

Issues of Confidentiality in Research into Criminal Activity: the Legal and Ethical Dilemma

Emily Finch

Introduction

The British Society of Criminology has issued a Code of Ethics providing guidance for researchers engaged in criminological research.¹ This Code seeks to address central issues that researchers may encounter and provides guidelines designed to promote good practice and high ethical standards. The Code covers various ethical issues including the responsibility of the researcher towards research participants. This article will focus on one of these responsibilities – confidentiality – and the conflicting legal and ethical dilemmas that may arise in relation to this issue.

Section 4(iv) of the Code of Ethics states: ‘Researchers should respect promises of confidentiality and not pass on identifiable data to third parties without participant’s consent.’ This suggests that a promise of confidentiality should be honoured and that such a promise gives rise to a duty not to divulge information given in confidence unless the confider consents to this. It would appear, however, that a promise of confidentiality is qualified, rather than absolute, as the paragraph continues: ‘Researchers should also note that they should work within the confines of the current law over such matters as ... confidentiality.’ The question that arises is the extent to which these two statements are compatible and, in case of conflict, which is to prevail. Should the ethical obligation of confidentiality be maintained in the face of a legal obligation to divulge information? Equally, does the legal duty compel confidentiality when other considerations indicate that disclosure is the ethical stance?

The conflict between competing legal and ethical considerations is particularly pertinent to researchers engaged in research into illegal activities. Possession of information regarding serious criminal wrongdoing may raise significant moral concerns and engage the

¹ British Society of Criminology Code of Ethics for Researchers in the Field of Criminology

researcher in an ethical dilemma. The Code of Practice acknowledges the potential for conflict between ethical and legal considerations but provides no guidance as to how this is to be resolved. This article examines the legal status of confidential information and explores the ethical issues that emanate from this. Consideration is given to the approach taken in other common law jurisdictions to determine whether there is a practical solution to this seemingly insoluble problem.

The Value of Confidentiality in Research Interviews

Promises of confidentiality are routinely made to participants in academic research. Research participants are a valuable resource and it is axiomatic that no detriment should accrue to them because of their participation in research studies. The purpose of conducting interviews is to gain information and increase the wealth of knowledge of the subject area under consideration. This is facilitated by interviews that frequently provide unique information not available from any other source. For example, great insight into criminal motivation can be gained from interviewing criminals. Equally, the effect of crime on individuals can be explored by interviewing crime victims. Even if a subject is well-documented, interviews may provide an insight into the subject area from a different perspective.

The efficacy of a research interview is largely dependent on the relationship established between the researcher and participant. It is important to create a rapport that facilitates the establishment of an atmosphere conducive to the disclosure of personal or sensitive information. Trust is an essential element here. Although a promise of confidentiality cannot establish an immediate trusting relationship it does create a situation of trust in which the participant feels assured that information will not pass beyond predetermined boundaries. This provides a basis for an effective research relationship that the researcher should endeavour to maintain and develop. Trust creates an environment conducive to disclosure of reliable information, which is the cornerstone of an effective empirical research.

The promise of confidentiality can be instrumental in establishing the research relationship as it reassures the participants that their integrity will be respected and that the information that they divulge will be held in confidence. This will be particularly important when conducting research into illegal activities as it is unlikely that there are many altruistic criminals who are prepared to further the interests of academic research by

running the risk of prosecution for the crimes that they confide in the researcher. Equally, victims of crime may be hesitant to take part in research interviews without an absolute assurance of confidentiality for fear of reprisals and further victimisation. Surely, then, as this valuable participation is gained as a direct result of the promise of confidentiality, this should be honoured at all costs, as it was the price paid for the disclosure of valuable information.

In addition to ensuring the availability of research participants, confidentiality also plays an important role in strengthening the validity of the information that is obtained as it minimises the risk of participants 'censoring' information in accordance with their own subjective criteria. If the participants are not promised confidentiality, they may hold back information they do not want to be disclosed. In terms of research into illegal activities, the purpose of interviewing those involved in committing crimes would be defeated if the research subject did not feel able to discuss anything connected with their offending for fear of prosecution. Not only does this limit the efficacy of the research interview, as it prevents the full picture from being obtained, but it can also distort the information provided as participants alter details to fit in with their own, frequently erroneous, conceptions of the legal position.

