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Psychology and Law and Forensic Psychology in Australia¹

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Abstract

Psychology's roots in Australia go back to 1881, but the first documented evidence of psychology-and-law (psycholegal) research and psychologists working in court and correctional settings only emerged in 1949. The activities of psycholegal researchers and psychologists providing services to the correction, investigative and justice systems are not well-documented. Our aim in this paper is to start recording the histories of these people and the development of the psycholegal and forensic psychology fields. We do this primarily by examining publications and conference papers and recording our and other people's personal recollections. We specifically record psychologists' interaction with lawyers, their concerns about professional and ethical issues and the teaching of forensic psychology. We finally give a brief overview of the current state of the two fields.

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Psychology and Law and Forensic Psychology in Australia

The roots of psychology in Australia go back to Henry Laurie's arrival in 1881, but the discipline remained unorganised until the Australian Association of Psychology and Philosophy (AAPP) was formed in 1923 (Cooke, 2000). Psychology as a profession officially commenced with the establishment of the Australian branch of the British Psychological Society in 1944 (Cooke, 2000) that became the Australian Psychological Society (APS) in 1966. We know anecdotally that psychologists were working and doing research related to law, which we define² to include the correction, investigative and justice systems, soon after the professionalization of psychology. We could, however, not find information about the psychologists involved, or their activities in the known histories of psychology (e.g., Cooke, 2000; O'Neil, 1982, 1987). Our aim in this paper is to start recording the history of psychology-and-law (psycholegal) research and forensic psychological practice in Australia. We intend doing this by examining mostly Australian publications, conference programs and psychologists' personal recollections³ that shed light on the work of researchers and psychologists and specifically record their interaction with lawyers, concerns about professional and ethical issues and the development of research and teaching programs. We finally give a brief overview of the current state of the two fields.

² We for the purpose of this paper define forensic psychology broadly as any psychological service provided to law, which we define to include the correction, investigative and justice systems because this is how forensic psychology is usually defined in Australia. We are aware of the ongoing conversation about the definition of forensic psychology (e.g., Neal, 2018; Thomson, 2013) and that the use of the title *forensic psychologist* is in Australia restricted to those who hold endorsement under the Health Practitioner Regulation National Law Act (2009).

³ These included three of the authors (Allan, Cole and Thomson) who we will refer to in the third person to be consistent.

Publications

The first domestic Australian journal aimed at psychologists was the *Australian Journal of Psychology and Philosophy* (founded in 1923 and it was followed by the *Australian Journal of Psychology* in 1949). We could not identify a paper with a psycholegal focus in the *Australian Journal of Psychology and Philosophy*, but Rose (1949) published a paper entitled *Social Factors in Delinquency* in the first edition of the *Australian Journal of Psychology*. Delinquency remained a very prominent topic in the 1950s (e.g., Crane, 1951; Mitchell, 1956), 1970s (e.g., Biles, 1971) into the 1990s (e.g., Huon & McConkey, 1998).

The *Australian Psychologist* was first published in 1966 and attracted psycholegal papers from psychologists (e.g., Brown, 1981), psychiatrists (Bartholomew, 1992; Bartholomew, Badger, & Milte, 1977) and lawyers (Kirby, 1978). These early papers reflect psychologists, psychiatrists and lawyers' attempts to clarify the role of psychologists in law. Anthony Cole became the *Australian Psychologist's* first Associate Editor for forensic psychology in 1989 and he remained in this position until 1994. He was later the special topic editor for a special section on Forensic Psychology in the *Australian Psychologist* in 1996. The papers in this edition included papers on organisational psychology applied to forensic issues (Hesketh, Rawlings, & Allen, 1996), the psychology of sentencing (Indermaur, 1996) and the investigation and formulation of forensic problems (Thomas-Peter & Howells, 1996).

Psychologists also worked with researchers from other disciplines to establish the *Australian and New Zealand Journal of Criminology* (first published in 1968) the *Australian Journal of Forensic Sciences* (first published in 1968) and the *Psychiatry, Psychology and Law* journal (first published in 1994). Dr Peter Golus started the *International Journal of Forensic Psychology* in 2003 with the aim of giving Australian forensic psychologists a specialised journal.

