

Expert legal psychological reports

The Netherlands Register of Court Experts (NRGD) is now open to legal psychologists. That inclusion spurred critical reflection on what an expert report in the legal psychological domain ideally should look like. Here, we briefly discuss the distinction between legal and forensic psychologists and explain what a legal psychologist can report on. Next, in the Appendix, we present the Legal Psychological Reporting Guidelines. The guidelines are based on a consensus meeting attended by Dutch legal psychologists, in which the scientific literature on biases and decision was explicitly taken into account. The guidelines represent a first step. It is our hope that they will help improve the quality and uniformity of the field of legal psychology.

Introduction

In many criminal cases, the court has to base its judgment almost exclusively on the statements of suspects, witnesses and alleged victims. In certain cases, the evidentiary value of these statements is not immediately apparent, for example because they contradict one another, because there are indications of fabrication or because questionable identification procedures have been conducted. Under such conditions, the court, the Public Prosecution Service or the defence may appoint a legal psychologist to provide expert advice. This advice can aid the court in arriving at a more precise judgment about the statements and the identification procedures.

The Netherlands Register of Court Experts (NRGD), a public list of certified experts, has been open to legal psychologists as of May 2017.¹ That prompted us to critically reflect on the role of legal psychologists in criminal cases and on what an expert legal psychological report ideally should look like. In this article, we start by briefly explaining the difference between legal psychological and forensic psychological reports. We subsequently discuss the range of topics that an expert report of a legal psychologist may address. Finally, we present Legal Psychological Reporting Guidelines (*Richtlijn Rechtspsychologische Rapportages*) with a corresponding checklist that experts can use for future reports.

The difference between legal and forensic psychologists

The difference between legal and forensic psychology will not be apparent to every legal actor. Legal and forensic psychology do, however, concern different fields of expertise.² Whereas legal psychological reports primarily contribute to matters of evidence (e.g., eyewitness testimony), forensic psychologists mainly focus on diagnosing possible mental problems of the suspect and the potential link between any psychological disorders the suspect may have and the alleged offense.³ In other words: legal psychologists help the court answer the question of whether the suspect has committed the crime (the first question in Article 350 of the Dutch Code of Criminal Procedure), whereas forensic psychologists help the court determine the degree of criminal responsibility and the punishment that best fits the perpetrator (the third and fourth questions in Article 350 of the Dutch Code of Criminal Procedure).⁴

What do legal psychologists report about?

The psychological subdisciplines on which legal psychologists can base their reports in criminal cases, range from basic cognitive psychology to social psychology. The NRGD's assessment framework distinguishes between three subfields of legal psychology: (1) the validity of statements, (2) deception relevant to statements and (3) psychology of evidence and evidence-gathering.⁵ Below, we will briefly outline examples of topics that are typical for each subfield.

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1. NRGD-newsletter (8th of May, 2017), 'Application open for Legal Psychology' ['Aanmelden mogelijk voor Rechtspsychologie']. Accessed via www.nrgd.nl/actueel/aanmelden-mogelijk-voor-rechtspsychologie.aspx.

2. See also p. 8 of the *Standards Legal Psychology* (NRGD, 2017).

3. NRGD (2017), *Standards Forensic Psychiatry, Forensic Psychology and Forensic Medical Pedagogy (003.1-003.4)* [Beoordelingskader Forensische Psychiatrie, Forensische Psychologie en Forensische Orthopedagogiek (003.1-003.4)], version 4.0, effective date 1st of July 2016. Accessed via www.nrgd.nl/binaries/Beoordelingskader%20FPPO%204.0_tcm39-83019.pdf.

4. In other European contexts, forensic psychiatry and psychology similarly focus primarily on the matter of criminal responsibility. In her comparative study, Boirot concludes: 'The typical bare bones of criminal psychiatric expertise revolve around the issues of evaluation of the person's responsibility (liability), dangerousness, and risk of recidivism', J. Boirot, 'Forensic psychiatry and psychiatrists in criminal justice in Europe: A comparative study of England, Spain, Rumania, Sweden and France', *Penal Issues* May 2014, p. 1-4.

5. NRGD (2017), *Standards Legal Psychology (009.0)*, version 1.0, effective date 1st of May, 2017. Accessed via www.nrgd.nl/binaries/Standards%20Legal%20Psychology_tcm39-258603.pdf.