Therefore, it is clear that in order to obtain full and detailed research information an unconditional promise of confidentiality is essential. However, it is important to determine whether such a guarantee is sustainable in law otherwise the researcher is making a promise that cannot be honoured. Is it ethical to make a promise that is instrumental in obtaining this information if the research subject cannot be protected from the consequences of disclosure, especially if the researcher knows that information is likely to pertain to criminal activities?

Confidentiality and the Law

It is first necessary to ascertain whether the research relationship and the information divulged therein is such as to attract a legal duty of confidentiality and, if so, the circumstances in which derogation is permissible. If the legal obligation of confidentiality is not absolute, it will be necessary to consider whether there are competing ethical considerations at play and, if so, which of these is to be considered paramount.

The legal duty of confidentiality used to exist only in the context of a pre-existing relationship between the parties or a contractual obligation.

It has expanded into a duty that exists independently in equity where its basis is that 'it is unconscionable for a person who has received information on the basis that it is confidential subsequently to reveal that information.'² Applied to the research context, this suggests that having promised confidentiality in order to obtain information, the researcher should not be permitted to renege on the promise at a later date.

As the circumstances in which a duty of confidentiality may arise are extremely diverse, no precise formula for determining its existence has been formulated. Instead, case law has developed three elements that must be present to establish a prima facie duty of confidentiality. These were outlined in *AG v Guardian Newspapers (No 2)* (the Spycatcher case) as:

- (i) the information itself must have the necessary quality of confidentiality about it;
- (ii) that information must have been imparted in circumstances importing an obligation of confidence;
- (iii) there must be an unauthorised use of that information to the detriment of the confider.³

In applying these principles to research interviews, it is clear that a duty of confidentiality could arise. The first requirement hinges on the nature of the information and the extent to which it is in the public domain. Information about involvement in criminal activity, whether as perpetrator or victim, is the type of information that is likely to be disclosed only in limited circumstances to a limited audience. The second requirement is satisfied by the nature of the research interview if it is used to discover information that would not otherwise be available, particularly if it is conducted under the auspices of an express promise of confidentiality. The third requirement has two aspects: unauthorised use of the information, and detriment accruing therefrom. In the Spycatcher case, Lord Keith suggested that if the confider were a private individual, the mere fact of unauthorised disclosure would constitute sufficient detriment to satisfy this requirement without the necessity for additional harm to flow from disclosure:

² *Stephens v Avery* [1988] Ch 449 at 482

³ *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109

The right to personal privacy is clearly one which the law should in this field seek to protect...I would think it is sufficient detriment to the confider that information given in confidence is to be disclosed to persons whom he would prefer not to know of it even though the disclosure would not be harmful to him in any positive way.⁴

This is not conclusive as Lord Keith's comments on this point were *obiter* and a contrary view was expressed by Lord Griffiths, who felt that some additional detriment, other than disclosure of that which the confider wished to keep secret, was required. Even if additional detriment is required, this may be satisfied by unauthorised disclosure of confidential information concerning unlawful activities. The consequences of disclosure for the perpetrator of otherwise undiscovered unlawful activity may include arrest, prosecution and even imprisonment, consequences that may easily be construed as detrimental. For the confider who has shared information regarding crime victimisation, unauthorised disclosure, even for the purest of motivations, may still be detrimental.

To involve the social services, police or victim support without the confider's permission is an encroachment on his/her autonomy that may represent an unforgivable incursion into the right to self-determination of someone who, through dint of their victimisation, is already substantially disempowered. Such an interference could surely amount to a detriment. Moreover, the knowledge of disclosure may induce a sense of anxiety and fear of reprisals from the perpetrator of the crime or a sense of embarrassment that such matters have become public knowledge. Although the extent to which such consequences could constitute a detriment is contingent upon the particular circumstances of each case, it is not impossible to envisage circumstances in which unauthorised disclosure of unlawful activity, whether in terms of perpetrator or victim, could amount to a detriment.

