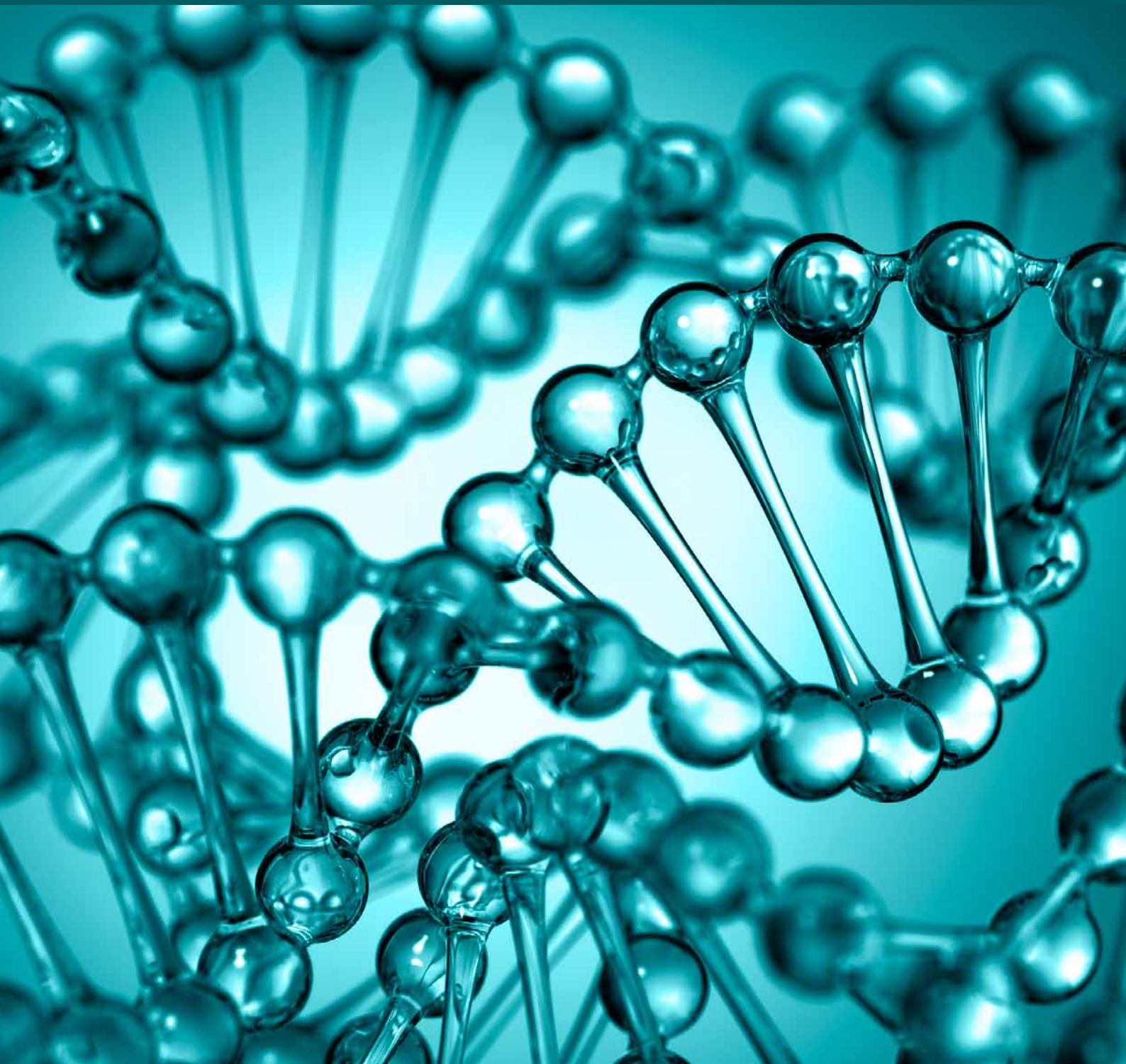


Annual report of The Ethics Group: National DNA Database

2012



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FOREWORD



This is the fifth annual report for the Ethics Group (EG) covering what has been another busy and productive year for the Group. A highlight this year has been that the EG made representations to Home Office Ministers as the Protection of Freedoms Bill continued its passage through Parliament. The new Act will see DNA profiles of innocent people removed from the National DNA Database (NDNAD), something that EG has called for over a number of years. The EG will be focusing in the coming months on the practical steps necessary to implement the legislation. This will be no small undertaking for government and the EG will stand ready to offer any necessary assistance and ethical challenge.

