

GUIDELINE: RESEARCH THAT POTENTIALLY INVOLVES LEGAL RISKS FOR PARTICIPANTS AND RESEARCHERS

These Guidelines should be read in conjunction with Chapter 4.9 of the *National Statement on Ethical Conduct in Human Research 2025* “Research that may discover illegal activity”

1. KEY POINTS

- Some research may gather information which has the potential to have legal consequences for participants or researchers.
- When designing research projects:
 - Consider what information is essential to collect for your research
 - Limit the identifiability of information
 - Restrict open ended questions where possible
 - Ensure participants:
 - are made aware of the potential for disclosing illegal activity
 - understand any mandatory reporting obligations
- Remember that Researchers must not disclose participant information to a third party without consent unless legally required to do so.
- Ensure that appropriate consent is obtained – use the ACU PICF Templates!

2. INTRODUCTION

The National Statement identifies several types of research where information gathered in the course of the project may potentially lead to legal consequences for participants and researchers if the researcher is later required by a court or similar order to disclose that information. This includes research:

- intended to study illegal activity
- not specifically intended to discover illegal activity but likely to do so
- where illegal activity is inadvertently and unexpectedly discovered.

Considerations in relation to designing and conducting these types of research should include:

- provision of information to participants in the PICF about the potential for disclosing illegal activity and obtaining consent on that basis.
- the scope of any mandatory reporting obligations (legal, professional or contractual) and the likelihood of this occurring.
- implications for researchers and participants arising from the discovery of illegal activity.

3. BACKGROUND INFORMATION ABOUT LEGAL RISKS

Potential participants in a study that is likely to collect information about illegal activities must be made aware of the risk that they accept by taking part (e.g. by answering some of the questions in the study, by undergoing certain tests, etc.).

Researchers *cannot* give an undertaking to *always* keep information confidential because:

- Information might be required by law: Researchers might have to provide information if it is ordered by a court or required by legislation (e.g. in the case of a search warrant or subpoena).

- Researchers might have a moral obligation to ‘breach’ confidentiality: Researchers may legally disclose information in some circumstances, e.g. to prevent serious harm to the participant, another person, or the community.

Whenever researchers record information about a research participant, they could potentially be required by law to disclose that information to government agencies, law enforcement bodies or courts.

If an ACU Researcher receives an order to disclose information, they should contact the Research Stewardship team at ResEthics.Manager@acu.edu.au in the first instance.

In an effort to protect participants, a researcher might take steps to protect the confidentiality of research participants in a manner that could put the researcher him/herself at legal risk (eg attempting to destroy data). In most situations, it is appropriate for researchers to follow standard ethical practices to protect participants’ confidentiality by ensuring that information is not readily identifiable (e.g. by using pseudonyms or codes). Accepted methods of protecting confidentiality, such as those recommended in the National Statement [4.9.4], should be utilised where possible and all data should be de-identified as soon as practicable.

4. WHAT INFORMATION CAN I DISCLOSE ABOUT A RESEARCH PARTICIPANT?

As with all research, Researchers must not disclose participant information to a third party without consent unless legally required to do so.

Researchers must only disclose participant information if required by law to disclose it, e.g.:

- where they receive a court order, such as a subpoena or a search warrant; or
- where they have a mandatory reporting obligation, such as in cases of notifiable infectious diseases or suspected child abuse.

Researchers generally are not mandatory reporters, however, if your professional affiliations make you a Mandatory Reporter under a state or territory, you would be obligated to report. This requirement is included in various State legislation as well as requirements for Mandatory reporters.

In line with the [Safeguarding Children, Young People and Adults at Risk Policy](#) all University members are mandatory reporters for any witnessed, suspected, disclosed, or alleged cases of child exploitation, harm, abuse, or breach of this Policy.

Researchers may disclose (but are not required to disclose) participant information where they are permitted by law to disclose it, e.g.:

- if they reasonably believe that disclosure is necessary to prevent a serious and imminent threat to anyone’s life, health, safety or welfare or a serious threat to public health, safety or welfare; or
- if legislation expressly permits disclosure.

If an ACU Researcher wishes to disclose participant information on a discretionary basis, they should contact the Research Stewardship team at ResEthics.Manager@acu.edu.au in the first instance.

