

# Annual report of The Ethics Group: National DNA Database

2011



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# FOREWORD



This has been another eventful year for the Ethics Group with the new Coalition Government taking a fresh look at the National DNA Database (NDNAD) and introducing legislation on

the retention of DNA profiles that it believes are consistent with the European Court of Human Rights' (ECtHR's) decision on S and Marper in 2008. The court held that holding the DNA of people that were not convicted of an offence is a violation of their rights to privacy. Reform of policy on DNA retention was a central plank of the Coalition Government's approach to redress the balance between the state and the individual in the area of surveillance and privacy.

In this light, the EG made early representations to newly-appointed Home Office Ministers that reflected previous recommendations in past annual reports. These included:

- A statutory footing for the database
- More transparency with the running of the database
- A completely independent appeal system
- An evidential basis for supporting the decision to adopt the Scottish retention model for DNA profiles
- Concerns about some categories of un-convicted remaining on the database
- Concerns about the convicted remaining on the database without time limits

- The need to address issues around proportionality and the discriminatory effect of the database

I am delighted that the Protection of Freedoms Bill has addressed some of these concerns. The extent to which they have been addressed is covered in Chapter 5.

The EG has continued this year to work closely with the National DNA Database Strategy Board and the Home Office Science Advisory Committee (HOSAC). 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, the Chair of the National DNA Database Strategy Board, and the National Policing Improvement Agency (NPIA).

We have continued 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
- The sampling of volunteers
- Ethical considerations of new DNA technology
- The Protection of Freedoms Bill
- The international exchange of DNA

A member of the EG, Julia Selman-Ayetey, stepped down this year. It has been a pleasure working with her and her contributions to the EG's work were of

immense value. I wish Julia all the best in her future endeavours.

The Home Office also recruited through open competition two new members: Dr Nina Hallowell and Professor David Latchman CBE. Nina is a researcher in medical ethics and David is a professor of genetics and molecular science. I am sure that they will bring a wealth of experience that will enhance the activities of the EG.

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 fourth annual report of the Ethics Group (EG). Since the last report was published in July 2010, the EG has met formally three times and work has continued in between meetings. The Chair and members have also continued to meet with stakeholders, working groups and other people with an interest in the NDNAD and related DNA matters.

Significant progress has been made since the last annual report through the National DNA Database Strategy Board and its working groups and the Protection of Freedoms Bill to implement the recommendations of the EG, especially on the implementation of the consequences of the S & Marper case.

The EG views the provisions on DNA retention in the Protection of Freedoms Bill as significant progress relative to the current retention regime. However, the EG remains concerned that the Bill does not fully comply with the ECtHR judgment on S and Marper, particularly in indefinite retention of DNA profiles for the convicted. The EG also continues to be concerned that the proposed retention regimes in the Bill are not supported by robust published statistical evidence.

The EG, in this annual report makes a new set of recommendations:

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.
2. The governance around the international exchange of DNA data should be strengthened with clear and transparent accountability mechanisms.
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.

## 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

Since the publication of the EG's third annual report, Julia Selman-Ayetey has stepped down and Nina Hallowell and David Latchman have joined the Group from 15 February 2011. 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 2010 – March 2011, two members of the EG attended the launch of the Nuffield Foundation report: 'The Future of Forensic Bioinformation'. An EG member attended Northumbria University's 'Forensic Science in the 2010s: How to Survive a Difficult Decade'. An EG member also attended the joint Home Office and Biotechnology and Biological Sciences Research Council (BBSRC) Genome Sequencing Workshop, with the Chairman making a presentation. The Chairman gave evidence to the Metropolitan Police Authority Civil Liberties Panel inquiry into the National DNA Database and the use of DNA within policing.

The EG also received contributions from: Alex Protts, Head of Corporate Equality Diversity and Human Rights at the NPIA; Andrew Alexander of the Home Office's Policing Powers & Protection Unit; Gary Pugh, Director of Forensic Services Metropolitan Police Service; 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.

