

Law Clinics in England and Wales

Thomas, Linden

DOI:

[10.1080/03069400.2017.1322858](https://doi.org/10.1080/03069400.2017.1322858)

Document Version

Peer reviewed version

Citation for published version (Harvard):

Thomas, L 2017, 'Law Clinics in England and Wales: A Regulatory Black Hole', *The Law Teacher*.
<https://doi.org/10.1080/03069400.2017.1322858>

[Link to publication on Research at Birmingham portal](#)

Publisher Rights Statement:

This is an Accepted Manuscript of an article published by Taylor & Francis in *Law Teacher* on 5th June 2017, available online:
<http://www.tandfonline.com/10.1080/03069400.2017.1322858>

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

Law Clinics in England and Wales: A Regulatory Black Hole

Abstract

There has been very limited consideration to date of how the regulatory environment in England and Wales impacts on university law clinics and the solicitors who run them. This paper sets out the current regulatory framework pertaining to university law clinics and explains the restrictions and limitations it poses. It highlights the current failure on the part of the regulators to meet their statutory duty to promote access to justice in relation to university pro bono services and sets out a series of recommendations as to how clinicians and regulators can secure a more certain and enabling future for clinics.

There is a wealth of literature addressing the pedagogical merit and social justice impact of clinical legal education, and quite right too. Clinic has many such virtues to extol. As a relative newcomer to the field, I have had no difficulty finding answers in the literature on clinic to my many questions about why law students ought to be given the opportunity to practise law and to reflect upon their experiences during their studies.¹ I have also been fortunate enough to meet with peers from around the globe to share experiences as to how, as practitioner teachers, we are able to optimise the learning experience that clinic offers and how our pro bono projects can be configured to have the greatest possible degree of positive social impact.² Yet, there is one fundamental question about clinic that I have struggled to find the answer to: how is it that universities are allowed to provide legal services to the public at all? As clinical legal educators, we focus on education and justice and how both can be improved. Yet, historically, we have not spent much time considering the regulatory framework under which we operate and whether it is fit for our purposes (or vice versa).

There are a multitude of regulatory challenges and restrictions facing clinics in England and Wales. These issues not only stymie innovations in clinic but can also leave solicitors practising in law schools feeling isolated, exposed and unwittingly vulnerable to regulatory and criminal sanctions. They can also prevent clinics from providing much needed legal services to some of the most vulnerable in our society. The latter problem becomes more acute when considered against the backdrop of significant cuts to public funding for legal advice and representation,³ concerns regarding funding related closures of high street law firms and third sector advice agencies that offer advice on areas of social welfare law⁴ and the significant rise in the number of litigants in person

¹ For example, The International Journal for Clinical Legal Education publishes extensively on the pedagogy of clinic. See: < <http://www.northumbriajournals.co.uk/index.php/ijcle> > last accessed 31 May 2016

² Conferences hosted by organisations such as the Global Alliance for Justice Education facilitate such discussions. There is also a wealth of literature on the social justice impact of clinics. See for example: Frank S. Bloch (ed), *The Global Clinical Movement* (OUP 2011)

³ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force on 1 April 2013, heralding significant changes to legal aid system. Public funding is no longer available for legal advice or representation in many areas, including: nearly all private family law matters; asylum support; consumer and general contract; and most areas of welfare benefits and employment law.

⁴ See for example, 'Law Centre Closures' (*Legal Action Group*, 12 February 2014) <<http://www.legalactiongroupnews.org.uk/law-centre-closures/>> last accessed 31 May 2016; and Catherine Baksi, 'Civil Legal Aid: Access Denied' (*The Law Society Gazette*, 7 April 2014)

representing themselves in court proceedings.⁵ Never have pro bono services been in greater demand.

In this article I will set out numerous examples of the regulatory and legislative difficulties and uncertainties faced by law clinics in England and Wales and outline the impact they can have on clinicians and their institutions. I will explain why it has become essential for law schools to grapple with the regulatory framework in which they work and to engage proactively with the regulators to ensure that our position is made known. Failure to do so will, for all except perhaps the most well-resourced clinics, have negative repercussions on those members of the public whom the clinics aim to assist and will limit the opportunities for legal practice experience that we can afford our students.

Part One: Regulation of legal services in England and Wales

The current regulatory framework for the legal profession in England and Wales derives from the Legal Services Act 2007 (LSA), which introduced the ability for non-lawyers to invest in, own and manage legal practices through regulated entities commonly referred to as alternative business structures. The LSA was intended to allow for innovation in the legal services market and to enable legal advice to be delivered in conjunction with other professional services.

One of the acts of the LSA was to establish the Legal Services Board (LSB) as the body responsible for overseeing the regulation of legal services in the jurisdiction.⁶ Section one of the LSA sets out “regulatory objectives” which the LSB must act in accordance with, to the extent that it is reasonably practicable to do so.⁷ The regulatory objectives include: protecting and promoting the public interest; improving access to justice; and increasing public understanding of the citizen's legal rights and duties.⁸

The LSB has oversight of ten separate bodies, known as the ‘approved regulators’, which in turn regulate different types of lawyers, including solicitors, barristers and legal executives.⁹ In the case of solicitors, the approved regulator is The Law Society of England and Wales. The LSA requires approved regulators to separate their representative function from their regulatory function.¹⁰ As The Law Society is the representative body for solicitors it cannot therefore also adjudicate on regulatory matters. Consequently, the Solicitors Regulation Authority (SRA) was established in 2007 as a separate operating division of The Law Society and acts as the independent regulator of solicitors and law firms.

