



## **The forensic use of DNA and the National DNA database**

### **Response to consultation by the Human Genetics Commission**

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## Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. We welcome the Commission's consultation on this issue. In JUSTICE's view, the genetic information contained in a sample of DNA represents the most intimate medical data an individual may possess. We consider that the current law governing retention of an individual's DNA on the National DNA Database ('NDNAD') involves a serious and disproportionate interference with fundamental rights. We are additionally concerned that the extent of this interference is significantly underappreciated by the wider public, due in large part to the lack of public awareness concerning NDNAD and DNA itself. We therefore welcome any measure that seeks to foster public debate on this issue.

### ***Q.1 – What information should be given to people when a DNA sample is taken following their arrest?***

3. We believe that where the police propose to take a DNA sample from an individual following their arrest, the individual should be notified that:
  - The police will record the person's DNA profile on the national DNA database;
  - The police will also store the physical sample of DNA taken from the individual;
  - Both the sample and the electronic profile will be kept by the police permanently;
  - This means that the DNA profile and sample can be accessed by the police not only for the purpose of this investigation but for the purposes of investigating other crimes in future. It may also be shared with other law enforcement agencies in other EU countries.
  - In the event that the individual is not charged with a criminal offence following their arrest, or is later acquitted of charges, the individual can write to the Chief Constable to ask for their DNA profile to be removed from the national database and for their DNA sample to be destroyed.
  - In the event that the Chief Constable refuses to do so, they will have the option of legally challenging the Chief Constable's decision in court. If they wish to do so, they should approach a solicitor or community law centre.

4. The above information should be provided to an individual *prior* to the sample being taken and the police should be required to certify that the individual was duly notified (e.g. by the individual's signature). Although we think a written notice should be mandatory form and ought to suffice in most cases, there should also be an obligation on police to deliver the information verbally in situations where the police have reason to suspect the written notice will not be understood (e.g. because of learning difficulties).<sup>1</sup> Any verbal explanation must be *in addition* to the written notice, however, not a substitute for it.
5. We believe that the mandatory supply of information concerning the taking of DNA samples following arrest would not only help individuals to understand the consequences of their DNA being held by police but also form part of a wider campaign to ensure that the general public are better informed about the National DNA Database.
6. On a related matter, we believe that there should be a similar, mandatory notice provided to individuals prior to the taking of any *voluntary* DNA samples. We are concerned that volunteers are not always made aware of all the implications involved in providing a sample and that this may preclude informed consent.<sup>2</sup> A standard mandatory notice along the lines of that provided to suspects following arrest would also help to reduce the possibility of individuals being pressured or coerced into providing voluntary samples.

#### **Q.2 – In what way should the National DNA Database be populated?**

7. The power of police to take fingerprints and DNA samples from suspects without consent should be limited to those whom the police have arrested (i.e. where the police reasonably suspect the person has committed an arrestable offence), *and* where the taking of the bioinformation would assist the investigation of the offence. We therefore strongly recommend that the taking and retention of DNA information be limited to serious criminal offences, which involve injury to another and where DNA information is of evidential value, namely offences against the person, sexual offences and burglary.
8. Police should, of course, remain free to request or invite individuals to provide bioinformation such as fingerprints or DNA samples on a voluntary basis to assist with their inquiries. But the power to take samples without consent should be strictly limited to those whom the police

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<sup>1</sup> C.f. Police and Criminal Evidence Act 1984, Code C, para 1.4 'If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable, in the absence of clear evidence to dispel that suspicion, the person shall be treated as such for the purposes of this Code'.

<sup>2</sup> R Williams, P Johnson and P Martin, *Genetic Information & Crime Investigation: Social, Ethical and Public Policy Aspects of the Establishment, Expansion and Policy Use of the National DNA Database* (2004 School of Applied Social Sciences, University of Durham),

have arrested. A broader police power to compel samples without the requirement of reasonable suspicion would, however, seem to us a substantial and unwarranted intrusion with the rights to personal privacy and the physical integrity of the person.

9. The decision of which profiles to record should be made by the police alone, although it would be appropriate for the police to have regard to the views of other bodies such as forensic service providers. Similarly, only samples collected by the police should be stored (although we would expect this would include samples collected by those working under the direction of the police, e.g. forensic service providers). In our view, this restriction would maintain clear lines of accountability concerning decisions to collect and retain DNA samples.