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:

[www.homeoffice.gov.uk/agencies-public-bodies/fsr/ndnad-ethics-group/](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:

- Theresa May, the Home Secretary
- James Brokenshire, the Parliamentary Under-Secretary of State at the Home Office
- The Home Office Scientific Advisory Committee
- The National DNA Database Strategy Board
- The Wellcome Trust
- The Home Office Chief Scientific Adviser's Review of Research and Development in Forensic Science



- The National Policing Improvement Agency
- The NDNAD Delivery Unit
- 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 2010/11. 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.

## CHAPTER 4

# WORKSTREAMS COMPLETED AND DEVELOPED DURING THE YEAR APRIL 2010 – MARCH 2011

The EG maintained and strengthened its links 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 EG members and the Strategy Board work programmes are as follows:

- Wendy Coates and Sameer Sarkar – DNA custody sampling
- Sarah Thewlis, Derrick Campbell and Madeleine Colvin – Regularising police databases
- Clive Richards – Destruction of PACE (Police and Criminal Evidence Act) samples
- Chris Hughes and Jane Pearson – Requests for research to the NDNAD
- Chris Hughes – Horizon scanning of DNA profiling systems
- Wendy Coates – Diversity and community issues
- Madeleine Colvin – Removal of DNA samples, Exceptional case appeal procedures
- 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.

### **DNA CUSTODY SAMPLING**

The EG contributed to the drafting of sampling forms for volunteers and the guidance that was issued to forces.

The EG also continued to press for the Gillick Competence principles to be applied to the sampling of child volunteers. This is about establishing whether a child has the maturity to make his/her own decisions and to understand the implications of those decisions. While this has not been adopted in the DNA sampling process for children, the EG is pleased to note it will now be applied to the database for victims of honour-based violence and missing persons.

The Group continued to make the case to Home Office Ministers for better information to the public on the use of DNA. Public confidence in the database is considered essential to its operation as part of the principle of policing by consent.

### **REGULARISING POLICE DNA DATABASES**

It is crucial to ensure an auditable process for any databases kept by police forces that operate in parallel to the NDNAD. The EG investigated the databases currently available and held discussions with the Strategy Board and its Chairman Gary Pugh. These databases include ones held for the purposes of contamination elimination, counter terrorism and missing persons.

The EG seeks assurances that the databases are under proper control and only used for

statutory purposes. The EG also raised concerns about their governance framework and whether there is effective oversight and accountability. The Group recommends that all databases containing DNA information held by the police service should be subject to a robust governance framework, transparent and only used for statutory purposes. The EG also wishes to have a continued involvement with the counter terrorism database in order to ensure appropriate systems and controls are in place.

The EG also contributed to a review of plans for a Missing Persons' Database.

### **DESTRUCTION OF PACE SAMPLES**

The EG is pleased that the Protection of Freedoms Bill includes provisions for the destruction of samples where the material was taken unlawfully, or in cases of mistaken identity or unlawful arrest. Additionally, all samples must be destroyed as soon as a profile has been derived from the sample and, in any event, within six months of the taking of the sample.

### **REQUESTS FOR RESEARCH TO THE NDNAD**

Part of the EG's remit is to consider applications for research involving access to NDNAD samples or data. The Group has not received any applications, however, it had developed a form for handling such applications and this was part of the recommendations in the EG's first annual report. The form has seen further iterations by the Strategy Board. The EG will continue to work with the Strategy Board and the NPIA to ensure that the protocol for research applications is implemented.

### **HORIZON SCANNING OF DNA PROFILING SYSTEMS**

The EG contributed to the Strategy Board's investigation into the coding DNA technique, with the EG Chair sitting on a Strategy Board working group addressing the issue. The EG raised concerns about:

- The robustness of the science
- The proportionality of using the technique against the offence
- The potentially discriminatory effects

DNA is a blueprint for constructing the other components of cells. It describes or codes how the cell is going to make its other components through a sequence of four bases along a structural 'backbone'. The majority of DNA does not describe how proteins are made, and therefore is described as non-coding. Most forensic science focuses on small areas of non-coding DNA because of the fact that this demonstrates greater variability between individuals; this is the technique used by the NDNAD. Those areas that do code for distinct proteins are increasingly interesting to researchers.

