

# Mandatory reporting obligations within the context of health research: Grappling with some of the ethical-legal complexities

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Mandatory reporting of various forms of abuse, from violence to corruption, is an attempt by the state to intervene in circumstances where there is a public or a private interest that ought to be protected. This intrusion of the state into what is often a very personal space, such as the home, is largely justified on the basis of the need to provide protection to prevent further harm, and in services to vulnerable populations such as children, the disabled or the elderly. In some instances, researchers and other members of the study team may encounter reportable information requiring the consideration of mandatory reporting in the design, implementation and review of health research. This is not simple. There are complex and competing interests at play, particularly as there are differing approaches in law and ethical guidelines. This article aims to describe the mandatory reporting obligations in South African law, discussing the ways in which these provisions apply within the context of health research, and to propose some factors that could be used to determine whether it is ethical or not to report information.

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Mandatory reporting is aimed at the early detection of abuse and neglect to facilitate the identification of persons in need of care and/or protection and then to ensure state intervention.<sup>[1,2]</sup> Globally, it has been in place since the 1960s.<sup>[3]</sup> Initially only doctors had a legal duty to report suspicions of child abuse under mandatory reporting laws.<sup>[4]</sup> Later, further obligations were added to require reporting by other professionals, and the circumstances in which information should be reported were extended.<sup>[5]</sup>

In some instances, researchers and other members of the study team may encounter reportable information. This issue must be considered in the design, implementation and review of health research. There are complexities involved because of the differing approaches of the law and ethical guidelines. The law requires mandatory reporting and in most cases there is limited discretion regarding not complying with this obligation. However, ethical guidelines advocate a more nuanced approach, allowing in some instances non-compliance with the law. This creates an ethical dilemma of whether to report information or not. There is also the unanswered question of how to establish when it would be ethically justified not to comply with the law. This article builds on earlier work.<sup>[6-8]</sup> Its main objectives are to describe the mandatory reporting obligations in South African (SA) law; to discuss the ways in which these provisions apply within the context of health research; and to propose some factors which could be used to determine whether it is ethical to not report information.

## Mandatory reporting in SA law

There are two main clusters of reporting obligations in SA law. The first relates to special protections for three vulnerable groups:

children, the mentally disabled and the elderly. The second relates to knowledge of crimes that have been committed.

### Reporting aimed at protecting members of vulnerable groups

#### Reporting in terms of the Children's Act of 2005

There are several mandatory reporting obligations regarding children. They relate to certain harmful behaviours by adults or other children and to some circumstances in which children require protection. S110(1) and (2) of the Children's Act use mandatory reporting obligations to facilitate the identification of and the providing of assistance to vulnerable children to protect them from further harm.<sup>[9]</sup>

S110(1) of the Act lists persons who must make such reports, including for example, medical practitioners, nurses, psychologists, social service professionals and social workers.<sup>[9]</sup> There is also a broader category of voluntary reporting in s110(2) where 'any person who on reasonable grounds believes that a child is in need of care and protection' may report such a belief.<sup>[9]</sup> The use of the word 'may' implies that such persons are not compelled to report.

In terms of s110(3)(a) the reportable information must be submitted to the provincial Department of Social Development, a designated child protection organisation such as Child Welfare or the police for further investigation.<sup>[9]</sup> If the reporter acts in good faith, they are protected from civil liability in terms of s110(3)(b) of the Act.<sup>[9]</sup> In other words, even if the information later turns out to be inaccurate or false, they cannot be held liable. Against this background the following are reportable:

#### (a) Physical, sexual and emotional abuse

Abuse is defined very broadly in s1 of the Children's Act as any form of harm or ill-treatment deliberately inflicted on a child,

and includes: assaulting a child or inflicting any other form of deliberate injury to a child; sexually abusing a child or allowing a child to be sexually abused; bullying by another child; a labour practice that exploits a child; or exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally.<sup>[9]</sup>

