

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

**Legal Issues that could Block the
Development of a National Lifelong
Learner Record System**

The 'Project Killer' Report

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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. Executive Summary of Report

B.1 Placing the Legal Risks in a Broader Context

It is important to remember that no legal system operates in a vacuum and that the development and application of laws are influenced by a range of social and economic factors. The likelihood of disruptive or damaging legal challenge to a national LLR system will depend largely upon the perceptions of the general public about its acceptability and desirability. Resistance to such a system is likely to arise in circumstances where the public come to view a national LLR system as constituting one or more of the following:

- An unwarranted state or commercial intrusion into their lives;
- An unnecessary and costly bureaucratic data shuffling system;
- A potentially discriminatory or otherwise socially exclusive mechanism.

Resort to legal challenges by individuals or organisations to aspects of a national LLR system will likely demonstrate a failure, not necessarily of the system itself, but of the effectiveness of the information flow about its purpose, structure and use, from those designing and operating such a system, to those who are affected by it.

The key challenge for those seeking to implement a national LLR system is to ensure that all stakeholders in that system have the ability to access relevant and up-to-date information about its planning, development and implementation. Provision of information does not mean simply provision of favourable publicity material by the JISC projects and others. It means providing the general public with an overview of the pros and cons that have emerged during the planning and development process as well as forums for discussion of their implications.

Where there are issues with the potential for negative effects for some or all stakeholders, it should be possible to demonstrate that these have been openly raised and discussed with stakeholders, and that as a result they have been adequately addressed. The wider the stakeholder audience for these discussions, the more likely it is that potentially negative effects will be identified and can thus be avoided or ameliorated.

Significant reduction of key legal risks can be achieved by transparency in the planning and development process and a unified approach across the sector to the provision of information and the stimulation of debate would significantly increase the effectiveness of this approach.

B.2 Purpose and Functions of a National LLR System

The purpose and functions of a national LLR system currently remain unfocussed. As such it is difficult to make definitive assessments of the nature and scope of particular legal issues, or to develop protocols for establishing how to determine acceptable types of future data use or LLR system development. These will have to be addressed in order to provide reassurance to learners that their data will be fairly and lawfully dealt with, and to permit support service suppliers to undertake informed risk assessment and make provision for dealing with potential liability.

This uncertainty does not constitute a 'project killer' issue, but it will need to be addressed as a matter of urgency if meaningful progress is to be made in assessing the severity of future legal risks.

B.3 Key Areas of Legal Risk

Four key areas of significant legal risk capable of derailing the provision of a national LLR system are identified in this report. While, for reasons of clarity, they have dealt with

separately it should be understood that there are often overlaps between them, and that the first area, in particular, has implications for all the others

B3.1 Liability, Risk and the Administrative Framework

The first area relates to the technical and administrative structure of such a system – failure to adequately understand and address the potential legal risks to those involved in the provision of LLR support services (e.g. educational institutions, professional bodies, training organisations, trade unions etc.) will make it difficult for them to take adequate precautions to limit, or otherwise provide for, legal liability. Such uncertainty would make participation in such system much less attractive for potential support service suppliers.

In principle, this area provides no clear-cut ‘project killer’ risk, except inasmuch as the task of assessing potential risk factors, determining where liability should rest, and ensuring that LLR system support service suppliers are cognisant of these factors, is likely to prove a complex and time consuming process – as such, the law would not be the ‘project killer’ but inadequate investment in development and administration might be. Early development of a practicable technical and administrative structure will be key to the success of a national LLR system. Simply scaling up existing regional projects is unlikely to provide a suitable national framework in the absence of some form of centrally organised infrastructural support, in particular back-up/archiving.

B3.2 Data Protection, Privacy and Confidentiality

The second area relates to issues surrounding data protection, privacy and confidentiality – the value of a national LLR system could be reduced to a level of non-viability if key advantages of the system were to be rendered unlawful by virtue of failure to adequately provide for the requirements of data protection legislation when transferring personal data between LLR support service suppliers, or when supplying personal data to third parties. While data protection law is the key driver here, the right of privacy and the duty of confidentiality must also be understood.

Here again, the law provides no obvious ‘project killer’ risk. Data protection law aims to ensure that data subject personal data is processed fairly and lawfully, not to prevent it from being processed at all, except in certain very limited circumstances. There are very clearly legal issues to be assessed, notably in terms of determining that the purposes and functions envisaged for a national LLR system can be achieved fairly and lawfully; and that the technical and administrative structure can adequately provide data subjects with the means to enforce their legal rights within the context of what may well be a highly distributed data system.

B3.3 User Accessibility

The third area deals with a range of legal issues relating to discrimination and other forms of social exclusion. A national LLR system will, for example, have to be capable of meeting the requirements of:

- disabled users;
- users for whom a LLR transcript/PDP in English is of little or no value;
- users who have limited, or no, access to the technological base required to access electronically-held LLR data; and,
- users with overseas qualifications, learning experiences, or employment which do not map easily/at all to the national LLR system schema,

if it is to be both non-discriminatory and non-exclusionary.

This area does not appear to pose a ‘project killer’ legal risk as far as contemporary discrimination law is concerned. Many of the issues relating to non-discrimination in access

to electronic materials, including transcripts and PDRs, for disabled users will already have arisen in the MLE/VLE context within both the formal education sector (e.g. school, college, university) and will increasingly become an integral part of other educational forums, i.e. professional development/trades union training, as well. If the LIPSIG work on mapping learner information metadata is successful and, additionally, user information can be displayed across varying platforms and systems through use of XML, it is likely that technical solutions can be arrived at for many of the initial difficulties that may arise.

