

The Skills and Post-16 Education Bill Clause 11: Information sharing in relation to technical education qualifications

The case for a Code of Practice

The purpose of the amendment is simple. The Information Commissioner's Office should develop a Code of Practice for the data processing of students' personal confidential information in post-16 Education including their transition into Further or Higher Education.

This is urgent because Clause 11 in this Bill not only changes how organisations in England with functions "relevant" to England (i.e Ofqual, Office for Students, Ofsted, and "prescribed persons") will obtain millions of students' personal data in infinity, but how it may be used for what purposes by whom is vague. The Westminster Secretary of State has powers to easily expand this in future.

Young people need and want consistent controls across their data life cycle from collection, use across and outside these sectors, data distribution and data destruction when no longer required for the lawful purposes for which it was collected. Institutions have also called for better guidance.

Proposed new clause (A duty on the Information Commissioner)

After Clause 25, insert new Clause—

"Code of practice by Information Commissioner's Office on data sharing in relation to post-16 education

(1) The Information Commissioner must prepare a code of practice for organisations which collect personal data for purposes connected to post-16 education, including the processing of applications for higher and further education courses.

(2) The code must—

- (a) contain practical guidance in relation to the sharing of personal data in accordance with the requirements of data protection legislation;**
- (b) contain such other guidance as the Commissioner considers appropriate to promote good practice in the sharing of personal data of students and potential students; and**
- (c) have regard to children's rights in the digital environment as set out in the United Nations Convention on the Rights of the Child General Comment No. 25.**

(3) Where a code under this section is in force, the Commissioner may prepare amendments of the code or a replacement code to reflect emerging technologies and changing needs of pupils, students and potential students.

(4) In this section—

"good practice in the sharing of personal data" means such practice in the sharing of personal data as appears to the Commissioner to be desirable having regard to the interests of data subjects and others, including compliance with the requirements of the data protection legislation; and

"the sharing of personal data" means the disclosure of personal data by transmission, dissemination or otherwise making it available."

Member's explanatory statement This amendment places a duty on the Information Commissioner to prepare a code of practice in relation to the sharing of personal data between students and others.

Territorial oversight

[The Skills and Post-16 Education Bill \[HL\]](#)¹ Clause 11 is about *Information sharing in relation to technical education qualifications*. [The territorial extent](#) set out in the Explanatory Notes (para 18) includes **all of the UK, and extends to Scotland and Northern Ireland**.

We believe that since Clause 11 goes beyond England, and while the institutions to which the new powers apply are all (currently) based in England, (Ofqual, the OfS, Ofsted and the Westminster Secretary of State) this means that the people and institutions from which they will obtain personal data under those powers, may be at any educational setting across the UK within the scope of the Bill in Post-16 education; and while not mentioned in this Bill one must consider that the third-parties (prescribed persons) to whom the institution may pass on the data may be anywhere in the world, according to their own data sharing powers.

Case study: as regards the existing data sharing powers in these educational institutions, UCAS, HESA, OfS and DfE already pass around students sexual orientation and religion data collected during application process to Higher Education and it's added to students' named national pupil records held by the DfE. **We are probably the only country in Europe that thinks it acceptable for a national government to keep a national list of named individuals' religion or sexual orientation, rather than keep statistics.** It was enabled by the data clauses in the Higher Education and Research Act 2017 introduced for equality monitoring.

The request for statutory guidance from institutions

Educational settings need support in questions of data sharing practice, that are particular to (i) the environment of education and (ii) children and young people. Several universities and the Department for Education (DfE) highlighted these problems in the 2020 ICO consultation on the generic Data Sharing Code of practice. A sector specific Code will support staff in organisations responsible for student data processing in post-16 education and transition to Further and Higher Education. It should recognise the challenges of settings where young people have limited agency, and parents may still play a role. Such a Code was missing from recent legislation that enabled the distribution of young peoples' personal confidential data without their knowledge already, such as *the Higher Education and Research Act 2017*, the *Higher Education and Research Act 2017 (Cooperation and Information Sharing) Regulations 2018*, *The Digital Economy Act 2017*, and the *Technical and Further Education Act 2017*.

