Nuffield Council on Bioethics

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Mr Andrew Proudfoot
Justice Committee
The Scottish Parliament
Edinburgh EH99 1SP

Dear Mr Proudfoot

Criminal Justice and Licensing (Scotland) Bill – call for written evidence

I am pleased to attach a response from the Nuffield Council on Bioethics to the above call for evidence.

We focus in the response on relevant findings from the Council's report *The forensic use of bioinformation: ethical issues* (published in September 2007), a copy of which has been enclosed with this letter. The report can be downloaded at: www.nuffieldbioethics.org/forensic.

I hope that this is a helpful contribution to the inquiry. Please let us know if we can be of further assistance.

Yours sincerely

Hugh Whittall
Director

NUFFIELD COUNCIL ON BIOETHICS

Introduction

1 In September 2006, the Nuffield Council on Bioethics appointed a Working Group, which was chaired by Professor Sir Bob Hepple QC and included members with expertise in law, genetics, philosophy and social science, to consider the ethical issues raised by the forensic use of bioinformation. As part of the inquiry, the Group held a public consultation, which elicited over 135 responses.

2 In September 2007 the Council published a report, *The forensic use of bioinformation: the ethical issues*. This response is drawn primarily from the conclusions and recommendations made in that report.

3 We put forward our own views and recommendations on these issues, not as the end of the debate, but hopefully as a contribution to the development of well-informed public engagement. We suggested means by which the public interest in crime control can be balanced in a proportionate way with other values such as liberty and autonomy, privacy, consent and equal treatment, and the legal protection of human rights and civil liberties.

Section 58 – Retention of samples etc.

Extract from Policy Memorandum:
301. This section authorises the retention of fingerprints and any other forensic data already taken from persons proceeded against but not convicted of a serious sexual or violent offence. Data does not have to be destroyed for at least 3 years, and the relevant chief constable would have discretion to apply to a sheriff for extensions of up to 2 years at a time. This would bring the law on the retention of fingerprints and other forensic data into line with current law on DNA retention.

4 In its report, the Council supported the current approach taken in Scotland to the retention of DNA for forensic purposes. The Council recommended that fingerprints, DNA profiles and subject biological samples should be retained indefinitely only for those convicted of a recordable offence. In all other cases, samples should be destroyed and the resulting profiles deleted from the database. Retention of samples and profiles should be allowed, for three years, from those charged with serious violent or sexual offences, even if there is no conviction. Thereafter

the samples and profiles should be destroyed unless a Chief Constable applies to a court for a two-year extension, showing reasonable grounds for the extension [paragraphs 4.53-4.55]. These proposals are compatible with a recent ruling of the European Court of Human Rights in the case of *S and Marper v UK*. The Court referred to the Council's report extensively in its judgment document. **The Council therefore supports the proposal to bring the law in Scotland on the retention of fingerprints and other forensic data into line with current Scottish law on DNA retention.**

Section 59 – Retention of samples etc. from children referred to children's hearings 302.

Extract from Policy Memorandum:
302. This section authorises the retention for three years forensic data taken under existing powers where a child accepts or is found by a Sheriff to have committed one of certain serious violent and sexual offences, with discretion for the chief constable to apply to a sheriff for extensions of up to 2 years at a time to provide a means of managing high risk cases. This would align with current arrangements under section 18A of the 1995 Act for retention of DNA from individuals proceeded against for violent and sexual offences, but not convicted and aims to strike a balance between the need to manage risk and protect the public with regard to offending behaviour; and maintaining the core ethos of the Children's Hearings System – to address the needs of the child.

5 The Council does not have any specific comments to make on the Scottish Government's proposals regarding children's hearings, except to point out that the policy of permanently retaining the bioinformation of minors is particularly sensitive in the United Kingdom, where the age of criminal responsibility is low (at age ten years in England and Wales and eight in Scotland) compared with many other countries.

6 There is a separate youth justice system, in recognition of the special protections that should be afforded to children and young persons. The European Convention on Human Rights recognises the special case of children in the criminal justice system. The UN Convention on the Rights of the Child requires special attention to be given to the treatment of children by legal systems, to protect them from stigma, and that if they have offended, opportunities for rehabilitation to be maximised. The destruction of relevant criminal justice records and accompanying body samples could comprise one element in such a rehabilitative

process. The Supreme Court of Canada, while acknowledging the strong public interest in crime detection, has held that it was contrary to principles of the youth justice system to treat juveniles in the same way as adults, and that juvenile immaturity was a factor which militated against inclusion on the database. Parental consent for sampling would not, in our view, negate concerns surrounding the retention of samples and profiles of minors.

7 When considering requests for the removal of profiles from the NDNAD and the destruction of biological samples taken from minors (including from adults who were minors when their DNA was taken), we recommend that there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the destruction of samples. In deciding whether or not the presumption has been rebutted, account should be taken of factors such as:

- the seriousness of the offence;
- previous arrests;
- the outcome of the arrest;
- the likelihood of this individual re-offending;
- the danger to the public; and
- any other special circumstances [paragraphs 4.71-4.72].