

Creating Ethical Guidelines for Forensic Psychology

Donald Thomson

Department of Psychology, Deakin University, and Justice Studies & Law, Edith Cowan University

In this article, the process and the issues in creating ethical guidelines for forensic practitioners are discussed. Distinctions are made between ethical and practice guidelines, among ethical principles, standards, and guidelines, and between ethical and legal obligations. Strategies for managing conflicting obligations are outlined.

Key words: ethical guidelines; ethical obligations; ethical principles; ethical standards; legal obligations; managing obligations

What is already known on this topic

- 1 American Psychological Association Specialty Guidelines for Forensic Psychology.
- 2 International Association for Correctional and Forensic Psychology Standards for Psychology Services in Jails, Prisons, Correctional Facilities, and Agencies.
- 3 Lack of ethical guidelines for forensic practice in the Australian context.

What this paper adds

- 1 Distinguishing ethical principles, standards, and guidelines.
- 2 Identification of legal obligations of forensic practitioners in Australia.
- 3 Strategies to manage conflicting legal and ethical obligations.

In 2010, the Ethical Guidelines Committee of the Australian Psychological Society (APS) considered a request from the College of Forensic Psychology for the creation of ethical guidelines for psychologists practising in the forensic domain. The college argued that there was a need for the creation of these guidelines because ethical dilemmas arise in the practice of forensic psychology, which do not occur in other areas of psychological practice, a position that the Ethical Guidelines Committee accepted. The American Psychological Association (APA) had published Specialty Guidelines for Forensic Psychology 20 years earlier (American Psychology-Law Society and Division 41 American Psychological Association, 1991), and recently updated these speciality guidelines (APA, 2011). The International Association for Correctional and Forensic Psychology also published in 2010 a third edition of "Standards for Psychology Services in Jails, Prisons, Correctional Facilities, and Agencies," setting out ethical principles and ethical guidelines for correctional and forensic psychologists who work in prisons. The Ethical Guidelines Committee established a working group to assist it in formulating relevant guidelines. The working group comprised people drawn from widely different areas of forensic psychology to ensure that diverse perspectives would be considered in the formulation of ethical guidelines.

However, before guidelines for forensic practitioners can be formulated, a number of preliminary matters need to be clarified. One matter is the basic one of what constitutes the practice of forensic psychology and who is a forensic practitioner. A second matter concerns the distinction between ethical guidelines and practice guidelines. A third matter is the clarification of the distinction among ethical guidelines, ethical standards, and ethical principles. The fourth matter is the identification of the obligations, both legal and ethical, that have special significance for forensic practitioners. It is only when these four matters are clarified that the question about conflicting obligations can be managed. It is these matters that are the focus of this article.

What is Forensic Psychology and Who Is a Forensic Practitioner?

The question of what constitutes forensic psychology has been discussed quite extensively in the literature; see, for example, Blackburn (1996) and Brigham (1999). Consistent with the view expressed by Blackburn, the position adopted in the APA's *Speciality Guidelines for Forensic Psychology* is that forensic psychology "refers to professional practice by any psychologist working within any sub-discipline of psychology . . . when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual, and administrative matters." The distinguishing feature of forensic practice identified in the APA's *Speciality Guidelines for Forensic Psychology* is that the practitioner provides a psycholegal opinion, that is, an opinion about a legal issue from a psychological perspective. Thus, a psychologist who is providing therapy to prison inmates, to victims of crime, or to accident victims may or may not be involved in forensic practice, even when the psychologist is

Correspondence: Donald Thomson, Department of Psychology, Deakin University, Burwood Highway, Burwood, Vic. 3125, Australia. Fax: +3 92446858; email: donald.thomson@deakin.edu.au

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required to write a report for the court describing details of the therapy and the progress made. When practitioners undertake psychological assessments for courts or other judicial or quasi-judicial bodies and, based on these assessments, offer opinions about legal concepts, those practitioners are practising forensically. When a practitioner is providing a therapeutic service and the provision of that service impacts on a psycholegal issue, that therapeutic service is a forensic one.

The scope of psychological services provided by forensic practitioners is wide and varied. Those services may range from advising lawyers about psychological issues in contested matters, assisting the courts in understanding the implications of the findings of relevant research, assessing an offender's risk of reoffending and advising the court of that risk, assessing a party's ability or inability to perform a particular function and report the findings to a lawyer or tribunal, for example, assessing victims of crime, assessing persons suing for psychological injuries following road or workplace accidents, or assessing parental skills.

