

# The Regulation of Solicitors and University Law Clinics

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This working paper is a chapter from the forthcoming 'Clinical Legal Education Handbook' which is due to be published by the Institute of Advanced Legal Studies (IALS) in spring 2020. It outlines the impact that the changes to the regulation of solicitors, which are due to come into force with the introduction of the Solicitors Regulation Authority's Standards and Regulations on 25 November 2019, may have on solicitors working and volunteering in university legal advice clinics. Given that many solicitors working in university law clinics will need to address their minds to this before the Clinical Legal Education Handbook is published, IALS have kindly given permission for this chapter to be published early.

The Clinical Legal Education Handbook is intended to act as a good practice guide and practical resource for those engaged in the design and delivery of clinical legal education programmes at university law schools. It has been written by lawyers, clinicians and third sector partners and will be available as an open access, online resource. For further information about the Handbook please contact Linden Thomas at [L.thomas@bham.ac.uk](mailto:L.thomas@bham.ac.uk).



# The Regulation of Solicitors and University Law Clinics<sup>1</sup>

by Linden Thomas\*

The majority of people who run university pro bono programmes are solicitors. Therefore, this section sets out the regulatory framework which permits solicitors employed by universities to deliver legal services to the public.

As mentioned in the introduction to this Handbook, at the time of writing, the solicitors' profession is currently facing significant regulatory changes. On 25 November 2019 the Solicitors Regulation Authority (SRA) Standards and Regulations (Standards)<sup>2</sup> will replace the current SRA Handbook.<sup>3</sup> The SRA has promised guidance to accompany the new Standards. However, at the time of writing some of this is still to be published and the final version of the Standards is not yet available.<sup>4</sup> Readers are therefore encouraged to check the most recent version of the Standards and accompanying guidance on the SRA website in order to verify the position set out in this Handbook remains correct.

## **The Regulation of Solicitors**

The regulatory framework for the legal profession in England and Wales derives from the Legal Services Act 2007 (LSA). The LSA established the Legal Services Board (LSB), which has overarching responsibility for the regulation of legal services. There are ten separate bodies, known as 'approved regulators' which fall under the LSB's remit. The approved regulator for solicitors is The Law Society of England and Wales (The Law Society). However, as the LSA requires a separation between regulatory and representative functions, the SRA was established in 2007 as an independent arm of The Law Society and is the independent regulator of solicitors and law firms.<sup>5</sup>

The SRA sets out the standards and requirements that it expects the community it regulates to achieve and observe. As explained above, the new Standards, due to come into effect on 25 November 2019 and will replace the 2011 Handbook, will introduce a number of significant changes to the ways in which solicitors are regulated. These will include:

- the replacement of ten mandatory principles with seven, which are described by the SRA as "the fundamental tenets of ethical behaviour that [they] expect all those [they] regulate to uphold";<sup>6</sup>
- the creation of two separate codes of conduct: one for firms and one for solicitors;
- allowing solicitors to carry out 'non-reserved' legal work from within a business not regulated by a legal services regulator; and
- allowing solicitors to provide reserved legal services on a freelance basis, subject to certain conditions.

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<sup>1</sup> Some of the content of this section was adapted from the following article: Linden Thomas, 'Law Clinics in England and Wales: A Regulatory Black Hole' (2017) *The Law Teacher* early online publication <<http://www.tandfonline.com/doi/full/10.1080/03069400.2017.1322858>> accessed 23 July 2019.

\* Thank you to Patrick Reeve of MP Reeve Ltd ([www.MPReeve.com](http://www.MPReeve.com)) for his helpful comments on an early draft of this chapter.

<sup>2</sup> Solicitors Regulation Authority, *Standards and Regulations* (20 March 2019) <<https://www.sra.org.uk/sra/policy/future/resources.page#resources>> accessed 23 July 2019

<sup>3</sup> The SRA Handbook was introduced in 2011 and has been subject to a number of revisions. Solicitors Regulation Authority, *Handbook* (6 December 2018, version 21) <<https://www.sra.org.uk/handbook/>> accessed 23 July 2019

<sup>4</sup> Guidance available to date can be accessed on the SRA Website: <<https://www.sra.org.uk/newregs/>> accessed 26 July 2019.