5. HOW CAN I DESIGN MY RESEARCH TO MINIMISE LEGAL RISKS TO PARTICIPANTS?

To conduct effective research in areas that may have an associated legal risk for participants, researchers need to design their research to elicit accurate information. However, participants

are unlikely to want to take part in a research project, or to give honest answers, if this is likely to have adverse consequences for them. It is also unethical to ask participants to put themselves at risk for the sake of the research, particularly when they are unlikely to derive any personal benefit.

To minimise the risks to Participants and Researchers:

- provide participants with accurate and appropriate warnings and reassurances in advance. (per 4.9.3, 4.9.5 NS, 2025)
- Only collect and retain essential information
- Use pseudonyms where possible and de-identify information for data security purposes as soon as practical.

Some recommended strategies include:

1. Avoid collecting information that is not directly necessary for the research project.
2. Only record 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 limiting identifiable information. This could include one or more of the following:
 - do not collect names and other identifying information (e.g. where the risks are particularly high, verbal consent may be preferable to written consent)
 - use pseudonyms
 - use month/year of birth or age rather than date of birth
 - store data in coded, rather than identified, form.
4. Use closed questions wherever possible.
5. When asking questions, phrase them so specific details of events such as names of people, specific dates or specific places that are not essential for the research are not included.
6. Include illustrative examples when first instructing participants, for example:

We may ask you 'How often do you use recreational drugs?' and you (the participant) could simply answer 'Around 4 times a month' as opposed to saying 'Every Friday I meet John Blogs at 17 Mitchell Rd for a drop after work and sometimes we use and sometimes we don't.'

The first is a less risky answer which requires no deidentification, where the second answer is risky and requires deidentification.'

7. Make sure that people considering participation are appropriately warned about the limits to confidentiality and the potential legal consequences of participation. This must be clearly outlined in the PICF to allow them to assess their own level of risk.
8. Ensure that information and alerts are appropriate to the participant group (e.g. a 16-year-old may not understand what a subpoena is or what 'as required by law' means). Examples or expanded information may be required.
9. Provide verbal instructions prior to consent processes or interviews or focus groups to remind participants of the most important points relating to risks. Remind participants that they should not reveal information that is not relevant to the research and is 'legally problematic'.

6. ADDITIONAL INFORMATION FOR PARTICIPANT INFORMATION & CONSENT FORMS (PICFS)

In the PICF, a standard general statement advising participants about confidentiality and its limits is not considered sufficient for some research. Additional information should 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 in itself may not be an illegal activity but could potentially have legal implications

Four key sections of the ACU PICF need to be considered:

- **4. What will I need to do to participate in this study?**
- **6. Are there any risks associated with participating in this project?**
- **10. Will anyone else know the results of the project or have access to my information?**
- **Consent form**

When addressing these sections, researchers need to ask themselves what information the specific participant group needs in order to understand the project and the consequences of their involvement, and the efforts that will be made to protect the information participants provide.

NOTE: Suggested wording is included within the ACU PICF Templates however every project is unique and you will need to adapt this to your project. Any risk mitigation plans should also be included within your Risk Assessment and Management Plan (if applicable)

POINTS TO CONSIDER AND RECOMMENDED WORDING

4. What will I need to do to participate in this study?

Points to consider:

- Participants should be advised if they may be asked to disclose information that may incriminate themselves or others: ie they will be asked questions about their personal involvement in activities that may be illegal (e.g. substance use)
- When describing the nature of the questionnaires, interviews, focus groups, etc. it may be appropriate to specifically alert participants that:
 - they will be asked for 'general' information/opinions/understandings and should avoid disclosing information of a personal nature;
 - they can choose not to answer if a question makes them feel uncomfortable or concerned.
- Participants must be advised if researchers intend to record interviews for the research. They also need to be told:
 - whether the recording of interviews is optional or essential.
 - whether the recording will be destroyed after transcription or kept.

Where interviews might contain sensitive information that is not needed for the research, it is recommended that researchers consider alternatives to video/audio taping, such as taking a hand-written summary of the information.