Ethical Guidelines and Practice Guidelines in Forensic Practice

Guidelines are statements formulated to guide or assist practitioners in their practice. Ethical guidelines are derived from ethical principles and standards, and provide guidance to psychologists in determining *what* is an acceptable professional conduct. In contrast, practice guidelines are *“how to”* guidelines; for example, recommended ways of assessment or intervention are undertaken. While it may be the case that ethical guidelines and practice guidelines are integrally related in that ethical considerations should inform practice, and that ethical guidelines are formulated in the context of practice, ethical guidelines and practice guidelines are distinct and have different foci.

Ethical Principles, Ethical Standards, and Ethical Guidelines

Ethical principles refer to fundamental understandings of what constitutes moral conduct. Three ethical principles are identified in the APS *Code of Ethics* (2007): respect for the rights and dignity of people and peoples, propriety, and integrity. These ethical principles underpin both ethical standards and ethical guidelines of the society. Ethical standards specify professional conduct that is mandatory. Breach of an ethical standard contained in the APS *Code* by practitioners makes those practitioners liable to sanctions being imposed on them. Ethical guidelines differ from ethical standards in that guidelines are advisory, and consist of recommendations about appropriate professional conduct and the processes and procedures for determining what is appropriate professional conduct. Guidelines are not intended to take precedence over the judgement of psychologists in balancing competing ethical principles, in considering the significance of the context and setting of an issue, and in assessing available resources (Bush, Connell, & Denny, 2006). Ethical guidelines are likely to have been formulated by committees of experienced practitioners, as is the case with the Ethical Guidelines Committee, employing a standard decision-making model, namely identifying the ethical problem, determining the weight

to be given to competing ethical principles, generating possible solutions, assessing the potential consequences of these solutions, and then making a judgement as to the appropriate solution. It is the solution at which the committee arrives that constitutes the guideline. However, guidelines formulated by committees cannot take into account all possible contexts in which ethical problems arise, and thus it is possible that a practitioner employing the same standard decision-making model as the Ethical Guidelines Committee arrives at a solution somewhat different from that of the Ethical Guidelines Committee. Practitioners coming to a solution different from that found in the guidelines may be required to justify the course of action they took (see *Code*, p. 9), but provided they can demonstrate that they have turned their mind to all relevant matters and employed a valid decision-making procedure, their conduct is unlikely to be found to be wanting.

Ethical and Legal Obligations of Forensic Practitioners

The ethical principles that underlie the conduct of forensic psychologists—namely, respect for the rights and dignity of people and peoples, propriety, and integrity—are no different from those of any other practising psychologist, nor are the ethical standards. What is different is the context in which those principles and standards are operationalised; the legal obligations imposed by statutes, common law, court orders and rules, and regulations; and the policies and practices of forensic institutions and organisations.

Psychologists who enter the forensic domain need to be aware that not only must they be competent to practise as psychologists, but they must also possess a reasonable level of knowledge and understanding of laws, regulations, rules, directives, precedents, policies, and practices, which govern their participation in legal proceedings and which govern their practice in forensic institutions and organisations. Thus, psychological services, such as forensic assessment, opinions, expert evidence, and treatment, provided by forensic psychologists should not only be based on sound scientific principles and research, but should also comply with legal requirements. The psychological services provided should be relevant and appropriate to the issues before the court or other legal body. Lack of knowledge and understanding of relevant laws, regulations, rules, directives, precedents, codes of conduct, policies, and practices has the potential to seriously impair the quality of psychological services that forensic psychologists are able to provide, and consequently has the potential to harm the rights of recipients of those psychological services (Stolle & Studebaker, 2011; Tippins & Wittmann, 2005; Young, 2008).

Managing Ethical and Legal Obligations of Forensic Practitioners

Managing ethical obligations is likely to pose a significant challenge for forensic practitioners. Whenever forensic practitioners are requested to provide psychological services, it is essential that, before these psychological services are provided, the nature of those services and the forensic practitioner's role in providing the requested services is clarified. Once practitioners

clarify the nature of the services and establish what their role is, practitioners can identify their ethical obligations and their legal obligations, and to whom these obligations are owed. These ethical and legal obligations may limit the type of services that the forensic practitioner can offer, and the conditions under which those services can be provided. Further, unless the recipient of the psychological services is made aware of the conditions under which the services can be, or are to be, provided, that person cannot be said to have given informed consent for those services. As a general rule, the primary obligations of practitioners who are providing therapeutic treatment, both ethical and legal obligations, are to the person receiving and paying for those services. However, in forensic practice, the practitioners' obligations are likely to be much more complex. Thus, for example, when a practitioner is retained by a lawyer representing a litigating party and asked to conduct psychological assessments relevant to an issue being contested in court, the practitioner has obligations not only to the party being assessed and to the retaining lawyer, but also to the court. Similarly, when forensic practitioners are retained by courts, by parole boards, by corrective services, or by compensation tribunals, forensic practitioners will have ethical and/or legal obligations, not only to the retaining body, but also to the person for whom the forensic practitioner has been retained to treat or assess. Forensic practitioners who provide expert opinion to courts and tribunals should be aware of the rules of courts and tribunals that specify that the expert witness' obligation to the courts overrides any obligation to the person on whose behalf the expert evidence is being tendered, and overrides the obligation to the instructing lawyer. Similarly, under Australian industrial law, the primary obligation of forensic practitioners is to their employer.

