

FACULTY OF LAW

FACULTY SPECIFIC GUIDELINES FOR PROMOTION

Adopted by the Faculty of Law by Resolution 89/15 (29 March 1989);
amended by Resolution 91/3 (20 March 1991)

A. Regarding Research

1. We do not place the same emphasis on international reputation or publication in international journals. The nature of legal scholarship is such that, in many areas of work, national reputation and publication is of at least equal importance.
2. Original research and creative work in the development of teaching materials for undergraduate and graduate subject may be taken into account. In the absence of evidence to the contrary, it will however be assumed that such work has not been subjected to peer review.
3. In producing evidence of research, candidates may draw attention to research undertaken in connection with community activities, such as law reform work, community legal education, continuing legal education and contributions to public debate and policy formulation (eg. submissions to law reform bodies or public campaigns).

B. Regarding Teaching

1. We should incorporate by reference the helpful document "Advice on the Documentation of Teaching Activities".
2. In addition, achievement in teaching may be manifested by evidence of, among other things,
 - a. subject design and development
 - b. preparation of teaching materials, and
 - c. convening of multi-group subjects.

PROMOTIONS IN LAW

This document discusses issues especially relevant to the assessment of Law applicants for promotion. It addresses widespread misapprehensions, notably in relation to research, arising from special features of the discipline of Law. In the course of so doing, it makes some elaboration of the Faculty of Law's Faculty -Specific Guidelines for Promotion.

A. RESEARCH

1. The nature of academic research in Law

The Submission of Australian Law Deans (April 1986) to the CTEC Assessment Committee for the Discipline of Law (the Pearce Committee) included the following observations about the nature of academic legal research:

- "53. As law is a fluid discipline law teachers must carry out substantial on-going research if they are to retain credibility in the classroom. They must read and analyse all relevant legislative, judicial and academic contributions to their area of teaching and research expertise...
54. Research in and on the law takes many forms. Apart from the substantial research undertaken in connection with the teaching of courses, the major types of research are:
- i. research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments ("doctrinal research");
 - ii. research which intensively evaluates the adequacy of existing rules and which recommends changes to any rules found wanting ("reform-oriented research"); and
 - iii. research which fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity ("theoretical research").

This threefold classification of legal research was subsequently adopted in the Pearce Committee Report (Australian Law Schools, 1987, Vol. 2, para.9.15)

2. Academic legal research and the discovery of "new truths"

It follows from what has just been said that, in Law, the "discovery" element in academic research is not as immediately apparent as it is, for instance, in the natural sciences. In Law, and in the humanities and social sciences generally, it may seem that one does not "discover new truths", but that one merely reviews and analyses (or synthesises) past and present social phenomena.

This view is however based on a fundamental misconception. Law is a highly sophisticated human construct that is constantly changing. A large part of legal research therefore consists of formulating hypotheses to give meaning to detailed legal rules already created (whether by statute or judicial decision) and projecting these hypotheses so as to create new

patterns of rule-making. Often the most profound “discoveries” are in fact those which give new coherence to familiar legal phenomena. For this reason, the process of ascertainment and synthesis of existing legal principles constitutes original research, as also does coming to terms with the dynamic of past, present and future legal development.

So long as the promotion criteria use the term “research”, as a key aspect of scholarship”, the former term must accordingly be interpreted widely enough to cover a whole range of investigative, analytical, critical, theoretical and/or synthesising intellectual activity by academic lawyers. (Such activity must of course be not purely pedagogic and must be original, in the sense of not being wholly or substantially derived from the work of others). In addition, any implicit requirement that there be some obvious and dynamic element of “discovery”, such as might win a Nobel Prize in a scientific field, cannot apply in Law.

3. The relationship of research to teaching

Academics from various disciplines outside Law sometimes assume that a textbook or a set of teaching materials that is or may be prescribed for undergraduate or even graduate students cannot, in any discipline whatsoever, be a major work of research and scholarship, simply because it is student-oriented. It is, however, well-recognised among academic lawyers that, at University level, Law research and teaching (even undergraduate teaching) are closely and inextricably linked. It is often most appropriate for insights and discoveries made in the course of research to be fed straight into the material put before students, or into published student case-books or text-books.

