

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 London Criminal Courts Solicitors' Association

Introduction

The current public consultation process in relation to the police powers to retain and use of DNA samples by the police is both welcome and long overdue. We regard the consultation process and public debate to be particularly important in addressing how samples of DNA should be dealt with for those who have not been convicted of any criminal offences but who have voluntarily provided DNA or provided DNA following arrest.

In our experience it has come as shock to many defendants to discover that the police have a right to permanently retain DNA profiles from those who have been arrested but not charged and those who have been acquitted of offences including those of a relatively minor nature. We can confirm that those who do learn of the extent of the circumstances in which the police can obtain DNA are most concerned.

The powers governing the NDNAD have been expanded through a series of minor clauses and successful Criminal Justice Acts and delegated legislation which is not subject to the scrutiny both by Parliament and the media that primary legislation attracts. We believe that the NDNAD has largely been set up "through the back door" and as a result appropriate public debate has not taken place.

We consider that it is important to consider any proposed changes to the law relating to the retention and use of DNA evidence to be considered in context. We note the current consultation process comes at a time when the introduction of means testing in the magistrates' court and the proposed Carter reforms are limiting the access of defendants to legal advice and therefore their ability to assert their increasingly limited rights against this and other encroaching powers of the state.

Specific points in response to the issues raised in the consultation paper

Many of the issues raised within the consultation paper fall outside of our area of expertise however we do wish to highlight various points of principle which we hope will be taken into account during the consultation process:-

1. The LCCSA is generally against the storage of DNA for people who are not convicted of crime. In our view those people should be placed in the same position as those who have not been arrested or charged. We do not regard it to be proportionate to retain DNA from people who have not been convicted of a criminal offence. We consider the retention of samples of suspects who are not convicted offends the presumption of innocence by implicitly assuming all suspects are more likely to offend in the future.

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We also have concerns about whether victims and witnesses are really in a position to give informed consent as to whether they wish to provide DNA. The current mechanism for applying to remove samples in "exceptional" cases is not in our view widely understood and would be difficult for people to use without the assistance of a lawyer who would not be paid by legal aid for their efforts.

2. We wish to refer to the response prepared by GeneWatch to the consultation paper. We share their concerns that the DNA database of those people who have been arrested or charged but not convicted will reflect any bias in law enforcement and we wish to highlight a particular paragraph from the GeneWatch report relating to this issue:-

Black men in particular are disproportionately represented on the DNA Database, with reports suggesting that up to 3 out of 4 black men (aged 15 to 34) are now on the Database.¹ Current legislation creates an enormous potential for a large proportion of Black and Minority Ethnic groups to be stigmatised and subjected to unnecessary surveillance, leading to (or exacerbating) a loss of trust in the police in these communities. Although controls on the Database alone cannot prevent bias and discrimination in the criminal justice system, they can limit the extent to which the Database is unfairly populated and used. Time limits on retention and a return to taking DNA on charge rather than arrest (except when needed to investigate a specific offence) would help to reduce the number of black men retained unjustifiably on the Database. Expanding the Database to include the whole population is unlikely to restore the trust of people already held on it unfairly, or to prevent it being used in a discriminatory way.

3. The strength of evidence required to arrest an individual is very limited and it is currently possible for arrests to be carried out in very minor cases (formerly non arrestable offences). With that in mind it appears to us to be a disproportionate response to retain DNA in cases when no convictions follow. It is of great interest to us that it would appear the number of direct DNA detections in 2005/2006 are reported as 20,349, compared with 20,489 in 2003/2004 and 19,873 in 2004/2005. Therefore it does not appear that the number of individuals on the database has led to an increase in DNA detections.²
4. The timing of this consultation paper is significant and it may be helpful to identify the context in which identification procedures are under review nationally and internationally. For instance the US have recently announced that there are new plans for the US airport scanners to take fingerprints of all fingers of all visitors so that the information will be compatible with the FBI database. Also we note that there are plans for a national "joined up" database of information which have been published very recently.

¹ Leapman B (2006) Three in four young black men on the DNA database. The Telegraph. 5th November 2006.

² Those statistics can be found in the GeneWatch Report referred to above.

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5. The NDNAD database at the moment can only be used for the prevention and detection of crime but we are mindful of the fact that the database could in time be used for other purposes. We note that the potential uses of ID cards have changed and expanded.
6. The argument that only the guilty should be concerned if DNA is retained and that the current database is a very useful tool to fight crime merits careful consideration. In our view it is certainly a helpful investigative tool to some degree but we would be assisted greatly in evaluating its success in knowing how many cases are actually solved by speculative searches of those who have previously not been convicted of any offences together with the nature of the offences that were solved in that way. We would also welcome a cost analysis so that the cost and relative success of the database can be properly evaluated. Until those steps have been taken it is difficult to be sure how useful the database is to the police when specifically looking at the use and retention of DNA of those who have previously not been convicted of criminal offences.

We would favour the appointment of an independent regulator of the database. The regulator should have power to evaluate accurately whether the database is used in accordance with the statutory regime and that it is run cost effectively. We would also want to see the introduction of a regulator to assess the quality of the scientific methods which are used.

We would welcome further comprehensive independent research into the reliability of various aspects of the analysis of DNA. For example we would suggest that the reliability of expert evidence which purports to attempt to predict the physical characteristics of a suspect through the analysis of DNA taken from the crime scene be examined further as we share the concerns of GeneWatch that such methods may not be reliable and may have serious ethical, privacy and social implications.

We would wish to ensure that steps are taken to reduce the risk of commercial interests influencing the findings of experts. In coming to that view we are particularly mindful of other high profile miscarriage of justice cases involving expert evidence and we are very conscious of the fact that the introduction of DNA evidence frequently has great influence on the outcome of trials. We would therefore seek to minimise the risk of a miscarriage of justice by promoting a greater understanding of the validity of certain DNA analysis techniques and to identify the limitations of DNA forensic evidence.

7. As noted above we are opposed to DNA being retained for suspects who are not convicted of any criminal offences. If the current situation remains we would at least wish to see a 'sliding scale' implemented so that samples which are retained from suspects are retained for a shorter period of time than those who are convicted of offences. Similarly we suggest the 'sliding scale' should apply so that for both suspects and those convicted of crime, the more serious the offence the longer the sample should be retained.

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Summary of response to the questions raised in the consultation paper

Question 1 - The interpretation of bioinformation

We do not have sufficient scientific expertise to respond to this question

Question 2 - Sampling powers

Please see points 1,3 4 and 6 raised above

Question 3 - The management of the NDAD

Please see points 4,5, 6, and 7 raised above

Question 4 - Ethical issues

Please see points 2 and 5 raised above

Question 5 - The evidential value of bioinformation

Please see point 6 raised above

Question 6 - Other issues

We have no further points to raise