

Re: Educational psychologists, Rule 21 and scope of practice

OPINION

1. My consultant is the Educational Psychology Association of South Africa ('EPASSA'). My opinion and advice is sought in respect of the legal and ethical parameters governing the scope of practice of Educational Psychologists. It is sought in light of a communication of 7 November 2019 from the Professional Board for Psychology of the Health Professions Council of South Africa ('the Professional Board') to practitioners.
2. The Professional Board apparently sent the communication to psychologist practitioners to clarify matters in light of recent legal developments. More specifically, in litigation instituted in the Western Cape High Court, an order was granted declaring invalid the Regulations Defining the Scope of the Profession of Psychology (GN R704 of GG 34581 of 2 September 2011) ('the 2011 Regulations'). The 2011 Regulations were made under the Health Professions Act 56 of 1974 ('the Act').
3. The November 2019 communication contains two key points of advice.
 - 3.1. First, and without controversy, it informs practitioners (i.e. registered psychologists) that they may perform the acts contemplated by the Regulations Defining the Scope of the Profession of Psychology (GN R993 in GG31433 of 16 September 2008) ('the 2008 Regulations').

3.2. Second, it reminds practitioners that they must comply with Rule 21 of the Ethical Rules of Conduct for Practitioners Registered under the Health Professions Act¹ ('the General Ethical Rules'). Rule 21, *inter alia*, ethically restricts practitioners to perform acts for which they are adequately educated, trained and have sufficient experience. While this advice, on its own, is uncontroversial, controversy has arisen because it is given, in the case of Educational Psychologists with reference to the document entitled *Minimum Standards for the Education and Training of Educational Psychology*² ('the minimum standards document').

4. Against this background I consider:

4.1. The legal parameters governing scope of practice.

4.2. The ethical requirements of Rule 21 of the General Ethical Rules regarding the field of practice of Educational Psychologists'.

4.3. Whether the minimum standards document imposes scope of practice restrictions for Educational Psychologists. I conclude that it does not.

4.4. How Educational Psychologists should determine the parameters of their competency limits? I conclude that they are permitted, legally and ethically, to practice within their

¹ Government Notice R717 of 4 August 2006. The General Ethical Rules were made by the Health Professions Council in consultation with the professional boards and the Minister of Health.

² The communication reads, in its final paragraph: 'Practitioners are still required to perform any psychological act and practice according to the specific category or level of qualification in which they are registered. Rule 21 of the Ethical Rules of Conduct for Practitioners under the Health Professions Act 56 of 1974 is used by practitioners to guide their professional acts in accordance with the education and training standards and competencies as contained in the *Minimum Standards for the Education and Training of the different categories of psychological practitioners, which are also reflected on the Website of the Board.*'

competency limits in the sense contemplated by Rule 3 of Annexure 12 of the General Ethical Rules and subject to the 2008 Regulations.

4.5. Whether, in light of the above, the communication of the Professional Board is lawful.

The legal parameters governing scope of practice

5. Educational Psychologists are one of several recognized categories of psychologists, each required to be registered under the Act. These categories are not specialties, but are ‘subsections of the total field of psychology and entail psychological procedures recognized as generally accepted practice for the particular subsection.’³ The recognized categories are Industrial Psychology, Clinical Psychology, Research Psychology, Educational Psychology, Counselling Psychology and Neuropsychology.⁴
6. Regulation 554 regulates which qualifications, if obtained in psychology, entitle the holder to registration, subject to the holder having completed the *approved* five years’ study⁵ and at least 12 months’ practical experience having been obtained. Notably, these qualifications may be obtained from multiple universities in South Africa and globally.
7. Section 17 of the Act is pivotal. Its central effect (for our purposes) is that registered practitioners whose practice mainly consists of mental examination, diagnosis, treatment or prevention of mental defects, illnesses or deficiencies in humankind, the giving of advice in regard to such defects illnesses or deficiencies or prescribing or providing medicine in

³ Regulations relating to the Qualifications which entitle psychologists to registration published under GN 554 in GG22390 of 22 June 2001 (Regulation 554).

