Faculty of Forensic and Legal Medicine

Recommendations

Peer Review in Sexual Offences including Child Sexual Abuse cases and the implications for the disclosure of Unused Material in criminal investigations and prosecutions

Introduction

In the field of forensic medicine, the forensic clinician's duty to the patient/complainant and court requires that they are able to practise their craft in an objective, independent and evidence-based manner.

A forensic clinician who is required to give or prepare expert evidence in criminal proceedings is subject to Part 33 of the Criminal Procedure Rules (CPR), which defines the Expert's duty to the court as helping to achieve "the overriding objective by giving objective, unbiased opinion on matters within his expertise" (part 33.2).

Part 33.3 sets out the content of the expert's report. This includes:

- Details of any literature or other information which the expert has relied on (part 33.3 (b)); and
- Where there is a range of opinion on the matters dealt with in the report –
  - Summarise the range of opinion, and
  - Give reasons for his own opinion (part 33.3 [f]).

Clinical Governance is "a framework through which NHS organisations are accountable for continually improving the quality of the services and safeguarding high standards of care by creating an environment in which excellence in clinical care will flourish". [1]

Peer review has become an accepted aspect of clinical governance and is encouraged by the GMC.[2, 3]

Peer Review of a clinician's work in sexual offences, including child sexual abuse cases, may have legal implications in relation to the disclosure of unused material which will need to be considered and appropriately addressed.

Definition

Peer review is the evaluation of work or performance by colleagues in the same field in order to maintain or enhance the quality of the work or performance in that field. The word *peer* is often defined as a person of equal standing. However, in the context of peer review, it is generally used in a broader sense to refer to people in the same profession who are of the same or higher ranking.

It may be desirable for groups of forensic clinicians based in different areas to hold joint peer review by way of video conferencing. This has the advantage of cross fertilisation of ideas; and it allows areas with smaller case numbers to benefit from the experience of areas with larger numbers of cases.

Aim

To provide a proactive culture of learning where clinicians and Sexual Assault Referral Centre (SARC) staff can review cases, discuss procedures, process and evidence bases underpinning diagnosis and in doing so provide a supportive environment to debrief cases with peers undertaking similar work. In turn this will help prevent professional isolation and aid sharing of best practice. The fact that a clinician regularly attends effective peer review may help reassure the courts as to the quality of their work. It will also contribute to the evidence collected by a clinician for the purposes of annual appraisal and revalidation.

It should be noted that the case discussion in peer review tends to be in broad terms, rather than addressing fine detail, and therefore opinions proffered by members should be viewed in this context.

The aim of the case discussion is **NOT** to generate either a second opinion or an expert opinion.

Objectives

- To provide time for discussion of cases in a relaxed, non-threatening environment.
- To share professional experience.
- To review cases to ensure appropriate evidence based management.
- To view photo documentation accompanying the case presentation.
- To provide an opportunity for emotional support.
- To provide training for clinicians and SARC staff.
- To help identify areas for additional training for the group and /or individuals concerned.
- To stimulate ideas for audit and/or research.

Process

All aspects of practice may be subject to peer review, including the forensic examination, case notes, photo-documentation, court statements, forensic sampling and case management.

- Aspects of a case should not be subjected to peer review unless the examining clinician is present.
- The examining clinician retains accountability and responsibility.
- Awareness of legal considerations is vital (see below).
- The meetings should take place at regular intervals.
- The Clinical Director or a nominated deputy should chair the meetings.
- Attendees should be fully informed of the aims and objectives of peer review.
- The examining clinician is to lead on their case. If photo documentation is being shown then:
  - The examining clinician will present the photo documentation to the group.
  - The examining clinician will proffer their views prior to the group asking any questions or offering comments.
  - Open discussion will take place and steps will be taken to ensure discussion remains balanced between constructive criticism and support, whilst avoiding collusion.
  - The examining clinician will summarise their concluding thoughts.
  - Any significant dissent will be recorded indicating who dissents and why.
  - Any subsequent statement / relevant legal discussion will make it clear that the case (or aspects of it) has been peer reviewed, and disclose any significant issues arising.

