

10th July 2009

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Dear Alan

Keeping the right people on the DNA Database: science and public protection

I am pleased to attach a response from the Nuffield Council on Bioethics to the above consultation.

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

The report was prepared by a Working Group established in September 2006, which was chaired by Professor Sir Bob Hepple QC and included members with expertise in law, genetics, philosophy and social science. To inform discussions, the group held a public consultation and met with representatives from relevant organisations.

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

Yours sincerely



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Response by the Nuffield Council on Bioethics to the Home Office consultation *Keeping the right people on the DNA Database: science and public protection*

- 1 This response draws on the conclusions and recommendations of the Nuffield Council on Bioethics' report *The forensic use of bioinformation: ethical issues*.¹ The report is clear that while DNA profiling is a valuable tool for detecting and prosecuting offenders, the public interest in crime control needs to 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.

- 2 Overall, we very much welcome this reconsideration of the way DNA is stored for forensic purposes, even if it has been forced upon the Government by a judgment of the European Court of Human Rights. Based on the arguments set out in our report, we welcome the following specific proposals as set out in the Government's consultation paper:
 - All DNA samples will be destroyed, including legacy samples.
 - Children's profiles will be destroyed at 18 if they are convicted of only one non-serious offence.
 - Volunteer profiles will not be loaded onto the database and existing volunteer profiles will be removed.
 - There will be a distinction between serious and less serious offences in terms of retention of DNA profiles.
 - Defined criteria for deleting profiles under exceptional cases will be set out in Regulations.
 - The establishment of a strategic and independent advisory panel to monitor the implementation and operation of the Regulations.

- 3 We have queries or concerns about some other aspects of the proposals, however, and these are outlined below.

Retention of DNA profiles

Evidence on the impact of retention

- 4 The research on which the Government has based its proposals to retain profiles for 6 and 12 years does not appear to be particularly robust. The evidence available finds that the time it takes after an arrest for a person to have no higher risk of re-arrest than a member of the public is

¹ Nuffield Council on Bioethics (2007) *The forensic use of bioinformation: ethical issues*. London: Nuffield Council on Bioethics. Available at: www.nuffieldbioethics.org/forensic

somewhere between 4 and 15 years – a wide range that suggests the data is far from conclusive. In its own research, the Government has made the assumption that the risk of offending following an arrest that did not lead to a conviction is similar to the risk of reoffending following a conviction. We agree that this is controversial, even though work by the Jill Dando Institute is cited in support. This research compares the risk of later conviction between people arrested but not convicted and people who received a caution or a non-custodial sentence. We understand the difficulties of conducting such research, but comparisons with people convicted of all offences would provide much more relevant data.

- 5 The Council noted in its 2007 report that “there is, at present, a lack of convincing evidence that retention of profiles of those not charged with or convicted of an offence has had a significant impact on detection rates and hence it is difficult to argue that such retention can be justified. Accordingly we recommend that independent research should be commissioned by the Home Office to assess the impact of retention. In the light of the findings of that research, an informed judgment could then be made.” We acknowledge that the legal requirement to comply with the judgment of the European Court of Human Rights within a short timeframe has meant there has not been time to conduct in-depth research. We urge the Government to commission such research as a matter of urgency, and amend any future Regulations promptly if warranted by the findings. In the meantime, we would suggest that, in view of the limited evidence available, there should be a presumption in favour of non-retention of profiles from non-convicted people, in which case the proposed retention periods of 6 and 12 years are excessive.

Plans for legacy profiles of innocent people

- 6 We would like the Government to clarify its plans for legacy profiles of people arrested but not found guilty of an offence. The summary of the consultation document states that it will take two years to destroy these profiles (para 2.11). However, the main text introduces the problem of 500,000 of the legacy profiles having no linked PNC Record and suggests that no action will be taken until the outcomes of an impact assessment by the Association of Chief Police Officers is available (para 6.31).

Removal of profiles in exceptional circumstances

- 7 Although we welcome the inclusion in statutory Regulations of criteria for deletion of DNA profiles in exceptional circumstances, we are

disappointed that this will still be at the discretion of the Chief Officer with no recourse to appeal other than judicial review. We recommend in our report: "An independent body, along the lines of an administrative tribunal, should oversee requests from individuals to have their profiles removed from bioinformation databases. The tribunal would have to balance the rights of the individual against such factors as the seriousness of the offence, previous arrests, the outcome of the arrest, the likelihood of this individual reoffending, the danger to the public and any other special circumstances."

Retention of children's DNA profiles

- 8 It seems inconsistent that under eighteens who are *arrested* twice or more but not convicted of a lesser offence will have their DNA retained for 6 years just like adults, yet under eighteens who are *convicted* once of a lesser offence will have their profile removed from the database when they turn eighteen. We would like the Government to provide a fuller explanation for this difference in policy.

Governance and accountability

- 9 The current proposals do not consider oversight of research and other access requests to the National DNA Database (NDNAD), for example for further testing of samples or familial searching and inferring ethnicity. We recommend that there should be a statutory basis for the regulation of all aspects of the forensic use of DNA, with specific powers of oversight delegated to an appropriate independent body or official. We consider that a longer-term view is required that considers the future possibilities and challenges that may come with increased access and linkage involving a range of forensic databases.
- 10 The Government is proposing to restructure the National DNA Strategy Board to have more external, independent membership. We would like more detail on this proposal and suggest that one way to ensure independence would be for the Board to be chaired by an external, independent individual.

