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Regulating clinic: Do UK clinics need to become Alternative Business Structures under the Legal Services Act 2007?

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In clinical legal education circles we tend to focus on the pedagogical aspects of our work. We enjoy lively debate on topics such as assessment, skills, ethics, student self-efficacy, the role of reflection and balancing the needs of the student with the needs of the client. Rarely do we speak or write about the legal framework regulating the work that occurs in clinics. However, the regulatory landscape is changing, and rapidly.

The Legal Services Act 2007 allows organisations that are owned or managed by non-lawyers to provide regulated legal services. It permits and encourages new entrants to the legal services market in England and Wales. It was heralded as ushering in important new opportunities for solicitors to team up with non-lawyers and to attract capital for their businesses in a carefully regulated environment.¹ At first glance, there did not appear to be anything within the framework which affected law school clinics. On closer inspection, this is sadly not the case.

The aim of this paper is to increase the level of awareness within the clinical legal education community, in England and Wales in particular, of the effects of the Legal Services Act 2007 on clinical activity. It will explore the background to the introduction of Alternative Business Structures and compare the approach which Australia has taken. It will also look to the future and discuss potential problems and solutions.

Background to the introduction of Alternative Business Structures

Australia (more specifically, New South Wales) was the first jurisdiction to adopt an atypical law firm arrangement. In 1990 it allowed law firms to form multi-disciplinary practices (MDP) but with the proviso that lawyers retained at least 51 percent of the firm's net income and the majority voting rights.² It also permitted solicitor-corporations. However, as with MDPs, only an "approved solicitor" could hold voting shares in the corporation.³ These strict caveats meant that, whilst outsiders could be involved in the ownership of a law practice, lawyers maintained ultimate control.

In 1998 *The Competition Policy Review of the Legal Profession Act* found that the existing rules were non-competitive. Following the report, the rules were changed. Non-lawyers could have majority voting rights in an MDP and were not prejudiced in terms of the share of net income of the MDP. However, even at this stage, lawyers were reluctant to move to a new form of legal firm structure.

It was not until the Legal Profession (Incorporated Legal Practices) Act 2001⁴ came into force in New South Wales that the idea that legal practices could and would be incorporated bodies was

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¹ Solicitors Regulation Authority (2013) *Legal Services Act*. Available at: <https://sra.org.uk/lja/> (Accessed 18 September 2013).

² Section 48G Legal Profession Act 1987. The "51%" rule was introduced in legislative changes which looked to liberalise multi disciplinary practices.

³ Legal Profession (Solicitor Corporations) Amendment Act 1990.

⁴ Accompanied by the Legal Profession (Incorporated Legal Practices) Regulation 2001.

embraced by the profession.⁵ The new legislation allowed legal service providers in New South Wales to register as a company with the Australian Securities and Investment Commission. As a company, the firm would be required to adhere to the requirements of the Corporations Act 2001 as well as the regulations governing the provision of legal advice.

The current statute which governs the legal profession in New South Wales is the Legal Profession Act 2004.⁶ Under Part 2.6 of the Act a legal service provider can incorporate and provide services alone or together with other legal service providers who may or may not be legal practitioners.

By March 2008, there were 800 Incorporated Legal Practices (ILPs) in New South Wales. Gradually, other states in Australia followed suit and permitted incorporation.⁷ The Legal Services Commissioner has estimated that ILPs comprise 20% of all firms in New South Wales.⁸ MDPs have continued, but have been far less popular.⁹

Much like the Australian experience, the origins of Alternative Business Structures in England and Wales can also be found in a competition policy review. In March 2001 the Office of Fair Trading published a report entitled *Competition in the Professions*.¹⁰ The report focused on the anti-competitive nature of the prohibition on partnerships between barristers, barristers and solicitors, and lawyers with non-lawyers. It also found fault with rules preventing solicitors in the employment of non-solicitors from providing services to third parties.¹¹ This led to a Consultation Paper, *In the Public Interest*, from the then Lord Chancellor's Department (now the Ministry of Justice) in 2002 and, the following year, the report *Competition and Regulation in the Legal Services Market*.¹² Both raised concerns about the legal services market, and both called for a full scale review.

