

Phase 1 of the Legal Study: Progress Report – January 2005

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

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Introduction

The primary aim of Phase 1 of the Study to Explore the Legal and Records Management Issues Relating to the Concept of the Lifelong Learner Record (hereafter “the Legal Study”, or “the Study”) has been to provide legal research and guidance to JISC Lifelong Learner Record (LLR) pilot projects and those engaged in drafting proposed learner information standards and specifications.

The specific objectives have been 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.

The staff currently engaged in Phase 1 of the Study are Andrew Charlesworth (AC), Project Director and Dr Anna Home (AH), Research Associate.

Outcomes of Phase 1

The receipt by the University of Bristol of confirmation of funding from JISC just one day before the project was due to begin made it impossible to fill the post of research assistant on the Study within the originally envisaged timescale. AH was appointed to the post with effect from 1st July 2004. This issue delayed both the start of the research and, as a result, the timetable for deliverables outlined in the original bid for funding. However, the initial primary aims of Phase 1 remain attainable within a 12 month timetable.

The first report from the Legal Study - “Legal Issues that could Block the Development of a National Lifelong Learner Record System - The ‘Project Killer’ Report”¹ - delivered in June 2004, was the result of the first phase of the research which aimed to identify legal problems which might have the potential to significantly hamper, or even prevent, the establishment of a national Lifelong Learner Record system. The report concluded that there were presently no such legal problems, and noted that even should future events demonstrate that existing technical and administrative measures could not provide an effective and efficient solution to a particular legal problem, the UK government could still, in most circumstances, consider adopting legal measures via primary or secondary legislation to provide such a solution.

However, the report identified a number of areas where the nature of the existing developmental process for Lifelong Learner Records might contribute to future legal problems. These included:

- a perceived failure to develop wider public engagement in discussions about the development of a national LLR system across potential stakeholders within the LLR development sector – the LLR/ePortfolio/PDP community appeared quite insular;
- the lack of a clear (and frozen) function and purpose model for a national LLR system which would permit the early development of accepted protocols for agreeing appropriate future uses/development of the system;
- the lack of a clear plan for a standardised technical and administrative infrastructure for a national LLR system, without which any assessment of the likely legal risks could only deal in generalities;
- the need for clear and standardised data protection guidance, training and materials for LLR projects, drawing where possible upon on existing experience including LLR project discussions with, and advice from, the OIC;
- in the light of increasing European harmonisation and integration, the lack of discussion forums for LLR interest groups at a European level to share experiences of legal problems and solutions.

The Study researchers also examined the state of play with regard to the positioning of Lifelong Learner Records/e-portfolios/personal development planning (PDP) development within the framework of EU policy on social inclusion and exclusion in education, in a paper “The ePortfolio’s potential as enhancer of social inclusion: Reflections on U.K. initiatives in light of the EU e-inclusion policy” which was initially delivered at the ePortfolio 2004 Conference in La Rochelle. The central argument of the paper was that, in line with EU policy on social inclusion and exclusion, those developing ePortfolios/Learner Records should not just be ensuring that their systems/processes do not increase social exclusion, but must actively plan to develop and employ those systems/processes in an inclusive manner. To advance this aim, the developer community would need to:

- Deepen their understanding of the relationship between the use of ICTs and the complex dynamics of social inclusion/exclusion
- Widen their horizons and engage in dialogue regarding the values and rationales for developing and implementing ePortfolio systems

¹ Legal Issues that could Block the Development of a National Lifelong Learner Record System
<http://www.jisc.ac.uk/uploaded_documents/ACFB77.pdf>

- Make the study of social inclusion/exclusion effects of existing and planned ePortfolio projects an integral element of their work
- Seek active collaboration with public authorities who are responsible for delivering on EU and national social inclusion/e-inclusion policies

In the course of the research and delivery of this work the Study researchers began an active engagement with Lifelong Learner Records/e-portfolios/personal development planning developers across Europe. From these contacts it rapidly became apparent that little or no similar research to that of the Legal Study (with the exception of work on LIP, which is being championed and advanced by other UK projects) was currently being undertaken by researchers elsewhere in Europe in support of national/regional projects. Despite this obvious gap, there was a growing recognition in Europe that such research would be required, both at a national level, and as national projects developed, at an international level, to ensure a harmonisation of approach to the legal issues.