B3.4 European & International Legal Issues

The fourth area notes a range of legal issues that may arise from the development of a national LLR system based solely on nationally agreed principles/metadata, to the exclusion of international standards or international educational service providers. This is probably the area of greatest uncertainty, primarily because international co-operation in the creation of LLR systems and electronic portfolios appear still to be largely in their infancy.

As with the first 3 areas, however, it appears unlikely at this stage that developments on the European or international stage will provide an insurmountable legal obstacle to the development of a national LLR system.

B.4 Conclusions

The first phase of the Legal Study research indicates that, at this stage, **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.**

Should future events demonstrate that existing technical and administrative measures cannot 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.

B.5 Recommendations

The following recommendations are directed towards ensuring that work in LLR design and development is carried out in an environment which is most conducive to identifying potential areas of legal uncertainty at an early stage, allowing stakeholders, regulators and legislators to be made aware in a timely fashion of both possible problems and potential solutions.

Recommendation 1 - Widening Participation

It is RECOMMENDED that the JISC MLEs for Lifelong Learning Programme address the need for a unified approach to the encouragement of wider public engagement in discussions about the development of a national LLR system across the LLR development sector.

It is further RECOMMENDED that the JISC MLEs for Lifelong Learning Programme engage in a higher-profile campaign of publicity about the legal implications of a national LLR system within the FE/HE sector to seek broad input from administrators with learner record management responsibilities about issues and possible solutions.

Recommendation 2 - Function and Purpose Model

It is RECOMMENDED that the JISC MLEs for Lifelong Learning Programme co-ordinate the production of a function and purpose model for a national LLR system, to permit the early development of accepted protocols for agreeing appropriate future uses/development of the system.

Recommendation 3 - Technical and Administrative Infrastructure

It is RECOMMENDED that the JISC MLEs for Lifelong Learning Programme, in conjunction with relevant stakeholders, consider at the earliest opportunity the specification of a standardised technical and administrative infrastructure for a national LLR system.

Recommendation 4 - Data Protection, Privacy and Confidentiality

It is RECOMMENDED that the JISC MLEs for Lifelong Learning Programme develop a set of data protection guidance materials for LLR projects, drawing where possible upon on existing experience including LLR project discussions with, and advice from, the OIC.

It is further RECOMMENDED that the JISC MLEs for Lifelong Learning Programme incorporate discussion of data protection issues, including relevant DP instruction for LLR project teams, within the Programme meeting schedule.

Recommendation 5 - International Co-operation on Legal Issues

It is RECOMMENDED that the JISC MLEs for Lifelong Learning Programme support the development of discussion forums for LLR interest groups at a European level to share experiences of legal problems and solutions.

C Full Report

C1. Introduction

C1.1 Placing the Legal Issues in Context

Assessing whether particular legal issues might prevent the development of a national Lifelong Learner Record (LLR) system is complicated by the fact that none of those legal issues operates in a vacuum. It is certainly possible to state what the statute book says and what courts have decided in the past, but the need for the application of legal rules, and how they may be applied by the courts in particular situations, will be largely dependant upon the circumstances which have led an individual or an organisation to resort to utilising those legal rules. In short, context matters. As such, the likelihood of disruptive or damaging legal challenge to such a national system will depend largely upon the perceptions of the general public about its acceptability and desirability. Resistance to such a system is likely to arise in circumstances where the public come to view a national LLR system as constituting one or more of the following:

- An unwarranted state or commercial intrusion into their lives;
- An unnecessary and costly bureaucratic data shuffling system;
- A potentially discriminatory, or otherwise socially exclusive, mechanism.

With most, if not all, of the risks examined in this document, it is suggested that resort to legal challenge by individuals or organisations will likely demonstrate a failure, not necessarily of the LLR system itself, but of the effectiveness of the information flow about its purpose, structure and use, from those designing and operating such a system, to those who are affected by it.

In many ways this scenario mirrors that of data protection – if data controllers have a clear and legitimate purpose for their processing, if they process personal data fairly (a broader concept than ‘legally’), and if their systems are transparent and provide data subjects with information about the collection, use, and distribution of their personal data, then damaging disputes between data controllers and data subjects can, in the most part, be avoided. A LLR system may be effective and efficient in transporting learner information between organisations involved in an individual’s lifetime learning experience, but if users distrust the system, or feel that there is scope for their data to be misused by educational providers, third parties such as employers, or the government, then there will be resistance. This may take the form of non-compliance with, or abuse of, the system as well as political attacks and legal challenges.

Therefore, an important challenge for those seeking to implement a national LLR system is to ensure that all stakeholders in that system have the ability to access relevant and up-to-date information about its planning, development and implementation. The issue needs to see broad discussion, and those working on aspects of a national LLR system’s planning and development must be prepared to actively engage with those stakeholders, and with the media, to outline the considerable benefits of such a system, and just as importantly, to demonstrate that potentially negative outcomes have been openly raised, discussed with stakeholders, and have been adequately addressed. The work undertaken by the JISC MLEs for Lifelong Learning Programme, including this Study, go some way towards addressing those needs, although as a recent article in the *Times Higher Education Supplement* demonstrated,¹ this development work may have to raise its profile to ensure

¹ Tysome, T. ‘Portal combat’, ICT in Higher Education, Issue No. 3 *The Times Higher Education Supplement*, 30 April 2004. Contrary to this suggestions in this report, subtitled ‘A plan to create electronic student records is falling foul of data protection rules’ there is very little

that alarmist or inaccurate accounts of the plans for, and risks of, a national LLR system do not gain too much credence.