On 24 July 2003 the UK government commissioned Sir David Clementi to undertake a complete review of the regulation of legal services. He was charged with recommending a framework which would "be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or

⁵ Steve Mark, New South Wales Legal Services Commissioner (2007) *A short paper and notes on the listing of law firms in New South Wales to the Joint NOBC, APRL and ABA Centre for Professional Responsibility Panel entitled "Brave New World: The Changing Face of Law Firms and the Practice of Law from a Professional Responsibility Perspective"*. [Online] Available at: http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/notes_for_joint_nobc_aprl_aba_panel (Accessed 14 July 2013).

⁶ Together with the Legal Profession Regulations 2005.

⁷ In Western Australia in 2004, Victoria in 2005, the Australian Capital Territory in 2006, the Northern Territory and Queensland in 2007.

⁸ See n5.

⁹ On 4 October 2011, the President of the Law Council of Australia gave an address to Council of the Law Society of England and Wales said that there had been a "strong preference" for incorporated legal practices. Full text available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/20111004LawSocietyofEnglandandWalesSpeech.pdf> (Accessed 14 July 2013).

¹⁰ Great Britain. Office of Fair Trading (2001) *Competition in Professions – A report by the Director General of Fair Trading* [Online]. Available at: http://www.offt.gov.uk/shared_offt/reports/professional_bodies/oft328.pdf (Accessed 14 July 2013).

¹¹ The Office of Fair Trading has advisory responsibilities relating to the competition implications of proposed rules and regulations under the Enterprise Act 2002. It also has advisory powers specific to the provision of legal services under the Courts and Legal Services Act 1990.

¹² Great Britain. Department for Constitutional Affairs (2003) *Competition and Regulation in the Legal Services Market* (Online). Available at: <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/general/oftreptcon.htm> (Accessed 18 September 2013).

burdensome than is clearly justified.”¹³ Clementi was given until 31 December 2004 to deliver his report. It was published on 15 December 2004.

The report strongly favoured greater competition between lawyers. It also sought to permit competition between different types of economic unit. In short, it set out that a new licensing regime should be available to entities which included non-lawyer owners or managers who wished to enter the legal service market. These were to be known as Alternative Business Structures. It proposed a Legal Services Board, with a non-lawyer chairman and chief executive, to oversee regulation by a list of approved bodies. At the time, the Office of Fair Trading stated that the Clementi report took forward a number of the important outstanding issues identified in its earlier work on competition in the legal professions. Clementi’s recommendations, said John Vickers the then Chairman of the Office of Fair Trading, combined “deregulation – greater freedom for legal service providers to compete – with better regulation.”¹⁴

The government took Alternative Business Structures to its heart. In its subsequent White Paper *The Future of Legal Services: Putting Consumers First*¹⁵ it listed the numerous benefits for consumers and legal providers. For consumers, Alternative Business Structures meant more choice, reduced prices, better access to justice, improved service and convenience. The paper envisaged that Alternative Business Structures would realise savings through economies of scale, increase services in rural areas and be a “one stop shop” for consumers. For legal providers, the suggested benefits included increased access to finance, better spread of risk, increased flexibility and better retention of high quality non-law staff.

The Legal Services Bill was introduced 24 May 2006 and the Legal Services Act 2007 received Royal Assent on 30 October 2007. In section 1(1) the Act laid out 8 regulatory objectives:

1. Protecting and promoting the public interest;
2. Supporting the constitutional principle of the rule of law;
3. Improving access to justice;
4. Promoting and protecting interests of consumers;
5. Promoting competition in the provision of services;
6. Encouraging an independent, strong, diverse and effective legal profession;
7. Increasing public understanding of citizens’ legal rights and duties; and

¹³ Great Britain. Department of Constitutional Affairs (2004) *Report of the Review of the Regulatory Framework for Legal Services in England and Wales* [Online] Available at: <http://webarchive.nationalarchives.gov.uk/+http://www.legal-services-review.org.uk/content/report/report-chap.pdf> (Accessed 14 July 2013).

¹⁴ Office of Fair Trading (2004) *OFT welcomes Clementi recommendations to reform the legal profession* [Press Release]. 15 December Available at: <http://www.offt.gov.uk/news-and-updates/press/2004/clementi> (Accessed 14 July 2013).