**Q.3 – What, if any, profiles, other than those relating to individuals convicted of a criminal offence, should be retained indefinitely (or for periods of many years) on the NDNAD?**

10. In our view, it is only proportionate to retain the samples of those convicted of serious criminal offences. The current criteria for the collection and retention of bioinformation by police are wholly disproportionate to the needs of law enforcement. In particular, the retention of DNA samples of persons either not charged or subsequently acquitted appears to us a gross interference with the right to personal privacy. We note that this view is at odds with the 2004 judgment of the House of Lords in *R v Chief Constable of South Yorkshire (ex parte S and Marper)*,<sup>3</sup> in which the House concluded that the retention of DNA samples of persons arrested but not subsequently convicted did not interfere with the right to respect for personal privacy under Article 8(1) of the European Convention on Human Rights, and – even if it did – was a legitimate restriction under Article 8(2). With respect, however, we consider the decision of the House in *Marper* to be deeply flawed. We further predict that it is unlikely to be upheld by the European Court of Human Rights on appeal.
11. We consider it an abuse of trust that the initial consent of a volunteer to assist the police with their investigation of a particular crime should be taken as a licence for the indefinite retention of their DNA on a police database. In our view, samples obtained by consent should only be retained for the purpose of the particular investigation (including, where necessary, any subsequent criminal proceedings), and thereafter destroyed. Thus they should not be routinely retained, despite further consent. It should be a matter of policy that volunteers are not asked to consent to the permanent storage of DNA samples or the retention of profiles beyond the conclusion of the relevant case.
12. We would view the retention of DNA of scene-of-crime officers on the same basis as volunteers. No doubt most serving officers would be willing to volunteer samples for the period

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<sup>3</sup> [2004] UKHL 39.

of their employment and for a reasonable period thereafter (given that there may be some time lag between when a crime is initially investigated and when the forensics from the scene are processed). But we see no reason for the indefinite detention of police samples beyond such a 'cooling off' period (e.g. 12 or 24 months). No individual should have their profile retained indefinitely merely because of their choice of employment.

***Q.4 – In what circumstances, and for what reasons, should DNA (as opposed to the numerical profile derived from it) be retained from individuals whose profiles are recorded on the database?***

13. The principle of proportionality requires that only the DNA profile is retained, not the full DNA sample. The retention of DNA information of convicted persons is only necessary and proportionate insofar as it assists the police with the identification of the relevant individual. The biological sample derived from the blood or bodily smears contains all of the most intimate genetic information about an individual. On the other hand, the DNA profile derived from the sample may be reduced so as to contain only that genetic information which provides the necessary markers for the identification of the individual from whom it was obtained ('junk DNA'), but no sensitive or personal data.
14. Given that it suffices to retain DNA profiles for the purpose of identifying the individual from whom the DNA information was obtained, the retention of biological samples after the profile has been taken from the sample is unnecessary and disproportionate. Therefore, there are no good reasons or circumstances in which DNA samples should be retained once identification is complete and so samples taken from convicted individuals should be destroyed, at latest after conclusion of the trial.<sup>4</sup>
15. Should the need for DNA samples of previously convicted individuals arise in case of future development of speedier and more sensitive means of searching the database, which are incompatible with the present method of profiling, new samples could be taken at that stage. This would also have the advantage that new samples would be taken under conditions where it would be known what the new techniques require from the sample.
16. As opposed to samples taken from identified individuals, the retention of crime scene samples does not interfere with anyone's right to respect for privacy, provided that the samples have not been matched to an already-identified individual. The retention of such anonymous samples thus does not raise an issue with Article 8.

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<sup>4</sup> The Council of Europe Committee of Ministers recommended that biological samples be destroyed 'after rendering of the final decision in the case for which they were used, unless it is necessary for purposes directly linked to those for which they were collected'; Council of Europe Committee of Ministers Recommendation No R (92) 1, para. 8.

**Q.5 – What evidence would be required to demonstrate the ‘forensic utility’ of the NDNAD (i.e. its value as a tool in the identification and prosecution of criminals)?**

17. In JUSTICE’s view, the basic utility of any forensic measure is whether it increases the ultimate likelihood of correctly identifying an individual who has committed a criminal offence. However, in addition to accuracy, we also recognise the value of making criminal investigations faster and more cost effective. We see particular value in the corroborative use of DNA evidence to identify those who have committed criminal offences in situations where there would otherwise be insufficient evidence to convict them.
18. A fairly crude starting point for measuring the ‘forensic utility’ of any DNA database would be to identify the number of cases in which evidence from the database was admitted into evidence, then calculate the proportion of cases which resulted ultimately in a conviction. However, the more significant question of whether the DNA evidence was conclusive or decisive in any particular case is inevitably involves qualitative rather than quantitative analysis, and one upon which even experienced criminal lawyers could reasonably be expected to disagree in particular cases. We would therefore be highly sceptical of any exercise that made claims of this kind.
19. For the avoidance of doubt, JUSTICE does *not* dispute the general forensic value of a police database containing the DNA profiles of persons convicted of serious criminal offences. As noted elsewhere, our objections concern its potential to infringe fundamental rights where the scope of the database is overbroad.