The circumstances under which a research interview takes place would satisfy these criteria for the imposition of a *prima facie* obligation of confidentiality. However, it is important to note that there are limitations on this right to confidentiality. These were recognised by Lord Griffiths in the *Spycatcher* case and come into three categories:

- (i) The general principle is premised upon the information being confidential and can therefore have no application once the

⁴ *Ibid* at 114.

information is in the public domain. However, limited disclosure does not constitute such publication so the fact that the information had been disclosed to a researcher or a limited amount of people would not disqualify it from protection under this category.

- (ii) The duty of confidentiality does not apply to useless information or trivia. Detailed information which will have value to academic research and which increases the knowledge of motivation of criminal actions hence providing further information as to how such crime could be combated could hardly be termed useless information or trivia.
- (iii) Confidentiality may, in certain circumstances, be negated by public interest.

Confidentiality and Public Interest

This third category is the one that is most likely to bring information regarding the commission of crimes outside the remit of information that is protected by confidentiality. The public interest in upholding confidentiality is well established in law but ‘public interest has two sides to it.’⁵ Thus considerations of confidentiality can be ‘trumped’ by a competing public interest. This has been clearly expressed by the House of Lords where it was said that ‘the private promise of confidentiality must yield to the general public interest ... truth will out unless ... a more important public interest is served by protecting the information.’⁶

This reflects the competing public interests at play in the research context. There is an interest in protecting the confidentiality of information acquired in the course of academic research as it enhances the availability and validity of information. The research may have an important contribution to make by increasing knowledge of certain types of offending. This may lead to the formulation of more effective preventative measures, hence to a decrease in the rate of offending. However, there is a competing public interest in the maintenance of law and order that requires that those who commit crimes be brought to justice. Additionally, depending on the nature of the crime that is disclosed, there

⁵ *Norwich Pharmaceutical Co v Commissioners of Customs and Excise* [1972] RPC 743 at 766 per Lord Denning.

⁶ *D v NSPCC* [1978] AC171at 218, per Lord Diplock

may be an interest in the prevention of contemplated crime especially if the commission of that crime would be injurious to the health or welfare of another person.

The Iniquity Rule

It would appear that the disclosure of criminal activity attracts no protection of confidentiality. This is commonly termed the 'iniquity rule' and stems from dicta in *Gartside v Outram* where it was said that:

There is no confidence as to the disclosure of an iniquity. You cannot make me a confidant of a crime or fraud and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such confidence cannot exist.⁷

This was the original source of the public interest defence, which involves adjudicating upon competing public interests. The modern restatement of this rule occurred in *Initial Services Ltd v Putterill* where it was said that:

It extends to any misconduct of such a nature that it ought, in the public interest, to be disclosed to others. The exception should extend to crimes, frauds and misdeeds, both those actually committed and those in contemplation provided ...the disclosure is in the public interest.⁸

Thus it would appear that an enforceable obligation of confidentiality could not exist in information relating to criminal activities whether these are undetected crimes or those in contemplation. This does not mean that there is no restriction on disclosure as cases have highlighted the need to breach confidentiality only so far as is necessary to bring the wrongdoing to the attention of the appropriate authorities. Hence, in *Francome v Mirror Group Newspapers Ltd*, the Court of Appeal refused to allow widespread disclosure by publication in a newspaper but allowed limited disclosure to the appropriate authorities to facilitate investigation of the allegations.⁹

⁷ *Gartside v Outram* (1856) 26 LJ Ch 113

⁸ *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405-6 per Lord Denning

⁹ *Francome v Mirror Group Newspaper Ltd* [1984] 1 WLR 892.

This is further illustrated in *W v Egdell*¹⁰ where a disclosure of a confidential report concerning a patient detained at a secure mental hospital made to the authorities was justified in the public interest as it revealed that the examining psychiatrist considered the patient would represent an ongoing danger to society if released. Thus if a research subject confided details of criminal activities during the course of the research interview, any obligation of confidentiality would not be absolute thus enabling the researcher to report the matter to the police if this were felt to be the appropriate course of action.

