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University Law Clinics as Alternative Business Structures: More Questions than Answers?

Elaine Campbell and Carol Boothby

When the Legal Services Act 2007 came into force¹, it was heralded as ushering in “important opportunities for solicitors to team up with non-lawyers and to attract capital for their businesses in a carefully regulated environment”.² The focus was on greater competition and choice for clients³ by encouraging new entrants to the market.

The Act paved the way for a new type of legal entity, the Alternative Business Structure (ABS). As an ABS, firms could have external ownership and investment and offer multiple services the clients from within the same practice. Fairly swiftly, the press decided to call this “Tesco Law”⁴; the rise of the one-stop shop where you could purchase your groceries and stop off for divorce advice.

Law School Clinics

At first glance, you would be forgiven for thinking that university law clinics - a stalwart of the UK *pro bono* scene for decades - have nothing to do with this brave new world. Surely, it’s just a question of making sure our students know about changes to the legal market?

However, when ABS’ were first introduced we were acutely aware that the ramifications for law school clinics were serious. Careful reading of the Act showed that “special bodies” (e.g. not for profits) with non-lawyer owners and/or managers providing reserved legal activities⁵ needed to be licensed as an ABS. It also said that, given this radical change, a transitional or “grace” period would be put in place. Special bodies could continue to provide reserved activities without needing to be licensed during that grace period. This raised the following three questions:

- (1) Did law school clinics undertaking reserved work fall into the category of ‘special bodies’?
- (2) If so, did this mean that they needed to be licensed as ABS’?
- (3) When would the grace period end?

Meeting the regulators

The Legal Services Board issued a Consultation Paper on the regulation of special bodies in summer 2012.⁶ Northumbria was the only law school to respond to that Consultation Paper. In that

¹ On 30th October 2007: <http://www.legislation.gov.uk/ukpga/2007/29/contents>.

² Solicitors Regulatory Authority, “Legal Services Act: New forms of practice and regulation”, 8 February 2010, available at <http://www.sra.org.uk/sra/legal-services-act.page> (accessed 8 October 2015).

³ Now rebranded as ‘consumers’.

⁴ This still continues. See e.g. Marion Dakers, “‘Tesco Law’ rules relaxed to encourage more one-stop law shops”, *The Telegraph*, 26 October 2014, available at <http://www.telegraph.co.uk/finance/newsbysector/supportservices/11187121/Tesco-Law-rules-relaxed-to-encourage-more-one-stop-law-shops.html> (accessed 23 October 2015).

⁵ Reserved legal activities include the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths, as defined in Schedule 2 to the Legal Service Act 2007. For further discussion on this point, please see the section below.

⁶ Legal Services Board, “Regulation of special bodies/non-commercial bodies: Consultation paper on the regulation of special bodies/non-commercial bodies that provide reserved legal activities” (Legal Services Board), available at

response⁷, we asked the questions set out above and were subsequently invited to attend a stakeholder engagement meeting at the Solicitors Regulatory Authority later that year. Whilst a number of pro bono organisations attended, there were no other representatives from law school clinics.

At that meeting it was confirmed that a law school clinic undertaking reserved work would be required to become licensed as an ABS under the Act.⁸ Reserved work includes the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths.⁹ Of that list, the most relevant for clinical work is the conduct of litigation. One potential resolution for clinics could be to avoid reserved work. This would mean, however, that clinics would be restricted to advice only and could not take on any contentious work.

In December 2012, the Legal Service Board's response to the consultation¹⁰ was released. It neglected to mention law school clinics, nor any of the issues we had raised in our consultation response and the stakeholder engagement meeting. We called for further consideration of this matter in the *Solicitors Journal*¹¹ and the *International Journal of Clinical Legal Education*.¹²

The grace period

The grace period was supposed to end in March 2013. However, this was initially extended to April 2014. In December 2014 work on licensing special bodies was deferred. According to the Legal Services Board, this was due to the lack of a licensing authority with the ability to licence special bodies as ABS'.¹³ The Legal Services Board state that 'this situation will remain under review' but that it does not 'anticipate further work on this issue before autumn 2016'.¹⁴ This means that there is likely to be another period after autumn 2016 before the grace period comes to an end.

"Teaching Law Firms"?