<sup>5</sup> Legal Services Act 2007 (LSA), s 30

<sup>6</sup> SRA Standards (n 2) 1

## **Reserved and Non-Reserved Legal Activities**

Before commencing any explanation as to the legal services that a solicitor may or may not provide to members of the public it is first necessary to understand that legal services can broadly be divided into two categories: ‘reserved’ legal activities; and ‘non-reserved’ legal activities. The way in which you chose to set up your clinic will probably depend upon the type of legal services you intend to offer and which of these categories they fall into.

There are also some limitations on solicitors providing legal services that include immigration work and financial services (including debt). These are addressed in separate chapters of this Handbook.

### **What are reserved legal activities?**

The Legal Services Act 2007 (“LSA”) prescribes that certain legal activities are “reserved”. Reserved legal activities can only be carried out by persons who are authorised to do so, or who are otherwise exempt.<sup>7</sup> Those activities that are reserved are listed at section 12 of the LSA. They are:

- a) the exercise of a right of audience;
- b) the conduct of litigation;
- c) reserved instrument activities (predominantly conveyancing activities);
- d) probate activities;
- e) notarial activities;
- f) the administration of oaths.<sup>8</sup>

A description as to what constitutes each of these activities is contained in Schedule 2 of the LSA.

There are a number of activities falling within the above definition which could potentially be carried out by a university law clinic - conducting litigation and exercising rights of audience both being obvious examples.<sup>9</sup> These are considered in further detail below. It is a criminal offence to carry out a reserved legal activity without being either an authorised person or exempt, therefore it is important for solicitors to understand whether the activity they propose to engage in is reserved or not.<sup>10</sup>

### **Conduct of litigation**

‘Conduct of litigation’ is defined at Schedule 2 of the LSA 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).<sup>11</sup>

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<sup>7</sup> LSA, s 13

<sup>8</sup> LSA, s 12(1)

<sup>9</sup> For example, the Student Law Office at Northumbria University offers representation in court hearings <<https://www.northumbria.ac.uk/about-us/academic-departments/northumbria-law-school/study/student-law-office/contact-us/>> accessed 23 July 2019 as does The University of Kent Law Clinic <<https://blogs.kent.ac.uk/kentlawclinic/2019/02/28/law-clinic-helps-elderly-client-recover-15k-from-mobile-home-park/>> accessed 23 July 2019

<sup>10</sup> LSA, s 14

<sup>11</sup> LSA, Schedule 2

For these purposes, ‘court’ includes First-tier and Upper Tribunals.<sup>12</sup> It seems to be commonly accepted that it does not include the Employment Tribunal or First-tier (Social Entitlement Chamber), neither of which restrict rights of audience. Therefore, conducting litigation (or exercising rights of audience) in either of those Tribunals would not amount to reserved activity.<sup>13</sup>

It is clear from the definition at Schedule 2 that in all other proceedings in courts where rights of audience are restricted, actions such as service of a claim form would amount to reserved activity. However, ‘performance of any ancillary functions’ has been interpreted narrowly by the courts. Therefore, actions such as engaging in general correspondence with an opposing party, drafting documents prior to proceedings being issued, giving legal advice in relation to matters in dispute and engaging in alternative dispute resolution (except where this has been ordered by the court) will not amount to ‘performance of ancillary functions’ and therefore will not be reserved activities.<sup>14</sup>

### **Exercising a right of audience**

The LSA defines a ‘right of audience’ as “the right to appear before and address a court, including the right to call and examine witnesses”.<sup>15</sup> As the same definition of ‘court’ applies here, solicitors undertaking representation and advocacy in those exempted Tribunals detailed above would be an unreserved activity. However, appearance in the County Court, for example, would be a reserved activity.

Solicitors should give careful consideration as to whether the work they propose to undertake is reserved and may wish to take a risk averse approach where in doubt, given the criminal sanctions for conducting reserved activity when not permitted.

