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CHAPTER 1 INTRODUCTION TO THE INQUIRY

Introduction

1. In the United Kingdom, one of the great academic achievements in the study of law over the last third of the 20th century, and continued into the 21st century, has been the creation of a substantial body of empirical research in law and legal process conducted by socio-legal researchers. This now stands alongside the well-established corpora of legal research and scholarship in jurisprudence and substantive law and practice.

2. Socio-legal research is wide in scope and ambition. It “takes all forms of law and legal institutions, broadly defined, and attempts to further our understanding of how they are constructed, organised and operate in their social, cultural, political and economic contexts.” For at least the past two decades socio-legal studies have been recognised as having achieved a central position in legal scholarship.

3. Under this broad umbrella, the work of empirical socio-legal researchers has contributed to the development of social and legal theory, influenced the development of substantive law, the administration of justice, and the practice of law.

Empirical research in law

4. Empirical research in law has been helpfully described by Baldwin and Davis as involving “the study, through direct methods rather than secondary sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effects they have.”

5. For the purpose of this inquiry, we adopt this broad definition. It is intended to cover the full spectrum of empirical research methods ranging from large-scale quantitative surveys, through ethnographic work down to small-scale qualitative studies and including experimental and pilot projects.

6. Adopting this broad definition of empirical research in law, Baldwin and Davis go on to comment that: “[I]t is principally through empirical study of the practice of law... and in studying the way legal processes and decisions impact upon the citizen, that the disciplines of sociology and, to a lesser degree, philosophy, psychology, and economics have entered into and enriched the study of law. This multidisciplinary research has, in turn, influenced many aspects of legal practice... Even the rules and procedures of the law, which can seem arcane and specialist, reflect this influence.”

7. We would also argue that the impact of such research is not just on the academic discipline and practice of law. It also informs those disciplines in the social sciences that have an interest in law and legal phenomena.

The problem of capacity

8. Notwithstanding the successes of empirical research in law, some of which are discussed in this consultation document, there is increasing concern within the academy and the user community that the current generation of empirical researchers in law is not large enough to undertake all the work that should be done; and of age and achieving critical mass and has enormous potential, but it is approaching a critical point when it could either continue to develop or it could decline.” (Blackstone’s Tower: The English Law School, Sweet & Maxwell, 1994, 145).

"[T]here is a sense of euphoria in the air and a growing sense that socio-legal studies is now firmly established...it is coming..."
that there are insufficient younger colleagues becoming available to build on past success and take empirical legal research forward.

9. The problem is particularly acute for empirical research in the areas of civil justice broadly defined (to include all areas of non-criminal law and regulation and for convenience subsumed under the term “civil law” or “civil justice” in this document) where historically there has been much less empirical research done and less capacity to undertake that work than in the criminal justice field.

10. The twin problems of the lack of current capacity and of the decline in future capacity are occurring at a time when the importance of this research is rapidly increasing. There are excellent opportunities to enhance our understanding of legal phenomena by building on the foundational empirical work completed over the last thirty to forty years. In addition, the demand for empirical research in law to inform policy-making and evaluate policy decisions is also growing.

11. This all reflects the obvious fact that the world in which law and regulation is required to operate is both expanding and changing rapidly. Economic globalization, scientific and technological change, environmental challenges, new modes of communication, threats to social order resulting from terrorism are just some of the big issues facing the modern world. At the more domestic level, there are the challenges provided by the expansion of the European Single Market, Human Rights, and other aspects of constitutional change. Government is making increasing use of law to regulate economic, social and family relationships and processes.

12. In this rapidly changing context there is a need for more empirical evidence about what types of law and regulation work, and what do not, how mechanisms of regulatory control could be improved and adapted, and generally the degree to which the use of law can contribute to the overall well-being of society.

13. The fundamental point is that while law is an increasingly important feature of modern life, there seems to a decreasing capacity to keep it under empirical examination.

14. Questions about ‘capacity’ in empirical legal studies are not new. Nor is the Nuffield Foundation’s engagement with this issue. In 1971 the Foundation was concerned enough to set up its own Legal Advice Research Unit, which eventually led to the formation of the Legal Action Group. At the same time, it launched a scheme of Social Science Fellowships for Law Teachers, so that university teachers of law could spend a year working in a social science department on a socio-legal research project. In the first year, there were no applicants and the scheme seems to have closed after a few years.

15. Despite this disappointment, there were other much more positive developments. A number of influential summer schools in the methodologies of the social sciences were run in the early 1970’s. And, most significantly, the SSRC – predecessor of the ESRC – took the decision to establish the Oxford Centre for Socio-Legal Studies.

16. More detail of the history is set out in Chapter 2. Here we note that in 1994 the ESRC commissioned a Review of Socio-Legal Studies after the decision to end core funding of the Oxford Centre for Socio-Legal Studies. The final Chapter of that report dealt specifically with the issue of capacity and training for future research in socio-legal studies. It concluded that:

“If socio-legal research is to flourish in Britain then the current output of identifiable trained researchers is inadequate…other sections of this report demonstrate a national demand for socio-legal research which cannot properly be met by the current output of properly trained researchers…If the social science community is going to be able to respond to the demand for socio-legal research, then the provision of research training both for established academics and postgraduate students must be increased.”
17. The Review also noted that: “There is a shortage of staff within law departments to provide training in socio-legal research, and social science departments do not have legally trained academics who can assist in developing an interest in, and knowledge about, law as a focus for research activity.”

The Review identified two key issues for the future viability of the subject. These were:

- the need for the skill base of academic lawyers to be broadened to enable them to undertake high quality empirically informed research; and
- the need for funders other than the ESRC to support socio-legal studies.

18. The issue of the intellectual background and skills required to undertake empirical legal research had already been raised by the ESRC-funded Oxford Centre in its 1987 Annual Report, highlighting the fact that at post graduate level law students, in particular, needed additional time to acquire the necessary intellectual capital to enable them to carry out empirical research.

19. Fragments of evidence available on the issue of empirical research capacity suggest that many mid-career legal academics do not have a research-based postgraduate qualification. Leighton et al in 1995 reported that at that time, only about one-fifth of legal academics had a PhD in Law; about one third of legal academics had a taught post graduate degree in Law; and a handful of legal academics had a postgraduate research degree in a subject other than Law. These figures help to demonstrate the lack of cross-fertilization between Law and other disciplines, and to explain why there is such a small cohort of legal academics able to produce empirically grounded work.

20. Against these figures has to be set the current vibrancy of the Socio-Legal Studies Association (SLSA). The most recent Annual Conference of the Association in 2003 was attended by 370 UK academics, 87% of whom were based in law departments. The 2002 SLSA Directory contains the research profiles of 327 UK academics. Nevertheless, closer examination of these research profiles underscores rather than contradicts the suggestion of a capacity problem. Of the 327 academics listed in the Directory, only 57 could be said to include funded empirical inquiry in their profile, and for 21 of these this did not appear to be a feature of their recent work. Of the 57 academics who had pursued externally funded work, 26 were located in departments other than Law. These other departments were principally criminology, sociology, social policy, politics and government.

21. This picture of relatively low levels of empirical activity among legal academics is also supported by ESRC information on applications for research funding and supported posts. While applicants in the field of socio-legal studies have recently been achieving an about average success rate, the number of applications has remained consistently low. Moreover, for ESRC purposes socio-legal studies includes Criminology, and many of the applications to the Research Grants Board concern criminal justice issues that are to be examined from the disciplinary position of Criminology rather than through empirical socio-legal inquiry.

22. On the other hand, the 2002 SLSA Directory also reveals that, since the ESRC’s Review of Socio-Legal Studies in 1994, there has been a diversification of funding for empirically-based legal research. The Department for Constitutional Affairs, the Home Office, the DTI and the Scottish Executive are now all regular funders of empirically-based legal research. The push towards evidence-based policy making by Government has had an impact here. Devolved government and regionalism may well result in increased demand for empirically informed research. Outside the funding provided by government, the ESRC continues its support of empirical socio-legal research. It is joined in this by a number of key charitable funders such as the Nuffield Foundation, Rowntree and Leverhulme.

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23. The concern about capacity to conduct empirical legal research goes well beyond the need and interests of academics. It affects legal practitioners and other users of empirical research as well. Rigorous empirical research of law and the institutions of law as they operate is needed to underpin many areas of legal and social policy.

24. An obvious example is the public funding of legal services. The Nuffield Foundation funded much of the work that looked at the first round of changes to the public funding of legal services. In more recent years, the Legal Services Commission has taken forward research in this area through its own research unit. But there is little spare capacity which enables the continued examination of issues that seem to be causing specific problems in the delivery of legal services, for example public family law.

25. Another area in urgent need of an empirical evidence base is found in the proposed radical change to the system of UK/GB tribunals. This is predicated on many assumptions about the needs of tribunal users and the public more generally. The system of tribunals produces judicial decisions in over 1 million cases annually, frequently touching the lives of some of the most disadvantaged groups in society. There has been empirical research evidence on tribunals, much of it extremely influential. But the overall coverage is patchy and some of it quite old. Recently there has been considerable difficulty in finding skilled researchers with the time to undertake further research in this important area.