The EG also advised Ministers on the development of the role of the Commissioner for the Retention and Use of Biometric Material. The scope for the Commissioner is wide and EG are pleased to have been asked to give a view. We also gave advice on how the governance of the NDNAD could be improved. The EG has continued to work closely with the National DNA Database Strategy Board, whose Chair Gary Pugh, stepped down this year. It has been a pleasure working with Gary and the EG remains very appreciative of the support he provided us during his tenure. We expect his replacement Amanda Cooper to continue to engage with the EG in a similar vein.

We are grateful for the continued support and assistance of the Forensic Science Regulator, who is our Home Office sponsor, the Home Office Chief Scientific Adviser, the Government Chief Scientific Adviser, and the National Policing Improvement Agency (NPIA).

We have continued this year to engage with key stakeholders in and outside government through meetings and presentations.

Our work in the past year has also covered the following areas:

- Transparency in the governance of all police databases holding DNA profiles
- Monitoring the impact of the closure of the Forensic Science Service (FSS)
- The Protection of Freedoms Act
- The international exchange of DNA
- The impact of the NDNAD for different ethnic groups

A handwritten signature in black ink, appearing to read 'C Hughes', written in a cursive style.

Christopher Hughes OBE
Chair, Ethics Group: National DNA Database

CHAPTER 1

SUMMARY

This is the fifth annual report of the Ethics Group (EG). Since the last report was published in June 2011, the EG has met formally four times and work has continued in between meetings. The Chair and members have also continued to engage with stakeholders, working groups and other people with an interest in the NDNAD and related DNA matters.

The Protection of Freedoms Bill has received Royal Assent and it contains provisions for the deletion of the DNA profiles of innocent people from the NDNAD. This is in line with the recommendations of the EG and we welcome the Act, which we see as significant progress from the previous retention regime. We will continue to work with the National DNA Database Strategy Board and its working groups to ensure the process for implementing the legislation meets the letter and the spirit of the law. We continue to be concerned about whether the indefinite retention of profiles of all those adults convicted irrespective of the offence and when it occurred is proportionate. We also see a need for a proper independent appeals system – which was one of our previous recommendations.

We would like to see the new retention regime subjected to robust statistical data collection and research that would inform policymakers on its effectiveness. In this regard, the EG makes in this annual report a new set of recommendations:

1. The Home Office should collate evidence that demonstrates the effectiveness of the new retention regime and report the findings on a regular basis.
2. In particular, the Home Office should collect data on a routine basis on what extent retaining the profiles of the convicted helps solve crimes. This evidence should be held for qualifying and non-qualifying offences.
3. The National DNA Database Strategy Board should aim for more transparency by involving more lay members in its governance structure.

CHAPTER 2

VISION AND VALUES OF THE ETHICS GROUP

1.0 BACKGROUND

The Ethics Group of the National DNA Database is an advisory non-departmental public body of the Home Office. The Ethics Group was established to provide Ministers with independent ethical advice on the operation and practice of the NDNAD. It came into being in 2007 and comprises members from different disciplines and professions led by an independent chair. It publishes its minutes, an annual report and various discussion papers to Home Office Ministers.

2.0 VISION

To ensure that all decisions relating to the forensic use of DNA (obtaining, storage, retrieval) are considered in the light of ethical and Human Rights principles, and that individuals may only have their DNA taken for lawful forensic purposes and at all times be treated fairly and with dignity and respect.

3.0 MISSION

We aim to ensure that the culture of the operational framework supporting the NDNAD in England and Wales places ethical issues at the forefront of all activities at all times.

4.0 VALUES

The following are the values and principles that the EG bring to our role in terms of establishing and resolving ethical issues:

- That the NDNAD must have a proper lawful basis that is compatible with the Human Rights Act 1998 and which provides for independent and accountable governance of its operations.
- That there are clear, detailed, open and transparent rules governing the every day operations of the NDNAD so as to ensure that processes are just and lawful and provide sufficient guarantees against the risk of abuse.
- That the use of forensic DNA sampling should be appropriate and proportionate and should not discriminate against members of any section of society.
- That the operations of the NDNAD are at all times fully based in credible science which shows a strong and cogent rationale for justifying such activities.
- That all decisions taken in relation to the operation of the NDNAD within the criminal justice system are proportionate and fair when balancing the rights of individuals against the needs of society to detect and prevent crime.
- That all persons who are lawfully required to give a DNA sample are treated fairly with dignity and respect and that there is an established independent appeals process to guarantee their right to an effective remedy.
- That the public is fully informed about all aspects of the NDNAD in ways that are understandable including providing information to those individuals who are required to provide a DNA sample.
- That research using the NDNAD is only permitted after full consideration that it is fully compatible with these principles and has been submitted to independent scientific scrutiny.
- That the rights of children and young people should be protected in light of their vulnerability and in accordance with international conventions.