Conferences

The AAPP, the Australian branch of the British Psychological Society and the APS all organised conferences on a regular, often annual, basis (Cooke, 2000). The first psycholegal paper we identified was, however, only presented at the 5th annual conference of the APS in Hobart in 1970 and the presenter's focus was like that of the authors of early articles on juveniles and delinquency (Loftus, 1970). A.H. Morgan chaired the first forensic psychology symposium at the APS' 15th Annual Conference in Toowoomba in 1980 during which speakers addressed the role of psychologists in courts (Brown, 1980), juvenile justice (Carlyon, 1980) and maximum security prisons (Dorey, 1980). Papers on testimony (Sturgess & Robertson, 1981) and juvenile justice (Cole, 1990; Cole & Hensley, 1989) continued to feature in conference programs over the years, but new themes appeared such as the interviewing of children as witnesses (Powell, 2002) and testimony in the family courts (Allan, 2003; Allan & Dear, 2003). The APS and the International Association of Applied Psychology (IAAP) co-hosted the 1988 International Conference of Applied Psychologists (ICAP) in Sydney and the IAAP's Division 10 (Psychology and Law) was formed at this meeting (personal communication, M Knowles, 19 October, 2018).

Psycholegal researchers who undertook experimental studies in areas such as memory, facial recognition and the accuracy of eye witness testimony (Thomson, 1975, 1977, 1980) also used the Annual Experimental Psychology Conference that Professor Ross Day and colleagues at Monash University started in 1974 a valuable forum (personal communication, D Thomson, 5 August, 2018). The psychologist and criminologist David Biles initiated conferences that were useful to psychologists after he became assistant director of research and statistics, and later deputy director of the Australian Institute of Criminology (AIC) that was established in 1973 (Anonymous, 2017). These AIC sponsored seminars gave both experimental psychologists (e.g., the Review of Criminological Research Conference in

1981) and practitioners (e.g., Veno, 1978) opportunities to discuss their professional roles and research.

The Australian and New Zealand Association of Psychiatry, Psychology and Law's (ANZAPPL) first conference took place in 1979 and it held a joint congress with the American Academy of Psychiatry and Law in 1988 (ANZAPPL, Undated). ANZAPPL informally participated in the First International Congress of Psychology and Law in Dublin in 1999, but formally participated in the Second International conference with the European Association of Psychology and Law and the American Psychology-Law Society in Edinburgh in 2003. ANZAPPL hosted the Third International Congress of Psychology and Law in association with its 27th Annual Congress in Adelaide in 2007.

The APS College of Forensic Psychologists organised the first Australian conference aimed specifically at forensic psychologists in Sydney in February 2001 and since then it arranged conferences in Noosa (2012) and Fremantle (2013) and a two-day symposium in Cairns in 2017. The titles of the papers presented at these meetings show the wide range of research and practice interests of forensic psychologists covering apologies in tort matters (Allan, 2013a), practice standards in risk assessment (Daffern, 2013), domestic violence evidence in family courts (Ogloff, 2013) and working with Aboriginal and Torres Strait Islanders (Day, 2017).

Forensic Psychology Practice

The above published and unpublished papers indicate that psychologists were working in forensic settings at least in the late 1940s and mostly worked with young and adult offenders. The relatively large number of papers and articles regarding juveniles during the next decade suggest that psychologists were primarily involved with young offenders and they were well established in the Children's Courts in both Victoria (Brown, 2018) and in New South Wales

(NSW) in the 1960s (personal communication, A D Cole, 23 March, 2018). Patricia Brown, who retired in 2018 as Director of the Children's Court Clinic of Victoria, was the first psychologist to be put in charge of a Government Clinic in Victoria. The NSW Department of Family and Community Services also employed psychologists in its Children Court Clinics during the 1970s, but closed them in the late 1980s. The service was re-established by the Department of Justice in the late 1990s (personal communication, A D Cole, 23 March, 2018). The Department of Family and Community Services also employed psychologists to work in the protection of children and people with intellectual disabilities until the NSW Guardianship Board took over responsibility for people with disabilities in the late 1980s. Psychologists' interest in the disability area, however, continued as is demonstrated by papers on the assessment of fitness to stand trial for defendants with an intellectual disability (e.g., Birgden & Thomson, 1999).

Psychologists' involvement with adult offenders were, however, minimal and mostly involved doing psychological assessments for psychiatrists in forensic mental health settings and prisons until the 1970s (personal communication, D Thomson, 25 October, 2017). Some psychologists were, however, starting to do assessments to inform prison authorities regarding the management of prisoners and later provided counselling services to prisoners (personal communication, D Thomson, 25 October, 2017).

Psychologists were working in the civil law area in the early 1980s as personal recollections (A D Cole, 23 March 2018; R Pryor, 15 March, 2018) and articles and papers on neuropsychology (Gilandas & Touyz, 1982) and post trauma injuries (Bryant, 1996) indicate. Amendments to the NSW Motor Vehicle Accident (1988) and Workers Compensation (Workers Compensation Act [NSW], 1987) Acts increased psychologists' involvement in civil law as it required decision-makers to view injured people's *whole person* and not only their physical injuries. These legislative changes benefited psychologists who practiced in

areas such as pain assessment and management, posttraumatic stress and post-injury adjustment and those who worked in rehabilitation and *return to work* programs (personal communication, R Pryor, 15 March, 2018).