This should not be read as an endorsement of, or recommendation that projects engage in, 'spin'. The general public is increasingly sensitive to, and irritated by, obvious attempts to manipulate public perceptions, and continuous dissemination of unrelentingly positive information would rightly be regarded with suspicion. It is clear from the existing JISC LLR projects, that there are serious legal issues to engage with concerning the risk of, and liability for, failings in possible national level LLR system models, and these are the types of issues that need to be carefully and openly considered.

At present, there appears to be relatively little co-operation between the interest groups developing and piloting elements which may eventually form part of a national LLR system, in terms of jointly publicising the type of work that is being undertaken. When the pilot study for the ITT for this current Study was undertaken, the author found it difficult to get a clear picture of who was working in the field, what was being developed, and most importantly what the underlying rationales for the development of a national LLR system were. It is clear, following some research, that a national LLR system could have significant benefits for a wide range of stakeholders; however, neither the extent of those benefits, nor significant evidence that developers are aware of, and attempting to address, potential negative outcomes were readily obvious from the publicly available materials.

It can be established from discussions with individuals and projects working in the area that potential negative outcomes have been identified, and that considerable thought has gone into how such issues might be addressed. However, this debate does not appear to be readily apparent to people outside those interest groups. Equally, the issues identified by FE/HE institutions running development projects are often skewed towards concerns about allocation of institutional risk and liability within those projects, and as such the projects may fail to identify wider negative outcomes that do not immediately impinge on this aspect.

To borrow from the open-source software development world, widening participation in the national LLR system debate will help to more rapidly identify potential legal issues, as well as to generate possible solutions. Just as in software development, where "with a million eyeballs, all bugs are shallow", so in this context, "with a million eyeballs, all legal issues are shallow" - although it should be recognised that the shallowness of a problem does not necessarily mean that it will be simple to identify a solution, or range of solutions, to that problem, or to easily reach agreement upon what the optimal solution will be.

A reduction of key legal risks could be achieved by greater transparency in the planning and development process for a national LLR system, and a unified approach across the sector to the provision of information and the stimulation of debate would significantly increase the effectiveness of this approach.

evidence to suggest that existing data protection law would prevent the creation of a national LLR system, if such a system was structured with data protection in mind. However, it might prevent, or place restrictions upon, the use of information derived from a national LLR system by 3rd parties, other than the institutions providing the learner with educational services, without the consent of the learner. This is, however, hardly objectionable even if it has the effect of restricting the information gathering activities/abilities of a range of 3rd parties.

C1.2 Purpose and Functions of a National LLR System

There are two key questions that one has to address when one wishes to assess the legal issues pertaining to a national LLR system. One of those questions, which relates to the nature of the technical/administrative design of such a system, is addressed below. The other question relates to the purpose or purposes of the national LLR system, put simply, what is it intended to achieve? It is currently difficult to apply rules as to appropriate use of learner data in the absence of a relatively fixed understanding of the purpose and functions for which those data are being processed.

The Dearing Inquiry into Higher Education (1997) envisaged the introduction 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 type of Lifelong Learner Record normally envisaged appears to broadly follow the same pattern, containing:

- A Transcript, the summative element of the LLR owned by an institution, recording formally assessed achievement, and usually drawn from an MIS. There may be one or more Transcripts from one or more institutions within a LLR.
- A Personal Development Record (PDR) drawn from the private personal records the learner has developed through a Personal Development Planning (PDP) Process, of which there are two types: Private PDRs owned exclusively by the learner, often using a framework provided by an institution, and containing an honest self-assessment; and Shared PDRs in which the learner presents a selected profile of aspects of their development to an audience using some of the material from the Private PDR.
- A Portfolio, a collection of material which may be used with, or presented to, an external audience, such as examples of the learner's work or testimonials.

In this model, the LLR is designed to enable a learner to take control of and improve their own learning and performance, and to transfer learning between different contexts, e.g. between the classroom and the workplace. Most of the ongoing work on the LLR appears to envisage this kind of model, with the learner effectively exercising control of the use of the LLR data, and permitting educational service suppliers to transfer transcript data between themselves for administrative purposes (e.g. transfer of from a school/college of the learner's transcript to a University to permit the University to determine the learner's eligibility for access to University courses).

There appears to be nothing inherently legally objectionable in the development of this kind of LLR, subject to institutional compliance with existing good administrative practice on processing and transfer of learner data, and to observance of non-discrimination measures in terms of accessibility to the benefits of the resulting LLR system. A particular problem likely to arise, however, is that the development of a national LLR system will permit new uses of learner data, and open up the possibility of much wider transfer of that data to interested third parties, such as employers, and government agencies. It is likely to be the potential for 'creeping data use' in such a system that will most concern both privacy advocates and the public.

