

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.

Liberty

Liberty's response to the Nuffield Council on Bioethics Consultation: "Forensic use of bioinformation: ethical issues" January 2007

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About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

Contact

Gareth Crossman

Director of Policy

Jago Russell

Policy Officer

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Introduction

1. Liberty is delighted that the Nuffield Council on Bioethics has decided to look into the ethical issues raised by the forensic use of bioinformation. The National DNA Database (the "**Database**" or the "**NDNAD**") undoubtedly raises profound legal and ethical concerns. Of particular concern to Liberty is the permanent retention of the DNA of everyone who is arrested and the severe over-representation of young black males in the samples currently contained in the Database. We are also worried about some of the current uses of that information. Such issues have, however, received surprisingly little political attention. The Database was established without any Parliamentary debate and the political discourse has since been dominated by over-inflated Government claims about the utility of the NDNAD in tackling crime.

2. The announcement of this consultation has already started to redress some of the unbalanced and misleading rhetoric, encouraging a wider public debate about the ethical dimensions of the NDNAD.¹ We hope that Nuffield's work further informs that debate and encourages policy-makers, politicians and the wider public to focus more on the privacy and equality implications of the Database and less on the rhetorically powerful but unrealistic promises of a risk-free society or one in which all criminals are brought to justice. Liberty fears that, in the pursuit of this mirage, we are sleep walking into what the Information Commissioner has called a "surveillance society"; that we will cease to be a society of citizens and instead become a society of suspects.

3. In this short response we outline our primary concerns about the privacy implications of the NDNAD and, in particular:

- explain why the policy on the retention of DNA constitutes an unjustified and disproportionate interference with personal privacy;
- consider the implications of this policy for race equality issues and children's rights;

¹ Cf <http://news.independent.co.uk/uk/crime/article1945768.exe>

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discuss some current and proposed uses of the NDNAD which raise particular ethical concerns.

Privacy – Principles

4. Liberty's starting point is that a person's DNA is private information and that the collection, retention and use of that information engages their right to privacy. We believe this is the case because DNA is information about a person's genetic make-up. In our view this kind of information belongs, *prima facie*, to the individual concerned and not to the state. As La Forest J explained in *R v. Dymont* "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit."²

5. This does not, of course, mean that it will never be justified for the state to take, retain and use a person's personal information, even their DNA. Instead, it means that the

state should be required justify such actions. First, is there a legitimate reason for the intrusion of privacy that the NDNAD constitutes? Secondly, could that legitimate aim be achieved in a way which does not intrude into a person's privacy or could do so less? Liberty believes that citizens are entitled to ask these questions and that responsible, democratic and accountable Governments should not shy away from providing us with the answers. Only then can we make up our own minds about the validity of these arguments. This culture of justification is, we believe, integral to good policy making, Government accountability and an engaged citizenship.

6. These are the questions that the courts are required to ask under the Human Rights Act 1998 when deciding whether a state action or law, engaging Article 8 of the European Convention on Human Rights (right to respect for private and family life) is justified.³ The domestic courts have accepted that the taking and use of DNA engages Article 8 and have therefore required a degree of justification for such actions from the

² (1988) 45 CCC (3d) 244, at 255-256)

³ Article 8(2)

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Government. They have not, however, conducted a very rigorous assessment of the "lawenforcement"

justifications they have been given. The courts' approach has been even worse as regards the indefinite retention of DNA. They have not even considered this to fall within the remit of Article 8 and, therefore, required no justification from the Government.⁴ We disagree with this assessment and hope that it will be overturned in the European Court of Human Rights.⁵

7. While disappointing, the courts' approach is, perhaps, unsurprising. Government schemes that impact on privacy (like the Database and ID Cards) often involve relatively low-level and less tangible infringements of a person's human rights. It is only by aggregating the impact of these schemes across the millions of people they affect that the

real extent of the privacy infringement becomes clear. When an individual's case is brought before a court, the judge does not have institutional capacity to assess whether the benefits of the scheme really justify the millions of low-level rights violations the scheme involves. In fact, s/he is presented with and asked to adjudicate only on the single

low-level violation brought before him/her. When this single privacy infringement is balanced against the grand and compelling claims of "accurate and efficient law enforcement" presented as a justification by the Government, it is not surprising that, more often than not, the courts decide in favour of the Government.⁶ This is why extrajudicial

mechanisms are so important in protecting our privacy rights against sweeping Government initiatives like the NDNAD and ID Cards.

8. Parliamentarians are beginning to wake up to the wider societal impact of these

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grand schemes. Indeed where, as with the NDNAD, the privacy of millions of people is at stake, politicians may be required to take account of privacy rights if they are to be reelected.

For this reason it is vital to ensure that the electorate, rather than just a legal and political elite, are awake to the privacy implications of the Database. We hope that Nuffield will help to contribute to that public awareness.

