

ETHICS, INTEGRITY & BIOSAFETY RESEARCH OFFICE

Research with Legal Implications

The National Statement on Ethical Conduct in Human Research 2023 (National Statement) Chapter 4.6 provides guidance for research with 'People who may be involved in illegal activities'. It is important to understand that this incorporates research where:

- There is an intention to study illegal activity such as illicit drug use or illegal sex work;
- There is no intention to study illegal activity, but the research is likely to do so (e.g. a study of industry responses to regulations surrounding banned or illegal products); or
- An illegal activity is inadvertently discovered while conducting the research (e.g. where a participant volunteers information unrelated to the research activity).

Research involving illegal activity, directly or indirectly, requires careful planning to manage the legal implications and risks within the project. This document will help you identify and manage some of the implications you should consider in designing a research on or discovery of illegal activity.

Legal Implications in Research

Legal implications in research can show in multiple ways including:

- Participant consent;
- Data collection and security;
- Mandated reporting; and
- Risks to participants.

Legal Implications in Participant Consent

A key requirement of ethical human research is that it is respectful of participants. Asking participants to put themselves at risk of harm, including exposure to legal ramifications, for the sake of the research is unethical, particularly when there is no individual or community benefit.

Participants need to be informed of any such risks in a research project before they provide consent. In the La Trobe template Participant Information and Consent Form (PICF) there is the advice to participants that:

The personal information you provide will be handled in accordance with applicable privacy laws, any health information collected will be handled in accordance with the Health Records Act 2001 (Vic).

This standard advice about confidentiality and its limits is not considered sufficient for some research, especially where the research is focussed upon illegal activity or is likely to raise legal risks. Potential participants in a study that will likely collect information about illegal activities must be made aware of the risk they accept by taking part.

Additional information needs to be included in the PICF if there is a reasonable likelihood that participants may reveal, and/or the research will collect, information about their involvement in an illegal activity or an activity/behaviour that may not be an illegal activity but could potentially have legal implications. Participants in a study that will likely collect information about illegal activities must be made aware of the risk they accept by taking part.

Researchers need to be candid in explaining any risks to participants in the PICF. It is recommended that you seek legal advice on the content of their PICF.

Legal Implications in data collection and security

Data Collection

Information collected by researchers may become subject to subpoenas even when the research was not interested in illegal activity. Information collected from people may be relevant in

ETHICS, INTEGRITY & BIOSAFETY RESEARCH OFFICE

proceedings involving, for example, the Family Court, the Victorian Civil and Administrative Tribunal (VCAT) or employment or insurance claims.

In general, it is important to avoid eliciting information that reveals information about the participant that suggests involvement by them or other people in illegality or impropriety. If the data collection method involves surveying or interviewing, then questions that would divulge actual or allegations of illegality must obviously be avoided.

While planning research and designing the methodology, researchers need to establish all possible safeguards by ensuring identities cannot be determined by:

- not collecting names and other identifying information (where risks are particularly high, verbal consent may be preferable to written consent);
- using pseudonyms;
- storing data in coded rather than showed form; and/or
- protecting links between names and data and storing them separately from other research materials.

When designing the research, you may also wish to consider:

- restricting the collection and retention of 'risky' information to what is necessary to answer your research questions;
- collecting information in the most 'general' form possible rather than individually identifiable (e.g. collect year of birth or even the age range of participants e.g. '18-25' rather than date of birth);
- constructing questions to elicit opinion rather than personal disclosures;
- whether the information you are collecting will be of interest to authorities such as the police;
- relevant legislation and laws in the specific state or country where the data is to be collected; and
- the requirements of data verification against that of participant confidentiality and anonymity.

Data Security

Data collected for or about people may have legal implications for participants or others if it could be used in legal proceedings as evidence against them. For example, information a researcher collected about participants' drinking or drug-taking habits may be relevant in a legal action involving a car accident and a participant.

Part of the risk management strategy in a research project is data security. Generally, data collected by researchers is retained for a specified period and remains confidential unless a request is made through a court to release that information. It is only through a court order or subpoena or warrant that data can be released. Therefore, if a participant reveals illegal activity as part of a research project they could be exposed to legal sanction at a future time.

Researchers need to consider data security strategies to maintain sensitive data and ensure confidentiality in the face of unanticipated findings of illegal activities.

Legal Implications for Risk to the Participant

The National Statement requires researchers to mitigate or adopt strategies to reduce risks of research to participants. Risks to participants are divided into six general categories:

- physical harms (e.g. injury, illness, pain);
- psychological harms (e.g. distress, guilt, anger, fear);
- devaluation of personal worth (e.g. humiliation, manipulation);
- social harms (e.g. damage to relationships);
- economic harms (e.g. financial costs or disadvantage); or
- legal harms (e.g. prosecution of criminal conduct).

