The (UK) Information Commissioner’s Office (ICO) regulates, inter alia, the Data Protection Act 1998 (the Act) and, in this capacity, is keen to provide a written submission to the Education & Culture Committee in the course of its Stage 1 consideration of the above Bill. Given that S15 of the Bill (Duty to provide information to Skills Development Scotland) relates to the processing of personal data and thus explicitly concerns issues of data protection, it is disappointing that the ICO was not contacted directly for its view on the matter.

The ICO’s Scotland office was first contacted by the Scottish Government in 2008 to discuss the data protection implications of its proposals for the university sector to share relevant data with the then Careers Scotland, for the purposes of supporting young people in higher education. Specifically, Careers Scotland was seeking data on non-attendees and those known to have dropped out, with a view to pursuing further employment, education or training options. The ICO’s Scotland office facilitated a meeting between representatives from the Scottish Higher Education Information Practitioners Group, Careers Scotland and Scottish Government to try to identify and address specific areas of concern from each of the groups. As well as practical issues such as format, timing and transmission, data protection concerns were raised as to fairness and the legal basis required for processing. In conversation with the Scottish Government team it had been suggested by the ICO that consideration be given to introducing a legal obligation to share the data as this would provide a firm legal basis and all higher education institutions had current fair processing notices informing students that their data would be disclosed where a legal obligation exists. It is interesting that, at that time, there was no appetite to go down this route and the proposal has been debated regularly ever since.

The ICO’s Scotland office has worked closely with Careers Scotland’s successor, Skills Development Scotland (SDS), in providing data protection advice to SDS and Scottish schools in similar data sharing activity. The crux of this activity is often finding appropriate conditions for processing, thereby, ensuring the legal basis for sharing. The Act requires that at least one condition for processing from Schedule 2 is met prior to processing personal data and at least one from Schedule 2 and one from Schedule 3 are met prior to processing sensitive personal data. The first condition in both Schedules is obtaining the consent of the individual to whom the data relate but the remainder provide for processing without consent or even in the face of outright objection. One such condition within each of the Schedules is where the processing is ‘necessary for the exercise of any functions conferred on any person by or under an enactment’ and, as paragraph 110 of the Explanatory Notes to the Bill indicates, the provisions of the Bill might therefore provide a legal basis for the sharing or using of data under the Act.
Given that legislation was mooted by this office when first contacted in 2008, the ICO is pleased to support the provisions of S15 as a means by which the sharing of such information can be done in compliance with the Act. Those provisions will also address the fairness and legal basis concerns expressed by the university sector at that time. Other issues of format, timing and transmission can be addressed through further guidance and the ICO would be pleased to be involved with the content of such guidance, especially where any privacy dimensions exist. Moreover, should the Committee deem it appropriate, I would be happy to expand on this written submission via verbal evidence.

Dr Ken Macdonald  
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