¹⁵ Great Britain. Department of Constitutional Affairs (2005) *The Future of Legal Services: Putting Consumers First*. London: The Stationary Office. (Cm. 6679)

8. Promoting and maintaining adherence to professional principles.

The newly formed Legal Services Board was tasked with acting¹⁶ in a way which was compatible with the objectives and which it considered more appropriate for the purposes of meeting those objectives. It would oversee the regulators who would put in place and administer the licensing rules. This took much longer than anticipated. The new regulatory regime became active on 1 January 2010, some 3 years after the Act came into force.

Reserved legal activities and the licensing regime

Historically, certain aspects of the work of solicitors and barristers in England and Wales have been “reserved” to the legal professions. Clementi stated in his report that these areas could be termed “the inner circle of legal services”.¹⁷

Reserved legal activities have been described as the fundamental building blocks of the Legal Services Act 2007.¹⁸ The activities currently reserved, and hence can only be carried out by authorised persons, are listed at section 12 of the Legal Services Act 2007 and defined in Schedule 2. They are:

- (a) the exercise of a right of audience;¹⁹
- (b) the conduct of litigation;²⁰
- (c) reserved instrument activities;²¹
- (d) probate activities;²²
- (e) notarial activities;²³ and
- (f) the administration of oaths.

An Alternative Business Structure is an organisation that is licensed to carry on one more of the legal activities regulated by the Legal Services Act 2007 and whose owners and/or managers include individual or entities who are not qualified lawyers.

¹⁶ So far as was reasonably practicable.

¹⁷ See n.13.

¹⁸ Miller, I and Pardoe, M. (2012) *Alternative Business Structures*, The Law Society, p.3.

¹⁹ The right to appear before and address a court including the right to call and examine witnesses (Schedule 2, part 3).

²⁰ Issuing proceedings before any court in England and Wales, the commencement, prosecution, defence of such proceedings and the performance of any ancillary functions in relation to those proceedings (schedule 2, part 4).

²¹ Preparing any instrument of transfer or charge for the purposes of the Land Registration Act 2002, making an application or lodging a document for registration under that Act or preparing any other instrument relating to real or personal estate for the purposes of the law of England and Wales or instrument relating to court proceedings in England and Wales (Schedule 2, part 5).

²² Preparing any probate papers for the purposes of the law of England and Wales or in relation to any proceedings in England and Wales (Schedule 2, part 6).

²³ Activities carried on by virtue of enrolment as a notary in accordance with section 1 of the Public Notaries Act 1801.

An Alternative Business Structure which wishes to carry out any of the reserved legal activities will need to be licensed to do so by the relevant licensing body. For example, if the licensing body is the Solicitors Regulation Authority, solicitors and therefore the Alternative Business Structure can perform all reserved work bar some notarial activities.²⁴ It is a criminal offence, under section 14 of the Legal Services Act 2007, to carry on reserved legal activities unless entitled to do so.

Under the Legal Services Act 2007 the licensing body must approve the holding of a "material interest" by a "non-lawyer" in the Alternative Business Structure. It must also authorise the firm as a whole as being appropriate to provide legal services. In order to assess whether a non-lawyer has a material interest the Act distinguishes between authorised and non-authorised persons. Authorised persons include solicitors, registered European lawyers, regulated law firms, barristers, licensed conveyancers and legal executives. Non-authorised persons are any individual or entity who is not (a) an authorised person (b) a registered foreign lawyer (c) a member of an Establishment Directive profession entitled to pursue professional activities in an Establishment Directive state or (d) a firm providing legal services in which all of the managers and owners are individuals within (a)-(c) above or are bodies in which more than 90 per cent of the managers and owners are within (a)-(c) above. Paragraph 3 of Schedule 13 of the Legal Services Act 2007 sets out the tests for assessing at which point an ownership interest in an Alternative Business Structure is material²⁵ and therefore requires separate approval.

This is in stark contrast to the Australian system, which is far simpler and easier to navigate. Section 14 Legal Profession Act 2004 sets out that a person may not engage in legal practice unless the person is an Australian legal practitioner. It then goes on to state that this does not apply to a legal practice engaged in by an incorporated legal practice.²⁶ An incorporated legal practice is defined²⁷ as a corporation that engages in legal practice, whether or not it also provides services that are not legal services. Legal services are defined, simply, as "work done, or business transacted, in the ordinary course of business."²⁸ A firm wishing to incorporate must simply liaise with the Australian Securities & Investment Commission and notify the Law Society of its intention to commence trading as an incorporated legal practice. In an address to Council of the Law Society of England and Wales, Alexander Ward, the President of the Law Council of Australia noted that Australia did not intend to move to a licensing regime for alternative business structures.²⁹ Although much has been made of the positive experience of Australian law firms who chose to become ILPs, this "key point of difference"³⁰ is not raised in any of the literature.

