GUIDELINE: Research involving Illegal Activity

The National Statement identifies several types of research where information gathered in the course of the project may potentially lead to legal consequences. The consequences could be for participants, researchers, and others, where information is disclosed during:

- Research intended to study illegal activity, and perhaps to disclose illegal activity (e.g. heroin use, white collar crime or illegal sex work)
- Research not specifically intended to study illegal activity, but likely to disclose illegal activity (e.g. a study which includes collecting information about substance use, juvenile delinquency)
- Research where illegal activity is inadvertently and unexpectedly disclosed (e.g. a study where such information may be volunteered by a participant despite no specific questioning).

Where research is being conducted into illegal activity, there may be particular ethical questions about a participant's consent. These ethical and legal questions arise from:

- What researchers might be obliged to disclose to legal authorities or under court processes;
- The vulnerability of participants and researchers because of exposure to illegal activity.

Where a researcher is planning to gather information from participants that has the potential to disclose illegal activity by participants or others (e.g., by asking about the use of illicit substances, downloading material protected by copyright, domestic violence or sexual abuse etc) there are several issues that need to be considered by the researcher:

- Informing the participants during the consent process of the researchers obligation to disclose the illegal information if they are required to do so by law (e.g., if the researcher is subpoenaed or is required by law to make a disclosure to the police or other authority).
- Clearly outlining to participants any limits on confidentiality that are associated with their legal obligations.
- How other types of notifiable activity, such as potential harm to children, will be communicated to the appropriate authority.

HREC Review

Only the full HREC can review and approve research that aims to expose illegal activity (National Statement, Chapter 2.3.4 b). Researchers should consider the possibility that data may be the subject of a subpoena and ensure that participants are fully informed of the potential for this to occur. In the event of a subpoena being served on a researcher, the Ethics Office should be contacted for advice.

As part of the HREC review, the following questions must be addressed in the online questionnaire:

- Does your study have the potential to disclose illegal activity by participants or others? This includes research intending to disclose illegal activity, as well as research not specifically designed to, but likely to disclose, illegal activity.
- Participants may be subject to risks because of their involvement in research that discloses illegal activity. This includes research intending to disclose illegal activity, as well as research not specifically designed to, but likely to disclose, illegal activity. Please outline how these risks are justified by the benefits of the research. These risks must be specified in the Participant Information Statement.
- To what extent will you or do you intend to keep confidential any information about illegal activity by participants or others?
- Are you aware of your legal obligations to disclose information? You may be in a situation where there is a statutory obligation for you to disclose information revealed or discovered, or you may be subject to legal orders that compel disclosure of information obtained by a researcher. These circumstances must be clearly explained to participants.
- How will you respond to any legal obligation or order to disclose such information?
Recommended strategies for dealing with disclosed illegal activity

1. Avoid obtaining information that is not directly necessary for the research project.
2. Record only that information which is relevant to the research project (e.g. written notes recording the essential information may be preferable to an audio-recording which captures everything said).
3. Protect the confidentiality of participants by ensuring identities are not ascertainable.

   This could include one or more of the following:
   - not collecting names and other identifying information (e.g. where the risks are particularly high, verbal consent may be preferable to written consent)
   - the use of pseudonyms
   - storing data in coded, rather than identified, form
   - protecting (and storing separately from other research materials) links between names and data.

   “Consideration should be given to the use of pseudonyms, or to the removal of links between names and data, for participants whose illegal activity may be revealed or discovered in research”. (National Statement Chapter 4.6.4)

When storing study records and interview transcripts researchers should also think about the best way to manage participant confidentiality, for example by storing the de-identified consent forms and identifying code separately, or stripping all identifiers from the information altogether. Researchers should also consider keeping the collection of retention of ‘risky’ information to that which is necessary, minimising the possibility of identifying individuals and maximizing data security.

As a practical matter, even if a researcher adopts the strategies identified above, the researcher may ultimately be required to provide all relevant information to legal authorities including breaking codes and dissolving pseudonyms to avoid the researcher being charged with hindering the investigation of a serious indictable offence under section 315 of the Crimes Act. This reinforces the importance of discussing the purpose of the research with the Ethics Office at an early stage and seeking to identify ways in which the exposure of researchers and participants to legal liability and potential imprisonment can be minimised and the nature of the required research can be suitably and best scoped.

When there is a possibility of researchers discovering illegal activity

When there is a possibility of disclosing illegal activity researchers should recognise the risk when completing the ethics application and to explain how they will mitigate this risk and manage any reporting obligations. To protect participants it may be necessary to include the relevant information in the Participant Information Statement and Participant Consent Form. The following paragraphs are a suggested way of doing this; please amend the wording to suit the particular study. Please contact the Ethics Office if you require further guidance.

Participant Information Statement (PIS)

“The researcher may be required or compelled to disclose information (including notes and recordings) obtained in the study, and may have a duty to report to the police or other appropriate authority, the details of any criminal offence disclosed in the interview, for which you have not been previously apprehended, charged or convicted and/or any details of any actual or perceived risk of harm or injury to you (including self-harm) or any third person.

