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RESEARCH ARTICLE

The Use of Subterfuge in Law Enforcement: An Assessment of Reliability and Validity.

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Abstract

The questionable reliability and validity of subterfuge in law enforcement has gained increasing attention, with prominent cases including that of *R v Brett Peter Cowan*. This report provides an assessment in respect of the use of subterfuge in law enforcement.

In the main, police subterfuge can be defined as: the use by law enforcement of covert deceptive tactical methods in order to gain confession or other firm evidence in respect of the guilt of the suspect or accused. Such tactical deception may include misleading representation of investigator identity and purpose pertaining to communications with the suspect, in addition to a spectrum of other deceptive measures.

The assessment conducted in the current report revolves around comparison with ethical procedures implemented in high-level professions in addition to consideration of core scientific principles. Precedent for the method of comparative analysis employed in the current assessment is discussed.

The conclusion drawn: Based on the current assessment, it would seem reasonable that the validity of subterfuge employed by law enforcement undergo rigorous scientific testing.

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Main Text:-

The questionable reliability and validity of subterfuge in law enforcement has gained increasing attention (Findlay et. al., 2014; Gillis, 2014;Schneier, 2014). The use of analogous comparison with the medical profession (in specific, clinical trial protocol centering on the basis for double-blinding) as a basis for assessment with respect to the reliability and validity of police subterfuge was briefly outlined in the respectable legal text *Australian Criminal Justice* (Findlay et. al., 2014). The current report provides extended assessment in respect of the reliability and validity of police subterfuge through such analogous comparison with principles (standards) adhered to in the medical profession, in addition to analytical comparison with respect to other scientific principles.

In brief, police subterfuge can be defined as '*the use by law enforcement of covert deceptive tactical methods in order to gain confession or other firm evidence with respect to the guilt of the suspect or accused.*' (Findlay et. al., 2014; Schloenhardt, 2015; USLegal, 2016). Such tactical deception may include misleading representation of

investigator identity and purpose pertaining to communications with the suspect, in addition to a spectrum of other deceptive measures. The use by law enforcement of subterfuge, particularly the questionable reliability and validity of such deceptive tactical measures, has received notable attention in recent years. One prominent case, with prosecution based heavily on foundations involving the use of tactical subterfuge, is that of *R v Brett Peter Cowan*. The case of Brett Peter Cowan involved law enforcement officers posing as members of a criminal syndicate in order to gain the confidence of the alleged criminal, being that of namely Brett Cowan. The officers offered Brett Cowan involvement in crimes, with financial benefit, and the potential for his alleged past criminal allegations involving Daniel Morcombe to cease, on the basis that he explain sufficiently any involvement he had in the alleged crimes against Morcombe to assist senior criminal members of the syndicate to ensure the allegations disappear. This subsequently resulted in confession of guilt in respect of Morcombe (involvement in the attempted rape and subsequent murder thereof) by the then suspect (and accused) Brett Cowan. The perspective of Brett Peter Cowan was that he was not guilty but in fact made the confession as a means to impress who he misleadingly understood to be criminals (officers deceptively representing themselves as criminals) as this is not an uncommon practice in attempting to gain entry into criminal enterprises. Brett Cowan was however found guilty in Queensland Supreme Court and his appeals rejected in Queensland Court of Appeal and High Court of Australia.

High-level clinical trials, in medical research, are required to undergo what is termed double-blinding in which the researchers and patients are restricted in regards to knowledge with respect to treatment group allocation of patients (active drug or placebo) (Juni et. al., 2001; Schulz et. al., 1995; Raymond et. al., 2009). The principles governing the requirement of blinding with respect to the researchers are founded on firm evidence that researchers (including physicians and surgeons) are unable to remain impartial and invariably affect the results of the clinical trial in a biased manner if not for the implementation of blinding protocol. In fact, non-blinding of the researchers in clinical trials has been found to consistently result in an approximate thirty to forty per cent exaggeration of the benefit of a drug (Altman, 1994; Raymond et. al., 2009).