From a legal perspective, the possibility of future 'creeping data use' and/or the evolution of a national LLR system into something more than a useful tool for learner empowerment and efficient institutional transcript data transfer system, does not constitute an immediate legal risk that might derail a national LLR system. Indeed, forbidding outright all 'creeping data

use' or changes to the nature of the system, might well prove counterproductive for both learners and support service suppliers over the longer term. However, a failure to develop acceptable protocols for establishing the determination of acceptable types of future data use or LLR system development, as part of the initial implementation process, might suggest to learners either a lack of reasonable preparation, or a degree of duplicitousness - neither of which would inspire confidence in the system.

A clear definition of the purpose and functions of a national LLR system will be required to make definitive assessments of the nature and scope of particular legal risks, and to develop protocols for establishing how to determine acceptable types of future data use or LLR system development.

C2. Liability, Risk & Technical/Administrative Frameworks

An elemental problem with assessing the legal risks pertaining to the development of a national LLR system is that it remains unclear what technical/administrative form such a system might take. Currently this tends to force discussion of where significant legal issues may arise within a national LLR system into examining generalities, or to attempting to extrapolate from existing JISC regional projects, such as SHELL and NIIMLE, which are both currently developing technical/administrative LLR frameworks that are suitable for their specific regional purposes.

The SHELL project maintains an agreement between the University of Plymouth and the partner colleges under which the University hosts the servers on which the information is stored, and acts as data controller for its own student data, and as the data processor for the data provided by the colleges, who remain the data controllers for data on their students. The University does not have access to the data supplied by the colleges other than for system level processing, and the Consortium Learner Record is partitioned with learner data provided by the institution providing the educational service, and accessible only to that institution for the duration of that service provision. This appears to be a slight modification on the 'data silo' model of processing and storage, where the LLR data is stored locally, but is also accessible through a central administrative agency.

The NIIMLE project uses a framework in which information is passed between institutions, rather than stored in a central location. The partners in the NIIMLE project did not have a partnership infrastructure before the project began, and there was no obvious central or lead partner that could operate and control an infrastructure that relied on a central store. Instead, the project envisages a 'snowball' effect, which sees student information passed from institution to institution as a student passes from institution to institution. The amount of information held about a student will inevitably grow throughout this process, and the most up-to-date (and largest) student record would be held by the current home institution of the student. All previous institutions attended by the student will hold a record for each student frozen at the point at which the student ceased to study. This 'snowball' effect is likely to only happen at the point of institutional change, although the institutions may need to exchange data at other times during an academic year.²

Of the two projects, it appears that the SHELL project has the most likely scalable model but, according to the SHELL project team, their administrative model is likely to cause difficulties under data protection law because of the difficulty in sensibly allocating risk and liability between an hugely increased number of data controllers in a larger scale project. It is possible that a SHELL-type technical/administrative model - with regional data

² MLE for Lifelong Learning Programme: Study of Authentication Services: NIIMLE Profile
<http://www.angel.ac.uk/accessmanagement/jisc_as/niimle_profile.pdf>

hubs/controllers collecting learner data from regional educational providers and authorising the transfer of relevant parts of it to other educational providers within the national (or international) LLR system learner data, or to non-educational provider third parties determined by the learner, and archiving the data within a segmented national data silo - might provide a solution. However, the allocation of risk and liability within this framework would still depend on the interpretation by the OIC of which legal entity (either alone or jointly or in common with other legal entities) is determining the purposes for which and the manner in which the personal data are processed.

From a legal issues perspective, the types of question that will need to be asked of any are essentially:

- Where might legal risks arise in the technical/administrative framework of an LLR system and who or what is threatened by them?
- How serious are those risks and could/should countermeasures be reasonably implemented to avoid or reduce them?
- Are the risks such that neither reasonable countermeasures, nor adequate methods of redress for injured parties, could be devised?
- Who should be liable in the event of particular failures within the system, and are they likely to be able to provide adequate redress for injured parties?
- Would a catastrophic failure in the system leave learners, educational service providers or reasonably foreseeable third parties in a worse situation than a similar failure in the existing system?

Legal certainty about the allocation of risk and liability within a national LLR system will be essential for educational service providers to make informed provision to ensure that they can meet their legal responsibilities technically, administratively and fiscally.

C2.1 Where might new legal risks arise?

Much of the collection and use of existing learner data within educational service providers should already be governed by institutional policies and guidelines for the handling of such data. The main areas where new risks are likely to occur in a new national LLR system are thus:

- at the time of transfer of learner data from an educational service provider to another educational service provider, to an information intermediary (e.g. UCAS), or to an authorised third party, such as an employer;
- at the time of receipt of learner data by an educational service provider from another educational service provider, from an information intermediary (e.g. UCAS), or from a third party, such as an employer.

At these 'boundary points' there is considerable potential for:

- provision of inaccurate or inappropriate learner data;
- provision of accurate learner data which has inaccurate or missing metadata;
- provision of learner data to the wrong recipient;
- provision of learner data to a recipient whose system is inadequately secured against unauthorised or unlawful processing;

- provision of learner data to a recipient whose system is incapable of maintaining or adding essential legal metadata (i.e. temporal or purpose metadata)
- misunderstandings about responsibility for learner data (e.g. who is a data controller/data processor for the purposes of data protection law).