Just as the Secretary of State saw fit to require the Age Appropriate Design Code set standards under section 125(1)(b) of the Data Protection Act 2018² for children's data protection *in commercial apps and platforms ("Information Society Services")* so too should there be consistent high standards in state organisations and their arms length bodies, as well as any 'prescribed persons' — third parties to whom the named bodies distribute data.

¹ Skills and Post-16 Education Bill [HL] <https://bills.parliament.uk/publications/41544/documents/288>

² The Age Appropriate Design Code <https://www.legislation.gov.uk/ukpga/2018/12/section/123>

The direction of travel of UK data protection law

The need for these protections for children and young people is heightened by the proposed reduction of safeguards on rights outlined in the DCMS consultation on changes to the UK Data Protection regime, launched on September 10th 2021, *Data: A new direction?*³

Many safeguards to be removed will disproportionately affect children and young people.

Examples include:

- **Re-introducing a charge for processing subject access requests (Ref Q2.3.4)**
For children and young people any charge is a barrier to accessing their rights to see their own data, correct any inaccuracies and know what is being used by others about them. Case study example: This was a key tool for young people in exposing unlawful practice and discrimination in the Met Police Gangs Matrix.⁴
- **Safeguards from automated decision making in Article 22 of UK GDPR should be removed (Ref Q1.5.17)**. Children and young people are already disempowered in relationships with institutions. Young people need to be able to have any automated decision fully understandable and be able to object to it, with a right to a human decision. This supports their rights to information enshrined in the UNCRC and also supports public trust in institutions. Case study example: The summer exams fiasco⁵ of 2020 is a well known case study in which automated decisions were opaque and untrustworthy.
- Promotion of **“data intermediaries in high public-interest applications” (Q1.7.1)**
28 million learners already have their personal confidential data passed on to thousands of third parties by data intermediaries from the national Learner Records Service. Case study example: In January 2020, the Sunday Times exposed that gambling companies had access to those records for the purposes of onboarding new gambler applications⁶. There has been no satisfactory public statement yet from the Department for Education on what exactly has been done to ensure such misuse does not happen again. The ICO audit of the DfE in 2020 found **“the DfE are not fulfilling the first principle of the #GDPR, outlined in Article 5(1)(a), that data shall be processed lawfully, fairly and in a transparent manner.”** And that the DfE 'commercial department' **“do not have appropriate controls in place to protect personal data being processed on behalf of the DfE”** which is deeply concerning given the routine distribution of millions of sensitive records for commercial reuse without any **“formal assessment of applications for data protection compliance.”**

³ DCMS consultation Data: a new direction (DCMS) September 10, 2021
<https://www.gov.uk/government/consultations/data-a-new-direction>

⁴ ICO finds Metropolitan Police Service's Gangs Matrix breached data protection laws (ICO, 2018)
[https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/11/ico-finds-metropolitan-police-service-s-gangs-matrix-breached-dat](https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/11/ico-finds-metropolitan-police-service-s-gangs-matrix-breached-data-protection-laws/)

⁵ A-levels and GCSEs: Boris Johnson blames 'mutant algorithm' for exam fiasco (BBC, 2020)
<https://www.bbc.co.uk/news/education-53923279>

⁶ FE Week <https://feweek.co.uk/esfa-launches-investigation-after-betting-companies-access-data-on-28-million-children/>

- The government proposes to extend the “soft opt-in” to electronic communications (i.e. marketing) from organisations (Clause 210) This will expose children and young people to increased marketing and advertising sent to their phones. Case study example: UCAS felt the reputational damage in 2014 when it was reported it was selling targeted advertising access including to mobile phone and energy drinks using the data of more than a million students and their parents.⁷

The generic ICO Code of Practice is unsuitable for education settings

The 2020 generic ICO Code of Practice on data sharing⁸ is **not** sufficient for the education sector due to

- (a) the non-consensual nature of the relationship and the power imbalance between learners, public authorities, educational settings, government and arms-length bodies; and
- (b) the balance of the child / parent roles and rights, and institutional statutory duties.
- (c) a large number of institutions involved in onwards distribution of third party data sharing

Various⁹ education bodies responded to the consultation to say the 2020 Code falls short.