The second report from the Legal Study - “Legal Issues raised by selected projects from the JISC MLEs for Lifelong Learning programme: Identifying areas where legal guidance is required” - delivered in January 2005, was the first stage of the second phase of the Study research which aims to identify the legal risks that might arise in relation to the wider use of LLR data, including linkages to external data sources. The report surveyed a number of projects within the JISC MLEs for Lifelong Learning programme in order to:

- focus on the relevance of legal issues already identified by the Study as being likely to affect the development of transferable Learner Records and Personal Development Planning within FE and HE institutions
- permit the projects to flag up and discuss other legal issues as yet unidentified, so that the Study researchers can ensure those issues are also adequately taken account of when guidance documentation is written

The projects surveyed were chosen on the basis that they were engaged in the development of cross-institutional applications and tools which were likely to result in engagement with one or more of the key legal issues, including data protection, intellectual property law, and accessibility, identified by the Study researchers. The issues identified in this report will serve as the drivers for the practical legal guidance documentation being produced by the Study researchers. The key legal issues that were identified in this report were:

- The need for appropriate arrangements to secure effective management of intellectual property rights in the ‘background’ and ‘foreground’ project materials. Projects were often uncertain about who owned the IPRs in pre-existing material which was incorporated into applications and tools, and what agreements were in place for the future use of such material by project partners and others. It was also often equally unclear who would own the IPRs in materials developed during the lifetime of the project. This issue is particularly important where projects carry out development work with private sector organisations or where projects plan in the longer term to develop commercial products.
- The need for information about the legal (and practical) implications of developing project software applications and tools as open source software (OSS). JISC has indicated a preference for the development of LLR/e-portfolio/PDP software applications and tools under OSS licences, but projects were often unclear about the criteria to be taken into account when adopting particular OSS licences, and sometimes misunderstood both how such licences worked and the possible implications for controlling development of software applications and tools.
- The need for appropriate arrangements to secure effective management of intellectual property rights in the data contained in project applications and tools, including learner generated data. While most transcript-oriented learner data appeared uncontroversial in this regard, it was clear that ownership rights in valuable material created by learners in the course of their studies, and the use by learners of potentially sensitive/proprietary research data in the PDP process remained a potentially controversial, if largely unexplored, issue.

- The continuing need for clarity with regard to data privacy and confidentiality. Projects differed widely as regards the nature and scope of the data collected, the channels of collection, the mechanisms for collection, methods of data quality control, and authorised access by staff to learner records. The majority of projects were not currently engaged in significant linkages to external data sources, nor releasing learner data to third parties outside the project, and were unsure about their position were they to do so. While most projects had addressed DP matters to some degree, uncertainties remained even amongst maturer projects. Where apparently acceptable solutions had been arrived at, as with the NIIMLE project, they appeared to be project specific solutions, which would lead to difficulties transferring them to other environments, or scaling them up to larger groups of institutions.
- The need for information about legal requirements as regards accessibility. All the projects were aware of their obligations, and all were ensuring that they had taken, or were taking, reasonable steps to prevent discrimination against disabled learners. Most, if not all, were cognisant of the relevant accessibility standards for software based tools. The main uncertainties in this area stemmed from a perceived lack of clarity in the legislation with regard to ‘reasonable adjustments’ an issue that will only become clearer as the legislation matures.

