Criminal Behaviour and Mental Health
28: 5–12 (2018)
Published online in Wiley Online Library
(wileyonlinelibrary.com) DOI: 10.1002/cbm.2061

Ethical challenges to research in the criminal justice system

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The history of non-consensual experimentation and abuse of humans in research in Europe and North America is well-documented (Annas and Grodin, 1992; Jones, 1993; Pressel, 2003). Prisoners have been exceptionally vulnerable in this regard (Hornblum, 1997; Kauzlarich and Kramer, 1998). A careful balance must be struck between the benefits of research and risks to the autonomy and well-being of vulnerable participants. Researchers follow international guidelines (Nuremberg Code, 1996, World Medical Association, 2013) as well as the Codes of Practice of their professional bodies and higher education institutions (Shaw et al., 2005). All research must be peer reviewed and approved by an independent ethics committee; other regulatory institutions may have to be consulted. This process is designed not only to safeguard research participants but also to enhance research quality. The increasing burden and complexity of regulation has, however, drawn widespread criticism (Salman et al., 2014) and its bureaucracy described as 'the biggest single threat' to clinical research (Stewart et al., 2008). It is complicated, slow, costly and unreliable and often disproportionate to the risks posed by the studies (Shaw et al., 2005; Salman et al., 2014). Despite efforts to streamline the process (Al-Shahi, 2005), clinical and sociological researchers remain frustrated by it (Richardson and McMullan, 2007).

In the criminal justice system (CJS) worldwide, the bureaucratic burden for conducting research is ever increasing, but there are special issues of confidentiality when researchers ask questions about criminal behaviour (Finch, 2001). To what extent can 'guilty knowledge' be kept private and when is there a duty to disclose the information? A real example challenges us all.

In 2013, I received funding from the Wellcome Trust to carry out research into mental disorder and fitness to plead in criminal courts. By definition, therefore, the proposal had already been subject to independent expert peer review and found acceptable. It had been developed in collaboration with a research team of experts in forensic psychiatry, criminology, law, moral philosophy and

sociology. The study was to screen defendants at court for mental disorder and carry out a structured assessment relating to fitness to plead in which participants would be asked to answer questions about a hypothetical court case shown as a filmed vignette, to test their understanding of court procedures (Brown et al., in submission). Follow-up was scheduled away from the court – in hospital, prison or wherever appropriate. By definition, study of fitness to plead involves participants who are vulnerable and who may lack capacity to consent to research participation. In such cases, the researcher would seek third party approval, in accordance with the Mental Capacity Act 2005. Without an appropriate consultee, the potential participant would not be included in the research. Safeguards for participants were explicit in the participant information sheet and consent process. If the researcher had concerns about the mental state of a research participant, he or she would ensure that the court-based mental health team were aware of the person and his or her potential mental health needs, if not, refer (with the participant's consent), with next steps then between the participant and the team. If the researcher elicited evidence of imminent risk of suicide or harm to others, then research confidentiality on this point alone would be breached in sharing the risk with the appropriate personnel – according to standard ethical principles. Justification for research confidentiality and breaches of this kind are compatible with General Medical Council (2017) guidance requiring disclosure only 'to protect individuals or society from risks of serious harm' or 'if ordered by a court'. This proved unexpectedly controversial.

Ethical approval for criminal justice research in England

The procedure for securing ethical approval in England is constantly evolving. Guidelines, not always up to date, are on the National Health Service Health Research Authority (HRA, 2017) website. At the time of this study (2013–2014), the ethical approval procedure was managed through the Integrated Research Application System (Gelling, 2016). After electronic completion of many forms, the researcher is encouraged to attend the National Health Service Research Ethics Committee (REC) meeting to respond to any questions. If approval is granted, then the researcher has to secure local approval from the university, each research site and other bodies as necessary. Since 2015, the HRA has been authorised to deal with all approvals, replacing separate supplementary applications.

We found very little local or HRA guidance on research in CJS settings, other than a link to the Offender Health Research Network (OHRN) (2014) 'toolkit'. The toolkit contained interactive flowcharts with detailed guidance for different types of studies in different settings (prisons, courts and police stations) but is no longer available because of frequent changes in regulations. OHRN still offers individual advice. The approvals required for our study are outlined in Table 1.