²⁴ See n.18, p.9.

²⁵ Usually, a material interest means ownership of at least 10 per cent of the shares in a licensed body or a body which controls a licensed body, although the Legal Services Act 2007 allows licensing bodies to reduce this figure should they wish.

²⁶ Section 14(2)(b) Legal Profession Act 2004. There are other examples of exempted legal practice in section 14(2) Legal Profession Act, including the practice of foreign law by an Australian-registered foreign lawyer and legal practice engaged in by a complying community legal centre (which I have explored in more detail below).

²⁷ Section 134 Legal Profession Act 2004.

²⁸ Section 4(1) Legal Profession Act 2004.

²⁹ *Address to Council of the Law Society of England and Wales by Alexander Ward, President, Law Council of Australia* (2011) Available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/20111004LawSocietyofEnglandandWalesSpeech.pdf> (Accessed: 14 July 2013).

³⁰ *Ibid.*

Legal Services Act 2007: “special” bodies

When the Legal Services Act 2007 came into force, the focus was, and has remained, on the expansion of the legal marketplace and the benefits of innovative business models.³¹ Very little has been written about the parts of the Act which have a direct impact on non-commercial legal services providers. These provisions are spread throughout the Act and perhaps this has been why they have remained “hidden” from detailed scrutiny.

Section 106 of the Act lists the entities which the Act calls “special bodies”.³² These are (a) an independent trade union (b) a not for profit body (c) a community interest company (d) a low risk body, and (e) a body of such other description that may be prescribed by order made by the Lord Chancellor on the recommendation of the Legal Services Board. Under the Act, special bodies with non-lawyer owners and/or managers that are providing reserved legal activities will need to be licensed by the Legal Services Board in the same way as any other Alternative Business Structure.

Section 23 of the Act states that not for profit bodies, community interest companies and independent trade unions have the benefit of a transitional grace period. During this period, they are not required to apply for authorisation as a licensed body. Until this transitional grace period ends, special bodies are free to provide reserved legal activities through individuals who are authorised to do so (for example, solicitors and barristers). Initially, the grace period was due to end in March 2013. The deadline was later extended to April 2014. On 5th December 2012, the Legal Services Board announced that the statutory grace period needed to remain in place for at least the next two years because “there was no regulator ready to provide an appropriate licensing framework”.³³

Do the provisions relating to special bodies in the Legal Services Act 2007 apply to law school pro bono clinics?

Most English universities and Higher Education Institutions (HEIs) are exempt charities under the Charities Act 1993. On 1 June 2010 the Higher Education Funding Council for England (HEFCE) became the principal regulator of those higher HEIs in England which it funds and which are exempt charities.³⁴

³¹ As of 25 September 2013 there are 189 licensed bodies (ABS): <http://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page>. They include brands which traditionally have been associated with different sectors i.e. Co-operative Legal Services Limited (supermarkets) and Admiral Law Limited (insurance).

³² There has been some criticism of the way in which the Act, and other literature on this subject, uses the terms “special bodies” and “non-commercial bodies” interchangeably. See the *Response from the Solicitors Regulation Authority to the Legal Service Board’s consultation* [Online] Available at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_consultation_on_the_regulation_of_special_bodies.htm

³³ Legal Service Board (2012) *LSB responds to consultation by revising plans for regulation of special bodies* [Press Release]. 5 December. Available at: http://www.legalservicesboard.org.uk/news_publications/press_releases/pdf/20121205_special_bodies.pdf (Accessed 5 December 2012).

³⁴ According to HEFCE, all but 18 HEIs fall into this category.

The definition of not for profit body under the Legal Services Act 2007 is a body which, 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).³⁵ A charity (exempt or not) therefore falls within the definition. Accordingly, it follows that if the body is carrying out reserved legal work, then, once the grace period has ended, it is required to be licensed under the Legal Services Act 2007 i.e. it must become an Alternative Business Structure.