This means that a researcher cannot ethically promise any research participant absolute confidentiality if they are involved in illegal activities as this promise may induce disclosures that there is no legal obligation to respect. This raises the problems discussed previously of how then to ensure full and detailed participation when participants fear they may incriminate themselves. Failure to guarantee confidentiality is likely to have a seriously detrimental effect on the quality of research into illegal activities.

The Ethical Dilemma

Although there is no legal obligation to maintain confidentiality once illegal activity or behaviour injurious to public interests is disclosed, this does not mean there is a positive legal duty to breach the confidence by disclosing this information. Nor will the researcher engender criminal liability for failing to report the information to the appropriate authorities. Knowledge of criminal activity is not sufficient to engender accessorial liability and the offence of being an accessory after the fact was abolished by the Criminal Law Act 1967, as was the offence of misprision of a felony.

Therefore, although the law cannot compel the researcher to maintain confidentiality, it cannot compel him to disclose the information in the absence of a court order. The decision on whether to maintain the confidence becomes an ethical one. Ethical decisions arise when one has to decide between one course of action or another not in terms of expediency or efficiency but by reference to standards of what is morally right or wrong. Formulation of ethical principles is contingent on the subjective moral evaluation of the situation made by the researcher. The question could be 'Is it ever ethical to withhold knowledge of criminal

¹⁰ *W v Egdell* [1990] 2 WLR 471.

activity from the authorities?’ or ‘Is it ever ethical to disclose information revealed in confidence when it is believed that the information would not have been disclosed but for the guarantee of confidentiality?’ It is a matter for the researcher in each particular situation to make a decision and each individual will consider different issues when making the evaluation. This is the crux of the dilemma identified at the outset of this article, which is tacitly acknowledged yet not addressed by the British Society of Criminology’s Code of Ethics.

Some ethical issues may come into play which are particularly relevant to research into illegal activities. Information may be disclosed to the researcher in confidence that they feel morally obliged to disclose, especially if it relates to a contemplated crime which threatens the safety of a named individual and which could be prevented. Equally, the interview may be with a criminal who has been imprisoned for their crimes and who is so distraught that they are contemplating suicide. The researcher may feel compelled to breach confidentiality to prevent this by notifying the prison authorities. Perhaps it is true to say that when carrying out any research, there is a paternalism threshold below which the researcher feels compelled to intervene in order to prevent harm occurring. This will be a subjective matter that varies according to the values of each individual researcher.

The degree to which the researcher may feel ethically compelled to breach confidentiality may also relate to the types of crimes which were within his contemplation when the assurances of confidentiality were made. When interviewing those involved in illegal drug use, it is foreseeable that issues will be discussed that relate to criminal activities associated with the primary subject of the interview. It is also possible that other illegal issues will be raised such as theft to pay for drugs. The researcher must have these in mind when deciding to interview, hence should have made the decision to know about this without disclosing in the interests of obtaining good research information. However, if the research subject discloses that whilst on drugs they sexually abuse their children, this may be so far outside the contemplation of the researcher when confidentiality was guaranteed that they feel justified in derogating from that promise. This could also apply when interviewing victims of crime who suddenly disclose that they have committed crimes, such as a rape victim who reveals that they killed the rapist.

The principle behind this is that if the researcher deliberately engages in research about illegal activity, this and any associated crimes should be within his contemplation when guaranteeing confidentiality;

thus it would surely be unethical to breach confidentiality when such contemplated crimes are disclosed. However, if the disclosure is of an unexpected nature, the researcher would not have had an opportunity to consider it when deciding to guarantee confidentiality, thus may consider that this justifies the decision to reveal the information. In the absence of clear legal rules or a cohesive code of ethics relating to research into illegal activities, the decision is an entirely subjective one for the individual researcher to make. The choices available range from the stance that the research subject should not suffer detriment as a result of their disclosures hence that confidentiality is to be maintained at all costs, to the other extreme that all criminal activity, even that which is the subject matter of the interview, should be reported to the appropriate authorities.