The EG was asked by the Chair of the Strategy Board for its views on the Nuffield Council on Bioethics report: 'The Future of Forensic Bioinformation'. There were two issues addressed in the EG's response: it provided thoughts on the report itself and views on the proposal in the report that police officers should make decisions on retention. In general, the EG agreed that it would be preferable for retention decisions to be made on an individual basis. The

EG was broadly supportive of the report and its conclusions, which they saw as comprehensive and illuminating.

The Chair of the EG gave a presentation to the joint Home Office and BBSRC Genome Sequencing Workshop. The workshop brought together academic researchers, members of the forensic community and interested Government bodies to discuss how recent advances and predicted developments in genome sequencing could impact upon Home Office business areas. He stressed that any future use of the genome for crime prevention and detection should follow these principles:

- Protect human dignity
- Take account of the unique significance of the genome
- Give priority to the individual
- Must be in accordance with law and respect for human rights.

The EG also made a contribution to the Home Office Chief Scientific Adviser's Review into Research and Development in Forensic Science, highlighting concerns about the impact of the proposed closure of the Forensic Science Service on research and development, and the need to narrow the gap between the cutting edge of science and its application for forensic purposes.

### **DIVERSITY AND COMMUNITY ISSUES**

The EG continued to monitor progress in dealing with concerns about the disproportionate representation of some minorities on the NDNAD. A member of the EG contributed to the NPIA project carrying

out an impact assessment of the operations of the NDNAD. The EG has suggested that more work needs to be done in communicating the uses of DNA to different communities.

The Chair of the EG gave evidence to the Metropolitan Police Authority's Civil Liberties Panel inquiry into the NDNAD and its use in policing. The panel looked at various issues notably disproportionality and the over-representation of young black men on the database.

### **REMOVAL OF DNA SAMPLES AND EXCEPTIONAL CASE APPEALS PROCEDURES**

The EG contributed to the draft of the Association of Chief Police Officers' (ACPO) guidance on the deletion of samples under Section 23 of the Crime and Security Act. This section included provisions for the Strategy Board to issue guidance on the destruction of DNA samples and profiles. However, the Act did not come into effect and is expected to be superseded by the Protection of Freedoms Bill.

The Bill creates a new retention framework for those charged but not convicted of a serious offence. They may be retained for three years, with a single two-year extension by application to a District Judge.

The Bill also gives the NDNAD Strategy Board the role of issuing guidance to police forces on dealing with applications for deletion from the NDNAD; that guidance will be binding on police forces.

Under the existing framework, arrested persons' profiles are retained indefinitely

even when they are not charged. With the new retention framework, DNA profiles taken from detainees arrested for or charged with a minor offence will be destroyed following either a decision not to charge or following acquittal (although a speculative search against the NDNAD will be permitted in all cases). In the case of those charged with but not convicted of a serious offence, DNA profiles may be retained for three years, with a single two-year extension available on application by a chief officer to a District Judge (Magistrates' Courts).

The EG welcomes this move that takes away the removal of certain profiles from Chief Constables' discretion as they will be automatically removed, and requires the Strategy Board to issue guidance on the removal of profiles in other circumstances. However, the EG believes that this does not go far enough. There should be an independent and effective remedy process for those that appeal against decisions to retain their profiles.



## CHAPTER 5

# REVIEW OF THE IMPLEMENTATION OF RECOMMENDATIONS MADE IN PREVIOUS ANNUAL REPORTS

## RECOMMENDATIONS FROM THE 3RD ANNUAL REPORT

Recommendation	Progress made
<b>Recommendation 1: To accept the fundamental need for prospective studies to ensure that key issues of the proportionality and relevance of the various uses/categories of individuals within the DNA database are illuminated by robust statistical information.</b>	The Home Office has informed the EG that the case for retention regimes proposed in the Protection of Freedoms Bill has been based on a further analysis of the evidence used for the Crime and Security Act. The EG understands that this analysis has been peer-reviewed and will be published in due course.
<b>Recommendation 2: The effectiveness of the NDNAD in solving crime needs to be addressed with a proper statistical/evidence basis for any conclusions.</b>	The Strategy Board supports the principle of further research in this area. However, the EG is not aware of any such research being commissioned.
<b>Recommendation 3: The National DNA Database Strategy Board and the NPIA should work with the EG towards an embedding of ethical considerations at all stages in the use, obtaining and retention of DNA samples and profiles.</b>	EG members are actively involved in Strategy Board work-streams so that ethical considerations are brought to the fore from the early stages of projects.

