

JISC Study to Explore the Legal & Records
Management Issues Relating to the Concept of the
Lifelong Learner Record

**Approaches to Areas of Particular
Legal Risk in relation to use of a
National Lifelong Learner Record
System**

The 'Aspect Killer' Report
v1.0

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A. Project Outline

A.1 Title

JISC Study to Explore the Legal & Records Management Issues Relating to the Concept of the Lifelong Learner Record

A.2 Background/Context

The Dearing Inquiry into Higher Education (1997) recommended the introduction, over the medium term, of a HE Progress File comprising:

- A transcript recording student achievement which should follow a common format devised by institutions collectively through their representative bodies;
- A means by which students can monitor, build and reflect upon their personal development (Personal Development Planning/Recording)

The Life-long Learner Record (LLR) extends this concept across the whole gamut of an individual's educational experience, and is designed to enable the learner to take control of and improve their own learning and performance, and more easily to transfer learning between different contexts, for example between the classroom and the workplace. However, the rollout of a national LLR system will clearly require a much higher degree of technological and administrative co-ordination between educational institutions at all levels, and will inevitably pose a number of difficult legal questions with regard to issues such as:

- the efficient, effective and fair collection, collation and use of learner data;
- the implementation of processes of identity management and security;
- assessments of the suitability of proprietary and open source software solutions;
- the responsibilities of educational institutions with regard to provision of effective services to students with special education needs.

A.3 Aims and Objectives

The Study aims to provide early and effective legal research and guidance to JISC LLR pilot projects and those engaged in drafting proposed learner information standards and specifications.

The specific objectives are to:

- Determine the perceptions of the legal and extra-legal risks and benefits of the LLR amongst stakeholders, regulators and other interested parties.
- Assess the legal risks to the main objectives of the LLR to determine if there are particular legal difficulties that might have the potential to turn into 'project killers'.
- Assess the legal risks that might arise in relation to the wider use of LLR data including linkages to external data sources
- Produce strategic reports on the key legal issues likely to affect the direction and viability of the LLR
- Create appropriate guidance documentation, provide advisory services for existing JISC LLR projects and contribute to JISC programme meetings in the programme area.

A.4 Methodology

The study will combine a number of research techniques - a literature review; interviews with key personnel from appropriate educational bodies, user representatives and regulatory agencies; the use of an expert group drawn from a range of organisations identified as key

participants in the study, and the use of an advisory group of industry and other organisations. The study will focus in part upon existing JISC LLR projects, such as the SHELL and NIIMLE projects, enabling them and their home institutions to provide relevant background to the analysis of the existing key legal issues.

A.5 Deliverables

The study will produce 4 workpackages aimed at supporting various aspects of the work of the JISC LLR projects, and those working on developing standardised metadata vocabularies or schemas for the LLR. The 4 workpackages will be:

- Project Killer Workpackage - an assessment of legal risks to the main objectives of the LLR to determine if there are particular legal difficulties that might have the potential to turn into 'project killers'. The deliverable of this workpackage will be a report.
- Aspect Killer Workpackage - an assessment of the legal risks that might arise in relation to the wider use of LLR data including linkages to external data sources. The deliverable of this workpackage will be a report and guidance documentation, where required.
- Legal Aspects of Metadata Workpackage - an assessment of the effect, over time, of the redefinition of vocabularies and the processes which use those vocabularies. The deliverable of this workpackage will be a report.
- Application Profiles Workpackage - an assessment of the legal aspects of generic application profiles, including vocabularies. The deliverable of this workpackage will be guidance documentation.

The findings will be disseminated to users via the Legal Study webpage, by contributions to JISC programme meetings, and by journal articles and conference papers.

B. The 'Aspect Killer' Report

B.1 Introduction

This report is the second report deliverable of the JISC Study to Explore the Legal & Records Management Issues Relating to the Concept of the Lifelong Learner Record. It follows up the first report "Legal Issues that could Block the Development of a National Lifelong Learner Record System" (the Project Killer Report)¹ which examined the possibility of there being such significantly intractable legal problems associated with the development of a national Lifelong Learner Record system, that such a system could never be feasibly delivered.

