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REFORM OF HIGHER EDUCATION RESEARCH ASSESSMENT AND FUNDING

RESPONSE BY THE SOCIETY OF LEGAL SCHOLARS

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REFORM OF HIGHER EDUCATION RESEARCH ASSESSMENT AND FUNDING

Introduction

0.1 The Society of Legal Scholars (SLS) welcomes the opportunity to respond to the Department's consultation paper *Reform of Higher Education Research Assessment and Funding* (July 2006). The Society (formerly the SPTL - the Society of Public Teachers of Law) is a learned society whose members teach law in a university or similar institution or who are otherwise engaged in legal scholarship. It is the largest such learned society in the field of law, with over 2,700 members. The great majority of members of the Society are legal academics and researchers working in universities, although members of the senior judiciary and members of the legal professions also participate regularly in its work. The Society was founded in 1908 and is the oldest professional association of academic lawyers in the U.K. The Society's membership is drawn from all jurisdictions in the British Isles but also includes some affiliated members typically working in other common law systems. The Society, as one of the larger learned societies in the field of humanities and social sciences, is therefore the principal representative body for legal academics in the UK.

0.2 The Society shares a number of the key assumptions and aspirations enunciated in the consultation paper. In particular, we accept that

- wasting the time and effort of University academics and administrators should be avoided;
- any changes to the research assessment system should have positive behavioural impacts in terms of achieving effective funding of high quality research;
- it is important to be able to assess UK university research in terms of international benchmarking.

0.3 The Society agrees with the Government's analysis that the research performance of UK universities is strong when viewed in the international context (*Science and Innovation Investment Framework 2004-2014: Next Steps*, para. 1.7). We also agree that research grant income alone cannot support research excellence in the arts and humanities (*Next Steps*, para. 4.15).

0.4 However, as will be clear from this response, the Society is firmly opposed to any move towards a metrics-based system of assessment for research quality in Law. We explain our reasons for this more fully below. In summary, the Society believes that the proposed changes to the modus operandi of the RAE after 2008 (and to an extent even for the current cycle) would inflict great damage to the UK's capacity to deliver independent legal scholarship of international excellence in the future. The panel review approach to assessing the quality of research outputs by legal scholars based in the UK has been an internationally trusted benchmark which has played an important role in attracting students to this country. It has given us an

advantage over our competitors in the rest of Europe (and further afield in the common law world). Were we to move towards such a system based predominantly on metrics, we would lose an important marketing tool in attracting EU and overseas students, with predictable loss of income to their universities (and by implication to the wider "UK plc"). Overall, the Society largely endorses the critical review of the Government's plans expressed by the Higher Education Policy Institute (T Sastry and B Bekhradnia, *Using metrics to allocate research Funds. A short evaluation of alternatives to the Research Assessment Exercise* (HEPI: June 2006).

0.5 We wish to make it clear that the Society is not against change as such in the methods for assessing research quality and determining funding arrangements. The Society accepts that a case can be made for streamlining the current peer review process, whether in terms of the frequency or density of review (or both). However, the Society is opposed to change which:

- undermines the basis on which universities, law schools, research groups and scholars have planned for RAE 2008, and which is thereby wasteful in resource terms and demoralising for our members;
- even if it did not apply to RAE 2008 would proceed thereafter on poorly researched ad hoc policy decision making which appears to be driven by the (highly contested) view that the primary purpose, if not the sole purpose, of University research is as an engine for economic growth;
- is based on the views of hastily convened and unrepresentative "expert groups".

0.6 Bearing in mind the more general observations above, the Society's answers to the eight specific consultation questions are as follows.