<<http://www.lawgazette.co.uk/law/civil-legal-aid-access-denied/5040722.fullarticle> > last accessed 31 May 2016

⁵ See for example: Sarah-Jane Bennett ‘The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On: Final Report’ (The Bar Council, 2014); *Lindner v Rawlins* [2015] EWCA Civ 61; and House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, (Eighth Report of Session 2014-15, 4 March 2015, HC311)

⁶ Legal Services Act 2007 (LSA), s 2

⁷ LSA, s 1 and s 3

⁸ LSA, s 1

⁹ A full list of the ‘authorised regulators’ and the different types of lawyers they regulate can be found at: ‘Approved Regulators’ <http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm> last accessed 31 May 2016

¹⁰ LSA, s 30

Approved regulators are also required by the LSA to act in a way which is compatible with the regulatory objectives. The SRA sets out its commitment to do so in the 'additional information' section to the introduction to the SRA Handbook in which it states that:

"We are confident that the contents of this Handbook, coupled with our modern, outcomes-focused, risk-based approach to authorisation, supervision and effective enforcement will:

- a) benefit the public interest;*
- b) support the rule of law;*
- c) improve access to justice;*
- d) benefit consumers' interests;*
- e) promote competition;*
- f) encourage an independent, strong, diverse and effective legal profession;*
- g) increase understanding of legal rights and duties; and*
- h) promote adherence to the professional principles set out in the Legal Services Act 2007."¹¹*

As the majority of lawyers working in university law clinics in England and Wales are solicitors, a consideration of the regulations affecting other types of lawyer is outside of the scope of this article.

Part Two: The regulatory status of law clinics and clinicians

In England and Wales, the vast majority of university law clinics are part of their institution's law school. Some clinics are modules delivered as part of the school's curriculum.¹² Others, as is the case at my own institution, are entirely extra-curricular activities run by the school. Some are a combination of both of the aforementioned. Therefore, subject to some recent exceptions, which are addressed below, clinics are not usually separate legal entities. Solicitors working in university law clinics are typically employed by the university and the university is the legal entity on behalf of which the clinic's legal work is conducted. These solicitors are therefore likely to be classed as 'in-house solicitors' for regulatory purposes because the Solicitors Practice Framework Rules¹³ provide that a person may practise as a solicitor "as the employee of another person, business or organisation, provided that you undertake work only for your employer, or as permitted by Rule 4 (In-house practice)".¹⁴ The reference to Rule 4 is crucial here because Rule 4.10 permits in-house solicitors to provide pro bono legal advice to a client other than their employer where the following conditions are met:

- a) the work is covered by professional indemnity insurance reasonably equivalent to that required by the SRA;
- b) either: no fees are charged; or the only fees charged are those received from the opposing party by way of costs if the client is successful and all costs are paid to charity; and

¹¹ 'SRA Handbook' (Solicitors Regulation Authority, November 2016)

¹² Elaine Campbell, 'Regulating Clinic: Do UK Clinics Need to Become Alternative Business Structures Under the Legal Services Act 2007?' (2014) 20(1) IJCLE <

<http://www.northumbriajournals.co.uk/index.php/ijcle/article/view/19>> 520, 526 last accessed 31 May 2016

¹³ The SRA Framework Rules are part of the SRA Handbook

¹⁴ 'Solicitors Practice Framework Rules 2011' in *The SRA Handbook* (Solicitors Regulation Authority, November 2016), Rule 1.1(e) (SRA Framework Rules)

- c) the solicitor does not undertake any reserved legal activities, unless the provision of relevant services to the public or a section of the public (with or without a view to profit) is not part of your employer's business.¹⁵

Whilst the requirement not to charge fees for the services provided is almost certainly not going to pose a problem for those acting on a pro bono basis, the remaining two provisions raise a myriad of questions for solicitors supervising university law clinics. I shall address each of these restrictions in turn below.

Sure, I'm insured...aren't I?

In order for an in-house solicitor to give advice to members of the public on a pro bono basis, he or she must have insurance that is reasonably equivalent to that required by the SRA.¹⁶ The SRA Indemnity Insurance Rules require solicitors in private practice to obtain insurance complying with the Minimum Terms and Conditions (MTC) of insurance that are set out at Appendix 1 to the Solicitors Indemnity Insurance Rules.¹⁷ The MTC are extensive, spanning 12 A4 pages and consisting of eight clauses and numerous sub-clauses. They set out the basis for arguably the most extensive liability cover for professional indemnity available in the UK insurance market. They include many terms that a university's insurance policy is exceedingly unlikely to contain. For example, they provide that the insurer may not decline cover due to misrepresentation, even in cases of fraudulence. Provisions such as this mean that a university's professional indemnity insurance is almost certainly not going to be comparable to an MTC compliant policy. Indeed, it is unlikely that it would even be possible for a university to obtain cover that is comparable to the MTC, given that it expressly applies to private legal practice.¹⁸ The issue for universities therefore is: how to determine whether insurance cover which cannot be directly compared with the MTC is 'reasonably equivalent' for the purpose of Rule 4.10. Clearly, a clause by clause comparison would be fruitless.

Disappointingly, the SRA provides no guidance on the meaning of the phrase "reasonably equivalent". Nor does it give any indication as to what a reasonably equivalent insurance policy ought to include. Unhelpfully, the SRA ethics helpline also declines to adjudicate on whether a specific clause or policy will satisfy the reasonably equivalent test.¹⁹ University clinics are therefore left to reach decisions in isolation, unsupported and without assistance or guidance from the regulator. Some sensible assumptions can of course be made. For example, it is likely that the overall indemnity cover provided by university insurers for any one event will be a relevant factor to be balanced against the risk and value of cases being taken on by the clinic. However, given the highly bespoke and specific nature of the MTC, no favourable interpretation of the reasonably equivalent test will be without risk. This situation is deeply unsatisfactory. The risk is placed firmly on the university and, anecdotally, I am aware that some universities have been extremely loathe to reach a determination on the issue, thereby threatening the future of their legal clinic. It is difficult to see how, in providing so little support and/or guidance for pro bono services that serve a

¹⁵ The above is paraphrased. SRA Framework Rules (n14) Rule 4.10 for the full wording

