

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.

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QUESTIONS ANSWERED:

Question 1: The interpretation of bioinformation

ANSWER:

1) Interpretation of Bioinformation. It appears, prima facie that the SGM Plus system, using 10 markers is sufficiently reliable for use in ascertaining the identity of suspects in criminal investigation/ and or criminal trial. It appears, assuming that the information on the company web site is correct, that the SGM Plus system is able to identify, from a DNA sample, approximately 7 people in the world. When used in conjunction with other sources of evidence, it seems reasonable that this level of discrimination is acceptable. Whether there is a better system available with more reliability is not clear, and my comment should be viewed in the light of lack of information on this point.

Question 2: Sampling powers

ANSWER:

2) Sampling Powers It appears logical that the same guidelines and regulations should be used both for the collection of fingerprints and of bioinformation. It is clear that this issue presents a stark dichotomy between the right of the individual to privacy, as enshrined in the European Convention of Human Rights (section 8) and the societal interest in the prevention and solving of crimes with the resultant pursuance of justice, in which all law abiding citizens have an interest. Where the Police plan to take samples, using statutory powers, they should be taken only once a suspect is put under arrest. To take such samples by force is an invasion of personal privacy which is only justifiable when there are adequate reason to believe that the suspect is responsible for the crime in question. Should a person wish to volunteer their DNA or other bioinformation for exclusion purposes during an investigation, this must be done on a strictly voluntary basis. Whilst there is a presumption of guilt should a person decline to submit a sample, there can be no meaningful consent. In that the taking of samples for the purpose of gaining highly sensitive personal information, I perceive it to be an invasion of personal privacy, for which there needs, as is currently recommended, very clearly defined, specific justification. Only on these grounds do I think that that the invasion of privacy is justifiable. 2a) The police should not, for reasons of laying themselves open to further claims of institutionalised racism, and because it is not relevant, should not be able to ask for information regarding race and gender from DNA analysts from samples taken from suspects. If the DNA matches, it will match, irrespective of the gender or race. Quite apart from the fact that it will be, in the vast majority of cases, perfectly self-evident as to the sex and race of the suspect. Samples taken from a scene of crime are in effect anonymised, not yet matched to anyone, and therefore such information may be helpful in identifying the criminal, without issues of privacy etc. The issue of misappropriation of race, as is currently argued as reason to seek this information will not be solved by DNA analysis. 2b) The degree of financial priority placed on the collection and analysis of DNA should be proportional to the degree of success it confers on the collection of evidence and resultant success in prosecution. It is assumed that it is a technology of significant cost, which, presumably will rise as updates and developments become available. The degree of priority that DNA analysis should be afforded should be determined by persons specialist in calculating the cost-benefit ratio, and decision making should be guided accordingly. This analysis is essential to ensure appropriate resource allocation decisions are made. This should even perhaps extend to a formal decision analysis of the benefits

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in light of the cost. 2c) The retention of samples from those found not to be in breach of the law is Disproportionate to the aims of law enforcement. There are currently strict and adequate guidelines on the procurement of samples. The EC council decision that the data must be 'collected for specified, explicit and legitimate purposes' seems as relevant to this as any other matter. If the reasons for obtaining the samples are found no longer to exist, then the justification for the availability of the samples also ceases to exist. It is my personal opinion that this contravenes the Human rights Act, section 8, and therefore should NOT be done. However, I understand that this issue is awaiting review by the European Courts, and the judgement should be awaited before issuing further recommendations on this topic. 2d) Any minor of the age of criminal responsibility who is suspected of a crime should expect that their data should be taken and stored on the DNA database until such time as they are cleared of the crime, or convicted, in the same way as an adult. It does not seem logical to gain samples from persons who will not be able to be prosecuted on the basis of their age. The oversight of the process should be undertaken in the same way that a responsible adult is present during processes such as questioning. Consent is no more an issue here than it is for the adult population, unless the data is given voluntarily, for the purposes of exclusion. 3a) The answer to this question mirrors my response to that expressed in question 2c. If the specific circumstances for which justification was gained for the collection of the data ceases to exist, so does the legitimacy of the storage of said data. Once any 'correction' measures have been taken against an individual successfully prosecuted, and they are no longer subject to any process of the court, such as probation, then it seems that there is no longer justification for retention of their DNA samples. However, I am open to persuasion on this point. I do not think that the removal of information should be at the sole discretion of the Chief Constable. It should be guided by the ethical recommendations of the Ethics Committee advising the NDNAD strategy board. This should form the policy, and any deviation from this should seek express consent from the Ethics Committee. The process should be as transparent and open to public scrutiny as security will allow, for reasons of public confidence in the application of police powers.