**Q.6 – What will be the likely social impact of maintaining the database at current levels or expanding it substantially?**

20. JUSTICE considers that the retention of DNA samples of persons who have not been convicted of a criminal offence is an unwarranted breach of the right to privacy. Given that the obvious purpose of such a forensic database is the detection and prevention of crime, there is an undoubted stigma that attaches to those whose records are stored on the database against their will.
21. More generally, *any* breach of human rights can be expected to have negative social impacts, including a strong sense of victimisation, stigmatisation, alienation and persecution. Such feelings are likely to be exacerbated where, for example, members of ethnic minorities are disproportionately likely to have their DNA retained by police. In the long term, respect for the rule of law is likely to be eroded where the law is seen to tolerate or permit disproportionate interference with fundamental rights on a widespread or systemic basis.

**Q.7 – What governance arrangements are necessary to secure confidence in the acceptable and appropriate management and use of the NDNAD?**

22. We consider it important that the NDNAD be put on a clearer, statutory footing, including governance by a public body independent from the police and the Home Office.

**Q.8 – What further uses might it be appropriate to make of the genetic information collected for the NDNAD in the future?**

23. Section 64(1A) of the Police and Criminal Evidence Act 1984 prohibits the use of retained DNA samples for purposes other than those ‘related to the prevention or detection of crime, the investigation of an offence or the conduct of an investigation’. In principle, this restriction should be consistent with the proportionate interference of the privacy rights of those convicted of serious criminal offences.

24. We are concerned, however, that this restriction is in fact being interpreted in a manner that is at odds with the right to respect for privacy. For example, we note the National DNA Database board of England and Wales has already approved two research projects using genetic samples from the database for the purpose of researching the possible identification of ethnic and familial traits.<sup>5</sup> In both cases, no consent was obtained from the persons from whom the DNA had been taken prior to the research project. In our view, the interests of medical research with only the broadest connection to the investigation of crime cannot justify the interference with the right to respect for privacy of individuals convicted of an offence. Less intrusive alternatives, such as the use of DNA information from individuals who consent to the use of their information for medical research, are available.

25. The Nuffield Council on Bioethics has referred to the numbers of research proposals put to the NDNAD strategy board and criticised the reporting of these requests.<sup>6</sup> It suggested that it is not usually possible to establish with any certainty the purpose of the research and stated that it is also difficult to determine whether requests are being made to meet police operational needs or as part of a wider research agenda.

26. It seems that at present, there is a significant lack of transparency concerning research using the NDNAD with the cursory details provided in the NDNAD Annual Report being inadequate. In order to avoid future instances of what seems to us a misuse of the data contained on the NDNAD, we therefore recommend that the language of section 64(1A) be narrowed to the use of DNA for comparison or identification only, and to exclude its use for medical research, as

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<sup>5</sup> R Williams, P Johnson and P Martin, n 2 above, p. 95.

<sup>6</sup> Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* (2007) p. 83.

well as the analysis or use of information on genetic disorders, personality or behavioural traits and dispositions, as may this become possible in the future.<sup>7</sup>

**Q.9 – Are there circumstances in which it might be acceptable for information contained on the NDNAD to be shared or linked, perhaps anonymously, with other agencies or databases?**