### **Carrying out ‘non-reserved’ legal work**

From 25 November 2019 a solicitor working for an organisation that is not regulated by the SRA<sup>16</sup> will be able to provide non-reserved legal services to the public on behalf of their employer.<sup>17</sup> It is anticipated that large commercial organisations such as banks, accountancy practices and supermarkets will seek to engage solicitors to work in this way, without the need for their organisation to be regulated in the same way as a law firm, which can be both onerous and costly.<sup>18</sup>

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<sup>12</sup> LSA, s 207

<sup>13</sup> LawWorks, *Practice Guidance: In-house solicitors and pro bono: regulatory issues* (15 March 2019) <<https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-practice-guidance-house-solicitors-and-pro-bono>> accessed 23 July 2019

<sup>14</sup> Ibid. The LawWorks Practice Guidance offers some very helpful direction on the interpretation of ‘conduct of litigation’, citing relevant case law on this topic, including Agassi v Robinson [2006] 1 WLR 2126 and Ellis v Ministry of Justice [2018] EWCA Civ 2686

<sup>15</sup> LSA, Schedule 2

<sup>16</sup> Or by any other legal services regulator

<sup>17</sup> Somewhat confusingly, this entitlement is not expressly set out in the new SRA Standards. Rather, the right to act in this way derives from the fact that the Standards do not contain any explicit prohibition against doing so. The Standards (n 2) place very few limitations on the way in which both reserved and non-reserved legal services can be provided, beyond those contained in statute. This is a significant move away from the previous regulatory provisions, which are set out later in this section for information. The SRA has produced a series of Guidance notes for unregulated organisations providing legal services to the public, which are available at <<https://www.sra.org.uk/newregs/>> accessed 26 July 2019

<sup>18</sup> Providing legal services from an unregulated entity will be an attractive option for many organisations as they will not be subject to a regulation fee, they will not be subject to the same insurance requirements and the organisation can operate without scrutiny from the SRA.

Solicitors employed by universities will also be able to rely on this relaxation of the regulatory framework and will be able to provide non-reserved legal services to the public on behalf of their institution. These services may be provided on a pro bono basis or for a fee.

It is important to bear in mind that although the university will not be regulated, the solicitors themselves will still be regulated and will be subject to those SRA Standards that apply to individual solicitors.<sup>19</sup> Solicitors employed in this way will be required to explain to their clients the regulatory protection that will be available to them.<sup>20</sup> They must also explain:

- the insurance arrangements that they have in place and make it clear that they are not covered by the SRA Minimum Terms and Conditions;<sup>21</sup>
- that their clients will not be eligible to apply to the Solicitors Compensation Fund;<sup>22 23</sup>
- which activities will be carried out by them as a solicitor authorised by the SRA;<sup>24</sup> and
- that their employer is not SRA regulated.<sup>25</sup>

The SRA has produced a guidance note entitled “SRA Standards and Regulations guidance for the not for profit sector” which contains a checklist of those matters that should be explained to clients in a client care letter before commencing work for the client, along with example wording.<sup>26</sup> The recommendations contained in that guidance note have been incorporated into the precedent client care letter in Part Five of this Handbook. For more information on client care letters, please refer to chapter on ‘Client Care and Taking on New Clients’.

Solicitors delivering legal services from a non-regulated entity will not be permitted to hold client money, which may impact on the type of services a university clinic is able to offer.<sup>27</sup>

In summary, if none of the legal services offered by your clinic are reserved then you may provide them to members of the public on behalf of your university, as long as you fulfil the requirements for individual solicitors contained in the Standards and provide the requisite information to your clients prior to commencing work.

### **Carrying out reserved legal work**

If any of the legal services provided to the public through the university’s clinic are reserved activities, the clinic must either be authorised to provide such activities, or otherwise be exempt from authorisation.