26. In short, empirical research capacity is crucial in order to build our understanding of law as a social phenomenon, to inform debate on substantive law, and to provide evidence for and evaluation of policy on the administration of justice.

The Inquiry

27. The problem of under-capacity to undertake high quality empirical research is not confined to the discipline of law. However, there are probably unique factors in the legal field that need to be understood and addressed by a specific strategy rather than via a more generic approach as envisaged, for example, in the current ESRC research methods programme. In recognition of the complexity of these capacity issues and the need for a long term strategy to address the problem, the Nuffield Foundation has generously made available funds to mount this broad ranging Inquiry.

28. The Inquiry has the following objectives:

- The provision of factual information about current capacity among both lawyers and social scientists to undertake empirical research, particularly on issues relating to civil justice (including administrative justice and family justice);
- Articulation of the different aspects of the capacity problem;
- Understanding the causes of the problem including incentives and disincentives for conducting empirical research in law, drawing on evidence from a wide range of background.
Introduction to the Inquiry

of sources, including overseas experience;

• Bringing together the major players in legal education and training, funders and users of research, and a wide range of policy-makers to develop a shared understanding of the issues and to identify where concerted action is possible;

• Identifying a range of possible solutions; and

• Making recommendations for a programme of short, medium and longer-term initiatives and activities that might help to alleviate the problem.

Methodology

29. To achieve the objectives of the Inquiry a number of activities are being undertaken over a one-year period, including:

• The distribution of this consultation document among academics and among relevant stakeholders inviting written responses by the end of June 2004.

• Meetings in London, Birmingham, Manchester, Bristol, Edinburgh and Belfast during May 2004 to bring together legal academics with other academics from the social sciences and stakeholders to discuss the nature and causes of the capacity problem in empirical legal research, to explore the incentives and disincentives within law schools and social science departments for conducting empirical legal research in law, and to canvass ideas for practical measures that might help to build capacity for the future. The meetings will be facilitated by members of the Working Group.

• Research on location, demographic profiles and career trajectories of empirical researchers in Law. Academics engaged in empirical legal studies are scattered throughout universities in the UK and are to be found in a number of different disciplinary units. Research will be undertaken to examine in more detail the demographics of this spread. The research will focus on the career biographies of these academics. It will look at the career trajectories and career expectations of these academics and how these are shaped within different disciplinary identities. This will be carried out by means of an email survey and some follow up telephone interviews.

• Research to identify available and relevant research methods training programmes and the provision of a comprehensive directory of such programmes.

• Research on capacity issues in other jurisdictions that will identify similarities with and differences from the UK situation and suggest whether there are lessons that can be learned.

• A series of four seminars to be held in Autumn 2004 at the Nuffield Foundation for academics, policy-makers, the judiciary, practitioners and other non-academic users of empirical research in law. The seminars would provisionally cover the following topics (though the precise topics may change in the light of responses to the consultation document):

  Seminar 1. The Capacity Problem
  From the perspective of academics in mid-career and new entrants [Structural issues, incentives and disincentives.]

  Seminar 2. The Capacity Problem
  From the perspective of the users of empirical research. [Experience, needs, interests, current and future demand.]

  Seminar 3. The Solutions
  Dealing with the issues of skilling and incentivising new entrants to academia.

  Seminar 4. The Solutions
  Dealing with the issues of re-skilling and incentivising academics who are mid-career.

30. All of the information gathered during the course of the Inquiry, including responses to this consultation document, contributions to meetings and seminars, will be analysed and will inform the final report and recommendations that will be published early in 2005. Responses to this Consultation Document will be published separately in full.
The Advisory Committee

31. The Inquiry is guided by a distinguished Advisory Committee comprising:

- Professor Martin Partington CBE, Law Commissioner (Chair)
- Professor Robert Burgess, Vice Chancellor, University of Leicester
- The Rt. Hon. Lord Justice Robert Carnwath
- Professor Ian Diamond, Chief Executive, Economic and Social Research Council
- Professor Hazel Genn CBE, Faculty of Laws, University College London
- Valerie Macniven, Head of Civil and International Group, Scottish Executive Justice Department
- Walter Merricks, Chief Ombudsman, Financial Ombudsman Service
- Professor Alan Paterson, Vice President, Society of Legal Scholars
- Professor Genevra Richardson, Trustee Nuffield Foundation
- Roger Smith, Director, Justice
- Jonathan Spencer, Director-General Clients and Policy, Department for Constitutional Affairs
- Professor Sally Wheeler, Chair, Socio-Legal Studies Association
- Professor Paul Wiles, Chief Scientific Advisor and Director, Strategy Research and Statistics, Home Office
- Sharon Witherspoon, Deputy Director Nuffield Foundation

32. Hazel Genn and Sally Wheeler have responsibility for the day-to-day work of the Inquiry, and they are being assisted by Marc Mason, who is research assistant to the Inquiry.

Responses and Communications

Responses to this Consultation Document are sought by the end of June 2004.

Communications with the project can be achieved through the Inquiry’s website at: http://www.ucl.ac.uk/laws/genn/empirical or directly with the Working Group as follows:

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CHAPTER 2  THE DEVELOPMENT OF EMPIRICAL RESEARCH IN LAW

1. In order to provide a context for debate about the current situation, this Chapter offers a brief survey of developments in empirical research in law over the last 30-40 years. More attention is devoted to civil justice research as that is the area in which the concerns identified in Chapter 1 seem to be most acute. But we also consider criminal justice research as we think experience in this area may offer some indications of the way forward for the development of empirical research in civil justice. Thus we consider first developments in empirical research in civil justice and then research in the field of criminal justice.

CIVIL LAW AND CIVIL JUSTICE

Early Beginnings

2. Pioneering empirical research on legal topics was being undertaken in the 1960s among others by Professors Brian Abel-Smith, Robert Stevens and Michael Zander. Much of that early work focused on the role of the legal profession and early debates on unmet need for legal services. The period also saw the creation of law schools such as Warwick and Kent offering programmes exploring the interface between law and society. The Institute of Judicial Administration was established in the late 1960s at the University of Birmingham, and in 1975 the Institute published the results of an empirical study of legal services in Birmingham funded jointly by the British Academy and the Nuffield Foundation.6

3. In 1972 the Socio-Legal Group – an early forerunner of the Socio-Legal Studies Association - was founded. It has been described as “a loose knit group of scholars, mainly male lawyers”7. It was a relatively informal grouping of scholars which nevertheless held an annual conference. One of the key themes in those early days was the place of empirical research in the socio-legal world. There were strongly expressed views about the relationship between theory and empirical evidence.8 Empirical work was often criticised at the time for lacking an adequate basis in social theory.

The Oxford Centre for Socio-Legal Studies

4. Although law was initially regarded as being outside the remit of the Social Science Research Council when it was established in 1965, by the late 1960s the Council was persuaded to give greater priority to the impact of law on society. Its most important initiative was to establish a research centre in socio-legal studies in Oxford. The Oxford Centre for Socio-Legal Studies had a commitment to interdisciplinary socio-legal research with ‘parity of esteem’ for lawyers and social scientists. The Centre was to be led by co-directors from law and another social science discipline with a corpus of research staff initially recruited from law, sociology, social administration and economics. Subsequently psychology and social history were added to the list of disciplines represented within the Centre.

5. Between 1972 and 1985, when its core funding from ESRC was withdrawn, the Oxford Centre published path-breaking empirical research in the fields of, for example, tort law and compensation for personal injury, the financial implications of divorce and the resolution of family disputes, the regulation of health and safety at work and environmental pollution, the construction of criminal conviction, regulatory compliance in the tax field, and business disputes.

6 Lee Bridges, Brenda Sufrin, Jim Whetton and Richard White, Legal Services in Birmingham, 1975, University of Birmingham, Institute of Judicial Administration.
8 cf Pauline Morris, Richard White and Philip Lewis, Social Needs and Legal Action, Martin Robertson, 1973. This was the first publication in the series of research monographs entitled Law and Society edited by Colin Campbell, W G Carson and Paul Wiles.
6. At the peak of its activity the Oxford Centre had over twenty full-time socio-legal researchers and ran a programme of training in socio-legal research for its corpus of doctoral students. From 1985 onwards the Centre’s core activities began to shrink and its researchers and postgraduates took up posts in the law and social science departments of other Universities.

7. This model was intended in the original conceptualisation of the Centre. It was to be a site for the training of a critical mass of empirical socio-legal scholars who would eventually promote the wider penetration of socio-legal studies throughout universities in the UK by establishing socio-legal research centres, groupings or programmes in law schools and social science faculties.