The logical position is that if the researcher is not prepared to guarantee that everything revealed within the interview will be absolutely confidential, then no assurances of confidentiality should be given as it cannot be ethical to guarantee confidentiality that causes disclosure of information that the researcher has never been prepared to keep confidential. This causes problems that have been discussed about the absence of confidentiality in research, but this must be the correct position. If the researcher's ethical stance is that all wrongdoing should be disclosed to the authorities, they should not put themselves or the research subjects in the position where such information is likely to be confided in them.

More difficulty arises if the researcher determines from the outset that everything, no matter what, will be kept confidential but is then in a position where disclosure is compelled by law. If the courts order the researcher to disclose his records and give evidence in courts, refusal to do so will result in contempt of courts charges which could lead to the imprisonment of the researcher. This situation occurred in the United States, where a researcher was imprisoned for 169 days¹¹ for refusing to breach confidentiality regarding his research into a radical animal rights group. This places the researcher in an intolerable position. Face imprisonment or compromise the well-being of the research subject. However, is legal regulation the answer? An examination of approaches taken in other common law jurisdiction reveals a range of different methods of resolving this dilemma.

¹¹ *Re Grand Jury Proceedings (James Richard Scarce)* 1993 5 F3d 397 (9th Cir)

Legal Regulation of Confidentiality in Other Jurisdictions

- (i) **The United States.** Some jurisdictions have introduced legislation to clarify the status of information disclosed under a promise of confidentiality. Some American States have 'shield statutes', which provide varying degrees of protection for confidential information. Although initially established in relation to journalistic privilege and linked to the First Amendment, these are now thought to encompass any person gathering information with the intention to disseminate this information in some form.¹²

There is no Federal legislation addressing the situation hence the level of protection varies from State to State:

- total protection - all information obtained in confidence is immune from enforced disclosure - includes unpublished information and sources of information;
- prima facie protection - there is a presumption that all information will be treated as confidential but statutory provisions allow for removal of shield law in certain circumstances;
- qualified protection - an evaluation is made as to whether public interest is best served by disclosure or protection of information;
- protection for the source of information but not the information itself;
- registration - some States have specific protection for researchers where registration of the research is sought in advance - once registered, immunity from subpoena is guaranteed.
- no protection at all - eighteen States offer no protection.

Obviously, the level of protection available here is contingent on the State in which the research is conducted. Despite the divergence of

¹² See for example *Blum v Schlegel* 150 FDR 42, 44-45 (WDNY 1993)

laws in this area, there appears to be no possibility of a Federal shield law that would unify protection throughout America.

(ii) **Canada.** Privilege for researchers is not explicitly recognised in Canadian law but any claim of privileged communication is considered on a case-by-case basis by the ‘Wigmore criteria’¹³ which requires that:

- communications must originate in a confidence that they will not be disclosed;
- this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
- the relation must be one which in the opinion of the community (as determined by the court) ought to be sedulously fostered;
- the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

These criteria were used to defeat a contempt of court action brought against graduate researcher Russel Ogden of Simon Fraser University for refusing to disclose confidential information gleaned in his research concerning assisted suicide in AIDS patients when requested to do so at a Coroner’s inquest.

Unfortunately, the success of this action was immediately undermined by Simon Fraser University which promptly changed its consent form for participants to inform them that confidentiality was only offered to the extent permitted by law and that researchers would divulge information given in confidence if required to do so by any legal body. The rationale for this was said to be that they could not sanction their researchers disobeying the law. This is an erroneous assertion as ensuring that their research methodologies are in line with the Wigmore criteria is not disobeying the law but is using legal means to assert researcher-participant privilege. However, by changing the consent form in this way, the University has ensured that the information would not be construed as strictly

¹³ Wigmore, *Evidence in Trials at Common Law*, Vol 8, McNaughton Revision, para 2285.

confidential hence it would not satisfy the first of the Wigmore criteria so would not qualify for protection.

This is illustrated by another Canadian case¹⁴ in which incriminating statements made by a murder suspect to her pastor were held not to be protected by the Wigmore criteria although both parties considered the relationship to be of a confidential nature as there was no evidence of an expectation of absolute confidentiality in relation to these particular communications:

It is absolutely crucial that the communication originate with the expectation of confidentiality (in order for those communications to qualify as 'privileged' and to thereby be excluded from evidence). Without this expectation of confidentiality, the *raison d'être* of the privilege is missing.¹⁵

Hence it can be seen that only by guaranteeing absolute confidentiality would a researcher be able to make use of the Wigmore criteria to protect sensitive research information.

