

The Scottish Government Consultation on the Fraser Report on DNA and fingerprint retention: the Government's response

Nuffield Council on Bioethics response

Retention periods for DNA samples

Comments are invited on the following proposal:

- Accept Professor Fraser's recommendation that there should be no change in the present arrangements. On that basis, DNA samples would continue to be retained from all convicted persons but would be retained from unconvicted persons only if they have had DNA taken from them following arrest or detention on suspicion of having committed an offence and if proceedings were instituted against them for a relevant sexual or violent offence. Such DNA samples would be retained for a period of 3 years, and the relevant chief constable would then have discretion to apply to a sheriff for an extension of up to 2 years at the end of that period.

NCOB response:

1. In 2006, the Nuffield Council on Bioethics appointed a Working Group, which included members with expertise in law, genetics, philosophy and social science, to consider the ethical issues raised by the forensic use of bioinformation. As part of the inquiry, the Group held a public consultation, which elicited over 135 responses. These revealed strong differences of opinion as to when biological samples should be taken and when these and DNA profiles should be retained, and the uses to which potentially sensitive genetic information should be put. Views ranged from those who wholeheartedly welcomed the expansion of forensic databases, to those who viewed the increase in police powers with deep suspicion.
2. In September 2007 the Council published a report, *The forensic use of bioinformation: the ethical issues*. This response is drawn primarily from the conclusions and recommendations made in that report, insofar as they relate to the questions posed in the consultation. Paragraph numbers have been provided at the end of each section of the response, in order to indicate from where in the report the recommendations are derived. The report is available to download at: www.nuffieldbioethics.org/go/ourwork/bioinformationuse/introduction
3. We put forward our own views and recommendations on these issues, not as the end of the debate, but hopefully as a contribution to the development of well-informed public engagement. We suggested means by which the public interest in crime control can be balanced in

a proportionate way with other values such as liberty and autonomy, privacy, consent and equal treatment, and the legal protection of human rights and civil liberties.

4. In England, Wales and Northern Ireland, the current practice of indefinitely retaining DNA samples and profiles from those not charged or convicted of an offence is expensive and is the focus of considerable public disquiet and mistrust about possible future uses to which the samples might be put. There is, at present, a lack of convincing evidence that the retention of DNA samples and profiles of those not charged with or convicted of an offence has had a significant impact on detection rates and hence it is difficult to argue that such retention can be justified.
5. We recommend that DNA profiles and subject biological samples should be retained indefinitely only for those convicted of a recordable offence. This would bring the law in England, Wales and Northern Ireland into line with that in Scotland. At present, the retention of profiles and samples can be justified as proportionate only for those who have been convicted. In all other cases, samples should be destroyed and the resulting profiles deleted from the NDNAD. The Scottish practice of allowing retention of samples and profiles, for three years, from those charged with serious violent or sexual offences, even if there is no conviction, should also be followed. Thereafter the samples and profiles should be destroyed unless a Chief Constable applies to a court for a two-year extension, showing reasonable grounds for the extension [paragraphs 4.53-4.55]. **We therefore support Professor Fraser's recommendation that there should be no change in the present arrangements in Scotland.**

Retention periods for fingerprints

Comments are invited on the following proposal:

- The Government accordingly proposes to bring forward provision in the forthcoming Criminal Justice and Licensing Bill for the retention of fingerprint and any other forensic data in respect of persons proceeded against but not convicted of an offence on exactly the same basis as DNA samples, as set out in section 18A of the 1995 Act.

NCOB response:

1. The Council's conclusions on the retention of bioinformation apply to both DNA and fingerprints. We recommend that fingerprints, DNA profiles and subject biological samples should be retained indefinitely only for those convicted of a recordable offence. The exception would

be people charged with serious violent or sexual offences, whose DNA could be kept for up to five years even if they are not convicted. **We therefore support the Scottish Government's proposal to bring forward provision in the forthcoming Criminal Justice and Licensing Bill for the retention of fingerprint and any other forensic data in respect of persons proceeded against but not convicted of an offence on exactly the same basis as DNA samples.**

Children's Hearings

Comments are invited on the following options:

- No change in the present arrangements, on the basis that it is not appropriate as a matter of principle to take and retain DNA and fingerprints from children who are dealt with by Children's Hearings as opposed to the criminal courts;
- Accept Professor Fraser's recommendation that there should be power to take and retain DNA and fingerprints from children who are dealt with by Children's Hearings and are found to have committed a relevant sexual or violent offence, or accept that they have done so. The Government does not however believe that it would be practical or appropriate to distinguish between assaults on the basis of a Reporter's marking: there is no distinction between 'grades' of assault in the existing definition of violent offences for the purposes of DNA retention and we do not think it right or necessary to introduce such a distinction. Views are therefore also invited on whether, if this option was adopted, assaults should be included or excluded in their entirety; and whether powers of retention should be confined to more serious sexual offences such as rape or indecent assault and exclude, for example, consensual sex between children who are both under the age of 16;
- Accept Professor Fraser's recommendation in part by introducing power to take and retain DNA and fingerprints from children who are dealt with by Children's Hearings and are found to have committed a relevant sexual or violent offence, or accept that they have done so, for a period of 3 years only. The same issues would arise about whether assaults should be included or excluded in their entirety; and about the definition of sexual offences for this purpose. This approach would reflect the potential gravity of sexual or violent offences but also maintain a balanced approach as retention of DNA and fingerprints in relation to children who are dealt with by Children's Hearings would always be subject to a strict time limit.