- Records of those present, the discussion and conclusion should be documented and filed in the case notes.
- Any actions resulting from case discussion are the responsibility of the examining clinician with the Clinical Director being responsible for overall clinical governance matters.

Confidentiality and patient consent

Clinical governance is key to the care of all patients. As peer review is one aspect of this, any case could be subject to it. As such, during the consent process with patients/complainants, peer review should not be discussed as an option rather an essential element of care unlike, for example, records being used for research from which a patient may opt out.

Details of cases discussed at peer review will be given due confidentiality in accordance with the General Medical Council document *Good Medical Practice.*[4]

Legal considerations

By definition, forensic work has an interface between the medical and legal worlds. Peer review processes for sexual offences including child abuse cases must reflect this. The Criminal Justice System's interest in peer review arises in relation to the disclosure of unused material.

Unused material is material that may be relevant to an investigation, but that does not form part of the evidence upon which the prosecution relies to prove its case against the accused. Relevant material is anything that appears to have some bearing on any offence under investigation or any person being investigated or on the surrounding circumstances, unless it is incapable of having any impact on the case.

Unused prosecution material must be disclosed by the prosecution to the accused if, and only if, it satisfies the test for disclosure subject to any overriding public interest considerations. The relevant test for disclosure depends on the date the criminal investigation commenced, as this will determine whether the common law disclosure regime applies, or either of the two disclosure regimes under the Criminal Procedure and Investigations Act 1996 (CPIA).

The test for disclosure under section 3 of the CPIA as amended is applicable in nearly every case. Material fulfils the test if it "might reasonably be considered capable of undermining the case for the prosecution … or of assisting the case for the accused".

Where material is held by a third party such as a SARC, investigators and the prosecution may need to make enquiries of the third party with a view to inspecting the material and determining whether the relevant test for disclosure is met and whether any material should be retained, recorded and in due course disclosed to the defence.

Notes of the peer review would not be material held by the prosecution but would meet the definition of third party material.

If peer review revealed a dispute or difference of opinion over the findings and/or opinion of the forensic clinician who carried out the examination, this could potentially weaken the prosecution case or strengthen that of the defendant. It is this type of information that, if it was in the possession of the investigators or the prosecution, they would need to consider disclosing to the defence unless it was so sensitive as to justify non-disclosure on the grounds of public interest immunity.

To ensure the smooth running of cases and assist the prosecution with carrying out its duty of disclosure, the following must be revealed to the police and passed to the prosecution for consideration:

- The carrying out of any peer review in relation to a case that is the subject of a criminal investigation or prosecution; and
- Details of any dispute and/or difference of opinion arising in the course of peer review discussion in such a case.

The following notes summarise recommended good practice:

I. The legal process should not be delayed whilst waiting for a peer review to take place.

II. The limitations and extent of the case review should be understood and agreed between clinicians and the legal professionals.

III. Clear contemporaneous notes of the outcome of any peer review of a case should be kept with the original medical record. These notes should include:

   a. The date of the peer review

   b. Persons present

   c. Clear notes that identify which aspect of the case was under review, with a short summary of the relevant conclusions of the clinician whose case it is.

IV. In the event of any significant dissent around the clinician's conclusion or negative feedback about the quality of the examination process, findings or conclusion reached, by any person taking part in the peer review, this should be clearly documented and include details of the person(s) dissenting and the nature of the dissent.

V. Should a case which has been peer reviewed be the subject of the criminal justice process the clinician will have a duty to disclose that peer review has taken place and, where applicable, to disclose if there was any significant dissent /comment and any relevant documentation as set out at note IV above.

VI. There is no requirement that all the names of those present at the peer review of a case be routinely disclosed.

References

1. Department of Health. Health Service Circular 1998/113: A first class service-consultation document on quality in the new NHS. June 1998 http://goo.gl/ND9XUb

2. Good Medical Practice for Physicians. Prepared by the Federation of Royal College of Physicians of the UK. 2004. Accessed 1 November 2013. http://goo.gl/lCMYrj

3. General Medical Council. Good Medical Practice. Accessed 1 November 2013. http://goo.gl/QGy13Y

4. General Medical Council. Good Medical Practice. Accessed 1 November 2013. http://goo.gl/DEtUqJ

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