Some of these possibilities are equally possible in existing learner data transfer systems, and may already be adequately provided for in terms of risk allocation agreements between the respective parties. However, the scale of a national LLR system is likely to provide an ever more complex set of interconnections between educational service providers, information intermediaries and third party. A national LLR system will have to be capable of ensuring, or providing a mechanism or mechanisms to allow educational service providers to ensure, that parties with access to the national LLR system maintain adequate data processing standards.

The main legal risk areas within a national LLR system will be the data transfer interfaces between parties with access to learner data from the system. The misuse or loss of learner data arising from problems/misunderstandings at these points is likely to raise the most complex questions of responsibility/liability.

C3. Data Protection, Privacy and Confidentiality

It is possible that the value of a national LLR system could be reduced to the level of non-viability³ if key advantages of the system⁴ were to be rendered unlawful, by virtue of failure to adequately provide for the requirements of data protection legislation when transferring personal data between LLR support service suppliers, or when supplying personal data to 3rd parties. Data protection law will be the central issue here, although it will be useful for providers of LLR services (and relevant employees) to both understand the basic principles of, and be aware of developments in, the related fields of privacy and confidentiality law, and where necessary to be able to explain the basic principles to learners, and to 3rd parties wishing to gain access to data contained in the LLR system.

Additional concerns have been raised about the possibility that a national LLR system would involve a monolithic national LLR database, and the possibility that some form of unique identifier, such as a unique learner number, would be required. It is not clear at present that either of these would be necessary for a national LLR system, although there are obvious arguments for and against each. With regard to both, it would seem that significant government involvement would be required to bring about their implementation, and that if they were to prove necessary, the government would be in a position to impose more (or less) stringent protections for privacy upon their use. These issues remain within the realm of speculation and public debate and cannot therefore presently be meaningfully located within a discussion of existing legal issues.

³ i.e. the benefits to learners and education providers would not justify the cost of the implementing the system.

⁴ i.e. ease of transfer of relevant learner data between and within education providers, and ease of access to transcript data, learning resources, information about careers and courses and online support for the learner.

Whether a national centralised LLR database or a unique national learner identifier are a good or bad thing are political rather than legal questions. Data protection law does not preclude the development and use of either; public opinion might.

C3.1 Will UK Data Protection law preclude a National LLR System?

There is a tendency in some circles, notably the media, to portray UK data protection legislation as unduly obstructive to the use of personal data by 'legitimate' organisations for 'legitimate purposes'.⁵ This type of portrayal usually fundamentally misunderstands the purpose of data protection law⁶ and often the practical implications of the current law as well.⁷

The purpose of data protection law is to ensure that an individual's (the data subject) personal data is processed fairly and lawfully. The law provides that, as a data subject, an individual should have the right to a degree of control over their personal data, and the right to know about uses and transfers of that personal data in order to enforce the fairness and lawfulness of any processing. None of these rights necessarily preclude the lawful processing of an individual's personal data, but they mean that the ability of a data controller to engage in lawful processing is usually subject to certain conditions.

A common misunderstanding is that in order for a data subject's personal data to be processed they must always have granted consent. This is not the case. Schedule 2 and 3 of the Data Protection Act 1998 contain the conditions relevant for the lawful processing of personal data and sensitive personal data respectively and both provide a wider set of conditions than simply consent. However, it is true that organisations often prefer to have some indication of consent, as this means that subjective decisions about the other grounds for processing do not have to be made.⁸ Providing for this consent 'comfort zone' for data controllers may prove problematical within a national LLR system.

⁵ See Note 1.

⁶ It has been argued that the Data Protection Act 1998 is less a privacy enhancing mechanism than a mechanism for validating the commodification of data, or for justifying the overriding of privacy interests in the 'public interest'. See Leith P, 'Genetic Privacy: A challenge to Medico-legal Norms, by Graeme Laurie', Book Review, *The Journal of Information, Law and Technology (JILT)* 2002 (2) <<http://elj.warwick.ac.uk/jilt/02-2/leith.html>>. While this may be unduly harsh, it is undoubtedly the case that the main purpose of the Act is not the prevention of the processing of personal data, but the setting of minimum standards of privacy protection for those wishing to process such data.

⁷ In fact, in many cases where the Data Protection legislation is blamed for causing harm to individuals by blocking the use of personal data by 'legitimate' organisations for 'legitimate purposes', the fault in fact lies with poor or inconsistent records management practices (e.g. the Soham case, where the Humberside police destroyed computer records of sex allegations against Ian Huntley) or poor understanding of data protection law (the Soham case, and British Gas case, where British Gas disconnected the gas supply of an elderly couple in their late 80s, due to an unpaid bill, and then claimed, after the couple had died, that they did not notify social services because the couple had not consented for them to do so).

⁸ This is essentially where British Gas (See Note 7) appears to have erred. The elderly couple withheld consent to be added to a priority list to receive care, and this meant that (by virtue of relating to their physical or mental health or condition) British Gas had to make a determination as to whether to pass on the information to social services was in the couple's "vital interests" – as the weather was temperate and the couple appeared in good health British Gas staff appear to have decided that this test was not met. In retrospect, this appears

Educational service providers already process considerable data about the learners to whom they provide services. They also pass that data on to a range of third parties. For example, at the FE/HE level both the internal organisational processing and the transfer of learner data to third parties is usually carried out on the basis of consent, by virtue of the fact that the learner has signed a matriculation document containing a data protection statement, or perhaps a specific data protection consent document, permitting the institution to carry out those functions.⁹

As such educational service providers understand the nature of their role and the extent of their obligations as data controllers when learner data is processed by their internal administrative systems. The difficulty with a national LLR system is that it may result in educational service providers finding themselves in situations where learner data for which they are data controller is being processed in circumstances where they have to rely on other partners in the LLR system to maintain those obligations and uphold the rights of the data subject under the Data Protection Act. In such circumstances, educational service providers will want to be able to clearly determine the extent of their own liability for unlawful processing, and the extent to which such liability can be allocated, by Service Level Agreement or contract, to other parties in the LLR system.