NCOB response:

2. The Council does not have any specific comments to make on Professor Fraser's and the Scottish Government's proposals regarding

children's hearings, except to point out that the policy of permanently retaining the bioinformation of minors is particularly sensitive in the United Kingdom, where the age of criminal responsibility is low (at age ten years in England and Wales and eight in Scotland) compared with many other countries. There is a separate youth justice system, in recognition of the special protections that should be afforded to children and young persons. The European Convention on Human Rights recognises the special case of children in the criminal justice system. The Supreme Court of Canada, while acknowledging the strong public interest in crime detection, has held that it was contrary to principles of the youth justice system to treat juveniles in the same way as adults, and that juvenile immaturity was a factor which militated against inclusion on the database. Parental consent for sampling would not, in our view, negate concerns surrounding the retention of samples and profiles of minors.

3. When considering requests for the removal of profiles from the NDNAD and the destruction of biological samples taken from minors (including from adults who were minors when their DNA was taken), we recommend that there should be a presumption in favour of the removal of all records, fingerprints and DNA profiles, and the destruction of samples. In deciding whether or not the presumption has been rebutted, account should be taken of factors such as:

- the seriousness of the offence;
- previous arrests;
- the outcome of the arrest;
- the likelihood of this individual re-offending;
- the danger to the public; and
- any other special circumstances [paragraphs 4.71-4.72].

Fixed penalty notices and other conditional offers

Comments are invited on the following proposals:

- DNA and fingerprint samples taken from persons arrested or detained on suspicion of having committed an offence and who subsequently accept an offer by the procurator fiscal of a fiscal fine, compensation order, combined order or work order should be retained indefinitely, in the same way as they are in respect of persons convicted of an offence; or alternatively
- DNA and fingerprint samples taken from persons arrested or detained on suspicion of having committed an offence and who subsequently accept an offer by the procurator fiscal of a fiscal fine, compensation order, combined order or work order should be retained

for a period of 3 years, with discretion for a chief constable to apply to a sheriff for an extension of up to 2 years at the end of that period.

NCOB response:

1. The Council did not consider specifically the issue of retaining DNA and fingerprints from people who accept fixed penalty notices and other conditional offers in Scotland.

Governance, accountability and transparency

Comments are invited on the following proposals:

- SPSA should publish regular data and reports on the operation of both the DNA and Fingerprint databases; and such data and reports should be subject to independent oversight;
- The Scottish Government should work with the Association of Chief Police Officers in Scotland (ACPOS) with a view to promoting greater consistency in the use of existing powers under section 18 of the 1995 Act to take DNA and fingerprint samples from persons who are arrested or detained on suspicion of having committed an offence;
- SPSA should review practice on the weeding of records held on the DNA and Fingerprint databases with a view to drawing up and publishing clear and consistent guidelines in respect of old records or those which relate to minor offences;
- The purposes for which DNA and fingerprint data can lawfully be used should be set out in statute. It is envisaged that these purposes would include the prevention or detection of crime, the investigation of an offence or the conduct of

NCOB response:

1. **In general, the Council supports the Scottish Government's proposals to improve accountability and transparency in the use of bioinformation for forensic purposes.** The Council made the following specific recommendations.
2. The national fingerprint database (IDENT1) and the National DNA Database in England, Wales and Northern Ireland (NDNAD) must retain public confidence in its security, especially its protection from non-authorised access and in control of its uses. This confidence depends on ongoing scrutiny and systematic audit of its uses so that the public can be sure that data held in it are not misused or misrepresented.

There should be regular public reports on the use, scrutiny and auditing of this database [paragraph 7.9].

3. There must be robust procedures for assessing applications for research access to the NDNAD and stored samples, but that there should also be a requirement to articulate publicly the basis upon which applications for any access to data stored on bioinformation databases will be considered and the precise purposes for which access will, and will not, be granted either to police or non-police agencies [paragraph 7.32].
4. We recommend that there should be a statutory basis for the regulation of forensic databases and retained biological samples. A regulatory framework should be established with a clear statement of purpose and specific powers of oversight delegated to an appropriate independent body or official. This should include oversight of research and other access requests, for example for further testing of samples or familial searching and inferring ethnicity. We are pleased to see the establishment of an Ethics Group by the Home Office, with a remit to oversee the running and uses of the NDNAD, but its specific functions and powers must be more clearly, and publicly, articulated. Moreover, we consider that a longer-term view is required that considers the future possibilities and challenges that may come with increased access and linkage involving a range of forensic databases [paragraph 7.55].
5. Throughout the Report we draw attention to the difficulty in assessing the impact of increasing police powers because of the poor quality or absence of official statistics (or conflicting statistics: see paragraphs 4.51–4.52). Moreover, on many vital issues such as requests to conduct research on databases and/or samples or general access provisions to the NDNAD, there is an absence of protocols or guidance. We recommend a far greater commitment to openness and transparency and a greater availability of documents to public scrutiny. Where public access is denied for reasons of security and the administration of justice, this should be fully explained and justified. Efforts to improve the generation of data and statistics are welcomed, as are apparent efforts to increase the publication of data. These moves are still in their early stages, and their continuation is strongly supported [paragraph 7.57].