8. Many of the socio-legal researchers currently conducting empirical research in law in Universities outside of the Oxford Centre were at one time either research staff or doctoral students at the Oxford Centre (e.g. Robert Baldwin (Law/Regulation); Professor of Law in the Law Department at LSE; Bridget Hutter (Sociology), Director of the ESRC Risk and Regulation Centre at the LSE; Anthony Ogus (Law and Economics) Professor of Law at Manchester Law School; Hazel Genn (Sociology/Law) Professor of Socio-Legal Studies at UCL; Robert Dingwall (Sociology/Social Policy), Professor of Sociology, School of Sociology and Social Policy Nottingham and Director of Institute for Genetics, Biorisks and Society; Sally Lloyd-Bostock (Psychology/Law) Professor of Law and Psychology at Birmingham University and Director of Institute of Judicial Administration; Paul Fenn (Economics) Professor of Insurance Studies at Nottingham Business School; Roger Bowles (Economics) Professor of Economics and Director of Centre for Criminal Justice, Economics and Psychology; Linda Mulcahy (Law) Professor in School of Law Birkbeck College; Sally Wheeler (Law) Professor of Commercial Law and Socio-Legal Studies Birkbeck College; Genevra Richardson (Law) Professor of Public Law Queen Mary; Carol Jones Professor of Criminology (Glamorgan); Ian Loveland (Law and Political Science) Professor of Law City University; Mavis Maclean (Social Policy/Law) Oxford Centre for Family Law and Policy). In this way the Oxford Socio-Legal Centre has had an influence on the development of UK socio-legal studies through the export of its researchers to law and social science schools throughout the UK.

9. Many institutions have created what might be described as thematic research centres or research groups focusing on particular areas of law and society. While some of these Centres are relatively well funded and employ a number of staff, others are little more than ‘virtual’ centres, with their work dependant on the activity and energy of just one or two researchers.

10. Examples include:

- **Family**
  - e.g. Oxford Centre for Family Law and Policy; Bristol Centre for Family Policy and Child Welfare; Leeds Centre for Research on Family, Kinship and Childhood; Cardiff – International Family Law Studies.

- **Legal Profession and legal services**
  - e.g. Institute for Judicial Administration at Birmingham (Baldwin and Lloyd-Bostock); the Centre for the Study of the Legal Profession at Sheffield (Shapland); Exeter (Economides - now defunct); Institute for Advanced Legal Studies (Sherr; Webley); UCL (Genn).

- **Business and commerce**
  - e.g. Cambridge Centre for Business Research (Deakin).

- **Regulation**
  - e.g. LSE (Hutter; Baldwin)

- **Human Rights**
  - e.g. Essex Human Rights Centre

- **Administrative law and administrative justice**
  - e.g. The Public Law Project; the Centre for the Study of Administrative Justice, Bristol (Partington – now defunct).
• Risk
  e.g. Nottingham Group (Dingwall); LSE (Hutter)
• Legal Education
  e.g. Warwick (BILETA)
• Environment
  UCL (Macrory; Holder)
• Medicine and biotechnology
  e.g. Cardiff Medico-Legal Studies Centre; Nottingham Institute for the Study of Genetics, Biorisks and Society.
• Courts and litigation
  e.g. Nottingham Law School Centre for Legal Research (Peysner and Seneviratne)
• Ethics
  Cardiff Centre for Ethics, Law and Society

Individuals and coalitions

11. There are other areas of empirical socio-legal research which derive from the work of individual scholars, or groups of researchers working in loose coalitions of colleagues not formally linked together. Examples include: Housing (where there is a loose coalition of researchers in Bristol and at Sheffield Hallam) and Law and Economics (with collaborative research being undertaken in Nottingham, York, UCL, and Surrey).

Government and the Legal Profession

12. Empirical research into non-criminal law has also been undertaken in a number of Government departments and to an extent by the legal profession. Examples include:

• The Department for Constitutional Affairs, which both promotes a programme of research and has some in-house capacity. The Research Unit in the DCA (Director Judith Sidaway) was only established in 1995/6 with a budget for annual commissioning of research, although the Department has had a long history of commissioning one-off empirical research projects, for example in the field of family law.
• The Legal Services Commission now has a significant programme of research into legal service provision. The Legal Services Research Centre (Director Pascoe Pleasence) (previously Legal Aid Research Centre) was established in 1996 and now has a core research staff of five.
• The Department of Trade and Industry, which has, for example, done considerable research into the work of Employment Tribunals.
• The Department of Health has from time to time funded socio-legal research, for example work on mediation of medical negligence claims (Mulcahy), and the working of the Mental Health Act (Peay).
• The Scottish Executive, which has long promoted socio-legal research into law and legal phenomena in Scotland and which has some in-house research capacity.
• The Law Society, which has its own research unit (previously called the Research and Policy Planning Unit, now renamed Strategic Research Unit). The Unit has a history of conducting its own empirical research into issues of concern to the solicitors’ branch of the legal profession and has also commissioned empirical research in law.

13. Government Departments have also been a source of funding for a number of empirical socio-legal research projects. These include:

• the ODPM, which has sponsored socio-legal research into housing law;
• the (now) DWP, which, as the Department of Health and Social Security, sponsored the key research (by Prof Kathleen Bell) into social security tribunals;
• more recently the Civil Justice Council has sponsored a modest number of projects, for example into the costs of litigation and Alternative Dispute Resolution.
Private social research companies

14. There are a number of private research companies that also carry out empirical research into legal issues as part of their portfolio of social research activity. These include:

- The Policy Studies Institute, which, for example, carried out the pioneering research into racial discrimination that led to the enactment of the Race Relations Act in 1975;
- The National Centre for Social Research (previously SCPR) which has a long history of conducting academic social policy and socio-legal research. NatCen also offers a programme of courses and workshops that providing training in quantitative and qualitative social research methods.

Freelance researchers

15. Finally it should be noted that there is a small number of researchers who operate on a free-lance basis, who have undertaken significant socio-legal projects. These include:

- Joyce Plotnikoff and Richard Woolfson, who have undertaken a number of studies funded by the Department for Constitutional Affairs and other funders into, for example, the Court of Appeal, litigants in person, case management.
- Tom Williams and Tamara Goriely, who have undertaken a wide range of empirical projects funded by Government and other research funders on topics such as legal aid, legal service delivery, county court litigation, costing of litigation.

Comment

16. It is worth observing that, in many ways, this is an impressive list, both of individuals and their achievements. This might lead some to wonder whether the capacity problem posed in Chapter 1 is as serious as some suggest.

Our response to such arguments is:

- First, although impressive, there are many important areas in the civil law area which have not received significant attention by empirical researchers, notwithstanding their importance. Many areas of commercial law and property law fall into this group.
- Second, even where empirical work exists, there is often a single study covering a particular topic but little more. Unlike other areas of research in the sciences and social sciences, there is not the critical mass of research reports that would allow ideas and theories to be tested and developed.
- Third, even this level of output may not be sustainable given current and likely future capacity.

Criminal Law and Criminal Justice

17. Criminal justice research has had a higher profile for a longer period than empirical research in the civil justice field. This is reflected in the early establishment of significant research institutes in both Cambridge and Oxford. The Institute of Criminology was founded by Cambridge University in 1959 with a donation from the Wolfson Foundation. It is part of the Law Faculty and is a multi-disciplinary research and teaching centre which includes sociology, psychiatry, psychology, history and law. In Oxford a Penal Research Unit was established in 1966 with a grant from the Nuffield Foundation. In 1973 it changed its name to the Centre for Criminological Research with a Committee of Management spanning Law and Social Science.

18. There are now a number of well-established institutes and criminological centres in universities throughout the UK. Some are based within Law Faculties or Departments, others within Social Science departments. Examples include:

- Centre for Law and Society Edinburgh (Law)
- Centre for Criminological Research Sheffield (Law)
• Criminology and Socio-Legal Research Unit Glasgow (Social science)
• Centre for Criminology and Criminal Justice Hull (Social policy)
• Criminal Justice Centre Kent (Law)
• Centre for Criminal Justice Studies Leeds (Law)
• Institute of Criminology and Criminal Justice, Queens Belfast (Law)

19. Although it is arguable that criminological research faces a capacity problem in terms of the availability of researchers interested in criminal justice who possess the necessary level of skill to conduct rigorous empirical research, it is suggested that the problem is of a different magnitude from that in the field of civil justice research.

20. Criminological research has a somewhat different profile from civil justice research in that those working in the field are rarely drawn from a purely legal background.

21. First, most leading criminological researchers have been trained in social sciences, for example in sociology or psychology. Although they may have obtained a law degree during their academic career, criminologists are less likely than civil justice empirical researchers to have entered academic research with a law degree.

22. Second, empirical research on criminal procedure was initially carried out in sociology and/or psychology departments. By contrast, non-family civil justice research tends to be conducted within Law Faculties, albeit often under the umbrella of a socio-legal research grouping or centre.

23. Third, another feature of criminological research is that it is international in a way that it is difficult for empirical research in civil justice topics to achieve. There are some notable exceptions to this generalisation, for example in the fields of legal aid, regulation and dispute resolution.

24. Fourth, there is a wealth of training available for budding criminologists at the undergraduate, post-graduate and mid-career levels. Such courses offer students an understanding of for example criminal law and process, analyses of criminality and victimisation and criminal justice policy. They also often equip students with the necessary skills for conducting empirical research. There is a dearth of similar courses for the socio-legal study of civil, family and administrative law and justice.

25. Finally, criminology and criminal justice research groups seem to have achieved critical masses that, apart from the Oxford Centre at its peak, have not been secured in the civil justice field.