¹⁶ Ibid

¹⁷ SRA Indemnity Insurance Rules, Appendix 1

¹⁸ Ibid clause 1.1

¹⁹ The SRA has a professional ethics helpline that offers advice on the SRA Handbook, and therefore also the Practice Framework Rules. I called it when considering the issue of whether my institution's professional indemnity insurance was reasonably equivalent to the MTC.

fundamental role in meeting unmet legal need, the regulator is successfully discharging its legislative duty or its publically declared intention to 'benefit the public interest' and 'support the rule of law'.²⁰

Reserved Legal Activities

The LSA ring-fences certain activities, known as "reserved legal activities", which can only be carried out by persons who are authorised to do so, or who are otherwise exempt.²¹ Those activities that are reserved are listed at section 12 of the LSA and include exercising a right of audience and conducting litigation,²² both of which form part of the offering of many law clinics. It is a criminal offence to carry out a reserved legal activity without being either an authorised person or exempt.²³

As set out above, an in-house solicitor doing pro bono work may only undertake reserved legal activities where the provision of those services to the public is not part of his or her employer's business.²⁴ The impact of this provision has been to significantly limit the capabilities of university law clinics to provide legal services that go beyond advice. I have calculated that there are five options available to universities wishing to circumvent this restriction; however, each of these options is encumbered by numerous shortcomings.

1. Limit the work your clinic does to work that is not reserved

The most risk averse approach for universities is to limit the work undertaken by their clinics to activities that are not reserved. In practice, this is likely to mean clinics offering either verbal or written advice only. To do otherwise is to risk straying into 'reserved' territory. However, it is not always clear where the boundaries between advice and reserved activity lie.

Schedule 2 of the LSA sets out a definition for each type of reserved activity. By way of an example, the 'conduct of litigation' is defined as:

- (a) the issuing of proceedings before any court in England and Wales,
- (b) the commencement, prosecution and defence of such proceedings, and
- (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).²⁵

This definition raises more questions than it answers. First, the definition of 'court' for these purposes is said to *include* First-tier and Upper Tribunals.²⁶ In England and Wales, the majority of employment law issues fall within the jurisdiction of the Employment Tribunal, which is separate to the aforementioned tribunals. Some clinicians have argued that at present, Employment Tribunal litigation therefore falls outside of the scope of this type of reserved activity.²⁷ However, the

²⁰ Ibid (n 8 and n 11)

²¹ LSA, s 13

²² LSA, s 12

²³ LSA, s 14

²⁴ Rule 4.10 Framework

²⁵ LSA, Schedule 2

²⁶ LSA, s 207

²⁷ This point was discussed by clinical practitioners from across the UK at the November 2014 Clinical Legal Education Organisation conference.

definition of 'court' in Schedule 2 is inclusive, as opposed to exclusive. This means that the majority of courts in England and Wales, including County Courts, the Court of Appeal and the Supreme Court are not expressly listed. However, on any reasonable interpretation they must surely fall within scope. Therefore, whilst the status of Employment Tribunal litigation may be unclear, it would be a risky approach to treat employment tribunal litigation as not being a reserved activity.

A further question raised by this definition is, exactly what activity falls within the scope of 'conduct of litigation'? The remit of paragraph c above is extremely broad. 'Performance of any ancillary functions' could include conducting settlement negotiations or drafting without prejudice correspondence on behalf of a client. It may also include advising clients who are representing themselves in proceedings as well as helping them to draft letters pertaining to their ongoing litigation or to prepare submissions for hearings. Advice to an individual representing himself or herself in bringing or defending a claim can be extremely valuable, particularly if little or no advice was sought before proceedings were commenced. Advice to a litigant in person on practical matters such as understanding a court order, drafting a witness statement or preparing a bundle of documents can be extremely useful in helping them to present their case to its full potential. Similarly, commercial legal advice on the potential value of a claim, the associated costs and risk analysis and how to conduct settlement negotiations are all areas that law clinics can potentially advise on without taking over conduct of the case. Finally, advice on the substantive law involved in a claim and its merits is invaluable. Sometimes an individual will have initiated a claim before having sought such advice. Yet this input, even after proceedings have commenced, may result in a significant reduction in stress, costs and time for all parties and for the court, for example, if a client is advised they have an unmeritorious claim and therefore decide to withdraw. In each of these situations, there is also huge potential for student learning on substantive law, procedure, ethics and the interplay between law and commerciality. Yet, many law schools may choose not to provide advice on some or all of these areas to self-represented parties in litigation, in case such advice should stray into the 'performance of ancillary functions'. LawWorks reported in June 2015 that significant numbers of in-house counsel have chosen to avoid giving pro bono advice on any matters which have become, or may end up becoming, contentious.²⁸

Assuming the regulation on this point is to remain unchanged, some detailed guidance from the regulator as to where advice ends and conduct of litigation begins would be extremely useful and may encourage clinics to engage in types of work currently deemed to be out of scope, or alternatively, it would at least give them comfort that their decision not to do so is justified.

2. Only do reserved legal activity that does not form part of your employer's business

Rule 4.10 expressly allows for in-house solicitors to undertake reserved legal activities where the provision of relevant services to the public or a section of the public (with or without a view to profit) is not part of their employer's business. Upon my initial reading of the Rule, I concluded that as my employing university does not (and indeed, cannot) provide reserved legal activities to the public as part of its normal course of business, there would be no issue with me doing so on a pro bono basis. The university's in-house legal team provides reserved activities only to the organisation

²⁸ 'LawWorks response to Legal Services Board consultation: 'Are regulatory restrictions in practicing rules for in-house lawyers justified?' (LawWorks, June 2015) < <https://www.LawWorks.org.uk/solicitors-and-volunteers/resources/LawWorks-response-legal-services-board-consultation-are>> last accessed 31 May 2016

itself, not to the public, and the normal course of business for a university is teaching, research and some commercial activities such as offering conference facilities etc. It does not include conducting litigation or exercising rights of audience on behalf of the public.