For the conduct to be considered abuse, two criteria must be met: firstly, the alleged action or omission must cause harm or ill-treatment. Secondly, the act or omission must be 'deliberate'.<sup>[9]</sup>

The Children's Act in s110(1) provides an illustrative list of examples which indicate that abuse may be physical, sexual or emotional and that it may be perpetrated by any person.<sup>[9]</sup>

#### **(b) Neglect**

Neglect is described in s1 of the Act as being 'a failure in the exercise of parental responsibilities to provide for the child's basic physical, intellectual, emotional or social needs'.<sup>[9]</sup>

Parental responsibilities in terms of s18(3) fall on parents (in most situations), guardians, or other persons appointed to care for the child.<sup>[9]</sup> S2 describes four parental responsibilities: to care for the child; to maintain contact with them; to support them; and to act as the child's guardian.<sup>[11]</sup> Failing to meet any of these parental responsibilities could be a form of neglect.

#### **(c) Children in need of care and protection**

S150 of the Children's Act deals with children in need of care and protection. These are children in vulnerable circumstances.<sup>[9]</sup> S150(1) of the Act provides an illustrative list of circumstances in which children need care, including if they are not under the care and supervision of an adult (i.e. they have been abandoned, orphaned, or live on the streets); if they have behavioural problems; or if they are being neglected.<sup>[9]</sup> In terms of s150(1)(g) children will need protection if they are abusing substances; being exploited, maltreated or abused; are at risk if they are returned to the custody of a parent; or are being physically or emotionally abused.<sup>[9]</sup>

#### **(d) Bullying**

Bullying by another child is regarded as a form of abuse in terms of s1 of the Act and is reportable.<sup>[9]</sup>

#### **(e) Exploitative child labour**

S1 of the Act stipulates that certain forms of child labour are reportable. The Children's Act defines abuse as including a labour practice that 'exploits' a child.<sup>[9]</sup> It is submitted that this would be a practice that contravenes employment laws. The Basic Conditions of Employment Act provides in s43(1)(a) and (2)(a) and (b) that children may only work if they are older than 15, if the work is age appropriate and if it does not put their wellbeing at risk.<sup>[10]</sup>

#### *Application of mandatory reporting provisions to health research with children*

Almost all health research with children has the possibility of mandatory reporting obligations. Researchers and research ethics committees (RECs) need to be aware that if there is the possibility of disclosure of abuse (physical, emotional, sexual, bullying or child labour) or of the identification of children in need of care and protection they will have to, firstly, develop a reporting strategy and, secondly, include information on this strategy in the informed consent document. These obligations are mandatory for professionals in the study team and voluntary for everyone else.

#### **Reporting in terms of the Mental Health Care Act of 2002**

S11(2) of the Mental Health Care Act provides a reporting obligation in

relation to the abuse of users of mental healthcare facilities.<sup>[11]</sup> The Act in s1(xix) defines mental healthcare users as persons receiving care, treatment, rehabilitation or other services at an establishment for the mentally ill.<sup>[11]</sup> The reporting obligation is a very broad one on any person who witnesses any one of three forms of abuse, listed below. They must report this information to the provincial Department of Health in terms of s11(2).<sup>[11]</sup> The following are reportable:

- 'exploitation, abuse and any degrading treatment' (s11(1)(a));<sup>[14]</sup>
- being required to do 'forced' labour (s11(1)(b));<sup>[11]</sup> and
- being provided with care, treatment and rehabilitation services as a form of punishment (s11(1)(c)).<sup>[11]</sup>

#### *Application of mandatory reporting provisions to health research with persons in healthcare institutions*

These reporting obligations have a limited impact on RECs and researchers as they would only arise if the research was in some way related to institutional care of the mentally ill. Should they arise, however, the obligations would fall on all members of the research team.