QUESTIONS FOR CONSULTEES

Q1. What do you regard as the key factors explaining the relative paucity of empirical research in civil justice?
Q2. What do you regard as the key factors explaining the relative wealth of empirical research in criminal justice?
Q3. Is it easier to integrate criminal justice rather than civil justice?
Q4. What lessons can be learned for the development of empirical research in the civil justice area from the history of empirical research in criminal justice?

Government funding of criminological research

26. A significant factor in the development of empirical criminological research in the UK must surely be the historical investment of the Home Office in funding research in criminal justice. The Research, Development and Statistics Directorate at the Home Office (previously the Home Office Research and Planning Unit) has, since the early 1970s, been conducting its own original empirical research studies and, at the same time, annually commissioning research projects.
from university academics. The RDS has a large budget and employs teams of specialist staff including researchers, statisticians, and economists, communication professionals and scientists.

27. The existence of such a well-supported team of researchers within the Home Office provides career opportunities in criminology for those leaving University research training posts. Furthermore, the existence of a large and relatively stable budget for the commissioning of criminological research has provided the conditions in which university academics have established a large critical mass of empirical research in criminal law and process.

**Funding of empirical research in civil law and civil justice**

28. Historically there has not been a special and significant source of funding for empirical research on civil justice comparable to the role of the Home Office in the development of criminological research. Nonetheless, there exists a range of funders who offer schemes to which empirical researchers in civil justice issues can apply. Such sources offer a variety of schemes (both directive and responsive) for funding individual projects, programmes, and research Centres. Examples include:

- **The Research Councils**, including the Economic and Social Research Council, the Arts and Humanities Research Council, and to a lesser extent the Medical Research Council.
- **Charitable research foundations** have provided a consistent source of funding for empirical research in law including the Nuffield Foundation (in particular the Access to Justice programme and streams of funding for research on the family), the Leverhulme Trust, the Rowntree Trust, and the Esme Fairburn Foundation.
- **Government departments** such as the Department for Constitutional Affairs, the Home Office, the Department of Trade and Industry (in particular for employment law and dispute resolution), have provided streams of research funding and funding of one-off projects. The Scottish Office and now the Scottish Executive have historically provided a regular stream of funding for civil justice research in Scotland. Other departments have commissioned research on an ad hoc basis, for example the Department of Health into personal injury litigation and mediation on medical negligence claims, the Office of the Deputy Prime Minister for research on housing disputes.

Funding has also been made available by voluntary agencies and organisations such as the British Academy.

29. Information from funders suggests that the number of applications from researchers interested in empirical research into civil, family, administrative and commercial law subjects has historically been rather small and that the situation is not improving.

**Comment**

30. Perhaps one of the most important constraints on the development of a body of empirical researchers interested in civil justice issues is the historical lack of Government investment comparable with that of the Home Office. There have been some areas of civil justice research where a steady stream of funding has been available – for example legal aid. This has produced a cohort of academics who have specialised in empirical investigation of public funding of legal services.\(^{10}\) Even in this field, however, there appear to be few newcomers and there are concerns about who will be carrying out research in this field over the next decade.

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\(^{10}\) For example the work of Alan Paterson, Avrom Sherr, and more recently Richard Moorhead.
Why has empirical research into civil justice lagged behind criminal justice?

31. There can be little doubt that in comparison with criminal justice, civil justice remains relatively under-researched and under-theorised. Civil procedure has not been accorded the same status as criminal procedure within law schools. Outside of the family sphere it is unlikely to be dealt with at any level in social science departments. Criminal justice has a more immediate appeal, being more dramatic and perhaps easier to comprehend. Baldwin and Davis argue that the close relationship between social policy and legal doctrine in criminal law and criminal justice and the relative accessibility of criminal law to non-lawyers have contributed to the growth of empirical research in the criminal justice field. In their view, empirical investigation tends to be regarded as an essential tool of the criminal justice academic rather than as a "parallel activity". 11

32. Certainly there is more material available for researchers through Government statistics and regular crime surveys which raise questions about policy, patterns and trends in the criminal justice system. By comparison, there is a paucity of Government statistics about most areas of the civil justice system and this itself may be a reflection of a deeper difficulty in attracting empirical researchers to civil justice issues.

QUESTIONS FOR CONSULTEES

Q5. To what extent do you think that Government investment has been an important factor in the historical development of empirical criminal justice research?

Q6. Are there factors relating to the requirements of funding bodies, their schemes or their programmes that deter empirical researchers interested in civil law from applying for or from succeeding with applications?

Q7. Are the explanations for this low application rate to be found in an interest or skills shortage among lawyers and social scientists, or are there factors built into the criteria for funding, or the shape of funding schemes and programmes that deter such applications?

Q8. Is there more that could and should be done by the funders of research to promote empirical research in the civil justice field?

Q9. Are there other sources of funding for empirical research that have not been identified above?

Q10. Who should be funding empirical research?

33. This absence of a feel for the civil justice system is itself a function of the sheer breadth and diversity of civil justice issues – family, company/commercial, administrative, employment, tort, contract, property, legal aid, legal profession, regulation, courts, tribunals and alternative dispute resolution. The civil justice system, at the broadest level, lacks the coherence of the criminal justice system: the parts of the legal system that are not concerned with the criminal law comprise a huge range of problems and disputes with widely differing configurations of parties. The possibilities for legal redress are myriad, and the avenues of redress diverse. 12 Paradoxically, the very scope and diversity of the ‘civil justice

QUESTIONS FOR CONSULTEES

Q11. Do consultees think that the relative lack of official data about the operation of the civil justice system acts as a deterrent to the undertaking of empirical research in this area?

11 Baldwin and Davis 2003, op cit, p 885.
system’ may inhibit the establishment of a critical mass of researchers in any one subject area, thus slowing down the establishment of substantial bodies of work on which new researchers might build. Critical mass is necessary to provide an intellectual foundation for new research through competition of ideas, to create capacity for undertaking new research, and equally importantly, to enter into critical discourse on the product of academic research.

**QUESTIONS FOR CONSULTEES**

Q12. How important do you think the building of critical mass in research centres is to the success of empirical research in civil justice?

Q13. If your answer to the preceding question is positive, what size research groups do you think are optimal?
CHAPTER 3  BUILDING EMPIRICAL RESEARCH CAPACITY: INCENTIVES & DISINCENTIVES

1. In analysing the causes of the current capacity problem it is clear that while there are important intellectual and practical incentives for lawyers and social scientists to engage in empirical research in law, there are also some powerful disincentives that may be working against the renewal and development of capacity. In devising strategies for the future it is necessary to reinforce and perhaps enhance existing incentives while understanding the full range of personal, disciplinary, and institutional barriers and disincentives in order to seek to overcome them.

INCENTIVES

The excitement of discovering new knowledge

2. The principal attraction of empirical research in law is the intellectual excitement it offers. Although the discipline of law depends on the highest quality of doctrinal scholarship, it also requires understanding of how the doctrines of substantive and adjectival law operate in practice. Many researchers find empirical investigation of law and legal processes extremely satisfying to intellectual curiosity. There are empirical questions to be asked about every area of substantive law. In many areas knowledge is either patchy or non-existent. The field is therefore wide open for researchers. The scarcity of empirical legal research virtually guarantees originality, especially in areas of civil law and process.

3. Empirical legal research helps to build our theoretical understanding of law as a social and political phenomenon and contributes to the development of social theory. Put simply, empirical research helps us to understand the law better and an empirical understanding of the law in action helps us to understand society better. At the same time, good quality empirical research is of value to policy makers and the judiciary.

Attractions for funders

4. Empirical research into law offers a number of attractions to funders. The originality of empirical investigation into topics relating to civil law and justice can have immediate appeal for grant-giving bodies anxious to develop new fields of inquiry. This can be a particularly powerful attraction since some research themes in psychology, economics or political science have now become well-trodden.

5. The essential inter-disciplinarity of socio-legal empirical research is also appealing to funders anxious to encourage the development of inter-disciplinary research processes and methods. The possibility of adding a legal dimension to existing categories of social inquiry can result in an enrichment of research. Legal scholars may be criticised for failure to engage with social sciences, but equally those working in social sciences may be criticised for failure to take law seriously. It is at least arguable that a lack of understanding of law in many areas of social science, particularly in areas with links to a range of social policies, results in impoverished social analysis.

The attractions for policy makers

6. Empirical legal research is increasingly important to policy makers. While policy-makers have not always been interested in evidence-based policy and the extent to which policy-makers engage with researchers and commission new research has varied from field to field and over time, it is probably true that there has rarely been a time when policy makers were more interested in empirical evidence as a basis for policy choices and a guide to efficacy of policy change. Particularly since 1997, the Government's commitment to evidence-based policy making has been very strong. Government Departments have research budgets to provide the necessary evidence. In addition to the need for evidence
to support arguments for change, the present
government also requires regulatory impact
assessment for all legislative proposals.

