

Legal Records at Risk: seminar held at the Centre for Socio-Legal Studies

Title: Legal Records at Risk 1914-2014(LRAR): the use of unpublished data in socio-legal research

Venue: Centre for Socio-Legal Studies, Seminar Room D, Manor Road, Oxford

Date: 25 April 2016 2.30-6.00 pm

Speakers:

1. Professor William Twining, Quain Professor of Jurisprudence Emeritus at University College London
2. Clare Cowling, LRAR Project Director
3. Professor Peter Bartlett, Nottinghamshire Healthcare NHS Trust Professor of Mental Health Law, School of Law and Institute of Mental Health, University of Nottingham
4. Professor Denis Galligan, CSLS
5. Dr Bettina Lange, CSLS
6. Dr Michael Reynolds, CSLS

1. The seminar was introduced by **William Twining** (WLT). He advised that the purpose of this seminar was:
 - To attempt to understand the users' points of view from those who have had access to and used (or not used) documentary material, whether archived or not, in their research; whether they encountered any difficulties in obtaining access, what restrictions (if any) were placed on use.
 - To find ways of making judgements about what kinds of records/ institutions are likely to be of interest to potential users of different kinds; for most institutions the main external use will usually be from outside the legal academic community. One exception to this is socio-legal scholars. In our 1994 publication, Legal Records in the Commonwealth, Neil Rickman (then at CSLS) wrote a very useful chapter on this topic. WLT advised that we are interested in finding someone to update this, but also to seek suggestions from current socio-legal scholars who have used, or might use, certain kinds of records that are not at present accessible.

WLT then briefly outlined the aims of the LRAR project ([see link to introductory blurb](#)) as follows:

- To broaden the concept of "legal" records from their traditional definition as court records or deeds to the business records of private sector institutions specialized to law (ISLs), including arbitration and mediation services, barristers, insolvency practitioners, legal executives, licensed conveyancers, multi-disciplinary practices, notaries, patent attorneys, pro bono legal services,

scriveners, solicitors, trade mark attorneys and providers of ancillary services such as law publishers and legal stationers.

- To identify and rescue historically significant legal records of private sector institutions that are at risk of destruction or loss because of indifference, apathy, lack of resources or concerns over confidentiality or reputational damage and to raise awareness of creators/holders of their potential value.

All private sector institutions in the UK face similar information management challenges, but modern legal records (C20-C21) are particularly vulnerable due to recent developments which are transforming the nature, organisation, regulation and economics of legal services. If these changes are not captured for posterity by the systematic collection and preservation of relevant records our more recent legal history will continue to be government-centric, with obvious implications for the study of legal, social and cultural change.

The project is currently undertaking three major investigations into:

- Arbitration records
- The Intervention Archives managed by the Solicitors Regulation Authority
- Digital legal records

2. An outline of action to date on the Project was given by **Clare Cowling** (CC) (see [link to presentation slides](#)). CC advised that the project has contacted three major categories of stakeholder institutions as follows:

- Research institutions
- Archival institutions and pressure groups
- Institutions specialised to law (ISLs)

The response from the first two groups has been overwhelmingly positive, with offers to publicise, actively assist and/or co-operate with the project. The response from ISLs has been overwhelmingly non-existent or negative, the only exceptions being where personal acquaintance with individuals could be called upon as an entry point. The project would value active lobbying from research institutions to help break this deadlock.

The project has also undertaken extensive investigation into the existence of modern legal records (using our definition above) already held in archival institutions, using The National Archives' [Discovery](#) portal, and has recently completed a case study of C20 alternative dispute resolution records held in the Transport for London Corporate Archives. These investigations show that there are many, varied and detailed legal records available for research, though there is no systematic process of collecting legal records other than by an extremely limited number of specialist repositories. This leaves a gap which the project hopes to work towards reducing.

3. **Peter Bartlett** (PB) then spoke about his experience of accessing documents as a user. PB outlined two projects of relevance, both in a sense very standard socio-

legal; the first looking at implementation of law; the second looking at how crime happens and how it's responded to. In both cases, an interest in the voice of non-legal actors (a big issue in the field of mental disability law) was a major factor. For details of the projects see the [link to PB's project notes](#).

PB made the point that documents created in the course of business have validity for research *because* they are created as part of a business process, not with a view to how future researchers may interpret them, the activity they represent or (consciously) the prevailing ethos of the time. PB noted, however, that this may be changing. Access to records was less of an issue in the past than it is now; recently a colleague was refused an application for funding to undertake research into current medical records due to "ethical issues". Is ethics becoming an increasing barrier to research, especially if the subject/patient lacks capacity or is viewed as being 'vulnerable', or due to the embarrassment factor where records demonstrate practitioner/administrator prejudice? PB expressed concern that he might not now be able to undertake the above projects, at least not without a great many more administrative hurdles to overcome. Whose rights exactly are "ethics" protecting?

4. **Denis Galligan** (DG) described the research undertaken by CSLS. 90% are empirical studies; conducting interviews and evaluating current data (eg case files, media releases, public domain reports, position papers, submissions) are the preferred methods of research. There is no particular pattern to the subject matter chosen for study, but something around alternative dispute resolution could be a useful topic, provided research material were available. Students to date have encountered no issues around accessing relevant material, but they may not be fully aware of the existence of much accessible – and relatively modern - information already available in archives.

CSLS theses themselves are clearly of archival research value; they are stored in the Bodleian Library and are therefore not at risk.

5. **Bettina Lange** (BL) gave a presentation (see [link](#)) on the advantages and pitfalls of using unpublished records for researching regulatory histories, drawing on a mixture of examples from DPhil theses she has supervised and her own research.

She advised that, again, no issues had been encountered around accessing available data but that the completeness of the data in the long term would be dependent on its being collected by archives. BL was concerned that the records of smaller regulatory bodies might slip through the net. She also emphasised the importance of knowing the context of the record to assess its validity.

BL felt that it was important for legal research organisations to be involved in the decision making process around destroying or preserving archives in order to ascertain their research value; The National Archives in particular should liaise with researcher communities when deciding what should be kept.

BL also agreed that CSLS would be interested in providing further guidance to students on how to access and use records in archives.

6. **Michael Reynolds** (MR) briefly described the limited availability of domestic arbitration records for research eg The Law Society keeps no records of its own involvement in arbitrations. MR suggested that perceptions around confidentiality were a major factor in the reluctance to keep - and make available - arbitration records. Very little is available, for example, by way of reports of arbitration decisions, particularly around domestic arbitration. Our domestic arbitrators are against disclosure; international arbitrators are much more sympathetic to openness – in part for purposes of education. The International Court of Arbitration publishes all decisions; MR feels that the UK should follow suit.

MR also felt that training of arbitrators needs improvement as does transparency over the rules of arbitration bodies. How do they pass on their knowledge? Another issue is one of a lack of dedicated archives combined with the indifference of arbitral organisations.

During and after the presentations there was considerable discussion around the suggestion that greater awareness about the availability or otherwise of records could open up new topics for socio-legal researchers and/or stimulate lobbying by researchers to make information owners more aware of the potential value of their records.