



**THE VALUE OF 'TECHNOLOGY-ENHANCED LEARNING'  
(TEL) IN EVIDENCING COMPLIANCE WITH THE 'STUDENT  
CONTRACT TO EDUCATE' (SCTE) IN A NEW ERA OF  
ACCOUNTABILITY IN UK HIGHER EDUCATION.**

**ANNIE McCARTNEY**

**VOLUME I: CHAPTERS 1-6 (MAIN THESIS DOCUMENT)**

**PhD THESIS**

**2020**

**The Value of 'Technology-Enhanced Learning'  
(TEL) in Evidencing Compliance with the 'Student  
Contract to Educate' (SCTE) in a New Era of  
Accountability in UK Higher Education**

**Student Name: Annie McCartney**

**Student no: 16128249**

**Date of submission:**

**Thesis Supervisors:**

**Dr Dawn Story (University of South Wales)**

**Dr Clare Kell (University of South Wales)**

**Thesis Panel:**

**David Palfreyman, OBE (University of Oxford)**

**Dr Alison Lui (Liverpool John Moores  
University)**

**Dr Mike Reddy (University of South Wales)**

**Professor Karen Fitzgibbon (University of South  
Wales)**

**VOLUME I  
MAIN THESIS  
DOCUMENT:  
Chapters 1-6**

University of  
South Wales  
Prifysgol  
De Cymru



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

## **LEGAL DISCLAIMER**

Please note the contents of this PhD thesis are for academic purposes only and should not be construed as constituting any form of legal advice. Appropriate legal advice gained from professionally qualified lawyers should be obtained in relation to legal transactions. Students and lecturers are not insured to give legal advice.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

## Word Count:

### Excluding Some Tables, References, Footnotes and Appendices

#### Volume I

Chapter 1	7,000 words (Starts on page 34)
Chapter 2	10,000 words
Chapter 3	8,500 words
Chapter 3 Postscript to chapter 3	<b>1,000 words</b>
Chapter 4	8,500 words
Chapter 5	8,500 words
Chapter 5 Postscript to chapter 5	<b>3,500 words</b>
Chapter 6	4,000 words
Chapter 6 Postscript to chapter 6	<b>1,000 words</b>

#### Volume II

Chapter 7	13,000 words
Chapter 8	13,000 words
Chapter 9	13,000 words

Volume III Chapter 10: Special Supplementary Appendix

Special case study on high quality provision that represents VFM

**Word count not applicable**

#### Volume IV Chapter 11

17, 000 (compulsory components only)

#### Volume V Appendices for I-II-IV

Word count not applicable

**TOTAL WORD COUNT:**

**104,500 words approximately**

## PREFACE

The author formally commenced this PhD by portfolio with project focus in February 2017, completing the thesis in the autumn of 2019. Under USW PhD portfolio rules students following this route of thesis must have a maximum of three Projects sufficiently completed at research proposal stage (2016). The three Projects are: **MCQ** assessment, Panopto, (lecture capture) and a selection of collaborative learning tools all designed to enhance the academic experience for students. Collectively these Projects are referred to as the '**TEL Tools**'.

The motivation for the research was triggered by a student complaint in 2014 alleging that the author had not sufficiently prepared students for an upcoming MCQ assessment. The author quickly referred the case manager to the relevant Panopto recording which evidenced that this was clearly not the case and the complaint was subsequently dismissed. This was the springboard for the research focussing on the evidential value of the TEL Tools in terms of their pedagogical and legal credentials within the context of the **SCTE**. The research was being conducted against the backdrop of a volatile and fast changing **HE** environment witnessing a shift from accountability primarily at institutional level to holding actors to account for 'high-quality' academic provision at the classroom coalface. The latter also steered the research direction of this thesis and the extent to which the TEL Tools could evidence accountability of three selected stakeholders charged with performing the SCTE and providing education of high quality at the coalface, namely the HEI, the academic and the student. Professional practice doctorates with primary data in place and collected over many years before thesis commencement still need to convince that the thesis delivers a strong contemporary and relevant research message that carries beyond the four corners of the institution. It is here that the research methodologies and research methods will need to be watertight and a detailed research methodology chapter has been placed early in the running order of this thesis for validation of this. (Please refer to the 'AMC Research Journey' at the beginning of Chapter 2) The thesis is divided into five volumes as set out below.

**Volume I** largely adheres to the format adopted for a traditional research thesis containing sections on background and introduction, research aims, objectives, research questions to be answered together with research 'golden threads', research methodology and a series of four mini-literature reviews covering TEL, accountability, the SCTE and digital evidence and ADR. This approach to a series of mini literature reviews was considered essential to critically investigate these key terms and their wider use beyond USW, as well as providing necessary underpinning for the remainder of the work, particularly Volumes II and IV. Supplementary sections on 'high-quality' (plus VFM) and ADR are added in chapters 5 and 6 respectively.

**Volume II** is dedicated to the three Projects and follows a similar format for each of the Projects so that their interrelationship as a complete research package is aligned which is essential for a PhD that charts this route.

**Volume III** is a supplementary special appendix. This appendix contains a case study on 'high-quality' including VFM as a key component of this as the author considered the work could be subject to challenge without an in- depth study of these key complex and elusive terms relevant to the SCTE. Further, research was emerging that clearly demonstrated the importance students attach to 'high-quality' teaching in their choice of HEI and key to a return on their tuition fee investment. The author considered the research is strengthened by providing strong pedagogical and legal messages on these complex terms and their relevance to the SCTE. (Due to word count restrictions, this work is now a special supplementary appendix Vol III). The work on markers of 'high-quality' across disciplines is in chapter 5.



**Volume IV** is the Critical Review which is a compulsory component for a PhD conducted via the portfolio route with project focus. The criteria for this section is prescriptive (**A-F**) but the author added four additional sections to reflect the uniqueness of this research (**G-J**) covering the ethical challenges for research which relies on student participation, overall research conclusions, a set of recommendations for USW and the wider academic community and a glimpse into the future of TEL where the use of **AI** and **VR** is set to transform higher education. The latter was deemed important by the author to demonstrate that the research has an enduring legacy in the rapidly changing technological environment within UK higher education. Due to word count restrictions sections (G-J) are in Vol. V.

**Volume V** contains the appendices for Volumes I-II and IV as Volume III is a standalone supplementary appendix.

Ample guides are contained in Volume I to explain the layout and format of this PhD such as the 'At a Glance' contents page set out immediately below and the PhD thesis storyboard (Figure 1) which takes the reader on a 'whistle stop' tour of the research. Special icons in this storyboard point the reader to each chapter of the work and page dividers follow this 'house style' for ease of reference. A summary of each of the chapters in all four volumes immediately precedes thesis commencement and is located on pages 40-45 below. The six 'Golden Threads' of the research are set out in a special graphic, located on page 66 and provide a visual 'holistic' summary of the research. Other graphics have been specially designed for the three Projects and are located at the front of Chapters 7/8 and 9 and should enable the reader to follow this unique research journey more easily.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

# Contents Page 'At a Glance'

	Chapter	Volume	Page Numbers
	1 Starting Point - Summary of thesis chapters	I	39-44
	1 Background and Introduction	I	47
	1 Research Rationale#1	I	53
	1 Research Rationale#2	I	56
	1 Research Aims	I	68
	1 Research Questions	I	71
	1 Research Objectives	I	74
	2 Research Methodology	I	82
	3 Mini Literature Review on TEL	I	111
	4 Mini Literature Review on Accountability	I	147
	5 Mini Literature Review on the SCTE	I	175
	6 Mini Literature Review on Digital Evidence	I	207
	7 Project 1 MCQ Assessment	II	17
	8 Project 2 Panopto Lecture Capture	II	72
	9 Project 3 Collaborative Learning Tools	II	127
	10 Special Case Study on 'High-Quality'	III	15
	11 Critical Review	IV	10
	Appendices (For Volumes I-IV)	V	4

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

# PhD Thesis Storyboard

PhD Storyboard - Signposting the start to finish of this thesis by portfolio with project focus: Annie McCartney (Student no 16128249)

**1 STARTING POINT**  
Defining the research questions to be answered aimed always at delivering a contemporary message with primary data comprising 3 projects in place at the outset of the research journey.  
Undertaking a PhD via this route is challenging but delivers 'uniqueness' and 'researcher' insights.

**2 Background and Introduction**  
Sets out the research rationale and justification for the research which is introduced primarily. Tracks the development of the research 'journey' through 'themes' looking TEL in supporting chosen pedagogy. TEL as potential accountability tool to evidence accountability at the classroom level. TEL as digital evidence of compliance with the SCTE and the value of TEL as an authentic and transparent digital evidence (quality) in relation to delivering 'high quality' provision that can be relied upon. In place TEL in the context of the digital university and whether it is a catalyst for change or an impediment on academic freedom and autonomy.

**3 Research Rationale #1**  
To test the reality of TEL (in the form of the three projects) in providing a level playing field for all students to take control of their learning and to enjoy a successful and inclusive academic journey of 'high quality' whatever their chosen route in a face to face or online educational environment.  
Could the 'digital footprint' left by the TEL tools comprising the three TEL projects contribute authentic and reliable evidence of performance of the SCTE?

**4 Research Rationale #2**  
To test the reality of the TEL tools as accountability and legal compliance tools to facilitate early assistance and available, confidential and swift resolution of student complaints and disputes.  
**11 Mini Literature Review on the SCTE**  
Critically assess when this contract is properly formed and the key express and implied terms of the doctrine of judicial deference to academic judgment. Specific attention will be paid to key terms that deal with the TEL duty to exercise reasonable skill and care 'the strict liability obligation to supply digital content that is fit for purpose in online provision, the duty to behave in accordance with good faith principles, duties to provide accurate information that students can rely on in making their choice of TEL. In doing so, case law from the construction industry where conflicting contractual standards were agreed to last included in different contractual documents. In questions for how long the doctrine of judicial deference to academic judgment can survive.

**5 Research Aims**  
To evaluate the extent to which the TEL tools comprising the three projects evidence compliance with key terms and conditions of the SCTE in a new era of accountability and to evaluate what this new accountability model looks like when operating at the 'realities' where teaching, learning and assessment happens. To evaluate how well the TEL tools support chosen pedagogy enabling the 'availability' of high quality provision for students. In line with this to evaluate if 'correct markers' across disciplines can evidence that high quality provision is being delivered despite the difficulty in defining this complex term. Being clear on these matters should facilitate greater understanding of duties and responsibilities of contractual parties and enable suitable dispute management.

**6 Research Questions**  
To question how and when the SCTE is formed and the key terms both express and implied that comprise this contract. To question the extent to which the TEL tools evidence compliance with this contract in meeting pedagogical and legal requirements.  
To question what 'accountability' looks like for the three stakeholders responsible for performing the SCTE and to question what are the legal ramifications when parties breach their legal duties as set out in the SCTE. To question how effective the TEL tools are in avoiding and managing disputes sensibly with students.

**7 Research Objectives**  
To deliver new and valuable interdisciplinary research that looks at accountability where it happens and makes most to students and delivers 'backed' compliance of the performance of the SCTE by the three stakeholders.  
To provide an honest and tracked account of the research methodology adopted for this research.  
To demonstrate the frequency and challenges of research conducted via this portfolio route combining traditional research methods with innovative and 'unique' action research methodology whilst also ensuring that the legal demands of this research are met.  
To provide a mini literature review chapters on the meaning of TEL, accountability, SCTE and digital evidence considered necessary underpinning for the 3 dedicated project chapters. Further to place this research in a contemporary UK context to ensure that the primary findings have a 'research reach' beyond the four corners of UK.  
To undertake a special case study on high quality provision combining secondary and primary data.  
To report on the primary findings for each of the three projects and the extent to which they answer the research aims and research questions.  
To provide a critical review chapter that is 'holistic' and demonstrates the 'inter relationship' of the three projects and their combined contributions in answering the research questions and providing research that is novel.  
To provide a set of recommendations and to highlight where further research is required.

**9 Mini Literature Review on TEL**  
Critically test how TEL is defined and how it operates in the wider academic community thereby laying the foundations for why being being how well the TEL tools are operating beyond their 'out of use' in HOW 'aligning' a 'real' TEL solution of TEL as it operates in this research.

**10 Mini Literature Review on Accountability**  
Provide a detailed review of how accountability is being defined in this research. Unique in this research is the development of a TEL Accountability Liability Matrix together with a Risk Register. Examination of duties and responsibilities of the three stakeholders to test how enforceable these duties are when breaches of the SCTE occur.

**13 Project 1- MCQ Assessment**  
To track the 10 year development of this project and consider the extent to which using MCQ assessment as deployed in this project can answer the research questions in this thesis. A standard bottom up format is adopted for each of the three projects applying a WILMIR (WILMIR) approach in these chapters. The primary findings are carefully aligned with secondary discussions to place each of the three projects in the wider academic community beyond the four corners of UK.

**14 Project 2- Panopto Lecture Capture**  
To present the case for and against lecture capture as supporting chosen pedagogical methods and the extent to which this digital TEL tool can evidence compliance with the SCTE. Again, the chapter will support the standard WILMIR (WILMIR) approach in answering the research questions always carefully aligned with secondary data to 'authenticate' primary findings in the wider TEL context.

**15 Project 3- Collaborative Learning Tools**  
To review selective collaborative learning tools as adopted in this project and to test their pedagogical and legal credentials in answering the research questions. The standard format in this chapter is followed with an added glance into the future on how well these TEL tools will hold up as an accountability and legal compliance tools in a changing technological landscape with AI and VR set to be widely adopted.

**16 Special Case Study on 'High-Quality' provision**  
To evaluate what this complex term means and how it can be differentiated from its educational counterpart 'academic' to evaluate if common markers of 'high quality' can be established across disciplines and if the TEL Olympic style measures of quality will truly address if 'high quality' provision is happening in the higher education student experience. To look at the different promises made in relation to 'high quality' and consider the potential legal liability that these promises carry when students rely on them in making their choice of TEL. Relevant consumer legislation e.g. The Consumer Rights Act 2015 and Equality legislation will be important.

**17 Critical Review Chapter**  
This chapter is prescriptive and must meet UKW requirements. The chapter must link the research methodologies adopted and fully justify the approach for the three projects as well as demonstrating the inter relationship between the projects. The chapter will need to validate the research as new and innovative.  
The interdisciplinary challenges in research of this nature will need to hold up to scrutiny and the chapter will need to draw together the relevant evidence that the combined projects answered the research questions or where gaps in the research need to be 'plugged'.

**18 THESIS FINISH**  
The chapters will bring all the golden threads of the thesis together and complete the research with a set of recommendations to address pedagogical and legal challenges.

**8 Research Methodology**  
To provide a tracked and transparent account of the research journey for this thesis from 2009 to the summer of 2020. The challenges of defining robust and reliable research that delivers a credible research message with primary data in place at the outset are laid bare in this chapter. The decision to place ontological theorising before epistemological discourses is fully articulated together with detailed evaluation of the research methodologies adopted to answer both the legal and pedagogical questions. The research is put under the evidential microscope in this chapter to validate its authenticity and reliability.

**THE THREE TEL PROJECTS FOR THIS THESIS BY PORTFOLIO - PROJECT FOCUS**

chapter 1 - no. 1 Volume I  
chapter 1 - no. 2 Volume I  
chapter 1 - no. 3 Volume I  
chapter 1 - no. 4 Volume I  
chapter 1 - no. 5 Volume I  
chapter 1 - no. 6 Volume I  
chapter 1 - no. 7 Volume I  
chapter 2 - no. 8 Volume I  
chapter 2 - no. 9 Volume I  
chapter 4 - no. 10 Volume I  
chapter 5 - no. 11 Volume I  
chapter 6 - no. 12 Volume I  
chapter 7 - no. 13 Volume II  
chapter 8 - no. 14 Volume II  
chapter 9 - no. 15 Volume II  
chapter 10 - no. 16 Volume III  
chapter 11 - no. 17 Volume IV  
End - no. 18 Appendices Part

Figure 1: PhD storyboard and 'whistle stop' tour of research

## EXECUTIVE SUMMARY

This thesis by portfolio with project focus charts a different and practical route to that of a traditional research thesis. The three **TEL** Projects selected for this research are **MCQ** assessment (Project 1), Panopto, (Project 2) and Project 3 is a selection of Collaborative Learning Tools (**CLT**). The main aims of this interdisciplinary research are firstly, to test how well these **TEL Tools** evidence compliance with key express and implied terms of the **SCTE** and secondly, to evaluate how well the TEL Tools can transparently track the accountability of three stakeholders (**HEI**, academic and student) responsible for performing the SCTE and ensuring education is of a 'high-quality' however flexibly students choose to learn. In an increasingly litigious sector this thesis also aims to demonstrate the extent to which the TEL Tools and the digital evidence they generate can be used to help avoid, manage and swiftly resolve potentially costly and time-consuming complaints and disputes with students in line with a sensible conflict management approach and adopting less adversarial **ADR** techniques.

The research methodology largely adopts a pedagogical action research approach supported by innovative and unique methodology to address the legal research problems. The research methods combine a quantitative and qualitative mixed methods approach in e.g. the form of annual TEL student surveys comprising open and closed questions. A special case study on 'high-quality' academic provision that represents VFM was undertaken combining primary and secondary data. A range of semi focus groups were formed to gain quantitative and qualitative data from students, academics and lawyers specialising in professional negligence, dispute resolution and with knowledge of higher education. Highly innovative research was undertaken to test the TEL Tools independently in their 'LIVE' environment at local level and to assess the value of the digital evidence generated by the tools in defending against standard mock student complaints and disputes. Careful alignment of epistemic frameworks tracks how knowledge is generated in this thesis and a specially designed knowledge generation timeline captures the knowledge generation models used at various stages of this work.

Accountability in this thesis centres on the 'local classroom coalface' where it is argued that the real test of how well it is or is not working needs to be put under the 'accountability' microscope in this new era. Vijay Grover (2014) highlights the difficulties in holding actors accountable in education but by focussing on responsibilities at 'local level' combined with automated 'accountability systems' this can enhance transparency in this environment. The TEL Tools, it is argued, can provide this transparent 'close up' digital eye of the activities in this local educational community. The thesis inextricably links accountability with 'high-quality' tuition and to that end the obligations (legal and pedagogical) have been forensically deconstructed for the three key stakeholders responsible for the performance and discharge of the SCTE. A **RAG** accountability liability matrix was specifically designed to rate the liabilities of the three stakeholders from moral (mainly students) with little remedial redress for breach to fully enforceable contractual rights and legal remedies (mainly the HEI). The ongoing debate between 'standards' and 'quality' in **HE** is given a construction law twist with a review of recent case law in this industry (but with findings that are applicable to the SCTE) that demonstrates the complexities relating to professional 'reasonable skill and care' and 'fitness for purpose' standards and the importance of ensuring contractual promises comply with professional indemnity insurance requirements. The surveillance concerns of academics who worry that TEL use can stifle pedagogical innovation, reduce quality and threaten student engagement as well as undermining academic freedom are fully addressed in this research.

The research findings deliver a largely positive message that the TEL Tools are capable of evidencing compliance with key terms in the SCTE as well as being effective accountability tools in tracking performance of the three stakeholders. The innovative approach in this research aligning chosen pedagogical models and the extent to which individual TEL Tools can scaffold 'high-quality' provision and support chosen pedagogy is considered pioneering. However, the difficulties in defining 'high-quality' and how it might be measured across the disciplines highlighted a need for further research in this area and for transparent articulation of this elusive phrase in the SCTE. HEIs often make exaggerated promises to provide tuition of 'excellent' or 'outstanding' quality and the research established a need for transparency in using this term so that students are not misled by marketing content and how courses are advertised. In terms of the TEL Tools and the digital evidence they generate the video footage produced by Project 2 was rated as 'best evidence' of the time and could be highly 'relevant' and 'admissible' evidence in internal, ADR and formal proceedings. Recommendations in this thesis are split between pedagogical and legal and between USW and at wider institutional level. An unequivocal recommendation urges the sector to finally accept that student consumer rights that must be upheld and that a standard form SCTE is now a priority for students paying a 'high-ticket' price for their education. Future research should focus on postgraduate and PhD student contracts and **VR** and **AI** as the TEL Tools for a new HE digital era.



## DEDICATIONS & ACKNOWLEDGEMENTS

At the time of writing this dedication, enthusiasm for this research has very much waned in my family home. That said, I must thank my husband Nigel, and my two sons Ralph and Tom for their help in putting this PhD together with its five volumes. The IT skills that they possess have been frequently called upon to assist with the tediousness of 'contents pages' and 'figures' etc that continue to elude me, and I fear too ageing to get excited by the software and skills needed for such tasks. While they are all vying for a special note of thanks, that honour must go to Nigel who continues to be my number one supporter and encourages me at every turn and seems to have unfailing belief in my ability, and I know not why. Nigel's attention to detail, knowledge and love of English grammar and his design eye never fail to impress and I am truly grateful for his assistance in putting all five volumes in place when he is so busy himself. Thank you to my three boys but especially to Nigel!

## ACKNOWLEDGEMENTS PART I

In a THE article, entitled "PhD students' happiness not written in 'stars'" (30<sup>th</sup> May 2019) it is reported that what matters most to PhD students is the relationship with their supervisors stating that, *"supervisors are the largest contributors to PhD student satisfaction, but this is driven solely through their supportiveness..."* I could not agree more!

The support I have had from Dawn and Clare turning chapters around in very quick timeframes and encouraging me to continually attend and deliver papers and presentations both within USW and at international conferences instilled a new level of confidence that was much in need of rekindling.

I had the pleasure of working and learning so much from Clare and Dawn and hope this is the start of a long and enjoyable research journey for the three of us.

Thank you Dawn and Clare for putting up with my endless ramblings that needed structure and coherence at every turn. The pleasure has been all mine. Our regular coffees and chats to discuss the research were always something to look forward to and trust this will continue as we explore new avenues of research.

I would also like to thank my students for completing all the questionnaires over ten years, taking part in focus groups and attending numerous conferences with me to discuss the impact of the TEL Tools for them as end users over recent years.

Finally, I would also like to thank the participants from students, academics, government and lawyers who participated in semi-focus groups, questionnaires etc enabling opinions from a broad church of stakeholders to participate and for their voices to be heard in this research.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

## ACKNOWLEDGEMENTS PART II

A research work such as this conducted over 10 years is the product of collaboration and support from colleagues across the university. The following is a list of names who without their support this work would never have materialised. I am sure there are names that are missing from this list and apologies for this but thanks to you all.

Neil L (media)

Neil L (materials)

Jacqui N (Former IT Services)

David L (Former IT Services)

Rachael J (LRC)

Sharon L (LRC)

Gerwyn D (USW Print and Design) \* Double thanks to Gerwyn, the design of the documents in this PhD are lovely and you took my scribbled nonsense and turned the ideas into super 'easy to follow' graphics. Thanks!

Kath G (USW Print and Design)

Darren E (CES)

Joao R (CES)

Roger C (media)

Visiting Professors in ADR and Visiting Guests in CSR

CELT

Siobhan C (USW)

Sam H (USW)

Sarah P (Disability unit)

Llinos S (GO)

Elaine H (GO)

Paul M and Jonathan S (Ethics)

Estates Team (USW)

CES colleagues (Built Environment)

Steve Lloyd and Peter Evans (former line manager and head of school who supported this work from its inception)

Daphne O'Doherty (former head of school)

Paul D (CES)

Philippa W (USW)

D. Whitcombe (HYDRA)

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

USW STATEMENT OF ORIGINALITY AND CONSENT TO REPRODUCE THIS WORK

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education



## Graduate School Ysgol Graddedigion

---

### Candidate declaration

*This is to certify that, except where specific reference is made, the work described in this thesis is the result of my own research. Neither this thesis, nor any part of it, has been presented, or is currently submitted, in candidature for any other award at this or any other University.*

Signed

A handwritten signature in black ink, appearing to read 'Aislinn McCreary', written over a horizontal line.

Date

20 July 2020



University of South Wales

Faculty of Computing, Engineering and Science

### Consent to reproduce this work

I Annie McCartney, hereby give my consent (for data protection purposes) to the release within the confines of the University of South Wales of my PhD entitled, "*The value of 'Technology-enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education*" to students and others in the pursuit of their studies. Further, I confirm that this PhD can be used for comparison with other future submissions.

Signed 

Dated 20 July 2020

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

## ETHICAL CONSENT STATEMENT



University of South Wales

Faculty of Computing, Engineering and Science

### Ethical Consent Statement

I, **ANNIE McCARTNEY** confirm that to very best of my knowledge that I have complied with relevant USW Regulations relating to ethics and ethical consent research requirements during the 10- year period in which this research has been conducted. \*

I confirm that I liaised with the CES ethics champion to ensure that appropriate ethical guidelines and consents were updated in line with changing USW requirements. Copies of the necessary ethical consent forms are set out in **Appendix 1** in Volume V.

I confirm that all participants who took part in this research did so of their own free will and that all responses are anonymised with zero 'trace-back' to the participants as required by USW ethical guidelines. All participants were made aware that their responses would be used in this and possible future and other research.

Signed

A handwritten signature in black ink that reads 'Annie McCartney'.

Dated 20 July 2020

\*On the date of thesis submission USW has updated its rules and regulations for PhD research (2019/2020) but these rules will fall outside of the remit of this thesis.



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

# Table of Contents

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

<b>Chapter 1</b>		<b>Introduction and background</b>	35
	1.1		
	1.2	Evolution and development of the research	37
	1.2.1	TEL Tools supporting pedagogical models: a pioneering evolutionary approach	37
	1.2.2	TEL Tools in evidencing compliance with the SCTE	38
	1.3	Overview of the TEL Tools and the three Projects: tracking the history of the research	38
	1.3.1	Multiple-choice questions (MCQ) assessment: <u>PROJECT 1</u>	38
	1.3.2	Panopto- lecture capture: <u>PROJECT 2</u>	38
	1.3.3	Collaborative learning tools/ distance learning tools: <u>PROJECT 3</u>	39
	1.4	Motivation and rationale, delivering high-quality education for all learners: <u>Rationale #1</u>	41
	1.4.1	Avoidance of disputes and litigation related to the SCTE- <u>Rationale #2</u>	44
	1.5	The embedding of TEL in the 'digital' university: the new UK Higher Education landscape	44
	1.6	The rise of the consumer student and consumer compliance culture in UK Higher Education	46
	1.7	Tracking the history of the SCTE: Do the origins of the SCTE lie in the Cor Tewdws?	47
	1.8	Is there a new 'era' of accountability in Higher Education? Shining the spotlight on the SCTE	49
	1.9	The demand for 'transparent' evidence in this new era of accountability	51
	1.10	Research golden threads	52
	1.11	Aims of the research:	55
	1.12	Research questions	58
	1.13	Objectives of the research:	60
	1.14	Conclusion	61
<b>Chapter 2</b>		<b>Research Methodology</b>	
	2.1	Introduction	66
	2.2	Tracking and positioning the research: 2009- 2019	67
	2.3	Turning point in the evolution of the research: 2016 onwards	68
	2.4	The increasing importance of professional practice and portfolio doctorates	68
	2.5	Challenges in research which early primary data: tracking backwards to move forward	70
	2.6	Refining the research proposal: balancing interdisciplinary research	71
	2.7	Refining the research questions from early proposal to thesis submission	72
	2.8	Refining research to address emergent new issues in Higher Education	73
	2.9	Ontological v Epistemological theorising: can there ever be a 'right' order?	74
	2.9.1	Ontology in practice in this thesis	75
	2.9.2	Putting evidence front and centre in research	77
	2.10	Epistemology and Epistemic frameworks	78
	2.10.1	Brief overview of key philosophies and epistemic frameworks underpinning this thesis	81
	2.11	Ontology with a small 'o': managing an authentic and reliable chain of digital evidence	83
	2.12	Challenges of interdisciplinary research: aligning research methodologies to work in harmony	84
	2.13	Research methodology: pedagogical action research	84
	2.14	Methods of data collection appropriate for pedagogical action research methodology	85
	2.15	Legal research methodology and legal research methods adopted in this thesis	87
	2.16	'Snap-shot' of primary data collection: 2011-2019	88
	2.17	Collection of secondary data: re-routing the literature review in this research	89
	2.18	Conclusion	89

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

<b>Chapter 3</b>	<b>Technology-Enhanced Learning (TEL)</b>	
3.1	Introduction	93
3.2	In search of a workable definition of 'TEL' suitable for this research	95
3.3	How well do the TEL Tools here measure up against TEL use in the wider academic community?	96
3.3.1	ALT TEL survey February 2019	96
3.3.1.2	Summary of findings on selective TEL Tools in the ALT survey compared with the three Projects	98
3.3.1.3	UCISA annual TEL survey 2018 Reported in January 2019	98
3.3.1.4	Summary of findings on Top 12 TEL Tools compared with the three Projects	100
3.3.1.5	Campus technology survey (July 2017)	100
3.3.1.6	Campus technology survey 2018	101
3.3.1.7	Digital learning technology: digital learning survey McGaw Hill 2017	102
3.3.1.8	Summary of the findings recent TEL surveys: how well do the TEL Tools measure up?	102
3.4	University Education for a new Digital Age	102
3.5	The case for and against TEL: emerging research	106
3.5.1	The case for TEL in enhancing learning	106
3.5.2	The case against TEL in enhancing learning	107
3.6	TEL and academic freedom	109
3.7	Pedagogy front and centre: a pioneering approach to pedagogy and TEL	110
3.7.1	Correct choice of pedagogy supported by good teaching practice	111
3.7.2	Does pedagogy need to be redone for the new digital learning environment?	112
3.7.3	Careful alignment of chosen pedagogy with education specific technologies	113
3.7.4	Selecting appropriate legal pedagogy for students in the built environment as the priority	114
3.7.5	Blending traditional and student- centred pedagogical approaches for law delivery	115
3.7.6	Pedagogy that combines the traditional lecture with innovative pedagogy supported by TEL	116
3.7.7	The increasing importance of TEL to scaffold 'high-quality' provision for all students	118
3.7.8	Pedagogy and learner autonomy	119
3.7.9	Pedagogy that fulfils a 'law in action' approach and meets the 'skill needs' of employers	120
3.7.10	Final thoughts on appropriate pedagogy for teaching law for the built environment student	121
3.7.11	The chosen pedagogical models underpinning this research	122
3.8	Conclusion	123
	Postscript to Chapter 3	
3A	Connecting Law Provision in the Built Environment and the TEL Tools	125
3A.3	Summary	127
<b>Chapter 4</b>	<b>Mini Literature Review on Accountability</b>	
4.1	Introduction and background	129
4.2	'Snap-shot' history of the accountability of the three stakeholders and the SCTE	130
4.3	The turning of the accountability tide: the 'new' face of accountability in Higher Education	132
4.4	Defining accountability in interdisciplinary research in this new era	137
4.5	Six approaches to accountability that impact on the SCTE	139
4.5.1	Moral accountability and the SCTE	139
4.5.2	Professional accountability and the SCTE	140
4.5.3	Bureaucratic accountability and the SCTE	141
4.5.4	Political accountability and the SCTE	141
4.5.5	Market ACCOUNTABILITY and the SCTE	141

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

4.5.6	Legal accountability and the SCTE	142
4.6	TEL Tools as accountability and evidential tools	142
4.7	The value of the TEL Tools as accountability tools	143
4.8	Balancing accountability and autonomy	143
4.9	Guide to the forensic itemisation of the duties and obligations of the three stakeholders	144
4.10	MINI HYPOTHESIS:	146
4.11	A forensic itemisation of the HEI's duties and responsibilities relevant to the SCTE	148
4.11.1	Duties and responsibilities of the ACADEMIC relevant to the SCTE	149
4.11.2	Duties and responsibilities of the STUDENT relevant to the SCTE	150
4.12	Check- up of the mini hypothesis: findings	151
4.13	Conclusion	152
<b>Chapter 5</b>	<b>Mini Literature Review on the SCTE</b>	
5.1	Introduction and background	154
5.2	Valid formation of the SCTE and contractual concept of reciprocal obligations	156
5.3	The contents of the SCTE: locating the documents that comprise the SCTE	157
5.4	The importance of accurate pre-contractual statements and the impact on the SCTE	159
5.5	Is the syllabus a form of contract? Importance to the SCTE	159
5.6	Selected KEY terms of the SCTE- the provision of the educational service	161
5.6.1	What does 'reasonable skill and care' mean in the context of the SCTE?	161
5.6.2	Agreeing to standards of educational service provision beyond reasonable skill and care	163
5.6.3	Conflicting standards of liability in a single contract: lessons from the construction industry	163
5.6.4	<b>('The Robin Rigg')</b> another lesson in 'fitness for purpose'	164
5.6.5	<b>Williams Tarr Construction Ltd v Anthony Roylance Ltd [2018] EWHC 2339 (TCC)</b>	165
5.6.6	Importance of these construction cases to the SCTE	166
5.7	The supply of digital content as part of the educational service provision	167
5.7.1	<i>Trebor Bassett and Cadbury v ADT Fire and Security [2012]</i>	168
5.8	Additional implied terms in the SCTE	169
5.8.1	Implied duty of good faith: relevance to SCTE	170
5.9	Additional HEI duties to students	172
5.10	Equality Act 2010 and the SCTE	173
5.11	Duties and obligations under the SCTE to be performed by the student	174
5.12	Judicial deference to academic judgment: can this survive in its current legal format?	175
5.12.1	The importance of 'high-quality' teaching for all students	177
5.12.2	Distinctions between standards v quality in educational provision	180
5.13	How enforceable are contractual promises relating to quality of provision?	180
5.14	Conclusion	181
5A	Postscript to Chapter 5	183
5A.1	Special research aim: markers of 'high-quality' across all disciplines.	183
5A.2	Clarity of terminology: 'high-quality' and 'VFM': educationalists v lawyers	184
5A.3	Distinguishing 'high-quality' and 'high-standards' – distinction without a legal difference?	185
5A.4	Case law in the context 'quality' and the SCTE?	186
5A.5	Markers of high-quality across disciplines: positive message on their feasibility	187
5A.6	The importance of clear messages on 'high-quality' provision during the Covid-19 pandemic	187

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

5A.7	Summary of the findings in relation to the case study on 'high-quality' provision	188
5A.8	The inextricable link between VFM and high-quality provision in UK higher education	189
5A.9	The Trendence UK Survey 2018 <sup>1</sup> : Students' perceptions of VFM	190
5A.10	Report #1: The SAES HEPI 2020	191
5A.11	SAES HEPI 2020	192
5A.12	Value for Money and 'Advanced Technology' – SAES 2020	193
5A.13	Report(s) #4: Academic Experience Surveys 2016-2019 (Advance HE and HEPI)	195
5A.14	Conclusion to VFM	196

## Chapter 6

### Mini Literature Review on Digital Evidence

6.1	Introduction and background	199
6.2	What constitutes 'digital evidence'?	200
6.3	TEL Tool evidence as 'documentary evidence'	201
6.4	Admissibility of evidence and its application to the SCTE	201
6.4.1	Upholding human rights in the context of admissibility of evidence	202
6.4.2	Current legal position on the admissibility of digital evidence obtained covertly	203
6.5	Relevant digital evidence	203
6.5.1	How and why is evidence relevant?	204
6.6	Authenticity and reliability of digital evidence	205
6.7	The concept of evidential 'weight' in civil litigation proceedings: burden of proof	205
6.8	Can the TEL Tools constitute admissible, relevant digital evidence?	206
6.9	Conclusion	207
6A	Postscript to Chapter 6	
6A.1	The value of TEL Tool digital evidence in resolving student complaints and disputes	209

<sup>1</sup> "Value for money: the student perspective", Trendence 2018 accessible at: <https://studentsunionresearch.files.wordpress.com/2018/03/value-for-money-the-student-perspective-2.pdf>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

## LIST OF ABBREVIATIONS

Abbreviation:	Full Title:
ADR	Alternative Dispute Resolution
AI	Artificial Intelligence
ALT	The Association for Learning Technology
BYOD	Bring Your own Device
CDPA 1988	Copyright Designs and Patents Act 1988
CES	Computing, Engineering and Science
CIArb	Chartered Institute of Arbitrators
CLA	Copyright Licence Agreement
CLT	Collaborative Learning Tools
CMA	Competition & Markets Authority
CRA	Consumer Rights Act
CTER	Commission for Tertiary Education and Research (Wales)
ELTT	Enhanced learning and teaching through technology
HEFCW	Higher Education Funding Council for Wales
HEI	Higher Education Institute
HEP	Higher Education Provider
HEPI	Higher Education Policy Institute
HERA	Higher Education Research Act 2017
IFS	Institute of Fiscal Studies
IPR	Intellectual Property Rights
MCQ	Multiple Choice Question
MIT	Massachusetts Institute of Technology
OfS	Office for Students
OIAHE	Office of Independent Adjudicator in Higher Education
PPP	Public Private Partnerships
QMP	QuestionMark Perception
RAG accountability	Red Amber Green
ROI	Return on Investment
SAES	Student Academic Experience Survey
SCL	Student-centred learning
SCTE	Student Contract to Educate
STEM	Science Technology, Engineering & Maths
TEL	Technology-Enhanced Learning
TEF	Teaching Excellence Framework
TERW	Tertiary Education and Research Wales Bill
THE	Times Higher Education
UCISA	Universities and Colleges Information Systems Association
UCTA	Unfair Contract Terms Act
USW	University of South Wales
UUK	Universities UK
UNCITRAL	UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
UNIDROIT	International Institute for the Unification of Private Law
USWSU	USW Students Union
UTCCR	Unfair Terms in Consumer Contract Regulations
VAR	Video Assistant Referee
VFM	Value for money
VLE	Virtual Learning Environment
VR	Virtual Reality

## LIST OF FIGURES

Figure	Title of Figure Volume I	Page No
Figure 1	PhD storyboard, 'whistle-stop' tour of research	6
Figure 2	Research Golden Threads: centring on the classroom coalface	53
Figure 2A	An overview of the 'connectedness' of the three projects as one integral research package	56
Figure 3	AMC research journey 2009 – 2019	65
Figure 4	Professor George's 'Facelift' for New Look PhD	69
Figure 5	The link between ontology, epistemology and research methodology, Salma Patel (2015)	75
Figure 6	Overview of 'truth' research journey – evidentialism in practice in this thesis	76
Figure 7	The Research Onion' by John Dudoviski 2012	79
Figure 8	Research Onion in Semi- Reverse Reflecting Research Stages in this Thesis	80
Figure 9	Epistemic Frameworks Timeline 2009-2019	83
Figure 10	Research Methods Timeline	87
Figure 11	Findings from the ALT annual TEL survey released February 2019	97
Figure 12	Campus technology survey 2017	101
Figure 13	Top 10 skills in 2020	121
Figure 13A	Extract from the QAA Subject Benchmark Statement for Land, Construction, Real Estate & Surveying (Oct 2019)	Removed to Vol V
Figure 13B	The value of the TEL Tools in supporting teaching of mandatory ADR techniques (RICS QS/PM Pathway Guide)	Removed to Vol V
Figure 14	Vijay Grover's Comparative Models of Accountability (2014)	145
Figure 15	RAG Accountability Liability Matrix	147
Figure 16	QS UK student survey 2019, 'High-quality' teaching is the no.1 priority for students' choice of course	177
Figure 17	The provision of quality teaching is the student's no. 1 indicator of value for money	178
Figure 18	Mandate for Regulation of High-Quality Education that represents VFM for fee-paying students in HE: an English and Welsh comparison	Removed
Figure 19	Linear liability graph of potential increase of liability in line with inflated promises	187
Figure 20	statistical presentation on 'VFM' across nine years of annual student academic surveys	192
Figure 21	Student perceptions of 'VFM' as set out in the Student Academic Survey 2020	193
Figure 22	Student perceptions on their course and VFM where technology is used SAES 2020 Page 57	194
Figure 23	Student assessment of teaching from 2016-2019, SAES 2019	195
Figure 24	Summarising the findings of students' perceptions of teaching pre and post 16 <sup>th</sup> March and lockdown	196
Figure 25	Capturing student responses over 4 years of surveys on return and the value of feedback	Removed
Figure 26	The shift in importance of digital technologies from 2014-2019	195
Figure 27	Potential life cycle of a student complaint and / or dispute	211
Figure 28	<b>Overview of ADR techniques pp 2 and 3 of 'The Three Paths of Justice' 2<sup>nd</sup> Ed. Neil Andrews</b>	213

## LIST OF TABLES

Table	Title of Table Volume I	Page No
Table 1	Model for Adopting Pedagogical Research Methodology	85
Table 2	'Snap-shot' of primary data collection in this thesis.	Removed to Vol V
Table 3	Education-specific TEL Tools combining the three Projects	Ditto
Table 4	Comparative study between selected TEL Tools in ALT survey and the three Projects	Appendix 3B
Table 5	The top 12 TEL Tools ranked in this UCISA survey, January 2019	Appendix 3B
Table 6	Comparative study between selected top 12 TEL Tools in UCISA survey and the three Projects	98
Table 7	Pedagogy and learner autonomy	99
Table 8	Aligning pedagogical models with the TEL Tools	100
Table 9	The HEIs duties in relation to the SCTE	120
Table 10	The academic's duties in relation to the SCTE	See Appendix 4
Table 11	The student's duties in Relation to the SCTE	148
Table 12	TEL Tool evidence table	149
Table 12A	Lawyer viewpoints on the interchangeable language of 'quality' and 'standards'	150
Table 13	Historical snapshot of selected case law	See Appendix 8
Table 14A	The 'takeaways' of the findings in relation to the Special case Study on High Quality	186



## LIST OF STATUTES

### List of Primary and Secondary Legislation

Copyright Designs and Patents Act 1988

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

Consumer Protection (Amendment) Regulations 2014

Consumer Rights Act 2015

Coronavirus Act 2020

Coronavirus Regulations 2020

Data Protection Act 2018

Equality Act 2010

Higher Education and Research Act 2017

Human Rights Act 1998

Local Government Act 1999

The Public Sector Bodies (Websites and Mobile Applications) Accessibility Regulations 2018

Unfair Contract Terms Act 1977

Unfair Terms in Consumer Contract Regulations 1999

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

<b>LIST OF CASES</b> Table of Cases Volumes I-IV	
<b>Case Name</b>	<b>Case Citation</b>
Abramova v Oxford Institute of Legal Practice	[2011] EWHC, 613
Alan Bates and Others v Post Office Limited	[2019] EWHC 606 (QB)
Al-Hasawi v Nottingham Forest Football Club Ltd & Ors	[2018] EWHC 2882 (Ch)
Asenbeck v Malardalen University	(2017) Hogsta Court of Justice Objective No Judgment T 2196
Astor Management AG v Atalaya Mining plc	[2017] EWHC 425 (Comm)
Benisty v Kloda	2018 QCCA 608
BL Holdings v Wood & Partners	(1980) (1980) 12 BLR 1
BP Gas Marketing Limited Claimant V La Societe Sonatrach (2) Sonatrach Gas Marketing UK Limited	2016 EWHC 2461 (Comm)
Brice Bradford et al v George Washington University	(2017) United States District Court for the District of Columbia (2017_ 1:16-cv-00858
Buckingham and Another v Rycotewood College	(26/03/2002) Oxford County Court
Eckersley v Binnie	[1988] 18 Con LR 44
Faiz Siddiqui v The Chancellor, Masters and Scholars of the University of Oxford	[2018] EWHC 536
Farley v Skinner	[2002] 2AC 732
George Hawkins v Chrysler	(1986) 38 BLR 36
Gestmin SGPS SA v Credit Suisse (UK) Limited	[2013] EWHC 3560 (Comm)
Grant v Southwestern and County Properties Ltd	[1975] Ch 185
Greaves and Co (Contractors) Ltd v Baynham Meikle and Partners [1975]	[1975] 2 Lloyd's Reports 325
Hastie and Jenkerson v McMahon	[1990] 1 WLR 1575
Lam v University of Western Ontario	(2019) ONCA 82
Linklaters Business Services v Sir Robert McAlpine Limited and Others	[2010] EWHC 2931 (TCC)
Marks and Spencer PLC v BNP Paribas	[2015] UKSC 72
Michael Phillips Architects Ltd v Riklin & Anor	[2011] EWHC 27 (TCC)
Mr Daniel Donovan (2) Naled Limited Claimants V Grainmarket Asset Management LLP	[2020] EWHC 17 (Comm)
Mr Jeffrey Ross Blue v Mr Michael James Wallace Ashley	[2017] EWHC 1928
Mr Philip Freeborn (2) Mrs Christina Goldie V - Mr Daniel Robert De Almeida Marcal (Trading as Dan Marcal Architects)	[2019] EWHC 454 (TCC)
Mr Stephen West and Dr Carol West v Ian Finlay & Associates (A Firm)	[2013] EWHC 898 (TCC)
MT Højgaard A/S (Respondent) v E.ON Climate & Renewables UK Robin Rigg East Limited and another (Appellants)	[2017] UKSC 59
Mylcrist Builders Ltd v Mrs G. Buck	[2008] EWHC 21102 (TCC)
Punjab Bank (International) Ltd and others v Gosain UKEAT	[2013] UKEAT/0003/14/SM
Rolls- Royce Power Engineering PLC and Allen Power Engineering Ltd v Ricardo Consulting Engineering Limited	[2003] EWHC 2871 (TCC)
Ross v Creighton University	1992 957 F.2d 410 73 Ed. Law Rep. 352
Russell v Stone (trading as PSP Consultants)	[2019] EWHC 831 (TCC)
Ruxley Electronics and Construction Ltd v Forsyth	[1995] 3 ALL ER 268 HL
Ryerson v Ryerson (Arbitration)	2018 CanLII 58446 (ON LA)- Published arbitration award
Sanderson Ltd v Simtom Food Products Limited	(2019) EWHC 442 (TCC)
Scammel & Nephew v Ousten	[1941] AC 251 House of Lords
Senior v Holdsworth Exp Independent Television News	[1976] QB 23
Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent	[2018] EWHC 333 Comm
Shell (UK) Ltd v Lostock Garages Ltd	[1916] 1WLR 1187
SSE Generation v Hochtief Solutions AG	[2018] CSH 26
Stephen West and Carol West v Ian Finlay & Associates (a firm)	[2014] EWCA Civ 316
Stoke on Trent College v Pelican Rouge Coffee Solutions Group Limited	[2017] EWHC 2829 (TCC)
Stuart v. University of Western Ontario,	2017 ONSC 6980
The Queen on the application of AW v St George's, University of London	[2020] EWHC 1647 (Admin)
Trebor Bassett and Cadbury v ADT Fire and Security	[2012] EWCA Civ 1158
UKO Abara, and the immediate family members of UKO Abara V university of Windsor (and others)	[2019] ONSC 2654
Williams Tarr Construction Ltd v Anthony Roylance Ltd	[2018] EWHC 2339 (TCC)
Xxx v Yyy and Zzz [2004] EWCA Civ 331	[2004] EWCA Civ 331
Yoo Design Services Limited v. iLiv Reality PTE Limited	[2020] EWHC 1077 (Comm)

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

## LIST OF APPENDICES

Table of Appendices Volumes I-IV		Volume V
Appendix No	Details	Volume
Appendix 1	Ethical Consent Forms	Volume V
Appendix 2	Social media tools exclusion	Volume V
Appendix 3	Epistemic Frameworks/philosophies	Volume V
Appendix 4	Pedagogical models	Volume V
Appendix 4A	Copyright duties of the three stakeholders	Volume V
Appendix 5	Factors determining relational contract	Volume V
Appendix 6	Wrigley Solicitor's student consumer rights guide	Volume V
Appendix 7	Historical 'snapshot' of potential digital evidence	Volume V
Appendix 8	Alignment of TEL Tools as potential digital evidence (Table)	Volume V
Appendix 9	WISERD Poster Presentation	Volume V
Appendix 9A	Postscript to Chapter 6 ADR and Digital Evidence	Volume V
Appendix 10	Overview of live UOG/USW campus construction projects linked to MCQ assessment	Volume V
Appendix 11	Sample MCQ assessment questions from level 5-level 7	Volume V
Appendix 12	Sample MCQ assessment questions from OUP (October 2019)	Volume V
Appendix 13	AMC – CPD Record 2017-2019	Volume V
Appendix 14	Overview of CLT in this thesis	Volume V
Appendix 15	'Snap-shot' of policy and legislation in England and Wales	Volume V
Appendix 16	2019 Update on recent literature that focuses 'high-quality' at the classroom 'coalface'	Volume V
Appendix 17	Independent reviews of AMC teaching	Volume V
Appendix 18	Summary of words used in relation to 'quality' and 'standards'	Volume V
Appendix 19	Summary of 'takeaways' from KCL Survey 2012 on student perceptions of teaching quality	Volume V
Appendix 20	Summary of the importance of honest advertising and content marketing in relation to university courses	Volume V
Appendix 21	Summary of the primary findings of the special case study on 'high-quality'	Volume V
Appendix 22	CES independent report on the value of the TEL Tools in relation to defending against standard student complaints and disputes	Volume V
Appendix 23	USW "PhD and MPhil Portfolio Guidelines" 2015	Volume V
Appendix 24	Abstract for the Critical Review- linking the three projects	Volume V
Appendix 25	A holistic summary of the inter-relationship of the three projects	Volume V
Appendix 26	2019 THE Europe Teaching Rankings- alignment with the three Projects.	Volume V
Appendix 27	QAA guidance on the Quality Code and Assessment- Alignment with the Project 1	Volume V
Appendix 28	Summary of primary data collection methods	Volume V
Appendix 29	Baseline Regulatory Requirements, November 2016	Volume V
Appendix 30	Manchester Methods Fair- poster presentation	Volume V
Appendix 31	A summary of the significant contributions to the academic field(s) in question	Volume V
Appendix 32	Sections G-J of non-compulsory components in Chapter 11	Volume V

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education



# chapter 1 - no. 1

## SUMMARY OF CHAPTERS

### Chapter 1

Chapter one sets out the background and development of the research together with the research aims, objectives and research questions to be answered. The research rationale is also set out in this chapter and how the research was conceived and conducted with early primary data in place at the outset. A special research 'golden threads' wheel provides a 'visual' and holistic explanation of how the TEL Tools (comprising the three Projects) are interwoven in this interdisciplinary work. The chapter places the six research 'golden threads' in context commencing with the embedding of TEL in the new digital university set against the backdrop of a very changed and changing higher education landscape in the UK. This chapter charts the rise of the consumer student and the SCTE and will question whether the 'Cor Tewdws' in Llantwit Major, south Wales can justifiably lay claims to its status as a first seat of education in Wales and potentially the UK. The shift from institutional accountability to accountability at the classroom coalface (and where arguably it matters most to students) is tracked in this chapter and applied in relation to the SCTE. The chapter also shines the spotlight on the demand by key stakeholders for reliable evidence that can be trusted that 'high-quality' education is being provided to students and sets the scene for the special case study in Volume III on 'high-quality'. The chapter never loses sight of the importance placed in this thesis on the need to avoid disputes with students and whether the evidence generated by the TEL Tools can be used in ADR and more formal legal proceedings linked to the SCTE.

### Chapter 2

Chapter 2 provides a full account of how this research was conducted in accordance with an essentially pedagogical action research methodology to address the educational research questions whilst also documenting the highly innovative research methods deployed to answer the legal research questions. This chapter was written at various stages of the research over the last two and a half years following the commencement of the formal thesis in February 2017. The adoption of traditional quantitative, qualitative and mixed research methods would need to work in harmony with more innovative and creative methods, considered a necessity for practical, professional thesis investigation. The decision to give ontology pride of place over epistemological theorising is fully validated in this chapter. This chapter perhaps more than any other must stand up to honest and testing scrutiny that the research methodology can be trusted and was robustly conducted to deliver '*substantiated*' reliable primary and secondary data to answer the research aims and questions.

### Chapter 3

Chapter 3 is the first of four mini-literature review chapters covering TEL, accountability, the SCTE and digital evidence. Being clear on terminology linked to 'TEL' and how it is defined is important in this chapter as it is in all chapters in this thesis and was the driver for the inclusion of these mini-literature reviews. These chapters are essential foundations for Volume II which contains the three Projects. A systematic literature review was undertaken in this chapter (and indeed in all 4 mini-literature review chapters) to critically appraise the case for and against TEL and pedagogy that supports wider use of TEL in today's HE digital classroom. This chapter also includes a detailed evaluation of TEL Tools routinely used in the wider HE communities enabling an honest benchmarking exercise to be undertaken on how sustainable and well represented the selected TEL Tools (comprising the three Projects) in this 'local' thesis are when compared and contrasted with wider TEL tool use. The case for and against a new approach to 'pedagogy' that has a better fit in the digital university is also given special attention in this chapter. The emphasis on the ability of the TEL Tools to support chosen pedagogy is considered pioneering in this research and there is significant attention paid to this in this chapter. The threat of TEL as potentially undermining academic freedom in a 'neoliberal' age is investigated and whether a '*surveillance*' culture within UK higher education is being fostered by the use of TEL.

### Chapter 4

To ensure the research reflects a contemporary message a thorough investigation of what '*accountability*' involves and its application in this research was identified for early investigation here. The changing face of 'accountability' in a new era in UK higher education is fully set out in this chapter to ensure the title of this thesis lives up to billing. The chapter argues that accountability in this new era requires answerability by the three stakeholders at the '*classroom coalface*' in respect of teaching, learning and assessment. An innovative accountability liability matrix was specially designed forensically detailing the individual duties and responsibilities for each of the three stakeholders and to investigate the operability and reach of the accountability matrix to all disciplines. Accountability when it involves legal liability is RAG rated by this matrix ranging from moral accountability with little legal remedial redress to accountability carrying full legal liability with enforceable remedies for breach of contractual terms and conditions.

The inextricable link between accountability and high-quality academic provision is set out in this chapter and lays the necessary foundations for the special case study on 'high-quality' and the accountability of all three stakeholders to deliver this as a key component of the SCTE.

## Chapter 5

Being clear on the content and contractual liabilities of the key stakeholders responsible for performance of the SCTE is vital to this research because the value of the TEL Tools in evidencing compliance with the SCTE would be significantly undermined without clarity on this contractual content. Being equally clear on the timing of formation of this SCTE is equally important and is investigated here. A selection of express and implied terms most in need of research were targeted because there is sometimes a *'cavalier'* approach to their understanding and relevant legal application. These terms (both express and implied) ranged from discussions on *'reasonable skill and care'* as the standard of the educational service provision required by S.49 of the CRA, digital content that must be provided to standards of *'fit for purpose'*, *'good faith'* requirements, meeting implied terms to provide education of *'high-quality'* and *'reasonable adjustments'* for disabled students. The chapter drew upon established and recent case law from the UK construction industry on e.g. *'reasonable skill and care'* highlighting the difficulties and insurance implications when these terms are used inappropriately. The call for a standard form industry wide SCTE is sounded as a priority in this chapter.

## Chapter 6

The value of the TEL Tools to evidence compliance with the SCTE is the backbone of this research and being clear on what *'evidence'* is and the evidence needed to fulfil this brief required careful balancing in this chapter. The TEL Tools in their capacity as evidential tools would need a dual approach to this element of the research.

Firstly, could the TEL Tools evidence compliance with key contractual terms in the SCTE such as *'high-quality'* tuition? The scaffolding of *'intelligent'* and appropriate pedagogy was a priority in this research in order to assess the true value of the TEL Tools to support chosen pedagogy and pedagogical models.

Secondly, could the TEL Tools fulfil the necessary legal evidential requirements and be capable of providing digital evidence that is *'relevant'* and *'admissible'* to defend actions of non-compliance by an HEI of their duties in relation to the SCTE? Evidence cuts both ways and the evidence generated by the TEL Tools is also evaluated to the extent it can demonstrate student engagement and *'buy-in'* and accountability for their own academic success.

The TEL Tools in this chapter are also evaluated in terms of their evidential value in avoiding and resolving disputes amicably, swiftly and confidentially between students and their HEI. A strong message that litigation is a *'last resort'* to resolve disputes of this nature had been handed down in

**The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education**

recent high-profile cases on the quality of the education provision and the SCTE. The work in this section also reviews the current position during the Covid-19 pandemic to critically assess the value of this TEL Tool evidence in resolving student complaints and disputes amicably at the USW internal level as well as in ADR or more formal litigation proceedings. (Due to word count restrictions some of the latter work needed to be consigned to the appendices in Volume V)

## Chapter 7

This chapter tracks the evolution and development of the research in relation to **Project 1** over a 10-year period and the extensive use of digital assessment in the form of MCQs linked to live USW construction Projects (45 such MCQ assessments have been undertaken at the date of writing). This project like the other two Projects forming this thesis will need to discharge the burdens placed upon it and its contribution in answering the research aims and questions. The chapter explains what MCQ assessment is and the research methodology and methods adopted here to answer the research questions as well as the research challenges for this project (and indeed the three Projects) when primary data is largely in place before secondary investigations.

Specifically, the research findings for **Project 1** need to convince that MCQs have a special place in this research in evidencing the extent to which their use delivers both assessment that is of 'high-quality', rigorous and with a 'real world of work' connection. Such findings go to the core of this research and their value in evidencing compliance with the SCTE. The value of this form of assessment in tracking accountability compliance duties in relation to assignment content and rigour is also addressed here. The legal value of the digital evidence generated by the MCQ assessment to defend against complaints and disputes by students in relation to module assessment outcomes are fully aired in this chapter. Approaching MCQ assessment and the TEL Tools in this way is considered highly beneficial because as M. Flavin and V. Quintero (2018)<sup>2</sup> argue a 'ground-up' approach reflects how lecturers and students interact with technology as opposed to adhering to wider TEL strategic goals at institutional level.

## Chapter 8

**Project 2**, Panopto lecture capture takes centre stage in this chapter and following the format set out above in relation to Project 1 needs to stand up to scrutiny and its contribution in this research.

---

<sup>2</sup> "UK higher education institutions' technology-enhanced learning strategies from the perspective of disruptive innovation" 2018 Vol.26 2018, Research in Learning Technology, Association for Learning Technology; '...a ground-up approach to technology-enhanced learning strategies can foreground and lead to the accommodation of disruptive innovation in technology-enhanced learning in UK higher education, thus avoiding a mismatch between the approaches to technologies articulated through strategies and the actual technology practices of students and lecturers.'



**The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education**

Panopto is said to leave a '*digital fingerprint of the entire activities of the classroom*'. The discussions in this chapter canvassed the divergent opinion on the pedagogical value of lecture capture and reflect a similarity in the views of academic staff within and beyond the four corners of USW with a fairly even split between those who consider that this TEL Tool can support chosen pedagogy and those who consider it undermines student performance, engagement and attendance and should be used with caution. The primary findings from USW students reflect similar wider student body opinion with students increasingly keen to see their HEIs roll out this TEL Tool to all modules across their courses. The value of the digital evidence generated by Panopto is given significant attention in this chapter together with an independent investigation of how well the evidence fosters early resolution of disputes with students.

## **Chapter 9**

**Project 3**, Collaborative Learning Tools (CLT). This project was the final piece in the TEL jigsaw for this thesis. As with Projects 1 and 2 the TEL Tools in this project also need to convince on their contribution both pedagogically and legally in answering the research questions in this research.

Up to this point there had been positive messages coming back from students on the benefits they felt they gained from MCQ assessment and the importance of Panopto in enabling their understanding of difficult legal concepts and the ability to playback and review sessions in preparing for MCQ assessments and exams. At the same time as this project was embarked upon employers were reflecting a disconnect between what was being taught in higher education and application to a 21<sup>st</sup> century workplace. Employers require graduates with strong digital literacy skills, developed critical thinking skills, skills in problem-solving, students with an ability to work collaboratively in teams supported by strong negotiation skills.

The tools in this project therefore needed to build upon the existing Projects but with a strong emphasis on facilitating students to take control of their own academic journey as well as addressing employer's concerns; the CLT in this chapter specifically address these requirements.

Tools that enable students to access each other at times suitable to them (part-time students in USW generally only attend campus one day per week) to work collaboratively on Projects and formative and summative assignments is seen as highly valuable.

The findings largely reflect strong support for the CLT, and the evidence generated by these tools will be invaluable in meeting the ADR brief fully canvassed in this chapter.

## Chapter 10: This is now a special supplementary appendix and located in Volume III

The challenges of what 'high-quality' provision entails needed individual attention in this special case study combining both secondary and primary data and to reflect increasing demands for substantiated evidence that 'high-quality' provision is being made available for all students. This chapter was added late in the research (January 2019 onwards) to test what is required to meet demands for 'high-quality' tuition at the 'classroom coalface'. The value of the TEL Tools to evidence compliance with the SCTE necessarily required that the elusive concept of 'high-quality' be interrogated both pedagogically and legally. Without a better understanding of this challenging contractual implied, sometimes express term the value of this element of the research could be subject to challenge. The chapter establishes that the primary driver for student selection of HEI is an overriding requirement for 'high-quality' teaching. Delivering a clear message on what this might look like as well as understanding the differentiations between 'excellent', 'outstanding', 'high-quality' teaching was investigated. The lack of case law on this terminology is a problem so there is added incentives to ensure that marketing and advertising does not mislead students. Again, this section of the work drew upon case law from the construction and shipping industries where terms relating to 'excellent service' had been investigated (albeit minimally). The word was also updated in this section to demonstrate the inextricable link between 'high-quality' and VFM as a key component in achieving this. The work on the feasibility of key markers of high-quality working across all disciplines is not located in chapter 5 SCTE.

## Chapter 11- Compulsory CRITICAL REVIEW

It is a compulsory requirement that a critical review linking the three Projects and their individual and combined contributions in answering the research aim and objectives is included in a thesis which tracks this portfolio route. The content of this critical review is prescriptive and fully itemised in this section of the work. All compulsory elements (**A-H**) are dealt with in turn in this chapter. However, given the uniqueness of this research the author added four extra sections (**G-J**) to cover ethics and the ethical constraints of the research, conclusions reached in relation to the research, recommendations arising out of the research both for USW and for the wider academic community and finally 'glimpsing' into the future with 4.0 TEL AI and VR technologies set for wider adoption in UK higher education aimed at authenticating the legacy of the research in this thesis.

Please note due to word count restrictions this work contained in (**G-J**) had to be consigned to the appendices in Volume V.



## chapter 1 - no. 2

### CHAPTER 1 – INTRODUCTION AND BACKGROUND

# Chapter 1

## 1.1 Introduction and background

The evolution and development of the research with primary data in place at the outset is given early attention in this chapter together with a brief overview of the three TEL Projects to ensure they take a necessary 'centre stage' essential for a PhD that charts this project portfolio route. The chapter will set out the motivation, rationale and justification for the research and the challenges in balancing the needs of research that is interdisciplinary. The aims and objectives of the research and the research questions to be answered are also set out in detail in this chapter.

This chapter documents the embedding of TEL in the new digital university landscape and the tensions in HE regarding its widespread use contrasting the views of those who consider that educational technology can positively impact on the educational experience for students and those who feel technology and accountability (in its many forms) are undermining academic freedom and autonomy in the academy and the rise of a culture of what some view as 'accountability by surveillance.' M. Spooner and J. McNinch (2018)<sup>3</sup> capture some of these tensions.

As the Open University ('University of the Air') celebrates its fiftieth anniversary the positive benefits that flexible learning and technology has made to the lives of many are well documented. Dismissed by the then shadow chancellor of the exchequer, Iain McLeod, as 'blithering nonsense' it remains the UK's largest university and stands proud across the globe as 'sparking the education revolution.'<sup>4</sup> Jo Faragher (2017)<sup>5</sup> captures the benefits of online learning and opening access to the 50% of people who do not attend university: "Virtual and online courses will play an important role in opening up access to higher education to segments of society that feel they have been ignored by the system too."

At the time of writing, the TEF has been associated with contributing to a 'systemic cultural change of the higher education system ...focused upon the fundamental priorities of high- quality teaching and strong student outcomes.'<sup>6</sup> A similar cultural shift (albeit on a smaller scale) is reflected in this thesis which focusses accountability at the classroom coalface and the accountability of key actors<sup>7</sup> responsible for ensuring education and teaching that is of 'high-quality'. This chapter will briefly track this shift in accountability and why focussing accountability at 'local level' is important to fee paying

<sup>3</sup> Introduction in "Dissident Knowledge in Higher Education" by Marc Spooner and James McNinch, 2018, University of Regina Press: "Perhaps you are growing increasingly alarmed with the negative changes you are witnessing at your university. Is a rise in managerialism and punitive accountability limiting ...your academic freedom...?"

<sup>4</sup> "The University that sparked an Education Revolution" accessible at: <https://www.bbc.com/ideas/videos/the-university-that-sparked-an-education-revolution/p0738lv8> and accessed 13<sup>th</sup> March 2019

<sup>5</sup> "How can universities weather the storm?" by Jo Faragher, THE, 13-19<sup>th</sup> July, No 2,314 July 2017

<sup>6</sup> Iain Mansfield, "The Essential Elements of TEF" 5<sup>th</sup> March 2019 accessible at: <https://wonkhe.com/blogs/the-essential-elements-of-tef/>

<sup>7</sup> HEI, Academic and Student

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

students. The challenges of defining a workable definition of 'accountability' is also briefly discussed in the context of this research.

The chapter will also chart the simultaneous rise of a new consumer compliance culture in HE and the rise of the 'consumer' or 'prosumer' student keen to ensure a value for money 'high-quality' education is received in an expensive higher education marketplace. A brief review of the history of the SCTE (which legend suggests could have its origins in South Wales) is also provided leading to the anticipated introduction of a new consumer style industry wide standard form SCTE.

The chapter remains focused on the importance placed at every point in this thesis to deliver credible and reliable evidence that can be trusted. Interested stakeholders want transparent and reliable evidence that students are receiving high-quality education and that duties and obligations/promises made in relation to the SCTE are being upheld. The provision of substantiated and reliable evidence is the core of this research. The TEL Tools under the evidential microscope in this thesis will need to meet both pedagogical and legal evidential requirements to answer the research questions. Put simply by M. Snel and J. De Moraes (2018)<sup>8</sup> the research must justify the research questions and *"enable a reader to check and judge everything you did in this respect...or as we would put it 'accountability'"*.

The chapter concludes with a holistic summary of the six 'golden research threads' covering TEL, accountability, the SCTE, digital evidence, ADR and 'high-quality' educational provision and the inter-relationship between each of these threads in this work. These 'golden threads' weave their way throughout this entire research and providing early context is important.

The circle is squared in this research with a necessary explanation relating to the omission in this research of discussions of social media tools for educational purposes.<sup>9</sup>

---

<sup>8</sup> Page 18 "Doing a systematic literature review in legal scholarship"2018 by Marnix Snel and Janaina De Moraes, Eleven International Publishing.

<sup>9</sup> Due to restrictions on word count this is now located as an **Appendix 2** to this first chapter and is located in VOLUME V (Appendices)

## 1.2 Evolution and development of the research

This research combines two distinct disciplines, law and education that came together more by accident than design. The author had been selected to trial the three TEL Projects at various points over an eight-year period. The research was initially going to focus on the effectiveness of the TEL Tools in enhancing the student academic experience, but this had been extensively researched and the author was struggling to find a 'novel' element for a valuable piece of research at doctoral level. However, it was a chance complaint by a second-year student in 2014 that would shape how the research would develop. The importance of the TEL Tools and in this case Panopto, provided the necessary evidence that the complaint (alleging that the author had failed to prepare students for an upcoming MCQ assessment) was without foundation and the complaint was promptly dismissed. The novel element of the research had fallen naturally into place; not only could the TEL Tools be used in potentially evidencing learning and other pedagogical benefits for students, but the TEL Tools had an equally valuable potential to evidence legal compliance by a relevant HEI of key legal duties to students set out in the SCTE. However, narrowing the research to work in harmony with the early primary data would be the greater challenge as well as delivering contemporary research that answered both pedagogical and legal questions in relation to the SCTE and the pivotal role of the TEL Tools as central to this.

### 1.2.1 TEL Tools supporting pedagogical models: a pioneering evolutionary approach

As the early research moved in different directions, it became clear that evaluating how well the TEL Tools support chosen pedagogy would be the priority. The validity of the TEL Tools to evidence delivery of 'high-quality' tuition (as an implicit term of the SCTE) required evidence of how they can support underlying chosen pedagogy. There was growing criticism<sup>10</sup> in the sector that pedagogy was having to justify and find its place working alongside expensive technology purchased by HEIs who needed to account for this expenditure to the taxpayer. There was a need to reposition pedagogy as the primary force in educational provision with TEL in a subsidiary yet supportive role.

The decision to anchor *aspects* of the research on how well the TEL Tools support chosen pedagogical models could be argued as being '*ahead of its time*' reflecting a '*research gap*' that has been picked up recently by L. Castañeda and N. Selwyn (2018)<sup>11</sup> who highlight concerns that TEL is not sufficiently discussed in the context of pedagogy.

---

<sup>10</sup> "More than tools? Making sense of the ongoing digitisations of higher education" Castañeda and Selwyn International Journal of Educational Technology in Higher Education (2018) <https://doi.org/10.1186/s41239-018-0109-y> and accessed 18th March 2019: "Another surprising gap in discussions around digital technology and higher education is pedagogy. Looking back, it is notable how many studies published in the area of educational technology – even those having a great impact on subsequent literature – pay little consideration to underlying pedagogies and teaching models."

<sup>11</sup> [supra]

### 1.2.2 TEL Tools in evidencing compliance with the SCTE

The pedagogical aims of the research had been set on a new and innovative path, but the legal aims also required a narrow and innovative research focus. Drawing on the experience of other industries, such as the construction industry, the author was able to narrow the focus of the key terms that required special attention in relation to the SCTE. The use of legal terms such as '*reasonable skill and care*' as set out in S.49 of the CRA and standards of '*fitness for purpose*' where digital content is provided reflected a cavalier and naïve approach in the sector. Recent case law in the construction industry had demonstrated that inappropriate use of such terms could leave contracting parties without the protection of professional indemnity insurance. The research would turn on evaluating how well the TEL Tools could evidence not just pedagogical compliance with the SCTE but legal compliance with selected key terms of the SCTE.

### 1.3 Overview of the TEL Tools and the three Projects: tracking the history of the research

A brief review of the TEL Tools and the three Projects is provided to ensure the Projects take centre stage in this research and to lay the foundations and understanding for the justification and rationale that subsequently follows.

#### 1.3.1 Multiple-choice questions (MCQ) assessment: PROJECT 1

Some ten years ago the author was asked to pilot the use of multiple-choice questions (MCQs) in an online VLE environment using QMP software, to assess students across a range of undergraduate and postgraduate law modules and return feedback immediately or within one week. The author, a natural '*technophobe*', was reticent to embrace an assessment in this new format and was concerned that the same academic challenge could be achieved with this mode of assessment. This form of assessment and the challenges encountered comprise PROJECT 1 and are in Chapter 7.

#### 1.3.2 Panopto- lecture capture: PROJECT 2

Around 2012 the author also agreed to pilot the use of a new lecture capture software initiative namely Panopto. The positive response from students on the value of this software and principally the ability to revisit lectures many times over had an immediate impact and the author quickly adopted this system in every teaching and learning session thereafter. Indeed, students in the School of Engineering now expect the use of Panopto in their construction and arbitration/ADR law modules. The use and success as well as the initial obstacles in adopting Panopto as a TEL Tool to enhance learning and teaching is the second project selected for this research and the findings are located in Chapter 8.

### 1.3.3 Collaborative learning tools/ distance learning tools: PROJECT 3

The final project that will form the research in this PhD relates to an initial pilot study that was adopted on an MSc in Dispute Resolution<sup>12</sup> to trial various collaborative learning tools. Such TEL Tools included not just Panopto, but the webinar facility afforded by Panopto for students accessing lectures at a distance and joining 'live' with face to face students. The tools also included video conferencing and Blackboard Collaborate ULTRA for conducting tutorials/seminars. The latter tools have real benefits for liaising and feeding back to students working at a distance and joining 'live'. Video conferencing and Collaborate ULTRA were also used to bring key global experts in arbitration law and practice into the local classroom. The USW TV network was used extensively for recording mock mediations, adjudications and arbitrations with leading professionals and for assessing students in simulated environments. Further, collaborative learning tools were adopted such as discussion board forums, blogs and wikis as part of this pilot and more recently audience participation tools and simulation training for students at the USW Hydra Centre.

The full findings of this research can be found in Chapter 9, but it must be recognised that the research here is on-going. The technology too has moved on significantly and the reach and accessibility of education for all is entering new territory. Greater use of AI and VR is set to change education of the future, and it is hoped that the findings here will have a strong relevance for technology in its many forms as we engage with unrelenting technological developments in this environment.

---

<sup>12</sup> The MSc is currently not running due to poor student recruitment, but the author was course leader for this programme which was recognised to fellowship status by the Chartered Institute of Arbitrators (CI Arb) and accredited by RICS.



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education



## chapter 1 - no. 3

#### 1.4 Motivation and rationale, delivering high-quality education for all learners: Rationale #1

The author has revisited this section throughout this research journey trying to accurately capture the rationale for undertaking this research. However, it was reading an article in The Guardian May 2017<sup>13</sup> that featured an interview with Claire Gray aged 26, a check-out operative in Waitrose, that essentially captures the author's passion for this work.<sup>14</sup>

Claire had enrolled as a part-time law student at the Open University hoping to *'swap till for a career in law.'* Claire had worked hard at school but developed a degenerative spinal condition that has left her disabled and also being a single parent she *'couldn't find a way to juggle work, study and childcare'*. As the article explains, *'most part-timers are juggling a job or a family or both and so need to study near home.'* This is equally true for the majority of students that the author teaches who are part-time yet holding down full-time jobs and who rely on the TEL Tools that the author uses to enable them to learn flexibly where they are. High-quality educational provision should reach all students however or wherever they choose to learn and foster education that is inclusive and accessible. It is here that the TEL Tools will need to stand up to scrutiny in this research and their ability to support flexible and inclusive learning that is of 'high-quality'. Jo Johnson, the then Universities Minister is quoted in the article as saying Claire is exactly the type of student the Government wishes to tempt back to University, *'students, especially mature ones were crying out for more flexible courses, modes of study which they can fit around work and life.'*

Claire records that she is understandably, *'nervous about studying...Now I'm taking out a loan to pay for my fees which is daunting but if I don't do this before I retire, I'll be sorry.'* Claire reflects the concerns of many students who worry about the 'big ticket' price of higher education; the duty to provide education of high-quality that meets the needs of flexible and all learners needs transparent and careful regulation to see that students receive what they have been contractually promised. The TEL Tools will equally need to stand up to scrutiny in this research in terms of their legal and evidential credentials.

In July 2017<sup>15</sup> the celebration of 60 years of colour television also brought into sharp focus why the author embarked upon this research journey. Melvyn Bragg 2017 outlined at the beginning of the programme the importance of television as a leveller in our society: *"If we think that the barriers of*

<sup>13</sup> "Part-time student numbers collapse by 56% in five years" Tuesday 2<sup>nd</sup> May 2017:

<https://www.theguardian.com/education/2017/may/02/part-time-student-numbers-collapse-universities>

<sup>14</sup> The author is aware that the main thrust of this article is to review the drop in part-time numbers but will not be discussing this here.

<sup>15</sup> <http://www.bbc.co.uk/iplayer/episode/b08wd7r8/click-cirque-du-click> accessed on 12th July 2017, Melvyn Bragg on TV: The box that changed the world.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*class and privilege still exist think of a life before television when the establishment could hide in the corridors of power, unreachable and unaccountable...TV allows us to participate in live democratic debate...activities once the privilege of the ruling classes are available to us all...TV has given us a voice where we had no voice before...all from the comfort of our home..."*

Melvyn Bragg was joined on the debating panel by historian and broadcaster, David Olusoga who said that he became an historian not because of what he learned in school but because television brought history to life. Olusoga says that TV was his educator reflecting on watching the then ground-breaking historical series, 'Timewatch'.

This resonates with this research in seeking to achieve and convince that the use of TEL can help to create a level playing field in higher education with equality and high-quality learning front and centre providing learning that is transparent and accountable in ways that the traditional classroom simply cannot achieve. *"TEL Tools can leave a finger-print of the activities of an entire class inside a public document in a way that the physical, traditional classroom was never capable of accomplishing."*<sup>16</sup>

The TEL Tools in this research have similar 'visual' learning strengths to the television and can bring learning to life beyond the physical classroom and reach those for whom the physical classroom remains a difficult learning space. High-quality education is one that does not discriminate in terms of who can or cannot be educated and pedagogy that respects this supported by TEL has much to commend it<sup>17</sup>.

---

<sup>16</sup> The Palgrave International Handbook of Higher Education Policy and Governance: edited by Jeroen Huisman, Harry de Boer, David D. Dill, Manuel Souto-Otero and quoting McCluskey and Winters (2012)

<sup>17</sup> "Inclusivity and TEL-Accessibility in education: from integration to inclusion" Nicholas Matthijs, April 2017: *"Thanks to technological progress, we are now seeing the rise of an inclusive approach that enables more flexible learning experiences and allows students to meet the same goals, achieving the same outcomes but in their preferred learning styles...we know students with disabilities can feel isolated from their peers and don't know how to engage with them...some of them could find engaging in ...a virtual classroom more comfortable... than face to face...and they can start feeling part of the group..."*

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education



## chapter 1 - no. 4

### 1.4.1 Avoidance of disputes and litigation related to the SCTE- Rationale #2

The author's own experience demonstrated how the use of technology in the classroom could avoid complaints and disputes between students and their HEI in relation to the academic provision. The author wanted to demonstrate through this research that the TEL Tools can provide a platform for tracking that students receive the education as promised and that complaints could be dealt with swiftly and fairly before they escalated into disputes that required more formal dispute resolution techniques via OIAHE or worst- case scenario litigation in the courts.

Higher Education in the UK has undoubtedly entered a new era and learning from the experience of other industries and in particular the UK construction industry where emphasis in newer standard form industry contracts is aimed at avoidance of disputes and careful management of conflict will deliver significant cost saving benefits for HEIs. Nicola Woolcock (2017)<sup>18</sup> reminds us that: *'Universities face the prospect of being sued if they fail to make the grade and renege on contracts they offer to students, under government plans to reform the higher education sector...Universities and other higher education institutions will be expected to offer value-for-money contracts setting out what undergraduates should expect in terms of lecture time, assessment and feedback, if a consultation is approved.'*

Appropriate utilization of TEL Tools could be key in avoiding costly, stressful and time- consuming litigation and harnessing the use of more amicable methods of resolving disputes will be important. Susan Haack (2014)<sup>19</sup> captures the dangers of an adversarial system for resolving disputes which she says is *"...an epistemologically poor way of determining the truth."*

The rise of the 'consumer' student has also seen the rise of the student 'disputer' keener than ever to complain when programme delivery falls short of promised contractual expectations.

### 1.5 The embedding of TEL in the 'digital' university: the new UK Higher Education landscape

The HEPI<sup>20</sup> delivered a policy note in June 2018<sup>21</sup> in the context of how technology can support the navigation by universities through turbulent times and sets out a clear message that the advantages of embracing technology by all stakeholders significantly outweigh the disadvantages, but that care

<sup>18</sup> "University contracts to let students sue", Friday July 21<sup>st</sup> 2017

<sup>19</sup> Evidence Matters: Science, Proof, and Truth in the Law, 2014 Susan Haack, Cambridge University Press

<sup>20</sup> Higher Education Policy Institute

<sup>21</sup> "Change is coming- how universities can navigate through turbulent political times" June 2018, Dr Diana Beech, HEPI Director of Policy and Advocacy in conjunction with PwC. "Disruptive technologies and changes to education delivery are altering the way universities are operating. The 4<sup>th</sup> education revolution has the power not only to change the way we teach and learn but, also how we manage information and data. The advantages of embracing technological change...include, greater agility, more collaborative learning, maximising new opportunities...and enhancing the student experience...The effectiveness of technology...depends on...a willingness to embrace it and a commitment to develop it...Technology cannot work without people...Yet, technology is not without risk...Universities must take care not to let technological developments distract them from their core missions of providing good quality teaching and research..."

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

must be taken by educators in how they use technology. Lawyers specialising in the law of higher education have been equally quick to send a message to academia that ignoring student expectations on the use of technology is no longer an option, Pinsent Masons (March 2019)<sup>22</sup> strongly urge the sector to view technology as 'enabling change'. *'Today's students expect it to be front and centre in how they learn...how technology is being a catalyst for positive change and why ignoring it is not an option...'* In Wales a major review for enhancing learning and teaching through technology was concluded in March 2018<sup>23</sup>. The review was conducted by JISC on behalf of HEFCW and confirmed that, *'Enhancing learning and teaching through technology (ELTT) has been mainstreamed and processes are in place to facilitate continued mainstreaming by all institutions.'*

The appointment of Professor Ross Parry as the first Deputy Pro-Vice Chancellor (**Digital**) at Leicester University signals a new era in the digital university and is evidence of the attention now being given to embedding digital technology in UK higher education.

Yet there remains criticism that institutions have been *'resistant to digital transformation.'* Chris Pennell (2018)<sup>24</sup> commenting on how he sees digital technologies as a *'catalyst for change in higher education'* and suggests that, *'Using technology to support pedagogical approaches in the classroom is a tried and tested approach, when the approach, training and support are aligned the benefits ...outweigh the barriers.'* It is precisely how the TEL Tools in this research support such pedagogical approaches that is fully discussed in subsequent chapters and goes to the core of the research in this thesis

Tools such as those adopted in this research have long been in demand. Antonio Padoa-Schioppa (2017)<sup>25</sup> whilst discussing how legal education developed from the twelfth century (with reference to the University of Bologna) highlights how law students had to revisit and review lecture content for more comprehensive understanding over successive years; the modern Edtech<sup>26</sup> equivalent of this is epitomized by Panopto demonstrating how pedagogy has evolved, supported by technology enabling *immediate* revisiting and reviewing of lecture content by a 21<sup>st</sup> century law student.

<sup>22</sup> "Technology Revolution in the Higher Education Sector" White Paper supported by University of Edinburgh and JISC

<sup>23</sup> Page 3 "Review of the Wales Higher Education Strategy for Enhancing Learning and Teaching through Technology" Report for HEFCW, March 2018, Prepared by Jisc ([https://www.hepi.ac.uk/wp-content/uploads/2017/02/Hepi\\_Rebooting-learning-for-the-digital-age-Report-93-20\\_01\\_17Web.pdf](https://www.hepi.ac.uk/wp-content/uploads/2017/02/Hepi_Rebooting-learning-for-the-digital-age-Report-93-20_01_17Web.pdf))

<sup>24</sup> "Digital Transformation in UK Higher Education: How a modern VLE can drive change", Chris Pennell, Research Director, IDC Government Insights, May 2018

<sup>25</sup> Chapter 10- "University: Students and Teachers: A History of Law in Europe: From the Early Middle Ages to the Twentieth Century" by Antonio Padoa-Schioppa and translated by Caterina Fitzgerald, 2017, Cambridge University Press, pages 127-129, *"Undoubtedly a student aiming to assimilate the difficult texts of the Corpus iuris... could not possibly limit himself to listening to a single course ... it would have been necessary to return and listen to the explanation two or three times in successive years, in this way slowly acquiring greater and greater understanding."*

<sup>26</sup> Edtech has been defined in the Cambridge dictionary as an abbreviation of 'Educational Technology' accessible at: <https://dictionary.cambridge.org/dictionary/english/edtech>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Other leading academics in the sector remain to be convinced of the benefits of some of the TEL Tools 'showcased' in this thesis and their voices and concerns will be equally addressed.

## 1.6 The rise of the consumer student and consumer compliance culture in UK Higher Education

This research was being undertaken against the backdrop of significant changes in consumer legislation improving amongst other things, the contractual rights of students in higher education. This new legislation aims to ensure that students are treated fairly and that terms and conditions of their contracts with their relevant HEI are 'transparent' and fair<sup>27</sup>.

Smita Jamdar (2017)<sup>28</sup> writing about the need for universities to prepare themselves for this new compliance culture warns that compliance duties will be challenging.

The publishing of the Teaching Excellence Framework (TEF) has disrupted the higher education 'status quo.' The term 'consumer' three days after publication of the first TEF results, seemed already dated and perhaps the term 'prosumer'<sup>29</sup> will now find its place more easily in higher education.

The TEF has given students a voice to sound their dissatisfaction with poor teaching<sup>30</sup>. The press was awash with leading institutions who had unexpectedly scored a 'bronze'<sup>31</sup>. Rosemary Bennett<sup>32</sup> (2017) reported on student reaction to an elite London university's bronze records their lack of surprise at this result.

Penny Anderson (2010)<sup>33</sup> asked the question whether students paying £9,000 per annum would be able to demand their money back if the university fails to deliver. President of the NUS, Aaron Porter,

---

<sup>27</sup> Section 54 CRA 2015

<sup>28</sup> "Time for universities to get ready for the compliance culture" 10<sup>th</sup> July 2017. WONKHE at <http://wonkhe.com/blogs/compliance-culture-is-coming-time-for-universities-to-get-ready/> (accessed 11<sup>th</sup> July 2017) "...the Higher Education and Research Act (HERA) will place a good deal of focus on compliance within providers. This may prove both challenging and ultimately transformative for the culture of universities as we know it."

<sup>29</sup> This term is reviewed by Prof. Amir M.Sharif in his article entitled. "Students as prosumers"(2014) in which he considers students as possible prosumers. "Given the experiential and pedagogic elements involved in discussing the student experience in HE, in many ways universities need to perhaps consider students as Prosumers (consumers who are involved in designing or customising services or products for their own needs)...the most revolutionary aspect of the student as prosumer concept here is that academic staff must begin to adopt a customer care approach and attitude...Universities therefore need to consider seeking overall improvements to student experience as a long-term investment through seeking an integrated approach to student experience across campus. This will involve developing partnerships with students and the wider set of campus stakeholders too."  
[http://universitybusiness.co.uk/Article/students\\_as\\_prosumers](http://universitybusiness.co.uk/Article/students_as_prosumers) (accessed 24<sup>th</sup> June 2017)

<sup>30</sup> There are many critics of TEL who question its validity as a measure of teaching quality when as Emilie Murphy says, "We need a framework of assessment that captures the diversity of teaching within our institutions, and it is inexplicable to me, and many others, how quality of teaching and learning can be said to have been assessed without anyone actually stepping foot inside classrooms and lecture theatres" Stop celebrating the TEF results – your hypocrisy is galling!" Emilie Murphy, 23<sup>rd</sup> June 2017  
<https://www.timeshighereducation.com/blog/stop-celebrating-tef-results-your-hypocrisy-galling-> accessed on 25<sup>th</sup> June 2017

<sup>31</sup> TEF grades education providers on their teaching according to gold, silver or bronze awards, bronze being the lowest grade.

<sup>32</sup> "Must try harder: LSE's absent academics are failing students"- The Times Saturday June 24, 2017 "For students, it came as no surprise...they are frustrated at the inaccessibility of many academics, scant feedback, constant sabbaticals and classes routinely covered by PhD students."

<sup>33</sup> "Can you get a refund if university fails to deliver?" The Guardian 18<sup>th</sup> December 2010

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

stated: "Students must have more power to hold their institutions *to account*. *Institutions must be required to repay fees to students where there is poor quality in delivery or promises not kept.*"

There is no doubt that students need consumer protection like any other 'purchaser' of a service. The student loan 'crisis' has certainly highlighted this. Estelle Clarke<sup>34</sup>, a former City lawyer on the advisory board of the Intergenerational Foundation think tank, says:

*"... student loans have less consumer finance protection than a basic product such as a credit card...if they were properly regulated, they would be unlikely to apply the monthly compound interest used for student loans."*

Fast forward to 2019 the message is being sounded loud and clear that student consumer rights need to be taken seriously and as Jim Dickinson (2019)<sup>35</sup> students are consumers and need to be treated as such. *"One of the more baffling aspects of the debate around students and higher education policy has been the outright rejection of students-as-consumers on the basis that it's sometimes an ill fit. A student's relationship with their institution is surely complex enough to be capable of fitting all sorts of models at different points – sometimes learner, sometimes consumer, sometimes partner and sometimes client."*

David Palfreyman (2019)<sup>36</sup> suggests it is time for (what he calls) the '*regulatory state*' to take seriously their '*moral and political duty of care*' to students. A not dissimilar message is echoed in this thesis which calls upon the sector to lay to rest the debate between learners and consumers and to accept that the consumer rights of students are enshrined in statute and such rights must be upheld. The rise of the consumer student has taken legal flight and if the sector is to avoid yet more regulation securing an industry- wide SCTE is now advocated in this research as a priority.

## 1.7 Tracking the history of the SCTE: Do the origins of the SCTE lie in the Cor Tewdws?

The origins of the first seat of learning in Great Britain has been widely debated but legend suggests that the '*Cor Tewdws*'<sup>37</sup> founded around the fourth century and set up in honour of the Roman Emperor Theodosius I was a 'first seat of learning' located in Llantwit Major in south Wales. The '*Cor Tewdws*' roughly translated as '*Chief University*'<sup>38</sup> was a place of learning for monastic scholars. This

<sup>34</sup> "Are tuition fees really heading for scrap heap?" By Sean Coughlan 13<sup>th</sup> July 2017 - <http://www.bbc.co.uk/news/education-40569202> (accessed 13<sup>th</sup> July 2017)

<sup>35</sup> "Keeping our Promises to Students" 6<sup>th</sup> June 2019 *"One of the more baffling aspects of the debate around students and higher education policy has been the outright rejection of students-as-consumers on the basis that it's sometimes an ill fit. A student's relationship with their institution is surely complex enough to be capable of fitting all sorts of models at different points – sometimes learner, sometimes consumer, sometimes partner and sometimes client."* Accessible at: <https://wonkhe.com/blogs/keeping-our-promises-to-students/>

<sup>36</sup> Page 206 "Regulating higher education markets" located in "Governing Higher Education Today: International Perspectives" 2019 edited by Tony Strike, Jonathan Nicholls and John Rushforth, Routledge Publishing

<sup>37</sup> <http://www.vaguelyinteresting.co.uk/tag/cor-tewdws/> accessed 12<sup>th</sup> March 2019

<sup>38</sup> Wikipedia [https://en.wikipedia.org/wiki/Cor\\_Tewdws](https://en.wikipedia.org/wiki/Cor_Tewdws) accessed 5<sup>th</sup> March 2019



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

educational establishment provided elite education *in exchange* for the monks' hard work and endeavours in diligently learning the scriptures of the time and subsequently spreading the gospel across Wales and beyond. Legend has it that both St Patrick and St David were educated at the Cor Tewdws and subsequently spread the gospel to Ireland and across Wales. The 'Ed tech' of the day was the *'state of the art'* waxed tablet and stylus as recorded by Alfred C. Fryer (1893).<sup>39</sup>

*"In another portion of the large hall an aged teacher was dictating a number of the wise sayings attributed to Cadoc of Llancarfan, and the students grouped around were taking them down on their waxed tablets and their styles."*

The legal concept of *'mutual exchange'* is important when discussing the formation and validity of all contracts. The concept of a *'financial exchange'* in relation to this SCTE or 'pedagogical contract' has a long history as recorded by Yun Lee Too (2000)<sup>40</sup>, *"Historically it describes the moment when two individuals- the professional teacher of Greek, the sophist and his young pupil- mutually consent to engage in the activities of teaching and learning...the interaction between teacher and pupil is a give-and-take ...the teacher gives something of value – a body of knowledge, a set of skills, a way of thinking...in return for which the pupil renders some form of payment..."*

In today's coinage this *'form of payment'* translates as the tuition fee of currently £9,000+ per year<sup>41</sup> that the student pays the relevant HEI *in exchange* for the educational service provided to him or her.

There are mixed views on articulating the student and teacher relationship as a commodity to be traded. Yun Lee Too (2000)<sup>42</sup> reflects the views of many and whether *'the relationship between student and teacher needs to be observed and controlled'* in a formal student contract.

Referring to the establishment of the then new regulator the Office for Students Jo Johnson (Universities Minister in 2017) explained that one of the first things he would be asking this body to do in exercising its new powers is, *'to consult on the system-wide introduction of student contracts between students and universities.'* Consultation on such formal contracts is necessary he feels *"as contracts would set out what students can expect from their providers in terms of resource commitments, contact hours, assessments, support and other important aspects of their educational experience...to ensure effective consumer protection for students.'*

<sup>39</sup> page 100 by Alfred C. Fryer in his translation of the work, "Llantwit Major: A Fifth Century University" Leopold Classics

<sup>40</sup> Page 7 of "The Pedagogical Contract: The Economics of Teaching and Learning in the Ancient World", 2000, The University of Michigan Press

<sup>41</sup> The fee also includes access to the university facilities, support both academic and pastoral, library facilities etc

<sup>42</sup> Page 13 [supra]

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

When Jo Johnson was briefly reinstated as Universities Minister in 2019, Jim Dickenson (2019)<sup>43</sup> was quick to remind us of the importance that Jo Johnson had placed on securing an industry wide SCTE when he first held this ministerial post (this had been put on the back burner by the OfS) adding that, "We know that Jo Johnson wanted to see work done on student contracts and legal rights .. but OfS has been dragging its heels since." It is too uncertain to predict how or when this industry wide SCTE might materialise and which government will be in control post BREXIT and whether a SCTE will be seen as a priority for the sector.

### 1.8 Is there a new 'era' of accountability in Higher Education? Shining the spotlight on the SCTE

The real challenge in this work is firstly, defining 'accountability' accurately for application in this research and secondly being clear on what it is that has changed in UK higher education so that we can justifiably speak in terms of a 'new era of accountability' and specifically in relation to the SCTE. All three stakeholders have always had accountability duties in relation to academic provision and student performance but what has changed so fundamentally in recent times that the duties of these parties have come under the SCTE 'accountability' spotlight? These issues are dealt with in detail in this thesis in subsequent chapters, but an early context will explain how the research developed and the justification for the research questions set out subsequently in this chapter.

Roger Brown (2018)<sup>44</sup> explains that 'accountability' in higher education is not a new phenomenon but it has certainly evolved rapidly in recent times to reflect '*the current ethos of commodification, marketisation, massification and managerialism.*' Brown's message is a largely institutional one on accountability however in this thesis it is at the coalface or 'local' classroom level where it is argued that the real test of how well accountability is or is not working needs to be put under the 'accountability' microscope. J. Frank et al (2019)<sup>45</sup> rightly point out that, '*...the work of the university is done at departmental level.*' Vijay Grover (2014)<sup>46</sup> articulates the difficulty in holding actors accountable in education yet in a post TEF era being able to demonstrate accountability at local level

---

<sup>43</sup> "Look who's back: Jo Johnson returns to universities brief" by Jim Dickenson, Wonkhe 25<sup>th</sup> July 2019 accessible at: <https://wonkhe.com/blogs/look-whos-back-jo-johnson-returns-to-universities-brief/>

<sup>44</sup> Page 538 "Changing patterns of accountability in the UK from QA to TEF" in Research Handbook on Quality, Performance and Accountability in Higher Education" edited by Ellen Hazelkorn, Hamish Coates and Alexander McCormick, 2018, Edward Elgar Publishing

<sup>45</sup> Page 179 "English Universities in Crisis" 2019 by Jefferson Frank, Norman Gower and Michael Naef, Bristol University Press

<sup>46</sup> "Top down versus bottoms up accountability: an analysis for implementation in educational institution" by Vijay Grover, 2014 in International Journal of Multidisciplinary Educational Research issn: 2277-7881; impact factor - 2.972; value:5.16 volume 3, issue 10(1), October 2014 accessible at and updated in **March 2016**: "Education system and institutions are service organizations which unlike product industries do not have specific indicators of performance, hence difficult to hold people accountable for consequences. There need be rigorous research work at local level to develop mechanism for making accountability acceptable and finally automated."

[https://www.researchgate.net/publication/296846718\\_top\\_down\\_versus\\_bottoms\\_up\\_accountability\\_an\\_analysis\\_for\\_implementation\\_in\\_educational\\_institution](https://www.researchgate.net/publication/296846718_top_down_versus_bottoms_up_accountability_an_analysis_for_implementation_in_educational_institution)

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

is what matters most to fee paying students who are demanding that contractual promises set out in the SCTE are properly performed and that contractual parties are held to account for this.

This shift in student demands for accountability is reflected in a plethora of case law culminating recently in the well- publicised case of international student, Pok Wong. In June 2019 settlement was reached in this case against the University of Anglia Ruskin where the Claimant sued her former institution for promises made in the university prospectus related to 'high-quality teaching' and references to the institution being a 'renowned centre of excellence.' The student is reported as saying, *'In light of this settlement I think universities should be careful about what they say in prospectuses...I think they often make promises which they know will never materialise or are simply not true.'* The university continues to deny the allegations but this case and others (discussed in detail in this thesis) signal a move amongst students who are prepared and willing to hold their HEIs to account.

The question to be addressed in this thesis is how well the TEL Tools can transparently and 'fairly' track the performance of the three stakeholders in this local community who all share responsibility for discharging the SCTE. Vijay Grover sees technology as key to 'accountability' stating that, *"... technology is the easiest way to enforce accountability. Use of electronic mail for giving and receiving information, electronic or even online attendance, CCTV cameras, creating database, and use of interactive (web 2.0 technologies) are some of technology measures an institution should **practise.**"*

The author will be fully canvassing the concerns of academics who worry that such an approach on technology tools as accountability tools could foster an unwelcome surveillance culture within the sector and potentially undermine 'high-quality' as well as stifling innovative pedagogy and creating an environment that threatens coveted academic freedom and autonomy. Recently, Dr C. Veliz (2019)<sup>47</sup> commented on lecture capture that, *"...the filming and recording of lectures is a form of 'surveillance' that 'diminishes creativity and independent thinking' adding that she feels that when she is lecturing in rooms with cameras and microphones that, "...there is typically less debate on sensitive issues...No one likes to be on record exploring tentative ideas."*

These concerns need to be taken seriously given the importance of pedagogical discussions in subsequent chapters and the importance of ensuring students develop as creative and critical thinkers as central to a university education.

---

<sup>47</sup> "AI in admissions is a 'big concern'" David Mathews THE 26<sup>th</sup> September 2019

## 1.9 The demand for 'transparent' evidence in this new era of accountability

In 2018 the press reflected a divided opinion on the value of digital evidence ranging from the new VAR<sup>48</sup> at the football World Cup to the wearing of video devices for recording incidents by our emergency services and dashcam technology. Such technology, not unlike the technology in this thesis, is aimed at ensuring fairness and accuracy in decision-making based on credible evidence that can be relied upon. Stewart I. Donaldson (2015)<sup>49</sup> shines the spotlight on the increasing public demand for the creation of a body of credible evidence that can be relied upon, *"The demand for rigorous and influential evaluations, and thus credible and actionable evidence, is at an all-time high across the globe."*

In the context of higher education Michael F. Middaugh<sup>50</sup> (2007) stresses that reliable evidence is needed in terms of transparently demonstrating the effectiveness of the learning that has taken place, *"The central core of a college or university mission statement has to be the teaching and learning process and it is incumbent upon institutions to show evidence that student learning is indeed taking place."* Similar findings are provided by G. Kuh et al (2015)<sup>51</sup> who also highlight the importance of evidence in demonstrating that learning has taken place, *'Documenting student learning requires evidence...Simply put evidence is essential to improving student learning and responding to accountability expectations.'*

The importance of 'evidence' in an enhanced accountability landscape in Wales is set-out in the White Paper<sup>52</sup> and puts a premium on the value of reliable, independent evidence that is trustworthy stressing the need to strengthen evidence and accountability.

However, as Stacey Barr<sup>53</sup> (2017) points out evidence which is credible and trustworthy requires a 'warts and all' approach and very much reflects the approach in this thesis, *"Evidence cuts both way... Evidence becomes both a tool in our hand and a rod in our back. It is how we learn about the true performance of our organisation...the price for informed decision-making is transparency and accountability... Because that's really the only way that things get better."*

<sup>48</sup> Video Assistant Referee in the Russian football world cup summer 2018

<sup>49</sup> Page 3 "Examining the Backbone of Contemporary Evaluation Practice" Chapter 1 of Credible and Actionable Evidence: the Foundations for Rigorous and Influential Evaluations, Stewart I Donaldson, Christina A. Christie and Melvin M Mark, Sage Publishing 2015

<sup>50</sup> "Creating a culture of Evidence: Academic Accountability at the Institutional level" - New Directions for Higher Education, no. 140 Winter 2007, Wiley Periodicals Inc.

<sup>51</sup> "Using Evidence of Student Learning" (2015), George D. Kuh, Stanley O. Ikenberry, Natasha A. Jankowski, Timothy Reese Cain, Ewell, Pat Hutchings, Jillian Kinzie Jossey-Bass Publications

<sup>52</sup> [https://consultations.gov.wales/sites/default/files/consultation\\_doc\\_files/170620\\_reformed\\_pcet\\_system\\_final\\_en.pdf](https://consultations.gov.wales/sites/default/files/consultation_doc_files/170620_reformed_pcet_system_final_en.pdf) accessed 24th July 2017 "Strengthen evidence-based capacity and capability required for strategic policymaking in order to provide objective analysis and advice to the Welsh Government, educational institutions, business and employers, wider societal groups [need to]... Improve data collection and analysis to underpin decision making, accountability, and public understanding of the contribution of education to society and the economy."

<sup>53</sup> "How to create a high-performance culture and measurable success- Prove it!" 2017 by Stacey Barr, Wiley

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

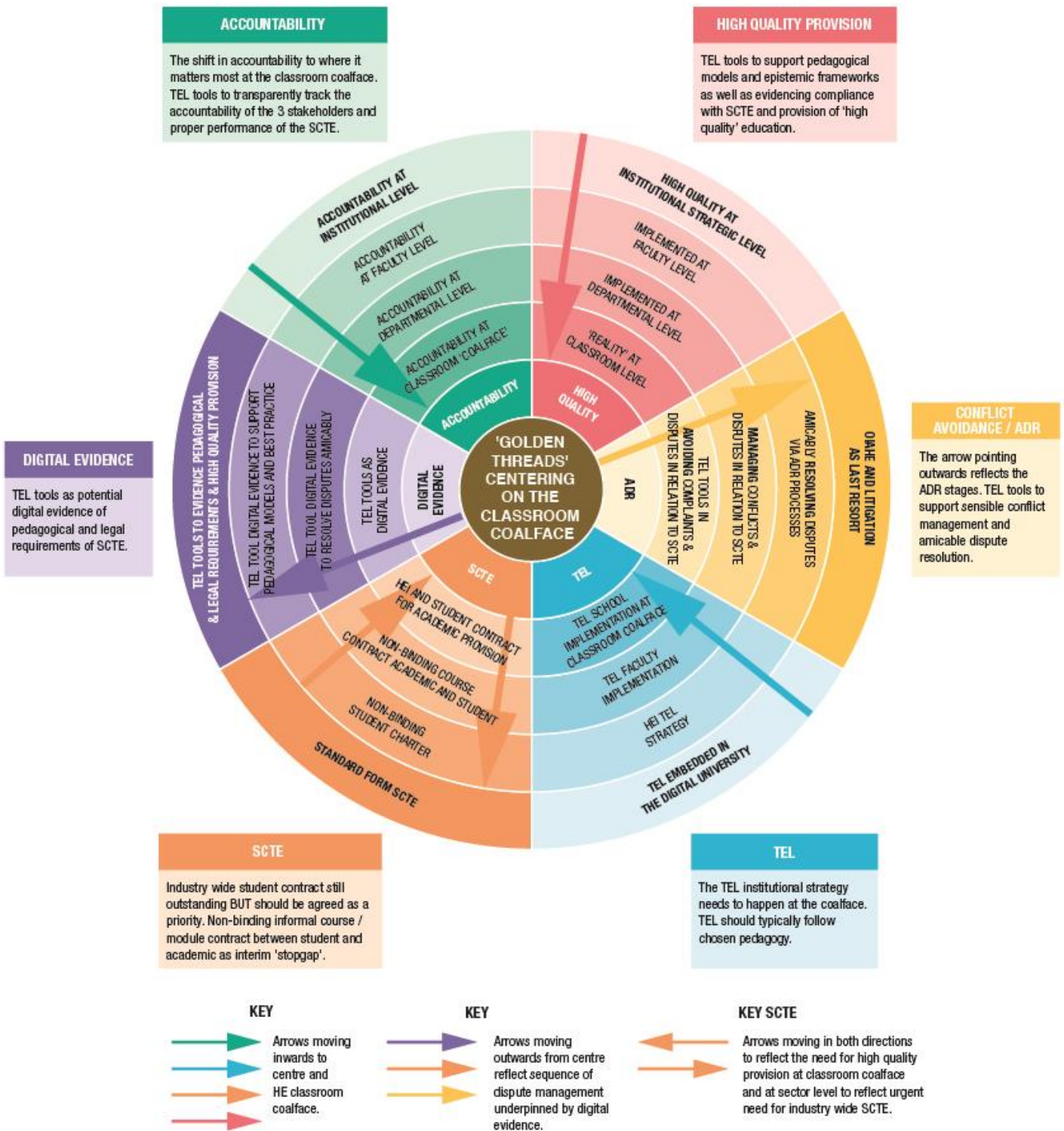
The author has dedicated a chapter in this thesis to the various forms of evidence that need to be evaluated both pedagogical and legal to honestly answer the research questions posed below.

### 1.10 Research golden threads

A special 'golden threads' research wheel has been designed for this thesis and is set out below as a graphic in Figure 2. This wheel provides a 'visual' explanation and 'holistic' summary of how the TEL Tools are interwoven in this interdisciplinary work and their role in linking the six research '*golden threads*' as an entire research project. The six golden threads cover TEL, accountability, the SCTE, digital evidence, ADR and 'high-quality' provision. The wheel clearly demonstrates the importance of the golden threads centring on the classroom coalface where it is argued that accountability and contractual liability must not only happen but must legally and transparently be seen to happen.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Figure 2: Research 'Golden Threads': centring on the classroom coalface





# chapter 1 - no. 5

## RESEARCH AIMS

### 1.11 Aims of the research:

- (a) The central aims of this research are to critically evaluate the extent to which the TEL Tools (comprising the three Projects) evidence performance and compliance by the three key stakeholders of their duties and obligations in relation to the SCTE operating within the confines of a new era of accountability which spotlights answerability at the HE '*coalface*'.
- (b) Further, the research aimed to critically evaluate the extent to which the TEL Tools scaffold 'high-quality' provision and support chosen pedagogy. Developing potential common key markers of 'high-quality' and critically evaluating their applicability across disciplines is a *special aim* of this research given the importance of this much misunderstood and elusive term in the SCTE.
- (c) The research also aims to critically evaluate the effectiveness of the TEL Tools and the digital evidence they generate in avoiding, managing and resolving disputes amicably with students in less formal internal proceedings using less adversarial ADR techniques as well as in formal civil litigation proceedings.

#### **Connecting the three projects as one interdisciplinary and unified research package.**

Although formally addressed in the compulsory Critical Review (CR) it is important (at this early stage) to demonstrate the 'connectedness' of the three projects for this format of PhD with project focus. The inter-relationship between the projects and their individual and combined contributions in answering the research aims, and questions and how the research objectives were met is summarised in Figure 2A set out overleaf.



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

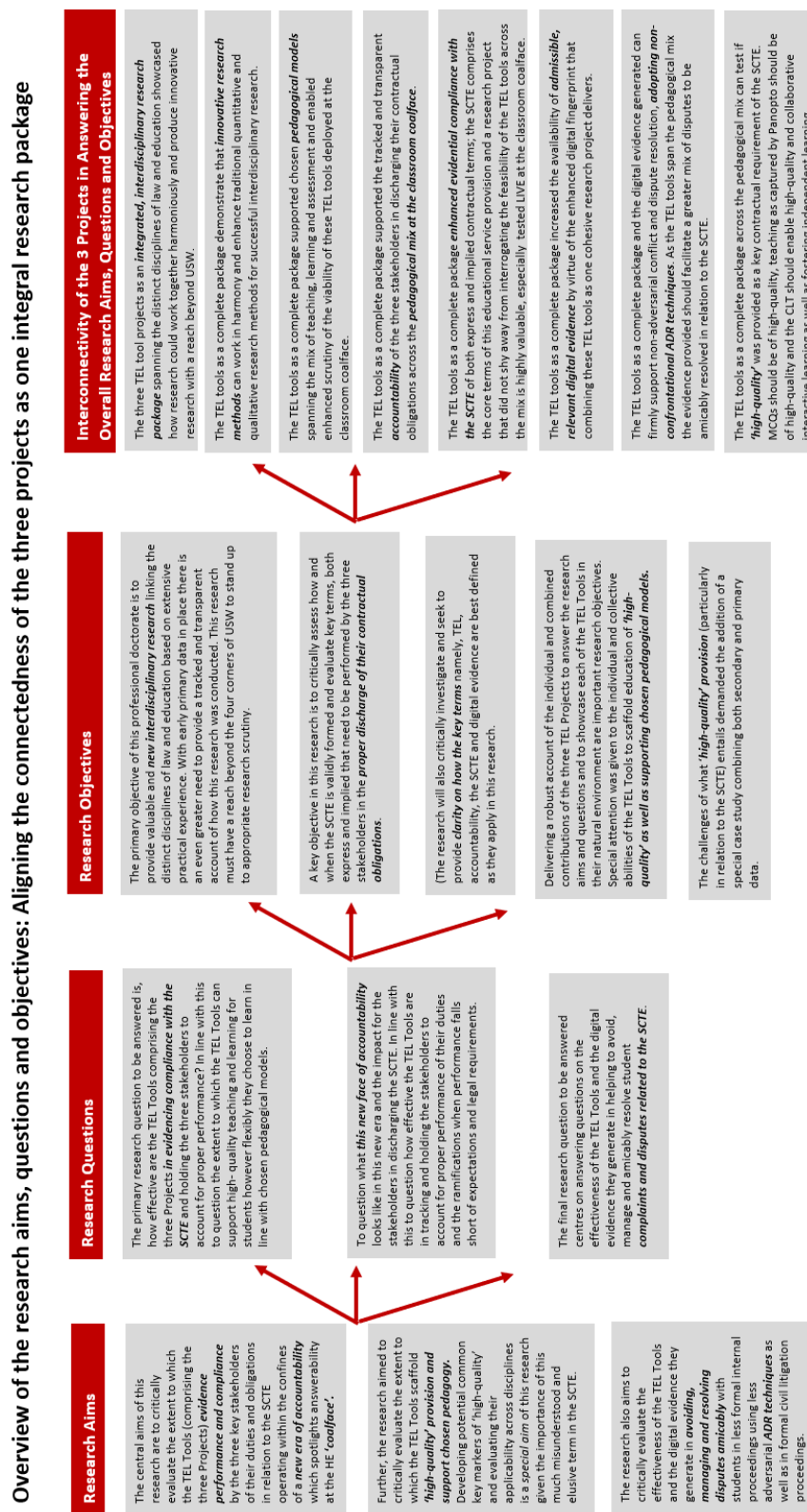


Figure 2A – An overview of the 'connectedness' of the three projects as one integral research package



## chapter 1 - no. 6

### RESEARCH QUESTIONS

## 1.12 Research questions

### Research Question 1:

The primary research question to be answered is, how effective are the TEL Tools comprising the three Projects in evidencing compliance with the SCTE and holding the three stakeholders to account for proper performance? In line with this to question the extent to which the TEL Tools can support high- quality teaching and learning for students however flexibly they choose to learn in line with chosen pedagogical models.

### Research Question 2:

To question what this new face of accountability looks like in this new era and the impact for the stakeholders in discharging the SCTE. In line with this to question how effective the TEL Tools are in tracking and holding the stakeholders to account for proper performance of their duties and the ramifications when performance falls short of expectations and legal requirements.

### Research Question 3:

The final research question to be answered centres on answering questions on the effectiveness of the TEL Tools and the digital evidence they generate in helping to avoid, manage and amicably resolve student complaints and disputes related to the SCTE.



# chapter 1 - no. 7

## RESEARCH OBJECTIVES

### 1.13 Objectives of the research:

- (1) The primary objective of this professional doctorate is to provide valuable and new interdisciplinary research linking the distinct disciplines of law and education based on extensive practical experience. With early primary data in place there is an even greater need to provide a tracked and transparent account of how this research was conducted and to that end a detailed research journey is set out early in this thesis. This research must have a reach beyond the four corners of USW to stand up to appropriate research scrutiny.
- (2) A key objective in this research is to critically assess how and when the SCTE is validly formed and evaluate key terms, both express and implied that need to be performed by the three stakeholders in the proper discharge of their contractual obligations.
- (3) The research will also critically investigate and seek to provide clarity on how the key terms namely, TEL, accountability, the SCTE and digital evidence are best defined as they apply in this research. This aspect of the research was undertaken by way of a series of mini-literature reviews deemed necessary to 'context' these terms and their application to the three Projects.
- (4) Delivering a robust account of the individual and combined contributions of the three TEL Projects to answer the research aims and questions and to showcase each of the TEL Tools in their natural environment are important research objectives. Special attention was given to the individual and collective abilities of the TEL Tools to scaffold education of 'high-quality' as well as supporting chosen pedagogical models.
- (5) The challenges of what 'high-quality' provision (particularly in relation to the SCTE) entails demanded the addition of a special case study combining both secondary and primary data and was added later in the research in 2019.
- (6) It is a compulsory requirement that a critical review linking the three Projects and their individual and combined contributions to the research outputs be included in a thesis which tracks this route. The content of this critical review is prescriptive and all compulsory elements to be addressed are dealt with in turn in chapter 11. The author added four additional sections covering ethics, thesis conclusions and recommendations and a glimpse into the future technological innovation in higher education. The latter was deemed essential to establish the extent to which the research here can claim it has an enduring legacy that delivers a contemporary message.

## 1.14 Conclusion

Pinsent Masons (March 2019)<sup>54</sup> capture how technology is impacting on higher education delivery and how it is no longer an option for HEIs to ignore how technology can transform the teaching and learning experience for students and be '*a catalyst for positive change*'. Pinsent's argue that, '*...the concept of learning has evolved as technology has developed. Students now expect to have 24/7 access to learning resources digitally, to have access to lecture capture<sup>55</sup> and be able to use devices in lectures and seminar rooms.*'

However, not everyone sees technology as a '*catalyst for positive change*'. Some view technology as underpinning a neoliberal university with consequential infringements on academic freedom and autonomy. B. Johnston et al (2019)<sup>56</sup> opine that autonomy is undermined and technology has led to standardization of the curriculum. Any technological instruments of change that threaten academic autonomy and provision need to be as carefully regulated as much as the educational provision itself and this research will balance the views on the pedagogical and legal dividends of the TEL Tools in both academic camps.

Pinsent Masons also reflect a strong message that resonates with this research that providers face more scrutiny than ever before on how courses are delivered. Scrutiny of the standards of courses has been tightened by the TEF and as the authors point out, '*...we have seen new standards developed in England to measure the quality of teaching, learning and outcomes delivered by higher education providers.*' Being innovative with pedagogy and harnessing TEL Tools to support new pedagogical approaches will be required to meet these new demands by students as well as providing transparent evidence that innovative teaching and learning is taking place.

Trendence UK 2018<sup>57</sup> reports that 94% of students say that, '*quality of teaching is very important*' and 91% consider that '*fair assessment and feedback*' are also '*very important*' for determining whether a university offers value for money. Further, in a survey by Trendence UK 2017<sup>58</sup> when students were

<sup>54</sup> "Technology Revolution in the Higher Education Sector" March 2019 Pinsent Masons Solicitors.

<sup>55</sup> At page 11 [supra] the authors warn of GDPR and intellectual property matters that need to be addressed where some TEL such as lecture capture is adopted. "Recording lectures may also give rise to issues around performance rights. Performers have rights in their performance and any recording, film or broadcast of that performance. The performer – in this case the academic delivering the lecture-will be the owner of the performance right, not the provider as his or her employer...Providers will need an assignment or licence from the lecturer to record and use of recordings in future." Other universities suggest that students who participate in a recording also acquire some performance rights which need to be respected. <https://www.ed.ac.uk/information-services/learning-technology/media-hopper-replay/help-and-support/frequently-asked-questions/lecture-recording-policy>

<sup>56</sup> Page IX of the Foreword "Conceptualising the Digital University: The Intersection of Policy, Pedagogy and Practice" 2019 by Bill Johnston, Sheila MacNeill and Keith Smyth. Palgrave Macmillan Publishing, '*...technology in the neoliberal university has led to the standardisation and instrumentalization of curriculum development and pedagogical activities within the classroom that have grossly interfered with autonomy, fluidity and creative processes of education.*'

<sup>57</sup> Page 16 "Value for money: the student perspective" Research commissioned by the Office for Students Project led by a consortium of Students' Unions.

<sup>58</sup> Page 8 "What does 'excellent teaching' mean for you?" In "Teaching excellence: the student perspective" - Research commissioned by a consortium of students' unions.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

asked what was the number one factor that demonstrated 'excellent teaching' the answer was 'the quality of the teaching/teachers themselves'. 86% of students also considered that IT was 'important or very important' in judging teaching excellence and 93% of students considered the library and 94% the course-specific resources in the library as key indicators of 'teaching excellence'. These findings capture what the TEL Tools in this thesis are keen to showcase and the extent to which they can deliver open transparent high-quality education that is easily accessed by students and open to peer review that welcomes comments by colleagues.

With legal regulation only set to increase yet further in higher education, being ahead of the curve in respect of potential legal claims and how to avoid and amicably resolve them has never been more important. The question in this thesis is the extent to which the TEL Tools deliver on this brief. Pinsent Masons (2018)<sup>59</sup> capture the legal reality of the contractual relationship between students and their HEIs. Putting the necessary tools in place to evidence discharge of legal duties will be crucial in avoiding unwelcome and sometimes unwarranted disputes by students and in the early settlement and resolution of complaints and disputes via amicable and confidential means.

At the time of writing the author's research rationale is epitomised by 'Sam'<sup>60</sup> a seven-year old child, who with the help of a robot accesses his classes and remotely enjoys the same learning experience as his peers. The robot evidences the entire activities of classroom too openly and transparently. When the author set out on this research journey over 10 years ago, she was absolutely sure that fairness and equity had a greater potential to flourish in higher education for all students where technology was put to good use. The reality however is those who are socially excluded are likely to be digitally excluded<sup>61</sup> and this is the greater challenge in research going forward and embracing new technology in the form of AI and VR and ensuring fair access for all.

This chapter has set out how this research was conceived and developed together with an overview of the research and the justification and motivation for it. The chapter has also highlighted the divided opinion in the sector in terms of the legal and pedagogical benefits and perceived disadvantages of TEL in the higher education classroom. The chapter has provided necessary 'foregrounding' in terms of the importance of understanding the key terms and conditions of the SCTE and respective obligations of the three stakeholders and their roles in the discharge and proper performance of such

<sup>59</sup> Page 14 "Mental Health in Higher Education" October 2018: "The student contract- The relationship between a university and its students is governed by the law of contract. The student contract is subject to consumer law and regulated by the Consumer and Markets Authority (CMA). The CMA's guidance to universities calls for any terms to be in an accessible form and to be clear and transparent in relation to the parties' respective rights and obligations....This is in addition to potential claims through the courts for breach of contract, misrepresentation or for breach of the Consumer Rights Act 2015"

<sup>60</sup> <https://www.bbc.co.uk/news/av/education-47240463/the-robot-helping-a-seven-year-old-boy-go-to-school>

Accessed 16<sup>th</sup> Feb 2019.

<sup>61</sup> Please see WISERD poster presentation at Appendix 9 on how TEL has the potential to create a more equitable and fair learning experience for students, summer 2018

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

duties in a new and uncertain era of 'local' accountability. The next chapter shall set out in detail how the research was conceived, and the research methodology and methods used to ensure a robust and reliable as well as a transparent research journey is provided.





## chapter 2 - no. 8

### CHAPTER 2 – RESEARCH METHODOLOGY

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

## AMC RESEARCH JOURNEY

### AMC Research Journey 2009-2019

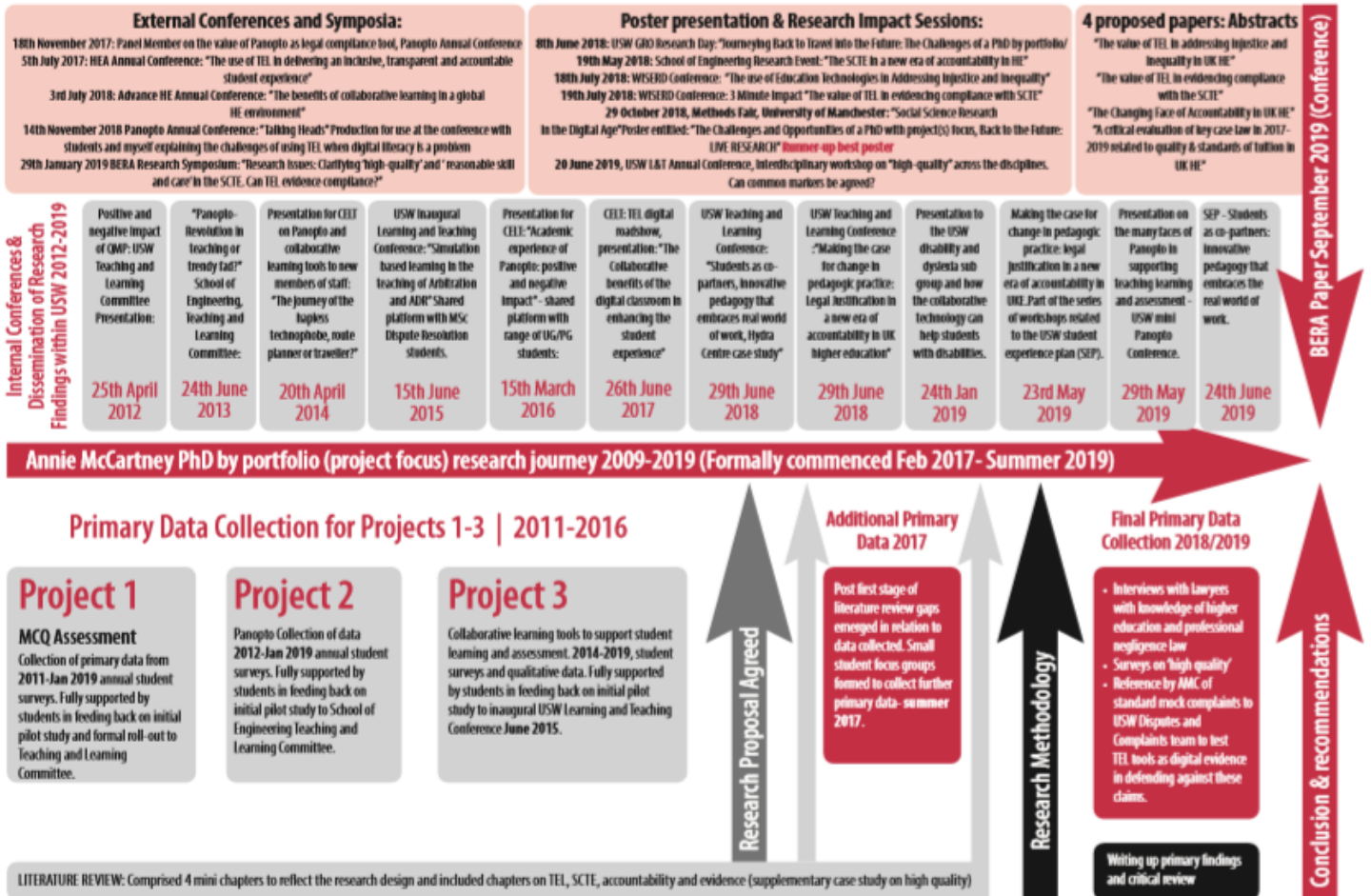


Figure 3: AMC research journey 2009 – 2019 and overview of the entire research

## Chapter 2

### 2.1 Introduction

This chapter will track the research journey of this PhD by portfolio from its inception in 2009 to its completion in the autumn of 2019. The chapter documents two distinct stages in the research, firstly, the completion of the three Projects with early primary data before submission of thesis proposal in 2016 and secondly, the collection of additional primary and secondary data post 2016 and deemed necessary to address the research aims and questions. Unusually this chapter has been placed much earlier in the running order of a thesis in comparison to one which follows a traditional PhD format where this chapter would normally follow the literature review. For a research journey with primary data in place before the collection of secondary data early justification for the research methodology adopted was considered a necessary adjustment. As R. Reaburn (2018)<sup>62</sup> explains, *“where action research applies the traditional structure of a thesis will often need ‘adaption’”*.

An early discussion is provided in this chapter on postgraduate research and the increasing emphasis on doctorates which follow a professional portfolio route and in the present case conducted in line with pedagogical action research methodology.<sup>63</sup> Thereafter, the chapter will concentrate on explaining how the research proposal, aims and questions to be answered were formulated and set out the research philosophy and epistemic frameworks underpinning the research. The complexity in selecting appropriate research designs for the collection of quantitative, qualitative, and mixed methods data in an interdisciplinary research project will be fully addressed and how these were carefully balanced for each of the three individual Projects. The use of highly innovative and unique research for collection of data to address the legal research questions is also fully documented in this chapter.

An over-arching review of the research methodology adopted for the three Projects as a holistic research package is contained in the critical review, Chapter 11 which is compulsory for this route of thesis. Ethical issues and ethical constraints in relation to this research which relies heavily on student participation are also located in Chapter 11.

---

<sup>62</sup> Page 124, “Structuring the Thesis: Matching Method, Paradigm, Theories and Findings”, 2018 edited by David Kember and Michael Corbett, Springer Publishing.

<sup>63</sup> “Action Research in Teaching and Learning” Second Edition, Lin Norton, 2019, Preface, Routledge Publishing: ‘The principle of pedagogical action research is very clear; it is to improve some aspect of the student learning experience. As in all forms of research, both pure and applied, the ultimate aim is to contribute to new knowledge, but of equal importance is the imperative to change one’s own practice.’

## 2.2 Tracking and positioning the research: 2009- 2019

As the research journey for this type of PhD thesis begins with the primary findings already in place, an understanding of how the work developed to this point will give the chapter necessary context and place. The research journey dates back to 2009 when the author was approached by the then head of school to undertake a pilot study on the use of MCQs in formative and summative assessment. As a consequence of the author's significant teaching load meeting the USW 20-day assessment feedback return date was challenging. In addition, there had been a history within the then School of the Built Environment of poor pass rates on a core module and a fresh approach to assessment was proposed for this and possibly other core modules. A successful pilot study and necessary staff training on using MCQ assessment was undertaken in 2010 and formal roll-out was introduced in the academic year 2011/2012 on a range of undergraduate and postgraduate modules.

Building upon the success of Project 1 the use of technology to support teaching, learning and assessment was further developed with the introduction of Project 2 (Panopto). Again, a pilot study was introduced and necessary training for staff preceded the formal roll-out of Panopto the following academic year in 2012/2013. As confidence grew in using technology and experiencing first-hand the potential benefits that technology offered in supporting students in their learning the final Project 3 was commenced<sup>64</sup> in the academic year 2014/2015. This project involved testing a range of collaborative learning (TEL) tools mainly in the VLE (Blackboard). These tools were introduced as part of the educational provision on a new and innovative MSc in Dispute Resolution. The first cohort of students on this new programme which commenced in September 2014 were given free access (at no extra cost to them for this aspect of the provision) to all the collaborative TEL Tools and materials online in return for their honest feedback on the tools. The students on this MSc were senior professionals from a range of medical, legal and construction backgrounds and considered as having the necessary confidence to provide honest positive and negative feedback on the collaborative tools. It was made clear from the outset that feedback on the TEL Tools was optional.

Projects 1 and 2 required formal feedback to the department's learning and teaching committee and feedback on Project 3 was delivered to a wider USW audience at the inaugural L&T conference in June 2015. Students involved in the pilot also joined the conference platform to discuss the range of TEL Tools from the student perspective.

---

<sup>64</sup> Project 3 will never truly complete given the constant changes and innovation in TEL and specifically collaborative TEL Tools

### 2.3 Turning point in the evolution of the research: 2016 onwards

The decision to formally commence the PhD was taken in early 2016. It was recognised that being an early adopter in relation to these TEL Tools had given the author significant and consistent years of data that needed to be shared both within and beyond the four corners of USW. However, with the primary findings in place delivering a workable contemporary research proposal and valuable piece of research was not without significant challenges. After a number of amendments, the research proposal was submitted around the spring of 2016 and was accepted in January 2017.

### 2.4 The increasing importance of professional practice and portfolio doctorates

The research was largely undertaken in accordance with a pedagogical action research methodology framework and the author makes no excuse for drawing direct correlations with the research of Professor Andrew George whose findings have a strong resonance and connection with this thesis. Professor George (2018)<sup>65</sup> is of the opinion that today's PhD needs a face lift to be a more useful document and that we should think of the, '*...thesis as something that is written up over the period of the research, forming a portfolio of work (a doctoral journal) that can be assessed in the viva.*' Please see Figure 4 below which has been reproduced with the kind permission of Professor George.

---

<sup>65</sup> "Has the doctoral thesis passed its sell by date?" 17<sup>th</sup> January 2018, Professor Andrew George accessible at: <https://wonkhe.com/blogs/has-the-doctoral-thesis-passed-its-sell-by-date/>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

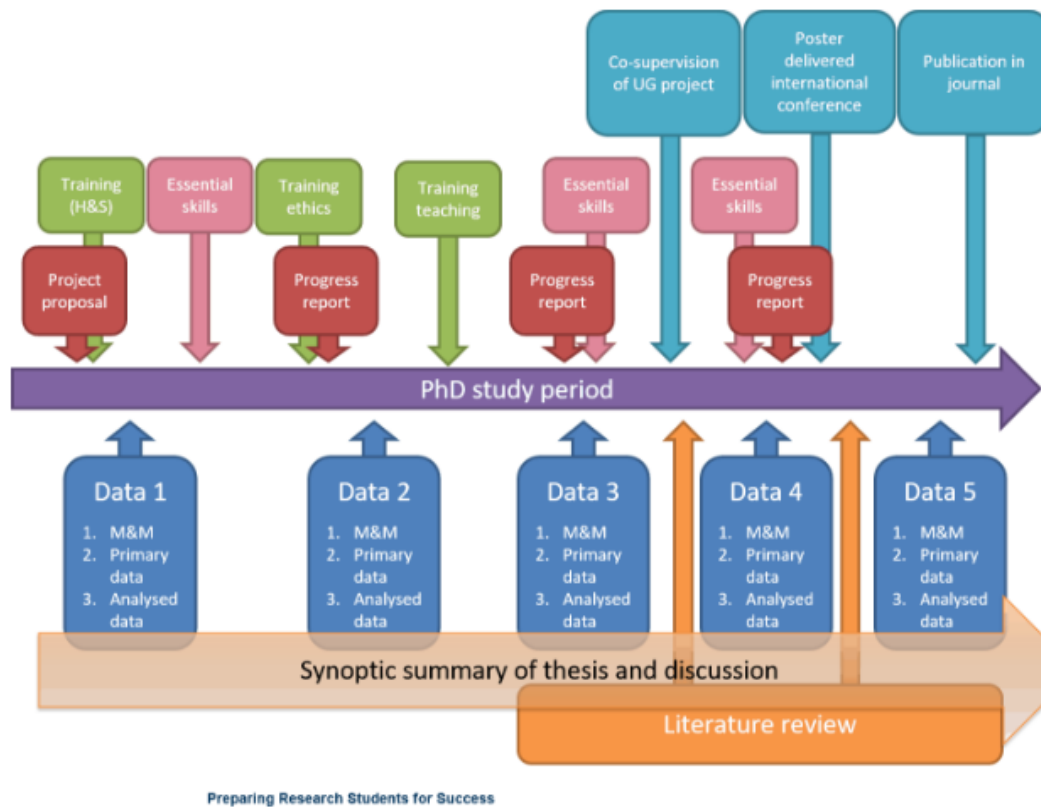


Figure 4: Professor George's 'Facelift' for New Look PhD

As a comparative analysis with Professor George's approach the three Projects and the data collected could be said to comprise the research journal supported by a genuine desire to share this research both within and beyond the four corners of USW.

Professor George (2018)<sup>66</sup> shares the author's views on the importance of dissemination of research work for the benefit of the wider good. In action research it is accepted by many researchers in this area that sharing of findings is integral to this research methodology. Lingenfelter (2016)<sup>67</sup> explains: *'Research on actual learning must be situated in practice...practitioners can learn from the direct evidence of practice and from sharing their learning process with other practitioners. Useful learning about practice is unlikely to come from any other approach.'*

This is also strongly advocated as a necessity by Norton (2019).<sup>68</sup>

<sup>66</sup> "Has the doctoral thesis passed its sell by date?" 17<sup>th</sup> January 2018, Professor Andrew George accessible at: <https://wonkhe.com/blogs/has-the-doctoral-thesis-passed-its-sell-by-date/>, 'Additional material could also be included, reports...presentations (oral or poster) that had been given at conferences and material that places the research in a wider context (for example, discussions relating to ...its societal impact)...it would also be possible to upload evidence of courses taken.'

<sup>67</sup> Page 135 "Proof Policy & Practice: Understanding the Role of Evidence in Improving Education", 2016 Stylus Publishing Inc.

<sup>68</sup> Page 74 "Action Research in Teaching and Learning" 2<sup>nd</sup> Edition, 2019, Routledge Publishing, 'For action research to be considered as 'research', it must be disseminated which means opening up your findings and conclusions to your peers.'

**The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education**

More importantly, the students at the heart of this research have equally shared their views as co-partners and as the end-users of the TEL Tools with the same conference delegates and at several USW training and research events.

There are references throughout this thesis to the difficulties in authenticating and managing a meaningful and contemporary literature review that supports a strongly innovative approach when primary findings in place at the outset. Here, Professor George<sup>69</sup> reassures that the approach adopted in this research has real value and indeed mirrors how the literature review was undertaken in this research.

The literature review was indeed broken up into mini chapters with the research moving in different directions in a constantly changing and politicised UK HE environment especially between 2017-2018.

Developing the literature review in mini sections was key to the research design because the literature established an even greater need for flexibility and distinct research approaches in relation to the three Projects and highlighted gaps in the research. The '*synoptic overview*' equates to the critical review in Chapter 11 of this thesis. In December 2018 and in January 2019 the research was still gathering pace against more contemporary discussions on the need to better understand 'high-quality' provision. A supplementary case study combining secondary and primary data dealing specifically with issues related to 'high-quality' tuition was added as a supplementary Chapter 10 in this research in 2019.

## **2.5 Challenges in research which early primary data: tracking backwards to move forward**

As Paul E. Lingenfelter<sup>70</sup> rightly points out, '*different kinds of research and evidence have different capabilities.*' This view is highly appropriate to this research because the primary data had to convince on two fronts, firstly, as admissible and relevant legal evidence that the TEL Tools and the digital evidence generated by them could be valid evidence of compliance with the SCTE and secondly, that the TEL Tools could support pedagogical innovation and scaffold high-quality academic provision as equally required by the SCTE.

A research thesis where the primary data is in place before secondary data still needs to undergo and be subjected to the same rigorous research '*tests*' whilst operating outside the strict confines of the traditional PhD thesis structure. As Jeroen Huisman (2018)<sup>71</sup> reminds us that '*professional*

---

<sup>69</sup> [supra] "*On top of the portfolio, it would be necessary for the student to perform an adequate literature review. This could be written in sections; as research evolves and moves in new directions...At the end of the research period, the students should provide a short synoptic overview of their research, drawing on the work that they have written up in their doctoral journal.*"

<sup>70</sup> Page 5 "Proof, Policy & Practice: Understanding the Role of Evidence in Improving Education", 2016, Stylus Publications Inc.

<sup>71</sup> Page 125, Chapter 10 "Accountability in higher education: different forms, functions and forums" in "Research Handbook on Quality, Performance and Accountability in Higher Education" edited by Ellen Hazelkorn, Hamish Coates and Alexander McCormick, 2018, Edward Elgar Publishing

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*accountability' in research in higher education requires 'researchers to explain in their papers what research design has been chosen, which data has been gathered and how they arrived at their conclusions.'*

Undertaking a thesis at this stage in the author's career and the way this research developed up to and beyond this point in 2016 is accurately captured by Costley and Fulton (2019)<sup>72</sup> who explain that practice researchers are: *"...coming to the research with a wealth of experience and a variety of Projects already completed...it is important that researchers position themselves within the research process which requires a reflective and reflexive ability at a sophisticated level."* Positioning oneself in the research is equally true for empirical legal research: W.H.V. Boom et al (2018)<sup>73</sup> equally reflect that it is not possible to do empirical legal research, *'that is completely unaffected by the researchers- there remains no such thing 'as a view from nowhere'. Equally the researcher needs to strive to be 'objective'.*

The challenges in delivering a set of aims and research questions that would provide a contemporary and relevant research message with early primary data are fully itemised subsequently below.

## 2.6 Refining the research proposal: balancing interdisciplinary research

At the time of preparing the research proposal a litigious higher education environment was evolving in the UK with strong emphasis being placed on an HEI's 'tracked' accountability to students to render an educational service of 'high-quality' that represented value for money. This proposal reflected a two-fold approach to the research that needed to be mindful of how TEL evidenced compliance with the SCTE in terms of pedagogical *and* legal duties and responsibilities. For the legal aspects of the research the formulation of the research proposal was not immediately at odds with traditional approaches. D. Watkins and M. Burton (2018)<sup>74</sup> reflect how this aspect of the research was formulated here, *"The process of choosing a research topic consists of gradually refining the issues to isolate those most in need of further exploration and discussion."*

However, with a research project that tracks back on itself with primary findings preceding secondary investigations the development of a research proposal quickly found itself in conflict with traditional research approaches because as Mark Bovens et al (2016)<sup>75</sup> explain: *"Theory plays an important role*

---

<sup>72</sup>

<sup>73</sup> Page 6 "Empirical Legal Research In Action" W.H.Van Boom, P.Desmet and P.Mascini (2018), Edward Elgar Publishing, 2018

<sup>74</sup> Research Methods in Law, 2<sup>nd</sup> Edition, 2018, Routledge Publications- page 26

<sup>75</sup> Mark Bovens, Robert E. Goodin and Thomas Schillemans. The Oxford Handbook of Public Accountability (Oxford Handbooks) (Kindle Locations 3651-3653). OUP Oxford. Kindle Edition.



**The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education**

*in experimental research*<sup>76</sup>. *The first step in a research project is the formulation of the research question and the identification of relevant theory for developing the hypotheses.*"

Theoretical analysis could never be the prominent driver in this research because the primary findings had essentially been completed. Indeed, for Projects completed in accordance with 'action research' it is acknowledged how *'...practice itself can be the 'motor' of research in the sense that it is the location from which research questions are generated'*. Corbett and Hill (2018)<sup>77</sup> substantiate the positioning of 'theory' in the form of research as it was conducted here: *"In much action research, the practical problem is the starting point; theory emerges from the research act itself and literature tends to be employed following a less theoretically-driven inquiry."*

Additionally, this approach demanded an open mind and a willingness to embrace research that was not constrained by theory; the absence of an early theoretical framework was seen as positive within the research and not a necessity as viewed by many researchers, *"...a prior theoretical framework is necessary..."*<sup>78</sup> However, the same authors also point out that, *'since qualitative inquiry is open in nature, the findings do not necessarily conform to the existing theories.'*<sup>79</sup>

Having early primary data in place presented a number of obstacles particularly with regards to emergent questions on accountability post TEF, but it is advocated that the flexibility and innovative research methods adopted by the author to ensure the research delivers a contemporary message enabled these obstacles to be overcome.

## **2.7 Refining the research questions from early proposal to thesis submission**

The research questions were updated on a number of occasions throughout this research journey to enable the findings to work in harmony with an unfolding and unpredictable new era and culture of compliance in UK higher education and to deliver valuable new research that reflected a strong contemporary message. Embracing a flexible approach to the original research proposal and initial research questions enabled, a contemporary and valuable piece of research to develop that could be

---

<sup>76</sup> On page 247 of *Research Design* by Creswell and Creswell, 2018 'experimental research' is defined as one which, 'seeks to determine if a specific treatment influences an outcome in a study. Researchers assess the impact by providing a specific treatment to one group and withholding it from another group and then determining how both groups score on an outcome.' Applying this to my thesis is problematic but was undertaken in somewhat different fashion in that where a second-year cohort of students had been denied QMP as an assessment in years preceding its introduction in 2011 marks were consistently poor, subsequent to its introduction in 2011 marks for this module have been consistently on an upward trajectory.

<sup>77</sup> Page 113 "Structuring the Thesis: Matching Method, Paradigm, Theories and Findings", 2018 edited by David Kember and Michael Corbett, Springer Publishing.

<sup>78</sup> Mark Bovens, Robert E. Goodin and Thomas Schillemans. *The Oxford Handbook of Public Accountability* (Oxford Handbooks) (Kindle Locations 4679-4683). OUP Oxford. Kindle Edition.

<sup>79</sup> Mark Bovens, Robert E. Goodin and Thomas Schillemans. *The Oxford Handbook of Public Accountability* (Oxford Handbooks) (Kindle Location 4683). OUP Oxford. Kindle Edition.

trusted. D. Kember (2018)<sup>80</sup> assures that in relation to education and social science research, *'Defining the study in terms of precise hypothesis or well- defined research questions is...often problematic...Plans for Projects must, therefore be seen as provisional or subject to amendments in light of how the project proceeds.'*

The title of the thesis too changed several times until close to submission, but this is not out of step with research at this level, *'It is quite normal for thesis titles to be changed as well, usually close to submission. This is surely indicative of Projects evolving as they progress.'*<sup>81</sup>

## 2.8 Refining research to address emergent new issues in Higher Education

Where the research and specifically the ongoing relevance of the primary data will rightly be under the research scrutiny microscope for this thesis is how it honestly adapted to a constantly changing and volatile, political HE marketplace and the pressure of placing the findings subsequently into this environment<sup>82</sup>. Callingham and Hay (2018)<sup>83</sup> are quick to advise against early collection of primary data that may fail to meet the demands of the research questions, Yet the same authors recognise the importance in educational research of *constantly '... re-looking, going back again and again, and wondering (theorising) what is happening and why in education.'*<sup>84</sup>

The former is difficult to argue against and subsequent gaps in the research did emerge that needed to be plugged with additional data as itemised in Figure 11 below (Research Methods Data Collection Timeline). However, the comments by D. Watkins and M. Burton (2018)<sup>85</sup> reflect a sensible research approach and highly relevant to how this research was carried out, *'A research and writing 'plan' exists on two levels. First, there is the 'idea plan' which consists of the topic you are writing about, the aspect of the main subject you intend developing, your hypothesis and your arguments. The second plan, the 'research plan' hangs off the first. Once you decide what you need, the second plan maps out how you are going to locate the relevant information- basically your research methodology.'*

Applying this analogy to here, the *'idea plan'* came from the primary findings and drove the research questions and the *'research plan'* directed the retrieval of relevant data to support primary findings ensuring the primary and secondary data were able to work in harmony in answering the research

<sup>80</sup> Page 411, D Kember 'Lessons Learnt about structuring the thesis' in "Structuring the Thesis" 2018, Springer Publication.

<sup>81</sup> Page 411, D Kember 'Lessons Learnt about structuring the thesis' in "Structuring the Thesis" 2018, Springer Publication.

<sup>82</sup> At the time of writing main political parties more at odds than ever before in terms of how the free market is operating with UK, HE. <https://www.theguardian.com/education/2019/feb/16/labour-would-end-free-market-in-higher-education-says-rayner> Accessed 16th Feb 2019.

<sup>83</sup> Page 30 of Chapter 3, "The Paradigmatic Challenge of Mixed Methods Research: Positivism, Relativism or Pragmatism?" in "Structuring the Thesis: Matching Method, Paradigm, Theories and Findings", 2018 edited by David Kember and Michael Corbett, Springer Publishing, *'Many research students are keen to collect data as early as possible but going out with half formed self-designed questionnaire or interview ... may generate qualitative or quantitative data, but those data may not ultimately address the research question.'*

<sup>84</sup> Page 27 of Chapter 3, "The Paradigmatic Challenge of Mixed Methods Research: Positivism, Relativism or Pragmatism?" in "Structuring the Thesis: Matching Method, Paradigm, Theories and Findings", 2018 edited by David Kember and Michael Corbett, Springer Publishing.

<sup>85</sup> Research Methods in Law, 2<sup>nd</sup> Edition, 2018, Routledge Publications- page 25

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

questions. Research methods need to keep pace with the changes in direction of the research and the range of research designs utilised in this research will testify to a willingness to meet unexpected twists in this journey. The research methods timeline set out in Figure 11 highlights where additional data was collected at various stages of the research journey. Callingham and Hay (2018)<sup>86</sup> recognise the need for research to adapt and change in education in response to issues in the wider community.

One key area that required a new focus and research direction related to the increasing emphasis on 'high-quality' provision for students with evidence emerging that the number one factor in student choice of HEI was based on 'high-quality teaching'. The author took the bold decision to confront the ability of the TEL Tools to scaffold high-quality provision and the extent to which they support chosen pedagogical models. This element of the research is considered pioneering and reflects a willingness to revisit data and view existing data via a new lens aimed always at delivering a contemporary and relevant research message.

## 2.9 Ontological v Epistemological theorising: can there ever be a 'right' order?

The research methodology and methods adopted to answer the research aims and questions particularly conducting research with early primary data as the 'motor' of the research need to take account of the philosophy underpinning the work. As Cresswell and Cresswell (2018)<sup>87</sup> explain, being clear on 'philosophical world views' underpinning research will help explain research approaches and 'why they chose qualitative, quantitative or mixed method approaches for their research.' How philosophical world views are developed depend on a person's ontological and epistemological perspectives and it is argued such differences also go to the heart of whether a quantitative or qualitative approach is adopted in research. It would be preferable if the author were able to recount a highly intellectual philosophical journey undertaken in this research to justify her own held knowledge and beliefs as discussed above, but it would be untrue. H.L. Ho (2008)<sup>88</sup> accurately captures how her 'self-belief' developed in relation to this research, 'It is true that in our daily lives, relatively few of our factual beliefs are acquired with critical self-consciousness. Many of them simply drawn down upon us; they are not the product of conscious judgment.'

<sup>86</sup> Page 35 of Chapter 3, "The Paradigmatic Challenge of Mixed Methods Research: Positivism, Relativism or Pragmatism?" in "Structuring the Thesis: Matching Method, Paradigm, Theories and Findings", 2018 edited by David Kember and Michael Corbett, Springer Publishing, 'What is evident...is the notion that the field of education research is not static but constantly changing in response to societal pressures, shifting values and changing priorities.'

<sup>87</sup> Pages 6 and 7, "Research Design: Qualitative, Quantitative & Mixed Methods Approaches" 2018, 5<sup>th</sup> Edition by John W. Cresswell and J. David Cresswell, Sage Publications. Being clear on world views explain according to Cresswell and Cresswell, 'why they chose qualitative, quantitative or mixed method approaches for their research.'

<sup>88</sup> Page 74 of A Philosophy of Evidence Law: Justice in the Search for Truth (Oxford Monographs on Criminal Law and Justice), 2008 by Ho Hock Lai, Oxford University Press.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

L. Webley (2010)<sup>89</sup> confirms that, '*Epistemology, one's understanding of the nature of knowledge, and ontology the nature of being or reality...affects the way in which one conducts research, interprets data and reports findings.*' It will therefore be necessary to understand the author's philosophical approaches that underpinned this work. As S. Hetherington (2019)<sup>90</sup> explains, '*When someone claims to have a philosophy ...She uses it to regard, interpret and react to the world...Her philosophy is a lens through which she views the world, perhaps explaining to herself what she sees and what she experiences.*' The 'world' in this research is the 'classroom coalface' and the lens through which the author views and experiences this local community was the 'reality' for her and her students. Generating knowledge that can be relied upon requires epistemic justification but the decision to give ontology priority over epistemology reflects the reality of how the research evolved and requires early justification. S. Patel (2015)<sup>91</sup> reassures that the approach adopted here is not out of step with other researchers and the following diagram shows the interconnection between ontology, epistemology and research methodology and data collection methods and strongly aligns with how this research was conducted.

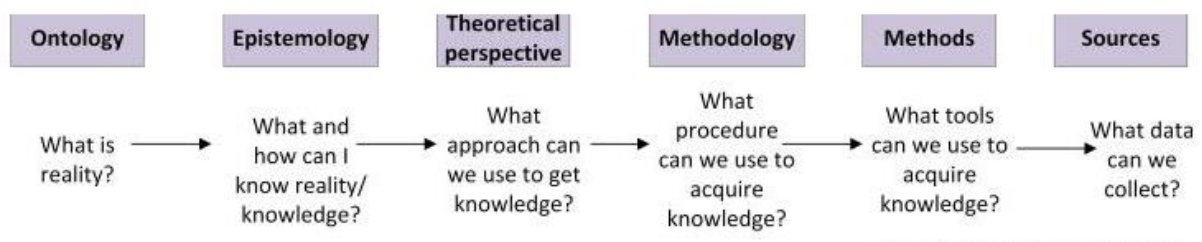


Figure 5: The link between ontology, epistemology and research methodology, Salma Patel (2015)

### 2.9.1 Ontology in practice in this thesis

With specific reference to practice based PhD research Costley and Fulton (2019)<sup>92</sup> set out what these PhDs should seek to achieve, and their views strongly resonate with this research and the author's own ontological perspectives which developed in the reality of the classroom over time, Translating this here the author has both practical and professional experience in her chosen discipline which supports teaching in construction law and ADR added to the significant years of teaching practice gained over twenty- five years. The author could see first- hand the '*real problems*'

<sup>89</sup> Page 929 'Qualitative Research – Assumptions and Theoretical Underpinning', The Oxford Handbook of Empirical Legal Research, 2010, edited by Peter Cane and Herbert M. Kritzer, Oxford University Press.

<sup>90</sup> Page 4 "What is Epistemology?" 2019 by Stephen Hetherington, published by Polity Press

<sup>91</sup> "The Research Paradigm- methodology, epistemology and ontology- explained in simple language" by Salma Patel 2015, accessible at: <http://salmapatel.co.uk/academia/the-research-paradigm-methodology-epistemology-and-ontology-explained-in-simple-language/> and accessed 24<sup>th</sup> August 2019

<sup>92</sup> Page 8 "Methodologies for Practice Research: Approaches for Professional Doctorates", 2019, Carol Costley and John Fulton, Sage Publications, "*Ultimately what we want in a professional person is practical wisdom, someone who has experience enough to recognise the points of significance in the chosen field of practice. This involves the confluence of real problems in real places in real time and with real people and real resources.*"

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

that non-law students experienced in understanding difficult legal concepts and in articulating and applying these to real life scenarios and the 'real world of work' experiencing first-hand how students struggled in their learning. These 'real' experiences and 'real learning problems' developed the authors' self-belief over many years and how these played out in the 'reality' of the HE classroom with the resources available.

The author also detected that the culture in higher education was changing developing a stronger emphasis on accountability and compliance and that students (as consumers) too were responding to this environment wanting 'transparent' value for money tuition. The chance complaint discussed in the previous chapter also helped form the author's 'self-belief' in the value of the TEL Tools to evidence compliance of contractual duties in relation to the SCTE. Practical experience with significant years of drafting construction contracts and allocating liability that was backed by professional indemnity insurance also informed the author's self-belief on the value of TEL Tools as legal accountability and compliance tools.

Figure 6 below captures how ontology and epistemology applied in this research and the importance of 'reliable evidence' being generated that could be trusted.

OVERVIEW OF 'TRUTH' RESEARCH JOURNEY – EVIDENTIALISM IN PRACTICE IN THIS THESIS

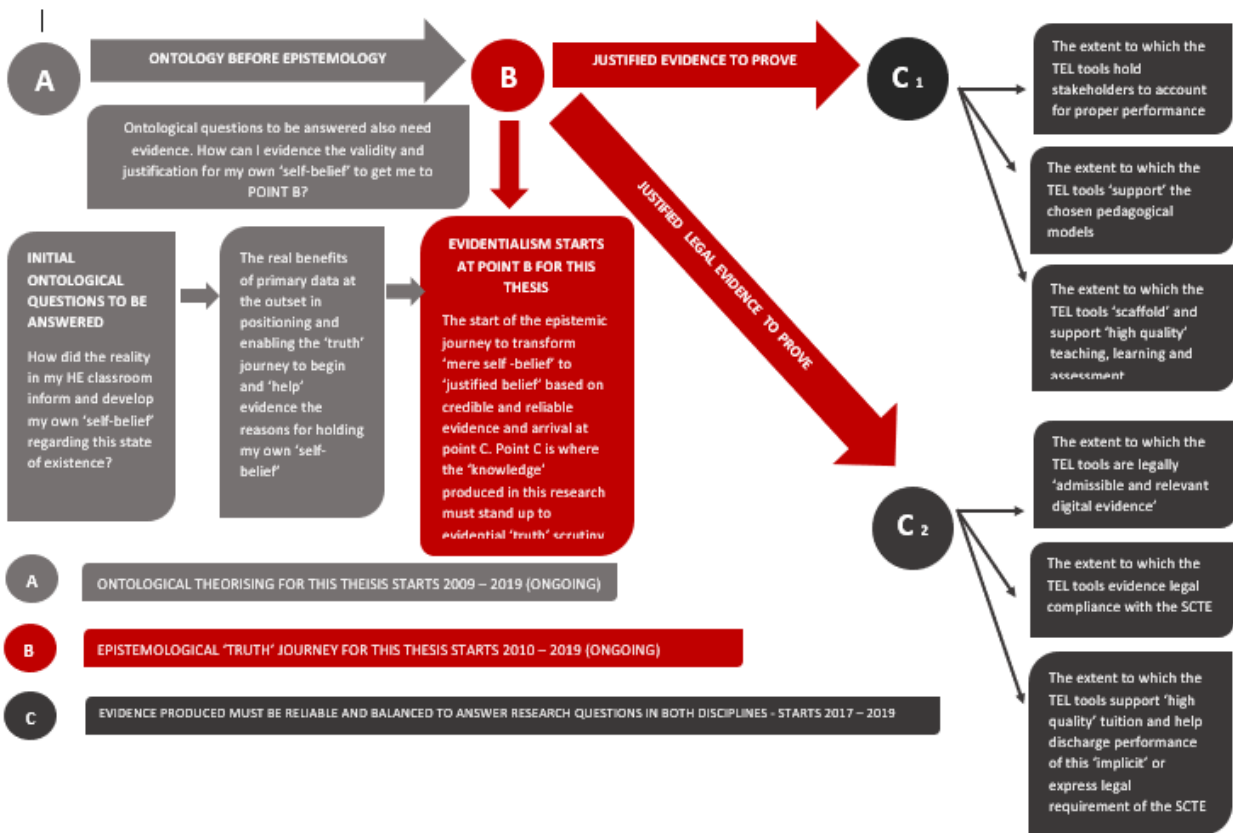


Figure 6: Overview of 'truth' research journey – evidentialism in practice in this thesis

### 2.9.2 Putting evidence front and centre in research

Whether ontology or epistemology is given pride of place in research evidence must be front and centre for both. V. Mitova (2019)<sup>93</sup>, stresses the necessity for evidence to demonstrate not just our self-belief but evidence for the *reason* for self-belief. *"For the evidence is something on the basis of which someone could – or should- form the belief ...The evidence that is, is a reason for belief..."*

Further complications regarding *legal* ontology and epistemology impede this research. The author's *subjective* belief that TEL could be invaluable in evidencing compliance with the SCTE, is irrelevant because the TEL Tools themselves must meet the *objective* evidential burdens as required by the laws of civil evidence in England and Wales. This need to meet legal evidential requirements is expressed by J. Cosic et al (2011)<sup>94</sup>: *'Legal admissibility of digital evidence is the ability of that evidence to be accepted as evidence in a court of law.'*

The primary data collected to 2016 coupled with the author's ontological perspective of the '*reality*' of her HE classroom confirmed her self-belief developed in real time and with real students over several years. Together they formed the '*reasons*' for holding such beliefs and backed by the early primary data substantiated evidence for holding these reasons. As Costley and Fulton (2019)<sup>95</sup> explain: *'Those doctorate candidates who are researching their own practice usually gain ontological insight into their research and this is generally encouraged by tutors.'* However, as S. Hetherington (2019)<sup>96</sup> rightly point out just because a researcher holds a belief passionately is not sufficient, evidence is needed. *'Epistemologists ask whether the belief is likely to be true or whether it is supported by genuinely good evidence.'* This viewpoint is fully substantiated by P. Johnson and J. Duberley (2011)<sup>97</sup> who equally remind us of the importance of epistemic evidence in answering difficult questions in all disciplines about how we know what we know and that we are justified in holding these beliefs,

The author would need epistemic justification to convince on the value and application of the early primary data.

<sup>93</sup> Page 2 "Believable Evidence", 2019, Cambridge University Press

<sup>94</sup> "An Ontological Approach to Study and Manage Digital Chain of Custody of Digital Evidence" by Jasmin Cosic, Zoran Cosic and Miroslav Baca 2011, in Journal of Information and Organizational Sciences · June 2011, open access at Research Gate and accessed on 3<sup>rd</sup> March 2019

<sup>95</sup> Page 27 of 'Methodologies for Practice Research' [supra]

<sup>96</sup> Page 10 [supra]

<sup>97</sup> Introduction to "The Importance of Epistemology in Management Research" In "Understanding Management Research" 2011, Sage Publications, *"...in any discipline, profession, occupation or everyday activity where knowledge claims are routinely made, epistemology contributes by clarifying the conditions and limits of what is construed as justified knowledge...No one can stand outside epistemological processes... The mere act of describing something as 'evidence' is to evaluate it epistemologically and accord it some kind of epistemic status"*

## 2.10 Epistemology and Epistemic frameworks

An epistemic framework is essentially a methodology which is adopted by the researcher to obtain knowledge with different epistemological theories (philosophical approaches) underpinning distinct frameworks. As Graham Webb (1991)<sup>98</sup> explains in the context of TEL that, “... *some understanding of epistemology and various frameworks for the interpretation of social and educational endeavours is necessary in order that adequate consideration may be given to the utilization of educational technology and prescriptions for classroom practice.*”

Mota et al (2014)<sup>99</sup> consider that knowledge development frameworks comprise 4 key frameworks, but that knowledge development operates in a contested environment, “...*There are four types of epistemic framework: positivism/empiricism, interpretivism, a critical perspective, and postmodernism.*” This view is contrasted with Creswell and Creswell (2018) who consider that the philosophies underpinning a research approach are best categorised as ‘*Postpositivist, Constructivist, Transformative and Pragmatic.*’ To some extent all of these philosophies are at work to a greater or lesser extent in this research and summarised in **Appendix 3 Volume V**

The author approached this research in an evidential manner best captured by Kevin McCain (2014)<sup>100</sup> who confronts ‘*evidential reliabilism*’ as the view that: “*to be justified in the only epistemologically important sense is to believe in accordance with one’s evidence, and one’s beliefs accord with one’s evidence if and only if that evidence is reliably connected to the truth of those beliefs.*” Epistemology or the theory of knowledge ‘*addresses what we count as valid knowledge*’ and in this thesis the valid knowledge that must be generated is concerned with answering core questions about the use of educational technology and how (if at all) it improves the core business of teaching, learning and assessment for students as well as answering whether the evidence generated by the TEL Tools can evidence compliance with the SCTE.

There are added complications here as law does not always fit easily into these established frameworks, yet law must find its place in this interdisciplinary research and the research methods must equally stand up to scrutiny in generating reliable knowledge that answers the legal research questions. Geoffrey Samuel (2003)<sup>101</sup> argues that an approach akin to natural science for legal epistemology is not appropriate either because: “*Of course, law is not a natural phenomenon. It is, at*

<sup>98</sup> Graham Webb (1991) Epistemology, Learning and Educational Technology, Educational & Training Technology International, 28:2, 120-128, DOI: 10.1080/0954730910280206 at: <https://doi.org/10.1080/0954730910280206> and accessed 18th March 2019

<sup>99</sup> Mota, Ronaldo; Scott, David. Education for Innovation and Independent Learning (p. 26). Elsevier Science. Kindle Edition.

<sup>100</sup> McCain, Kevin. Evidentialism and Epistemic Justification (Routledge Studies in Contemporary Philosophy) (pp. 31-32). Taylor and Francis. Kindle Edition.

<sup>101</sup> Page 7 of “Epistemology and Method in Law”, 2003 by Geoffrey Samuel, Ashgate Publishing Limited

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

best, a social science and thus implies that it is subject to all the epistemological difficulties which attach to social science. Legal epistemology will therefore have to confront these more general difficulties."

As J. Dudovskiy (2012)<sup>102</sup> explains, 'Research philosophy deals with the source, nature and development of knowledge...Although the idea of knowledge creation may be profound, you are engaged in knowledge creation...you will collect secondary and primary data and engage in data analysis to answer the research questions and...marks the creation of new knowledge.' A knowledge development timeline was produced for illustration of how knowledge was generated in this thesis and can be found in Chapter 11, Critical Review. J. Dudovskiy provides a research onion with the outer layer positioning the research philosophy and highlights the importance of a researcher's philosophy in the subsequent method development and direction of the research.

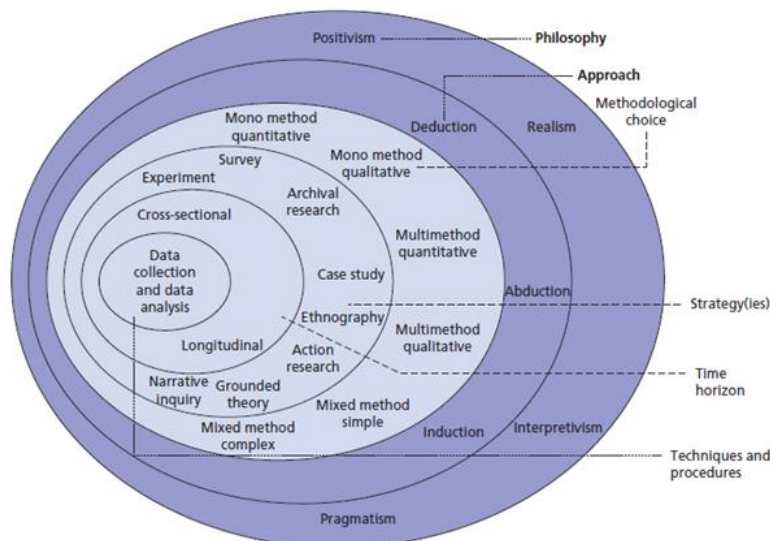


Figure 7: 'The Research Onion' by John Dudovskiy 2012

<sup>102</sup> <http://research-methodology.net/research-philosophy/>



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

For this research the research onion was in semi-reverse to that of J. Dudovskiy particularly reflecting the early primary data which drove the research direction. Strictly speaking, 2 & 3 were often operational at the same time but for convenience are depicted separately.

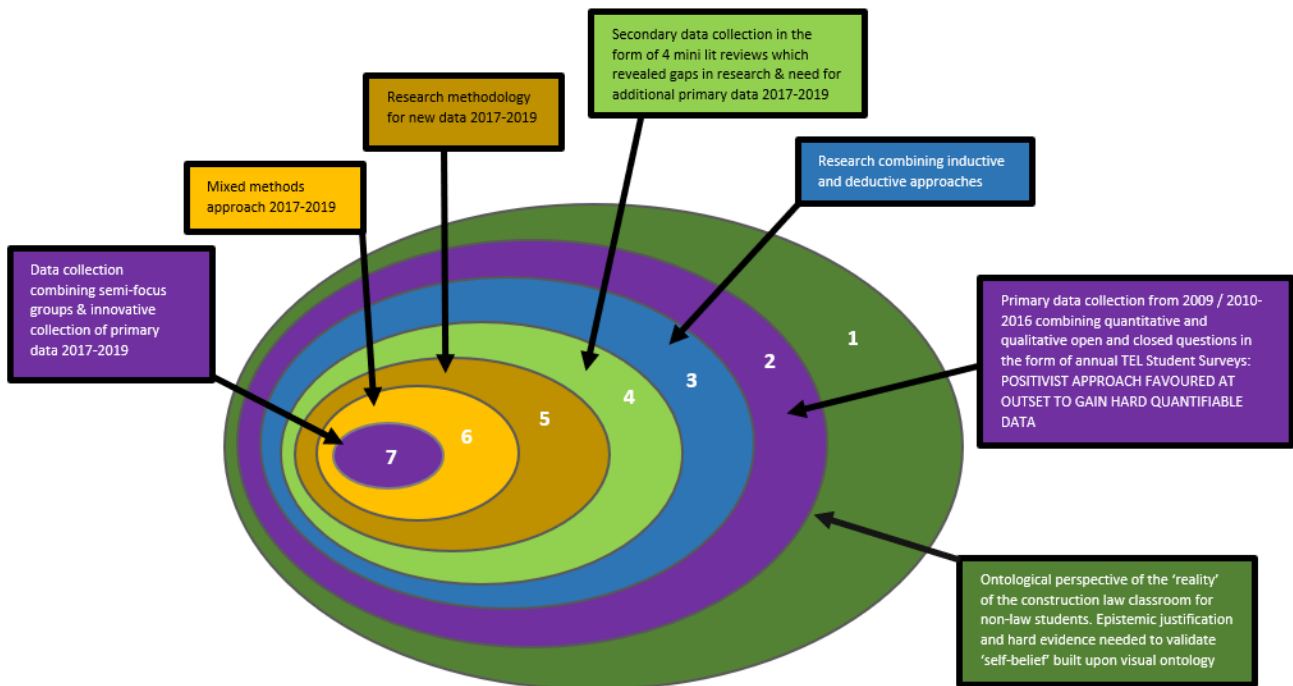


Figure 8: Research onion in semi- reverse reflecting research stages in this thesis

It is immediately obvious that for the thesis research journey as it applied here the author has combined stages **2 and 3**. As Hayley (2019)<sup>103</sup> observes, *'The deductive approach...starts with a specific hypothesis or hypotheses that has been developed based on information or patterns that have been observed by the researcher...Typically, a deductive approach is associated with quantitative research and an inductive approach with qualitative data.'*

The author does not specifically refer to her *'real'* classroom observations as a hypothesis but rather a reflection of what she observed in that environment at first hand but recognised that early quantitative *'hard'* facts was needed to provide evidence for her observations as discussed above. Combining this data with qualitative data also reinforced and provided further substantiated evidence to justify the beliefs that she held about her non-law students operating in their local environment.

<sup>103</sup> "The research onion for beginners" 19<sup>th</sup> January 2019 by 'Hayley' at [www.lifeasabutterfly.com](http://www.lifeasabutterfly.com)

### 2.10.1 Brief overview of key philosophies and epistemic frameworks underpinning this thesis

A brief review of key epistemic frameworks as applied in this research will give context and underscore the relevancy of the research methodology and methods subsequently adopted the three Projects. Graham Webb (1991)<sup>104</sup> recognises that '*Critical Theory*' as an epistemic framework has its own practical problems but does have potential for adopting what he calls '*progressive educational practice and concomitant uses for educational technology.*' Other frameworks he argues present more difficulties e.g. *Positivism* in using technology successfully within this framework can be an issue if educational ends are to deliver, '*improved problem solving, critical thinking, skills in analysis, synthesis, evaluation and so on.*' These views align with this research and underscore the range of research methods that needed to be adopted in relation to the TEL Tools to provide the necessary evidence to 'showcase' skills in facilitated team building and problem solving for students as well as fostering criticality and creativity as key to delivering 'high-quality' provision.

Closer to the research here and the use of MCQ assessment Webb<sup>105</sup> raises direct concerns that, '*... a multiple-choice test calling for rote memorization... would seem ... to be inappropriate*' but stressing that we should not blame technology itself but how it is used and again in the context of MCQs Webb suggesting that intelligent activities can be set where careful selection and use of technology is given proper thought.

The author advocates that Project 1, MCQ assessment was developed in such a manner envisaged by Webb, requiring students to critically appraise MCQs linked to LIVE assessments in stimulating ways and that a similar philosophical approach to '*Critical Theory*' underpinned this research and generating reliable knowledge in this paradigm.

Lin Norton (2019)<sup>106</sup> confirms that educational researchers working in a positivist paradigm would be looking for hard data that can be independently verified and is essentially quantitative. When the research data was initially being collected hard facts were the order of the day and as the research continued over many years the ability to analyse statistical trends in annual data was equally important. L. Norton (2019)<sup>107</sup> suggests that researchers working in this paradigm rely on *methods such as 'experiments', closed response questionnaires and measurement tools that produce data that*

<sup>104</sup> Graham Webb (1991) Epistemology, Learning and Educational Technology, Educational & Training Technology International, 28:2, 120-128, DOI: 10.1080/0954730910280206 at: <https://doi.org/10.1080/0954730910280206> and accessed 18th March 2019

<sup>105</sup> [supra] "*For example, researching the ambiguities and constructing alternatives to the 'right' answers given in a computer-based multiple-choice test, or critically appraising the assumptions and value positions behind a supposedly objective piece of 'courseware', may utilize unremarkable materials in quite educationally stimulating ways.*"

<sup>106</sup> Page 44 "Action Research in Teaching and Learning", 2019 Second Edition, Routledge Publishing.

<sup>107</sup> Page 77 of "Action Research in Teaching and Learning" 2019 2<sup>nd</sup> Edition by Lin Norton, Routledge publications

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*can be statistically tested.*' The timeline of research methods set out below reflect that these methods were adopted at various points in the research.

A. Kumar Jha (2009)<sup>108</sup> distinguishes between *positivist epistemology and constructivist* in terms of their reliability when applied in given contexts: *"...unquestionably reliability and validity are tools of an essentially positivist epistemology...but sit uncomfortably in that kind of education which is better concerned by questions about...accountability."* However, with research that embraces sometimes conflicting demands from a range of disciplines a willingness to experiment with research approaches was imperative to the success of this work. Flexibility in research, for example as it relates to *'accountability'* is supported by Bovens et al (2016)<sup>109</sup> who recognise that not all research in this area needs to be qualitative and indeed reflects how research on accountability was conducted in this thesis combining a mixed methods approach.'

The author initially followed a positivist approach deemed necessary to deliver early quantifiable data on the value of the TEL Tools to students as part of their academic journey. However, the need for greater understanding of e.g. accountability at the classroom coalface saw a more qualitative direction being favoured that was at times underpinned with quantitative discussions.

As L Norton (2019)<sup>110</sup> also confirms, *"A more interpretivist paradigm (often described as the social sciences reaction to positivism) would be concerned with the 'belief' in a socially constructed subjectively-based reality Educational researchers from this paradigm would be likely to be interested in a ...phenomenological approach so common methods would include interviews, focus groups, narrative, life stories, diaries and case studies..."* This is an accurate reflection of the methods adopted to answer the research questions both pedagogical and legal and fully itemised below.

A 'snap-shot' view of the epistemic frameworks underpinning this research is provided in Figure 9

<sup>108</sup> Page 3 of Constructivist Epistemology and Pedagogy, 2009, Atlantic Publishing

<sup>109</sup> The Oxford Handbook of Public Accountability Mark Bovens, Robert E. Goodin and Thomas Schillemans. (Oxford Handbooks) (Kindle Locations 4469-4471). OUP Oxford. Kindle Edition, *'This does not mean all accountability studies must or will be qualitative. After the meaning of accountability is discovered in a particular setting, quantitative measures could be developed to assess the level of accountability.'* But at the same time recognising that that *'quantitative empirical studies into accountability are scarce.'*

<sup>110</sup> Page 77 of "Action Research in Teaching and Learning" 2019 2<sup>nd</sup> Edition by Lin Norton, Routledge publications

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

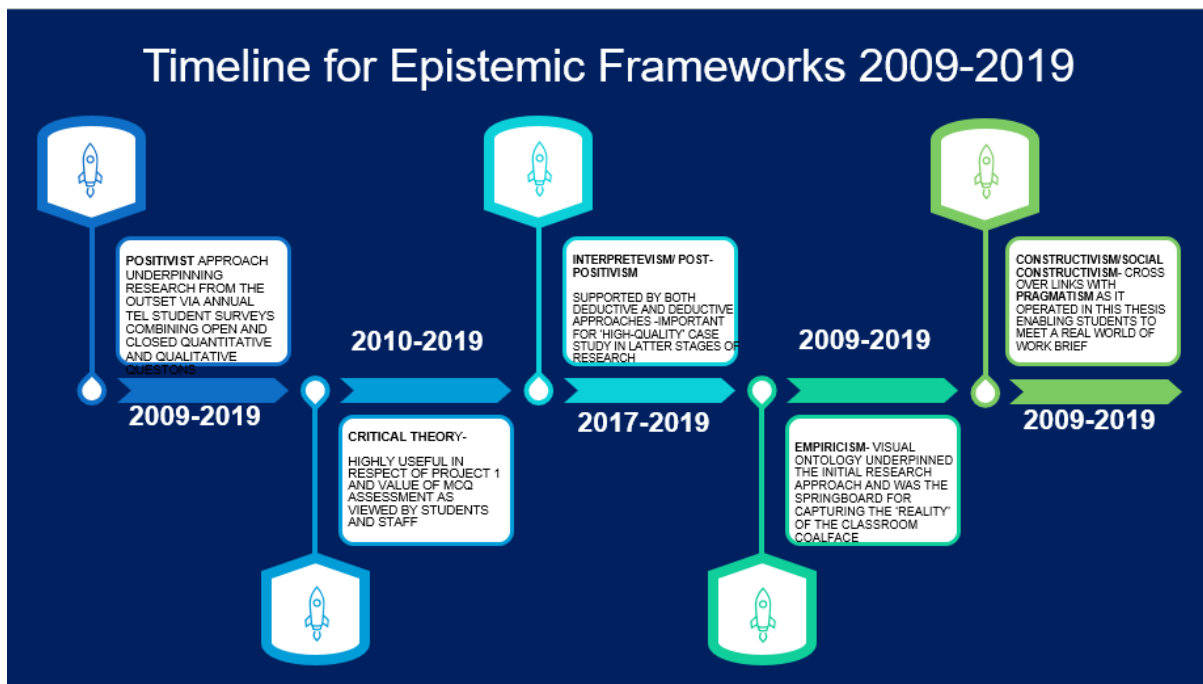


Figure 9: Epistemic Frameworks Timeline 2009-2019

## 2.11 Ontology with a small 'o': managing an authentic and reliable chain of digital evidence

J. Cosic et al (2011)<sup>111</sup> explain that today's digital forensic field relies on knowledge and knowledge management systems as important resources. They distinguish between two types of ontology, one that relates to the philosophical domain where '*Ontology is a systematic accounting of existence*'. The alternative is 'ontology' with a lower case 'o' which describes the situation in which 'knowledge is acquired for the purposes of organisation and classification'. Both are highly relevant in this work.

The research methods adopted in answering the research questions must also instil confidence in the integrity of the collected data and demonstrate that the manner in which data was collected does not offend against the rules on 'authenticity' and 'reliability'.

*"The evidential weight of digital evidence can only be safeguarded if it can be proven that the records are accurate i.e. by whom they were created, and that no alteration has occurred."*

It will be important that the digital evidence created by the TEL Tools is not tampered with and has a reliable chain that can be trusted if the TEL Tools are to be admissible and relevant and to carry the necessary evidential weight in civil proceedings. As R. Brownsword (2019)<sup>112</sup> explains '*Regulators will*

<sup>111</sup> Page 1 "An Ontological Approach to Study and Manage Digital Chain of Custody of Digital Evidence" by Jasmin Cosic, Zoran Cosic and Miroslav Baca 2011, in Journal of Information and Organizational Sciences · June 2011, open access at Research Gate and accessed on 3<sup>rd</sup> March 2019

<sup>112</sup> Page 24, Prologue "Law, Technology and Society: Re-imagining the Regulatory Environment", 2019, Routledge Publishing

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*be attracted to make use of technological management because it promises to be an effective form of regulation. Whether this promise will be fulfilled we do not yet know...*' Brownsword (2019)<sup>113</sup> also places importance on the need for an appropriate accountability trail to be put in place for when things go wrong: *"It needs to be clear who is to be held to account as well as how they are to be held to account and the accounting itself must be meaningful."*

## 2.12 Challenges of interdisciplinary research: aligning research methodologies to work in harmony

This section of the work will provide equal explanation of the research methodologies and methods that were applied in answering the legal and pedagogical questions commencing with pedagogical action research methodology as it applied here. Whatever methodology and whatever methods are adopted they must be capable of delivering credible and reliable evidence that the research findings are robust in any research. Buckley and Chang (1976)<sup>114</sup> define 'research methodology' as, *'the strategy or architectural design by which the researcher maps out an approach to problem-finding or problem-solving.'* The research problems here span pedagogical and legal disciplines and the research strategies need to work to solve problems in both paradigms. However, the divide between 'legal science' and 'social science' and getting these to work in harmony with research that is interdisciplinary is difficult. W.H.V. Boom et al (2018)<sup>115</sup> capture some of the struggles that permeate research for lawyers who lack mathematical research skills and were highly relevant to this research, *'Some lawyers have perhaps found themselves alienated by the emphasis on ever more sophisticated statistics and stylized experiments in social science...'*

## 2.13 Research methodology: pedagogical action research

Action Research is defined as<sup>116</sup> *"A research methodology in which the researcher investigates practice through cycles of reflection ...The emphasis is on improving practice... research methods are likely to be qualitative and are also often creative..."*

Further, Lin Norton (2019)<sup>117</sup> supports pedagogical action research that is conducted in the same manner as undertaken in this thesis where an interpretivist approach is often adopted and where theoretical explanations have a place in research only after the practitioner research has commenced.

---

<sup>113</sup> Page 11[supra]

<sup>114</sup> *Research Methodology & Business Decisions*. National Association of Accountants. Accessible at: <https://maaw.info/ArticleSummaries/ArtSumBuckley76.htm> and accessed 17th February 2019

<sup>115</sup> Page 7 "Empirical Legal Research In Action" W.H.Van Boom, P.Desmet and P.Mascini (2018), Edward Elgar Publishing, 2018

<sup>116</sup> Page 7 of "A Dictionary of Education" 2<sup>nd</sup> Edition 2015, Oxford University Press.

<sup>117</sup> Page 49 *"In pedagogical action research we start from an issue rooted in our practice, we carry out research and then we move to theoretical explanations that will help us to understand the implications of our research findings."*

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

A model comprising **6 stages** of how pedagogical action research might be conducted is provided by Norton (2019)<sup>118</sup> and has been easily adapted and highly relevant to the way in which pedagogical action research was conducted in this thesis. A **7<sup>th</sup> step** has been added to the model to reflect how each project in this thesis inter-related and drove subsequent stages of the research. The pedagogical action models for each of the three Projects are located in the Critical Review (Chapter 11) to specifically address the prescriptive research methodology requirements that require individual and collective explanation of the research methodology and methods adopted for the Projects.

STAGES in action Research 1-6	Requirements for each stage
Step 1	Identifying a problem/paradox/issue/difficulty
Step 2	Thinking of ways to tackle the problem
Step 3	Doing it
Step 4	Evaluating it (actual research findings)
Step 5	Modifying future practice
Step 6	Disseminating your findings
<b>Step 7</b>	<b>Developing the research</b>

Table 1: Model for adopting pedagogical action research methodology

## 2.14 Methods of data collection appropriate for pedagogical action research methodology

This research is concerned with policy and practice in education and a mixed method approach is accepted as appropriate in research of this nature. Support for combining quantitative and qualitative in policy and practice in education is advocated by Lingenfelter (2016)<sup>119</sup>,

Whilst qualitative data can have a more natural fit with action research, being tasked with delivering hard data that answered questions for the Faculty on the pedagogical dividends (if any) of these TEL Tools quantitative data collection methods were favoured but supported by qualitative data. This approach is not out of step with other researchers in the field of pedagogical action research and as Norton (2019)<sup>120</sup> confirms, *"More often when quantitative designs are used in action research, they tend to be part of a mixed methods design...I believe that when you are trying to fit in pedagogical action research alongside all your other professional commitments then it is helpful to start from what you already know."*

<sup>118</sup> Page 70 "Action Research in Teaching and Learning" 2<sup>nd</sup> Edition 2019 Routledge Publishing

<sup>119</sup> Page 6 [supra] *"...the difficulties, measurement- quantitative and, where necessary, systematic, qualitative expert ratings- is essential for improving policy and practice."* In fact, some commentators would argue that valid research in education demands that a mixed-methods approach be undertaken given the combination of disciplines that need to work together in research of this nature. As Callingham and Hay (2018)<sup>119</sup> reflect on the importance of interdisciplinarity and mixed methods, *"Education is a meeting point of many other disciplines, such that mixed methods, mixed theories and mixed approaches are now almost standard practice in education research."*

<sup>120</sup> Page 92

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

In comparing and contrasting when quantitative or qualitative research should be adopted L. Zamarti (2018)<sup>121</sup> also supports the view that quantitative data capitalises on what you already know. The author was confident that her beliefs developed within the '*reality*' of her classroom would deliver positive and quantifiable data that students appreciated the pedagogical dividends the TEL Tools provided as part of their academic experience.

Both forms of data have their strengths in a mixed method approach and in relation to educational research. Jennie Walmsley (2019)<sup>122</sup> highlights the importance of using qualitative and whilst it, '*...lacks structure and categorisation and it can be time consuming... the unstructured nature of qualitative data can be its biggest advantage, providing more context and detail than the boundaries of numerical quantitative data ever can.*' The research methods timeline set out below shows an even split between quantitative, qualitative and innovative research methods and align with epistemic frameworks for knowledge generation as discussed above.

The importance of hard data to produce evidence that was objectively measured was vital for the research to convince on the findings across disciplines. As Lingenfelter (2016)<sup>123</sup> observes some disciplines do not regard evidence as evidence unless, '*...it comes in the form of objective numerical data*'

However, care and caution are needed where, as in this thesis statistical analysis was favoured in interpreting quantitative data. As Norton advises (2019)<sup>124</sup>, '*You will need to be careful in over-generalising from your findings, as no matter which basic experimental design you choose, you are not working in a laboratory with inert substances.*'

---

<sup>121</sup> Page 218, "Teaching History in Australian Museums: Pedagogy and Praxis", "Structuring the Thesis" 2018, "*... quantitative researchers... know in advance what they are looking for and the objective is to identify, classify and count features, as well as to construct statistical models in an attempt to explain what is observed.*"

<sup>122</sup> "A Better Use of Qualitative Data Can Inform Policy", by Jennie Walmsley, 12<sup>th</sup> June 2019 at [www.wonkhe.com](http://www.wonkhe.com)

<sup>123</sup> Page 5 "Proof Policy & Practice: Understanding the Role of Evidence in Improving Education", 2016 Stylus Publishing Inc., "*Despite its importance, qualitative research is unavoidably subjective and limited. One rarely finds commonly accepted scales for measuring qualitative observations ... qualitative researchers seek to create compelling, persuasive narratives explaining why the world works as it does... without objective measurement it is quite difficult to demonstrate 'improvements' of any kind*"

<sup>124</sup> Page 108 [supra]

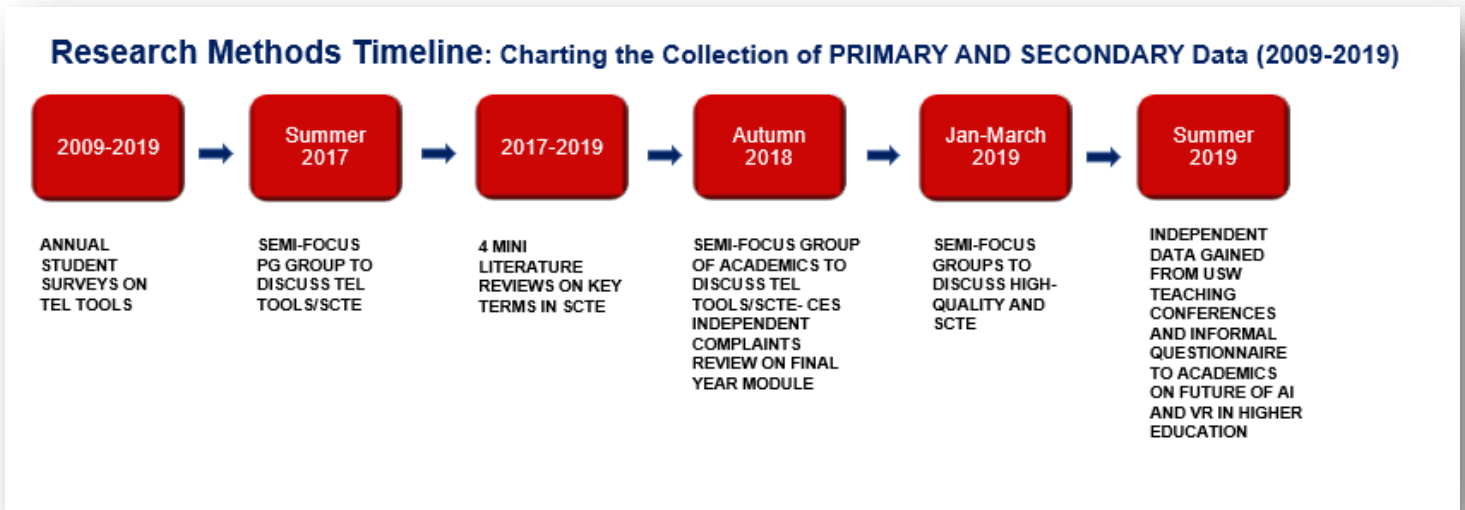


Figure 10: Research methods timeline

### 2.15 Legal research methodology and legal research methods adopted in this thesis

Often in legal research the words '*method*' and '*methodology*' are used interchangeably; Watkins and M. Burton (2018)<sup>125</sup> define '*method*'<sup>126</sup> as an approach to legal research which reflects: "*what you actually do to enhance your knowledge, test your thesis or answer research questions. By contrast... 'methodology' can also be employed to refer more critically to the 'study of the direction and implications of empirical research or of the suitability of the techniques employed in it.*"

In truth both these definitions fit in relation to how the research was conducted for this thesis to answer the legal research questions. It is important to differentiate between doctrinal and empirical legal research because both have been fundamental in this work and equally valuable. W.H.V. Boom (2018)<sup>127</sup> explain that: '*... empirical evidence in empirical research is determined by universal criteria such as reliability and validity, in doctrinal legal authority arguments often play a role in the weight that is attributed to legal sources.*'

Research approaches in a legal context are also generally reflected as qualitative, quantitative or mixed methods and as D. Watkins and M. Burton (2018)<sup>128</sup> confirm both methods are well established

<sup>125</sup> Page 72 Research Methods in Law, 2<sup>nd</sup> Edition, 2018, Routledge Publications

<sup>126</sup> Pages 1-3 ditto

<sup>127</sup> Page 6 "Empirical Legal Research In Action" W.H.Van Boom, P.Desmet and P.Mascini (2018), Edward Elgar Publishing, 2018

<sup>128</sup> Page 72 Research Methods in Law, 2<sup>nd</sup> Edition, 2018, Routledge Publications



**The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education**

in legal research, *"There are a number of different strategies that empirical<sup>129</sup> legal researchers can adopt which broadly fall into the qualitative and the quantitative research distinction..."*

Similarly, Cane and Kritzer (2010)<sup>130</sup> remind us of the main features that define empirical legal research but with flexibility needed when discussing them in a legal context, *"The distinctive feature of empirical legal research is the use of systematically collected data, either qualitative or quantitative, to describe or otherwise analyse some legal phenomenon. While many people equate empirical with quantitative or statistical analysis, this need not be the case. Work that is qualitative and systematic is also empirical."*

The balancing of quantitative and qualitative data combined with innovative and unique collection methods was equally required for answering the legal research questions. An example of quantitative data for legal purposes can be found in the annual TEL survey questionnaires. Student participants responded to questions about whether they considered all modules should adopt lecture capture; such questions are aimed at obtaining answers on whether the TEL Tools supported high-quality provision as part of their academic experience; such responses go to the heart of duties to be performed under the SCTE. Examples of qualitative data (semi-focus groups) where more subjective opinions were required from students related to their own accountability and that of the HEIs in performing the SCTE. Further, qualitative data gained from highly qualified lawyers specialising in professional negligence and with experience of teaching in higher education required legal opinion on how performance of the SCTE could best be evidenced. The analysis of contemporary construction case law precedent in relation to standards of reasonable skill and care v fitness for purpose and the difficulties of establishing any consistent message from the case law on duties of good faith were fundamental in answering questions relating to liabilities and duties under the SCTE.

## **2.16 'Snap-shot' of primary data collection: 2011-2019**

**A complete summary of the primary data collected can be found at [Appendix 28 in Vol V.](#)**

---

<sup>129</sup> Empirical research is defined on page 25 of "Research Methods and Methodologies in Education" 2<sup>nd</sup> edition 2017 by Robert Coe et al, Sage Publications as, "...empirical research studies are designed to support arguments. The data collected are linked to the conclusions by a warrant that gives a logic explaining why the empirical evidence collected supports the validity of those conclusions."

<sup>130</sup> Page 883 Chapter 36 Section V 'Methodologies' in "The Oxford Handbook of Empirical Legal Research", 2010 OUP.

## 2.17 Collection of secondary data: re-routing the literature review in this research

Discussions on how secondary data was collected in a thesis would normally feature earlier than at this point in a research methodology chapter. The literature review is traditionally followed by discussions on primary data collection that was identified as appropriate for the research and emerging from the secondary data findings. However, the positioning of the secondary data in this chapter reflects its positioning in the research journey where it was preceded by primary data collection and positioning it here is a natural fit that works with the phases of the action research cycle as conducted in this research. Lin Norton reminds us of the importance that the literature review plays in pedagogical action research, *'As part of the research process in pedagogical action research we must also seek out the relevant literature in our topic...'*<sup>131</sup>

The research design for the collection of secondary data was approached on the basis of four mini chapters comprising the literature review. The validity of this approach needs to be justified in relation to each of the three Projects as distinct units of research. Similar to the approach of Reaburn (2018)<sup>132</sup> who split his literature review into three chapters so that, *'the differing facets behind understanding the probability and inferential statistics could be described and analysed'* the author also felt that splitting the literature review into four distinct sections covering TEL, accountability, the SCTE and digital evidence was necessary to ensure these difficult concepts were fully understood and could properly scaffold the remainder of the work and specifically the dedicated chapters for the three Projects. Also, similar to A. Reaburn, the author added an extra chapter to specifically address important research issues on 'high-quality' tuition that merited individual attention.

The content of four mini literature review chapters is summarised in the chapter summaries before thesis commencement and are located on pages **40-45**.

## 2.18 Conclusion

This chapter has provided an honest and transparent account of how this research evolved and developed over a ten- year period. The research approaches were put under the research microscope and fully justified for all three Projects. Careful alignment of epistemic frameworks in this interdisciplinary research was given special attention in this chapter. There was an honest appraisal of the constraints placed on a thesis that has the primary findings in place at the outset and how these constraints were overcome and where further research was required. The chapter never lost sight of

---

<sup>131</sup> Page 49 Lin Norton...check

<sup>132</sup> Page 125 of "Structuring the Thesis" [supra]

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

the importance of reliable evidence and connecting the author's philosophical approaches with appropriate research methodology and methods.

The chapter reflected 'real' time and place' with a research project operating in an HE environment seemingly at odds with itself in highly uncertain times of change. The challenges of conducting research in this environment were confronted and how these obstacles to the research were overcome.

The case supporting increased professional doctorates in HE was strongly made at the outset. Unsurprisingly, the chapter concludes with a strong message of support for this thesis route with words from Professor George (2018)<sup>133</sup>: *"The development of a doctoral journal would prepare students better for the world of research, it would encourage and reward the acquisition of broader skills and understanding and it would be a more accurate record of the student's achievements."*

The author would add to this in terms of how this research route can more readily prepare students for the 'real world of work'. This research route more easily aligns with employer's needs in the 21<sup>st</sup> century workplace where there is strong demand for students who can take ownership and see Projects through to successful completion exhibiting highly refined critical skills. Further, this route demands honest reflection on how such Projects can be improved and adapted to avoid future disputes in relation to them. This thesis demanded regular interaction with colleagues and students and working with various teams across the university in the completion of this work; such team building and problem -solving skills are highly sought- after skills by today's employers. This view is supported by Carol Costley and John Fulton (2019)<sup>134</sup> for students undertaking professional doctorates: *"Their ability to transform research into action can meet the needs of employers and society, demonstrate improvements in practice and help society to adapt to the ever-changing pace of change in the twenty-first century."*

A research methodology with enhanced demands placed on researchers to regularly and consistently share their research findings develops skills in presenting and succinctly articulating findings for audiences from multi-disciplinary backgrounds. Addressing audiences on a regular basis provides an added layer of authenticity in the author's work with a need to be able to field questions and defend the research from delegates of diverse academic backgrounds. As universities across the globe struggle to control an epidemic in cheating, a thesis that can offer an honest, open and transparent route of research has much to offer.

---

<sup>133</sup> [supra]

<sup>134</sup> Introduction in "Methodologies for Practice Research" (2019) edited by Carol Costley and John Fulton, Sage Publishing

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

What is also clear in action research is that the research often takes place over a long period of time and as W.J. Phelps, (2018)<sup>135</sup> explains, '*Action research is a process and typically concerned with big issues over long-time scale.*' A researcher who is involved in the long process of gathering data to complete a thesis such as this has tracked a more honest research journey where allegations of plagiarism and cheating should be significantly reduced. With the author's professional hat on it is strongly advocated that more research be conducted along similar lines as here and support the move across higher education to end unfair practice. Higher education is seeking out new ways to ensure trustworthiness in assessment and this is equally true for PhD research.

The following four chapters contain the secondary data and are essential underpinning as well as clarifying difficult and complex terminology for the dedicated Project chapters which are contained in Volume II of this research.

---

<sup>135</sup> Page 162 "A Journey Around Tongan Education", "Structuring the Thesis" (2018), Springer Publishing



## **chapter 3 - no. 9**

### **CHAPTER 3 – MINI LITERATURE REVIEW - TEL**

## Chapter 3 TEL

### 3.1 Introduction

This chapter will critically review the secondary literature which challenges the definitions of 'technology-enhanced learning' (TEL) with a view to refining the term suitable for use and application in this research and specifically in relation to the three Projects. J. Passey (2019)<sup>136</sup> has recently raised some concerns over how the commonly used term 'TEL' is adopted highlighting that, "Educational technology terms are not clearly defined."

This chapter, as with all four mini literature review chapters, should not be viewed in isolation but rather as a complete package strongly inter-connected but separated to ensure individual attention is given to difficult and confusing terminology. This chapter sets high standards for ensuring terms are accurately defined throughout this thesis because as Doug Lederman (2010)<sup>137</sup> reminds us, "high-quality academic programs insist that students define the words they are using with precision before they undertake their analysis. We should expect the same high-quality standards by the critics of higher education."

The TEL Tools and the evidence they generate are central to the aims of this research in terms of their effectiveness in demonstrating compliance with the SCTE in a new era of accountability in UK higher education. Providing early discussions in this chapter on the TEL Tools routinely used across the wider higher education community is therefore important as the evidence generated in this 'local' research can be more confidently relied upon if they strongly align with wider academic use.

An understanding of what a university education should deliver particularly in a new digital era is also given early attention in this chapter as well as addressing the challenges for learners operating in a digital university. The value of the TEL Tools in supporting the delivery of education that meets the needs of learners where they are whether learning in a face to face or online environment will be important in this context.

This chapter was rewritten and reshaped as new research continues to emerge casting doubt on the promised benefits of TEL and the author wanted to be sure that a contemporary message was delivered, and that the early primary data still has a strong relevance in a very changed 'digital university' with TEL firmly 'embedded' in its fabric. The case for and against TEL is given a highly

---

<sup>136</sup> "Technology-enhanced learning: Rethinking the term, the concept and its theoretical background" 2019, Jon Passey, British Journal of Educational Technology doi:10.1111/bjet.12783 Vol 50 No 3 2019 972–986 "Examples will show that the term itself is now used beyond its apparent, stated scope... and that this is in itself problematic. The ways in which the term is used will be identified, and from these a strategic categorisation to rethink the use of the single term in areas of scholarship (particularly research and teaching) will be proposed, offering terms specifically encompassing the realms in which technologies are being used..."

<sup>137</sup> "Setting Quality Standards in Higher Ed" 9<sup>th</sup> September 2010, Inside Higher Education: Accessed 17<sup>th</sup> Feb 2018: <http://www.insidehighered.com/views/2010/09/09/setting-quality-standards-higher-ed>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

contemporary makeover in this chapter and will include recent research raising concerns that TEL potentially undermines '*high-quality*' provision. The individual TEL Tools comprising the three Projects are '*stress tested*' in subsequent dedicated chapters on how well they defend against increasingly criticism of TEL in higher education and challenging the literature at a general level in this chapter is essential underpinning for these subsequent discussions.

The voices of those who consider that academic freedom and autonomy are being undermined by TEL are also given appropriate voice in this chapter because the integrity of high-quality education is founded on academic freedom and autonomy.

If the primary obligation in the SCTE is to provide education of '*high-quality*', adopting appropriate pedagogy as the driving force in scaffolding and delivering this is a top priority. A thorough and contemporary review of pedagogy as it operates in the provision of legal education is provided and questions will be asked on the extent to which TEL is capable of supporting chosen pedagogy and chosen pedagogical models underpinning it. When early primary data is collected, and drives research aims and questions there remains the overwhelming requirement that the final thesis submission must reflect a contemporary and relevant research message. A bold decision was taken to tread uncharted research waters that tested how well TEL (and specifically the three Projects) supports chosen pedagogy and viewing the TEL Tools through this lens is considered pioneering work in this thesis. The work set out in this chapter will lay important foundations for stress testing the individual TEL Tools in Chapters 7-9 and how well each individual TEL Tool supports chosen pedagogical models. The relevance of the early primary data highlighted gaps in the research on '*high-quality*' and this chapter must be read in conjunction with the special case study on '*high-quality*' in chapter 10.

The TEL Tools and the evidence they generate must also demonstrate compliance with the SCTE as legal compliance tools and this element of the work is more particularly set out in the mini literature review on digital evidence.

### 3.2 In search of a workable definition of 'TEL' suitable for this research

Sian Bayne (2015)<sup>138</sup> suggests that the term 'TEL' is used in a cavalier manner in the UK higher education sector, and that there is a lack of critical enquiry surrounding its use. These views on inappropriate and insufficient enquiry surrounding 'TEL' are equally shared by A. Kirkwood and L. Price (2014)<sup>139</sup> who suggest that 'TEL': *"...is too often used in an unconsidered manner...Explicit statements about what the term is understood to mean are rare and it is not evident that a shared understanding has been developed in higher education."* M. Flavin (2017)<sup>140</sup> reviewed a range of definitions of 'TEL' to include technology that supports an improved learning experience whilst reminding us that: *"...a Higher Education Funding Council for England (HEFCE) report (2009) resisted a definition of 'technology enhanced learning' and that 'it is important not to create fixed definitions..."*

However, for the purposes of this research an accurate definition of 'TEL' and one that has a natural fit in this research is essential. EdTech Now (2012)<sup>141</sup> suggests that 'TEL' is a poorly conceived acronym. *"Building a new approach that focuses on education-specific technologies will take time. But the first step should be to get our terminology straight...we should leave 'TEL' behind and talk instead about 'education technology.'*

The author supports this new approach of focussing on 'education-specific technologies' as more suited to this research work. However, what this definition does not do is explain what type of 'technology' is being used and more importantly how, where and why it is being used to support educational provision, nor does it shed light on what is meant by technology that 'enhances' learning or what 'enhanced learning' means. The three Projects will be subjected to individual and combined scrutiny to justify the extent to which they strengthen educational provision. This approach to TEL is considered pioneering as the author will be taking each of the TEL Tools and testing them in terms of how individually and collectively, they scaffold 'high-quality' provision and support chosen pedagogical models as integral to this. To that end a combined approach for defining 'TEL' to include Ed-Tech Now (2012) and UCISA's 2016<sup>142</sup> definition of 'TEL' which focusses on 'supporting' learning

<sup>138</sup> "What's the matter with Technology-Enhanced Learning", Journal of Learning, Media and Technology, Vol 40 2015 Issue 1 available at [http://www.research.ed.ac.uk/portal/files/19531335/What\\_s\\_the\\_matter\\_with\\_TEL\\_for\\_web.pdf](http://www.research.ed.ac.uk/portal/files/19531335/What_s_the_matter_with_TEL_for_web.pdf) and accessed on 28<sup>th</sup> August 2017: *"In recent years, 'technology-enhanced learning', or 'TEL', has become a widely accepted term in the UK and Europe for describing the interface between digital technology and higher education teaching... Yet there has been little critique in the literature of the assumptions embedded within the terminology of TEL."*

<sup>139</sup> Technology-enhanced learning and teaching in higher education: what is 'enhanced' and how do we know? A critical literature review - The Open University's repository of research publications: <http://oro.open.ac.uk/36675/1/TEL%20in%20Higher%20Education-What%20is%20enhanced%20and%20how%20do%20we%20know.pdf> – accessed 22<sup>nd</sup> August 2017

<sup>140</sup> Disruptive Technology-Enhanced Learning, The Use and Misuse of Digital Technologies in Higher Education, by Michael Flavin Palgrave Macmillan, Digital Education and Learning Series, 2017 (Page 3)

<sup>141</sup> "The Problem with 'Technology-Enhanced Learning'" December 2012 at <https://edtechnow.net/2012/12/05/tel/> and accessed 28<sup>th</sup> August 2017

<sup>142</sup> Executive Summary, page 1 2016 Survey of Technology Enhanced Learning for higher education in the UK By Richard Walker, Julie Voce, Elaine Swift, Jebar Ahmed, Martin Jenkins and Phil Vincent, accessible at [https://www.researchgate.net/profile/Richard\\_Walker15/publication/309673739\\_2016\\_Survey\\_of\\_Technology\\_Enhanced\\_Learning\\_for](https://www.researchgate.net/profile/Richard_Walker15/publication/309673739_2016_Survey_of_Technology_Enhanced_Learning_for)



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

and teaching has a natural fit in this research as the latter also details some education specific technologies that are highly relevant in the context of the three Projects, "Any online facility or system that directly supports learning and teaching. This may include a formal VLE, e-assessment or e-portfolio software, or lecture capture system mobile app or collaborative tool that **supports** student learning. This includes any system that has been developed in-house, as well as commercial or open source tools."

### 3.3 How well do the TEL Tools here measure up against TEL use in the wider academic community?

To validate the preferred combined definition of 'education specific technologies' in this research the author considered a semi-forensic analysis of the technologies in use in the wider academy was required at this early stage. If the education specific tools in this thesis are strongly reflected in similar wider TEL use in higher education, then the research findings can be more confidently relied upon both within and outside the strict confines of the USW academic community<sup>143</sup>. A 'snap-shot' summary of the TEL Tools the subject of the three Projects is set out below and will enable honest benchmarking on how well they are represented in the recent TEL surveys discussed subsequently. An alignment of the TEL Tools and how well they are represented in the ALT and UCISA surveys are set out in a table as Appendix

#### 3.3.1 ALT<sup>144</sup> TEL survey February 2019

The annual ALT survey (now in its 5<sup>th</sup> year)<sup>145</sup> summarizes the key TEL Tools most in use in UK higher education. The survey was made publicly available in February 2019 so is considered a highly contemporary 'window' on the current use of TEL. The survey was open for responses between 12 December 2018 and 15 January 2019. In total 203 responses were analysed (this compares to 226 in the previous year). The relevant sections that apply to the three Projects are highlighted below and Figure 11 contains details of the TEL Tools that were surveyed and whether there is an upwards trend in their adoption. The TEL Tools in this thesis are well represented in this very recent survey and is strong authentication for the relevance and contemporaneity of the findings in relation to the three

[higher education in the UK/links/581ca19d08ae12715af2018f/2016-Survey-of-Technology-Enhanced-Learning-for-higher-education-in-the-UK.pdf](https://higher.education.in.the.uk/links/581ca19d08ae12715af2018f/2016-Survey-of-Technology-Enhanced-Learning-for-higher-education-in-the-UK.pdf)

<sup>143</sup> The potential to 'roll-out' the findings of this research **beyond HE** will be important in complying with the USW's<sup>143</sup> own guidelines (2015) on completing a research by portfolio which makes clear that the Projects: "must be sufficiently extensive so as to provide **convincing evidence** that the research constitutes a substantial contribution to knowledge or scholarship."<sup>143</sup>

<sup>144</sup> "The Association for Learning Technology (ALT) represents individual and organisational Members from all sectors and parts of the UK. Our Membership includes practitioners, researchers and policymakers with an interest in Learning Technology. Our community grows more diverse as Learning Technology has become recognised as a fundamental part of learning, teaching and assessment."

<sup>145</sup> <http://repository.alt.ac.uk/2431/2/ReportingfromtheAnnualSurvey2018.pdf> Date Accessed 18th March 2019

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Projects. The key findings of this ALT Survey 2019 are easily aligned with Table 3 and demonstrate strong comparatives between the local TEL Tools in this thesis and wider use across the UK.

Figure 11: Findings from the ALT annual TEL survey released February 2019

Area	2014	2015	2016	2017	2018	2014/ 18 +/-	2017/ 18 +/-	Trend
Lecture capture tools	41%	40%	45%	35%	55%	14%	20%	
Learning Space Design				35%	43%	-	8%	
Assistive technologies	29%	18%	25%	33%	40%	11%	7%	
Digital repositories	41%	33%	35%	33%	40%	-1%	7%	
Blended Learning				65%	71%	-	6%	
ePortfolios	39%	35%	39%	37%	42%	3%	5%	
Plagiarism detection		53%	49%	52%	55%	-	3%	
Data and Analytics (incl. Learning analytics)	37%	40%	43%	47%	50%	13%	3%	
Content Management Systems and VLEs	81%	81%	79%	80%	83%	2%	3%	
Collaborative tools (e.g. Google G Suite, Office365, Padlet etc.)	50%	52%	60%	64%	66%	16%	2%	
Open Education (Practices, Policy & Resources)	40%	36%	40%	36%	36%	-4%	0%	
Game-based/playful learning	15%	14%	20%	23%	24%	9%	1%	
Web conferencing/virtual classroom software	60%	56%	53%	60%	60%	0%	0%	
Digital and Open Badges	21%	15%	20%	20%	19%	-2%	-1%	
Blogs	44%	43%	39%	35%	34%	-10%	-1%	
Bring Your Own Device (BYOD) initiatives		38%	36%	33%	32%	-	-1%	
Media production (e.g. podcasting, video interviews)	57%	53%	56%	57%	55%	-2%	-2%	
Augmented and Virtual Reality				22%	20%	-	-2%	
One-to-One Device initiatives		9%	8%	14%	12%	12%	-2%	
Social networking (e.g. Twitter, Facebook, Google+)	59%	53%	51%	47%	44%	-15%	-3%	
Electronic assessment, submission & feedback tools	68%	69%	69%	75%	70%	2%	-5%	
MOOCs, SPOCs, TOOCs etc.	39%	30%	29%	31%	25%	-14%	-6%	

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

### 3.3.1.2 Summary of findings on selective TEL Tools in the ALT survey compared with the three Projects

A quick comparative study is set out in the table below and shows that the TEL Tools combining the three Projects align strongly with wider TEL use in UK higher education as configured in the ALT survey on TEL released in 2019. Digital and open badges and BYOD did not form part of the TEL Tools in this research and therefore are excluded from the table below.

Relevant ALT TEL TOOL	Relevant Project in this thesis where same TEL Tool adopted as that in the ALT Survey 2019
Lecture Capture	Project 2
Assistive Technologies	Projects 1/2/3
Blended Learning	Projects 1/2/3
E-portfolios	Project 1/2/3
Data and Analytics	Project 3
VLE	Projects 1/2/3
Web Conferencing/ Virtual Classroom	Projects 2 and 3
Blogs	Project 3
Collaborative Tools	Project 3
E- Assessment	Project 1

Table 4: Comparative study between selected TEL Tools in ALT survey and the three Projects

### 3.3.1.3 UCISA<sup>146</sup> annual TEL survey 2018<sup>147</sup> Reported in January 2019

The findings from this survey were also released in early 2019 and the strong correlation between the findings in this survey in relation to TEL tool use reflect a similar message as the ALT survey. The survey findings confirm a high level of engagement from 108 of 160 potential higher education institutions that completed this annual survey: “– a response rate of 68% (in line with 69% in 2016), maintaining the overall growth in the number of responses since 2008 (44%).” This is a large survey but the answer to Question 3.21 was selected for specific comparative value. Question 3.21 asked: “Which centrally supported TEL Tools are used by students in your institution?” If these findings are compared with the Table 4 set out above summarising the education specific technologies forming the TEL Tools for the individual Projects, there is once again a strong correlation in the top 12 TEL Tools used here in UK higher education and the TEL Tools in this thesis. Again, this provides strong support for the research in this ‘local’ environment to be relied upon given the representation of the TEL Tools in the wider UK higher education community.

<sup>146</sup> UCISA is the member-led professional body for digital practitioners within education. Open and inclusive, we use our collective knowledge and expertise to help transform teaching, learning and research to ensure both operational efficiency and an excellent student experience. Our community networks, collaborates and shares their inspirational thinking, practices and procedures so that we can all learn more, advance faster and be more effective. As a mutually supportive community, we know that we are better able to meet the ever-increasing digital demands of contemporary education in the UK.” - website: <https://www.ucisa.ac.uk/about>

<sup>147</sup> [https://www.ucisa.ac.uk/bestpractice/surveys/tel/TEL\\_survey\\_report\\_2018/summary](https://www.ucisa.ac.uk/bestpractice/surveys/tel/TEL_survey_report_2018/summary) Date Accessed: 18th March 2019

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Response	Total		Type			Country			
	No	%	Pre-92	Post-92	Other	Eng	Wal	Scot	NI
<i>(Base: All respondents)</i>		(103)	(50)	(43)	(10)	(83)	(7)	(12)	(1)
Virtual Learning Environment (VLE)	97	94%	92%	98%	90%	93%	100%	100%	100%
Text matching tools (e.g. SafeAssign, Turnitin, Urkund)	92	89%	94%	91%	60%	88%	100%	92%	100%
Asynchronous communication tools (e.g. discussion forums)	87	84%	86%	81%	90%	82%	86%	100%	100%
Document sharing tool (e.g. Google Docs, Office 365)	83	81%	80%	86%	60%	80%	86%	83%	100%
Formative eAssessment tool (e.g. quizzes)	83	81%	84%	79%	70%	76%	100%	100%	100%
Lecture capture tools	77	75%	84%	77%	20%	73%	100%	67%	100%
ePortfolio	75	73%	66%	81%	70%	72%	57%	83%	100%
Summative eAssessment tools (e.g. quizzes)	73	71%	72%	72%	60%	66%	86%	92%	100%
Blog	70	68%	68%	74%	40%	61%	86%	100%	100%
Electronic Management of Assignments (EMA)*	69	67%	72%	63%	60%	67%	71%	58%	100%
Personal response systems (including handsets or web-based apps)	69	67%	76%	67%	20%	63%	86%	83%	100%
Reading list management software	66	64%	66%	70%	30%	61%	57%	83%	100%

Table 5: The top 12 TEL Tools ranked in this UCISA survey, January 2019

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

### 3.3.1.4 Summary of findings on Top 12 TEL Tools compared with the three Projects

A quick comparative study is set out in the table below and shows that the TEL Tools align strongly with wider use in UK higher education as configured in the UCISA survey and the top 12 TEL Tools adopted in UK higher education. Those TEL Tools not reflected below from the UCISA survey relate to coursework submission and plagiarism detection software which is used at USW but did not form part of the three Projects.

Relevant UCISA TEL TOOL	% Adoption in English HE	% Adoption in Welsh HE	% Adoption in Scottish HE	% Adoption in Northern Irish HE	Relevant Project in this thesis where same TEL Tool adopted
VLE	93%	100%	100%	100%	Projects 1/2/3
Discussion Boards	82%	86%	100%	100%	Project 3
Formative e-assessment and Quizzes	76%	100%	100%	100%	Project 1
E-portfolio	72%	57%	83%	100	Project 3
Lecture Capture	73%	100%	67%	100%	Project 2
Summative e-assessment	66%	86%	92%	100%	Project 1
Blogs	61%	86%	100%	100%	Project 3
Personal Response Systems	63%	86%	83%	100%	Project 3
Reading list platforms	61%	57%	83%	100%	Project 3

Table 6: Comparative study between selected top 12 TEL Tools in UCISA survey and the three Projects

### 3.3.1.5 Campus technology survey (July 2017) <sup>148</sup>

In September 2017 a survey entitled, "Teaching with Technology Survey", was released by Campus Technology<sup>149</sup> and a summary of the 'education specific technologies' widely used across nearly 235 US campus' is set out below. The TEL Tools comprising the three Projects in this thesis are excellently represented embracing all software save for 'social media services', video and image editing which the author prefers not to use (the decision to avoid their use is fully substantiated when discussing

<sup>148</sup>

<file:///C:/Users/npijos/Documents/AAAAAAA%20PhD%20Write%20Up%20file%2024%20April%202017/Chapters%20for%20PhD/TEACHING%20WITH%20TECHNOLOGY%20SURVEY%20SUMMER%202017.pdf>

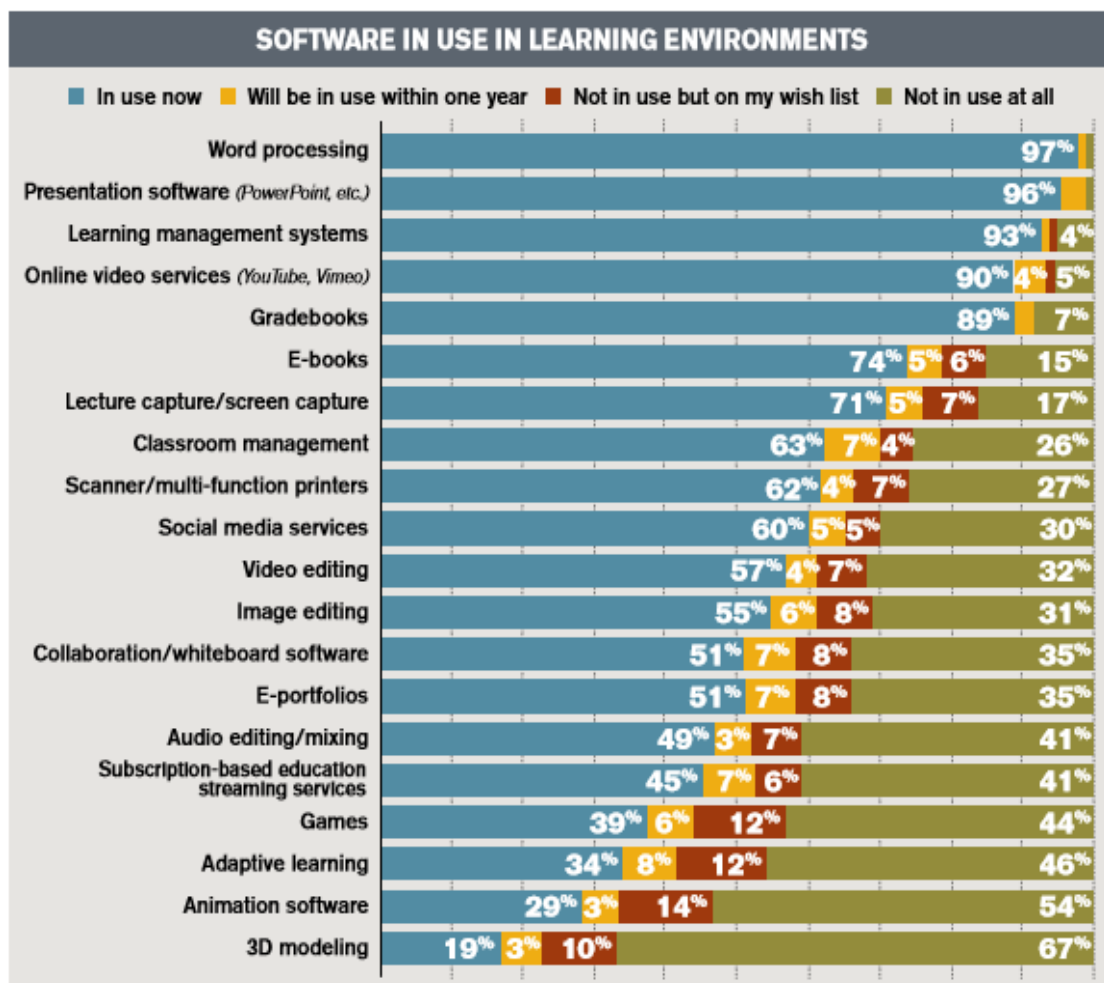
<sup>149</sup> Campus Technology online service in US and describe themselves as: "Campus Technology is one of higher education's top information sources — delivering valuable information via a daily site, monthly digital magazine, newsletters, webinars and online tools. It's the go-to resource for campus professionals — providing in-depth coverage on the technologies and implementations influencing colleges and universities across the nation." <https://campustechnology.com/pages/about.aspx>  
Accessed on 28<sup>th</sup> September 2017

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

the authenticity and 'weight' of digital evidence when it is not edited or altered in any way (Chapter 6). This was important to demonstrate trend not just here in the UK but wider afield, again to add authenticity and reliability to the TEL Tools as adopted in this thesis.

Figure 12: Campus technology survey 2017

### 3.3.1.6 Campus technology survey 2018



In a little under 18 months the technology trends to watch out for in 2019 are highlighted in a similar survey<sup>150</sup> with the spotlight being shone unsurprisingly on the value of AI, machine learning and VR, learning analytics, accessibility and the value of technology in supporting all students, digital course materials and STEM. A not dissimilar list of TEL Tools was discussed at an Inside Government event in January 2019<sup>151</sup> which the author attended to ensure that the TEL Tools adopted for the research are still holding strong in their wider adoption across UK higher education but recognizing how VR and AI are set to change the TEL landscape significantly in the future.

<sup>150</sup> Campus Technology Magazine, Vol 32 No. 2, January/February 2019, "8 EdTech trends to watch in 2019"

<sup>151</sup> "Using Technology Enhanced Learning Effectively in Higher Education", Jan 2019, Inside Government Event

### 3.3.1.7 Digital learning technology: digital learning survey McGaw Hill 2017<sup>152</sup>

The findings are rigorously reviewed in relation to each of the TEL Tools in the Projects given the impressive student participation figures in this survey. At this point it is encouraging to document that similar findings in this thesis have a strong correlation with the findings in this survey.

### 3.3.1.8 Summary of the findings recent TEL surveys: how well do the TEL Tools measure up?

Whilst only a 'snap-shot' of the surveys could be reviewed in this section without question the TEL Tools in this thesis are widely represented in all of the national and international surveys set out above adding confidence that the findings here reflect wider academic use. But, the TEL Tools in this thesis will have to work especially hard to convince that they remain on course to provide a contemporary message of their ongoing value in supporting and enhancing teaching, learning and assessment in the new digital university. L. Daniela (2018)<sup>153</sup> reassures that the strains that this research is encountering in delivering a current message on the use of educational technology is not out of step with other researchers who come under pressure in delivering what seems to resemble 'just in time' research messages on TEL. More recently the same author considers that there is insufficient take up of 'innovative technology'. L. Daniela et al (2019)<sup>154</sup> "...it can be concluded that respondents use a relatively wide range of technology and technological solutions, but they no longer qualify as innovative...So far, innovative solutions such as gamification principles, virtual reality ...and robotics are currently used relatively rarely..."

This research is therefore 'just in time' in terms of the TEL Tools but does lay important foundations for wider adoption of future 'innovative technology' and the lessons to be learned in how such technology is introduced and adopted in higher education. The discussions on pedagogy set out below will be invaluable to future research in this era.

## 3.4 University Education for a new digital age

Education providers need to provide education that matches standards of 'reasonable skill and care' and being clear on what a university education should deliver will be important in fulfilling this

<sup>152</sup> <file:///C:/Users/npjios/Downloads/2017-digital-trends-survey-results.pdf> "Hanover administered the survey to college students through a panel company. In order to qualify for the survey, students had to be currently enrolled at a U.S. university. The final sample size after data cleaning consisted of 1,005 completed responses."

<sup>153</sup> Page 4 "Smart Pedagogy for Technology-Enhanced Learning" as part of "Didactics of Smart Pedagogy: Smart Pedagogy for Technology-Enhanced Learning" 2018, edited by Linda Daniela, Springer Publications: "Technological progress brings about a transformation of the educational environment which happens faster than the literature can offer solutions for how to work in this environment."

<sup>154</sup> Page 21, Chapter 1 "How to Predict the Unpredictable: Technology-enhanced Learning and Learning Innovations in Higher Education", Linda Daniela, Anna Visizi and M.D. Lytras in "The Future of Innovation and Technology in Education" Emerald Studies in Higher Education, Innovation and Technology, 2019 edited by Anna Visizi, Miltiadis D. Lytras and Linda Daniela

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

contractual obligation in the SCTE. Equally important is understanding what a 'high-quality' university education should provide is necessary particularly in the digital age if meaningful evaluation of the extent to which the TEL Tools in supporting this can be properly evaluated.

Tom Nichols (2017)<sup>261</sup> argues that a university should aim to, *"produce graduates with a reasonable background in a subject, a willingness to continue learning for the rest of their lives and an ability to assume roles as capable citizens."* Microsoft (2017)<sup>155</sup> focuses on the importance of the student learning experience and where the *"... ideal university education is ...about improving a student's ability to produce appropriate ideas, solve problems correctly and build on complex theories and make accurate inferences from the available information."* M. Guilbault (2017)<sup>156</sup> stress the importance of student engagement with their education and closer understanding of what 'education' is as well ensuring that learning is taking place whilst Jan Derry (2008)<sup>157</sup> reminds us that education involves, *'... far more than the acquisition of information and the ability to follow procedures...It also includes the development of the capacities of judgment...to make decisions actively in different contexts'*<sup>158</sup>.

Increasing importance is placed on a university education that equips students for working life and as Annika Zorn (2018)<sup>159</sup> opines. The message from employers is that current university education is failing to equip some graduates with key skills necessary for a 21<sup>st</sup> century workplace and that graduates lack key skills in criticality, creativity, problem-solving and an ability to work collaboratively in teams. The TEL Tools will be stress tested in their dedicated chapters on the extent to which this university educational brief is met and discharged and the effectiveness of the TEL Tools in delivering such education.

At the time of thesis submission, a number of new reports have been generated in September 2019 relevant to the skills and knowledge university students need to acquire and skills students also want, to equip them for the future world of work, and it would be remiss not to include these findings. An important and innovative message is delivered in this thesis aimed at demonstrating

<sup>155</sup> "The Future of Learning Technology in UK Higher Education" 2017 - <https://profile.microsoft.com/RegSysProfileCenter/wizardnp.aspx?wizid=997cb883-0bd9-4c18-9ab3-1d119cf4e891&lcid=2057-> and accessed 23<sup>rd</sup> August 2017

<sup>156</sup> "Students as customers in higher education: The (controversial) debate needs to end, Melodi Guilbault, Journal of Retailing and Consumer Services (2017) <http://dx.doi.org/10.1016/j.jretconser.2017.03.006>-accessed 25th September 2017" Education can be defined as the process of gaining knowledge...The nature of (the service) of education is that it provides the basis for learning and for demonstrating that this has taken place. And learning requires engagement of the student...Engagement is critical- education is not a passive service- the student must make a commitment and contribute for the desired outcome to be achieved."

<sup>157</sup> "Technology-Enhanced Learning": A Question of Knowledge", Journal of Philosophy of Education, Vol 42, No.3-4, 2008

<sup>158</sup> Case in August 2017 on what is information—insert etc here.

<sup>159</sup> Page 9 Higher Education in the Digital Age: Moving Academia Online" 2018, Annika Zorn, Jeff Haywood and Jean-Michel Glachant 2018, Edward Elgar Publishing, *'...have to educate a larger student body and much more diverse groups of learners with different needs, expectations and backgrounds...to equip students and lifelong learners with key competencies and skills...fostering the employability of graduates throughout their working lives...'*



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

the ability of the TEL Tools to scaffold 'high-quality' and these recent reports provide a contemporary window on how 'quality' is being viewed by key stakeholders in higher education.

In the first of the three reports Pearson (2019)<sup>160</sup> reviewed the responses of 11,000 people in terms of what skills learners want from their education. At page 5 of the report it is recorded that whilst learners recognise that STEM education is important they consider that skills that make us uniquely human are highly valued yet recognising that these are the hardest to learn, *'Skills like creativity, originality, problem-solving and the ability to learn give humans an advantage over machines'* and importantly learners want help mastering these. The author will argue that TEL Tools particularly in Project 3 and e.g. the HYDRA simulation exercises are designed specifically to foster such skills.

In the second report Pearson (2019)<sup>161</sup> underscore the importance of defining 'quality.' The views resonate with those articulated in this thesis and more fully set out in chapter 10. In line with the findings in this thesis the need for an accurate and workable definition of 'high-quality' must be established for students to ensure they receive what has been contractually promised. On page 16 of this second report under the umbrella heading of, *"Defining quality in the new world of credentials"* it is recognised that frameworks such as the TEF set out metrics for quality but the authors ask the question that this thesis also seeks answers to, *'But who defines quality in a world of new credentials?'* The authors share the vision of this author that universities can help to define and standardise some elements of quality essential for all disciplines. The author will be discussing her use of 'common markers' of quality that could apply across disciplines in Chapter 10. In this second report the authors stress the importance of employers as key stakeholders in higher education.

In addition, evaluating the TEL Tools from the outset on their ability to scaffold 'high-quality' provision that delivers employers with graduates with the skills articulated above, has created research that can be more readily relied upon.

In the third and final September report the Lumina Foundation (2019)<sup>162</sup> reflect on their research exercise which took place in 2018 with two central aims, firstly, to *'explore new ways to assure the quality of a college education and other forms of learning beyond high school'* and to develop a *'broad conceptual model of credential quality'*. The report calls for students to receive, *'...better*

---

<sup>160</sup> "The Global Learner Survey" Pearson September 2019

<sup>161</sup> "Opportunity for Higher Education in the Era of the Talent Economy" Pearson September 2019, *'...defining both the learning outcomes associated with employability, and the quality of the programs that ... prepare the workforce...this then creates...feedback loop between the workplace/industry and the classroom/education provider.'*

<sup>162</sup> "Unlocking the Nation's Potential" A Model to Advance Quality and Equity in Education Beyond High School, September 2019

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

consumer-protection regulation and information to make informed choices'<sup>163</sup> and advocate a four-stage model 'from design to outcomes' to ensure the system does produce these promised outcomes. The report also confirms (at page 19) the importance of 'human skills' as important in the provision of quality education such as *creativity, critical thinking, communication, analytical skills and collaboration*. These are consistent messages that are being voiced to complement the graduate skill set and which underpin features of today's university/tertiary education and the TEL Tools forming the three projects will be critically assessed on how well they support the acquisition of these valued skills.

UUK (2018)<sup>164</sup> carried out research on the future skills needed and concluded that a university education must have at its core the development of **subject content knowledge** and that the nature of the university education must also provide students with, "...the skills to analyse, interrogate, research, convey and apply knowledge to various problems and circumstances... universities are committed to developing the transferable skills of learners, including problem-solving, communication and 'learning ability' by embedding them into the curriculum across all subjects" Adding on page 12 of the report that these are skills required in, '...all academic subject areas, and in facing increasingly complex challenges, employers value the innovation, creativity and understanding that these skills can bring"

Contractual promises made to students that educational provision will be of 'high-quality' need to be honoured<sup>165</sup> but articulating what this complex term means is challenging<sup>166</sup> and as E. Hazelkorn et al (2018)<sup>167</sup> contend there remains little consensus in the sector on how it should be defined or measured. G. Gojkovab et al 2015)<sup>168</sup> argue that critical thinking and creativity are essential features of 'high-quality' academic provision for today's students across all disciplines<sup>169</sup> and S. Norton (2018)

<sup>163</sup> Page 20 [supra]

<sup>164</sup> Page 8 "Solving Future Skills Challenges" 2018 Universities UK

<sup>165</sup> Page 1 of the UUK Report entitled "EDUCATION, CONSUMER RIGHTS AND MAINTAINING TRUST" – What Students Want from Their University, 2017 "It is incumbent on universities to deliver on the promises they make to students, and that have informed their choice. This will help to maintain the trust and confidence of students whilst providing consistency and continuity during their studies. This includes promises made at the application stage, as well as clarity of policies and regulations that apply to students"

<sup>166</sup> Page 3, Chapter 1 "Quality, performance and accountability: emergent challenges in the global era" in "Research Handbook on Quality, Performance and Accountability in Higher Education" edited by Ellen Hazelkorn, Hamish Coates and Alexander McCormick, 2018, Edward Elgar Publishing "For if quality is ephemeral and subjective, then really

<sup>167</sup> "Public trust and accountability: a time of special challenge" 10<sup>th</sup> Feb 2018, WOKNHE "...quality' is a complex term, and although widely used there is no agreed-upon definition or on how it should be measured, much less improved."

<sup>168</sup> "Critical Thinking Of Students – Indicator Of Quality In Higher Education" 2015 by Grozdanka Gojkovab, Aleksandar Stojanovičab, Aleksandra Gojkov Rajičab Social and Behavioral Sciences 191 (2015) 591 – 596 © 2014 The Authors. Published by Elsevier Ltd. Selection "The Bologna reform puts studies in a paradoxical situation emphasizing the need for critical thinking, as the most significant teaching aim, while, on the other hand, it actually leaves little space to reach it." The same authors raise concerns that critical thinking can be taught at all adding that, "It has become clear today that critical thinking is not a unique competence; it is rather mastering of a technique, which as such cannot be neither taught nor trained in teaching. Critical thinking essentially means to leap out of usual currents of thin king and to learn how to further examine or re-examine something which has already become generally accepted knowledge."

<sup>169</sup> Page 53 Chapter 4: "Innovation and creativity" of "Developing the Cambridge learner attributes", March 2018 "Critical thinking and problem-solving have general applications beyond particular disciplines... In this sense critical thinking is the ability to identify, analyse and



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

"...the power of interactivity and ...the potential to enhance what is learned, how we learn and how we teach." This 2017 message of support for TEL is also provided by Nicholas Matthijs (2017)<sup>174</sup> who highlights how TEL can 'democratise' and provide an educationally inclusive experience for all students.

In Wales the role of technology in enhancing learning and teaching was the subject of a major review conducted by JISC on behalf of HEFCW<sup>175</sup> and the report emphasized the 'enhancing' role of technology in supporting amongst other things 'pedagogical practice' and the findings strongly resonate with the approach to pedagogy as front and centre in this research and specifically detailed subsequently in this chapter:

By 2018 divided opinion on TEL was gathering pace and questions were being raised over inflated promises and that further evidence was needed to corroborate earlier promises on the benefits of TEL. The comments of Annika Zorn et al (2018)<sup>176</sup> reflect ongoing support for TEL and how "Moving online thus gives access to information...where the interested kid wants to access it and it offers access to a series of activities which previously were strictly limited by time and place." But the comments of S. Edwards (2018)<sup>177</sup> shows a more cautious message on the value of technology in the classroom for adult learners highlighting the need for enhanced digital literacy skills and fair and equitable access to hardware. S. Edwards (2018)<sup>178</sup> whilst advocating the potential for wider access for adult students when digital pedagogy is adopted but at the same time recognising that 'Learning technology may improve learner progress and achievement, but the evidence is at best mixed.'

### 3.5.2 The case against TEL in enhancing learning

N. Selwyn (2014)<sup>179</sup> has long been sceptical of the promised democratisation of TEL and concerns regarding the willingness of the academy to accept TEL as something positive without sufficient

<sup>174</sup> "Inclusivity and TEL-Accessibility in education: from integration to inclusion" Nicholas Matthijs, April 2017 "Thanks to technological progress, we are now seeing the rise of an inclusive approach that enables more flexible learning experiences and allows students to meet the same goals, achieving the same outcomes but in their preferred learning styles...we know students with disabilities can feel isolated from their peers and don't know how to engage with them...some of them could find engaging in ...a virtual classroom more comfortable... than face to face...and they can start feeling part of the group..."

<sup>175</sup> Page 19 "Review of the Wales Higher Education Strategy for Enhancing Learning and Teaching through Technology" Report for HEFCW, March 2018, Prepared by Jisc, "The emphasis should remain on how technology enables, and is embedded in, the enhancement of the student experience, for example, ...and enhancing pedagogical practice."

<sup>176</sup> Page 12 "Higher Education in the Digital Age: Moving Academia Online" 2018, Annika Zorn, Jeff Haywood and Jean-Michel Glachant 2018, Edward Elgar Publishing

<sup>177</sup> Page 220 of Chapter 5.3 'Widening adult learning participation' of in Enhancing Learning and Teaching with Technology: What the Research Says, 2018 edited by Rosemary Luckin and published by UCL IOE Press "Learning technology can make learning more flexible in how, when and where learning takes place...a small body of evidence suggests that learning technology helps to attract, engage and motivate learners...the value of technology...is conditional on the learner's existing ICT skills...Although learning technology is potentially attractive to 'hard-to-reach' learners...it may present a barrier to learning for older learners and those on low incomes without access to technology and the Internet at home."

<sup>178</sup> Page 220 of Chapter 5.3 'Widening adult learning participation' of in Enhancing Learning and Teaching with Technology: What the Research Says, 2018 edited by Rosemary Luckin and published by UCL IOE Press

<sup>179</sup> Page 7 "Distrusting Educational Technology, critical questions for changing times" 2014, Neil Selwyn, Routledge Publishing, "...most digital technologies over the past 30 years have been accompanied by promises of widened participation in education, increased motivation

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

critical enquiry of promised benefits. Fast forward to 2018 and many of these concerns are being raised in wider academic studies. Cukurova and Luckin (2018)<sup>180</sup> raise the possibility of bias with regards to the word 'enhance' and whether the right questions are being asked about what TEL can actually do, "In fact, the question: 'do the technologies enhance learning?' is not even the right one to ask, because it implies that any technology regardless of the purpose of its design or the manner of its use can enhance learning and teaching." These comments are insightful and go some way to explaining why the author felt that TEL needed to be put under the 'pedagogy' microscope in terms of how well they scaffold and support 'high-quality' provision

N. Yusuf (2018)<sup>181</sup> discusses the, "...passive consumptive nature of viewing certain educational video...Educational video content of a real-life lecture, for example, can be seen as a passive mode of learning with video, because there is little operational interaction required on the part of the learner." Lecture Capture in the form of Panopto is Project 2 in this thesis and the contribution of this TEL tool will need to defend against allegations of passive learning is this TEL Tool is to withstand the 'stress test' on how well it scaffolds pedagogy that supports 'high-quality' provision.

The author's own experience of using TEL at 'local' level is captured by Ian Glover et al (2016)<sup>182</sup> who confirms that technology continues to be used by a small band of TEL enthusiasts and more recently A. Zorn et al (2018)<sup>183</sup> captures the views of the reticence of the wider academic community,

The Horizon Report on HE released in 2017<sup>184</sup> warns of being over optimistic about the aspirations of what technology can realistically achieve for increasing student learning and achievement and can disrupt the learning process if not used appropriately, "Technology and digital tools have become ubiquitous, but they can be ineffective or dangerous when they are not integrated into the learning

---

and engagement, better levels of 'attainment', enhanced convenience of use and more 'efficient' and 'effective' provision of educational opportunities. Indeed, the field of education and technology is beset by exaggerated expectations over the capacity of the latest 'new' technology to change education for the better..."

<sup>180</sup> Page 34 "What the research says about the use of different technologies to enhance learning" in Enhancing Learning and Teaching with Technology: What the Research Says, 2018 edited by Rosemary Luckin and published by UCL IOE Press

<sup>181</sup> Page 71 "Video for Learning" in "Enhancing Learning and Teaching with Technology: What the Research Says" 2018, Edited by Rosemary Luckin, UCL, IOE Press

<sup>182</sup> By Ian Glover, Stuart Heppleston, Helen J Parkin, Helen Rodger and Brian Irwin in the British Journal of Educational Technology, Vol 47, No 5 September 2016, "Pedagogy First: Realising Technology-Enhanced Learning by Focusing on Teaching Practice" "The potential for technology to support and enhance learning has been well stated...however the reality has been that, in general, it has not fulfilled its promise to transform learning and teaching practice...Where technology is being used in transformative ways, it is frequently by a small minority of innovators who are enthused by technology, accept its value and have a strong desire to enhance their student's learning."

<sup>183</sup> Page 82 Chapter 4 "How to design a 21<sup>st</sup> Century online course that makes learning happen for all in "Higher Education in the Digital Age" edited by Annika Zorn, 2018, Edward Elgar Publishing, "Online tools are not...necessarily welcome by all teaching faculty and strong opinions on technology exist that still too often keep the door for innovation shut."

<sup>184</sup> Horizon Report > 2017 Higher Education Edition accessible at:

<file:///C:/Users/npijs/Documents/AAAAAA%20PhD%20Write%20Up%20file%2024%20April%202017/Chapters%20for%20PhD/2017-nmc-horizon-report-he-EN.pdf> - accessed on 19 July 2020.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*process in meaningful ways*". More recent research from Linda Castañeda and Neil Selwyn (2018)<sup>185</sup> rightly point out "*While digital education might work well for individuals, it is likely to work better for some individuals rather than others.*" Receiving education of high-quality is the prerogative of all students and any potential of TEL to undermine this must be taken seriously.

### 3.6 TEL and academic freedom

This research is focussed on demonstrating how TEL and specifically the TEL Tools can *scaffold 'high-quality' provision* and the views of academics who consider that TEL is potentially threatening and undermining academic freedom are highly important. High-quality provision in UK education is predicated on the autonomy of academics and suggestions that TEL can undermine this must be investigated. The recently enacted Teaching and Research Act 2017 is designed to enshrine academic freedom and autonomy in legislation, a point made many times by the then Universities Minister Jo Johnson (2017).<sup>186</sup>

L. Castañeda and N. Selwyn (2018)<sup>187</sup> worry that not only are TEL Tools potentially undermining academic independence in selecting and experimenting with pedagogy but they may be constrained in their freedom to experiment (essential for the provision of 'high-quality' education) due to the expensive educational technology purchased by an institution and requirements to justify this expenditure to the taxpayer. Prioritising pedagogy in this research with the TEL Tools in a secondary role to chosen pedagogy is strengthened when discussed in the context of these concerns.

B. Johnston et al (2019)<sup>188</sup> recently raise concerns that far from technology enabling innovative and high-quality delivery the opposite is being allowed to flourish in a 'neoliberal' education environment. *'...technology in the neoliberal university has led to the standardisation and instrumentalization of curriculum development and pedagogical activities within the classroom that have grossly interfered with autonomy, fluidity and creative processes of education.'* Any technological instruments of change that threaten academic autonomy and provision need to be as carefully regulated as much as the

<sup>185</sup> "More than tools? Making sense of the ongoing digitisations of higher education" Castañeda and Selwyn International Journal of Educational Technology in Higher Education (2018) 15:22 <https://doi.org/10.1186/s41239-018-0109-y> accessible at: <file:///F:/PhD%20materials%20from%207th%20March%202019/AAA%202019%20Chapters%20from%2011th%20Feb%202019/Neil%20Selwyn%20on%20digital%20technology.pdf> and accessed on 27<sup>th</sup> March 2019

<sup>186</sup> The Daily Telegraph, Education Section January 10<sup>th</sup> 2017, "*The Act will protect and enshrine the autonomy and academic freedom of Higher Education institutions in law. And it puts students at the heart of the system, with the Office for Students making universities rightly more accountable to their students so they get the best value for money.*"

<sup>187</sup> "More than tools? Making sense of the ongoing digitizations of higher education" Castañeda and Selwyn International Journal of Educational Technology in Higher Education (2018) <https://doi.org/10.1186/s41239-018-0109-y> and accessed 18<sup>th</sup> March 2019, "*Regardless of the pedagogic intent of university educators, the software they use shapes what can and cannot be done in the classroom and lecture theatre. In this sense, it could be argued that engineers, data scientists, programmers and algorithm designers are becoming today's most powerful teachers... This draws attention to the philosophies of pedagogy and learning that are 'baked into' the coded design of the software that universities purchase and use, alongside any corresponding consideration for equity, critique and other ideals that might be seen as traditional underpinning features of higher education.*"

<sup>188</sup> Page IX of the Foreword "Conceptualising the Digital University: The Intersection of Policy, Pedagogy and Practice" 2019 by Bill Johnston, Sheila MacNeill and Keith Smyth. Palgrave Macmillan publishing.

educational provision itself and this research will balance the views on the pedagogical and legal dividends of the TEL Tools in both academic camps.

### 3.7 Pedagogy front and centre: a pioneering approach to pedagogy and TEL

If one of the primary obligations to be discharged by the three stakeholders and an implicit term in the SCTE is to provide education of 'high-quality', adopting appropriate pedagogy must be the driving force in achieving this. As S. Mostafa and P. Rahnamayiezekavat (2019)<sup>189</sup> explain teaching students in the built environment is challenging because so many distinct fields of study need to come together to form the educational programme. The pedagogy to be discussed will need to be convincing in terms of 'best practice' in construction contract law as it applies to students studying for degrees in the built environment.

The teaching approaches and pedagogy adopted by the author are arguably ahead of their time in terms of utilising the TEL Tools to support chosen pedagogy in new and innovative ways. The literature set out below is aimed at showing the relevance of these pedagogical approaches for the built environment student. A shift to innovative pedagogy in this learning environment is encouraged by L.M. Scott (2019)<sup>190</sup> who captured the approach of the author in directing how students learn construction law 'actively' connecting theory with practice harnessing the inductive learning approaches advocated by the authors.

The TEL Tools will need to demonstrate how they scaffold a learning environment (whether face to face or online) that fosters such inductive teaching methods and work fairly for all students however flexibly they choose to learn. Pedagogy in this research needs to show that construction law as it is taught enables non-law students to stay motivated and engaged in meaningful study that links legal theory with professional practice in their industry. Matt Bower (2017)<sup>191</sup> raises concerns that educational technology is presented as the answer to all educational ills without proper investigation

---

<sup>189</sup> Preface xvi, "Claiming Identity Through Redefined Teaching in Construction Programs" 2019 by Sherif Mostafa and Payam Rahnamayiezekavat, IGI Global Publishers, "A collage of management, engineering and technology, material sciences, commerce, economics, accounting, law, together with construction-specific topics such quantity and building surveying hinder deployment of a "one-size-fits-all" approach to the teaching of Construction Management."

<sup>190</sup> Page 3 Chapter 1 page "Engaging Students' Learning in the Built Environment Through Active Learning" Lloyd Martin Scott "Claiming Identity Through Redefined Teaching in Construction Programs" 2019 by Sherif Mostafa and Payam Rahnamayiezekavat, IGI Global Publishers, "Traditional BE instruction has been adopted with a deductive approach, more often beginning with theories and progressing to the applications of those theories. Alternative learning and teaching approaches are more inductive...several of the most commonly used inductive teaching methods, including inquiry learning, problem-based learning, project-based learning, case-based teaching, discovery learning, and just-in-time teaching..."

<sup>191</sup> "Design of Technology Enhanced Learning, Integrating Research and Practice", Matt Bower, Emerald Publishing, 2017, Preface page xi "In education, technology enables students and teachers to rapidly collect data, represent knowledge, share perspectives...collaborate from almost any location...The reality is that simply using contemporary technologies in education does not guarantee a successful lesson, and in fact, using technology poorly can render a learning experience confusing and meaningless."

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

of pedagogical place and value acknowledging that technology used inappropriately can render a poor learning experience for students.

### 3.7.1 Correct choice of pedagogy supported by good teaching practice

In the same way that it is impossible to itemise the many different philosophies that underpin research it is equally impossible to itemise the many different pedagogical approaches that operate in different disciplines because as L. Daniela (2018)<sup>192</sup> reminds us, '*Pedagogy as a science is constantly evolving and looking for ways to better teach and to scaffold students in the process of knowledge building.*' However, whatever form of pedagogy is chosen it must address the number one priority which L. Daniela (2018)<sup>193</sup> confirms puts the, '*...student...at the centre of the learning process but the teachers are those who using their pedagogical knowledge plan and organize the educational processes to support all students.*' The TEL Tools are only as good as the teacher responsible for delivery and as C. Fulgham and S. Robert (2016)<sup>194</sup> emphasise the TEL Tools must find their place in supporting the teacher.

Discussions on what constitutes '*excellent teaching*' are set out in the case study on 'high-quality' educational provision but it would be useful to evaluate the practices of elite institutions (topping the QS world university rankings in September 2019) on how they assess what constitutes '*excellent teaching and learning*'. If the TEL Tools in this research can align in supporting excellent teaching as configured through these highly contemporary elite institutional lenses this will add value to the research findings.

Sarah Wild (2019)<sup>195</sup> reports that each of the elite institutions, '*...has a distinctive flavour with regard to how it cultivates the teaching and learning that wins it recognition and plaudits.*' David Gibson, head of education and policy at the University of Oxford, (1<sup>st</sup> place in the overall 2019 rankings) is quoted as saying that, '*We are committed to maintaining the tutorial system...providing rigour, challenge and personalised attention...*' Gibson also stresses the importance of technology in helping students to learn adding that, '*A key opportunity is to make effective use of technology to enhance teaching practice and to reduce the burden of teaching administration for both academic and non-academic staff.*' For this institution their success in delivering excellent teaching rests on their long-

<sup>192</sup> Page 3 "Smart Pedagogy for Technology-Enhanced Learning" as part of "Didactics of Smart Pedagogy: Smart Pedagogy for Technology-Enhanced Learning" 2018, edited by Linda Daniela, Springer Publications

<sup>193</sup> Page 4 "Smart Pedagogy for Technology-Enhanced Learning" as part of "Didactics of Smart Pedagogy: Smart Pedagogy for Technology-Enhanced Learning" 2018, edited by Linda Daniela, Springer Publications

<sup>194</sup> "Online Teaching Boot Camp" by Cheryl Fulgham and Susan Robert, Magna Report on "Teaching with Technology" 2017 accessible at <file:///C:/Users/npijos/Documents/AAAAAAA%20PhD%20Write%20Up%20file%2024%20April%202017/Chapters%20for%20PhD/Best-of-MTWT-report-2017.pdf> and visited on 29th September 2017, "*What makes technology powerful is not the technology itself, but the teacher behind it. All too often, technology is placed ahead of the teaching, or worse yet, in place of the teacher, and the result is poor learning. Technology should enhance a learning environment, not become it.*"

<sup>195</sup> Page 100 "The best can't stand still" special edition of THE 12<sup>th</sup> September 2019, "World University Rankings"



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

established tutorial system whilst recognising the importance of harnessing modern technology to support their students.

On the other hand, Ian Waltz, vice-chancellor of MIT<sup>196</sup> links excellent innovative teaching that keeps pace with changes in the world and advances pedagogy to meet changing curricula, For MIT innovative teaching needs to equip students with real world of work preparedness whilst recognising that evaluating what 'excellent teaching' means is difficult to articulate let alone measure.

Michael Keller, university vice-provost for teaching and learning at the elite US Stanford University states that it is one of the institution's strategic goals, '*... to ensure the quality of educational experiences for all of our students by vigorously supporting the development and widespread use of teaching expertise and learner-centred approaches in teaching.*' Stanford clearly puts a high premium on the expertise of the teacher whilst focussing attention on the students to take control of their learning.

The discussions highlight value in a personalised tutorial system and the importance of iterative formative assessment, pedagogy that connects with 'real world of work' experiences and learning that is student centred are also explored in this section of the work. The author will return to these viewpoints for appropriate benchmarking against the findings for the three TEL Tools Projects. However, the contemporary discussions put forward here from top ranking universities on excellent teaching provision have laid important foundations for subsequent discussions and context.

### 3.7.2 Does pedagogy need to be redone for the new digital learning environment?

In 2001, John Stephenson<sup>197</sup> asked the question, "*Do we need a new pedagogy for online learning? ...the evidence is clear he said that, '... new technologies, however effective in other fields, don't inevitably lead to major change in education...By this view it is not new pedagogies that we need, but new ways of providing existing pedagogy efficiently and flexibly.*" To some extent this viewpoint is relevant. Antonio Padoa-Schioppa (2017)<sup>198</sup> whilst discussing how legal education developed from the twelfth century (with reference to the University of Bologna) highlights how law students had to revisit and review lecture content for more comprehensive understanding over successive years; the

---

<sup>196</sup> [supra]'...the institution has always shown a strong commitment to teaching innovation, improving its pedagogical practices and advancing its curricula to respond to changes in the world...there are new degrees...that respond to the trends in the outside world in terms of what kinds of skills, knowledge and attributes students need...' stressing that, '*Learning is a difficult thing to measure and therefore teaching is a difficult thing to measure. Different people learn at different rates and approach problems in different ways...*'

<sup>197</sup> Teaching and learning online, Pedagogies for new technologies- Stylus Publishing 2001

<sup>198</sup> Chapter 10- "University: Students and Teachers: A History of Law in Europe: From the Early Middle Ages to the Twentieth Century" by Antonio Padoa-Schioppa and translated by Caterina Fitzgerald, 2017, Cambridge University Press, pages 127-129 "Undoubtedly a student aiming to assimilate the difficult texts of the *Corpus iuris*...could not possibly limit himself to listening to a single course ... it would have been necessary to return and listen to the explanation two or three times in successive years, in this way slowly acquiring greater and greater understanding."

**The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education**

modern Ed-tech equivalent of this is epitomized by Panopto (lecture capture) demonstrating how the traditional lecture style pedagogy supported by technology enables *immediate* revisiting and reviewing of lecture content by a 21<sup>st</sup> century law student.

This statement pre-supposes that the traditional ways of delivering a quality learning experience are inherently positive but simply in need of a 21<sup>st</sup> century face lift. Beetham and Sharpe (2013)<sup>199</sup> consider that an entirely new approach to pedagogy is required where technologies are adopted. These points are equally well made but if we fast forward to a futuristic glimpse into a new and uncertain TEL future wearing 2019 glasses W. Swain (2019)<sup>200</sup> paints a very different picture in terms of what pedagogical delivery could resemble in the future. What is important in this research is that the findings here have an enduring reach beyond the USW academic community in a fast- changing educational environment in higher education with TEL firmly embedded in its fabric. Whatever the future holds the priority must be pedagogy first and foremost and the author would argue this message is timeless whatever TEL Tools are adopted.

### **3.7.3 Careful alignment of chosen pedagogy with education specific technologies**

Linking specific technologies (the TEL Tools) to pedagogy as this research aims to do is important and considered pioneering, because as Matt Bower (2017)<sup>201</sup> emphasises, ill- considered alignment threatens '*high-quality*' delivery or worse still leads to a poor learning experience for students. Liz Marr (2018)<sup>202</sup> also stresses the importance of proper alignment of TEL with underlying pedagogical models if learners are to engage and achieve pointing out that,

The author has set an innovative challenge for herself in this research to take each individual TEL Tool comprising the three Projects and critically assess the extent to which each one aligns with chosen pedagogy as necessary scaffolding to '*high-quality*' provision. Such an approach is highly valuable to

---

<sup>199</sup> Page 3 [supra] "*...pedagogy needs to be 're-done' at the same time as it needs to be 're-thought'...Papyrus and paper...even the basic technologies of writing were innovations once...It is true none of these technologies has changed human beings' fundamental capacity to learn...But they have profoundly changed how ideas and practices are communicated and what it means to be a knowledgeable and capable person.*"

<sup>200</sup> Page 8 [supra] "In the next decade the old- style lecture and tutorial is likely to be, if not obsolete, then a rarity. Technology is likely to be increasingly important. Content can be delivered using blended learning in which some content is delivered online and some face to face...technology...can be used to supplement learning but also as a means of encouraging the desirable deep learning and promotional skills-based learning. It is difficult to predict what will come along. Ideas like the flipped classroom which a few years ago were seen as innovative are likely to seem dated"

<sup>201</sup> "Design of Technology Enhanced Learning, Integrating Research and Practice", Matt Bower, Emerald Publishing, 2017, Preface page xi "*As technologies change, it is crucial that educators...respond...based upon a deep understanding of pedagogical issues...educators can avoid being distracted by the novelty of new technologies and concentrate upon how each technology is influencing interaction and learning.*"

<sup>202</sup> Page 32 of "The transformation of distance learning at Open University: the need for a new pedagogy for online learning in "Higher Education in the Digital Age", edited by Annika Zorn 2018, Edward Elgar Publishing, "*...technological innovation is not ...a panacea. Rather, it is the innovative ways in which technology is used in teaching and learning...aligned with appropriate pedagogic choice that will enable learners to engage and succeed.*"

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

this sector because as M. Bower (2017)<sup>203</sup> explains it is crucial that TEL follows and supports chosen pedagogy.

Laying the foundations for the subsequent discussions on each individual TEL Tool in the three dedicated project chapters with secondary research that is highly contemporary should provide confidence that the early primary findings can be trusted. The secondary research set out below combines the 2019 views of leading contract law experts as well as highly qualified educators skilled in teaching project management in the built environment. This secondary data is important as it combines discussions on 'best practice' pedagogy for teaching contract law for students studying for qualifications to enable them to work as quantity surveyors and project managers (not lawyers) in the built environment.

### 3.7.4 Selecting appropriate legal pedagogy for students in the built environment as the priority

The right pedagogy for built environment students learning construction contract law needs to convince the built environment student of the relevance of law as a crucial component of their studies. W. Swain (2019)<sup>204</sup> reflects what the author has long been aware of and the need for a modern rethink on legal pedagogy.

The majority of the teaching undertaken by the author is contract based and the emerging pedagogical picture for both law and non-law students studying contracts and contract law is the need for teaching and content to be updated and to connect with 'real life'.<sup>205</sup> This viewpoint has also been recently substantiated by E. Gharaie and D. Wingrove (2019)<sup>206</sup> when discussing students studying project management in the built environment *"... student engagement in their learning is salient in successful teaching of the course. it is essential that learning is embedded in a cycle of knowledge acquisition with opportunities for students to apply their learning in practice."*

<sup>203</sup> Page 58 "Design of Technology-Enhanced Learning: Integrating Research and Practice", 2017, Matt Bower, Emerald Publishing, "... that the sort of pedagogy adopted will influence the type of technology that is needed - for instance drill and practice tools for behaviourist pedagogies, online tutorials for cognitivist pedagogies, simulation tools for constructivist pedagogies and communication tools for social constructivist pedagogies."

<sup>204</sup> Pages 228-229 Chapter 16 "Contract law pedagogy, A new agenda" in "Reimagining Contract Law Pedagogy - A New Agenda for Teaching" 2019 and edited by Warren Swain and David Campbell, Routledge Publishing, "There isn't very much written on the pedagogy of law teaching. As long as eighty-five years ago, Joseph Beale made a plea to think more seriously about the teaching of the subject of law...Subsequent responses to Beale's plea have left us with still a lot to do. Within the itself fairly limited class of pedagogical literature about law, almost nothing has been specifically written on the subject of contract law."

<sup>205</sup> Preface to "Reimagining Contract Law Pedagogy - A New Agenda for Teaching" 2019 and edited by Warren Swain and David Campbell, Routledge Publishing, "The book engages with the major criticism of the standard contract course, which is too narrow and rarely engages with ordinary life, or at least ordinary contracts, and argues that students are left without vital knowledge"

<sup>206</sup> Page 201, Chapter 11 of Strategies for Effective Teaching in Project Management Ehsan Gharaie RMIT University, Australia Dallas Wingrove RMIT University, Australia "Reimagining Contract Law Pedagogy - A New Agenda for Teaching" 2019 and edited by Warren Swain and David Campbell, Routledge Publishing

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

W. Swain (2019)<sup>207</sup> also asserts a need for more innovative pedagogy in the teaching of 'black letter subjects' such as contract law<sup>208</sup>. W. Swain (2019)<sup>209</sup> paints a picture of the problems of learning law in isolation from commercial contract practice, "*Part of the problem is the way in which students are left without even a flavour of everyday commercial realities. This can make the subject feel remote and abstract...An account without context is incomplete.*" As discussed in Chapter 2 the author explained how she could see first-hand the 'reality' of the difficulties non-law students had in studying construction law and in applying legal principles to standard form construction contracts in 'real life' scenarios. There was an urgent need for more innovative pedagogy to be adopted by the author that could support students in this difficult learning journey but selecting the right TEL Tools to accommodate and support this for full and part-time students was not a straightforward alignment.

### 3.7.5 Blending traditional and student-centred pedagogical approaches for law delivery

M. Hogg (2019)<sup>210</sup> acknowledges that whilst the teaching of contract law has improved together with the accessibility of materials, improvements are needed in terms of students' negotiation and argumentation skills but at the same time not necessarily abandoning lectures and tutorials. This aligns with similar pedagogical approaches advocated in this research particularly with regards to Project 3 and the formative assessment negotiation and ADR exercises undertaken by built environment students in the USW Hydra Simulation Centre.

Further, more innovative pedagogy that enables students to construct their own knowledge drawing upon their own employment experiences is a key pedagogical approach adopted by many keen to stress a 'real world of work' connection. The majority of students that the author teaches are part-time who come with a significant blend of practical skills developed in the real world of the construction professional. Whilst discussing consumer law and how students' own experiences of consumer law can be harnessed R. Hyde (2019)<sup>211</sup> stresses the benefits of '*situational*' pedagogy; this approach can be highly valuable in enabling students to put themselves and their behaviour in the

<sup>207</sup> Page 5 "Rescuing Contract Law Pedagogy" 2019 by Warren Swain, "Reimagining Contract Law Pedagogy- A New Agenda for Teaching" 2019 and edited by Warren Swain and David Campbell, Routledge Publishing

<sup>208</sup> Page 5 [supra]

<sup>209</sup> Page 6 [supra]

<sup>210</sup> Page 18 "Agreement" in "Reimagining Contract Law Pedagogy- A New Agenda for Teaching" 2019 and edited by Warren Swain and David Campbell, Routledge Publishing, "...assuming that we are not to abandon the traditional teaching framework of lectures and tutorials, we need to find ways to continue to improve the practical negotiations skills and oral augmentation of students. One way to do this would be to use a contract scenario between specified imaginary parties as the basis for writing a course of tutorial problems."

<sup>211</sup> Page 99-101, Chapter 7 "Students as Consumers: Using student experiences to teach consumer contract law" in "Reimagining Contract Law Pedagogy- A New Agenda for Teaching" 2019 and edited by Warren Swain and David Campbell, Routledge Publishing, "First, it argues that students' own experiences within the landscape of consumer contract law, students can understand their own behaviour in the context of consumer law and contract law, leading to the awareness of the broad application of those laws...By using situated learning techniques as part of my consumer law teaching, the students engage with the academic learning of consumer law through their practice as consumers, and they come to appreciate how consumer contract law is constructed and performed by their activities in procuring goods and services, and dealing with issues that arise within their contractual relationships."

context of construction law and seeing how best they can meet ethical requirements of professional bodies.

The shift to constructivist learning should not see the lecturer disengage however but the role should encourage a facilitative learning approach, *"Though the emphasis is on the learner, constructivism does not dismiss the active role of the lecturer/teacher or the value of the expert knowledge. However, their roles now change to that of facilitator."*<sup>212</sup>

Pedagogy that places a premium on a student-centred learning approach can be key to a successful learning experience for large student cohorts at the learning coalface. L.M Lloyd (2019)<sup>213</sup> stress the value of an SCL approach which enables students to take responsibility for their own learning functioning autonomously because responsibility is on "the 'learned' *"to take explicit actions that will motivate and enhance student learning."*

E. Gharaie and D. Wingrove (2019)<sup>214</sup> also highlight the potential for purely didactic learning experiences where large lecture cohorts can lose students and undermine SCL and active learning, *"In higher education, the large classes are often delivered in lecture mode. As the literature attests, the large class lecture can present many challenges for educators, with the risk that students engage in a didactic learning experience, whereby a one-way transmission of knowledge negates opportunities for them to actively engage in learning."* It is here that TEL Tools can support teaching in this environment and connect with students via appropriate use of technology.

L.M. Lloyd (2019)<sup>215</sup> identifies 10 key terms associated with SCL which the author will review in relation to the three Projects because they strongly align with what the author seeks out in terms of evaluating how well the TEL Tools scaffold 'high-quality' provision and enabling a SCL environment to function and flourish.

### 3.7.6 Pedagogy that combines the traditional lecture with innovative pedagogy supported by TEL

The pedagogical models routinely adopted by the author combine a strong blend of traditional behaviourist pedagogical models (relying heavily on the traditional lecture) and more innovative models reflecting student centred, problem-based, collaborative learning. This approach aligns with how contract law teaching is taught in the wider academic community, *'It is possible to promote a formalist view of the subject but still regard context as playing an important role in*

<sup>212</sup> Page 7 [supra]

<sup>213</sup> Page 11 "Claiming Identity Through Redefined Teaching in Construction Programs Sherif Mostafa and Payam Rahnamayiezekavat 2019 ICI Global Publishing

<sup>214</sup> Page 197 Chapter 11 "Strategies for Effective Teaching in Project Management"

<sup>215</sup> Page 8 "Claiming Identity Through Redefined Teaching in Construction Programs Sherif Mostafa and Payam Rahnamayiezekavat 2019 ICI Global Publishing

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*pedagogy...Contract law is a subject that many students find dull; in part this is because of the way it is presented as a series of abstract rules. A law in action approach provides a valuable antidote"*<sup>216</sup>

UUK (2018)<sup>217</sup> acknowledge the premium placed on content knowledge with, '62% of employers rating it as one of the most important factors when recruiting graduates.' The importance of ensuring underlying relevant legal principles are firmly in place is stressed by Hyde (2019)<sup>218</sup> who argues that for socially constructed/constructed, 'situational' exercises to work effectively content is the bedrock. E. Gharai and D. Wingrove (2019)<sup>219</sup> explain that clever use of technology (more fully discussed in the context of Project 3) in large lecture spaces can support what happens here and reach students individually and in groups.

Other forms of TEL can equally support more traditional forms of pedagogy favoured by the author such as the lecture and have been recently reviewed in the summer 2019 and therefore represent a highly contemporary window on such TEL use. In discussing strategies for effective project management teaching E. Gharai and D. Wingrove (2019)<sup>220</sup> highlight the importance of proper use of tutorials to solve problem-based learning exercise with pedagogy shifting to focus on the student to take charge of learning and drawing upon the information in a formal lecture.

The importance of tutorials and seminars in reinforcing content messages from the traditional lecture is recognised as 'best practice' pedagogy. Running tutorials in a face to face, or online environment to solve problems collaboratively can be facilitated by using blogs, wikis, discussion board forums and online tutorials via software such as Collaborate Ultra. Whilst most institutions cannot run the one on one tutorial experience which David Gibson identifies as key to excellent teaching in Oxford University using TEL Tools can ensure that tutorials run effectively in 'real time' whether online or in a face to face setting.

---

<sup>216</sup> Pages 6-7 [supra]

<sup>217</sup> Page 8 "Solving Future Skills Challenges" 2018 Universities UK

<sup>218</sup> Page 102 [supra] "To ensure that the situated learning through which individuals become consumers supports student learning in consumer contract law it is necessary to ensure that the experience is tied to exposition of the relevant legal principles....for students of consumer law it is necessary to engage fully with the 'why' question - 'why can I do this' or 'why can I not do this'

<sup>219</sup> Page 197 Chapter 11 "Strategies for Effective Teaching in Project Management", "In the large lecture setting, technologies can help to foster a collaborative learning environment. These technologies can make real time formative feedback possible and create an engaging environment for learners. One of these technologies is Personal Response System (PRS) also known as Clickers."

<sup>220</sup> Page 208, Chapter 11 "Strategies for Effective Teaching in Project Management" Ehsan Gharai and Dallas Wingrove 2019 in "Claiming Identity Through Redefined Teaching in Construction Programs Sherif Mostafa and Payam Rahnamayiezekavat 2019 ICI Global Publishing, "The knowledge and skills introduced to the students in the lectures is reinforced and developed in the tutorials. Tutorials are run as problem-based learning exercises. These tutorials employ a different pedagogy to the lecture, where learning is more teacher guided."

### 3.7.7 The increasing importance of TEL to scaffold 'high-quality' provision for all students

R. Hyde (2019)<sup>221</sup> supports the use of technology in enhancing new and innovative pedagogical approaches for the teaching of law and his comments on the forms of technology capable of achieving this strongly align with the TEL Tools in the three Projects in this thesis.

This highly recent secondary data from leading professors in contract law support the use of similar TEL Tools on a wider scale in the teaching of contract law and could be said to 'independently authenticate' the findings in this thesis. There is a reservation on the part of this author in using social media communications technology which Hyde equally shares, and which was discussed in Chapter 1 with full explanation as to why social media communication tools were beyond the remit of this thesis.

The Socratic style with a modern twist (blending contemporary and traditional teaching methods from traditional lectures and smaller groups working on problem solving exercises) adopted by the author is facilitated by the technology that she has adopted. However, she agrees with the views of J. Viven-Wilsch (2019)<sup>222</sup> that where TEL is adopted it needs careful integration into the teaching and learning process and must justify its contribution and place in enhancing the student academic experience.

From the point of view of the student studying project management in the built environment E. Gharai and D. Wingrove (2019)<sup>223</sup> also reflect on the importance of tutorial exercises that connect with industry and it is advocated that the TEL Tools can facilitate this pedagogy for students however flexibly they chose to learn

<sup>221</sup> Page 99, chapter 7, [supra] "...virtual learning environments can be harnessed to provide opportunities for situated learning. By using e-tivities students can engage with both their own experiences of consumer and contract law and with the experiences of others... As asynchronous learning tools they allow students to engage in their own time, supplementing synchronous taught sessions"

<sup>222</sup> Page 190 Chapter 13 "Making use of new technology" 2019, Jessica Viven-Wilsch, in "Reimagining Contract Law Pedagogy- A New Agenda for Teaching" 2019 and edited by Warren Swain and David Campbell, Routledge Publishing, "Pre-class activities were once limited to readings and preparation of tutorials. Today, with the emergence of flipped classrooms, students can be asked to view videos and read materials prior to attending the lecture. During face to face interactions, the role of the lecturer is to facilitate understanding of content. The research on the use of technology in higher education shows that technology should be used but that it must be carefully designed and not overused. Done well, it can enhance the student experience both on and off campus. Not every student is a visual learner..."

Page 192 continued, "...Once students have engaged with material prior to class, it is important to build on this experience in class and not revert to a lecture format which is only delivering content...A lecturer can now show a question on the screen...the question will simultaneously appear...on the phone...It was often a multiple choice question, but sometimes was a short problem scenario...The question reached students who would not contribute for fear of being singled out...In engaging with the software, students can feel connected to the lecture even though the activity took place in a large theatre...Surveys have shown this to be a valuable tool.

<sup>223</sup> Page 209, Chapter 11 "Strategies for Effective Teaching in Project Management" Ehsan Gharai and Dallas Wingrove 2019 in "Claiming Identity Through Redefined Teaching in Construction Programs Sherif Mostafa and Payam Rahnamayezekavat 2019 ICI Global Publishing "The tutorial problem-based exercises are formative in their design. Students submit their solutions on a weekly basis and receive feedback a few days before the next lecture. The tutorial exercises provide a means by which new knowledge can be consolidated and then applied in practice. The tutorial questions give the students the opportunity to consolidate their learning and clarify their 'muddy points'. The tutorial sessions provide the opportunity for students to develop and extend their learning from the lecture. The students recognise the importance of the learning process designed and respond positively to this pedagogy."

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

The tools trialled by Viven-Wilsch<sup>224</sup> aligned with the 'polling' tools in this thesis to enhance and re-enforce student learning and vindicates this technology as a scaffold to 'high-quality' provision.

### 3.7.8 Pedagogy and learner autonomy

'E-learn' (2017)<sup>225</sup> rightly reminds us that it is the student who must ultimately take responsibility for their own learning. *"When individuals take control of their own learning, the amount of knowledge acquired can increase significantly, due to a general awareness of their strengths and weaknesses and ability to self-assess."* Clearly the student's own input and their accountability for their own education has a significant role to play in the proper performance of the SCTE. The judge in Siddiqui<sup>226</sup> acknowledged at paragraph 82 that students should assume a level of independence in their learning highlighting that 'spoon feeding' is to be avoided.

An important aspect of 'high-quality' provision is ensuring that students develop as '*autonomous learners*' and delivering on this also drives chosen pedagogy fostered by a community of learning where students feel motivated to engage whatever the mode of learning. This must be a key pedagogical message that is reflected in this thesis and importantly the extent to which the TEL Tools support this overriding requirement. C. Gutierrez-Bajos et al (2019)<sup>227</sup> stress the 'centrality' of the agent learner working in a 'knowledge building' environment that enables the autonomous learner to thrive. *"Today, pedagogy does not innovate by proposing new methods but by creating learning conditions conducive to the autonomy of learners..."*

Drawing on the research by Gutierrez-Bajos & Salmeron Peres (2015),<sup>228</sup> the authors point out how new educational technology can offer extended opportunities for knowledge building by students. An overview is set out below, but each category will be reviewed in more detail in the individual collaborative learning tools **Project 3** in Chapter 9. C. Gutierrez-Bajos et al (2019)<sup>229</sup> explain that, *"...the most noteworthy advantage of these technologies is that they expand the opportunities for*

<sup>224</sup> [supra] *"...A lecturer can now show a question on the screen...the question will simultaneously appear...on the phone...It was often a multiple choice question, but sometimes was a short problem scenario...The question reached students who would not contribute for fear of being singled out...In engaging with the software, students can feel connected to the lecture even though the activity took place in a large theatre...Surveys have shown this to be a valuable tool."*

<sup>225</sup> "The Secret to Life-Long Learning is Taking Responsibility for it" accessible at: <http://elearnmagazine.com/secret-life-long-learning-taking-responsibility/> and visited on 31<sup>st</sup> of September 2017.

<sup>226</sup> *"The expression 'spoon feeding' comes to mind which is hardly to be expected for an Oxford undergraduate degree...As Professor Washbrook said, Like all special subjects at the time, [the course] was designed to encourage students to study the set texts themselves in preparation for their examination and as part of their development as historians."*

<sup>227</sup> Page 41, Chapter 3 "A Review of Educational Innovation from a Knowledge-building Pedagogy Perspective" by C. Gutierrez-Bajos, J. Montejo-Gamez, A. E. Marin-Jemenez and Fatima Poza-Vilches in "The Future of Innovation and Technology in Education" 2019, Emerald studies in Higher Education.

<sup>228</sup> Extracted from page 45 of "The Future of Innovation and Technology in Education" 2019, Emerald studies in Higher Education.

<sup>229</sup> Page 45, Chapter 3 "A Review of Educational Innovation from a Knowledge-building Pedagogy Perspective" by C. Gutierrez-Bajos, J. Montejo-Gamez, A. E. Marin-Jemenez and Fatima Poza-Vilches in "The Future of Innovation and Technology in Education" 2019, Emerald studies in Higher Education.



**The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education**

*interaction, communication and learning, provided they are supported by a suitable pedagogical model...the integration of technology can only be fully understood when taking into account...knowledge of teachers about pedagogy and technology."*

<b>What are the opportunities that technology brings to improve educational quality and learner autonomy</b>	<b>Key aspects: of these tech tools to improve knowledge building by student and learner autonomy.</b>	<b>Relevant and applied in this thesis</b>
Facilitate opportunities to access information and knowledge	Students can easily access relevant information	<b>Projects 1/2/3</b>
Facilitate opportunities to communicate with each other	These technologies offer synchronous and /or asynchronous virtual environments	<b>Project 3</b>
Facilitate opportunities for collaboration and ...equi-distributed learning	Increased opportunities for increased feedback from everyone regardless of learning styles	<b>Project 3</b>
Facilitate opportunities to empower marginalised groups	The democratisation of technologies and access to information	<b>Projects 2 and 3</b>

**Table 7 Pedagogy and learner autonomy**

### 3.7.9 Pedagogy that fulfils a 'law in action' approach and meets the 'skill needs' of employers

The TEL Tools will need to demonstrate their true value as tools suited to the pedagogical job and primarily delivering high-quality provision providing students with the right blend of skills required for a 21<sup>st</sup> century workplace. As E. Gharai and D. Wingrove (2019)<sup>230</sup> stress, *"Preparing project management students for their future life and work requires actively developing and evidencing a suite of transferable skills and attributes These attributes include professional communication, critical thinking, collaborative problem solving, and critical reflective skills..."*

The skills needed by employers in the construction industry need to be taken on board throughout the learning process and teaching law should also be seen as key to enforcing these skills by using appropriate formative exercises that encourage students to work collaboratively to solve problems on an iterative basis. M.S. Stevens and J. E. Day (2019)<sup>231</sup> also supports iterative formative assessment.

The TEL Tools in the three Projects need to hold up to scrutiny in terms of their ability to further these skills and support graduates entering the 21<sup>st</sup> century workplace. S. Norton (2018)<sup>232</sup> equally reflects

<sup>230</sup> Page 197 Chapter 11 "Strategies for Effective Teaching in Project Management"

<sup>231</sup> Page 34 Chapter 2 A Construction Management Education Focus and Process Direction: The Power of Focusing on Four Outcomes Using Formative Teaching, Learning, and Assessment, Matthew Steele Stevens Jennifer E. Day "Claiming Identity Through Redefined Teaching in Construction Programs" 2019 by Sherif Mostafa and Payam Rahnamayizekavat, IGI Global Publishers, *"The formative process delivers those features that contractors want most in graduates: thoroughness, independence, steadiness, and integrity. It does this through iteration. The process is a continuous process throughout a semester. This is a long time to think and rethink thoroughly about the subject matter at hand."*

<sup>232</sup> "The keys to the curriculum: Creativity, Enterprise and Employability" 28<sup>th</sup> October 2018 accessible at: <https://www.advance-he.ac.uk/news-and-views/the-keys-to-the-curriculum-creativity-enterprise-and-employability>, Advance HE *"What has become more and more apparent to me is*

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

the points canvassed in relation to what a university education should provide with particular emphasis on employers as key stakeholders in higher education delivery,

These concerns need to be taken seriously given the importance of pedagogical discussions in this chapter that seeks to promote such skills and the opinions of employers who consider that such skills are vital in a rapidly changing employment environment.

## Top 10 skills

### in 2020

1. Complex Problem Solving
2. Critical Thinking
3. Creativity
4. People Management
5. Coordinating with Others
6. Emotional Intelligence
7. Judgment and Decision Making
8. Service Orientation
9. Negotiation
10. Cognitive Flexibility

### in 2015

1. Complex Problem Solving
2. Coordinating with Others
3. People Management
4. Critical Thinking
5. Negotiation
6. Quality Control
7. Service Orientation
8. Judgment and Decision Making
9. Active Listening
10. Creativity



Source: Future of Jobs Report, World Economic Forum

Figure 13: Top 10 skills in 2020

### 3.7.10 Final thoughts on appropriate pedagogy for teaching law for the built environment student

The importance of the interdisciplinary research undertaken here in the narrow confines of construction contract law and pedagogy for non-law, built environment students and its value beyond USW could be said to have been elevated by this recent research in 2019. W. Swain (2019)<sup>233</sup> states that, "Most modern students are digital natives<sup>234</sup> who are not merely comfortable with technology

*that there is a very real need for HE to provide increased opportunities for students to be creative: The world is changing fast and graduates are going to need to be creative in order to engage with this pace and growth, in particular around new technologies."*

<sup>233</sup> Pages 228-229 Chapter 16 "Contract law pedagogy, A new agenda" in "Reimagining Contract Law Pedagogy - A New Agenda for Teaching" 2019 and edited by Warren Swain and David Campbell, Routledge Publishing

<sup>234</sup> For an alternative viewpoint please see page 184 of "Reimagining Contract Law Pedagogy - A New Agenda for Teaching" 2019 and edited by Warren Swain and David Campbell, Routledge Publishing, J. Viven-Wiksch states, "Yet recent studies show that the digital native may be

*but have an expectation that it will be a central feature of the way they learn. This is not merely a question of the way that courses are delivered. Technology shapes the whole perspective about learning of the modern student.*" This underpins one aspect of this thesis and the importance of the TEL Tools to scaffold 'high-quality' provision when used appropriately. However, the bigger question relates to the pedagogy itself and whether the evidence as provided in this thesis can be academically and professionally respected and trusted and if indeed it contributes to original and independent knowledge.

The author hopes that in some small measure the work in this thesis which took up the challenge to look at the TEL Tools in terms of the extent to which they support chosen pedagogy (in relation to construction contract law and to a more limited extent business law) has enabled this 'almost nothing' vacuum on contract pedagogy to be a little fuller. Swain concludes that today's students see themselves as consumers and their teaching as a product but that we need to ensure that our pedagogy takes account of students but 'not a slave to them.'

### 3.7.11 The chosen pedagogical models underpinning this research

Having set out the arguments on the need for TEL to support chosen pedagogy the individual and combined contributions of the TEL Tools are overviewed in the table below. Table 8 containing the pedagogical models has been moved to **Appendix 4**. This research draws upon the research by Matt Bowers (2017)<sup>235</sup> and is applied in the context of this research and the individual TEL Tools comprising it. Being able to align individual TEL Tools and their ability to support chosen pedagogy is arguably ahead of its time delivering research that is contemporary with an enduring legacy. T.J. Dunn and M. Kennedy (2019)<sup>236</sup> record that, *'...the majority of UK institutions rely on forms of TEL such as online lecture slides and recordings, additional content posted online...course blogs, course-specific discussion forums and student-centred social media groups. The most commonly employed VLE-style of TEL make up the range of individual technologies...there is a need to assess (a) the individual contributions of specific components and most commonly employed TEL and (b) engagement with TEL as a whole.'*" This research goes one step further in 'spotlighting' these TEL technologies in a live pedagogical context where it is advocated their true value must be tested.

There is an overlap between primary and secondary data in this table which does not follow a typical traditional and 'pure' literature review, but the unique research journey here does not always allow

---

only a myth...and that students are not actually digital literate. While students may be familiar with social media, they are not necessarily versed in using technology in a professional setting."

<sup>235</sup> Extracts selected from "Design of Technology-Enhanced Learning" by Matt Bower 2017 published by Emerald Publishing – pages 36-53.

<sup>236</sup> "Technology-Enhanced Learning in Higher Education; Motivations, Engagement and Academic Achievement" 2019 by T. J. Dunn and M. Kennedy, Journal of Computers and Education 4<sup>th</sup> April 2019 page 106

for strict adherence to traditional thesis structure. The dedicated chapters will review in detail how each of the TEL Tools underpin chosen pedagogy and will capture the views of students and how they view these tools as supporting educational provision.

### 3.9 Conclusion

This chapter has justified that the combined definition of 'TEL' as 'education specific technologies' supported by the 2016 definition of 'TEL' by UCISA is suitable for use in this research. The chapter made out a strong case for the alignment between the TEL Tools in this narrow research and wider TEL use in the UK and wider academic communities. The case for and against the use of TEL in higher education was canvassed together with the concerns of those who consider that TEL in its many forms is undermining academic freedom and autonomy as well as potentially threatening high-quality provision. These discussions are important and are picked up subsequently in the dedicated Project chapters (7-9) where the individual TEL Project will be under scrutiny in relation to the same issues.

This chapter 'showcased' chosen pedagogy that enables knowledge transmission and acquisition to work in a learning environment that fosters key markers of 'high-quality' provision such as creativity, criticality and developing skills in team working (and working autonomously) and in collaboration with student peers as well as the development of problem-solving skills.

In conclusion, the author recounts the famous words of Bill Gates (2014) who arguably has more understanding than most of the value of technology and yet holds true to the belief that, *"Technology is just a tool. In terms of getting the kids working together and motivating them, the teacher is most important."* This is a clear message of support that puts technology firmly in its subsidiary place, following and supporting the chosen pedagogy as selected by the human teacher. More recently this has been confirmed with Anna Visvizi et al (2019)<sup>237</sup> advocating that, *'The effectiveness of teaching and learning processes enhanced by technology is a function of that relationship that develops between learners and the mentors... This is the greatest challenge inherent in education.'*

To test the true value of TEL Tools is to test them in their own live environment in which they are adopted and the extent to which they truly support the chosen pedagogy and scaffold 'high-quality' learning for students. This chapter has provided a strong foundation for subsequent

---

<sup>237</sup> Page 8 "The Future of Innovation and Technology in Education" Emerald Studies in Higher Education, Innovation and Technology, 2019 edited by Anna Visvizi, Miltiadis D. Lytras and Linda Daniela

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

dedicated chapters on the three Projects to interrogate the extent to which these TEL Tools deliver on the pedagogical messages outlined here.

The next chapter will build upon the secondary findings within this section and context 'TEL' in a new era of accountability in UK higher education and evaluate the extent to which TEL is effective in holding stakeholders to account for performing the SCTE.

## Postscript to Chapter 3

### 3A Connecting Law Provision in the Built Environment and the TEL Tools

The value of the TEL Tools in supporting chosen pedagogy for the teaching of law to non-law construction and engineering students necessitate reviewing what the sector and industry expects in terms of legal content knowledge supported by appropriate pedagogy. Establishing this will ensure an honest benchmarking exercise can take place connecting law provision in the USW built environment and relevance of the TEL Tools comprising the three projects in supporting this.

Teachers differ in their approach to pedagogy and whether *'teaching should be learning-focused instead of content-focused'*.<sup>238</sup> As the author has demonstrated she favours a combined approach for the teaching of law to non-law students but always in line with 'pedagogy first'<sup>239</sup> principles. The views of N. Baporikar and M. Sony (2019)<sup>240</sup> are important in emphasising that the educational service provision must also extend beyond content knowledge which quickly dates in a rapidly changing society. They confirm previous discussions in this thesis that arguably the most valuable skill for students (and relevant across disciplines) is, *'...to teach students how to learn and to think critically'* on the basis that these skills do not date and are lifelong skills. In the new pandemic era questions remain on how effective teaching can be in the online world. Effective use of technology will be at the heart of this, as captured by Sir Keith Burnett (2020)<sup>241</sup> who considers that exciting times lie ahead and reaching many more students in innovating ways. The latter will be paramount for students who are as keen in these pandemic days to avoid as Eve Alcott (2020)<sup>242</sup> calls it, *'Death by Powerpoint.'*

---

<sup>238</sup> "The effect of short online pedagogical training on university teachers' interpretations of teaching-learning situations" Page 680 Instructional Science (2019) Henna Vilppu, Ilona Södervik, Liisa Postaref, Mari Murtonen,

<sup>239</sup> Page 15 of "Guidance Building a Taxonomy for Digital Learning" 30<sup>th</sup> June 2020 by QAA which defined 'Pedagogy First' as *"An approach to the development of digital learning in which the pedagogical approaches to be taken in the delivery of the programme are placed at the forefront and regarded as a key driver in the programme development and design process."*

<sup>240</sup> Preface "Quality Management Principles and Policies in Higher Education (Advances in Higher Education and Professional Development)" 2019 by Neeta Baporikar and Michael Sony, Published by Information Science Reference

<sup>241</sup> "Teaching in the time of the coronavirus" by Sir Keith Burnett, 10<sup>th</sup> May 2020 who said, *"What a teacher must do is what we always did, to give an idea life. We must embed knowledge deeply using platforms that enable teacher and student to innovate together in this new world. And as I recognise the continuing centrality of teaching itself, my fears begin to diminish. And there is a stirring of possibility, even excitement, at who we might reach and how."* Accessible at: <https://www.timeshighereducation.com/blog/teaching-time-coronavirus>

<sup>242</sup> "How to protect students from death by Powepoint come September" by Eve Alcott, 7<sup>th</sup> May 2020, *"If lectures are the bread and butter of university then it's the people, the opportunities and the environment that provide the filling – turning something fairly unpalatable on its own, into something you want to pay for, and indulge in."* accessible at: [wolkhe.com/blogs-sus/how-to-protect-students-from-death-by-powerpoint-in-september/?doing\\_wp\\_cron=1593598541.9323880672454833984375](https://wolkhe.com/blogs-sus/how-to-protect-students-from-death-by-powerpoint-in-september/?doing_wp_cron=1593598541.9323880672454833984375)

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Legal content knowledge is highly regulated in terms of professional body requirements<sup>243</sup> and direction and guidance across the pedagogical mix in terms of the teaching, learning and assessment is provided in relevant QAA Subject Benchmark Statements.<sup>244</sup> A sample of what is expected in terms of learning teaching and assessment for construction students is extracted from the relevant construction QAA Subject Benchmark set out in **Table 3A (Appendix 3B)** and mapped against TEL Tools in the three projects. **Table 3B (Appendix 3B)** sets out a **sample** of the RICS mandatory ADR competencies required for students undertaking accredited RICS courses for project managers and quantity surveyors<sup>245</sup> and again how the TEL Tools support these elements of law provision. The legal input in these courses span many RICS competencies and only a sample is provided in **Table 3B**.

It is widely recognised that law schools have seen the demise of modules dedicated to construction law yet as P. Gerber (2010)<sup>246</sup> explains other university departments are including the study of construction law as part of their course portfolio whilst stressing the need to balance professional practice with skills in teaching.<sup>247</sup> The author has practised as a construction lawyer and has over 25 years teaching experience which she considers essential for appropriate selection of pedagogical models supported by the TEL Tools because as Gerber confirms, *"It is clear that the success of a construction law course depends on having it taught by someone who not only understands construction law, but also understands the pedagogical principles that underpin effective teaching."*

The author also concurs with Gerber that teaching construction law to non-lawyers requires a different approach particularly in terms of content knowledge<sup>248</sup> and that the aim is not to produce construction lawyers but construction practitioners who have sufficient construction law knowledge to sound the contractual safety alarm to their clients. Problem based questions and simulations are therefore highly appropriate and TEL Tools can be used to good effect in supporting this delivery. This

<sup>243</sup> RICS Requirements and Competencies guide August 2018; RICS Pathway guide Project Management August 2017; RICS Pathway guide Quantity Surveying and Construction August 2017; Joint Board of Moderators 2017 Guidelines for Developing Degree Programmes (ICE/CIHT/IHE/ISE) 2017.

<sup>244</sup>; QAA Subject Benchmark Statement Land, Construction, Real Estate and Surveying December 2019; QAA Subject Benchmark Statement Engineering October 2019

<sup>245</sup> RICS Chartered Pathway guide Quantity Surveying and Construction August 2018

<sup>246</sup> The Teaching of Construction Law and the Practice of Construction Law: Never the Twain Shall Meet?, 2010 Legal Education Review, Volume 20 Issue 1 *"The dearth of construction law courses in law schools is in stark contrast with the plethora of construction law offerings in the engineering, architecture and building faculties. It appears that universities are producing construction professionals who have an understanding of the law regulating their industry, but not lawyers who have the knowledge to advise and represent clients on construction-related issues."*

<sup>247</sup>The Teaching of Construction Law and the Practice of Construction Law: Never the Twain Shall Meet?, 2010 Legal Education Review, Volume 20 Issue 1 *"Overwhelmingly, the construction law offerings that are available within law schools are taught by practising lawyers, rather than fulltime academic staff. This can impact negatively on the effectiveness of the course. Although lawyers who practise in this area of law will know a lot about the subject matter, they may have given little thought to how to teach the subject effectively. Knowing how to teach is as important to the success of a subject as knowing the substantive content."*

<sup>248</sup>The Teaching of Construction Law and the Practice of Construction Law: Never the Twain Shall Meet?, 2010 Legal Education Review, Volume 20 Issue 1 *"The difference between teaching construction law to law students and teaching construction law to non-law students has been likened to the medical training that paramedics receive compared with the training that medical students receive. Paramedics need enough medical knowledge to be able to deliver first aid until a patient can be transferred to a doctor; builders, architects and engineers need to know just enough legal 'first aid' to effectively manage a crisis until a construction lawyer is engaged. However, construction lawyers, like doctors, need to have the expertise to fix the problem."*

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

view is also shared by U. QUAPP and K. HOLSCHEMACHER (2014)<sup>249</sup> in respect of teaching construction law to civil engineering and structural students acknowledging that they are not being trained as construction lawyers but developing skills in being able to recognise when legal support is needed. John Wevill (2018)<sup>250</sup> reminds architects not to advise clients on legal matters which lie beyond their expertise and to seek additional help when required. However, in discussing the case of *BL Holdings v Wood & Partners* (1980)<sup>251</sup> which confirmed that architects must have, '...enough knowledge of the relevant principles of law to protect their client from damage and loss' the architect was held to have failed in the duty to exercise reasonable skill and care in not advising the client on the correct planning permits needed. Whilst Wevill is discussing this in the context of qualified architects' legal content as part of the undergraduate or postgraduate provision is nonetheless highly important and needs to be both current and relevant.

### 3A.3 Summary

This section together with paragraphs 3.7.4, 3.77 and 3.79 demonstrate the importance of the TEL Tools in supporting chosen pedagogy across the pedagogical mix for the teaching on law to non-law students in the built and civil engineering environments.

132

---

<sup>249</sup>"THE IMPORTANCE OF CONSTRUCTION LAW TEACHING IN CIVIL AND STRUCTURAL ENGINEERING EDUCATION" 2014 by ULRIKE QUAPP and KLAUS HOLSCHEMACHER Faculty of Civil Engineering, Leipzig University of Applied Sciences, Leipzig, Germany accessible at: <https://www.researchgate.net/publication/280931761> "The conclusion is that courses in construction law are necessary to ensure graduates' employability and the qualification to work professionally. Legal pitfalls are lurking everywhere... But, many of legal problems can be solved or prevented if there is a civil or structural engineer who is able to see the risks and to decide whether legal advice is necessary or not. Civil or structural engineering graduates do not have to become construction law experts. It is sufficient to enable students to acknowledge the seriousness of a situation and to identify a problem. Students must learn to recognize the difference between a legal problem they can solve by themselves and a situation which requires professional legal advice. They should be able to understand legal terminology as well as relevant regulations, standards and codes. This enables the building industry to avoid claims for damages and to save money that they might have otherwise spent for unnecessary legal consulting."

<sup>250</sup> At page 4 of "Law in Practice, A RIBA Legal Handbook" 2018 by John Wevill, RIBA publishing.

<sup>251</sup> (1980) 12 BLR 1





## **chapter 4 - no. 10**

### **CHAPTER 4 – MINI LITERATURE REVIEW ON ACCOUNTABILITY**

## Chapter 4

### 4.1 Introduction and background

The central aim of this research is to evaluate how well the TEL Tools can evidence compliance by the three key stakeholders of their duties set out in the SCTE in a new era of 'accountability'. Achieving this aim rests on accurately defining 'accountability' as it applies within the narrow confines of this interdisciplinary research and specifically in relation to the SCTE. This chapter will explore what this new face of accountability looks like and what it means for the three stakeholders charged with performing the SCTE. To that end the chapter opens with a short history of accountability to evaluate what has changed that we can confidently talk about a new era of accountability in UK higher education.

The duties and responsibilities have been forensically itemised for each of the stakeholders in this chapter. Focussing on the roles and responsibilities of the key stakeholders is fundamental in the context of accountability because as Kirsty Williams (2017)<sup>252</sup> explains (albeit discussing accountability in schools but equally applicable to teachers in higher education), *"I want an accountability system that is fair ... This means, a system with clear roles and responsibilities, which promotes inclusion and equity, and recognises the value that is added by teachers in classrooms across the system."* Adding that, this does not mean *"going back to the days where we do not hold people accountable for their performance"*. An innovative accountability liability matrix (based on a RAG framework) has been specifically designed for this work and will be used to assess the liability (if any) of the relevant stakeholders in the event that they fail to fulfil expected accountability performance demands.

Accountability discussions in this 'local' research, focus on the performance duties of the stakeholders set out in the SCTE but with special attention given to delivering education that is of 'high-quality' at the classroom coalface. Accountability and delivering 'high-quality' academic provision are inextricably linked in this thesis and the special case study on 'high-quality' set out in Chapter 10 cannot be read in isolation from this important chapter on accountability.

The value of the TEL Tools as accountability tools to evidence compliance with duties set out in the SCTE is not without controversy. The chapter will balance the contrasting viewpoints between those who see TEL Tools as transparent tools capable of evidencing that duties have or have not been performed and those who question whether using TEL Tools as evidential/accountability tools have any place in higher education. Adopting the use of these TEL Tools in academic provision could be

---

<sup>252</sup> <https://www.iwa.wales/click/2017/09/squaring-circle-accountability/>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

seen as actively encouraging 'accountability by surveillance' and a culture of micro-management and monitoring performance of duties and responsibilities. D.G. Johnson and P.M. Regan (2014)<sup>253</sup> express the concerns of those who view accountability and surveillance negatively: "Recognising that surveillance involves accountability helps us to understand why individuals so often react negatively to surveillance."

#### 4.2 'Snap-shot' history of the accountability of the three stakeholders and the SCTE

There is a long 'accountability' history associated with the three stakeholders charged with performance of the SCTE and this chapter needs to address what has so fundamentally changed that we are entitled to talk in terms of 'new era of accountability' in this context. Only when reliable evidence has been presented that we are officially in a new era can an accurate definition of 'accountability' in this new era be provided for this local research. J. Huisman (2018)<sup>254</sup> states that, "The concept of 'accountability' has always been figured in higher education...academics and their institutions through time have had relationships with various stakeholders in which 'answerability' continuously played a role..."

An established and well documented message of accountability for HEIs at institutional level is provided by M. Klemencic (2015)<sup>255</sup>, 'Public universities are accountable for quality education not only to students but also to the state and other interested stakeholders, such as employers.' The accountability of academics acting on behalf of their HEI has an equally long history with academics being held accountable for the performance of their students as recounted by J. Sabapathy (2014)<sup>256</sup>: "In the early thirteenth century, Thomas of Chobham talked of masters' accountability at the Last Judgment for their teaching of students" P. J. Markie (1950)<sup>257</sup> stresses the accountability of academics to place teaching and teaching preparation as our top priority because when we, '...invite students to the university with the understanding that we will guide them to knowledge - so long as we are going to teach - we must prepare our classes so as to teach well...' We are all accountable in everything we do and no less for our responsibilities as academics to deliver a positive and meaningful learning experience for our students. Boven et al<sup>258</sup> (2014) writing about the accountability of the teaching profession stress that, "There is hardly any aspect of our lives that has not been touched by

<sup>253</sup> Page 6 of "Transparency and Surveillance as Societal Accountability: A House of Mirrors" 2014, Routledge Studies in Science, Technology and Society.

<sup>254</sup> "Accountability in Higher Education" 2018 by Jeroen Huisman under 'A' in the Encyclopaedia of International Higher Education Systems and institutions, Springer Publications

<sup>255</sup> On page 534, Manja Klemencic, The Palgrave International Handbook of Higher Education (2015) by Jeroen Huisman and Harry de Boer and David D Dill, published by AIAA

<sup>256</sup> Sabapathy (2014), John. Officers and Accountability in Medieval England 1170—1300 (Page 204). OUP Oxford. Kindle Edition.

<sup>257</sup> Page 39- [supra]

<sup>258</sup> Mark Bovens, Robert E. Goodin and Thomas Schillemans. The Oxford Handbook of Public Accountability (Oxford Handbooks) Kindle Locations 786-788). OUP Oxford. Kindle Edition.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*the growing obsession with accountability. Teachers are held accountable for the performance of their students..."*

There is no doubt that lecturers have always been required to accept their professional accountability to their students in the full knowledge that their employer will be vicariously liable to these students for this performance. S. Groundwater-Smith and N. Mockler (2009)<sup>259</sup> reinforce the message that, *"Teachers need to be accountable- primarily to their students, but also to their schools, colleagues and society more broadly- for what they do and how they do it."*

Luanna H. Meyer (2012)<sup>260</sup> warned that ignoring accountability was not an option for academics because, *"If universities are to continue to be perceived as adding value in educating the next generation and the scholars who will create and transmit new knowledge, academics have to engage with public demands for accountability."*

At the same time that we hear about medieval scholars being reminded of their duties to their students and avoiding unwelcome 'accountability' discussions in the afterlife, we are also reminded of the scholars' complaints about poor student performance and low student numbers (at the equivalent of something akin to today's university course board) and students not taking their studies sufficiently seriously or in today's terminology 'being accountable for their own learning', and spending too much time in the equivalent of today's student pub, *"The run of extant minutes appears to show each fellow speaking in turn... In April 1338, the principal complaint was that there were too few students and fellows. Students were racing about inns and eating-houses too. They would bring wine and drink it standing just on Merton's threshold—provocatively, presumably."*<sup>261</sup>

This very brief history of accountability as it applies to the three stakeholders charged with performing the SCTE shows that each of the three stakeholders have long been charged with accountability duties in relation to the SCTE and that these duties are well established. The following section will demonstrate why the author has chosen to focus accountability in this new era at the classroom coalface and the need for quality provision to happen here and to be seen to happen here. It could be argued that the author was ahead of her time with this research that was focussed from the outset on how the TEL Tools could leave a digital fingerprint of the entire activities of the classroom experience providing a transparent and 'tracked account' of what transpires here. The highly recent literature review that is set out below has been brought up to date at the time of thesis

<sup>259</sup> Page 60 of chapter 5 entitled, "Inquiry as a Framework for Professional Learning: Interrupting the Dominant Discourse" in Teacher Professional Learning in an Age of Compliance: Mind the Gap 2009, Springer Publishing

<sup>260</sup> "Negotiating Academic Values, Professorial Responsibilities and Expectations for Accountability in Today's University" hequ\_5 16 207.217

<sup>261</sup> Sabapathy (2014), John. Officers and Accountability in Medieval England 1170—1300 (Page 196). OUP Oxford. Kindle Edition.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

hand in and reflects a contemporary window on accountability at the classroom coalface. Key works have been underlined for ease of tracking and to justify what has fundamentally changed in this new era and the impact of this on the accountability duties of the three stakeholders.

#### 4.3 The turning of the accountability tide: the 'new' face of accountability in Higher Education

Jo Johnson,<sup>262</sup> then Universities Minister speaking in 2015 sparked a new 'accountability' conversation on the need for a 'transformed regulatory landscape' in HE, and said it was his government's goal to have a system that, "...explicitly champions the student, employer and taxpayer interest in ensuring value for their investment in education and requires transparency from providers so that they can be held accountable for it..." The vision of that transformed and regulated HE environment has emerged post TEF and HERA and speaking in July 2017<sup>263</sup>, the same University Minister was once again championing the student cause focussing on the importance of accountability in terms of the educational provision as a priority for students, "...the Act promotes value for money by improving the quality of teaching and incentivising universities to focus on graduate outcomes through the introduction of TEF... We will move towards subject-level information... it is our belief that a subject-level TEF can provide even better information to students and be an even more powerful driver quality and value... We want prospective students to make well-informed and meaningful choices between institutions offering innovative and flexible ways of learning..." Later that same year in September 2017 Jo Johnson delivered a speech specifically focused on accountability and entitled, 'Embracing Accountability and Promoting Value for Money in Higher Education' and made clear, that the new TEF system sets a new transparent standard designed to hold: '... universities to account for performance and value for money' Adding that the use of student contracts could also be used in making universities, 'do more to make themselves accountable to students through the systematic use of the kind of student contracts already used in various forms by a number of institutions.'

Liability for academic performance is on a vicarious basis with the institution carrying ultimate responsibility for proper performance by the academic. It is here that one senses a shifting mood amongst the public and regulators and captured by E. Hazelkorn et al (2018)<sup>264</sup> who stated that in relation to performance and responsibility for student learning the traditional focus, "... has concentrated on individual institutions, but increasingly performance-related deliberations have shifted to academic staff and professional staff and students... questions are now being asked more

<sup>262</sup> "Higher education: fulfilling our potential" 9<sup>th</sup> September 2015 <https://www.gov.uk/government/speeches/higher-education-fulfilling-our-potential> and accessed 24th July 2017

<sup>263</sup> "Delivering value for money for students and taxpayers" 20<sup>th</sup> July 2017 <https://www.gov.uk/government/speeches/jo-johnson-delivering-value-for-money-for-students-and-taxpayers> accessed 24th July 2017

<sup>264</sup> Page 6, Chapter 1 "Quality, performance and accountability: emergent challenges in the global era" in "Research Handbook on Quality, Performance and Accountability in Higher Education" edited by Ellen Hazelkorn, Hamish Coates and Alexander McCormick, 2018, Edward Elgar Publishing

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*broadly about academic staff. Controversially, it speaks to public perceptions about what academics do all day or all year, and thereby shifts responsibility for student learning onto academics...*"

Slowly but surely the sector was witnessing demands for academics to step forward and to account for what was happening in their classrooms and to demonstrate value to students for their expensive education. Robert Kelchen (2018)<sup>265</sup> whilst discussing accountability in the US reflects a message that was being equally picked up in the UK, '*...most accountability efforts in higher education have traditionally been at the institutional level, but program-level efforts are becoming more common.*'

This similar message on 'accountability' at a more local level in higher education in England is set out by Sam Gyimah MP (2018)<sup>266</sup> "*Subject-level TEF builds on the greater choice being made available to prospective students by letting them look behind provider-level ratings and access information about teaching quality for a specific subject.*"

The consultation on subject level TEF has concluded and the findings of the pilot studies were due for publication at the end of the summer in 2019 but the jury is still out in terms of how measuring performance at subject level can best be captured by metrics that are fit for this purpose. The message from the Department of Education in their '*Response to TEF Consultation at Subject-Level*' (2018)<sup>267</sup> provides evidence of more close scrutiny in relation to what is happening at subject level to enable students to make better informed judgments on what they can expect from their chosen course, "*The Government sees the movement to subject-level as an important development in TEF, ensuring that prospective students have information about a provider's teaching excellence and student outcomes in the subject they are looking to study...*"

Whilst the synoptic history of accountability dating back to Medieval times placed responsibility on the academic to deliver the educational provision there lacked any formal accountability consequences where answerability fell short. This same point is picked up by J. Huisman (2018)<sup>268</sup> who explains, "*What is relatively new is that the notion of 'accountability' is much more explicit on*

<sup>265</sup> Page 166 of "Accountability in Higher Education" by Robert Kelchen, Johns Hopkins University Press

<sup>266</sup> "New measure to tackle grade inflation at university: Government outlines plans to tackle grade inflation in its response to the subject-level TEF consultation." Sam Gyimah MP, 22<sup>nd</sup> October 2018 accessible at: <https://www.gov.uk/government/news/new-measure-to-tackle-grade-inflation-at-university>

<sup>267</sup> "Teaching Excellence and Student Outcomes Framework: subject level Government consultation response" October 2018 accessible at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1065860/Subject\\_TEF\\_Govt\\_Response\\_Final\\_v2.0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1065860/Subject_TEF_Govt_Response_Final_v2.0.pdf)

<sup>268</sup> "Accountability in Higher Education" 2018 by Jeroen Huisman under 'A' in the Encyclopaedia of International Higher Education Systems

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

stakeholders' agendas than in the past and that it appears that the balance between accountability and autonomy tilts quite often toward an over emphasis on accounting for performance."

The sector was being asked to ask questions of itself that demanded the delivery of 'high-quality' provision and being able to track this at the classroom coalface was becoming a priority. Institutional level TEF was deemed insufficient and new subject level TEF is soon to be introduced to better inform students in relation to what they can expect in terms of quality and teaching from their chosen courses. The spotlight was shifting with closer attention being focussed at the classroom coalface and delivery of high- quality programmes at course level. E. Hazelkorn (2018)<sup>269</sup> stresses the importance of 'quality' as a determinant evidential factor in the accountability of the HEI and their academics and that this is becoming a priority not just at national level but globally, *"With respect to higher education, a war-of-words has opened up in many countries...These issues speak to concerns about holding higher education accountable and responsible to the public for quality. It is about meeting the needs of students, society and government"*

Boland and Hazelkorn (2018)<sup>270</sup> also link accountability with quality and 'holding higher education accountable to the public for quality' whilst at the same time recognising that, *"... 'quality' is a complex term, and although widely used there is no agreed-upon definition or on how it should be measured, much less improved."* The special case study on high-quality in Chapter 10 sets out special common markers of high-quality that are intended to be used across the disciplines and the TEL Tools will be evaluated to assess their effectiveness in demonstrating that these markers of quality have been performed.

Sam Gyimah (2018)<sup>271</sup> was quick to deliver a speech entitled, *"A Revolution in Accountability"*<sup>272</sup> not long after his appointment as successor to Jo Johnson. In this speech Gyimah discussed the role of the new OfS recording that its powers are: *"...set out in statute as part of HERA. The OfS will set registration conditions on a wide range of matters including quality and standards... and will be able to hold providers to account against these."*

Chris Skidmore (2019)<sup>273</sup> the Universities Minister who replaced Sam Gyimah, speaking at the Royal Academy of Dramatic Art in January 2019 set out his vision for higher education and *'increased accountability'* stating that, *"The coming into effect of the Higher Education and Research Act in 2017*

<sup>269</sup> "The Accountability and Transparency Agenda: Emerging Issues in the Global Era" by Ellen Hazelkorn 2018 [file:///C:/Users/npjos/Documents/AAAAAAA%20PhD%20Write%20Up%20file%2024%20April%202017/Chapters%20for%20PhD/Transparency-Tools---impact-and-future-developments\\_Ellen-Hazelkorn.pdf](file:///C:/Users/npjos/Documents/AAAAAAA%20PhD%20Write%20Up%20file%2024%20April%202017/Chapters%20for%20PhD/Transparency-Tools---impact-and-future-developments_Ellen-Hazelkorn.pdf)  
Accessed on 23<sup>rd</sup> June

<sup>270</sup> "Public trust and accountability: a time of special challenge" 10<sup>th</sup> Feb 2018, WONKHE

<sup>271</sup> Universities Minister in the current Government 2018

<sup>272</sup> Accessible at: <https://www.gov.uk/government/speeches/a-revolution-in-accountability> and accessed on 30th March 2018.

<sup>273</sup> "Universities Minister sets vision for higher education" 29<sup>th</sup> January 2019 accessible at: <https://www.gov.uk/government/speeches/universities-minister-sets-vision-for-higher-education> and accessed 12th March 2019

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*means plenty of changes are still afoot... With these changes has come increased accountability. And it is now more important than ever that our higher education system delivers for students... It also means providing a first-rate student experience to ensure that all students ... receive a top-quality education and a fulfilling university experience that will enrich their lives and future careers."*

The Welsh Government is equally keen to stress the importance of enhanced accountability in post-compulsory education for higher education providers. Drawing on the findings of Professor Hazelkorn's Report in 2016<sup>274</sup> which considered that there is '*inadequate accountability*' in Wales and in a White Paper recommended measures to enhance *higher education accountability in Wales*. In summary, the authors of the report propose that in Wales<sup>275</sup> linking, '*funding to performance and learning outcomes would help strengthen institutional accountability.*'

As recently as May 2019 Jo Johnson was interviewed by Tess Kidney Bishop and Dr Catherine Haddon for the Institute for Government's Ministers Reflect Project<sup>276</sup> and his comments a few months before his reinstatement as Universities Minister (albeit for a short term) demonstrates a commitment to the accountability of HEIs for the provision of high-quality teaching.

*"The Higher Education and Research Act was probably the most significant bit of legislation for the sector in a generation. It created a new regulator in the Office for Students which was able, with the powers it would have under the legislation, to make universities much, much more accountable to students, in particular for the quality of teaching that they offered to students who, as I said, under the new system were paying £9,000+ a year for their tuition."*

On the 16<sup>th</sup> September 2019 the message on ensuring students receive high-quality education was reinforced by the new Education Secretary Rt. Hon Gavin Williamson CBE MP in a letter to the OfS reminding them of the need, '*...to continue to support the higher education sector to ensure a high-quality experience for all students, delivering excellent student outcomes and value for money.*'

Students too as stakeholders with their own performance duties required by the SCTE are sensing the winds of change and are keen to play their part in the new accountability movement and for their voices to be heard, messages from the US are being heard here and responded to. Students in America record their willingness to play a more active role in this new accountability movement in

<sup>274</sup> "Towards 2030: A Framework for Building a world class post-compulsory education system for Wales"  
<http://gov.wales/docs/dcells/publications/160310-hazelkorn-report-en.pdf> accessed 24th July 2017

<sup>275</sup> [https://consultations.gov.wales/sites/default/files/consultation\\_doc\\_files/170620\\_reformed\\_pcet\\_system\\_final\\_en.pdf](https://consultations.gov.wales/sites/default/files/consultation_doc_files/170620_reformed_pcet_system_final_en.pdf) accessed 24th July 2017

<sup>276</sup> Page 6 "Ministers Reflect Jo Johnson" 28<sup>th</sup> May 2019



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

HE<sup>277</sup> and the 'Young Invincibles' (2018)<sup>278</sup> in a report on accountability in HE from the student perspective stress: *'Contrary to negative stereotypes students see themselves as equally responsible for their success in higher education...*'

In Wales there is also mounting support reflected in the "Quality Assessment Framework for Wales" March 2018 for ensuring students are involved in their education maintaining that students should be: *"... integrated as partners in the design, implementation, monitoring and reviewing of processes to improve the quality of their education..."*

Today's students are equally reminded of their duties in relation to the SCTE and summarised in the recent 'Which' 2018 Report<sup>279</sup> as follows, *"As a student, you've also got responsibilities in return. This includes regularly attending scheduled teaching, submitting work on time and doing the required reading, paying your fees, taking and passing exams, or not exceeding a certain number of hours in a part-time job."*

The case for holding students accountable is strongly made by A. Tyler and M.J. Petrilli (2018)<sup>280</sup> whilst talking in the context of high school students they explain that students as stakeholders have, *'the biggest stake in their academic success'* but that whilst new technology in classrooms *'can personalize a student's experience and give them greater agency over their learning... students need to be held accountable for working hard and making progress... Students benefit from accountability, and, given the right circumstances, they choose it.'*

In higher education it is about managing student expectations and ensuring that opportunities and proper resources for all students however flexibly they choose to learn, are equally available which should facilitate engagement and enable 'real accountability for their studies'. However as Debbie McVittie (2019)<sup>281</sup> points out attention on student engagement sits uneasily with 'teaching quality' and 'value for money' and as most students equate value for money with good teaching there is an unease where there is lack of engagement by students, *"If students are determined to be*

<sup>277</sup> Defined by them as 'policies that measure and respond to higher education outcomes, generally referred to as accountability policy'

<sup>278</sup> "Maximizing Student Success, A Student Driven Platform for Higher Education Accountability" - 2018: accessible at: <https://younginvincibles.org/maximizing-student-success-student-driven-platform-higher-education-accountability/> and accessed 3<sup>rd</sup> January 2019

<sup>279</sup> <https://university.which.co.uk/advice/choosing-a-course/get-to-know-your-student-rights#yourresponsibilities>: WHICH UPDATE FOR STUDENTS 6<sup>th</sup> November 2018 and accessed 3<sup>rd</sup> January 2019

<sup>280</sup> "The case for holding students accountable how extrinsic motivation gets kids to work harder and learn more" 2018 by Adam Tyler and Michael J. Petrilli new technology in educationnext.org summer 2018

<sup>281</sup> "Higher Education Needs an Answer to the Value Question" 17<sup>th</sup> June 2019 <https://wonkhe.com/blogs/higher-education-needs-an-answer-to-the-value-question/> "Meanwhile, the most *reliable proxy* for educational gain we have – student engagement – has fallen out of favour, possibly because it does not fit the policy narrative of university accountability very well. On the face of it, it makes very little sense to base judgments of teaching quality on whether students themselves are showing up and putting the work in. Yet students that put in the effort to their learning will inevitably gain greater value from higher education than those that do not. Moreover, frequently the conversation about teaching excellence stalls at the barrier of student lack of interest. If students are determined to be "instrumentalist" and care most about getting the grade with as little effort as possible, can universities really be held accountable for that attitude?"

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*"instrumentalist" and care most about getting the grade with as little effort as possible, can universities really be held accountable for that attitude?"*

It seems that everywhere we turn 'accountability' is the new buzzword in higher education but the literature as set out above clearly demonstrates that accountability for high-quality education is now a priority and that the three stakeholders must share responsibility in meeting future challenges. This new era of accountability holding HEIs, academics and students to account for performance of their duties needs evidence that this is happening. As J. Huisman (2018)<sup>282</sup> explains, *'The evidence is however thin on whether accountability has increased quality...'* The question that this research seeks to establish is the extent to which the TEL Tools and the digital evidence generated by them can deliver on this increasing need for evidence of high-quality education at the classroom coalface because this demand for evidence will increase. If J. Huisman is right in his assertions that higher education is set to experience, *'Increased scrutiny...and that they will have to continue to explain their behaviour and performances, whether they like it or not and whether they agree with the quality and performance indicators'* then forewarned is forearmed.

#### 4.4 Defining accountability in interdisciplinary research in this new era

Wendy Nelson Espeland (2016)<sup>283</sup> articulates the difficulties in defining 'accountability' when set against an ever changing and fluid HE environment explaining that the problem with 'accountability' is that, *'The meaning and use of the term changes over time and with circumstance.'* It was therefore highly important to capture the current face of 'accountability' as it is operating in relation to the SCTE before it could be accurately defined here.

An accurate definition of 'accountability' as it applies in the narrow confines of this research set against the backdrop of the new era is provided by, The National Foundation for Education Research (2018)<sup>284</sup> who define 'accountability' in terms of 'high-quality education' and whilst the comments are related to non-tertiary education, they have an equal reach in higher education and highly applicable. Importantly the comments demonstrate the strong link between the two concepts especially where delivery happens, *"...we define accountability broadly as a government's mechanism for holding educational institutions to account for the delivery of high-quality education. The idea that the*

---

<sup>282</sup> [Supra]

<sup>283</sup> Espeland, Wendy Nelson. Engines of Anxiety: Academic Rankings, Reputation, and Accountability (Kindle Location 621). Russell Sage Foundation. Kindle Edition.

<sup>284</sup> "What Impact Does Accountability Have On Curriculum, Standards and Engagement In Education? A Literature Review" Report 2018 National Foundation for Educational Research (NFER) by Francis Brill, Hilary Grayson, Lisa Kuhn and Sharon O'Donnell. In the introduction the additional definition is highlighted, "Although there are many different definitions of accountability, in this review we define it broadly as a government's mechanism for holding education institutions to account for the delivery of high-quality education." Accessible at: <https://mail.google.com/mail/u/0/#inbox?Projector=1>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*practice of accountability can contribute directly to improvements in education is a powerful one that underpins policy."*

The Oxford English Dictionary (2015) defines the adjective, 'accountable' as: "responsible for your actions and expected to explain them." For the purposes of this research it will be essential to accurately stipulate what the required actions are that need to be performed by the three stakeholders if they are to properly explain and account for their performance of them. This will be particularly useful when expected levels of performance fall short. This chapter has forensically itemised the duties of each of the three stakeholders in the SCTE and these discussions are fully set out subsequently. The author considered if accountability is to have real value in this research being forensic on what the stakeholders had to account for and to whom is paramount. The research which will need to link an HEI's answerability to students and vice versa in relation to their respective obligations to be performed under the SCTE and their ability to account to each other and provide 'necessary answers' when proper performance is questioned.

The difficulties of alignment in interdisciplinary research across academic fields when dealing with complex issues such as 'accountability' are captured by Bovens et al (2014)<sup>285</sup>.

The idea of 'answerability' has a strong resonance with the work of Jeroen Huisman(2018)<sup>286</sup> who links 'legal accountability' as referring to 'forms of answerability laid down in legislation...' This is also a neat fit given the impact of legislation such as the Consumer Rights Act 2015, The Higher Education Research Act 2017 and the Equality Legislation that directly impacts on the SCTE and discussed in subsequent chapters.

There is no legal definition of 'accountability' in the Oxford Dictionary of Law (2015). This is not surprising because as Marios Costa (2016)<sup>287</sup> explains: '...From a legal point of view, there is no core statutory definition... it can mean different things to different people, and as such, the meaning of 'accountability' can change to cover a variety of processes and purposes.' This is problematic for this research which needs to find suitable and workable definition(s) that respect not just the pedagogical questions to be answered but also the legal ones. We are comforted to some extent in this challenge

---

<sup>285</sup> Mark Bovens, Robert E. Goodin and Thomas Schillemans. The Oxford Handbook of Public Accountability (Oxford Handbooks) (Kindle Locations 375-378). OUP Oxford. Kindle Edition, "... there is a bewildering array of approaches across the multitude of academic fields that concern themselves with accountability... The minimal conceptual consensus entails, first of all, that accountability is about providing answers; is about answerability towards others with a legitimate claim to demand an account. Accountability is then a relational concept, linking those who owe an account and those to whom it is owed."

<sup>286</sup> Page127, Chapter 10 "Accountability in higher education: different forms, functions and forums" in "Research Handbook on Quality, Performance and Accountability in Higher Education" edited by Ellen Hazelkorn, Hamish Coates and Alexander McCormick, 2018, Edward Elgar Publishing

<sup>287</sup> Costa, Marios. The Accountability Gap in EU law: Mind the Gap (Routledge Research in Constitutional Law) (Kindle Locations 588-595). Taylor and Francis. Kindle Edition.

## The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

by Bovens et al (2014)<sup>288</sup> who confirm that '*legal accountability*' is often equated with '*liability*' and put simply that "*In law, accountability is liability...*" The Oxford Dictionary of Law (2015) defines '*liability*' as '*a legal duty or obligation*' which reinforces the importance of being clear on the duties to be performed by the stakeholders. Key and important legal duties set out in the SCTE are discussed more fully in the following chapter and both chapters are designed to work in harmony.

### 4.5 Six approaches to accountability that impact on the SCTE

The Education Encyclopaedia<sup>289</sup> describes, '...six approaches to educational accountability, moral, professional, bureaucratic, political, market and legal' and to some extent all of these impact on the SCTE and the roles to be performed by each of the key stakeholders pursuant to the SCTE.

#### 4.5.1 Moral accountability and the SCTE

With regards to '*moral accountability*', this attaches more to the student than any other stakeholder because of the difficulty in bringing successful legal actions against students for breaches by them of the SCTE. In the RAG accountability liability matrix set out below a **RED** signal represents 'STOP' in terms of pursuing legal redress for breach of duty. Students could be considered as having *moral* responsibilities to fellow students and their lecturers to perform their academic duties. Students must share in their responsibilities to be accountable for their own learning and 'moral' accountability to their student peers as partners and indeed their lecturers in their learning journey.

Holding students to account for their duties to perform the SCTE is problematic but tracking this will become important in the future particularly where there has been lack of engagement by the student. This was relevant in the recent case of **Siddiqui v University of Oxford** [2018] and at paragraph 118 of the judgment it is recorded that: "*As Professor Washbrook observed, the quality of the tuition received is a part of what goes into producing a student's result, but only a part.*"

Julie-Anne Regan (2012)<sup>290</sup> argues that the relationship between student and HEI does not always need to have a focus on a consumer contractual arrangement. Regan advocates that focussing on the

<sup>288</sup> Mark Bovens, Robert E. Goodin and Thomas Schillemans. The Oxford Handbook of Public Accountability (Oxford Handbooks) (Kindle Locations 5314-5315). OUP Oxford. Kindle Edition

<sup>289</sup> "Educational Accountability – Moral and Professional Accountability, Bureaucratic Accountability, Political Accountability, Market Accountability, Legal Accountability, Standards and Assessment" accessible at: <https://education.stateuniversity.com/pages/1931/Educational-Accountability.html> and accessed 20<sup>th</sup> March 2019.

<sup>290</sup> "The Role Obligations of Students and Lecturers in Higher Education" Journal of Philosophy of Education, Vol 46, Issue 1 pages 14-24, Wiley Online Library

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

'moral role obligations' rather than 'legal role obligations' of students and their lecturers offers an: "alternative view that recognises that both students and lecturers have moral obligations to one another...these moral role obligations are derived from the functions of the roles being voluntarily undertaken by each party." Regan also advocates an approach of this nature 'using moral role obligations as a basis for the student/lecture relationship offers a less contentious alternative to the consumerist model' arguing that, "Their role as a student in higher education places upon them a moral obligation to fulfil their function well."

J. J Rivera et al, (2019)<sup>291</sup> articulate the importance of the syllabus and ensuring that students understand what is required of them in relation to their studies and even in some contexts considered as a 'contract'.

The importance of understanding their duties as students is reinforced by the authors who suggest that students should adopt a 'real world practice' where they are treated akin to employees and sign to confirm that they have read and understood the requirements of their job and rules set out in the employee handbook. The author also concurs that enabling students to fully understand their duties is vital and their duties are fully and forensically itemised below.

#### 4.5.2 Professional accountability and the SCTE

'Professional accountability' is best linked to the academic who, acting on behalf of the university carries significant professional responsibilities that need to be performed to ensure promised module delivery and assessment requirements are met. Under the RAG accountability liability matrix many of these duties are **AMBER** because whilst liability is established it is difficult to pursue the academic who is acting on behalf of his employer HEI and further because many of his duties fall within the remit of 'academic judgment' and therefore can be immune from liability in respect of their breach.

However, greater understanding of the role of the university lecturer with regards to, teaching duties and responsibilities and placing 'students at the heart of their learning' should always demand the utmost respect by academics charged with teaching duties. We can't all be excellent communicators, but we can all strive to perform better in this role by better understanding of the role itself. The words of Peter J. Markie (1950)<sup>292</sup> are worthy of record here as he shares his vision on how an

<sup>291</sup> Page 66 Chapter 5 "Reinforcing Responsible Learning: Acknowledgement of Syllabus and Course Requirements" 2019 John J Rivera, Richard S. Colfax and Joann C.E. Diego, Published Feb 2019 by IGI Global Publishing, "The syllabus is generally expected to identify the requirements and expectations of the specific course that is being taken. The syllabus further identifies materials that will be utilised such as textbooks and handouts. More and more, the syllabus identifies the electronic tools and media that may be used in a course...In some cases the syllabus has even been identified as a 'contract' between the student and the instructor..."

<sup>292</sup> Pages 3 and 4, Chapter 1 of "Professor's Duties, Ethical Issues in College Teaching", 1950 Rowman & Littlefield Publishers, Inc

## The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

academic should approach teaching and the importance of understanding the role. The text summarises what 'teaching' embodies and is timeless.<sup>293</sup>

### 4.5.3 Bureaucratic accountability and the SCTE

The Oxford Dictionary of Education (2015) defines 'accountability' with an emphasis at institutional level: "Educational institutions, in the persons of their managers and governing bodies, are required to account publicly ...through such means as performance indicators and league tables. This is termed 'accountability'." Accountability at this level it could be argued is, "...anchored in the mundane yet important practice of record-keeping and gives rise to story-telling in a context of social (power) relations within which enforcement of standards and the fulfilment of obligations is a reasonable expectation."<sup>294</sup> This form of accountability especially at subject level TEF will be highly important for the student to check and confirm that the HEI is offering the right educational service for the relevant student. It is therefore highly relevant to the SCTE and for the student to be able to hold the HEI to account for promises made and also contained in the relevant TEF data.

### 4.5.4 Political accountability and the SCTE

This chapter set out in some detail the 'tracked' political message coming from government on the need for education that is of high-quality and happening where it matters most to students, at the classroom coalface. The relevance of this political message and its impact on the accountability of the three stakeholders was made out in detail here and drove the ushering in of a new era in accountability in higher education and highly relevant to the SCTE.

### 4.5.5 Market ACCOUNTABILITY and the SCTE

The marketisation of higher education, where the market drives competition between providers will also drive 'market accountability' to meet the demands of this competitive higher education marketplace. What the next chapter shall also deal with is the importance of ensuring and being held accountable for honest, accurate and transparent marketing content and advertising of courses for students.

---

<sup>293</sup> "Professors teach, and the verb is transitive...To teach isn't just to present the subject to the students...Teaching produces knowledge, and knowledge is true belief based upon good reasons. To teach is to guide students through the course material in such a way that they come to form a series of rationally based true beliefs with regard to it. Guiding students to this goal entails mapping out the best way to proceed, directing their attention to the most important details, helping them to develop the skills necessary to progress, and assisting those who need help...To be the professor for a course is to be the certifier of student's knowledge and ability...Finally, to be a professor is to be engaged actively in one's intellectual discipline in a way that supports one's teaching..."

<sup>294</sup> Mark Bovens, Robert E. Goodin and Thomas Schillemans. The Oxford Handbook of Public Accountability (Oxford Handbooks) (Kindle locations 273-276). OUP Oxford. Kindle Edition.

#### 4.5.6 Legal accountability and the SCTE

J. Huisman (2018)<sup>295</sup> state that '*legal accountability*' equates to, '*...a more direct and explicit answerability relationship.*' The next chapter will explicitly address key legal obligation and duties that the three stakeholders are required to discharge in terms of the SCTE where accountability is firmly rooted in a formal contractual accountability context between HEI and student.

Viewing accountability through a 'wide' lens such as that articulated above but strictly within the confines of the SCTE has enabled accountability to be showcased from six key angles and the impact on the SCTE.

#### 4.6 TEL Tools as accountability and evidential tools

The changing landscape of accountability in this new era is equally matched by demands for credible evidence that accountability requirements are being met. This increasing demand for '*inside local evidence*' is reflected at paragraph 35 of the 'Value for Money' House of Commons Report in discussing the next phase of TEF at subject-level to give students the information they need about the course to be studied and to better inform their decision making.<sup>296</sup>

A similar message is provided by D. Palfreyman (2019)<sup>297</sup> ) raises concerns that despite the myriad of stakeholders and regulatory bodies charged with monitoring and enforcing quality and standards in UK higher education that they have, drawing on the opinion of Land and Gordon, '*failed to prevent a perceived secular decline in the quantum and quality of undergraduate teaching in relation to exactly what happens in the **chalk-face**, in the lecture theatre and in the seminar room on a daily basis.*'

The demand for 'authentic' data as generated by the TEL Tools in this research might be more confidently relied on as a 'window' into the classroom for students where teaching and learning can be judged first- hand by students prior to selecting their HEI on a '*try before you buy*' basis. The accuracy and the reliability of the information delivered by an HEI in enabling students to form decisions which will have an impact for the rest of their lives, and HEIs must be held to account for the accuracy of this content.

<sup>295</sup> Page 2 "Accountability in Higher Education" 2018 [supra]

<sup>296</sup> Paragraph 35 "Dame Janet Beer explained why she hopes the subject-level TEF will be helpful for students: a student does not apply to the university in order to study philosophy, physics, English or chemistry. They apply for English at five different ones, so the only meaningful comparison for them is at the subject level, not the institutional level. Universities are big, complex organisations, and subjects and courses are different within that. I do hope that when we get to subject-level TEF, it is truly useful for students in terms of making that all-important decision about what kind of degree is going to suit them in the subject that they want to study."

<sup>297</sup> Page 201 "Regulating higher education markets" located in "Governing Higher Education Today: International Perspectives" 2019 edited by Tony Strike, Jonathan Nicholls and John Rushforth, Routledge Publishing, David Palfreyman (2019) raises concerns that despite the myriad of stakeholders and regulatory bodies charged with monitoring and enforcing quality and standards in UK higher education that they have, drawing on the opinion of Land and Gordon, '*failed to prevent a perceived secular decline in the quantum and quality of undergraduate teaching in relation to exactly what happens in the **chalk-face**, in the lecture theatre and in the seminar room on a daily basis.*'

#### 4.7 The value of the TEL Tools as accountability tools

In answering the question, 'What are Accountability Technologies?' Oludotun Babayemi (2018)<sup>298</sup> confirms that, *"Accountability technologies are communication technologies...Among communication technologies are Print, Radio, Mobile Phones, WhatsApp, Facebook and Twitter. These technologies help to share and interpret data, strengthen citizen voices, facilitate social cohesion and support direct citizen participation in democratic process."*

'Accountability Technologies' for the purposes of this thesis have similar properties as the social media tools listed above but designed to meet an educational brief. Social media tools are routinely used in providing evidence in court of what was said or done and as N. Antoniou and E. Scarlett (2018)<sup>299</sup> speaking about the evidential value of social media communications stress: *"Messages and media on WhatsApp, Snapchat and the like, have been used in evidence to show that defendants have committed offences...."* The same TEL Tools it could be argued have the same evidential properties and could be used to good evidential effect in proving or disproving whether students had received education as promised enabling the transparent tracking and accountability of HEIs and academics. N. Antoniou and E. Scarlett (2018)<sup>300</sup> also explain *"... it's important to remember that the technology of today that is used to encrypt and protect our communications, may be no match for the technology of next week... revealing past thoughts and opinions to the world"*

#### 4.8 Balancing accountability and autonomy

It is clear that 'accountability' as a term in HE in England and Wales must be carefully and accurately defined whilst setting out clear parameters of remit and context. USW's own Chancellor Dr Rowan Williams (2017)<sup>301</sup> best sums up the tensions facing HEIs in this unrelenting quest for accountability. When asked what Dr Williams would try and achieve if he were HE Minister for a day for the 'He and Me' column in the Times Higher Education weekly magazine he said: *"I'd want to ask some serious questions about how you preserve the genuine independence of universities and how you devise a system of accountability that takes seriously the professionalism of people working in the system."*

<sup>298</sup> Page 12 of "Accountability Technologies", 2018, Lambert Academic Publishing

<sup>299</sup> "Social media in court: your tweets could be used as evidence against you" 2018 accessible at <https://theconversation.com/social-media-in-court-your-tweets-could-be-used-as-evidence-against-you-97739> and accessed 13th March 2019

<sup>300</sup> "Social media in court: your tweets could be used as evidence against you" 2018 accessible at <https://theconversation.com/social-media-in-court-your-tweets-could-be-used-as-evidence-against-you-97739> and accessed 13th March 2019

<sup>301</sup> THE: 13-19 April 2017 no 2,301



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

The author recognises the tension for academia when terms such as 'accountability' are used in a legal compliance sense as opposed to improvement and perhaps best conveyed in the simple words of Daniel H Pink (2015)<sup>302</sup>, *"Control leads to compliance; autonomy leads to engagement."*

#### 4.9 Guide to the forensic itemisation of the duties and obligations of the three stakeholders

There now follows a forensic itemisation of the duties and obligations which each of the stakeholders are required to perform and to be held accountable for in relation to the SCTE. The duties are not exhaustive and specific disciplines will have specific additional duties to include in this package. The duties set out below are intended to be a minimum in evidencing key markers for 'high-quality' tuition and contractual compliance. Advocating these duties in this way is new research and an important 'window' for all stakeholders to understand their roles and should encourage greater responsibility and 'accountability' for them. The focus is very much bottoms-up but has shared and reciprocal elements of the so called 'two-way or STAR accountability model' as designed and advocated by Vijay Grover (2014)<sup>303</sup> who states that it is difficult to hold actors accountable in education due to lack of 'performance indicators.'

The accountability models as designed by Vijay Grover<sup>304</sup> demonstrate that accountability can best be achieved when matters such as clear demarcation of duties are defined and set out well. This captures the essence of the forensic itemisation of the duties of the HEI, academic and student set out below and supported by the RAG Accountability Liability Matrix.

Grover also adds that tracking accountability is best obtained where compliance technology is adopted stating that, *"... technology is the easiest way to enforce accountability. Use of electronic mail for giving and receiving information, electronic or even online attendance, CCTV cameras, creating database, and use of interactive (web 2.0 technologies) are some of technology measures an institution should practice."*

---

<sup>302</sup> Chapter 1 "From compliance to ownership" by Stanley O. Ikenberry and George D Kuh in the Jossey Bass publication entitled, "Using Evidence of Student Learning to Improve Higher Education" 2015

<sup>303</sup> "Top down versus bottoms up accountability: an analysis for implementation in educational institution" by Vijay Grover, 2014 in International Journal of Multidisciplinary Educational Research issn : 2277-7881; impact factor - 2.972; ic value:5.16 volume 3, issue 10(1), October 2014, *"Education system and institutions are service organizations which unlike product industries do not have specific indicators of performance, hence difficult to hold people accountable for consequences. There need be rigorous research work at local level to develop mechanism for making accountability acceptable and finally automated."* accessible at and updated in March 2016: [https://www.researchgate.net/publication/296846718\\_top\\_down\\_versus\\_bottoms\\_up\\_accountability\\_an\\_analysis\\_for\\_implementation\\_in\\_educational\\_institution](https://www.researchgate.net/publication/296846718_top_down_versus_bottoms_up_accountability_an_analysis_for_implementation_in_educational_institution)

<sup>304</sup> *"Defined powers and duties for a designation: accountability becomes a problem when powers and duties for a designation are ill defined. Powers calls for more accountability towards both up line and down line designations. Well defined powers and duties prevent misuse of power and dereliction of duties. "*

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

The technology compliance tools listed above are replicated by some of the TEL Tools in this research which will be under the evidential microscope in terms of how well they can evidence accountability and track performance of the three stakeholders responsible for discharging the SCTE.



Figure 14: Vijay Grover's Comparative Models of Accountability (2014)

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

#### 4.10 MINI HYPOTHESIS:

A simple hypothesis was established as follows for this element of the research to rate the enforceability of accountability duties when they are not fulfilled. These are more appropriately illustrated in the diagram entitled, **"The Accountability Liability Matrix"** set out on the next page.

Mini hypothesis - the duties and obligations that STUDENTS will be held accountable for will fall into the RED category or the SOFT accountability category possibly at moral accountability level and difficult to enforce in the event of non-compliance.

Mini hypothesis - the duties and obligations that ACADEMICS will be held accountable for will fall into the ORANGE category or the MEDIUM accountability category and whilst liability might be established enforceability will present greater problems.

Mini hypothesis - the duties and obligations that HEIS will be held accountable for will fall into the green category or the HARD accountability category leading to legal enforceability and appropriate remedies for breach.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

The value of technology enhanced learning (TEL) in evidencing compliance with the 'student contract to educate' (SCTE) in the new era of accountability in UK higher education.

**ACCOUNTABILITY "LIABILITY RATINGS MATRIX" RELEVANT TO THE SCTE: TRAFFIC LIGHT APPROACH or "RAG" SYSTEM: RED AMBER GREEN**

The matrix is designed to distinguish between legal and non-legal duties of accountability. A sliding scale of remedies are available ranging from non-performance of moral accountability duties (**SOFT**) attracting zero legal remedies to breach of contractual accountability duties (**HARD**) which trigger a range of legally enforceable remedies. (**AMBER**) sits in the middle reflecting difficulty of successful outcome in court.

**Soft accountability:** duties and responsibilities which reflect zero or little legal remedy if these duties are not performed by the relevant stakeholders. **STOP- NO GO ON PURSUING LEGAL REDRESS.**

**Medium accountability:** duties and responsibilities that carry legal consequences if breached but pose difficulties in successfully bringing an action in court and establishing a causative link in relation to the legal claim. **AMBER- WAITING FOR GREEN LIGHT BUT NO CERTAINTY OF MOVING OFF.**

**Hard accountability liabilities:** reflect contractual obligations and remedies that are fully enforceable in court. They can include liability in contract and in the tort of negligence. **GREEN – GOOD TO GO AND PURSUE LEGAL REDRESS.**

SOFT ACCOUNTABILITY IN SCTE		MEDIUM ACCOUNTABILITY IN SCTE		HARD ACCOUNTABILITY IN SCTE	
Moral and ethical responsibilities with no legal redress if not performed	Responsibilities under SCTE with little if any legal enforceability	Duties under the SCTE which may or may not be enforceable	Duties that are enforceable but difficult to establish causation.	Duties and contractual obligations which are enforceable.	Enforceable liability both for contract and tort of negligence. Can also attract criminal liability.
<b>EXAMPLE OF THIS FORM OF ACCOUNTABILITY</b>	<b>EXAMPLE OF THIS FORM OF ACCOUNTABILITY</b>	<b>EXAMPLE OF THIS FORM OF ACCOUNTABILITY</b>	<b>EXAMPLE OF THIS FORM OF ACCOUNTABILITY</b>	<b>EXAMPLE OF THIS FORM OF ACCOUNTABILITY</b>	<b>EXAMPLE OF THIS FORM OF ACCOUNTABILITY</b>
Duty to work as part of a team in group assignments and to work collaboratively. Morally and ethically students should work to support each other. In future years it is not inconceivable that students might challenge their institution for making them work with students who failed to pull their weight which resulted in subsequent reduction in marks and overall classification. Students are not in contract with other students and suing in tort would bring significant obstacles.	To engage with studies. Students should assume responsibility for their own learning and be accountable to themselves and others but difficult to see how this could be proven and enforced. It is possible to track student engagement online in Blackboard via tools such as 'performance dashboard' but this is not full-proof.	Challenging the grade awarded by HEI- generally this is beyond challenge due to 'academic judgement'. The HEI is under contractual duty to ensure marking is fair and equal and boards conducted anonymously but thereafter the grade will stand.	Alleged negligent teaching: will require expert evidence but very difficult to prove causative link between poor teaching and subsequent grade awarded.	Failure to provide the course as promised, contact hours, promised library and teaching facilities to support the learning experience. Such claims are challengeable via OIA and in court.	Failure to provide inclusive and accessible education for all students- discrimination against students with disabilities etc

Annie McCartney: student number:16128249

Figure 15 - RAG Accountability Liability Matrix

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

#### 4.11 A forensic itemisation of the HEI's duties and responsibilities relevant to the SCTE

Duties and Responsibilities of the HEI and relevant to the SCTE- forensic itemisation of key significant duties and responsibilities <sup>305</sup> .	Accountability LIABILITY RATING relevant to each of the duties and responsibilities of HEI	Relevant case law and or legislation
Duty to ensure that all information supplied pre-contract to the student is 'transparent' and clear to enable informed choice by the student of future course and choice of HEI.	<b>HARD</b>	Consumer Rights Act 2015 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 Consumer Protection (Amendment) Regulations 2014
Duty to provide details to students of course material, assessment details, learning outcomes, contact hours, tuition fees, mode and delivery of education service provision. Duty to provide a fair contract.	<b>HARD</b>	Consumer Rights Act 2015
Duty of care to student to ensure that the education standards of the educational service provision accords with reasonable skill and care standards.	<b>HARD</b> What constitutes 'reasonable skill and care' standards of provision is subsequently covered in detail in the following chapter and chapter 10.	Consumer Rights Act 2015 Faiz Siddiqui v University of Oxford [2018] Abramovich v Institute of Oxford Eckersley v Binnie
Duty to provide a high- quality educational provision that meets TEF quality standards ranging from GOLD SILVER OR BRONZE and or quality standards of QAA or other appropriate bodies to support quality assurance measures. Such duties will be further enhanced when TEF subject level metrics are introduced in 2020.	<b>SOFT TO MEDIUM</b> (TEF VOLUNTARY IN WALES) - The problems relating to 'standards' and 'quality' will be extensively reviewed in chapter 10 and indeed the implications of Faiz Siddiqui v University of Oxford.	HEIs will advertise the TEF badge achieved by them and the quality of learning subsequently experienced by students needs to match the advertising. However, highly subjective and difficult to measure quality of teaching. What is considered excellent teaching by one student may not be so received by other students.
Duty to ensure staff are skilled in their discipline and that the service provided reflects contemporary message.	<b>HARD (in part)</b>	Consumer Rights Act 2015 and Higher Education and Research Act 2017
Duty to provide an inclusive and accessible learning environment for all students and duty to make 'reasonable adjustments' for disabled students	<b>HARD</b>	Equality Rights Act 2010 and Equality Public Sector Duty 2014
Duty to provide an educational service that embraces innovative pedagogy	<b>MEDIUM- difficult to measure this.</b>	TEF encourages applications that highlight innovative technology adopted by the relevant HEI.
Duty to provide an educational service that is non-discriminatory	<b>HARD</b>	Equality Act 2010
Duty to provide an educational learning facilities/space that reflects promises made in prospectuses and at open days etc	<b>HARD</b>	Consumer Legislation set out above
Duty to adopt 'good faith' dealings with students	<b>HARD</b>	Consumer Rights Act 2015
Duty to provide teaching, learning and assessment strategies that embrace real world of work experience.	<b>MEDIUM- will relate to discipline.</b>	Need to meet the demands of QAA and quality bodies
Duty to provide a 'value for money' student academic experience	<b>MEDIUM- difficult to measure this</b>	HERA 2017 and TEF
Duty where digital content is provided as part of the education service to ensure it is of satisfactory quality and fit for purpose	<b>HARD plus, plus</b>	Consumer Rights Act 2015
Duty to provide fair and impartial internal processes for dealing with disputes regarding educational provision made by students.	<b>HARD</b>	Consumer Rights Act 2015
Responsible to ensure that programmes which are accredited by professional bodies reflect the requirements of the body and are delivered accordingly	<b>MEDIUM</b>	Partnership agreement between HEI and relevant body. The professional body has the option to end the agreement if they consider HEI not delivering programme as envisaged.
COPYRIGHT	<b>HARD</b>	The duties for the three stakeholders are set out in Appendix 4A and all three must comply with the CLA and the CDPA 1988

Table 9: The HEI's duties in relation to the SCTE

<sup>305</sup> It is important to differentiate between 'duty' and 'responsibility' in the context of the roles to be performed by the three stakeholders because e.g. the academic as a stakeholder is 'responsible' for performing the SCTE but is not in actual contract with the student. The Oxford Legal Dictionary (2015) on page 211 defines 'duty' as, "A legal requirement to carry out or refrain from carrying out any act" and in relation to the nouns the difference between 'duty' and 'responsibility' is expressed as follows, "duty is that which one is morally or legally obligated to do while responsibility is the state of being responsible, accountable, or answerable" and highly relevant in the context of immediate discussions. <https://wikidiff.com/duty/responsibility> Students and academics could equally view their duties to each other as 'moral' and discussed above in relation to the six criteria for accountability in the context of 'accountability' and the SCTE. Using both terms needs careful management particularly in the context of the SCTE. A recent Canadian Case, UKO ABARA, and THE IMMEDIATE FAMILY MEMBERS OF UKO ABARA AND: UNIVERSITY OF WINDSOR (and others) 2019 ONSC 2654 included individual lecturers as defendants with one Dr Li alleged to have failed to meet teaching standards due to failure to teach the course adequately and deal with computer labs. Whilst the court held that the issues fell to the university's own internal decision-making processes and within the remit of 'academic judgment' and instructed Mr Abara to utilise the university internal processes firstly for resolving his disputes the case does show a shift in the willingness of students to hold individual teachers liable to account for their actions.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

4.11.1 Duties and responsibilities of the **ACADEMIC**<sup>306</sup> relevant to the SCTE

Duties and Responsibilities of the <b>ACADEMIC</b> and relevant to the SCTE- forensic itemisation of each significant duty and responsibility.	Accountability <b>LIABILITY RATING</b> relevant to each of the duties and responsibilities of the <b>ACADEMIC</b>	Relevant case law and or legislation applicable to each of the duties and responsibilities of the <b>ACADEMIC</b>
Duty to provide the educational provision on behalf of the HEI in accordance with professional standards of reasonable skill and care.	<b>MEDIUM</b>	Academics do not have contracts with students but should respect the standards of the profession and behave ethically in carrying out their duties on behalf of their HEI. The standard for this duty is set out in Bolam and equates to professional skill and care. Eckersley v Binnie; Faiz Siddiqui v Oxford. Liability will also relate to the contract of employment between HEI and academic. The recent Canadian case of Abarro 2019 named individual lecturers in the action against Winchester University. (Chapter 10)
Duty to ensure the provision of education is up to date and current as well as being supported by contemporary reading lists and appropriate library materials and resources. Allied to this is the duty of the academic to keep up to date in discipline supported by his HEI being notified of requirements for additional training and support.	<b>MEDIUM</b>	Again, duties are of a professional nature and to ensure the proper materials are in place to support students in each academic year and that the library support staff are fully informed of academic requirements in each academic year. Faiz Siddiqui v Oxford- importance of up to date reading list.
Duty to ensure that the requirements of the module descriptor are fully adhered to and explained to students. Duty to meet assessment outcomes and requirements	<b>MEDIUM</b>	Duties to behave professionally and to be accountable to HEIs and students alike that promises made and delivered upon on behalf of the HEI are met to the extent they fall within the academic's remit.
Individual responsibility to be held to account for quality educational provision for students within academics remit commensurate with HEI's TEF badge at <b>institutional level</b> .	<b>SOFT TO MEDIUM (TEF voluntary in Wales)</b>	HEIs will advertise the TEF badge achieved by them and the quality of learning subsequently experienced by students needs to match the advertising. However, highly subjective and difficult to measure quality of teaching.
Individual responsibility to be held to account for quality educational provision for students within academics remit commensurate with HEI's TEF badge for the new <b>incoming SUBJECT level in 2020</b> .	<b>MEDIUM</b>	The spotlight will be more accurately focussed on the student's individual programme when the new TEF subject level metrics are introduced in 2020. The academic will be subject to enhanced accountability in relation to these new metrics.
Duty to engage in pedagogy that strives to include TEL and practice that is inclusive, collaborative and accessible for all students. Pedagogy that supports a digital platform that includes all students and is anti-discriminatory. Further, to play their part in ensuring modules reflect a real world of work experience.	<b>MEDIUM TO HARD</b>	Personal liability can ensue for an academic that fails to adopt professional practice that is inclusive for all. The Equality Act and discrimination legislation is highly relevant, and academics should fully appraise themselves of potential individual liability as a result of non-compliance with such legislation.
Duty to adhere to the assessment requirements of the module and to ensure that they are always inclusive and accessible for all students where possible (some disciplines make this difficult to always achieve). Provide ample opportunity for formative assessment. Ensure feedback on summative assessment is returned within the agreed timeline by the relevant HEI (sensible for this deadline to be reached in agreement with the student union).	<b>MEDIUM</b>	This is important both in terms of NSS and TEF at institutional and subject level metrics. The academic needs to play his or her part and be accountable for the modules that they are responsible for to support the HEI in its mission to achieve high scores in NSS and a TEF high quality teaching badge
Duty to mark fairly, independently and anonymously. Duty to adhere strictly to a HEI's policy on second marking and follow processes where two markers are significantly divergent. Duty to ensure clear and transparent marking schemes that can easily explain how marks have been arrived at. Duty to follow internal and external moderation policies of HEI and engage in transparent practice.	<b>HARD</b>	Due to judicial deference to 'academic judgment' this is the most important duty that an academic can perform because it is essentially allocated grade is beyond challenge. This duty must be performed in accordance with the highest ethical standards. Academics hold significant power which must be managed honestly transparently and fairly.

<sup>306</sup> The HEI will be vicariously liable for the performance of the academic's duties and responsibilities relevant to the teaching and learning experience of students under the SCTE. The employment contract between HEI and academic will of course have responsibilities and duties that may reflect the 'back to back' duties and responsibilities contained in the SCTE. However, should the academic fail to perform his professional obligations to a satisfactory standard under his contract with his HEI employer the disciplinary procedures will be activated aimed at supporting the academic to improve the quality of his performance. However, if progress in performance of professional teaching duties is not made this may ultimately lead to the academic's dismissal. To that end the academic's function in this contract is always on behalf of the HEI employer and will not carry direct legal responsibility to students but professional performance of the academic duties remains fundamental to the overall successful performance of this contract. It is for this reason that the duties fall into the **MEDIUM** accountability category because breaches of professional duties might end the employment contract between HEI and academic but that will generally be the end of the matter.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Duty to follow HEI policies on plagiarism detection, reporting cheating by students ensuring fairness and integrity in the HEIs procedures and being fair to all students who behave ethically.	MEDIUM TO HARD	High standards of ethics need to be demonstrated by academics regarding this duty.
Duty to ensure that the requirements of the professional bodies are fully reflected in the modules for which the academic is responsible.	MEDIUM	This partnership will be reflected in the partnership agreement between the HEI and the relevant professional body.
Duty to engage with industry and inform teaching with industry input in lectures plus, research informed teaching.	MEDIUM	For some disciplines require industry to be invited into classroom or attend site to put theory into practice.
COPYRIGHT	HARD	The duties for the three stakeholders are set out in Appendix 4A and all three must comply with the CLA and the CDPA 1988

Table 10: The academic's duties in relation to the SCTE

#### 4.11.2 Duties and responsibilities of the STUDENT relevant to the SCTE

Duties and Responsibilities of the STUDENT and relevant to the SCTE- forensic itemisation of each significant duty and responsibility.	Accountability LIABILITY RATING relevant to each of the duties and responsibilities of the STUDENT	Relevant case law and or legislation applicable to each of the duties and responsibilities of the STUDENT
Duty to pay tuition fees in relation to the SCTE in return for the provision of the education service delivered by their HEI.	HARD	Consumer Rights Act 2015
Duty to assume responsibility for own learning and seek support when it is required. Duty to fulfil the requirements of the programme and meet assessment deadlines and attend for examinations.	SOFT	The case of Faiz Siddiqui v Oxford University [2018] relevant as judge said Oxford students should not expect to be 'spoon-fed.' Student contracts currently in use invariably make this a contractual requirement for students.
Duty to attend lectures, tutorials, seminars and workshops.	SOFT	The level of accountability will reflect the HEI policy on whether attendance is compulsory. This becomes more difficult where provision is online and intended to be flexible. The accountability rating has conservatively been placed at <b>SOFT</b> .
Duty to engage with studies and be pro-active in learning	SOFT	Student engagement in studies key to a successful academic experience for students but difficult to measure but increasing use of 'engagement analytics' may help in tracking this but not full proof.
Duty to work collaboratively in teams when required and to support colleagues in their studies as appropriate.	SOFT	Students who work in teams and collaboratively more likely to be successful in their studies. However, this is difficult to enforce and may present future problems where students allege mark and overall grade reduced by being required to work in a team and team members failed to comply with their 'shared duties' in relation to the assessment.
Duty to ask for help when student requires support in their learning.	SOFT	Students need to be responsible to support themselves and provided HEI has provided student with all the information on the support services available at the HEI the student must take the initiative in seeking support.
Duty to advise HEI of any recognised disability to enable appropriate learning and 'reasonable adjustment' to be put in place relevant to studies and assessments.	SOFT	Help can only be provided to students when difficulties are communicated. Provided this message is communicated students must be pro-active in this.
Duty to assist the HEI in feedback and as partners in learning and to accept responsibility for ensuring how courses can be improved. Collaborative working between HEI and student needs to be underpinned by a strong partnership ethos.	SOFT	Students are at the centre of the learning process and their help and feedback is always to be encouraged and for students to see themselves as co-creators or PROSUMERS in their own learning.
Duty to follow HEI procedures for dealing with complaints in relation to educational provision and avoid time consuming and costly disputes which could have been avoided in proper processes followed by the student at earliest possible opportunity.	SOFT	Essentially this duty is a two-way process with the initial responsibility on the HEI to be clear on the process to be followed which should be clear, simple and accessible. Students retain the right to refer matters (but not those pertaining to matters of 'academic judgment') to the OIAHE.
Duty to engage in internal feedback and external feedback such as NSS	SOFT	This is very definitely a SOFT accountability duty with zero ramifications if not completed.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

COPYRIGHT	HARD	The duties for the three stakeholders are set out in Appendix 4A and all three must comply with the CLA and the CDPA 1988
-----------	------	---------------------------------------------------------------------------------------------------------------------------

Table 11: The student's duties in relation to the SCTE

#### 4.12 Check- up of the mini hypothesis: findings

At paragraph 4.10 the author set out a mini hypothesis designed to test whether accountability would be confirmed as hard for HEIs, medium for academics or if a soft approach to accountability would be appropriate for students. There is a check-up set out below and confirms the initial hypotheses.

Mini hypothesis check-up- Confirmed for HEIS that their accountability duties and responsibilities fall mainly into the HARD accountability category.

Mini hypothesis check-up- Confirmed for ACADEMICS that their accountability duties and responsibilities fall mainly into the MEDIUM accountability category.

Mini hypothesis check-up- Confirmed for STUDENTS that their accountability duties and responsibilities fall mainly into the SOFT accountability category.

#### 4.13 COPYRIGHT UPDATE ON STAKEHOLDER DUTIES AND SCTE – Please see Appendix 4A



#### 4.14 Conclusion:

This chapter has shone the spotlight on accountability where it matters most at the classroom coalface and confirmed that this shift in accountability has ushered in a new era for UK higher education. All three stakeholders need to be made fully aware of their duties and to accept responsibility for them. Approaching 'accountability' and 'high-quality' in the forensic manner adopted in this chapter and in Chapter 10 has produced valuable research for use across the disciplines and the author commends the discussions and findings to the sector.

The recurring problems of accountability will continue beyond this research and as E. Hazelkorn and Tim Boland (2018)<sup>307</sup> stress: *"To succeed, the academy must fight the undermining of public trust while delivering to its communities full and transparent accountability."*

The test for this research is the extent to which the TEL Tools and the evidence they generate are capable of providing this full and transparent accountability albeit at local 'classroom coalface' level. The TEL Tools in this research will need to stand up to subsequent scrutiny in this regard in the dedicated chapters for the three Projects.

In August 2018 a briefing was issued by Universities UK entitled, *"Student Contracts: Ensuring a Transparent and Accountable Relationship Between Universities and Students"* and at paragraph 12 of that briefing the following is recorded which goes to the heart of this research and the focus of accountability where it matters most at 'the classroom coalface'. The paragraph comes with the heading 'Principles of Good Practice': *"Student contracts play a role in ensuring a fair and accountable relationship between the student and their university. Students and their representatives should be able to use the contract to hold institutions to account if they do not receive what was promised, including through the OIA where necessary"*

This chapter has provided the necessary foundations for a seamless transmission to the next chapter dedicated to key contractual terms and conditions to be performed by the stakeholders in accordance with the SCTE. The two chapters and the chapter containing the special case study on 'high-quality' work in harmony and should not be viewed in isolation.

---

<sup>307</sup> Public trust and accountability: a time of special challenge, 7<sup>th</sup> February 2018 accessible at <https://wonkhe.com/blogs/public-trust-and-accountability-a-time-of-special-challenge/> and accessed 24<sup>th</sup> June 2018



## **chapter 5 - no. 11**

### **CHAPTER 5 – MINI LITERATURE REVIEW ON THE SCTE**

## Chapter 5

### 5.1 Introduction and background

This chapter establishes when formation of the SCTE<sup>308</sup> generally takes place for the contracting parties as well as providing a detailed analysis of selective contractual express and implied terms to be performed by the three stakeholders<sup>309</sup>. The chapter will also evaluate the extent to which these duties are legally enforceable and the legal remedies available in the event of their breach.

The chapter takes the opportunity to draw upon important case law from the UK construction industry and how key terms such as '*reasonable skill and care*' are best approached in relation to the SCTE as a '*service*' contract. The liability of the HEI '*service provider*' when providing '*digital content*' as part of the educational delivery is in accordance with '*strict liability*' standards that require to be '*fit for purpose*' and this complex legal term will also be fully investigated here. This element of the research will draw upon the '*unexpected*' judgments in recent case law from the construction industry and the problems of signing up to contracts that could potentially '*invalidate*' professional indemnity insurance cover.

The Office for Students (OfS)<sup>310</sup> was formed in January 2018 and its first task was to produce an industry wide standard form SCTE due for publication in late 2018. (This is still outstanding, October 2019). Calls for such an industry wide SCTE have long been requested. In 2016 David Palfreyman<sup>311</sup> made a strong case in support of their implementation<sup>312</sup> and persuading the then Universities Minister that such a contract is needed.<sup>313</sup> Pending production of an industry wide standard form SCTE this chapter will endeavour to review **key** clauses that combine to make up this SCTE because as

---

<sup>308</sup> The relevant consumer legislation in this thesis is the CRA 2015 which applies to contracts entered into on or after the 1<sup>st</sup> October 2015 and consolidates the Sale of Goods Act 1979, The Supply of Goods and Services Act 1982 and the Unfair Terms in Consumer Contract Regulations 1999. For Consumer Contracts entered into after 13<sup>th</sup> June 2014 the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 also apply. Information provided in relation to the main characteristics of the service to be provided is to be treated as a term of the contract.

<sup>309</sup> Other stakeholders are relevant to the successful performance of this contract such as HEI library and student support staff, employers and external accrediting and professional bodies and of course the general public who wish to ensure that taxpayer's money is being well spent. However, the chapter focuses on the university's core business of teaching, learning and assessment and how such responsibilities translate in this contract.

<sup>310</sup> <sup>310</sup> The new Office for Students comes into formal legal existence 1st January 2018 and as Jo Johnson states "This is a regulator that is going to be driving value for money in the provision of higher education. That's a core concern right now for students who are bearing the cost or a significant part of the cost of their higher education" recorded in article entitled, "Toby Young to lead government's new universities regulator" Guardian, Mon, January 1<sup>st</sup> 2018 and accessible at: <https://www.theguardian.com/education/2018/jan/01/toby-young-universities-regulator-office-for-students>

<sup>311</sup> "The TEF's time has come", Times Higher Education Supplement, THE, June 30 2016, David Palfreyman

<sup>312</sup> "This should incorporate as binding terms the representations made by a university to the applicant/student consumer...if the student had a contractual certainty over key aspects of teaching and assessment, much of the dissatisfaction with the value for money of undergraduate education could be addressed." Adding that such contracts would give universities less, "opportunity to hide the reality of their egregious neglect of the resourcing of it, the quality of teaching and learning would be improved."

<sup>313</sup> Page 24 "Regulation and the HEI-Student relationship- marketing, contracts and resolving complaints." 12<sup>th</sup> June 2018 Westminster Higher Education Forum.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Dame Julia Goodfellow<sup>314</sup> (2017) president of Universities UK points out students are already in contracts with their HEIs.<sup>315</sup>

The SCTE provides some legal privileges as distinct from other professional and consumer contracts because as David Palfreyman<sup>316</sup> (2014) reminds us academics retain a '*get out of jail card*'<sup>317</sup> in respect of matters of academic judgment. These permissible exclusions of liability are reviewed in this chapter and the difficulties in obtaining legal redress for breach of fundamental terms such as '*the delivery of teaching that is of high-quality*,' Questions are continuing to be asked about how long this privilege can continue when students are paying significant sums of money for their education and when their number one priority for selection of their HEI is '*teaching quality*'.

The key clauses of the SCTE that will be discussed in this chapter relate to '*reasonable skill and care*', '*fitness for purpose*' in relation to digital content, '*good faith*' and its application to the SCTE, and reasonable adjustments under Equality legislation. This shall provide a strong foundation for the supplementary chapter on 'high-quality' provision and the unending debate on quality and standards in higher education. These clauses were specifically selected as they are much misunderstood and recent case law and lessons from the construction industry could help to shed some light on how best to interpret and apply them to the SCTE. Being clear on the contents of this SCTE is important if disputes in respect of it are to be avoided. In a highly important report on construction disputes released in August 2019<sup>318</sup> it is recorded that the number one cause of disputes in the global construction industry is '*parties failing to understand and/or comply with contractual obligations*.' The chapter will also review additional duties that can arise in tortious negligence and in actions resulting from misrepresentations made prior to formal formation of the SCTE.

---

<sup>314</sup> "University contracts to let students sue", The Times, Friday 20<sup>th</sup> July 2017

<sup>315</sup> "All students have contracts with their HEIs. The sector has been responding to the advice of the Competition and Markets Authority to ensure that these are fair and transparent."

<sup>316</sup> "Reshaping the University: The Rise of the Regulated Market in Higher Education" by David Palfreyman and Ted Tapper, Published to Oxford Scholarship Online, chapter on "The Student as Consumer"

<sup>317</sup> "... for government seeking to enhance consumer protection for students...by way of its commitment to teaching, it is vital to recognise that, unique among all business suppliers of a service, universities possess a valuable get out of jail free card in the refusal of the courts to second-guess and review decisions based on the proper exercise of expert academic judgment ...in say, lecture content, assessment and marking or degree classification."

<sup>318</sup> Page 11 "Global Construction Disputes Report" 2019, by Arcadis

## 5.2 Valid formation of the SCTE and contractual concept of reciprocal obligations

The CMA<sup>319</sup> has produced a guide for HEIs on consumer law<sup>320</sup> concluding there are potentially two contracts which are relevant to students in terms of their contractual relationship with their HEI. The first relates to the offer of a place on a course, the second contract (which may be formed at enrolment) is more substantial and covers the provision of educational services itself. It is this second contract which is the subject of this work.

The SCTE must meet the same legal requirements for valid formation as any other contract.<sup>321</sup> A contract such as the SCTE is a collection of reciprocal or bilateral promises<sup>322</sup>, in this case promises made by both the relevant HEI and the student respectively. As Adam Kramer (2017)<sup>323</sup> reminds us the law of contract is, *"... a system of rules for enforcing promises or, more usually, requiring the payment of compensation for breaking them, and for shifting the risk of future or unknown events."*

As a reciprocal agreement the HEI and the student have contractual duties to perform and the academic will also be performing duties for and on behalf of the HEI. David Palfreyman (2017)<sup>324</sup> reminds us that the SCTE, *'...is a simple contractual relationship between the student and the university...governed by the CRA 2015 which delightfully refers to the supplier of the service, and the service is teaching and also assessment, examination leading possibly but not guaranteed to the degree result if the student puts in a modicum of effort.'* The SCTE is that part of the student's contract that relates to the educational provision and as Dennis Farrington (2017)<sup>325</sup> confirms the University is required to include certain CORE elements for students.<sup>326</sup>

Penny Anderson (2010)<sup>327</sup> asks us to, *"...remember that students are not buying a degree. They pay for services and facilities (tuition, libraries) which enable them to study and complete a course to the best of their ability"*. Students seem to be increasingly aware of their own obligations to perform and to

<sup>319</sup> Competition & Markets Authority

<sup>320</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/428549/HE\\_providers\\_-\\_advice\\_on\\_consumer\\_protection\\_law.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/428549/HE_providers_-_advice_on_consumer_protection_law.pdf) (accessed 25th June 2017)

<sup>321</sup> The Oxford Dictionary of Law, edited by Jonathan Law, 8<sup>th</sup> Edition (2015) defines a 'Contract' as: "A legally binding agreement. Agreement arises as a result of offer and acceptance, but a number of other requirements must be satisfied for an agreement to be legally binding."

<sup>322</sup> Bilateral contracts are contracts where there is an exchange of promises....

<sup>323</sup> The Law of Contract Damages Second Edition, (2017), Hart Publishing- Preface to First Edition and recorded in this second edition

<sup>324</sup> David Palfreyman 2017, Chair of the Westminster Forum Conference on "Regulation and the HEI-student relationship-marketing, contracts and resolving complaints"- 12<sup>th</sup> June 2017 (Please note that the transcript of this forum comes with a disclaimer, "Anyone who intends to publicly use or refer to any text based on the transcript should make clear that speakers have not had the opportunity for any corrections...")

<sup>325</sup> "Understanding Student Contracts" - 14<sup>th</sup> November 2017, <https://wonkhe.com/blogs/understanding-student-contracts/>

<sup>326</sup> *"... the contract would include what is common practice: published syllabus and learning outcomes for each course/module, defined contact hours "X" lectures, "Y" seminars, practical classes, tutorials, etc., named staff or at least details of their academic status, assessment turn-around times, examination methods, reading lists, etc."*

<sup>327</sup> "Can you get a refund if university fails to deliver?", 2010, Penny Anderson, Guardian, education accessible at: <https://www.theguardian.com/money/2010/dec/18/refund-if-university-fails-deliver> and accessed 2<sup>nd</sup> January 2018

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

get the most out of their degree, as recorded by David Willetts (2017)<sup>328</sup> discussing the findings of the HEPI-HEA Student Academic Experience Survey 2015, *"Of the 61 per cent for whom at least in some respects their experience was worse, their top reason was 36 per cent saying they had not put in enough effort themselves- an honest recognition that what you put in determines how much you get out."*

At paragraph 118 of **Siddiqui** the importance of the quality of tuition is discussed in the context of the overall academic experience and the many parts that make up this academic journey, *"As Professor Washbrook observed, the quality of the tuition received is a part of what goes into producing a student's result, but only a part."* A similar view is also recorded by a post 92 dean in the HEA Report on teaching excellence (2016).<sup>329</sup> More recently, W. A. Kaplin et al (2019)<sup>330</sup> recount the findings in the US case **Ross v Creighton University**<sup>331</sup> in which the student alleged that the university *'had negligently failed to educate him'* and the judge held that the *'student was ultimately responsible for his academic success.'* However, the judge did add that, *'if the plaintiffs could prove that the college breached an express warranty to the students or that they relied on misrepresentations by college personnel the student contract claims might succeed.'*

### 5.3 The contents of the SCTE: locating the documents that comprise the SCTE

The SCTE is like any other contract and will be a collection of both express<sup>332</sup> and implied<sup>333</sup> terms and conditions. However, the content of the SCTE is not always easily ascertained for this contract as R. Gaffney Rees and J. Williams (2009)<sup>334</sup> (such discussions precede CRA 2015) explain<sup>335</sup>. Also, the SCTE is rarely found in one document but can comprise a range of different university documents such as the student handbook, promises made on the HEI website, relevant rules and regulations particular to

<sup>328</sup> Page 204 "A University Education", David Willetts, 2017 Oxford University Press.

<sup>329</sup> Page 69 of "Teaching Excellence in the Disciplines" 2016 by Andrea Abbas, Joan Abbas, Kira Brayman, John Brennan and Orkhon Gantogtokh *"If students perceive they are paying for something...there is an expectation that they get good quality...and I think that is the right thing. So, the teaching and learning needs to be engaging, the infrastructure around them needs to be appropriate for what they are doing... There is a bit of a perception from the students of 'I've paid my money, I want my degree'. If they don't engage and turn up, we can't deliver that."*

<sup>330</sup> The Law of Higher Education, 6<sup>th</sup> Edition, April 2019 by W.A Kaplin, B.A. Lee and N.H Hutchins, Jossey Bass publications

<sup>331</sup> 740F. Supp 1319 (N. D. 111. 1990)

<sup>332</sup> An express term is defined in the Oxford Dictionary of Law (2015) as, 'a provision of a contract, agreed to by the parties, that is either written or spoken. Such a provision may be classified as a 'condition', 'warranty' or an 'innominate' term.'

<sup>333</sup> An implied term is defined in the Oxford Dictionary of Law (2015) as, 'A provision of a contract not agreed to by the parties in words but either

<sup>334</sup> "Issues surrounding the introduction of formal student contracts" Ruth Gaffney-Rhys & Joanna Jones Pages 711-725 | Published online: 04 Sep 2009 and located at <http://www.tandfonline.com/doi/abs/10.1080/02602930902977749?journalCode=caeh20>; Accessed 25<sup>th</sup> June 2017.

<sup>335</sup> *"Although the contract between an applicant and a university is usually formed in writing...the terms of the relationship are not always clear. It is possible that promises made by a HEI in its prospectus or on its website may take effect as contractual terms and ...action for breach of contract could be initiated if the promises are not met."*

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

the specific HEI. Hannah Oakman (2016)<sup>336</sup> stresses that the range of potential terms and conditions in the varied documents making up this SCTE is not without risks.<sup>337</sup>

The SCTE may also include terms as promised on a HEI website, promises such as the provision of 'excellent teaching'<sup>338</sup> which it could be argued may increase the liability of HEIs in this regard beyond insurable 'reasonable skill and care' standards of provision. This is discussed more fully in Chapter 10 containing the special case study on 'high-quality'. T. Shanahan et al (2015)<sup>339</sup> provide some useful guidance to college and university administrators and suggest that they need to look at these documents which could be held in court to form part of the SCTE.<sup>340</sup>

The very recent Canadian Court of Appeal case of *Lam v. University of Western Ontario* (2019)<sup>341</sup>, records at paragraph 38 of the judgment<sup>342</sup> that "The motion judge referred to the Handbook as something seemingly with contractual force and made no finding that the contract excluded those terms" Lawyers acting on behalf of the Claimant caution universities that, "The Court of Appeal clarified that written documents published by an institution, such as a Graduate Student Handbook, may be relied upon as evidence of contractual obligations. Policies and procedures, along with other website materials, could, therefore, be found to have similar weight. Institutions are thus cautioned to avoid aspirational statements in drafting such documents and focus instead on content for which they are prepared to be held accountable."<sup>343</sup>

The latter comments are important particularly when students rely on pre-contractual promises that inform their reasons and decisions for selecting and attending a particular HEI. This element of the work is contained in Chapter 10.

<sup>336</sup> "Student Contracts: A Fair Deal?" and accessible at: <https://www.vuw.co.uk/news-and-events/blog/higher-education-law/higher-education-compliance-review-student-contracts> and accessed 4th January 2018

<sup>337</sup> "On the face of it, the collation of terms and conditions into a discreet student contract, which links through to relevant policies and procedures for clarity and ease of accessibility is an obvious way of addressing concerns about the lack of consistency and transparency but is not without risk. Many students are consumers and wider range of material can be given contractual merit under the Consumer Rights Act (CRA) 2015."

<sup>338</sup> As will be discussed what constitutes 'excellent teaching' is not easily answered - is it a higher standard than teaching in accordance with standards of 'reasonable skill and care'?

<sup>339</sup> Page 159 of "Handbook of Canadian Higher Education Law", 2015 by Theresa Shanahan, Michelle Nilson, Li-Jeen Broshko, McGill-Queen's University Press

<sup>340</sup> "Understand the contractual nature of the student-institution relationship, and keep in mind that many of your institution's publications- especially...university calendar (or equivalent website), promotional materials, student and residence handbooks, and other similar documents- are likely to be viewed as contractual documents by the courts."

<sup>341</sup> 2019 ONCA 82

<sup>342</sup> <http://www.ontariocourts.ca/decisions/2019/2019ONCA0082.htm>

<sup>343</sup> Court of Appeal Finds Contract Between University and Student March 19, 2019 | Gillian Tuck Kutarna, Greg Bush accessible at: <https://www.millerthomson.com/en/publications/communiqués-and-updates/education-law-newsletter/march-19-2019-morning-recess/court-of-appeal-finds-contract-between-university-and-student/>

## 5.4 The importance of accurate pre-contractual statements and the impact on the SCTE

The CRA 2015 sets out in clause 50 that any statement made by a trader which the consumer relies on is to be included as a **TERM** of a contract to provide a service if it is taken into account by the consumer in deciding to enter the contract or when making any decision about the service after entering the contract. Recent case law and the high-profile case of Pok Wong 2019 who alleged that her course provided by the University of Anglia Ruskin did not deliver on promises relating to teaching quality and future career prospects highlighted the importance of accuracy of marketing content and how courses are advertised. Further afield an international US student, Connie Asenbeck who studied at the Malardalen University in Sweden<sup>344</sup> was refunded approximately £14,500 having spent two years engaged in what she considered was a pretty 'worthless' degree. The Analytical Finance course failed to measure up in terms of promises made in the *course description* promising graduates that they would have "*competitive qualifications*" to land an "*attractive*" job. At paragraph 3<sup>345</sup> of the judgment it is recorded that Ms Asenbeck claimed '*a refund of the tuition fee due to the lack of quality of education*' adding at **paragraph 18** that "*In the application of general contractual principles in connection with alleged quality deficiencies in an education it is also important what information the student has already received from the university regarding the education.*"

## 5.5 Is the syllabus a form of contract? Importance to the SCTE

Deborah Miller Fox (2014)<sup>346</sup> asks her students to consider her course as a business transaction with those students willing to put in the hard- intellectual effort more likely to receive a premium return on their investment and reap the educational reward.

Various arguments have also been presented on the status of the syllabus and whether this constitutes a contract, actual or implicit<sup>347</sup> between academic and student in relation to the provision or part provision of the student's course.

<sup>344</sup> Sweden has a civil coded legal system and not a common law jurisdiction so the case is of interest value only

<sup>345</sup> Translation provided by the Swedish court Hogsta Court of Justice Objective No Judgment T 2196-17 announced in Stockholm on April 17, 2018 Connie Askenbäck v Mälardalen University

<sup>346</sup> "Education and Consumerism: Using Students' Assumptions to Challenge Their Thinking", Deborah Miller Fox (2014), Faculty Focus, Magna Publications, at: <https://www.facultyfocus.com/articles/effective-teaching-strategies/education-consumerism-using-students-assumptions-challenge-thinking/> and accessed 30<sup>th</sup> December 2017, "Everyone gets the same syllabus, the same assignments, equal opportunity to participate in or lead discussion, identical lectures ... the same research and reading assignments, the same intellectual invitations and challenges. Unfortunately, some students just want a bargain; they spend a little to get a little. Others want the premium goods, willingly investing exceptional intellectual capital to get the good stuff."

<sup>347</sup> W. Kenton 12 Jan 2020 defines an 'implicit contract' as, "... a legally-binding obligation that derives from actions, conduct, or circumstances of one or more parties in an agreement. It has the same legal force as an express contract, which is a contract that is voluntarily entered into and agreed on verbally or in writing by two or more parties. The implied contract, on the other hand, is assumed to exist, but no written or verbal confirmation is necessary." Accessible at: [https://www.investopedia.com/terms/i/implicit\\_contract.asp](https://www.investopedia.com/terms/i/implicit_contract.asp)



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Martha M. Rumore (2016)<sup>348</sup> views the syllabus as nothing more than something akin to an owner's manual lacking the necessary formation element of actual '*offer and acceptance*.' However, this is in contrast with other American academics who consider that the module syllabus whilst '*fluid and gets updated and amended regularly*' can also be treated as forming a contract between professor and student as per the comments of Amber R. Comer (2016)<sup>349</sup>

Whilst this author does not agree that a syllabus is a contract actual or implicit between student and academic (as lacking key ingredients for the valid formation of contracts) the importance of the contents of the syllabus has a strong relevance in this work and the role that technology can play in evidencing that the syllabus has been fully delivered. The performance of these duties is central to the remit of the OIAHE who are keen to ensure that lecture times and facilities provided reflect the promises made in a prospectus or other key document which a student relied upon in making his or her decision to undertake their degree at the relevant HEI.

J. J. Rivera et al (2019)<sup>350</sup> articulate the importance of the syllabus and ensuring that students understand what is required of them in relation to their studies as well as identifying that college instructors are often unsure how to '*reinforce*' student responsibility for their own learning. They support early engagement by students in their own learning journey by the adoption of a '*Course Start Contract*' which is something akin to the employee handbook and *brings 'real world experience'* and responsibility LIVE into the classroom from day 1. Further, in line with real world practice that students, like employees need to sign to confirm that they have read and understood the requirements of their job and rules set out in the employee handbook. Similar to the students referred to in this article many have work experience and familiar with the employee handbook, many USW students are part-time and would have a strong connection and understanding of this approach. Therefore, whilst the syllabus for each module/course should not in the author's opinion be viewed as a contract per se it is submitted that it is very much at the heart of the SCTE and proper performance

---

<sup>348</sup> "The Course Syllabus: Legal Contract or Operator's Manual?", December 2016, American Journal of Pharmaceutical Education, 2016 Dec 25; 80(10): 177 accessible via <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5289733/> and accessed 31<sup>st</sup> December 2017

<sup>349</sup> "The Syllabus as a Contract", The Chronicle of Higher Education 2016 and accessible at <https://www.chronicle.com/article/The-Syllabus-as-a-Contract/237251> and accessed on 31st December 2017, "*What began as a simple list of class topics has morphed into a sort of contract between professor and student...once straightforward elements of a syllabus, like due dates, have gotten complicated thanks to technology. Technology has forced professors to be extremely specific on these details or ...face inevitable challenges from students. And it's precisely when such challenges arise that both professors and students look to the syllabus as a contract.*"

<sup>350</sup> Page 66 Chapter 5 "Reinforcing Responsible Learning: Acknowledgement of Syllabus and Course Requirements" 2019 John J Rivera, Richard S. Colfax and Joann C.E. Diego in ...Published Feb 2019 by IGI Global Publishing, They explain that: "The syllabus is generally expected to identify the requirements and expectations of the specific course that is being taken. The syllabus further identifies materials that will be utilised such as textbooks and handouts. More and more, the syllabus identifies the electronic tools and media that may be used in a course...In some cases the syllabus has even been identified as a 'contract' between the student and the instructor..."

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

of each module is part and parcel of the overall performance of the SCTE. Ensuring all parties are aware of what is contained in the syllabus will be a priority for contracting parties.

## 5.6 Selected KEY terms of the SCTE- the provision of the educational service

The SCTE is a consumer contract and as such must meet certain minimum consumer standards and requirements in the performance of this contract. As stipulated previously it is a consumer contract for the provision of an educational 'service' as opposed to the delivery of 'goods'.

This student contract is like any other contract and will contain a collection of express terms dealing with payment, intellectual property rights, grievance and complaints procedures, termination and cancellation, fair and reasonable provisions for changing courses content etc but the clause that needs careful attention here relates to the term dealing with the provision of the educational service itself. There are many examples of this form of student contract on university websites.<sup>351</sup> It is argued that this clarity and transparency by these institutions in providing guidance to students '*upfront*' is to be encouraged given the calls for '*transparent and clear*' provisions under the Consumer Rights Act 2015 more fully discussed below<sup>352</sup>. Some universities expressly stipulate in the SCTE that their responsibilities are to deliver the education provision to the student in accordance with '*reasonable skill and care*' standards thereby expressly reflecting their liabilities under **section 49(1)** of Consumer Rights Act<sup>353</sup>.

### 5.6.1 What does 'reasonable skill and care' mean in the context of the SCTE?

This term 'reasonable skill and care' is not defined in the CRA 2015 and it will be necessary to look at the case law for a better understanding of the term. Michelmores LLP (2015)<sup>354</sup> point out the difficulty of lack of definition.<sup>355</sup> The long-established construction case of **George Hawkins v Chrysler**<sup>356</sup> made clear that where professionals such as engineers or (by application academics) are concerned the standard of their work must be judged against the '*reasonable skill and care*' standards of a reasonably competent member of that profession. The case also established that absolute warranties

<sup>351</sup> <https://www.plymouth.ac.uk/students-and-family/student-contract>

<sup>352</sup> David Palfreyman (2018), "Regulation and the HEI-student relationship-marketing, contracts and resolving complaints" on page 21 asked the delegates how many HEIs had posted the 60 second CMA guide to the Consumer Legislation for student - the response did not indicate that any in the room raised their hands. This CMA 60 second guide is located at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/695583/60-second-summary.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695583/60-second-summary.pdf)

<sup>353</sup> The clause stipulates that: "Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable skill and care"

<sup>354</sup> "Guide to the Consumer Rights Act 2015, part 3- selling services" at Lexology – accessible at <https://www.lexology.com/library/detail.aspx?g=62369e73-9355-4067-9268-5113769339f6>

<sup>355</sup> "But what is 'reasonable skill and care' and 'reasonable time'? The CRA 2015 does not define either other than, in the latter case, stating it is a question of fact. This means that both standards can vary on a case by case basis."

<sup>356</sup> 1986 38 BLR 36

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

of 'fitness for purpose' should not apply to professionals **unless such warranties have been expressly accepted** by the professional in the relevant contract<sup>357</sup>.

Translating this to the SCTE, it means that an HEI will be required to provide the educational service to the student in accordance with standards that equate to reasonable skill and care of a professional academic employed<sup>358</sup> in his relevant discipline in the HEI. Farrington and Palfreyman (2014)<sup>359</sup> neatly distinguish between contractual promises to exercise reasonable skill and care and higher standards of liability akin to fitness for purpose that essentially guarantee end results.

The case of Eckersley v Binnie<sup>360</sup> is referred to in ascertaining how this might apply to academics. The importance of being up to date in one's academic discipline and pedagogy are key in this. The pendulum has swung in favour of improving standards and quality of teaching with Palfreyman and Tapper (2014)<sup>361</sup> warning that, *"...in the context of mass HE 'academics must become proactive and experienced teachers, trained in pedagogy' (perhaps more like school- teachers than Oxford dons!)"*

A SCTE that carries contractual promises to carry out the education service with reasonable skill and care<sup>362</sup> whilst at the same time promising to deliver an 'outstanding high- quality student experience' could have the potential to be judged against different standards of liability leading to unintended legal consequences. *'Reasonable skill and care' in relation to contractual professional negligence claims in the construction industry have been tested in many cases in the courts and essentially equates to the standard of care established in the common law tort of negligence*<sup>363</sup>.

---

<sup>357</sup> "Where a contracting party is a professional man providing advice or designs alone (i.e. without supplying any product), no warranty will normally be implied beyond a term that **reasonable skill and care** will be taken in giving the advice or preparing the design. There was nothing in the present case to require the implication of any term other than a duty to take reasonable care and skill in preparing the design."

<sup>358</sup> The judge in Siddiqui also confirmed that the standard for teaching for a professional, 'must be of a reasonable standard it need not be perfect.'

<sup>359</sup> Para 12.63 on page 382 of The Law of Higher Education 2014, Oxford University Press, *"Even then a contract such as that between the HEI and the student, to provide professional services (teaching) does not guarantee to produce a specific result...all that is implied is that the supplier of the service will undertake to perform the promised services with reasonable skill and care."*

<sup>360</sup> (1988) 18 CLR 1 (CA) "...a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinarily assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks inherent in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon, combining the qualities of polymath and prophet."

<sup>361</sup> Reshaping the University: The Rise of the Regulated Market in Higher Education, 2014 chapter on "The Student as Consumer" Chapter 6 page 21/30 from Oxford University Online.

<sup>362</sup> "A contractual obligation to carry out works or services with **reasonable skill and care** creates a performance obligation which is analogous to the standard of care in negligence." 2014

<sup>363</sup> Negligence as a tort is defined in the Oxford Dictionary of law at page 413 as "A tort consisting of the breach of a duty of care resulting in damage to the Claimant...Negligence can be used to bring a civil action when there is no contract...Normally it is easier to sue for breach of contract but this is only possible where a contract exists...In cases of professional negligence, involving someone of special skill, that person is expected to show the skill of a reasonably competent member of that profession (Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 (HL))

**The value of ‘Technology-Enhanced Learning’ (TEL) in evidencing compliance with the ‘Student Contract to Educate’ (SCTE) in a new era of accountability in UK higher education**

A full discussion on the potential legal distinctions and consequential legal liability (if any) of promises made by HEIs to deliver education of ‘high-quality’, ‘outstanding quality’, ‘excellent quality’, ‘reasonable quality’ etc are provided in detail in the special case study on ‘high-quality’ in Volume III.

### **5.6.2 Agreeing to standards of educational service provision beyond reasonable skill and care**

The law provides that if you expressly or impliedly promise to perform an obligation in your contract then you could (in the absence of any vitiating factors such as duress or undue influence) be legally held to account for this even where the contractual undertakings are outside the remit of an organisation’s professional indemnity insurance. Architects and engineers have long been made aware that if they expressly agree in their contracts to deliver a standard of service which exceeds reasonable skill and care they may be held liable to comply with such a contractual condition which could fall outside the remit of their professional indemnity insurance cover<sup>364</sup>. The leading authority in relation to this issue is the case of **Greaves and Co (Contractors) Ltd v Baynham Meikle and Partners [1975]**<sup>365</sup> in which engineers were held by the courts to have impliedly warranted that their design would be fit for purpose<sup>366</sup>. Applying this analogy to the SCTE promises that exceed ‘reasonable skill and care’ will potentially be upheld.

### **5.6.3 Conflicting standards of liability in a single contract: lessons from the construction industry**

Problems will occur where two standards of liability could have been agreed in the contract and the question will be for the court to decide which standard prevails. Recent construction case law highlights the legal tensions and uncertainties when conflicting standards of liability are set out in a single contract and ascertaining which standard prevails. The findings are highly relevant to the SCTE which is made up of documents from a range of sources which don’t always align neatly in terms of content and consistency in contractual messages.

---

<sup>364</sup> “The “Bolam Test” established that where special skill and competence are involved, it is not necessary for the professional consultant to possess the highest skill provided his views or actions accord with those of a responsible body of opinion of that profession. Therefore, if a consultant can show that they acted in accordance with the usual practice and professional standards for their particular business current at the time the design was carried out, they will escape liability.” Summarised by Willis Towers Watson in their article entitled, “Reasonable skill and care vs. fitness for purpose”

<sup>365</sup> [1975] 3 All ER 99

<sup>366</sup> Fit for purpose is a strict liability obligation that guarantees that an end product is of satisfactory quality and suitable for its purpose. Lord Denning MR explained: “Apply this to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case.” A fit for purpose obligation is not supported by professional indemnity insurers as professionals do not guarantee the end result and is a higher and strict standard of liability compared to a fault - based standard of reasonable skill and care.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

N. Buckingham of Shepherd and Wedderburn Solicitors (2018)<sup>367</sup> in summarising the most important construction cases of 2018 paid particular attention to the case of **SSE Generation v Hochtief Solutions AG [2018] CSIH 26** where the Contractor was held liable for the collapse of a tunnel even though he had limited his design liability to '*reasonable skill and care*'. The Appeal Court overturned the decision of the High Court and found the Contractor was at fault in how the '*design was implemented*' and held the Contractor was in breach of the higher duty of fit for purpose in respect of this. The case was surprising and demonstrates that all contractual terms will be scrutinised, and that care must be taken in terms of what is promised as part of the overall contract package. Applying this analogy to the SCTE an HEI needs to be very careful that all contractual terms fall within the remit of professional indemnity insurance requirements and carefully negotiated contract terms are not 'trumped' by other terms that students had relied upon and may be located in other contractual documents. This was a main point in the following important case too.

#### 5.6.4 ('The Robin Rigg')<sup>368</sup> another lesson in 'fitness for purpose'

In 2006, E.ON employed MTH to design, fabricate and install 60 wind turbine foundations at the Robin Rigg offshore wind farm in the Solway Firth. The contract included a requirement that J101 was adopted but this international standard contained an error that the industry was unaware of at the time. The contract also contained warranties that the wind farm would have a 20- year life span. The issue before the court was which of the parties should bear responsibility for the error in J101 and, therefore, the cost of the remedial work. MTH submitted that they had exercised '*reasonable skill and care*' in adopting and complying with J101 as required by the contract. The Supreme Court held the Contractor was liable to deliver the contract to standards equating to '*fit for purpose*' relying on paragraph 3.2.2.2 of the technical specification and the 20-year life span of the windfarm.<sup>369</sup> This contractual clause in the technical documentation trumped the obligation to exercise '*reasonable skill and care*' in the main terms and conditions.

---

<sup>367</sup> "Construction case law update - Top 5 construction cases of 2018" 25<sup>th</sup> January 2019 accessible at: <https://shepwedd.com/knowledge/construction-case-law-update-top-5-construction-cases-2018> and accessed 27th April 2019

<sup>368</sup> MT Højgaard A/S (Respondent) v E.ON Climate & Renewables UK Robin Rigg East Limited and another (Appellants) [2017] UKSC 59 <https://www.supremecourt.uk/cases/docs/uksc-2015-0115-judgment.pdf>

<sup>369</sup> "paragraph 3.2.2.2(ii) of the Technical Requirements (TR) involved MTH warranting either (i) that the foundations would have an actual lifetime of 20 years, or (ii) that they would be *designed* to have a lifetime of 20 years."

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Clyde and Co (2017)<sup>370</sup> highlight the relevance of the findings in these cases to all parties contracting in accordance with English law<sup>371</sup>. Graham Johnston of Faithful and Gould (2018)<sup>372</sup> commenting on the Robin Rigg case summarises the Supreme Court's findings from a technical rather than specifically legal perspective but the worrying outcomes are the same<sup>373</sup> and emphasises the need to be aware of *all documents forming the contract*. Referring to the comments of T. Shanahan et al (2015)<sup>374</sup> set out above there is much to commend an industry standard form SCTE that locates all the obligations for all contracting parties in a single contract.

### 5.6.5 Williams Tarr Construction Ltd v Anthony Roylance Ltd [2018] EWHC 2339 (TCC)

The importance of accurately recording contractual duties is equally highlighted in this recent case. The Court held that the defendant had not been required to warrant that the wall was fit for purpose, only to design a solution to a drainage problem in relation to the retaining wall needed on the site. WTC were therefore unsuccessful in claiming breach of contract and breach of this warranty. However, the judge stated obiter that, "if he had found Mr Roylance subject to an obligation to amend the wall design, he would also have found him subject to a fitness for purpose warranty." Denise Charlwood of Kennedy Solicitors (2018)<sup>375</sup> stress the importance of this case for professionals because normally consultants such as engineers and architects are only liable to

<sup>370</sup> Robin Rigg Supreme Court decision "Why complying with an agreed international standard can still land you in stormy waters" accessible at: <https://www.clydeco.com/blog/energy/article/robin-rigg-supreme-court-decision>

<sup>371</sup> "In a decision that may come as a shock to many, and that will have potentially wide-reaching ramifications for English law contracts... In reaching its decision, the Supreme Court has, it seems, reinforced the more literal approach towards contract interpretation that has been increasingly adopted by the English courts in recent years. **As such, this decision will be of relevance to all parties who contract under English law.** Going forwards, contractors in particular should be aware of this decision and the increased risk that it potentially entails. **Now, more than ever, the importance of clearly drafted contracts cannot be overstated.**"

<sup>372</sup> So That – So What?!: Design Liabilities within Terms of Contract, 28<sup>th</sup> March 2018 accessible at: <https://www.fgould.com/uk-europe/articles/so-that-so-what-design-liabilities-within-terms/> and accessed 27<sup>th</sup> April 2019

<sup>373</sup> "...the Supreme Court ... held that the twenty-year life was either a warranty or an agreement to design the foundations in a certain way. The requirement to follow J101 was the *minimum* standard, but the obligation to achieve the twenty-year life was the overriding obligation. This meant that MT Højgaard had to ensure the twenty-year life. ***The argument that the twenty-year life requirement was included in the technical specification, and not in the body of the contract, was rejected. When read together, the documents were sufficiently clear.***"

<sup>374</sup> Page 159 of "Handbook of Canadian Higher Education Law", 2015 by Theresa Shanahan, Michelle Nilson, Li-Jeen Broshko, McGill-Queen's University Press: "Understand the contractual nature of the student-institution relationship, and keep in mind that many of your institution's publications- especially... university calendar (or equivalent website), promotional materials, student and residence handbooks, and other similar documents- are likely to be viewed as contractual documents by the courts."

<sup>375</sup> "Fit for purpose: a cautionary tale about a contract" 14<sup>th</sup> September 2018 accessible at: <https://www.kennedyslaw.com/thought-leadership/case-review/fit-for-purpose-a-cautionary-tale-about-a-contract/> and accessed 27<sup>th</sup> April 2019 "A professional's default obligation is the exercise of reasonable skill and care. Courts have been reluctant to find construction professionals subject to the higher duty of fitness for purpose, unless it arises from the parties' common intention or agreement, objectively construed. They have been more willing to impose a fitness for purpose obligation upon design and build contractors, comparable to a seller of goods providing a finished product, rather than consultants who only provide a service. The Judge's comments in this case may pave the way for a change of approach."

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

perform their services to standards of 'reasonable skill and care' but the comments albeit obiter suggest that this might not always be the case and accurate recording of duties is important. The forensic itemisation of duties as discussed in Chapter 4 is not exhaustive but is an important step in capturing this for the SCTE whilst adaptation is needed for specific disciplines.

### 5.6.6 Importance of these construction cases to the SCTE

Universities that encourage students to attend their HEI with promises of '*outstanding and excellent teaching*' supported by GOLD TEF badges may well find that these promises make their way into the SCTE particularly where students relied on them and considered that such promises induced them to enter into the SCTE with their chosen HEI<sup>376</sup>. The OfS explain what the TEF badges mean in relation to teaching quality.<sup>377</sup> For students aware of TEF<sup>378</sup> they appear to value the information that TEF provides with regards to '*teaching quality*' or '*teaching standards*' as more easily understood by students in helping them to make decisions on where to study. An excerpt from the QS UK Domestic Student Survey March 2019<sup>379</sup> reflects the views of students who took part in this survey. Ester, who is also 17 and looking to study Law records that, "*There are a lot of universities you could go to where you know the research is really good but if you're not actually at the university you wouldn't know how the teaching is. So, if we are offered something to let us know how the teaching standards are, I think it would be better than just knowing the research.*"

The jury is still out on how breaches by an HEI to deliver '*high-quality*' teaching (added to the difficulties of suing if this is not provided in light of judicial deference to academic judgment as fully discussed below) is to be measured but avoiding unnecessary and expensive litigation in an uncertain legal HE future will be a priority. Whilst the construction cases related to the supply of goods i.e. a wind farm and a hydro- electric power station the element of design and provision of a design service is generally limited in UK construction contracts to one of reasonable skill and care only. If liability was not limited in this way a contractor with responsibility for the provision of the design and construction

<sup>376</sup> Section 50 CRA 2015

<sup>377</sup> <https://www.officeforstudents.org.uk/advice-and-guidance/teaching/what-is-the-tef/>

What do the TEF ratings mean? -

A provider taking part in the TEF is awarded:

- **gold** for delivering consistently outstanding teaching, learning and outcomes for its students. It's of the highest quality found in the UK
- **silver** for delivering high quality teaching, learning and outcomes for its students. It consistently exceeds rigorous national quality requirements for UK higher education
- **bronze** for delivering teaching, learning and outcomes for its students that meet rigorous national quality requirements for UK higher education.

<sup>378</sup> Around 51% as set out in the Hobson's Survey

<sup>379</sup> [https://www.qs.com/portfolio-items/uk-domestic-student-survey-2019/?utm\\_source=qswebsite&utm\\_medium=blog](https://www.qs.com/portfolio-items/uk-domestic-student-survey-2019/?utm_source=qswebsite&utm_medium=blog)

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

of the building would at common law be liable to provide an end product building that is fit for purpose<sup>380</sup> with consequent issues for professional indemnity cover.

This distinction between 'reasonable skill and care' and liabilities for 'fitness for purpose' may in future years be significant in relation to the SCTE and in particular the provision of 'digital content' as part of the educational service provision as more fully discussed below.

## 5.7 The supply of digital content as part of the educational service provision

Section 34 of the CRA 2015<sup>381</sup> provides that contracts for the supply of digital content, "... must be of satisfactory quality and fit for purpose. Satisfactory quality is 'satisfactory if it meets the standard that a reasonable person would consider satisfactory...'". Section 35<sup>382</sup> provides that the digital content must be fit for purpose and in line with how the consumer made known the purpose for which the digital content was required.

Satisfactory quality is a phrase more commonly associated with 'goods' rather than services but it is the reference to 'fit for purpose' that requires attention here. If HEIs are providing 'digital content' as part of their educational provision, then this new legislation requires such digital content to be 'fit for purpose'. Using a reference to strict liability 'fit for purpose' in conjunction with 'educational provision' raises alarm bells with regards to the cases discussed above and the lack of available professional indemnity insurance to support such contractual undertakings.

Traders that attempt to exclude liability for obligations related to those contained in S35 will not be permitted. Digital content has been defined and clarified by the CMA (2015)<sup>383</sup> at para 1.26 as:

*"... data that is produced and supplied in digital form. The digital content may be contained within a physical product, as is the case with, for example, music, films, games or software contained in CD,*

<sup>380</sup> Independent Broadcasting Authority v EMI Electronics (1980) 14 Build LR 1

<sup>381</sup> Section 34 Digital content to be of satisfactory quality

- (1) Every contract to supply digital content is to be treated as including a term that the quality of the digital content is satisfactory.
- (2) The quality of digital content is satisfactory if it meets the standard that a reasonable person would consider satisfactory, taking account of—
- (a) any description of the digital content,
  - (b) the price mentioned in section 33(1) or (2)(b) (if relevant), and
  - (c) all the other relevant circumstances (see subsection (5))

<sup>382</sup> Section 35 Digital content to be fit for particular purpose

- (1) Subsection (3) applies to a contract to supply digital content if before the contract is made the consumer makes known to the trader (expressly or by implication) any particular purpose for which the consumer is contracting for the digital content.

<sup>383</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/450440/Unfair\\_Terms\\_Main\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf)



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*DVD or computer disc. Alternatively it may be supplied in a non-tangible form, such as a music download on to a computer, apps on a mobile phone/tablet and a film that is streamed."*

Translating these definitions to the SCTE it is clear that HEIs are significant users and providers of 'digital content' to students in this SCTE and particularly where the SCTE relates to the provision of an online course. Stephen Pearson (2015)<sup>384</sup> comments align with this viewpoint.

Of greater concern are the comments of Dr Leela Cejnar and Arlen Duke (2018)<sup>385</sup> who consider that undertakings equating to standards of fit for purpose have the potential to expose institutions to 'huge liability' because they consider, "...any regulation of digital content will have increased significance. It will require that any information distributed digitally (lecture slides, overview notes, lecture recordings) must be of satisfactory quality, fit for purpose and match any description of the service provided by the institution. This exposes institutions to potentially huge liability, if, for example, students are provided with outdated or inaccurate materials and could curb the trend to use cheap and often inexperienced casual teachers."

This view must be contrasted with the Guidance as provided by RPC Finance (2015)<sup>386</sup> but tensions will ease when this is formally tested in the courts. *"In contracts for a "mixed supply" of services and digital content (e.g. a music streaming service), the CRA's digital content provisions apply to the digital content, whilst its services provisions apply to the service. The CRA retains the implied terms in the SGSA (i.e. services must be carried out with reasonable care and skill, in a reasonable time and for a reasonable charge)." The following case of Trebor Bassett also gives support to this latter viewpoint where mixed consumer contracts are provided and in the case of the SCTE where the educational service is required to be performed to standards of 'reasonable skill and care' and with digital content needing to be 'fit for purpose'.*

### 5.7.1 Trebor Bassett and Cadbury v ADT Fire and Security [2012]<sup>387</sup>

The full facts are set out in the footnote<sup>388</sup> below but briefly ADT argued that as designers their liability should be limited to 'skill and care only' and the court agreed holding that, "Very clear words

<sup>384</sup> "The Consumer Rights Act 2015: Important Consumer Law Update- UK Higher Education Providers", Freeth's Solicitors, *"The use of digital content is becoming increasingly popular for HE providers, with most offering content such as virtual learning environments (VLE) platforms and online lectures. It is worth noting that the CRA digital content provisions will apply to contracts under which digital content is made available to a student as part of a contract for educational services..."*

<sup>385</sup> "Competition and fair-trading practices in the higher education sector: a comparative review of the position in the UK and Australia." European Competition Law Review, 2018

<sup>386</sup> "Digital content under the new consumer rights" RPC Finance, 14<sup>th</sup> May 2015 accessible at: <https://www.lexology.com/library/detail.aspx?g=fc9d3d38-6489-4dd6-b81b-399179f7415a> and accessed on 9<sup>th</sup> April 2018

<sup>387</sup> **EWCA Civ 1158**

<sup>388</sup> In this case ADT had agreed to design, supply install and commission a fire suppression system for a factory owned and operated by Trebor Bassett and Cadbury. In a catastrophic fire in 2005 the system designed by ADT failed to extinguish the fire and both Trebor and Cadbury sued for £100 million in damages. If the work provided by ADT could be considered as part of a contract to supply 'goods', the

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

would be required to bring about the result that a designer and supplier of fire suppression systems had contracted to extinguish all fires, as it would be highly unusual for a professional to accept that type of liability. “

Applying this legal analogy to the SCTE it seems that **very clear words** would be needed for HEIs to surrender their rights and agree to deliver the educational service to standards above and beyond 'reasonable skill and care.' To that end would an HEI that promises to deliver the student's programme with 'reasonable skill and care' whilst at the same time agreeing to provide students with 'world-class teaching' or 'excellent teaching' be using 'extremely clear words' and by implication enhancing their liability beyond reasonable skill and care? These points are picked up in the case study set out in Chapter 10.

### 5.8 Additional implied terms in the SCTE

The express terms of a contract are not the complete package of obligations in contracts, particularly consumer contracts such as the SCTE. H. Sumption and P. Ward of Clyde and Co Solicitors (2017)<sup>389</sup> discussing sale of goods contracts remind us that, "Implied terms may be "invisible" in a contract, but they are no less important than express terms."

Wrigleys Solicitors (2018)<sup>390</sup> in their briefing paper for the NUS relating to the strike action across UK higher education provide some useful guidance on how the consumer legislation can be used by students who consider that their contractual rights were breached by the strike action .

*"However, consumer rights legislation could help a student identify implied terms which may have been breached. For example, was a student ...told at an open day how much contact time they would receive ...was a student told what the content of a module or course would be and some of that is being omitted because of strike action."*

Recording open day presentations about courses and facilities and sending the recording to prospective students or putting this on university websites could avoid subsequent allegations of breaches of implied contractual terms for contracts entered into after 1<sup>st</sup> October 2015.

---

standard of liability under the under the Supply of Goods and Services Act 1982 was subject to express and implied terms of satisfactory quality and fitness for purpose. In other words, strict liability where the end product is guaranteed with little defence or potential arguments of contributory negligence being relevant<sup>388</sup>; both Trebor and Cadbury had failed to maintain the system. CMS McKenna (2012)<sup>388</sup> confirmed, "The court rejected this argument. **ADT was agreeing to supply design skills, and reasonable care in exercising them, not mere goods. ADT was not supplying an off-the-shelf product, but a bespoke system; the flaws in the system were matters of design and did not concern the inherent quality, or fitness for purpose, of the goods.**"

<sup>389</sup> "Invisible" Contractual Obligations – Appreciating the Importance of Implied Terms" by H. Sumption and Peter Ward, November 2017 available at:<http://www.mondaq.com/uk/x/647332/Contract+Law/Invisible+Contractual+Obligations+Appreciating+The+Importance+Of+Implied+Terms> and accessed 30<sup>th</sup> December 2017

<sup>390</sup> "Briefing Paper – Students' Rights as Consumers in Relation to the UCU Strike", Feb- March 2018- **Paragraph 5.5.2 page 9**

### 5.8.1 Implied duty of good faith: relevance to SCTE

The Consumer Rights Act 2015<sup>391</sup> provides that Traders such as HEIs must agree fair terms in contracts that do not result from 'bad faith'. In common law jurisdictions the concept of 'good faith' is fraught with legal difficulties<sup>392</sup> but it is important to understand how this term might be interpreted in the SCTE given the legal requirement set out in clause 62 of the CRA 2015<sup>393</sup>.

So much had been written by the author related to legal uncertainty in relation to when and the status of implied terms specifically in relation to 'good faith'<sup>394</sup> but due to word count the author concentrated on delivering a contemporary message<sup>395</sup>. The highly recent case of **Alan Bates and Others - and - Post Office Limited [2019] EWHC 606 (QB)** is an important judgment and relevant in the context of the SCTE. The judgment is lengthy but at paragraph 738 His Honour Mr Justice Fraser provided some very useful guidance on 'relational contracts' and the implication of terms of 'good

---

<sup>391</sup> "62 Requirement for contract terms and notices to be fair

(1) An unfair term of a consumer contract is not binding on the consumer.

(2) An unfair consumer notice is not binding on the consumer.

(3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.

(4) **A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.**

(5) Whether a term is fair is to be determined — (a) taking into account the nature of the subject matter of the contract, and (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends."

<sup>392</sup> <http://www.blplaw.com/expert-legal-insights/articles/high-court-indicates-a-duty-of-good-faith-can-be-implied-into-commercial-contracts>

<sup>393</sup> In the case of Mr Stephen West and Dr Carol West v Ian Finlay & Associates (A Firm) [2013] EWHC 898 (TCC) the judge provided the following guidance on how the principles of 'good faith' should be applied in relation to consumers confirming that:

"For the sake of completeness, I should deal briefly with the argument that the clause is unfair under regulation 5(1) of the Regulations. In order to satisfy the test for unfairness under that regulation the term must be contrary to the requirements of good faith and be one which causes a significant imbalance in the party's rights and obligations arising under the contract to the detriment of the consumer. These requirements are cumulative. I was referred to the guidance on this test that was provided by Lord Bingham in Director General of Fair Trading v First National Bank plc [2002] 1 AC 481, at 491, where he said: "The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any factor listed in or analogous to those listed in Schedule [2] to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice."

<sup>394</sup> The Office of Fair Trading (2014)<sup>394</sup> produced a report on universities terms and conditions for students and at page 23 the report reviews the requirement of 'good faith' and drawing upon the findings of (Lord Bingham of Cornhill in Director General of Fair Trading v First National Bank Plc [2001] UKHL 5219) concluded that the term 'embodies a general 'principle of fair and open dealing' The Report explains that this, "means that terms should be expressed fully, clearly and legibly containing no concealed pitfalls or traps and that terms that might disadvantage the consumer should be given appropriate prominence. However, transparency of terms is not enough on its own, as good faith relates to the substance of terms as well. Fair dealing requires a supplier not to take advantage of consumers' weaker bargaining position including his or her needs, lack of resource, lack of experience or unfamiliarity with the subject matter of the contract."

<sup>395</sup> The case of **Astor Management AG v Atalaya Mining plc [2017] EWHC 425 (Comm)** established that 'good faith' could be interpreted as follows: "The duty of good faith, simply put, reflects each party's expectations that the other will act honestly, not act in a manner as could be regarded as unacceptable by a reasonable or honest person or in such a way that aims to frustrate the contract.

"The case of **Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent [2018] EWHC 333 Comm** implied 'good faith' into a joint venture agreement in order to give effect to the 'reasonable expectations' of the parties. Leggatt LJ held that Sin Tahnoon Bin had breached his implied duty of good faith through his 'furtive and opportunistic conduct'.

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*faith*' and how this might be defined, "In all the circumstances therefore, and in the context of the commercial relationship between each SPM and the Post Office, I find that these *were relational contracts*. I find that this means the contracts included an *implied obligation of good faith*. This means that *both the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Transparency, co-operation, and trust and confidence are, in my judgment, implicit within the implied obligation of good faith.*"

D. Wallis and N. Brown (2019)<sup>396</sup> referring to this recent High Court decision states that it is now a general principle that if a contract is a "relational" contract 'then it will include an implied obligation of good faith'. Previously, there had been doubt whether such a general principle exists, as historically this was not an approach recognised by the English courts.' The case is important as it establishes some key concepts that must be met by the parties in relational contracts. Whilst the courts were prepared to give effect to 'express provisions' relating to 'good faith' setting the legal remit for implied terms of 'good faith' is more problematic but the authors summarise the following from the judgment which suggests that a SCTE could be treated as a 'relational contract' for the purposes of 'good faith'. This judgment is therefore highly important in construing how 'good faith' might be interpreted and applied in the SCTE bearing in mind that the SCTE is a **consumer contract** the contents of which are produced by one contracting party in the main.

**Figure 16 has now been removed to Appendix 5: The 9 key factors for determining a 'relational contract' from the Bates Case 2019**

Articulating what 'good faith' means in practice is not without difficulty and it is suggested that if 'good faith' is to be implied into contracts and certainly in relation to S.62 CRA 2015<sup>397</sup> it might be better to define what this means for both parties. Again, a standard industry wide contract could set out in simplistic terms how good faith would be expected to operate for both parties in the SCTE.

---

<sup>396</sup> "More than you bargained for: the implied duty of good faith." 26<sup>th</sup> April 2019 accessible at: <https://www.rpc.co.uk/perspectives/rpc-big-deal/more-than-you-bargained-for-the-implied-duty-of-good-faith/>

<sup>397</sup> "If a contracting party does wish the contract to be governed by good faith, again it may be best to expressly say so in the contract rather than rely on the uncertainty of whether the contract would be considered relational. This has the added advantage of allowing the parties to define what good faith means, giving greater contractual certainty."

"More than you bargained for: the implied duty of good faith." 26<sup>th</sup> April 2019 accessible at: <https://www.rpc.co.uk/perspectives/rpc-big-deal/more-than-you-bargained-for-the-implied-duty-of-good-faith/>

## 5.9 Additional HEI duties to students

Liabilities can also arise in the law of tort, e.g. the tort of negligence and independently of a contract where a party is considered to have assumed a special relationship of reliance<sup>398</sup> to another. Tortious liability to students can equally arise concurrently and in addition to contractual duties. Tortious actions may also arise in e.g. in misrepresentation if students rely on statements made before the SCTE was formally entered into and which subsequently prove to be untrue<sup>399</sup>. Martin Lewis (2014)<sup>400</sup> in an article about potential mis-selling of university courses reminds the sector of the need for honesty and transparency especially at this early stage for potential students making expensive decisions. Whilst referring to the Canadian higher education sector T. Shanahan et al (2015)<sup>401</sup> review a number of cases where students were successful in their actions against their institution where courses were not taught in accordance with promises made in advance. The authors remind HEIs that, *“Colleges and universities have also been held accountable to students in tort law for negligent misrepresentation, in promotional or other similar material. In addition, universities have been found liable for breach of contract or negligent misrepresentation in promotional or other similar material.”* The BIS Report (2016)<sup>402</sup> also establishes that, *“Information, particularly on price and quality, is critical if the higher education market is to perform properly. Without it, providers cannot fully and accurately advertise their offerings, and students cannot make informed decisions.”* The authors add that *“The lack of information is particularly acute for teaching quality, which should be among the most important factors in students’ choices.”*<sup>403</sup> If it is acknowledged that ‘teaching quality’ is among the most important factors for students then the legal challenges and difficulty for students in suing when quality is not as promised seems acutely unfair.

<sup>398</sup> (1) Peter Burgess (2) Lynn Burgess V Basia Lejonvarn (2017) which confirmed that: “An architect who had supplied her professional services to friends free of charge had been under no contractual duty to provide the services, but any work done had to be done with reasonable skill and care. She owed her friends a duty of care in tort because, although not clients in a contractual sense, they were clients in a professional sense: she possessed a special skill and had assumed a responsibility on which they had relied.” At Lawtel: <https://www.lawtel.com/UK/Searches/346/AC0154234> and accessed 3rd April 2018

<sup>399</sup> <https://www.bbc.co.uk/news/education-41984465> Sean Coughlan (2017) reports that **“The advertising watchdog has told six UK universities to take down marketing claims that could be misleading.”**, *“We now have a much more consumer-driven university landscape and it’s important that universities understand that the way they portray themselves, like any other environment trying to attract business, needs to be ethical, clean, clear and above board.”*

<sup>400</sup> “Beware universities mis-selling courses on open days” -17th October 2014, accessible at: <https://blog.moneysavingexpert.com/2014/10/beware-universities-mis-selling-courses-on-open-days/>

<sup>401</sup> Page 159 of “Handbook of Canadian Higher Education Law”, 2015 by Theresa Shanahan, Michelle Nilson, Li-Jeen Broshko, McGill-Queen’s University Press

<sup>402</sup> Paragraph 19 “Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice” May 2016

<sup>403</sup> Paragraph 20 “The lack of information is particularly acute for teaching quality, which should be among the most important factors in students’ choices. Good teaching – broadly defined to include learning environments, student support, course design, career preparation and ‘soft skills’, as well as what happens in the lecture theatre or lab – pays dividends in terms of outcomes for students. But applicants are currently poorly informed about the content and teaching structure of courses, as well as the job prospects they can expect.”

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Jim Dickenson (2017)<sup>404</sup> highlights the unfairness to students in the post TEF era who are not always aware of what they are entitled to or how to enforce contractual promises and that subject level TEF could inform students better of the offer.<sup>405</sup>

At the time of submission of this thesis it is worth recording the recent views of the Education Secretary, Gavin Williamson MP (2019)<sup>406</sup> who states that universities are guilty of 'mis-selling hope and opportunity' and that some courses lack 'academic rigour' and that 'poor levels of teaching' will not be tolerated. It is understood that Mr Williamson has asked the OfS to investigate and 'to crack down on bad-value courses. The worst offending universities could be fined, or even deregistered.' The author considers that this continued attention on what is happening at the classroom coalface for students and ensuring that promised high levels of teaching are delivered and that students receive 'value for money' independently demonstrates the value of the research in this thesis.

Universities that attempt to frame the SCTE as an 'entire agreement'<sup>407</sup> will need to ensure that it is absolutely clear what the agreement relates to because in the recent case of *Al-Hasawi v Nottingham Forest Football Club Ltd & Ors [2018] EWHC 2882 (Ch)*<sup>408</sup> the judge held that, '... clear wording is required to evidence the intention to exclude misrepresentation claims.'

## 5.10 Equality Act 2010 and the SCTE<sup>409</sup>

HEIs have a duty of care to ensure that students with disabilities are treated fairly and that 'reasonable adjustments' are made where appropriate and where it is reasonably feasible to do so. P. I. Roberts and E. Hou (2016)<sup>410</sup> explain that 'The Equality Act 2010 imposes obligations on higher education institutions...in England and Wales not to discriminate against students with disabilities.' The Equality Act 2010<sup>411</sup> defines 'disability' as existing when: 'A person has a disability if they have a

<sup>404</sup> "Good news for the student rights let out of a (mixed) bag": Jim Dickinson July 2017 accessible at: <https://wonkhe.com/blogs/good-news-as-some-student-rights-are-let-out-of-a-mixed-bag/> and accessed on 5<sup>th</sup> April 2018

<sup>405</sup> [supra] "...yet the sector's willingness to plaster TEF Gold stickers (and associated student experience boasts) over their open days goes unchecked. Subject Level TEF and clearer contracts will help both choosers and HE users get what they're being sold and improve practice at something closer to students' experience in a large HEI."

<sup>406</sup> Universities are guilty of 'mis-selling hope and opportunity' 5<sup>th</sup> October 2019, exclusive interview with the Daily Mail accessible at: <https://www.dailymail.co.uk/news/article-7539803/Universities-guilty-mis-selling-hope-Education-Secretary-Gavin-Williamson-declares.html>

<sup>407</sup> "Entire agreement clauses attempt to limit the terms between the parties to one document. One aim of such a clause is to prevent pre-contractual statements from forming additional (collateral) terms to the document which the parties enter into."

Defined by <http://bhwsolicitors.com/case-update-al-hasawi-v-nottingham-forest-football-club-ltd/>

<sup>408</sup> <https://www.bailii.org/ew/cases/EWHC/Ch/2018/2884.html>

<sup>409</sup> Much had been written on this for this thesis but has been removed in place of delivering a contemporary message whilst recognising that this area of the law has been researched extensively

<sup>410</sup> "The best education money can buy? Disabled university students and the Equality Act" 2016 by Pauline Isobel Roberts and Eric Hou of Cardiff University, open access "International Journal of Discrimination and the Law 16 (2-3) Pages 143-160

<sup>411</sup> Section 6 Equality Act 2010

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.'*

In a report prepared by The Equality Challenge Unit <sup>412</sup> it is made clear that *"Under the Equality Act 2010, reasonable adjustments are required where disabled staff, students or visitors personally experience substantial disadvantage in comparison with non-disabled people. The measure of what is a reasonable adjustment will depend on an institution's circumstances in relation to the: resources available, cost of the adjustment, practicality of the changes, potential benefit to other staff, students and visitors."*

And on page 2 of the report<sup>413</sup> we are reminded of the 'anticipatory' approach to reasonable adjustments for students in higher education.

The author will discuss the extent to which each of the TEL Tools in this thesis support disabled students and this is covered in each of the dedicated project chapters. The value of TEL in enabling HEIs to discharge their duties to disabled students is recorded by P. I. Roberts and E. Hou (2016)<sup>414</sup> who also acknowledge that technology such as lecture recordings can benefit all students. With regards to consumer legislation the same authors note on *page 23* that disabled students can also rely on the CRA 2015 to enforce contractual rights related to their disability<sup>415</sup>. Students must also be reminded of their duties to their HEI to inform them of their special requirements so appropriate arrangements can be put in place.

### 5.11 Duties and obligations under the SCTE to be performed by the student

Wrigley's solicitors have set out a useful consumer guide for students who consider their consumer rights to have been breached- please refer to **Appendix 6**. However, as discussed at the outset of this chapter and forensically itemised in Chapter 4 students also have duties and responsibilities to

<sup>412</sup> "Managing reasonable adjustments in higher education", 2010, Equality Challenge Unit accessible at: <https://www.ecu.ac.uk/publications/managing-reasonable-adjustments-in-higher-education/>

<sup>413</sup> "... there is an anticipatory duty to provide reasonable adjustments for students, which means service providers must plan ahead and take a strategic approach to addressing the barriers that potentially impede disabled students. This will involve institutions putting in place systems that can be activated as appropriate for disabled students, staff and/or visitors. Alongside this, disabled students and staff are entitled to individual reasonable adjustments for specific requirements."

<sup>414</sup> Page 12 "The best education money can buy? Disabled university students and the Equality Act" 2016 by Pauline Isobel Roberts and Erich Hou of Cardiff University, open access "International Journal of Discrimination and the Law 16 (2-3) Pages 143-160 ""Certainly access to recorded lecture materials may well alleviate disadvantage to students with visual impairments, but may also be beneficial to students without that particular impairment (Wasserman 2013)"

<sup>415</sup> Page 23 [supra] "For example, in terms of information to be provided to the student- if a student is led to believe that audio-visual technology is in place, the student may rely on section 50 of the Consumer Rights Act 2015 which provides that information taken into account by the student-consumer when entering into the contract, will be included as a term of the contract. While this raises the possibility of a claim for breach of contract if there is no such equipment, this does not remove the potential claim for breach of duty to make reasonable adjustments."

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

perform under the SCTE. Sue Rowland 2017<sup>416</sup> explains that in the context of a formal SCTE students too have duties to perform.

The digital trail left by students is also useful in ascertaining how engaged students have been in their studies and activities assigned to them. J. McIntosh and C. Callery (2017)<sup>417</sup> highlight not just the importance of analytics in 'early tracking' of students who might require additional support, but the data could be equally used in highlighting students' lack of participation particularly if the same students complain about the quality of the educational service<sup>418</sup>.

## 5.12 Judicial deference to academic judgment: can this survive in its current legal format?

The tensions surrounding judicial deference to academic judgment are under the HE spot-light for fee-paying consumer students because as Palfreyman and Temple (2017)<sup>419</sup> highlight this immunity affords a special privilege to academics (not afforded to other professionals) enabling liability to be avoided for key contractual duties such as 'teaching quality'<sup>420</sup>. Palfreyman and Temple (2017)<sup>421</sup> opine that students are unable in common law jurisdictions to sue their HEI in the private law of contract for supposed poor quality of teaching delivered under the SCTE or under the law of negligence in the private law of tort. *"This question of special academic immunity against failing to provide teaching of appropriate quality will eventually have to be addressed - probably via its removal..."*

This strict application of the immunity from liability position is also applied by the Australian courts.<sup>422</sup> However, there would appear to be some relaxation in the strict application in other

<sup>416</sup> "A value for money student contract cuts both ways" 24<sup>th</sup> July 2017 accessible at: <http://comment.capital-law.co.uk/post/102ec2r/a-value-for-money-student-contract-cuts-both-ways> and accessed 4th May 2019 accessed 18<sup>th</sup> October 2019, "Students would be under a legal obligation to attend lectures and seminars or read prescribed texts. So, not only would students be able to sue universities for any breaches, but universities could defend and counterclaim any actions brought by student on this basis or, even in theory, bring their own claims against students for non-performance."

A value for money student contract cuts both ways, Helen Rowlands of Capital Law, 24<sup>th</sup> July 2017, accessible at: <http://comment.capital-law.co.uk/post/102ec2r/a-value-for-money-student-contract-cuts-both-ways> and accessed on 7th April 2018

<sup>417</sup> 'Learning analytics' can help universities improve student engagement and performance but data protection issues must be addressed, say experts" May 2017 and accessible at: <https://www.out-law.com/en/articles/2017/may/learning-analytics-can-help-universities-improve-student-engagement-and-performance-but-data-protection-issues-must-be-addressed-say-experts/>

<sup>418</sup> "Technology is playing a growing role in the way teaching is delivered to university students. Students are increasingly accessing course materials, completing modules and participating in assessments online. This digital activity leaves a data trail that can offer insights into students' engagement and performance."

<sup>419</sup> Pages 115-117 of "Universities and Colleges: A very short introduction", 2017, Oxford University Press.

<sup>420</sup> "There remains however, one very special ...feature of being a professor - the concept of judicial deference in every legal jurisdiction to the proper exercise of academic judgment. Providing the faculty teach the specified quantity of material the university recruitment and marketing has stipulated or promised for the degree course and also examine the students in accordance with any stated procedures, **the courts will not attempt to second-guess student claims based on issues of alleged poor teaching quality**...The academic...the last professional group to benefit from this legal immunity against challenge on the basis of incompetence."

<sup>421</sup> Page 117 [supra]

<sup>422</sup> "The Contract for the Supply of Educational Services and Unfair Contract Terms: Advancing Students' Rights as Consumers" Page 181 as part of PhD submission and related article available <http://www.austlii.edu.au/au/journals/UWALawRw/2013/10.pdf> and accessed 29th December 2017 - Lisa Goldacre (2013) "Outside of the consumer tribunals, there is no Australian precedent to indicate that the courts will look to matters of quality and standards in the supply of educational services the same way as it will for other professional services. It is



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

common law jurisdictions, Shanahan et al (2015)<sup>423</sup> comment in relation to the Canadian case of **Gauthier v Saint Germaine** that: *"the superior courts have inherent jurisdiction to hear contract and tort claims against universities even if the dispute is academic in nature."*

This perceived unfairness of the judicial deference to 'academic judgment' and being unable to challenge what is arguably the most important TERM of the SCTE for students, 'teaching quality' needs attention<sup>424</sup>. It is suggested that such complaints could be avoided (settled privately and internally) by using the 'digital evidence' provided by TEL Tools to check e.g. that fundamental promises of contact hours and module content have been delivered and that content reflects a contemporary message. The Hobsons UK Domestic Student Report 2019<sup>425</sup> confirms that for students selecting a particular course the most important factor for them is that there will be 'high-quality' teaching provided. With 94% of the 1700 participants in this survey aged between 16-18 making these decisions (that have significant financial ramifications in their adult life) based on high quality and then subsequently being denied possible redress for the key factor that motivated their choice of institution is difficult to support<sup>426</sup>.

---

arguable that this may not be so easily overlooked by the higher courts. This is, and continues to be, a significant hurdle for students seeking redress for what they perceive to be poor quality educational services."

<sup>423</sup> Shanahan, Nilson, and Broshko Page 161 [supra]- case reference, 2010 ONCA 309, 325 DLR

<sup>424</sup> The BIS Report (2016)<sup>424</sup> "Success as a Knowledge Economy: Teaching Excellence, Social Mobility and Student Choice" May 2016 also explain at paragraphs 19 and 20 that, *"Information, particularly on price and quality, is critical if the higher education market is to perform properly. Without it, providers cannot fully and accurately advertise their offerings, and students cannot make informed decisions."* The authors add that *"The lack of information is particularly acute for teaching quality, which should be among the most important factors in students' choices."*

<sup>425</sup> UK Student Survey 2019- "An action plan for domestic recruitment in 2019" Page 15 accessible at <file:///C:/Users/npjios/Downloads/QS%20Domestic%20Student%20Survey%202019.pdf>, Profile of students and number of recipients "Received 1,700 responses ✓ Majority of respondents aged 16-18 (94%)"

<sup>426</sup> Palfreyman and Temple (2017)<sup>426</sup> make an interesting analogy between the teaching profession and the role of architects and engineers concluding that: *"...the issue of academic judgment in terms of what is taught and how it is taught is beyond challenge, unlike for doctors, engineers, architects and other such professionals who can be found to have been professionally negligent, to have failed to meet the standard of the reasonably competent doctor, engineer etc...by the courts or by their professional bodies. There is no such idea of academic malpractice, of professional negligence."*

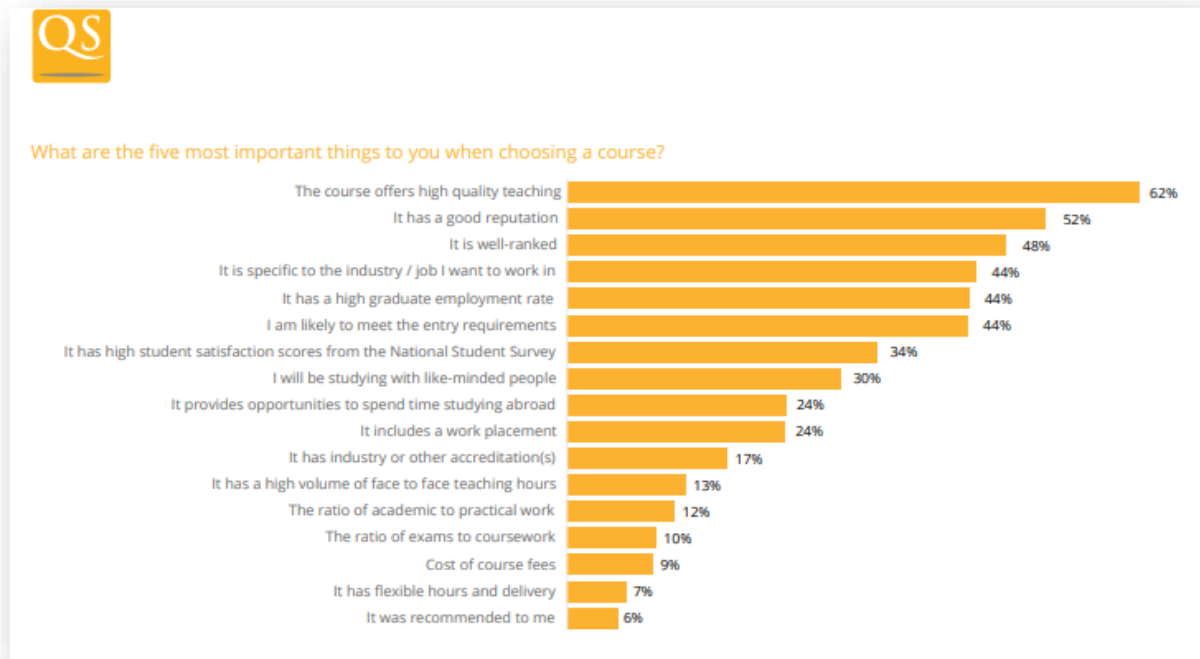


Figure 16: QS UK Student Survey 2019<sup>427</sup>, 'High-quality' teaching is the no.1 priority for students' choice of course

### 5.12.1 The importance of 'high-quality' teaching for all students

The Hobsons Report 2017<sup>428</sup> asked international students what was the most important factor influencing their choice of university and the top answer in 2017<sup>429</sup> was '*the course offers high quality teaching*'.<sup>430</sup> Again in the 2019 ISS survey the same is reported in relation to choice of university with 59% of international students stating that 'high-quality teaching' is their number one priority in university choice.<sup>431</sup> International students are paying significantly higher fees than their domestic counterparts and being unable to obtain redress if quality teaching is not provided in their country of choice could be viewed as unfair. The need to agree a workable definition across the disciplines on what 'high-quality teaching' means has never been more important despite the difficulties of

<sup>427</sup> Page 16 "UK Domestic Student Survey 2019 | An action plan for domestic student recruitment in 2019"

<sup>428</sup> UK International Student Survey 2017- "Welcoming the World" by Hobsons 2017 pages 8-9

<sup>429</sup> This question was not asked in the 2018 survey which focussed on how students define 'high-quality' and is more fully discussed in the case study subsequently.

<sup>430</sup> Key facts on survey participant • "65 universities participated globally • 62,366 respondents globally • 27,955 respondents considering the UK • 5 million data points collected from respondents to the UK survey • 196 nationalities represented • 55% male / 45% female • 61% postgraduate / 35% undergraduate / 4% other (incl. foundation and vocational) • Top subject areas: (1) Business and Administration, 23%; (2) Engineering, 15%; (3) Social Studies, 7% • Top age groups: (1) 18-21, 72%; (2) 22-25, 27%; (3) 26-30, 19% • Top income groups: (1) Under \$25K, 72%; (2) \$25K-100K, 23%; (3) Over \$100K, 5%"

<sup>431</sup> Page 37 of the ISS 2019 survey, "Growing Global Education | Rising to the international recruitment challenge"

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

articulation and in enforcing breaches by students by virtue of the doctrine of judicial deference to academic judgment.

As T. Shanahan et al (2015)<sup>432</sup> explain, 'In an age of increasing accountability and competition, program quality is often touted by universities and colleges as a drawing card to attract the brightest and best minds to their campuses.'

When approached in the manner as set out above it is paramount that universities are held to account in relation to these promises given the student investment and the right to expect that information provided by a future HEI is honest. In a recent survey by Trendence 2018<sup>433</sup> the number one factor was quality of teaching that signified 'value for money' for students.

#### Which factors demonstrate value for money

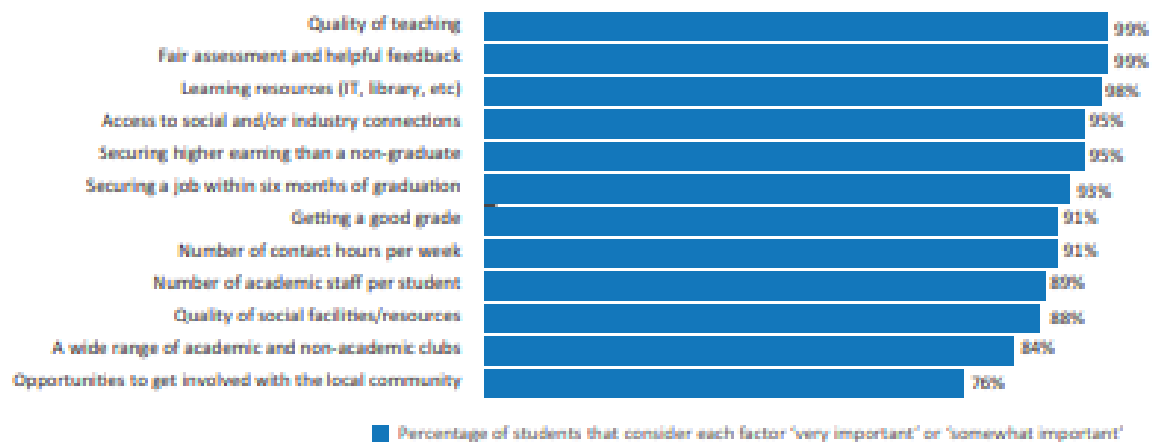
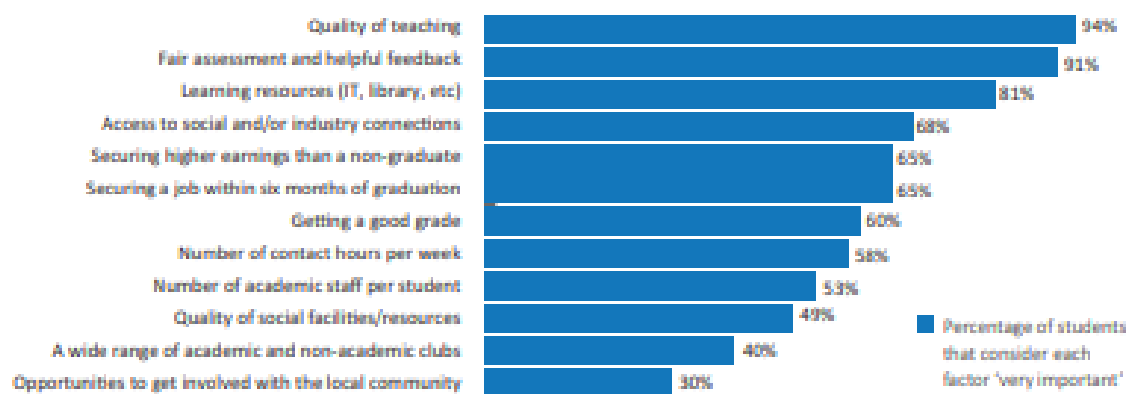


Figure 17: The provision of quality teaching is the student's no. 1 indicator of value for money

<sup>432</sup> Page 115 of "Handbook of Canadian Higher Education Law", 2015 by Theresa Shanahan, Michelle Nilson, Li-Jeen Broshko, McGill-Queen's University Press

<sup>433</sup> Page 16 "Value for money: the student perspective Research commissioned by the Office for Students. Project led by a consortium of Students Unions" Trendence 2018 accessible at: <https://studentsunionresearch.files.wordpress.com/2018/03/value-for-money-the-student-perspective-final-final-final.pdf>

A positive fair approach in dealing with student complaints in relation to teaching quality<sup>434</sup> and enabling the student voice to be heard early is to go to the source and review what took place there e.g. the recordings of lectures or workshop exchanges. Giving students a voice to raise concerns over quality of provision is sensible given the cost of tuition and if we are promising transparency and good faith in our dealings with students it seems unfair not to harness these tools in amicable resolution.

T. Shanahan et al (2015)<sup>435</sup> remind us of the importance of fair dealing and fair internal processes and whilst there is a reluctance on the part of the courts to get involved in academic matters there is less reluctance on their part in holding institutions to account where they fall short in terms of their duty of care to students and '*fundamental fairness especially with regards to processes that institutions use to make decisions*'<sup>436</sup>. With readily available lecture recordings in most universities that could provide prompt answers to questions related to teaching quality students would be entitled to ask why refusing to review the recordings or to take the recordings into consideration in relation to these complaints represents a fair internal process for them. In highly recent research conducted in the US questioning the value and reliability of student evaluations of teaching quality and performance, Paul Basken (2019)<sup>437</sup> refers to the work of Dr Kreitzer who suggests that one of the best methods, '*...identified...involved hiring skilled evaluators to sit in classrooms and rate instructors...*' This approach is also being adopted in Australia with J. Ross (2019)<sup>438</sup> stating that, '*Australian universities are increasingly formalising peer observation of teaching as a tool that can be used to assess academics in promotion and performance reviews.*'

The use of recorded lectures could make this freely accessible and easy to manage whilst at the same time being less intrusive and enable such experts to be remotely 'parachuted' into classrooms to observe teaching.

---

<sup>434</sup> The BIS report acknowledges the difficulty of defining and measuring 'teaching quality' at paragraph 14 "Measuring teaching quality is difficult. But it is not impossible. We define teaching broadly - including the teaching itself, the learning environments in which it takes place, and the outcomes it delivers."

<sup>435</sup> Page 164 of "Handbook of Canadian Higher Education Law", 2015 by Theresa Shanahan, Michelle Nilson, Li-Jeen Broshko, McGill-Queen's University Press

<sup>436</sup> Page 164 of "Handbook of Canadian Higher Education Law", 2015 by Theresa Shanahan, Michelle Nilson, Li-Jeen Broshko, McGill-Queen's University Press "Canadian courts generally have not expressed a desire to get involved or intervene in universities' core business and thus have historically shown considerable judicial deference to postsecondary institutions especially with respect to fundamental academic matters such as admission and curriculum requirements, academic standards, and issues relating to academic judgment. That said, while the courts do not consider themselves experts in these core academic matters they do consider themselves experts in matters of fundamental fairness, especially with respect to the processes that institutions use to make decisions, resolve disputes and deal with academic and non-academic disciplinary matters that arise from time to time."

<sup>437</sup> "US Campuses reluctant to reduce reliance on student evaluations" Paul Basken, 28<sup>th</sup> August 2019, THE

<sup>438</sup> "More Universities using peer observation to assess teaching" 3 June 2019, THE

### 5.12.2 Distinctions between standards v quality in educational provision

These issues are fully discussed in the special case study on high-quality, but it is worth pointing out at this stage that the approach to this difficult issue is not aligned between educationalists and the legal profession. The legal community seem to have fewer struggles in differentiating 'standards' from 'quality' in respect of the educational provision<sup>439</sup> and specifically in relation to teaching quality. CMS McKenna (2018)<sup>440</sup> highlight that in relation to the **Siddiqui Case (2018)**<sup>441</sup> case that teaching had not fallen below reasonable standards<sup>442</sup> and that the *claim by a former student against Oxford University for alleged negligent quality of teaching ... was rejected ...but the judge forecast that... with students now incurring substantial debts to pursue their university education, the quality of the education delivered will undoubtedly come under even greater scrutiny than it did in the past...*

### 5.13 How enforceable are contractual promises relating to quality of provision?

The traditional and well established approach to quality of provision and specifically quality of teaching was addressed in **Abramova v Oxford Institute of Legal Practice [2011]**<sup>443</sup> which held that whilst educational services should be delivered without negligence this should not 'open the door to claims based on poor quality of teaching.'<sup>444</sup> The Honourable Mr Justice Foskett, in the **Siddiqui** case was prepared to question the standards of teaching delivered by Oxford University and heard evidence from former students but concluded on the difficulty of winning cases in relation to educational provision *but didn't rule out future actions.*

*"Litigation is costly, time- and emotion consuming and runs the significant risk of failure, particularly in this area where establishing a causative link between the quality of teaching and any alleged "injury" is fraught with difficulty."*

The clear message here must surely be aimed at avoiding disputes of this nature escalating beyond the institutions own internal disputes resolution processes and in so doing negating any damage to an HEI's reputation by 'going public' in relation to aggrieved students.

<sup>439</sup> A special case study follows and highlights the different approach by lawyers who use these terms interchangeably which is not the case in the higher education sector.

<sup>440</sup> "Education: claim for alleged negligent teaching fails" 9<sup>th</sup> Feb 2018, accessible at: <file:///F:/PhD%20materials%20from%207th%20March%202019/AAA%206th%20April%202019/CMS%20Review%20of%20Siddiqui-%20negligent%20university%20teaching.pdf>

<sup>441</sup> [2018] EWHC 184 (QB)

<sup>442</sup> The lawyers add that in this case "The outcome of this case will be welcomed by educational institutions and their insurers Teaching must be of a reasonable standard; it need not be perfect."

<sup>443</sup> [2011] EWHC, 613

<sup>444</sup> Burnett J. stated, "Section 13 of the Supply of Goods and Services Act 1982 implied a term that the educational services would be provided with reasonable care and skill. The effect of that term was to imply a term that the educational services would be provided without negligence... This is not to open the door to claims based on poor quality of teaching. It is one thing for the law to provide a remedy in damages when there is manifest incompetence or negligence comprising specific identifiable mistakes... Proof of under-performance by a child is not by itself evidence of negligent teaching."

## 5.14 Conclusion

There is little doubt that in 2019 UK higher education is in a very difficult and different marketplace with students highly attuned to their legal rights and prepared to take the necessary action to enforce them. Many will argue that HEIs and their academics have for too long been protected from external regulation and that with students paying significant sums for their education are now the ones who need protection and need legal power to hold their HEIs to account. Others will argue that the UK has secured its place as delivering world class education and this strong reputation for high-quality university programmes attracting significant overseas interest without being subject to this new regulation with demands for accountability in every sphere of academic life.

The author would encourage the higher education industry to learn from the mistakes of other industries such as the UK construction industry which was beset with adversarial disputes but is now developing a new culture aimed at avoiding and managing disputes more efficiently, cost effectively and without intervention by the courts. Much time can be wasted on cases with little chance of success. The comments of the judge in **Glasgow Caledonian University v Lihe Liu** (2015) drive this important message home of how difficult it is to establish educational negligence.

*"...reliance on a single incident, or the conduct of a single lecturer, was not on its own sufficient to found breach of contract in relation to the delivery of a whole university course..."*

Clyde and Co (2018)<sup>445</sup> remind us that managing disputes and resolving them internally will be of greater value to all stakeholders in the future as well as maintaining an HEI's reputation:

Too many unsubstantiated complications are voiced in providing a workable and 'user-friendly' industry wide standard form SCTE. Difficult contracts are negotiated every day and whilst there are challenging clauses that require sensible negotiation in the SCTE these are not insurmountable hurdles that would prevent a fair agreement being finalised. There is a striking naivety in the industry in relation to promises that are routinely made and a SCTE that has the backing of professional indemnity insurers and students' unions has much to commend it and is in the interests of all contracting parties.

Universities UK (2018)<sup>446</sup> strike the right note with regards to student contracts and reflect what all contracting parties need to be fully aware of and the transparency needed for a fair SCTE. *"Student contracts should present relevant course information so that students know what to expect and what*

---

<sup>445</sup> "... a case does not need to come to court to have an impact on an institution and its insurers. As competition increases within the sector, which will likely continue to do so as a result of Brexit, institutions may be increasingly concerned to maintain their reputation as leading providers and avoid any public allegations of negligence or sub-standard teaching." Accessible at: <https://www.lexology.com/library/detail.aspx?g=72537123-3e61-4209-bb90-242d69a4a52e>

<sup>446</sup> Page 6 "Student Contracts: Ensuring a Transparent and Accountable Relationship between Universities and Students" 1<sup>st</sup> August 2018

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*is expected of them...the student contract is an opportunity to reiterate the summary course information that was presented to prospective students. By placing this information in the contract, the expectations of both the student and the institution will be clear and consistent from the outset."*

The recommendations relating to this chapter are set out in Chapter 11, but it will come as no surprise that the production of an industry wide SCTE agreed by HEIs, students' unions and professional indemnity insurers is strongly advocated as a priority.

Having set out in the three mini-literature reviews how TEL is to be defined and applied in this research and how accountability in a 'local' SCTE context operates, as well as establishing the duties and responsibilities of the three stakeholders charged with performance of the SCTE, the next chapter will square the necessary evidential circle and put '*digital evidence*' under the microscope. The next chapter is arguably the most important chapter in the entire thesis. Being clear on what counts as valid, admissible and relevant evidence that needs to satisfy evidential burdens in interdisciplinary research is paramount if the true value of the TEL Tools and the evidence they generate can be used effectively and legitimately as evidence of compliance with the SCTE.

## Postscript to chapter 5 (Terms and Conditions of the SCTE)

### 5A 'High-quality' provision that represents VFM in the context of the SCTE

This section of the work is an extension of the investigations in chapters 4 and 5 dealing with the regulatory and legal aspects of accountability<sup>447</sup> and the stakeholder's contractual duties to be performed in accordance with the SCTE. An extensive case study was undertaken for this element of the research dedicated to unravelling the complexities of how HEIs can meet their obligations to deliver education that is both of 'high-quality' and represents VFM in exchange for 'high ticket' tuition fees. However, due to word count restrictions this case study has been inserted as a special supplementary appendix (**Volume III**) and only a summary of the key findings is recorded here. As it is an implicit term of the SCTE that students receive education that is of suitable quality commensurate with their studies<sup>448</sup> this postscript has a natural fit in a chapter dedicated to the terms and conditions of the SCTE.

#### 5A.1 Special research aim: markers of 'high-quality' across all disciplines.

One of the aims of this research is to critically evaluate the extent to which the TEL Tools scaffold *'high-quality' provision and support chosen pedagogy*. In line with this it is a special aim of this research to assess the feasibility of applying a set of common markers of high-quality across disciplines. At no point in the history of the UK higher education sector has the viability of EdTech to support and enable the delivery of high-quality education been more under scrutiny and having tools in place which can evidence continuity in high-quality provision during the pandemic will be valuable in early resolution of anticipated complaints and disputes by students.

The main focus of the case study relates to the feasibility of markers of 'quality of teaching' across disciplines as arguably what happens at the online or face to face classroom coalface is what matters most to fee paying students.

---

<sup>447</sup> "Accountability" by NAO accessible at: <https://www.nao.org.uk/successful-commissioning/general-principles/accountability/> Research, Accountability is a complex and much misunderstood term and can wear many different hats at the same time. As the NAO explain " 'Accountability' is the obligation to explain to someone how well you have met your responsibilities...Such an obligation may arise from law, **regulation** or contract. "

<sup>448</sup> paragraph 4.102 of "The Law of Higher Education" Dennis Farrington and David Palfreyman (2012): " There is also the implicit promise to teach effectively but there are important questions about the criteria of effective teaching and what standard of teaching a court would hold it reasonable to expect in order to discharge the institution's obligations"



## 5A.2 Clarity of terminology: 'high-quality' and 'VFM': educationalists v lawyers

The case study focussed on a thorough interrogation of what the complex terms 'high-quality' and 'VFM' mean. Both terms are complex and contestable, compounded by a lack of consensus on suitable metrics by which either can be satisfactorily measured. Hazelkorn et al (2018)<sup>449</sup> crystallise the difficulty in accurately articulating 'quality' whilst recognising that this difficulty should not be used as an excuse for not agreeing and setting some common markers on how 'quality' might be measured in terms of performance, *"For if quality is ephemeral and subjective, then really anything goes. If there is no agreement on the aspects of performance that matter most, then inefficiencies can abound."* For students what matters most is what happens at 'local level' but aligning the views of stakeholders in terms of their respective perceptions of 'high-quality' is an enduring challenge.

The legal complexities associated with 'standards' and 'quality', 'reasonable quality', 'high-quality' 'excellent quality', 'outstanding quality' and 'world-class teaching quality' are reviewed in detail in the case study. Some of these terms such as 'quality' and 'standards' are often used interchangeably by lawyers who have no difficulty in talking in terms of 'high-quality standards.' The separability and individual approach to 'quality' and 'standards' by educationalists is often at odds with a strongly legal approach and adds to the tension in research that is interdisciplinary, and which strives to deliver a consistent message.

Key recent policy documents dedicated to ensuring standards and quality are maintained by HEIs in the during the Covid-19 pandemic has spotlighted the need for continuity in high-quality educational

---

<sup>449</sup> Page 3, Chapter 1 "Quality, performance and accountability: emergent challenges in the global era" in "Research Handbook on Quality, Performance and Accountability in Higher Education" edited by Ellen Hazelkorn, Hamish Coates and Alexander McCormick, 2018, Edward Elgar Publishing

## The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

provision for all students. HEFCW<sup>450</sup>, OfS<sup>451</sup> QAA<sup>452</sup>, Universities UK<sup>453</sup> have all addressed these current challenges with further guidance provided in relation to protecting consumer rights of students from the OfS<sup>454</sup> and HEFCW<sup>455</sup>.

### 5A.3 Distinguishing 'high-quality' and 'high-standards' – distinction without a legal difference?

The approach to 'standards' and 'quality' in higher education is one of separation. This is crystallised by Chris Brink (2010)<sup>456</sup> who states the general public would probably equate standards with quality. Palfreyman and Temple (2017)<sup>457</sup> also highlight the tensions surrounding 'quality' as distinct from 'standards' in the provision of the educational service and which from a legal perspective are

<sup>450</sup> On page 15 of "COVID-19 impact on higher education providers: funding, regulation and reporting implications" 4<sup>th</sup> May 2020 HEFCW reminds Welsh institutions of their ongoing quality commitments, "HE providers will need to continue to report to HEFCW where they think there is reason to believe that the quality of provision is inadequate or likely to become inadequate as identified through their own processes including via complaints. This must be treated as a notifiable event, with HEFCW informed as soon as possible."

<sup>451</sup> The OfS in their recent guidance to providers during the Pandemic "Guidance for providers about student and consumer protection during the coronavirus (COVID-19) pandemic" 9<sup>th</sup> June 2020 paragraphs 20-24 summarise their regulatory functions aimed at ensuring registered providers meet Consumer legislative requirements (C Provisions) in fulfilling the (B Provisions) on standards of provision during the pandemic. "The OfS's regulatory framework is designed to deliver the OfS's regulatory objectives: we are seeking to deliver significant improvements in access and participation for particular groups of students and a high-quality higher education experience and good outcomes for all students. The primary regulatory tools we use to do this are access and participation plans, and the baseline conditions of registration for quality and standards (the B conditions). We use the Teaching Excellence and Student Outcomes Framework (TEF) to incentivise excellence and improvement beyond the regulatory baseline. 21. The C conditions are necessary to underpin the delivery of the regulatory objectives. This means that the student protection mechanisms are primarily designed to work effectively in support of our objectives, rather than as ends in and of themselves. In other words, they protect students when, for example, the requirements of the B conditions are not being delivered in practice. 22. The C conditions are generally expressed as a minimum baseline that all providers are required to meet, but the OfS does not prescribe how a provider should do so"

<sup>452</sup> "COVID-19 Guidance Preserving Quality and Standards Through a Time of Rapid Change: UK Higher Education in 2020-21" - QAA June 2020, page 9, "Providers have moved quickly to deliver teaching and learning virtually, ensuring that lecture/seminar/tutorial materials were available through a VLE and that students could virtually attend sessions. They have also had to assure the quality of the move to virtual delivery, often implementing 'emergency' or 'exceptional' academic regulations to do so. The challenge providers are now facing is how to ensure that those regulations are not a barrier to making reasonable changes while ensuring that quality is not adversely affected." And on page 11 standards of assessment must also be maintained "To maintain standards, expediency should not triumph over rigour. Parity, between virtual and onsite assessment approaches, is crucial. A focus on learning outcomes can help to ensure that virtual-mode students get an equal experience to previous cohorts, and that which they would otherwise have had, and standards continue to be maintained."

<sup>453</sup> <https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2020/principles-and-considerations-emerging-from-lockdown-june-2020.pdf>

<sup>454</sup> <https://www.officeforstudents.org.uk/publications/guidance-for-providers-about-student-and-consumer-protection-during-the-pandemic/>

<sup>455</sup> [https://www.hefcw.ac.uk/documents/publications/circulars/circulars\\_2020/W20%2019HE%20COVID-19%20impact%20on%20higher%20education%20providers%20consumer%20protection%20student%20expectation%20quality.pdf](https://www.hefcw.ac.uk/documents/publications/circulars/circulars_2020/W20%2019HE%20COVID-19%20impact%20on%20higher%20education%20providers%20consumer%20protection%20student%20expectation%20quality.pdf)

<sup>456</sup> "Quality and standards: Clarity, Comparability and Responsibility", Quality in Higher Education Journal, 16:2, 139-152 "If the question 'What is quality in higher education?' were posed to a cross-section of the population, the response would probably indicate that 'quality' is believed to be synonymous with 'good'. Furthermore, **quality is popularly equated with 'high standards'** and it would probably be a surprise to many people that quality assurance professionals make a fundamental distinction between quality and standards..."

<sup>457</sup> Page 93 of Universities and Colleges, A Short Introduction – 2017 David Palfreyman & Paul Temple OUP

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

sometimes difficult to reconcile<sup>458</sup>. Roger Ellis (2019)<sup>459</sup> reflects a contemporary yet enduring message which crystallises the difficulty and challenges in this area of research.

Lawyers however might argue that these terms could and should be viewed as one in the same, especially in relation to teaching, if teaching is of a poor quality then surely the teaching as a key component of the educational service to students has failed to be delivered to a standard that equates with '*reasonable skill and care*' as the law<sup>460</sup> requires. The views of the lawyers who took part in the semi-focus legal group reflect a unanimous view that these terms can be used interchangeably.

Consider how, if at all, it is difficult at a <u>legal level</u> to evaluate quality of provision in isolation from standards of provision, especially when talking about the quality of teaching.	
Lawyer respondent No 1	Very difficult if not impossible
Lawyer respondent No 2	Quality & standards should be interchangeable. Quite agree with McKenna
Lawyer respondent No 3:	Very difficult in legal terms to separate the two
Lawyer respondent No 4	Totally agree

Table 12A: Lawyer viewpoints on the interchangeable language of 'quality' and 'standards'

#### 5A.4 Case law in the context 'quality' and the SCTE?

Despite the dearth of case law in relation to terminology on '*quality*' as it applies to a consumer service contracts such as the SCTE the case study investigated the legal complexities of each '*quality*' phrase routinely adopted in higher education. This is combined in figure 19 which shows the potential of inflated promises of provision to enhance legal liability potentially exceeding insurable '*reasonable skill and care*' standards.

<sup>458</sup> "Most people outside higher education expect universities to offer a high- standard of education and perhaps they assume that saying it is of high- quality is another way of saying it is a high- standard. But, strictly speaking it is not. To borrow from the ...QAA...academic standards are 'predetermined and explicit levels of achievement which must be reached for a student to be granted a qualification. Academic quality on the other hand 'is a way of describing the effectiveness of everything that is done or provided by individual institutions to ensure students have the best possible opportunity to meet the stated outcomes of their programmes. "USW adopt similar language in their Student Experience Strategy at: QUALITY ASSURANCE MANUAL 2016-110 accessible at: USW [file:///C:/Users/npijos/Downloads/Quality\\_Assurance\\_Manual.pdf](file:///C:/Users/npijos/Downloads/Quality_Assurance_Manual.pdf), "The University defines academic standards as the level of achievement a student must reach to gain an academic award. 4. The University defines academic quality as the learning opportunities provided to students to assist them in achieving their award. 5. The University defines academic enhancement as the process of taking deliberate steps to improve the quality of learning opportunities."

<sup>459</sup> Pages 48 and 49 Chapter 4 "A British Standard for University Teaching?" in SRHE, "Handbook of Quality Assurance for University Teaching" edited by Roger Ellis and Elaine Hogard, 2019 published by Routledge, "...Quality is one of those interesting words that has both a neutral and positive interpretation. In a neutral sense quality refers to the standard achieved... On the other hand, the label 'quality' is usually associated with high standards... Whether employed neutrally or positively, quality carries with it the notion of standards that must be met."

<sup>460</sup> Clause 49 of the Consumer Rights Act 2015

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

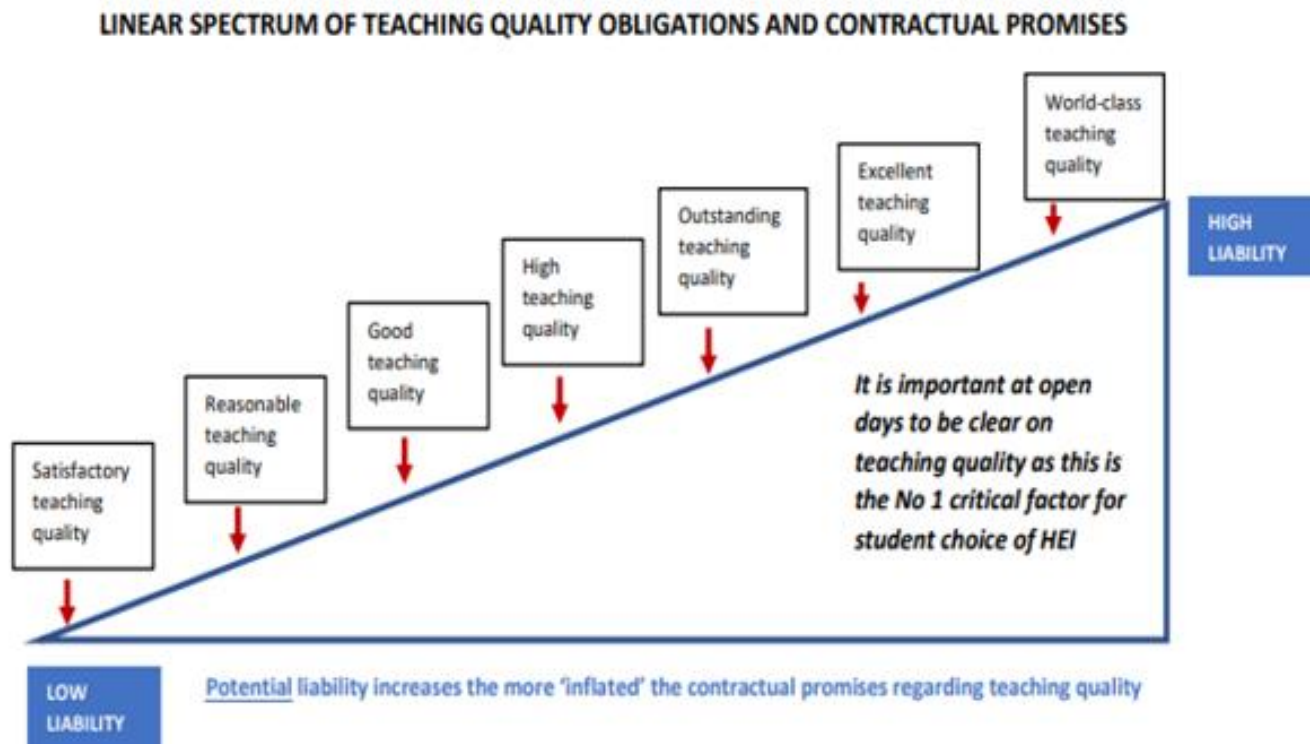


Figure 19: Linear liability graph of potential increase of liability in line with inflated promises

### 5A.5 Markers of high-quality across disciplines: positive message on their feasibility

The key markers that are important for students in establishing whether 'high-quality' is delivered as promised were reviewed in a range of reports and are fully itemised in the case study. The primary data delivers a positive message on the feasibility of common markers of high-quality across disciplines that align with student viewpoints. The markers show an equally strong alignment with the accountability duties as set out in chapter 4 for the three stakeholders. These markers are fully addressed in the 'Takeaways' set out below which summarises the entire case study.

### 5A.6 The importance of clear messages on 'high-quality' provision during the Covid-19 pandemic

It is always important to differentiate between statements which are considered '*mere advertising puffs*' from statements which can be legally binding. In the current pandemic honesty and transparency and delivering a clear message of what students can honestly expect to receive in terms of educational provision (2020-2021) has never been more necessary.<sup>461</sup> Vicky Hayhurst (2020)<sup>462</sup> urges the sector to be both ethical and honest about what's truly on offer and reminding the reader

<sup>461</sup> "University Marketing Should Build Trust with Students" Vicky Hayhurst, 28/05/20 accessible at: <https://wonkhe.com/blogs/university-marketing-should-build-trust-with-students/>

<sup>462</sup> [supra]

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

that the CEO of the OfS, Nicola Dandridge has also stressed the importance of 'clarity' in the message to students.<sup>463</sup>

### 5A.7 Summary of the findings in relation to the case study on 'high-quality' provision

Summary of the 'TAKEAWAYS' from the case study on 'high-quality' provision	
Are common markers of high-quality provision capable of implementation across disciplines?	Yes, but greater clarity and agreement on how to articulate 'standards' and 'quality' accurately is required due to the separation of these two terms by educationalists. In the legal environment these terms are used interchangeably and with ease but confusion reigns in academia on how to best define these complex terms.
What are the common markers of high-quality that could work across disciplines?	Clear information about courses and how they will be provided in terms of contact time, assessment and content; provision of a fair SCTE that meets consumer requirements; lecturers are qualified and up to date in their field and pedagogy and use TEL; real world of work opportunities; provision is non-discriminatory and accessible for all students, standards meet the CRA requirements and tuition is of high-quality; there is a fair and independent process for handling student complaints and disputes. These same markers connect with key markers of VFM as most important to students and demonstrates an inextricable link between the two.
Should 'reasonable skill and care' represent the standard going forward that needs to be met in terms of delivery under and in accordance with the SCTE.	Yes, because it is the required standard in Section 49 of the CRA 2015 and it meets the requirements of professional indemnity insurers.
Could promises to deliver 'excellent' standards of teaching and educational provision exceed requirements of 'reasonable skill and care'?	Theoretically yes. However, translating this to legal reality is difficult without a legal precedent to guide. Erring on the side of caution, be clear in the SCTE that the HEI will use reasonable endeavours to provide the educational service in accordance with standards of 'reasonable skill and care'
Should a standard industry wide SCTE be made a priority for contracting parties?	This is urgent as there is a lack of knowledge within the industry on the duties and responsibilities of the key stakeholder actors charged with performing this contract.
Is high-quality teaching the key priority for students when it comes to assessing their academic experience.	Yes, for both domestic and international students and underpins the need to articulate what this means for potential and existing students to enable them to manage their expectations and importantly to raise concerns when they consider provision falls short.
Why has 'high-quality' become so important in the new era of accountability in higher education?	Because accountability is inextricably linked to the issue of high-quality and enshrined in government policy. What has changed is the focus on tracking accountability where it matters most- at the 'chalk-face' where it is argued that the taxpayer and the student need enhanced and transparent tracked accountability.
Can the TEL Tools in this research provide this much needed tracked accountability?	Again, this depends on how 'accountability' is defined and in the relevant context, but the TEL Tools are a window on the reality of the activities of the classroom and provide a transparent account of what happened there.
Can the TEL Tools in this research evidence that high-quality provision has been provided to students?	The combined three TEL projects and the digital evidence they generate could evidence high-quality as it has been defined in this chapter by students, employers, academics, lawyers, disabled students but the evidence and digital footprint that they leave behind could equally evidence that the students did not receive 'high-quality' educational provision.
The students who took part in the 2012 survey by KCL/QAA expressed strong views on their perceptions of 'good and bad' teachers' and the need for professional teacher training. Could the TEL Tools evidence where teachers need support to improve in teaching and innovative	Yes, and yes but again the lack of a clear understanding and set of common markers to articulate 'high-quality' needs attention. Implementing this initiative will also inform students what to expect and manage their expectations. This should also have the added benefit of fewer complaints about quality of teaching and educational delivery.

<sup>463</sup> "The important thing here," said Nicola Dandridge, chief executive of the Office of Students, at the House of Commons education committee last week, "is absolute clarity to students so they know what they're getting in advance of accepting offers."

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

pedagogy to support the needs of learners in a digital age? Further, can the TEL Tools here support chosen pedagogy and scaffold 'high-quality' provision.	
Marketing and advertising- how should HEIs ensure that marketing content accurately reflects what students will receive and what students are promised?	Careful drafting of marketing and advertising content is a priority and needs the full support of the academic team aimed at avoiding inflated promises about standards and quality when there is no realistic ability to fulfil these inflated promises. Transparency, honesty and good faith dealings with students are paramount given their investment.
The case of Pok Wong 2019- could the TEL Tools as adopted in this thesis avoided the potential damage to the reputation of UEA and enabled swifter resolution of this ongoing dispute.	As the primary complaint by this student related to lack of promised teaching hours and contact time the TEL Tools as a combination record the entire activities of the classroom so theoretically yes. That said the court papers are not available at the time of writing and these would provide the detail of the students claim. However, this case was settled, and no precedent established with UEA continuing to deny any liability. Sometimes claimants just want their day in court and private resolution is not an option.
TEL and dispute resolution- could the evidence generated by the TEL Tools be used effectively in private ADR proceedings with the aim of avoiding escalation of the dispute and managing the dispute sensibly, privately and cost-effectively?	Yes, the digital evidence trail left by the TEL Tools could be used in ADR proceedings provided this evidence meet the requirements of admissible, reliable and relevant digital evidence as set out in the Civil Evidence Rules.
Can the TEL Tools provide evidence for students to support complaints and disputes	It is perfectly feasible that students would make full use of the evidence in the form of lecture capture recordings to evidence that quality of teaching and content to be expected of academics fell far short of expectations. Such evidence generated by these TEL Tools cuts both ways and adds transparency that students are being treated fairly and that promises are being delivered on.
What forms of evidence truly demonstrate that 'high-quality' teaching is happening in the HE classrooms?	Peer observation or observation via lecture capture. TEF has spotlighted the importance of 'high-quality' teaching and elevated its status but question marks surround the metrics currently being used. This combined with increasing problems associated with SET questionnaires that are seen by many as highly unreliable.
What is the single most important 'takeaway' message that this case study has established?	The need for a fair and transparent industry wide student contract as there is too much confusion in the terminology which can be used as an excuse for not delivering this SCTE, Difficult contracts are negotiated every day and delivering an agreement that is fair on all parties needs to be urgently finalised. This will give clarity to all parties and with the full support of professional indemnity insurers and agreement on the contents by key stakeholders will enable parties to understand their roles and responsibilities. The importance of provisions enabling swift resolution of disputes will be paramount.

Table 14A: The 'takeaways' of the findings in relation to the Special case Study on High Quality

### 5A.8 The inextricable link between VFM and high-quality provision in UK higher education

There is increasing demand for institutions across the UK higher education sector not only to demonstrate that students have received education that is of 'high-quality' but also that it represents 'VFM' in exchange for student tuition fees<sup>464</sup>. As discussed elsewhere in this thesis both terms are complex and contestable compounded by a lack of consensus on suitable metrics by which either can be satisfactorily measured. It is a key aim of this research to assess the feasibility of key markers of 'high-quality' provision being applied across all disciplines and to that end, this section focusses on the interrelationship of high-quality educational provision and VFM as a key component in achieving

<sup>464</sup> 'Given the economic and financial uncertainty as concerns relating to COVID-19 grow, we believe clear communication on value for money will continue to be important.' QS DOMESTIC STUDENT SURVEY Britain 2020 Student recruitment in the new paradigm: Britain 2020 | How to speak to domestic students" and at page 13 of the report.

**The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education**

this. As N. Baporikar and M. Sony (2019)<sup>465</sup> explain there is no single definition of the meaning of 'quality' but is based on a range of dimensions including 'quality as value for money (as efficiency and effectiveness).' This link between high- quality provision and VFM is also strongly advocated by the Department for Education (2019).<sup>466</sup>

As this chapter is concerned with the express and implied terms of the SCTE an in depth investigation of implying a term related to VFM into the SCTE was undertaken in the case study as well as the importance of HEIs demonstrating that they have acted in good faith and treated students fairly in their contractual dealings with them.

### **5A.9 The Trendence UK Survey 2018<sup>467</sup>: Students' perceptions of VFM**

This report was commissioned by the OfS 2018<sup>468</sup> and Nicola Dandridge CEO of the OfS summarised the findings and urged providers to read the report, *'The results of this research show that students particularly prioritise high quality teaching, helpful feedback and good learning resources. Securing a good graduate job and salary are also important, as well as transparency about how fees are spent and other costs that students may incur.'*<sup>469</sup> The markers highlighted in bold reflect those that fall within the remit of the SCTE.

- **quality of teaching**
- **fair assessment and helpful feedback**
- **learning resources (IT, library, etc)**
- access to social and/or **industry connections**
- securing a higher- earnings than a non-graduate
- securing a job within six months of graduation
- getting a good grade
- **number of contact hours per week**
- number of academic staff per student
- quality of social facilities/resources

<sup>465</sup> Preface "Quality Management Principles and Policies in Higher Education (Advances in Higher Education and Professional Development)" 2019 by Neeta Baporikar and Michael Sony, Published by Information Science Reference, 'Given the complexity of the quality concept there is no single definition to comprehensively describe the meaning of 'quality'...within the higher education field...the widely differing conceptualizations of quality grouping is into five discrete but interrelated categories. Quality thus can be as exception, as perfection, as fitness for purpose, as value for money and as transformative.'

<sup>466</sup> Page 1 of the "Government Response to the Education Select Committee report: Value for Money in Higher Education" January 2019 and Presented to Parliament by the Secretary of State for Education by Command of Her Majesty. "In terms of students and graduates, value for money spans the provision of a high- quality higher education course, effective support for students whilst studying, and successful employment outcomes upon graduation."

<sup>467</sup> "Value for money: the student perspective", Trendence 2018 accessible at:

<https://studentsunionresearch.files.wordpress.com/2018/03/value-for-money-the-student-perspective-2.pdf>

<sup>468</sup> Research commissioned by the Office for Students. Project led by a consortium of Students' Unions and accessible via:

<https://www.officeforstudents.org.uk/media/7ebb7703-9a6b-414c-a798-75816fc4ef33/value-for-money-the-student-perspective-final-final.pdf>

<sup>469</sup> <https://www.officeforstudents.org.uk/news-blog-and-events/press-and-media/new-research-shines-spotlight-on-student-perceptions-of-value-for-money/>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

- a wide range of academic and non-academic clubs; and
- opportunities to get involved with the local community.

There are an overwhelming number of reports on VFM and are fully reviewed in **Volume III**. Only a small selection of the findings most relevant to TEL and high-quality provision that represents VFM have been selected.

1. Report #1 SAES June 2020 (HEPI)<sup>470</sup>
2. Report #2 QS Domestic Student Survey 2020 (QS)<sup>471</sup>
3. Report #3 SAES April 2020 (HEPI)<sup>472</sup>
4. Report(s) #4: Academic Experience Surveys 2016-2019 (Advance HE and HEPI)<sup>473</sup>
5. Report #5: VFM and feedback on assessment: SAES 2019 (Advance HE HEPI)<sup>474</sup>
6. Report #6 IFS Impact of degree on lifetime earnings (2020) (IFS)<sup>475</sup>
7. Report #7 Graduate Outcomes June 2020 (HESA)<sup>476</sup>
8. Report #8 LEO 25<sup>th</sup> June 2020 (UK Government)<sup>477</sup>

#### 5A.10 Report #1: The SAES HEPI 2020

In the recent SAES 2020<sup>478</sup> representing the views of over 10,000 full-time undergraduates students in the UK (5,000 students were canvassed before 16<sup>th</sup> March and lockdown in the UK and 5,000 after this date), there is an increase of 2% more students who consider that the course was poor or very poor value for money than the previous year. Correspondingly, there was a decrease of 2% from 41% in 2019 to 39% in 2020 of students who felt their course was good or very good value for money. The authors speculate on page 12 of the report on the survey that, '*...a change to teaching necessitated by Covid-19 may have impacted on value perceptions.*'

<sup>470</sup> Student Academic Experience Survey 2020, 11<sup>th</sup> June 2020 by Jonathan Neves (Advance HE) and Rachel Hewitt (HEPI)

<sup>471</sup> "DOMESTIC STUDENT SURVEY Student recruitment in the new paradigm: Britain 2020 Student recruitment in the new paradigm: Britain 2020 | How to speak to domestic students"

<sup>472</sup> "One for all or all four one? Does the UK still have a single higher education sector?" HEPI Report 129 Nick Hillman

<sup>473</sup> "Student Academic Experience Survey 2019" edited by Jonathan Neves and Nick Hillman (Joint Advance HE and HEPI Report)

<sup>474</sup> "Student Academic Experience Survey 2019" edited by Jonathan Neves and Nick Hillman (Joint Advance HE and HEPI Report)

<sup>475</sup> "The impact of undergraduate degrees on lifetime earnings" by Jack Britton, Lorraine Dearden, Laura van der Erve and Ben Waltmann, 2020, Institute of Fiscal Studies. <https://www.ifs.org.uk/publications/14729>

<sup>476</sup> <sup>476</sup> HESA Graduate Outcomes with statistical analysis 18<sup>th</sup> June 2020 available at: <https://www.hesa.ac.uk/data-and-analysis/graduates>

<sup>477</sup> "Graduate outcomes (LEO): Provider level data" 25<sup>th</sup> June 2020 accessible at: <https://explore-education-statistics.service.gov.uk/find-statistics/graduate-outcomes-leo-provider-level-data>

<sup>478</sup> Student Academic Experience Survey 2020, 11<sup>th</sup> June 2020 by Jonathan Neves (Advance HE) and Rachel Hewitt (HEPI)



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

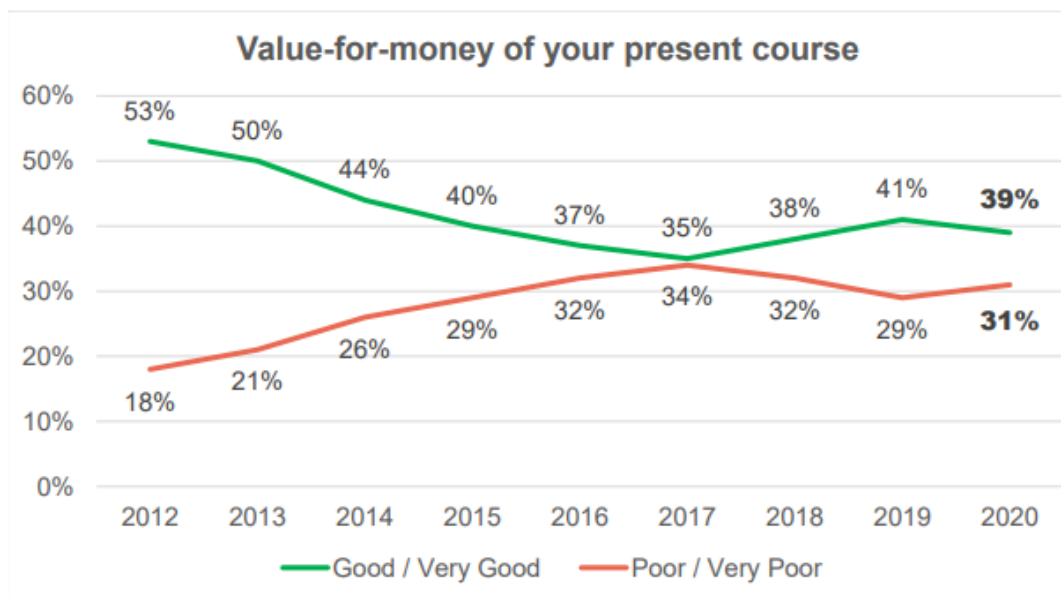


Figure 20: statistical presentation on 'VFM' across nine years of annual student academic surveys<sup>479</sup>

### 5A.11 SAES HEPI 2020

In accordance with previous surveys, students continue to link VFM with quality of teaching, course content and facilities with 60% of students responding to this 2020 survey confirming that their teaching represented good or very good value in terms of student perceptions. However, nearly 40% felt that the teaching quality received by them was perceived as poor or very poor representing a

<sup>479</sup> Page 11 "Student Academic Experience Survey 2020" edited by Jonathan Neves and Rachel Hewitt (Joint Advance HE and HEPI Report)

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

large proportion of students who are dissatisfied with the teaching on their course.



Figure 21: Student perceptions of 'VFM' as set out in the Student Academic Survey 2020

### 5A.12 Value for Money and 'Advanced Technology' – SAES 2020

In a **new section 12** for this annual survey students were asked about the use of technology on their courses and how, if at all, this supported their learning. 'Advanced Technology' is set out in the report as including TEL Tools reflected in this thesis. The findings concluded that those students who used such 'Advanced Technology' were, '*... significantly more likely to feel they have received **good value** and, perhaps more significantly, to feel they have learnt a lot and that their skills gained will play a key role in their future.*'<sup>480</sup> Further, although not formally reported in this survey the authors confirm that a follow-up question was asked on the importance of technology in supporting learning and that: '*Overall, a large proportion – 45% – feel technology is very important (not charted here) but, logically, those exposed to the most advanced technologies are the most likely to be convinced of its importance, with **66% believing technology is very important to learning**. This data should provide evidence to help drive the continued advancement of learning technologies at a time when circumstances are likely to require it.*'

<sup>480</sup> Page 57 of Student Academic Experience Survey, 11<sup>th</sup> June 2020

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

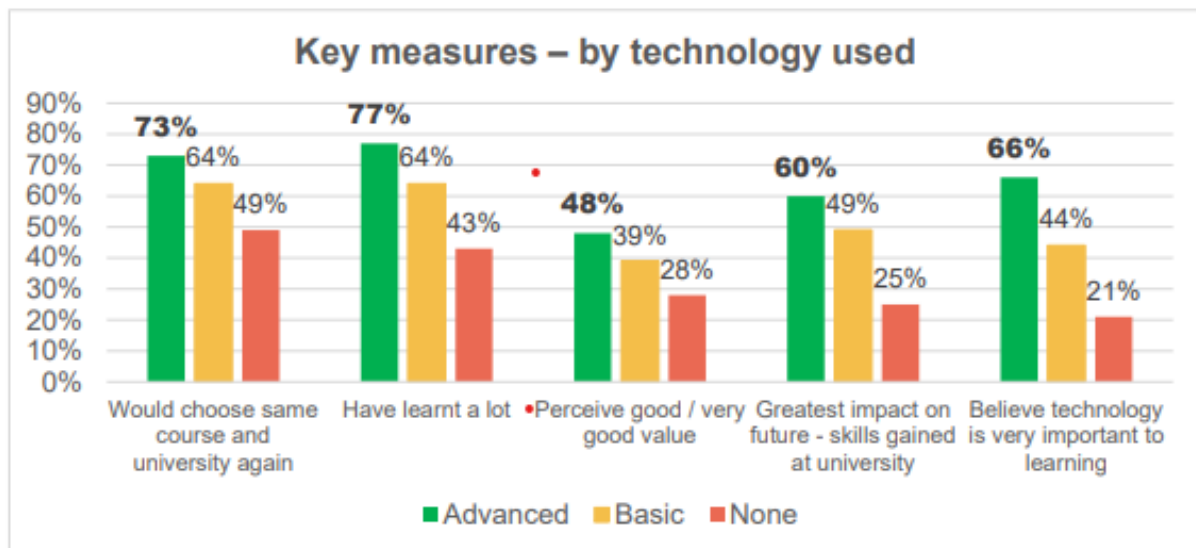


Figure 22: Student perceptions on their course and VFM where technology is used SAES 2020 Page 57

As the authors explain, where 'Advanced Technology' is used students are significantly more likely to feel they have received 'good value' and, perhaps more significantly, 'to feel they have learnt a lot and that their skills gained will play a key role in their future.'

This survey carries the views of around 10,000 students and is highly respected having been conducted over many years. This confirmation on the importance of 'Advanced Technology' and correlation to students' perceptions of VFM is added independent validation of the TEL Tools in this thesis and their important place in this contemporary post pandemic narrative. However, D. Kernohan (2020)<sup>481</sup>, in reviewing the findings from this SAES 2020 points out that these 'advanced technologies' are widely in use in UK higher education. This view is supported recently by G. Evans and K. Luke (2020)<sup>482</sup> who confirm that lecture capture is becoming mainstream in the HE classroom.

Additionally, the annual ALT learning technology survey 2020<sup>483</sup>, whilst showing a drop in importance of lecture capture in the last academic year, evidences LC as being mainstream since 2014 in this

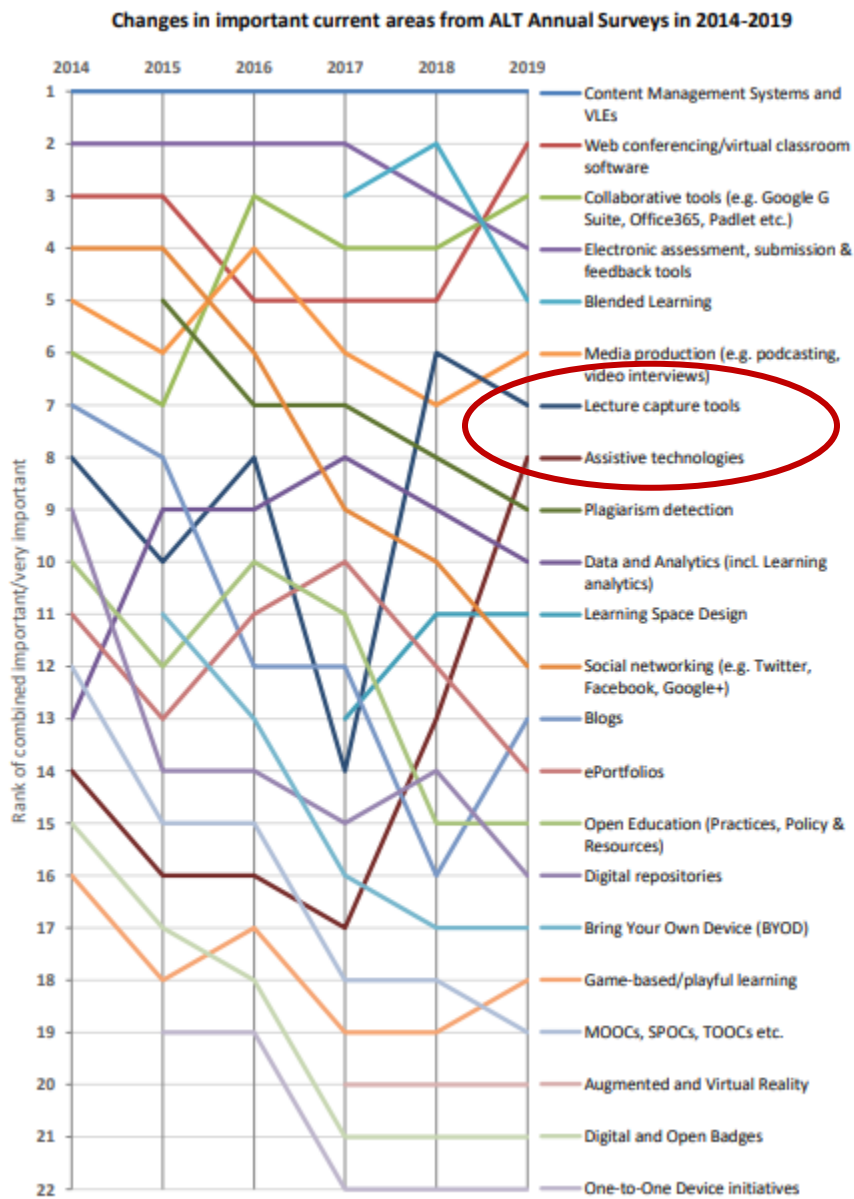
<sup>481</sup> [supra] "The "advanced" technologies cited are hardly unusual – one of them is BlackBoard (despite virtual learning environments like BlackBoard being prompted as "basic technology"), another is lecture capture. Nearly all providers use these or similar technologies and have done – in the case of BlackBoard – for more than a decade. Those students who are impressed by such technology tend to be more impressed with other areas of provision too, so there's that."

<sup>482</sup> "Lecture capture and peer-working: exploring study practices through staff-student partnerships" 2020 by Geraint Evans and Karl Luke, "The provision of educational recordings, particularly the recordings of teaching events such as lectures (commonly known as lecture capture), is fast becoming an established practice within UK higher education." <sup>482</sup> accessible at: <https://journal.alt.ac.uk/index.php/rlt/article/view/2314/2641>

<sup>483</sup> Page 7 of ALT annual technology survey 2020– This survey was delayed in publication due to the pandemic- 227 participants completed the survey and it is accessible in full via: <https://repository.alt.ac.uk/2433/2/Annual%20Survey%20Report%202020.pdf>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

caption with LC peaking in importance in the academic year 2018-19. The reduced importance in 'blended learning' clearly reflects a pre Covid-19 HE land-scape.



Source: Association for Learning Technology (ALT) Annual Survey Report 2020

Figure 26: The shift in importance of digital technologies across academic years 2014 -2019

5A.18 Report(s) #4: Academic Experience Surveys 2016-2019 (Advance HE and HEPI)

In the recent 2020 HEPI report<sup>484</sup> participants were asked the annual question on pedagogy but in the context of the pandemic. It is interesting to see that whilst students were unhappy with the reduced

<sup>484</sup> Page 19 "One for all or all four one? Does the UK still have a single higher education sector?" April 2020, HEPI Report 129 by Nick Hillman

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

'face to face' contact in terms of their perceptions of VFM, the findings suggest that, *'there is little evidence that the quality of teaching'* was impacted by Covid-19.

	Pre-March 16 interview date	Post-March 16 interview date
Teaching staff regularly initiated debates and discussions	37%	<b>43%</b>
Teaching staff used lectures / teaching groups to guide and support independent study	58%	<b>62%</b>
Teaching staff helped you explore your own areas of interest	36%	<b>42%</b>

Figure 24: summarising the findings of students' perceptions of teaching pre and post 16<sup>th</sup> March and lockdown

#### 5A.14 Conclusion to VFM

In the final VFM analysis as J. Dickinson (2018)<sup>485</sup> rightly points out, *'... in the long term delivering value for money is ... working hard to work out what students and the public value about education – and developing systems and structures and rewards to deliver it.'* The end goal is to reach a fair and common ground for all contracting parties who play their part in delivering the SCTE and enabling students to see close up that they have received a fair return on their tuition fee investment as promised. The value of TEL and the transparency it offers in tracking provision cannot be overestimated.

<sup>485</sup> "Universities should take back control of the VFM agenda" 3<sup>rd</sup> June 2018 Accessible at: <https://wonkhe.com/blogs/universities-should-take-back-control-of-the-vm-narrative/>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education



## **chapter 6 - no. 12**

### **CHAPTER 6 – MINI LITERATURE REVIEW ON DIGITAL EVIDENCE**

## Chapter 6

### 6.1 Introduction and background

As this research is focussed on answering key questions on the extent to which the TEL Tools can evidence compliance with the SCTE, an understanding of what constitutes 'digital evidence' in this context requires early attention in this chapter. The chapter will also address the complexities of what constitutes valid relevant 'digital evidence' when research must satisfy evidential burdens in two distinct academic fields. This is challenging as S. Donaldson (2015)<sup>486</sup> accurately points out, *"Unfortunately, seeking truth or agreement about what constitutes credible and actionable evidence does not seem to be an easy matter in many fields"*. The chapter will conclude with a critical review of the value of the digital evidence generated by the TEL Tools in amicably resolving student complaints and disputes in relation to the SCTE via university internal complaint processes, via ADR or in litigation. The author took the opportunity to spotlight the value of this digital evidence in supporting sensible conflict management in relation to expected contractual 'fall-out' due to the Covid-19 pandemic.

Admissible and relevant evidence in civil proceedings in England and Wales is highly regulated by the Civil Procedure Rules (1999). In the context of whether the TEL Tools and specifically the evidence generated by them can constitute *'admissible and relevant legal digital evidence'* rests on whether this evidence can be given sufficient *'weight'* to discharge the civil evidential burden of proof.

The chapter will track the development of the law in relation to digital evidence paying special attention to highly recent case law in 2019 where the message is coming from the courts that society must confront the *'smartphone'* era where the making and recording of video or audio is a *'click'* away<sup>487</sup>. The chapter will explain the misconceptions surrounding the admissibility of covert evidence in civil proceedings and why findings in recent cases should be taken seriously by higher education providers and specifically in the context of the SCTE.

Reliable and trustworthy evidence needed to prove that education is of 'high-quality' is complicated given the difficulties of defining this complex term in a pedagogical context. G. D. Kuh et al (2015)<sup>488</sup> addressing the specific evidential demands placed on HEIs ask us to think about what counts as evidence in this context, *"Colleges and universities are collecting a broader range of information about student learning...The practical challenge is to translate this growing body of information into*

<sup>486</sup> Page 11 "Examining the Backbone of Contemporary Evaluation Practice" Chapter 1 of *Credible and Actionable Evidence: the Foundations for Rigorous and Influential Evaluations*, Stewart I Donaldson, Christina A. Christie and Melvin M Mark, Sage Publishing 2015

<sup>487</sup> "Covert recording in a smartphone era: What do employers need to consider?" 14<sup>th</sup> August 2019 by Brodies LLP

<sup>488</sup> Page 20 of *Using Evidence of Student Learning to improve Higher Education 2015* by George D Kuh and others and published by Jossey Bass



evidence...in ways that will inform pedagogical changes and policy... This means paying careful attention to what counts as evidence for different audiences." Chapter 10 (supplementary appendix) contains the special case study on 'high-quality' provision and the detailed discussions on what this complex term means will be required reading in conjunction with this chapter.

## 6.2 What constitutes 'digital evidence'?

This chapter is arguably the most important chapter in this thesis. Being clear on what is required in terms of credible and reliable evidence is vital in all research, but this research demands that evidence takes centre stage as part of the research validation process itself. M. A. Biasiotti et al (2018)<sup>489</sup> explain that in everything we do, "It is now clear that each of us leaves digital traces everywhere and these traces can in the future be potential evidence in an investigation or court case"

Evidence is defined as<sup>490</sup>: "That which tends to prove the existence or non-existence of some fact. It may consist of 'testimony', 'documentary evidence', 'real evidence' and when admissible 'hearsay evidence'..." In the context of evidence that is 'digital' Maria A Biasiotti et al (2018)<sup>491</sup> confirm that, "Electronic evidence is any data resulting from the output of an analogue device and/or digital device of potential [probative] value that are generated, processed, stored or transmitted using any electronic device..."<sup>492</sup> Further, Corbetts LLP (2009)<sup>493</sup> explain that, 'Documents now are not just pieces of paper. Electronic documents must be disclosed too, and these can include audio and video recordings, data held on a PDA or mobile phone, microfilmed records, computer databases and disks and information stored on servers and back-up systems.'

Technology can be used to prove or disprove a fact as noted by Mason and Seng (2017)<sup>494</sup> referring to the judgment in R v Robson, Mitchell and Richards [1991]<sup>495</sup> where it was held that the printed record of a telephone call was 'evidence of a fact' stating that, "where a machine observes a fact and records it... It is evidence of what the machine recorded, and this was printed out... The record was not the fact but evidence of the fact."

Translating this to the TEL Tools the various digital records generated via Panopto, MCQ digital outputs or Collaborate ULTRA record 'An event or state of affairs known to have happened or existed'<sup>496</sup> or the fact itself and the recordings can be evidence of this fact. The recordings will need

<sup>489</sup> Page 4, Chapter 1 "Opportunities and Challenges for Electronic Evidence" in "Handling and Exchanging Electronic Evidence Across Europe (Law, Governance and Technology Series) by M.A. Biasiotti, Jeanne Pia Mifsud Bonnici, Joe Cannataci 2018, Springer Publication

<sup>490</sup> Page 241 of the Oxford Dictionary of Law, 8<sup>th</sup> Edition 2015, Oxford University Press

<sup>491</sup> Page 4, Chapter 1 "Opportunities and Challenges for Electronic Evidence" in "Handling and Exchanging Electronic Evidence Across Europe (Law, Governance and Technology Series) by M.A. Biasiotti, Jeanne Pia Mifsud Bonnici, Joe Cannataci 2018, Springer Publication

<sup>492</sup> page 4 [supra]

<sup>493</sup> "Case Study: electronic disclosure" Jan 30, 2009 available via [www.lexology.com](http://www.lexology.com)

<sup>494</sup> Para 3.24 of Electronic Evidence, 4<sup>th</sup> Edition 2017, Published by the Institute of Advanced Legal Studies

<sup>495</sup> [1991] Crim Law Review 362

<sup>496</sup> Definition of 'fact' on page 253 of the Oxford Dictionary of Law [supra]

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

authentication because as Mason and Seng (2017): *"Electronic evidence must be authenticated as for any other form of evidence"*<sup>497</sup> Mason and Seng (2017)<sup>498</sup> have helpfully reviewed key cases as listed below which enable the author to conclude that the TEL Tools in this research can (to the extent not tampered with or altered) constitute 'admissible' and 'relevant' 'documentary evidence'. There now follows, discussions on each of these three key terms commencing with documentary evidence.

### 6.3 TEL Tool evidence as 'documentary evidence'

Table 13 (now Appendix 7) provides an historical 'snap-shot' of selected case law which has been applied to 'showcase' how case law precedent could be applied in the context of the evidence generated by the TEL Tools. These are well established cases, but more recent case law provides a current and contemporary window through which to view the digital evidence generated by these tools reflecting a highly changed digital higher education environment. HHJ Stephen Davies in the case of **Stoke on Trent College v Pelican Rouge Coffee Solutions Group Limited (2017)**<sup>499</sup> referred to the CCTV recordings as documentary evidence in this case commenting at paragraph 3, *"Perhaps the most important documentary evidence is from a CCTV camera located in a room adjacent to the reception area, which the defendant's expert Mr Jones described in the joint statement of experts as a 'game changer'."*

### 6.4 Admissibility of evidence and its application to the SCTE

Paul McKeown (2012)<sup>500</sup> reminds us that, *"The starting point is that any item of evidence if sufficiently relevant is admissible unless there is a specific rule that it is not admissible."* This is supported by Langlois Lawyers LLP (2017)<sup>501</sup> who distinguish between recordings obtained with the participants knowledge and recordings made without the knowledge of the participants, *'Evidence of any fact relevant to a dispute is admissible and may be produced by any means'...* Nigel Cooper QC<sup>502</sup> equally reminds us that at common law in England and Wales, unlike the system in the US that restricts evidence gained by unlawful means, *"Traditionally, English judges have been prepared to eat the fruit,*

<sup>497</sup> Para 3.37 of Electronic Evidence [supra]

<sup>498</sup> extracted from pages 44-47 of 'Electronic Evidence' by Mason and Seng 2017

<sup>499</sup> [2017] EWHC 2829 (TCC)

<sup>500</sup> Para 1.5 pages 14-15 of "Evidence", Paul McKeown, 2012 Oxford University Press

<sup>501</sup> "Words fade away but Recordings Remain: the Admissibility into Evidence of Audio and Video Recordings" dated 28<sup>th</sup> September 2017 and available via: [www.lexology.com](http://www.lexology.com). Please note these lawyers are based in Quebec but their discussions resonate in this work.

<sup>502</sup> Undated paper entitled, "THE FRUIT OF THE POISONED TREE – THE ADMISSIBILITY OF EVIDENCE IN CIVIL CASES" by Nigel Cooper  
"The position has been altered by the introduction of the Civil Procedure Rules, in that the court now has a power to exclude evidence in the interest of the overriding objective.

CPR Rule 32.1 provides that the Court may control the evidence before it by giving directions as to the issues on which it requires evidence, and the nature of the evidence which it requires to decide those issues, and the way in which that evidence is to be placed before the court. Rule 32.1(2) expressly gives the court the power to "exclude evidence that would otherwise be admissible".

There is therefore now a general discretion to exclude evidence in civil cases. The judge must exercise that discretion in accordance with the overriding objective in CPR Part 1 – the objective of "enabling the court to deal with cases justly".

**The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education**

*however poisonous the tree. However, that position is slowly changing as a result of the introduction of the Civil Procedure Rules, and the impact of the Human Rights Act 1998.*" Parties are now required by CPR 1.3 to help to further the Overriding Objective set out in CPR 1.1<sup>503</sup>

M. Thomson (2018)<sup>504</sup> state that in the context of social media but equally applicable to the evidence generated by the TEL Tools, that it is evidence in social media can be relevant but proving authenticity will be important. As discussed in Chapter 4, paragraph 4.7 the collaborative learning tools comprising Project 3 aligned neatly with accountability tools in the form of social media communication technologies, so these observations have a direct application to discussions on the admissibility of digital evidence here as generated by the TEL Tools.

#### **6.4.1 Upholding human rights in the context of admissibility of evidence**

Video evidence which depicts people/students, or their views needs to be handled carefully particularly with respect to human rights and also complying with the issue of consent as set out in the Data Protection Act 2018 and the recent GDPR legislation. In a sex discrimination case of **Xxx v Yyy and Zzz [2004] EWCA Civ 331** a secretly recorded video was the subject of extensive dispute. Whilst the video was held not to be relevant, in any event the case is important in that the court emphasised the need to balance Article 6 of the Convention on Human Rights and the right to a fair trial with Article 8 preserving the right to respect for private and family life, (the covert video having taken place in the family home). To this end students should always be made fully aware that their comments and questions are being recorded via Panopto, Collaborate ULTRA etc and ensure consent is obtained.

However, what about the situation if students have covertly obtained recordings of lectures on their smartphones without the consent of their lecturers, would such evidence be admissible in supporting their claims that education has not been provided in accordance with the SCTE?

---

<sup>503</sup> The overriding objective CPR 1.1

(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that it is dealt with expeditiously and fairly;

(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;

(c) ensuring that the parties are on an equal footing;

(d) saving expense; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

<sup>504</sup> "Impact of Social Media Evidence in Litigation" 6<sup>th</sup> June 2018, Lexology, Canada, *'...undeniable that social media has transformed the way individuals interact with each other... It is simply a fact that information we put into social media platforms becomes indefinitely stored and available for future access. We have come a long way from only admitting an original document as evidence to allowing Facebook messages to be used in criminal and civil cases... It should be noted that even if electronic records have been disclosed the evidence still needs to meet the threshold for relevancy and admissibility... First a party introducing the electronic records bears the onus of proving its authenticity ...second the best evidence rule needs to be satisfied by showing the integrity of the electronic record...'*

#### 6.4.2 Current legal position on the admissibility of digital evidence obtained covertly

Peter's Law (2016)<sup>505</sup> makes clear that there should be fewer legal issues 'when the video recordings are gathered lawfully and in accordance with legal provisions.' The case of **Punjab Bank (International) Ltd and others v Gosain UKEAT [2014]** was reviewed by Penningtons Manches Cooper LLP (2014)<sup>506</sup> who reported that recordings used in disciplinary proceedings which had been obtained **covertly**, '...was not of itself a ground for making them inadmissible.'

Fast forward to 2019, and employers are being advised that they should, 'just get used to the idea' that their employees are recording them and that contrary to popular belief on the admissibility of 'covert recordings' that these can be admissible. Discussing the very recent case of **Phoenix House Ltd v Stockman [2019]** Steve Conlay<sup>507</sup> stresses that if employers, '...are facing a claim with a covert recording disclosure, ask your legal team if there is any way that the recordings may be inadmissible.'

#### 6.5 Relevant digital evidence

The concept of relevant evidence is 'fundamental to all evidence'<sup>508</sup> and quoting Lord Simon in the case of **DPP v Kilbourne [1973]** who confirmed that evidence is relevant if, "...it is logically probative or disapprobative of some matter which requires proof. It is sufficient to say ...that relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter...more or less probable."

Calls for reliable and relevant digital evidence in demonstrating compliance by a HEI of its duties to deliver education of high-quality at the digital classroom coalface are increasing as discussed in previous chapters. That said any evidence including video evidence must be relevant. In the case of **Xxx v Yyy and Zzz [2004] EWCA Civ 331** at paragraph 22 the judge held, "...the video is irrelevant...Being irrelevant, it is not evidence in the case at all."

Video evidence can, it is argued be more reliable and credible digital evidence provided it is relevant because the court is not being asked to evaluate the evidence based on memory. This has been highlighted in the case of **Mr Jeffrey Ross Blue v Mr Michael James Wallace Ashley [2017]**<sup>509</sup> and summarised by Freshfields Bruckhaus Deringer (2017).<sup>510</sup> The case confirms the precedent

<sup>505</sup> "The use of video recordings as evidence" – Peters Law 20/12/2006

<sup>506</sup> "Watch what you say!", 27<sup>th</sup> March 2014 accessible at [www.lexology.com](http://www.lexology.com)

<sup>507</sup> "Your employees are recording you- get used to it" 6<sup>th</sup> August 2019, by Steve Conlay, BPE and accessible at [www.lexology.com](http://www.lexology.com)

<sup>508</sup> Para 1.3.1 of Evidence by Paul McKeown, 2012, 16<sup>th</sup> Edition, OXFORD UNIVERSITY PRESS

<sup>509</sup> [2017] EWHC 1928

<sup>510</sup> "The weaknesses of evidence based on recollection" 26<sup>th</sup> July 2017 [http://www.lexology.com/library/detail.aspx?g=8d471d6e-b25e-47ed-ac78-ac8472b99743&utm\\_source=Lexology+Daily+Newsfeed&utm\\_medium=HTML+email&utm\\_campaign=Lexology+subscriber+daily+feed&utm\\_content=Lexology+Daily+Newsfeed+2017-07-31&utm\\_term=](http://www.lexology.com/library/detail.aspx?g=8d471d6e-b25e-47ed-ac78-ac8472b99743&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2017-07-31&utm_term=) and accessed 31<sup>st</sup> July 2017

established in **Gestamin SGPS S.A. v Credit Suisse (UK) Limited and Credit Suisse Securities (Europe) Limited**<sup>511</sup> and the reluctance of the courts to place reliance on memory recall.

Recordings provide a digital footprint of the entire activities of a classroom and are not reliant on memory. Annika Zorn et al (2018)<sup>512</sup> applying the saying '*verba volenti*' in the context of video recordings such as Panopto, explains that such a platform enables a permanent record of what was said at the time; such words would normally '*fly away*' if this facility was not available without restriction to time and place.

### 6.5.1 How and why is evidence relevant?

Of course, evidence must not only be relevant, but it must be demonstrated 'how' and 'why' it is relevant. To that end the evidence generated by the TEL Tools in this thesis is not sufficient to be admissible or relevant and must demonstrate how and why it is relevant. It could be argued that in relation to some of the regular complaints and disputes raised by students that using evidence from video and audio USW recordings could demonstrate how e.g. the learning and assessment outcomes in given modules were delivered and possibly why student complaints are unfair or unfounded in respect of such a complaint. The opposite of course could equally be established by the video evidence demonstrating breaches of the SCTE to provide education of 'high-quality'.

This video evidence must be viewed in conjunction with the comments by M. Kengyel and Z. Nemessányi (2017)<sup>513</sup> who point out that the human failings that struggle to discern relevant facts will still have the same failings where such facts are recorded on videotape.

USW has had unwelcome attention in the press in the summer of 2019 regarding one of its Master's courses and evidence was produced by students (generated by Panopto) which was used to support their case which related to the quality of the course not matching student expectations. The author also referred in Chapter 1 to allegations that were the springboard for this thesis which involved unwarranted allegations against the author which were promptly dismissed by virtue of the video evidence generated also by Panopto recordings. In some universities, students are entitled to use

<sup>511</sup> [2013] EWHC 3560 (Comm) '*the weaknesses of evidence based on recollection*' concluding that, "*the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence<sup>511</sup> and known or probable facts*".

<sup>512</sup> Page 8 of "Higher Education in the Digital Age: Moving Academia Online" 2018, Annika Zorn, Jeff Haywood and Jean-Michel Glachant 2018, Edward Elgar Publishing

<sup>513</sup> Editors Electronic Technology and Civil Procedure, New Paths to Justice from Around the World, Springer 2017 - page 56, "*...as a result of the technological development easing the task of making video recordings, it does seem likely that there will be less dependence in the future on the observations of eye ... We may therefore hope that our courts could be more accurate in applying the law to disputed facts when they are presented with more videotapes recording the events in dispute. But the human failings that limit our ability to discern accurately the facts in dispute are, alas, not eliminated by the presence of the videotape.*"

their own personal devices for recording lectures and tutorials and supervision sessions, and it is suggested that this is a sensible approach given the ease of recording lectures on personal devices.

## 6.6 Authenticity and reliability of digital evidence<sup>514</sup>

As discussed in Chapter 2, J.Cosic et al (2011)<sup>515</sup> explain that today's digital forensic field relies on knowledge and knowledge management systems as important resources. J.Cosic et al (2011)<sup>516</sup> also explain the importance of ensuring a reliable chain of evidence is in place and a 'tracker' to validate the history of how the evidence was handled.

This is important because *"The evidential weight of digital evidence can only be safeguarded if it can be proven that the records are accurate i.e. by whom they were created, and that no alteration has occurred."* This point is more fully explored in the following section.

The digital evidence generated by the TEL Tools are generally located in one management system, namely the USW VLE and to the extent that this is well maintained and regularly updated the author advocates that the VLE provides a tracked system of authentication should any of this evidence be subsequently tampered with or altered. The importance of the evidence not being tampered or altered is specifically discussed in the context of the 'weight of evidence' in discharging the civil burden of proof.

## 6.7 The concept of evidential 'weight' in civil litigation proceedings: burden of proof

McKeown (2012)<sup>517</sup> reminds us that, *"The weight of the evidence concerns the extent to which the evidence is capable of proving or disproving the conclusion."* Weight is a matter for the judge in a civil case and for jurors in a criminal case. M. Kengyel and Z. Nemessányi (2017)<sup>518</sup> articulate this as follows, *"The judge therefore has to decide, in the individual case before him and taking into account any and all other evidence he has heard so far, whether he believes that the electronic document is 'telling' the truth or not. The likelihood of him 'believing' the electronic document will depend on the*

<sup>514</sup> "A proposed electronic evidence exchange, across the European Union" in the "Digital Evidence and Electronic Signature Law Review" Feb 2017 and available via open access in Research Gate Maria Angela Biasiotti (2017, accessed 3<sup>rd</sup> March 2019

<sup>515</sup> Page 1 "An Ontological Approach to Study and Manage Digital Chain of Custody of Digital Evidence" by Jasmin Cosic, Zoran Cosic and Miroslav Baca 2011, in Journal of Information and Organizational Sciences · June 2011, open access at Research Gate and accessed on 3<sup>rd</sup> March 2019

<sup>516</sup> Page 1 "Do We Have Full Control Over Integrity in Digital Evidence Life Cycle?" 2014 by Jasmin Cosic , Miroslav Baca accessible at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.669.7119&rep=rep1&type=pdf>, *'...that evidence has not been altered or changed through all phases, and must include documentation on how evidence is gathered, how was transported, analysed and presented. Knowing the current location of original evidence, is not enough for court, there must be accurate logs tracking evidence material at all time. Access to the evidence must be controlled and audited. To prove the chain of custody, we must know all the details on how the evidence was handled every step of the way.'*

<sup>517</sup> Evidence by Paul McKeown, 2012, 16<sup>th</sup> Edition, OXFORD UNIVERSITY PRESS, page 9

<sup>518</sup> Editors Electronic Technology and Civil Procedure New Paths to Justice from Around the World, Springer 2017- page 250 – CHECK PAGE REFERENCE

*extent to which he can assume that whatever is documented in the electronic statement reflects the truth."*

Mark Schweizer (2016)<sup>519</sup> compares the burden to be discharged in civil proceedings in civil coded jurisdictions with those where a common law jurisdiction applies confirming that for English law a '*balance of probabilities*' standard is adopted. Referring to Lord Denning's definition in the case of *Miller v Minister of Pensions*<sup>520</sup> this burden is discharged: "*If the evidence is such that the tribunal can say, 'we think it more probable than not...but if the probabilities are equal it is not.'*"

Assuming that the digital evidence before him, has been authenticated the judge will be tasked with deciding the weight to be attached to it but it seems reasonable to assume that video evidence has the potential to carry more weight in comparison to evidence that '*taps*' into memory. M. Kengyel and Z. Nemessányi (2017) referring to the use of electronic technology suggest that, "*...It seems reasonable to expect that visible recordings of events will tend to improve the accuracy of judicial fact-finding.*"<sup>521</sup>

Recent case law continues to cast doubt on the weight and relevance to be attached to witness evidence and relying on memory recall with the Honourable Mr Justice Fraser in **Alan Bates and Others v Post Office Limited [2019] EWHC 606 (QB)** referring at paragraph 537 to an earlier judgment by him in the case of **Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm)**, where he made some observations about the unreliability of human memory.<sup>522</sup>

Clearly, to the extent that the evidence from e.g. the Panopto recordings is not edited or tampered with, it can be a reliable record of what took place at the time and is not dependent on variable factors such as human recollection.

## 6.8 Can the TEL Tools constitute admissible, relevant digital evidence?

The SCTE sets out the duties and responsibilities of the contracting parties and if one of the primary obligations of this contract is to provide education of 'high-quality' being clear on what this term means is of paramount importance. Whilst thorough investigations of what 'high-quality' education might look like (see the special supplementary appendix containing the case study from Chapter 10) there are common markers proposed for evidencing minimum expectations of high-quality provision.

<sup>519</sup> "The civil standard of proof- what is it actually?" - The International Journal of Evidence and Proof 2016 Volume 20(3) Pages 217-234

<sup>520</sup> *Miller v Minister of Pensions*. [1947] 2 All ER 372

<sup>521</sup> Miklós Kengyel • Zoltán Nemessányi Editors *Electronic Technology and Civil Procedure New Paths to Justice from Around the World*, Springer 2017- page 55

<sup>522</sup> "*... the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.*"

**The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education**

A semi-forensic review of each of the TEL Tools is set out in Table 14, now Appendix 8, to evaluate the extent to which the evidence the tools generate could be used in discharging both legal and pedagogical evidential burdens that education of high-quality has been provided to students. These points are also fully addressed in the three dedicated project chapters, but this 'TEL Tool Evidence Table' will give the work context at this point and will lay necessary foundations for these subsequent discussions.

Table 14 (now Appendix 8) has provided a succinct account of the extent to which the TEL Tools and the evidence they generate demonstrate whether key markers of high-quality educational provision have been met. This table of course, will be subject to amendment to take account of specific requirements in distinct disciplines.

## 6.9 Conclusion

This chapter has clearly demonstrated that there is certainly a demand for evidence in education which is growing but delivering meaningful and useful evidence demonstrating that education of 'high-quality' has been provided is challenging. Morris and Deforges (2009)<sup>523</sup> writing about the need for greater evidence in education highlight that reliable evidence in a central repository is required.

Recent evidence from the court demonstrates a preference for evidence which does not rely on memory recall and the extent that the recordings have not been altered or tampered with USW's own first-hand experience shows how these recordings are now being used in relation to complaints and disputes. The evidence generated by the TEL Tools is clearly valuable evidence with the capacity to meet admissible and relevant legal requirements. In one of the legal semi-focus groups that took place (Feb 2019) one of the participant lawyers when questioned whether evidence generated from TEL Tools such as Panopto, could constitute admissible and relevant evidence for use in civil proceedings and in internal complaint and dispute processes exclaimed, *"Yes, absolutely! Especially if recorded openly and not concealed... Best evidence<sup>524</sup> of what happened at the time."*

The bigger challenge for the TEL Tools and the evidence they generate is in relation to providing credible and reliable evidence that education of 'high-quality' has been provided given the lack of agreement over this complex term and how if at all 'high-quality' education can be validly measured.

---

<sup>523</sup> "Evidence Matters: Towards informed professionalism for educators" (2009): Andrew Morris with a foreword by Professor Charles Desforges, CfBT Education Trust and available via [file:///C:/Users/npjios/Downloads/r-evidence-matters-2009%20\(1\).pdf](file:///C:/Users/npjios/Downloads/r-evidence-matters-2009%20(1).pdf) and accessed on 28<sup>th</sup> December 2017 – page 19, *"More widespread use of evidence is required in education; ... Within education, innovations and initiatives could be built upon to develop more widespread professional use of evidence... A central body of sound evidence is needed from which policymakers and practitioners can draw before they encounter problems in implementing change."*

<sup>524</sup> Stewart I. Donaldson, page 246 of "Credible and Actionable Evidence: The Foundations for Rigorous and Influential evaluations" 2015 Sage Publications reminds us that, 'The same evidence might be judged as credible under some conditions but not others. Failure to acknowledge this contextual nature would leave us with a dimension of credibility, ranging from low to high, on which some evidence is better than others and some is even viewed as the 'best' as in a gold standard of evidence.'



The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

The primary research gathered over many years will take centre stage in the subsequent chapters to interrogate its value as credible and reliable evidence of compliance by key stakeholders of their respective duties under the SCTE. The value of TEL in keeping complaints within the four corners of the institution thereby protecting its reputation will be a much sought-after commodity; the question here is the extent to which the TEL Tools can play their part in this.

## Postscript to Chapter 6

### 6A.1 The value of TEL Tool digital evidence in resolving student complaints and disputes

Up to this point this chapter has focussed on the extent to which the digital evidence generated by the TEL Tools can constitute admissible and relevant legal evidence. This section will now build upon these investigations and critically assess the value of this digital evidence in avoiding and resolving student complaints and disputes in accordance with internal HEI provisions, in challenges in judicial review proceedings, in ADR or in formal litigation proceedings. This section of the work is necessary platform-building for subsequent scrutiny of the individual and combined contribution of the three projects in Chapter 11 in answering the research aim on the value of TEL and avoiding and resolving disputes amicably with students.<sup>525</sup>

The case for and against the admissibility and relevance of TEL Tool digital evidence in aiding sensible conflict and dispute management and resolving student disputes amicably both pre and post Covid 19 (in relation to the SCTE) was investigated in depth and is highly relevant at date of thesis submission. However, due to wordcount restrictions a summary of the work only is set out here with the remainder **located in Appendix 9A**.

At the time of updating this section before final thesis submission the Covid-19 pandemic has caused universities across the globe to close their doors and move teaching online. The impact on students has led to inevitable '*contractual fall-out*' and legal actions in respect of educational provision in the '*new normal*' are anticipated. The author has taken the opportunity to review how valuable the digital finger- print evidence left from the TEL Tools comprising the three projects could be in resolving disputes related to online provision and changes to delivery necessitated by the pandemic. The NUS has gathered 500,000 signatures in a mass action<sup>526</sup> seeking compensation from the UK Government for students who have experienced disruption to their learning as a result of the pandemic. The House of Commons Petitions committee<sup>527</sup> have responded to the petition saying that, "*While students do*

---

<sup>525</sup> "... to critically evaluate the effectiveness of the TEL Tools and the digital evidence they generate in **avoiding, managing and resolving disputes amicably** with students in less formal internal proceedings using less adversarial **ADR techniques** as well as in formal civil litigation proceedings.'

<sup>526</sup> "JOIN THE COMPLAINT CHAIN We are calling for students to join our mass action to win the chance to REDO, REIMBURSE, WRITE-OFF." – "*Students must be compensated for the high levels of disruption. In order to achieve this win, we need you to come forward about your experience over the past few months. When lots of students sign up to join our mass complaint action, this will put huge pressure on the government, urging them to act nationally. We will continue to campaign tirelessly in your favour, but if there is no movement from the government, this doesn't mean we've lost the fight. Your case matters, we will support you to complain directly through your education provider, and appeal together. You won't be left to face it alone during this process*". Accessible at: <https://www.nusconnect.org.uk/nus-uk/student-safety-net/join-the-complaint-chain>

<sup>527</sup> "UK universities: no automatic tuition fee refunds, MPs say" Richard Adams, 13/07/2020 accessible at: <https://www.theguardian.com/education/2020/jul/13/uk-universities-no-automatic-tuition-fee-refunds-coronavirus>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*have a right to seek a refund or to repeat part of their course if the service provided by their university is substandard, we do not believe that there should be a universal refund or reimbursement of tuition fees to all university students."*

Reporting on this mass action by the NUS, A. McKie (2020)<sup>528</sup> explains that the government has reminded students of the process to be followed in resolving complaints of this nature whilst at the same time reminding HEIs of their duty to continue to provide education of high-quality.<sup>529</sup>

The author considered it necessary to include discussions on educational provision in the new normal because as Liz Austen (2020)<sup>530</sup> rightly points out, *"The expectation to provide good quality learning and teaching during this emergency provision, and for future delivery, has been clearly outlined by the Office for Students ... As such, it seems pertinent to ask: How are providers evidencing quality? And are the well-known evidence sources still fit for purpose?"* Whilst Austen focusses discussions at institutional level what happens at the 'online classroom coalface' will be important going forward and 'lessons learned' and it is here that scrutiny of the TEL Tool digital evidence will be highly valuable.

This supporting section of the work sets out the various methods for conflict and dispute resolution via internal processes, via the OIA, in Judicial Review proceedings, in ADR or in litigation. A 'snap-shot' of a potential student claim from inception to completion is set out in Figure 27 below.

---

<sup>528</sup> NUS mass action demands Covid-19 student debt relief Anna McKie 24<sup>th</sup> June 2020 THE accessible at: <https://www.timeshighereducation.com/news/nus-mass-action-demands-covid-19-student-debt-relief>

<sup>529</sup> A Department for Education spokesman said the government "expects universities to continue to deliver a high-quality academic experience, and we know many institutions have provided this to ensure that courses are fit for purpose and to help students achieve their academic goals". [supra], *"Universities are autonomous, and there is an established process in place for students with concerns about their education. Students should first raise their concerns with their provider, and any unresolved complaints at providers in England and Wales should go to the Office for the Independent Adjudicator, which has published guidance on this issue,"*

<sup>530</sup> "How to evaluate changes to teaching and learning in a new Covid age" 14<sup>th</sup> July 2020 by Liz Austen, accessible at: <https://wonkhe.com/blogs/how-to-evaluate-changes-to-teaching-and-learning-in-an-age-of-covid-19/>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

Potential Flowchart of a Student Complaint from Inception to Completion: ADR in Practice

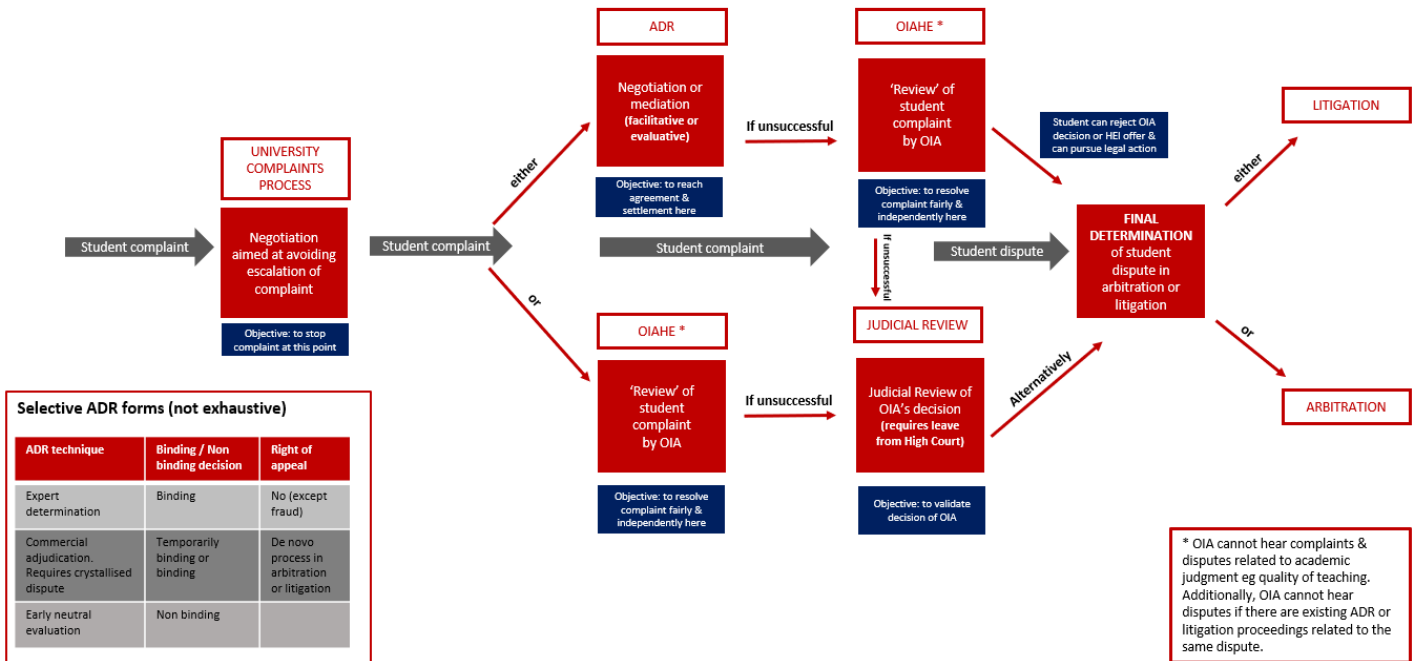


Figure 27: The 'possible' lifecycle of a student complaint

A contemporary legal window is opened on the complex Covid-19 higher education disputes landscape. The support for adopting ADR in resolving student complaints and the different ADR techniques is reviewed as well as the need for the sector to understand the resourcing implications of wider ADR use. The dispute challenges ahead in relation to the SCTE are outlined and the potential of HEIs to exclude liability by virtue of Force Majeure provisions in SCTE or in worse case scenarios of terminating a SCTE under the common law doctrine of Frustration. These complex legal issues were reviewed through a contemporary legal lens concluding that we are in 'unchartered legal territory' and advocating that disputes with students should be resolved at the earliest possible opportunity. The need for such Force Majeure clauses to comply with consumer protection law and acting fairly in SCTE provisions is going to be difficult because as Leigh Day (2020)<sup>531</sup> opine that the existence of a FM clause may face legal hurdles in relation to compliance with consumer legislation. "... there may be a force majeure clause in a contract, although untested by case law, it may be arguable that a particular force majeure clause falls foul of the CRA which does not allow exclusion of liability in a contract...Remember that purpose of the CRA is to ensure that contracts are carried out in

531 "Contracts in the time of coronavirus" 8<sup>th</sup> May 2020, Leigh Day- USA and UK accessible at: <https://www.lexology.com/library/detail.aspx?g=ade17510-9ee4-44c0-9c73-a8b8c4470c7b&l=8XMQGY0>

The value of 'Technology-Enhanced Learning' (TEL) in evidencing compliance with the 'Student Contract to Educate' (SCTE) in a new era of accountability in UK higher education

*good faith and that there is not an imbalance on rights and obligations which are weighted against the consumer.*" The value of the TEL Tool evidence of what took place at the 'online classroom coalface' could be highly valuable in early resolution of complaints and disputes and post Covid-19 provision. The ongoing difficulties for students seeking legal redress in relation to matters of academic judgment were given appropriate attention and in particular 'high-quality teaching' in the 'new normal'.

Without question the case was firmly made out that litigation should be a place of '*last resort*' for resolving student complaints with significant support for the OIA process and other ADR techniques coming from the courts. Having tracked evidence of what took place in the face to face and the online classroom can facilitate transparency in evidence and the TEL Tools will individually and collectively be tested in subsequent chapters.

**1.03** There are many other possible forms of dispute resolution, notably the following.

- (1) '*Mini-trial*':<sup>6</sup> this can be an adjunct to mediation; each party presents a 'mini' version of their case to a panel consisting of a senior executive of that party and or the other party, but this is more effective if a neutral chairs the presentation stage. This process can create a 'stronger feeling of having had a day in court than mediation', and 'a better opportunity to assess the performance of key witnesses'.<sup>7</sup>
- (2) '*Expert determination*': this involves the giving of a binding determination by an impartial third party of a technical problem, for example, a request to make a valuation of company assets or commercial property. An expert determination clause can be combined with an arbitration clause, as on the facts of the '*Channel Tunnel*' construction dispute, *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (1993)<sup>8</sup> (case examined at 9.113).
- (3) '*Ombudsmen*': this type of adjudication, private or semi-public, is often conducted on a 'documents-only' basis, across a range of specific fields, for example, pensions or investments disputes.<sup>9</sup>
- (4) '*Adjudication*': this applies to construction law dispute. It involves fast-track determination of disputes arising during the course of a building project. These decisions, initially provisional, become binding if, within a short period, neither party seeks to re-open the determination, by litigation or arbitration.<sup>10</sup>
- (5) '*Dispute Review Boards*': major international construction projects often involve such decision-makers, whose decisions become binding unless reversed by arbitration or a court decision.
- (6) '*Early neutral evaluation*':<sup>11</sup> a neutral third party, often a lawyer, gives a non-binding verdict on the merits of the dispute. There is a special provision for this in the Commercial Court.<sup>12</sup>

Figure 28: Overview of ADR techniques pp 2 and 3 of 'The Three Paths of Justice' 2<sup>nd</sup> Ed. Neil Andrews