I telephoned the SRA's professional ethics helpline to check my understanding and received confirmation that my interpretation was correct. However, I have subsequently realised that this is not the case. Guidance note (x) to Rule 4, lists 12 factors that are relevant when determining whether the reserved activity is part of the employer's business. Factors include 'the extent to which the employer relies on or publicises the work' and 'the extent to which the work complements or enhances the employer's business'.²⁹

The Rule is also referred to in a practice note issued by The Law Society on 'In-house pro bono practice: regulatory requirements'. This states that:

*"the SRA tends to take a wide interpretation of what constitutes 'part of your employer's business'. For example, this has included the in-house lawyer's employer requiring him or her to undertake pro bono legal work or where the employer provides management, supervision or training in relation to such work, publicises any pro bono efforts or pays any premium for an indemnity insurance policy to cover the pro bono work."*³⁰

Given that: law school clinics are endorsed and funded by the university; supervising solicitors are specifically employed to provide pro bono advice, which is covered by insurance funded by the university; and law schools are likely to use the educational and employability opportunities afforded by the clinic to market to potential students and to promote the university's public engagement work, it seems certain that the clinic itself would be deemed to form 'part of the employer's business' and therefore no law school solicitor will be able to rely upon this provision to undertake reserved activities.

My consideration of the interpretation of this Rule highlighted two key issues. First, as currently drafted, the Rule is prohibitively broad. It is difficult to envisage any situation in which an in-house solicitor undertaking pro bono work could do so in a manner that would not form part of the employer's business if the work is in anyway endorsed by the employer. Given that pro bono work undertaken by an in-house lawyer is likely to fall within the employer's broader corporate social responsibility agenda, this is almost certainly going to be the case. This restriction places considerable limitations on the services that in-house lawyers can provide. To prevent all in-house lawyers from conducting litigation or exercising a right of audience is to deny them the ability to assist clients with some of the highest levels of need and vulnerability.

The second issue brought to the fore was the inadequacy of the guidance provided by the SRA helpline on the issue. The advice I was given was patently wrong. I return to the issue of guidance provided by the regulator below.

3. Rely on the exemption at section 23 of the LSA

²⁹ SRA Framework Rules (n14) Guidance note (x) to Rule 4

³⁰ 'In-house pro bono practice: regulatory requirements' (The Law Society, February 2016) <<http://www.lawsociety.org.uk/support-services/advice/practice-notes/in-house-pro-bono-regulatory-requirements/>> last accessed 31 May 2016

A third option is for law schools to rely upon the exemption at section 23 of the LSA. This exemption provides that during a transitional period not for profit bodies are able to 'carry on any activity which is a reserved legal activity'.³¹ At the end of this transitional period not for profit bodies will need to be authorised as alternative business structures (see numbered paragraph 4 below) if they wish to continue to carry out reserved activities.³² The LSA defines a not for profit body as

“a body which, by or by virtue of its constitution or any enactment–

(a) is required (after payment of outgoings) to apply the whole of its income, and any capital which it expends, for charitable or public purposes, and

*(b) is prohibited from directly or indirectly distributing amongst its members any part of its assets (otherwise than for charitable or public purposes)”.*³³

Given that nearly all universities are charities, they are likely to fall within this definition.³⁴

Therefore, those universities that were delivering reserved activities before the LSA came into force, can continue to do so for the time being. However, this provision poses two challenges for clinics. First, section 23 allows not for profit bodies to “carry on” undertaking reserved activity. It does not allow not for profit organisations to begin performing reserved activity. This means that no clinics wishing to start delivering reserved activities for the first time will be able to rely on the exemption.

Second, it is clearly stated in the statute that the exemption is transitional. It is not the legislator’s intention that not for profit organisations are to be allowed to carry out reserved activities without authorisation under the LSA indefinitely. Yet, further details as to when the transitional period might come to an end and what this will mean for not for profit organisations are not forthcoming. Section 23 of the LSA came into force on 1st January 2010, meaning that law schools and other not for profit organisations have been in a state of regulatory limbo since that time. The LSB website states that the reason for the delay is that there “is still no [licensing authority] with suitable arrangements to license special bodies as ABS.”³⁵ Consequently, it states that “the transitional protection for special bodies will remain in force for the foreseeable future.”³⁶ It had previously been indicated the period could be over by 2015.³⁷ This level of uncertainty cannot be conducive to innovation on the part of universities. Why would a university already delivering reserved legal

³¹ LSA, s 23 n.b., this section also applies to community interest companies and trade unions, neither of which are likely to be relevant to university law clinics.

³² LSA, s 106

³³ LSA, s 207

³⁴ Most English universities are exempt charities under the Charities Act 1993. They are regulated by the Higher Education Funding Council for England (HEFCE). See for example: ‘Key Charitable Information’ <<http://www.birmingham.ac.uk/university/governance/publication-scheme/charitable.aspx>> last accessed 31 May 2016

³⁵ Legal Services Board, ‘Transitional Protections from ABS Licensing’ <http://www.legalservicesboard.org.uk/projects/alternative_business_structures_and_special_bodies/index.htm> last accessed 18 April 2017

³⁶ Legal Services Board, ‘Transitional Protections from ABS Licensing’ <http://www.legalservicesboard.org.uk/projects/alternative_business_structures_and_special_bodies/index.htm> last accessed 18 April 2017

³⁷ Legal Services Board, ‘Regulation of special bodies/non-commercial bodies’ (December 2013) 3 <http://www.legalservicesboard.org.uk/projects/alternative_business_structures_and_special_bodies/index.htm> last accessed 31 May 2016

activities branch into new areas of work or recruit new staff to supervise new pro bono projects when the length of the transitional period is so uncertain? It is difficult to establish the business case for doing so.