The aim of those seeking to develop a national LLR system appears to consist of two key elements:

- The provision to the lifelong learner of a LLR consisting of a Transcript, Personal Development Record and a Portfolio over which the learner exercises control with regard to the disclosure of information to third parties;
- The provision of learning resources, information about careers and courses and online support linked to elements of the learner's LLR, in accordance with the learner's wishes.

Neither of these elements appears to be fundamentally in conflict with data protection legislation, indeed, it is arguable that, depending upon how a national LLR system is constructed, learners may be provided with more control over their personal data, and how it is presented to third parties than at present.¹⁰

Where problems will arise in relation to data protection law is if a national LLR system is constructed in such a fashion that:

- a data subject within the LLR system cannot adequately ascertain that their personal data is being processed in conformity with their legal rights, for the purposes that the relevant data controller within the LLR system has declared, as well as any preferences that the data subject has expressed and which the data controller is legally obliged to respect;

to have been a rather poor decision, and probably one that British Gas personnel were not in suitably qualified to determine.

⁹ It is a matter of debate as to whether many learners in fact read (and understand the implications of) what they are signing – a common organisational data protection failing is to not do enough to ensure that data subjects actually understand both their rights, and the data controller's obligations, with regard to the processing and transfer of their personal data.

¹⁰ An assessment of the full implications of the Data Protection Act 1998 for the development of a national LLR system is outside the purpose of this document. However, it should be noted that it might, for example, be necessary to make provision for safeguards to prevent 3rd parties placing unfair pressure on learners to release information that they do not wish to disclose from their LLR. At present, the DPA 1998 prevents 3rd parties from requiring data subjects to make 'forced' SARs with regard to certain records (criminal - S.56) in circumstances of recruitment, continued employment, or supply of goods, facilities or services to the public or (medical – s.57) in contracts.

- a data controller within the LLR system cannot ensure that personal data for which they are responsible is being processed in conformity with their obligations and the rights of the data subject under the Data Protection Act;
- unauthorised third parties are granted, or able to obtain access to a data subject's personal data within the LLR system.

In the absence of an agreed model for a national LLR system, it is difficult to assess how easily such problems could be addressed. However, it is clear that with careful forward planning (and consultation with the Office of the Information Commissioner), none of these issues should be insurmountable if a suitable technical and administrative framework is devised.

Data protection law is not an insurmountable barrier to the creation of a national LLR system. However, clear policy on data protection, privacy and confidentiality issues, including determinations as to data controller responsibilities, risks and liabilities, and how accountability to data subjects will be ensured will have to be an integral part of pre-development planning for such a system.

C4. User Accessibility

C4.1 Disability Requirements

The Special Educational Needs and Disability Rights in Education Act 2001 (SENDA), removes the previous exemption of education from the Disability Discrimination Act (1995), ensuring that discrimination against disabled students will be unlawful. Institutions incurred additional responsibilities in 2003, and the final sections of legislation come into effect in 2005. The legislation applies to the UK (except Northern Ireland). As the Act is an amendment to the existing Disability Discrimination Act 1995 (DDA), it only protects people defined as disabled under that legislation. Under SENDA all publicly-funded FE and HE institutions, schools with post-16 provision, and local authorities providing further, adult or continuing education or training will have responsibilities.

It is unlawful for institutions to treat a disabled person 'less favourably' than they treat, or would treat non-disabled people for a reason which relates to the person's disability. If any arrangements at the institution place a disabled person at a 'substantial disadvantage', the institution is required to take such steps as are reasonable to prevent that disadvantage. Thus, since 2002, institutions have been required to change policies and practices, e.g. checking all new electronic courseware to ensure it is accessible to disabled students. From 2003 institutions have also been obliged to provide auxiliary aids and services where these would help to prevent substantial disadvantage, e.g. introducing specialist software on computers for a visually impaired or dyslexic student.

It is worth noting that, in addition to learner use of the LLR system, educational service providers may also have disabled employees, and they too will require access to the LLR system under non-discriminatory conditions.

The implications of the DDA and SENDA for a national LLR system seem relatively straightforward, as indeed they do for the implementation of MLE/VLEs in FE/HE. Where a national LLR system enables non-disabled learners to take control of and improve their own learning and performance by virtue of provision of learning resources, information about careers and courses and online support linked to elements of the learner's LLR, all reasonable steps should be taken to ensure that necessary arrangements are made to ensure that disabled learners have the same or similar functionality. Failure to take such

measures will breach the law. How this will work in practice will depend very much on the eventual nature of the interface to the national LLR system, for example, educational service providers seeking to provide customised electronic interfaces to LLR data for their learners will be likely to be required to ensure that such interfaces are not incompatible with relevant standards for Braille printers and screen readers.¹¹ It is unlikely however, that disability rights legislation will pose a 'project killer' legal risk as technological solutions are likely to be available.

