

JUSTICE-ILAG
Legal Aid Newsletter
January and February 2010

Opening note

1. Major Themes of the Issue

For those who knew Francis Regan, his sudden death overshadows the rest of the content of this newsletter. There are two issues of lesser note. First, you will observe that the Ontario criminal lawyers finally ended their boycott of cases involving murder, guns and gangs when they obtained a financial settlement on remuneration that they regarded as acceptable and, indeed, appears generous. Second, the form of the newsletter may be mutating. This issue contains fewer summaries of press stories (they tend to be repetitive) and more longer contributions. The disproportionate coverage of events from England and Wales would be easily corrected by volunteers from elsewhere writing on topical issues in their jurisdictions. Send proposals for content to rsmith@justice.org.uk.

Roger Smith

2. Obituary

Professor Francis Regan born August 21th 1954, died January 6th 2010

Jon T. Johnsen, University of Oslo, Norway



On the 10th of December I received a call from Francis Regan. He was in a hospital in Shanghai and had just been diagnosed with cancer. His cancer soon turned out to be incurable. He died on January 6th at the age of 55.

His sudden illness and early death was a shock to many. I learned that his funeral was attended by several hundred people – family, friends, colleagues and students. To me the huge attendance showed that he was a man who reached out to people. He touched many with his funny, social and unconventional way of communicating and meant something to them. His network was not limited to people from Adelaide where he lived. It comprehended Australians elsewhere and people from the UK, Canada, Scandinavia and China. Many more of us would have attended his funeral had it not been for the distance.

Francis Regan joined the Legal Studies Department of Flinders University, Adelaide in 1991. He was a gifted teacher and an effective administrator. His teaching and research

were closely integrated. He promoted in students a spirit of reform-oriented inquiry and encouraged them to think critically about practical reforms in a realistic and constructive manner.

A year ago I spent three months with Francis at Flinders. We worked at a joint book project. I was astonished to learn about the heavy workload he carried in teaching, supervision and administration and seemingly had done so for many years. When we discussed it and I remarked that such a workload obviously hampered his academic writing, he fully agreed, but it seemed deeply ingrained in his character that people around him – family, students, colleagues, employers – should have priority over his own writing.

Francis became a member of the International Legal Aid Group from the start. He was very active in the group and did a lot to help it develop. He contributed at every meeting. His selfless attitude often led him to take on tasks that others profited more from than he did himself. He was restlessly occupied by bringing new people and new perspectives into ILAG. Recently he was eager at getting people from Eastern Asia participating in the New Zealand Meeting.

Francis was good at collaborating with people. Looking at his bibliography we observe that an unusually high share is written with others and most of them are ILAG members. With me he published two articles on Finnish legal aid. I can confirm that he was very easy to work with, being constructive, funny and dedicated and usually more focused on the common product and his coauthor's contribution than his own. I came to know him as an academic who had research interests similar to mine and ended up with him as a close colleague and valued friend.

He was the major editor of the Oxford University Press book on Transformation of Legal Aid with several ILAG contributors. It was published in 1999 and still is the most significant common publication from the group. He also edited a volume of the International Journal of the Legal Profession on the History of Legal Aid in 2006.

Like many other activists he became increasingly critical about legal aid in his home jurisdiction Australia. Reading his drafts on Australia in our common book project sometimes made me ask whether he was a bit unfair in describing the Australian situation. Sometimes he became significantly disappointed with the Australian development. Contrary to many he also became intensely fascinated by legal aid schemes in other parts of the world and wanted to focus on jurisdictions with a political environment more favorable to legal aid development.