- the University of Birmingham¹⁰ suggested that:

“The sharing of personal data for research purposes ... is unclear and should clarify whether consent is required in that example or not, rather than say “the school might wish to obtain parent’ consentbut other lawful basis would be available”.

“More clarity is needed on situations where Data Sharing Agreements (DSAs) are necessary or alternative ways of demonstrating accountability especially where data sharing is on a routine basis.”

“Sharing personal data for research in the ...University sectors has not been adequately covered.”
- the University of Leeds¹¹ found that the draft code insufficiently addressed:

“new areas or developments in data protection that are having an impact on (y)our organisation’s data sharing practices.”
- Data protection staff from the DfE responded twice. The first asked for additional guidance on the National Pupil Database¹² and the second about onwards data distribution to third parties, and children’s consent.¹³

⁷ UCAS sells access to student data for phone and drinks firms' marketing (The Guardian, 2014)

<https://www.theguardian.com/uk-news/2014/mar/12/ucas-sells-marketing-access-student-data-advertisers>

⁸ The ICO Data Sharing Code of Practice (2020)

<https://ico.org.uk/for-organisations/guide-to-data-protection/ico-codes-of-practice/data-sharing-a-code-of-practice/>

⁹ The ICO consultation on the data sharing Code of Practice (**University of Essex**) the University of Essex also raised concerns and gaps.

<https://ico.org.uk/media/about-the-ico/consultations/dsc/2618894/20190909-university-of-essex-response-102-redacted.pdf>

¹⁰ The ICO consultation on the data sharing Code of Practice (**University of Birmingham**)

<https://ico.org.uk/media/about-the-ico/consultations/dsc/2618888/20190909-the-university-of-birmingham-response-96-redacted.pdf>

¹¹ The ICO consultation on the data sharing Code of Practice (**University of Leeds**)

<https://ico.org.uk/media/about-the-ico/consultations/dsc/2618895/20190909-university-of-leeds-response-103-redacted.pdf>

¹² **DfE (1) response** to the ICO consultation on the 2020 Data Sharing Code of Practice (Q9)

<https://ico.org.uk/media/about-the-ico/consultations/data-sharing-responses/2615279/ds-response-department-for-education-2.pdf>

¹³ **DfE (2) response** to the ICO consultation on the 2020 Data Sharing Code of Practice (Q6)

<https://ico.org.uk/media/about-the-ico/consultations/data-sharing-responses/2615278/ds-response-department-for-education.pdf>

What this legislation will build on and what it will change

“This Bill will legislate for landmark reforms ... to help transform post-16 education and training,” according to the Secretary of State for Education (June 21, 2021).¹⁴

Legislators must therefore recognise that since the Bill introduces such significant change, it needs appropriate levels of oversight and safeguards. **But it is key that it is not seen as a small stand-alone clause.** This Bill is yet another step in the removal of protections for student personal confidential data and exposure to commercial use that began with learners’ data in 2012 from the National Pupil Database, stretched to students in *the Higher Education and Research Act 2017 (Cooperation and Information Sharing) Regulations 2018 (SI 2018, No. 607)* which opened up who the Office for Students can pass on data to, as a prescribed person, without safeguards,¹⁵ and continued in The Technical and Further Education Act 2017¹⁶ when we wrote in a briefing in 2016, *“There are no safeguards, oversight or future limitations.”*