C4.2 Language Requirements

There appear to be no legal requirements applicable to a national LLR system with regard to provision of learner data in particular languages.

C4.3 Temporal and Locational Requirements

Modern education, as well as potentially continuing throughout a learner's lifetime, has an increasingly international dimension. FE and HE institutions routinely accept students from across the world, and overseas students contribute, in particular, a significant percentage of the UK postgraduate population. Equally, UK students are increasingly looking abroad for educational opportunities. The growth of distance learning courses offered to overseas students also increases the diversity of the learner population. The implications of these changes are four-fold: firstly, many foreign learners may spend only a relatively short period engaging in study at a UK educational institution before returning overseas; secondly, some foreign learners may opt to remain in the UK and undertake further study or enter employment; thirdly, some home learners may spend time at educational institutions abroad or conducting distance studies with such institutions before re-entering education or beginning employment in the UK, fourthly, some home learners will at some point in their life leave the UK for long periods of time, or permanently.

The increasing ubiquity of the international learner will undoubtedly raise legal issues for a national LLR, not least the question of how to assess the value of, and map into the learner information metadata vocabulary, an increasingly wide range of international qualifications. Similarly, the value of access to the national LLR system by learners may raise questions of discrimination on the part of home students studying abroad and overseas students who have studied in the UK, who cannot access their LLR in their current location. However, the area does not currently appear to pose a 'project killer' legal risk as far as existing discrimination law is concerned.

User accessibility issues will be an important part of the design process for both the main LLR system and the educational service provider interfaces for staff and learners. However the fact that some individuals may face problems in obtaining full functionality from the system, or from bespoke interfaces providing access to it, does not preclude their development.

C5. European & International Legal Issues

There is clearly significant interest in the area of LLR provision across the EU and in North America – what there does not appear to have been, at present, is any concerted attempt at co-operation between national/regional interest groups in this area to assess the likelihood of legal difficulties arising at the transnational level as a result of choices made by national

¹¹ Sloan M, 'Web Accessibility and the DDA', Refereed article, 2001 (2) *The Journal of Information, Law and Technology (JILT)*. <<http://elj.warwick.ac.uk/jilt/01-2/sloan.html>>

institutions, interest groups and governments. Education is increasingly a transnational operation, particularly at the FE/HE level, with fierce competition for students. This potentially provides an incentive for national governments to use legislative and regulatory mechanisms as a means to directly or indirectly favour national educational service suppliers. Within the EU, the European Commission has long been concerned to ensure both that there is increasing mutual recognition by Member States of training and qualifications (a long and painful struggle), and that Member States do not engage in protectionist practices at the expense of the free internal market in goods and services. Any implementation of a national LLR system will need to avoid an inadvertent conflict with those objectives.

Additionally, as the WTO General Agreement on Trade in Services (GATS) lists education and healthcare as services susceptible to be opened up for trade liberalisation, the impact of such liberalisation in the future may also have to be considered.¹² Many industrialised nations are particularly interested in exporting their expertise in distance education and virtual education. While such trade liberalisation has not yet occurred in the education sphere, developing a national LLR system which would have the effect of excluding non-national educational service suppliers might, over time, come to be seen as barrier to free trade and thus be vulnerable to challenge before WTO dispute panels.

Thus, the implications of a free market in educational services where private enterprises are allowed to expand their educational services across borders and where individuals may move more freely overseas to choose their educational service provider will have to be considered when developing the technical and administrative structure of such a system. Such a development might also call into question the role of national governments in financing and regulating national LLR systems.

While educational service provision is fast becoming a global business, international co-operation in resolving the issues surrounding the creation of LLR systems and electronic portfolios appears to be a relatively new phenomenon. However, adopting a parochial attitude towards LLR legal issues may lead to unnecessary longer-term problems that could have been resolved by early international-level discussion.

C6. Conclusions

The first phase of the Legal Study research indicates **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.**

As far as can currently be assessed, given the uncertainties about the future shape of such a system, if the legal issues are fully and properly analyzed in advance, then use can be made of technical and administrative measures within the system to adequately address/ameliorate any potential negative legal outcomes.

However, should it transpire that technical and administrative measures will not provide an effective or efficient solution to all the legal issues, it will still remain open, in most circumstances, for the UK government to adopt legal measures, via primary or secondary legislation, to provide such a solution. Only in areas of EU sole legislative competence, or where there are conflicting international agreements, might it prove difficult to make

¹² See Fuller, T. 'Education exporters take case to WTO' *International Herald Tribune*, Special Report February 18, 2003 at p. 15.

necessary legislative changes – at present no such conditions appear to pose a threat to a national LLR system.

It should be noted, however, when considering aspects of the national LLR system that might require UK legislative measures, that such measures might require considerable time to pass through the legislative process, particularly if contentious, and that as a result this solution should be treated very much as an avenue of last resort.

In order to avoid creating or building in unnecessary legal problems, considerable care will need to be taken in designing the technical and administrative framework for the control and processing of personal data within a national LLR system, in order to minimise risk, fairly and efficiently allocate liability, and provide legal certainty for both LLR system support service suppliers and users. To this end, effective liaison will have to be established with all stakeholders, notably representatives of staff/student user groups, and key international organisations, particularly those considering standards development for LLR systems outside the UK.