That report concluded that "while there are a range of legal issues that will have to be addressed if a national LLR system is to be successfully implemented, scenarios in which some aspect of UK law proves to be a 'project killer' appear highly unlikely." Indeed, the report noted, the key problems were likely to lie, not with the UK legal framework (although issues of data protection, privacy and confidentiality, in particular, would have to be addressed), but rather with the administrative development of a national LLR system. Here the report suggested that implementation problems might arise from what the author perceived as a continuing failure to actively engage both the general public and FE/HE staff in discussions about the implications, both social and legal, of the development of a national LLR system. Difficulties were also likely to arise if a clear function and purpose model for a national LLR system, allowing the early development of accepted protocols for negotiating appropriate (legal) future uses/development of the system, was not drawn up. Equally, it was suggested that the specification of a standardised technical and administrative infrastructure would be required in order to create a viable legally coherent infrastructure for a national-level system. Finally, the report suggested that those seeking to develop a national LLR system would need to be fully cognizant of international developments, both in Europe and beyond, and the functional requirements that might arise as a result of such developments.

This second report turns to discuss those legal issues, which while considered 'non-fatal' to the development of a National Lifelong Learner Record system, might significantly hinder the development of certain desirable aspects of such a system, particularly in terms of its development beyond being simply a basic transcript transferal system between educational institutions. The issues it raises are largely, but not wholly, derived from research carried out in conjunction with a number of pilot projects funded under the JISC MLEs for Lifelong Learning.² This research sought to identify the key legal issues with which the pilot projects were grappling, and to provide initial advice and guidance on how such issues might be tackled. None of the issues raised appeared to pose insuperable difficulties for the pilot projects at this early stage of development, but it seems likely that without the provision of clear direction/guidance from the JISC, effective wider regional or national implementation may potentially be slowed or obstructed.

A noticeable outcome of the work with the pilot projects is that the issues in this report demonstrate a rather more institutional, as opposed to overarching, focus. This is particularly noticeable in relation to discussion of issues of ownership and intellectual property rights, both in LLR system software/infrastructure, and in the content that might potentially be stored within them. Such issues, and how they are to be handled within a national framework, are clearly of great importance to many of the educational institutions

¹ Charlesworth, A. "Legal Issues that could Block the Development of a National Lifelong Learner Record System" (the Project Killer Report) - v1.0 (2004)
<http://www.jisc.ac.uk/uploaded_documents/ACFB77.pdf>

² Charlesworth, A. & Home, A. "Legal Issues raised by selected projects from the JISC MLEs for Lifelong Learning programme: Identifying areas where legal guidance is required" - v1.0 (2005)

involved. As such, clear guidance/policy formulation is likely to be required to ensure that FE/HE institutions understand the legal implications of particular policy decisions, and that neither institutions, nor learners, are unfairly disadvantaged by such decisions.

Privacy and confidentiality continue to raise problematic issues; in particular, the problem of maintaining compliance with the UK data protection legal regime in a digital environment in which practical application of existing regulatory requirements seems likely to be rendered increasingly difficult, and the report suggests that lessons might be usefully learnt from developments in privacy regulation being developed in other sectors.

Finally, the report turns to the legal practicalities of implementing wider regional or national LLR systems. In particular, it notes the types of difficulties faced by other large-scale IT projects, and how some of those difficulties might be addressed by careful construction of legal documentation, such as consortium agreements between project partners and contracts with suppliers for the provision of hardware, software and services.

B.2 Key Areas of Risk

The key areas of legal risk examined here largely revolve around issues with the potential to prevent the effective interaction of, or data transfer between, institutional and regional LLR systems; and issues which might prevent the use of certain types of information for LLR or personal development portfolio (PDP) purposes. Whilst they are not 'project killer' type risks their solution will require a significant degree of strategic planning and co-ordination across the formal education sector. At the very least, JISC will have to take steps to ensure that the project work that it funds in the area of eLearning does not inadvertently result in negative impacts in these areas.

B.2.1 Systems, Standards and Software

A key element in the construction of sophisticated LLR/PDP mechanisms will be the interoperability of institutional/organisational systems. Such systems will need to be able to import and export learner data using agreed standards, such as the IMS Learner Information Package (IMS LIP).³ In particular, it is probable that systems will need to be able to accurately handle legal metadata relating to issues such as data protection (e.g. metadata specifying purpose for processing and retention periods) in order that personal data transfers can be made in compliance with the requirements of data protection law.