Engaging with the regulator

In April 2012, the Legal Services Board released a *Consultation Paper on the regulation of special bodies/non-commercial bodies*.³⁶ The consultation closed on 16 July 2012 and 24 organisations³⁷ in total responded. I prepared a response based on my concerns as to how the Act applied to law schools carrying out pro bono activities.³⁸ I was subsequently invited to attend a stakeholder engagement meeting at the London office of the Solicitors Regulation Authority on 6th November 2012. Thirteen representatives from not-for-profit organisations attended. There were no other representatives from higher education institutions.

The key issue is that university clinics are rarely companies, entities, or any other type of “body”. They are activities - sometimes embedded into the curriculum, sometimes not. Some are voluntary, others compulsory. In my own institution, Northumbria University, our clinic (the Student Law Office) is a module. It is not a company, or some other form of separate legal entity or “body”. The question then becomes: what is the body to which the Legal Services Act 2007 refers? Is it the university within which the clinical activities take place? If this is the case then the Act requires universities where pro bono reserved work is being carried out to become Alternative Business Structures. I asked this question in the stakeholder engagement meeting and the answer was yes.

An alternate course of action would be for the clinic to become a separate legal entity, distinct from the university structure, so that it can be a licensed body itself. Yet, how many universities want to put this in place? And, is there any benefit to the clinic and the members of the public which that clinic serves, beyond complying with rules that do not seem to have been written with all non-commercial legal service providers in mind?

³⁵ Section 207 Legal Services Act 2007.

³⁶ Legal Services Board (2012) *Consultation Paper on the regulation of special bodies/non-commercial bodies that provide reserved legal activities* [Online] Available at: <http://www.legalservicesboard.org.uk/what-we-do/consultations/open/pdf/3.pdf> (Accessed 20 May 2012).

³⁷ Advice UK, Advice Services Alliance, Action Against Medical Accidents, Child Poverty Action Group, Chartered Institute of Legal Executives and ILEX Professional Standards, Citizens Advice, The Council for Licensed Conveyancers, The Legal Services Consumer Panel, Disability Law Service, Friends of the Earth, The Institute for Chartered Accountants England and Wales, LawWorks, Law Centres Network, Liberty, Northumbria University School of Law, Prisoners Advice Service, Shelter, The Solicitors Regulation Authority, The Charity Commission, The Law Society, The Public Law Project, Trades Union Congress and UNISON. The full responses can be read at: <http://www.legalservicesboard.org.uk/what-we-do/consultations/closed/submissions-received-to-the-consultation-on-the-regulation-of-special-bodies.htm>. There were also three confidential responses.

³⁸ Campbell, E (2012) *Response to the Legal Service Board's Consultation Paper on the regulation of special bodies/non-commercial bodies that provide reserved legal activities*. [Online]. Available at: <http://www.legalservicesboard.org.uk/what-we-do/consultations/closed/submissions-received-to-the-consultation-on-the-regulation-of-special-bodies.htm>.

LawWorks, a charity which aims to provide free legal help to individuals and community groups in England and Wales, raised similar concerns in its response to the consultation.³⁹ The introduction of the licensing rules, it said, will have a significant impact on law school clinics, especially as the clinic is often only a small part of the law school and the university as a whole. The burdensome rules posed “a real threat” to their “very existence”.⁴⁰

In addition, LawWorks looked at other models of clinical pro bono work and provided detailed information about legal advice clinics and the ways in which those clinics would be affected by the special bodies provisions in the Legal Services Act 2007. It used the example of a clinic based in the south of London where 20 – 30 volunteers attend a community centre one night a week and assisted over 60 individuals. It is entirely reliant on volunteers, with no permanent member of staff, and has a budget of less than £1500 per annum which is primarily spent on stationary, photocopying costs and legal resource. LawWorks stated that they were very concerned “that services such as these, providing access to justice for those most in need, will be unable to continue if burdensome, complex or expensive regulations governing special bodies are implemented”.⁴¹

The stakeholder engagement meeting demonstrated that there was no “one size fits all” model for the licensing of special or non-commercial bodies. There were significant differences in respect of how each body was organised and what their goals were for the future. For example, many of the organisations noted that they were going to use the new regulatory framework to allow them to have separate charging trading arms which would charge for advice.