Students’ expectation of a duty of confidentiality of individuals’ identifiable data in Technical Education [was bypassed through legislation changed in 2017](#). The 2017 Act changed the purposes in the prior legislation (Section 54 of the Further and Higher Education Act 1992) from what *“the authority may require for the purposes of claiming any amount in respect of the pupil from another authority”* to give unlimited powers to the Secretary of State to decide how the data may be used broadly to do with Further Education: *“as the Secretary of State may require for purposes connected with further education.”* (our emphasis)

Part 3, s40 of the **Technical and Further Education Act 2017** changed what data could be collected by the Secretary of State. **Now this 2021 Bill changes how it can be handed out and to whom**, and why. It is vague and open. It should be tightened up. However, a Code of Practice offers at least safeguards that could both support students’ rights and give institutions the sector specific clarity and confidence they need for safe data use.

This clause in the Skills and Post-16 Education Bill, *“inserts new section 40AB into the 2009 Act. It supports effective collaboration between Ofqual and other bodies with functions in relation to technical education qualifications, by introducing information-sharing provisions similar to those relating to the Institute under section 40AA of the 2009 Act. “It empowers Ofqual to share information in relation to technical education qualifications with the Secretary of State, Ofsted and the Office for Students, **as well as with other bodies that the Secretary of State may prescribe.** It also allows these bodies to share technical education information with Ofqual. This information sharing may support the technical education functions of Ofqual or the other relevant bodies.”* (our emphasis added)

¹⁴ The Secretary of State for Education, Education Questions (21/06/2021)

<https://hansard.parliament.uk/commons/2021-06-21/debates/7D244C12-0D2C-4DD9-B7D5-1C5D2F839F8E/HouseOfCommons>

¹⁵ UCAS submission at Report Stage on Higher Education and Research Act 2017

<https://publications.parliament.uk/pa/cm201617/cmpublic/HigherEducationandResearch/memo/HERB10.pdf>

¹⁶ The 2017 Technical and Further Education Act <https://bills.parliament.uk/bills/1916>

As with all recent legislation and data policy from the government, the bill overrides consent and there are no guarantees on how data may be used by the 'prescribed persons' who are unrestricted and undefined in the Bill, and for vague purposes that do not preclude commercial use.

Such use, ***“could undermine applicants’ trust in the admissions service, degrade the quality of data collected, and potentially deter some people from applying to university altogether,”*** according to UCAS in 2017 when talking about the changes made to the Higher Education and Research Act ([Point 25, UCAS evidence](#) to Committee in 2017) (our emphasis).

Key issues

This 2021 Bill on data in Technical Education could usefully learn lessons from the similar recent changes made with regards to data sharing in Higher Education by similarly prescribed persons, without safeguards in place, and which were debated in 2018.

- **Lack of privacy impact assessment of risk**

In the July 2018 Motion of Regret debate on the *Higher Education and Research Act 2017 (Cooperation and Information Sharing) Regulations 2018* Lord Watson of Invergowrie called on the government to carry out a **privacy impact assessment** on the Regulations. Such an assessment is also missing now from the [The Skills and Post-16 Education Bill \[HL\]](#).

- **The regulatory function of the Office for Students**

Lord Watson made the point that, *“during the passage of the Higher Education and Research Bill, noble Lords and MPs raised **concerns about the powers in the regulatory function of the Office for Students** and questions of institutional autonomy.”*

This 2021 Skills Bill further expands the powers given to the Office for Students through their expanded data access.

- **Undefined and unlimited ‘prescribed persons’ (third-party data recipients)**

Lord Watson also said in debate in July 2018, *“They create for the Office for Students to grant access to students’ confidential data to a single commercial provider...**the purposes for which the data may be used remain open and vague.**”*

[The Skills and Post-16 Education Bill \[HL\]](#) has the same problem. This draft Bill once again leaves open the question of who may access the data in future without further consultation, since in future they can add, *“other bodies that the Secretary of State may prescribe.”*

- **Lack of public consultation on data sharing with data subjects**

Lord Watson said in debate in July 2018, *“We have a number of concerns, not least that, as I said, **there has been no parliamentary debate or public consultation.**”* This new Skills Bill once again sidesteps any public consultation.