7. Since 1996 the Department for Constitutional
Affairs (previously the Lord Chancellor’s
Department) has had a budget for
commissioning empirical research on topics
of policy relevance to the Department. Since
the research programme was initiated some
51 research reports have been published
between 1997 and 2003. These reports
illustrate the type of empirical research in
law being commissioned and the range
of researchers carrying out the projects.
Approximately twice as many studies could
be loosely categorised as involving sociological
or social policy perspectives as economics.
In terms of subject-matter, by far the most
well covered areas were family law and legal
services. Other topics covered included
the judiciary, legal costs, alternative dispute
resolution, and discrimination.

8. In terms of capacity, the number of academics
appearing more than once as report authors
is also telling. Some 14 academics were
responsible for more than one project each,
with five academics having three or more
mentions.

9. There are examples of empirical legal research
having a direct and sometimes more subtle
effect on policy. For example:
○ There have been individual studies that
have led to policy initiatives and reform
(e.g. administrative tribunals; small claims;
personal injury; relationship breakdown);
○ Significant parts of the work of the English
Law Commission have been underpinned
by empirical research into the operation
of law (e.g. damages, trustee exemption
clauses, evidence of previous misconduct,
company directors’ duties)
○ Current changes to the costs rules and
the introduction of fixed costs in Road
Traffic accidents have been underpinned
by relevant empirically based economic
research.

QUESTIONS FOR CONSULTEES

Q14. To what extent do policymakers in your
field of research interest encourage
and commission empirical research?
Q15. To what extent are policymakers in your
field interested in engaging with the
results of empirical research, whether
or not they have commissioned work?
Q16. Are there measures that need to
be taken both by researchers and
policymakers to increase dialogue and
enhance the impact of empirical legal
research?

The legal profession and the judiciary

10. The legal profession is increasingly dependent
on good quality social research data. For
example, research demonstrates trends in the
nature of legal practice and indicates ways in
which the legal profession should respond to
those changes. Work on legal skills has helped
to develop ideas for the nature of professional
legal education. The English Law Society’s own
studies have provided important information
on entry into the profession and demographic
change.

11. Empirical legal research commissioned by the
English Law Society, the Civil Justice Council
and the Department for Constitutional
Affairs has been central to debate about
the impact of the civil justice reforms on
settlement behaviour and legal costs.
Economic analysis was key to the acceptance
of proposed fixed-fee scheme for low value
road traffic accidents (see for example work
by Fenn and Rickman).

13 John Baldwin (5), Paul Fenn (4), Neil Rickman (4), Tamara
Goriely (3), and Joyce Plotnikoff (3). The other academics
with 2 reports included Sarah Blandy, Julia Brophy, Anthony
Dnes, Hazel Genn, Alistair Gray, Mike Hope, Kate Malleson,
John Raine, Joanna Shapland, and Richard Woolfson.
14 See for example work by Goriely, Moorhead and Abrams
on pre-action behaviour in civil cases.
15 See for example Peysner’s work on costs.
12. The judiciary has also benefited from empirical legal research. A recent example of judicial use of empirical research in law was the case of *Heil v Rankin* on damages for pain and suffering. Studies such as Hood’s work on discrimination in the criminal courts led to a major programme of judicial education on equal treatment of parties run by the Judicial Studies Board. Other recent work influencing judicial behaviour includes work on child protection cases (Brophy) and public perceptions of the judiciary (Genn).

**The Universities**

13. There are also incentives within Universities that could be said to encourage the undertaking of socio-legal research. One particular development over the last decade that may be noted is the demise of the stand-alone law faculty and the creation within larger faculty structures of schools of law (or other similar outcomes.) While no doubt such changes have been introduced for reasons of managerial efficiency within particular universities, they may also be seen as bringing academic benefits. Certainly some university vice-chancellors have been concerned about the apparent isolation of their law schools from other disciplinary groups. The creation of law schools within larger faculties could therefore lead to the closer relationship of legal scholars with social science colleagues. In turn, this could have a significant impact on the ability and willingness of lawyers and social scientists to undertake important empirical research in law.

14. There is also a trend in some universities to be more directional in the ways in which research activity is organised. Since it is becoming increasingly hard to demonstrate research excellence across whole disciplines, many universities have encouraged staff to group themselves into identifiable research groups or centres, to ensure that individual departments or schools develop particular recognition in specialist areas.

15. In sum, there are considerable attractions for both lawyers and social scientists to work, both independently and collaboratively, on empirical legal research projects.

**QUESTIONS FOR CONSULTEES**

Q17. Do you agree that these factors represent incentives for both lawyers and social scientists engaging in empirical research in law?
Q18. If so, which do you regard as the most significant incentives?
Q19. Are there other incentives that should be taken into account?
Q20. What measures could you suggest to increase the incentives for scholars to engage in empirical research in law?
Q21. Have structural changes in universities led to improved collaboration between law and other social science areas?

**BARRIERS AND DISINCENTIVES**

16. Notwithstanding these factors which might be thought to amount to incentives to undertake empirical research in law, there are also powerful disincentives.

**The Position of Legal Academics**

17. There has been an historic difficulty in attracting promising law students into academic life. Many students entering law schools have their sights firmly fixed on practice. But among those who consider further study and are tempted by academia, there is little exposure to empirical research in law within the standard law curriculum. Most academic lawyers will have read law as undergraduates. The overwhelming majority of undergraduate law degrees in the UK offer no research training other than the traditional skills of the doctrinal scholar. Many undergraduate law degrees offer few opportunities for students to read optional subjects (not least because of the core subjects required by the Law Society and the Bar for a “qualifying” law degree). Where optional subjects are available, these
are rarely in subjects other than Law.\textsuperscript{16} The relocation of many Law Schools into Social Science Faculties may lead to further change. Empirical research skills are not easy to graft on to training in legal reasoning. Few undergraduate law subjects introduce empirical materials for students to consider so that they might develop an appreciation of the value and interest of empirical research in law (possible exceptions here are family law and, of course, criminology).

18. An interesting conundrum is posed by reflecting on the career paths of those students who study social science or another discipline as undergraduates and then go on to take the CPE. The mixed disciplinary background of many of these students ought to yield a pool of well-qualified graduates with the intellectual equipment and practical skills necessary to undertake empirical socio-legal research. And yet they do not seem to be staying within academia, but rather going on to practice. Thus it seems that it is legal practice rather than academia that is reaping the benefit of such interdisciplinary legal education as exists within the UK university system. Where those with such qualifications leave the practice of law, they seem not to be tempted into a research career.

19. At the postgraduate research level, where one might hope that some social science skills could be acquired, there are also difficulties. The paucity of legal academics with the skills to supervise doctoral students interested in engaging in empirical research projects acts as a serious constraint on developing subsequent generations of socio-legal scholars. Students are often dissuaded from embarking on such projects and co-supervision arrangements with social scientists may not provide an answer to the problem as a result of funding disincentives.

20. As noted in Chapter 1, during the 1970s and early 1980s the Oxford Centre for Socio Legal Studies was responsible for providing an environment in which many leading socio-legal scholars began their research careers. Since the termination of core funding from the ESRC in the late 1980s the capacity and activity of the Oxford Centre has consequently declined, including its contribution to the training of the new generations of socio-legal scholars.

21. Finally, in common with a number of other disciplines, there is a difficulty in attracting promising scholars to an academic career given the pay differentials between University and government and other research agencies, leaving aside the financial attractions of private legal practice.

### QUESTIONS FOR CONSULTEEES

Q22. Is there a lack of interest in the investigation of issues relating to justice and society among young legal academics?

Q23. How can the recruitment of new empirical legal researchers be made more attractive?

Q24. What should be the relationship between university pay scales and other employers of potential researchers?

### Training opportunities in empirical research skills

22. Opportunities to develop empirical research skills for undergraduates, postgraduates and academics in post are thin on the ground (see appended review of relevant Law and Society, Socio-Legal, Empirical Research Skills courses). Examples are:

- Summer schools
- Oxford Centre
- SLSA day courses
- Departmental research training programmes
23. ESRC research studentships have been of little help since few Law Departments have sought, and even fewer obtained, ESRC recognition. There has been an historical dearth of applications for ESRC Studentships in Socio-Legal Studies and success rates have been poor.

24. Opportunities for mid-career academics, both lawyers and social-scientists to develop new skills are even more scarce. For example, funded training courses are generally geared to the acquisition of advanced research skills rather than the provision of basic cross-disciplinary skills. Legal academics seeking to develop social research skills will be hard-pressed to find a course to meet their needs.

25. While the SLSA has in the past run short courses, and has recently been considering ways of reviving this initiative, the ability of such courses to offer a full training in social research methods is limited.

26. The situation for social scientists interested in developing their interest in legal topics is no easier. Some leading empirical socio-legal scholars who began their research careers as social scientists also took full undergraduate law degrees17 but these are the exception rather than the rule.

‘But what can they teach?’ The place of the empirical socio-legal researcher in the Law School

27. There is a self-perpetuating problem in drawing socio-legal researchers – whether lawyers or social scientists – into the heart of Law Schools. This arises from the demands of the provision of core teaching in law. So long as the law curriculum remains as it currently is, there will always be pressure in recruitment processes to appoint to lecturing posts new blood interested in teaching core courses.