Psychologists were also active in working with the police (McConkey & Jupp, 1985; McConkey, Roche, & Sheehan, 1989; McConkey & Sheehan, 1988a, 1988b) and in corrections departments. Priest (1996) surveyed departments of Justice in the States and Territories with the exception of Queensland and ACT and found that most employed psychologists but that they also used contractors and that Tasmania and the Northern Territory primarily used psychologists who worked for other departments responsible for health and community services. He found that the number of fulltime psychologists fluctuated considerably between 1980 and 1983 and reported that they mostly worked in prisons or regional community corrections offices and spent most of their time doing assessments and interventions. Their interventions mostly took the form of anger and stress management, substance abuse and sex offender programs, but psychologists also provided crisis and suicide prevention interventions. Priest concluded that Australian correctional psychologists' scope of activities and research opportunities were narrower and less developed than those of their counterparts in England and Wales. He was pessimistic about the possibility that the situation would improve.

Allan, Martin and Allan (2000) who surveyed 79 psychologists who did assessments for the courts in the late 1990s found that 58% were working in a private forensic practice and that they received most of their instructions (51%) from defence lawyers. These psychologists reported that pre-sentence reports and personal injury claims formed the bulk of their forensic work with family law work a distant third. The respondents were generally satisfied with the treatment they received, and the court atmosphere, but they believed that their answers and testimony were sometimes distorted.

Interaction with Lawyers

Some judges and lawyers still found it difficult to understand who psychologists were and what they could offer to law into the 1970s (see, e.g., Bartholomew et al., 1977; Brown, 1981). Psychologists tried to answer this question by presenting papers at Australian Institute of Criminology conferences (e.g., Thomson, 1983) and the conferences of judicial officers (e.g., Thomson, 1982). Some lawyers, nevertheless showed a keen interest in psychology and understood the potential of the interaction between psychology and law. Justice Michael Kirby who was chair of the Law Review Commission (formed in 1975) and later became Justice of the High Court of Australia presented a keynote lecture on Psychology and the Law at the APS' 1978 annual conference. Justice Kirby also invited Don Thomson in 1981 to join the Australian Law Reform Commission working group on evidence that worked towards developing a Uniform Evidence Act (Evidence Act, 1995). Don Thomson was subsequently also invited by Professor Michael Chesterman to join the Australian Law Review Commission working group on the law of contempt (personal communication, D Thomson , 26 May, 2018). Justice Kirby also supported the establishment of a psychology and law program at Monash University by writing a letter of support for its formation to the Vice-Chancellor of the University in the early 1990s (personal communication, D Thomson , 25 October, 2017). Other prominent lawyers who believed that psychologists had an important role to play in law were Judge Frank Vincent and Melbourne's Chief Magistrate Mr Daryl Duggan. The latter was particularly interested in how people would react to sentences and also sought psychologists' guidance regarding criminal compensation (personal communication, D Thomson, 25 October, 2017). Ms Barbara Holborrow as the senior Children's Court magistrate in NSW in the 1980's and 1990's considered psychological reports useful (personal communication, A D Cole, 23 March, 2018). She continued to

request psychologists' reports from private practitioners until her retirement even after the Department closed its Children Court Clinics in the late 1980s.

Psycholegal Research

Many of the early psycholegal researchers lacked research training and received little or no support from their employers (personal communication, A D Cole, 23 March, 2018, and see Priest, 1996). Researchers therefore often undertook research in their work settings but outside their normal working hours and the focus was on adult and young offenders (Marriott, Law, & Perry, 1977, 1978), prison officers (Bartholomew & Badger, 1975) and police officers (Milte, Coleman, & Sharpe, 1981). Researchers, however, appear to have started doing research outside their work settings during the 1980s and early 1990s by investigating juror instructions (Timmons, 1982) and the interviewing of children (Brooks & Siegal, 1991; O'Callaghan & D'arcy, 1989). The reason for this change might be that Australian researchers encountered notable difficulties when they applied to do psycholegal research within corrective institutions such as prisons and juvenile justice centres in the last 25 years of the 21st century (personal communication, A D Cole, 23 March, 2018).