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<sup>19</sup> These are set out in the SRA Standards ‘SRA Code of Conduct for Solicitors, RELs and RFLs’ (n 2)

<sup>20</sup> Ibid. Standard 8.11

<sup>21</sup> Rule 4.3(a) of the ‘SRA Transparency Rules’ which are contained within the SRA Standards (n 2)

<sup>22</sup> Rule 4.3(b) of the ‘SRA Transparency Rules’ which are contained within the SRA Standards (n 2)

<sup>23</sup> Rule 4.4 of the SRA Transparency Rules states that the requirements of Rule 4.3 do not apply to non-commercial bodies, which are defined in the Glossary to the SRA Standards as bodies that are subject to the exemption at section 23(2) of the LSA. Some universities may therefore be exempt from these requirements, but may still wish to provide clients with the information in any event.

<sup>24</sup> Standard 8.10(a), SRA Standards (n 2)

<sup>25</sup> Standards 8.10(b), SRA Standards (n 2)

<sup>26</sup> Solicitors Regulation Authority, *SRA Standards and Regulations guidance for the not for profit sector* (23 July 2019) <<https://www.sra.org.uk/newregs/>> accessed 26 July 2019

<sup>27</sup> Standard 4.3, SRA Standards (n 2)

With the implementation of the new Standards, the regulatory position set out by the SRA will be brought in line with the statutory position under the LSA. The LSA provides that reserved activity may be carried on by an employee who is an authorised person, *unless* the employee is providing the reserved activity to the public or a section of the public as part of the employer's business.<sup>28</sup> It does not matter whether the activity is being done with a view to profit or on a pro bono basis.<sup>29</sup> This means that solicitors employed by organisations that are not regulated by the SRA can carry out reserved activities on behalf of their employer. For example, a solicitor employed by a university could engage in a reserved activity, such as litigation, when acting on behalf of the university. However, the same solicitor may not engage in any reserved activities on behalf of a member of the public in their capacity as an employee of the university where to do so forms part of the university's business. This is the case even where the services are being provided pro bono.

There is no definition under the LSA as to what amounts to part of an employer's business. However, guidance on the SRA website recommends that solicitors consider the following non-exhaustive list:

- “whether your employer describes its business as including the relevant services;
- how regularly it provides the services, the number of employees that do so and the overall proportion of time spent on providing them;
- the extent to which these services complement or enhance the business of your employer;
- whether your employer provides management, training or supervision in relation to the provision of these services, or rewards you (directly or indirectly) for doing the work;
- who provides the necessary indemnity insurance cover.”<sup>30</sup>

Solicitors supervising in university law clinics will almost certainly find themselves providing relevant services to the public or a section of the public as part of their employer's business. There are a multiplicity of factors which are likely to lead to this conclusion. Not least that law school clinics:

- tend to be funded by the university and are often housed in university premises;
- are referenced by universities when marketing their courses to potential students and when promoting the university's public engagement work;
- are commonly staffed by solicitors who have been recruited specifically for the purpose of providing legal services through the clinic; and
- are often covered by the university's own public indemnity insurance.<sup>31</sup>

Therefore, the requirement for authorisation or exemption will apply where reserved activities are to be provided.

#### When is a clinic exempt from authorisation?

The circumstances in which a clinic may be exempt from the requirement to be authorised to provide reserved legal activities are set out below.

#### **1) Under the transitional provisions at section 23(2) of the LSA**

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<sup>28</sup> LSA, s 15(4)

<sup>29</sup> Ibid.

<sup>30</sup> <<http://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Does-my-employer-need-to-be-authorised-by-an-approved-regulator-.page>> accessed 25 July 2019

<sup>31</sup> Thomas (n 1)

Section 23(2) of the LSA permits not for profit bodies to ‘carry on any activity which is a reserved legal activity’ during a transitional period.<sup>32</sup> A not for profit body is defined 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)”.<sup>33</sup>*

As most universities are charities, they may fall within this definition and therefore continue to deliver reserved activities.<sup>34</sup> However, the position on this is perhaps not as clear cut as it may seem. In the ‘SRA Standards and Regulations guidance for the not for profit sector’ there is a case study which indicates that a university would not fall within the definition of a ‘non-commercial body’ under the LSA.<sup>35</sup> It is unfortunate that the SRA Guidance on this point does not align with the statutory wording and does not offer further explanation.