Scandinavia became one major point of interest. His fascination for the Nordic countries probably came from welfare research and a hypothesis that societies with a highly developed welfare systems also might have well developed legal aid schemes. Francis consulted me about his studies and I was surprised of his great capacity in communicating

with people. In a short time he achieved knowledge of Sweden's legal aid that bypassed mine although he could not read or speak Swedish. In ILAG he became *the* expert on Sweden although some of us might remember the vivid opposition one of his theories met at the 2001 Harvard conference from a Swedish participant. I think he actually loved causing this kind of commotion. It obviously refreshed our discussions at that meeting. He had no fear of being corrected or of losing face.. He was a natural academic in the sense that he thought the way to learning went through exposing the knowledge he had, whether solid or not, to others and learn from the reaction whether confirming or critical. He did not think it a defeat to be corrected, just a way to learn more.

In 2003 we studied Finland's legal aid schemes together. Francis became well known and liked in Finland too, and the Finnish participation in ILAG meetings increased. It might have helped that he thought the Finnish scheme possibly the best scheme in the world.

He then became deeply fascinated with a very different society, namely China. He spent a sabbatical and taught at a university in Beijing in 2003. He learned some Chinese and overcame the significant cultural and language challenge that communication with Chinese scholars, students and legal aid officials represented. He also met his second wife in China. Francis was among the few Westerners who have been allowed to witness a Chinese criminal trial. It concerned theft of a motorized bike, which is a serious although not major crime in China. His objective, analytical study of the case left a picture of a criminal justice system that is harsh on crime and has little sympathy on suspects that are considered liable. It is a pity it is still unpublished.

The speed and seriousness of the Chinese attempts at building a Western inspired justice system with a sophisticated legal aid scheme obviously impressed him. He generally wrote favorably about Chinese legal aid; although he was not at all blind to the weaknesses of their schemes. His main point was that progress was impressive given that prior to 1996 no legal aid scheme existed. In a few years' time the Chinese legal aid scheme has become among the largest in the world counted from cases and personnel involved. It might be argued that China also is by far the most populous jurisdiction in the world, but still their legal aid development is impressive.

What sorts of insights into legal aid does his work leave behind? His main focus is well expressed in the working title he proposed for the book we were working on when he died – "Best Policies for Legal Aid". I think results on the ground – schemes that actually improved access to justice for poor and ordinary people – mattered more to him than academic success. Still he recognized that a well conducted academic analysis could provide policymakers with valuable tools for reform and that it was an important task for research to provide such insights. Francis was not afraid to use humour to get his point across. His writing had an accessibility that other scholars could only envy, and he put this

to good effect. The very readability of his writing enabled others to grasp the complex and abstract issues he was addressing. I think his published articles have a lot to offer.

Among his works are reports to governments in Australia, Finland, Taiwan and China on evaluations and reforms in their national legal aid schemes. These reports might not reveal astonishing and hitherto hidden insights, but they argue in pedagogic and well structured ways the necessity of a range of reforms like providing mass advice, telephone service, differentiated provision, efficient management, quality assurance etc. Like other ILAG members, he obviously saw it as a major task to produce viable models for legal aid development. He realized the usefulness of establishing an international clearing house or toolbox for legal aid reform and making it available to policy makers, administrators and other legal aid activists. Several of his policy advices also have been put into practice in different jurisdictions.

Another idea of his is that societies should use multiple legal aid providers. It is a development of the “mixed model” approach that he regarded as too simplistic. Francis thought that the experiences from several jurisdictions with NGOs and other non commercial legal service providers contain a variety of models useful to legal aid His concern was how they might be used to widen a discussion focusing on the seemingly narrow distinction between *judicare* and salaried provision. He also advocated emphasis on non litigation advice that he found in common law countries and contrasted it to the litigation approach that characterizes legal aid in many civil law jurisdictions.

His interest in the history of legal aid might stem from his perception of legal aid policy as a remedy for “intractable” or “recurring” problems – a category of social problems to which society does not find efficient or lasting solutions both due to their complexity and lack of reform models, and also to the fact that they primarily relate to the underclass. Reforms tend to be provisional and superficial, more aimed at getting the issue off the political agenda for a period than promoting substantive change. With irregular intervals the insufficiency of legal aid surfaces in politics again and call for new reforms.