Legal psychologists can provide insight into the validity of statements made by those involved in criminal cases. The validity of a statement concerns the extent to which the statement corresponds to what actually transpired.⁶ There are three ways in which an expert can evaluate statements. First, the quality of the investigative interview should be a point of interest,⁷ for example by evaluating what instructions were provided prior to the interview and whether any leading questions were posed.⁸ Second, factors that may have affected the perception and the memory of the incident can be analysed, such as the lighting at the crime scene, the influence of alcohol, the delay between the crime and the interview, and conversations with third parties.⁹ Third, and related to the previous points, the expert can examine how the statements fit into different scenarios, in which alternative scenarios should be considered that are based on elements of the case file.¹⁰ One example of an alternative scenario could be that a statement about sexual abuse was significantly influenced by suggestive questioning by a psychotherapist.

The second topic within the legal psychologist's field of expertise is deception detection. For instance, legal psychologists may administer tests that provide information about whether a suspect, witness or alleged victim is feigning certain symptoms (e.g., post-traumatic stress or psychotic symptoms).¹¹ They may also assess whether the conclusions from previous deception detection tests, such as polygraphs or verbal deception detection methods, are based on valid scientific methods.¹²

Perhaps the broadest subfield of the NRGD's assessment framework is the psychology of evidence and evidence-gathering. It includes an overall analysis of the evidence in a case and how that evidence was gathered. For example, the expert may analyse whether the law enforcement investigation suffered from tunnel

vision or other cognitive pitfalls.¹³ However, this subfield also includes analyses of specific evidentiary procedures in a case, such as the implementation and composition of an identification parade (i.e., line-up).¹⁴ In this subfield, the legal psychologist applies her¹⁵ expertise from the literature on decision theory and biases.¹⁶

The Guidelines

Both the content and the form of expert legal psychological reports can vary greatly, but this does not preclude the formulation of certain standards. Based on a consensus discussion with Dutch legal psychologists who are active as experts in courts of law, we have identified several elements that we deem essential for any legal psychological report.¹⁷ These elements are discussed in the *Legal Psychological Reporting Guidelines*, which are included in the Appendix. As indicated previously, these Guidelines are the result of an exchange of views between Dutch legal psychologists and legal scholars, which also involved recent scientific literature on expert witness reports.¹⁸ The Guidelines contain a checklist for legal psychologists to consult when writing reports. It is our hope that the Guidelines contribute to the quality and uniformity of expert legal psychological reports in Dutch criminal cases.

We regard these Guidelines strictly as a first step, rather than as a final product. As such, they will be subject to amendment, preferably on the basis of scientific argumentation. We intend to assess the usefulness of these Guidelines in future research. For instance, we would like to determine whether studying the Guidelines can assist Master's students in writing a fictitious expert report. Should this be the case, it would be a preliminary indication of the usefulness of the Guidelines.