The consultation questions

1. *Which, if any, of the RAE 2008 panels might adopt a greater or wholly metrics-based approach?*

1.1 We acknowledge that the Society can only speak for the academic discipline of Law. Legal scholarship is characterised by original investigation undertaken in order to gain knowledge and understanding of the field (including doctrinal and theoretical research as well as empirical studies into the effects of law on human behaviour); its quality is assessed in terms of originality, significance and rigour, taking account of the diversity of academic research in Law (Panel J Working Criteria RAE 2008),

1.2 The overwhelming view of our members is that the RAE sub panel for Law (and, so far as it is relevant, Main Panel J) should not make any changes to the criteria and working methods which have already been published by the funding councils. It would therefore be entirely inappropriate to use metrics in the context of assessing overall research quality in Law. The reasons for this are both *procedural* and *substantive*. Notwithstanding our status as a learned society in one discipline, we

believe that our procedural concerns will be relevant to all units of assessment; obviously our substantive concerns are confined to Law. We are not equipped to say how widely they apply in other areas in the broader field of humanities and social sciences.

1.3 *Procedurally*, the funding councils have already set out the basis on which RAE 2008 will be conducted. The assessment period is from January 2001 to December 2007. We are, therefore, already in the final phase of that period. Universities, law schools and legal scholars have been preparing for RAE 2008 for some time now on the basis of these criteria and working methods. It is entirely unacceptable to seek to change the rules of the game as we approach the final whistle. Indeed, we suspect that there may be scope for institutions to challenge through the courts any decision to introduce metrics at this stage of the RAE 2008 process by way of an application for judicial review. There has, of course, been High Court litigation in the past over the RAE (see *R v Higher Education Funding Council ex parte Institute of Dental Surgery* (1994) 1 WLR 242, Sedley J.) so the risk of court action is real and not fanciful.

1.4 *Substantively*, the Society is convinced that peer review of outputs must remain the fundamental benchmark for assessing research excellence in the domain of Law. Indeed, the Society's view is that shifting to a metrics-based system in Law would be disastrous. In our view, qualitative assessments in legal scholarship simply cannot be replaced with quantitative methods. This is the case for all forms of legal scholarship, whether doctrinal. theoretical or empirical. The introduction of a metrics-based system would involve several undesirable consequences for Law. These include, but are not limited to, the following outcomes. A metrics-based scheme would

- waste the time and energy of researchers who would feel compelled to pursue research agendas designed to achieve higher ratings on the basis of the metrics irrespective of the intrinsic quality of the contribution to scholarship;
- discourage and unfairly penalise those potential researchers who are unable to satisfy metrics which favour certain forms of legal research (e.g. empirical work funded by external agencies) over others (e.g. desk-based doctrinal analysis and theoretical work);
- inappropriately incentivise quantity over quality in terms of publication outputs (for example a metric based on publications per FTE would drive down rather than enhance research quality, and was rightly abandoned after an earlier RAE);
- generate even fiercer competition for the (small number of) "multi-million pounds" empirical researchers, which would far outshadow the current transfer market in "RAE stars";
- dissuade institutions from appointing early career researchers;
- profoundly affect the nature of the research undertaken, by creating an incentive to undertake contract and grant funded research over curiosity-driven research that does not have a customer, and so undermine the public interest in the vital freedom of academics to

pursue innovative, ground breaking theoretical work even, and perhaps especially, where that may be critical of the activities of government and other funding bodies;

- undermine in particular doctrinal legal research, which has a profound influence on legal practitioners and both national and international courts and tribunals, and indeed helps the UK legal systems to continue to be an attractive vehicle internationally for the resolution of legal disputes, thereby generating significant income for the UK;
- undermine the linkage between research and teaching, in that those successful in obtaining funding will have little time left to teach and those unsuccessful will have little time left to research (indeed, without funding, their time is likely to be devoted to teaching only leading to a polarisation within the profession);
- damage the development of pedagogic research in law, which would fare poorly under any of the standard metrics suggested, and thereby further impair the drive to enhance teaching quality in legal education;
- fail to provide a respected international benchmarking for QR in Law.