The number of academic researchers, however, remained low and an examination of Figure 20 of the Working Group for the National Committee of Psychology's (Australian Academy of Science, 1996) report indicates that only 10 tertiary institution researchers worked in the "forensic area". Heads of academic departments identified the psycholegal area as a less developed field (Figure 4.4), but only three heads saw it as a field that should be prioritised as a research area (Figure 4.5; Australian Academy of Science, 1996). The research topics and identities of researchers during the 1990s and early 2000s, however, suggest that academics were becoming more active psycholegal researchers and that they were studying a broad

range of topics. The topics included psychologists use of psychometric instruments in forensic work (e.g., Martin, Allan, & Allan, 2001; Thomas-Peter & Howells, 1996); the influence of court interpreters upon the attributes of defender and plaintiff culpability (e.g., Francis & Thomson, 1997); and jurors' perceptions and eyewitness identification (e.g., Brewer, Semmler, & Wells, 2001; Dutton & Carroll, 2001). Researchers still mostly focus on criminal law with Goodman-Delahunty and Foote's (2011) book on work harassment a notable exception. Psychologists, many associated with the therapeutic jurisprudence movement, also undertook research aimed at better understanding and improving legal and correctional processes by doing research about the mental health (Allan, 2002), correctional (Birgden, 2002) and court systems (Allan, 2007; Allan, McKillop, & Carroll, 2010; Dorward & Thomson, 1990).

Professional Issues and Ethics

Australian forensic psychologists have through the years demonstrated that they appreciated the professional and ethical issues they face and early correctional psychologists (e.g., Taylor, 1961; Veno, 1978) were aware of their position of power and the confidentiality issues they faced. They often expressed concerns about the applicability of the Australian Psychological Society's Code of Ethics (e.g., Veno, 1978). These concerns were addressed by authors (e.g., Allan, 2013b, 2018; Day, Whetham, & White, 2008) and the APS further developed ethical guidelines specifically for psychological practice in forensic contexts (APS, 2013a). The APS also developed ethical guidelines to address difficult situations, such as working with people who pose a high risk of harm to others (APS, 2013b), or where the practice of some psychologists became a concern (McConkey, 1995a), such as the forensic use of hypnosis (McConkey & Sheehan, 1992) and reporting on recovered memories (McConkey, 1995b).

The legal-ethical and management of self-harm in prisons has also been a topic of special interest (e.g., Dear, 2006; Dear, Thomson, Howells, & Hall, 2001) to psychologists.

Professional Bodies

ANZAPPL that was formed in 1978 was the first Australian professional body tailored for the needs of psychologists interested in psycholegal research and forensic psychology. Alfred Allan was the first psychologist who was the president of this transnational organisation in 2005 and he was followed by three other psychologists (ANZAPPL, Undated).

Patricia Brown initiated the formation of the APS Forensic Group in 1980 when she convened a meeting of Melbourne psychologists working in forensic settings at the Melbourne's Children's Court in 1980 (personal communication, D Thomson, 25 October, 2017). This group evolved into the Board of Forensic Psychologists in 1981 (with Patricia Brown as the national chair in its inaugural year) and became the APS College of Forensic Psychologists in 1993 with Anthony Cole as its first chair. The APS College of Forensic Psychologists had 151 members in 1996 (Australian Academy of Science, 1996). Members of the College could refer to themselves as members of the College of Forensic Psychologists but not forensic psychologists, with the exception of those who held forensic specialist title in Western Australia (Psychologists Board of Western Australia, 2007).

Teaching Psychology and Law

Michael Singer made the first attempt to establish a psychology and law course that students could take in their 4th year at Caulfield Institute in the mid-1980s and Don Thomson established a Forensic Psychology Master's degree at Monash University in 1988. Several other psychologists such as Ellen Berah and Jack White also worked hard to establish

forensic psychology programs during the 1990s. Priest (1994) found that eight Australian Universities that responded to his questionnaire concerning training “applied to Justice systems” reported relevant courses at Master’s level. Five Universities (Adelaide, Curtin, La Trobe, Monash, Swinburne) reported that they provided their students supervised contact with offender populations and La Trobe and Melbourne Universities’ students also did placements at the Children's Court Clinic. Universities such as Charles Sturt University (director, Don Thomson), Edith Cowan University (director, Alfred Allan), University of New South Wales (director, John Taplin) and South Australia (director, Kevin Howells) were offering programs accredited by the APS College of Forensic Psychologists in 2000.

Current Situation

Forensic psychology is currently well organised in Australia. The Psychology Board of Australia (PsyBA) at its formation in 2010 made it possible for suitably qualified psychologists to be endorsed as forensic psychologists and there are currently (March 2018) 572 psychologists who are endorsed. Psychologists must be so endorsed to use the title forensic psychologist (Health Practitioner Regulation National Law Act, 2009), but non-endorsed psychologists can still do forensic work provided that they do not call themselves forensic psychologists. Many psychologists who lack forensic training, knowledge or skills still do forensic work such as family court work (e.g., Maher & Mills (2), 2015; Olssen & Wise, 2014) and this might impair the reputation of forensic psychologists.

