

GOORANGAI

OCCASIONAL PAPERS OF THE ROYAL AUSTRALIAN NAVAL RESERVE PROFESSIONAL STUDIES PROGRAM

VOLUME 1 NUMBER 5

SEPTEMBER 2005

CONFIDENTIALITY: A CASE OF (MILITARY) ETHICS

Ethical standards affecting professional groups such as medical practitioners, psychologists, solicitors and others are enshrined in codes of practice that, in very general terms, are appreciated and acknowledged by the wider community. Confidentiality of information shared between professionals and their clients or patients is one such standard.

The Australian Psychological Society's *Code of Ethics* states that psychologists 'must make provisions for maintaining confidentiality in the storage, access and disposal of records, subject to the legal requirements of their employment conditions'¹. These standards are reiterated in the various state based registration boards' Codes of Behaviour. The Psychologists' Registration Board of Victoria, for example, requires that psychologists 'take reasonable precautions to respect the confidentiality of clients within the requirements of the law, institutional rules and professional relationships'². Further, the Board requires that psychologists not divulge information about a client unless he or she is authorised in writing by the client to do so, the release of the information is to protect the client or others from harm, or the release of information is required by law.

The Australian Medical Association's (AMA) Code provides similar guidance, noting that exceptions to the maintenance of a patient's confidentiality, 'must be taken very seriously. [Exceptions] may include where there is a serious risk to the patient or another person, where required by law, where part of approved research, or where there are overwhelming societal interests'³. The AMA's Code also notes that practitioners must maintain their professional independence. The Code states that, 'in order to provide high quality healthcare [the practitioner] must safeguard clinical independence and professional integrity from increased demands from society, third parties, individual patients and governments'⁴.

The legal profession is also governed by the tenet of professional privilege. *Butterworth's Australian Legal Dictionary* defines privilege as the common-law principle that protects confidential communications between a legal practitioner and a client for the purpose of the client obtaining, or the legal practitioner giving, legal advice. In addition, privileged information need not be given in evidence nor disclosed by the client or by the legal practitioner in existing or contemplated litigation without the consent of the client⁵. Thus legal professional privilege is a privilege recognised by the courts to protect the confidentiality of communication between solicitor and client. Legal professional privilege is also referred to as 'client legal privilege', as the privilege refers to that of the client and not the solicitor. The purpose of legal professional privilege is to allow the client and solicitor to communicate freely about issues that are or might be the subject of legal proceedings.

In the broadest sense, ethical standards, including that of confidentiality, are principles by which a professional practitioner's actions may be judged as good or bad, or right or wrong. Maintaining these standards involves more than simply acting in accordance with the law of the land; it requires the use of sound judgement, consideration of societal values and the maintenance of personal integrity within the parameters of the various codes

With some rare exceptions, the maintenance of confidentiality within the civilian community is generally a clear-cut issue. The exceptions may relate to the need to protect others from harm or injury when to not report a seemingly confidential matter may cause harm to someone other than the client or patient. Indeed, there are circumstances in which a professional is compelled by law to report what might otherwise be considered privileged information. Holding the belief that a child has been abused, for example, obligates many professionals to report their belief to state authorities. In this situation, these

professionals are statutorily protected from follow up civil action taken to deal with a perceived breach of confidentiality. To not report such beliefs, especially if found to be warranted, may result in sanctions against the professional. Codes of professional conduct usually include clauses to account for these mandatory requirements. The *APS Code of Ethics*, for example, notes that, a psychologist 'must not disclose information about criminal acts of a client unless there is an overriding legal obligation to do so or when failure to disclose may result in a clear risk to themselves or others'⁶.