1.5 To elaborate on these points, it is clear from previous RAEs that there is no direct correlation between the achievement of the highest level of RAE outcomes in Law and a particular law school's performance in any of the suggested metrics. For example, the culture and, more importantly, the practice of research activities in law schools is not dependent upon attracting external funding or recruiting doctoral students. To switch to a metrics-based system for Law would have the impact of further diverting the energy and time of researchers to seek funded projects or research students with a deleterious impact upon actual engagement in quality research activity. If RAE judgments were to be linked to research grant income, a number of damaging effects can be expected. The success rate of applications, which is already low, would go down significantly as many more UK researchers would be required to apply for grants as one of their main methods of funding research. This in itself would create great instability as successful applications will inherently vary from year to year. There would be a significant increase in the wasted costs inherent in a high volume of unsuccessful applications; these costs would have to be borne by research councils, institutions and individual academics. It would certainly become impossible to rely any more on the 'goodwill factor' (as at present) amongst referees. Low success rates would also demoralise staff so that retention and recruitment of academic lawyers would become even more problematic than it already is. Those most adversely affected would be early career researchers, those returning after career breaks and part-time staff, as they are at a particular disadvantage in successfully applying for and managing (large) research projects. In this way a metrics system based on research grant income as a primary determinant would have worrying equal opportunities implications.

1.6 It may be that bibliometric measures and citation indexes may have some role to play in other disciplines. However, the Society is deeply sceptical of the relevance of such indicators in our discipline. The fact is that there is simply is no way of generating reliable bibliometric

measures for Law. This is not only because of the lack of correlation between quality - and more importantly, positive influence - and citation, but also because of the serious lack of data about citation and the variety of relevant citation. In contrast to some other disciplines, the impact of a particular publication in Law cannot be measured simply on the basis of the standing of the source of publication (there is no ranking of law journals) nor on the amount of citations earned (indeed, as we have seen, there is no readily available citation index in Law and nor will there be for the foreseeable future). As the RAE 2001 Law panel reported:

> "Work of internationally-recognised excellence was found in a wide range of types of outputs and places, and in both sole and jointly authored works (the Panel adhered to its published criteria in allocating credit for joint pieces). First-rate articles were found in both well-known journals and relatively little-known ones. Conversely, not all the submitted pieces that had been published in 'prestigious' journals were judged to be of international excellence. These two points reinforced the Panel's view that it would not be safe to determine the quality of research outputs on the basis of the place in which they have been published or whether the journal was 'refereed'."

There are in any event the risks in adopting bibliometric measures of encouraging the adoption of perverse positions in order to gain citations and of unduly and unfairly disfavouring the work of those who write on specialist areas.

1.7 Moreover, in relation to the need for establishing international benchmarking, the picture becomes complicated by the fact that many high quality outputs are addressing matters of purely domestic significance. This is a particular concern in Law as the UK is home to several jurisdictions. For example, over the years successive RAE law panels have come to recognise the importance of high quality legal research and scholarship which has its primary focus in Scots law, with its very different intellectual heritage. A similar argument can be made for legal research in Northern Ireland and Wales, where the role of law schools in sustaining jurisdiction-specific legal expertise is also crucial. The Society is firmly of the view that the approach to recognising international excellence which has been developed by successive Law panels in the RAE exercise, and which reflects these nuances, commands widespread support across our academic community. In particular, we are not confident that any system based primarily on metrics can give sufficient weight to these considerations, which are vital to legal developments throughout all parts of the UK.

1.8 In conclusion, no evidence has been provided to substantiate the alleged perverse incentives created by the current largely peer review based assessment methodology or the claim that these could be neutralised by linking RAE assessments to research grant income (or other metrics). In our view the problems associated with metrics would be avoided by retaining a peer-review exercise for Law. In the Society's judgment, previous RAEs, conducted principally on the basis of peer review of outputs, have made a significant contribution to encouraging high quality publications in UK legal scholarship (rather than merely

incentivising a large number of published pages per researcher). Although the ground rules for RAE 2008 have been laid down and should not be changed, this does not mean that any future exercise must follow precisely the same format – see further our response to (4) below.