#### **Reporting in terms of the Older Persons Act of 2006**

S1 of the Older Persons Act, 13 of 2006 defines older persons as women over the age of 60 and men over the age of 65.<sup>[12]</sup> In terms of s25(1) the reporting obligation in relation to this Act falls on any person involved in a professional capacity with an older person.<sup>[2]</sup> The Act also provides that 'any person' who suspects abuse or an abuse-related injury is under a duty to report this either to the Director-General of the Department of Social Development or a police official (s23(3)(4)(b)).<sup>[12]</sup> Where there is the possibility of an older person being in need of care and protection, it is a discretionary obligation in terms of s25(2) as in this instance any person 'may' report this to a social worker.<sup>[12]</sup>

The following are reportable:

#### **(a) Abuse or an abuse-related injury**

The Act (s26(1)) provides that it is an offence to abuse an older person and any person aware of this possibility must report it.<sup>[12]</sup> In s30(a)-(d) the Act defines abuse as any act or omission by a person entrusted with caring for the older person 'which causes harm or distress or is likely to cause harm or distress', including physical, sexual, psychological and economic abuse.<sup>[12]</sup>

#### **(b) Older persons in need of care and protection**

The Older Persons Act (s1) requires that older persons are provided with care, and this is the 'provision of "physical, psychological, social or material assistance"'.<sup>[12]</sup> A mandatory reporting obligation is created where a professional person exists, and a discretionary obligation is placed on any other person who observes an older person to be in need of care and protection (s25(1) and (2)).<sup>[12]</sup>

#### *Application of mandatory reporting provisions to health research with older persons*

All members of the research team would need to report abuse, whilst only professionals are required to report older persons in need of care and protection. It is a broad reporting obligation as it is not limited to those in institutions.

#### **Reporting illegal behaviour**

There is no general legal obligation to report criminal activity. However, legislation has created reporting obligations in a number of specific instances.

### Reporting in terms of the Drugs and Drug Trafficking Act of 1982

The Drugs and Drug Trafficking Act places reporting obligations on three categories of persons, first, the owners, occupiers, managers or persons in control of places of 'entertainment' (s10(1)(9a)).<sup>[13]</sup> Such persons are required in terms of s10(1) to report any suspicion of a person using or in possession of drugs on the premises.<sup>[13]</sup> Second, directors, managers and executive officers of financial institutions are required to report any suspicion that property has been acquired from the proceeds of crime in terms of s10(2)(a).<sup>[13]</sup> Third, stockbrokers who reasonably suspect that property acquired by clients is from the proceeds of crime (s10(3)).<sup>[13]</sup>

The Act (s9) also creates a discretionary reporting obligation on persons who are under a legal obligation to maintain confidentiality. This would include doctors, psychologists and nurses.<sup>[13]</sup> Such persons may report or allow access to their records where they believe it is necessary for the prevention of a defined offence.

Any reportable information must be given to the police (s9(b)).<sup>[13]</sup>

#### *Application of mandatory reporting provisions to health research with drug users*

There is only a discretionary obligation to report drug use and it is limited to researchers who are health professionals. It is likely to be relevant to research only if as part of the study participants are provided with healthcare and this information is disclosed as part of a therapeutic relationship within the confines of the study.

### Reporting in terms of the Sexual Offences and Related Matters Act of 2007

#### Offences against children

The Sexual Offences and Related Matters Act (s13-22) contains several dedicated provisions on sexual offences against vulnerable populations, including children.<sup>[14]</sup> There are six categories of sexual offences involving children including under-age consensual sex; rape; sexual exploitation; grooming; child pornography; and compelling children to witness a sexual act (s15-22).<sup>[14]</sup>

S54(1)(a) of the Act places an obligation to report any of these sexual offences to the police.<sup>[14]</sup> This is a very broad obligation on 'any person who has "knowledge" of such a sexual offence (s54(1)(a)).<sup>[14]</sup>