ETHICS, INTEGRITY & BIOSAFETY RESEARCH OFFICE

Legal harms can materialise in different ways. Research that may identify participants, or other people or organisations not directly involved in the research, as being involved in illegal or improper activities opens them to a threat of prosecution of criminal conduct. Where research is looking at an activity that is not itself illegal information that has been collected can also be used against participants (e.g. in disputes over child custody or a workplace accident). The HREC will generally expect that the research is conducted in a way that reduces the legal risks to participants or anyone else not directly involved in the research.

Legal Implications for Mandated Reporting

There are several provisions in State and Commonwealth legislation that require reporting by specific occupational classes or individuals. Some of these are set out below in summary form (this is not an exhaustive list). This summary is for the purposes of alerting researchers of their obligations and is provided as a guide only. Researchers must access the relevant legislation and be familiar with the specific requirements in each jurisdiction.

Please seek legal advice from La Trobe's Legal Services Group if you require further information or advice about the ambit of this legislation in relation to your research.

Health Practitioners

In all states and territories in Australia the Schedule to the Health Practitioner Regulation National Law (Victoria) Act may apply. Section 141 of the Schedule states that a registered health professional must notify the Australian Health Practitioner Regulation Agency if he or she has a reasonable belief that another registered health professional has:

- practised while intoxicated (alcohol or drugs);
- engaged in sexual misconduct during the course of professional practice;
- placed the public at risk of substantial harm because of an impairment; or
- placed the public at risk of harm because he or she practised in a way that constitutes a significant departure from accepted professional standards.

If a researcher is a registered health professional and the research involves another registered health professional(s) they must comply with Section 140, or they may face disciplinary proceedings.

All states and territories in Australia require medical practitioners and/or nurse practitioners and/or pathologists and/or diagnostic laboratories report notifiable conditions (notifiable communicable diseases). The reporting requirements and communicable diseases vary. Please access the relevant government website for up-to-date details.

- [Australian Capital Territory Reporting of notifiable conditions - Code of Practice 2022](#)
- [New South Wales \(NSW\) - New South Wales Health - infectious diseases notification](#)
- [Northern Territory \(NT\) - Centre for Disease Control - Notifiable Diseases](#)
- [Queensland - Public Health Regulation- Notifiable diseases](#)
- [South Australia \(SA\) - South Australia Health - Notifiable diseases reporting](#)
- [Tasmania - Notifiable Diseases - Guideline January 2016](#)
- [Victoria - Victorian Health - Notifiable Diseases](#)
- [Western Australia - Notification of communicable diseases](#)
- [National Notifiable Disease Surveillance System](#)

Suspected child abuse or neglect

There are a variety of reporting requirements across Australia and these have been summarised by the [Australian Institute of Family Studies](#). In terms of reporting sexual offences in Victoria, [Section 327 of the Crimes Act 1958](#) makes it an offence for a person to fail to report a sexual offence committed against a child by an adult (where a person has reason to believe an offence had occurred). This could possibly arise in the situation of research being conducted into areas of sexual abuse where the researchers may receive information about sexual offences

ETHICS, INTEGRITY & BIOSAFETY RESEARCH OFFICE

committed against minors. They could then have an obligation to report it to Victoria police under Section 327 (subject to exceptions appearing in Section 327).

Research conducted in the Northern Territory

In the Northern Territory there is a legal requirement to report family violence. Under Section 124A of the [Domestic and Family Violence Act 2007](#) (NT), an adult must report to police their belief, on reasonable grounds, the life and safety of another person is under serious or imminent threat because of domestic violence has been, is being, or is about to be committed. A failure to make a report is a criminal offence.

Note that if you are conducting national surveys in areas involving family violence or child abuse then you will need to consider the legal requirements in individual states in your project and ethics application.

Risk Mitigation

Research that may reveal evidence or indications of illegal activity should be designed to avoid compromising participants and researchers. How the legal risks in the research are minimised will depend upon the aims of the research and specifically whether you are researching an illegal activity per se or whether the research is likely to uncover some illegal activity.

Legal Instruction

Researchers must disclose participant information if required by law to disclose it. If you receive a legal request for information such as a subpoena, summons or search warrant it is recommended that you contact the Research Office and the La Trobe Legal Services Group before responding to the request. The ethics review committee that approved the application should also be advised of any request to release data collected as part of a project that had human research ethics approval as this involves a departure from the terms of the human research ethics approval.

Acknowledgements

Queensland University of Technology, Office of Research Ethics and Research Integrity, Guidance on Illegal Activities Research.

RMIT University, Research Ethics and Governance, Research and Innovation, Guidance Note: Illegal Activities in Research.

Further information

For further advice on this topic or other human research ethics matters, please email humanethics@latrobe.edu.au, an Ethics and Biosafety Advisor will assist you and may connect you to one of the HREC or LEAP members in your discipline who can offer expert ethics advice.