DOI: 10.1002/cbm

Table 1: Summary of the ethical and regulatory approvals required to carry out research in court.

Approval body	Forms required	Main issues raised	Time to approval
Local university/ NHS sponsorship	-IRAS application form -Confirmation of funding -Protocol -PIS and consent forms	-Can researchers directly approach defendants to take part in the study? -What additional NHS approvals are needed to cover all of the sites in the study (courts and prisons)?	6 weeks
NHS REC first submission	-IRAS application form -Researcher and supervisor Curriculum Vitae -Protocol -PIS and consent forms -Consultee forms -Questionnaires -Confirmation of funding/sponsor approval (total 33 documents)	-Information gleaned from the study may be of interest to legal teams, and the court may order the information to be disclosed at court and may have a bearing on their case -Concerns about the feasibility of the study and the burden on the court	8 weeks
NHS REC second submission	-As above with amendments	-Information gathered with consent from the study, including medical and criminal records, may have to be disclosed to the court, and the researcher should remove the statement that this information would be kept confidential	12 weeks
HMCTS DAP	-DAP application form -Confirmation of NHS REC approval	-Concern about carrying out the study at one court leading to the results being unrepresentative. As a result, a further court location was added -Concern about bias introduced due to the researcher also being a forensic psychiatrist	7 weeks
MoJ PAA	-PAA form	-MoJ requested to know the names of medical secretaries who would be transcribing qualitative interviews	4 weeks
NOMS NRC	-IRAS NOMS form -Protocol (as amended) -PIS and consent forms	-Clarification on how many subjects will be assessed in prison and how many prisons will be accessed	4 weeks
		-Various minor corrections to documents and version numbers in light of	8 weeks

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DOI: 10.1002/cbm

Table 1: *Continued*

Approval body	Forms required	Main issues raised	Time to approval
Local R&D approval ↓	-All submitted to REC + Site Specific Information forms -R&D approval form -Email to local Clinical Academic Group	amendments made following NHS REC approval	
End	Total time taken to receive approval		49 weeks

NHS REC, National Health Service Research Ethics Committee; HMCTS DAP, Her Majesty's Court and Tribunal Service Data Access Panel; MoJ PAA, Ministry of Justice Privileged Access Agreement; NOMS NRC, National Offender Management Service National Research Committee; R&D, research and development; PIS, participant information sheet; IRAS, Integrated Research Application System.

A different application form was required for each of these approvals, each between 10 and 40 pages long, with different questions. The different bodies did not consider the applications in parallel but in the order shown in Table 1. The total time from application to securing all approvals was 49 weeks, excluding the time spent preparing the forms. This amounts to almost a third of the study funded time. Who benefited?

Confidentiality in criminal justice research

Many of the ethical issues had been thoroughly considered at the funding stage. Some further reflection was undoubtedly helpful when more serious discussions started with the proposed research sites. To what extent did the researchers have conflicting roles? Could we be sure that researchers were at minimal risk in the research settings and that the burden on court and prison staff was low? With respect to research participants, the main required change to the protocol was a variation in word order with respect to confidentiality limits.

As noted, the researchers opined that information from the study should not be routinely divulged to the courts. The REC gave an 'unfavourable ethical opinion' to the study. The ethics committee reasoned that information gathered from the participants may be 'of interest to legal teams' and that the researcher may not be able deliver confidentiality as described on the participant information sheets and consent forms. The committee also argued that the researchers would have to disclose information to a court if ordered to do so. In response, we sought advice from the court and legal professionals. All agreed that a court order to disclose the findings of the research study was a real but highly unlikely risk, as much

DOI: 10.1002/cbm

of the information gathered from the study was available to the court by other means and very little concerned criminal behaviour. We changed the participant information sheets confidentiality statement to reflect this.

On re-submission of the application, the issue of confidentiality remained a sticking point for the REC. The committee asserted that not only was it likely that the court would request the information gathered from the study, but the researcher should be obliged to share information with the defendant's solicitor 'as it could affect the case'. They proposed the wording: 'because of the nature of this study none of the information may be kept confidential'.