2. *Have we identified all the important metrics? Bearing in mind the need to avoid increasing the overall burden of data collection on institutions, are there other indicators that we should consider?*

2.1 For the reasons explained above, the metrics identified in the consultation paper, whatever their value (if any) in relation to other subject areas, are not suitable for use in the discipline of Law. There are no alternative indicators which can act as a substitute for peer review.

3. *Which of the alternative models described in this chapter do you consider to be the most suitable for STEM subjects? Are there alternative models or refinements of these models that you would want to propose?*

3.1 We cannot comment on this question as we have no expertise in STEM subjects.

4. *What, in your view, would be an appropriate and workable basis for assessing and funding research in non-STEM subjects?*

4.1 The only appropriate and workable basis for assessing and funding research in Law (again, we cannot speak for other non-STEM subjects) is to retain a system of peer review. We have seen no evidence to persuade us that metrics have any significant role to play in that process.

4.2 We emphasise that the Society is not against change as such. But changes to the research assessment process in Law must:

- maintain and enhance, rather than diminish, the quality of research conducted in UK law schools
- be based on principle, not expediency;
- be appropriate to the discipline, rather than "one-size fits all";
- avoid distorting research activity and creating perverse incentives;
- command the support of those working in the discipline;
- minimise the administrative burden and costs involved.

4.3 For the reasons explained above, the Society recommends the retention of a peer-review exercise for Law. We accept, however, that it may be possible to simplify such an exercise for the future without interfering with the current round. We acknowledge the case for the RAE 2008 being the last RAE in its current form. So, for example, consideration could be given to requiring law schools to provide a reasoned argument for retaining the presumptive grading of the 2008 (or indeed, in the future, the other most recent) RAE exercise on the basis of

a slimmer portfolio of evidence than that which is currently required. On this model, a fuller peer review would be conducted in any exercise after 2008 in cases where either Law schools are seeking a higher grading or where the Panel is unconvinced by the argument put forward for the presumptive grading.

5. *What are the possible undesirable behavioural consequences of the different models and how might the effects be mitigated?*

5.1 We have identified the undesirable consequences of a metrics-based system for Law in our responses above. In our judgement they are not susceptible to mitigation.

6. *In principle, do you believe that a metrics-based approach for assessment or funding can be used across all institutions?*

6.1 No, or at least for the vast majority of institutions, for the simple reason that the great majority of universities (but not all) include a law school.

7. *Should the funding bodies receive and consider institutions' research plans as part of the assessment process?*

7.1 We have some difficulty in following the logic of this proposal, given the overall emphasis in the consultation paper on a shift towards metrics. It is hard to see how the evaluation of research plans can be factored into such a model. The Society obviously accepts the importance of universities being accountable for their deployment of public funding; we also acknowledge the value of encouraging a reflective research culture in individual law schools. Thus a statement of how an individual law school views its existing research achievements and how it proposes to develop or enhance its research strategy is obviously relevant to the award of continuing research funding. However, future research plans by definition have no direct link to current research achievements. There is also a clear risk that giving undue prominence to detailed research plans for allocation of research funding is likely to produce a sub-culture of research plan writing which will only divert energy from the effective accomplishment of actual research activity. We have already had ample experience of this phenomenon in the context of learning and teaching activities in law schools.

8. *How important do you feel it is for there to continue to be an independent assessment of UK higher education research quality for benchmarking purposes? Are there other ways in which this could be accomplished?*

8.1 The Society believes that it is fundamental for the continued health of UK law schools that we retain an independent assessment of research quality based on peer review for benchmarking purposes. We

have indicated in our response to (4) above how this might be modified in a fair, transparent and cost-effective fashion for the future.

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Society of Legal Scholars

[Please note that any questions concerning this response should be directed to Prof Wikeley's successor, Prof S H Bailey: see above for contact details.]

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