On occasions, professional practitioners find themselves in a situation where they face an ethical dilemma. This refers to those circumstances where practitioners find themselves faced with two or more conflicting choices, each involving what might be considered 'the right thing to do'. Solving such dilemmas requires more than simply referring to one's Code of Ethics for guidance (although this would be a good start). An example of such a dilemma involves a professional who is responsible to two 'masters'; that is the professional has an obligation to a client or patient on the one hand and an employer or organisation on the other. A classic example of this dilemma involved events leading up to the crash of the Southern Aurora train at Violet Town, Victoria in 1968. The driver of the train had sought medical advice from a general practitioner who noted that the driver was suffering from heart disease. The practitioner counselled the driver to report his condition to the rail authority but, understandably, the driver chose not to, fearing, naturally, that his employment would be jeopardised. The doctor did not report his patient's condition to the rail authority, maintaining that professional privilege was inviolable. The driver continued to operate the train and subsequently suffered a fatal heart attack at the controls. As no 'dead man' switch was fitted at the time, the train travelled on only to crash into the rear of a stationary goods train, killing 10 passengers and seriously injuring many others. The Coroner examining the case later admonished the medical practitioner for failing to report his concerns to the rail authority, noting that the doctor had failed to avert harm to others. In this case, it may be argued that the harm caused to the community outweighed potential harm that might have been caused to the patient had the doctor chosen to breach confidentiality. At the time of the medical consultation, however, one might believe that the doctor was acting in accordance with what he considered to be the right thing to do. He had no hard evidence to suggest that the driver would die at the controls of the train and certainly could not identify individual victims of a train crash, which he had no reason to believe was going to occur.

Professional practitioners serving in uniform may find themselves in the situation where they are tied to two masters. On the one hand they are required to attend to the requirements of their respective codes of conduct when dealing with clients or patients while on the other they are expected to comply with military obligations, including responding to lawful orders from superiors. Ethical issues may surface when the military practitioner's obligations to military Command come into conflict with the traditional obligations normally afforded to clients by a civilian practitioner. Howe argues that the discrepancy between military and civilian practitioners is based on the military professionals' overriding agreement to serve the military⁷. Indeed, within the ADF, all those who enter the services, whether they be officers or other ranks, confirm their obligation to 'comply with directions and orders given by persons in the ADF who have the legal authority to issue such directions and orders'⁸. To not comply with a lawful order issued by Command may and will have repercussions under the Defence Force Discipline Act (DFDA); thus a uniformed practitioner who is requested by a superior authority to provide information about a subordinate may feel obliged to release personal data under fear of legal sanction. US military research has found that over 80 percent of military psychologists did not obtain written permission before releasing personal information about service members when requested to do so by Unit



commanders⁹. This suggests that perceived or actual obligations to Command take precedence over principles of confidentiality for many uniformed practitioners.

Indeed, Leso noted that in the US military, 'commanders and other personnel with a "need to know" may have access to mental health information by regulation. If military regulations can be considered an extension of military law, then [American Psychological Association] standards permit psychologists to disclose information to qualified military personnel with an official need'¹⁰. This may also be the case in the ADF, where Commanders who hold the view that they have the need to know about the mental or physical well being of those under their Command request to be informed about what might otherwise be considered confidential communication. This raises the possibility that when a practitioner is requested to supply information to a Unit Commander, the practitioner may feel obliged to break the principle of confidentiality and thus breach relevant ethical standards. Leso noted that the uniformed practitioner who believes that he or she can maintain confidentiality following a legitimate request for information is misinformed and is also at risk of 'adverse action against his or her professional licensure and/or military career status'¹¹.

This issue was highlighted in 2004 when Justice Crispin of the ACT Supreme Court handed down his findings in the case of *Russell Vance v Air Marshall Errol John McCormack in his capacity as Chief of Air Force and The Commonwealth*¹². The Court heard testimony concerning the claim by Vance of unfair dismissal from the RAAF. On the request for access to documents held by the RAAF and Commonwealth, the RAAF responded, stating that the documentation was protected under legal professional privilege. What is of particular interest here is Justice Crispin's opinion about the relationship between uniformed lawyers and their clients and their military employer. The Judge concluded that military lawyers are 'clearly employed within an authoritarian structure in which obedience may be enforced by penal sanctions. Section 27(1) of the *Defence Force Discipline Act 1982* . . . provides that it is an offence punishable by a maximum penalty of two years' imprisonment for a member of the Defence Force to disobey a lawful command by a superior officer'¹³. He also noted that, 'it seems clear that a DLO [Defence Legal Officer] could be ordered to act in a manner that would be quite contrary to prevailing standards of professional ethics'¹⁴ and that, 'it must be expected that once lawyers are subject to statutory obligations of obedience to the commands of others and amenable to criminal sanctions in the event of non-compliance, the degree of independence they may exercise will generally be limited to that permitted by senior officers entitled to command'¹⁵. Of particular note, and this may relate to any military practitioner who believes that they are governed by a code of practice, is Justice Crispin's opinion that 'the scope of the orders that members of the ADF may be compelled to obey by relevant provisions of the Discipline Act is not constrained by any provision protecting an overriding entitlement for DLOs to act in accordance with accepted professional standards'. This suggests that the provisions of the DFDA requiring obedience to superior Command would plainly prevail over rules promulgated by professional associations. Of particular note is the Judge's conclusion that the, 'ethical codes promulgated by [professional] bodies do not have statutory force and it is difficult to see how any ethical duty of compliance could be maintained in the face of a direct order made under the authority of a Commonwealth statute'¹⁶ such as the DFDA.