More than the rest of us he focused his research on other countries instead of his home jurisdiction. Looking at his academic contributions on legal aid over the last twenty years, the number of publications on other jurisdictions and cross cultural issues by far exceeds his publications on the Australian situation. Francis Regan became a true international scholar in legal aid.

3. News: Summaries and Links

These reports are largely compiled from news reports on the internet on the basis of a simple search under the words 'legal aid'. Readers must, just as buyers, beware of authenticity. The links worked at the time of writing but some will fail after a period of time.

Australia: \$10m cost of terrorism case comes from federal exceptional cases budget: <http://www.heraldsun.com.au/news/breaking-news/terror-accused-got-10m-of-legal-aid/story-e6frf7jx-1225827800383>;

Canada:

Criminal lawyers threaten to escalate protest:

<http://www.canada.com/news/Defence+lawyers+threaten+escalate+fight+over+legal/2430215/story.html>; BC branch of Canadian Bar Association to establish a 'people's commission' into state of legal aid: <http://timesonline.typepad.com/law/2010/01/law-society-in-legal-challenge-over-acquitted-defendants.html>; Yukon: one trial with two defendants threatens to eat up whole of province's legal aid budget:

<http://www.cbc.ca/canada/north/story/2010/01/18/yukon-trial-aid.html>; CRIMINAL LAWYERS WIN 5 PER CENT RISE EVERY YEAR FOR SEVEN YEARS:

<http://www.lfpress.com/news/london/2010/01/24/12597361.html>; Alberta legal aid in trouble: <http://www.cbc.ca/canada/edmonton/story/2010/02/09/edmonton-legal-aid-shortfall.html>;

England and Wales:

Attack on legal aid advice for asylum-seekers that costs:

<http://www.thesun.co.uk/sol/homepage/news/2794665/28m-on-legal-aid-to-asylum-seekers.html>; public interest litigator defends legal aid for non UK residents in context of Iraq:

<http://www.guardian.co.uk/commentisfree/2010/jan/04/uk-human-rights-abuses-courts>; Law Society applies for judicial review of new rules limiting repayment of costs to acquitted defendants who were privately represented to legal aid rates:

<http://timesonline.typepad.com/law/2010/01/law-society-in-legal-challenge-over-acquitted-defendants.html>; Praise for Jackson report (see below)

<http://www.guardian.co.uk/commentisfree/2010/jan/18/civil-costs-justice-lawyers>; Bar worried that legal aid cuts will impact on bar: http://www.ft.com/cms/s/0/89cd2d10-0e95-11df-bd79-00144feabdc0.html?nclick_check=1; National Audit Office criticises Legal Services Commission (LSC):

<http://www.google.com/hostednews/ukpress/article/ALeqM5iJMld-BpPonuE09nXt9G2IqOoR-w>; Law Society enjoys LSC criticism and joins in:

<http://www.lawgazette.co.uk/opinion/mps-have-performed-a-valuable-service-legal-aid>;

Ministry of Justice announces cuts to civil cases – tighter public interest test, non-residents

exclusion <http://www.lawgazette.co.uk/news/moj-restricts-civil-legal-aid>; flagship law centres bailed out by government, private practice partnership:

http://www.yourlocalguardian.co.uk/news/local/wandsworthnews/4891049.Legal_aid_lifeline_to_stop_planned_Wandsworth_closures/; barristers threaten legal action against legal aid

cuts: <http://www.telegraph.co.uk/news/newstoppers/politics/lawandorder/7167993/Barristers-threaten-legal-action-over-legal-aid-reform.html>; Greater rights for opponents to challenge legal aid in family cases reckoned to save £6m a year:

<http://www.familylawweek.co.uk/site.aspx?i=ed52391>;

Ireland:

Minister's concern at growing legal aid bill:

<http://www.irishtimes.com/newspaper/ireland/2010/0127/1224263210490.html>;

New Zealand:

Legal aid lawyers may face competency tests: <http://www.nbr.co.nz/article/legal-aid-lawyers-may-face-competency-tests-118399>;