- **Lack of adequate governance at the Department for Education**

There were **28,423,345** individual’s records in the Learning Records Service (LRS), according to [DfE numbers](#) as of 01/10/2019. It is now estimated at around 30 million people’s records.

Personal confidential data from the public, from pupils to students and throughout the data life cycle, if too easily taken and passed around is lost or stolen. It was even found to have been made available to gambling companies, and access credentials left open, unchecked, even at commercial companies that upon audit were found to have gone bust.

- **The 2020 DfE data protection ICO audit (139 findings 60% urgent / high priority)**

The [DfE privacy notice for the LRS](#) claims that : *“The LRS is accessible by organisations under agreement with the DfE (England). Your personal information is **only accessed through the LRS by organisations specifically linked to your education and training, including those organisations specified in Regulations made under section 537A of the Education Act.**”*

That is provably untrue. There has been no satisfactory update on the gambling companies’ access or on the 2020 ICO audit, the findings of which included that there are not “appropriate controls in place” at the Commercial Department at the DfE for third party due diligence or data distribution. And that, “There is limited oversight and consistency around how data is shared externally.” The mechanisms to manage learners’ lawful rights, to correct mistakes, see what is held, and give or withhold consent for further purposes not defined at the point of collection do not exist today by any adequate or consistent routes. Unanswered questions are listed on our website¹⁷ and we await an overdue Ministerial announcement.

- **Parental (and pupil) ignorance is systemic and deliberate**

In February 2018 we commissioned Survation who asked 1,004 parents of state-educated children aged 5-18, about their understanding of which technologies are used, and how personal data is used in and by schools. **69% of parents said they had not been informed that the DfE may give away children’s data from the National Pupil Database (Department for Education) to third parties. Despite the damning 2020 ICO audit there have been no plans announced to change this lack of parental awareness nor the 15 million people who have already left school and whose data is given away without their knowledge.**

¹⁷ The ongoing ICO audit of the Department for Education
<https://defenddigitalme.org/2020/01/19/comment-on-sunday-times-story-gbg-use-of-national-learner-records>

Alternative models of Codes of Practice: Digital Economy Act 2017

Since the ICO powers will be undermined by the new UK Data Governance proposals announced by the DCMS, an alternative to the ICO Code of Practice might be even stronger. For defined purposes across specific parts of the public sector, under *the Digital Economy Act 2017 (DEA)*¹⁸ the government devised a framework for sharing personal data. It aims to:

- ensure clarity and consistency in how the public sector shares personal data;
- improve public services through the better use of data; and
- ensure respect for privacy and the professional duty of confidentiality.

The powers to share information under Part 5 of the DEA are supplemented by statutory codes of practice (the DEA codes) which must be consistent with the Information Commissioner's data sharing code of practice but put duties not on the ICO but Secretary of State. The DEA codes must follow the data protection principles, ensuring that sharing personal data under the DEA powers is proportionate. But this DEA Code does not include Ofqual, Ofsted, the Office for Students, or other Higher Education bodies and nothing exists specific to these bodies, including the Office for Students since January 2018, established by the Higher Education Act 2017.

There are extensive support materials and additional information published for the public sector for consistent, clear and confident data sharing practices for the purposes of identifying fraud, debt, or improved public services. Yet nothing equivalent supports the processing of learners' personal information by a range of new bodies with new data sharing responsibilities, and the ways in which vast amounts of data are used at speed and scale in emerging technologies, including predictive analytics and to make mental health inferences.

A Data Register model example: The Digital Economy Act 2017

Whereas the requirement to provide information about sharing under the Digital Economy Act powers for inclusion in a public register¹⁹ applies to all persons listed in the relevant schedules to the Digital Economy Act, and its schedules set out the specified persons able to share information under each of the information powers in Part 5 of the DE Act, by contrast **Clause 11 in [The Skills and Post-16 Education Bill \[HL\]](#) prescribed persons are left open for the institutions or Secretary of State to decide without any duty to announce changes or keep any sort of transparency register at all.**

Under the Digital Economy Act all persons disclosing and using information under the powers are expected to have regard to the register in the code of practice. Bodies that fail to have regard to relevant requirements of the code may be removed from the schedule. Such strength of protections is needed for all learner data; the volume of which nears half the UK population and the sensitivity of which on named, individual level learner records must not be underestimated.