Following from this report the Study researchers are currently engaged in the development of guidance documentation in the following areas:

- structuring intellectual property rights in educational projects that involve the use of background materials and/or the development of foreground materials.
- the legal implications of open source software licensing, covering the licensing of OSS code into and out of projects, as well as the relationship of OSS with copyright.
- the responsibilities of those holding/accessing transcript-oriented learner data (stewardship).
- the effective management of IPRs in student generated works created in and/or held on institutional applications.
- managing the interface between the requirements of PDP and the effective protection of proprietary information.
- data protection, with specific reference to determining data controller/data processor status; possible approaches to multi-institutional data protection frameworks; and third party access to personal data.

Additionally, the findings of this research will provide the structure for a one-day open legal workshop planned for April 2005 in Wolverhampton which will publicise the research and guidance to national and international developers of LLR/e-portfolio/PDP software applications and tools.

The research in the second report also grounds a further key deliverable, the report “Approaches to Areas of Particular Legal Risk in relation to use of a National Lifelong Learner Record System – The ‘Aspect Killer’ Report” to be delivered in January 2004, which will develop the policy issues underlying the practical guidance to permit informed debate within the community about the practical and legal implications of adopting particular approaches to the legal questions raised.

Work on the ‘Legal Aspects of Metadata’ workpackage is currently ongoing, having been put back within the Phase 1 timetable, primarily due to the need to address, as a matter of urgency, the legal issues raised by the JISC MLEs for Lifelong Learning programme projects. It is expected that the metadata research, including the work with Peter Rees-Jones of the University of Leeds to analyse the relevant metadata and develop generic application profiles with the aim of providing effective responses to the data protection, privacy, confidentiality and records management issues will now be completed by late February 2005.

The project researchers have been actively engaged in raising consciousness of legal issues in the LLR/e-portfolio/PDP community, attending and presenting at arrange of conferences and seminars, including:

- Expert Seminar on Converging Practice in Education and Employment, hosted by the JISC project ‘Specifying an ePortfolio’ at the University of Nottingham on 8 June 2004 (AC - attendee)

- CETIS LIPSIG event focusing on Accessibility and the Lifelong Learner Record on 23 June, and the MLE's for Lifelong Learning Programme Meeting on 24 June 2004, Trafford Park, Manchester. (AC - speaker)
- CETIS Pedagogy Forum Meeting: e-portfolios - pedagogical and social issues – University of Liverpool, 30 June, 2004 (AC - speaker)
- CETIS Pedagogy Forum and Assessment SIG Meeting focusing on Assessment & the educational aspects of CAA, and how the use of technical standards can help and hinder both the assessment process itself, and the development of appropriate tools and resources., Bolton Institute, 20 October, 2004 (AH – attendee)
- ePortfolio 2004 Conference The second International Conference on the electronic portfolio and covering ePortfolios for schools, higher education, continuing professional development and lifelong learning. Espace Encan, La Rochelle, France. 28 - 29 October, 2004 (AH - speaker)
- JISC/CETIS Conference 2004 e-Learning Tools, Standards and Systems, The Kassam Stadium, Oxford, 4-5 November 2004. (AC/AH - attendee)
- Centre for Learning and Teaching, University of Wolverhampton, Defining and Designing an ePortfolio System, Wolverhampton Science Park , 13 December 2004 (AH - speaker)

In November 2004, a JISCmail list called: <eport-legal> was set up to disseminate the Phase 1 deliverables to the wider community and to provide a forum for discussion of legal issues. Membership is currently available upon application to the Study researchers. While only list members are able to post to the list, it has a JISCmail web page where the archived discussions and project deliverables will be visible to a wider audience.

Issues raised by Phase 1 Outcomes and Ongoing Developments

The work carried out by the Study researchers in Phase 1 suggests that there are grounds for continuation of the Legal Study for at least a further year. This perception is reinforced by developments in the area of LLR/e-portfolio/PDP development at both a national and international level. While the JISC MLEs for Lifelong Learning programme ends in July 2005, the development of projects initially funded by the programme will continue via various other funding avenues (e.g. NIIMLE will be funded by DELNI for at least another year, PROSPERO has external funding for at least two years), and will provide the basis for a continuing longitudinal study of the legal issues encountered by those projects, building upon the second report from Phase 1, and for continuing development of the resulting legal guidance documentation, as the projects, their applications/tools, and the educational environment, mature.