As the field of LLR/PDP system development across the formal education sector is likely to attract considerable funding over the next decade it seems likely that, in addition to the developmental work being carried out by JISC programme projects, there will be considerable incentives for commercial software vendors to enter the market for such systems. It is clear that, in particular, the FE sector will, due to cost and staffing considerations, be inclined to opt for off-the-shelf vendor-supported software solutions. While, in principle, this approach could be legally neutral, it may raise questions with regard first, to the issue of standards development and compliance and, second, with JISC's policy of encouraging projects to produce system software under open source licences.

If there is significant vendor engagement in the LLR/PDP market, it is likely that vendors will seek greater input into the standards development process, and indeed may wish to both actively 'embrace and extend' standards. While there should be scope for encouraging

³ Wilson, S. and Rees Jones, P. *What Is... IMS Learner Information Packaging?* (2002) <<http://www.cetis.ac.uk/groups/20010801124300/FR20021029103504>> (accessed 17/04/05)
IMS Global learning Consortium Inc. The IMS Learner Information Package (IMS LIP) specification. <<http://www.imsglobal.org/profiles/index.cfm>> (accessed 17/04/05)

continued innovation amongst commercial vendors, particularly in the area of the development of proprietary extensions to common standards, such developments will require careful monitoring in order to ensure that the LLR/PDP software infrastructure used by FE/HE institutions remains broadly based on open standards and does not become effectively 'captured' by proprietary interests, to the detriment of effective system interoperability.

JISC's policy of encouraging, but not requiring, its funded projects to produce system software under open source software (OSS) licences is currently causing difficulties for many projects. Many project teams appear unclear as to the rationales behind particular types of OSS licence, and indeed about the effect of particular conditions contained within certain licences on the future development and exploitation of project deliverables. While the (currently draft) JISC document "An Open Source Policy for JISC projects"⁴ provides some basic guidance, projects appear to want more specific guidance, in particular as regards the choice of a suitable existing licence variant (there are over 50 variants) or, if necessary, about how to develop a new OSS licence variant. It is unlikely to be helpful in enabling the co-ordination of developments in the field of LLR/PDP systems if projects are all left to go their separate ways as regards their choice of licensing conditions.

B 2.2 Ensuring Data Privacy and Confidentiality in Distributed Systems

Existing JISC funded LLR/ePortfolio/eLearning projects seem generally to have been able to devise suitable data protection compliance mechanisms for the size and scope of their current operations, based on analysis of the flows of personal data within their systems, and supported by suitable contractual documentation, such as Joint Data Controller Agreements, Data Processor Agreements and Data Sharing Agreements.⁵ However, it is likely that the solutions thus far developed will not be readily scalable to the extent required by a national LLR/PDP system. Indeed, a national system, particularly one where the parties providing and receiving information may include institutions and organisations outside the formal educational environment, such as professional organisations and employers, might prove difficult, if not impossible, to adequately regulate given current data protection practices and procedures.

Work has already been carried out in this area, under the auspices of the DfES, by the Managing Information Across Partners (MIAP) Group.⁶ The MIAP Group has produced a Data Sharing Report,⁷ and a Data Sharing Framework and Guidelines for the sharing of data between MIAP partners.⁸ A key finding in the latter document is that the proposal to facilitate the transfer of personal data between institutions in the educational sector, via the creation of

⁴ Yeates, S. & Rahtz, S. "An Open Source Policy for JISC projects"
<http://www.jisc.ac.uk/uploaded_documents/Draft_JISC_Open_Source_Software_Policy.doc>
(accessed 17/04/05)

⁵ See, for example, the Union Education Online project. Charlesworth, A. "UEO Personal Data Flows and Institutional Relationships Diagram" v1.0 (2005)
<<http://www.tuc.org.uk/extras/UEODataFlows.pdf>> (accessed 17/04/05).

⁶ The MIAP Group consists of representatives of government agencies and representative groups such as the Association of Colleges, BECTA, Universities - UK. Individual FE/HE institutions were not individually represented.