Pakistan

National Public Defender and Legal Aid Office Bill passed:

<http://www.cbc.ca/canada/north/story/2010/01/18/yukon-trial-aid.html>; Lahore Bar Association reportedly threatens death to any lawyer who represents interests of Christian child allegedly murdered by leading Muslim lawyer: <http://www.asianews.it/news-en/Lahore.-Muslim-lawyers-will-burn-alive-anyone-who-defends-murdered-12-year-old-Christian-17559.html>;

Sierra Leone

Has successful first year of legal aid public defender programme:

http://www.news.sl/drwebsite/publish/article_200514470.shtml;

South Africa:

500 residents protest about legal aid for accused killers:

<http://www.timeslive.co.za/news/article249447.ece>; Courts to work 16 hour days during World Cup with legal aid assistance on tap:

<http://www.weekendpost.co.za/article.aspx?id=527070>; New branding for Legal Aid South Africa:

<http://www.marketingweb.co.za/marketingweb/view/marketingweb/en/page74600?oid=125283&sn=Marketingweb%20detail&pid=71616>;

United States:

Commercial organisation estimates that one in five Americans had a legal problem for which they could have used a lawyer: <http://www.prnewswire.com/news-releases/one-in-five-americans-had-a-legal-issue-in-the-last-year-that-could-have-involved-hiring-a-lawyer-says-new-findlawcom-survey-80778567.html>; New York bar announces 'attorney emeritus' programme to encourage retired lawyers to do pro bono work: http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202439358963&font_colorredFreefont_New_Attorney_Emeritus_Program_Is_Announced&slreturn=1&hbxlogin=1; Michigan use of contracted private lawyers in criminal cases under attack: <http://www.nbr.co.nz/article/legal-aid-lawyers-may-face-competency-tests-118399>.

4 Reports and Publications

England and Wales

Review of Civil Litigation Costs: Final Report ('the Jackson Report')

Ministry of Justice, http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf

This is a major report on the rules relating to costs in England and Wales. It applies generally to costs and not specifically to legal aid costs. However, the two are related. Its major recommendation is the proposal to amend the regime as to 'conditional fee agreements' so that a successful litigant cannot claim an additional 'success fee' and the cost of 'after the event insurance' in addition to the normal costs award. It, therefore, hits at the core of the way that the personal injury market is currently organised and financed. The report also recommends the abolition of 'referral fees', payments to claims farmers by solicitors to obtain cases.

Professor Richard Moorhead of Cardiff University comments:

The most controversial proposal is the abandonment of the principle of full recoverability of costs. If the proposals are implemented, Claimants funded under Conditional Fee Agreements (CFA) will not be able to claim the success fee or after the event insurance premium which is chargeable on their normal costs from their opponents but will have to pay it themselves, out of damages. The normal costs (be they hourly rates or fixed fees) are still recoverable.

The idea is that it is fairer that claimants rather than defendants bear (and share) the costs additional to CFAs and also that this will ensure some market restraint on success fees and insurance premiums. Claimant lawyers and trade unions are up in arms. Both of course make substantial sums from conditional fee agreements, but point out that legal aid was withdrawn from personal injury claims on the understanding that full recoverability would

mean that claimants did not lose a penny of damages. Jackson LJ has proposed an uplift of general damages to compensate: the figure suggested? 10%. More importantly perhaps, the reduction in claiming that will result from more claims becoming economically unviable is unknown. The benchmark data necessary to assess this, as ever, goes uncollected.

Changes in recoverability would mean that CFA return to the pre-2000 situation where CFAs operated like a complicated contingency fee. Jackson goes further recommending the introduction of Ontario style contingency fees where the successful claimant pays a percentage of their damages to their opponent and their lawyer (if successful) claims their normal costs from the opponent. Such fees would be subject to regulation including the requirement, Jackson recommends, that lay clients have independent advice on contingency fees prior to entering into them which (he surmises) the claimant's lawyer would pay for. Interestingly, this recommendation is not applied to any other source of funding (even though CFAs will give rise to similar problems and the regulatory problems of hourly fees may be greater). It also ignores the possibility that such independent advice arrangements may operate de facto like referral relationships. Not a problem? Maybe not but Jackson wants to ban referral arrangements a proposal, designed to reduce the costs of personal injury cases and starve the market of claims management companies.