⁴ There is some debate about the position of neuropsychology which I highlight, but don’t deal with here.

⁵ These approval requirements are found in section 16 of the Health Professions Act.

that regard, can only practise insofar as such practise is authorized by legislation regulating health care providers and sections 33, 34 and 39 of the Act.

8. Sections 33, 34 and 39 of the Act must be read together. Centrally, they impose strict requirements (enforceable through the criminal law) on practitioners who are required to register under the Act, both to register under the Act and to practice within any prescribed scope of practice.

9. Section 33 governs the definition of any scope of practice and provides as follows in subsection (1):

*‘The Minister may, on the recommendation of the council and the relevant professional board, by regulation define the scope of any health profession registrable in terms of this Act by specifying the acts which shall for the purposes of the application of this Act be deemed to be acts pertaining to that profession: ...’*⁶

10. As an incident of the rule of law and the principle of legality – foundational to South Africa’s legal system –no public power may be exercised other than in accordance with law and to the extent authorized by law.⁷ This means that the only way in which scope of practice restrictions can lawfully be imposed is by regulations made by the Minister in terms of section 33 of the Act and pursuant to its procedures.

11. At the present time, practitioners are required to comply with the 2008 Regulations. Importantly, to the extent that the 2011 Regulations have been declared invalid, these do

⁶ A proviso is then given that strictly governs the procedure through which such a regulation be made. The proviso reads: *‘Provided that such regulations shall not be made unless any professional board established in terms of section 15 in respect of any profession which may in the opinion of the Minister be affected by such regulation, has been given an opportunity of submitting, through the council, representations as to the definition of the scope of the profession in question: Provided further that if there is a difference of opinion between the council and such professional board as to the definition of the scope of the profession concerned, the council shall mention this fact in its recommendation.’*

⁷ *Fedsure life Assurance ltd and others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC 17 at paragraph 56 to 58.

not purport to impose any specific restrictions on any category of practice in the profession of psychology but are generic in their application and govern all psychologists.

12. Their generic character stands in contrast to the 2011 regulations which purported to define the scope of practice of each category in the field. Although subsequent to the litigation in the Western Cape, the Minister initiated a process to make new scope of practice regulations for the field of psychology, this process has been halted.⁸ It is this set of developments that appear to have caused the Professional Board to issue the November 2019 communication to practitioners.
13. In the result, the law both permits and requires registered Educational Psychologists to practise their profession in accordance with the generic 2008 regulations.⁹ This has critical implications for access to mental health care for patients as no psychologists can lawfully be precluded from performing the acts contemplated by the 2008 regulations, subject to any other lawful restriction.

The ethical requirements of Rule 21 of the General Ethical Rules field of practice

14. There are additional ethical principles that govern what any registered practitioner including any psychologist can do. Amongst these is Rule 21 of the General Ethical Rules referred to above. It provides, in short, that a practitioner shall perform, except in an emergency, only a professional act ‘for which he or she is adequately educated, trained and

⁸ As communicated by the Minister in Government Notice 1169 of 13 September 2019: ‘Notice not to proceed with the proposed regulations defining the scope of the profession of psychology.’

⁹ The 2011 Regulations were declared invalid by an order granted by consent in the Western Cape High Court. That declaration of invalidity was initially suspended but the period of suspension has lapsed, and the invalidity has triggered. There is no controversy regarding the fact of their invalidity – indeed it is accepted by the State, the HPCSA and the profession. However, it can be noted that the 2011 Regulations have not been expressly repealed in the remainder of the country. It is arguable that they have been impliedly so repealed by GN 1169 of 13 September 2019, ie the Notice not to proceed with the proposed Regulations Defining the Scope of the Profession of Psychology which concludes by advising that the 2008 Regulations remain in force. Even if not, the risk of any person or body seeking to enforce the 2011 Regulations against a practitioner is low given that it is accepted that they are invalid and their invalidity can always be raised collaterally as a defence in the unlikely event that this should occur. Ideally, however, the Minister should expressly repeal the 2011 Regulations.