Yet, for reasons outlined below, universities have not been queuing up to become alternative business structures either, notwithstanding the certainty of continuity of service provision that this would offer. Perhaps one reason for this is that whilst the alternative options are still unknown, a “watching brief” remains preferable.³⁸ As Campbell hypothesised in 2014:

*“Perhaps the transitional grace period will be extended indefinitely. Perhaps the regulator will carve out an exemption for law school clinics. Perhaps the Ministry of Justice will take heed of the calls for a complete overhaul of legal regulation”.*³⁹

Whatever the eventual outcome, a period of uncertainty that has gone on for more than six years and appears set to continue indefinitely does not encourage innovation or expansion of service provision by law school clinics. Once again, the regulator’s action, or rather, inaction, falls short of meeting the regulatory objectives to protect and promote the public interest and to improve access to justice.⁴⁰

4. Set up an alternative business structure

The option that provides the greatest degree of certainty for clinics wishing to undertake reserved legal activities is to become an alternative business structure. Yet, to date, I am aware of only two law schools out of a total of 99 in England and Wales that have chosen to pursue this option.⁴¹

What is an alternative business structure?

As set out above, in order to perform reserved legal activities a person must either be authorised or exempt. There are two ways in which a person can be authorised.⁴² First, an individual or another legal entity, such as a corporate body, can be authorised by a regulator to do so. The majority of law firms are authorised in accordance with this provision. Organisations that do not provide legal services to the public can still employ solicitors to provide in-house legal services to the organisation itself. These organisations do not need to be authorised. Indeed, it would not make sense to subject corporate entities such as universities to the same SRA reporting requirements and regulatory restrictions as law firms, when provision of legal services is delivered internally. However, the individual in-house lawyers will themselves need to be authorised persons in order to carry out any reserved activity for their employer.⁴³ In-house lawyers will be so authorised by virtue of holding a current practising certificate granted by the SRA and can therefore undertake reserved

³⁸ Elaine Campbell and Carol Boothby, ‘University law clinics as alternative business structures: more questions than answers?’ (2016) 51(1) *The Law Teacher* 132

³⁹ *Ibid* (n 12) 530

⁴⁰ LSA, s 1

⁴¹ Nottingham Law School and The University of Law. Total number of law schools taken from figures in D Carney, F Dignan, R Grimes, G Kelly and R Parker *The LawWorks Law School and Pro Bono Clinic Report 2014* (LawWorks, 2014) < <https://www.LawWorks.org.uk/solicitors-and-volunteers/resources/LawWorks-law-school-pro-bono-and-clinics-report-2014> > last accessed 31 May 2016

⁴² LSA, s 18

⁴³ LSA, s 15 and Explanatory Notes to the Legal Services Act 2007, paras 70-73 < <http://www.legislation.gov.uk/ukpga/2007/29/notes> > last accessed 31 May 2016

activities such as conducting litigation and appearing in court or tribunal on behalf of their employer. As explained above, under Rule 4.10 of the Practice Framework Rules, they cannot provide reserved activities to the public, even on a pro bono basis.

The second option therefore, is for the employing organisation to become what is commonly known as an alternative business structure (ABS). An ABS is an entity delivering legal services that is managed or part owned and controlled by non-lawyers. In order for the ABS to perform reserved legal activities, it must be licensed to do so by a regulator.⁴⁴

The process of becoming an ABS is not cheap. The application fee for applying to become an ABS includes an initial payment of £2,000, plus £150 for each candidate that is subject to approval. Where costs exceed the amount of the initial payment, a day rate of £600 will be charged.⁴⁵ However, it is not necessarily the one-off setup costs that are likely to be prohibitive for law schools. It is the administrative burden of getting to that point and the ongoing compliance requirements. Many law school clinics (including my own) are run by just one solicitor. They form a small part of the law school and an even smaller part of the university. My university employs over 6000 people and has over 27,000 students enrolled at any one time.⁴⁶ It is an exempt charity with three key decision making bodies and a multitude of regulations and ordinances.⁴⁷ The efforts required to navigate the institution's internal governance procedures and gain approval for turning the entire university into an ABS would be herculean and the business case for doing so, when viewed at an institutional level, is almost non-existent. An alternative then, would be to establish a separate legal entity at least partially controlled by the University to deliver the clinical offering and turn that into an ABS. This was the approach adopted by Nottingham Trent University. However, Nottingham Trent's Legal Advice Centre is a well-resourced clinic, which employs three solicitors.⁴⁸ The infrastructure needed to comply with the regulatory requirements once an ABS may be prohibitively onerous for many other law schools. For example, once licensed, the LSA requires an ABS to appoint a head of legal practice⁴⁹ and a head of financial affairs and administration.⁵⁰ This may be an ask too many for law school solicitors with already heavy caseloads as well as teaching, research and other administrative responsibilities. It also seems wholly unnecessary when it is taken into account that most law school clinics will not handle any client money, as all work is delivered on a pro bono basis. ABS clinics may also no longer be able to rely on their university's professional indemnity insurance as a separate entity and may need to source their own, adding an additional recurring cost to the provision of the service.

One potential advantage to law school clinics being separate legal entities from their university, is that it may offer them freedom from the aforementioned university bureaucracy. Indeed, this appears to have been a relevant factor for Nottingham Trent University's clinic as the Director of their Legal Advice Centre revealed that "We think it will give the Centre greater autonomy within the

⁴⁴ LSA, s 18

⁴⁵ Solicitors Regulation Authority 'Fee Policy 2016/17' < <http://www.sra.org.uk/mysra/fees/fee-policy-2016-2017.page> > last accessed 18 April 2017

⁴⁶ 'The Impact of the University of Birmingham' (Oxford Economics, April 2013)

⁴⁷ For further information see: 'Our Governance'

<<http://www.birmingham.ac.uk/university/governance/index.aspx> > last accessed 31 May 2016

⁴⁸ <http://www.ntu.ac.uk/legal_advice_centre/about_us/index.html > last accessed 29 October 2016

⁴⁹ Re-termed a compliance officer for legal practice (COLP) by the SRA

⁵⁰ Re-termed a compliance officer for finance and administration (COFA) by the SRA