⁷ Webtech Systems Ltd, "Data Sharing Project: Findings and Recommendations" v1.1(2004)
<<http://www.dfes.gov.uk/learning&skills/docs/Data%20Sharing%20Project%20Report%20V1%5B1%5D.1%202.rtf>> (accessed 17/04/05)

⁸ Webtech Systems Ltd, "Framework and Guidelines for the Sharing of Data between Partners of the Managing Information Across Partners Group" v1.1 (2005)
<<http://www.dfes.gov.uk/learning&skills/docs/MIAP%20Data%20Sharing%20Framework%20FINAL.doc>>

specialist mechanisms or channels, referred to in the report as 'legal gateways,' is in fact unlikely to provide a simple solution, because:

"It is not possible to create a legal gateway through existing legislation unless the [Data Protection] Act itself, or another Act that impacts on it is changed. Such changes require the full legal and governmental consultative processes to be used."⁹

It also appears from the former document that parties to MIAP differ in their interpretations of the law, do not always have a team or individual "Data Protection Officer" responsible for ensuring the organisation is aware of, and abides by the Act, and have concerns both with the potential to lose track of where data has been shared and why, and also that without proper processes, data on individuals might be used in a manner inappropriate to its collection. A particularly interesting finding was that "Personal and sensitive personal data sharing [between government agencies and educational institutions] is actually done on a more restricted basis than first thought"¹⁰

The work carried out by the MIAP group suggests that under existing legislation and current methods of data privacy regulation, there remains a considerable amount of work to be undertaken, legally, administratively and technically, before a national LLR/PDP system could be fully implemented. This will involve examining the precise legislative and regulatory changes that would be required, and determining whether these could be put in place at a national level without breaching the European Union regime for data protection, which the UK is legally obliged to implement.

Developments in data privacy regulation, concerned with designing mechanisms for the effective provision of data subject rights over personal data, within technical environments that are not conducive to current regulatory techniques and frameworks, are also taking place in other forums. In particular, work is being carried out in the mobile and web-based communications and transactions sector, where the Liberty Alliance Project is attempting to establish privacy mechanisms for identity-based services.¹¹ Given the rapid uptake of mobile and web-based communications and transactions by the general public, it is likely that these developments will impact upon the nature and modes of provision of LLR/PDP services to learners, and that at least some of the findings of organisations like the Liberty Alliance Project will be of direct relevance to the educational sector.

B.2.3 'Ownership', 'Stewardship', and Effective Records Management

While the issue of proprietary rights has arisen with regard to the development of LLR/PDP system software and standards, very little appears to have been said about the possibility of proprietary rights causing problems in the effective use of the content of such systems. In large part this is because the proprietary possibilities inherent in software and standards are rather more apparent, yet it is possible that the development and use of LLR/PDP systems might in time give rise to proprietary rights claims in content that will affect the ways in which institutions and learners can effectively utilise the systems.

Basic learner transcript data in the formal education sector does not, at present, appear to pose significant problems as regards ownership, primarily because it is difficult to see how it could be effectively commoditised, thus making the issue of ownership rights a financially viable one.¹² However, suggestions that learners will 'own their ePortfolio' are probably not

⁹ WSL, *op.cit.* n.8 at p.14.

¹⁰ WSL, *op.cit.* n.7 at p.7-9.

¹¹ The Liberty Alliance Project
<<http://www.projectliberty.org/>> (accessed 17/04/05)

¹² This interpretation might be different for other potential players in an expanded LLR scenario, for example, a professional organisation that charges subscription fees for provision of

wholly accurate, notably as regards those parts of an ePortfolio which are comprised of learner transcript data that an educational institution will create, process, and probably eventually destroy. With regard to such data, it is more accurate to say that the learner has some control over the use of, or access to, or has some legally exercisable rights over or in, the data. A more appropriate and effective way of looking at the position, in terms of the formal taught education sector, might be to regard the institution's relationship to the LLR data in an ePortfolio as one of 'stewardship', where 'stewardship' is defined as 'the assumption of responsibility for the proper management of learner data' and where the stewardship is underpinned by reference to, for example, data protection law.

Where matters become more complicated, is where the information/material held in an LLR/PDP system has been created by the learner, e.g. in the course of their studies, such as essays, software code, artistic works etc. Here, if the work is original work created by the learner, there is a clear proprietary right in the work, grounded in intellectual property law, which will, in the normal course, be owned by the learner. This ownership right has clear implications for the policies that are adopted by institutions as regards their access to, and control over, learner-created PDP materials, as well as learner expectations about the security and retention of such works.

