. I suggest that bioinformation records should be excluded from extended disclosure reports.

- 2.) At present, little discussion actually differentiates the storage of the samples taken from the storage of the 'DNA fingerprint' information in a computer. This should be raised in public discussion. The abuse potential of a database of the information alone is considerably lower than that of a bank of stored samples.