Whenever practitioners have multiple obligations, there is the potential that these obligations will conflict with one another. In addition to possible conflicts of ethical principles, the forensic practitioner may well have legal obligations that conflict with one or more ethical principle. Forensic practitioners should endeavour to identify all their ethical and legal obligations, and then establish whether there is conflict between those obligations. If there is a conflict or potential conflict in obligations, forensic practitioners should carefully consider how those conflicting obligations are managed. For example, if a psychologist is requested to make a forensic assessment of a person to whom the psychologist has been providing therapeutic psychological services, the most effective way of managing potential conflict of obligations as a therapist and as a forensic assessor (Greenberg & Shuman, 1997, 2007; Strasburger, Gutheil, & Brodsky, 1997) is to decline to accept the invitation and refer the request to another forensic practitioner.

If forensic practitioners' ethical obligations conflict with their legal obligations, forensic practitioners should seek a constructive resolution of the conflict in a way that upholds the principles of the *Code* (section B.12.1). When the conflict cannot be resolved in this way, forensic practitioners may meet their legal obligation but only to the extent required and not in any way that violates a person's human rights (General Principle A: Respect for the rights and dignity of people and peoples, APS *Code*, see also section 10.01 APA's *Speciality Guidelines for Forensic Psychology*).

Conflict between obligations potentially occurs when the practitioner is required to assess and/or treat a person and that assessment and/or treatment has been ordered by the courts or some other legal authority (Stolle & Studebaker, 2011). Even though the assessment or treatment has been ordered by the courts or other legal authority, and thus the assessment or treatment can proceed without consent of that person, the ethical obligation of the practitioner to inform the person of the nature and purpose of the assessment or treatment remains. If the mandatory assessment or treatment includes consulting others, such as prison or probation staff, the practitioner informs the person who is to be assessed or treated of that fact. The person who is to be assessed or treated is also informed about who will have access to the practitioner's observations and findings arising from the proposed assessment and/or treatment. If the person refuses to be assessed or treated, that decision by the person is respected by the practitioner, who then advises the retaining party that the person is not willing to be assessed or treated (APS *Code*, General Principle A 3.7).

In the explanatory statement in the section of the *Code* outlining ethical standards concerning integrity, it is stated that "*Psychologists* recognise that their position of trust requires them to be honest and objective in their professional dealings." Being honest and objective in their professional dealings means that practitioners provide services that are impartial and unbiased. Because of the adversarial nature of the legal system, forensic practitioners are likely to experience pressures to be partisan, and to provide reports that may not fairly present the psychological profile of an individual or that may not accurately represent the findings of scientific research. In conducting forensic examinations, practitioners strive to consider all alternative opinions and hypotheses impartially (Stolle & Studebaker, 2011).

One strategy that forensic practitioners may adopt in coping with conflicting obligations is to prioritise those obligations, and then respond to the obligation assessed as having the highest priority, but in a fashion that attempts to minimise the effects of breaching the conflicting obligations. Care should be exercised by practitioners in generating any hard and fast rule for prioritising obligations as the context of the service provision may determine the priority of an obligation. For example, although a forensic practitioner has been retained by a lawyer to make an assessment of the lawyer's client, it can be argued on two grounds that the person who is to be assessed has the right of access to the records. First, the person who is to be assessed is likely to be the person paying for the assessment, not the lawyer; and second, the lawyer is likely to be acting on behalf of his or her client, that is, the lawyer has been retained by and paid by the person being assessed. Rather obviously, the practitioner should discuss the issue of who has access to the records with the person who is to be assessed and the lawyer, and should not proceed until there is agreement by all the parties about the access. Likewise, how practitioners respond to receiving a subpoena for their records will depend on the reason those records were created and the jurisdiction in which the litigating is occurring. If the matter is a criminal matter and the records have been created at the request of the litigant's lawyer solely for the purposes of that matter, then these records are likely to be considered privileged information by the court,

and therefore not accessible to other parties. However, there are some circumstances when legal privilege may give way to other considerations.

Concluding Comments

Because some issues arising in providing psychological services in the forensic domain are quite different from issues in other areas of psychological practice, there is a clear need for ethical guidelines for forensic practitioners. The guidelines being formulated by the Ethical Guidelines Committee should alert practitioners to their competing ethical and legal obligations, and provide assistance to practitioners in managing these competing obligations.

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