28. An increasing emphasis on high-fee-paying postgraduate taught law courses may exacerbate this problem as the demand for practice-orientated courses and teachers able to deliver specialist courses grows.

29. The relatively rare examples of social scientists being recruited to Law Schools to undertake empirical research suggest that they can feel isolated and may be regarded as a luxury when times are hard and student numbers increase.

QUESTIONS FOR CONSULTEES

Q25. What is needed by way of training for new empirical researchers wishing to enter the field?
Q26. Where should it be provided?
Q27. How can it be funded?
Q28. Can such training be offered collaboratively?
Q29. Could graduate schools be the focus of research training/staff development to enable new researchers to develop the necessary skills?

Q30. Should law schools be as dominated by the demands of the taught curriculum as they currently appear to be?
Q31. Could the organisation of teaching programmes provide more time for staff to carry out empirical research?
Q32. Are there lessons that law schools could learn from other disciplinary areas (e.g. engineering, medicine) where there are pressures to teach an extensive professionally determined syllabus while at the same time carrying out cutting edge research?
Q33. Are there ways in which law schools can cost-effectively include non-lawyer socio-legal researchers in their staff complements?
Q34. Are other institutional arrangements required (e.g. the creation of graduate schools) to enable interdisciplinary work to be taken forward?

17 E.g. Maclean, Lloyd-Bostock, Genn.
30. Social scientists interested in working within law schools may find it necessary to obtain a legal qualification and be prepared to teach core legal subjects in order to secure a full-time appointment.

The Position of Social Science Academics

31. If academic lawyers have been reluctant to pursue empirical studies of law as a result of lack of research skills and disincentives within the Law School, how do we account for the meagre interest of social scientists outside of the realm of criminal law? In 1973 Pauline Morris drew attention to the lack of a sociological perspective in much empirical research in law at the time and argued that an understanding of law was fundamental to an understanding of society and, in particular, social change:

“[S]ociologists must inevitably be interested in law as part of, as contributing to, and as affected by, wider aspects of the social structure. They should, through study of the law and the legal process, be concerned with understanding and with explanation, asking, for example, what is the social nature of law, how does its study help us to understand society and what is its relationship to social change?”

32. In the mid 1970s the SSRC created special Fellowships designed to help academic lawyers and/or social scientists to cross the disciplinary divide (e.g. Carol Smart (Leeds), Fran Wasoff (Edinburgh)). All of the Fellowships at that time went to social scientists.

33. The question, however, is to what extent the situation has changed in the past 30 years? There are some distinguished sociologists, economists, and other social scientists who have made a career in empirical socio-legal research in the civil justice field, but it is clear that the study of legal institutions and processes has not become a major focus for research within social science. A number of reasons could be suggested for this.

34. Historically, the legacy of struggles within sociology between Marxists and non-Marxists in the 1950s and 1960s led to a concentration on criminology at the expense of other areas of law and society and also had a more general chilling effect on empirical research.

35. More recently, there has also been a drift in UK sociology from studying hard social institutions, such as medicine or law, towards studying broader concepts like culture. This may be a reflection of fierce competition for scarce research money leading researchers to opt for cheaper theoretical and cultural studies than more expensive, fundable empirical projects. The absence of sustained government investment in civil justice research, referred to earlier, may also be a factor here.

36. There may also be a belief among sociologists that the study of law requires a great deal of technical knowledge, although this does not seem to have held back the growth of medical sociology or the sociology of science and technology.

37. In the UK it is arguable that there has been relatively more interest in empirical socio-legal research from social anthropologists and social policy scholars than from sociologists, particularly in areas of welfare and family law. The contemporary decline of these disciplines may have led to a loss of the few empirical researchers focusing on civil legal issues.

38. There is also the question of whether students in sociology or social policy need more time than is available within the structure of say ESRC funding to undertake some additional work, like sitting in on some law courses, in order to undertake a socio-legal PhD. It is important to provide incentives for new entrants to the field to cross disciplinary boundaries.

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19 Examples include Carol Smart, Robert Dingwall, Gwynn Davis, John Baldwin, Bridget Hutter, Mike Adler, Roy Sainsbury, and economists such as Paul Fenn and Neil Rickman.
20 We are indebted to Robert Dingwall, Carol Smart, Bridget Hutter and Mary Stratton for their contributions to the discussion in this section.
39. The lack of interest by sociologists in the sociology of law is apparently not unique to the UK. Sociology of law is a relatively small section in both the American Sociological Association and the International Sociological Association. A correspondent from Canada has ’wondered at the almost total absence of sociological attention (either theoretical or applied) to the role or organisation of civil justice in contemporary society.’ This absence of interest is attributed to a number of causes which may well strike a chord on this side of the Atlantic. For example, general academic attitudes to the purposes of research and in particular the value given to abstract and theoretical knowledge over that which is accessible to the lay person and can be practically applied.

Institutional factors

The role of the funding councils

40. The primary task of the Funding Councils is to distribute the resources made available by Government for higher education to the institutions of higher education. They also have key roles in ensuring the quality of the output of the institutions to which it provides resources. In making their distributions, the funding councils do seek to achieve particular strategic goals, but on the whole they are not well equipped to encourage developments at the [relatively] micro level, which empirical research on law and legal process would represent.

41. They are also keen where possible to promote interdisciplinary research approaches, but the emphasis on peer review – in relation to which interdisciplinary is often highly problematic – means that they find it hard to be particularly directive.

42. A key role for universities and HE colleges, alongside the provision of teaching and research, is Third Leg activity to meet the needs of business and the community, contributing to economic and social development both regionally and nationally. Thus funding councils are committed to encouraging and rewarding partnerships between HEIs and business, the transfer of knowledge and expertise, and the development of employment skills.

43. It is not clear how these broad objectives could be translated into specific modes of assistance for the development of empirical research capacity in law and legal process.

QUESTIONS FOR CONSULTEES

Q35. Is there a lack of engagement with the law as part of sociology or other social science training?
Q36. Does lack of fluency in legal issues present a serious problem for sociologists interested in research on law?
Q37. Does the ESRC stress on research skills for graduate social scientists hamper attempts to branch out and develop new skills, such as legal skills?
Q38. Is there a need for positive incentives to encourage students in social science to cross disciplinary boundaries?
Q39. Has the demise of joint Law and Sociology degrees (e.g. Warwick) had an impact on the development of interdisciplinary research interest?
Q40. Is there an intellectual ‘animosity’ between lawyers and other social scientists that inhibits interdisciplinary activity?
Q41. What are the key factors inhibiting social scientists from engaging in empirical research on legal subjects?
Q42. What measures could be taken to overcome such problems and to encourage social scientists to work either alone or collaboratively on empirical research in law?

21 Mary Stratton, Research Coordinator, Civil Justice System and the Public Project, University of Alberta, Edmonton.
The Research Assessment Exercises

44. There are a number of possible effects of the RAE which may relate to the issues addressed in this paper. Some of them emanate from the demands of the exercise itself; some from disciplinary preferences for single discipline research; and some specifically from the approach to assessment taken by the Law Panels in 1996 and 2001.

The imperatives of the exercise

45. The first RAE in 1992 was specifically quantitative leading to possible disadvantage to those engaged in lengthy projects. Academics keen to maximise output might have felt reluctant to embark on substantial empirical projects. The 1996 and 2001 exercises shifted the emphasis from quantity to quality, but the requirement to produce four published works of “international” excellence within the four or five year assessment period may still have encouraged the production of shorter-term and more easily published work.

Interdisciplinarity

46. There has been a longstanding concern that the various Research Assessment Exercises have had a chilling effect on interdisciplinary work. Rightly or wrongly, many have a clear perception that interdisciplinary work is less well-regarded by RAE panels than single discipline work. Whatever the truth of this, the perception of any sort of handicap for interdisciplinary work will inevitably act as a brake on the development of collaborative research or on academics taking an interdisciplinary approach.\(^\text{22}\)

47. In its response to the recent Roberts Review of the Research Assessment Exercise\(^\text{23}\), the Society of Legal Scholars wrote: “Whilst recognising the value that may lie in some inter-disciplinary work, the Society firmly believes that Law must be regarded as an academic discipline in its own right … It is important for the funding councils to appreciate that only a minority of legal research and scholarship is in the form of applied or empirical social science research. The majority of legal research is analytical and reflective in a different style, being more akin to disciplines in the humanities such as philosophy and history. Whilst sharing some concerns with such branches of study, legal scholarship is essentially an interpretative discipline with a number of unique features…”

48. It may be thought that such statements are not likely to encourage young scholars who might be considering making the intellectual and time commitment to embark on an empirical project, notwithstanding all the intellectual attractions that such research might offer, as outlined earlier in this Chapter.

The Law Panel’s approach to assessment

49. For many, if not most, academic disciplines, success in attracting external research-funding is an independent factor in rating research activity for the RAE. In seeking not to disadvantage those Law Departments with a poor record of securing external research funding, successive Law Panels have effectively undermined the position of empirical researchers in Law Departments by apparently giving little, if any, credit for success in securing external research funding. Thus, in the Law Panel’s published working methods for the 2001 exercise, no comment was made about credit being given for external research funding.

\(^{22}\) It is often claimed, for example, that in the discipline of Economics, theoretical work is regarded of higher status than applied. This could have negative impacts on those economists wanting to conduct interdisciplinary Law and Economics research, which is often of an applied nature

50. On the other hand many panels that might be considered broadly comparable in terms of models of research activity each devoted a specific section to External Research Income in their working methods and indicated how credit would be given. These included the subject panels in Philosophy, History, English, Geography and Economics. Indeed, in some disciplines credit was given merely for applying for research grants, irrespective of outcome.

51. The approach of the Law Panel would seem to result in two effects. First, it creates a self-perpetuating situation in which there is no incentive for legal academics to apply for external funds to carry out empirical research. Secondly, those who undertake empirical research may be further disadvantaged. In addition to the fact that they may receive no credit for obtaining external funds, at the same time they may have fewer publications in the assessment period because of the length of time taken to collect and analyse empirical data and thus to write up the reports of their research.

53. The reasons for this are many and complex. They include:

- The highly contested issue of the extent to which the university retains a proportion of any income in order to fund essential centrally provided services (e.g. the Registry, Library, Estates etc.)
- The move from detailed allocations to individual departments to more aggregate allocations at the Faculty/School level means that departments may lose access to the sources of income they have generated
- The varying ability of departments to raise their own research incomes leads successful departments to complain that their success is used to fund other departments which have not achieved the same degree of success. This can lead to some departments positively discouraging the obtaining of research grants and contracts on the basis that it is a lot of work, it may bring few rewards, and they will get bailed out by high income stream departments anyway.

54. The whole question of incentives is one that affects the university system as a whole, and is not peculiar to the socio-legal research activity. But it seems that it is still an issue that needs consideration in this particular context, as well as more generally.

**QUESTIONS FOR CONSULTEES**

Q45. Do consultees agree that a particular effect of the RAE has been to deter researchers from undertaking empirical research into law and legal process?

Q46. If so, are there measures that can be taken to address the issue?

**Resource allocations in Universities**

52. Most Universities have adopted a more transparent form of financial modelling. It is in most cases somewhat easier to track the sources of money that come into the University and how they are transferred thence from the centre to the faculty/department. While the main purpose of these developments was to encourage departments to earn more of their own income, there are reasons to think that this is not always as effective as it should be. Departments that successfully raise research grants and contracts do not always receive the full benefit of this.

**QUESTIONS FOR CONSULTEES**

Q47. Do you agree that the barriers and disincentives suggested in this Chapter act as a constraint on both lawyers and social scientists engaging in empirical research in law?

Q48. If so, which do you regard as the most significant constraints?

Q49. Are there other barriers and disincentives that should be considered?

Q50. What measures could you suggest to overcome these barriers and disincentives?
CHAPTER 4  EXPERIENCE OVERSEAS

1. In attempting to identify the underlying causes of the lack of capacity problem, the Inquiry is hoping to draw on experience from overseas. Preliminary exchanges with socio-legal academics abroad indicate some similarities and some differences in interest and capacity to undertake empirical research in law.

Canada

2. Several correspondents from Canada have contributed views suggesting similar capacity problems to the UK. One correspondent argues that the lack of capacity in empirical legal research can be traced to the lack of any form of legal research methodology on the Law curriculum. (“...the only liberal arts discipline that pays so little attention to its methodological problems and prospects”). It is argued that work done outside of the law faculties has been grounded in “an impoverished view of law” leading to a limited scope and issues hypothesized in the “old language of law in books”.

3. Other factors that may have contributed to a perceived lack of capacity include a “dumbing down” of social research generally, with the growth in the late C20th of ideological work that has no need of data, together with the demand from Universities for more research and publications which produces perverse incentives against undertaking lengthy empirical projects.

4. Another correspondent adds that over the last two decades there have been several prominent studies that have urged that there be more empirical research in law in Canada. The reasons given for the need for more such research echo the comments made in the Background to the Inquiry document. The absence of empirical research in Law in Canada, it is argued, can partly be accounted for by the fact that few law professors have been adequately trained to undertake empirical research in law. Moreover, social scientists who do have the skills to undertake such research do not appear interested in doing so, with the exception of some issues regarding criminal law.

5. It is argued that in common with the situation in the UK, civil law issues in Canada have been subordinated to those of criminal law both within and outwith academia. As in the UK a heightened focus on criminal laws, courts and processes is pervasive within government, the media and the legal system. Public interest in, and concern about, crime is promoted by the mass media. Whereas coverage of civil law issues is minimal. Again in common with the UK, there is a lack of statistics concerning usage of the Canadian civil justice system.

6. A sociologist working on a major civil justice project argues that “establishing social science interest in civil justice issues will require a concerted and long-term effort to contest and change attitudes...The discounting of community based knowledge and devaluing of applied research initiatives is ingrained and not confined to social science interest in the law. Similarly, a failure to understand the role of civil justice systems in democratic societies is not limited to social science academics.” Tellingly, she admits that prior to her involvement in her current project she had “never once thought about the system of civil justice as an area of sociological study.”

Australia

7. Preliminary information provided by several colleagues in Australia suggests the existence of capacity problems in relation to empirical research in law. There is little, if any, formal training offered by Australian Law School...
anthropology, history) or as a result of undertaking combined Law degrees which are relatively popular in Australia. There is some difficulty in recruiting appropriately skilled junior researchers to work on socio-legal empirical projects. One correspondent remarks that “while social science graduates may have the necessary research skills, it is rare to find a legally trained researcher with any significant knowledge of social science research methods, notwithstanding the prevalence of combined degree courses in Australia.”

8. One correspondent suggests that empirical research remains somewhat marginal within the Australian legal academy and that the few scholars conducting such work tend to be in newer and relatively poorly supported universities. It is argued that empirical socio-legal research has a relatively low status within traditional Australian Law Schools. On the other hand empirical research projects tend to attract competitive research grants and there is a strong incentive for development in this area, given the higher education funding arrangements in Australia.

9. There is a Socio-Legal Research Centre at the Griffith Law School involving just over 40 members, a little under a third of whom are in the Law School. Most of the members are engaged in empirical research in law and are regularly funded via external research grants. Other Law Schools with scholars engaged in empirical research include the Australian National University, University of Melbourne, and Monash University. Although there used to be a Centre for Socio-Legal Studies at La Trobe, that Centre no longer exists.

New Zealand

10. Responses so far suggest that there is very little socio-legal research being conducted in New Zealand. There is some agreement that there is a lack of status or understanding of the value of socio-legal studies, with no uniting body for the subject and a lack of impact on policy, which tends to be driven by more populist considerations. The culture of black-letter law is seen as dominating Law Schools in New Zealand and that empirical socio-legal research is “tolerated” rather than valued. As a result empirical research does not provide the path to career progression and there is also some difficulty in getting empirical legal research published with the publishing industry being small and principally interested in text books which will have a continuing market.

11. Among the disincentives for academics who might be interested in empirical legal research is the longer timescale required for empirical research which “in the publish-soon-or-perish world of the modern academy” is too daunting for most academics and even more so for young academics needing rapid publication. Furthermore, empirical publications are unlikely to be sole authored articles in the Law Quarterly Review or a book by Sweet and Maxwell which means that for young legal academics there is a need to produce orthodox doctrinal or theoretical publications as a separate stream of research, an additional and unnecessary challenge at the early stages of an academic career. “It is so much easier to stay in the law library reading cases and statutes.”

12. A further issue is the “formidable range of knowledge and skills” needed for empirical research in law – skills which are not normally taught together at undergraduate level in New Zealand. The potential solution of legal academics working in interdisciplinary teams (as with the science model) is hampered by law students being taught to work alone.

13. Suggested solutions include a shift to North American models of the legal academy and replication of the styles of research found in the sciences. However, “The conservatism and resilience of our legal culture and its models of appropriate scholarship will still be formidable barriers.”

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28 We would like to thank Ursula Cheer, Senior Lecturer in Law at University of Canterbury; Professor John Dawson, Faculty of Law, University of Otago; Professor Greg Newbold, School of Sociology and Anthropology, University of Canterbury; and Professor Neil Boister, University of Canterbury for their detailed comments on the situation in New Zealand.
USA 29

14. The situation in the US seems rather more mixed. One correspondent suggests there is not so much a capacity problem as an interest problem on behalf of the government in funding socio-legal research for policy purposes. Some of the points of difference between the UK and US, however, that have been identified include the fact that in the US much empirical socio-legal research is located outside of the law schools both in other faculties and private/non-profit organisations, with most of the scholars/researchers having a mainline social science background.

15. The vocational nature of the law degree in the US suggests that those undertaking it may not have as much interest in socio-legal issues as those undertaking a social science degree;

16. In the US, law is a subfield within political science and as such benefits from the major stream of empirical training available in this discipline.

17. As far as sociology of law is concerned, there is often a major link between criminology and sociology of law in major universities, which is rather different from the situation in the UK.

18. The funding situation in the US also seems to be somewhat different from that in the UK in that the US, Government does most research in-house. Where government departments do fund external research, however, they tend to be more interested in criminal justice than civil justice issues, which is similar to the situation in the UK.

19. There are a large number of consulting companies and research institutes that employ empirically trained social scientists to conduct empirical research e.g. non-profit making organisations such as the RAND Corporation and the National Center for State Courts. There are a significant number of organizations in the profit sector as well. All of these hire empirically-oriented social scientists.

20. Despite the differences between the background of empirical socio-legal researchers in the US as compared with the UK and the greater volume of empirical socio-legal work in the US, another correspondent suggested that the establishment of the Journal of Empirical Legal Studies was partly a response to concerns about the availability of publishing outlets for empirical legal research in the US.

Japan 30

21. There has been a slowly developing field of empirical legal research in Japan dating back around 30 years. There have been some policy orientated surveys (by the Japanese Federation of Bar Associations) since 1980 producing descriptive data but with little theoretical development. Policy orientated empirical research has also continued through the Civil Procedures reforms and judicial reforms which began in the late 1990's.

22. Factors that might have contributed to the delay in developing a strong empirical tradition in Japan include some reluctance by academics to undertake policy related studies and the relationship between academics and public agencies: public agencies in Japan prefer to base policy on commissions of law professors, the judiciary and lawyers rather than commissioned empirical research.

23. It seems that in Japan, in common with other jurisdictions, academics find it easier to write academic papers based on library research rather than accepting the risks involved empirical research “the success of which is not always sure.”

24. An additional suggested factor in Japan is that sociology of law has established its roots as a subject in law, and has therefore attracted few sociologist or political scientists, instead relying on law graduates who need further training in research methods and statistics.

29 We are indebted to Professor Herbert Kritzer, University of Madison-Wisconsin and Professor Ted Eisenberg of Cornell University for their contributions.

30 We are indebted to Professor Masayuki Murayama of Chiba University, Tokyo for his observations on the situation in Japan.
25. Socio-legal studies does not have a distinct identity in the broader field of social sciences in Switzerland and there is no association or society which brings together all those who engage in legal empirical research.

26. Not many researchers are trained both in law and in social science and there a no specific training programmes in socio-legal studies. Empirical researchers tend to work in teams of lawyers, sociologists, political scientists. An example of this model is research conducted by CETEL, Centre d'études, de technique et d'évaluation legislatives [Centre for evaluation and legislative studies] at the University of Geneva. Although the CETEL is based in the Faculty of Law, in many cases, empirical research in law is more likely to be associated with political science chairs.

27. While some socio-legal research is conducted by academic research units such as CETEL, many empirical studies are commissioned by state agencies from private contractors.

28. There are, however, at least two fields where socio-legal empirical research in Switzerland can be described as quite strong. The first is legislative evaluation which is recognised by the State as being important and where pioneering work has been done by academics such as Luzius Mader). Under art. 170 of the 1999 Federal Constitution, the Federal Assembly (the Swiss Parliament) has to make sure that the efficacy of federal policies (including legal provisions) is assessed. Many cantons have similar provisions and some have set up specialized bodies to undertake or commission empirical studies to that effect.

29. The second area in which there is a substantial body of empirical research is criminology, in a broad sense encompassing criminal sociology, and there are well-established research centres in Lausanne, Bern, Zurich and Geneva.

30. This selection of experience from overseas indicates that the issues raised in this Consultation Document have some resonance for colleagues in other jurisdictions. We are keen to canvass views as widely as possible and we invite our overseas colleagues to consider all of the questions in the Document and to discuss the situation in their country. In particular we would value contributions on the following questions:

**QUESTIONS FOR CONSULTEES**

Q51. Are there concerns about capacity to conduct empirical research in law in your country?

Q52. If so, what is the nature of the problem and what do you consider to be the contributing factors.

Q53. If, on the other hand, there are no such concerns about capacity, can you suggest why the situation in your country might be different from that in the UK?

Q54. Are there any lessons from the experience in your country that you think would be particularly important to consider in the UK context?

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31 We are indebted to Professor Thierry Tanquerel of the University of Geneva for this contribution on the situation in Switzerland.
CHAPTER 2
THE DEVELOPMENT OF EMPIRICAL RESEARCH IN LAW

Q1. What do you regard as the key factors explaining the relative paucity of empirical research in civil justice?

Q2. What do you regard as the key factors explaining the relative wealth of empirical research in criminal justice?

Q3. Is it easier to integrate criminal justice rather than civil justice research centres within Law Schools and social science faculties, and if so why?

Q4. What lessons can be learned for the development of empirical research in the civil justice area from the history of empirical research in criminal justice?

Q5. To what extent do you think that Government investment has been an important factor in the historical development of empirical criminal justice research?

Q6. Are there factors relating to the requirements of funding bodies, their schemes or their programmes that deter empirical researchers interested in civil law from applying or from succeeding with applications?

Q7. Are the explanations for this low application rate to be found in an interest or skills shortage among lawyers and social scientists, or are there factors built into the criteria for funding, or the shape of funding schemes and programmes that deter such applications?

Q8. Is there more that could and should be done by the funders of research to promote empirical research in the civil justice field?

Q9. Are there other sources of funding empirical research that have not been identified above?

Q10. Who should be funding empirical research into civil law subjects?

Q11. Do consultees think that the relative lack of official data about the operation of the civil justice system acts as a deterrent to the undertaking of empirical research in this area?

Q12. How important do you think the building of critical mass in research centres is to the success of empirical research in civil justice?

Q13. If your answer to the preceding question is positive, what size research groups do you think are optimal?
CHAPTER 3. BUILDING EMPIRICAL RESEARCH CAPACITY: INCENTIVES AND DISINCENTIVES

Q14. To what extent do policymakers in your field of research interest encourage and commission empirical research?

Q15. To what extent are policymakers in your field interested in engaging with the results of empirical research, whether or not they have commissioned work?

Q16. Are there measures that need to be taken both by researchers and policymakers to increase dialogue and enhance the impact of empirical legal research?

Q17. Do you agree that these factors represent incentives for both lawyers and social scientists engaging in empirical research in law?

Q18. If so, which do you regard as the most significant incentives?

Q19. Are there other incentives that should be taken into account?

Q20. What measures could you suggest to increase the incentives for scholars to engage in empirical research in law?

Q21. Have structural changes in universities led to improved collaboration between law and other social science areas?

Q22. Is there a lack of interest in the investigation of issues relating to justice and society among young legal academics?

Q23. How can the recruitment of new empirical legal researchers be made more attractive?

Q24. What should be the relationship between university pay scales and other employers of potential researchers?

Q25. What is needed by way of training for new empirical researchers wishing to enter the field?

Q26. Where should it be provided?

Q27. How can it be funded?

Q28. Can such training be offered collaboratively?

Q29. Could graduate schools be the focus of research training/staff development to enable new researchers to develop the necessary skills?

Q30. Should law schools be as dominated by the demands of the taught curriculum as they currently appear to be?

Q31. Could the organisation of teaching programmes provide more time for staff to carry out empirical research?

Q32. Are there lessons that law schools could learn from other disciplinary areas (e.g. engineering, medicine) where there are pressures to teach an extensive professionally determined syllabus while at the same time carrying out cutting edge research?

Q33. Are there ways in which law schools can cost-effectively include socio-legal researchers in their staff complements?

Q34. Is there a lack of engagement with the law as part of sociology or other social science training?

Q35. Does lack of fluency in legal issues present a serious problem for sociologists interested in research on law?

Q36. Does the ESRC stress on research skills for graduate social scientists hamper attempts to branch out and develop new skills, such as legal skills?

Q37. Is there a need for positive incentives to encourage students in social science to cross disciplinary boundaries?
Q39. Has the demise of joint Law and Sociology degrees (e.g. Warwick) had an impact on the development of interdisciplinary research interest?

Q40. Is there an intellectual ‘animosity’ between lawyers and other social scientists that inhibits interdisciplinary activity?

Q41. What are the key factors inhibiting social scientists from engaging in empirical research on legal subjects?

Q42. What measures could be taken to overcome such problems and to encourage social scientists to work either alone or collaboratively on empirical research in law?

Q43. Do consultees agree that the capacity of the HEFCE (and other HE Funding Councils) to address the specific issues raised in this CD is limited?

Q44. Should the Funding Councils be more directive?

Q45. Do consultees agree that a particular effect of the RAE has been to deter researchers from undertaking empirical research into law and legal process?

Q46. If so, are there measures that can be taken to address the issue?

Q47. Do you agree that the barriers and disincentives suggested in this Chapter act as a constraint on both lawyers and social scientists engaging in empirical research in law?

Q48. If so, which do you regard as the most significant constraints?

Q49. Are there other barriers and disincentives that should be considered?

Q50. What measures could you suggest to overcome these barriers and disincentives?

CHAPTER 4: EXPERIENCE OVERSEAS

Q51. Are there concerns about capacity to conduct empirical research in law in your country?

Q52. If so, what is the nature of the problem and what do you consider to be the contributing factors?

Q53. If, on the other hand, there are no such concerns about capacity, can you suggest why the situation in your country might be different from that in the UK?

Q54. Are there any lessons from the experience in your country that you think would be particularly important to consider in the UK context?