

This response was submitted to the consultation held by the Nuffield Council on Bioethics on the Forensic use of bioinformation: ethical issues during November 2006 to January 2007. The views expressed are solely those of the respondent(s) and not those of the Council.

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List of questions

1. The interpretation of bioinformation

- a. In your view, is the SGM Plus[®] system, which uses ten STR markers, sufficiently reliable for use in ascertaining the identity of suspects in criminal investigations and/or criminal trials?

No. Given the abandonment of the 16-point standard for fingerprint matching in 1999, and subsequent drop to 12 points or less, it would appear that the dynamic – just as we are seeing an explosion in the numbers of people whose biometric data is held on criminal databases – is for the standard of ‘identification’ to be *reduced* when, if anything, it should be increased.

‘DNA’ is being sold to the public as a magic bullet for crime detection. If the technology is to retain any credibility in years to come, the standards used should be improved to well beyond ‘reasonable doubt’. The first Sheila McKie-type case based on DNA evidence could (rightly) destroy public trust in a technology which – in tightly-constrained circumstances – can clearly be of benefit.

2. Sampling powers

- a. From whom should the police be able to take fingerprints and DNA samples? At what stages in criminal investigations and for what purposes? Should the police be able to request further information from DNA analysts, such as physical characteristics or ethnic inferences?

The police should be able to *check* fingerprints of anyone they arrest against IDENT1, but they should not be allowed to retain the fingerprints for any longer than the results take to come back unless charges are then brought. And if the charges are subsequently dropped, or if the person is later found not guilty in court, then the fingerprint record should automatically be destroyed (no archive).

The same fundamental principles should be applied to DNA samples and NDNAD.

The police should be allowed to request, with no sanction against those who refuse, for people to volunteer their DNA for single-purpose checks in *very* serious cases (multiple rape or murder only). All DNA samples and data gathered in this way should be destroyed after checking, and should not be used for other checks ‘in the meantime’. If the contract is for people to sacrifice their privacy and anonymity in order to catch a maniac, it would be a serious abuse of trust to ‘take a sneaky peek’ just because you can. I imagine that most police officers experienced in gathering intelligence or the use of informants would appreciate this point, albeit in a different context.

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I would be very disturbed to see the introduction of ethnic inference in what is still a relatively immature technology. The very notion that “there is a gene / are genes for ethnicity (or other characteristics)” would be disputed by many experts. On the one hand, someone seems to be implying that just 10 STR markers may be sufficient to identify a person and, on the other, they are saying that the technology is sufficiently accurate and robust to provide ‘identikit’ information about physical characteristics. If the latter is true, then why not set the standard for the former *much* higher?

Clearly, cost is an issue – but one should not ‘scrimp’ on the basic ‘service’, especially when ‘premium’ (if slightly dodgy) services are being kept in reserve for use in potentially discriminatory ways.

- b. Should police expenditure on bioinformation collection and analysis be given priority over other budgetary demands?

No. I remain unconvinced that NDNAD makes a proportionate, or even significant, contribution to serious criminal convictions in the UK. The police should not be wasting money collecting the bioinformation of innocents. NDNAD and IDENT1 are tools, not replacements for police officers—and the increasing accumulation of data is bound to lead to an increase in inconclusive ‘analysis’ or massive waste of police time (cf. the FBI’s paedophile ‘sting’ that swamped the British police’s child abuse investigative capacity for years).

- c. Do you consider the current criteria for the collection of bioinformation to be proportionate to the aims of preventing, investigating, detecting and prosecuting criminal offences? In particular: is the retention of bioinformation from those who are not convicted of an offence proportionate to the needs of law enforcement?

The current criteria are not at all proportionate. One should not be DNA tested or fingerprinted unless arrested and, preferably, charged of an offence. That there no longer appears to be any definition of an arrestable offence is a perversion of justice—removing the distinction between non-arrestable, arrestable and serious arrestable offences has opened the floodgates to indiscriminate gathering and retention of bioinformation.

Retention of innocent people’s bioinformation is not only disproportionate, it is a disgrace. Filling criminal databases with the data of innocents will not help solve crime for the simple reason that innocent people don’t commit crimes. The small fraction* of people who, when checked with reference to one crime, turn out to be implicated in another does not justify the retention of hundreds of thousands of innocent people’s bioinformation.

*This fraction is bound to get smaller as the proportion of law-abiding citizens to criminals goes up.