- (iii) **Australia.** The degree of protection available to Australian researchers varies from State to State. There is, however, a Federal statute dealing with confidentiality in research. The Epidemiological Research Studies (Confidentiality) Act 1981 was enacted to provide assurances of absolute confidentiality to participants in the Vietnam Veterans Study of Agent Orange. Once accepted for registration under this statute, researchers and participants are guaranteed absolute and unconditional confidentiality. This is limited to research funded by the Commonwealth thus excluding State-funded and privately-funded research. There is a further limitation that the research be 'by or on behalf of the Commonwealth' thus restricting the scope of statutory protection still further. Failure to obtain registration and subsequent concerns about the capacity to protect confidentiality has led to the suspension of important research projects in Australia whilst the legal implications of absence of registration were explored.

The only Australian State legislation in this area is the Australian Capital Territory Epidemiological Studies (Confidentiality) Act 1992 which was modelled on Commonwealth

¹⁴ *R v Gruenke* [1991] 3 SCR 263.

¹⁵ *R v Gruenke* [1991] 3 SCR 263 at 269 per Lamer CJ

legislation but without the restrictions regarding funding or scope of the research, hence any research conducted within the Australian Capital Territory could be registered.

Researchers in the Australian Capital Territory appear to be in a more favourable position than those elsewhere in Australia particularly those in Victoria where accessorial liability for researchers would appear to be a real possibility. In a paper given in 1995, Geoff Flatman QC, the Director of Public Prosecutions for Victoria, indicated several sections of the Crimes Act 1958 where possession of information gained in the course of research could engender criminal liability.¹⁶ Section 325 relates to any act which is done with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender which would include providing false information to the police and could include refusing to provide information. A researcher could also be held liable under section 326 of concealment for benefit if, knowing or believing a serious offence to have been committed, he accepts any benefit for not disclosing information which may be of material assistance in securing the prosecution of the offender. Mr Flatman indicated that the value of the information for the purposes of research could be considered to be a material benefit for these purposes.

This illustrates the two extreme positions in which a researcher could be placed. At one extreme, in the Australian Capital Territory, researchers of registered research know they can safely guarantee research subjects absolute confidentiality. At the other extreme, researchers in Victoria appear to be running the risk of criminal prosecution should they attempt to withhold information gained in the course of their research from the authorities.

¹⁶ Flatman, G, 'Victoria's Prosecuting Guidelines Related to Issues of Confidentiality and Research into Illegal Behaviours' University of Melbourne conference on Ethical and Legal Issues When Conducting Research into Illegal Behaviours

Conclusion

It could be argued that the disparity of approaches to the issue of confidentiality in research interviews throughout these common law jurisdictions illustrates the difficulty of formulating a practical and effective solution to this complex problem. Even if this is so, a solution must be sought. Research into unlawful activities benefits from the input of those directly involved, whether as victims or perpetrators, thus it is surely of fundamental importance that no harm should accrue to the participants as a result of their involvement in research. The problem is at its most complex in relation to perpetrators of criminal acts, especially if they disclose information revealing that they have caused harm to another person or, even more crucially, that they intend to do so. Possession of such information has value in terms of research but may be a burden to the conscience of the researcher.

It is clear that although the law may afford *prima facie* protection to research interviews, this would dissipate if the participant were to reveal information regarding criminal activity – ‘there is no confidence as to the disclosure of an iniquity’. Thus, the researcher cannot be legally compelled to uphold a promise of confidentiality in the light of such disclosures. However, what is equally apparent is that there is no obligation to reveal the information in such circumstances thus creating a loophole in which the question of disclosure becomes a matter to be determined according to the ethical stance of the individual researcher.