⁴ *R (S and Marper) v Chief Constable of S. Yorks & Home Secretary*, [2004] UKHL 39

⁵ *Ibid.*, cf Baroness Hales' dissenting judgment on this point, para 73

⁶ In terms of human rights litigation, cases like that of *S and Marper* are at the other end of the spectrum from torture cases which usually involve a very severe rights violation which affect very few people and, in which, adjudication of individual cases is particularly well-placed to protect rights.

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Sampling Powers

9. The Consultation raises a number of questions about the ethical issues raised by the taking of DNA samples and fingerprints. Liberty is more concerned about the indefinite retention of DNA than about the initial taking of this bioinformation. There are many legitimate reasons why the police may need to take a suspect's fingerprints or DNA during the course of a criminal investigation. This information could, for example, help the police to determine whether a suspect was at a crime scene and/or to confirm a person's identity. During the course of a criminal investigation there may also be a good reason to request the DNA and/or fingerprints of a person who is not suspected of committing any crimes (i.e. a witness or victim). This could for example help the police to eliminate non-suspect bioinformation found at a crime scene. If a justification like these exists, it is unlikely that the taking of DNA samples or fingerprints for the purposes and duration of a particular criminal investigation would raise particular privacy concerns.

10. Some of the other ethical issues which could arise from the taking of bioinformation in the context of a criminal investigation are also worth mentioning:

- Samples should not be taken in a manner or at a time that is likely to cause unnecessary distress or inconvenience to the person concerned. It would not, for example, be acceptable to wake a suspect in police custody on several occasions during the course of a night to take samples which could have been taken upon arrival at the station.
- The least intrusive method of taking bioinformation should be used – i.e. blood should not be taken if a mouth swab will suffice.
- Particular sensitivity should be shown to the taking of DNA from victims and other vulnerable people.

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- At the time the sample is taken, a clear explanation should be given of the reason and legal power being used to take the sample. Guidance should also be given on the applicable rules on retention and use of the sample.

Retention of Samples

11. The Criminal Justice Act 2003 provides for the retention of DNA samples and profiles regardless of whether a person is prosecuted or cleared of an offence. It means that even if a person is never charged with an offence for which s/he was arrested his/her DNA will be retained on the Database indefinitely. Many of the arguments in favour of the retention of DNA profiles of suspects that are not ultimately convicted of or even charged with an offence, simply do not stand up to scrutiny. Arguments in favour of the policy are also outweighed by the disproportionate impact on individual privacy. The policy has also had a disproportionate impact on black men and the Database inappropriately contains the DNA of thousands of children not convicted or charged with any offence.

12. Liberty is not aware of any evidence which supports the hypothesis that the detection of crime is improved by including DNA profiles on the Database from people

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who are arrested but not charged, or people against whom charges are dropped or are found to be innocent, as compared with retaining DNA profiles taken at random from the population. This was accepted by the Government on 9th October 2006, when Joan Ryan MP stated "As far as we are aware, there is no definitive data available on whether persons arrested but not proceeded against are more likely to offend than the population at large."⁷ There is no basis for distinguishing these people from the population as a whole and the current approach therefore discriminates against them without justification.

13. The assertions put forward by police and Government as to the number of 'matches' made to the DNA profiles of unconvicted persons are highly misleading since (a) 'matches' only result in convictions in a small proportion of cases and no conviction

⁷ 8th October 2006, HC Deb, Col 491W

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information is given; (b) no information is given as to whether those persons were already suspects or would have been otherwise identified through traditional policing methods; and (c) the figures are probably inflated by the inclusion of a high (but necessarily diminishing) proportion of 'cold cases' relating to crimes committed before the police had today's capacity to use DNA in crime detection.

14. In addition there is no evidence that the detection of crime is improved by increasing the size of the Database. This is illustrated by the fact that, although there has been a massive extension of the NDNAD over the last 3 to 4 years, the rate of crime detection using the Database has stayed at about 0.35% of all recorded crime. If extending the size of the NDNAD had been successful one would expect this proportion to have increased. We would also point out that the usefulness of the Database is driven by the ability to obtain DNA from the crime scene. In many cases DNA is not available. Furthermore, the identity of the suspect is not in question in a high proportion of cases and, in these, the ability to match crime-scene DNA would not facilitate prosecution.

15. The NDNAD is the most extensive DNA database in the world, yet the public has never been properly consulted on it. Indeed the creation of the database was not even debated in Parliament. The Government justifies the Database by referring to individual cases which have been solved as a result of the NDNAD. This leads one to balance the right of the victim of such crimes against the privacy rights of the individual criminal whose DNA identified him/her. It does not, however, take account of the wider impact on the privacy of the many people who have never committed a crime. We are also concerned about the lack of legal restrictions on the use of the NDNAD. The police are already using this information in a way which extends beyond merely matching DNA found at a crime-scene to an entry on the NDNAD (see comments below about racial profiling and familial searching).