#### Mandatory reporting provisions and health research with sexually active adolescents

This reporting obligation is so broad that it includes reporting any knowledge of consensual, under-age sex. This is information which would be disclosed in most sexual and reproductive health studies. Strode and Slack<sup>[6]</sup> argue that thoughtless reporting may be harmful to adolescent research participants. They suggest that only 'exploitative sex' should be reported.<sup>[6]</sup> This is in line with the national ethical guidelines.<sup>[16]</sup> In a similar approach, McQuoid-Mason<sup>[17]</sup> suggests that reports should only be made if they are in the best interests of the child. It is suggested that the following factors be considered in establishing the best interests of children when reporting of consensual, under-age sex:

(a) Age of the child. Waiving the obligation is not appropriate if the child is below the age of 12.

(b) Peer sex. Sex is consensual but involves a child between the ages of 12 and 15 and another child between the ages of 12 and 15.

(c) No more than a 2-year age gap between the sexual partners. Sex involves a child who is 16 to 17 years old when there is more than a 2-year age gap between the sexual partners.

(d) Sex is not exploitative. Sex occurs between an adult and a child between the ages of 12 and 15 but is not considered 'exploitative'.<sup>[6]</sup>

#### Sexual offences against disabled persons

There are eight potential sexual offences against 'disabled persons', including for example, the offence of sexual exploitation of a person who is mentally disabled (s23-26).<sup>[14]</sup> A mentally disabled person is defined in the Act as a person who has a mental disorder or disability that impacts on their ability to appreciate the sexual act, or is unable to resist the sexual act, or is unable to communicate their unwillingness to participate in the sexual act (s1).<sup>[14]</sup> In other words, having a mental disorder or disability is not sufficient: this must impact on their capacity to appreciate and act on that appreciation.

S54(2)(a) of the Act places an obligation on 'any person who has "knowledge" of a sexual offence against a disabled person' to report it to the police.<sup>[14]</sup>

#### Mandatory reporting provisions and health research with disabled persons

In the situation discussed above, there is a very broad obligation to report a sexual offence against a disabled person. This obligation goes beyond disabled persons living in institutions. It is submitted that this situation is very different to that of adolescents, as some disabled persons may lack the capacity to provide consent to sex and there may be a real possibility of abuse. The context of the research and the possibility of uncovering such information and whether reporting would be ethical must be carefully considered.

### Reporting in terms of the Domestic Violence Amendment Act, 2021

In terms of s2B(4) of the Domestic Violence Amendment Act there is an obligation to report domestic violence being perpetrated against three very vulnerable categories of persons within the home, namely children, persons with disabilities and older persons.<sup>[15]</sup>

There are two categories of persons who must report. First, functionaries, who include among others: medical practitioners, healthcare personnel, social workers and educators. Second, any adult persons (s2B).<sup>[15]</sup> In terms of s2, the report must be made to a social worker or member of the South African Police Service.<sup>[15]</sup> Failure to report is an offence (s22(2B)(4)).<sup>[15]</sup>

#### Mandatory reporting when undertaking research on domestic violence

There has been a recent change in the law relating to domestic violence which mandates reporting. This means that all members of a research team doing research into family violence would incur reporting obligations if information were disclosed on abuse or if members of the research team become aware of physical, sexual, emotional or financial abuse against a child, disabled person or elderly person. There is no obligation to report abuse against an adult person.

### Reporting in terms of the Prevention and Combating of Corrupt Activities Act of 2004

*Mandatory reporting provisions relating to research with persons who may be aware of corrupt activities*

Given the high levels of corruption in South Africa, a mandatory reporting obligation has been created regarding such activities in The

Prevention and Combating of Corrupt Activities Act.<sup>[18]</sup> This provides that 'any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed' various corrupt acts worth more than ZAR100 000 must report these to the police (s34).<sup>[18]</sup> The term 'person in authority' is defined very broadly to include a:

- Director-General or an equivalent officer within a national or provincial department;
- municipal manager;
- public officer in the Senior Management Service of a public body;
- head, rector or principal of a tertiary institution;
- manager, secretary or a director of a company;
- executive manager of any bank or other financial institution; and
- partner, chief executive officer of an organisation responsible for the overall management and control of the business.<sup>[18]</sup>

*Application of mandatory reporting provisions to health research with government officials or persons in private companies who may be aware of corrupt activities*

These provisions have a very limited application to health research as the obligation to report falls on 'any person who holds a position of authority' and this would not include a researcher. The only obligation which may arise would be that researchers should inform any research participant who is in a position of authority that if they are aware of corrupt activities and disclose them in research – even if reported anonymously – this may lead to investigations into their broad area of work and may result in them being charged with failing to report corrupt activities to the police.<sup>[18]</sup>

## Key issues for researchers

### Situations which may require mandatory reporting

There are mandatory reporting obligations which are scattered through various pieces of legislation. Researchers must be aware that research with children, older persons, the mentally disabled, victims of domestic violence and persons aware of corrupt activities may all incur mandatory reporting obligations. The biggest category of reporting obligations is those that apply to children.

### Proof of reportable acts or omissions

If a researcher becomes aware of potentially reportable information there is no need for concrete evidence substantiating the information.<sup>[19]</sup> Persons reporting must simply act in good faith, i.e. honestly and impartially.<sup>[19]</sup>

### Implications of a report based on incorrect or inaccurate information

Most legislation indemnifies persons who report in good faith (see s110(3)(b) of the Children's Act,<sup>[9]</sup> s26(2) of the Older Persons Act,<sup>[12]</sup> s54(2)(c) of the Sexual Offences and Related Matters Act,<sup>[14]</sup> and the ) (a) and 2B (3)(a) of the Domestic Violence Amendment Act.<sup>[15]</sup> It is only the Prevention and Combating of Corrupt Activities Act which does not indemnify persons who make reports in terms of the Act.

### Consequences of failure to comply with mandatory reporting obligations

S305 of the Children's Act does not specify that failure to report is an offence.<sup>[9]</sup> However, an application could be made to order someone

to comply with the Act. S26(3) of the Older Persons Act provides that it is an offence not to report abuse and this could make a person liable for a fine, imprisonment of up to 5 years, or both.<sup>[12]</sup> Likewise, failure to report when required is a criminal offence. In terms of s54(2)(b) of the Criminal Law Sexual Offences Act an offender could face a fine, imprisonment (not exceeding 5 years), or both.<sup>[14]</sup> Finally, in terms of the Prevention and Combating of Corrupt Activities Act it is an offence to fail to report knowledge of potential corruption to the police.<sup>[18]</sup>

This article submits that if a researcher fails to report in line with conditions accepted by a REC they will not be criminally liable, as not to do so is ethically justifiable. This argument hinges on their lack of intention – a key element of any crime. It is less clear as to whether there could be civil liability.

### Applications for ethical approval

The national ethical guidelines require researchers to address issues relating to mandatory reporting in their protocols. Researchers need to submit detailed justifications for their approach to mandatory reporting. They are also required to provide details on how this will be managed.<sup>[16]</sup>

In their justification they would need to set out whether they are going to be complying or requesting a waiver of such requirements. If a waiver is requested, ethical justifications such as potential harm must be addressed and alternative means of protecting participants must be set out. Detail on any reporting obligations must be specified in the informed consent document to enable participants to self-select if they still wish to participate.<sup>[16]</sup>

## Key issues for RECs

### Mandatory reporting and the potential for further harm

Research participants have the right to privacy in all aspects of research participation.<sup>[15]</sup> However, the national ethical guidelines accept that mandatory reporting obligations may be a justifiable limitation on a research participant's privacy right.<sup>[16]</sup> Nevertheless, in terms of the ethical principle of beneficence there is an obligation on RECs to promote participant welfare through minimising harms.<sup>[16]</sup> Some authors have argued that mandatory reporting may result in unintended harm. For example, the possible negative outcomes of reporting elder abuse may outweigh the benefits and hence this issue would need to be raised with the REC.<sup>[6,20]</sup> Likewise, in the context of child abuse studies, some authors have highlighted how a mandated report starts an arduous process that can be more traumatic than the abuse itself.<sup>[6,21]</sup> It may also result in further physical or emotional harm to the victims and their family.<sup>[7,22-23]</sup>