In a Statement entitled “The Nature of Law Research”, adopted in 1989 by the Committee of Australian Law Deans, this point is strongly emphasised. The Statement says: “...there is no discipline in which research and teaching are so closely interrelated”. It goes on to suggest, quoting from the Pearce Committee Report, para. 3.47, that promotions committees in Australia often fail to recognise that the “better” teaching materials often contain “valuable commentary”.

In conformity with this comment, Guideline A.2 in the Faculty-Specific Guidelines for Law is as follows:

“2. Original research and creative work in the development of teaching materials for undergraduate and graduate subjects may be taken into account. In the absence of evidence to the contrary, it will however be assumed that such work has not been subjected to peer review.”

This Guideline is not intended to imply that Law teaching materials are always based on original research and creative work, but merely that they may be. It also acknowledges that teaching materials may be subjected to peer review. But the Guideline requires that individual applicants adduce evidence of peer review, as a means of establishing that the materials are based on genuine and worthwhile research which should be duly acknowledged as such in the promotion process.

4. Rate of publication of articles

Law is not a discipline where a scholar who does not produce a “steady flow of articles” should for that reason alone be viewed as under-productive. It is entirely within the traditions of legal scholarship for academic lawyers to focus their research energies almost exclusively on producing a major book, with the result that over a period of several years few if any articles are published. In contrast to some scientific disciplines, there is not an expectation

that the interim results of continuing large-scale research should be put out into the public domain through a continuing series of articles.

5. The relation of research to professional and community activities

Faculty-Specific Guideline A.3 is as follows:

“3. In producing evidence of research, candidates may draw attention to research undertaken in connection with community activities, such as law reform work, community legal education, continuing legal education and contributions to public debate and policy formulations (eg submissions to law reform bodies or public campaigns).”

This matter is elaborated in the Committee of Law Deans’ Statement on “The Nature of Law Research” (1989):

A further activity of which cognisance should be taken by relevant bodies is research and publication carried out in connection with law reform agencies. Such work requires a collection and analysis of existing materials and, more particularly, the writer is required to make predictions and suggestions for change. Hence, in addition to more usually demonstrated skills, writers are required to address matters of policy and generally demonstrate a creative approach to legal matters. Although it should be said that matters of policy and issues of reform are not irrelevant in other types of legal writing...Nonetheless, law reform research is at the very cutting edge of law academic study, practice and social policy. Many law academics are involved in law reform work in advisory, consultative and policy-making capacities. Hence, law academics, in this context, can have an immediate and direct effect, through their research and publication, on the development of law and its agencies.

Since law and legal institutions directly concern the daily lives of people, it is a further responsibility of law academics to bring matters of public importance to the notice of the community at large. This can take various forms such as articles in newspapers and like periodicals and appearances on other media. There are few disciplines in which this kind of activity is as important as it is in law. The writing of such articles and the making of such appearances requires that legal information be sought, correlated and put into a form which is readily comprehensible to members of the community. As with law reform research, the academic will also be required critically to evaluate the substantive law and make suggestions for its reform.

Where a Law applicant for promotion has done substantial work of this nature, it may often qualify, for these reasons, as “mainstream” research, not merely as a form of consultancy.

6. The question of international reputation

Faculty-Specific Guideline A.1 is as follows:

“1. We do not place the same emphasis on international reputation or publication in international journals. The nature of legal scholarship is such that, in many areas of work, national reputation and publication is of at least equal importance”.

By way of example, tax law, federal constitutional law and many branches of commercial law in Australia are “Australia specific”. The issues which they deal with must also be confronted in overseas countries, but the relevant legal principles are so numerous and complex that it is perfectly legitimate for academic lawyers specialising in such areas to be almost entirely preoccupied with the “home-grown” version. In such a case, an applicant for promotion may be able to offer evidence of a large quantity of highly-value research, but little or nothing in

the way of international reputation. Indeed, overseas referees will often not be qualified to write a good reference.