One more recommendation deserves emphasis, which Jackson calls modified one way cost shifting. He proposes that all personal injury cases, including medical negligence cases, be subject to one way costs shifting. It works a bit like an automatic legal aid certificate, but without the need to make an application. Claimants who bring such claims would be automatically protected from their opponents' costs but if they win could still claim their own costs from the defendants. This provoked a range of reactions when Jackson first proposed it on the basis that it would remove ATE premium costs and save defendants money (they spend far more on recovered ATE premiums than they get back on recovered costs under such premiums). The defendants are trying to work out whether this means that are more likely to face weaker claims undoing the costs benefits. The issue is likely to turn on how 'modified' costs shifting is: if claimants behave unreasonably the idea is they lose their one way costs shifting.

There are other interesting elements in the report: not least attempts to utilise IT systems as a vehicle for quantifying damage, but the final issue, and the most important, is the political one: who is sufficiently interested to implement the proposals? The answer? No one knows. It's early days but not looking promising so far, though there are some who suggests a changed administration would approve of changes to recoverability which reduced insurance costs and hit trade union funding.

England and Wales

Quality Assurance for Advocates

Angela Devereux, Jason Tucker, Professor Richard Moorhead, Cardiff University and Ed Cape of UWE Bristol

The authors have conducted the first evaluation of quality of advocacy encompassing the Bar in England and Wales. They were commissioned to evaluate approaches to assessing key competencies for advocates' assessment as part of Lord Carter's recommendations into the reform of legal aid. The process of agreeing competencies and assessment mechanisms is a vexed one with the Bar, in particular, coming to terms with external influence on regulation.

The Cardiff study trialled 8 different forms of assessment on over 100 volunteer candidates from the Bar, Solicitors, the CPS and ILEX. Assessment methods included testing barristers, solicitors and other lawyers on a range of their work as advocates: including simulated cross-examination and evaluation of their performance in court by judges. Their study is published this week by the Legal Services Commission and is also available at <http://www.law.cf.ac.uk/research/pubs/repository/2269.pdf>.

Judges and practitioners have been complaining for some time about the quality of some advocates. It is difficult to generalise from the research findings, because the number of candidates was small and they were all volunteers, but levels of competence under the assessment mechanisms were not as high as might have been hoped by any sector of the profession. The professions' regulators now take forward work on developing a system of quality assurance for advocates under the watchful eye of their uber-regulator - Legal Services Board. The LSC continues its interest as a dominant purchaser of criminal advocacy services.

The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission

National Audit Office HC29 2009

The National Audit Office has ... reported to Parliament that there are risks to value for money from the way the Legal Services Commission (the LSC) administers and procures legal aid for criminal cases ...

A study by the NAO has discovered that the LSC should do more to understand the market for criminal legal aid to make the most of its ability to control price and quality. In particular, while the Commission holds good information locally about its suppliers it does not bring this information together centrally. Better use of this information would help the LSC to establish whether it is paying a fair price for criminal legal aid and forecast the impact of changes it makes.

The LSC is undergoing a major transformation to reduce administrative costs and to improve effectiveness. The LSC has implemented some significant market reforms in the last few years, but it has not always piloted reforms or evaluated their impact, nor has it confirmed the financial savings generated.

The NAO also found that the Commission is not always making accurate payments to solicitors for criminal legal aid. In October this year, the NAO qualified the LSC's accounts for the legal aid fund for 2008-09 because it had overpaid solicitors on criminal and civil legal aid cases by an estimated £25 million.