6. For a well-considered estimate of the validity of statements, the legal psychologist can examine the consistency, accuracy and completeness of the statement. See for instance: T. Smeets, I. Candel & H. Merckelbach, 'Accuracy, completeness, and consistency of emotional memories', *American Journal of Psychology* 2004, afl. 4, p. 595-609 and chapters 24 et seq. in: P.J. van Koppen, J.W. de Keijser, R. Horselenberg & M. Jelicic, *Routes van het recht: Over de rechtspsychologie*, Den Haag: Boom Juridische uitgevers 2014.
7. That is, provided that the recordings of the interview are available and useful. See R. Horselenberg, A. Vredevelde & P.J. van Koppen, 'Dutch police interrogations in practice' ['Nederlandse politieverhooren in de praktijk'], *NJB* 2016/2222.
8. M. Jelicic & H. Merckelbach, 'Witness statements and the criminal court judge' ['Getuigenverklaringen en de strafrechter'], *EeR* 2009, afl. 2, p. 35-40.
9. *Ibid.*
10. See H.F.M. Crombag & W.A. Wagenaar, 'Audite et alteram partem', *Trema* 2000, afl. 23, p. 93-96; E.G.C. Rassin, 'Establishing credibility: The method of alternative scenarios' ['Het bepalen van geloofwaardigheid: De methode van alternatieve scenario's'], *De Psycholoog* 2001, afl. 36, p. 348-355; E.G.C. Rassin, 'Assessing the validity of (witness) statements by using the method of alternative scenarios; an update' ['Het beoordelen van de validiteit van (getuigen) verklaringen met de methode van de alternatieve scenario's; een update'], *EeR* 2014, afl. 4, p. 119-123; en P.J. van Koppen, *Overtuigend bewijs: Indammen van rechterlijke dwalingen*, Amsterdam: Nieuw Amsterdam 2011.
11. An example of such a test is the SIMS. See: M. Jelicic, A. van Impelen & H. Merckelbach, 'The Structured Inventory of Malingered Symptomatology (SIMS): Een update', *Tijdschrift voor Neuropsychologie* 2013, afl. 8, p. 170-178.
12. A. Vrij (2015), 'Verbal lie detection tools: Verbal lie detection tools: Statement Validity Analysis, Reality Monitoring and Scientific Content Analysis', in: P.A. Granhag, A. Vrij, & B. Verschuere (red.), *Detecting deception: current challenges and cognitive approaches*, West Sussex: Wiley-Blackwell 2015; A. Vrij & R.P. Fisher, 'Which lie detection tools are ready for use in the criminal justice system?', *Journal of Applied Research in Memory and Cognition* 2016, afl. 3, p. 302-307; and E.H. Meijer & P.J. van Koppen, 'Lie detectors and the law: The use of the polygraph in Europe', in: D. Canter & R. Žukauskienė (red.), *Psychology and law: Bridging the gap*, Aldershot: Ashgate 2008, p. 31-50.
13. S.D. Charman, M. Kavetski & D.H. Mueller, 'Cognitive bias in the legal system: Police officers evaluate ambiguous evidence in a belief-consistent manner', *Journal of Applied Research in Memory and Cognition* 2017, afl. 2, p. 193-202.
14. P.J. van Koppen & R. Horselenberg, 'Identification' ['Identificatie'], in: P.J. van Koppen, J.W. de Keijser, R. Horselenberg & M. Jelicic (red.), *Routes van het recht: Over de rechtspsychologie*, Den Haag: Boom Juridische uitgevers 2017, p. 283-334.
15. To improve readability, the legal psychologist is denoted as 'she' throughout the article. The reader should read this as 'he/she'.
16. See for instance: I.E. Dror, 'Practical solutions to cognitive and human factor challenges in forensic science', *Forensic Science Policy & Management* 2013, afl. 3/4, p. 105-113; S.M. Kassir, I.E. Dror & J. Kukucka, 'The forensic confirmation bias: Problems, perspectives, and proposed solutions', *Journal of Applied Research in Memory and Cognition* 2013, afl. 1, p. 42-52; en S.O. Lilienfeld & K. Landfield, 'Science and pseudoscience in law enforcement', *Criminal Justice and Behavior* 2008, afl. 10, p. 1215-1230.
17. Consensus meeting Legal Psychology, Utrecht 20th of February, 2017.
18. See for instance: J. Goodman-Delahunty & M.K. Dhali, 'A forensic examination of court reports', *Australian Psychologist* 2013, afl. 1, p. 32-40; P.M. Richards, J.A. Geiger & C.M. Tussey, 'The dirty dozen: 12 sources of bias in forensic neuropsychology with ways to mitigate', *Psychological Injury and Law* 2015, afl. 4, p. 265-280; T.M.S. Neal & S.L. Brodsky, 'Forensic psychologists' perception of bias and potential correction strategies in forensic mental health evaluations', *Psychology, Public Policy, and Law* 2016, afl. 1, p. 58-76; G. Young, 'Psychiatric/psychological forensic report writing', *International Journal of Law and Psychiatry* 2016, Part B, p. 214-220; and P.J. van Koppen, 'Expert evidence of a legal psychologist' ['Het deskundigenbewijs van de rechtspsycholoog'], in: P.J. van Koppen, J.W. de Keijser, R. Horselenberg & M. Jelicic (red.), *Routes van het recht: Over de rechtspsychologie*, Den Haag: Boom Juridische uitgevers 2017, p. 439-459.

Appendix

Legal Psychological Reporting Guidelines

Introduction

The following Guidelines were drafted to improve the quality of the reports written by legal psychological experts in criminal cases. The Guidelines were developed on the basis of a meeting between ten experts who regularly write or read expert legal psychological reports, mainly experienced legal psychologists. The meeting was facilitated by the Netherlands Register of Court Experts (NRGD). After the meeting, several other experienced Dutch legal psychologists and the Court Experts Board (College gerechtelijk deskundigen) provided written feedback on a first draft of the Guidelines.¹⁹

A thorough legal psychological report contains a clear analysis that is supported by scientific references applicable to the case in question. For every element of the legal psychological report, this document first outlines the considerations that led to the realisation of the Guidelines. This is followed by a checklist that legal psychological experts may consult when writing reports. The checklist is intended to serve as a *guideline*, not as a binding rule.