University structure, enable us to develop more effectively and clarify management structures.”⁵¹ Yet, this autonomy is unlikely to be attractive for less well-resourced clinics that are highly integrated with their law schools and rely upon school resources and academic colleagues for support. This autonomy may also be unappealing to universities wishing to retain control where the clinic delivers assessed clinical modules which form part of a degree programme. It is also likely to be unattractive to clinical staff who may be obliged to transfer their employment from the university to the ABS. Campbell and Boothby have summarised these concerns as including: uncertainty over terms and conditions of employment and pension arrangements; and divisions between legal academics and legal clinicians.⁵²

In conclusion then, there is a very real possibility that the administrative complexities and the financial and personnel demands that setting up an ABS involves will mean that only the largest and most well-resourced law school clinics will be prepared to take this step. Law schools certainly have not been jumping at the possibility to date. If the transitional period is brought to an end and becoming ABS as the only option available, it could herald the end of many law school clinics delivering reserved activities at all. Whilst the regulators and legislators have rightly made consumer protection paramount, any such regulations must be balanced against practicality, affordability and the consequential impact on access to justice. For many law school clinics, transformation into an ABS is the regulatory equivalent of using a sledgehammer to crack a nut.

5. Partner with external organisations to supervise and deliver reserved activities

A final option, which will permit law students to undertake reserved legal activities, is to arrange for them to undertake placements or externships with external organisations, such as the local law centre or Citizens’ Advice Bureau. Students can work under supervision from lawyers employed by the external organisation to assist the clients of that organisation. This approach can offer the student experience of work in a busy practice environment and can, in turn, offer a valuable additional resource to the host organisation. Many law schools already deliver arrangements of this nature as part of their current pro bono offering. However, this approach does have its limitations. First, although students can be a useful resource to a third sector organisation, there are costs associated with supervising them, not least the staff time required to do so. Some host organisations may therefore require a financial contribution from the university to supervise the service and even then, are likely to limit the number of students they can take. This therefore means that such an arrangement is unlikely ever to be able to rival the student numbers that can participate in an internally delivered clinic. Furthermore, clinics run by universities will have student learning at their core and the mode of delivery and supervision will reflect this. Understandably, the same cannot be said of third sector organisations seeking to balance ever-shrinking budgets with ever-growing demand for their services. Therefore, the style of supervision and the opportunity for reflection are likely to be impacted where supervisors are not employed by the university and, for similar reasons, meaningful assessment of a student’s performance by an external supervisor is likely to be challenging and may face scrutiny from university exam boards. In conclusion then, whilst

⁵¹ Richard Owen, ‘Alternative business structures and university law clinics: Q & A with University of Law and Nottingham Law School’ (2015) 49(2) *The Law Teacher* 257

⁵² *Ibid* (n 37)

partnering with external organisations ought to be encouraged as part of a law school's pro bono offering, it cannot be seen as a panacea for the regulatory restrictions on the delivery of reserved activities.

Part three: Legislative limitations on specific areas of advice

The restrictions on clinics are not limited solely to in-house solicitors wishing to undertake reserved activity. There are some areas of significant legal need which are out of bounds entirely for the majority of university law clinics, even those wishing to provide an advice only service.

Debt advice

On 1st April 2014 the Financial Conduct Authority became responsible for the regulation of consumer credit activity. The previous regime, under which solicitors were covered to provide advice on debt and consumer credit under a group licence issued to The Law Society and administered by the SRA, was abolished. The consequence of this change is that solicitors are no longer permitted to provide debt advice on a pro bono basis at legal advice clinics.⁵³ A wide range of debt-related legal advice falls within the scope of this restriction, including: debt counselling; debt adjusting and debt administration. The FCA has offered some guidance, for example, as to what advice will amount to debt counselling.⁵⁴ The guidance reveals that the line between permitted advice and debt counselling is finely balanced and consequently, prudent law clinics are likely to avoid giving debt-related advice entirely. This is unsurprising given that to advise on such issues without authorisation, permission or exemption is a criminal offence.⁵⁵

The consequences of this prohibitive regulation have been far reaching. In January 2015 LawWorks⁵⁶ reported that:

"In the period April 2013 to March 2014, 29,279 people accessed the LawWorks Clinics Network and debt advice constituted 7% of all advice delivered... As a result of the removal of the group licencing regime, LawWorks clinics not covered by limited permission (to our knowledge 61 [out of 78] clinics in our network that previously offered pro bono debt advice services are not covered by limited permission) have had to suspend all debt advices services..."⁵⁷

⁵³ 'Briefing: Regulation of Consumer Credit and Debt Advice' (LawWorks, January 2015) < <https://www.LawWorks.org.uk/solicitors-and-volunteers/resources/briefing-regulation-consumer-credit-and-debt-advice> > last accessed 31 May 2016 N.b., there are some limited exemptions to this rule for not for profit organisations such as law centres that had their own group licences immediately prior to 31 March 2014. Law clinics run by universities are not covered by any such exception.

⁵⁴ Financial Conduct Authority Handbook (PERG 17.7) < <https://www.handbook.fca.org.uk/handbook/PERG/17/7.html> > last accessed 31 May 2016

⁵⁵ Financial Services and Markets Act 2000, s 23 [1A]

⁵⁶ LawWorks is the operating name of the Solicitors Pro Bono Group, a charity working in England and Wales to connect volunteer lawyers with people in need of legal advice, who are not eligible for legal aid and cannot afford to pay and with the not-for-profit organisations that support them.

⁵⁷ Ibid (n 52)

Disappointingly, the FCA will not introduce a waiver to cover pro bono clinics. It has stipulated that this can only be done by way of legislative amendment.⁵⁸ Whilst LawWorks and The Law Society have confirmed they are petitioning for this, change has not been forthcoming.