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- d. Is it acceptable for bioinformation to be taken from minors and for their DNA profiles to be put on the NDNAD?

No. This obviously depends on your precise definition of 'minor', but until someone has reached the age at which they are and can be treated fully as an adult, he or she should not have their bioinformation put onto an adult criminal database.

3. The management of the NDNAD

- a. Is it proportionate for bioinformation from i) suspects and ii) volunteers to be kept on forensic databases indefinitely? Should criminal justice and elimination samples also be kept indefinitely? How should the discretion of Chief Constables to remove profiles and samples from the NDNAD be exercised and overseen?

Indefinite retention is proportionate for one class of individual and one class only—*serious* convicted criminals (crimes against the person). And this should be further qualified that if the conviction of an individual is overturned, and they have been convicted of no other crime, then their record should be expunged. Bioinformation gathered as part of a minor offence should be deleted at the same time as the conviction is considered spent, in line with best practice on rehabilitation of offenders.

CJ and elimination samples should not be kept indefinitely. Surely the idea and purpose of NDNAD is to construct and maintain an effective *criminal* database? Every effort should be made to prune and purge the database of inappropriate bioinformation, to maintain integrity and public trust.

The Chief Constable should have **no discretion whatsoever** when it comes to the removing of profiles and samples of people proven innocent and minors. All such bioinformation should be removed as a matter of course. CC's discretion should be applied only in exceptional cases, e.g. at the borderline of 'serious' offence and 'serial offenders'.

Any Chief Constable who refuses to remove the samples or profiles of innocent people should face sanction, up to and including dismissal. We do not live in a police state, although it seems that successive Home Secretaries and the current Prime Minister appear to think we should.

- b. Is the ethical oversight of the NDNAD adequate? What, if any, research on NDNAD profiles or samples should be permitted? Who should be involved in the oversight of such databases and granting permission to use forensic DNA profiles or samples for research?

Ethical oversight is clearly not adequate. Why else is the bioinformation of hundreds of thousands of innocent people on the NDNAD, with no guaranteed mechanism for its removal?

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NDNAD should not be treated as a research database. Independent research done on samples separately volunteered may throw up developments that can be incorporated into NDNAD *when proven*. We don't permit non-consensual medical experimentation on prisoners, let alone members of the public – it should not be allowed on people's genetic material or data derived from it, either.

- c. Who should have access to information on the NDNAD and IDENT1 databases and how should bioinformation be protected from unauthorised uses and users? Should forensic databases ever be made available for non-criminal investigations, such as parental searches, or the identification of missing or deceased persons?

Access to NDNAD & IDENT1 should be by heavily audited, accredited police personnel only, and only ever in relation to a specific, live investigation. Each search of a database should be recorded against the crime number of that case, and all searches should be reported to the person with overall responsibility for the case. Random checks should be applied, and failure to account for a single access should be a disciplinary offence. Proven negligence and or abuse should result in dismissal not only for the individual who made the inappropriate access, but the official in charge.

Fishing expeditions, speculative searches and non-criminal searches should be utterly forbidden. This year it's trying to identify dead people, next year it's linking to Somerset House, five years down the line....

Feature creep is insidious and must be stamped on, not encouraged. There's always 'a good reason' for doing a little extra, but the ultimate consequences are unpredictable at best—disastrous at worst.

- d. What issues are raised by the transfer of bioinformation between agencies and countries? How should such transfers be facilitated and what safeguards should be in place for the storage and use of transferred data?

International transfers should be treated in the same way as extraditions (though our current government seems all too willing to erode protections in this area).

Each transfer should be considered on a case-by-case basis, and with the full knowledge of the individual concerned. If the individual has not been, or could not be, convicted of a crime in this country then their consent for transfer should be an absolute requirement. A sovereign nation should protect its citizens to the same standard of proof required in its own courts.

Safeguards are meaningless in the digital arena, so only the absolute minimum of data should be provided. DNA samples should *never* leave our borders.

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4. Ethical issues

- a. Is the use of DNA profiles in 'familial searching' inquiries proportionate to the needs of criminal investigations? Do you consider the use of familial searching may be an unwarranted invasion of family privacy?

No. Guilt by association is a slippery slope, whether circumstantial or genetic. NO2ID's position is that this is in conflict with ECHR Article 8 and HRA, i.e. 'familial searching' is a contravention of human rights.