This raises the question of when, if ever, research-related information is ethically reportable. Legally, there are no exceptions made for information obtained during health research. However, when research is conducted with minors, there is a range of interests at play and there may well be unintended consequences including increased risk of harm for participants when complying with certain reporting obligations.<sup>[6]</sup>

This article submits that in assessing whether it is ethical to waive reporting obligations there are several factors that should be considered by the REC, including the value of reporting in an under-resourced social welfare system. This requires asking whether there is the possibility of further social harms to research participants. A South African study on social workers' attitudes towards reporting under-age, consensual sex found that because of concerns about

the value of reporting most did not comply with the law but used counselling to address the issue.<sup>[7]</sup>

Secondly, is the violation of the ethical guidelines and the legal duty to maintain privacy justified? It should be taken into consideration whether the trust in the research relationship would be undermined. It is argued by some that without privacy victims are unlikely to disclose abuse<sup>[25,26]</sup> and this may undermine the integrity of the researcher-participant relationship.

Thirdly, is this limitation of privacy clearly explained in the informed consent document, allowing research participants the opportunity to choose not to participate given the potential consequences?<sup>[6]</sup>

Fourthly, speaking directly about the mandatory reporting of under-age, consensual sex, McQuoid-Mason<sup>[17]</sup> submits that the standard RECs should use is whether reporting is in the best interests of the child. Other authors suggest limiting reporting to instances where the sex is considered exploitative.<sup>[6]</sup>

Finally, if reporting is to be waived, what interventions or referrals will be used to ensure that vulnerable participants are assisted?<sup>[6]</sup> The ethical guidelines reflect these views in broad terms and mention the reporting of under-age, consensual sex as an example of how blindly following the law may be unethical.<sup>[16]</sup>

### Legal implications of waiving reporting for RECs

None of the offences set out above apply to RECs, as the reporting obligation falls only on the person working with the vulnerable population. However, the ethical guidelines do place the responsibility on RECs to protect the rights and welfare of participants and to ensure their safety.<sup>[16]</sup> This raises the question of whether the REC would be liable for harm that occurs after it has allowed a waiver of a reporting obligation.

Strode *et al.*<sup>[20]</sup> argue in the context of a REC approving self-consent for research with minors in contravention of s71 of the National Health Act that a REC would not be civilly liable for acting ethically. They base their argument on s73(2)(b) of the National Health Act which gives RECs the power to grant approval to research proposals which 'meet the ethical standards of that health research ethics committee'.<sup>[27]</sup> They submit that this requires the REC to focus on whether the approach is ethical or not. In doing so RECs would have to weigh up the ethical obligations to ensure participants are not harmed with the legal obligations to report information. The REC would also need to consider the possibility of further harm if the report is not made, which may result in direct harm to itself. Clear ethical justifications must be in place with either decision.

### Conclusion

With the law prescribing reporting and ethical guidelines favouring a more nuanced approach, there is an ethical dilemma for researchers and RECs when determining whether to report information or not.<sup>[6]</sup> Both legal and ethical guidelines attempt to protect vulnerable populations. The legal mechanism of mandatory reporting, although intended to facilitate state interventions to protect such populations, may have unintended consequences when the obligations are not specific enough, as is the case with consensual child sexual activity. RECs and researchers cannot ignore these obligations and they must be mindful

that they may arise in research with children, the disabled, certain victims of domestic violence, the elderly and persons in authority who become aware of corruption. A careful ethical analysis is needed in establishing how to address them within the context of health research.

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