Openness and public perception

Communication of new Regulations

- 11 The Government has been criticised for creating a 'surveillance society' and urged to take steps to maintain and build public trust in the use of

personal data.² Many respondents to our public consultation had strong objections to the DNA of innocent people being stored on the NDNAD, often driven by a fear that the Government would abuse the database or pass their information to third parties.³ The pledge to destroy all DNA samples and to keep indefinitely only DNA profiles of convicted criminals is a strong signal from the Government that it does not want or need to keep information about people unnecessarily. It will be important for the Government to communicate clearly the implications of the proposed changes in policy and governance in order to gain public trust.

Acknowledgement of concerns about being on the NDNAD

12 The consultation document does not acknowledge people's concerns about being on the NDNAD. We would welcome an explicit recognition by the Government that the 'no reason to fear if you are innocent' argument ignores several points:

- If an individual's DNA is on the NDNAD, there is a chance they will be identified as a match or partial match to DNA found at a crime scene even if they are innocent. They may have been at the crime scene at an earlier date, or have a similar profile to the real criminal. This does not mean they will be charged, but being involved in a criminal investigation, and being tainted with suspicion, can be personally distressing.
- The NDNAD was originally intended to represent the criminal community and so people may feel that being on the NDNAD implies that they are a criminal.
- Sensitive genetic information can be obtained from DNA profiles, such as family relationships. The fact that the police, forensic science services and people carrying out research on the NDNAD have access to people's DNA without their consent could be seen as an intrusion of personal privacy.
- The 'nothing to fear if you are innocent' argument cannot, alone, be a sufficient justification for the full extent of police powers. One's starting point should be the presumption of liberty, which is necessarily accompanied by the importance of keeping governmental and police power appropriately delimited and within the rule of law.

² House of Commons Home Affairs Select Committee (2008) 5th report 2007-08 *A Surveillance Society?* Available at:

www.publications.parliament.uk/pa/cm200708/cmselect/cmhaff/58/5802.htm

³ See Nuffield Council on Bioethics (2007) *The forensic use of bioinformation: ethical issues*, Appendix 2. London: Nuffield Council on Bioethics. Available at:

www.nuffieldbioethics.org/forensic

Given this starting point, then the government always needs to show a strong reason, backed by objective evidence, that there is adequate justification for interfering with the lives of its citizens.

Again, it is important that these issues are addressed and discussed as openly and publicly as possible if the policy is to gain and retain public trust.

Collection and use of statistics

13 The Government continues to cite 'match data' to justify its retention policy on DNA. For example, the consultation document states:

"We know that from research between May 2001 and 31 December 2005 there were approximately 200,000 DNA profiles on the National DNA Database which would previously have had to be removed before legislation was passed in 2001 because the person was acquitted or charges dropped. Of these 200,000 profiles, approximately 8,500 profiles from some 6,290 individuals have been linked with crime scene profiles, involving nearly 14,000 offences. These include 114 murders, 55 attempted murders, 116 rapes, 68 sexual offences, 119 aggravated burglaries and 127 offences of the supply of controlled drugs."

These statistics are also repeatedly cited in Parliament.⁴ This type of data is misleading as it does not tell us whether the match resulted in a conviction or whether DNA evidence was essential or even relevant to the case. There may be an innocent reason for a person's DNA being found at a crime scene. The Home Office has itself reported that in 42 per cent of cases where DNA evidence was available, the police already had the name of the suspect whose identity was suggested by the match report.⁵ In many such cases it is likely to be possible for the police to acquire a new sample, hence obviating the need for the profile to be retained on a database.

⁴ For recent examples see:

- Lord West of Spithead, Second Reading Policing and Crime Bill, 3 June 2009
- Lord Bach, Personal Information Debate House of Lords, 2 April 2009
- Vernon Coaker, A Surveillance Society? Westminster Hall debate, 19 March 2009
- Jacqui Smith Genetics, Written answers and statements, 16 December 2008

⁵ Home Office (2005) *DNA Expansion Programme 2000–2005: Reporting achievement* (Forensic Science and Pathology Unit), pp12–15.

14 We welcome the proposal that key statistics on NDNAD numbers, speculative searches, deletions and applications for deletions should be published quarterly and annually. However, we recommend that there should be improved recording of police data on the uses of DNA matches and the production of better statistics to inform key stakeholders and the wider public. The collection of statistics would also assist with an exploration of both the effectiveness and the cost-effectiveness of the forensic use of bioinformation and help provide evidence as to the proportionality of the resulting infringements on the liberty, privacy and autonomy of individuals. More effort should be made to ascertain 'best practice' within policing to maximise the crime control potential of bioinformation.⁶

Recordable vs non-recordable offences

15 DNA samples can be taken from an individual who has been arrested in connection with a 'recordable' offence without their consent. We noted in our report that the distinction between recordable and non-recordable offences is to some extent arbitrary (e.g. failing to give advance notice of a procession is recordable, but obstruction of the highway is not). We recommend that the list of recordable offences for which DNA samples can be taken from arrestees, should be rationalised so as to exclude all minor, non-imprisonable offences.

Consultation process

16 Inviting people to submit their views on a consultation document will result in a self-selecting set of respondees, many of whom will have a strong personal or professional interest in the topic. Given the fact that the Regulations are likely to affect a large number of the population, we would urge the Government to seek the views of other members of the public on the new proposals. Several organisations have already attempted to engage with a non-self-selecting audience on issues related to the NDNAD and the Government might like to note their findings:

- The Human Genetics Commission: 'Citizens' Inquiry into the Forensic Use of Genetic Information'
www.hgc.gov.uk/Client/Content.asp?ContentId=755

⁶ For example, a collaboration between researchers at the Universities of Leeds, Durham and Northumbria is considering the utilisation of forensic bioinformation within the justice system. See: <http://www.law.leeds.ac.uk/research/projects/bioinformation.php>

- University of Glamorgan, the Wales Gene Park, Techniquet and Swansea University: 'Putting the National DNA Database on Trial'
www.dnadbasetrial.org