Royal College of Paediatrics and Child Health
Leading the way in Children's Health

Faculty of Forensic & Legal Medicine

Peer review in sexual offences

including child sexual abuse cases and the implications for the disclosure of unused material in criminal investigations and prosecutions

Apr 2021 Review date Apr 2024 – check www.fflm.ac.uk for latest updates

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.

Rule 1.1(1) of the Criminal Procedure Rules (CrimPR) states the overriding objective is that 'criminal cases be dealt with justly'.[1] A forensic clinician who is required to give or prepare expert evidence in criminal proceedings is subject to CrimPR 19.2(a), which defines the expert's duty to the court as helping to achieve 'the overriding objective by giving opinion which is — (i) objective and unbiased, and (ii) within the expert's area or areas of expertise'.[1]

However, the same responsibilities apply to any forensic clinician or paediatrician, whether providing expert evidence of fact (sometimes called 'professional evidence') or opinion.

Rule 19.4 of CrimPR sets out the content of the expert's report. This includes:

- Details of any literature or other information which the expert has relied on (r 19.4(1)(b)); and
- Where there is a range of opinion on the matters dealt with in the report –
    - Summarise the range of opinion (r 19.4(1)(f)(i), and
    - Give reasons for the expert's own opinion r 19.4 (1) (f) (ii)).

Clinical governance has been defined as: 'a system through which healthcare organisations are accountable for continuously improving the quality of their services and safeguarding high standards of care by creating an environment in which excellence in clinical care will flourish. Effective clinical governance ensures that risks are mitigated, adverse events are rapidly detected and investigated openly, and lessons are learned'.[2]

Peer review has become an accepted aspect of clinical governance and is encouraged by the General Medical Council (GMC) [3], the Royal College of Paediatrics and Child Health (RCPCH) [4] and the Faculty of Forensic & Legal Medicine (FFLM).[5]

Peer review (PR) 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 and/or paediatricians 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. It is essential that the information security of such methods is robust and complies with any information governance requirements.

Although cases are usually discussed in general rather than detailed terms, it may arise in a joint peer review process that an attending clinician has a legal involvement in a case under review, for example they may have been instructed by the defence as an expert. Such involvement should be declared as soon as realised and any discussions be documented and disclosed to the relevant bodies.

Aim

To provide a proactive culture of learning where clinicians, including paediatricians and clinical Sexual Assault Referral Centre (SARC) staff can review cases, discuss procedures, process and evidence bases, underpinning diagnosis and management 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. Please see *FFLM Quality Standards for Clinicians undertaking PSOM*.

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 medical 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, with a record being made (see below).
- 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.
  - There are different approaches to how the case is presented e.g. a brief introduction by the examining clinician, then a description of the findings and interpretation by those present, or the examining clinician will proffer their views, prior to the group asking any questions or offering comments.
  - Thought should be given to the point at which the history is given to avoid confirmation bias.
  - 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 (see guidance below).

- In general terms, a record of all peer review meetings must be kept including details of those present, cases discussed and findings; this may be a paper or electronic record. In terms of what is needed for the patient's notes, this will be: a summary of the discussion, e.g. agreement or disagreement about the findings and interpretation, and lastly any required actions by the examining clinician and/or the clinical director, for example a further statement.

Confidentiality and patient consent

Clinical governance is essential 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, or their parent/carer, 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. Specific consent must be obtained for the use of images for teaching (although it is likely there is an educational element in any peer review session).

If images are going to be reviewed remotely then the mechanisms for this should be discussed with the patient.

Details of cases discussed at peer review will be given due confidentiality in accordance with GMC guidance.[6]

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 which has been retained but does not form part of the case for the prosecution 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 defence 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), as amended by s32 of the Criminal Justice Act 2003.

The test for disclosure under s3 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 undermine the prosecution case or assist the case for 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:

1. The legal process should not be delayed whilst waiting for a peer review to take place.
2. The limitations and extent of the case review should be understood and agreed between clinicians and the legal professionals.
3. 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.
4. 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.
5. 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 4 above.
6. In accordance with CrimPR r 19.3(3)(c) anything 'which might reasonably be thought capable of (i) undermining the reliability of the expert's opinion, or (ii) detracting from the credibility or impartiality of the expert' must be disclosed. This enhanced disclosure obligation should be carefully considered in relation to points 3, 4 and 5 above.

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

Remote Peer Review (PR)*

For a variety of reasons, such as the COVID-19 pandemic, it may not always be possible for clinicians to undertake PR via face to face meeting but instead opt for PR to be undertaken online.

Concerns have been expressed regarding the security of discussing confidential information such as patient identifiable details and the sharing of sensitive images.

