

Response to the Scottish Government's consultation on enhanced oversight of biometric data for justice and community safety purposes

October 2018

Background

- 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.
- 2 This response draws on the conclusions and recommendations of our 2007 report, *The forensic use of bioinformation: ethical issues*.¹ This report identified and considered the ethical, social and legal issues raised by current and potential future uses of bioinformation for forensic purposes.
- 3 Our report concluded that more safeguards were needed to protect the liberty and privacy of the innocent. Specifically, we advised that the policy at the time (in England, Wales and Northern Ireland) of indefinite storage of DNA profiles of people who are arrested but never charged or convicted was a disproportional measure. We recommended a move to bring the law in England, Wales and Northern Ireland into line with Scotland where retention of bioinformation was only on an indefinite basis for those convicted of a recordable offence. In 2010, a change in the law was implemented to this effect.

Statutory Code of Practice

Do you believe a statutory Code of Practice covering the acquisition, use, retention and disposal of biometric data for justice and community safety purposes is required?

- 4 Yes. We welcome the introduction of a statutory Code of Practice to ensure that the retention of biometric data is both necessary and proportionate, and in accordance with the law.
- 5 The gathering and use of biometric data demands the highest operating standards in terms of accountability, security, quality assurance and ethical standards. A statutory Code of Practice should help to ensure that biometric data is used appropriately, and that any potentially harmful effects of its use (such as compromises of privacy, discriminatory practices, unauthorised data use) are minimised.

¹ Nuffield Council on Bioethics '*The forensic use of bioinformation: ethical issues*.' Available at <http://nuffieldbioethics.org/project/bioinformation>

- 6 In our 2007 report, we recommended the development of a clear ethics and governance framework for the operation of the National DNA Database Ethics Group which was then being established, and recommended that consideration should be given to broader ethical oversight and governance.

Do you believe the General Principles outlined in the statutory Code of Practice are the right ones?

- 7 The Nuffield Council on Bioethics 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.
- 8 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 both proportionate and necessary. The principle of ‘proportionality’ is at the heart of the recommendations in our report. Any interference with legally enforceable human rights must be justified as being *proportionate* to the need to detect and prosecute offenders, and there must be evidence that the interference will be effective.

Do you believe the statutory Code of Practice covers all relevant issues which require consideration when decisions are being taken about the acquisition, use, retention and disposal of biometric data?

- 9 The suggested approach appears to be in accordance with the spirit of the ethical framework put forward in our 2007 report. In particular, we welcome the focus on the human rights of individuals and the particular needs of children and others who may be vulnerable in various ways, alongside recognition of the importance of furthering justice, the public good, and public safety.

Establishment of a Scottish Biometrics Commissioner

Do you believe a Scottish Biometrics Commissioner is required?

- 10 In our report, we highlighted the need for broad ethical oversight and governance of forensic science databases. We therefore welcome the establishment of the proposed Commissioner.

Do you believe the proposed approach to the acquisition of biometric data from children and young people in the justice system is the right one?

- 11 We support the emphasis on ‘proportionality’ and consideration of the best interests of the child, when considering whether it is appropriate to take biometric information from a child aged 12-17. Much will clearly depend on how those judgments are exercised in individual cases. An independent body, such as the proposed Commissioner, could play an important role in monitoring this discretionary approach, and we welcome the review/scrutiny approach put forward in the consultation document.