6. Are there any risks associated with participating in this project?

Points to consider:

- The extent of the risk/seriousness of consequences will depend on participants' individual circumstances. For example, the consequences of illicit drug use being revealed may be considerable for someone facing a child custody hearing; on the other hand, they may not be of particular concern to someone whose drug use is already known to the police.
- Potentially incriminating information about a participant could be disclosed in either of the following circumstances:
 - a) Researchers could be required by law to disclose information (e.g. if research records are subpoenaed).
 - b) Researchers may disclose information about a participant if legislation expressly permits disclosure; for example, they reasonably believe this is necessary to prevent a serious and imminent threat to anyone's life, health, safety or welfare or a serious threat to public health, safety or welfare.

If the research is likely to uncover specific information that the researcher believes they have an obligation to, and may lawfully, disclose, the possibility of disclosure and reasons for the disclosure should be made clear in the PICF.

If a Researcher is issued with a subpoena or search warrant, they are to contact the Research Stewardship team at ResEthics.Manager@acu.edu.au in the first instance.

Recommended wording for the PICF [see ACU PICF Template]:

Any identifying information obtained for the purpose of this research project and for future research described will be treated as confidential and stored securely. We will take all reasonable steps to protect your privacy, including de-identifying your data wherever possible in accordance with the Australian Privacy Act 1988. De-identification involves removing direct identifiers and reducing the risk of re-identification through safeguards. However, any information that you provide may be disclosed to an appropriate third party if (1) it is to protect you or others from serious harm, (2) it is specifically required by law or (3) you provide the researchers with written permission. In addition, if you disclose illegal activity, you should be aware that a third party may be able to gain access to this information via a legal process (e.g.: subpoena or search warrant). If such a situation arises, we will comply with applicable laws and, where possible, make reasonable efforts to notify you before disclosure. By participating, you acknowledge and consent to these potential limitations on confidentiality.

SOME ALTERNATIVE WORDING FOR SPECIFIC CASES:

We will also ask you about *[insert type of activity, eg. crime, your use of drugs]*. We will not disclose that information without your consent except in circumstances where we have to do so for legal reasons. In the unlikely event that this happens, the information you gave us could potentially be used against you in legal proceedings. For that reason, you should not tell us anything specific about events or activities such as *[insert appropriate example/s – e.g. crimes that you have not been charged with or you have not been to court about]*. Please don't tell us things like names, specific dates or specific places of illegal activities. *[Include if applicable]* Over many years of research, we have never been required by law to provide our research information under such circumstances. If we are requested to do so, we will do our best to let you know at the earliest opportunity.

Where the research involves drug testing of samples:

Participation in this study includes *[blood and /or urine analysis]* to determine the presence of *[name of substances]*. The test may reveal evidence that you have previously used illegal

drugs. We will not disclose that information without your consent except in circumstances where we are required by law to do so. In that case, the information could potentially be used against you in legal proceedings. *[Include if applicable]* Over many years of research, we have never been required by law to provide our research information under such circumstances. If we are requested to do so, we will do our best to tell you at the earliest opportunity.

Where the nature or subject matter of the research means that there is a reasonable possibility that the researcher will receive information that they feel obliged, and are legally permitted, to disclose:

For example, if we:

- think you are going to seriously harm yourself
- think you are going to seriously harm someone else
- are required to provide this information by a court of law
- learn information concerning the protective safety of children

We may not be able to keep this information confidential. If we receive such information, we would *[briefly explain what action you would take]*.

10. Will anyone else know the results of the project or have access to my information?

Required wording for **all** PICFs:

Any information or personal details gathered during this study are confidential and will not be shared with third parties unless:

- (1) you give your consent to do so,
- (2) it is required to prevent serious harm to yourself or others,
- (3) as required by law via a subpoena, court order or mandatory reporting obligation - in these cases we will do our best to contact you to notify you at the earliest opportunity.

Consent Section

The Consent section must include:

- ☐ *I consent to my personal information being shared with third parties (insert name) for the purpose outlined, but any further disclosure will not occur without written consent or authorisation from me.*
- ☐ *I acknowledge that information about me may be disclosed to an appropriate third party if (1) it is necessary to prevent serious harm to you or another person (for example violence or self-harm) (2) it is required by law.*
- ☐ *** (only add if this applies to your research – can be adapted for other risks)** *I acknowledge and I am aware of the risks associated with disclosing illegal activity, as stated in the PICF.*