On the other hand, even in fields of law where there are “Australia-specific” rules, scholars may choose to adopt a comparative approach - in order, for instance, to develop critical perspectives. In such a case, and a fortiori where the field of study is not “Australia-specific” (for example, international law), an international reputation is clearly attainable.

7. Status of journals

The Law Deans’ Statement on “The Nature of Law Research” points out that a hard-and-fast distinction between refereed and unrefereed journals does not exist in Law:

A major distinction which must be adverted to immediately which exists between law and many other disciplines relates to the issue of refereed journals, to which so much importance is attached in science and technology. The process of refereeing and assessment is altogether more diverse, varying considerably from journal to journal, than it seems to be in other areas. There are very many journals which have considerable influence in legal circles which would or might not fulfil the generally required science criteria, but it would be wrong to ignore them especially as they deal with matters relating to the practising legal profession. Methods of quality control are different but no less rigorous than in other disciplines.

A further comment may be added about publication in Law journals that are edited by students. It is sometimes assumed that for an academic journal to have student editors is a mark of low scholarly content and repute. Yet this is a characteristic of some of the leading Law journals in the world: in particular, the Harvard Law Review, which is the USA’s most prestigious law journal. In such journals, submitted articles are assessed, if not formally refereed, by leading academic lawyers in the particular field.

8. Status of referees

Legal practitioners, or other non-academic persons who have made their career in law, are sometimes asked by Law applicants for promotion to act as their referees. Because a great deal of professional legal work involves scholarly study similar to that undertaken by academic lawyers, and because many distinguished lawyers outside academe spent an earlier period of their professional life on the staff of a law school such referees are often entirely qualified to comment on an applicant’s research achievements. This is not, however, to suggest that all or even a majority of a Law applicant’s referees should be non-academic.

9. Postgraduate research qualifications and research supervision

It is a commonplace in academic law that relatively few academics have PhDs and relatively few are called upon to supervise PhDs. LLM degrees taken by research are also relatively uncommon. A Law applicant for promotion should therefore not be seen as “below par” merely because he or she (a) does not have a postgraduate research degree or (b) does not often supervise postgraduate research students.

B. TEACHING

1. The interactive nature of law teaching

Law is a subject which lends itself par excellence to top-quality interactive teaching, going far beyond the mere imparting of rules so as to involve the acculturation of students into a highly distinctive, demanding and sophisticated way of thinking and reasoning. An outstanding teacher in Law should have as strong a case as any other teacher for being credited with an “exceptional” or “outstanding” contribution to teaching, for the purposes of a promotion application.

2. Evidence of contribution to teaching

The Faculty-Specific Guidelines on teaching are as follows:

B.1. We should incorporate by reference the helpful document 'Advice on the Documentation of Teaching Activities'.

2. In addition, achievement in teaching may be manifested by evidence of, among other things,

- a. subject design and development
- b. preparation of teaching materials, and
- c. convening of multi-group subjects.”

Guideline 1 is self-explanatory. In relation to guideline 2(b), it should be stressed that the inclusion of teaching materials, in this context as well as under Research, is not intended to constitute “double-dipping”. In this context, all that is meant is that the routine preparation and updating of good-quality teaching materials should be taken into account in the overall assessment of a Law applicant’s case under the heading “Teaching”. It is important to acknowledge that the rapid changes that can occur in the law make a dramatic impact on teaching. Legislation or a single judicial decision can require a significant reassessment of course material and sometimes structure. The ability and willingness to keep abreast of such changes in course development is clearly relevant to assessing the applicant’s contribution to teaching. As regards Research, teaching materials will only be relevant, and for distinctly different reasons, in the far narrower range of circumstances outlined above. These depend, in particular, on the materials being anything but “routine”: they must manifest genuinely creative and original research.