16. We have particular concerns about the retention of children's DNA on the Database. Over 50,000 of those whose DNA has been taken and stored on the database are children. There is also anecdotal evidence that children's DNA has been taken and

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retained following an arrest in connection with very trivial offences. Liberty is also profoundly concerned about the disproportionate number of black men on the NDNAD. 37% of black men have their DNA on the database. It is estimated that 135,000 black males aged 15-34 will be entered in the NDNAD by April this year, equivalent to as many as 77 per cent of the young black male population in England and Wales. By contrast, only 22 per cent of young white males and six per cent of the general population will be on the database.⁸ Within the Metropolitan Police area, 51% of the innocent (uncharged/unconvicted) people whose DNA is held on the Database are of black or BME origin. This disproportionate representation of black men on the Database exacerbates and reinforces discriminatory police practices which are well-documented.

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17. The NDNAD does not exist in a vacuum and its privacy implications are exacerbated by its connection with other sources of information and other Government databases:

We understand that private companies, for an annual fee, retain the samples from which the data contained in the NDNAD are derived. These samples contain vast amounts of genetic information, including health-related information. We understand that the companies have themselves used these samples to develop minidatabases

of DNA records. We do not see any justification for the retention of these samples and believe that they should be destroyed.

The Database is also connected to the Police National Computer. This exacerbates privacy implications because: (a) connections can be drawn between sets of personal data; (b) PNC records are now retained indefinitely as a result of the link to the Database, whereas before they would have been weeded after a short period of time; and (c) information contained on the PNC, is visible to a wider range of non-policing bodies. In short, the effect of the NDNAD is not limited to that database but has a wider impact on other police records.

We fear that connections will be made between the National Identity Register (“NIR”) and the Database. A recent Home Office document on the NIR explains

⁸ *Telegraph*, 5th November 2006

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that “it will have links with other Government systems to share identity data” and even suggests that the biometric data element of the NIR will, in fact, be stored on “existing biometric systems”.⁹ If the bioinformation in the NDNAD were to form part of the NIR, this would represent a severe extension of the stated lawenforcement purpose of the Database.

Volunteers

18. The Consultation asks a number of specific questions about the retention of bioinformation which has been supplied voluntarily, for example by victims who provide their DNA for elimination purposes during the course of a criminal investigation. At present over 12 thousand volunteer samples are contained in the Database. The samples that are retained may be used in the future in the same way as samples taken from convicted criminals. A person who has volunteered for their DNA to be put in the Database has no right to have this bioinformation removed. This is not only unacceptable in principle but also unwise in practice. It is wrong in principle because if a person’s consent is needed to take a DNA sample then the person concerned should have the right

to withdraw that consent and to require their sample to be removed. It is wrong in practice because if people fear that any bioinformation they voluntarily provide to the police could be used against them or their families in the future, they will not provide their consent in the future. In the long run this policy will make it more difficult for the police to do their jobs.

Uses of DNA samples

19. There are some current uses of the NDNAD which we consider to raise particular ethical concerns:

The police are currently in favour of the recovery of physical information on an individual (from crime scene DNA where there is no match to an NDNAD entry) in

⁹ *Strategic Action Plan for the National Identity Scheme: Safeguarding your Identity*, Home Office, December 2006, pages 7 and 11

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order to obtain information about the appearance of a perpetrator. This would represent a move into a class of genetic marker of considerable importance to an individual. Such markers could, for example, carry information on disease liability (for instance, a gene involved in facial appearance could well carry variants that might cause congenital malformation in a carrier's offspring). In Liberty's view, such information would give the police access to entirely inappropriate medical and ethnic information and would constitute a serious invasion of genetic privacy.

□ Liberty is also concerned at the use of a technique known as "familial searching", whereby the NDNAD is used to assemble a list of possible relatives of the owner of a particular DNA sample. The list of possible relatives is obtained by identifying individuals whose Database profiles show a statistically significant similarity to a profile from a crime scene sample but which do not exactly match the sample profile. Each familial search throws up 50-150 possible relatives and about 80 searches are being undertaken each year. This raises additional privacy concerns as many innocent individuals are potentially brought into a criminal investigation. Familial searching could also unwittingly reveal to the police information about private personal relationships. A genetic link between individuals might be previously unknown to one or both parties and police investigations may make this information known for the first time. This is a serious concern given that it is estimated that around 1 in 30 people in the UK are mistaken as to the identity of their biological father. Familial searching also risks disclosure by police of the fact that an individual has been arrested to their family members.

□ We understand that 19 research projects using the NDNAD have been allowed since 2000. We are concerned that, at present, the procedure for approving research uses of the NDNAD is not sufficiently transparent. Information about these approved research projects should be made public. There should be formal ethical review of applications to use the database and the associated samples for research purposes. Without tight regulation, there is no reason why a great variety of tests could not be conducted on many of the millions of genetic markers in human DNA

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to reveal highly sensitive information about ethnic origin, physical appearance and disease liability.

Jago Russell, Liberty