In any event, if the transitional period is brought to an end, the not for profit body would need to become authorised.<sup>36</sup>

Universities seeking to rely on the exemption at section 23(2) should keep in mind that it expressly permits not for profit bodies to “carry on” providing reserved activities. Again, there is arguably some lack of clarity here. If “carry on” is interpreted as “to continue” to do an activity, this would mean that any clinics delivering reserved activities for the first time since the transitional provision came into force on 1 January 2010 may not rely on the exemption. However, sections 13, 14 and 15 of the LSA all use the term “carry on” in the sense of “engaging in” an activity rather than “continuing to engage in” an activity you were previously undertaking and would not make sense if they only applied to those who were engaged in reserved activity before the LSA came into force. Furthermore, the SRA Guidance suggests all not for profit organisations and charities may rely on the exemption and makes no mention to the statutory reference to ‘carry[ing] on’.<sup>37</sup>

## 2) SRA Regulated Independent Solicitors

Up to the introduction of the Standards in November 2019, solicitors practising alone have been required to have their practice authorised. The practice had to be a separate legal entity known as a sole-practitioner firm. However, following the introduction of the Standards it will be possible for

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<sup>32</sup> S 23, LSA The transitional period was introduced on 1 January 2010. It can be brought to an end by the Lord Chancellor. At the time of writing the SRA website states that it is not aware of any plans to do so <<http://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Does-my-employer-need-to-be-authorised-by-an-approved-regulator.page>> accessed 21 July 2019

<sup>33</sup> LSA, s 207

<sup>34</sup> Most English universities are exempt charities under the Charities Act 1993 and are regulated by the Higher Education Funding Council for England (HEFCE).

<sup>35</sup> SRA Guidance for not for profits (n 26) 24

<sup>36</sup> LSA,s 106

<sup>37</sup> <<https://www.sra.org.uk/solicitors/guidance/ethics-guidance/different-ways-working.page>> accessed 23 July 2019

solicitors to offer some services without the practice itself being authorised or the need for the creation of a separate legal entity from which to provide those services.<sup>38</sup> In its guidance, the SRA is referring to individuals delivering services in this manner as ‘SRA-regulated independent solicitors’,<sup>39</sup> although that term is not used or defined in the Standards.

The SRA Guidance states that “[w]e use the term independent solicitor to describe a self-employed solicitor who is:

- practising on their own, and does not employ anyone else in connection with the services they provide
- practising in their own name (rather than under a trading name or through a service company)
- engaged directly by clients with fees payable directly to them.”<sup>40</sup>

Where the independent solicitor’s practice consists entirely of activities that are not reserved legal activities, no authorisation will be required.<sup>41</sup> Where reserved legal activities are to be offered, it will still be possible for the solicitor to provide these on their own account, without authorisation, as long as certain criteria are met.<sup>42</sup> For example, the solicitor must:

- have at least three years’ of post-qualification experience;
- be self-employed and practising in their own name, and not through a trading name or service company;
- not employ anyone in connection with services that they provide.<sup>43</sup>

Given that the vast majority of solicitors running university law clinics will be employed by the university and will provide their services on behalf of the university, they will not be trading on their own account as SRA-regulated independent solicitors and therefore will not be able to rely on this exemption. However, external solicitors employed in private practice or in-house at another organisation, wishing to practise as a volunteer with a university pro bono clinic may be able to undertake both reserved and non-reserved activity, acting on their own account as an SRA Regulated Independent Solicitor, providing they comply with the requirements at Regulation 10.<sup>44</sup>

### 3) Schedule 3 of the LSA

There are further exemptions set out at Schedule 3 of the LSA. However, they are very specific and are unlikely to assist solicitors wishing to undertake reserved activities in university law clinics. For example, in relation to conduct of litigation, Schedule 3 provides that a person will be exempt if they are not authorised, but are granted a right to conduct litigation by the court in relation to those

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<sup>38</sup> Regulation 10.2, ‘SRA Authorisation of Individuals Regulations’ which are contained within the SRA Standards (n 2)

<sup>39</sup> <<https://www.sra.org.uk/solicitors/guidance/ethics-guidance/Preparing-to-become-a-sole-practitioner-or-an-SRA-regulated-independent-solicitor.page>> accessed 26 July 2019

<sup>40</sup> Ibid.