sufficiently experienced.’ A similar ethical principle is found in the Rules of Conduct that Pertain Specifically to the Profession of Psychology, being Annexure 12 to the General Ethical Rules. Under the heading ‘competency limits’, Rule 3 of Annexure 12 provides:

- (1) A psychologist shall limit his or her practice to areas within the boundaries of his or her competency based on his or her formal education, training, supervised experience and / or appropriate professional experience.*
- (2) A psychologist shall ensure that his or her work is based on established scientific and professional knowledge of the discipline of psychology.*

15. In my view, Rule 3 of Annexure 12 gives further content and qualifies Rule 21 of the General Ethical Rules for all psychologists. In the result, core ethical principles that govern the practice of psychology are those found in Rule 3, in other words, the competency limits.

16. In practice, in the nature of things, this must mean that the ethical requirements governing the work of Educational Psychologists will depend materially on their individual qualifications, training and supervised or appropriate professional experience. It will also depend on what is established scientific and professional knowledge of the discipline of psychology.

The minimum standards document & scope of practice

17. I have concluded above that psychologists must practice in accordance with (amongst other things) the following important requirements.

- 17.1. A legal requirement to perform only those acts contemplated by the 2008 Regulations on scope of practice;

17.2. An ethical requirement to practice within their competency limits as contemplated by Rule 3 of Annexure 12 to the General Ethical Rules.

18. Against that background, I consider whether the minimum standards document imposes scope of practice restrictions for Educational Psychologists. The minimum standards document with which I have been supplied is sourced from the HPCSA website, concerns Educational Psychologists specifically, emanates from the Professional Board, and is dated February 2019. Similar documents of the same date can be found for the other categories in the field of psychology.

19. In nature, the minimum standards document is a form of standard setting in respect of current training of Educational Psychologists. The Professional Board is vested with various powers affecting the education and training of health professionals which are sourced in sections 15A(c) and (d) and sections 16(1) and (2) of the Act. Without commenting on the legality of this set of minimum standards, the following warrants emphasis:

19.1. The minimum standards document deals with *current educational standards* for Educational Psychologists.

19.2. The document is a *minimum* standards document. On its own terms it does not set a standards ceiling.

19.3. While it may have a bearing on the competency limits of persons currently undergoing training and education in the field, it cannot affect the existing competency limits of qualified registered Educational Psychologists.

20. Importantly, however, it is not and cannot lawfully constitute a scope of practice regulation as contemplated by section 33 of the Act. Although it resorts to the language of ‘scope of practice’ and purports to provide a definition of the field, this must be understood loosely and cannot carry the technical meaning of ‘scope of practice’ ascribed under section 33 of the Act. That is provided by the 2008 Regulations.
21. Accordingly, in my opinion, the minimum standards document does not impose any scope of practice restrictions in the sense contemplated by section 33. And importantly, it does not set the standard for any determination of whether a registered Educational Psychologist is practising within his or her competency limits as contemplated by Rule 3 of Annexure 12 (and General Ethical Rule 21).

Determining Educational Psychologists competency limits

22. The next question is how to determine registered Educational Psychologists competency limits.
23. In light of the analysis set out above, the answer to this question is that, in my view, Educational Psychologists are permitted, legally and ethically to practice within their competency limits in the sense contemplated by Rule 3 of Annexure 12, subject to the scope of practice restrictions contemplated by the 2008 Regulations. As mentioned, in practice, these competency limits might vary considerably between individual practitioners depending on when and where they qualified, and what their individual competencies are. Individual practitioners may thus have competencies that extend well beyond the minimum standard contemplated by the minimum standards documents.

Is the November 2019 communication lawful?

24. Finally, I consider whether the November 2019 communication is lawful.

25. One of the functions of the Professional Board is to guide the relevant health profession¹⁰ and I understand the November 2019 communication to constitute an act deemed necessary to perform this function. As an exercise of public power, it must comply with the rule of law, which, as explained above includes the principle of legality. The rule of law also imposes requirements of certainty and clarity on the simple principles that those who are subject to the law's reach must know with reasonable certainty what the rules are that they are obliged to comply with and because absence of clarity yields arbitrary exercises of power.¹¹ Put differently, the rule of law requires not only that the Professional Board only give guidance that is lawful in its nature but that it also gives that guidance in a manner that is clear and accessible and provides reasonable certainty.

