

# NUFFIELD COUNCIL ON BIOETHICS

## Response to the Independent Advisory Group on the Use of Biometric Data in Scotland

*September 2017*

- 1 The Nuffield Council on Bioethics is an independent UK body that examines and reports on ethical issues arising from developments in bioscience and medicine that concern the public interest. We welcome the opportunity to contribute to the work of the Independent Advisory Group on the Use of Biometric Data in Scotland.

### **Background about the report**

- 2 The Council carried out a project in 2007 to identify and consider the ethical, social and legal issues raised by current and potential future uses of bioinformation for forensic purposes<sup>1</sup>. The work was chaired by Professor Sir Bob Hepple QC FBA (now deceased), former Emeritus Professor of Law at the University of Cambridge, and Chair of the Nuffield Council on Bioethics.

### **Ethical values and human rights**

- 3 In Chapter 3 of the report, we endorsed a rights-based approach that recognises both the fundamental importance to human beings of respect for their individual liberty, autonomy and privacy and the need, in appropriate circumstances, to restrict these rights either in the general interest or to protect the rights of others.
- 4 We noted that the relevant legally enforceable human rights include the right to a fair trial, the right to respect for a private and family life, and the right for equal treatment, adding that any interference with these last two rights must be proportionate.
- 5 We also stated that where a policy does interfere with a qualified right, such as Article 8 of the European Convention of Human Rights, it is then necessary to ask whether the interference with the right is *proportionate* and *necessary* – with proportionality meaning that a policy is founded on relevant and not arbitrary conditions; and necessity implying that there are no alternatives that achieve the same policy goal in a less intrusive manner.

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<sup>1</sup> Nuffield Council on Bioethics (2007) The forensic use of bioinformation: ethical issues, available at: <https://nuffieldbioethics.org/project/bioinformation>

- 6 At the time of writing the Council report, the House of Lords held that a case of retaining bioinformation (the case of *S and Marper*) did not breach Article 8 of the Convention<sup>2</sup>. However, judges at the European Court of Human Rights subsequently endorsed the Council's recommendations against storing DNA profiles and samples of innocent people on the National DNA Database and upheld Marper's case. The ethical approach we advocated was directly cited in the 2008 European Court of Human Rights judgement. The relevant extract from the ruling is below:

According to a recent report by the Nuffield Council on Bioethics, the retention of fingerprints, DNA profiles and biological samples is generally more controversial than the taking of such bioinformation, and the retention of biological samples raises greater ethical concerns than digitised DNA profiles and fingerprints, given the differences in the level of information that could be revealed. The report referred in particular to the lack of satisfactory empirical evidence to justify the present practice of retaining indefinitely fingerprints, samples and DNA profiles from all those arrested for a recordable offence, irrespective of whether they were subsequently charged or convicted. The report voiced particular concerns at the policy of permanently retaining the bioinformation of minors, having regard to the requirements of the 1989 UN Convention on the Rights of the Child.

The report also expressed concerns at the increasing use of the DNA data for familial searching, inferring ethnicity and non-operational research. Familial searching is the process of comparing a DNA profile from a crime scene with profiles stored on the national database, and prioritising them in terms of 'closeness' to a match. This allowed identifying possible genetic relatives of an offender. Familial searching might thus lead to revealing previously unknown or concealed genetic relationships. The report considered the use of the DNA data base in searching for relatives as particularly sensitive.

The particular combination of alleles in a DNA profile can furthermore be used to assess the most likely ethnic origin of the donor. Ethnic inferring through DNA profiles was possible as the individual "ethnic appearance" was systematically recorded on the data base: when taking biological samples, police officers routinely classified suspects into one of seven "ethnic appearance" categories. Ethnicity tests on the data base might thus provide inferences for use during a police investigation in order for example to help reduce a 'suspect pool' and to inform police priorities. The report noted that social factors and policing practices lead to a disproportionate number of people from black and ethnic minority groups being stopped, searched and arrested by the police, and hence having their DNA profiles recorded; it therefore voiced concerns that inferring ethnic identity from biological samples might reinforce racist views of propensity to criminality.

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<sup>2</sup> R (on the application of S) v Chief Constable of S Yorkshire; R (on the application of Marper) v Chief Constable of South Yorkshire [2004] All ER 148

- 7 In a separate case<sup>3</sup>, challenging the failure to act in response to Marper, a majority judgment of the Supreme Court in 2011 confirmed that the policy of indefinitely retaining DNA samples infringed Article 8 of the European Convention of Human Rights. This decision echoed that made by the European Court of Human Rights in *S and Marper*.
- 8 The Protections of Freedom Act 2012 introduced a new framework for police retention of fingerprints and DNA data that adopted the Scottish model, whereby other than in exceptional cases, fingerprints, DNA profiles and biological samples from a person are kept permanently on record only if they have been convicted of a recordable offence.
- 9 Technologies have moved on since publication of the Council report, with the emergence of facial images and other forms of biometric data. We make a distinction between samples and profiles throughout the Council report, on the basis that the retention of samples leaves scope for further information gathering than the profile. Despite making this distinction, our recommendations were the same for both.

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<sup>3</sup> R (on the application of GC) (FC) (Appellant) v The Commissioner of Police of the Metropolis (Respondent) R (on the application of C) (FC) (Appellant) v The Commissioner of Police of the Metropolis (Respondent) [2011] UKSC 21 On appeal from the High Court (Administrative Court) [2010] EWHC 2225 (Admin)