<sup>41</sup> Regulation 10.2(a), ‘SRA Authorisation of Individuals Regulations’ which are contained within the SRA Standards (n 2)

<sup>42</sup> Regulation 10.2(b), ‘SRA Authorisation of Individuals Regulations’ which are contained within the SRA Standards (n 2)

<sup>43</sup> Ibid.

<sup>44</sup> Regulation 10, SRA Standards (n 2). See also SRA Guidance for not for profits (n 26) 23-24

proceedings. It is unlikely to be viable to seek such permission in each piece of litigation that a clinic may take on.

If I am not exempt, how do I become authorised?

The SRA is able to authorise three different types of business:<sup>45</sup>

- 1) **A sole practice** – This is where solicitor is practising on their own account, providing services in their own name, or a trading name. Solicitors working in universities will not be working for sole practices, as the services will be provided on behalf of the university.
- 2) **A legal services body**<sup>46</sup> – This is a firm in which all of the managers and those who hold an interest in the business are lawyers. A legal services body might include a partnership, company or limited liability partnership. Again, universities will not fit into this definition.
- 3) **A licensable body (commonly known as an alternative business structure (ABS))** - An ABS is an entity that provides legal services, and which is managed or owned and controlled by both lawyers and non-lawyers.<sup>47</sup> In order for the ABS to perform reserved legal activities, it must be licensed to do so by a regulator.<sup>48</sup>

Given that law clinics tend to make up a very small part of a university's offering, it is unlikely to be feasible to turn the entire institution into an ABS. However, some universities have chosen to set up subsidiary companies from which to deliver their legal services to the public. **There is a separate chapter in this Handbook which provides more detail on the practicalities of setting up an ABS.**

Where a clinic is authorised, it will be subject to the Code of Conduct for firms contained in the Standards.<sup>49</sup>

Our clinic does not do any reserved work. Is there any reason why we might want to seek authorisation anyway?

Even where your clinic does not undertake any reserved activities and therefore does not need to be authorised, you may still decide to seek authorisation. There are a number of reasons why this might be an attractive option. For example, authorised practices are able to offer client's greater protections, such as the requirement to have indemnity insurance that complies with the Minimum Terms and Conditions (see below) and the right of recourse to the Solicitors' Compensation Fund.

**Reserved activities and external partnerships**

Some clinicians may be keen to offer their students the opportunity to engage in reserved legal work, such as conducting litigation, but will have neither the resources nor the institutional backing to seek authorisation to do so through their university. In such cases, an alternative option is to adopt what is

<sup>45</sup> The following descriptions are abridged versions of the content of the SRA Guidance on Firm Authorisation <<https://www.sra.org.uk/solicitors/guidance/ethics-guidance/Firm-authorisation.page>> accessed 26 July 2019

<sup>46</sup> The Glossary to the Standards (n 2) states that 'legal services body' is given the same meaning as that given in section 9A of the Administration of Justices Act 1985.

<sup>47</sup> LSA, s 72 sets out what makes a body licensable

<sup>48</sup> LSA, s 18

<sup>49</sup> 'SRA Authorisation of Firms Rules', SRA Standards (n 2)

commonly referred to as an ‘externship’ arrangement and partner with external organisations such as law centres, third sector advice agencies and law firms that are authorised to carry out reserved activity and to arrange for students to undertake placements with them.<sup>50</sup> The duration of such placements can vary depending upon the external partner’s needs and student capacity.

Further guidance on establishing an externship arrangement can be found in [Part One of this Handbook](#).