CHAPTER 3

MEMBERSHIP, ADMINISTRATION AND ACTIVITIES OF THE ETHICS GROUP

The current EG membership is as follows:

Chairman: Christopher Hughes

Members: Dr Derrick Campbell

Mrs Wendy Coates

Ms Madeleine Colvin

Dr Nina Hallowell

Professor David Latchman

Dr Jane Pearson

Dr Clive Richards

Dr Sameer Sarkar

Ms Sarah Thewlis

Dr Suzy Walton

During the year April 2011 – March 2012, the EG Chair opened a workshop at the University of Oxford on presenting DNA evidence in court. He also gave advice to a visiting delegation from the United Arab Emirates on their plans to establish a universal database. The Chair advised the Home Office Scientific Advisory Committee on a structured approach to ethical issues in Home Office science. He also spoke at the Northumbria University Centre for Criminal and Civil Evidence and Procedure symposium that looked at the reform of the law relating to governance of genetic policing in England and Wales.

A member of the EG attended the Howard Dalton Lecture 2012: ‘Don’t know, can’t know – communicating risk and deeper uncertainty’. Another member attended the Northumbria University Centre for Forensic Science seminar on Low Template DNA profiling. Other members of Ethics Group kept ‘watching briefs’ on their various topics of responsibility and took part in relevant visits and briefings which are too numerous to mention here.

The EG also received contributions in the form of presentations from: Lord Carlile of Berriew, the former Independent Reviewer of Terrorism Legislation; Iain Williams, the Head of Science Secretariat at the Home Office; DI Stacey Dibbs, ACPO DNA Staff Officer National DNA Database Strategy Board; Alex Prott, Head of Corporate Equality Diversity and Human Rights at the NPIA; Andrew Alexander of the Home Office’s Police Transparency Unit; Amanda Cooper, Chair National DNA Database Strategy Board; The NPIA Forensics21 Programme, and Andrew Rennison, the Forensic Science Regulator. An appraisal report on the contributions of EG members was submitted by the Chairman to the EG sponsor, the Forensic Science Regulator, as required by the Terms of Reference of the group. For all the oral presentations that the EG received, the EG challenged and probed the speaker with regard to relevant ethical issues.

During the year, there were four General Meetings of the EG. The minutes of these meetings are published and can be found on the Home Office website via the web link below:

<http://www.homeoffice.gov.uk/agencies-public-bodies/fsr/ndnad-ethics-group/>

During the period of this report, the Chairman and members of the group also met with, attended and/or made contributions and representations to:

- James Brokenshire, the Parliamentary Under-Secretary of State at the Home Office
- The National DNA Database Strategy Board
- The Home Office Chief Scientific Adviser
- The National Policing Improvement Agency
- The Government Chief Scientific Adviser's meeting for Chairs of Scientific Advisory Committees

The EG is financed by the Home Office and had a budget allocation of £25,000 in the accounting year 2011/12. Costs were associated with the provisions of facilities for meetings and expenses of members properly incurred. The EG generated no income of its own. Members are not paid for undertaking activities on behalf of the EG.

Administrative support to the EG has been provided by a Secretariat made up of staff from the Home Office. Press Office support also comes from the Home Office.

CHAPTER 4

WORKSTREAMS COMPLETED AND DEVELOPED DURING THE YEAR APRIL 2011 – MARCH 2012

The EG continued to work closely with the National DNA Database Strategy Board. The Strategy Board is the operational arm for implementing the recommendations of the EG. The EG Chairman sits on the Strategy Board as an ex-officio member and EG members with lead responsibilities for certain issues remain involved in the related Strategy Board work programmes.