It has also become apparent during the Phase 1 research that there are a growing range of e-portfolio/PDP projects working on learner record-related applications/tools/processes, both within and outside the JISC umbrella, that raised ongoing legal issues relating to their particular mode of operation, but whose operational characteristics were not captured by the Phase 1 research brief within the MLEs for Lifelong Learning programme. It seems likely from the outcomes of the current round of funding by JISC in this area that, over the coming months, a wider legal evaluation will be required to ensure an adequate and ongoing representation of the legal questions raised by JISC funded projects, to complement the work carried out by other bodies, such as the CRA, in mapping the benefits and risks of the different e-portfolio systems in use in the UK.

Additionally, Andrew Charlesworth has been involved with the DfES Management Information Across Partners (MIAP) programme of work which aims to reduce the Management Information demands placed upon the Post 16 education and learning sector. Andrew has represented JISC on the MIAP Legal Advisers Network, which is examining the legalities of data sharing with other organisations via the Data Sharing Framework, and the work of which is expected to continue over the next 12 months. The outcomes of the MIAP programme are likely to have a significant impact upon the accepted understandings of the permissible nature and scope of data sharing in the FE and HE sectors. Ongoing developments in the wider educational sector arising from the now almost certain adoption of a unique student identifier (possibly the National Insurance number) will require evaluation of the developing

methods adopted by FEIs and HEIs generally, and LLR/e-portfolio/PDP developers in particular, to ensure that their data sharing practices are both effective and legal.

The Legal Study has attracted a great deal of interest from outside the UK, notably from European LLR/e-portfolio/PDP Record developers and projects, as it appears to currently be unique within the EU in directly assessing, and suggesting potential solutions for, the legal issues arising from LLR/e-portfolio/PDP development. As a result, increasing number of links have been established with European interest groups and projects providing the Study researchers with the opportunity to benefit from input to and from a range of non-UK legal jurisdictions - this input has placed the Study in a prime position to take a lead in Europe in structuring the nature of the legal debate in this area, as part of a Phase 2 continuation. Given the disparities in administrative and legal frameworks and approaches across the EU even in supposedly harmonised areas of law, such as data protection, the ability to continue the dialogue with European developers and policy makers based on an established and ongoing research resource will afford UK developers and policy makers a key tactical advantage in the formation of standards and educational policy.

It has also become apparent from research contacts made during Phase 1 of the Study that there will be useful lessons to be drawn from the North American experience with LLR/e-portfolio/PDP development. Both the US and Canada have a longer history of employing portfolios (and now e-portfolios) in learning, teaching and PDP than the UK or other European countries.² While the US legal system, in particular, differs markedly in some areas from the UK legal system (e.g. data protection and privacy terms) the developmental approach for e-portfolio tools for PDP in the US and Canada has been much more commercially oriented. As such, it is likely to provide valuable insights into the legal issues that arise from attempts to encourage increased public/private co-operation in PDP/e-portfolio development within the FEI/HEI sphere, including personal data usage, intellectual property rights and use of OSS.

At present, as already noted above, the records management research specified in the Phase 1 research proposal remains underdeveloped, due to the changing priorities in Phase 1 of the Study suggested by the requirements of the JISC MLEs for Lifelong Learning programme projects. As this work develops, however, the utility of taking a longer term approach to the standards process is becoming apparent from the influence that this permits the UK to wield in influencing, at the very least, the European environment for LLR/e-portfolio/PDP development. As such, the path drawn in the initial Phase 1 bid for likely second year development of legal research in support of the UK and EU standards process remains an obvious avenue for continuing development.

² See for overview of e-portfolio developments in the US, Cambridge, B.L., Kahn, S., Tompkins, D.P., and Yancey, K.B. (Eds.) (2001): *Electronic portfolios: Emerging Practices in Student, Faculty, and Institutional Learning*. Washington, DC: American Association for Higher Education.