There are likely to be further issues with learners who are working with the proprietary materials of others, for example a sponsored Ph.D. student, or a learner undertaking studies as part of professional CPD. The former may create original works in the course of their studies which by contractual assignment will belong to their sponsor, or other third party. Their placing of that work, or their reporting on their research, and particularly their ability to display that data to third parties, as part of their PDP process may thus be constrained by the dictates of that third party. The latter may wish to draw upon or incorporate information derived from their work environment when engaging in PDP processes, but this may bring them into conflict with commercial confidentiality, trade secrets law, or contractual requirements that will restrict their ability to do so. Additionally, where material in which third party rights exist is made available to staff of an institution, for example for supervisory, counselling or careers advice purposes, those staff will also need to be advised as to the external rights at issue and their responsibilities, in order to reduce the chances of deliberate or inadvertent disclosures for which staff and/or the institution may be held liable.

The issue of how to handle rights in learner-created works is one which is long overdue for critical examination in the education sector. As with the issue of staff-created works, institutions have tended to take a relatively *laissez-faire* approach. Learners are rarely instructed in the ownership implications of their work, and many institutions seem to assume that works created by learners in the course of their studies either belong automatically to the institution, or can be obtained by requiring a learner to sign a purported assignment at the start of their studies. The former perception is inaccurate, and the latter very likely unsafe.

A further issue relates to the liability of institutions for holding and/or disseminating learner-created works, particularly where these may be made available to third parties. In all circumstances where learners are able to store and/or disseminate materials via an institutional service, that institution must be aware of the potential risks that may arise from that content. The learner may (or may not, in the case of plagiarised works) own the work, but the institution may be the target for litigation in the event that a third party takes exception to its holding or dissemination. Allowing learners to disseminate material via an institutional service may, depending upon the material made available, and the potential audience, leave the learner and potentially the institution open to liability for such content issues as defamation, breach of copyright, contempt of court, obscenity and indecency etc. In such circumstances, it is clear that an institution planning to operate such a service will need to

services to its members, including maintaining a record of common professional development (CPD) achievements undertaken through the organisation.

think carefully about the guidance it provides to its learners, the rules (and sanctions) it adopts for inappropriate publication by learners, its administrative procedures for dealing with third party complaints about defamatory statements and breaches of intellectual property, and the administrative procedures for dealing with other agencies in the event of the publication of material in contempt, or which is deemed potentially obscene or indecent. These may involve significant financial and resource implications for the effective long-term operation of such a system.

B.2.4 Overoptimism, Overambition, Overspecification, Underestimation

The implementation of a national LLR/PDP system can be viewed as, in many respects, simply another large government-funded IT project. The problem is, of course, that large government-funded IT projects do not have a particularly good track record when it comes to timely, cost-effective delivery of the services originally promised. Many of the difficulties in this area, which frequently result in lengthy and expensive litigation, come from poor management of the project process, which itself usually stems from one or more of the following: the failure to fix a clear, coherent, and above all concrete set of project objectives; the failure to identify project risks, including legal risks; the failure to effectively allocate by contract the rights and responsibilities of the parties to the project in achieving the objectives and handling the risks; the failure to have processes for auditing and accountability of partners' adherence to their contractual rights and responsibilities; and failure to make provision for effective termination of a project that is failing, or the termination/replacement of partners who are not meeting their contractual obligations.

A significant potential risk factor with the current JISC approach to the possible development of a national LLR/PDP/ePortfolio system is the relatively lax approach to the construction and use of Consortium Agreements at the project level. While this does not yet seem to have resulted in major problems for projects in the MLEs for Lifelong Learning programme, it has, in at least one case, rather complicated the task of building upon the valuable work that a major regional project has achieved to date. In several cases, projects do not appear to have engaged in any serious risk assessment with regard to legal rights and liabilities until projects were well underway, with the result that there was no obvious capacity within the Consortium Agreement, or the project work plan, for coping with the costs and burdens of legal problems, partner disagreements and the appropriate assignment of legal risks. Additionally, JISC does not appear to have an effective oversight mechanism for ensuring that project Consortium Agreements are adequate, comprehensible, and understood by the project staff members who are undertaking the work that JISC is funding. It is worth noting at this point that, in this regard, the JISC MLEs for Lifelong Learning programme is not obviously a custom and practice 'outlier'.

