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This paper considers the legal issues which may arise in relation to the use of e-assessment in UK further and higher education.

1. How do I deal with personal information as part of the assessment process?

The Data Protection Act 1998 gives individuals control over the collection and use of their personal data. Collecting information about an individual's competences and performance is very likely to be personal information. Colleges and universities are therefore under an obligation to ensure that the processing of assessment data is done in compliance with the Act. This means making sure learners are aware of the collection of information about them, the processing of that information, and ensuring that the information is kept securely and is only released in accordance with the Act.

Example: a module specification states that 10% of the grade is to be given for "engagement and participation". Without making it clear to the students, the lecturer decides to use the usage information collected in the virtual learning environment to assess this grade. This use of personal data is likely to be contrary to the Data Protection Act 1998, as there is no notification of the collection of the data, or the use to which it is going to be put.

There are likely to be very few circumstances where the release of a student's grade to other students (or, indeed, the world at large) is justifiable under the Data Protection Act 1998. For this to happen, the student would need to give his or her consent, or there would need to be a strong argument that the release was necessary for the purposes of learning and assessment. So, when a student asks if he can get his friend's grade, the lecturer should decline to give this information (unless certain that the friend has given permission in some way).

Example: a lecturer wishes to use a copy of a student's assessment from a previous year to use as a learning resource in the next year. In terms of data protection, the lecturer should consider anonymising the work. The student's permission will usually still be required in order to respect intellectual property rights.

Example: where students undertake peer review and assessment of each other's work, this will clearly involve some students being aware of other students' grades. This is likely to be permissible if it is necessary to achieve the assessment objectives, provided that the way in which the information is used is fair. Announcing student grades to the entire class might be unjustified when group peer assessment has been conducted.

Common questions relate to the release of a student's grades to parents and to an employer or other sponsor. Where a parent asks for details of a student's performance, this should not be released unless the student has given prior permission. There is no legal right for a parent to access information about a student's performance, except where the institution is a school under local authority control. Likewise, even where an employer or other sponsor is paying a student's fees, grades can only be released when the student has consented to this. An alternative is to give the student the grades in a form that he or she can pass on to the employer or sponsor, which avoids the institution having to seek and record the student's consent.

2. What if I want to use other people's materials as part of the assessment?

In order to ensure legal compliance, quality and confidence, other people's materials should be used with due respect for intellectual property rights. Some assistance comes from s.32(3) of the Copyright, Designs and Patents Act 1988, which states that copyright isn't infringed by anything done for the purpose of setting or answering questions in an examination. The term 'examination' isn't defined, but many institutions have taken it to mean all formal (summative) assessment. The limits have not been defined in court, however. There is no guidance, therefore as to whether an exercise counting for 1% of the final grade, or a combined learning-and-assessment continuous assessment activity, benefit from this provision.

Care should be taken where a lecturer wishes to make exam papers or other assessment instruments available online afterwards as a learning resource. The exception does not apply to this, and either the copyright materials will need to be removed, or licensed.

One exception to s.32(3), which should be noted, is that it does not cover the reprographic copying of a musical score for performance by a student as part of an assessment. This would have to be licensed.

Overall, s.32(3) is a very powerful tool for the inclusion of other people's text, images, videos, recordings etc as part of a summative assessment.

3. What happens if the technology doesn't work or goes wrong?

As well as the damage to reputation and confidence in the institution, there may be liability in negligence (part of the law of tort in England, Wales and Northern Ireland, and of delict in Scotland). The law imposes on institutions a duty of care in circumstances where a lapse would be likely to cause damage or loss. Where an assessment is poorly planned, managed or delivered, the institution may be subject to a claim from students affected. It should be noted that the standard of care required is that of a reasonable person in the same circumstances. Where an assessment goes wrong, as long as reasonable precautions have been taken to prevent disruption, the institution will not be liable in negligence.

Typical precautions which should be looked at in the case of technology-mediated assessment might include checking to make sure there are no infrastructure problems (a planned power or network outage, for example), that the technology to be used has been tested appropriately, that sufficient technical assistance is on-hand and it may be appropriate to have a back-up plan in the event that a problem arises.

4. What happens if a student 'hacks' or cheats in a technology-based assessment?

Where a student attempts to hack into a technology-based assessment they are almost certain to be in breach of the institution's acceptable use of IT policy, and its student disciplinary code. In addition to this, the student may have committed an offence under the Computer Misuse Act 1990, which prohibits unauthorised access to a computer system.

5. What should I do if I have a student with a disability who has difficulty taking the assessment?

By virtue of the Disability Discrimination Act 1995, as amended, institutions are under a duty to consider the needs of users with disabilities in their educational provision. This includes the delivery of assessments.

There are two parts to this duty:

1. The duty to make reasonable adjustments
2. The disability equality duty

Accessibility should be taken into account during the design of an assessment, considering whether any parts are likely to cause access issues is necessary, and that the technology to be used allows for reasonable adjustments.

Example: a tutor adopts a new technology to deliver an online assessment. The technology allows no facility for changing the appearance of text displayed. The tutor must be able to provide an equivalent alternative assessment for students with a disability which does not permit the use of the chosen technology.

Any assessment process should take place in a way which does not put students with disabilities at a disadvantage. For example, providing different assessment methods allows a disabled student to choose the method best suited to their disability. The institution must provide assessments where students have the opportunity to demonstrate their competence in that particular subject. This might include offering flexibility with the time provided to complete assessments, permitting an exam to be completed at another more appropriate location or changing the format of submissions etc.

S.14A of the Act provides for “competence standards”, which are the necessary academic standards to be reached. Provided that these are applied equally to all (irrespective of disability), and their application is proportionate in achieving a legitimate aim, such standards are not subject to adjustment.

Example: it may be decided in appropriate cases to allow a student with a disability extra time where this compensates for a longer time needed to tackle the assessment task. However, where an electronic manikin is used to assess student response in dealing with a heart attack, it will not be appropriate to grant more time where the speed of response is a necessary part of the assessment criteria – speed is part of the competence standard being measured.

In such cases, although the competence standard is not subject to adjustment, the process by which that standard is to be assessed may be. So, in the above example, the delivery of the task may be adjusted accordingly. Institutions should first consider carefully what is actually being assessed, and then make any reasonable adjustments that do not compromise the relevant competence standard being sought.

For examples of ways in which assessments can be adjusted to provide for students with disabilities, refer to JISC TechDis, a fellow JISC advisory service.

6. What if the student objects to taking the technology-based assessment?

In legal terms, there is no right to object to any particular form or medium of assessment. A student might argue that an institution is bound contractually to deliver the course as described at the time of enrolment, including specification of the forms of assessment to be used. However, institutions are likely to include a notice that the right to alter details of the course is reserved, and in any case, a statement of the forms of assessment to be used is unlikely to be held to be a contractual undertaking.

Students do have a right, by virtue of s.12 of the Data Protection Act 1998, to give notice in writing to prevent automated decision-taking, based on their personal data. Although this wouldn't prevent

automated assessment delivery, it would prevent any automated calculation of grades and progression decisions – these would have to be processed manually.

7. Further Information

Further information on relevant areas of law in relation to technology use in UK further and higher education can be found on the JISC Legal website at www.jisclegal.ac.uk. In addition, JISC Legal offers an enquiry service, details of which can be found on the website.

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