Immigration advice

Under the Immigration and Asylum Act 1999 it is a criminal offence for a person to provide immigration advice or services in the UK unless their organisation is regulated by the Office of the Immigration Services Commissioner (OISC) or is otherwise covered by the Immigration and Asylum Act 1999.⁵⁹ Members of certain professional bodies, such as the General Council of the Bar and the Law Society of England and Wales, may give immigration advice without being regulated by OISC. Therefore, solicitors and barristers are able to provide immigration advice and services without needing to be regulated by OISC. However, the popular university law clinic model of using external solicitor and barrister volunteers to supervise advice, which is then sent out on behalf of the university, will fall foul of these provisions. The legislation only permits those who are “acting on behalf of, and under the supervision of” a person who is regulated or a member of a relevant professional body to provide immigration advice or services.⁶⁰ Where advice is being sent from the university, rather than from the supervising lawyer’s firm or chambers, the students cannot be said to be acting on their behalf and thus, will be unwittingly committing a criminal offence; as will the university and potentially any senior member of staff who permitted the offence.

These two examples of restrictions on advice that can be offered by university law clinics show that the SRA is not the only regulator with which the clinical legal community would do well to engage with more proactively. It is difficult to imagine that it was the intention of these regulators to render areas of significant legal need outside of the scope of provision for so many pro bono providers. Certainly the need in these areas is acute. A report issued in January 2016 revealed that average UK household debt rose by a staggering 42% from summer 2015 to winter 2015, increasing to £13,520⁶¹ and in a 2015 report on the impacts of LASPO on onward immigration appeals by the Ministry of Justice noted that practitioners working in that area felt that the greater amounts of pro bono work being carried out post-LASPO were not presently sustainable.⁶²

Part four: Regulatory requirements and expectations on students

Another area in which the regulatory framework governing clinics is opaque is in relation to the provisions that allow students to engage in clinical activity, insofar as they exist. For example, I struggled for a considerable period of time to understand why law students have rights of audience to represent clients in Employment Tribunal and Social Security Tribunal hearings.⁶³ Eventually I stumbled across the following in the Guidance Note to Rule 4 of the SRA’s Practice Framework Rules:

⁵⁸ Ibid (n 52)

⁵⁹ Immigration and Asylum Act 1999, s 84 and s 91

⁶⁰ Immigration and Asylum Act 1999, s 84(2)(e)

⁶¹ ‘Family Finances Report Winter 2016’ (Aviva, January 2016) <<http://www.aviva.com/media/thought-leadership/report-library/>> last accessed 31 May 2016

⁶² Anita Krishnamurthy and Karen Moreton, ‘Monitoring the early impacts of the Legal Aid, Sentencing and Punishment of Offenders Act (2012) on onward immigration appeals’ (Ministry of Justice, 2015)

⁶³ Many law schools work in conjunction with a charity called the Free Representation Unit (FRU) <<http://www.thefru.org.uk/>> last accessed 31 May 2016

“Examples of situations where you will be practising as a solicitor, and will therefore need a practising certificate, include:

... (f) you undertake work which is prohibited to unqualified persons under the provisions of Part 3 of the LSA, unless you are supervised by, and acting in the name of, a solicitor with a practising certificate or another qualified person”⁶⁴

Part three of the LSA deals with reserved activities. It would appear that an unqualified student without a practising certificate may carry out reserved work if he or she is being supervised by a solicitor who is entitled to carry out reserved activities and it is that solicitor’s name on the Tribunal record. I have already addressed the restrictions which prevent many university clinic solicitors from being authorised to carry out reserved activities.

I am not aware of any comprehensive publically available guidance on the regulatory provisions pertinent to student volunteers.

Part five: The role of the regulator

As I have alluded to frequently throughout this chapter, there is a dearth of regulatory guidance available for university law clinics. In 2011 the SRA launched a new Code of Conduct, which moved away from the previous rules based approach to regulation and, instead, introduced outcomes-focussed regulation (OFR) with a view to offering “good firms more flexibility in how they operate their business”.⁶⁵ OFR sets out the outcomes to be achieved, but does not stipulate how organisations must arrive at that outcome.

A reduction in red tape is typically considered to be a positive step. However, in the case of regulation, it risks stifling innovation, unless it is coupled with meaningful guidance and assistance with interpretation. Well-resourced law firms with internal compliance specialists may be in a position to take calculated risks when interpreting the SRA Handbook, but the same cannot be said for university pro bono clinics with stretched resources, competing pressures on staff time, unwieldy institutional governance, a conservative attitude to risk and staff who, albeit usually legal practitioners, are not compliance experts. Indeed, many law school solicitors come from private practice law firms where someone else took care of compliance matters. Setting up and/or running a law school clinic should not be so challenging, daunting and fraught with risk that is so difficult to quantify. The regulatory provisions set out in this chapter have been pieced together as a result of my own research from a wide variety of publically available sources and helpful discussions with more experienced clinicians. It has been neither simple, nor speedy. It has frequently been frustrating and the findings have undoubtedly limited the scope of some pro bono activity I would otherwise have wished to provide. Furthermore, the lack of authoritative guidance on this subject leaves me with the constant niggling concern that there is something I have missed, that one terrible day a piece of regulation will come to my attention that reveals I have been doing it all wrong after all.