As such, a key (if not the key) potential 'aspect killer' for the development of a National Lifelong Learner Record System is likely to be a failure to construct an adequate contractual framework for the development and delivery of the component parts, that clearly outlines the rights, risks, and responsibilities of the parties involved. It is fair to say that even with such a contractual framework in place, failure of aspects of the project may still occur. However, avoiding or overcoming such failures is likely to be made easier by the application of proper administrative processes in advance, rather than resort to acrimony or litigation in the aftermath.

B.3 Conclusions

The second phase of the Legal Study research suggests that a successful transition from the current position to the effective use of a national LLR/PDP system will require both institutions and JISC to address key practice deficiencies in a number of areas. JISC, in particular, will have to take a more pro-active leadership role in the areas of standards and open source licensing, will need to review the impact of developing technologies on its strategy for managing effective data sharing in FE/HE, and should, as a matter of urgency,

review its procedures for advance assessment of the legal risks of project bids, and the procedures for oversight of the adequacy of the Consortium Agreements of the projects that it funds.

B.4 Recommendations

The following recommendations are directed towards ensuring that, as far as is possible, work in LLR/PDP design and development is carried out in an environment in which legal difficulties which might limit the usefulness or interoperability of systems have been both anticipated and planned for. While the majority of the recommendations refer to policy issues within the remit of the JISC, they may also be of value in informing stakeholders, regulators and legislators, in a timely fashion, of both possible problems and potential solutions.

Recommendation 1 - Standards Development and Compliance

It is RECOMMENDED that JISC, in conjunction with other appropriate bodies, should actively monitor developer/vendor compliance with those interoperability standards relevant for a national LLR/PDP framework, and identify and assess proprietary extensions of those standards in order to advise institutions as to their suitability, or otherwise, for inclusion in institutional LLR/PDP systems.

Recommendation 2 - Open Source Licensing

It is RECOMMENDED that where JISC requests projects to consider making project software deliverables available under an open source licence, that JISC provides an option of a limited number of appropriate licences, and an overview of those licences' implications for the future development and exploitation of the software.

Recommendation 3 - Data Protection

It is RECOMMENDED that JISC conduct a review of the applicability of the work of the MIAP group to the developmental work being undertaken by the regional projects.

It is further RECOMMENDED that JISC request that the regional projects undertake a data protection mapping of their project in order to identify potential risks and to allocate responsibilities and liability between the partners.

It is further RECOMMENDED that JISC conduct a review of developing technology frameworks and practices relating to data privacy compliance in the mobile and web-based communications and transactions sector in order to assess the applicability of potential industry compliance strategies to the FE/HE environment.

Recommendation 4 - Proprietary Rights in Content

It is RECOMMENDED that JISC, as part of its developing strategy on rights in the digital environment, should survey current institutional practice with regard to rights in learner-created works, and should produce guidance materials for institutions as to appropriate mechanisms for assignment, licensing and other treatment of learner-created works.

It is further RECOMMENDED that JISC should produce:

- guidance materials for institutions to use with learners which identify appropriate and inappropriate uses of materials in a PDP context;
- guidance materials for institutions to use with sponsors and other third parties whose rights might be affected by the use of materials by learners in PDP activities, in order to structure an appropriate balance between the rights of the sponsor/third party and the PDP requirements of the learner

- guidance materials for institutions with regard to legal risks arising from circumstances where learners storing and/or disseminating materials via an institutional LLR/PDP service, and strategies for risk reduction.

Recommendation 5 - Risk Assessments and Consortium Agreements

It is RECOMMENDED that JISC require projects to complete a legal risk assessment as part of the project bidding process, in order that the relevant legal risks are identified and understood by both the project parties and the relevant JISC managers

It is further RECOMMENDED that JISC should provide projects with guidance on the appropriate structure and content of Consortium Agreements, with particular emphasis on project administration, partner rights and responsibilities, intellectual property, addition and removal of partners, and exit strategies.

It is further RECOMMENDED that JISC should develop a formal oversight procedure for project Consortium Agreements. This should review all project Consortium Agreements, at an early stage, for an appropriate level of compliance with the JISC guidance, as well as internal consistency and coherence.