The researcher will stop the interview and caution you, if you begin to disclose details of any criminal offence for which you have not been apprehended, charged or convicted. If you wish to discuss offences for which you have not been apprehended, charged or convicted you should only do so if you understand this caution, and only discuss such offences in general terms.”
Alternative Statement (PIS)

“All aspects of the study, including the results, will be strictly confidential and only the researchers will have access to information on participants, except as required by law for three reasons. These reasons are: (1) if you say you might harm yourself or someone else, (2) if you share information about children you know who are being abused or neglected, or (3) if you share information about crimes you haven’t told the police. These events will have to be reported, by law. This is to ensure the safety of yourself and others. A report of the study may also be submitted for publication, but individual participants will not be identified in such a report and you will not be identified in any way”.

Participant Consent Form (PCF)

“I understand that the researcher may be required or compelled to disclose information (including notes and recordings) obtained in the interview, and may have a duty to report to the police or other appropriate authority, the details of any criminal offence disclosed in the interview, for which I, or others known to me, have not been previously apprehended, charged or convicted and/or details of any actual or perceived risk of harm or injury to myself (including self-harm) or any third person.

“The researcher will stop the interview and caution me, if I begin to disclose details of any criminal offence for which I, or others known to me, have not been previously apprehended, charged or convicted. If I decide to discuss offences for which I have not been apprehended, charged or convicted I understand I should only discuss such offences in general terms.”

There are some contexts where written evidence of a person’s consent to participate may not be necessary, or may pose a more significant threat to participants than the protection that written evidence of consent is meant to provide. For example, in research involving anonymous surveys into illegal or socially stigmatised activities, requiring written evidence of consent may identify participants and so put them at risk of social harm or legal prosecution. Although consent is still required in these situations, the completion of consent forms that identify participants is likely to be inappropriate. Such situations require the researcher to identify clearly the process of consent that will be followed and how the fact of that consent will be evidenced.

Verbal Caution

If conducting interviews it may also be appropriate to give a verbal caution:

“The information you provide in this interview will remain confidential and will not be disclosed, except where there is an obligation at law to do so.

I may be required or compelled to disclose information obtained in the interview, and may have a duty to report to the police or other appropriate authority, the details of any criminal offence disclosed in the interview for which you or others known to you have not been previously apprehended, charged or convicted and/or any details of any actual or perceived risk of harm or injury to you (including self-harm) or any third person.

I will stop the interview and caution you if you begin to disclose details of any criminal offence for which you or others known to you have not been previously apprehended, charged or convicted. If you wish to discuss offences for which you have not been apprehended, charged or convicted you should only do so if you understand this caution, and only discuss such offences in general terms.”

For less serious instances of criminal behaviour researchers can use the phrase “…your identity/information will be kept strictly confidential, except as required by law”. Please see the Forms and Templates on our website.
When researchers are subject to mandatory reporting

Where it is known that the researchers are subject to the requirements of mandatory reporting legislation if the research participants disclose certain matters, e.g. sexual abuse, an explanation must be included in the research protocol of how these situations will be handled if they arise. A similar (briefer) explanation should also appear in the Participant Information and Consent Form. In all questionnaires, focus group schedules or similar instruments used in research, it must be made clear that the research participants are not obliged to answer questions. Where only part of the questionnaire deals with illegal behaviour, that warning should normally be repeated prior to that group of questions. A warning to this effect should be followed by a brief description of the steps proposed by the researchers to maintain the confidentiality of the information supplied to them by participants, as far as is legally possible.

The PIS could state “You are not obliged to disclose information about illegal behaviours. The researchers cannot guarantee absolute confidentiality with respect to illegal behaviour of which they are made aware.”

Where research involves criminal matters still before the courts

Where the researchers intend to question a research participant about criminal matters that are still before the courts (whether the participant is involved as offender or victim), researchers must exercise extreme caution. The consent of the participant may not be sufficiently informed if the person has not obtained legal advice regarding the possible consequences for his or her defence (in the case of an offender), or for the success of the prosecution case (where the participant is a victim of crime). Researchers proposing to conduct research into illegal behaviours should obtain advice from the Ethics Office.

Researchers should be satisfied that participants who are subject to criminal justice processes:

- are aware that the research may disclose illegal activity; and
- do not have unrealistic expectations of benefit from their participation.

(National Statement, Chapter 4.6.7)

The Law

Section 316 of the Crimes Act 1900 (NSW) (the Crimes Act) provides that it is an offence to conceal a serious indictable offence. A serious indictable offence is an offence that is punishable by five or more years’ imprisonment. Subsection 1 of section 316 of the Crimes Act provides: “If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years”.

Section 316(4) of the Crimes Act, when read in conjunction with Regulation 4 of the Crimes Regulations 2010 (NSW), provides some limited protection where the information is obtained by a researcher for professional or academic purposes. The Regulation provides no definition of the words “researcher for professional or academic purposes” and there might be some doubt whether it extends beyond a chief investigator. Moreover, it is not an absolute protection. It simply means that a prosecution for a breach must first be approved by the Attorney-General.

The National Statement

Chapter 4.6.3 “Where research discovers information about illegal activity by participants or others, researchers and institutions may become subject to orders to disclose that information to government agencies or courts”

Please see Chapter 4.6 of the National Statement for further guidance.