The following EG members lead for the Group on these work programmes:

- Wendy Coates and Derrick Campbell – Monitoring disproportionality
- Sarah Thewlis, Madeleine Colvin and Clive Richards – Governance of DNA databases
- Clive Richards and Madeleine Colvin – Implementation of European Court of Human Rights decision in S & Marper
- Wendy Coates, Chris Hughes, Sarah Thewlis and Suzy Walton – Development of the role of the Biometrics Commissioner
- Chris Hughes – Closure of the Forensic Science Service
- Chris Hughes – Wind down of the NPIA
- Madeleine Colvin and Sameer Sarkar – International exchange of DNA
- Derrick Campbell and Nina Hallowell - Public awareness
- Chris Hughes and Nina Hallowell - Social consequences of new use of DNA beyond the CJS
- Chris Hughes and Jane Pearson - Research applications
- Wendy Coates and David Latchman - Monitor developments on crime scene DNA testing and other new technology
- Suzy Walton – protection of rights of children and young people in line with common conventions in the DNA sampling process, plus (all age groups) general consent issues and DNA sampling kits.

The work progressed to date in these areas is described below with detail being found in the meeting minutes.

MONITORING DISPROPORTIONALITY

The question of disproportionality of representation of different ethnic groups within the database has been of concern for some years. The EG kept a watching brief on the operations of the NDNAD in terms of its impact on minorities. The Group endorsed the work carried out by the NPIA to equality-proof the NDNAD to ensure it was proportionate. The EG also carried out a study of the NDNAD which established that the context of disproportionality in the ethnic composition of the database arose through the collection of samples following arrest, with disproportion in stop and search. The removal of substantial

numbers of those without convictions from the database as a result of the Protection of Freedoms Act 2012 is widely welcomed, and is very likely to reduce the disproportionality in the representation of some ethnic groups. The EG is of the view that it would be highly desirable if the impact of the new retention regime was properly evaluated to assist in the understanding of its impact on different ethnic groups. Such data collection and its publication could do much to demystify the functioning of the database and go a long way in increasing public trust and confidence in running of the database.

The EG also endorsed the then Metropolitan Police Authority's Civil Liberties Panel report "Protecting the innocent: The London experience of DNA and the National DNA Database". Some of the recommendations in the report are in line with the EG's previous recommendations. These include the need for more information when a sample is taken, the handling of volunteer samples, and improvements in public information on the use of DNA in policing.

GOVERNANCE OF POLICE DNA DATABASES

The EG has been asked by the Forensic Science Regulator to consider the ethical implications around the operations of contamination elimination databases for the police, forensic science providers and manufacturers of forensic kits. An initial scoping study is being undertaken by the EG and the Group is also looking at what lessons could be learned from recent cases of contamination of DNA evidence.

The EG continues to seek assurances that the databases are under proper control and only used in accordance with the law. The EG recommended in last year's annual report that all databases containing DNA information held by the police service should be subject to a robust governance framework. The Group is therefore concerned with the governance of other police databases specifically the Counter-Terrorism DNA database.

The EG also gave advice on operational matters in relation to the use of the NDNAD in exceptional circumstances.

The EG also agreed with Home Office Ministers and the Northern Ireland Minister for Justice to give advice on ethical issues to the newly-created Northern Ireland DNA Database Board (NIDNAD).

IMPLEMENTATION OF EUROPEAN COURT OF HUMAN RIGHTS DECISION IN S & MARPER

The Protection of Freedoms Act has received Royal Assent. The EG welcomes the provisions in the Act that mean that the DNA profiles of over 1 million innocent people will be removed from the NDNAD. This is in line with the ECtHR judgment in S & Marper and recommendations of the EG.

There is also the general matter of the need for ongoing, accurate statistical information as regards to the need and effectiveness of the retention periods stipulated in the Act. This is a matter that the EG has raised several times, and has considered further in terms of making a specific recommendation for effective qualitative research that demonstrates the effectiveness of the new retention regime in this year's annual report. There are currently no Government plans for this type of research.

The implementation of the destruction of samples and profiles of the innocent will remain a concern for the EG in the following months. The Group has general ethical responsibility for reviewing the process of destroying DNA profiles and how best this is to be achieved in an effective and timely manner. There also remains the question of the technical ability to destroy all the data or render it truly anonymous which has been discussed previously by the Group.

The EG continues to take the view that the indefinite retention of profiles for the convicted is disproportionate and not in line with ECtHR judgment.

The Act has placed the NDNAD on a statutory footing, but this is insufficient in terms of statutory governance rules in terms of a Code of Practice on its operation and use.