C7. Recommendations

This Report has not identified any obvious 'project killer' legal issues arising from UK law, therefore the following recommendations are primarily directed towards ensuring that work in LLR design and development is carried out in an environment which is most conducive to identifying potential areas of legal uncertainty at an early stage. This will mean that those areas can be dealt with on a proactive basis, allowing stakeholders, regulators and legislators to be made aware in a timely fashion of both possible problems and potential solutions.

Recommendation 1 - Widening Participation

The work currently undertaken in anticipation of the future development of a national LLR system does not appear to have been widely advertised to those outside of the interest groups developing and piloting elements of such a system. This makes it difficult to anticipate the reaction of the wider range of stakeholders to such a development, or elements of it. In particular, the reactions of those whose data will be contained within, or accessible via, a national LLR system are difficult to anticipate, although evidence suggests that the general public are sceptical/worried about projects that may include potential national identifiers (e.g. a Lifelong Learner Number), or which have the potential to allow the dissemination of elements of their personal data to a wider range of third parties than is currently the case. Many of these issues would be best addressed in public forums at an early stage, rather than being left to the media, the courts or the regulators in the future.

It is RECOMMENDED that the JISC MLEs for Lifelong Learning Programme address the need for a unified approach to the encouragement of wider public engagement in discussions about the development of a national LLR system across the LLR development sector.

It is further RECOMMENDED that the JISC MLEs for Lifelong Learning Programme engage in a higher-profile campaign of publicity about the legal implications of a national LLR system within the FE/HE sector to seek broad input from administrators with learner record management responsibilities about issues and possible solutions.

Recommendation 2 - Function and Purpose Model

The current uncertainty about potential further expansions of a national LLR system's purpose and functions does not appear to preclude, on legal grounds, the development of such a system. However, in order to determine fully the legal issues relevant to the development of a national LLR system, and in particular to enable the development of the type of protocols that will be required to:

- reassure learners that the stated purposes and functions of the system are being adhered to;
- provide guidance to support service suppliers with regard to their appropriate use of the system.

it will be necessary to develop, in conjunction with the stakeholders, a stable understanding of the purpose and function of the national LLR system.

It is RECOMMENDED that the JISC MLEs for Lifelong Learning Programme co-ordinate the production of a function and purpose model for a national LLR system, to permit the early development of accepted protocols for agreeing appropriate future uses/development of the system.

Recommendation 3 - Technical and Administrative Infrastructure

Assessing the legal risks which stem from the technical and administrative infrastructure of a national LLR system, in the absence of a consensus on the future development of either, remains problematic. Whilst it is possible to adopt a reactive approach to problems arising from the JISC regional projects, it is clear that the problems that those projects face, the legal risks that they incur, and the solutions that they are developing, differ considerably based on the model that they have adopted. It is likely that a much higher degree of harmonisation/standardisation will be required in order to create a viable legally coherent infrastructure for a national-level system. The risk that the current approach runs is in creating a patchwork national system based on regional sub-systems with different technical and administrative infrastructures, which while able to handle technical data exchange based on the use of common metadata vocabularies, is on rather more uncertain ground with regard to the attribution of risk and liability within the system as a whole, and particularly on the boundaries between regional sub-systems.

It is RECOMMENDED that the JISC MLEs for Lifelong Learning Programme, in conjunction with relevant stakeholders, consider at the earliest opportunity the specification of a standardised technical and administrative infrastructure for a national LLR system.

Recommendation 4 - Data Protection, Privacy and Confidentiality

Data protection, privacy and confidentiality issues, whilst unlikely to prove 'project killers', are clearly a high priority for proactive development work for a national LLR system. It appears from the JISC projects that UK FE/HE institutions remain unclear as to the effect of data privacy law on the transfer of learner data between educational service providers and third parties. The EU law basis for data protection in the UK suggests a need for early and detailed discussions with both the Office of the Information Commissioner (OIC) in the UK, and LLR interest groups in Europe. Such discussions should aim to determine the optimal way forward and to avoid 're-inventing the wheel' at both the national and EU levels when determining data privacy protocols and agreements.

It is RECOMMENDED that the JISC MLEs for Lifelong Learning Programme develop a set of data protection guidance materials for LLR projects, drawing where possible upon on existing experience including LLR project discussions with, and advice from, the OIC.

It is further RECOMMENDED that the JISC MLEs for Lifelong Learning Programme incorporate discussion of data protection issues, including relevant DP instruction for LLR project teams, within the Programme meeting schedule.

Recommendation 5 - International Co-operation on Legal Issues

While some of the UK LLR-related projects, such as the CETIS LIPSIG, have been actively involved in discussions with colleagues in Europe about relevant areas of joint interest, including a European standard for learner information metadata, there appears to have been little, or no, discussion at the European level of the potential impact of legal issues upon the development of LLR systems within the EU Member States. While there remain considerable differences between the Member States' legal systems, notably between common law and civil law jurisdictions, there are significant areas of overlap, e.g. data protection, where early dialogue between LLR interest groups could be valuable to all parties. In the wider international sphere, it appears that there is a possibility of considerable change in the provision of educational services internationally, and that this may have implications for the technical and administrative infrastructures of national LLR systems if a wider range of educational service providers enter national markets.

It is RECOMMENDED that the JISC MLEs for Lifelong Learning Programme support the development of discussion forums for LLR interest groups at a European level to share experiences of legal problems and solutions.