

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 9

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?

*It is certainly important evidence, but should not be considered sufficient in isolation. In particular, its impairment when discriminating between close relatives can cause particular concern given that relatives often live in the same area and visit the same places in an area increasing the chance (albeit small) that they could be both "identified" by DNA **and** placed in the area. Clearly it falls down with identical twins.*

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?

The police should be able to take fingerprints and DNA samples from anyone arrested for a recordable offence without consent. The retention of such data is a completely different issue and is dealt with later. They should then be able to compare that sample against fingerprint/DNA evidence in both the crime under investigation and other outstanding unsolved crimes within the UK.

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

Certainly not priority – it is an important but not overriding aspect of investigation.

- 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?

The current criteria are not at all proportionate and as well as infringing on the freedoms and liberties of innocent people, are also the building blocks of a totalitarian state. In addition, the scope for abuse (by both people in power, and lowly public servants with access) of such centralised data on a large proportion of the populace must not be underestimated.

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.

The retention of bioinformation from those not convicted of an offence is not merely disproportionate, but an affront to freedom. It is a morally vacuous method of enlarging the scope of the DNA database without superficially appearing to target the innocent. Indeed, by retaining bioinformation for those arrested and not even charged, nevermind convicted, there is an incentive for police to arrest people, merely to gather the bioinformation. Perhaps because they are related to a real suspect, and wish to use familial DNA match inference, or perhaps just because they look "one of those types" and "it may come in useful" and "they're probably already guilty of something" and want to check them against the database. The scope for abuse is too large.

Instead bioinformation should only be retained for those convicted of an offence in a court of law (and which must be expunged if there is a successful appeal against that conviction).

There is also a strong argument that such bioinformation should be removed from the database after an admittedly lengthy period of time, for minor crimes. Bioinformation from those convicted of serious crimes should be retained indefinitely.

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

It is acceptable for the bioinformation to be taken, but only for their DNA profiles to be put on the NDNAN if they are convicted of an offence in court (and which must be expunged if there is a successful appeal).

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?

It is not proportionate for bioinformation from suspects to be kept on databases indefinitely, as also described in my response to 2.c. Bioinformation from suspects (as opposed to convicted criminals) should not be entered at all.

Volunteers should be able to determine the terms by which their bioinformation is kept, on an opt-in informed consent basis. So if they wish their sample to be removed after the investigation for a particular crime has ended, that is their choice. Elimination samples should be treated identically.

Criminal Justice samples used for convictions should be kept indefinitely for serious crimes, but it is reasonable to allow the data to be removed from the database after the passage of years for those convicted of only minor offences.

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.

Those falsely arrested, or where no offence was committed, must have an automatic, not discretionary, right to have their bioinformation removed. Better would be not to have the information in the database at all, prior to conviction.

- 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?

The ethical oversight of the NDNAD appears to be, to all intents and purposes, non-existent as the Strategic Board is inherently unbalanced so that those appointed to give the ethical context are in a permanent minority. The NDNAD appears to be operating to the limits of the law, under the "ethical" eye of politicians who seem only too keen to push the law out further to accommodate them.

Any research should be on an opt-in basis and/or anonymised.

An independent non-political body should be established to oversee the ethical and regulatory operation of the database, reporting directly to Parliament.

- 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?

It is a reasonable and just tenet of data protection that information should be only be used for the purpose it was gathered. And so it should only be used for law enforcement.

Wide-ranging access to the bioinformation should only be given to senior officials, with full audit trails of all accesses. Other NDNAD/IDENT1 database users given delegated access by those officials for a specific purpose must be not only legally but technologically prevented from accessing records unconnected with that purpose.

Forensic databases should not be made available for the use of parental searches. The identification of missing or deceased persons is a different matter as firstly, until identification is made, it may not be possible if a crime has taken place; and secondly, the deceased need not have the same rights as the living.

- 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?

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.

Bioinformation should not be transferred at all. Instead it should simply be a matter of allowing access to search for matches against bioinformation recovered in connection with specific unsolved crimes. Even then, the greatly expanded population greatly increases the risks of misidentification and a lower burden of proof must be associated with this evidence.

The agency wishing to search for data would then have to provide information satisfying the state with the database to be examined that there is a real crime associated with this search request. Any matching results must be returned in confidence.

But in all cases, this facility should only be used for serious crimes.

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?

It could be used by the police to help identify suspects, but it is not appropriate to approach, question or detain someone merely because they are related to a suspect. The risks and consequences of both misidentification, and or raising previously unknown relationships, are too great and can deeply affect individuals. As such, the familial searching is not necessarily a problem, but it is what is done with that information that truly matters.

The issue of identical twins has still not been addressed.

- 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 unacceptable, as long as the data was actually gathered legally and appropriately. Some of it, sadly, reflects the consequences of social exclusion and disadvantage in minorities.

- 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?

This appears to repeat question. 3.a.2. Volunteers should be able to specify the terms of their inclusion on the database, whether for a specific investigation, a chosen time, or if they wish, indefinitely.

Consent should not be irrevocable.

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.

The provisions for obtaining consent are poor. Consent may have been given under pressure (possibly even illegally so), without relevant legal advice, without consultation as to the real long-term consequences, when under extreme pressure, or just to avoid the valid issue of appearing guilty by denying consent.

It is for these reasons, that consent must not be irrevocable and volunteers must be able to withdraw consent. In addition, consent may have been given a long time in the past.

- 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?

Collection of DNA from everyone at birth would be intrinsically more equitable, but is still intrinsically wrong and disproportionate. While a complete database (including collection of bioinformation of travellers at port entry) would clearly make crime-solving easier and be able to exclude people as well as include them, it is still an important tool that could be used by an oppressive Government. Or could be abused (legally or illegally) by those with access to such a wealth of information.

It also makes implicit that no-one is free... everyone is a suspect, and a subject to state power.

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?

The police should have their own staff qualified to judge the true significance of DNA matches. In court, expert witnesses should be presented on behalf of the defence to explain the statistical issues involved, including as a matter of course, in what situations a false match can be given; as well as in what (if any) situations the bioinformation may have been present in the location benignly.

- 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 quantity of other evidence required to corroborate a DNA match would depend on many factors including the quality of the match, other legitimate reasons why the DNA may have been present, contamination of evidence, and the intrinsic uncertainties of the process. A DNA match must never be sufficient evidence in isolation.

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.

6. Other issues

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

While this is as yet not so much the case for DNA, there is a rapidly increasing use of fingerprint scanners in other spheres than criminal justice, including workplace authentication, commercial purchases, and even of primary school children for registration or library use.

While some of these do not yet use the 10 point system required by police for matching a fingerprint matches, that is probably only temporary and it can be foreseen that such scanners will have a quality allowing for them to be seized and used for intelligence or evidence gathering, possibly even by trivially inputting the data into the databases.

I think there are many negative problems with this, and it is worth closer scrutiny. One easily overlooked aspect is that it can ingrain a culture of providing bioinformation casually without real thought to how important giving unique biometric data can be, and what uses it can really be put to. There are of course many other problems: intrinsically disproportionate, fingerprints are forgeable, and so on.

It is a topic well worth analysis.