Forensic psychologists and psycholegal researchers can also be members of the APS College of Forensic Psychologists that currently has 524 members (APS College of Forensic Psychologists, Undated) and they have free access to APS resources such as ethical guidelines (APS, 2013a, 2013b). Most Australian forensic psychologists today still work in

forensic mental health settings and prisons where they do assessments, write risk assessment, sentencing and parole reports, and also provide treatment and counselling. Psychologists, however, also work for other government and police departments including anti-crime and corruption agencies.

Psychologists in private practice working in criminal law mostly undertake pre-sentence assessments and reports, but also provide expert testimony regarding the reliability of memories and police interviews (e.g., *Hardwick v State of Western Australia*, 2011).

Psychologists also do assessments and write reports for guardianship boards and civil and family courts (Finton and Kimble, 2017).

Psychologists' status is still not equal to that of psychiatrists and the legislation in most states prevent them from testifying on fitness to stand trial and criminal responsibility questions on behalf of the State. The legislation in several Australian jurisdictions further allow only psychiatrists to testify on behalf of the State about respondents' risk of sexual reoffending in applications for preventative detention orders (e.g., *Dangerous Sexual Offenders Act [WA]*, 2006). Psychologists can therefore only testify as supplementary witnesses of the applicant or for respondents (e.g., *DPP v Williams*, 2007). The irony is that Australian forensic psychologists consider the undertaking of offenders' risk of reoffending in general, and sexual reoffending in particular, as a core activity (e.g., Allan, Dawson, & Allan, 2006) and undertake most, if not all, research in the area (e.g., Allan et al., 2006; Smallbone & Rallings, 2013).

Researchers still find it difficult to gain access to research participants within many forensic settings and the relatively small populations in some jurisdictions restrict the research that they can undertake. This is particularly a problem for researchers who want to undertake research with Aboriginal and Torres Strait Islander people. Australian psycholegal researchers nevertheless currently do research in many areas with many focusing on the

assessment (Ogloff, Pfeifer, Shepherd, & Ciorciari, 2017) and treatment of violent (Klepfisz, Daffern, & Day, 2016; Mastromanno et al., 2018; O'Brien & Daffern, 2016) and sexual (Day, Bryan, Davey, & Casey, 2005) offenders and arsonists (Ducat, McEwan, & Ogloff, 2015; Nanayakkara, Ogloff, & Thomas, 2015). Research in emerging areas include studies of the therapeutic climate of prisons (Daffern, Simpson, & Chu, 2018; Day, Casey, Vess, & Huisy, 2012) and the deaths in custody (Biles, Harding, & Walker, 1998, 1999).

Children and young people remain an important focus of research and researchers are still studying established research issues such as the interviewing of children (Benson & Powell, 2015; Hamilton, Whiting, Brubacher, & Powell, 2017; Powell, Guadagno, & Benson, 2016; Powell & Thomson, 1997), but also new areas such as apologies in juvenile justice (Allan, Beesley, Attwood, & McKillop, 2014). Several researchers do work on the interviewing of adults (Goodman-Delahunty, Martschuk, & Dhimi, 2014) and eye-witness accuracy (Towler, White, & Kemp, 2017; Wang, Paterson, & Kemp, 2014). The emphasis nevertheless remains on criminal work with some exceptions such as Allan, McKillop and Carrol's (2010) study of apologies in tribunals.

The teaching of forensic psychology at universities has rapidly declined since the amendment of the Health Insurance Commission Act (1973) in 2006 that gives patients a rebate for services provided by clinical and some other psychologists. Nine universities offered forensic psychology programs accredited with the Australian Psychology Accreditation in Council 2010, but at the time of writing in 2018 only the University of New South Wales and Swinburne University were still offering forensic psychology positions to students. A related problem is the lack of psychologists who have been approved by the PsyBA to supervise psychologists who want to work under supervision to acquire endorsement as forensic psychologists.

Conclusion

Both psycholegal research and forensic psychology have evolved into strong areas during the last 70 years and work opportunities for forensic psychologists appear to be growing. The field might, however, soon not be able to provide suitably trained psychologists to meet this demand if it cannot resolve the lack of training opportunities and supervisors. The risk is that psychologists who lack the appropriate knowledge, skills and experience will then do forensic work that could be to the detriment of the profession as such.

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