### **Using external solicitors as volunteers in a University-run clinic**

Many university clinics rely on external solicitors to increase the capacity of their clinic by advising on client cases and/or supervising students in doing the same. The capacity in which the external solicitor is volunteering with the clinic and their eligibility to do so should be established at the outset. It is important to be clear on whose behalf the legal service is being provided. For example:

- Is the service being given on behalf of the university, with the volunteer solicitor operating under the supervision of the solicitor employed by the university?
- Is the volunteer solicitor providing the service on behalf of their employer and if so, is their employer an authorised firm or an unregulated organisation?
- Is the volunteer solicitor providing the service on their own behalf as a SRA-regulated Independent Solicitor?

It is important to be clear about these arrangements so that:

- appropriate supervision can be put in place, as required under the Code of Conduct for Solicitors (see below);
- it is clear whether the volunteer solicitor is permitted to undertake reserved activities;
- accurate information can be given to the client as to the protections available to them; and
- it is clear whether appropriate insurance cover is in place and, if so, on whose insurance the volunteer will be relying.<sup>51</sup>

Universities may wish to consider entering into a written agreement with individual volunteers or, where the partnership is at organisational level, with their employers, to address issues such as confidentiality, data sharing, quality of student supervision, insurance, etc.

### **Supervision of staff, professional and student volunteers in a university clinic**

There are many different types of people who may be involved in the provision of legal services through a university law clinic. These can include:

- student volunteers;
- staff employed by the university; and
- external lawyer volunteers.

Standard 3.5 of the ‘SRA Code of Conduct for Solicitors’ states:

“Where you supervise or manage others providing legal services:

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<sup>50</sup> The pros and cons of arrangements of this type are explored in Thomas (n 1)

<sup>51</sup> See SRA Guidance for not for profits (n 26) 22-25

- (a) you remain accountable for the work carried out through them; and
- (b) you effectively supervise work being done for clients.”<sup>52</sup>

Standard 3.6 goes on to provide that:

“You ensure that the individuals you manage are competent to carry out their role, and keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up to date.”<sup>53</sup>

The SRA Guidance for not for profits provides that the degree of supervision and the proximity of the supervision will vary depending upon the type of work being undertaken and the qualification, knowledge and experience of those being supervised.<sup>54</sup> Therefore, student volunteers are likely to require much closer supervision than an experienced external volunteer. Solicitors working in university law clinics should be mindful of their obligations as supervisors and ensure appropriate systems are in place to enable them to oversee work being done for clients. They should also consider the training requirements of those they are responsible for and ensure that these are met. See Part One for further guidance on training for students.

It is important to set out clearly in the client care letter the scope of the work that the solicitor is responsible for before undertaking work on a matter.

#### **Solicitors working in University Law Schools: The Position before 25 November 2019**<sup>55</sup>

Up to and including 24 November 2019, a solicitor employed by a university to deliver, or supervise the delivery of, legal services to members of the public on behalf of the university, is likely to fall within the definition of an in-house solicitor under the Solicitors Practice Framework Rules.<sup>56</sup>

The Practice Framework Rules (“PFRs”) permit an individual to 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)”.<sup>57</sup> It is the reference to ‘Rule 4’ of the PFRs (specifically, Rule 4.10) that enables in-house solicitors to provide pro bono legal advice to a client other than their employer. However, this can only be done 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

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<sup>52</sup> Standard 3.5, SRA Standards (n 2)

<sup>53</sup> Standard 3.6, SRA Standards (n 2)

<sup>54</sup> SRA Guidance for not for profits (n 26) 19

<sup>55</sup> Further details on the position prior to 25 November 2019 can be found in Thomas (n 1)

<sup>56</sup> The Practice Framework Rules are part of the SRA Handbook 2011 (n 3)

<sup>57</sup> Ibid. Rule 1.1(e) Practice 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 their employer's business.<sup>58</sup>

Each of these requirements is addressed in turn below:

- Professional Indemnity Insurance reasonably equivalent to that required by the SRA

Solicitors working in private practice are required to obtain insurance that complies with Minimum Terms and Conditions ("MTCs").<sup>59</sup> As set out above, Rule 4.10 makes it clear that in-house solicitors wishing to do pro bono must do so under "reasonably equivalent" terms to the MCTs.<sup>60</sup> However, the SRA does not provide any guidance as to how "reasonably equivalent" ought to be interpreted, or as to what a reasonably equivalent insurance policy might include. Universities contemplating whether they have insurance that satisfies this test should take into account factors such as the overall indemnity cover provided by university insurers for any single event and the risk and value of cases being taken on by the clinic. Further guidance on ensuring your clinic has appropriate insurance in place both up to and after 25 November 2019 is set out elsewhere in this Handbook.