Given these issues, military practitioners must ensure that their clients or patients are aware that the assumption of confidentiality may be limited when overriding military regulations permit information to be shared. Clearly there are limitations to the extent to which confidentiality may be protected in a military setting. With this in mind, it is advisable that documentation relating to the provision of professional services within the ADF contain a clause about such limitations. The Medical History Questionnaire used by the ADF, for example, contains a statement indicating that the information provided by members may be supplied to Recruiting Officers and ADF Personnel Managers while noting the information privacy principles referred to in the *Privacy Act 1988*. Rather than compromising their professional ethical standards, the military practitioner is urged to clarify the limitations to confidentiality that exist at the outset of any client-practitioner relationship. Ideally, such a clarification should be acknowledged in writing and will assist the practitioner should any question about a breach of confidentiality be raised.

It is evident that the notion of confidentiality in professional practice is not an absolute, especially in the military setting. Within the civilian community, the various codes of ethics do provide for reporting of confidential information and in some cases, reporting is mandatory. Codes may allow professionals to disclose if there is imminent danger to others; however circumstances may develop when the assessment of risk and its immediacy is unclear. The Southern Aurora crash is a case in point. But what does 'danger' mean? To some practitioners it will apply only to physical or psychological danger, yet to others it may include the potential for harm caused by fiscal maleficence. Does this represent 'imminent danger'? This lack of predictive certainty places the practitioner in an unenviable position, especially so when he or she is uniformed. In light of Justice Crispin's comments concerning the obligations of military personnel to comply with lawful orders and his view that the choice to not obey is not statutorily protected by ethical principles, it is recommended that all such military practitioners lay out the ground rules concerning confidentiality matters well before any conflict can arise. Although this may prompt some service members to take their medical, psychological or legal concerns elsewhere, the integrity of the practitioner, the service and ultimately the member will be maintained. In addition, uniformed practitioners, through their respective professional bodies, must inform and educate military commanders that their professions' ethical codes have been developed to limit personal harm, protect professionalism and maintain the integrity of all parties involved. Over time, and with a better appreciation of the ethical standards expected of practitioners amongst military commanders, the likelihood of uniformed professionals having to choose between two 'masters' will be reduced.

Notes

1. Australian Psychological Society 2003, *Code of ethics*. Melbourne, Australia: Author. p. 2.
2. Psychologists Registration Board of Victoria 1997, *Code of behaviour for psychologists*. Melbourne, Australia: Author. p. 1.
3. Australian Medical Association 2004, *Code of ethics*, Australia: Author. p. 1.
4. *Ibid*, p.7.
5. Nygh, P.E. & Butt, P. (Eds) 1997, *Butterworth's Australian Legal Dictionary*. Sydney, Australia: Butterworth.
6. Australian Psychological Society, *op cit*, p. 2.
7. Howe, E.G. 1986, Ethical issues regarding mixed agency of military physicians. *Social Science and Medicine*. 23 (8), 803-815.
8. Statement signed by ADF applicants on enlistment.
9. Jeffrey, T.B. 1989, Issues regarding confidentiality for military psychologists. *Military Psychology*, 1 (1), 49-56.
10. Leso, J.F. 2000, Confidentiality and the psychological treatment of US Army aircrew members. *Military Medicine*, 165 (4), p. 261
11. *Ibid*, p. 261.
12. *Russell Vance v Air Marshall Errol John McCormack in his capacity as Chief of Air Force and The Commonwealth* [2004] ACTSC 78 (2 September 2004).
13. *ibid*, para 57.
14. *ibid*, para 60.
15. *ibid*, para 58.
16. *ibid*, para 63.

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