¹⁸ Digital Economy Act 2017 (Part 5, Chapter 1) <https://www.legislation.gov.uk/ukpga/2017/30/section/35>

¹⁹ Guidance for Controllers relating to the Register of Information Sharing Agreements under Part 5 of the Digital Economy Act <https://www.gov.uk/government/publications/digital-economy-act-2017-part-5-codes-of-practice/guidance-for-controllers-relating-to-the-register-of-information-sharing-agreements-under-part-5-of-the-digital-economy-act>

The Explanatory Notes

“63 This clause inserts new section 40AB into the 2009 Act. It supports effective collaboration between Ofqual and other bodies with functions in relation to technical education qualifications, by introducing information-sharing provisions similar to those relating to the Institute under section 40AA of the 2009 Act.

64 It empowers Ofqual to share information in relation to technical education qualifications with **the Secretary of State, Ofsted and the Office for Students, as well as with other bodies that The Secretary of State may prescribe. It also allows these bodies to share technical education information with Ofqual.**

65 This information sharing may support the technical education functions of Ofqual **or the other relevant bodies.**”

Reference: <https://bills.parliament.uk/Publications/41545/Documents/287/5802005en.pdf>

Definitions

“Ofqual”, “The Office for Students (OfS)” and “Ofsted” have the same meanings as in section 40AA;

“further education” has the same meaning as in the Education Act 1996 (see section 2 of that Act);

“higher education” has the meaning given by section 579(1) of the Education Act 1996;

“institution within the further education sector” has the same meaning as in the Further and Higher Education Act 1992 (see section 91(3) of that Act);

“post-16 education or training provider” means an institution or person who provides or intends to provide relevant education or training;

“registered higher education provider” has the same meaning as in Part 1 of the Higher Education and Research Act 2017 (see section 3(10) of that Act);

“the United Nations Convention on the Rights of the Child” means the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989 (including any Protocols to that Convention which are in force in relation to the United Kingdom), subject to any reservations, objections or interpretative declarations by the United Kingdom for the time being in force;

“The territorial extent” of the Code is the United Kingdom.

The Bill drafting includes Clause 11 “Information sharing in relation to technical education qualifications”

(1) The Apprenticeships, Skills, Children and Learning Act 2009 is amended as follows.

(2) After section 40AA insert—

“40AB Sharing of technical education information by or with Ofqual

(1) Ofqual may disclose information to a relevant person for the purpose of a relevant function of—

- (a) Ofqual, or
- (b) the relevant person.

(2) A relevant person may disclose information to Ofqual for the purpose of a relevant function of—

- (a) Ofqual, or
- (b) the relevant person.

(3) In this section “relevant person” means—

- (a) the Secretary of State;
- (b) the OfS;
- (c) Ofsted;
- (d) a prescribed person.

(4) In this section “relevant function” means—

- (a) in relation to the Secretary of State, Ofqual, the OfS or Ofsted, a technical education function of that body so far as the function relates to England;
- (b) in relation to a prescribed person, a prescribed technical education function of that person, so far as the function relates to England.

(5) In this section— “Ofqual”, the “OfS” and “Ofsted” have the same meanings as in section 40AA;

“technical education function” means a function that relates to technical education qualifications approved, or that may be approved, by the Institute for Apprenticeships and Technical Education under section A2D3 or [A2D5](#).”

(3) In the heading of Part 1A, after “Apprenticeships” insert “, Technical Education Qualifications”.

(4) In section 262 (orders and regulations), in subsection (6), after paragraph (aza) insert—“(azb) regulations under section [40AB](#) ;”.