DEVELOPMENT OF THE ROLE OF THE BIOMETRICS COMMISSIONER

The Protection of Freedoms Act brings into effect the position of the Commissioner for the Retention and Use of Biometric Material. The post-holder will act as a watchdog, to oversee and possibly reject applications to retain DNA profiles on national security grounds.

The EG discussed the development of the role and what role the EG could play in assisting the Commissioner with Lord Carlile of Berriew, the former Independent Reviewer of Terrorism Legislation. The EG then made representations to James Brokenshire MP, Parliamentary Under Secretary for Crime and Security, on how the Biometrics Commissioner could function effectively, informing the Minister that the post-holder should be able to call on the members of the Group either individually or collectively for advice and support on ethical matters.

CLOSURE OF THE FORENSIC SCIENCE SERVICE

The EG has been concerned about the mechanisms and steps in place to ensure the integrity of the data that would remain in the hands of commercial providers when the FSS winds down. The Group has been reassured by the Forensic Science Regulator that forensic science providers have to be accredited for the DNA material they send to be loaded on to the NDNAD, and any loading of DNA material has to comply with NDNAD rules. None of the DNA work undertaken by the FSS will be transferred to any organisation that was not accredited to the required standard.

WIND DOWN OF THE NPIA

The NDNAD is managed by the NPIA and the EG has an interest in ensuring that the closure of the NPIA and the new arrangements that inherit its work do not compromise the integrity of data held by NDNAD. The EG has been informed that options are being discussed about responsibility for running the NDNAD when the NPIA winds down. The EG will consider the ethical implications of the proposed option.

INTERNATIONAL EXCHANGE OF DNA

The EG has been looking at the arrangements for exchanging DNA data across international jurisdictions. The exchange has to be based on the following principles:

- There has to be a policing purpose
- It has to be subject to proper legal controls
- The use must be proportionate
- It should meet certain scientific standards
- Ethical considerations should be factored in.

Consideration is being given for Biometrics Commissioner to check a sample of the subject profiles sent abroad to ensure that they had adhered to the guidelines. But there were concerns over the volume that might be involved. The Strategy Board has been asked to provide guidance on what should be exchanged and the EG will be involved in drafting this guidance. The Strategy Board has to sign off the release of subject profiles to another country at the present time.

PUBLIC AWARENESS

While public understanding of issues around the forensic use of DNA remained a concern, the EG recognised that its contribution to public awareness was limited by resources and is a responsive area of its activity, involving encouraging key contacts to devote resources to providing effective and accessible public information. The EG will continue to bring any concerns it has to the attention of Ministers. The Group has achieved positive outcomes in raising awareness about: the treatment of children, the categorisation of ethnicity on the NDNAD, impact assessments, information leaflets, the research application form, etc.

The EG continued to engage with stakeholders and the wider public throughout the reporting year and spent some time exploring more effective ways to raise public awareness about the use of genetic information in policing.

CHAPTER 5

REVIEW OF THE IMPLEMENTATION OF RECOMMENDATIONS MADE IN PREVIOUS ANNUAL REPORTS

RECOMMENDATIONS FROM THE 4TH ANNUAL REPORT

Recommendation	Progress made
Recommendation 1: All databases containing DNA information including the counter terrorism database held by the police service should be subject to a robust statutory governance framework, appropriate systems and controls, and should be transparent and only be used for statutory purposes.	The EG has been informed that this is currently the case (governance provided by the Strategy Board) and this will continue as the Strategy Board is on a statutory footing in light of the Protection of Freedoms Act. The EG is not wholly satisfied because the Strategy Board still does not have sufficient independent and/or lay members, and the counter-terrorism database has no statutory basis.
Recommendation 2: The governance around the international exchange of DNA data should be strengthened with clear and transparent accountability mechanisms.	This has been strengthened as a result of a new International DNA policy document. This document has been agreed by all relevant stakeholders including SOCA and the National DNA Strategy Board. The policy has been sent to Police forces and relevant stakeholders to provide clarity of process.