Another issue is the provision of pro bono advice at a private university which would not fall within the definition of a special body. One would expect that they, if they are owned or managed by non-lawyers and are carrying out reserved legal activities, should be licensed now. However, there has been no confirmation that this is the case. Indeed there is no reference to section 23 or section 106 of the Legal Services Act 2007 in the legal handbook which was published by The Law Society last year⁴² nor has there been any discussion of the effect of these sections of the Act on clinic in any capacity in any journal or press article.⁴³

Changing the definition of reserved legal activity

The stakeholder engagement meeting also highlighted that the Solicitors Regulation Authority was considering whether general legal advice should become a reserved legal activity.⁴⁴ This would mean that special/non-commercial bodies providing any type of legal advice would need

³⁹ LawWorks (2012) *LSB Regulation of special bodies/non-commercial bodies - LawWorks response* [Online] Available at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_consultation_on_the_regulation_of_special_bodies.htm.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² See n.18.

⁴³ I wrote about the issue last year: Campbell, E (2012) ‘No one size fits all: not-for-profit legal services providers cannot be treated like law firms’, *Solicitors Journal*, 156 (34), p.10-11.

⁴⁴ The idea was also mooted in the consultation paper. Respondents were asked: What are your views on the proposed timetable for ending the transitional protection? Should we delay the decision of whether to end the transitional protection for special bodies/non-commercial bodies until we have reached a view on the regulation of general legal advice?

to be licensed as an Alternative Business Structure once the transitional grace period was at an end. Whether this will happen remains to be seen. In May 2013, the Lord Chancellor Chris Grayling rejected the Legal Service Board's recommendation that will writing should become a reserved legal activity, despite the support which the recommendation had. Given this, it is hard to see how he would accept what would effectively mean abolishing the concept of reserved legal work altogether.

What will the licensing regime look like?

At present there is no information stating what the application requirements will be for non-commercial bodies following the expiration of the grace period. Many law school clinics will not have obvious "owners", "managers" and "shareholders" as envisaged by the Act. For example, at Northumbria University the Student Law Office has a director (an academic post), and is also under the remit of an Associate Dean, the Executive Dean of the Faculty of Business and Law, the University Board of Governors and Vice Chancellor's Office. As LawWorks note in their response to the Legal Service Board's *Consultation Paper on the regulation of special/non-commercial bodies*⁴⁵, there is often a difference between the purpose of the clinic and the aims of the university as a whole.

The Student Law Office, like many pro bono service providers, does not handle any client money. It is a free legal advice clinic. The licensing authority currently uses turnover as a basis for the calculation of fees for commercial bodies who wish to become Alternative Business Structures. The Legal Service Board states that special bodies will need to pay a fee to be licensed. It has not announced how the fee will be calculated.

The Australian experience of alternative business structures and not-for-profit bodies

Section 134(2)(a) Legal Profession Act 2004 states that a corporation cannot be an incorporated legal practice if it does not receive any form of, or have any expectation or, a fee, gain or reward for the legal services it provides.

The difference between the provisions in the Legal Profession Act 2004 as compared to the Legal Services Act 2007 is striking. Rather than the Legal Profession Act 2004 trying to impose an "alternative" business structure on not for profit legal service providers, it firmly states that not for profit bodies are not permitted to become an incorporated legal practice. Solicitors and barristers supervising clinical work in Australia are regulated as individuals, as the position has been in England and Wales. A university or clinic does not require any licence in order to provide legal advice. "Pro bono clinic" is term used to describe clinics that are staffed by private lawyers. In contrast, university clinics are referred to as that, or a Community Legal Centre clinic. Section 134(2)(d) of the Legal Profession Act 2004 states that a complying Community Legal Centre is not an incorporated legal practice.

⁴⁵ See n.36.

In England and Wales, it is interesting to note that there is still confusion within the profession as to what special bodies are. The Law Society⁴⁶ states that:

“Special bodies are a type of ABS. It is currently unclear exactly which bodies will need to apply to become special bodies.”

According to the Legal Services Act 2007 and the Legal Services Board’s interpretation of it, special bodies are not a type of Alternative Business Structure – they are a type of entity which must, if carrying out reserved legal activities, become an Alternative Business Structure.

The drafting of the Legal Profession Act 2004 does not allow for this uncertainty. There are no “special” bodies. A firm decides for itself whether it wishes to incorporate and then notifies the relevant authorities. As Alexander Ward said to the Council of the Law Society of England and Wales⁴⁷, a licensing regime for alternative business structures was not an option for Australia.