Part of the reason for such bias, occurring with non-blinding of researchers, is due to the expectations of benefit from the drug by the researchers and subsequent manipulation (perhaps unintentional or subconscious) and biased interpretation of results in favour of the trial drug (Raymond et. al., 2009). That being said, it has also been clearly identified that researchers in clinical trials (including physicians and surgeons) are prone to engage in unethical conduct resulting in biased outcomes if appropriate blinding protocols are not adhered to - an example being that of unethical ascertainment of patient treatment group allocation, with subsequent alteration of group allocation according to the preference of the given researcher and the unethical biased outcomes they seek to achieve (Altman, 1994).

Another scientific principle in consideration is that of the observer effect in physics (Knight, 2014; SDWIOS, 1998). Essentially, the observer effect is accepted by a body of scientists and revolves around the concept that the observer affects the outcome. The concept can be traced back to scientific experiments that identified an electron to act in wave form but when observed to act in particle form. There is literature to support this concept as also potentially holding true in the macro environment (Goswami, 2016). This would mean that the investigators of the crimes that involve the use of police subterfuge would potentially impact the investigation in a manner detrimental to the suspect, due to their preconceptions of potential criminality and guilt with respect to the suspect, which the investigators would seem to hold given they would not be investigating the alleged crime if not for such suspicions and preconceptions.

One further principle to consider at this stage is that of leading question bias (Cole and Bird, 2014; Gingery, 2009). A status difference in personal interactions can induce pressure to answer a question in the manner likely to please the person of higher perceived status, regardless of accuracy (or, truthfulness). For instance, it has been shown in doctor-patient interactions that the patient can feel pressured to agree that a medication has worked or that they possess a certain symptom when in fact it is not correct, due to the above pressure (Cole and Bird, 2014). For this reason, there are now medical schools which teach in-depth detail regarding consultation style in order to minimize such issues. In a similar manner, it would seem a realistic possibility that, in situations of subterfuge, a suspect (or, accused) who is put under pressure, by whom they have been misled to believe is a high ranking criminal member, may feel pressure by way of perceived status difference to answer questions in a manner they believe will most please the individual concerned, whether it be true or not, including agreeance with respect to having committed or partaken in acts of a criminal nature, for a multitude of reasons including fear of repercussions if they disagree. In addition to the above, loaded questions produce similar detriment to accuracy of response (Cole and Bird, 2014;

Gingery, 2009). Subterfuge techniques may also be potentially questionable on the principles of transference and countertransference (Sadock et. al., 2009).

Core Analytical Findings:-

The questionable reliability and validity of police subterfuge has gained increasing attention (Findlay et. al., 2014; Gillis, 2014; Schneier, 2014). The current report extended such assessment based on analogous comparison with standards employed in the medical profession (clinical research investigations) in addition to consideration of other scientific principles. There is metaphorical precedent for assessment of subterfuge validity based on such analogous comparison – *Australian Criminal Justice* (Findlay et. al., 2014).

The reliability and validity of subterfuge employed by law enforcement, or police subterfuge, is initially questionable based on core scientific principles including that of the observer effect in physics. Further concern is generated in consideration of concepts revolving around leading question bias. Subterfuge techniques may also be potentially questionable on the principles of transference and countertransference (Sadock et. al., 2009).

Following on from the above, the evidence from clinical research strongly supports that the investigator will produce biased and misleading outcomes if not appropriately adhering to blinding protocol with knowledge of relevant particulars withheld from the investigator in respect of the subjects.

In considering all the above, it would seem reasonable to suggest that the reliability and validity of subterfuge employed by law enforcement undergo rigorous scientific testing.

The above would also seem reasonable to espouse as holding true for other areas including forensic psychiatry.

Conclusion:-

Based on the current assessment, it would seem reasonable that the reliability and validity of subterfuge employed by law enforcement undergo rigorous scientific testing.

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