

## Research into illegal behaviours

In considering applications for ethical review of research into illegal behaviour, the Department of Human Services (DHS) Human Research Ethics Committee (HREC) takes into account the following factors:

- The importance of the participant not being misled as to the possible legal consequences of responding to questions about his or her illegal behaviour, particularly the risk of self-incrimination;
- Whether any legal proceedings, such as summary hearings, trials, fitness to stand trial, or proceedings for breach of a sentencing order are still pending;
- Whether the participants of the research are juveniles;
- Any existing obligations the researchers may have under mandatory reporting legislation in relation to their knowledge of illegal activity;
- The discretionary nature of the legal powers to prosecute those who are alleged to be involved in criminal activity;
- The fact that the law cannot be relied upon to protect the confidentiality of information if the researchers are subject to a subpoena to produce documents to a court, or to appear in person to give evidence.

In dealing with research into illegal behaviour, the Committee will not accept wording in Participant Information and Consent Forms that “absolute” confidentiality can be guaranteed. This is because researchers may be obliged under mandatory reporting legislation to supply information to authorities, or under subpoena to testify in court or to produce documents in relation to information supplied to them in the course of their research.

However, it is not necessary to spell out in precise detail the nature of the circumstances in which a legal obligation may arise to reveal information to police, prosecuting authorities, or to a court. The Committee will accept statements in the Participant Information and Consent Form to the effect:

“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.”

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.

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, the Committee will require an explanation 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.

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 consult Israel, M. (2004) "Ethics and the Governance of Criminological Research in Australia", a Report for the New South Wales Bureau of Crime Statistics and Research (available at: [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/R55.pdf/\\$file/R55.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/R55.pdf/$file/R55.pdf)) and [Barratt M. J., J. S. Norman, C. L. Fry](#) (2007). "Positive and negative aspects of participation in illicit drug research: implications for recruitment and ethical conduct" *International Journal of Drug Policy*, 18(3):235-8.