Question 3: The management of the NDNAD

ANSWER:

3b) The formation of an Ethical Committee is, in my opinion, essential, as is the integration of lay members and experts in Human genetics and also Ethics. The process needs to be seen to be as fair and equitable, transparent and justifiable as is possible. Compulsory taking of extremely detailed and perhaps highly sensitive personal data should be subject to continued and rigorous ethical review. Where the research on the stored DNA data is directly in pursuance of the reasons for which the samples were taken in the first place, I can see no reason why this should not be permitted. For any other reason, it seems logical that the same restrictions and requirements as use of personal data for medical or scientific reasons should be applied. The gaining of DNA samples in this context are specific to the aim of law enforcement. Any other use is ethically impermissible should adequate consent be absent. 3c) Only persons with legitimate need to be in possession of data on the NDNAD or IDENT1 databases should have access to it. Strictly on a need to know basis. All persons who have access to these databases should be subject to full security procedures and be bound by professional codes of ethical conduct and also of confidentiality. Access should be restricted in the same way as other highly sensitive data. Searches of the database should only be used for issues of law enforcement or other police procedures. This would extend to the identification of missing or deceased persons. Parental or familial searches are not matters for police or law interest, unless they are of a criminal nature and therefore it is completely

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unjustifiable to use this data for such purposes. The storage of DNA on any database has serious implications on personal privacy and therefore access should be strictly restricted to the matters for which the DNA was originally collected. 3d) Only where requesting countries/ agencies conform

to similar ethical restrictions as the UK should data be shared. Should the transfer of this data be any different from that of transfer of existing evidence? Logically, it appears not. 4a) In that each competent person is individually liable for their own action, including those of a criminal nature, I do not see the use of familial searching as being proportionate to the needs of criminal investigation. I consider the use of familial searching to be an unwarranted invasion of family privacy, again, enshrined in article 8 of the European Convention on Human Rights.

Question 4: Ethical Issues

ANSWER:

4b) It appears to me that certain groups of persons are disproportionately represented on forensic databases because the proportion of those persons questioned or arrested for offences are also disproportionate. There should be no room for such bias within agencies for law enforcement. To do so is unjustifiably discriminatory and as such, is by definition, unethical. 4c) Similarly to answers offered for previous questions, the retention of data on the NDNAD is not proportional where persons have already been excluded from investigations. The consent offered by volunteers should NOT be irrevocable. If the samples are erased as a matter of course, when such persons are no longer relevant to an investigation, issues of continued consent are not applicable. The issue of gaining consent is a very difficult one. It is difficult to see how refusal of consent to gaining DNA information can be seen anything other than an indication of guilt. Perhaps a more suitable way of dealing with this problem is to only return to individuals refusing consent when all other avenues have been explored. Many people will willingly volunteer their DNA for reasons of exclusion. Those who choose not to offer consent should be able to do so for any justification at all, until they are suspects. They should not be pressured into believing their refusal constitutes 'something to hide' as there are many reasons that consent may be withheld. The ethical principles of the right to personal autonomy should remain upheld. Similarly, consent of volunteers should be able to be withdrawn at a later stage unless there is clear evidence of their involvement in the crime under investigation. In any event, persons excluded from the investigation should be able to expect that their DNA has been deleted from the NDNAD. 4d) The collection of DNA samples from everyone at birth is highly disproportionate to the needs of law enforcement and an unwarranted gross invasion of personal privacy. There is no reason for the vast majority of persons to come into contact with law enforcement agencies and the taking of samples with no justification not only has implications for the security of such a large amount of information, but also of personal privacy and resource allocation. Substantial and additional computing power will need to be put at the disposal of the collection agencies, as well as additional resources...huge additional resources. This is not justifiable within the context. There is also a potential case to answer of discrimination. The new database, collected in this manner will by its nature only include the newborn. This information is gained from the rest of the public, i.e. those born before the implementation date, only with very clear and explicit reasons. Why should the next generation be denied the same rights to privacy? I, personally, would be more than happy to furnish the Police with a DNA sample for clear and justifiable reasons, such as exclusion from an enquiry. I see no reason why they should have this data 'just in case' I turn out to be a criminal. The argument for such action could only include the more rapid identification of criminals or the exclusion of persons from investigation. This is highly disproportionate to the collection of DNA from every newborn.

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Question 5: The evidential value of bioinformation

ANSWER:

5b) DNA evidence should only ever be supportive of a prosecution, never the sole basis for it. DNA is shed by every person, in every place they visit. Its presence does not automatically indicate participation in a criminal act. The presence of DNA will not be sufficient to prove intent or motive, for example, the presence of semen DNA in a accusation of rape does not address issues of consent. Nor can the presence of DNA prove that the suspect was any place at any particular time. The evidence of witnesses etc should still very much form part of the proceedings.

Question 6: Other issues

ANSWER:

Especially where the DNA or other bioinformation is no longer needed for legal proceedings, there is an issue of ownership, in the very same way as exists for the removal of samples and tissues etc in other settings, for example medical research. It is logical that ownership can be transferred to the police for justified reasons, such as investigation by the criminal justice system. Should that justification fail to continue then who should have continual ownership? Surely the person from whom the sample/ data originates.