27. The transfer of bioinformation between agencies and countries raises the same issues concerning respect for individual privacy as are raised by the retention of bioinformation by a single agency. Any increase in the pool of potential persons who may have access to an individual's bioinformation is an increase in the extent of the interference with that individual's right to privacy. Although such interference may sometimes be justified as proportionate, it is essential that the legal basis for sharing information must be clearly spelt out in primary legislation and attended by appropriate safeguards. For example, we think it incumbent that any recipients of the information (e.g. another EU law enforcement body) must be bound by the same restrictions as should apply to those holding the information.
28. The problems of ensuring effective compliance with safeguards are multiplied when bioinformation transfers from country-to-country are considered. For instance, although we welcome the latest EU Council Decision in relation to the protection of personal data processed in the course of police and judicial co-operation under the EU Treaty's Third Pillar, there is often a substantial gap between the principle of mutual recognition in EU law and the achievement of genuine equivalence in data protection standards. For this reason, we argue that any transfer of DNA profiles outside the UK should be subject to independent scrutiny to ensure that their use is attended by the same degree of safeguards as we argue should apply in the UK (e.g. profiles should not be retained where a person is not subsequently convicted, etc).
29. Under no circumstances must the sharing of information from the NDNAD with other law enforcement agencies be allowed to become routine. Even greater caution should be exercised where the proposal is to share information for non-law enforcement purposes, or to correlate information from the NDNAD with such non-law enforcement databases containing genetic information (e.g. health records). In our view, the use of private medical records, for instance, for law enforcement purposes may very easily amount to misuse of sensitive

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<sup>7</sup> For instance, section 92 of the New South Wales *Crimes (Forensic Procedures) Act 2000* sets out a list of permitted purposes of the DNA database, including conducting forensic matches or speculative searches, to establish and administer the DNA database system, to provide an individual with DNA information about himself, to consider a claim that a miscarriage of justice under section 2 of the *Criminal Procedure Act 1993* has occurred or that a conviction should be overturned on appeal, to investigate a complaint in relation to the database, to compile statistics on the operation of the database, to make information available to other jurisdictions as sanctioned by legislation, to identify unknown deceased or severely injured persons (only with court order), or any other related purpose.

personal information even where the sharing is for an ostensibly legitimate purpose. The value of a voluntary DNA database held for purposes of medical research, for instance, would be utterly undermined if potential participants became aware that their DNA might be accessed by police.

**Q.10 – Under what conditions or in what circumstances might arrangements for a universal DNA database be persuasive?**

30. The concept of a ‘universal’ DNA database is a chimera. It is not only impossible to achieve in practical terms but any attempt to establish it would inevitably result in unnecessary and unwarranted breaches of fundamental rights.
31. The mere fact that such a database would be useful in forensic terms would, in our view, hardly be enough to justify the gross and systemic interference with personal privacy that would result from its attempted creation. Even if it could be shown that a universal database would increase significantly the rate of identification of and conviction of suspects or have a significant effect in deterring individuals from committing crime, utility alone is not enough. Nor would the fact that everyone’s DNA is stored in anyway ameliorate that interference. It is a basic error to suppose that the stigma of unequal treatment is the only harm caused by a violation of basic rights.
32. Indeed, the greater the amount of information stored, and the larger the number of people whose bioinformation is stored therein, means the more substantial the violation of personal privacy, particularly when the database is either hacked or subject to unauthorised access. The government’s track record for the handling of sensitive personal data gives excellent reason to believe that significant loss or misuse of such data would be inevitable.
33. The idea of a ‘universal’ DNA database is also a practical impossibility, at least in the sense that ‘universal’ implies that everyone in the UK would have their DNA recorded on the database. Of the approximately 59 million people who currently reside in the UK,<sup>8</sup> somewhere in the region of seven million are foreign-born,<sup>9</sup> including nearly half a million people thought to be residing illegally.<sup>10</sup> In addition to this, approximately 33 million people visit the UK each year.<sup>11</sup> In other words, even if it were possible to establish a database containing the DNA of

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<sup>8</sup> The UK population at the last census in April 2001 was 58,789,194 people (Source: National Statistics Office).

<sup>9</sup> 2006 Labour Force Survey (Source: Bank of England).

<sup>10</sup> See House of Lords Economic Affairs Committee, *The Economic Impact of Immigration*, HL 82, April 2008, para 12, citing ‘Home Office estimates’.

<sup>11</sup> National Statistics Online, *Travel and tourism: year-on-year trends* (16 October 2008): ‘During the 12 months to August 2008, the number of visits by overseas residents to the UK, not seasonally adjusted, increased by 2 per cent when compared with the 12 months to August 2007, from 32.6 million to 33.2 million’.

every person born in the UK, such a database would still fall far short of ‘universality’ – at least 12% of the population would still be unrecorded.

34. Leaving such practical objections aside, however, the concept of a population-wide DNA database seems to us flawed as a matter of basic principle. In our view, the intimate nature of individual genetic information means that storage on a national database could only be justified where strictly *necessary*, i.e. the proportionate pursuit of a legitimate aim. We find it impossible to conceive of circumstances where it could ever be *necessary* (as opposed to merely desirable or useful) to record the DNA of an entire country.

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