Assignment

A legal psychological report normally starts off by presenting the details of the assignment that the expert received, as well as who provided the assignment. If the assignment is not entirely clear to the expert, it is important that she²⁰ contact the appointing party to clarify and, if necessary, to reformulate the assignment and questions. If the appointing party has posed a question that the expert is unable to answer, the expert should explain in the report why she cannot answer the question. In sum, the expert witness report should include the original assignment and question(s), how the expert interpreted the assignment and which questions were unanswerable and why (if applicable).²¹

All communication with the appointing party about the case must be recorded in the report. This communication could, for example, have transpired via e-mail or telephone. Especially if the content of this communication does not appear to be directly relevant to answering the questions posed by the appointing party, it is vital that the expert records exactly which information she has received. For example, if the expert is asked to assess the quality of a line-up identification procedure and the appointing party casually provides information about other evidence that has been found for the

suspect's guilt, that irrelevant contextual information might influence her judgment.²² Often, such influence cannot be entirely avoided, but the report must at least mention any information obtained that may have influenced the expert's opinion.

Sources

The report must contain an overview of all source material that the expert has received from the appointing party or other parties. If the expert has not consulted all the case files she received for her report, a distinction can be made between consulted and non-consulted sources.²³ The expert should adopt a proactive stance towards the documents she receives. If the expert believes that relevant documents are missing, she should contact the appointing party to inquire whether these documents are available. If the appointing party refuses to provide crucial documents, the expert can still decline the assignment. That could be the case, for example, when audio or video recordings were made of an interview, but the recordings were not provided to the expert. If certain documents are missing that the expert believes to be relevant, but not necessary, for her to perform her analysis, she must note this in the report. In that case, the expert can explain how the omissions limit her conclusions.

Expertise

In the report, the expert explains why she is an expert on the topic of the assignment. For example, she could refer to relevant scientific publications or previous reports on similar topics. The expert may also attach her biography or CV to the report. Finally, it is important that the expert states that she adheres to the NRGD Code of Conduct and whether or not she is registered in the NRGD.²⁴

Case summary

Before describing the approach and analysis, it is useful to outline the essentials of the case. They briefly explain what the case is about, who the relevant persons are and when any investigative interviews or other proceedings, such as a line-up identification, were carried out.

Approach and analysis

The expert must clearly explain in her report which approach or method she has used. This explanation can be presented in a separate section prior to the analysis, or can be incorporated into the analysis of the case. Both the used approach and the analysis itself must be anchored in the scientific literature.

19. The following legal psychologists and legal scholars have contributed to these guidelines: Annelies Vredevelde, Henry Otgaar, Harald Merckelbach, Marko Jelacic, Peter van Koppen, Gezinus Wolters, Marijke Malsch, Melanie Sauerland, Linsey Raymaekers en Jannie van der Sleen.

20. To improve readability, the legal psychologist is denoted as 'she' throughout the article. The reader should read this as 'he/she'.²¹ About the problems that may arise in this matter, see: W.A. Wagenaar, 'The question asked to the expert' ['De vraag aan de deskundige'], in: R. Bullens (red.), *Getuige-deskundige in zedenzaken*, Leiden: DSWO Press 1998, p. 47-59.

22. See for instance H. Merckelbach, 'Experts in the trajectory of reform' ['Deskundigen in het traject naar herziening'], *NJB* 2016/1232.

23. For instance, in reports about the reliability of statements it should not be necessary to consult autopsy reports of the victim.

24. The Code of Conduct can be found via: <http://wetten.overheid.nl/BWBR0037418/2016-01-01>.

In the majority of cases, the expert will analyse how the evidence fits into different scenarios or hypotheses. Often, the expert begins with two main scenarios, such as a scenario in which a child's statements are authentic (hypothesis 1) and a scenario in which a child's statements are fabricated (hypothesis 2). Gradually, the analysis can lead to other scenarios, for example that abuse did take place, but was committed by another perpetrator. The explicit articulation of alternative scenarios guards an expert against all kinds of cognitive pitfalls, such as affiliation bias.²⁵ For example, a defence lawyer can unduly influence the expert by providing irrelevant contextual information, such as stating that the alleged victim often lies.

In addition to the main scenarios, most cases involve various local subscenarios. For instance, the expert who assesses the quality of a line-up identification could distinguish between two local scenarios. The first scenario could be that a witness recognised the suspect based on his or her memory of the incident. Another scenario could be that the witness selected the suspect from the line-up because this individual was the only person matching the description of the perpetrator.