Given this background, many within the clinical community have watched with interest as Nottingham Law School and the University of Law made the decision to apply for their legal advice

http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/3.pdf (last accessed 27 October 2015)

⁷ Elaine Campbell, "Response to the Legal Service Board's Consultation Paper on the regulations of special bodies/non-commercial bodies that provide reserved legal activities", available at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received_to_the_consultation_on_the_regulation_of_special_bodies.htm (last accessed 27 October 2015).

⁸ Elaine Campbell, "Regulating Clinic: Do UK Clinics Need to Become Alternative Business Structures Under the Legal Services Act 2007?" (2014) 20 *International Journal of Clinical Legal Education* 519, at 526.

⁹ Section 12 Legal Services Act 2007: <http://www.legislation.gov.uk/ukpga/2007/29/section/12>.

¹⁰ Legal Services Board, "Response to consultation and next steps", December 2012, 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 27 October 2015).

¹¹ Elaine Campbell, "No one size fits all: not-for-profit legal services providers cannot be treated like law firms", (2012) 156(34) *Solicitors Journal* 10.

¹² Campbell, *supra* n.8.

¹³ Legal Services Board, "Transitional protections from ABS licensing", available at http://www.legalservicesboard.org.uk/projects/alternative_business_structures_and_special_bodies/index.htm (last accessed 27 October 2015).

¹⁴ *Ibid.*

centres to become ABS'. Both of those applications have now been granted. There have been a number of useful press releases¹⁵ and Richard Owen's interesting Q&A with Emma Douglas, head of legal practice at the University of Law's Legal Advice Centre and Nick Johnson, director of the Nottingham Law School Legal Advice Centre in *The Law Teacher*.¹⁶ However, there are perhaps more questions than answers. Those questions affect academics, clients and students.

What are the consequences of becoming an ABS for academic staff?

At Northumbria Law School, all of the staff working in the pro bono clinic, the Student Law Office, are employed under academic contracts. They are no different to any other member of academic staff at the university. This is because the clinic is an integrated module like any other, and is not separate from the rest of the university. This is a similar set up to many other clinics.

In contrast, an ABS is a separate legal entity. It has an ownership and management structure all of its own. There are compliance officers for legal practice (COLP) and for finance and administration (COFA). The COLP needs to take all reasonable steps to ensure the ABS complies with regulatory requirements and statutory obligations. They are also responsible for reporting any failure to comply. The COFA needs to take all reasonable steps to ensure that the body complies with Accounts Rules and must report any failure to comply.

There are two concerns here. First, if a law clinic becomes an ABS, academic supervisors will work for that ABS, not the university. What will this mean in terms of job description, salary, holidays and pension arrangements? An alternative would be a secondment package, although this seems unnecessarily convoluted. Secondly, who will be the COLP and the COFA? These are roles which attract a great deal of responsibility, perhaps more so than the traditional 'director' role that most clinics have. It is one thing to be responsible for your own and your students' legal work. It is another thing entirely to be placed in a position where you are ensuring compliance for the entire clinic, especially when clients are being charged for services and accounting rules need to be followed.

It may be that some clinicians are on separate contracts to academic staff already. However, there is concern amongst clinicians who are academic staff that separating out the clinic as an ABS will mean that we have a split system; legal academics on one side and legal clinicians on the other. This is an issue which clinicians in other jurisdictions, such as the United States¹⁷, have struggled against for years.

The end of pro bono for clients?

Providing a pro bono service to the local community is something that is seen as a core value for existing law clinics. It is also part of our goal as clinicians to encourage our students to develop an awareness of social justice and the barriers to accessing legal advice. There is a concern that creating

¹⁵ See e.g. <http://www.law.ac.uk/about/press-releases/2015/ulaw-granted-abs-licence/> and http://www.ntu.ac.uk/apps/news/180191-15/Nottingham_Law_School_granted_ABS_licence.aspx (last accessed 27th October 2015).

¹⁶ 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.

¹⁷ In the United States there is a divide between what is known as 'clinical faculty' and 'doctrinal faculty': see David A. Santacroce et al, "The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy", (2012) 36(2) *The Journal of the Legal Profession* 353.

an ABS and the subsequent separation of the clinic from the law school and the university may prove to be a move towards charging clients for our services.