- b. Certain groups, such as ethnic minorities and young males, are disproportionately represented on forensic databases. Is this potential for bias within these databases acceptable?

This is absolutely not acceptable, though it is certainly understandable in the current climate. Given that young Black and Asian males are the most arrested amongst the population, it is no surprise that they are disproportionately represented on NDNAD. There may be no solution to this—putting everyone on the database to 'redress the balance' is not only political correctness gone mad, it is completely unacceptable—but the worst excesses could be reduced by strict application of the principles I have already articulated, i.e. removal of the bioinformation of the uncharged and innocent, and deletion of samples and profiles of those with spent minor convictions.

- c. Is it acceptable that volunteers (such as victims, witnesses, mass screen volunteers) also have their profiles retained on the NDNAD? Should consent be irrevocable for individuals who agree initially to the retention of samples voluntarily given to the police? Are the provisions for obtaining consent appropriate? Should volunteers be able to withdraw their consent at a later stage?

No. 'Irrevocable consent' is in some ways worse than no consent at all. People may have all sorts of reasons for giving consent at one point in time, but—especially given the increasing range of tests and purposes to which DNA can be put—it is hard to say that consent could *ever* be properly informed. Victims, witnesses and volunteers should have the absolute right to withdraw their consent and have their bioinformation deleted or destroyed at any point.

- d. Would the collection of DNA from everyone at birth be more equitable than collecting samples from only those who come into contact with the criminal justice system? Would the establishment of such a population-wide forensic database be proportionate to the needs of law enforcement? What are the arguments for and against an extension of the database?

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DNA is *already* collected from everyone at birth, in the form of the blood spot test performed on newborn babies. To use this, or another collection method, to build a population-wide database—forensic or otherwise—would be dangerous beyond belief. The risks of miscarriages of justice, denial of service (e.g. insurance for those with a propensity to a certain condition), discrimination, personal distress (how many children really want to know that the person they call Dad is not their father?), etc. far outweigh any purported ‘benefits’.

Given that this government’s stated policy is to permit minimally-constrained ‘sharing’ of citizen data between and within the public and private sectors (cf. ‘Transformational Government’) any new or increased accumulation of personal data should be robustly challenged and implacably opposed if the authorities cannot, to the highest standards of proof, provide evidence of any and all claimed ‘benefits’ and reasons given for accumulating that data.

I would sincerely hope that the Nuffield Council on Bioethics can articulate the arguments for and against the extension of NDNAD better than an unpaid campaigner, and furthermore come down heavily on the ‘against’ side. I look forward to some stringent new guidelines, issued under your second term of reference.

5. The evidential value of bioinformation

- a. What should be done to ensure that police, legal professionals, witnesses and jury members have sufficient understanding of any forensic bioinformation relevant to their participation in the criminal justice system?

I hesitate to suggest testing the knowledge and understanding of jury members – but proper, unbiased teaching in schools might be a step in the right direction. And a clear statement by the judge in relevant cases that forensic bioinformation alone is not sufficient grounds to find someone guilty might help counter some of the ‘magical thinking’ around DNA.

Sanctions against senior officers who make political statements about NDNAD, e.g. suggesting that it should be extended to the entire population, or parroting government propaganda (“If you’ve nothing to hide, you’ve got nothing to fear”) would be a good start.

- b. How much other evidence should be required before a defendant can be convicted in a case with a declared DNA match? Should a DNA match ever be taken to be sufficient to prove guilt in the absence of other evidence?

A DNA match should *never* be considered sufficient in and by itself to convict someone. If no other evidence can be found, then the DNA match should be considered no better than circumstantial evidence. If the rule of law is ever

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overridden by mere technology, then British justice is dead. On a practical level, problems with the train of evidence, contamination and the use of amplification methods on tiny samples mean that DNA evidence should be treated as an *investigative* tool, not proof of guilt.

6. Other issues

- a. Are there any other issues, within our terms of reference, which we should consider?

If you are issuing guidelines, then one absolute should be that one's National Identity Register Number (NIRN)—whatever that turns out to be—should *never* be included on either NDNAD or IDENT. Such a move would, in effect, mean the *de facto* inclusion of bioinformation on the National Identity Register. Now that this is clearly intended to be a 'meta-database' (i.e. several linked databases used to index other databases, to facilitate rampant 'data sharing'), the inclusion of a single number could have far-reaching and devastating co