The expert should also describe the specific methods she has applied. If, for example, she has administered a psychological test, she should explain why that test is useful for answering the question asked, what the outcome and associated interpretation of the test is and what the scope and limitations of that interpretation are. She may attach additional information about the psychometric specifications, the duration of the test, the assessment by the Dutch Committee on Testing (Commissie Testaangelegenheden Nederland, COTAN) and any other relevant data about the test.

The expert can also describe which measures she has taken to guard against cognitive pitfalls. For example, it is advisable to have a competent colleague critically review a draft version of the report. That colleague must pay attention to both the content and the readability of the report. This review process facilitates the identification of possible blind spots, problematic reasoning or partisan tendencies. If multiple people have worked on a report, it is advisable to specify which person contributed to which part of the analysis and report.

Conclusion

The conclusion - i.e., the answers to the questions that the appointing party raised - may be presented before the case summary, approach and analysis, but may also be included at the end of the report. If the conclusion is provided in the middle of the report, such as between the Expertise and Context headings, it is a good idea to summarise the main points of the analysis at the end of every report.²⁶

In the conclusion, the expert describes the results of her analysis. She summarises the main points of the analysis and explains how the evidence fits into the examined scenarios. The expert does not judge whether the suspect is guilty of the offense; after all, that ultimate issue must be left to the court. The expert can, on the basis of her analysis, make a judgment about the extent to which her findings fit the different scenarios and whether these scenarios are more or less likely than other scenarios. At the end of the conclusion, the expert once again presents the questions submitted to her by the appointing party, only now with the corresponding answers.

Obiter dictum

If, while conducting her analysis, the expert notices something that is not covered by the assignment but that is within her field of expertise, she may draw attention to this at the end of her report. If, for example, the expert is asked to assess the quality of a line-up identification, but discovers while reading the case file that a suspect or witness has been questioned in a highly suggestive manner, then she should indicate this in her report. This gives the court, the defence or the Public Prosecution Service the opportunity to investigate that observation further.

Literature

The expert must anchor her analyses in scientific literature. References to literature can be included in footnotes within the text or in a separate section at the end of the report.

Appendix

The appendix contains all relevant information that does not need to be described in the body of the text, such as the expert's CV and specifications of the tests administered.

Checklist

**Recommendations marked with an asterisk apply only if relevant*

Assignment

- Write down the assignment as submitted to the expert
- Record all communication with the appointing party about the case
- Ask the appointing party how certain questions should be interpreted*
- Reformulate (portions of) the assignment to answerable questions*
- Explain why certain questions cannot be answered*
- Explain why a specific question has been referred to another expert*

25. See for instance H. Otgaar, C. de Ruiter, M.L. Howe, L. Hoetmer & P. van Reekum, 'A case concerning children's false memories of abuse: Recommendations regarding expert witness work', *Psychiatry, Psychology, and Law* 2017, afl. 3.

26. This recommendation is based on *primacy* and *recency* effects in memory: information presented at the beginning as well as information presented at the end is remembered better than information presented in the middle. See also J. Goodman-Delahunty & M.K. Dhali, 'A forensic examination of court reports', *Australian Psychologist* 2013, afl. 1, p. 32-40.

Sources

- Prepare an overview of the documents received
- Distinguish between documents that have and have not been consulted*
- Ask the appointing party for missing documents relevant to the analysis*
- Note which relevant documents were not available*

Expertise

- Explain expertise in relation to the assignment
- Include a biography or a CV
- Behave in accordance with the NRGD's Code of Conduct
- Indicate whether expert is registered in the NRGD

Case summary

- Succinctly describe the case
- Introduce suspects, victims, witnesses and other relevant parties
- Discuss when investigative interviews and other procedures took place

Approach and analysis

- Refer to relevant scientific literature
- Explain which approach has been used for the analysis, such as the method of alternative scenarios
- Describe the analysis of the case
- Discuss the background, relevance, outcome, interpretation and limitations of any administered tests *
- Indicate peer review of the draft report*

Conclusion

- Summarize the key points of the analysis
- Analyse how the evidence fits into different scenarios
- Explicitly answer the appointing party's questions

Obiter dictum

- Discuss important observations that are not covered by the instructions*

Literature

- Refer to scientific sources

Appendix

- A CV or expert biography
- Detailed information about any administered tests *
- Other relevant documents not part of the main text*