

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 39

## **QUESTIONS ANSWERED:**

### **Question 1: The interpretation of bioinformation**

#### **ANSWER:**

The current system seems broadly reliable, though anything which can be done to increase reliability should be done. However it is important to recognise that, like fingerprint evidence, there is some degree of risk of a wrong match (as, in the case of fingerprints, happened in a recent Scottish case) and it will be important that this risk is properly understood both by police investigators and by lawyers and jurors if a case comes to trial.

### **Question 2: Sampling powers**

#### **ANSWER:**

This question raises a number of issues. I believe that it is reasonable for the police to have the power to take fingerprints and DNA samples from those arrested for a recordable offence, though it is questionable whether that power should routinely be exercised in cases such as motoring or public order offences where fingerprint/DNA evidence is not an important issue - in short the power should not be interpreted as a requirement. They should also be able to invite suspects, victims, witnesses and volunteers to give fingerprints and DNA samples for the purpose of investigation but they should not have the right to require samples from these groups. The police should have the discretion to determine when in an investigation it would be appropriate to invite individuals or groups to give samples. The aim of this approach would be to balance the needs of criminal investigation with the rights of individual citizens. This balance is of even more significance in relation to the retention of fingerprints and DNA samples. While I am prepared to accept the retention of samples in relation to those convicted of a crime (perhaps subject to some provisions such as those in the Rehabilitation of Offenders Act which would provide for the destruction of samples after specified periods) I can see no justification for the retention of samples from those who have been acquitted of the crime for which they have been charged. To retain these samples implies that regardless of the verdict of the Courts they are still regarded as suspicious characters to be kept under covert surveillance. If the police wish to retain samples in such cases they should be required either to obtain the consent of the individual or, if as is likely this is not forthcoming, to make out a case to be considered by the judiciary, on the lines of the Scottish position. Such an approach would strike a more appropriate balance between the rights of the individual and the needs of criminal investigation. The position in relation to minors should mirror that for adults -there should be no retention of samples taken from minors who are not cautioned, charged or found guilty of an offence. In short I consider that the current arrangements for collecting and particularly retaining bioinformation are disproportionate to the needs of criminal investigation and there is a real risk that increasing investment in this area at the expense of other investigative techniques will distort policing priorities and actions and may, over time, lead to an undue and unacceptable reliance on bioinformation alone in criminal investigation.

### **Question 3: The management of the NDNAD**

#### **ANSWER:**

As indicated earlier I consider the indefinite retention of bioinformation from suspects to be inappropriate. This is even more the case in relation to volunteers witnesses and victims. Such

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information should be destroyed at the end of the investigation. In the case of crimes which remain unsolved for many years (and I had a school friend whose murder was only solved about 30 years after his death) samples should not be retained beyond the point at which it is clear that they cannot materially assist the investigation, perhaps normally one year. In all cases, if the police want to retain samples for longer periods they should obtain the individual's explicit consent and, if that is not forthcoming, make a case to the judiciary for their retention. To retain such samples indefinitely is to suggest that those who have been touched by crime are in some way more worthy of police attention than those who have not been so touched, which is unacceptable in a free society. It is also likely to deter people from coming forward when volunteers are sought - speaking personally I would be extremely reluctant to volunteer to give a DNA sample if I knew it would be retained indefinitely and potentially checked regularly when crimes are committed. It follows from this that the current position whereby Chief Constables have discretion to remove samples from the database in exceptional circumstances should be reversed - retention should only be in exceptional circumstances. Again there is much to be said for the Scottish position. In relation to other elements of Q3 not reproduced in the electronic version above, I believe the current ethical oversight of the databases should be strengthened with additional lay members to avoid the understandable enthusiasm of police forces to maximise use of the databases resulting in action which the general public would regard as impermissible. Any requests for research use of the databases should be subject to the approval of some body such as the Research Ethics Committees used to control research in the Health Service. There should be clear and publicly available criteria for access to the databases, which should in effect be limited to their use for criminal investigation and approved research. They should not be used for parental/familial searches though there is a case for using them to help identify missing/deceased persons, recognising however their limited value given the skewed subset of the population on the databases. Exchange of bioinformation between countries should be subject to strict rules and only occur where the operation of the databases in another country at least meets the standards in this country.

#### **Question 4: Ethical Issues**

##### **ANSWER:**

I am unclear about the reasons why familial searching might be undertaken but instinctively concerned about the potential for unjustified interference with the rights of innocent individuals. I suspect that the current bias within the databases is an inevitable reflection of police practice (the taint of institutionalised racism still hangs over the police service) and the propensity of young men to commit more crimes than young women. This problem could be to at least some extent reduced by moving away from the policy of retaining all samples indefinitely. As indicated earlier I do not believe that it is acceptable for samples from volunteers to be retained and individuals should have the right to withdraw any agreement to retention at any time. If there is to be a national database then it should be truly national and comprehensive and not built up from people who happen to have had contact with the police. An "at birth" registration would be preferable to the present haphazard approach. However I believe such an approach would be wholly disproportionate to the alleged aim of supporting criminal justice in both cost terms and in terms of its impact on the relationship between an individual and the state. And, of course it would both take many years and to achieve coverage of all those born here and would require the taking of samples from all who visit or settle in this country if it was to be comprehensive. In short such an approach is likely to be ineffective and to antagonise the public whose co-operation the police require to legitimise their work.

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**Question 5: The evidential value of bioinformation**

**ANSWER:**

Given the recent cases where expert witness evidence has contributed to wrongful convictions (eg Sally Clark) it is clear that current arrangements for explaining the strengths and limitations of scientific information is inadequate. I have no easy solution to this but perhaps discussions with the Royal Statistical Society to draw up either some standard written material about the limitations of statistical data for the use of all involved in criminal investigations and trials or a list of accredited statistical witnesses might be fruitful. Given the risks, however remote, of misidentification, particularly where the DNA evidence is partial or weak, it is important that there should always be some corroborative evidence of an individual's guilt rather than relying on bioinformation alone. I am concerned that the major investment in this area of policing may lead us in the direction of using DNA evidence alone with all the risks of wrongful conviction this would imply.

**Question 6: Other issues**

**ANSWER:**

I would only add one final point, which is the importance of looking at the development of bioinformation databases alongside proposals for a national identity card in terms of how these proposals will affect the citizen's attitude to the state. There is a real risk of alienating public support for the police and other state organisations if we move to a position where citizens consider themselves to be under constant surveillance. This is particularly the case for those groups who already consider themselves, rightly or wrongly, to be the target of police and state suspicion (minority ethnic and religious groups for example).