As reported in *Legal Futures*¹⁸ and *The Law Teacher*¹⁹, Nottingham Law School are exploring the possibility of charging start-ups below market rates for legal advice. The Student Law Office has a successful business law clinic which has been providing free legal advice to local businesses, start-ups, and entrepreneurs for a number of years. As Jenny Holloway, Associate Dean at Nottingham Law School, has noted “these early start-ups are not the kind that would get legal advice. They can’t afford it”.²⁰ The provision of pro bono advice to businesses is arguably part of our social justice goals.²¹ There is often nowhere else for those businesses - the lifeblood of our economy - to turn.

What does this mean for our students?

One of the core benefits of clinic is the transformative effect it has on students. Our experience is that clinic can have the most impact on students who have not been high-flying academic achievers. Clinical legal education allows us, as teachers, to work with students in a holistic, inclusive and continuous manner. We have the pleasure of seeing students grow as critical thinkers, independent and autonomous workers, and good time managers. They develop their legal skills, but there is also a personal journey. Clinic provides students with room to grow and evolve as lawyers and people.

If the change to ABS status means that there is increased pressure on the clinic to take on more clients and turn their matters around faster, then there is the possibility that the pedagogic benefits of clinic may be lost. A move to charging will increase clients’ expectations as to the service they will receive. Of course, every clinical supervisor ensures that the legal work they are overseeing is accurate, but the attraction of experiential learning is that students have the time to make mistakes, reflect on those mistakes and try again. Experienced supervisors know that students will not get things right even on a third or fourth draft. They might skim the surface of the legal principles at play. They might identify the legal principles, but fail to apply it correctly. They might not be able to work out what is and what is not a key issue. As supervisors, our role is to help students in the clinic navigate this process of active learning. Supervisors are already under a great deal of pressure to move things along at a steady rate. They do not want to be pressurised into providing a rate of service akin to a private practice law firm. The students’ personal and practical development is just as important as the provision of advice to a client. Meeting both of those needs can require a fine balancing act, without the additional dimension of charging clients.

¹⁸ Nick Hilborne, “Law school ABS aims to provide paid-for advice to young entrepreneurs”, *Legal Futures*, 17 March 2015, available at <http://www.legalfutures.co.uk/latest-news/law-school-abs-aims-to-provide-paid-for-advice-to-young-entrepreneurs> (last accessed 27th October 2015).

¹⁹ Owen, *supra* n. 15, at 258-259.

²⁰ Hilborne, *supra* n.16.

²¹ See Elaine Campbell, “A dangerous method? Defending the rise of business law clinics in the UK”, (2015) 49(2) *The Law Teacher* 165; Susan R. Jones, “Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law”, 14 *Washington University Journal of Law and Policy* (2004) 249; and Susan R. Jones, “Transactional Law, Equitable Development, and Clinical Legal Education”, (2005) 14 *Journal of Affordable Housing and Community Development* 213.

The future

In September 2015, a report on the England and Wales and Australian experience of ABS's declared that the merits were 'inconclusive' and 'the jury was still out'.²² There have been high profile cases of ABS' failing or being closed down by the Solicitors' Regulatory Authority.²³ Alongside this, Stephen Mayson has said that "the nature and pace of change in legal services since 2004 leaves many (myself included) in no doubt that well before 2024 we will need a different and more robust framework for legal services regulation."²⁴ The future of university law clinics is far from clear. It may be that the hand of law clinics that resist becoming an ABS will be forced by the removal of the grace period. For now, many clinicians maintain a watching brief.

²² Dan Bindman, "Report on ABS benefits says England and Wales experience "inconclusive"", *Legal Futures*, 28 September 2015, available at <http://www.legalfutures.co.uk/latest-news/report-on-abs-benefits-says-england-and-wales-experience-inconclusive> (last accessed 10 November 2015).

²³ See e.g. Neil Rose, "Stobart Barristers reaches the end of the road", *Legal Futures*, 15 May 2014, available at <http://www.legalfutures.co.uk/latest-news/exclusive-stobart-barristers-reaches-end-road>; and Nick Hilborne, "SRA closes alternative business structure after securing High Court order", *Legal Futures*, 18 December 2014, available at <http://www.legalfutures.co.uk/latest-news/sra-closes-alternative-business-structure-securing-high-court-order>.

²⁴ <https://stephenmayson.files.wordpress.com/2015/04/mayson-2015-lsa-what-might-replace-it-final.pdf> (accessed 10 November 2015).