There are some online platforms such as Microsoft Teams that are suitable from a security perspective for SARC Peer Review, including discussions of patient identifiable information and reviewing sensitive images provided that:

Images are:

- Shown only via screen sharing
- Not sent or uploaded via the platform e.g. Microsoft Teams
- That element of peer review is not recorded on the platform
- SARC staff involved have undertaken a home risk assessment.
- Images are reviewed prior to online sharing to ensure that they are anonymous, for example the patient's face is not visible.
- Shown only to those who are taking part in the peer review process.

SARCs should work with their Information Governance teams to ensure that they have a suitably secure online platform.

In order to feel confident with this new way of working it is advisable that:

- At the start of each peer review meeting, prior to any sensitive information being discussed or images shared, the chair will revisit with the attendees information governance issues:
    i. Peer review discussions are not overheard by anyone that should not have access to the content.
    ii. Keep discussions about patients as anonymous as possible.

iii. Any images shared during peer review are not visible to anyone who should not have access to them.

iv. That any computer or laptop or other electronic device that is being used during a peer review session will not be left unattended and thereby risk exposing others to the content of peer review.

v. The clinician will not save, copy, download, upload or share any of the peer review client images shared during peer review.

- All the SARC clinicians involved with peer review should self-certificate that they have read and understood their responsibilities and SARCs keep copies of such. See example in Appendix A.

Concerns about prosecution of clinicians

There have been some concerns that clinicians partaking in remote peer review may be at risk of prosecution if there is any online sharing of sensitive images (children or adults) created during a forensic medical examination.

The Crown Prosecution Service (CPS) and National Police Chief's Council (NPCC) have been consulted on this. Reassurance has been given by them with the following:

'Prosecutors are reminded that where an intimate image is made, published, sent or stored for clinical reasons in accordance with the operational guidance led by NHS England and Improvement, this will normally amount to a "legitimate reason" in relation to the patient and/or carer and to any clinician involved in the process.'

This guidance is available **here.**

The statutory defences under ss.1(4)(a) and 1B of the Protection of Children Act 1978 may be relied on if clinicians are conducting a clinical peer review of sensitive images of children, created as part of a forensic medical examination provided that the clinician is using/sharing the image(s) for the legitimate reasons of:

a. Undertaking peer review of images which have been taken as part of a medical assessment of a child where child sexual abuse is suspected but as yet there has been no disclosure or report to the police.

b. Undertaking peer review of images which have been taken as part of a forensic medical examination for the police and/or CPS, for the purpose of the prevention, detection or investigation of crime, or for the purposes of criminal proceedings.

Similarly, the offence under s1 of the Sexual Offences (Amendment) Act 1992 would (subject to the safeguards set out in this guidance) not be applicable as the peer review would not constitute "publication".

References

1. The Criminal Procedure Rules 2020
https://www.legislation.gov.uk/uksi/2020/759/contents/made
N.B. It is essential to check the most up to date version of the Crim PR.

2. NHS Improvement Consolidated Pathology Network
Clinical Governance Guide
2018

3. General Medical Council
Protecting children and young people. The responsibilities of all doctors.
2012 and updated 2018

4. RCPCH
Peer Review in safeguarding
May 2012

5. FFLM
Quality Standards in Forensic Medicine: General Forensic Medicine (GFM) and Sexual Offence Medicine (SOM)
May 2019

6. General Medical Council
Confidentiality: good practice in handling patient information

*The remote peer review section of this document has been reviewed by:

- CPS Strategy and Policy Directorate in April 2021
- IG Policy Team, NHSX in December 2020

Produced by Charlotte Triggs, Senior Policy Adviser on behalf of the CPS and Dr Cath White, Dr Vicky Evans and Prof Ian Wall on behalf of the of the FFLM
Updated Jun 2019 by Dr C White, Dr S Paul and Dr B Butler on behalf of the FFLM and Mr R Allen on behalf of the CPS
Updated Apr 2021 by Dr C White

Send any feedback and comments to forensic.medicine@fflm.ac.uk

APPENDIX A

Example of SARC Self-certificate for remote Peer Review

Saint Mary's & SPM SARC

Peer Review Self-certificate

As a member of the Saint Mary's & SPM SARC team I understand the importance of regular peer review.

I appreciate the need to maintain a confidential service.

As part of the response to the COVID-19 pandemic, I understand that peer review will take place with team members joining remotely.

I will maintain a professional and responsible approach to these sessions.

I will maintain the confidentiality of the service and any patients being discussed by ensuring that:

- Peer review discussions are not overheard by anyone that should not have access to the content.
- Any images shared during peer review are not visible to anyone who should not have access to them.
- That any computer or laptop or other electronic device that is being used during a peer review session will not be left unattended and thereby risk exposing others to the content of peer review.
- I will not save, download, upload or share any of the peer review client images shared during peer review.

Name:

GMC Number:

Signed

Date: