Unpacking Precarious Academic Work in Legal Education

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Precarious work is becoming increasingly prevalent in academe, as tenured opportunities diminish and university employment practices adapt to a volatile and internationalised funding context. This article explores the notion of precarious work as it applies to academic work, particularly in the context of legal education. It analyses available statistical evidence to map and unpack the prevalence of precarious work in higher education in the United Kingdom and Australia. Drawing on an original empirical survey of law academics in the UK and Australia, the article examines the implications of increasing employment precarity for legal education.

Keywords: precarious work, universities, United Kingdom, Australia, legal education

Introduction

Precarious work is becoming increasingly prevalent in academe, as permanent opportunities diminish and university employment practices adapt to a volatile and internationalised funding context.¹ As governments reduce their financial sponsorship of higher education, universities have responded with changes to academic employment

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¹ Ernst Benjamin, 'Overreliance on Part-Time Faculty: An American Trend' (2015) 21 *International Higher Education* 7; Jan Currie and Lesley Vidovich, 'The Changing Nature of Academic Work' in Malcolm Tight and others (eds), *The Routledge International Handbook of Higher Education* (Routledge 2009).

structures and approaches,² with growing financial uncertainty stimulating increasingly unstable and insecure employment.

Despite repeated recognition that precarity is becoming the new normal in higher education, research in the area has primarily focused on specific national contexts, rather than cross-national comparisons.³ This risks obscuring the international trend towards precarious work across different national contexts, and encouraging a narrow focus on the causes and potential remedies for work precarity. This article therefore employs a comparative approach to mapping and critiquing precarious work, drawing on empirical evidence from the United Kingdom (UK) and Australian higher education contexts, and with a particular focus on legal education. As Australia and the UK have similar systems of higher education and labour law structures, they are useful international comparators for understanding how precarity is manifesting and measured in higher education, and how it differs across nations. A comparative approach offers new insights that facilitate critique and reflection, and the potential for mutual learning.

There has also been limited consideration of the impacts of precarious work for legal education more specifically, and how legal education might differ from other subject areas. Precarity in law schools is surprisingly understudied. Some scholars have discussed precarity and the decline of tenure in United States law schools, and particularly its impact upon women,⁴ and scholars in Australia have considered the

² David Greenaway and Michelle Haynes, 'Funding Higher Education in the UK: The Role of Fees and Loans' (2003) 113 *The Economic Journal* F150; Nicholas Barr, 'Higher Education Funding' (2004) 20 *Oxford Review of Economic Policy* 264; Jung Cheol Shin and Grant Harman, 'New Challenges for Higher Education: Global and Asia-Pacific Perspectives' (2009) 10 *Asia Pacific Education Review* 1.

³ see, e.g., Robyn May and others, 'The Casual Approach to University Teaching: Time for a Re-Think?' in K Krause and others (eds), *Research and development in higher education: reshaping higher education* (Higher Education Research and Development Society of Australasia 2011); Annette Thörnquist and Åsa-Karin Engstrand, 'Precarious Employment in Perspective' in Annette Thörnquist and Åsa-Karin Engstrand (eds), *Precarious employment in perspective: old and new challenges to working conditions in Sweden* (PIE Peter Lang 2011); UCU, 'Precarious Work in Higher Education: A Snapshot of Insecure Contracts and Institutional Attitudes' (2016).

⁴ Marina Angel, 'The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure' (2000) 50 *Journal of Legal Education* 1; see also Deborah L Rhode, 'Midcourse Corrections: Women in Legal Education' (2003) 53 *Journal of Legal Education* 475; Dan Subotnik, 'Bah, Humbug

development needs of sessional legal academics, especially as they relate to the emotional labour of law teaching.⁵ Similar discussion has not occurred in the UK.

Despite this lacuna of scholarship, law schools offer a unique case study for examining precarity in higher education for two (potentially contradictory) reasons. First, they offer a microcosm in which to consider broader trends that are affecting higher education institutions (HEIs) as a whole. Second, though, law schools have a number of distinct institutional advantages over other faculties, which should position staff and administrators in an advantageous position to navigate and challenge precarious work structures.⁶ There is a tension, though, between *resisting* precarious work and acknowledging that precarious work is now the norm or reality of legal education: as Cowley describes it, this could become a strategy where “casualisation of academic staff is accepted as a reality and ‘embraced’ as an opportunity to include many eminent and valued professionals as members of a team.”⁷ The challenge for law schools, then, is to balance the potential benefits and risks of precarious work in a mindful way – including through more introspective research.

To take up this challenge, the article first discusses the idea of precarious work, and considers how it might apply to academe. Then, it analyses available statistical evidence relating to the higher education workforce in Australia and the UK (including the results of Freedom of Information requests sent to all UK HEIs by the author in July

to the Bleak Story of Women Law Faculty: A Response to Professor Neumann’ (2001) 51 Journal of Legal Education 141; Marina Angel, ‘The Modern University and Its Law School: Hierarchical, Bureaucratic Structures Replace Coarchival, Collegial Ones; Women Disappear from Tenure Track and Reemerge as Caregivers: Tenure Disappears or Becomes Unrecognizable’ (2005) 38 Akron Law Review 789.

⁵ Mary Heath and others, ‘Learning to Feel like a Lawyer: Law Teachers, Sessional Teaching and Emotional Labour in Legal Education’ (2017) 26 Griffith Law Review 430.

⁶ As Heath et al argue, ‘Legal education is not only a site of increasing diversity but also a location of power, and thus a site of inequality and resistance.’: Heath and others (n 5) 431.

⁷ Jill Cowley, ‘Confronting the Reality of Casualisation in Australia. Recognising Difference and Embracing Sessional Staff in Law Schools’ (2010) 10 Queensland University of Technology Law and Justice Journal 27, 27.

2016) to map and unpack the prevalence of precarious work in higher education in each jurisdiction. Drawing on a case study of legal education, and using data from an empirical survey of legal educators in the UK and Australia, I then consider the potential implications of increasing employment precarity across the sector. I argue that it is time to review the basis on which precarious work is being measured, evaluated and managed within law faculties and HEIs more generally, to better balance the institutional and individuals risks and benefits of precarious work.

Precarious work

Fudge and Owens define “precarious” work as that which “departs from the normative model of the standard employment relationship ... and is poorly paid and incapable of sustaining a household.”⁸ Rodgers operationalises this by identifying four dimensions for gauging the degree of work precarity, including the level of: (1) work certainty and security, (2) control, (3) protection by law or collective bargaining, and (4) income.⁹

Precarious work has typically been associated with those who are low skilled, working part-time, in fixed-term, short-term, temporary and casual roles or working for small businesses or in self-employment.¹⁰ However, precarious work has also come to be associated with skilled and highly educated professionals.¹¹ The ideal of professional “entrepreneurs”, “who take charge of their careers by running their own businesses or moving from company to company as contractors”, is seen as a more mature form of

⁸ Judy Fudge and Rosemary J Owens, ‘Precarious Work, Women and the New Economy: The Challenge to Legal Norms’ in Judy Fudge and Rosemary J Owens (eds), *Precarious work, women and the new economy: the challenge to legal norms* (Hart Publishing 2006) 3.

⁹ Gerry Rodgers, ‘Precarious Work in Western Europe: The State of the Debate’ in Gerry Rodgers and Janine Rodgers (eds), *Precarious jobs in labour market regulation: the growth of atypical employment in Western Europe* (International Institute for Labour Studies 1989) 3.

¹⁰ Andrew Frazer and Malcolm Sargeant, ‘Older Workers as Vulnerable Workers in the New World of Work’, *World Congress of the International Industrial Relations Association, Sydney* (2009) <http://www.ilera-directory.org/15thworldcongress/files/papers/Track_5/Wed_W2_FRAZER.pdf> accessed 19 September 2014.

¹¹ William E Halal, ‘The Rise of the Knowledge Entrepreneur’ (1996) 30 *The Futurist* 13.

employment for the highly-skilled, which optimises work flexibility and organisational productivity.¹² While some individuals may choose these forms of work to maintain their lifestyle and avoid long-term commitment, others may not have such choice.¹³ If a worker is forced – contrary to their own preferences – to operate in an unpredictable work context, then they are experiencing precariousness of employment,¹⁴ regardless of their level of skill and education. For example, in a study of ex-managers of the UK National Health Service, who were now employed as contingent workers in organisations, the majority noted that their aim was to secure a longer-term contract within an organisation. This was partly due to a desire for a regular income, but was also grounded in a desire to “belong” again to an organization.¹⁵ Thus, many “professional entrepreneurs” in contingent, temporary or contract-based work may be experiencing precarity, despite their skills and education. These concerns equally extend to the growing numbers of contingent higher education workers.

Precarious work in academe

Despite being highly skilled and educated, some workers in academe face precarious employment, not through choice, but through lack of opportunity and continuity. This may be attributable to a range of interlinked and overlapping factors: the decline in tenured positions; the increasingly volatile and internationalised funding context of universities, and a reliance on “soft” grant money; declining turnover among senior academic staff; and a desire to reduce employment costs in universities. As university funding becomes increasingly unpredictable and dependent on student demand, a move

¹² Halal (n 11).

¹³ Jill Rubery and others, ‘Working Time, Industrial Relations and the Employment Relationship’ (2005) 14 Time & Society 89.

¹⁴ Rubery and others (n 13).

¹⁵ Mary Mallon and Joanne Duberley, ‘Managers and Professionals in the Contingent Workforce’ (2000) 10 Human Resource Management Journal 33, 40.

to more flexible work arrangements is a means of reducing employment costs across the sector.

Statistics from the Australian higher education sector (where data is collected and freely available) helpfully illuminate these trends. The sector has experienced an increase in staffing expenditure relative to revenue since 2010, with the average staffing cost rising from 50.71% of revenue in 2010 to 53.79% in 2012.¹⁶ Turnover is also declining, with average total annual turnover dropping from 17.98% in 2008 to 15.89% in 2012.¹⁷ More senior university staff are choosing to remain in the workforce, including with the removal of mandatory retirement;¹⁸ turnover tends to be lower in more senior posts: in 2012 in Australia the average turnover at professorial levels was only 8.34%.¹⁹ This has led to Australian academia becoming increasingly “top heavy”: the number of senior academic posts (at Levels D and E) has risen from 19% of all academic posts in 1996 to 25% in 2008²⁰ to 27.5% of all posts in 2015;²¹ by comparison, the number of Level B (Lecturer) positions has experienced a “hollowing out” since 1996, dropping from 36% to 32% of academic positions in both 2008²² and 2015.²³ Overall, the total growth of non-casual staff in Australian academia between 1996 and 2008 at Level E was 54%, with Level B experiencing only 7% growth.²⁴ My own calculations reveal that this disparity was even more dramatic from 1996 to 2015: Level D and E positions increased by 135%, Level C (Senior Lecturer) by 49%, Level B

¹⁶ Stuart Andrews, Henry Wong and Daniel Gullo, ‘Universities HR Benchmarking Program 2013: Companion Report’ (2013) 5.

¹⁷ Andrews, Wong and Gullo (n 16) 6.

¹⁸ Alysia Blackham, ‘Managing without Default Retirement in Universities: A Comparative Picture from Australia’ (2015) 35 *Legal Studies* 502.

¹⁹ Andrews, Wong and Gullo (n 16) 6.

²⁰ May and others (n 3) 195.

²¹ Author’s own calculations using data from the Australian Commonwealth Department of Education and Training.

²² May and others (n 3) 195.

²³ Author’s own calculations using data from the Australian Commonwealth Department of Education and Training.

²⁴ May and others (n 3) 195.

by 41%, and Level A (Associate Lecturer) by only 32%.²⁵ This indicates that there were significantly more senior positions in Australian academia in 2015 than in 1996, creating an expensive and largely secure (“inflexible”) workforce.²⁶

These trends may explain why universities are increasingly looking to contingent labour to supplement their permanent workforce. This fragmented employment approach has escalated over the last decade, providing universities with a precarious, flexible workforce that can be adapted to suit changes in student demand, government funding or financial downturns. With most established staff securely employed, the likely targets of flexible employment are those newly entering the academic workforce.

Benefits and risks of precarious work in academe

A more flexible approach to academic employment offers institutions substantial short-term benefits. Short-term or flexible contracts might allow universities (and especially professional schools like law) to employ specialized experts to run particular courses, drawing on professional or industry expertise.²⁷ HEIs can use flexible staffing arrangements to respond to changing funding arrangements, and fluctuations in student numbers. Thus, at an institutional and departmental level, this form of work can be a form of responsible budget management.²⁸ Allocating teaching to sessional staff can “free up” permanent staff members to allow them to focus on research and leadership.²⁹ Further, non-permanent contracts offer an expedient way of testing individuals’

²⁵ Author’s own calculations using data from the Australian Commonwealth Department of Education and Training.

²⁶ Emmaline Bexley, Richard James and Sophie Arkoudis, ‘The Australian Academic Profession in Transition: Addressing the Challenge of Reconceptualising Academic Work and Regenerating the Academic Workforce’ (2011) 4.

²⁷ Cowley (n 7) 34.

²⁸ Cowley (n 7) 34.

²⁹ Cowley (n 7) 34.

workplace performance³⁰ and/or avoiding long and costly performance processes where staff fail to meet standards.

However, flexible work arrangements also come with institutional costs, many of which are borne by secure, permanent staff. As Cowley argues, “The biggest cost comes with administering sessional staff to ensure quality, given, first, that not all sessional staff are world-class experts and, second, many sessional staff are inexperienced teachers.”³¹ Those who are permanently employed tend to be asked to integrate further administrative and leadership responsibilities into their workload, particularly for responsibilities that cannot be undertaken by those employed as casual or sessional teachers. Further, the decline in permanent positions risks a “hollowing out” of academia, and a “lost generation” of academic staff.³² This may undermine the capacity of universities to train and develop the next generation of academic staff members.

At the individual level, precarious work can offer some benefits, particularly where individuals seek to balance teaching with other employment, including in practice. As Junor argues, however, casual or sessional employment is a “minority choice”: from survey responses of 1304 casual academics in Australia, only 28% indicated that a casual contract was their preferred work arrangement.³³ The individual “cost” of precarious work can be substantial. As Heath et al argue in the Australian context,

³⁰ Cowley (n 7) 34.

³¹ Cowley (n 7) 34.

³² Graeme Hugo, ‘Demographic Trends in Australia’s Academic Workforce’ (2005) 27 *Journal of Higher Education Policy and Management* 327, 327.

³³ Anne Junor, ‘Casual University Work: Choice, Risk, Inequity and the Case for Regulation’ (2004) 14 *The Economic and Labour Relations Review* 276, 277, 284–5.

the precarious nature of sessional law teaching is likely to compound the stress of managing significant unrecognised emotional labour. The lack of discipline practices of self-care coupled with the isolation of sessional work often leave sessional law teachers to manage their own emotions while tending to the emotions of their students, and to do all this without training or support. Institutional processes and the power imbalance inherent in industrially precarious work mean that broad-brush institutional wellness or resilience programs will likely fail to provide sessional law teachers with the support they need. Their emotional labour inevitably comes at a cost to self; a cost that the academy would do well to consider and respond to. In our view, these issues are under-researched.³⁴

It is this “cost to self” that is particularly evident in other studies relating to higher education more broadly. At an individual level, casual and insecure employment is associated with isolation, limited professional opportunities, poor working conditions, uncertainty and insecurity, and may have negative health implications.³⁵ Precarious higher education staff may also lack the space, skills and support to become well-rounded “modern academics”, with an integrated portfolio of teaching, research and leadership skills. The work intensity associated with teaching-focused short-term contracts often limits and impairs the development of a research profile and track record, which is essential for employability in an academic role. This reflects the “trap” of sessional teaching, as individuals become less competitive for permanent teaching

³⁴ Heath and others (n 5) 450–1.

³⁵ Glenda Strachan and others, ‘Women, Careers and Universities: Where to from Here?’ (2016) 40.

and research positions the longer they remain in a casual/sessional position.³⁶ Precarious work may come to define individuals' experiences of employment,³⁷ leading to "scarred" employment careers.³⁸ This was evident in the Work and Careers in Australian Universities survey of casual teaching staff (WCAU), conducted in 2011, where only 12% of respondents were "casuals by choice"; and 53.5% of respondents would have liked to be in a continuing academic position in five years' time, but did not expect to be able to obtain a continuing position.³⁹ Only 38% of respondents had been employed for less than twelve months on a casual teaching appointment; the majority had worked within a single institution on a casual teaching appointment for more than one year: 16% had worked for six or more years, 29% for three to five years, 18% for one to two years.⁴⁰

Precarious academics are not a homogenous group;⁴¹ because of that heterogeneity, they will be exposed to the risks of precarious work in different ways and to different degrees. In the context of legal education at the University of New South Wales, Cowley found that of 80 sessional academics, Casual Academics Only (that is, those who held no other paid employment) were a much smaller proportion of precarious staff than Junor's findings for a generalist staff cohort of 1337 sessional staff (10% versus 30% of sessional staff for all areas);⁴² Academic Apprentices,⁴³ Outside

³⁶ Dawn Bennett, Lynne Roberts and Subramaniam Ananthram, 'Teaching-Only Roles Could Mark the End of Your Academic Career' (*The Conversation*, 28 March 2017) <<http://theconversation.com/teaching-only-roles-could-mark-the-end-of-your-academic-career-74826>> accessed 12 August 2019.

³⁷ Robert MacDonald, 'Precarious Work: Risk, Choice and Poverty Traps' in Andy Furlong (ed), *Handbook of Youth and Young Adulthood: New Perspectives and Agendas* (Routledge 2009) 170.

³⁸ MacDonald (n 37) 173.

³⁹ Strachan and others (n 35) 41.

⁴⁰ Strachan and others (n 35) 40.

⁴¹ Cowley (n 7) 34.

⁴² Junor (n 33) 286.

⁴³ Those enrolled full-time or part-time in a postgraduate degree; and seeking an academic career.

Industry Experts,⁴⁴ and Retirees⁴⁵ made up the remaining 90% of sessional teachers. Of course, some Outside Industry Experts may wish to move into a permanent academic post. On the whole, though, Cowley found that law schools appear to be employing relatively privileged sessional teachers, with other careers or income that they can primarily rely on.⁴⁶ This means that this cohort will be less exposed to the personal risks of precarious work. Cowley's study, though, focused on sessional *teachers*, and did not consider the position of casual or insecurely employed research staff. This is likely to ignore a large and growing pool of those employed in law schools.

Mapping precarious work in academe

Precarious work in higher education can take a variety of forms. In the UK, the University and College Union (UCU) has identified a range of contractual forms that might be used in precarious work situations including: fixed-term contracts; zero hours contracts; variable hours hourly-paid contracts; hourly-paid contracts with set hours; or contracts for services (self-employment).⁴⁷ In Australia, precarious work may take the form of casual contracts (with no guaranteed hours of work); fixed-term contracts; sessional teaching contracts (for a fixed teaching period, often a semester); or self-employment. All of these contractual forms are associated with indicators of precariousness, such as a lack of work security and certainty, legal protection and control over quantity and quality of work.⁴⁸

⁴⁴ Holding a full-time position in an industry other than education.

⁴⁵ Aged over 54; drawing income from superannuation or pension, and agreeing that 'as a retiree I like this work'.

⁴⁶ Similar arrangements have been noted at Queensland University of Technology: see S Kift, 'Assuring Quality in the Casualisation of Teaching, Learning and Assessment: Towards Best Practice for the First Year Experience' (2003) 12 *Legal Education Digest* 17.

⁴⁷ UCU (n 3) 2.

⁴⁸ Even tenured or permanent academic staff may be perceived to be occupying precarious work positions in some circumstances, including with the growth in performance management processes in some HEIs, and work intensification: see, eg, Emmanuel Ogbonna and Lloyd C Harris, 'Work Intensification and Emotional Labour among UK University Lecturers: An Exploratory Study' (2004)

This diversity of legal forms raises a practical problem when attempting to map the prevalence of precarious work in higher education. It is difficult (or impossible) to obtain rigorous, reliable information about how prevalent precarious work is in higher education. In the sections that follow, I use statistics relating to the higher education workforce in Australia and the UK to try to map the level of precarity in academic work in each jurisdiction. Like previous authors⁴⁹ I note the serious limitations of institutional data for mapping precarity. This lack of information is indicative of the general lack of institutional and sectoral attention being paid to precarity in higher education.

Precarious work in Australian academe

Australian university administrators are increasingly relying on casual staff to reduce employment costs and increase staffing flexibility. This has led to a significant increase in casualised, insecure roles in Australian higher education. In 2014, Australian universities reported 12,103 full time equivalent (FTE) casual staff in academic classifications, compared to 9,968 FTE in 2009,⁵⁰ an increase of 21% in five years. These official figures significantly understate the number of casual staff in Australian universities, as they use FTE data, not numbers of actual workers. Using superannuation data, May et al. estimated that there were six or seven actual casual staff members to one FTE in Australia.⁵¹ This would indicate that there are now around 84,000 casual academic staff in Australian higher education, representing well over 50% of all academic staff in Australia: in 2015, there were only 52,974 actual academic workers on full-time or fractional full-time contracts in Australia.⁵² Thus, casualised and precarious

25 Organization Studies 1185; Colin Bryson, 'What about the Workers? The Expansion of Higher Education and the Transformation of Academic Work' (2004) 35 Industrial Relations Journal 38.

⁴⁹ May and others (n 3).

⁵⁰ May and others (n 3) 194.

⁵¹ May and others (n 3).

⁵² Author's own calculations using data from the Australian Commonwealth Department of Education and Training.

employment may well have become the predominant form of work in Australian higher education, though it is impossible to assess how widespread casual work is without data relating to actual casual staff numbers in Australia.

Of those who are employed in a non-casualised position, a sizeable number of workers in Australian higher education are employed on a fixed or limited term contract. From 2007 to 2016, the number of full-time and fractional full-time staff in Australian higher education who were employed on a fixed or limited term contract remained fairly stable between 36.8% and 40.6% of all staff (see Table 1). Thus, accounting for both casualised and fixed-term work, the norm of a secure, permanent position has been eroded by an institutional dependence on casualised and fixed-term labour.

TABLE 1 NEAR HERE

Precarious work in the United Kingdom

Precarious work also appears to be on the rise in UK higher education. According to the UCU, this reflects the fact that permanent staff are seen as too costly and “risky”: precarious contracts shift that risk to staff themselves.⁵³ Like in Australia, the data gathered on precarious work in UK higher education is piecemeal and incomplete, though recent changes have improved this data collection somewhat. The data that is available is marshalled below.

The UK Higher Education Statistics Agency (HESA) is responsible for collecting, processing and publishing data about higher education in the UK, including about staff. Non-permanent positions are classified by HESA as “atypical”. “Atypical” is defined broadly as members of staff whose contracts involve working arrangements

⁵³ UCU (n 3) 2.

that are not permanent, involve complex employment relationships and/or involve work away from the supervision of the normal work provider.

Only minimal data is collected on atypical staff in the UK. However, HESA *does* collect data on full-person equivalents (“FPE” or headcounts) rather than FTE data. Thus, the data is potentially more informative about the actual prevalence of precarious work than the official Australian figures. Despite this, it is highly likely that HESA data is incomplete: it is unclear how different forms of employment map against “atypical” work, which may mean many workers are omitted from university reporting due to definitional misunderstandings.⁵⁴ Further, HESA does not compel institutions to consistently report data on atypical staff.⁵⁵ Thus, in practice, HESA data may be even less informative than that collected in Australia.

While recognising these limitations, HESA data does provide some insights into the prevalence of “atypical” work in UK higher education. In 2014–15 (that is, on 1 December 2014) there were 403,835 staff (academic and non-academic) in the UK higher education sector; 132,865 were full-time academic staff; 65,470 were part-time academic staff; and 75,560 were classified as academic atypical staff (up from 75,040 in 2013–14).⁵⁶ Thus, on the basis of headcount, atypical staff constituted at least 38 per cent of all academic staff in the UK on 1 December 2014.

The Universities and Colleges Employers Association (UCEA) complemented HESA data with a survey of 87 UK HEIs to compile its *Higher Education Workforce Report 2019*.⁵⁷ The Report concluded that the trend was actually *away* from precarious

⁵⁴ The UCU has identified a number examples of universities underreporting or not reporting staff on precarious contracts to HESA: UCU (n 3) 5.

⁵⁵ UCU (n 3) 3.

⁵⁶ These statistics may be compared with data from the Higher Education Funding Council for England (HEFCE), which also provides data on atypical staff in English HEIs. According to HEFCE, in 2014–15 there were 69,775 atypical staff in English HEIs, down from 82,375 in 2004–05.

⁵⁷ Universities and Colleges Employers Association, ‘Higher Education Workforce Report 2019’ (2019) <<https://www.ucea.ac.uk/library/publications/he-workforce-report-2019/>> accessed 21 October 2019.

work, towards open-ended and full-time academic employment.⁵⁸ According to UCEA's analysis of HESA data, the headcount of atypical academic staff fell by 16.1% from 2011–12 to 2017–18, and the headcount of academic staff on open-ended contracts rose by 21.9%.⁵⁹ However, as discussed above, HESA's data collection on atypical work is limited and incomplete, making comparisons over time relatively meaningless.

In 2017–18, HESA first started collecting data on hourly paid contracts and zero hours contracts. In that first year of reporting, 11,440 staff were reportedly employed on a zero hours contract, and 6,520 non-atypical academic staff were employed on zero-hours contracts. Overall, for academic staff in the UK by headcount in 2017–18, 3.1% (6,520) were on zero hours contracts, 13.4% (28,450) were on hourly paid contracts, and 33% (70,945) were employed on fixed-term contracts in 2017/18, though these numbers are not mutually exclusive (see Table 2). A further 68,845 staff were employed on academic atypical contracts.⁶⁰

TABLE 2 NEAR HERE

In January 2016 (prior to HESA collecting data on hourly paid contracts and zero hours contracts), the UCU gathered data on precarious work in UK higher education via requests to individual institutions. Using this data, the UCU estimated that 54% of all academic staff and 49% of all academic teaching staff in the UK were on insecure contracts of some form.⁶¹ This is based on figures of 69,415 staff on fixed term contracts, and 75,040 staff on atypical contracts, out of a total group of 269,285 staff,

⁵⁸ The UCU would likely argue that this was the result of its campaigning.

⁵⁹ Universities and Colleges Employers Association (n 70) 6. Though note the limitations of HESA atypical staff data, discussed above.

⁶⁰ HESA data still distinguishes 'atypical' employment from its other data gathering, meaning it is often difficult to generate a holistic statistical picture of the academic workforce.

⁶¹ UCU (n 3) 1, 4.

using 2013–14 data from HESA.⁶² The UCU also gathered data on zero hours contracts in UK HEIs in 2013, via Freedom of Information (“FOI”) requests. These data indicated that 75 HEIs (or 52.8% of responding institutions) used zero hours contracts for teaching and research, employing a total of 24,725 staff on zero hours contracts, who may or may not have been included in HESA data on atypical staff.⁶³ Using both HESA data and FOI data, the UCU produced an “insecurity ranking” for UK universities. Using HESA data, four universities had over 80% of academic staff employed on fixed term or atypical contracts. The University of Oxford, for example, which was the sixth highest in its “insecurity” ranking, had 76.1% of academic staff employed on insecure contracts. Using FOI data, five universities had over 80% of academic staff employed on insecure contracts, and 37 HEIs had over 50% of academic staff employed on insecure contracts.

Building on the UCU’s findings, I also sent FOI requests to all UK HEIs in July 2016 (see Appendix 1). The 95 responding institutions employed a combined total of 11,137 academic staff on fixed term contracts of one year or less in duration.⁶⁴ This ranged from 0.0007% (University College London, one staff member) to 53% (Bishop Grosseteste University) of all academic staff at the institutions. Twenty-six institutions (representing 27% of respondents) employed a total of 6,540 staff on zero hours contracts, and zero hours workers ranged from 0.3% (Imperial College London) to 63.86% (London Met) of all academic staff at these institutions. Responding institutions were also asked to provide data for individual faculties or departments; the vast majority

⁶² UCU (n 3) 4. Even this figure likely underreports precarious work, as it is based on an imprecise definition of “atypical work”, might exclude hourly-paid staff, and does not include data from 28 HEIs who chose not to report their data: UCU (n 3) 4.

⁶³ UCU (n 3) 5.

⁶⁴ However, these figures should be used with some caution, as some institutions reported FTE not headcount. While institutions were not excluded from the final tally on this basis, it means the numbers are likely lower than they would be otherwise.

did not report this data, because the numbers were too small, or because they did not have data available in this form. Those that did, though, provide some insights into how complex it is to gather accurate data on insecure work arrangements: the University of Kent, for example, employed only nine staff on fixed term contracts of one year or less in duration – and only one was employed at Kent Law School. However, the University also engaged 732 academic staff (or 37.8%) on zero hours contracts, and this was not broken down by faculty or department. Other universities combined their law school with other departments, like business: Manchester Metropolitan University, for example, employed 182 staff in business and law (out of 450 staff total) on fixed term contracts of one year or less, including sessional staff.⁶⁵ A small number of institutions did disclose data on short fixed term contracts in their law school, as depicted in Table 3.

TABLE 3 NEAR HERE

These results provide a nuanced picture of the type of insecurity being experienced by HEI staff: many are employed on very short fixed-term contracts, and a substantial number are engaged on zero hours contracts. However, it is difficult to generalize across different schools and faculties: there do not appear to be fixed trends according to subject or discipline. This reflects, in part, the lack of disaggregated data that is available.

⁶⁵ Combined figures for business and law were also provided by: London Metropolitan University (29 of 205 staff); Leeds Beckett University (0.5 of 165.50 FTE, or 0.30%); University of East London (36 of 137 academic staff, or 26%); De Montfort University (19 of 250 academic staff, or 7.60%). Combined figures for arts and law were provided by University of Birmingham (60 of 416 FTE). The University of Central Lancashire reported for the College of Business, Law and Applied Social Studies (23% of academic staff, compared to 15% for the University as a whole).

The use of zero hours contracts may be declining in some UK universities. In response to my FOI request, a number of institutions noted that they had moved away from insecure contracts, or were in the process of doing so. The University of Glasgow, for example, had moved 1100 workers previously on zero hours contracts onto fractional contracts. Thus, the highly publicized campaigns of the UCU against zero hours contracts may be influencing university practices, leading to a reduction in one form of precarious work. This is consistent with UCEA's argument that precarious work is in decline across the sector. However, even if zero hours contracts are in decline, other precarious work arrangements still appear prevalent in UK higher education.

Overall, then, and despite the variation in these statistics, precarious work is highly prevalent in UK higher education, and affects at least half of all academic staff. This is not confined to new HEIs or those that lack funding: even established, prestigious and well-endowed institutions rely on a precarious workforce. While there are multiple sources of data available in the UK, all are limited in providing an accurate picture of the prevalence of precarious work. What is clear, though, is that precarity is an established part of the higher education employment model.

Precarious work in legal education

The question, then, is how do these statistics relate to law schools and legal education? There is limited statistical data available on this point: neither HESA nor the Australian Department of Education provide public staffing statistics for law schools specifically, and the FOI data I collected provides only a limited picture for law schools as a whole. However, UCEA's report does offer figures for zero-hour and hourly-paid contracts in UK law schools. According to HESA data, academic zero hour contracts represented

2.8% of FTE in the law cost centre in 2017–18.⁶⁶ This was higher than the FTE figure across HEIs (2.3%).⁶⁷ In terms of hourly-paid contracts, the law cost centre had 15.7% of headcount,⁶⁸ higher than the overall figure of 13.4% of academic staff headcount.⁶⁹ Thus, while law is certainly not the area with highest precarity, it exceeds the average for HEIs generally on a number of measures.

Thus, precarious work arrangements are an issue of growing importance for legal education. This is surprising for three key reasons. First, a law school education remains desirable for students, and international students in particular. We might presume that this would bolster the demand for and need to recruit a steady stream of permanent law school academics. Indeed, the ability to charge high fees for a law school education, and the relatively low teaching costs for a law degree, mean law schools are seen as financially beneficial by university administrators and, therefore, unlikely to be subjected to wide-spread cost-cutting exercises. As Kritzer notes,

Compared to many other types of professional-level training provided through universities, legal education is relatively inexpensive. It requires relatively minimal facilities beyond lecture halls and libraries. It can be delivered to large numbers of students, and the number of students can be increased in ways that are disproportionate to increased costs of providing that education. The facilities faculty need for their own research and writing are relatively modest compared to other disciplines of comparable prestige. To put it crudely, law schools have, or perhaps had, the potential of being a profit center—a “cash cow”—for a university. ... One possible explanation for the increase in both the number and size (in student counts) of law faculties in England is

⁶⁶ Universities and Colleges Employers Association (n 70) 43.

⁶⁷ Universities and Colleges Employers Association (n 70) 8.

⁶⁸ Universities and Colleges Employers Association (n 70) 44.

⁶⁹ Universities and Colleges Employers Association (n 70) 8.

that the revenue per student (government payment plus tuition through 2011) more than covers the cost of educating the additional students, and the surplus can be redirected to subsidize more costly areas of instruction.⁷⁰

If law schools are net profit generators, then there is less pressure to reduce staffing costs via the use of precarious work arrangements. This makes the prevalence of precarious contracts in legal education difficult to explain from a funding perspective, at least at faculty or school level.

Second, doctrinal legal scholarship has not traditionally been reliant on grant funding (and, anecdotally, it can be harder to obtain large grants to fund legal research than in other fields of scholarship), meaning there is less dependence on “soft” grant money in law schools, and potentially fewer academics employed on contingent grant funding. While this may not be in the interests of legal scholarship as a whole, it might be thought to have reduced the number of precarious research staff in law schools.

Third, as in other fields of professional education, law academics arguably have high levels of “employability”, either through the possibility of moving into legal practice or by having strong transferable skills to allow them to pursue non-academic careers. Thus, there is arguably less dependence on academia as an employer in the legal field, meaning both that universities must work harder to attract and retain legal academics,⁷¹ and that legal academics may be less willing than those in other non-professional disciplines to tolerate precarious conditions long-term. Further, some

⁷⁰ Herbert M Kritzer, ‘Law Schools and the Continuing Growth of the Legal Profession’ (2013) 3 *Oñati Socio-Legal Series* 459 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221281>.

⁷¹ UCEA’s survey of UK HEIs did not note particular recruitment difficulties for law schools, which were presumably subsumed within other disciplines (‘social studies’ or ‘business’): Universities and Colleges Employers Association (n 70) 21. On recruitment issues in professional schools generally, see Universities and Colleges Employers Association (n 70) 22.

sessional law teachers may be combining teaching with legal practice, increasing their individual income and capacity to develop their career. This is likely to make sessional teaching less of a “trap” for law teachers,⁷² although it is still widespread. The question, then, is how do precarious legal educators experience their employment? What individual and institutional risks are emerging from our reliance on precarious employment?

Method

To address these evidentiary gaps, a survey of law academics in the UK and Australia was conducted, with a view to capturing the individual experiences of permanent, sessional and contract staff working in legal academia, and the institutional impact of how academic work is structured.⁷³ The survey aimed to offer insights into how legal academics are operating in a contemporary higher education environment, and how to best support legal academics in their role. An invitation to participate in the survey was sent to all UK and Australian law school deans, with a request that they distribute the link to their staff. The survey link was also publicised on social media.

In total, 104 responses were received to the survey; 48 from Australian law academics, and 50 from UK law academics. Respondents represented a range of levels of seniority, as demonstrated by Table 4. The vast majority (90 respondents) held only one academic appointment. Of the respondents, 41 identified as male, 56 as female, and one as other.

⁷² Bennett, Roberts and Ananthram (n 36).

⁷³ This research project was conducted with Dr Shelda Debowski as part of a project funded by the Legal Education Research Network, approved by the Human Research Ethics Committee of the University of Melbourne (ID number 1646355.1).

TABLE 4 NEAR HERE

Limitations

As Table 4 demonstrates, the survey had limited success at gathering the views of those obviously in precarious roles, particularly post-doctoral researchers and tutors. This is perhaps unsurprising, as those in precarious roles may be the least likely to have the time or capacity to undertake an (unpaid) survey. In total, 16 respondents self-identified as being employed on a casual or fixed-term basis. While we considered directly approaching academic staff, in an attempt to boost response rates among under-represented groups, this proved uniquely challenging as many institutions did not list sessional staff on their institutional websites. The survey's inability to comprehensively capture the experiences of insecure law academics represents a major challenge to its findings and generalisability. However, it is revealing for its broader implications for future research into precariousness at work.

Further, it is clear that the small sample in this survey is not representative of legal educators as a whole. We cannot extrapolate from these findings to the general population of those employed in law schools. Rather, these results provide insights into the personal self-reported experiences of respondents, and can only be analysed on that basis. In addition, respondents to this survey were self-selecting. Respondents may therefore be more likely to be concerned with precarious work and conditions in law schools than the general law school population; though this was managed somewhat by not using the word “precarious” in the survey, and framing it in [a](#) general way as being about “academic work”.

Results

Of the 16 respondents employed on a casual or fixed-term basis, the majority (11 respondents) said they were seeking a permanent position; five were seeking entry to academe, and three were working post-retirement.⁷⁴ Only one respondent said that they preferred a casual or fixed-term arrangement; and only two held another job in industry. Thus, a sizeable number of respondents were involuntarily working in insecure posts.

Respondents across all positions were asked about various indicators of precarity, and the extent to which the indicators applied to their primary academic job, using a four-point Likert scale.⁷⁵ The responses in Table 5 illustrate that, despite the relatively privileged position of most respondents, most struggled with the pace and intensity of academic work, to the extent that a substantial minority felt that their jobs put their health and safety at risk. The majority also felt that their work was negatively affecting their life outside of work, being too exhausted to engage in other activities, and preventing them giving time to family. Most worked on weekends. Contrary to the ideas above, most respondents did not hold their employability in high regard, doubting that they could get another similar job easily. That said, most perceived that they had high job security, reflecting their comparatively privileged work position.

TABLE 5 NEAR HERE

These survey responses paint a bleak picture of work intensity; if these are the experiences of largely secure and mostly permanent staff, then the situation for precarious law academics is likely to be particularly concerning. These results raise substantial concern about the general wellbeing of law academics, whether on

⁷⁴ Respondents could choose multiple options.

⁷⁵ These questions were adapted from a variety of instruments, including the European Working Conditions Survey.

“precarious” contractual arrangements or not. Further, these findings emphasize the interconnectedness of work-life balance, work intensity, and work precarity, particularly the dimension of work “control”.

For respondents who were in precarious positions, the stress of insecurity was plainly evident: when asked what they would change about their current work context, responses included:

Support and reassurance that my job will become permanent at the end of my 5-year contract. I have a baby ... and I am extremely worried that job cuts and freezes will mean I won't have a job in 2 years time. There is no real support with “ticking the boxes” to ensure that this happens.

Greater job security. A two year contract is not uncommon for academics my age. From my perspective, this helps create a culture of bullying, unhealthy competitiveness, anxiety and depression.

Discussion and conclusions

Precarious academic work is the new normal in universities in the UK and Australia, embodying the shift towards the neoliberal university and the individualizing of employment risk.⁷⁶ Legal education is not immune from these trends.

This analysis demonstrates a number of challenges with our current understanding of precarious work in higher education. In both the UK and Australia, issues have emerged regarding how precarious or insecure work is defined (particularly in the UK, with the broad range of contracts that might be insecure and the unhelpful definition of “atypical”), the quality of data reporting (such as the Australian focus on

⁷⁶ Louise Archer, ‘The New Neoliberal Subjects? Young/Er Academics’ Constructions of Professional Identity’ (2008) 23 *Journal of Education Policy* 265; Stephen J Ball, ‘Performativity, Commodification and Commitment: An I-Spy Guide to the Neoliberal University’ (2012) 60 *British Journal of Educational Studies* 17.

FTE not headcount) and the challenge of accessing quality data (HESA, for example, charges for access to detailed information). Transparency and accountability around precarious work in higher education in Australia and the UK is therefore severely restricted.

What can be concluded, however, is that precarious work is widespread in higher education in Australia and the UK, potentially affecting the majority of academic workers. This comparative perspective reveals a long-term, cross-national trend towards precarious work in higher education. The challenge for law schools in particular is to assess the degree to which this has also affected legal education, particularly in the context of limited publicly available data. Further, we need to be more attuned to the institutional and individual risks of precarious work, and how these can best be moderated or managed. It is important to seek out and listen to the experiences of those employed in insecure work arrangements, to develop structured programmes of support and alternative models of working. In this way, there is a need to simultaneously resist precarious work and acknowledge that it is the norm or reality of legal education.

That said, this study also struggled to source the views and voices of precarious legal academics. Since this survey was conducted, there has been growing attention to the challenges faced by precarious academics, leading to, for example, Twitter accounts that highlight the experiences of those in precarious work,⁷⁷ and a UCU strike on the issue of precarity (among other issues). However, so long as casual and sessional teachers are omitted from institutional websites and mailing lists, and left off institutional data reporting, it will be difficult to capture the experiences of this growing

⁷⁷ For example, @PrecariousAcad1; @UofK_Precariat

population. It is time for a major review of precarious work in higher education, in the interests of individuals and the sector as a whole.

Acknowledgements

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Table 1: Number of Full-time and Fractional Full-time Staff by Current Duties Term, 2007 to 2016 (Source: Australian Commonwealth Department of Education and Training 2016 Staff Numbers)

Year	Tenurial Term	Limited term	Other (including no information)	Total	Limited term as % of total
2007	59,837	34,975	250	95,062	36.8
2008	59,950	38,184	244	98,378	38.8
2009	61,867	40,808	255	102,930	39.6
2010	62,597	43,048	314	105,959	40.6
2011	65,306	43,860	358	109,524	40.0
2012	67,933	45,360	337	113,630	39.9
2013	69,676	45,804	321	115,801	39.6
2014	71,322	46,383	351	118,056	39.3
2015	72,667	45,825	221	118,713	38.6
2016	74,428	45,986	274	120,688	38.1

Table 2: Non-atypical staff employed on zero-hours, hourly paid or fixed term contracts, 2017–18 (Source: HESA, Creative Commons Attribution 4.0 International Licence)

Mode of employment	Zero-hours contract	Hourly paid	Fixed term contract
Academic contract			
Full-time	1,360	1,685	35,045
Part-time	5,165	26,765	35,900
Total academic staff	6,520	28,450	70,945
Non-academic contract			
Full-time	1,515	965	18,990
Part-time	3,405	7,010	12,815
Total non-academic staff	4,920	7,980	31,805
Total	11,440	36,430	102,750

Table 3: Short fixed term contracts, Law Schools

School	Staff on short fixed term contracts	Total staff	Per cent
University of Glasgow School of Law	3	55	5.5
University of the West of England Department of Law	11	not disclosed	11 (head count) 2 (FTE)
University of East Anglia School of Law	13	53	24.5
Liverpool Hope University Law	0	6	0

Table 4: Current level of appointment for survey respondents (n = 104)

Position	Number of respondents
Associate Lecturer / Tutor	4
Post-doctoral researcher	4
Lecturer / Fellow	28
Senior Lecturer / Senior Fellow	19
Reader / Associate Professor	17
Professor	22
Head of School	1
Other	2
Not answered	7

Table 5: Survey responses to the question “With respect to my primary academic job...”

	Strongly Disagree		Disagree		Agree		Strongly Agree	
	SD	% SD	D	% D	A	% A	SA	%SA
My health and safety is at risk because of my work. (n=102)	16	15.69	39	38.24	36	35.29	11	10.78
My job leaves me too tired to participate in other activities. (n=102)	3	2.94	33	32.35	40	39.22	26	25.49
My job prevents me from giving the time I want to my partner or family. (n=102)	4	3.92	38	37.25	37	36.27	23	22.55
My work often involves me working at weekends. (n=102)	0	0.00	15	14.71	40	39.22	47	46.08
I can choose or change the pace of my work. (n=101)	7	6.86	29	28.43	48	47.06	17	16.67
I often find my work stressful. (n=102)	2	1.96	18	17.65	50	49.02	32	31.37
My work uncertainty means I cannot plan for the future. (n=101)	25	24.51	49	48.04	20	19.61	7	6.86
I am likely to lose my job or be laid off in the next twelve months. (n=102)	45	44.12	43	42.16	13	12.75	1	0.98
I could easily get a similar or better job with another employer if I had to leave my current job. (n=102)	14	13.73	43	42.16	36	35.29	9	8.82
My job is secure. (n=101)	14	13.73	24	23.53	42	41.18	21	20.59
Considering all of my efforts and achievements in my job, I feel I get paid appropriately. (n=102)	20	19.61	27	26.47	44	43.14	11	10.78
I can live comfortably on my present income. (n=102)	4	3.92	27	26.47	57	55.88	14	13.73

Appendix 1: Freedom of Information Request

From: Alysia Blackham

Sent: 04 July 2016

Subject: Freedom of Information request

Dear Sir/Madam

I am requesting information under the Freedom of Information Act regarding the university's use of temporary or non-permanent academic staff. This information will feed into a research project being funded by Funder A on new forms of academic work in the UK and Australia.

In particular, could you please provide the following information:

1. In the 2015-16 academic year, how many academic staff at your institution were employed on short term contracts (of one year or less in duration)?
 - What proportion (%) did this represent of all academic staff at your institution?
 - Where available, please also provide this information for individual faculties or departments.
2. Does your university employ academic staff on zero-hours contracts?
 - If yes:
 - How many academic staff are employed on zero-hours contracts?
 - What proportion does this represent of all academic staff at your institution?
3. Has your university considered the non-permanent or atypical employment of academic staff as an institutional issue in any meetings or reports? This might include the use of zero-hour contracts, short-term contracts, or the casualisation of staff at a general institutional level (we are not concerned with consideration of cases of individual employees).
 - If yes:
 - Please provide a copy of any documents relating to this issue.
4. What support does your university offer for academic staff on temporary or short-term contracts (e.g. training, office space, IT facilities, research funds, access to training and development)? Please provide a copy of any documents relating to this support (e.g. policies or internal documentation).

Please let me know if you require any further information or clarification regarding this request. I very much appreciate your assistance.

Kind regards