- Charging fees

The proviso that fees must not be charged is likely to be overcome easily for most university law clinics, given that nearly all provide their services on a pro bono basis.

- Undertaking reserved legal activities

As will be the case from 25 November 2019, a law clinic will either need to be authorised or exempt in order to provide legal services that include reserved legal activities. If the services provided are limited to non-reserved activities, then no authorisation or exemption is required and solicitors can act for members of the public under the provisions at PFR 4.10.

### **Holding a practising certificate**

Section 1 of the Solicitors Act 1974 states that you will not be "qualified to act as a solicitor" unless:

- you have been admitted as a solicitor;
- your name is on the roll; and
- you have a valid practising certificate issued by the SRA.

### **Acting as a solicitor**

Sections 20 and 21 of the Solicitors Act 1974 make it a criminal offence for a person who is not qualified to act as a solicitor (for example, because they do not have a valid practising certificate) to wilfully

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<sup>58</sup> Ibid.

<sup>59</sup> The MTCs are set out in the SRA Indemnity Insurance Rules, Appendix 1 to the 2011 SRA Handbook (from 25 November 2019 they will be contained in the new Standards (n 2))

<sup>60</sup> Practice Framework Rules (n 56)

pretend to be so qualified or to refer to themselves in any way that would imply that they are so qualified.<sup>61</sup>

Therefore, where an individual is described as a 'solicitor' they should either:

- hold a current practising certificate; or
- make it clear that they are not qualified to act as a solicitor because they do not have a valid practising certificate.<sup>62</sup>

Simply putting 'non-practising solicitor' at the end of your name or job title may not be sufficient to get around this requirement, as members of the public will not necessarily understand what is meant by that description.

It should also be borne in mind that it may also be possible to impliedly hold yourself out as a solicitor through your actions, even where there is no reference to being a solicitor or legal practitioner in your job title. The only way to avoid any risk of this is to make it expressly clear that you are not qualified to act as a solicitor.<sup>63</sup>

#### Employed in connection with the provision of legal services

Under section 1A of the Solicitors Act 1974, you will be treated as "acting as a solicitor" (and will therefore need to hold a practising certificate) if you are employed in connection with the provision of legal services by any of the following:

- a person who is qualified to act as a solicitor;
- a partnership where at least one member is qualified to act as a solicitor;
- a body recognised under section 9 of the Administration of Justice Act 1985; or
- any other authorised person entitled to provide reserved legal services, this would include a licensed body, or a body authorised by another approved regulator.

The SRA's guidance on this states that:

"If you come within section 1A, even if your job title has nothing in it to suggest you are a solicitor, your role does not involve dealing directly with clients, it is a role an unqualified person could do, or you are employed on a temporary or voluntary basis, you will still need to consider whether you require a practising certificate. The determining factor is whether you are employed in connection with the provision of legal services; if so, you are deemed to be practising as a solicitor and must therefore hold a practising certificate, regardless of whether you are held out as a solicitor".<sup>64</sup>

It is recommended that solicitors providing legal services on behalf of a university law clinic ought to have a current practising certificate in place unless absolutely satisfied that they are covered by one of the limited exemptions.

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<sup>61</sup> <<https://www.sra.org.uk/solicitors/guidance/ethics-guidance/When-do-I-need-a-practising-certificate-.page>> accessed 26 July 2019

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> <https://www.sra.org.uk/solicitors/guidance/ethics-guidance/When-do-I-need-a-practising-certificate-.page>