An NAO survey of solicitors has also revealed tensions in the relationship between the profession and the LSC. Of those who responded to the survey, 36 per cent of solicitors perceived the LSC as 'unhelpful' and 29 per cent believed the LSC did not fully understand the legal system, although firms were more positive about the knowledge of the Commission's local relationship managers.

The LSC is a Non-Departmental Public Body of the Ministry of Justice. The Ministry employs 34 staff on legal aid policy work at a cost of £2 million. This is in addition to the LSC's own administration budget of £125 million. The NAO has called on the Ministry to clarify the respective roles and to review the level of staff involved in making legal aid policy in both organisations with a view to reducing this number.

(NAO summary)

5. Cases

Dayanan v Turkey (application no. 7377/03), judgement of 13th January 2010 (second section)

This is a case decided by the European Court of Human Rights. It is one of a series in which the court is advancing its requirement of the point at which legal assistance is required – which essentially derive from a case referred to in the text: Salduz v Turkey decided late last year. The decision could yet be appealed to the Grand Chamber of the court. It is currently available only in Turkish and French.

The case relates to the construction of Article 6(3)(c) of the European Convention on Human Rights which reads:

Everyone charged with a criminal offence has the following minimum rights ... to defend himself in person or through legal assistance or his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice require.

Facts of the case

On the 30th January 2001, in the course of an operation led against an illegal armed organisation known as Hezbollah, the applicant was arrested and brought into police

custody. He signed there a document entitled 'form explaining arrested persons' rights and was told of the charges against him. He was informed of his right to remain silent and his right to have a lawyer present at the end of his arrest. The police asked him some questions. The applicant made use of his right to remain silent. His home was subsequently searched, and in the meantime he continued to use his right to remain silent.

Decision

The Court reiterated the rule that the accused has a right to effective legal representation, if necessary with the help of legal aid, and that this one of the fundamental elements of an equitable process (Salduz at paragraph 51, Poitrimol at paragraph 34, and Demebukov at paragraph 50). Equity in the criminal process requires generally that, on the basis of article 6 of the Convention, the accused should have the possibility of being assisted by a lawyer as soon as he is put into police custody or remanded into custody.

As emphasized by international norms that are generally recognized, accepted by the court and that underline its jurisprudence, an accused must, as soon as he is deprived of his liberty, have the right to the assistance of a lawyer, independently of any questioning that he may undergo (Salduz paragraphs 37-44). Indeed, the equity of the procedure requires that the accused should have access to any of the many methods of help available and which are related to legal counsel. To this end, discussing the case, organizing the defence, searching for evidence favourable to the accused, preparing the questioning (I assume this is the civil law equivalent of examination in chief and cross examination), supporting the accused when in distress and controlling the conditions of his or her custody are fundamental elements of the defence that the lawyer must be able to freely exercise.

In the present instance, no one denies that the accused did not enjoy legal help during his arrest as the law in force at the time would not have allowed this (Salduz paragraphs 27,28). In and of itself, such a systematic restriction of available and relevant legal help, suffices in itself to lead to the conclusion that article 6 was violated, in spite of the fact that the accused kept his silence during his police custody.

The Court concluded that article 6 (3)(c) combined with art 6(1) [overall right of fair trial] had been violated.

Catriona Cairns, JUSTICE intern

6. Conferences

Forthcoming: Legal Services Research Centre

The next Legal Services Research Centre's International Research Conference on 'Research into Practice: Legal Service Delivery in a New Decade' will be held at Downing College in Cambridge. The conference will run from Wednesday 30th of June pm to Friday 2nd July 2010. Those wishing to attend can obtain a booking form from www.lsrc.org.uk or by

contacting catrina.denvir@legalservices.gov.uk. Late abstract proposals may be considered. Please contact Catrina at the above email address for further information.

7. And Finally

This newsletter has been compiled by Roger Smith of JUSTICE in London, UK. If you would like to be taken off the circulation list; add someone or contribute some content: contact rsmith@justice.org.uk.