The future for university law clinics in England and Wales

In December 2012, the Legal Services Board released a document summarising the responses to its consultation paper and the next steps.⁴⁸ There was no reference to university-led legal clinics, nor to any of the issues which I raised in my response and at the stakeholder engagement meeting.

The current expectation is that the transitional grace period will end in 2015. By this date, the Solicitors Regulation Authority should have completed the licensing of all special bodies. The Solicitors Regulation Authority states that the licensing of special bodies will be preceded by a significant programme of work in 2013/14 to develop the framework within which they will be licensed.⁴⁹

If this goes ahead, one option available to university based clinics (and other pro bono legal advice providers) is to stop doing reserved work. Put simply, this would mean ceasing to offer full representation and moving to advice only. In the Student Law Office at Northumbria University this would mean that we would have to curtail the legal services provided to those requiring assistance with civil and consumer disputes. It is unclear whether this would also affect tribunal work such as employment, welfare benefits and criminal injuries compensation award appeals as no guidance on what constitutes “conduct of litigation” has been forthcoming. Naturally, this would have a significant impact on the vulnerable and disadvantaged who access the services offered by clinics. It comes at a time when the legal aid budget in England and Wales is being cut by £220 million, something which has led The Joint Committee on Human Rights to comment that the Ministry of Justice knows “the price of everything but the value of

⁴⁶ The Law Society (2012) *Setting up an ABS* [Online] Available at: <http://www.lawsociety.org.uk/advice/articles/setting-up-an-abs> (Accessed 31 October 2012).

⁴⁷ See n9.

⁴⁸ Legal Services Board (2012) Response to consultation and next steps [Online] Available at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20121130_lsb_response_to_special_bodies_consultation_and_next_steps.pdf (Accessed 5 December 2012).

⁴⁹ <http://www.sra.org.uk/sra/strategy.page>

nothing”.⁵⁰ It is also likely to have a knock on effect with the courts – increased numbers of self-represented litigants without any legal assistance and legal knowledge will arguably lead to delays and added cost.

Of course, if the change to the definition of reserved legal activities proposed by the Legal Services Board is accepted then it will not be enough to merely stop undertaking reserved work. If that were to occur, then the game changes entirely.

The future in terms of the regulation of reserved work carried out by university based law clinics appears uncertain, as does the future of the regulatory framework in general. The Ministry of Justice has recently said that its aim is to reduce the burdens which hold back the legal industry. In June 2013, in a written statement to the House of Commons⁵¹, justice minister Helen Grant said that the Ministry of Justice would conduct a review which would encompass the ‘full breadth’ of the legislative framework, including 10 pieces of primary legislation and more than 30 statutory instruments. The Ministry of Justice issued a “call for evidence” from stakeholders.⁵² The rejection of the regulation of will writing and the government’s focus on removing “red tape”⁵³ has led some to query whether there will be a Legal Services Act 2015.⁵⁴

For law school clinics which fall within the remit of the Legal Services Act 2007, there are two ways of dealing with this issue. The first is to broach it head on and engage with the regulators as much as possible – highlighting problems, misunderstandings and the reduction in pro bono service the licensing regime may cause. The second is to wait and see what will happen. 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.⁵⁵ In this author’s view, there needs to be a full and honest discussion between law schools, the Legal Services Board and the SRA so that the issue is not overlooked, or, worse, acknowledged but put to one side to deal with another day.

⁵⁰ <http://www.theguardian.com/law/2013/dec/13/further-legal-aid-restrictions-endangers-access-justice>

⁵¹ Ministry of Justice, *Legal Services Review Call for Evidence* [Online] Available at: http://www.parliament.uk/documents/commons-vote-office/June_2013/3rd_june/5.JUSTICE-Legal-Services.pdf (Accessed 5 June 2013).

⁵² I submitted a response on 2nd September 2013 detailing the concerns raised in this paper.

⁵³ The Red Tape Challenge: <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/>

⁵⁴ Rose, N (2013) *Are we headed for a Legal Services Act 2015?* Available at <http://www.legalfutures.co.uk/blog/the-legal-services-act-2015> (Accessed 15 May 2013)

⁵⁵ The Law Society, Solicitors Regulation Authority and the Bar Standards Board and Bar Council have all published their responses to the call for evidence. The Bar Standards Board recommends that the Legal Services Board should be removed and calls for a new Legal Services Act in 2018.