Recommendation	Progress made
<p>Recommendation 3: The National DNA Database Strategy Board should monitor the use of ‘Gillick competence’ which will be used selectively to ensure children consent when they are deemed capable of doing so (rather than have an adult consent for them). The Strategy Board should encourage the adoption of good practice.</p>	<p>The Strategy Board/DNA unit encourages forces to apply ‘Gillick’ competence regarding their assessment of an individual’s ability to understand what they are consenting to, if deemed necessary. Each force should have access to guidance on applying ‘Gillick’, as this is not DNA specific. These efforts will be monitored by the EG.</p> <p>Forces also apply Section 4.10 of the ‘DNA Good Practice Guide’ which states the following:</p> <p>Consent including minors and psychiatric or sectioned patients</p> <p>When dealing with children under the age of 14 years, a parent or guardian must provide consent. When the young person is 14 - 16 years old, an appropriate adult must witness their consent. In cases when the individual is a psychiatric or sectioned patient or any other individual who is or appears to be vulnerable, the consent of that individual should be sought together with the consent of an appropriate adult.</p> <p>If consent is refused, providing the provisions of s.63, PACE, 19842 are satisfied, the sample can then be taken without their co-operation or consent using such force as is reasonably necessary.</p>

The following recommendations from previous reports have had some action, but not progressed as far as they could:

1ST ANNUAL REPORT

Recommendations C&D: Improvement of the process for taking consent and providing a better consent form for adult volunteers

The EG still remains concerned that the forms provided do not show that the rights of individuals concerned are sufficiently protected.

2ND ANNUAL REPORT

Recommendation 2: To accept and take forward the EG's proposals on consent for children and young people

At present the DNA sampling process does not usually take account of the Gillick Competence principles which are prevalent in medical settings and which, after thorough consultation, the EG recommended when DNA is taken from children and young people. The EG felt strongly about this issue and produced a paper specifically on it. It therefore remains the case that the EG's recommendations have NOT been taken up to the full satisfaction of EG. It is conceded that since the new sampling policy which became effective in Spring 2010 seeks to take DNA from children on an exceptional basis only, that far fewer children will be sampled than was previously the case. Nonetheless, there will be occasions, for example, elimination samples, when children are asked to consent to DNA being taken.

Recommendation 4: To urgently improve the level of easily available and assimilated public information on the use of forensic DNA.

A website has been developed by the NPIA. This website is designed to give information about the database to the public. The EG supports this development, however, it does not go as far as the EG had asked in recommendations. There is a continued and widely acknowledged need to provide information to individuals who are being sampled at the time they are being sampled. Individuals may be in a state of increased anxiety and should be provided with basic information covering:

- a) What DNA is (and what it is not – many people have a misperception from the media);
- b) How their sample will be taken;
- c) What will happen after their sample is taken;
- d) What their rights are.

The EG produced a suggested information template sheet to sit on the back of the consent form. They based this template on an early prototype by the NPIA which was believed to not fully meet the needs of the public. There has been acknowledgement of the importance of providing people with information, but there is currently no work underway to produce DNA information sheets. Though it is believed that it has been discussed by the NDNAD Strategy Board.

3RD ANNUAL REPORT

Recommendation 2: The effectiveness of the NDNAD in solving crime needs to be addressed with a proper statistical/evidence basis for any conclusions.

The Strategy Board supports the principle of further research in this area. However, the EG is not aware of any such research being commissioned either by the NPIA or the Home Office.

CHAPTER 6

RECOMMENDATIONS

1. The Home Office should collate evidence that demonstrates the effectiveness of the new retention regime and report the findings on a regular basis.
2. In particular, the Home Office should collect data on a routine basis on what extent retaining the profiles of the convicted helps solve crimes. This evidence should be held for qualifying and non-qualifying offences.
3. The National DNA Database Strategy Board should aim for more transparency by involving more lay members in its governance structure.

CHAPTER 7

FUTURE WORK PLAN

- To advise on the implementation of the Protection of Freedoms Act 2012.
- To monitor, advise, and review the implementation of the deletion of profiles from the NDNAD.
- To provide ethical advice on elimination databases.
- To ensure all police and supplier databases containing DNA information are subject to robust governance requirements.
- To provide support and advice on ethical matters to the Biometrics Commissioner and others as required.
- To continue to monitor the various agreements, including the Prüm Treaty, for the international exchange of DNA data and the use of the NDNAD.
- To monitor developments on crime scene DNA testing and other new technology.
- To continue to monitor the treatment of children and young people in relation to DNA sampling and retention with a view to ensuring that they are safeguarded and that their distinct rights are recognised.
- To continue to monitor and assess potential disproportionate or discriminatory effects of the use and operation of the NDNAD may have on ethnic minority groups and vulnerable people.
- To support the NDNAD Strategy Board in developing more transparent, ethical and user friendly information about the forensic use of DNA and the database.