⁶⁴ SRA Framework Rules, Rule 4

⁶⁵ ‘Outcomes-focused regulation - transforming the SRA's regulation of legal service’ (*Solicitors Regulation Authority*, 28 July 2010) < <http://www.sra.org.uk/sra/consultations/OFR-consultation.page> > last accessed 31 May 2016

If the SRA wishes to further the LSA's regulatory objectives and promote, amongst other things, access to justice; increasing understanding of legal rights and duties; and promoting adherence to the professional principles set out in the Legal Services Act 2007 it should take the following steps:

- 1. Engage with law school clinics when developing regulation:** At present law school clinics fall into a regulatory black hole. They are not referred to expressly in the regulation and there is no bespoke guidance available on the regulatory matters directly concerning them. Yet they provide a significant amount of pro bono advice and make a fundamental contribution to meeting several of the LSA's regulatory objectives.⁶⁶
- 2. Provide bespoke guidance on the regulatory provisions relating to university clinics:** I have set out the compelling case for such provision elsewhere in this chapter. In 2014 LawWorks reported that at least 70% of UK law schools (approximately 69 schools) are now involved in pro bono work. This signified a 5% increase in the total number of law schools delivering pro bono work since 2010.⁶⁷ There is an ever-increasing critical mass of law schools that would benefit from such guidance.
- 3. Offer a helpline that provides meaningful, consistent and reliable guidance and bears accountability for the guidance offered:** The refusal to adjudicate or assist with interpretation of SRA rules by ethics helpline advisors exacerbates the isolation and uncertainty experienced by law school clinicians. The lack of accountability for incorrect advice given also means that practitioners may be loathe to rely on any representations that are made. This unwillingness on the part of the advisors and any inaccuracies in advice may be exacerbated by the lack of available guidance and the current failure to cater for law school clinics outlined at 1 and 2 above. A recognition of the regulatory framework surrounding law schools clinics and associated guidance is likely to assist SRA advisors as much as it will clinicians themselves.

Part Six: Where do we go from here? The role of law schools

Whilst it is evident that more can, and should, be done on the part of the regulator to support university law clinics, the onus cannot rest solely with the SRA. Dialogue is a two-way process and university law schools need to be better at concerning themselves with the prevailing regulatory environment and how it affects them. Organisations such as LawWorks and the Clinical Legal Education Organisation are well placed to facilitate this activity.⁶⁸ The regulatory restrictions detailed in this chapter highlight the need for positive action on the part of clinicians in England and Wales to engage proactively with regulators. The time for rallying ourselves is now. During summer 2016 the SRA held its 'Looking to the Future' consultation; the first phase of its comprehensive

⁶⁶ In 2014-15 32% of clinics in the LawWorks network were university law school clinics. These clinics received 11,100 enquiries over the course of the year. Ibid (n 40) There are of course also numerous university pro bono activities which are not delivered through LawWorks clinics.

⁶⁷ Ibid (n 40)

⁶⁸ The Clinical Legal Education Organisation (CLEO) is a UK based charity which has the objectives of fostering, promoting and developing clinical legal education in all its forms.

review of the SRA Handbook.⁶⁹ The responses to that consultation (of which an early draft of this paper was one) are currently under consideration by the SRA. The proposals put forward by the SRA in phase one do not address the multitude of challenges and restrictions on university law clinics, that have been highlighted in this paper. As the consultation enters its second phase, university clinics need to ensure their voice is heard. The SRA has made a public commitment that its programme of regulatory reform will aid pro bono work.⁷⁰ We need to ensure that this includes pro bono work done by universities.

It is also incumbent upon law school clinicians to share information and knowledge concerning regulation amongst themselves. At present, despite the severe consequences of falling foul of the many of the regulations I have detailed, these regulations are not well-publicised amongst clinicians. Whilst those clinics that are part of the LawWorks clinic network may benefit from its guidance notes, there is at present no comprehensive national manual or guide for law school clinics on relevant regulatory issues. Consequently, it would be very easy to remain ignorant of their existence. If an individual does not know that a particular regulatory restriction exists, he or she will not know to look into it. There is therefore a very real risk that at some point a university will accidentally provide pro bono services unlawfully, resulting in criminal liability, as well as reputational, professional and personal embarrassment for the individuals and institution concerned. The latter will also impact on university law clinics more broadly. We share a collective interest, and responsibility, in ensuring that this does not happen.

It is not only in relation to the regulatory framework that law schools would benefit from a greater degree of discussion and disclosure. There are numerous other compliance issues affecting clinics which we do not commonly discuss as a collective. For example, many law schools work in partnership with solicitors firms, barristers chambers, NGOs and charities to deliver pro bono services. There is a wealth of regulatory provisions and data protection issues governing these relationships. Yet, we do not habitually discuss what these issues are or share our means of dealing with them. If one university has developed a model collaboration agreement or memorandum of understanding, it seems pointless for other universities to dedicate time and resources to developing one too. Similarly, some law schools have purchased bespoke case management systems, others use cloud based systems. The introduction of any such system raises numerous IT security and SRA compliance issues. It seems sensible to share our knowledge, our recommended due diligence, our concerns and our understanding of the prevailing legislation on such matters.

With these challenges in mind, I proposed at the Clinical Legal Education Organisation (CLEO) Conference hosted by the University of Central Lancashire in June 2016 that clinicians in England and Wales ought to work together to create a 'Handbook for Clinical Practice' which would address and share regulatory best practice in relation to all these issues and more. I was delighted to receive a positive response and offers of assistance from clinicians working at institutions across the country and the work on drafting the document is now underway. It was agreed that it would be in the

⁶⁹ 'Looking to the future: Flexibility and public protection - a phased review of our regulatory approach' (Solicitors Regulation Authority) < <http://www.sra.org.uk/sra/consultations/code-conduct-consultation.page> > last accessed 29 October 2016

⁷⁰ 'SRA's regulatory approach will aid pro bono' (Solicitors Regulation Authority, 2 November 2015) < <https://www.sra.org.uk/sra/news/press/regulation-aids-pro-bono.page> > last accessed 31 May 2016

interests of both new and experienced clinicians to have an agreed framework as to how we ought to operate.

The proposed handbook will set out the compliance risks facing clinics and propose solutions. Perhaps this will also be the best vehicle for engaging the SRA in order to seek its input on and endorsement of chapters dealing with compliance with the SRA Handbook. The drafting of the handbook will also provide a forum for sharing experiences of the barriers to service provision and innovation posed by current regulation and may encourage the much needed engagement with the regulator by law school clinics.

Whilst the thought of drafting such a document might not seem like a particularly exciting task, its existence will ultimately free clinicians up to do what we do best and what we ought to be spending the majority of our time doing: educating law students and delivering services that increase access to justice.