As we remained committed to confidentiality as an important principle, we persisted with the ethics committee and finally agreed the following words:

> All information you give us is kept strictly confidential. However there are two important exceptions to this rule:
>
> - if you tell us something that makes us think either you or someone else is at serious risk of harm we are obliged to share this information
> - due to the nature of the study the court might order us to share information with them.

Of note, we have now recruited over 400 defendants into the study, and not once have the courts or lawyers requested information from the research team. On two occasions, we have informed appropriate personnel in the prison to which the participant was subsequently sent that he or she had disclosed active suicidal plans, both times with the participants' knowledge and only once without their consent.

Can an ethics committee become unethical?

The potential conflict between legal and ethical considerations in disclosing research information is well-recognised, yet many ethical codes do not address the issue of court-ordered disclosure (Finch, 2001). While researchers may be legally obliged to disclose information relating to criminal behaviour or risks to the public, is it always right for them to do so? Is it ethical for an ethics committee to recommend that research participants should be denied the right to confidentiality in case the information they provide is of use to others?

Lowman and Palys (2001) have written extensively on the experience of researchers in North America who have been subpoenaed to disclose information. In one case – in Canada – a Master's student exploring suicide and euthanasia in AIDS sufferers was subpoenaed to attend an inquest and asked to reveal the identity of his research participants. He refused, and his refusal was supported by the courts. In the USA, researchers in the 1970s went to prison after refusing to breach research confidentiality, but more recently, the courts have been more respectful of researchers' confidentiality obligations. Lowman and Palys express

DOI: 10.1002/cbm

dismay that researchers who learn about past criminal behaviour should be required to disclose this to the authorities and highlight the loss this could pose to the body of sociological knowledge. They go so far as to suggest that researchers should offer complete confidentiality to research participants and should not even include *a priori* limitations such as 'disclosures required by law'. The US position and that of the REC to which we applied thus seem different, but why would anyone provide information for research purposes if the main likely outcome would be a form of self harm? And why would any ethical researcher gather information in this context? Steps clearly intended to prevent future harm are in everyone's interests. Any other disclosures are not.

To my knowledge, there has been no case in the UK of researchers being subpoenaed to disclose information apart from the 'Boston College Affair'. This was a transatlantic case in which the UK government requested a Boston, US, researcher to divulge information gathered exploring paramilitaries during *The Troubles* in Northern Ireland in the 1970s; that request has been legally challenged (Palys and Lowman, 2012). The REC's assertion that court-ordered disclosure was 'likely' in our study was, thus, not borne out by our experience; however, their view is not entirely inconsistent with other authorities. Brewer (2016) has emphasised the need for researchers to follow the law of the land and to make clear to participants that research information can be legally disclosed if a court demands it. A number of UK institutions have limited researchers when either asking questions about criminal acts or providing confidentiality for sensitive information obtained in research (Lowman and Palys, 2014). Some criminologists have gone so far as to suggest that researchers should not undertake studies where details of offences are sought (Feenan, 2002), but how then would we ever really understand offending behaviour or fitness to plead? In our opinion, it was right to warn participants about the limits of confidentiality, especially on risk of imminent harm, but it would have been wrong to suggest it was likely that we would disclose information and even worse to offer no confidentiality at all.

Conclusions

Research in the CJS, especially pretrial, will continue to present ethical challenges to participants and researchers alike, but this field of study should not be unduly restricted. As a research team, we agree that ethical regulation is essential for all human research. Further streamlining the procedure and having at least one ethics committee member with real expertise in the field of a project is essential, however, not only to reduce bureaucracy and costs but also for ensuring real safeguards. We have not touched on the problems encountered with the other regulatory bodies involved, but it was apparent that some were wholly inexperienced in CJS research. Improving knowledge about the law and the criminal

DOI: 10.1002/cbm

justice system for individuals who sit on committees or manage researchers conducting research in this field would benefit everyone. We welcome Feenan's (2002) advice to be cautious and open about the legal limits of confidentiality and to plan how to deal with 'guilty knowledge', avoiding undue disclosure. With regard to calculating whether the risks of disclosure of information or to ourselves constitute a price worth paying for the information, it is necessary to reflect how little clinical practice in relation to the courts is founded in evidence.

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Contract/grant sponsor: Wellcome Trust; contract/grant numbers: 099009/Z/12/Z.