26. The difficulty with the November 2019 communication is that it is confusing and capable of different interpretations, one lawful and one not. The confusion flows from the three words - 'as contained in' - which precede the reference to the minimum standards document.¹²

27. On one interpretation, these words might be understood to mean that the minimum standards document imposes legal and / or ethical constraints on the practice of Educational Psychology and its scope. In other words, the words '*as contained in*' might be understood

¹⁰ Section 15A(h).

¹¹ Affordable Medicines Trust and Others v Minister of Health of RSA and another 2005(5) BCLR 529 (CC) at paragraph 108

¹² See fn 2 above for full quotation of the relevant paragraph.

as meaning that the competency limits of Educational Psychologists are fully and comprehensively described and sourced in the minimum standards document. This is not the correct legal or ethical position. Although the minimum standards document will be a relevant guide to the standards and competencies of current graduates, they do not and cannot be the source for the competency limits of all Educational Psychologists.

28. On another interpretation, the words '*as contained in*' are illustrative and not comprehensive. Put differently, they should be understood to mean '*such as contained in*', or '*as contained, for example, in ...*'. On this interpretation, they are intended to refer to an illustrative set of competency limits, being those currently in place, rather than the competency limits of each and every Educational Psychologist. That interpretation comports with the correct legal and ethical position.¹³

29. The November 2019 communication is at best badly phrased, and can easily generate confusion. This is damaging as the confusion relates to a key issue of what is and what is not lawful conduct. To this extent, the communication is unlawful as it breaches the requirements of the rule of law referred to above. Because it creates uncertainty, the Professional Board should correct the communication. Furthermore, if the potential for this confusion is pertinently drawn to its attention, and the Professional Board does not then remove it, the members of the Professional Board may potentially become exposed to personal liability in terms of section 47 of the Act should any practitioner or other person suffer damage as a result.

¹³ That the Professional Board might have intended this interpretation, might explain the somewhat defensive letter from the HPCSA to my instructing attorney dated 26 February 2020. In this letter, the Professional Board pertinently does not refer to the minimum standards document thereby removing the confusion that is created by the November 2019 communication.

30. However, even if the Professional Board fails in its duty in this regard, EPASSA's members may responsibly continue to practice their professions within the correct legal and ethical constraints. In doing so, EPASSA will be adopting the interpretation of the communication as set out in paragraph 28 above, which comports with the law and ethical requirements.
31. Furthermore, assuming my understanding of the legal and ethical parameters to be correct, then neither the Professional Board nor anyone else can lawfully seek to restrain or discipline a registered practitioner who conducts his or practice in accordance therewith. That is so irrespective of any confusion created by the November 2019 communication. Any attempt to restrain or discipline a practitioner could be defended with reference to the correct position and, indeed, such practitioner might wish to consider his or her civil remedies for any damages suffered as a result.
32. In light of the above, it would be prudent in my view for EPASSA to inform the Professional Board that EPASSA has been advised, in respect of the November 2019 communication, that:
- 32.1. Educational Psychologists are legally bound by the scope of practice parameters in the 2008 Regulations and ethically bound to practice within their competency limits pursuant to Rule 3 of Annexure 12 and Rule 21.
- 32.2. The communication is unlawful because it creates confusion and uncertainty on a matter germane to what constitutes lawful conduct and that the Professional Board must clarify the confusion in order to comply with its duties under the rule of law and the principle of legality.

32.3. In the meantime, and in order to act lawfully and ethically, EPASSA's members should interpret the reference in the communication to the minimum standards document in line with the interpretation referred to in paragraph 28 above and not the interpretation in paragraph 27.

32.4. That should the Professional Board disagree that this is the correct interpretation, then it should inform EPASSA promptly and on what basis.

33. I advise accordingly.

**Susannah Cowen SC
Thulamela Chambers
6 May 2020**