The ethical stance held will vary according to whether the researcher accords primacy to the integrity of the research process or to the final outcome. The first is a more deontological approach that divorces the consideration of the acceptability of disclosure from the content of the information. From this perspective, the question is whether or not it is ethically acceptable to breach a promise of confidentiality, which is considered in isolation from the content of the information or the consequences of disclosure. Such an approach can be determined in advance as the position should not alter regardless of the content of the interview as the researcher would consider breach of a promise of confidentiality to be intrinsically wrong. Despite the clarity and simplicity of such an approach, it is likely that many researchers will consider the ethical ‘tone’ of the interview to hinge upon the nature of the information confided and the consequences of disclosure or non-disclosure. This consequentialist approach is concerned with achieving an ethically sustainable course of action, thus balancing the merits of disclosure and

non-disclosure to determine a 'good' outcome. The determination of a good outcome is likely to be heavily influenced by the nature of the information disclosed during the course of the interview. As such, the promise of confidentiality is qualified by an implicit exemption that is contingent upon the content of the interview. This is problematic because anything other than an undertaking of complete confidentiality is inherently uncertain and wholly dependent upon the individual ethical evaluation of the information and the potential consequences of disclosure or non-disclosure by the researcher. This has potentially detrimental consequences for both the participant and the researcher who, particularly in the case of serious criminal activity, may feel heavily burdened by possession of the information and the responsibility of determining an appropriate course of action.

An additional difficulty with an approach which considers that it is the ends that must be ethically acceptable rather than the means, is that it is impossible to predict with certainty the content of any research interview. Thus, it is not that such researchers are acting in a deliberately duplicitous manner by promising confidentiality that may not be honoured but that unlawful activity of the particular nature that was disclosed was not contemplated by the researcher.

Given the range of views on the appropriate ethical approach to take when unlawful activity, whether foreseen or unforeseen, is disclosed during a research interview, there is clearly little certainty in this area. A clear and consistent ethical standard could be outlined by codes of practice, such as those established by the British Criminological Society. This would have the merit of consistency but it would be difficult for any Code to anticipate and address the range of situations that may arise. Research into unlawful activities clearly raises the potential for criminal acts to be disclosed during the interview but the nature and severity of these may vary dramatically. Moreover, the potential for unanticipated disclosure of more serious wrongdoing further complicates the task of establishing a uniform standard of practice.

Having considered the various approaches taken in other jurisdictions, a scheme of registration appears the most sensible means of addressing the problems posed by disclosure of illegal activity. Such schemes exist in relation to medical research and are governed by a specially established supervisory body. The establishment of a criminological research ethics committee would go some substantial way towards addressing the difficulties raised in this article.

An application for registration would require the researcher to have given thorough consideration to the potential for disclosure of information about unlawful behaviour. There is a clear distinction to be made regarding the disclosure of information regarding unlawful activity that is foreseeable in the context of the interview, such as theft to fund drug addiction, and the unexpected disclosure of criminal activity is that is not associated with the conduct under investigation, such as murder committed whilst under the influence of illegal drugs. A requirement that the researcher addresses the potential criminal activity that could be disclosed ensures that the researcher makes an informed decision to proceed with the research knowing that certain criminal activity is likely to be disclosed. In such circumstances, the researcher who feels that they would be compromised by possession of such information may wish to re-evaluate their approach to the research. Once the researcher has accepted that certain conduct is likely to be disclosed, there is no justification for departing from the promise of confidentiality. Once the research is accepted for registration, the promise of confidentiality should be enforceable against the researcher to the extent of the contemplated criminal activity. The problem remains that of the unexpected disclosure of unassociated criminal activity. Clearly, if neither the researcher nor the registration committee had contemplated the conduct in question, the ethical dilemma that was resolved by registration is resurrected. However, the onus of deciding upon a course of action should be removed from the individual researcher and passed to the committee who could determine a course of action that is appropriate in the particular circumstances of the case.

Whilst it is appreciated that this is not a final solution to the problem, it goes some way to ameliorating the ethical dilemma with which a researcher could be faced. Research ethics committees are common in medical and scientific research. The idea of a registration scheme would merely expand upon this and extend the remit of registration to other areas of research. Such a system would ensure that the implications of undertaking research into unlawful activities were fully addressed by the researcher and should remove from the individual researcher some of the ethical burden that may arise from disclosure of criminal activity.

Emily Finch
Lecturer
University of Reading