Recommendation	Progress made
<p><b>Recommendation 4: The appeals process against decisions not to delete a profile from the database should be reviewed to ensure that the cost of an application does not act as an unreasonable bar to redress. Consideration should be given to referring such decisions to a specialist tribunal (such as that under the Regulation of Investigatory Powers Act) rather than panels of magistrates across the country who may very rarely consider such a case in practice.</b></p>	<p>The Protection of Freedoms Bill introduces a new retention framework that destroys the profiles of those arrested but not charged or not convicted of minor offences. Those arrested for serious offences will have their profiles retained for three years. It is expected that those provisions will result in the removal of the majority of the one million plus records relating to un-convicted individuals currently on the NDNAD. When this is viewed alongside the expanded categories in which the police will be expected to delete material, as set out in the Strategy Board’s guidance, the Government does not believe that a further independent appeal mechanism is either necessary or cost effective.</p> <p>However conviction for a minor recordable offence will still mean indefinite retention which the EG believes is not compatible with the Human Rights Act 1998.</p>
<p><b>Recommendation 5: The Database should be supported by a strong governance framework and there should be a clear and transparent accountability for its operations.</b></p>	<p>The Protection of Freedoms Bill puts the NDNAD and the Strategy Board on a statutory footing, with the board overseeing the operations of the NDNAD. The Board reports to the Home Secretary, who is accountable to Parliament and must lay the Strategy Board’s Annual Report before Parliament.</p>

The following recommendations from previous reports have not been progressed to the EG's satisfaction:

### 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 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 take account of the Gillick Competence principles which are prevalent in medicine 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 this issue. It therefore remains the case that the EG's recommendations have NOT been taken up to the 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, where 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 is under development by the NPIA. This website is designed to give information to the public and professionals on the database. 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 is it 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 an 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.

## CHAPTER 6

# RECOMMENDATIONS

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.
2. The governance around the international exchange of DNA data should be strengthened with clear and transparent accountability mechanisms.
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.

## CHAPTER 7

# FUTURE WORK PLAN

To continue to work on the implementation of the ECtHR decision in S & Marper, contribute to the debate on the Protection of Freedoms Bill, advising Ministers on ethical implications of the new provisions for the NDNAD and monitor the implementation of the provisions when the Bill becomes an Act.

To contribute to the development of the role of Biometrics Commissioner and support the appointee with ethical advice.

To monitor the impact of the closure of the Forensic Science Service on the NDNAD and support the Forensic Science Regulator to ensure the closure does not have an adverse impact on quality standards.

To monitor the impact of the winding down of the NPIA on the NDNAD and highlight any ethical implications that may arise.

To monitor developments on crime scene DNA testing and other new technology, ensuring their introduction takes account of the protection of human rights and individual liberties.

To continue to monitor the various agreements including the Prum Treaty for the international exchange of DNA data and the use of the NDNAD.

To explore the gaps between practice and public understanding of DNA.

To investigate the potential social consequences of new use of DNA beyond CJS purposes.

To explore whether the effectiveness and therefore need for the NDNAD can be supported by a strong statistical/evidence basis.

To ensure all DNA databases under government jurisdiction (including the counter terrorism database) are subject to governance rules, appropriate systems and controls, and are used transparently.

To ensure all research applications conform to ethical standards and to audit research requests that are considered by the Strategy Board to ensure there is consistency and fairness in responses to research applications.

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 the use and operation of the NDNAD may have on ethnic minority groups.



